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History of the Referee, Division Engineer, State Engineer, Water Court Consultation Process Under the Water Rights Determination and Administration Act of 1969

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Colorado Re-Forges Its Pioneering Adjudication Code

Under Colorado's 1876 constitution, the public owns the waters of the natural stream and their use is dedicated to the people. The natural stream includes surface water and tributary groundwater connected to it. First in time to place prior appropriation beneficial use water law into its constitution, Colorado promptly followed on statehood with its first water right determination act in 1879.² Ninety years later, the 1969 session of the General Assembly created seven water courts to exercise special statutory jurisdiction over water matters encompassing major watersheds within the state.

The need to integrate groundwater and surface water rights into the prior appropriation use and enforcement system precipitated the 1969 Water Right Determination and Administration Act.³ Horrendous droughts

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² Act of Feb. 19, 1879, 1879 Colo. Sess. Laws 94 (regulating the use of water for irrigation and settling of priorities). See Gregory J. Hobbs, Jr., *Plumbing The Dimensions Of The Colorado Doctrine of Prior Appropriation*, Vol. 1, Ch. 1, Colorado Water Law Benchbook, Second Edition (Continuing Legal Education In Colorado, Inc. 2016).

³ Water Right Determination and Administration Act of 1969, ch. 373, 1969 Colo. Sess. Laws 1200.

in the 1930s and 1950s, rural electrification, and invention of the high-capacity irrigation pump produced multiple junior water rights relying on wells to extract tributary groundwater from the South Platte, Arkansas, and Rio Grande aquifers which were hydraulically connected to the surface streams senior water rights depended upon.

In 1967, the General Assembly, through Senate Bill 407, commissioned a water study for the purpose of determining the

“need for and content of legislation that would provide for integrated administration of all diversions and uses of water within the state, protect all vested water rights, conserve water for maximum beneficial use, and permit full utilization of all water in the state.”⁴

Judicial necessity promptly followed upon the legislature’s call for re-engineering legislation. The Colorado Supreme Court in 1968 issued its *Fellhauer* decision pulling back the curtain on groundwater /surface water conflicts in need of resolute administration promoting integrated use of the waters.⁵ Up stepped the “lawyers committee” of distinguished attorneys to help craft the legislation and shepherd its enactment.⁶

In the first volume of the University of Denver Water Law Review, chair of the lawyers committee, Robert Welborn, describes the extraordinary significance the General Assembly placed on this legislation:

“(T)o show the tremendous importance that the Legislature placed on this matter, the entire membership of the State Senate was constituted as a water committee with hearings to commence at the very start of the 1969 session . . . Although there were significant changes, Senate Bill 81 finally passed (basically intact), requiring adjudication and administration of tributary wells in the priority system

⁴ Act of April 19, 1967, ch. 175, §§1-6, 1967 Colo. Sess. Laws 249, 249-50 (providing for a study of water resources, uses, and administration of applicable water laws).

⁵ *Fellhauer v. People*, 167 Colo. 320, 447 P.2d 986 (1968).

⁶ See William A. Hillhouse II, *Integrating Ground and Surface Water Use In An Appropriation State*, 20 RMMLF-INST. 21 (1975).

Possibly the most significant impact of the 1969 Act was a change in the procedure for the adjudication of water rights one in which there were periodic general adjudication proceedings in the various water districts (proceedings which could last for years as the court permitted statements of claims to be filed), to one of individual adjudication which could be accomplished on each claim that was made.”⁷

This article examines how the referee, water judge, and division and state engineers’ consultation process with the parties to a water case became an integral part of this comprehensive legislative reform of the adjudication code.

Three Competing Bills, 1969 Session, S.B. 81, H.B. 1307, H.B. 1295

The 1969 Act emerged out of a number of competing bills the General Assembly considered in its 1969 session. Three bills – in particular-Senate Bill 81,⁸ House Bill 1307,⁹ and House Bill 1295¹⁰ -- appear to have been the front-runners. Senate Bill 81 became the primary vehicle for a series of amendments resulting in the 1969 Act. The two other bills died in committee at the end of that session. As introduced, each of these bills proposed to have either a commission or the division engineer make the initial ruling on a water right application instead of a district judge or referee of the court, in contrast to prior adjudication acts dating back to the first adjudication act of 1879. As introduced into the 1969 session, none of these three bills contained any reference to a referee.

