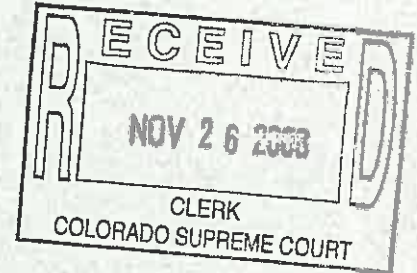




November 25, 2008

Ms. Susan J. Festag
Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO 80203



RE: Comments Concerning the Proposed Water Court Rules

Dear Ms. Festag:

On August 1, 2008, the Water Court Committee of the Colorado Supreme Court submitted its report to Chief Justice Mullarkey. In this report, a number of recommendations were provided which included proposed revisions to the Colorado Revised Statutes (C.R.S), revisions to the Colorado Rule of Civil Procedure (C.R.C.P.), and various other recommendations.

As a water resource consulting firm, Applegate Group, Inc. has provided various clients with Water Court assistance, including providing expert witness testimony. We believe that the Water Court process has worked generally well and are not certain changes are necessary. We have reviewed the report of the Water Court Committee and its recommendations, and would like to provide the following comments.

1. **Declaration of Expert.** The Committee recommended that the Supreme Court should consider adopting a declaration for all experts to sign in Water Court proceedings and a declaration has been drafted (Appendix 1 to Chapter 36 Colorado Water Court Forms, Form 2, Declaration of Expert). We do not agree that such a declaration is needed to substantiate the opinions of practicing engineers and experts. The qualifications of any expert can be reviewed and challenged by the Court or legal representatives during process of the case. Although we do not agree that such a declaration is necessary, we provide the following comments.

In paragraph 3 of said declaration it states the following:

"I have also disclosed whether, and to what extent, the content of my written report was drafted or changed by any other person."

In our opinion, the above language is ambiguous as to what level of changes needs to be disclosed by the expert. For example, staff engineers may assist project engineers in development of certain aspects of a report, these individuals are typically identified in the Rule 26(a)(1) disclosure process. Additionally, reports are typically reviewed by the client and other individuals to ensure the information is clearly reported. Finally, reports are reviewed by administrative staff for quality control including formatting, punctuation, and clarity. The suggested language seems to indicate that all of the potential changes from the various sources needs to be disclosed which seems to be very burdensome and could result in significant costs.

2. **Rule 11, Pre-Trial Procedure, Case Management, Disclosure, and Simplification of Issues.**
The proposed changes for Rule 11 include the following provisions:

Additional Expert Disclosures. Paragraph (C)(I) and (C)(II) describe the additional disclosures that are recommended in addition to the disclosures required by C.R.C.P. 26(a)(2)(B)(I). These include "A list of all expert reports authored by the expert in the preceding five years" and, "An executable electronic version of any computational model, including all input and output files, relied upon by the expert in forming his or her opinions."

We believe that providing the executable computational model will significantly assist in review of the engineering aspects of a case. It is difficult at times, to confirm the assumptions, calculations, and corresponding results without developing a similar model. Although we agree this requirement would be useful, our concern lies with the potential use of a unique tool or model following receipt of the information through disclosure. We would suggest that as part of the disclosure, the experts sign an agreement to not utilize the information or intellectual property for their own purposes unrelated to the case, and further, following resolution of the case, the information is deleted.

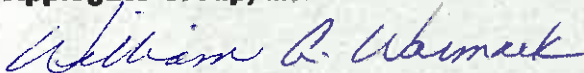
Meeting of Experts To Refine And To Attempt To Resolve Disputed Issues. Paragraph (D)(I) states that the expert witness(es) for the applicant and the oppose(s) shall meet within 45 days after the applicant's initial expert disclosures are made. Paragraph (D)(II) states that the expert witness(es) for the applicant and the oppose(s) shall meet within 25 days after the opposers' expert disclosures are made. Finally, paragraph (D)(III) states that the meetings of the experts shall not include the attorneys for the parties or the parties themselves.

In our experience, meetings of the experts have been very worthwhile particularly early during the case. During this time, various issues can be discussed and solutions may be explored which can facilitate settlement of the case. However most, if not all, of these meetings are held with the client or parties present so that decisions can be made concerning specific requests or disputes. Absent having the parties in attendance, the experts will likely be unable to commit to any requests without first confirming with their client. This process would seem to delay possible resolution of the issues and may in fact, result in repetitive meetings. In the alternative, we would suggest that representatives of the parties be able to attend the meetings with experts absent legal counsel.

On behalf of Applegate Group, I respectfully request that you consider our comments and concerns.

Regards,

Applegate Group, Inc.



William A. Warmack, P. E.

Vice-President