

## MINUTES

### COLORADO SUPREME COURT WATER COURT COMMITTEE

Tuesday, October 18, 2016, 1:30 p.m.  
Ralph L. Carr Colorado Judicial Center  
2 E.14<sup>th</sup> Ave., Denver CO 80203  
Fourth Floor, Supreme Court Conference Room

The Colorado Supreme Court Water Court Committee was called to order by Justice Allison Eid at 1:30 p.m., in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Judicial Center. Members present or excused from the meeting were:

<b>Name</b>	<b>Present</b>	<b>Excused</b>
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 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 (Marjorie Sant)	X	
<b>Non-voting Participants</b>		
Andrew Rottman	X	
Jenny Moore	X	

## **I. Welcome and Introductions**

## **II. Approval of Minutes from 4/15/2016 Meeting**

The April 15, 2016, minutes were approved.

## **III. Update on Supreme Court's Adoption of Proposed Consistency Rule Changes**

The Committee is unaware of any complaints regarding the rule changes.

## **IV. Report on October 5 CLE**

Andy Jones provided an update on the October CLE. Mr. Jones reported that it was well attended, he received generally positive reviews, and he thought it might be good to revisit the same topic in a year. Mr. Jones raised the idea of providing more hands on training to younger attorneys. Committee members who attended the CLE had very positive feedback, and Justice Eid thanked the CLE subcommittee and Mr. Jones for their work.

## **V. Discussion of Proposed Abandonment Rule**

Holly Strablizky reported on the proposed abandonment rules. Ms. Strablizky reported that Jim Witwer and Bill Paddock provided suggested revisions to section 12(h) regarding ownership controversies in abandonment cases. The new draft of this provision leaves the water judge discretion in handling ownership disputes. Steve Witte stated that the proposed rules accomplish the goal of giving judges the ability to exercise jurisdiction over ownership disputes and believed this will expedite the resolution of abandonment and ownership controversies. Justice Eid questioned whether these rules are ready for review by our water judges. The Committee believed the rules are ready.

Doug Sinor questioned whether subsection 12(a) is consistent with statute for publishing list in newspaper. Holly Strablizky stated that the Engineers do not have to pay to publish the entire list, just notice of availability of the list. Justice Hobbs clarified that the entire list is published in the resume. Justice Hobbs questioned whether the Committee should we make rule more specific about publishing so that it is consistent with the statute. The Committee decided the rule was explanatory enough as written.

The Committee then had further discussions on subsection 12(h). Doug Sinor questioned the use of "may" in this section regarding providing additional notice of ownership disputes and thought the provision would apply mainly to quiet title actions. Mr. Sinor stated that in quiet title actions, notice is mandatory, so the use of "may" might be inappropriate. Jim Witwer stated that this provision could cover a lot of potential ownership controversies, not just quiet title actions. Judge Keunhold stated that there are many types of ownership disputes and the rule should leave discretion to judges. Justice Eid suggested possible revisions, and Ms. Strablizky agreed to work on changes to the language.

The Committee expressed its thanks to Holly Strablizky, the subcommittee that worked on the proposed rule, and Paul Bennington and Jen Mele at the Attorney General's office.

## **VI. Role of Engineers and Consultation Process**

Dick Wolfe discussed a white paper proposal to convene a statewide conference regarding the Engineers' advisory role to the water court. Mr. Wolfe stated it would be valuable for the Engineers to have interaction with the courts at a conference. There are inconsistent practices statewide in the consultation process, and it would be useful to have a conference to look at the issue.

Steve Witte explained that it would be useful to bring people together physically and have the players discuss the nuts and bolts of the 69 Act together. Mr. Witte would like the judicial and executive branch to discuss resume review, the consultation process, reporting, and best practices. There was a discussion about whether the group should be small to foster discussion, but some Committee members thought that this would create the appearance of collusion. The Committee discussed the proper format and location for the discussion.