S.B. 81 (Senators Gill and Denny) (the “lawyers committee bill”), as introduced, proposed to have the division engineer, with approval by the state engineer, rule upon water right applications.¹¹ The division engineer would “make such investigation as necessary to determine whether or not

⁷ Robert F. Welborn, *Commentary, Two Colorado Water Crises*, 1 U. Denv. Water L. Rev. 307, 310 (1998).

⁸ S.B. 81, 47th Gen. Assem., 1st Reg. Sess. (1969).

⁹ H.B. 1307, 47th Gen. Assem., 1st Reg. Sess.(Colo. 1969).

¹⁰ H.B. 1295, 47th Gen. Assem., 1st Reg. Sess. (Colo. 1969).

¹¹ S.B. 81 (Introduced bill, Jan. 21, 1969, §148-21-17 at 12).

the statements in the applications and statements of opposition are true.” The “state and division engineers may consult with the water conservation board and other state agencies as appropriate.”¹² The water judge for the division would hear and rule de novo on any protested rulings. The division engineer would be required to appear in support of that ruling. The water judge for the water division would issue all judgments and decrees, and the division and state engineers would regulate the distribution of water in accordance with the decrees.

H.B. 1307 (Representative McCormick) (the “Sparks bill”), as introduced, proposed to create water rights commissions in each of the water divisions for hearing and determining water right applications. The executive director of the department of natural resources would appoint the members of each commission, which would consist of “not less than three nor more than five members.”¹³ The commissions would “conduct appropriate hearings.” The state engineer, or appointed agent, would be a “necessary party” to all proceedings of the commissions and would be subject to examination and cross-examination by the parties. The commissions would rule on all applications.¹⁴ The water judge for the water division, on appeal, would review the commission’s ruling and decree de novo and issue the resulting decree. The water judge would issue the commission’s ruling and decree if no appeal were filed.¹⁵

H.B. 1295 (Representative Jackson), as introduced, proposed to create an elected board of water users in each division, composed of three “agricultural purpose” water users, three “municipal purpose” water users, and three “industrial purpose” water users. Water rights owners would comprise the eligible electors for election of the board members.¹⁶ The board in each division would select and hire a division engineer.¹⁷ The water judge for each division would have “exclusive review jurisdiction of all

¹² *Id.*, §148-21-18(4) at 15-16.

¹³ H.B. 1307 (Introduced bill, Mar. 10, 1969, §148-7-5 at 5-6).

¹⁴ *Id.*, §148-2-9 at 10-12.

¹⁵ *Id.*, §148-2-12 at 15-16.

¹⁶ H.B. 1295 (Introduced bill, Mar. 5, 1969, §3 at 4-6).

¹⁷ *Id.*, §4 at 6-7.

water matters” in each division.¹⁸ The division engineer would rule initially on each application and establish a volumetric limit for each water right.¹⁹ The board of water users for the division would have to give majority approval to any changes of water right the division engineer approved.²⁰

Referee/Division Engineer Consultation Provision is Amended into S.B. 81 on Third Reading Before this Bill Goes to the House

On second reading in the Senate, S.B. 81 provided in section 148-21-17(2) “. . . the division engineer in each division shall in the first instance have the authority and duty to rule upon determination of water rights and conditional water rights and the amount thereof, determinations with respect to changes of water rights, plans for augmentation, approvals of reasonable diligence in the development of appropriations under conditional water rights, and determinations of abandonment of water rights or conditional water rights. . .”²¹ Section 148-21-18(4) provided that “The division engineer shall make such investigation as may be necessary in his opinion so that he will be fully advised with respect to the subject matter of the application and statements of opposition. The state engineer and division engineers may consult with the Colorado water conservation board and other state agencies as may be appropriate.”²²

A third reading amendment by Senator Fred Anderson to S.B. 81 assigned the initial investigation and ruling on applications to a water court referee, instead of the division engineer, and required the referee to consult with the division engineer in the course of the referee’s investigation and ruling.²³ The House approved this provision, along with other adjustments,

¹⁸ *Id.*, §5 at 7-8.

