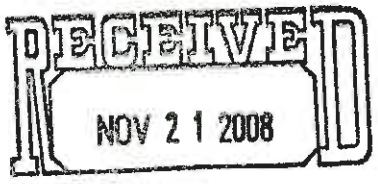
White & Jankowski *Lawyers*

November 21, 2008

VIA HAND DELIVERY



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

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

Dear Ms. Festag:

On behalf of the eleven attorneys at White & Jankowski, LLP, we appreciate the opportunity to comment on proposed amendments to the Water Court Rules and Rule 90 of the Colorado Rules of Civil Procedure. The lawyers in our firm collectively have over 183 years of experience in water court practice in all division in the state. Two lawyers in our firm tried cases under the Adjudication Act of 1943, before the water court rules and forms were created, but after code pleading was abolished.

We understand that several of the reasons for changing the water court rules were to save costs and expedite water cases. In general, we are concerned the proposed changes will increase costs and may clog the water courts. The proposed rules tend to: (1) front load mandatory requirements; (2) elevate the form of pleading under a "substantial compliance" standard over the substance of the pleading under an "inquiry notice" standard; (3) remove the water judges' express and inherent power to manage cases to fit the unique facts and circumstances presented; and (4) elevate the water referees' powers, which should be derivative from the water judge.

These comments are provided from the perspective of representing both applicants and objectors, private and governmental entities, and large and small water users. We will not provide comments on all of the rules or the finer details of each, but rather note the major concerns regarding particular rules. These comments are, of course, ours alone and not those of our clients.

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PROPOSED RULE 90, C.R.C.P.

1. ***Proposed Rule 90 CRCP changes the legal standard for pleading from "inquiry notice" to "substantial compliance."***

Colorado's application and resume notice procedures are calculated to alert water users on a stream system whose rights may be affected and provide these persons an opportunity to participate. *City of Thornton v. Bijou Irrigation District*, 926 P.2d 1, 24 (Colo. 1996). The Court continued:

> 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). 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)).

Thornton v. Bijou, 926 P.2d at 24.

Proposed Rule 90 has a number of problems. It replaces an "inquiry notice" standard with a "substantial compliance" standard with the water court forms. It sets up a process where there are two bites at the apple to determine whether a pleading provided adequate notice: one in front of the judge and a second when objectors enter the case. Lawyers now quarrel over "inquiry notice." A new "substantial compliance" test provides fertile ground for creative lawyers to bicker.

Moreover, because lack of subject matter jurisdiction based on insufficient notice can be raised at any time, what happens when a water judge does – or does not require an applicant to amend the application to be in "substantial compliance" with a water court form? Would an application that has been accepted by a water judge under the "substantial compliance" test now be immune from subject matter jurisdiction challenges, even if the application fails to include a statutory requirement, critical to put one on inquiry notice? (e.g. failure to plead nontributary groundwater as in *Stonewall Estates*).

Normally the failure to provide adequate notice falls on the applicant, because lack of notice can rise to the level of lack of subject matter jurisdiction. Accordingly, most water lawyers' applications include the substantive matters from the statutes and rules that are needed to put other water users on inquiry notice of the nature, scope and impact of the proposed diversion. (We have not seen what changes may be made to any new forms to see what additional matters would be required to be pled under a "substantial compliance" test.)

2. ***Proposed Rule 90 CRCP would elevate form over substance.***

Under the current rule, strict form or code type pleading is not required, because current Rule 90 provides an exception for "strict conformity" in use of the standardized forms. "Failure to use these standardized forms, however, does not automatically result in the application being considered insufficient." *Thornton v. Bijou*, 926 P.2d at 24.

In rejecting an argument relying on cases from 1900 that facts were not pled with sufficient definiteness, the Colorado Supreme Court said these cases "were decided in 1900 under the strict confines of *code pleading* and demurer practice, and they represent a philosophy of pleading which – ***praise be*** – *was interred in 1941* with the adoption of the Rules of Civil Procedure." *Doddo v. Fenno*, 172 Colo. 294, 299, 472 P.2d 146, 149 (1970) (emphasis added).

Proposed Rule 90 resurrects code pleading. It elevates the form of the pleading over the substance of the pleading. Water applications should be viewed through the lens of the purpose of the pleading – to put interested parties to the extent reasonably possible on *inquiry notice* of the *nature, scope, and impact* of the proposed diversion. *Thornton v. Bijou.*

We recommend only minor changes, if any, be made to Rule 90. Rule 90 needs to preserve the water judges' ability to decide whether an application provides adequate notice under the inquiry notice standard by applying the many cases that have been decided under that same standard.

WATER RULE 3

For the same reasons described above for Rule 90, the references in Rule 3(a) to what "shall" be required from the forms and referring back to Rule 90 on the completeness of the application should be deleted.

WATER RULE 6

The changes to Rule 6 appear designed to speed up the process. That is a laudable goal. The concern we have is that the proposed rule increases the water referees' powers in contravention of the statutory scheme in C.R.S. § 37-92-304. The authority of the water referee is derivative from, and not greater than, the water judge. *Gardner v. State*, 200 Colo. 221, 614 P.2d 357 (1980).

