The Non-Lawyers' Guide to Hearings before the Colorado Ground Water Commission

The information provided here contains general information about how to represent yourself in a hearing. This information is to help you prepare for your hearing, but it is not to be construed as legal advice or as a substitute for having an attorney. Not all cases are the same, and your case may be different. It is not proper to talk to the Hearing Officer about the facts of your case or to ask him/her for legal advice.

Who will hear the case?

Your case will be heard and decided by a Hearing Officer assigned by the Executive Director of the Colorado Ground Water Commission. The Hearing Officer is an independent decision-maker in the organization and cannot discuss your case with anyone else in the agency, including the State Engineer, staff for the Ground Water Commission, or members of the Colorado Ground Water Commission.

Acknowledgment and Notice to Set

When someone objects to your application for a well permit, or you object to the proposed issuance of a well permit, you will receive a formal pleading signed by the Hearing Officer that acknowledges receipt of objections and provides a date when all parties will be contacted by telephone to set the matter for either a pre-hearing or a hearing. Please follow the instructions on this notice carefully. If you fail to make yourself available for the conference, a hearing date will be set that may not fit your schedule as well as you would have liked, and you run the risk that the hearing date will not be changed. **IT IS EXTREMELY IMPORTANT THAT YOU PARTICIPATE IN *ALL MATTERS* RELATED TO THE HEARING OR YOUR OBJECTION MAY BE DISMISSED!**

Is there a way to settle this without a hearing?

Most cases settle without going to a hearing. You are encouraged to contact the other party or parties and see if you can agree to settling the case. The parties may discuss settlement and settle a case at any time.

Settlement discussions do not put your case on hold. All deadlines in the case remain the same unless the Hearing Officer changes them.

What should I know about procedural rules?

Procedurally, your hearing will be governed by the Colorado Rules of Civil Procedure, the Colorado Rules of Evidence, the Colorado Ground Water Commission Rules of Procedure for All Adjudicatory Hearings (2 CCR 402 – 3) and the Administrative Procedure Act (see section 24-4-105, C.R.S. (2001)). Your case may also involve the Rules and Regulations for the Management and Control of Designated Ground Water (2 CCR 410-1), Rules for Small-Capacity Well Permits in Designated Basins (2 CCR 402-4) and any applicable local Ground Water Management District Rules and Regulations relevant to the area. To obtain a copy of the relevant rules and regulations visit the Colorado Division of Water Resources web site at http://www.water.state.co.us/pubs/rule_reg.asp . The Rules of Procedure and Evidence, as well as the Administrative Procedure Act can usually be found at local libraries throughout the state under the Colorado Revised Statutes. Or you can visit the Colorado Statute Manager at http://64.78.178.12/stat01/index.htm

What do I have to prove and what kind of evidence will I need for the hearing? (exhibits and witnesses)

The Hearing Officer's decision will be based upon the evidence presented at the hearing. Generally, **the person applying for the well permit has the initial burden of proof** to show that there is unappropriated water available, and that the issuance of the well permit will not unreasonably impair existing water rights and/or cause unreasonable waste. (In a change of use case, the burden is to show that the change will not injure existing water rights). In making his/her decision, the Hearing Officer will take into consideration the area and geologic conditions, the average annual yield and recharge rate of the water supply, the priority and quantity of existing claims of all persons who use the water, the proposed method of use, and all other matters appropriate to such questions. Therefore, it is helpful if the evidence presented addresses these areas to afford the best information for the Hearing Officer to make a decision. Objectors will also want to submit evidence and present testimony addressing the same issues.

You can bring witnesses to the hearing who know about the facts and issues involved in the case. You may also hire an expert water resource engineer, groundwater geologist and/or well driller to analyze the situation. Often times they may testify at the hearing. If there are documents, such as letters, contracts, deeds, business records, permits, electrical records, photographs and/or maps that help you prove your case, you must bring those for the Hearing Officer to consider.

It is extremely important for you to send a copy of any exhibits you plan to introduce at the hearing to the other parties in the case by the date the Hearing Officer orders (usually 10 days before the hearing). Further, you must let the other parties know who you plan to call as a witness and what

they will testify about as ordered by the Hearing Officer (a final list is usually due 10 days before the hearing). Failure to do so may exclude your exhibits or witnesses at the hearing. Follow all pre-hearing orders issued by the Hearing Officer!

