

**DEPARTMENT OF NATURAL RESOURCES**

**DIVISION OF WATER RESOURCES**

**2 CCR 402-5**

**PROCEDURAL RULES**

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## **Rule 1 Authority**

These rules are promulgated and adopted pursuant to the authority conferred upon the State Engineer in sections 24-4-101 et seq., C.R.S., (the Administrative Procedures Act or the "APA") and are intended to implement and be consistent with its requirements and the requirements of the Water Right Determination and Administration Act, (the Determination Act) sections 37-92-101 et seq., C.R.S., and the Ground Water Management Act, sections 37-90-101 et seq., C.R.S. (the Management Act).

## **Rule 2 Scope and Purpose**

- A. These rules shall govern all rulemaking procedures, Adjudicatory Proceedings and petitions for declaratory orders before the State Engineer except when the State Engineer is acting as an ex officio, non-voting member of the Colorado Ground Water Commission, is acting solely as executive director of the Commission, or is acting as a member of the State Board of Examiners of Water Well and Pump Installation Contractors.
- B. These rules are intended to assure that all hearings held before the State Engineer are conducted in a fair and impartial manner, to assure that all Parties to the proceedings are accorded due process of law, and to provide the State Engineer with all relevant facts and information pertinent to decision making. These rules shall be liberally construed to carry out these purposes.
- C. These rules do not apply to interpretive rulings, guidelines or other general statements of policy, which are not meant to be binding as rules.

## **Rule 3 Applicability**

- A. These rules apply to rulemaking, Adjudicatory Proceedings, declaratory orders, reconsideration of rulemaking decisions, and reconsideration of Adjudicatory Proceedings before the State Engineer.
- B. Except when necessary to comply with applicable statutes, the State Engineer may waive the requirements of these rules whenever it is determined that strict adherence to the rules will not promote fairness and impartiality. In any such instance, appropriate justification shall be provided to all Interested Persons and Parties.
- C. In the event of a conflict between these rules and the APA, the Determination Act, or the Management Act, the statutes shall prevail. The provisions of the APA generally apply to all hearings held by the State Engineer. Specifically, the provisions of § 24-4-103, C.R.S., shall apply to all rulemaking hearings, the provisions of § 24-4-104, C.R.S., shall apply to all decisions regarding the grant, renewal, denial, revocation, suspension, annulment, limitation or modification of Licenses (permits), and the provisions of § 24-4-105, C.R.S., shall apply to all Adjudicatory Proceedings and petitions for declaratory orders unless such provisions are inconsistent with the specific provisions of the Determination Act and/or the Management Act, in which case the those statutory provisions shall control.

## **Rule 4        Definitions**

- A. "The Determination Act" – The Water Right Determination and Administration Act of 1969, § 37-92-101 et seq., C.R.S., as may be amended.
- B. "The Management Act" - The Ground Water Management Act of 1965, § 37-90-101 et seq., C.R.S., as may be amended.
- C. "Adjudication" - the procedure used by the Division of Water Resources for the formulation, amendment, or repeal of an order; including orders regarding licensing and permitting under § 24-4-104, C.R.S. § 24-4-102(2), C.R.S.
- D. "Adjudicatory Proceeding": - Adjudicatory Proceedings include notice, prehearing procedures and hearings which are required or allowed by law in order to determine past and future rights and obligations of persons or agencies, including persons or agencies aggrieved by an administrative action of the State Engineer other than rulemaking. Adjudicatory Proceedings are governed by the procedures in Rules 8 and 9 of these rules.
- E. "The APA" – The State Administrative Procedures Act, § 24-4-101 et seq., C.R.S., as may be amended.
- F. "Agency" – any board, bureau, commission, department, institution, division, section, or officer of the state, except those in the legislative branch or the judicial branch.
- G. "Ex parte Communication" – An oral or written communication regarding a proceeding where the communication is between the State Engineer or Hearing Officer and a Party to the proceeding that: takes place after the adoption of a petition to notice a rulemaking or after an appeal for an adjudicatory hearing has been Filed; is not on the public record; is not authorized by other specific provision of law or order of the State Engineer; and, with respect to which reasonable prior notice to all Parties is not given. Communications solely inquiring as to the process of the proceeding that are not seeking any procedural or substantive relief, nor pertaining to any substantive issues, are not included in Ex parte Communication.
- H. File or Filed: Received in the office of the State Engineer and date-stamped by staff as received on that day or, when filed by electronic mail for rulemakings or Adjudications as provided herein:
  - a. Electronic Mail - Service by electronic mail shall be complete when the Office of the State Engineer receives an electronic mail containing an attached, signed version of the document to be filed. When any Person, Interested Person or Party files by electronic mail, it shall be considered an agreement to be served by electronic mail. The filer is responsible for furnishing one or more electronic notification addresses at which the electronic filer agrees to accept service and shall immediately provide the State Engineer's office and all Parties with any change to the electronic

filer's notification address. Special filing arrangements may be made on a case-by-case basis as needed.

- b. All filings for rulemakings and Adjudications under these Procedural Rules shall be made by electronic mail.
  - c. Exception to Electronic Filing – Any person may request approval by the State Engineer to file documents in paper copy format if they are unable for any reason to comply with the electronic filing requirements. Pro se Parties may file documents via US mail if electronic filing is not available.
- I. "Good Cause" – a rational explanation justifying why a requirement in these procedural rules was not met or need not be complied with in the particular circumstance.
  - J. "Initial Decision" – a decision made by the State Engineer's designated Hearing Officer which will become the final action of the Division of Water Resources unless appealed to the State Engineer. § 24-4-102(6), C.R.S.
  - K. "Interested Person" - any Person who may be aggrieved by the Division of Water Resources action. § 24-4-102(6.2), C.R.S.
  - L. "License" – the whole or any part of any Division of Water Resources permit, certificate, registration, charter, membership, or statutory exemption. § 24-4-102(7), C.R.S.
  - M. "Party" – any person or agency named or admitted as a Party, or properly seeking and entitled as of right to be admitted as a Party in a proceeding before the State Engineer, subject to the provisions of these rules.
  - N. "Person" – an individual, limited liability company, partnership, corporation, association, county, or a public or private organization other than an agency.
  - O. "Rulemaking Proceedings" – Rulemaking Proceedings are the notice and hearing activities required by law for the State Engineer to adopt rules, as authorized by the Act or other specific authority, that are of general applicability and future effect implementing, interpreting, or declaring law or policy, which are intended to be binding. They include adoption of whole generic rules, or deletion of, or revisions or modifications to, existing rules of the State Engineer. Rulemaking Proceedings are governed by the procedures in Rules 6 and 7 of these rules.
  - P. "State Engineer" – the person appointed by the governor pursuant to section 13 of article XII of the state constitution having the general duties set forth in section 37-80-101, *et seq.*, C.R.S., as well as duties under the Determination Act, the Management Act, and other provisions of Title 35 and 37 of the Colorado Revised Statutes. The State Engineer has the duty and authority to "administer, distribute,

and regulate the waters of the state in accordance with the constitution of the state of Colorado, the provisions of this article and other applicable laws” pursuant to section 37-92-501, C.R.S. As used in these rules, “State Engineer” includes the Hearing Officer or any other person the State Engineer delegates to act on his behalf. The address of the State Engineer is:

Colorado Division of Water Resources  
1313 Sherman St., Room 821  
Denver, CO 80203

Q. “Stipulation” – an agreement or concession as to facts or the law made by the Parties in a proceeding before the State Engineer.

