

November 26, 2008

VIA HAND DELIVERY

Colorado Supreme Court
Attn: Susan J. Festag, Clerk of Court
2 East 14th Avenue
Denver, Colorado 80203

Re: Proposed Changes to Water Court Rules and Forms

Dear Justices of the Colorado Supreme Court:

The Colorado Water Rights Practice Group of Holland & Hart LLP (“Holland & Hart”) and Joe Tom Wood, P.E., on behalf of Martin and Wood Water Consultants, Inc. (“Martin & Wood”), thank the Court for the opportunity to comment on the proposed changes to the Water Court rules and forms. We understand that the Court will conduct a public hearing on December 3, 2008, regarding proposed changes to C.R.C.P. 90; the Uniform Local Rules for all State Water Court Divisions (“Water Court Rules”), Rules 2, 6, and 11; and a new Colorado Water Court Form, the Declaration of Experts (“Declaration”).

Holland & Hart has more than a dozen lawyers practicing water rights law in seven western states. Holland & Hart represents diverse clients in water matters that include ranchers, farmers, homeowners, landowners, real estate developers, municipal water providers, special districts, recreational water users and industrial water users. Holland & Hart attorneys have served in a variety of service and advisory roles, including membership on the Governor’s South Platte River Task Force, the Water Quality Control Commission, the Colorado Ground Water Commission, various municipal boards and commissions, and as law clerks for water judges. Holland & Hart attorneys currently represent clients in numerous pending cases before the water courts, the Office of the State Engineer, and the Ground Water Commission. The comments and views expressed herein are solely those of Holland & Hart, and are not intended to reflect the positions, official or otherwise, of any of the above-referenced clients, boards or bodies.

Martin & Wood is a water resource engineering firm specializing in water rights engineering and surface and ground water resource evaluation and development. Martin & Wood professionals have decades of experience serving as consultants and



expert witnesses in cases before the water courts, the Office of the State Engineer, and the Ground Water Commission.

As an initial matter, we remain unconvinced that the proposed revisions to the existing rules are necessary and will result in material reductions in the cost and duration of the water court process, and respectfully urge the Court to carefully consider the comments that have been submitted by others questioning the need for, or application of, specific proposed rule changes. To avoid repetition of the comments of others, Holland & Hart and Martin and Wood limit their comments to the proposed Declaration that would be required for expert witnesses. Among other things, the Declaration requires experts to affirm that the opinions expressed in their expert reports are their own; that they have endeavored to be accurate and complete; that they have made the inquiries that they believe are appropriate; and that they have not withheld relevant evidence from the court.

Holland & Hart and Martin & Wood believe that the proposed Declaration is unnecessary. The professional engineers, geologists, and other experts with whom we work on a daily basis would not ever, in our experience, consider putting material in a report that was not accurate, complete and fully representative of their professional opinions. In the water court setting, an expert's credibility is foremost, and cannot be replaced or enhanced by the requirement of a signed form. We have not encountered problems with water resources experts expressing opinions that are not their own, or not performing the work required to provide an appropriately researched report. In addition, we have never experienced a situation in which an expert has inappropriately withheld necessary and relevant information from the court.

Should the Court decide to adopt the Declaration, however, the second sentence of paragraph 3 is particularly onerous and should be deleted. This sentence, which reads "I have also disclosed whether, and to what extent, the content of my written report was drafted or changed by any other person," is a solution in search of a problem that does not exist. If the Court believes that there is a problem with attorneys and other third parties substantively drafting expert reports, that problem is already addressed by other sections of the Declaration including paragraphs 1 and 4. To the extent that such a statement is deemed to be necessary, Holland & Hart and Martin & Wood would support changing this sentence to the similar, but preferable language proposed by Lord Woolf: "[the expert]has not included anything in the report which has been suggested to him by anyone . . . without forming his own independent view on the matter."

Changes to an expert's report occur for many reasons without impacting the legitimacy or independence of the expert's opinions, as the Declaration seems to suggest occurs. Water court cases involve complex issues of fact and law that are necessarily interrelated. This results in a healthy and constructive collaboration



between expert and attorney. Additionally, experts routinely have their own colleagues perform peer review of their reports, sometimes resulting in changes. Attorneys and others proofread expert reports, also resulting in changes.

Changes made in this context enhance, rather than compromise, the expert's work product. Requiring experts to disclose these types of changes is counterproductive in that it provides fodder for pointless and expensive discovery which neither resolves the truth of the matter nor assists the trier of fact. Experts would be forced to spend considerable time and effort keeping track of every change made in a report that may be drafted, revised, and finalized over many months. None of this effort is likely to result in useful, relevant or probative evidence. Experienced trial lawyers do not spend time probing into changes made from earlier drafts of expert reports, because such changes are easily explained by the expert testifying that he or she considered other factors and that consideration led to the changes. Particularly with trials to the court, as are all water court cases, the court can determine the credibility of the expert witness without resort to testimony about changes made to drafts over time.

Finally, we note that proposed amendments to the Federal Rules of Civil Procedure, now open for public comment, provide that drafts of expert reports are afforded work product protection, are not discoverable, and are not required to be disclosed. Specifically, a new federal Rule 26(b)(4)(B) would provide that "Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form of the draft." We strongly encourage the Court to consider a similar rule for the water courts as an addition to Water Court Rule 11.

The Advisory Committee comment on this proposed federal rule contains the following explanation of the proposal:

Consequences that surely were unforeseen in 1993 [when the rule on disclosures was first adopted] have demonstrated the pragmatic failure of any hope that expert opinions would be better tested by sweeping discovery of draft reports and attorney-expert communications. The result has been a regime that does not provide the anticipated information. It does not provide that information because attorneys and expert witnesses go to great lengths to forestall discovery. These strategies generally defeat discovery of any information that might be valuable, but lawyers persist in devoting costly deposition time to the vain quest for communications or drafts that may undercut an expert's opinions. Perhaps worse, these strategies impeded effective use of expert witnesses. Effective use is impeded as to the opinion testimony



because lawyers restrict free communications that might lead to more sophisticated and helpful opinions.¹

We agree, and believe that the same observations are accurate in Colorado water court proceedings. As with the issue of disclosing changes to the report discussed above, it is not constructive or cost effective to compel the expert to disclose drafts of his/her report and be subjected to cross-examination on the differences between the draft and the final version. By definition, a draft report is one that will be changed and refined in the final cut. It is the expert's final opinions, which he or she stands by, that are relevant to the issues before the court.

Thank you again for the opportunity to submit these comments. If there is any way in which we may be of further service to the Court in this matter, please do not hesitate to contact us.

Very truly yours,

Christopher L. Thorne
Christopher L. Thorne
of Holland & Hart LLP *by Anne Castle*

cc: Mr. Joe Tom Wood

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¹ Report of Civil Rules Advisory Committee, May 9, 2008, as supplemented June 30, 2008, http://www.uscourts.gov/rules/Reports/CV_Report.pdf.