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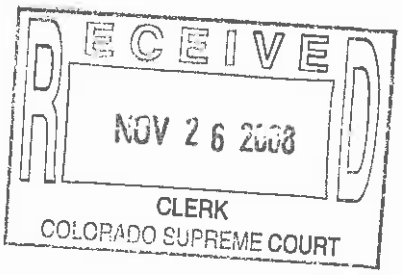
November 25, 2007



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

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

Dear Ms. Festag:

On behalf of the water law attorneys at Berg Hill Greenleaf & Ruscitti, LLP, the professional engineers of Deere & Ault Consultants, Inc., the water law attorneys at Brownstein Hyatt Farber & Schreck, LLP, and Joe Tom Wood, P.C. on behalf of Martin & Wood Water Consultants, Inc., we offer the following comments regarding the Supreme Court Water Committee's proposed changes to Local Water Court Rules 2, 3, 6, 11, and C.R.C.P. Rule 90.

First, we concur with and support the well-reasoned concerns raised by David Taussig and the attorneys at White & Jankowski in their letter of November 21, 2008. Their comments regarding Rules 3, 6, and C.R.C.P. Rule 90 echo our concerns that the proposed changes will have the opposite of the intended effect of streamlining the resolution of water applications and disputes.

Second, with respect to modified Rules 6 and 11, we note that there is nothing in the modified rules or the commentary on the modified rules suggesting whether they will be retroactively applied to cases in process at the time of the rule changes. Due to the complicated postures of many pending cases and the potential prejudice of changing the rules in the middle of the game, we strongly urge the Committee to make all rule changes prospective.

Third, we are concerned that the proposed changes articulated in Rule 11(b)(5)(C) requiring the listing of "all expert reports authored by the expert in the preceding five years" does not distinguish between reports that were disclosed pursuant to C.R.C.P Rule 26(a)(2) and those that were not. If the proposed rule is intended to include non-disclosed reports, it would seem to conflict with C.R.C.P. Rules 26(b)(4)(B) and 26(b)(5) which protect facts and opinions held by a consulting expert who does not testify. Moreover, if the listing of non-disclosed reports implies that those reports are then subject to discovery, such a framework creates a conflict with the Professional Engineers' Code of Conduct which requires all engineers to protect their clients' confidential information. We suggest that the proposed Rule be modified to include

language that restricts the listing of reports to those that were previously disclosed pursuant to C.R.C.P. Rule 26(a)(2).

As a side note, the implementation of Rule 11(b)(5)(C) will create logistical issues for the many experts involved in water cases who produced hundreds of reports over a 5-year period. We also wonder why the mandatory disclosures required by C.R.C.P. Rule 26(a)(2)(B)(I) and the general discovery procedures are insufficient to address the evidentiary needs implied by the modified rule.

In addition, while the computational models discussed in proposed Rule 11(b)(5)(C) are routinely exchanged in some proceedings now, those exchanges are often accompanied by intellectual property protections. The proposed rule requires the exchange of "executable electronic versions of any computational model, including all input and output files, relied upon by the expert in forming his or her opinions" with no recognition of the valuable intellectual property embedded in the computational models. Part of the value added to an expert's services is in the tools he or she has developed to aid in the analysis of a particular class of problems. If executable versions of those tools are required to be exchanged with competitors as part of the discovery process, the expert risks the loss of a competitive business advantage in complying with the rules.

Our experts do not oppose the exchange of proprietary computational models as long as they are protected by a binding agreement that such models will only be used by opposing parties in the case at hand and as long as there are appropriate remedies for the violation of such an agreement. We request that the proposed rule be modified to protect the intellectual property associated with the expert's computational models and have attached a proposed Intellectual Property Protection agreement that can be included as a standard form required by the rules to ensure that such protection does not require negotiation in every case.

Furthermore, the proposed rule does not address the issue of providing fully executable computational models when the model itself is a proprietary piece of software, such as MODFLOW 2000, AUTOCAD, or ARCGIS. Experts who provide fully executable computational models based on commercially available platforms risk violation of their software license agreements in complying with the rule as it is currently proposed. We request that the rule specify that in such circumstances, the expert is responsible for providing input data only and the recipient is responsible for acquiring the appropriately-licensed computational platform.

Finally, we suggest that the Committee reconsider the disclosure requirement implied by Paragraph (3) of the Declaration of Expert form in the Appendix to the Rules. That paragraph requires the expert to declare that he or she has disclosed whether and how the content of his or her expert report was drafted or changed by another person. This all-encompassing disclosure requirement does not clearly distinguish between the use of boilerplate language, typographical or editorial changes, and the critical, substantive portions of the report that are the intended target of the modified rule. We suggest that the language of the statement be revised to limit the required disclosure to substantive changes directly related to the expert's opinions and conclusions as expressed in the report. Or in the alternative, we suggest a statement along these

lines: "I certify that I have not included anything in my report which has been suggested by another person and on which I have not formed my own independent conclusion."

We are grateful for the opportunity to comment on the proposed rule changes and offer our comments in a spirit of genuine concern and cooperation.

Respectfully,

Jon N. Banashek
David G. Hill
Ann M. Rhodes

JNB/amr
Enc.
CC: Martin & Wood Water Consultants, Inc., Attn: Joe Tom Wood
Deere and Ault Consultants, Inc., Attn: Dan Ault
Brownstein Hyatt Farber & Schreck, LLP, Attn: Steve Sims

Intellectual Property Non-Disclosure Agreement

Form 3. Intellectual Property Non-Disclosure Agreement

I, _____, on behalf of _____ ("the Party") agree that the computer models, spreadsheets, input data, output, and other files related to the _____ computer model and spreadsheets are the proprietary intellectual property of _____ ("the Owner") and shall not be used by me, the Party, or the Party's consultants for any other purposes besides the evaluation of the engineering work conducted by the Owner and the Owner's client for this Case No. _____. I further agree that the proprietary items referenced herein shall not be copied or provided to any other party or individual.

I consent to the continuing jurisdiction of the Court in this Case No. _____ for the purpose of enforcing this agreement and acknowledge that violation of this agreement, if proven, may result in appropriate Court sanctions and/or damages.

Date: _____ Signed: _____

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