

# Statutory and Rule Changes to Water Court Practice

by James S. Witwer and P. Andrew Jones

*On February 18, 2009, the Colorado Supreme Court adopted revisions to Colorado Rule of Civil Procedure 90 and to numerous Uniform Local Rules for All State Water Court Divisions. The Colorado General Assembly also recently amended the statutory procedures for water court filing and service and for filing applications in one river basin. These rule changes are designed to increase the efficiency of the adjudication process, decrease costs, and ensure that Colorado water professionals maintain an ongoing commitment to the highest standards of professionalism.*

Chief Justice Mary Mullarkey established a Water Court Committee of the Colorado Supreme Court (committee) by order dated December 4, 2007. Appointees to the committee included water users, court personnel, government and private engineering professionals, and attorneys. The committee had two principal charges: (1) to review the water court process and identify possible ways through statutory and/or rule changes to achieve efficiencies in water court cases while still protecting the quality of outcomes; and (2) to ensure the highest level of competence in water court case participants. The committee's report to the Chief Justice contained ten recommendations for timely, fair, and effective water court proceedings.<sup>1</sup>

After reviewing the committee report and conducting its own hearing, the Colorado Supreme Court adopted revisions to Colorado Rule of Civil Procedure 90 and to numerous Uniform Local Rules for All State Water Court Divisions (Water Court Rules). The Court adopted the rules on February 18, 2009 with an effective date for all applications filed on or after July 1, 2009. Recommendations from the committee also led to passage of two amendments to the Water Right Adjudication and Administration Act of 1969 (1969 Act). Related actions on revisions to water court forms, additional training for water court personnel and profes-

sionals, and a *pro se* user guide also are forthcoming. This article explains the major changes to court rules and the 1969 Act that affect practice in the water courts.<sup>2</sup>

## Committee Process and Public Input

In her directive establishing the committee, the Chief Justice directed the committee to establish an agenda and process that allowed persons who have any interest in water-related matters to provide additional issues, information, and proposals to the committee. The committee used the Colorado Judicial Branch website to announce the dates and places of committee and subcommittee meetings, which frequently were attended by members of the public.

The committee also accepted written comments and held a public meeting at the Court on March 10, 2008, at which it received oral and written comments. In addition, the committee conducted two surveys—one for members of the public who interact with the water courts; and one for water court professionals such as engineers, attorneys, and court personnel.

The general public survey results showed a consensus that timely action by water judges was the top concern among respondents. The water court professionals' survey showed a similar concern.

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The general public cited the cost of the water court process as the second area most in need of improvement, and improved professionalism in water court practice as the third.

### Change in Water Court Jurisdiction Over White River Basin—S.B. 09-15

Under Senate Bill (S.B.) 09-15, the general assembly amended CRS § 37-92-201(1) to put the White River basin within one water division for all purposes. That basin previously was within the administrative authority of the division engineer for Water Division 6, based in Steamboat Springs, but within the authority of the water judge and water clerk for Water Division 5, based in Glenwood Springs. The split between judicial and administrative authorities led to confusion and occasionally to misfiling of water rights applications. The legislation places the White River basin into Water Division 6 for all purposes.<sup>3</sup>

The effective date of this legislation is August 5, 2009, according to a notation attached to the bill, which has been signed into law by Governor Bill Ritter. Thus, the Chief Justice has issued an order requiring the water clerk for Water Division No. 6 to accept for filing and publication all White River Drainage Basin applications filed in Water Division No. 6 on or after August 5, 2009. This order prohibits the water clerk for Water Division No. 5 from accepting for filing and publication any White River Drainage Basin applications attempted to be filed in Water Division No. 5 on or after August 5, 2009. To assist in alerting prospective applicants and their attorneys of the new filing requirements, the order requires the water clerks for both divisions to include the Chief Justice's order in the May through August 2009 full resumes of both divisions. The order is printed on page 119 of this issue.

