

WATER COURT PROCESS

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I. How Water Cases Begin

The vast majority of cases are initiated by the filing of an application for water rights, changes to water rights or plans for augmentation. Each month, for all the applications filed, the water judge will refer the cases to the water referee for independent investigation and consultation with the division engineer. The application will remain in front of the referee to disposition unless the case is re-referred to the water judge prior to entry of a ruling.

Other types of initial proceedings comprise the decennial abandonment list, injunctions/temporary restraining orders and petitions filed under retained jurisdiction provisions alleging injury to vested water rights in a change to water rights or plan for augmentation.

The latter types of proceedings are fairly rare. Petitions filed pursuant to the retained jurisdiction provision are occurring more frequently in Division No. 5 and might become more prevalent as demand for water increases and injury becomes more likely. Temporary restraining orders/injunctions are also less common but in the recent past, occur with more regularity in Division No. 1 regarding underground rights.

After the tagging of over 1,000 wells in Summit County during summer 2007, injunction proceedings could become common in Division No. 5 as well. Decennial abandonment lists can begin before the water judge, but the cases that arise from them can proceed before the water referee with the same procedures in place as for a regular application. Injunctions and petitions are not referred to the referee but are before the water judge.

II. Notice/Contested and Uncontested Cases

After an application, decennial abandonment list, injunction or petition pursuant to a retained jurisdiction provision is filed it is

published in newspapers chosen by the water judge. This replaces the personal service requirement. Prospective opposers have sixty days to file a statement of opposition. They have standing to file opposition to hold the applicant to a strict standard of proof and/or to assert injury to vested rights if it a change case or includes a plan for augmentation.

Not all applications are contested. It varies by division, case type and source of the subject right. Changes for water rights, plans for augmentation and underground water rights typically draw more opposition than applications for surface, storage or exchanges. Some assert that when an application is uncontested, there is no need for the water referee to investigate or request evidence to support the claims asserted in the application. However, no separate standard of review exists for contested and uncontested cases.

In some divisions, publication of the resume will be delayed due to deficiencies in the application. For instance, if the application is for changes to water rights and the applicant has failed to attach diversion records or summaries of diversion records and a map of the historic place of use pursuant to CRS 37-92-302(2)(a), the application will not be published until those documents are received. In this situation, the water court will send a notice requesting this information and will publish the application once this information is received by the court.

In most instances, regardless of apparent deficiencies in the application, the application will be published. However, if the costs of publication are not paid to the newspapers for publication or affected landowners have not been notified, no ruling will be entered until this information is received by the court. Notices to this effect are issued at the time the case is opened from the court to the applicant, movant or petitioner.

III. Consultation

Once the application has been published and the time for filing statements of opposition has expired, the next important step toward disposition of a water application is the consultation between the division engineer and the water referee. This usually occurs

approximately 90 days after the application is filed. The written summary of this meeting is called a summary of the consultation. These summaries are created jointly and include court and division engineer concerns but are drafted and served on the applicant by the division engineer. There is one consultation for each application. If an application is amended and republished, another consultation will be generated. The content of the summaries varies by division with some including both engineering and legal issues and others limited to engineering issues. It is the burden of applicant to then serve this summary on the other parties to the case, if the application is contested.

The referee and the division engineer do not consult on injunctions, petitions filed pursuant to the retained jurisdiction provision, the decennial abandonment list or cases in which the state and division engineer are parties (this may vary by division).

During the consultation, the referee and division engineer raise all concerns that would delay and/or bar entry of a ruling unless addressed. These concerns are generally aimed at getting the applicant to submit sufficient evidence to enable the court to determine applicant has met the burden of proof by a preponderance of the evidence. Common factual issues include but are not limited to incorrect or dated legal descriptions (e.g. 76 degrees 13 minutes whence the old spruce tree located 3/4 of a mile from the mouth of Big Salt Wash and Yellow Creek bears east 2,500 feet), capacities of ponds, number of acres irrigated, consumptive use requirements, surface evaporation rates, operable plan for augmentation, existence of valid well permits, exchange potential, water availability analysis, permits issued to satisfy can and will and other evidence to support the claims made in the application.

The division engineer and the referee rely upon, *inter alia*, prior decrees that pertain to the subject water right, plans for augmentation, field inspections conducted by the water commissioners for each water district in the divisions which usually include but are not limited to a written report with observations, digital photographs, and gps coordinates plotted on topo maps.