¹⁹ *Id.*, §7-8 at 9-13.

²⁰ *Id.*, §9 at 13-14.

²¹ S.B. 81 (Engrossed bill, Mar. 7, 1969, §147-21-18(2) at 13-14) (on file with the Colorado Supreme Court Library).

²² *Id.*, §148-21-18(4) at 17-18.

²³ Senate Journal, 47th Gen. Assem., 1st Reg. Session, 72nd Day, March 20, 1969 at pp. 474-75, approved by the full Senate March 21, 1969 at p. 590.

as part of the 1969 Act²⁴ and killed H.B. 1306 and H.B. 1295 in committee at the end of the 1969 session.²⁵

On final consideration in the House on April 29, 1969, section 148-21-17(2) provided “. . . the referee in each division shall in the first instance have the authority and duty to rule upon determination of water rights and conditional water rights and the amount thereof, determinations with respect to changes of water rights, plans for augmentation, approvals of reasonable diligence in the development of appropriations under conditional water rights, and determinations of abandonment of water rights or conditional water rights.”²⁶ Section 148-21-18(4) provided that “The referee without conducting a formal hearing shall make such investigations as are necessary to determine whether or not the statements in the application and statements of opposition are true and to become fully advised with respect to the subject matter of the applications and statements of opposition. The referee shall consult with the appropriate division engineer and may consult with the state engineer, the Colorado water conservation board and other state agencies.”²⁷

As adopted by the General Assembly in that year, the 1969 Act did not contain any explicit reference to the division or state engineer becoming a party to a water case in proceedings before the referee or the water judge. Section 148-21-18(1) generally provided that “Any person who wishes to oppose the application” shall file a statement of opposition by the last day of the second month following the month in which the application is filed.²⁸ Section 148-21-20(2) provided that “any person who wishes to protest a ruling of the referee” shall file the protest with the water clerk and

²⁴ House Journal, 47th Gen. Assem. 1st Reg. Session, 113th Day, April 30, 1969.

²⁵ *Id.*, 119th Day, Tuesday May 6, 1969 at 1519.

²⁶ S.B. 81 (Re-engrossed bill, Apr. 29, 1969, §147-21-18(2) at 11-12) (on file with the Colorado Supreme Court Library).

²⁷ *Id.*, §148-21-18(4) at 16.

²⁸ Water Right Determination and Administration Act of 1969, ch. 373, 1969 Colo. Sess. Laws 1200, 1207.

the referee within twenty days of the referee's ruling²⁹ Section 148-21-20(3) provided for the water judge to hear the protest de novo in accordance with trial practice and procedure, without being bound by the referee's findings. This section further provided that the "division engineer shall appear to furnish pertinent information and may be examined by any party, and if requested by the division engineer, the attorney general shall represent the division engineer."³⁰ In section 146-21-3, the 1969 Act, as adopted, defined "Person" to include "the state of Colorado . . . or any other legal entity, public or private."³¹

The consultation process between the referee and the division and/or state engineer is *sui generis* to the 1969 Act. The complexities of ground water /surface water priority integration, the amelioration of augmentation plans to allow out of priority diversions, and the increasing pressure of water right changes due to growing municipal demands may have prompted the legislators to include the engineers within the canopy of the referee's investigation, in order to take advantage of their expertise in water matters posed by individual cases without requiring them to become parties. All prior adjudication acts included provisions for a referee to conduct formal proceedings on behalf of the district court.