### Ensuring Completeness of Applications—C.R.C.P. 90 and Water Court Rule 3

Some water users reported to the committee that review of applications with incomplete information was time-consuming and sometimes led to the filing of unnecessary statements of opposition. As discussed elsewhere in this article, the rules retain the general principle of notice pleading, but create the new case manage-

ment plan process for applicants to provide additional information in cases before the water referees and revise expert disclosure requirements in cases before the water judges.<sup>4</sup>

Changes to C.R.C.P. 90 and Water Court Rule 3 help to implement the existing provisions of the 1969 Act that require water court applications to contain the information required by the standard forms approved by Colorado's water judges pursuant to CRS § 37-92-302(a). Effective July 1, 2009, C.R.C.P. 90 directs the water clerk to promptly refer to the water judge any application the clerk, in consultation with the water referee, believes does not substantially contain the information required by the standard forms and Rule 3. Publication of such an application is deferred until the conclusion of the judge's review of the application, and the clerk promptly will inform the applicant of the review and provide the applicant with a list of missing information.<sup>5</sup>

The water judge is instructed to employ an inquiry notice standard when reviewing the suspect application, taking into account the information required by the standard forms and Rule 3. Following a water judge's determination of insufficient inquiry notice, the applicant will have thirty days to submit the required information or risk dismissal. Unless and until dismissed, the application retains its original filing date.<sup>6</sup>

The importance of these changes will depend on changes to water right application forms under review by the committee for consideration by the water judges. Formal action to modify the existing forms is expected to occur before July 1, 2009; visit the State Judicial Branch Water Courts website ([www.courts.state.co.us/courts/water/index.cfm](http://www.courts.state.co.us/courts/water/index.cfm)) for information about the updated forms.

### Filing and Service Requirements—Rule 2 and H.B. 09-1185

The revisions to Rule 2 and CRS § 37-92-302 and House Bill (H.B.) 09-1185, respectively, harmonize the filing and service requirements in water matters under the rules and the 1969 Act. They also recognize the significant time and cost savings available to water court litigants from electronic filing.

The statute previously required the filing of water rights applications and statements of opposition in quadruplicate, and for a two-step mailing of the summary of the statutorily required consultation among the water referee and the division and state engineers. In practice, parties have filed applications and statements of opposition using the electronic filing and service system currently provided by Lexis-Nexis.<sup>®</sup> Water court personnel observed that, for the few such pleadings still paper-filed in quadruplicate, the extra copies are recycled.

The statutory changes eliminate the quadruplicate filing requirement, and use the word "send" rather than "mail" when referring to delivery of the summaries of consultation.<sup>7</sup> The changes also save a step in the process by allowing the division and state engineers, instead of the applicant, to serve the other parties with that summary. The complementary revisions to Rule 2 affirmatively require the state or division engineer to electronically file and serve the summary of consultation,<sup>8</sup> a practice that some water divisions had adopted despite the previous statutory requirement that the engineer mail a copy just to the applicant, and for the applicant to then mail copies to the opposers.

The Court's revisions to Rule 2 ensure that the water court clerk will upload any paper-filed pleadings from *pro se* parties to the elec-

tronic filing system,<sup>9</sup> so the revisions should not create an undue burden on such parties. It is important to note, however, that service of court documents remains the responsibility of the parties. *Pro se* parties (who currently do not have access to the electronic filing and service system) must serve such documents by mail or other means recognized under C.R.C.P. 5.

Importantly, new subsection (6) of CRS § 37-92-302 provides: The General Assembly hereby recognizes the authority of the Colorado Supreme Court to adopt rules for filing and service of documents and other case management procedures in water court proceedings. Any such rules that are adopted shall supplement the procedures set forth in this section.<sup>10</sup>

This subsection clarifies that the Supreme Court, rather than the general assembly, is in the best position to adopt and adapt specific filing and service requirements.<sup>11</sup>

## Proceedings Before the Water Referee—Water Court Rule 6

No rule underwent more substantial revisions than Water Court Rule 6. The rule now gives the role of the water referee considerably more definition,<sup>12</sup> and creates specific processes for managing cases before the referee in advance of the C.R.C.P. 26 disclosure deadlines triggered by re-referral of an application to the water judge.