### **Rule 5 Alternative Means of Dispute Resolution**

For the purposes of this rule, the term –

- A. “Alternative means of dispute resolution” means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, mini trials, arbitration, and use of ombudsman, or any combination thereof;
- B. “Dispute resolution proceeding” means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified Parties participate;
- C. “In confidence” means, with respect to information, that the information is provided—
  - 1. with the expressed intent of the source that it not be disclosed; or
  - 2. under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;
- D. “Issue in controversy” means an issue which is material to a decision concerning an administrative program of the Division of Water Resources and with which there is disagreement:
  - 1. between an Agency and Persons who would be substantially affected by the decision; or
  - 2. between persons who would be substantially affected by the decision;
- E. “Neutral” means an individual who, with respect to an issue in controversy, functions specifically to aid the Parties in resolving the controversy;
- F. “Roster” means a list of persons qualified to provide services as neutrals.

## G. General authority

1. The State Engineer or Hearing Officer may approve the use of a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the Parties agree to such proceeding.
2. The State Engineer or Hearing Officer shall consider not using a dispute resolution proceeding if:--
  - a. a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent;
  - b. the matter involves or may bear upon significant questions of state government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the Division of Water Resources;
  - c. maintaining established policies is of special importance, so that variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions;
  - d. the matter significantly affects persons or organizations who are not Parties to the proceeding;
  - e. a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; or
  - f. the Division of Water Resources must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the Division of Water Resources' fulfilling that requirement.
3. Alternative means of dispute resolution authorized under this subchapter are voluntary procedures which supplement rather than limit other available dispute resolution techniques.

## H. Neutrals

1. A Neutral may be a permanent or temporary officer or employee of the State of Colorado or any other individual who is acceptable to the Parties to a dispute resolution proceeding. The neutral shall have no official,

financial, or personal conflict of interest with respect to the issues in controversy, unless such interest is fully disclosed in writing to all Parties and all Parties agree that the neutral may serve.

2. A neutral who serves as a conciliator, facilitator, or mediator serves at the will of the Parties.
- I. Confidentiality - Except as provided herein, a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless--
1. all Parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a non-Party participant, that participant also consents in writing;
  2. the dispute resolution communication has already been made public;
  3. the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or
  4. a court determines that such testimony or disclosure is necessary to--
    - a. prevent a manifest injustice;
    - b. help establish a violation of law; or
    - c. prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of Parties in future cases that their communications will remain confidential.
  5. A Party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, unless--
    - a. the communication was prepared by the Party seeking disclosure;
    - b. all Parties to the dispute resolution proceeding consent in writing;
    - c. the dispute resolution communication has already been made public;
    - d. the dispute resolution communication is required by statute to be made public;

- e. a court determines that such testimony or disclosure is necessary to--
    - i. prevent a manifest injustice;
    - ii. help establish a violation of law; or
    - iii. prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of Parties in future cases that their communications will remain confidential;
  - f. the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or
  - g. except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all Parties to the dispute resolution proceeding.
6. Any dispute resolution communication that is disclosed in violation of these rules shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.
7. The Parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the Parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications that will govern the confidentiality of the dispute resolution proceeding.
8. If a demand for disclosure by way of discovery request or other legal process is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the Parties and any affected non-Party participants of the demand. Any Party or affected non-Party participant who receives such notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.
9. Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.
10. A decision by the Division of Water Resources to use or not to use a dispute resolution proceeding under this subchapter shall be committed to



the discretion of the Division of Water Resources and shall not be subject to judicial review.

## **Rule 6 Rulemaking Procedures under Compact and Water Rule Powers**

### **A. Applicability**

Under § 37-92-501(1), C.R.S., the State Engineer may adopt rules to assist in the performance of his or her duties to administer, distribute, and regulate the waters of the state ("water rule power"). Under § 37-80-104, C.R.S., the State Engineer shall make and enforce such rules with respect to deliveries of water as will enable the state of Colorado to meet its interstate compact commitments ("compact rule power"). The water rule power and the compact rule power are governed by the procedures of the Determination Act and not by the APA. See *Simpson v. Cotton Creek Circles, LLC (In re Rules Governing New Withdrawals of Ground Water)*, 181 P.3d 252, 264 (Colo. 2008); *In re Rules & Regulations Governing Water Rights*, 196 Colo. 197, 202 (Colo. 1978). Whenever the State Engineer adopts any rule under the water rule power or the compact rule power, the provisions of this rule shall apply. All other rulemaking shall be subject to the rulemaking procedures under Rule 7 below. To the extent any provision of this rule conflicts with any current or future provision of the Determination Act, Management Act or an interstate compact, the procedures of the Determination Act, the Management Act or interstate compact shall apply.

### **B. Proposals for Rulemaking**

1. Any rulemaking proceedings shall be conducted by the State Engineer or person(s) as he may designate. Whenever the State Engineer contemplates rulemaking, public announcement may be made at such time and in such manner as he determines, and opportunity may be afforded Persons to submit views or otherwise participate informally in conferences with the State Engineer or his staff on the proposals under consideration. It is within the discretion of the State Engineer to determine if and when such informal proceedings should occur and who may participate.
2. The State Engineer may establish a representative group of participants with an interest in the subject of the rulemaking to submit views or otherwise participate informally in any conferences on the proposals under consideration or to participate in the public hearing(s) under this rule. In establishing any representative group, the State Engineer shall make reasonable attempts to solicit input from representatives of each of the various stakeholder interests that may be affected positively or negatively by the proposed rules.
3. Prior to the notice required by this rule, the State Engineer shall publicize and hold at least one public meeting in each water division subject to any proposed rules and may publicize and conduct such hearing at such time and in such manner as he determines. The State Engineer shall make the proposed rules

available prior to the hearing at such time and in such manner as he determines to be appropriate. At the hearing, Persons will have the opportunity to submit written data, views, or arguments and to present the same orally unless the State Engineer deems it unnecessary.

#### C. Notice

Notice shall be made as required by § 37-92-501(2)(g), C.R.S. and any other applicable provisions of the Determination Act or Management Act, as may be amended from time to time.

#### D. Protests

Any person desiring to protest a proposed rule may do so in the manner as provided in § 37-92-304, C.R.S. for the protest of a ruling of a referee, and the water judge shall hear and dispose of the same as promptly as possible. See § 37-92-501(3)(a), C.R.S. Any such protest must be filed by the end of the month following the month in which such proposed rules are published. See *id.*

#### E. Appellate Review of Water Judge Decisions

Under section 37-92-304(9), C.R.S., appellate review shall be allowed to any judgment and decree of the water judge. Under § 13-4-102, C.R.S., water cases involving Adjudications are appealed to the Colorado Supreme Court.

### **Rule 7      Other Rulemaking Procedures**

A. Applicability. Whenever the State Engineer adopts any rule, except those to be promulgated under § 37-92-501 or § 37-80-104, C.R.S., as addressed in Rule 6 above, the provisions of this rule shall apply.

#### B. Proposals for Rulemaking

1. All rulemaking proceedings shall be conducted by the State Engineer or designated Hearing Officer. Whenever the State Engineer contemplates rulemaking, public announcement may be made at such time and in such manner as he determines. The State Engineer shall establish a representative group of participants with an interest in the subject of the rule-making to submit views or otherwise participate informally in conferences on the proposals under consideration or to participate in public rule-making proceedings on the proposed rules. It is within the discretion of the State Engineer to determine the extent to which such informal proceedings should occur. § 24-4-103(2), C.R.S.
2. Any Person shall have the right to petition the State Engineer in writing for the issuance, amendment, or repeal of a rule. Such petition shall be open to public inspection. Action on such petition shall be within the discretion of the State

Engineer, but when he undertakes rulemaking on any matter, all related petitions for the issuance, amendment or repeal of rules on such matter shall be considered and acted upon in the same proceeding. § 24-4-103(7), C.R.S.

