

# Expert Witnesses in Water Court

Colorado's New Rules Governing Expert  
Witness in Water Court

## Standards for Admissability of Expert Testimony - Colo. Rules of Evidence

- Rule 702: **Testimony by Experts** - If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify . . . in the form of an opinion . . . .

- **Rule 703: Bases of Opinion Testimony by Experts** . . . . If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. . . .

# Court Acts as a Gate Keeper

*Daubert v. Merrell Dow Pharmaceuticals Inc.*,  
509 U.S. 579(1993):

The admission of scientific evidence under FRE 702 requires that the judge insure the evidence based on scientific knowledge, technical or other specialized knowledge be both relevant and reliable before it is admitted into evidence.

# Considerations for Admissability

- Whether the technique can and has been tested;
- Whether the theory or technique has been subjected to peer review and publication;
- The existence of specialized literature dealing with the technique;
- The scientific technique's known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation;
- The non-judicial uses to which the technique are put;
- Whether the technique has been generally accepted;
- The relationship of the proffered technique to more established modes of scientific analysis; and
- Whether such evidence has been offered in previous cases to support or dispute the merits of a particular scientific procedure.

# Water Court Rule 11 – Role of Experts

- Expert reports, disclosures, and opinions are rendered to the water court under **professional standards of conduct** and **duty to the court**.
- The expert shall not include anything in his or her expert report, disclosure, or opinion suggested by any other person, without forming an **independent judgment** about the correctness, accuracy, and validity of the suggested matter.

# Required Consultation Among Experts

- The expert witnesses for the parties shall meet, without the attorneys or the parties, to discuss the matters of fact and expert opinion that are the subject of the experts' disclosures and:
  - Attempt to resolve disputed matters;
  - Identify the matters of fact and expert opinion that remain in dispute.
  - Advise the parties of the undisputed matters of fact and expert opinion and of the disputed matters that they believe remain for trial.

# Declaration of the Experts

Every expert must sign a written declaration that affirms:

- The role of the expert, both in preparing this report or disclosure and in giving evidence, is to **assist the court** to understand the evidence or to determine facts in issue.
- The opinions expressed in my disclosures and in my report are my own professional opinions.



- Expert report and disclosures are accurate and complete;
- Addresses matters that are material to the opinions expressed, including the assumptions, the bases for the opinions, and the methods employed in reaching the opinions.
- The report and disclosures do not contain anything suggested by anyone, including the attorney for my client, on which the expert has not formed its own independent judgment.
- Disclose any qualifications (limitations) to Opinions.
- Has made the inquiries that expert believes are appropriate.

- No matters of significance that expert regards as relevant have been withheld from the court.
- Expert has disclosed any financial or pecuniary interest in the results of this lawsuit or in any property or rights that are the subject of the lawsuit for which the report and disclosures are being submitted.
- Immediately notify the attorney for the party for whom expert is giving evidence if, for any reason, I consider that my existing report or disclosures requires any correction or qualification.

# Examples of Water Court Decisions Involving Complex Scientific Evidence

- In the Matter of the Confined Aquifer New Use Rules, Case No. 2004CW24, Findings of Fact, Conclusions of Law, Judgment and Decree, Nov. 9, 2006. < [http://www.courts.state.co.us/Courts/Water/Division.cfm?Water\\_Division\\_ID=3](http://www.courts.state.co.us/Courts/Water/Division.cfm?Water_Division_ID=3)>
- Concerning the Office of the State Engineer's Approval of the Plan of Water Management for Special Improvement District No. 1 of the Rio Grande Water Conservation District, Findings of Fact, Conclusions of Law, Judgment and Decree, May 27, 2010 < <http://www.courts.state.co.us/userfiles/file/Subdistrict%20No%201%202010%20Decree.pdf>>.
- Final Order – FRICO Barr Lake Division Change Application, <<http://www.courts.state.co.us/Courts/Water/Rulings/Div1/02cw403.pdf>>