

## **RULE CHANGE 2014(10)**

### CHAPTER 36 UNIFORM LOCAL RULES FOR ALL STATE WATER COURT DIVISIONS Rules 6 and 11

#### **Rule 6. Referral to Referee, Case Management, Rulings, and Decrees**

(a) [NO CHANGE]

(b) [NO CHANGE]

(c) [NO CHANGE]

(d) The applicant shall have the burden of sustaining the application and, in the case of a change of water right, a proposed or existing exchange of water, or a plan for augmentation, the burden of showing the absence of injurious effect. If any Expert reports, disclosures, and/or opinions are presented to the referee, they shall be filed and include the signed Declaration of Expert set forth in the applicable water court form.

(e) To promote the just, speedy, and cost efficient disposition of water court cases, the goals of the referee, as contemplated by C.R.S. § 37-92-303(1), shall include a ruling on each unopposed application within 630 days after the last day on which statements of opposition may be filed, and all other applications as promptly as possible. In pursuit of this goal, the referee shall initiate consultation with the division engineer in every case promptly after the last day for filing statements of opposition. The division engineer's written summary report of the consultation is due within 350 days of the date the referee initiates consultation in accordance with C.R.S. § 37-92-302(4), except that for applications that require construction of a well, the summary of consultation ~~division engineer's written report~~ is due within 4 months after the filing of the application in accordance with C.R.S. § 37-92-302(2)(a). Upon request, the referee may extend the time for filing the summary of consultation ~~division engineer's written report~~. If the referee determines that the summary of consultation report requires a response, the applicant shall file a written response within the time specified by the referee either in the case management plan adopted under section (l) of this rule 6 or by a separate order under section (n) of this rule 6. ~~The division engineer may submit additional written reports upon receipt of new information and shall provide them to the referee and all parties.~~ The referee shall not enter a ruling on applications for determination of rights to groundwater from wells described in C.R.S. § 37-90-137(4) until the state engineer's office has had the opportunity to issue a determination of facts concerning the application in accordance with C.R.S. § 37-92-302(2)(a). The referee and the division engineer may confer and jointly agree to forego consultation in a particular case because it is not needed; and, if so, the referee shall enter a minute order as provided in section (o) of this Rule 6.

(f) For good cause, upon agreement of the parties, or sua sponte, the referee may extend the time for ruling on the application beyond 630 days after the last day on which statements of opposition may be filed but not to exceed a total of 1 year following the deadline for filing

statements of opposition, except that the referee may extend the time for entering a ruling to a specified date that is not more than 182 days after the expiration of the one year period, upon finding 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.

(g) [NO CHANGE]

(h) For all applications in which statements of opposition are filed, the attorney for the applicant, or the referee if the applicant is not represented by counsel, shall set a status conference with the referee and all parties. The status conference shall occur within 63 days after the deadline for filing of statements of opposition, unless the deadline is extended by the referee for good cause. The status conference may be conducted in person or by telephone. All parties must attend the status conference unless excused by the referee. The referee shall advise the division engineer of the status conference and invite or require the division engineer's participation. To assist discussion at the status conference, applicants are encouraged to prepare and circulate a proposed ruling and proposed decree to the referee, the division engineer, and the parties in advance of the conference.

(i) [NO CHANGE]

(j) [NO CHANGE]

(k) [NO CHANGE]

(l) Regardless of whether any expert is involved in the proceedings before the referee, the referee shall not be bound by the opinions and report of the expert, may make investigations without conducting a formal hearing, including site visits, and may enter a ruling supported by the facts and the law. The case management plan shall contain a listing of the disputed issues to the extent known, the additional information needed to assist in resolution of the disputed issues, additional investigations needed to assist in resolving the disputed issues, an estimate of the time required to complete the tasks, the time for filing a proposed ruling and proposed decree, the time for opposers to provide file comments to the applicant on the proposed ruling and proposed decree, the time for the applicant to file status reports, and a schedule for further proceedings. The referee may make such interim rulings, including scheduling additional status conferences and allowing amendments to the case management plan, as will facilitate prompt resolution of the application and issuance of a proposed ruling and proposed decree. The proceedings before the referee shall be completed and the proposed ruling and proposed decree issued no later than 1 year following the deadline for filing of statements of opposition, except that the referee may extend the time as specified in subsection (f) above.