3. Petitions for rulemaking shall be filed by electronic mail or pursuant to the paper format filing exception pursuant to Rule 4(G).
4. Petitions for rulemaking shall include the following information:
  - a. Identification of the person or persons requesting rulemaking and the nature of the requests;
  - b. The language of the proposed rule;
  - c. A statement of the State Engineer's authority to promulgate the rule;
  - d. A concise general statement of the rule's basis and purpose. If the rule involves technological or scientific issues, this statement must include a detailed, analytical statement of the scientific or technological rationale justifying the proposed rule;
  - e. A fiscal analysis of the proposed rule, which shall include an identification of the types of persons who will bear the costs and/or assume the benefits of the proposed rule.

#### C. Notice

1. Official notice of proposed rulemaking proceedings shall be filed with the secretary of state in sufficient time for publication in the Colorado Register. §§ 24-4-103(3)(a) and (11).
2. At the time of filing a notice of proposed rule-making with the secretary of state as the secretary may require, the Division of Water Resources shall submit a draft of the proposed rule or the proposed amendment to an existing rule and a statement, in plain language, concerning the subject matter or purpose of the proposed rule or amendment to the office of the executive director in the Department of Regulatory Agencies. The provisions of 24-4-103(2.5) shall apply.
3. Notice of proposed rulemaking shall be published in the Colorado Register and shall state the time, place, and nature of public rulemaking proceedings, the authority under which the rule is proposed, and either the terms or the substance of the proposed rule or a description of the subjects and issues involved. § 24-4-103(3)(a), C.R.S. Publication of the notice in the Colorado Register shall be by electronic publication pursuant to § 24-4-103(11)(g).

4. With due regard for the number and complexity of the proposed rules, the State Engineer shall establish the date for the public rulemaking proceedings. The date set for the proceedings shall not be less than twenty (20) days after publication of notice as provided in this section and as required by § 24-4-103(3)(a), C.R.S.
5. Public notice may contain requirements with respect to special procedures, including Party status, prehearing conferences and requirements for written testimony, which the State Engineer deems appropriate to any particular rulemaking hearing.
6. An amended notice may be issued by the State Engineer at any time prior to the hearing without necessitating a continuance of the hearing date, provided the original notice is not substantially altered to the prejudice of any Party or Person. If an amendment is substantial and prejudicial, the hearing date shall be continued to an appropriate date as determined by the State Engineer, and notice thereof shall be made in the same manner as the original notice.
7. The State Engineer may continue a hearing to another date by issuing written notice to that effect at any time prior to the close of the record, or by announcement at the date, time and place of the original hearing.

#### D. Party Status

1. Status as a Party will be available to Interested Persons in rulemaking proceedings before the State Engineer unless the State Engineer specifies otherwise in his notice of proposed rulemaking pursuant to Rule 7(C). Where an opportunity to obtain Party Status is provided, it may be obtained in the manner prescribed in this section. Parties to rulemaking hearings shall have the rights specified in this section. Party Status is not required for Persons to appear at the public hearing to submit written data, views, or arguments and to present the same orally unless the State Engineer deems it unnecessary.
2. If Party Status is to be allowed, then any person or Agency who is interested may become a Party to rulemaking proceedings by filing an application for Party Status. Applications for Party Status shall be filed as stated in the notice of proposed rulemaking. Thereafter, applications to be made a Party shall only be granted if other Parties will not be prejudiced thereby.
3. Applications for Party Status shall set forth the name, U.S. mail address, telephone number and e-mail address of the Person, Persons or Agency seeking Party Status. The application shall also indicate the interest of the Person(s) or Agency in the proposed rules and a description of the general nature of the evidence to be presented by the proposed Party in the course of the proceedings.

4. For a hearing where Party Status is available, it shall be freely granted by the State Engineer. Upon Good Cause shown, Party Status may be granted prior to or at the prehearing conference or other appropriate time prior to the hearing.
5. The staff of the Office of the State Engineer shall automatically be a Party to rulemaking proceedings before the State Engineer when Party Status is allowed to other Persons.
6. For the purpose of service of any documents upon a Party other than the staff of the Office of the State Engineer, delivery by U.S. mail or by e-mail to the addresses provided in a Party's application for Party Status shall constitute service as of the date mailed or e-mailed. A Party shall promptly serve upon the State Engineer and all other Parties notice of any change in the Party's U.S. mail address or e-mail address for the purpose of service.

#### E. Prehearing Procedures for Rulemaking

1. These prehearing procedures provide a process by which the issues related to a proposed rule are raised and discussed, and presented to the State Engineer for decision in an efficient manner if they cannot be resolved prior to the prehearing conference. It is the strong desire of the State Engineer that the Parties try to resolve as many issues as possible by negotiation prior to the prehearing conference. Any Person may appear at the prehearing conference but only Parties may participate.
2. The State Engineer may specify in the notice of proposed rulemaking that a prehearing conference will be held. Any such conference shall be held not less than five (5) days in advance of the hearing unless the State Engineer, for Good Cause, specifies otherwise.
3. At any prehearing conference each Party or shall present to the State Engineer or Hearing Officer and to every other person or Party in attendance a prehearing statement that shall contain the following:
  - a. A specific statement of the factual and legal claims it asserts;
  - b. Copies of all exhibits it will introduce at the hearing;
  - c. A list of witnesses it will call and a brief summary of their testimony;
  - d. Specific language proposed for the rule, where appropriate, and a proposed statement of the basis and purpose for the rule; and
  - e. All written testimony it will offer into evidence at the hearing.

4. The purpose of the prehearing conference may include the formulation of Stipulations or orders respecting the issues to be raised, as well as witnesses and exhibits to be presented by the Parties. The Parties shall make known at the prehearing rulemaking conference of any objections to the procedures or evidence that may be raised at the hearing. Stipulations may be made at the prehearing conference to reflect any matters which have been agreed to or admitted by the Parties or Interested Persons. A prehearing order shall be prepared by the State Engineer/Hearing Officer or, at his direction, by any Party, based upon the prehearing conference, which shall reflect any rulings made with respect to procedures to be followed at the hearing, or any other matters.

#### 5. Motions

The State Engineer or Hearing Officer may require as part of the prehearing conference or otherwise advance submittal of all motions or requests for rulings that such Person(s) or Party intends to make with respect to the proposed rulemaking. These shall include motions regarding procedures, the scope and nature of the proceedings, or any other matter that requires a determination by the State Engineer prior to final Division of Water Resources action based on the record, or any matter that may reasonably be disposed of prior to receiving testimony or other evidence.

#### 6. Discovery

The State Engineer may, on his own accord or upon the motion of any Party for Good Cause shown, take depositions or have depositions taken, and fix the time and place for them to be held. Other forms of discovery provided for by the Colorado Rules of Civil Procedure may be allowed by the State Engineer. Discovery may be requested by any Interested Person or Party as well as by the staff of the State Engineer. Discovery shall be granted where due process, fairness, and the establishment of an adequate record may be served thereby, and when the timely completion of the proceedings will not be unduly delayed. Discovery shall be completed no later than five (5) days prior to the hearing date, except as otherwise ordered by the State Engineer.

#### 7. Subpoenas

Subpoenas shall be issued without discrimination between public and private Persons or Parties by the State Engineer or Hearing Officer. A subpoena shall be served by the Person or Party requesting its issuance in the same manner as a subpoena issued by a district court. Upon failure of any witness to comply with such subpoena, the State Engineer or Hearing Officer may petition any district court setting forth service of the subpoena and stating that due notice was given to the witness of the time and place of attendance. The district court, after hearing

evidence in support of or contrary to the petition, may enter an order as in other civil actions compelling the witness to attend and testify or produce books, records, or other evidence under penalty of punishment for contempt in case of contumacious failure to comply with the order of the court. A witness shall be entitled to the fees and mileage provided for a witness in §§ 13-33-102 and 13-33-103, C.R.S. to be paid by the Person or Party requesting the issuance of the subpoena. § 24-4-103(14), C.R.S.