All Prior Adjudication Acts Provided for Reference to a Referee

Under the 1879 Act, the adjudication of irrigation water right priorities began with the district judge of a local irrigation district entering an order appointing a referee to conduct hearings, take evidence, issue subpoenas, order the production of documents, examine witnesses, allow for the cross-examination of witnesses, note objections, and certify the record to the district judge.³² The referee then filed a report, abstract of testimony, and the record with the district court judge.³³ The judge examined the testimony for the purpose of entering a "decree determining the several priorities of

²⁹ *Id.*, §148-21-20(2) at 1209.

³⁰ *Id.*, §148-21-20(3).

³¹ *Id.*, §146-21-3 at 1201.

³² Act of Feb. 19, 1879, §§19-24, 1879 Colo. Sess. Laws 94, 99-101.

³³ *Id.*, §27 at 103.

the several ditches and reservoirs . . . according to the date of the construction and enlargement, thereof, with the amount of water which it shall be held to have appropriated.”³⁴ The clerk of court issued a certificate evidencing the decree by which the local water commissioner distributed water to the use rights.³⁵

In correcting the 1879 Act’s lack of a service of process procedure to bring claimants before the court, the 1881 Adjudication Act provided for a general adjudication proceeding to decree irrigation ditch and reservoir priorities.³⁶ The district judge could take the evidence, consider the evidence taken by a referee under the 1879 Act, or appoint the same or a different referee to take evidence for the court.³⁷ The referee taking the evidence filed a report and record with the court, together with an abstract of testimony, findings, and proposed decree for the irrigation priorities in the water district.³⁸ After giving notice of the day and time for hearing, the district judge considered any exceptions to the referee’s report, findings or proposed decree, approving or modifying it.³⁹ Any appeal went to the Colorado Supreme Court.⁴⁰ A separate 1881 act created the office of State Hydraulic Engineer.⁴¹

The 1903, 1919, and 1943 Acts provided for general and supplementary adjudications of priorities for all claimed beneficial uses, in the same manner as for irrigation priorities, including through the

³⁴ *Id.*, §30 at 104.

³⁵ *Id.*

³⁶ Act of February 23, 1881, §1, 1881 Colo. Sess. Laws 142, 142-43 (further provisions for providing for the settling of priority of rights for irrigation).

³⁷ *Id.*, §§4, 10-17 at 144-46, 149-53.

³⁸ *Id.*, §20 at 153-54.

³⁹ *Id.*, §21 at 154.

⁴⁰ *Id.*, §27 at 156-57.

⁴¹ Act of March 5, 1881, 1881 Colo. Sess. Laws 119 (providing for the appointment of a state engineer).

appointment of referees to take evidence and file a report, findings, and proposed decree to the court for adjudication.⁴²

As of 1905 the General Assembly had created 70 water districts.⁴³ In 1929, it added a seventh irrigation division.⁴⁴ Thus, on the eve of the 1969 Act there existed seven irrigation divisions, each with a division irrigation engineer reporting to the State Engineer, and water commissioners distributing the water of the 70 districts in accordance with district court decrees.⁴⁵ The system of general and supplementary adjudications by district judges for local water districts and not the larger watersheds proved to be prolonged and unwieldy.⁴⁶ In establishing case by case adjudication of applications, the 1969 Act created seven water divisions in place of the 70 local districts, with provisions for a water judge, an alternate water judge, a water clerk, a referee, and an engineer in each of the divisions, plus the resume notice system for summarizing applications.

In a D.U. Water Law Review interview, long-time Director of the Colorado Water Conservation Board and former Colorado Supreme Court Justice, Felix Sparks, proclaimed himself satisfied with the outcome of S.B. 81, though he had promoted a competing bill, H.B. 1307, that would have established water commissions in each division to rule on water applications:

⁴² Act of April 11, 1903, ch. 130, §1, 1903 Colo. Sess. Laws 297, 297 (concerning water rights); Act of April 9, 1919, ch. 147, §§ 3, 4, 7, 1919 Colo. Sess. Laws 487, 489-91, 493-94 (to make further provisions for settling priority of rights); Act of April 19, 1943, ch. 190, §§3-5, 7-10, 12, 1943 Colo. Sess. Laws. 613, 615-22 (providing for the settling of the priority of rights).

