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November 26, 2008

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

VIA E-MAIL susan.festag@judicial.state.co.us
and
US Mail

Re: *Proposed Amendments to Water Court Rules and C.R.C.P. Rule 90*

Dear Ms. Festag:

On behalf of this firm, I am submitting the following comments on the above referenced amendments to the Water Court Rules and C.R.C.P. 90.

1. **C.R.C.P. 90 – Counties in which the resume will be published.** C.R.S. §37-92-302(3)(b) provides that the resume will be published “in a newspaper or newspapers as is necessary to obtain general circulation once in every county affected, as determined by the water judge.” In our experience, the practice of the water divisions is not consistent. Division 1 publishes in any county identified by the applicant in the caption as being affected. Division 2 generally publishes in every county in which depletions occur to tributary waters or nontributary waters. Division 5 appears to always publish in the county in which the depletion occurs and generally in downstream counties. Thus, an application with all structures and depletions in Summit County will nonetheless be published in Garfield County, Mesa County and Summit County.

The statute provides that the water judge is to make the determination of the “affected” counties. It may not be practical for the water judge to do so in each case. Thus, it may be helpful to at least require the water clerk, possibly with assistance from the referee, to make a determination as to which counties are affected by an application on a case by case basis. Thus, I would suggest that an additional sentence be added in the amended C.R.C.P. 90 as follows:

The water clerk shall include in the resume all applications filed during the preceding month that are complete for purposes of publication. The water clerk, with assistance from the referee, shall identify and cause the resume of the applications to be published in every county affected by the application pursuant to C.R.S. § 37-92-302(3)(b).

In order to completely resolve this issue, an amendment to C.R.S. §37-92-302(3)(b) may be appropriate more specifically identified what is meant by “every county affected”. The addition of the suggested sentence in C.R.C.P. 90 at least directs the water clerk to make a determination of the affected counties.

2. **Proposed Amendment to Rule 6(k) - Referee Interim Rulings.** The proposed penultimate sentence in this proposed rule states:

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"The referee may make such interim rulings, including scheduling additional status conferences and allowing amendments to the case management plan, as will facilitate prompt resolution of the application and issuance of a proposed ruling and decree.

It is unclear what "interim rulings" means. This could be interpreted to mean rulings that are not final and can be appealed to the water judge. I do not think that is the intent, rather the language starting with "including" indicates that the rulings are intended to be procedural in nature. Thus, I would suggest the word "interim" be struck and replaced by "procedural".

3. **Rule 11(b)(5)(C)(I) – Disclosure of Expert Reports.** The proposed rule requires disclosure of "A list of all expert reports authored by the expert in the preceding five years; and. . ." On its face this would include all reports whether or not disclosed in litigation. Many experts author reports in cases in which they are not identified as a testifying expert and those reports have never been disclosed. It would be inappropriate to force disclosure of those reports because the expert is listed as a testifying expert in a subsequent case. Thus, the proposed rule should be modified to read: "A list of all expert reports authored and disclosed in litigation by the expert in the preceding five years."
4. **Rule 11(b)(5)(D) – Meeting of the Experts.** I question whether this will actually cause adjudications to become more expensive by requiring more time and effort to be expended by the expert than may otherwise be required.
5. **Rule 11(b)(5)(E) – Declaration Form.** Paragraph 5 in the declaration by expert should be modified in the last line to strike the words "whether there are" and substitute the word "all". As written, the expert would have to state whether there are qualifications to the opinion, but not disclose what those qualifications are. The change above would require the expert to identify the substance of those qualifications.
6. **Rule 11(b)(5)(F) – Proposed Decree.** The second sentence requires opposers to provide comments on the proposed decree. Prior to discovery, it may not be possible for the opposers to comprehensively comment. Thus, a phrase should be included at the beginning of the sentence stating "To the extent possible given the existing disclosures, all opposers should provide comments. . ."

Sincerely yours,

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By


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