#### F. Conduct of Rulemaking Hearings

1. The State Engineer shall hold a public hearing before promulgating any rule. At such hearing, the State Engineer, any Parties and Persons shall be afforded the opportunity to submit written data, views, or arguments, and to present the same orally unless the State Engineer deems it unnecessary.
2. All witnesses called to testify by a Party shall be subject to cross-examination by other Parties.
3. The State Engineer shall, in addition to authority specified elsewhere, have authority to: administer oaths and affirmations; sign and issue subpoenas; regulate the course of the hearing, set the time and place for continued hearings; fix the time for filing appropriate documents; take depositions or have depositions taken; issue appropriate orders; and, take any other action authorized by statute or Division of Water Resources rule.
4. The State Engineer will make efforts to provide for and solicit the greatest possible public participation in rulemaking hearings.
5. The State Engineer may allow Parties to submit evidence not previously submitted under prehearing conference procedures for Good Cause, such as where necessary for rebuttal testimony.
6. The State Engineer may allow Parties to submit motions not previously submitted under prehearing conference procedures for Good Cause shown.
7. The State Engineer, after the receipt of the evidence, may allow or require Persons or Parties to present oral or written summations of the facts and the law, either at the hearing or subsequent thereto.
8. At any time the State Engineer may question any Interested Person, Party or witness participating in the hearing.
9. All hearings shall be conducted in the following order unless otherwise directed by the State Engineer or Hearing Officer.
  - a. Call to order and introductory remarks;

- b. Presentation of any Stipulations or agreements between the Parties;
- c. Opening statements by the Party upon whom the burden of proof rests;
- d. Opening statements by all other Parties;
- e. Presentation of case-in-chief by the Party upon whom burden of proof rests:
- f. Presentations by all other Parties wishing to offer evidence, with the order of presentation to be determined by the State Engineer or presiding Hearing Officer;
- g. Rebuttal by the Party upon whom the burden of proof rests;
- h. Closing statement by Party upon whom the burden of proof rests;
- i. Closing statements by all other Parties.
- j. At the conclusion of any witness's testimony, or at the conclusion of the Party's entire presentation, all other Parties may then cross-examine each witness. The order of the cross examination shall be determined by the Person conducting the hearing. The State Engineer or Hearing Officer may examine any witness at any time.
- k. All briefs and memoranda of law that parties file shall be served on the State Engineer or Hearing Officer and all Parties no later than five (5) days prior to the hearing unless otherwise specified.

#### G. Final Agency Action and Post-Hearing Procedures for Rulemaking

1. Within one hundred eighty days after the last public hearing on a proposed rule, the State Engineer shall adopt a rule pursuant to these rulemaking procedures or terminate the proceeding by publication of a notice to that effect in the Colorado Register.
2. After the conclusion of the last public hearing, the State Engineer shall prepare an initial ruling as to any rules proposed for adoption.
3. Any Party to the rulemaking may file written exceptions to the initial ruling within 21 days of the State Engineer's service of the initial ruling on the Party. The State Engineer shall rule on any such exceptions prior to adopting any rule or terminating the proceeding.



4. The State Engineer shall consider all submissions entered into the record in adopting any rule. The rules promulgated shall be based on the record. The record shall consist of proposed rules, evidence, exhibits, other matters presented or considered, matters officially noticed, ruling on exceptions, any findings of fact and conclusions of law proposed by any party, and any written briefs filed.

5. Material Incorporated by Reference

- a. As allowed under § 24-4-103(12.5), C.R.S., the State Engineer may incorporate by reference in his rules, without publishing the incorporated material in rules as finally published, all or any part of a code, standard, guidelines or rule that has been adopted by an agency of the United States, the state of Colorado, or another state or adopted or published by a nationally recognized organization or association.
- b. The State Engineer shall maintain a copy of the code, standard, guideline, or rule readily available for public inspection at the Division of Water Resources during regular business hours, as well as a posting of the same on their website. The State Engineer shall provide certified copies of the material incorporated at cost upon request or shall provide the requestor with information on how to obtain a certified copy of the material incorporated by reference through the source agency, association or organization. § 24-4-103(12.5)(b), C.R.S. Electronic versions may be substituted upon request.
- c. References to any incorporated material shall identify the incorporated material by appropriate agency, organization, or association by the date, title and/or citations. The reference shall also state that the rule does not include later amendments to or editions of the incorporated material.
- d. The State Engineer shall include in any rule incorporating material by reference the fact that the state engineer will provide information regarding how the incorporated material may be obtained or examined.

6. Statement of Basis and Purpose

After consideration of the relevant information presented, the State Engineer shall include as part of the rules or incorporate by reference in the rules adopted, a written and concise general statement of their basis and purpose. The written statement of the basis and purpose of a rule that involves scientific or technological issues shall include a detailed, analytical evaluation of the scientific or technological rationale justifying the rule.

7. All rules adopted by the State Engineer shall first be submitted to the attorney general for his opinion as to their constitutionality and legality. Any rule issued without being so submitted shall be void. § 24-4-103(8)(b), C.R.S.
8. All rules adopted by the State Engineer, including temporary or emergency rules, shall be submitted to the Office of Legislative Legal Services in the form and manner prescribed by the Committee on Legal Services. Any rule issued that is not submitted to the Office of Legislative Legal Services for review within twenty (20) days after the date of the attorney general's opinion rendered thereon shall be void. The State Engineer shall revise promulgated rules to conform to any action taken by the general assembly. § 24-4-103(8)(d), C.R.S.
- 9.. Each rule adopted by the State Engineer, together with the attorney general's opinion rendered in connection therewith, shall be filed within twenty (20) days after adoption with the secretary of state for publication in the Colorado Register. Rules revised to conform with action taken by the general assembly shall be filed with the secretary of state for publication in the register and in the code of Colorado Regulations. § 24-4-103(11)(d)(II), C.R.S.
10. Any rule as finally adopted by the State Engineer shall become effective twenty (20) days after final publication as required by law or on such later date as is stated in the rule. Once a rule becomes effective the rulemaking process shall be deemed to have become final agency action for purposes of judicial review. § 24-4-103(5), C.R.S.
11. Any Person adversely affected or aggrieved by the final agency action may commence an action for judicial review under section 24-4-106(4), C.R.S. within thirty-five (35) days after the final agency action becomes effective.
12. The State Engineer shall maintain an official rule-making record for each proposed rule for which a notice of proposed rule-making has been published in the Colorado Register. Such rule-making record shall be maintained by the State Engineer until all administrative and judicial review procedures have been completed. The rule-making record shall be available for public inspection and shall contain those items identified in § 24-4-103(8.1)(b), C.R.S.

#### H. Temporary or Emergency Rules.

Temporary or emergency rules may be adopted without compliance with the procedures prescribed in this section and with less than twenty (20) days notice (or where circumstances imperatively require, without notice) where the State Engineer finds the immediate adoption of the rule is imperatively necessary to comply with a state or federal law or federal regulation for the preservation of public health, safety, or welfare, and compliance with the requirements of these rules would be contrary to the public interest and the State Engineer makes such a finding on the record. Such findings and statement of the reasons for the action shall be published with the rule. A temporary or emergency rule shall become effective on adoption or on such later date as is stated in the rule, shall be published promptly, and shall have effect for not

more than one hundred twenty (120) days after its adoption unless made permanent by compliance with this section and with the APA. § 24-4-103(6)(a), C.R.S.

