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November 26, 2008

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

Re: Proposed Amendments to Uniform Local Rules for all State Water Courts and C.R.C.P. 90

Dear Ms. Festag:

On behalf of the ten attorneys at Porzak Browning & Bushong LLP, please accept these comments on the proposed amendments to the Uniform Local Rules for all State Water Courts and C.R.C.P. 90. By way of introduction, this firm represents clients in virtually every sector of water use, from large to small users, cities to individuals, agricultural and industrial users to recreational users, and ski area operators to oil and gas companies. We offer these comments based on our experience of having represented both objectors and applicants in hundreds of water court proceedings throughout every water division in the State.

We understand that the purpose of convening the Water Court Committee was to "achieve efficiencies in water court cases while still protecting quality outcomes." We appreciate this goal, and we believe that there are some inefficiencies in the existing water court process. However, we would suggest that any current weakness in the system is more related to budget and personnel matters, rather than any perceived defects in the procedural rules. In addition, we would note that applications involving small amounts (under 10 AF, for example) and unopposed cases often take too long and cost too much money to adjudicate. The major problem we see in these cases is excessive opposition by state agencies and/or the division engineer, often on policy or precedential grounds, even in cases as small as 0.25 acre feet. With that said, we believe that the adjudication of larger cases, involving elaborate engineering and ground water modeling, should take several years to adjudicate, because quality outcomes cannot be achieved quickly in complex matters.

A. Rule 90 C.R.C.P.

A water resume is intended to provide "inquiry notice" to interested parties. The Colorado Supreme Court thoroughly articulated this legal standard in *Thornton v. Bijou*, 926 P.2d 1, 24 (Colo. 1996):

> "[The] resume notice procedures are calculated to alert all water users on the stream system whose rights may be affected by the application and to provide these persons an opportunity to participate in the water right proceeding and to oppose the application." *Bar 70 Enters., Inc. v. Tosco Corp.*, 703 P.2d 1297, 1302-03 (Colo. 1985). We evaluate compliance with the notice provisions with reference to the underlying purpose of the notice: "to put interested parties to the extent reasonably possible on *inquiry notice* of the *nature, scope, and impact* of the proposed diversion." *Closed Basin*, 734 P.2d at 634 (emphasis added in *Bijou*). Any evaluation, therefore, must take into account the particular facts and circumstances of the case, and must assess the reasonableness of the notice in the context of the "practicalities and peculiarities" of the water project at issue. *Id.* at 633 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15, 70 S.Ct. 652, 657-58, 94 L.Ed. 865 (1950)).

Bijou, 926 P.2d at 24.

The Supreme Court restated the inquiry notice standard as follows:

> Inquiry notice requires sufficient facts to attract the attention of interested persons and prompt a reasonable person to inquire further. The receipt of inquiry notice charges a party with notice of all the facts that a reasonably diligent inquiry would have disclosed. *Colburn v. Gilcrest*, 60 Colo. 92, 94, 151 P. 909, 910 (1915). Consequently, alleged deficiencies invalidate the resume only if the resume taken as a whole is insufficient to inform or put the reader on inquiry of the nature, scope and impact of the proposed diversion.

Id.

Finally, the Supreme Court, with specific reference to Rule 90, said:

> This court has recognized an exception to the use of the standard forms where "strict conformity may be unsuitable, prejudicial, or impose an unreasonable burden." *Closed Basin*, 734 P.2d at 635 n. 4 (quoting C.R.C.P. 90).

Id.

In *Closed Basin*, the Court had previously stated:

> *We decline to endorse the referee's conclusion that in every case, a would-be appropriator must determine the exact amount of water to be diverted at a*

> *precisely located point of diversion before that appropriator can form the necessary intent to appropriate or provide sufficient notice to others.* Rather, the determination [of sufficient notice] must always be made on an ad hoc basis, taking into account whether the particular facts of each case satisfy the purposes underlying the requirements of the first step test.

Closed Basin, 734 P.2d at 635 (emphasis in original).

The proposed amendment to Rule 90 would:

1. Change the "inquiry notice" standard for water court applications into a "substantial compliance" standard.

2. Grant authority to the water clerk to withhold the publication of an application.

3. Delete the very phrase that the Supreme Court cited with approval in *Closed Basin*; namely, that "strict conformity may be unsuitable, prejudicial, or impose an unreasonable burden."

4. Create a back-door mechanism, via judicial forms, to alter the substantive statutory elements required for water rights applications.

5. Increase the burden on applicants to provide far more specificity within their pleadings than is required of any party in any other civil action in Colorado.

Thus, the proposed Rule 90 would ask the wrong person (the water clerk) to apply the wrong standard (substantial compliance) to applications, with the wrong result for non-compliance (no publication). Given the above case law, it is clear that evaluating the sufficiency of a water right application can take the careful nuanced attention of the Supreme Court. It is therefore inappropriate to ask for the water clerk, who may have no legal training, to perform the task. Also in light of the authority cited above, the current standard is clearly one of "inquiry notice," not one of "substantial compliance," which was ("praised be") discarded with the abolishment of code pleading. *See Dodd v. Fenno*, 172 Colo. 294, 299, 472 P.2d 146, 149 (1970).

