

RULE CHANGE 2018(08)

Uniform Local Rules for All State Water Court Division

Rules 11, 12 and 13.

Rule 11. Pre-Trial Procedure, Case Management, Disclosure, and Simplification of Issues

COMMITTEE COMMENT:

Rule 11(b)(5)(D)(III)

Amended Rule 11, which became effective July 1, 2009, provides for meetings of the experts without attorneys for the parties or the parties themselves. Effective July 1, 2011, Rule 11(b)(5)(D)(III) was amended, nunc pro tunc on and after July 1, 2009, to make explicit the non-discoverability and non-admissibility of the notes, records, content of discussions, and the experts' written statement prepared in accordance with Rule 11(b)(5)(D)(II). In response to arguments that this provision does not prohibit use of such material in pretrial proceedings, Rule 11(b)(5)(D)(III) is further amended to clarify the original intent of the rule that the only permissible use of information from the expert meetings is for purposes of the preparation of the written statements and reports required or permitted by Rule 11(b)(5)(D). This clarifying change applies nunc pro tunc on and after July 1, 2009.

Rule 11(b)(5) and (9)

Effective January 1, 2018, Rule 11(b)(5) was amended to require expert disclosures to be made earlier than deadlines under the previous rule. For the applicant's expert disclosure, supplemental expert disclosure, and opposer's expert disclosure, the new deadline is five weeks earlier than the previous rule. For rebuttal expert disclosures, the new deadline is four weeks earlier than the previous rule. This change was to allow more time after expert disclosures for settlement discussions, mediation, and preparation of pretrial motions pursuant to C.R.C.P. 56. At the same time, Rule 11(b)(9) was amended to require that pretrial motions pursuant to C.R.C.P. 56 be filed 91 days before trial instead of the previous rule requiring such motions to be filed 84 days before trial.

Effective July 1, 2014, Rule 11(b)(9) is amended to require that pretrial motions pursuant to C.R.C.P. 56 be filed 84 days before trial instead of 91 days before trial to allow the parties time to review any expert rebuttal reports prior to filing any Rule 56 motions. The purpose of this

~~amendment is to reduce the potential for unnecessary, inappropriate, or moot motions or supplemental filings by the parties to address any new information in expert rebuttal reports.~~

Amended Rule 11, which became effective July 1, 2009, provides for meetings of the experts without attorneys for the parties or the parties themselves. Effective July 1, 2011, Rule 11 is further amended in subsection (b)(5)(D)(III) to make explicit the non-discoverability and non-admissibility of the notes, records, content of discussions, and written statement prepared by the experts in accordance with the rule, and, further, to clarify that the meetings of the experts exclude attorneys for the parties or the parties themselves unless they are designated experts. These clarifying changes apply nunc pro tunc on and after July 1, 2009.

In addition, the following Suggested Guide is included in this Comment by way of example for conduct of the meetings of the experts and preparation of the joint written statement of the experts.

Rule 12. Procedure Regarding Decennial Abandonment Lists

For all decennial abandonment lists filed by the Division Engineers pursuant to C.R.S. § 37-92-401(4), the following procedures apply:

- a. The water clerk shall cause notice of the availability of the final decennial abandonment list to be included in the resume and published in accordance with C.R.S. § 37-92-401(4)(d). In addition, the water clerk shall include the revised or unrevised final decennial abandonment list in its entirety in the copy of the resume described in C.R.S. § 37-92-302(3)(a) posted on the water court's web site in accordance with C.R.S. § 37-92-302(3)(c)(I)(D). Neither the water clerk nor the Division Engineer is required to publish the final decennial abandonment list in any newspaper. The published notice and resume for the final decennial abandonment list shall include notice of the deadline for filing any protest.
- b. Any protest filed pursuant to C.R.S. § 37-92-401(5) shall automatically trigger a bifurcation from the original case in which the decennial abandonment list was filed without the necessity of a motion to bifurcate or any bifurcation order by the court. Each bifurcated protest case shall be assigned a new case number by the water clerk, shall include a reference to the original abandonment case number, and shall be published in the water court resume in accordance with C.R.C.P. Rule 90 and C.R.S. § 37-92-302(3) and with notice of the deadline for any entry of appearance under Water Court Rule 12(d). Parties to the bifurcated protest cases shall not be considered parties to the original abandonment case for the purpose of filings and service in the original abandonment case, except as provided in Water Court Rule 12(j).
- c. All other Water Court Rules, with the exception of Water Court Rules 3, 6 and 9, apply to the bifurcated protest cases. For the purposes of the applicable Water Court Rules, the final decennial abandonment list shall be considered an application, the Division Engineer shall be considered the applicant, any protest shall be considered a statement of opposition, and any protestant shall be considered an opposer.
- d. Any person who may be affected by the subject matter of a protest or by any ruling thereon and desiring to participate in any hearing pursuant to C.R.S. § 37-92-401(6) must file an entry of appearance by August 31, 2022, or the respective tenth anniversary thereafter. If the water judge permits additional protests after June 30, 2022, or the respective tenth anniversary thereafter, as will serve the ends of justice pursuant to C.R.S. § 37-92-401(6), then any entry of appearance under this Water Court Rule 12(d) must be filed by the last day of the second month following the month in which an additional protest is filed. An entry of appearance must identify:

- (1) the portion of the decennial abandonment list with respect to which the appearance is being made; (2) whether the person is participating in support or in opposition to abandonment of the subject water right(s); (3) any factual and legal basis for any allegation that the person may be affected by the subject matter of the protest or by a ruling on the protest; and (4) any claim of ownership in the subject water right(s).
- e. The at-issue date for a bifurcated protest case shall be 49 days after the deadlines for filing an entry of appearance by any potentially affected persons under Water Court Rule 12(d).
- f. For the purpose of the proceedings within the bifurcated protest case, any person entering an appearance under Water Court Rule 12(d) in support of abandonment of the subject water right(s) shall have the same case management deadlines and order of presentation at hearing as the Division Engineer unless otherwise ordered by the water judge. Any person entering such an appearance in opposition to abandonment of the subject water right(s) shall have the same case management deadlines and order of presentation at hearing as the protestant(s) unless otherwise ordered by the water judge.
- g. Any person who wishes to participate in a bifurcated protest case after the deadline for filing an entry of appearance must intervene pursuant to Water Court Rule 7.
- h. If it is necessary to determine the ownership of or right to use a water right that is the subject of a protest to the decennial abandonment list in order to determine whether the water right has been abandoned, in whole or in part, then the water judge may exercise jurisdiction over any such controversy. If the water judge elects to exercise jurisdiction over such a controversy, the water judge shall order any party to serve additional notice under C.R.C.P. Rule 4, and to file such supplemental pleadings as the water judge finds necessary or appropriate to resolve such controversy. Any such controversy may be resolved by separate hearing and under a preliminary case management order prior to implementing the case management procedures of Water Court Rule 11 as to the Division Engineer's claim of abandonment. If the water judge does not elect to exercise jurisdiction over such controversy, then the water judge may order the applicable parties to commence a separate proceeding to resolve the controversy and stay further proceedings on the abandonment claim until the controversy is resolved. If the water judge exercises jurisdiction over issues of ownership in such abandonment proceedings, the water judge will consider any requests by a party as to the place of trial, and venue is proper within any county in the water division notwithstanding C.R.C.P. 98.

- i. Any order of the water court in a bifurcated protest case resolving the alleged abandonment of all or part of any water right that is the subject of a protest shall be entered in the bifurcated protest case and in the original abandonment case.
- j. Within 63 days of resolution of all bifurcated protest cases, the Division Engineer shall file a motion in the original abandonment case for a judgment and decree listing: (1) the final decennial abandonment list as filed with the court by the Division Engineer; (2) identification of all orders by case number and date in the bifurcated protest cases and the resolution of the alleged abandonment of all or part of any water right that was the subject of a protest; and (3) a complete listing of the water rights, in whole or in part, abandoned by the water court. No conferral with any person shall be required prior to the Division Engineer filing the motion. In each bifurcated protest case, the Division Engineer shall simultaneously file notice of the filing of the motion in the original abandonment case and a copy of the proposed judgment and decree. Any party to a bifurcated protest case objecting to the form of the proposed judgment and decree may file a response to the Division Engineer's motion in the original abandonment case solely to identify any clerical errors in the proposed judgment and decree within 21 days of the date that notice of the motion's filing was filed and served in the bifurcated protest case, and the Division Engineer may file a reply.

Rule 12.13 Modification of Rules

The requirements of these rules may be modified with approval of the water court upon agreement of the parties, or by the court, in exceptional cases to meet emergencies or to avoid substantial injustice or great hardship. Any request for modification shall be presented to the judge before whom the case is pending and shall state in writing the grounds supporting it. The opposing party shall be given reasonable notice and an opportunity to contest the request in writing.

Amended and Adopted by the Court, En Banc, May 31, 2018, effective immediately.

By the Court:

Monica M. Márquez
Justice