#### **Rule 8 Reconsideration of a Rulemaking Action**

Reconsideration of rulemaking action of the State Engineer may be sought by petition to the State Engineer in accordance with the provisions of Rule 7(B)(2) pertaining to petitions for rulemaking. Any such petition shall be evaluated according to the established rules and policies of the State Engineer where applicable, and may be granted for Good Cause. Such a petition is not a prerequisite to the right of judicial review of the rule on which it is based and does not affect the time period for seeking judicial review of the rule. The decision to grant or deny such a petition is not itself final action subject to judicial review.

#### **Rule 9 Hearing Officers**

- A. Pursuant to § 37-80-102(2), and § 37-80-109(2), C.R.S., the State Engineer may designate a person or persons to convene and conduct hearings under these rules on his behalf and make Initial Decisions on the matter heard. When appropriate, the Hearing Officer may be an employee of the Division of Water Resources, except that no person engaged in conducting a hearing or participating in a decision or an Initial Decision shall be responsible to or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigatory or prosecuting functions for the Division of Water Resources. *See also* § 24-4-105(3) and (6), C.R.S.
- B. Upon a timely, good faith filing by a Party of a sufficient affidavit of personal bias of the Hearing Officer, the Hearing Officer shall forthwith rule upon the allegations in such affidavit as part of the record in the case. A person designated to conduct a hearing may at any time withdraw if he deems himself disqualified or for any other good reason in which case another person or Hearing Officer may be assigned by the State Engineer to continue the hearing, and he shall do so in such a manner that no substantial prejudice to any Party results. § 24-4-105(3), C.R.S.
- C. If the Parties are dissatisfied with the Person or Persons appointed by the State Engineer to conduct the hearing or act as the Hearing Officer, they may request the State Engineer to appoint another Person or Persons. Requests shall be accompanied by a detailed statement of the reasons justifying the request and shall include the identity of other Parties that support the request. The Parties may request that the matter be referred to the Division of Hearing Officers; however, the Parties must be willing to pay for the full cost of such referral.

#### **Rule 10 Adjudicatory Procedures**

##### **A. Scope and Applicability**

- 1. In order to assure that all Parties to any formal Adjudicatory Proceeding of the State Engineer are accorded due process of law, the provisions of this section

shall apply. § 24-4-105(1), C.R.S. Also, and in general, the Colorado Rules of Civil Procedure shall apply to all adjudicatory hearings. In complex litigation matters the State Engineer or Hearing Officer may apply Rule 11 of the Uniform Local Rules for All State Water Divisions requiring meeting of experts within the scope of disclosure, including applicable deadlines as determined by the Hearing Officer.

2. Whenever the State Engineer conducts a formal, public adjudicatory hearing, the provisions of this rule shall apply.
3. The State Engineer shall provide the opportunity for a formal public adjudicatory hearing in the following cases:
  - a. To consider the revocation, suspension, annulment, limitation, or modification of a previously issued License or permit under § 24-4-104, C.R.S.;
  - b. To review State Engineer action under § 37-87-124(3), C.R.S., ordering the removal of any facilities constructed, enlarged or remodeled in violation of § 37-87-124, C.R.S.;
  - c. To review State Engineer action concerning small capacity wells under § 37-90-105(6)(a), C.R.S.;
  - d. To determine under § 37-90-137(2)(b)(II), C.R.S., whether the circumstances of a particular case warrant the issuance of a permit to construct a well at a distance of six hundred (600) feet or less from an existing well, unless no hearing is required for the one of the reasons listed in §§ 37-90-137(2)(b)(II)(A)-(E); or
  - e. In any case for which an administrative hearing is required by existing or subsequent statutory law or by existing or subsequent rules lawfully promulgated by the State Engineer.
4. In his sole discretion, the State Engineer may provide the opportunity for a formal public adjudicatory hearing in the following cases:
  - a. To review State Engineer action under §§ 35-49-106, 35-49-107, and 35-49-108, C.R.S., in approving or disapproving plans and specifications for construction or the completed construction of a livestock watering tank;
  - b. For a Division Engineer to address issues regarding loans of agricultural rights to the Colorado Water Conservation Board under § 37-83-105(2)(b)(VI), C.R.S.;

- c. To review State Engineer action under § 37-87-105, C.R.S., approving or disapproving plans for specifications for construction of a reservoir, or alteration, modification, repair or enlargement of a reservoir or dam which will affect the safety of the structure;
- d. To review State Engineer action under § 37-87-122, C.R.S., upon an application for construction of an erosion control dam;
- e. To review State Engineer action under § 37-87-124(3), C.R.S., ordering the removal of any facilities constructed, enlarged or remodeled in violation of § 37-87-124, C.R.S.;
- f. To review State Engineer action under § 37-90-110, C.R.S. regarding the administration and enforcement, conservation of groundwater resources, and the protection of vested rights when acting in the State Engineer's own capacity and not as the executive director of the Ground Water Commission;
- g. To review the State Engineer's action under § 37-90-137(2)(b)(I), C.R.S., regarding well permit applications;
- h. To review the State Engineer's action under § 37-90-137(2)(b)(II), C.R.S. regarding wells not more than 600 feet from an existing well when no hearing was required for the one of the reasons listed in § 37-90-137(2)(b)(II)(A)-(E);
- i. To determine whether a well permit should remain in force and effect under § 37-90-137(3)(c), C.R.S.;
- j. To make determinations under § 37-90-137(4), C.R.S., regarding well permits to withdraw nontributary ground water or any groundwater in the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers;
- k. To review State Engineer action concerning determinations under § 37-90-137(4), C.R.S., regarding well permits to withdraw nontributary ground water or any groundwater in the Dawson, Denver, Arapahoe, and Laramie-Fox Hills aquifers;
- l. To make determinations under § 37-90-137(7), C.R.S concerning dewatering of geologic formations by withdrawing nontributary groundwater to facilitate or permit mining of minerals;
- m. To review State Engineer action under § 37-90-137(7), C.R.S concerning dewatering of geologic formations by withdrawing nontributary groundwater to facilitate or permit mining of minerals;

- n. To review State Engineer action under §§ 37-90.5-106 & 37-90.5-107, C.R.S., on an application for a permit to construct a geothermal resource exploration, production or reinjection well;
- o. To address issues regarding requests for approvals of substitute water supply plans under § 37-92-308, C.R.S.;
- p. To address issues regarding requests for approvals of interruptible water supply agreements under § 37-92-309, C.R.S.
- q. To review relevant State Engineer action as required under rules as lawfully promulgated under § 37-92-501, C.R.S.;
- r. To review the validity of any orders issued by the State Engineer or a Division Engineer, but in no instance shall a request for such a hearing or the setting or holding of such a hearing be the basis for delaying compliance with or enforcement of such orders; or
- s. As necessary or desirable to make any determination required under the State Engineer's statutory duties and responsibilities as they exist now or may exist in the future.

#### B. Requests for Adjudicatory Hearings

1. All requests for adjudicatory hearings must be timely filed pursuant to these rules and applicable statutory requirements.
2. All adjudicatory hearings before the State Engineer shall be held in the main office of the Colorado Division of Water Resources located in Denver, Colorado, unless the State Engineer, for Good Cause shown, allows for the hearing to be held at a different location. Should a hearing be held at a location other than Denver, Colorado, the Parties may be required to find a suitable location and pay any associated costs.
3. Hearing requests shall be filed with the State Engineer within applicable deadlines by electronic mail or pursuant to the paper format filing exception pursuant to Rule 4(G).
4. All requests for adjudicatory hearings shall contain the following information:
  - a. Identification of the Person(s) requesting the hearing and the subject matter of the request;
  - b. The legal, statutory, and regulatory authority that forms the basis and authority for the request;

- c. The basis upon which the applicant believes the State Engineer or his staff has committed error with respect to the subject matter of the request; and,
- d. An estimate of the time that will be required for the hearing.