⁴³ Act of April 10, 1905, ch. 111, 1905 Colo. Sess. Laws 243 (concerning water districts).

⁴⁴ Act of May 7, 1929, ch. 114, 1929 Colo. Sess. Laws 410 (creating irrigation division no. 7).

⁴⁵ See 1963 C.R.S. §§148-12-1 to 4 (1968).

⁴⁶ See Justice Gregory J. Hobbs, Jr., *Colorado's 1969 Adjudication and Administration Act: Settling In*, 3 Univ. Denv. Water L. Rev. 1, 11-12 (1999).

“I had a lot of input. I monitored that all the time, constantly. There were some things I wanted to go further than what they finally did but we got it set up finally where there was one system. It was a lot of work for the State Engineer’s office. Years and years of work of revising the whole system so today he knows where the Number One decree on the Colorado River is, or the South Platte.”⁴⁷

Sparks could be salty. The General could overgeneralize. In the same interview, he called the prior adjudication system “a mess of fraud.” “I knew all the holes in our water law and the problems we’d had over the years and the whole adjudication procedure was a mess of fraud . . . Anybody could be a referee – you could just appoint some guy who could be anybody.”⁴⁸

Current Consultation Roles, Responsibilities, and Authorities of the Referee and Engineers Under the 1969 Act and Water Court Rules

Under section 37-92-302(1) (b) & (c) “Any person, including the state engineer, who wishes to oppose the application” may do so by the last day of the second month following the month the application was filed.⁴⁹

Under section 37-92-302 (4), C.R.S. (2016), the referee, without conducting a formal hearing, makes “such investigations as are necessary to determine whether or not the statements in the application and statements of opposition are true.”⁵⁰ These investigations focus on the referee becoming “fully advised with respect to the subject matter of the applications and statements of opposition.” The referee “shall consult with the division engineer or the state engineer or both.”⁵¹ The engineer consulted files a written report in the proceedings, with a copy to the applicant who must provide it to all parties of record. If the application is re-referred to the water judge prior to consultation, the division engineer files a

⁴⁷ Interview of Felix Sparks, *Practitioner’s Perspective*, 3 Univ. Denv. Water L. Rev. 105, 109 (1999).

⁴⁸ *Id.* at 109.

⁴⁹ Colo. Rev. Stat. §37-92-302(1) (b) & (c) (2016).

⁵⁰ *Id.*

⁵¹ *Id.*

written recommendation with the court within thirty-five days of the re-referral. The water judge may also request the state engineer to file a written report.⁵²

Section 37-92-304(2) provides that “. . . any person, including the state engineer who wishes to protest or support a ruling of the referee” may do so by filing a written pleading with the water clerk within twenty-one days of the mailing of the ruling.⁵³ Under section 37-92-304(3), the “division engineer shall appear to furnish pertinent information and may be examined by any party, and, if requested by the division engineer, the attorney general shall represent the division engineer.”⁵⁴

Under section 37-92-303(2), before the referee’s hearing, any applicant or opposer may require re-referral of the application to the water judge.⁵⁵

Uniform Water Court Rule 6 provides further definition of the referee’s duties and responsibilities. They include “working with the division engineer and the parties to obtain additional information that will assist in narrowing the issues and obtaining agreements,” and the referee’s issuance of a ruling and proposed decree with appropriate findings and conditions preventing injurious effect to other water rights.⁵⁶

The referee must consult with the division engineer and the engineer must file a written summary report of the consultation. The referee may require the applicant to file a response to the division engineer’s written summary report of the consultation.⁵⁷ For all applications in which a statement of opposition is filed, the referee must hold a status conference, and invite or require the division engineer to appear at this conference. The

⁵² *Id.*

⁵³ Colo. Rev. Stat. §37-92-304(2) (2016).

⁵⁴ *Id.*

⁵⁵ Colo. Rev. Stat. §37-92-303(2) (2016).

⁵⁶ Colorado Uniform Local Rules for all State Water Court Division (hereinafter Water Court Rules) Rule 6(b) (2016). See *also* Colo. Rev. Stat. §37-92-305(3)(a).

