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November 25, 2008

Susan J. Festag
Clerk of the Court
2 East 14th Ave.
Denver, Colorado 80203

Re: Proposed Amendments to Water Court Rules and CRCP Rule 90

Dear Ms. Festag:

On behalf of the attorneys at Balcomb & Green, P.C., we appreciate the opportunity to comment on the proposed amendments to the Water Court Rules and Rule 90 of the Colorado Rules of Civil Procedure. These comments reflect the opinions of the attorneys in our firm and not those of our clients.

The intent of the Water Rights Determination and Administration Act of 1969 was to improve access by individuals to the water court. The proposed Rules largely close the door to such individuals by adding complex requirements, most of which emphasize form over substance. The proposed changes will not make the water court and referee process more accessible to individuals. Rather, the rules will have the opposite effect by increasing costs and delays.

Rule 90 Disposition of Applications:

The proposed changes to C.R.C.P. 90 requiring the water court clerk to make determinations as to the completeness of applications for publication elevates the form of

the pleading over its substance, and unnecessarily, and prejudicially, modifies the inquiry notice standard to a "substantial compliance" standard. In our opinion, the primary effect of these changes will be to slam closed the doors of the water court upon individuals, and particularly pro se applicants.

It is unclear why the rules need to be modified in this regard. The adequacy of an application, and of its notice, can be raised at any time to challenge subject matter jurisdiction. This opportunity already provides the necessary incentives for applicants to fulfill the substantive requirements of the statutes and rules defining the elements of inquiry notice of the nature, scope and impact of the claimed appropriations. This process also provides ample protection to parties who are entitled to this notice. The proposed changes throw into question a process that has been used, and relied upon, in establishing subject matter jurisdiction for thousands of existing decreed water rights.

The proposed changes to Rule 90 will result in unnecessary delays. Applications containing minor deviations from the standard form may be withheld from publication and referred to water judge. The attendant delay in publication could have materially adverse effects on applicants who rely on the filing date as the date of appropriation. Arguably, there is no notice if the application is not accepted for filing in a timely manner.

Reading the proposed changes to Rule 90 and Rule 6 together indicates that both the Water Judge and the Water Referee will be engaged in reviewing applications and opining and advising upon their substantial compliance with proposed Rule. The dockets of the water court judges and referees are already burdensome, and backlogged. These proposed changes will increase delays to water court participants, and should not be adopted.

Rule 2 – Filing and Service Procedure. We generally support the proposed modifications to Rule 2, including the recommendations by the water court committee. We suggest, however, that proposed Rule 2 mandate only electronic filing of documents with the water court, and not also require electronic service of those documents. The additional costs of electronically serving documents may be unnecessarily burdensome on some parties.

Additionally, Rule 2 should contain an exception to the mandatory electronic filing requirements for documents that, due to file size limitations imposed by the electronic filing service, cannot be electronically filed and served. Water court participants should be allowed, without leave of court, to file paper copies of any documents that cannot be electronically served for this reason, and to otherwise serve those documents on the parties in the proceeding.

Rule 3 – Applications for Water Rights. For the reasons described above in the discussion of proposed Rule 90, the changes in proposed Rule 3(a) outlining what "shall" be required from the standard application forms should be deleted, together with the reference to C.R.C.P. 90 regarding the determination of completeness of an application.

Rule 6 – Referral to Referee, Case Management, Rulings and Decrees. The imposition of strict deadlines and formality to the referee process will further dissuade individuals from adjudicating their water rights as contemplated by the 1969 Act.

The referee process was intended to be an informal process that provides parties with time to conduct informal discovery and engage in settlement negotiations. It is, in essence, alternative dispute resolution. The flexibility and fluidity provided within the referee process is a proven success; the vast majority of cases are resolved at this level.

Imposition of rigid timelines and filing requirements, specifically the requirements of proposed Rule 6(i) through (k), will jeopardize the purpose and utility of this process. Front loading the case with mandatory engineering and disclosures from all parties may be more onerous than proceeding before the water judge under Rule 11. These requirements will very likely be overwhelming to individuals without counsel. Judging by the current backlog in the water referees' dockets, the strict timelines established for proceedings before the referees may not be manageable in any event.