### C. Notice

1. All formal adjudicatory hearings of the State Engineer shall be preceded by written notice thereof in accordance with the requirements of this section.
2. Any Person requesting Party status in a hearing, including the petitioner(s), shall be given timely notice of the time, place, nature of the hearing, the legal authority and jurisdiction under which it is to be held, and the matters of fact and law asserted.
3. Unless otherwise provided by law, such notice shall be served either personally or by mailing by first-class mail to the last address furnished to the State Engineer by the person to be notified at least thirty (30) days prior to the hearing. § 24-4-105(2)(a), C.R.S.
4. In fixing the time and place for a hearing, due regard shall be had for the convenience and necessity of the Parties and their representatives. § 24-4-105(2)(a), C.R.S.
5. Upon receipt of a request for hearing, the State Engineer shall acknowledge such receipt and provide the Parties with a notice of a setting conference within a reasonable time frame. The setting conference will allow for the determination of hearing dates and related prehearing filing requirements as necessary.
6. The notice may contain requirements with respect to any special procedures, including requirements for written testimony, which the State Engineer deems appropriate as to any particular Adjudicatory Proceeding.
7. An amended notice may be issued by the State Engineer at any time prior to the hearing without necessitating a continuance of the hearing date, provided the original notice is not substantially altered to the prejudice of any Party. If an amendment is substantial and prejudicial, the hearing date shall be continued to an appropriate date as determined by the State Engineer.
8. The State Engineer may continue a hearing to another date by issuing written notice to that effect at any time prior to the close of the record, or by announcement at the date, time, and place of the original hearing.
9. If any written application or other request made in connection with any adjudicatory hearing is not accepted for filing, or is denied in whole or in part,

prompt notice shall be given of the decision, with a statement of the grounds for such refusal or denial. § 24-4-105(10), C.R.S.

#### D. Party Status

1. Any Person who may be affected or aggrieved by a Division of Water Resource action shall be admitted as a Party to the proceeding upon filing a timely written request pursuant to § 24-4-105(2)(c), C.R.S. Upon motion by any other Person or Agency, the State Engineer or Hearing Officer may admit such Person or Agency as a full or limited Party.
2. Any Person who requests an adjudicatory hearing pursuant to Rule 10(B) shall be granted Party Status and need not apply.
3. A request or motion to be made a Party shall set forth a brief and plain statement of the reasons for seeking Party Status, the facts that entitle or may allow such Person to be admitted, and the matters that such Person claims should be decided. In addition, the request or motion should contain a description of the general nature of the evidence to be presented in the course of the proceedings.
4. Granting or denying a motion for Party Status shall be done by the State Engineer or Hearing Officer. Party Status may be granted at the prehearing conference or other appropriate time prior to the hearing.
5. Staff for the State Engineer shall be automatically a Party and need not apply for Party Status.
6. Nothing in this subsection shall prevent the State Engineer or Hearing Officer from admitting any Person as a Party to any proceedings for limited purposes. § 24-4-105(2)(c), C.R.S.

#### E. Prehearing Procedures

1. In general, the Colorado Rules of Civil Procedure shall apply to all adjudicatory hearings before the State Engineer. Prehearing procedures may be modified as required or approved by the State Engineer or Hearing Officer.
2. Disclosure and discovery
  - a. Any deadlines for the Parties' initial disclosures and expert disclosures shall be established by an order of the State Engineer or Hearing Officer.
  - b. Parties shall first attempt to utilize discovery through informal methods. When informal attempts fail, further discovery shall be conducted



pursuant to the Colorado Rules of Civil Procedure. Discovery shall be completed as ordered by the State Engineer or Hearing Officer.

- c. The State Engineer or Hearing Officer may, on his own accord or upon the motion of any Party for Good Cause shown, take depositions or have depositions taken, and fix the time and place for them to be held.
- d. Discovery may be requested by any Party as well as by the staff of the State Engineer. Discovery shall be granted where due process, fairness, and the establishment of an adequate record may be served thereby, and when the timely completion of the proceedings will not be unduly delayed. Discovery timelines shall be set by the State Engineer or Hearing Officer.

### 3. Subpoenas

- a. The State Engineer or Hearing Officer shall issue subpoenas in accordance with § 24-4-105(5), C.R.S., on forms provided to the State Engineer or Hearing Officer by the Party requesting the subpoena.
- b. Subpoenas shall be issued without discrimination between public and private Parties by the State Engineer or Hearing Officer. A subpoena shall be served in the same manner as a subpoena issued by a district court. Upon failure of any witness to comply with such subpoena, the State Engineer may petition any district court, setting forth that due notice has been given of the time and place of attendance of the witness and the service of the subpoena; in which event, the district court, after hearing evidence in support of or contrary to the petition, may enter an order as in other civil actions compelling the witness to attend and testify or produce books, records, or other evidence, under penalty of punishment for contempt in case of contumacious failure to comply with the order of the court and may award attorney fees under the Colorado rules of civil procedure. A witness shall be entitled to the fees and mileage provided for a witness in a court of record. § 24-4-105(5), C.R.S.

### 4. Motions

The State Engineer or Hearing Officer may require in advance submittal of all motions or requests for rulings that any Party intends to request at any hearing. These shall include but are not limited to all motions regarding procedures, the scope and nature of the proceedings, motions for summary judgment or determinations of questions of law, motions in limine, or any other matter that requires a determination prior to final action based on the record.

### 5. Prehearing Conference

- a. A prehearing conference may be held if deemed useful by the State Engineer or Hearing Officer. Parties may also request a prehearing conference at least twenty (20) days before a scheduled hearing in writing. The scope of issues to be raised at the prehearing conference shall be determined by the State Engineer or Hearing Officer. Prehearing conferences shall be held in the office of the Division of Water Resources in Denver, Colorado, unless the State Engineer or Hearing Officer determines the conference should be held at some other location. The State Engineer or Hearing Officer may hold the prehearing conference by telephone (or other conferencing means) at their discretion for cost-saving purposes or for the convenience of the Parties.
- b. The prehearing conference shall be for the purpose of facilitating the Adjudication of issues to be determined at the hearing. The purpose of the prehearing conference may include the formulation of Stipulations or orders respecting relevant issues to be raised as well as witnesses and exhibits expected to be presented by the Parties.
- c. The Parties shall make known at the prehearing conference any objections to the procedures or evidence that may be raised at the hearing. Stipulations are encouraged and may be made at the prehearing conference to reflect any matters that have been agreed to or admitted by the Parties. A prehearing order may be prepared by the State Engineer or Hearing Officer and shall reflect any rulings made with respect to procedures or any other matters to be followed at the hearing. The State Engineer or Hearing Officer may also direct a Party to prepare a draft of any order necessary.

## 6. Prehearing Statement

- a. Prior to any prehearing conference or hearing all Parties shall file a prehearing statement by the date ordered by the State Engineer or Hearing Officer. Failure to file a prehearing statement or other such documents by any Party as ordered may result in dismissal or that Party's claim if the State Engineer or Hearing Officer determines such failure results in undue prejudice to the other Parties in the case.
- b. At a minimum, the prehearing statement shall include the following:
  - i. Specific statements of all factual and legal claims asserted by the Party.
  - ii. A list of facts the party believes to be undisputed between the Parties.

- iii. A list of all exhibits the Party plans to introduce at the hearing.
- iv. A list of witnesses the Party plans to call and a brief summary of their testimony.

#### F. Conduct of Hearings

1. All adjudicatory hearings shall be held with reasonable dispatch after the filing of a request for such a hearing unless all Parties to the hearing agree otherwise or, unless otherwise ordered by the State Engineer or Hearing Officer due to extenuating circumstances.
2. In conducting adjudicatory hearings the State Engineer or Hearing Officer shall, in addition to the authority specified elsewhere, have authority to: administer oaths and affirmations; sign and issue subpoenas; regulate the course of the hearing; set the time and place for continued hearings; fix the time for the filing of appropriate documentation; take depositions or have depositions taken; issue appropriate orders that shall control the subsequent course of the proceedings; and take any other action authorized by statute or Division of Water Resources rule. § 24-4-105(4), C.R.S.