⁵⁷ Water Court Rules, Rule 6(e) (2016).

referee must enter minute orders summarizing all conferences with the parties or the division or state engineers.⁵⁸

The rule encourages an Applicant's filing of a proposed ruling and decree before the status conference to assist discussion.⁵⁹ At the status conference the parties shall discuss whether expert investigations are needed.⁶⁰ In consultation with the parties, the referee shall establish "a case management plan for obtaining the necessary information and preparing a proposed ruling and a proposed decree."⁶¹

The referee may require the applicant to supply further information reasonably necessary for the disposition of the application, and may ask the division engineer for additional information as part of the referee's ongoing informal investigation. The referee must discontinue making such requests if the state or division engineer has become a party to the case. The division engineer may file a written report in response to new information in any proposed ruling or expert report the applicant files, and the referee may require the applicant to file a written response.⁶² The Applicant has the burden of sustaining the application.⁶³ If adjudications of fact and rulings of law must be made, these belong to the water judge upon re-referral.⁶⁴

Committee Comment to the water court Rule 6 states intent "to ensure that the participation by the division engineer is clear, meaningful, transparent, and timely" and "provide a more clear record of consultations between the referee and the division engineer." The "primary purpose of the referee's role in water court proceedings" is to "fashion a proposed decree that, with water judge approval, can be entered as a final decree if no protest to the referee's ruling is filed with the water court within the time

⁵⁸ Water Court Rules, Rule 6(o) (2016).

⁵⁹ Water Court Rules, Rule 6(h) (2016).

⁶⁰ Water Court Rules, Rule 6(j) (2016).

⁶¹ Water Court Rules, Rule 6(k) (2016).

⁶² Water Court Rules, Rule 6(n) (2016).

⁶³ Water Court Rules, Rule 6(d) (2016).

⁶⁴ Water Court Rules, Rule 6(h) (2016).

the statute specifies.” To forward this end, “the General Assembly has authorized the referee to consult without the state or division engineer having to file a statement of opposition to the application.”⁶⁵

Observations On The Legislature’s Choices in the 1969 Act

- (1) During its 1969 session, the General Assembly considered but did not adopt provisions that would have authorized the division engineer, or a board or commission, to conduct the initial investigation and make a ruling on a water right application.
- (2) Since 1879, the General Assembly has consistently provided for a referee to gather evidence and fashion a proposed ruling and decree for a District Court Judge’s review and determination.
- (3) The 1969 Act establishes exclusive jurisdiction over water matters in the seven water divisions.
- (4) The 1969 Act authorizes the referee to conduct investigations into applications and statements of opposition, without a requirement to conduct a formal hearing.
- (5) The 1969 Act requires the referee to consult with the division or state engineer, or both. The engineers must respond with a written report of the consultation in the proceedings. Under the Water Court Rules the referee must document through minute orders all conferences with the parties or the division or state engineers.
- (6) The 1969 Act does not restrict the issues the division or state engineer may raise in a written consultation report. These issues may include any matter identified in section 37-92-305 regarding standards for referee and water court rulings and decisions.
- (7) The division engineer must appear in proceedings before the water judge.
- (8) The state engineer may become a party to a case before the referee by filing a statement of opposition or by way of protesting the referee’s ruling.
- (9) The state engineer has discretion whether or not to become a party to a water court case.

⁶⁵ Water Court Rules, Rule 6 Committee Comment (2016).

Conclusion

Because the public owns the water and the people make use of it through adjudicated enforceable water rights that are continuously inter-related with each other, the Colorado General Assembly starting in 1879 established a corps of expert water officials — state and division engineers and water commissioners — to ensure the ongoing value of beneficial use rights throughout the state. The consultation provisions of the 1969 Act bring this expertise to bear as the referee works with the parties to fashion, if possible, a consent decree the water judge may review and approve without trial, if no protest is filed. Any party who desires a trial of disputed issues of fact or law may trigger re-referral of the case to the water judge.