The 1969 Act requires the issuance of a water referee's rulings within sixty days of the deadline for filing statements of opposition, unless extended by the water judge for good cause.<sup>13</sup> Rulings rarely have issued within the sixty-day time frame. Rule 6 specifically includes as a goal of the referee the issuance of a ruling in every unopposed water case no later than sixty days following close of the period for filing statements of opposition, and in opposed cases "as promptly as possible."<sup>14</sup> The referee may extend the sixty-day deadline for good cause, on agreement of the parties, or *sua sponte*. However, the case may not remain before the referee longer than one year after the statement of opposition deadline, unless the referee finds "that there is a substantial likelihood that the remaining issues in the case can be resolved, without trial before the water judge, in front of the referee." Even if the referee makes such a finding, the referee can extend this one-year period only for another six months.<sup>15</sup>

Under the amended rule, most cases before the water referee will undergo more thorough review earlier in the process and will either move promptly toward resolution or be re-referred to the water judge. Rule 6 requires the referee, promptly after a case is accepted for filing, to determine whether it likely will need water judge adjudication and, if so, to re-refer the case to the water judge.<sup>16</sup> Applicant's counsel should note that the rule accelerates the customary time when the referee and other parties will expect the applicant to tender proposed rulings. In unopposed cases, counsel must promptly submit such a proposed ruling (certainly within the referee's own sixty-day deadline).<sup>17</sup> In opposed cases, the referee must hold a status conference within sixty days after the statement of opposition deadline, and the applicant is encouraged to circulate a proposed ruling before the conference.<sup>18</sup>

At the initial status conference, the referee, in consultation with the applicant and other parties, will identify cases that likely will require adjudication by the water judge, and re-refer those cases.<sup>19</sup> For cases in which the applicant and other parties agree to proceed

before the referee, the referee and the parties will establish a case management plan designed to produce a ruling within one year after the statement of opposition deadline. The rule contains detailed requirements for the exchange of information under such plans.<sup>20</sup> As noted elsewhere in this article, at the conference, the parties also could agree on the use of a single expert in the case.<sup>21</sup>

Parties participating in a case management plan agree not to re-refer the case to the water judge during the plan period.<sup>22</sup> The referee may dismiss applications or statements of opposition of parties who fail to comply with the requirements of any case management plan.<sup>23</sup>

The maximum eighteen-month period available to the water referee for resolution of opposed cases may be an ambitious goal in busier water divisions that have a substantial backlog of cases. The rule 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.<sup>24</sup>

## Expert Testimony—Water Court Rule 11

Revised Water Court Rule 11 introduces two important changes affecting experts in water court proceedings: (1) a declaration by each expert that the expert's report and testimony represents his or her professional judgment and has not been dictated by any other person; and (2) a procedure for experts to meet in a confidential context and report their agreement or disagreement regarding matters of fact and expert opinion in the case to the clients and attor-

neys. These provisions stem from a recognition that experts can have a highly influential role in the outcome of water court cases and owe a duty to the court.

### *Considerations in the Adoption of Rule 11*

One factor contributing to the cost of Colorado water adjudications is water litigants' reliance on expert witnesses to help refine disputed issues in the water court process.<sup>25</sup> Today's water litigants arrive at the courthouse with complex hydrologic models, gigabytes of data, and a cadre of expert witnesses. Colorado has a large number of qualified, ethical professionals who fulfill this role, helping attorneys, participants, and judges understand the complexities of hydrology and related technical fields.

As a whole, the committee and its Experts Subcommittee (subcommittee) concluded that the manner in which expert testimony is used in Colorado's adjudication process is fundamentally sound and produces just results. In complex matters of hydrology, reasonable minds differ, and there is no substitute for the adversarial process to educate the court and arrive at well-reasoned decisions. At the same time, the committee identified a number of areas where Colorado's expert process could be more efficient. It also concluded that the baseline principles guiding the expert process could be expressed more clearly in the rules. An effort was made to correct these deficiencies.