(m) [NO CHANGE]

(n) At any time after the status conference on applications to which statements of opposition have been filed, or after the filing of applications to which no statements of oppositions have been filed, if some further information is reasonably necessary for the disposition of the application, the referee may require the applicant to supply the information in writing, by

affidavit or at an informal conference or at a hearing. The referee may ask the division engineer for information as part of the referee's ongoing informal investigation, but shall discontinue making such requests if the state or division engineer has become a party to the case. In response to such requests, the division engineer may file supplemental written summary of consultation reports. The division engineer also may file a written report in response to new information in any proposed ruling or expert report filed by the applicant within the time specified by the referee. If the referee determines any written report filed by the division engineer requires a response by the applicant, the applicant shall file a written response within the time specified by the referee.

(o) [NO CHANGE]

(p) [NO CHANGE]

(q) [NO CHANGE]

**Rule 7. [NO CHANGE]**

**Rule 8. [NO CHANGE]**

**Rule 9. [NO CHANGE]**

**Rule 10. [NO CHANGE]**

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

The provisions of C.R.C.P. Rules 16 and 26 through 37 shall apply except that they shall be modified as follows:

(a) [NO CHANGE]

(b) **Presumptive Case Management Order.** Except as provided in section (c) of this Rule, the parties shall not file a Case Management Order and subsections (1)-(10) of this section shall constitute the Case Management Order and shall control the course of the action from the time the case is at issue, unless the water court orders otherwise for good cause shown. The time periods specified in this case management order are provided to take into account protested or re-referred cases that involve computer modeling or detailed technical analysis. Parties and counsel are encouraged to request a Modified Case Management Order, pursuant to section (c), to shorten time periods whenever possible, unless the water court orders otherwise for good cause shown.

(1) [NO CHANGE]

(2) [NO CHANGE]

(3) [NO CHANGE]

(4) [NO CHANGE]

**(5) Disclosures.**

(A) The time for providing mandatory disclosures pursuant to C.R.C.P. 26(a)(1) shall be as follows:

(I) Applicant's disclosure shall be made 35 days after the case is at issue;

(II) An opposing party's disclosure shall be made 35 days after applicant's disclosures are made.

(B) The time periods for disclosure of expert testimony pursuant to C.R.C.P. 26(a)(2) shall be as follows:

(I) The applicant's expert disclosure shall be made at least 245 days before trial;

(II) The applicant's supplemental expert disclosure, if any, shall be made after the first meeting of the experts held pursuant to subsection (b)(5)(D)(I) of this Rule, and served at least 182 days before trial;

(III) An opposer's expert disclosure shall be made at least 126 days before trial;

(IV) If the evidence is intended to contradict or rebut evidence on the same subject matter identified by another party under subsection (b)(5)(B)(III) of this Rule, such expert disclosure shall be made no later than 91 days before trial.

**(C) Additional Expert Disclosures.** In addition to the disclosures required by C.R.C.P. 26(a)(2)(B)(I), the expert's disclosure shall include:

(I) A list of all expert reports authored by the expert in the preceding 5 years; and

(II) An executable electronic version of any computational model, including all input and output files, relied upon by the expert in forming his or her opinions. The court may require the party to whom this information is disclosed to pay the reasonable cost to convert the data from the electronic format in which it is maintained in the expert's normal course of business to a format that can be used by the expert for the opposing party(ies).

**(D) Meeting Of Experts To Identify Undisputed Matters of Fact and Expert Opinion and To Refine and Attempt to Resolve Disputed Matters of Fact and Expert Opinion.**

(I) The expert witness(es) for the applicant and the opposer(s) shall meet within 49 days after the applicant's initial expert disclosures are made. The meeting(s) may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the matters of fact and expert opinion that are the subject of the expert(s) disclosures and with respect to such disclosures: to

identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. The applicant may subsequently file a supplemental disclosure pursuant to Water Court Rule 11(b)(5)(B)(II) to address matters of fact and expert opinion resolved in or arising from the meeting(s) of the experts.

(II) The expert witness(es) for the applicant and the opposer(s) shall meet within 28 days after the opposers' expert disclosures are made. The meeting may be in person or by telephonic means. The purpose of the meeting is for the experts to discuss the matters of fact and expert opinion that are the subject of the expert(s) disclosures and, with respect to such disclosures: to identify undisputed matters of fact and expert opinion, to attempt to resolve disputed matters of fact and expert opinion, and to identify the remaining matters of fact and expert opinion in dispute. Within 21 days after such meeting, the experts shall jointly submit to the parties a written statement setting forth the disputed matters of fact and expert opinion that they believe remain for trial, as well as the undisputed matters of fact and expert opinion, arising from the expert disclosures.