To make matters worse, the potential result of non-publication is irreversible. A water right's value is directly linked to its priority, and a water right's priority is directly linked to the date of filing and publishing the application. The proposed Rule 90 would potentially deprive an applicant of valuable property rights by delaying or prohibiting publication of a claim. Although the proposed rule purports to maintain the original filing date by allowing relation back, that language is an impractical fiction that does not and cannot substitute for the actual publication of an application. The proposed rule lacks the flexibility that exists, and was endorsed by the Supreme Court in *Closed Basin*. Finally, and perhaps most dangerously, the proposed rule opens a back door for judicial forms to be used to insert new requirements in water rights applications.

We believe that the judicial forms that exist as of the time of this writing are consistent with and do not exceed the existing statutory requirements for water rights applications. However, we understand that the forms are the subject of another parallel process that seeks to add several new elements. We have seen drafts of newly proposed forms (*see* Memorandum from Referee Lain Leoniak) that far exceed the statutory requirements, conflict with case law (e.g. *Closed Basin* and *Bijou*), and would present an enormous burden on applicants that is neither necessary nor appropriate.

For example, the Memorandum proposes that every application should include "specifics regarding various uses. E.g. number of dwellings, head of stock, acres irrigated, location of acres irrigated (topo map), type of commercial or industrial use etc., even for a claim of conditional water rights" together with the specific amount, specific place of use (including a map), and specific legal description of the point of diversion. Yet, the Supreme Court has declined "*to endorse the referee's conclusion that in every case, a would-be appropriator must determine the exact amount of water to be diverted at a precisely located point of diversion before that appropriator can form the necessary intent to appropriate or provide sufficient notice to others.*" *Closed Basin*, 734 P.2d at 635 (emphasis in original). This is only one of many examples of proposed additions to the judicial forms that would be made strict legal requirements, and therefore elements required for the exercise of subject-matter jurisdiction, by way of the proposed Rule 90.

By requiring "front-loading" of applications, complete with engineering analyses, surveys, and specific numbers of dwelling units, depletions (by month) etc., as contemplated in the proposal by Referee Leoniak, would directly conflict with the disclosure rules and timetable set forth in C.R.C.P. 26 and U.L.R. 11. The result of "front-loading" of engineering would prejudice applicants by giving objectors many months and potentially years to review specific information and prepare rebuttals to applicants' engineering, while, in turn, applicants would have only thirty days to rebut the expert reports of objectors. This is especially problematic in cases involving complex modeling and other similar science, where recent water cases have proven the maxim that "all models are wrong, some are helpful." This sort of prejudice is not found in other civil matters, where pleadings simply require a "short and plain statement" of the claim and a demand for judgment (not including a specific dollar amount). *See* C.R.C.P. 8(a). Such front loading also compounds the very problem the proposed revisions are attempting to address – namely, increasing costs for the smaller applications with minimal or no opposition.

This approach also prejudices applicants because opponents have nothing like these obligations with respect to their statements of opposition. In fact, a heavily detailed application with reams of engineering support, detailed development plans, etc., can be opposed by dozens of objectors, each of which can file a statement that merely "holds applicant to strict proof" and/or asserts "potential injury" to their water rights without having to specify that injury or any other matter. Of course, our firm represents both applicants and opposers, so the proposed changes would prejudice our clients at times, and our opponents at other times. We believe it is best not to prejudice any party.

A requirement that every application identify the specific amount of depletions by the type of use, number of stock, acres of evaporative surface area and number of dwellings, bears

no relation to reality. In the development approval process, these figures necessarily change over time. Water rights applications must maintain sufficient flexibility to account for some changes in the mix of uses, so long as sufficient augmentation supplies are dedicated for the replacement of the total amount of out-of-priority depletions.

In light of the foregoing, we strongly recommend that the Supreme Court reject the proposed changes to Rule 90.

B. U.L.R. 3

The proposed Rule 3 would make an applicant responsible for providing "all information required by the [judicial] forms." As detailed above, limitations on the water court's subject matter jurisdiction should not and cannot be created via Rule 90, via Rule 3 or via judicial forms. All of the objections raised above in relation to the proposed Rule 90 are applicable and should be considered objections to the proposed Rule 3. Only a few of the most obvious dangers have been mentioned above, while a multitude of unidentified dangers remain hidden in the proposed Rule. No changes to Rule 3 should be made at this time.

C. ULR 6

Section 37-92-302, C.R.S., states that, "The referee, *without conducting a formal hearing*, shall determine whether or not the statements in the application and statements of opposition are true and to become fully advised with respect to the subject matter if the applications and statements of opposition." (emphasis added). Contrary to the clear language of the statute and intent of the legislature, the proposed Rule 6 would establish a formal procedure for applications pending before the Referee, including a case management plan with deadlines for virtually all of the same elements that would be required in an adjudication before the Water Judge.