#### 3. Burden of Proof

- a. Except as otherwise provided by statute, in Adjudicatory Proceedings before the State Engineer, the proponent of the order shall have the burden of proof. § 24-4-105(7), C.R.S. "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) by the Division of Water Resources in any matter other than rule-making. § 24-4-102(10), C.R.S. The State Engineer or Hearing Officer shall determine the proponent or proponents of orders as appropriate on a case-by-case basis based on the relief requested by the Parties. In making this determination and in holding the proponents of orders to their burdens of proof, the State Engineer or Hearing Officer shall consider the following general principles:
  - i. When a Party is requesting that the State Engineer or Hearing Officer review to either reverse or modify an initial Division of Water Resource action, the Party seeking reversal or modification of the initial Division of Water Resource action is the proponent of the order as to the requested relief.
  - ii. When a Party is requesting any determination by the State Engineer or Hearing Officer not previously made by the Division of Water Resources, the Party seeking the determination is the proponent of the order as to the requested determination.

- iii. If a proponent of an order presents initial evidence sufficient on its face to satisfy the burden of proof based on the preponderance of the evidence, the burden of proof may be shifted to the opposing Party or Parties to present sufficient evidence to the contrary, but the ultimate burden of proof rests with the proponent of the order to prove its claims based on the preponderance of all of the evidence.
    - iv. The State Engineer or Hearing Officer should give effect to any rebuttable presumptions established by statute or other law.
4. All hearings shall be conducted in the following order unless otherwise directed by the State Engineer or Hearing Officer or as provided for under Rule 5:
  - a. Call to order and introductory remarks;
  - b. Presentation of any Stipulations or agreements between the Parties;
  - c. Opening statements by the Party upon whom the burden of proof rests;
  - d. Opening statements by all other Parties;
  - e. Presentation of case-in-chief by the Party upon whom burden of proof rests;
  - f. Presentations by all other Parties wishing to offer evidence, with the order of presentation to be determined by the State Engineer or presiding Hearing Officer;
  - g. Rebuttal by the Party upon whom the burden of proof rests;
  - h. Closing statement by Party upon whom the burden of proof rests;
  - i. Closing statements by all other Parties.
  - j. At the conclusion of any witness's testimony, or at the conclusion of the Party's entire presentation, all other Parties may then cross-examine each witness. The order of the cross examination shall be determined by the person conducting the hearing. The State Engineer or Hearing Officer may examine any witness at any time.
  - k. All briefs and memoranda of law that Parties file shall be served on the State Engineer or Hearing Officer and all Parties no later than five (5) days prior to the hearing unless otherwise specified.

5. No Ex parte Communications with or by the State Engineer or Hearing Officer may occur during the pendency of an Adjudicatory Proceeding. The State Engineer or Hearing Officer may, through formal communication with all Parties, request that certain information be provided to him or that certain tasks be performed.
6. Evidence
  - a. The rules of evidence and requirements of proof before the State Engineer shall conform, to the extent practicable, with those in civil non-jury cases in the district courts. However, when necessary to do so in order to ascertain facts affecting the substantial rights of the Parties to the proceedings, the State Engineer or Hearing Officer may receive and consider evidence not admissible under such rules if such evidence possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs. Objections to evidentiary offers may be made and shall be noted in the record. The State Engineer or Hearing Officer shall give effect to the rules of privilege recognized by law. Incompetent and unduly repetitious evidence may be excluded. Documentary evidence may be received in the form of a copy or excerpt if the original is not readily available, but upon request, the Party shall be given an opportunity to compare the copy with the original. § 24-4-105(7), C.R.S.
  - b. Parties may make objections and all witnesses shall be subject to cross-examination. The State Engineer or Hearing Officer may question any witness that testifies at the hearing and all witnesses shall also be subject to cross-examination by the State Engineer or Hearing Officer.
7. The State Engineer or Hearing Officer may allow Parties to submit evidence not previously submitted or disclosed under prehearing procedures for Good Cause shown.
8. The State Engineer or Hearing Officer may permit Parties to submit motions not previously submitted under prehearing procedures for Good Cause shown.
9. The State Engineer or Hearing Officer, after the receipt of the evidence, may allow or require Parties to present oral or written summations of the facts and the law, either at the hearing or subsequent thereto.
10. Every Party shall have the right to present their case or defense by oral and documentary evidence. They shall also have the right to submit rebuttal evidence and conduct cross-examination as may be required for a full and true disclosure of the facts. Subject to these rights, where a hearing will be expedited and the interests of the Parties will not be substantially prejudiced, the State

Engineer or Hearing Officer may receive all or part of the evidence in written form. § 24-4-105(7), C.R.S.

11. The State Engineer or Hearing Officer may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented. § 24-4-105(7), C.R.S.
12. The State Engineer or Hearing Officer may take notice of general, technical, or scientific facts within their knowledge if the relevant fact noticed is specified in the record or brought to the attention of the Parties before a final decision (or Initial Decision of the hearing officer) and all Parties are afforded an opportunity to controvert the fact so noticed. § 24-4-105(8), C.R.S.
13. Any Party, or the agent, servant, or employee of any Party, permitted or compelled to testify or submit data or evidence, shall be entitled to the benefit of legal counsel of his own choosing and at his own expense, but a Person may appear for himself. An attorney who is a witness may not act as counsel for the Party calling him as a witness. § 24-4-105(9)(a), C.R.S.
14. The State Engineer or Hearing Officer shall cause the proceedings to be recorded by a reporter or by an electronic recording device. When requested, the State Engineer or Hearing Officer shall cause the proceedings, or any portion thereof, to be transcribed, the cost thereof to be paid by the Party requesting the transcription. If the State Engineer or Hearing Officer acquires a copy of the transcription, said copy shall be made available to any Party at a reasonable time for inspection and study. § 24-4-105(13), C.R.S.

#### G. Final Agency Action

1. The State Engineer or Hearing Officer shall proceed with reasonable dispatch to conclude any matter presented to him with due regard for the convenience of the Parties or their representatives, giving precedence to rehearing proceedings after remand by court order. § 24-4-105(10), C.R.S.
2. The decision by the State Engineer or Initial Decision by a Hearing Officer shall be based on the record. The record shall include: All pleadings, applications, evidence, exhibits and other papers presented or considered, matters officially noticed, rulings upon exceptions, any findings of fact and conclusions of law proposed by any Party, and any written briefs Filed. § 24-4-105(14)(a), C.R.S.
3. In any case in which the State Engineer has conducted the hearing, he shall prepare, File and service upon each Party his decision. In any case in which a Hearing Officer has conducted the hearing, the Hearing Officer shall prepare an Initial Decision which he/she shall serve on each Party, except where all Parties, with consent of the State Engineer, have expressly waived their right to have an Initial Decision rendered by the Hearing Officer. Each decision and Initial

Decision shall include a statement of findings and conclusions upon all the material issues of fact, law, or discretion presented by the record and the appropriate order, sanction, relief, or denial thereof. § 24-4-105(14)(a), C.R.S.