The subcommittee's effort began with a review of available literature.<sup>26</sup> Drawing on these materials, the subcommittee identified a number of potential reforms to be discussed.<sup>27</sup> Some of the measures identified by commentators and adopted in other jurisdictions were rejected as incompatible with Colorado's adversarial process.<sup>28</sup> However, several of them gained favor in the subcommittee. The subcommittee proposed to implement these measures through amendments to Water Court Rules 6 and 11. It also drafted proposed language, which was revised by the committee as a whole and further revised by the Supreme Court prior to its adoption. The changes to Rule 11 received the most comments from attorneys throughout the process.<sup>29</sup>

### *Duty to the Court and Meeting of Experts*

One of the committee's guiding principles was the conviction that an expert's primary duty is to the court, not to the litigants.<sup>30</sup> Colorado Rule of Evidence 702 recognizes this principle when it states that the purpose of expert testimony is to "assist the trier of fact . . . understand the evidence or . . . determine a fact in issue. . . ."<sup>31</sup> The perception that the expert is a partisan "hired gun" used to persuade the court is inconsistent with the role assigned to experts by Rule 702.

The committee found that amendments to Rule 11 were desirable to affirm and reinforce the intended role of experts as helpers to the court. New Water Court Rule 11(b)(4)(E) discusses an expert's duty to the court, the expectation that the substance of expert reports will not be altered or written by attorneys or other third parties, and the requirement that an expert's opinion be formed independent of the parties and their attorneys.<sup>32</sup> The Supreme Court adopted an "expert declaration" to be signed by every testifying expert affirming these principles, now appended to the Water Court Rules.<sup>33</sup>

Another concept the committee found meritorious was the "meeting of the experts." Attorneys observed that an inability or unwillingness to narrow the matters of fact and expert opinion at

issue for trial contributes to the costs and delays in water court. Rule 11(b) was amended to require the experts for the parties to meet in person or by telephone after the applicant's initial expert disclosure and after opposers' rebuttal disclosure(s) to "identify undisputed matters of fact and expert opinion" and to "refine and attempt to resolve disputed matters of fact and opinion."<sup>34</sup>

After the second meeting, the experts are instructed to jointly prepare a "statement setting forth the disputed matters of fact and expert opinion they believe remain for trial, as well as the undisputed matters of fact and expert opinion."<sup>35</sup> Both the discussions occurring in the meeting and the statement are considered "statements made in compromise negotiations within the ambit of C.R.E. 408."<sup>36</sup> As a final measure, Water Court Rule 11(b)(6)(B) requires the parties to "jointly file a statement setting forth the specific disputed issues that will be the subject of expert testimony at trial."<sup>37</sup>

The meetings of the experts "shall not include" the attorneys for the parties or the parties.<sup>38</sup> Though there was considerable debate on this point, the committee found that, as long as the discussions in the meeting were limited to matters of fact and expert opinion, as opposed to settlement of legal matters, the value of allowing the experts to discuss technical matters unhindered outweighed the perceived loss of control felt by counsel. Further, substantive matters within an expert's opinion should not be subject to influence by parties or counsel, regardless of whether the client or counsel is in attendance at the meeting.

### *Expert Disclosures and Proposed Decrees*

As an aid in narrowing issues, the committee drafted a provision requiring the applicant to submit a proposed decree with its initial 26(a)(2) disclosures.<sup>39</sup> Opposers are required to provide comments to the applicant's proposed decree and "specific decree provisions deemed necessary by them" at the time of their 26(a)(2) disclosure.<sup>40</sup> After considering opposers' proposed language, the applicant is required to provide another draft of the proposed decree at the time of its rebuttal disclosure.<sup>41</sup> The intent of this provision is to narrow the issues for trial to those that are genuinely disputed, thereby saving time and expense to the parties and the court.

Attorneys and engineers on the committee expressed a desire for the initial 26(a)(2) disclosures to be more complete, so that additional discovery was not necessary to obtain basic information. In response to this concern, the committee added a provision requiring that 26(a)(2) reports include "a list of all expert reports authored by the expert in the preceding five years" and "an executable version of any computational models, including all input and output files. . . ."<sup>42</sup> These additional disclosure requirements force the parties to communicate information that is clearly discoverable and commonly requested, without the need for discovery requests.