(III) The content of the meetings of the experts and the written statement prepared pursuant to Water Court Rule 11(b)(5)(D)(II) shall be considered as conduct or statements made in compromise negotiations within the ambit of CRE 408. ~~For this reason, notes taken by the experts or other records of the discussion during these meetings shall~~ In addition, the content of the meetings, including notes taken by the experts or other records of the discussion during these meetings, are not be discoverable, and none of the content of the meetings of the experts or the written statement prepared shall be admissible at trial and can only be used for purposes of the preparation of the written statements and reports required or permitted by Water Court Rule 11(b)(5)(D). The meetings of the experts shall not include the attorneys for the parties or the parties themselves, unless they are the designated expert\_s(s).

(E) [NO CHANGE]

(F) [NO CHANGE]

(6) [NO CHANGE]

(7) [NO CHANGE]

(8) [NO CHANGE]

(9) **Pretrial Motions.** Unless otherwise ordered by the court, the time for filing pretrial motions shall be no later than 35 days before the trial date, except that motions pursuant to C.R.C.P. 56 shall be filed at least ~~94~~ 84 days before the trial date.

(10) [NO CHANGE]

(c) [NO CHANGE]

## COMMITTEE COMMENT

The amendment to the water court rules effective January 1, 2012 adopt the “rule of 7” numbering for procedural time periods specified in these water court rules. Statutorily-prescribed time periods incorporated into the rules have not been changed, except to express those time periods in numbers instead of words.

The amendments to water court rule 3 effective January 1, 2012 address applications that contain multiple claims, rights and structures, including applications filed by multiple applicants. Deletion of the words “and that each has the same ownership” from the former water court rule 3(b), now numbered water court rule 3(b)(1), is not intended to alter or change any provision of law pertaining to ownership of a claim, right or structure that may otherwise be applicable to the adjudication of an application.

### Rule 6(d), (e), (f), (h), (l) & (n)

Effective July 1, 2014, Rules 6(d), (e), (f), (h), (l) & (n) are amended to clarify the role of the division engineer during the water referee’s investigation of each application and to ensure that the participation by the division engineer is clear, meaningful, transparent, and timely.

Prior to these amendments, Rule 6(e) allowed the division engineer, upon the receipt of new information, to submit to the referee and the parties additional written reports after the division engineer’s initial written report on the referee’s consultation with the division engineer. The amendments move this provision to Rule 6(n) and modify it to clarify that the division engineer may file such written reports in response to new information in any proposed ruling or expert report filed by the applicant within the time specified by the referee.

To provide a more clear record of consultations between the referee and the division engineer, the amendments describe and permit the division engineer’s filing of the initial written summary of consultation report as well as supplemental written summary of consultation reports in response to the referee’s subsequent requests for information as part of the referee’s ongoing informal investigation. The amendments further clarify which documents must be filed with the court so that they are provided to and received by the parties and the division engineer and, in Rules 6(e) and 6(n), affirm the referee’s ability to require the applicant to file a written response to any of the division engineer’s written reports to aid in the referee’s investigation. To the extent practicable, the case management plan should be written or revised to include time schedules for the division engineer filing of all written reports and responses thereto.

The amendments to Rule 6(e) and 6(n) are intended to further implement the primary purpose of the referee’s role in water court proceedings: 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 the statute specifies. To this end, the General Assembly has authorized the referee to consult with the division engineer without the state or division engineer having to file a statement of opposition to the application. Rule 6 is also amended to adopt the "rule of 7" numbering for procedural time periods specified in this water court rule.

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

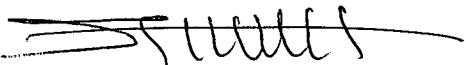
Amended Rule 11, which became effective July 1, 2009, provides for meetings of the experts without attorneys for the parties or the parties themselves. Effective July 1, 2011, Rule 11(b)(5)(D)(III) was amended, nunc pro tunc on and after July 1, 2009, to make explicit the non-discoverability and non-admissibility 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)(9)

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 and Adopted by the Court, En Banc, June 26, 2014, effective July 1, 2014.

By the Court:



Gregory J. Hobbs, Jr.  
Justice, Colorado Supreme Court