4. An appeal of an Initial Decision by a Hearing Officer to the State Engineer may be made pursuant to § 24-4-105(14)(a)(II), C.R.S., by filing an exception within thirty (30) days after service of the Initial Decision upon the Parties, unless extended by the State Engineer or unless review has been initiated upon motion of the State Engineer, every such Initial Decision of the Hearing Officer shall thereupon become the decision of the State Engineer. In such case the evidence taken by the Hearing Officer need not be transcribed. § 24-4-105(14)(a)(II), (14)(a)(III), C.R.S.
5. Any Party who seeks to reverse or modify the Initial Decision of the Hearing Officer shall File with the State Engineer, within twenty (20) days following such decision, a designation of the relevant parts of the record and of the parts of the transcript of the proceedings which shall be prepared and advance the cost therefor. A copy of this designation shall be served on all Parties. Within ten (10) days thereafter, any other Party or the State Engineer may also File a designation of additional parts of the transcript of the proceedings which are to be included and advance the cost therefor. The transcript or the parts thereof which may be designated by the Parties or the Hearing Officer shall be prepared by the reporter or, in the case of an electronic recording device, the agency and shall thereafter be Filed with the Division of Water Resources. No transcription is required if the State Engineer's review is limited to a pure question of law. The State Engineer may permit oral argument. The grounds of the decision shall be within the scope of the issues presented on the record. The record shall include all matters constituting the record upon which the decision of the Hearing Officer was based, the rulings upon the proposed findings and conclusions, the Initial Decision of the Hearing Officer, and any other exceptions and briefs Filed. § 24-4-105(15)(a), C.R.S.
6. The findings of evidentiary fact, as distinguished from ultimate conclusions of fact, made by the Hearing Officer, shall not be set aside by the State Engineer on review of the Hearing Officer's Initial Decision unless such findings of evidentiary fact are contrary to the weight of the evidence. The State Engineer may remand the case to the Hearing Officer for such further proceedings as he may direct, or he may affirm, set aside, or modify the order or any sanction or relief entered therein, in conformity with the facts and the law. § 24-4-105(15)(b), C.R.S.
7. Each decision and Initial Decision shall be served on each Party by first class mail or in person, or via electronic means (upon agreement between the Parties) and shall be effective on the date served or such later date as stated in the decision. § 24-4-105(16)(a), C.R.S.

8. A Party seeking judicial review of final agency action may apply to the State Engineer to postpone the implementation date of the action. The State Engineer, upon a finding that irreparable injury would otherwise result, shall postpone the implementation date of the agency action pending judicial review. Postponement of the implementation date of an agency action does not stay the time for seeking judicial review and does not constitute agency agreement to grant a hearing, rehearing, or reconsideration as provided for in these rules. § 24-4-106(5), C.R.S.

## **Rule 11      Requests for Declaratory Orders**

A. Any person may petition the State Engineer for a declaratory order to terminate controversies or to remove uncertainties as to the applicability to the petitioner of any statutory provision or of any rule or order of the State Engineer.

B. The State Engineer will, after consideration of the materials submitted, determine in his discretion whether to rule upon the merits of any such petition.

C. In determining whether to rule upon a petition Filed pursuant to his rule, the following matters will be considered among others:

1. Whether a ruling on the petition will terminate a controversy or remove uncertainties as to the applicability to petitioner of any rule or order of the State Engineer or any statutory provision.
2. Whether the petition involves any subject, question or issue which is the subject of a formal or informal matter or investigation currently pending before the State Engineer.
3. Whether the petition involves any subject, question or issue which is the subject of a formal or informal matter or investigation currently pending before the State Engineer or a court but not involving any petitioner.
4. Whether the petition seeks a ruling on a moot or hypothetical question or will result in an advisory ruling or opinion.
5. Whether the petitioner has some other adequate legal remedy, other than an action for declaratory relief pursuant to C.R.C.P. 57 or § 13-51-101, et seq. C.R.S., which will terminate the controversy or remove any uncertainty as to the applicability to the petitioner of the statute, rule or order in question.

D. Any petition Filed pursuant to this rule shall set forth the following:

1. The name and address of the petitioners;
2. The statute, rule or order to which the petition relates; and,



3. A concise statement of all of the facts necessary to show the nature of the controversy or uncertainty and the manner in which the statute, rule or order in question applied or potentially applies to the petitioner.
- E. If the State Engineer determines that he will rule on the petition, the following procedures shall apply:
1. The State Engineer may dispose of the petition without conducting an evidentiary or other hearing. If the State Engineer does so, any ruling will apply only to the extent of the facts presented in the petition and any amendment to the petition. The State Engineer may request the petitioner to submit additional facts in writing and they will be considered as an amendment to the petition. If the State Engineer rules upon the petition without a hearing, he shall promptly notify the petitioner of his decision.
  2. The State Engineer may order the petitioner to File a written brief, memorandum or position statement.
  3. The State Engineer may set the petition, upon due notice to the petitioner, for a non-evidentiary hearing.
  4. The State Engineer may take administrative notice of facts pursuant to the APA and may utilize his experience, technical competence and specialized knowledge in the disposition of the petition.
  5. The State Engineer may, at his discretion, set the petition for hearing, upon due notice to petitioner, for the purpose of obtaining additional facts or information or to determine the truth of any facts set forth in the petition or to hear oral argument on the petition. The notice to the petitioner setting such hearing shall set forth, to the extent known, the factual or other matters into which the State Engineer intends to inquire. For the purpose of such hearing, to the extent necessary, the petitioner shall have the burden of proving all of the facts stated in the petition, all of the facts necessary to show the nature of the controversy or uncertainty as to the applicability to the petitioner of the statute, rule or order in question, and any other facts the petitioner desires the State Engineer to consider.
  6. The State Engineer may consolidate for determination petitions raising similar issues of fact or law.
  7. The Parties to any proceedings pursuant to this rule shall be the petitioner and, where appropriate, the staff of the State Engineer and any other Person the State Engineer determines is necessary or desirable for the proper or full disposition of the petition.

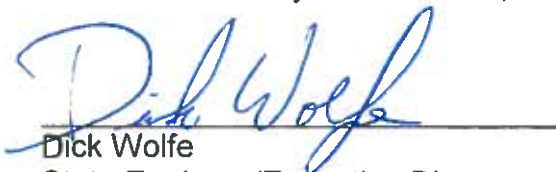
- F. Any declaratory order or other order disposing of a petition pursuant to this rule shall constitute agency action subject to judicial review pursuant to § 24-4-106, C.R.S. § 24-4-105(11), C.R.S.
- G. The State Engineer may appoint a Hearing Officer to make an Initial Decision on any request for a declaratory order. Such Initial Decision shall be subject to appeal directly to the State Engineer for final agency action.

**Rule 12      Reconsideration of Agency Action for Orders Issued Under Rules 10 or 11**

- A. During the time permitted for seeking judicial review of any final order of the State Engineer rendered in any Division of Water Resources proceeding under Rules 10 or 11, any Party directly affected by such order or determination may apply to the State Engineer, as appropriate, for a hearing or rehearing with respect to, or reconsideration of, such order or determination. The determination by the State Engineer whether to grant or deny the application for a rehearing or reconsideration shall be made within ten (10) days after receipt by the State Engineer of such application.
- B. If the application for a hearing, rehearing, or reconsideration is granted, the order or determination to which such application pertains shall not be considered final for purposes of judicial review, and the State Engineer may affirm, reverse, or modify, in whole or in part, the pertinent order or determination. Thereafter, such order of determination shall be final and not subject to reconsideration under this section.
- C. If the application for rehearing, or reconsideration is denied, the order of determination to which such application pertains shall be considered final agency action as of the date specified in Rule 10(G)(7). An application under this section extends the time period for seeking judicial review of the original order or determination only for the number of days that it is pending, since such an application merely stays the time period for seeking judicial review.

The rules are hereby adopted and shall become effective 20 days after publication in the Colorado Register.

Dated this 25<sup>th</sup> day of November, 2015.

  
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Dick Wolfe  
State Engineer/Executive Director  
Office of the State Engineer  
Division of Water Resources