### *Use of Single Expert*

Finally, the committee assessed the role of the expert in the referee process governed by Water Court Rule 6 and endorsed an amendment to Rule 6 that encourages the referee to consider the use of a single, shared expert for simple cases, as opposed to competing experts.<sup>43</sup> This optional provision is intended to provide a lower-cost option for cases before the referee where the technical issues and processes are generally understood and undisputed. The Committee chose to provide this option in the referee context, as

opposed to before the water court, because, in disputes that go to trial, separate experts were more likely to clearly identify the technical matters that are disputed. However, the use of a single expert in the informal referee process by agreement of the parties could reduce costs and increase efficiency in cases with a limited number of specific factual disputes that were capable of resolution without particular controversy.

### Educational Program

In addition to the rule changes, the committee recommended the creation of an ongoing educational program designed specifically for experts, attorneys, referees, judges, and state water administration officials involved in water court proceedings. This voluntary program will give water professionals the opportunity to refine their knowledge in the technical areas of hydrology and related fields, presentation of expert testimony, and other subjects especially relevant to water court practice. The Supreme Court and the Colorado Bar Association (CBA) are in the process of implement-

ing this program. Interested parties should contact Priscilla Fulmer at CBA-CLE, (303) 824-5373.

### Conclusion

Colorado adopted the present form of its water court adjudication process in the 1969 Water Rights Determination and Administration Act. The rule changes adopted by the Supreme Court are designed to increase efficiency of this adjudication process, decrease costs, and ensure that Colorado water professionals maintain an ongoing commitment to the highest standards of professionalism.

### Notes

1. See Water Court Committee (committee) of the Colorado Supreme Court Report to the Chief Justice (Aug. 1, 2008), available at [www.courts.state.co.us/userfiles/File/Court\\_Probation/Supreme\\_Court/Committees/Water\\_Court\\_Committee/Final\\_Report\\_August\\_1\\_2008.pdf](http://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Water_Court_Committee/Final_Report_August_1_2008.pdf).
2. The authors thank committee Chair Justice Greg Hobbs and all of the committee members for their hard work and commitment, as well as

C.R.C.P 16 and Water Court Rule 11 Timeline	
This table summarizes the timeline established by C.R.C.P. 16 and revised Water Court Rule 11.	
Case At Issue	45 days after earlier of Re-Referral or Protest of Referee Ruling
Confer and Exchange Information	15 days after At Issue date
Applicant 26(a)(1) Disclosure	30 days after At Issue date
Parties Explore Settlement	35 days after At Issue date
Opposer 26(a)(1) Disclosure	30 days after Applicant 26(a)(1) Disclosure
Trial Setting	60 days after At Issue date
Certificate of Compliance	75 days after At Issue date
Stipulated Modified Case Management Order	75 days after At Issue date
Motion for Modified Case Management Order	75 days after At Issue date
Motion to Amend Pleadings or Add Parties	120 days after At Issue date
Applicant 26(a)(2) Disclosures	240 days before Trial
First Expert Meeting	45 days after Applicant 26(a)(2) Disclosure
Applicant Supplemental 26(a)(2) Disclosure	180 days before Trial
Opposer 26(a)(2) Disclosure	120 days before Trial
Second Expert Meeting	25 days after Opposer 26(a)(2) Disclosure
Expert Depositions May Begin	30 days after Opposer 26(a)(2) Disclosure
Expert Joint Report to Parties	15 days after Second Expert Meeting
Rebuttal 26(a)(2) Disclosure	90 days before Trial
Rule 56 Motions	90 days before Trial
Joint Statement of Specific Disputed Issues	60 days before Trial
Completion of Discovery	50 days before Trial
Exchange Draft Witness and Exhibit Lists	40 days before Trial
Pre-Trial Motions (except Rule 56)	35 days before Trial
Proposed Trial Management Order	30 days before Trial
Tender of Proposed Decree (WCR 2(b))	15 days before Trial
Trial Brief	10 days before Trial

the many members of the Bar, the general public, the courts, and the engineering community who provided valuable input.