It is also extremely important to note that the staff for the Ground Water Commission and their attorney will not represent you or put a case on for you! This is your burden! You may have your case decided against you if you fail to submit evidence or testimony that meets the burden of proof.

What is a pre-hearing conference?

A pre-hearing conference is a proceeding held before the Hearing Officer in which the parties narrow the issues that will be contested at the actual hearing. At this conference facts that are not in dispute are stipulated to by the parties and final issues that are in dispute are focused into concise statements for the Hearing Officer to consider. The pre-hearing conference is not a settlement conference, however, once the conference is complete parties often meet to discuss settlement without the Hearing Officer being present. Most cases do not require a pre-hearing conference to be conducted. However, every case requires a pre-hearing statement to be filed.

What is required in the pre-hearing statement?

You are required to file a pre-hearing statement with the Hearing Officer and provide copies of it to the other parties in the case. **FAILURE TO DO SO MAY RESULT IN YOUR DISMISSAL FROM THE CASE!** This statement identified for the other parties and the Hearing Officer what you plan to argue at the hearing. The pre-hearing statement needs to include the following:

1. Legal claims to be asserted. A concise statement of all claims or defenses asserted by you as a party.

2. Undisputed Facts. A concise statement of all facts that you contend are or should be undisputed.

3. Disputed issues of fact. A concise statement of the material facts which the you claim or concede to be in dispute.

4. Points of law. A concise statement of all points of law that you will rely upon or which may be in controversy, citing pertinent statutes, regulations, cases and other authority. Extended legal argument is not required here.

5. Witnesses. The name, address and telephone number of any witness or party whom you may call at hearing, **together with a detailed statement of the content of such person's testimony**.

6. Experts. The name, address and brief summary of the qualifications of any expert witness a party may call at hearing, together with a statement as to each expert which sets forth in detail the opinions to which the expert is expected to testify. These requirements may be satisfied by the incorporation of an expert's resume or report containing the required information.

7. Exhibits. A description of any physical or documentary evidence to be offered into evidence at the hearing.

8. Hearing efficiencies. An estimate of the amount of time it will take to hear the case.

The information provided in a pre-hearing statement shall be binding on each party throughout the course of the hearing unless modified to prevent manifest injustice. New witnesses or exhibits may be added only if the need to do so was not reasonably foreseeable at the time of filing of the pre-hearing statement and then only if it would not prejudice other parties or necessitate a delay of the hearing.

If a pre-hearing conference is held in your case, you must be prepared to:

a. Discuss the prospects of settlement and be prepared to report on the status.
b. Prepare the pre-hearing statement in substantial compliance with the outline above and file it with the Hearing Officer and serve it on all other parties.
c. Be prepared to consider any matters that will simplify the issues and aid in the disposition of the controversy.
d. To the extent practicable, exchange copies of all exhibits intended to be offered into evidence at the hearing on the merits.
e. Confer concerning the matters of fact and law that can be stipulated.

What is discovery?

Discovery is a formal way of finding out information about the other side's case before the hearing. (See the Colorado Rules of Civil Procedure). Discovery includes depositions, interrogatories, requests for admissions and requests for production of documents. **In these types of hearings, while formal discovery can be used, informal discovery is encouraged!**

Depositions are sworn statements of a witness taken before the hearing before a court reporter, without the Hearing Officer being present. If you want to take the deposition of a witness, you may subpoena the witness, but you will be responsible for any witness fees, court reporter fees and other expenses of the deposition.

Interrogatories are written questions the other side must answer in writing under oath. A request for production of documents is a written request to make available documents that are identified in the request. A request for admissions is a number of statements a party sends to the other side in writing and the other side must admit or deny these statements.

How do I get a witness to come to the hearing?

Most witnesses come voluntarily. However, in the rare instance where a party refuses to come voluntarily, a subpoena can be issued to require their testimony. Contact the Hearing Clerk well before the hearing to arrange the subpoena to require the witness to appear. You must arrange to pay required fees, including mileage, and have someone else serve the subpoenas at least 48 hours before the hearing, not counting weekends and holidays. If you subpoena experts, you may have to pay for their time to testify at the hearing as well as their time to travel to the hearing.

What if I can't be there on the day of the hearing?

