# MINUTES

**COLORADO SUPREME COURT**

**WATER COURT COMMITTEE**

Friday, November 5, 2021, 1:30 p.m.

Webex or Call in Only

|  |  |  |
| --- | --- | --- |
| **Name** | **Present** | **Excused** |
| Justice Monica Márquez, Chair  | X |  |
| Justice (Ret.) Gregory Hobbs  |  | X |
| Judge (Ret.) John Kuenhold  | X |  |
| Referee John Cowan | X |  |
| Referee Nicolas Sarmiento | X |  |
| Referee Susan Ryan | X |  |
| Holly Strablizky  | X |  |
| Scott Steinbrecher | X |  |
| Kevin Rein | X |  |
| Erin Light | X |  |
| Craig Cotten | X |  |
| Kaylea White  | X |  |
| Doug Clements  | X |  |
| Jennifer Ashworth | X |  |
| Mark Hamilton  | X |  |
| Kirsten Kurath  | X |  |
| Andy Jones  | X |  |
| Peter Ampe | X |  |
| Jim Witwer |  | X |
| Doug Sinor  | X |  |
| Chris Geiger  |  | X |
| Emily Hunt | X |  |
| **Non-voting Participants**  |  |  |
| Andrew Rottman  | X |  |
| Kelley O’Leary | X |  |

Also Present: Paul Benington, Andrea Bronson, Gregor MacGregor

1. **Call to Order**
2. **Approval of Minutes**

The Committee approved the minutes from the April 23, 2021 meeting.

#### **Report from Education Subcommittee**

Jennifer Ashworth reported on the May 7, 2021 CLE. The CLE covered Water Exchange Projects, anti-speculation, and sustainability in Division 3. There were 100 attendees and 13 presenters. The subject of Water Exchange Projects has been discussed in additional presentations. The next planned CLE was supposed to take place in October, but that was again delayed. The CLE will now be held on February 11, 2022, and will address water law trial practice in a mock trial format.

#### **Standards for Conferral**

Andrea Bronson discussed a new issue for the Committee’s consideration. Ms. Bronson explained the problem of inconsistent standards for conferral in water courts prior to filing motions. Some court orders specify that conferral must be in person or by phone, even for simple issues and where responses will be filed. Many cases involve a number of parties, and many times attorneys do not hear back on attempts at conferral. For some issues and motions, conferral simply doesn’t make sense, or in-person conferral is time consuming. Ms. Bronson asked the Committee whether it is interested in defining the expectation for conferral. Justice Márquez asked whether the proposal would be for a change to the civil rules, local rules, or something else. Ms. Bronson believed that was an issue for further discussion, but the proposal would probably be limited to water court cases. Ms. Bronson clarified that the proposal would be to more specifically define when a what conferral is required. Holly Strablizky stated that many times this issue is covered in the local rules for a water court division. Maybe the divisions already have something that could be incorporated into a rule. Judge Kuenhold stated that conferral has been a real problem for a long time, and COVID has made it worse. Doug Sinor stated that email conferrals with short notice and a hard deadline are also difficult to comply with. Justice Márquez questioned the need for uniformity. Judge Kuenhold believed that separate rules make it harder for practitioners. Referee Sarmiento stated that, in some cases, conferral can be run through the e-filing system, but that doesn’t work for every case. Justice Márquez asked how frequently this occurs and whether a case management order can address this issue in each case. Susan Ryan believed a rule on this might be too rigid. The Committee discussed options for rules regarding the timing and sufficiency of email conferral. Mark Hamilton stated that substantive conferral is very helpful in some situations, and those are hard to identify up front. Justice Márquez suggested that a subcommittee explore the issue. The subcommittee will be Jim Witwer (or Andrea Bronson), Pete Ampe, Judge Kuenhold, and Doug Sinor.

#### **Modifying Decrees for Adjudicated Rights**

Referee Cowan discussed an issue in Divisions 1 and 2 related to the modification of decrees for adjudicated rights. He stated that in the Denver Basin, landowners’ rights to Denver Basin water are adjudicated and decreed. If the landowner wants to vacate water from an existing decree to get a well permit, the landowner would histrionically file a motion in the previous case to vacate enough water to receive a well permit from the state engineer. Some judges are taking the position that the old decrees are res judicata without retained jurisdiction, and a new change case is the only option to vacate a portion of the right. This involves a filing fee and extensive time in front of the water court. Kevin Rein stated that the Engineer has taken the position that the water right, once adjudicated, is no longer available, but a motion in the existing case was a longstanding practice. Mr. Rein was interested in exploring whether this is an issue that can be clarified in the rules. Referee Cowan stated that prospectively, the parties will include retained jurisdiction provisions in these decrees, but the problem remains with existing decrees. Referee Cowan and Mr. Rein will meet and discuss potential proposals. Paul Benington stated that the Engineers and Division of Water Resources have asked to have court orders vacating a potion of the right prior to issuing a well permit, but he understands that stretches the limits of jurisdiction. Referee Cowan, Mr. Rein, and Mr. Benington will get together and report back to the group.

#### **Water Exchange Projects Subcommittee Update**

Susan Ryan provided an update on Water Exchange Project education and outreach efforts. The subcommittee met in June and decided that it had fulfilled its goal of educating the water community on the issue of Water Exchange Projects. Paul Benington stated that there was additional outreach and guidance from the engineer to the water bar, as this is really the Engineer’s issue. Further written guidance was provided to Division Engineers and the Bar. Ms. Ryan stated that there wasn’t full consensus on addressing the issue, but that is probably not feasible or necessary. Mr. Benington reported that the Division of Water Resources put out a memo to the water community explaining that it would take no firm position on the issue until 2022 and asked for written comments or feedback.

#### **Update on the Anti-Speculation Work Group**

Kevin Rein provided an update on the final report from the Anti-Speculation Work Group. Justice Márquez thanked the Committee members who served on the work group. Mr. Rein stated that the goal of the diverse workgroup was to strengthen the state’s anti-speculation laws. It addressed two types of speculation – traditional speculation and investment water speculation. The report laid out the perceived risks and potential outcomes if the issues are not addressed. The work group did not make any specific legislative proposals, but so far three bills have been developed based on the report. Justice Márquez asked if there was anything for this Committee to do. Mr. Rein believed that some of these issues might be the subject of future rules, but nothing from the report required action now.

#### **Update on Pro Se Resources**

Gregor MacGregor updated the Committee on efforts to expand resources for Pro Se water litigants. Mr. MacGregor was still working on proposals. He was moving forward with the video series and had conducted a number of video interviews. He also wanted to develop handbooks and training to Sherlocks in the courthouses. Susan Ryan stated that the CLEs for Water Law 101 and 201 were recorded and she was working with the courts to get those posted to websites. There are also additional efforts to provide resources during legal resource week. Justice Márquez thanked the group.

#### **Adjourn**