Common legal issues or mixed questions of law and fact raised in the summary of consultation include but are not limited to the absence of evidence to meet the standard of proof, no connection of the appropriation to a land area, failure to apply the proper test to meet the burdens for changes or plans for augmentation (e.g. providing a basis for the change like diversion records, ownership of ditch shares, evidence of actual historic use, sufficient detail to allow the court to determine no injury will result). Therefore, both engineering and legal issues are presented in the written summaries of the consultation.

The summaries are served on the applicant and court anywhere from one month to over one year after the actual consultation has occurred. This differs by division. Sometimes the delay can be attributed to the caseload of the division engineer, the complexity of the claims in the application, the poor quality of the application and/or for an underground water right, findings from the state engineer's office in Denver.

IV. Status Conferences

If a case is contested, the referee will typically begin to hold status conference every 90-120 days to allow the parties to update the court as to their progress toward settlement and make additional inquiries as to status of pending engineering reports and settlement negotiations. Most opposers will not enter into a stipulation with the applicant until the summary of consultation has been received. Most parties are represented by counsel.

Once the consultation is received, the applicant typically submits a written response within 60 to 90 days. These can be helpful to the opposers and the referee when reviewing the proposed ruling, but these responses often do not contain additional evidence or reference to statute or case law to support their positions.

The referee will continue to hold status conferences every 90-120 days to allow the parties to settle and/or allow permitting processes to time out. Concurrently, the referee conducts an independent investigation of the claims. This can include a site visit to the property, requests for engineering, supplemental engineering,

maps etc. and speaking with water commissioners applicants and opposers for clarification.

V. The Proposed Ruling

If the case is uncontested or applicant has stipulated with all opposers, a proposed ruling is submitted for referee review. The referee will enter the ruling as submitted, enter the ruling as modified, or issue a request for more information pursuant to Rule 6 of the Uniform Water Court rules. The referee does have discretion to deny an application in its entirety, but I do not think that is common in any water division. Often the information requested in the Rule 6 request is the same as the issues raised several months earlier in the summary of consultation. Reviews differ by division but I will review a proposed ruling immediately to determine if applicant addressed the issues in the summary of consultation. If so, I will enter the ruling at the time it was filed.

If the issues set forth in the summary of consultation have not been addressed, which is often the case, the ruling goes to my chambers and gets in the queue. This queue can be as long as 90-120 days out before I can review it again and issue a Rule 6 request for the missing information and evidence. Applicants usually have fifteen to ninety days to supply the information depending on the nature of the requests. Should the applicant fail to submit the information, it is common practice for the referee to issue a second request for the information to be submitted within fifteen days.

If no information or deficient information is submitted at this point, the referee will rely upon the information obtained during the consultation, the independent investigation, the Rule 6 requests, and will proceed to enter a ruling that modifies the claims set forth in the application or denies the application in whole or in part. Referees can preside over contested hearings, but this is rarely if ever used in current practice, presumably, based in part upon cost concerns coupled with the standard of review of rulings and orders of the referee.

VI. Re-Referrals

At any time, any party may file a motion to re-refer. This motion shall be granted if the movant attests to their intent to protest any adverse ruling of the referee. If the case is contested the case is placed on a litigation track and the clock begins to tick towards the at-issue date and discovery. The referee may also re-refer the case, but this seems to be rare as most referees seem to make every effort to keep files off the water judge's desk if at all possible. In some instances, applicants file motions to re-refer in uncontested cases. While there are a few possible reasons for this, they are not required to disclose the reasons to the referee beyond the statement of their intent to protest any adverse ruling of the referee. Any review by the water judge once the case is re-referred is de novo.

VII. Protests

Once a ruling is entered, the case sits for twenty (20) days, during which time, any person, whether a party to the case or not, may file a protest to the ruling of the referee including the state and division engineer, after filing a fee and submitting in writing the reasons for the protest. If a protest is timely filed, the statute requires that the water judge hold a hearing and that, at a minimum, the petitioner, the applicant and the division engineer attend the hearing.

The applicant has the burden of sustaining the application. The water judge may either reverse, reverse and remand, modify or affirm the ruling of the referee. The statute allows for "term days" for the water judge to deal with all protests and referrals. This is no longer practiced as the parties have things set on the judge's calendar at various times. However, these settings can often be bumped for criminal or juvenile matters and a return to some form of term day or a docket day might not be a bad thing to reconsider; to have regular settings much like a criminal docket in district court.

VIII. Referee as Case Manager

It is my understanding that this is limited to Division No. 5. The referee serves as the case manager after the case is re-referred to approve ministerial motions and to aide the parties in preparing for trial and reaching settlement.