Jim Witwer stated his belief that the current system has been working since 1969. It's an odd system, but it has worked and everyone is used to it now. Mr. Witwer did not believe the meeting was necessary. Dick Wolfe mentioned the criticism the Engineers have received under the current system. Mr. Wolfe also stated that if there is a robust consultation process, there is less of a chance of the state intervening in case after consultation. Mr. Wolfe stated that there are inconsistent practices among the water divisions. Steve Witte reiterated that rulemaking is not objective of the discussion. The intent is to facilitate a discussion about ideas and practices from different divisions. Judge Kuenhold believed that sharing practices is a great idea, but leaving out the water bar is fraught. Previous discussions regarding the consultation process were heated, and bar can be distrustful of referees and consultation process. Mark Hermundstad stated that it is critical to have private bar involved and suggested that having the discussion outside of the metro area to encourage broader participation. Andy Jones believed it would be useful to compare practices. When this gets to the big question of Engineers' role in water court process, it is better to have more participation from water bar and water users. Holly Strablizky believed this will be a valuable discussion and has wanted to compare practices within the branch. Ms. Strablizky agreed that private attorneys have good ideas that should be included. Justice Hobbs suggested that mediation CLE is a good example, and the Committee should consider a best practices CLE-type panel discussion. Dick Wolfe suggested integrating this into May CLE and then follow up, possibly at judicial conference. Jim Witwer stated that if the issue is really consultation process and best practices, maybe it's easiest to have free and frank exchange between engineers and referees. Dick Wolfe believed the proposal was broader than just that discussion. Andy Jones agreed that the CLE subcommittee should look into it. Kaylea White stated that the interest of CWCB and governor is the implementation of water plan, and they might not have a role if this is just a discussion between the engineers and judicial.

## **VII. Update to Water Law 101 CLE**

Jennifer Ashworth stated that the CLE subcommittee presented a revamped Water Law 101 CLE on May 13. It was well received. The subcommittee is looking into Groundwater 101 and Water Law 201 CLEs for more advanced concepts. Ms. Ashworth believes the previous discussion about the consultation process would be a good CLE topic.

### **VIII. Open Discussion of Future Projects**

Laura Chartrand discussed the intersection of mediation and discovery/trial preparation. Ms. Chartrand raised a concern about the timeline for rebuttal expert reports. After rebuttal expert reports, there is a short turnaround time for trial preparation. Recently, judges have ordered the parties to mediate their disputes shortly before trial, and the attorneys are struggling to prepare for trial and mediate at the same time. Ms. Chartrand suggested that changing the expert report deadlines could enable a better commitment to mediation. Judge Keunhold stated that in every case the judge and the parties can discuss mediation at case management conference and adjust deadlines accordingly. Peter Ampe stated that in recent cases where the judge ordered mediation, the case management conference had already been completed. Doug Sinor stated that these are expert-driven cases, and in order for mediation to be successful it has to happen after all expert reports are in. Mr. Sinor believed more time is needed between rebuttal disclosures and the CRCP 56 deadline and trial. Mr. Sinor stated that the rule could be modified to move the deadlines up by a couple of weeks. Laura Chartrand, Jennifer Ashworth, and Doug Clements will look into this.

Mark Hermundstad discussed publication of resumes in newspapers. Mr. Hermundstad believes it is anachronistic to have newspaper publication and wondered whether there is a better way to publicize the resumes. Jim Witwer stated that an early adjudication statute was held to violate due process, and there could still be a due process challenge to publication as it currently exists. Peter Ampe has researched the issue in the past, and there are valid due process concerns in moving away from newspaper publication. Kaylea White suggested looking at the abandonment list as a model, where newspaper publication of notice of the list, and not the list itself, is sufficient. Mark Hermundstad will head a subcommittee to look into the issue. Jim Witwer will join.

Justice Hobbs discussed the upcoming 50<sup>th</sup> anniversary of 69 Act. He believed the DU Water Law Review might be a good leader for discussion. Justice Hobbs asked if there was a role for the Committee in the discussion. The Committee discussed whether the CBA water section would want to be involved. Marjorie Sant agreed to look into it.

Kaylea White raised the issue of the format of final water court decrees. There are varying practices in the state regarding the issuance of final decrees. Some water judges use a cover sheet approving the order and the decree itself is not signed. Some final decrees still have a watermark. There is a concern about having final decrees without the judge's signature on the decree itself. Ms. White questioned whether the branch can have its IT department look at the issue. Justice Eid and Andy Rottman will look into the issue.

Referee Cowan raised the issue of attachments to decrees. Many times the accounting forms are attached to decrees and are therefore part of the decree. Referee Cowan stated that accounting

forms involve complex calculations and aren't suited for attachments to decrees. If a calculation is used, it should not be embedded in an excel spreadsheet attached to the decree as a pdf. Rather the formula itself should be included. Referee Cowan suggested that the Committee consider a rule requiring that exhibits be legible. Jennifer Ashworth provided information on the converting complex excel spreadsheets to pdf and suggested that the accounting need not be attached to the decree.

Judge Kuenhold updated the Committee on a proposal in civil rules to eliminate notary requirement. This enables self-represented litigants to file more easily. There has been no opposition on civil rules side. The Committee believed the water courts would follow whatever is done in the civil rules context.

#### **IX. Next Meeting Date**

The next meeting will be in April. Andy Rottman will coordinate.

#### **X. Adjourn**