The one-size fits all case management plan, and one-year timeline for entry of a ruling in all cases, fails to consider the unique facts and circumstances of each case. Prompt resolution is a laudable goal, but if that goal can only be achieved by requiring water court participants to waive their statutory rights, such as the right to rerefer, then the ends do not justify the means.

For adjudications that necessarily require the use of experts, the single-expert concept proposed in Rule 6(i) is probably unworkable and not advisable. There are benefits in having multiple experts provide professional opinions after review and analysis of the available data. The element of peer review inherent in the existing process would be absent in cases where a single expert is engaged for the proceedings before a Referee. 6

The proposed Rule 6(i) does not adequately explain how a single expert will be chosen by the parties or appointed by the Referee when the parties agree to use, but cannot agree on the identity of, a single expert. Is there a pool of qualified experts that would be willing to act in this capacity, knowing that this discrete service would . disqualify them from future representation of the parties, and from testifying if the matter were to proceed

to trial? The appointment of experts by the Referee unnecessarily exposes that office to claims of bias toward certain experts or certain consulting firms, and poses a correlative risk of homogenizing expert opinion product into a "form" preferred by the Water Referee in any given jurisdiction.

Further, proposed Rule 6(i) could result in improper disqualification of a testifying expert at trial. A party could find its expert appointed by the referee without opportunity for redress.

Proposed Rule 6(i) will result in additional costs to parties. It would inadvisable for a party to agree to appoint any shared expert with whom it has an existing relationship. If the application were later rereferred, or the ruling protested, that expert would not be allowed to testify for the party without the (unlikely) consent of all the other parties. As a result, all parties will be forced to engage additional experts at additional cost. On its face, this provision should arguably appeal to pro se parties hoping to control costs. However, the decision whether to engage in this process presents another burden for pro se parties. These parties inevitably turn to the Water Referee and other counsel for advice and guidance, placing additional burden and risk upon the Court and other parties. Further, if the matter proceeds to trial, the pro se party would have to share the costs of the single expert, and also pay their own testifying experts.

Rule 11 Pre-Trial Procedures.

Proposed Rule 11(D)

The proposal to prohibit parties from attending the mandatory meetings of the experts directly contradicts the goals of the 1969 Act. These proposed changes bar individuals and their counsel from settlement negotiations that have a material impact on their water rights.

Standard practice in most cases is for the experts to confer and attempt to informally resolve differences in their engineering/hydrological analyses, in consultation with the clients and counsel. Water court participants will be reluctant, and ill-advised, to grant their experts settlement authority without having input into the discussion and the ability to consult with counsel regarding compromise negotiations.

The impact of this proposal is to place experts into advocacy roles that are reserved, by practice and statute, for attorneys. This seems to run contrary to the apparent intention underlying the Declaration of Experts proposed at 11(E).

Proposed Rule 11(B)

The modification to the discovery schedule prohibiting depositions of expert witnesses until 30 days after the time for filing the opposers' Rule 26(a)(2) disclosures is prejudicial and inefficient. Opposers often depose the applicant's expert witnesses after the applicant files 26(a)(2) expert disclosures in order to better understand their opinions. Understanding how an expert arrived at the disclosed conclusions and opinions is critical for the opposers' experts to provide comprehensive disclosure in its own Rule 26(a)(2) disclosures. The proposed changes inject inefficiency in the process, and provide need and opportunity to seek leave for extensions of time for discovery and for filing supplemental reports. The mandatory meeting of experts is not adequate replacement for these early depositions, as experts are not expected to serve in this active discovery role, and as the discussions of these meetings are protected under CRE 408.

Finally, the requirement that experts provide a fully executable electronic version of any computation model, including all input and output files relied upon the expert fails to consider the intellectual property rights of the expert in the creation of such a model.

In summary, we believe that most of the proposed changes to these rules are unnecessary to the proper function of the water court, and injurious to appropriators represented by counsel and acting in their own behalf. Thank you for considering our comments, and please contact us if we may be of assistance.

Very truly yours,

BALCOMB & GREEN, P.C.

By _____
Scott Balcomb