3. S.B. 09-15 § 1 (2009), to be codified at CRS § 37-92-201(1).
4. See discussion of Water Court Rules 6 and 11, *infra*.
5. C.R.C.P. 90 (b). See also Water Court Rule 3(a) (applicant responsible for providing all information required by the approved forms and Rule 3).
6. C.R.C.P. 90(c). This subsection refers to the thirty-day notice of dismissal procedure outlined in section 1-10 of C.R.C.P. 121.
7. H.B. 09-1185 § 1 (2009), codified at CRS §§ 37-92-302(1)(a), -302(1)(b), and -302(4) (effective July 1, 2009).
8. Water Court Rule 2(a).
9. *Id.*
10. H.B. 09-1185 § 1.
11. This provision will allow the Supreme Court to address the general assembly's inadvertent failure to eliminate additional references to quadruplicate filing and service by mailing of protests to referee's rulings in CRS § 37-92-304(2). Rule 2 specifies how all pleadings and other documents are to be filed and served electronically by represented and unrepresented parties, which would include protests. The deadline for filing such a protest set forth in that statutory section, "[w]ithin twenty days after the date of mailing" of the ruling, already refers to the water court clerk sending a copy of the ruling to the parties "by regular or electronic mail." CRS § 37-92-303(2).
12. See Water Court Rule 6(a) to (c).
13. CRS § 37-92-301(1).
14. Water Court Rule 6(e).
15. *Id.*
16. Water Court Rule 6(c).
17. Water Court Rule 6(g).
18. Water Court Rule 6(h).
19. Water Court Rule 6(i)(1).
20. Water Court Rule 6(k) to (m).
21. See discussion of Water Court Rule 6(j) in "Use of Single Expert," *infra*.
22. Water Court Rule 6(i)(4).
23. Water Court Rule 6(p).
24. Water Court Rule 6(q).
25. A majority of water users responding to the committee's survey reported a concern over the high cost of Colorado's adjudication process. Committee, *supra* note 1 at 7.

26. Materials reviewed included Masid, Dissertation, "Reforming the Culture of Partiality: Diffusing the Battle of the Experts in Western Water Wars" (Colorado State University, Fort Collins, CO, Fall 2007) (discussing expert witness reforms enacted in England and Wales, Hong Kong, Canada, and Australia and results of a survey of water judges, magistrates, and administrative decision makers in the Western United States in which respondents reported frequently encountered expert testimony issues and responded to a series of proposed reform measures); Bernstein, "Expert Witnesses, Adversarial Bias, and the (Partial) Failure of the *Daubert* Revolution," George Mason University Law and Economics Research Paper No. 07-11, available at [ssrn.com/abstract\\_id=963461](http://ssrn.com/abstract_id=963461); *Reference Manual on Scientific Evidence* (2d ed., Federal Judicial Center, 2000); Woolf, "Access to Justice, Final Report," available at [www.dca.gov.uk/civil/final/contents.htm](http://www.dca.gov.uk/civil/final/contents.htm).

27. The Experts Subcommittee placed special reliance on chapter 13 of Woolf, *supra* note 26.

28. Proposals enacted in other jurisdictions deemed inappropriate for Colorado included the mandatory appointment of a single, court-appointed expert; the offering of testimony of all experts on a single occasion in a discussion led by the court (known as "hot tubbing"); and a requirement that testifying experts disclose all data or opinions contrary to their position as a part of their testimony-in-chief.

29. Comments filed by interested parties and other materials considered by the committee are available for review at [www.courts.state.co.us/Courts/Supreme\\_Court/Committees/Committee.cfm/Committee\\_ID/27](http://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm/Committee_ID/27).

30. See Woolf, *supra* note 26 at chapter 13, ¶ 25.
31. C.R.E. 702.
32. Water Court Rule 11(b)(4)(E).
33. Colorado Water Court Forms, appendix 1 to chapter 36, "Declaration of Expert."
34. Water Court Rule 11(b)(4)(D).
35. *Id.*
36. *Id.*
37. Water Court Rule 11(b)(6)(B).
38. Water Court Rule 11(b)(4)(D)(3).
39. Water Court Rule 11(b)(4)(F). Note that revised Rule 6 also requires the applicant to submit a proposed decree in the referee context.
40. *Id.*
41. *Id.*
42. Water Court Rule 11(b)(5)(C).
43. Water Court Rule 6(j). ■