If you cannot attend the hearing on the date and time agreed to, you must contact the Hearing Officer's Clerk and the other parties as soon as you know of the problem. You can ask for a new hearing date, but good cause must be shown. The sooner you make the request, the more likely it will be granted. Good cause may include circumstances beyond your control, such as your illness, illness of another household member requiring your presence, a household emergency, or the unavailability of an important witness on the day of the hearing. The provisions of section 37-90-113(2) require that a hearing shall be held within 180 days of the last day for filing objections unless otherwise agreed by all parties or ordered by the Commission.

What will the hearing be like?

The hearing will be very similar to a trial in court, with witnesses, exhibits and rules of evidence. An attorney may represent the other side in your case. You may be represented by an attorney or you may appear on your own behalf.

It is up to you to decide whether you will hire an attorney. You may choose to represent yourself, but an attorney may be better able to present your case.

All testimony will be under oath and the hearing will be voice recorded so that if an appeal of the Hearing Officer's decision is made, a transcript of the proceeding can be prepared.

When the hearing begins, each party may present an opening statement, which is a brief outline of the evidence they expect to present. The opening statement is not evidence, and neither side is required to make one.

After the opening statements, each side is allowed to call witnesses who will take an oath to tell the truth. You may call witnesses and you may testify yourself. If you call witnesses, you may ask them questions about facts of your case (known as "direct examination"). After you are finished asking questions of your witness, the opposing party will ask questions of this witness (cross-examination). You may then ask more questions of your witness about matters brought up by the other side during their cross-examination (known as redirect).

All parties may offer previously identified papers, documents, or other materials as exhibits. All parties have the right to object to any of the exhibits that a party requests to be admitted into evidence. The Hearing Officer then decides whether or not to allow the exhibits into evidence.

After each side has presented its case, rebuttal witnesses may be called. Rebuttal witnesses may only testify to issues already brought up by the other side during the hearing. Few hearings actually involve rebuttal witnesses. The Hearing Officer may also ask questions of any witnesses at any time.

After all testimony has been heard and the documents received, the Hearing Officer may allow each side to make a closing argument. Closing arguments can only address facts brought out in testimony of the witnesses or in exhibits received into evidence. Closing argument is not a chance to testify and you my not mention things that were not received in evidence. Sometimes the Hearing Officer may allow the parties to make closing argument in writing after the hearing.

When will I get a decision?

After closing arguments have been presented, the hearing is concluded. Usually the Hearing Officer will not announce the decision at this time. Instead, he/she will take it under consideration and a written decision will be forthcoming within 30 days.

Can I appeal the Hearing Officer's decision?

Any party, including the staff, can file with the Commission an appeal of the Hearing Officer's initial decision within 30 days of service of the initial decision (Note: designation of the record is required within 20 days of service of the initial decision). There are specific requirements for how such an appeal must be filed and for designation of the record and other matters [see CRS 24-4-105(14)&(15)]. The Commission has a policy dated November 22, 1992, which

allows the time for appeal to be extended upon the request of an individual Commission member.

Appeals are directed to the Commission and are mailed or delivered to the office of the State Engineer as executive director of the Commission. Once an appeal is filed, the Hearing Officer is no longer directly involved in the case.

If an appeal is filed with the Commission, a hearing is scheduled before the entire Commission. Usually this will be at a regular meeting of the Commission (Quarterly). At this hearing the Commission may affirm or modify the Hearing Officer's Initial Decision, remand the matter back to the Hearing Officer, or set aside the Hearing Officer's decision and adopt its own decision.

Absent an appeal, the Hearing Officer's Initial Decision becomes the Final Commission Decision. Confirmation that no appeal was filed, in the form of a final order of the Commission, is mailed to all the parties as soon as possible after expiration of the appeal period.

The recorded hearing proceedings are not generally transcribed. If there is an appeal of Initial Decision, the Hearing Officer will cause the parts of the proceedings designated by the party seeking to reverse or modify the initial decision to be transcribed. The party seeking to reverse or modify the initial decision must pay for the cost of such transcription.

Any decision of the Commission, after a hearing on a case resulting from an appeal of a Hearing Officer's Initial Decision, may be appealed to the District Court for the county in which the water right is located. The District Court reviews the Commission's action pursuant to 37-90-115, C.R.S (2001).

Proceedings on appeals to the District Court are de novo (a new trial that is not based on the record), except that evidence taken in the agency administrative procedures may be considered as original evidence. The Commission, upon appeal, must provide a certified copy of the papers, maps, plats, field-notes, orders, decisions and other available data affecting the matter to the District Court. If a party disagrees with the decision of the District Court, the appeal is directly to the Colorado Supreme Court as a water matter.