We believe that if the Referee process is structured as specifically and onerously as in the proposed Rule 6, and contains a requirement that parties waive their statutory right to rerefer the case for a certain period of time, that parties will forego the Referee process in favor of the Water Judge. This is because the Ruling of Referee can be protested by any person, and is reviewed by the Water Judge de novo. Thus, an applicant would commit to the onerous Referee process outlined in the proposed Rule 6 with the risk that it would be required to undergo virtually the same procedure a second time before the Water Judge. This represents a more expensive and <u>less</u> efficient process than presently exists. In light of that risk, applicants would likely rerefer the case immediately to ensure that only one formal process will be required for the adjudication.

Additionally, the proposed Rule 6 requires the Referee to enter a ruling within one year after the deadline for filing statements of opposition, unless "exceptional circumstances" exist. We believe that this arbitrary time period fails to account for the variety of water rights applications, many of which routinely take more than one year to process. Should this clause be included, "exceptional circumstances" will become the norm. We believe that allowing the

Water Judge to actively manage cases, rather than instituting an arbitrary deadline, is the better method for ensuring efficient and carefully considered rulings.

As a practical matter, we believe that it is inappropriate to recite statutory language in the Rules. Repeating statutory language in rules adds no substance to the existing law, yet, it presents the danger of future conflicts between rules and statutes, should either one undergo amendment. Further, if not repeated verbatim, recitations in rules would become "interpretations" of statutes that could further complicate legal disputes over the meaning of statutory language.

At minimum, given our objections to the proposed Rule 90 and Rule 3, we believe the reference in the proposed Rule 6(b) to Rule 90 should be deleted, together with any directly associated duties of the Referee.

Overall, we support the Supreme Court's goal to increase the efficiency in the Water Courts, but we do not believe the proposed Rule 6 is the proper means to achieve that end. Rather, we believe that increasing resources available to the judicial branch, including additional funds and personnel, will be the best means to achieve efficiency in the adjudication of water matters.

In light of the foregoing, we respectfully recommend that the Supreme Court reject the proposed Rule 6.

D. ULR 11

We are opposed to the proposed Rule 11 inasmuch as it requires experts to meet and confer without the presence of counsel or the parties. This is a due process violation. Colorado Water Courts, like all American courts, depend upon and presuppose an adversarial system. Since the late eighteenth century, the adversarial system has been the cornerstone of all American jurisprudence, within which competing arguments are rigorously tested. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." *See* Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A.J. 569, 569 (1975).

More than a historical remnant, we believe that the adversarial process is guaranteed by the due process clause of the Colorado and United States Constitutions. Due process guarantees the right to assistance of counsel, which includes the right to present evidence. Water resources engineers are typically the parties' primary means of presenting evidence in Water Court. The proposed Rule 11 would substantially erode a party's ability to present evidence in substance and in a manner that the party sees fit and would likely constitute a due process violation.

Although the proposed Rule 11 purports to protect the experts' discussion and statement under C.R.E. 408, we do not believe that the protections afforded by C.R.E. protect statements of fact from being used at trial. *See Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1190, fn3 (Colo. 2002); *Scott Co. of California v. MK-Ferguson Co.*, 832 P.2d 1000, 1006 (Colo. App. 1991). That is, whatever information or documentary evidence is disclosed or communicated during a meeting of the experts will eventually make its way into the trial record. We do not believe that

a meeting of experts should become a forum for discovery. Rather, the discovery rules that have been tried and tested for decades, set forth in C.R.C.P. 26 through 37, should continue to be employed in water matters.

In addition, in cases where the division engineer is a party, the proposed Rule 11 would both require the division engineer to attend the meeting (as the expert) and prohibit the division engineer from attending the meeting (as the party).

It is not clear what purpose the expert's declaration serves. No such declaration is required of expert witnesses in any other civil or criminal proceeding, although they serve the same purpose and have identical relationships to parties and their counsel. It appears that the declaration is just another process that can lead to disputes and increased costs. For example, Paragraph 3 requires disclosure of the extent to which any other person changed the content of a written report. Parties and their counsel frequently work with experts throughout the water court process, and even before an application is filed. Due to the ongoing discussions between experts and their parties and parties' counsel, it is unclear to what extent the content of those discussions should be disclosed to comply with this declaration. Nevertheless, at present any party can make such a determination through discovery, as they can in other types of civil litigation; as a result, this appears to be a solution to a non-problem.

Finally, the proposed Rule 11 will increase the cost to applicants and objectors, as their engineers would be required to prepare for and attend an additional meeting that is not currently required. In light of the foregoing, we urge the Supreme Court to reject the proposed Rule 11.

In summary, our firm whole-heartedly endorses any change to the rules and statutory provisions regarding the water court adjudication process that stream-lines and reduces the cost of that process. However, the pace of a particular adjudication should be driven primarily by the parties based on the particular facts and circumstances surrounding the application. The present system seems to accomplish this fairly well, with inquiry notice in the resume system, with the referral and re-referral processes, and with disclosure and discovery deadlines under Rule 11 that were recently adopted based on recommendations from the water bar. Where there is not an obvious benefit to a rule change, and where any change deviates from existing practice in both water court and other civil courts, we believe that such a change is unwarranted.

Thank you for the opportunity to comment on the proposed Rules.

Sincerely yours,
PORZAK BROWNING & BUSHONG LLP

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