In our experience, the better practice is for the water judge to take an active role in the case management. For example, in a recent case in Division 1, the water judge entered an order that picked up on some of the ideas and concepts being proposed in the rule. A copy of this order is enclosed. The point is that water judges already have the authority to manage cases based on the facts and circumstances of each application. Fitting every case into the cookie-cutter mold of Rule 6 will not work for all cases.

Proposed Rule 6 will tend to front load the engineering and require mandatory submittals by all parties. This will cause applicants in smaller cases to spend money they may not have needed to expend. It will require all applicants and objectors to spend resources at the beginning of the case that may not have been necessary. Our experience is that the water referee process works well in all divisions under the existing rules. It provides a forum to allow smaller applications to work through the process. It provides all applicants and objectors the ability to try to negotiate a stipulated decree without getting on a trial track where mandatory filings under Rule 26 kick in.

Adopting Rule 6 may have the unintended consequence of clogging the water courts. It is likely that many applicants and objectors will re-refer the case to the water judge rather than going through the mandatory process set out in the proposed rule, with its rigid timelines, and filing requirements.

We recommend that the changes to Rule 6 not be adopted, and instead, that water judges, water referees, and water lawyers make a concerted effort to actively manage cases based on the particular circumstances of the case, the issues involved, and the timing and needs of all parties.

To the extent that Rule 6 is intended to address workload issues in the water courts due to lack of resources or personnel, we suggest that it is the wrong approach. Instead, additional resources should be sought from the legislature. Our firm would actively support efforts by the judicial branch to obtain additional resources and personnel to handle the caseloads in Colorado's strained district courts to facilitate the expedient management and resolution of water court applications.

Thank you again for the opportunity to comment.

Very truly yours,

David C. Taussig

DCT/id
w/enc. *Order for Initial Status Conference*, Case No. 08CW82, Water Division No. 1

DISTRICT COURT, WATER DIVISION NO. 1 STATE OF COLORADO 901 9th Avenue P. O Box 2038 Greeley, Colorado 80632 **CONCERNING THE APPLICATION FOR WATER RIGHTS of the CITY OF THORNTON** **IN ADAMS, DENVER AND WELD COUNTIES**	▲ **COURT USE ONLY** ▲
	Case Number: 08CW82 Division Courtroom
ORDER FOR INITIAL STATUS CONFERENCE	

On April 25, 2008 the City of Thornton filed the captioned case, entitled *Application for Storage Rights, Plan for Augmentation Including Exchange, and for Adjudication of Lawn Irrigation Return Flows*. The case was referred to the Water Referee on April 25, 2008.

Seventeen parties filed statements of opposition, including: Centennial Water and Sanitation District, the Harmony Ditch Company, East Cherry Creek Valley Water and Sanitation District, the City of Brighton, Farmers Reservoir and Irrigation Company, the State and Division Engineers, the City of Aurora, the City of Northglenn, Denver Water, the City of Westminster, Coors Brewing Company, South Adams County Water and Sanitation District, the City and County of Broomfield, the City of Greeley, Public Service Company, Todd Creek Metropolitan District, and Henrylyn Irrigation District.

The Division Engineer's Office filed its Summary of Consultation on July 11, 2008.

An Initial Status Conference should be held in cases involving numerous parties in order to determine whether there is a reasonable likelihood that a ruling will be entered at the conclusion of proceedings before the Water Referee. Such proceedings should be concluded within a reasonable time to be established during the Initial Status Conference, with the goal of entry of a ruling within two years from the date the case was filed.

If on the basis of the goals set forth in the preceding paragraph the parties agree that the case should remain on the Referee's docket, the Applicant should establish a schedule of milestones by which to measure the progress of the case (the "Case Management Plan"). Such milestones should include, but not be limited to, the date that engineering reports will be circulated to the opposers and the date that a proposed ruling will be circulated to the parties. The Opposers should agree to make a good faith effort to provide timely comments on all reports, proposed rulings, and other items for which comments are requested.

If the parties do not agree that there is a reasonable likelihood that proceedings before the Referee will result in entry by the Referee of a ruling within the target time period, then the case should be re-referred by the Referee or one of the parties without undue delay.

Accordingly, it is ORDERED that the Applicant set this matter for an Initial Status Conference with Water Referee John Cowan. The Initial Status Conference shall be held no later than sixty days from the date hereof. The Applicant shall file with the Court, and serve on all parties, a draft Case Management Plan no later than fifteen days prior to the date of the Initial Status Conference. The draft Case Management Plan shall contain a schedule of milestone dates by which the progress of the case can reasonably be measured, including a schedule of Status Conferences, a deadline for distribution of engineering reports, a deadline for distribution of a proposed ruling and a target date for entry by the Referee of a ruling. Dates established in the Case Management Plan are advisory, and may be amended by the Water Referee for cause shown.

Dated: July 31, 2008.

Roger A. Klein
Water Judge
Water Division No. 1

This document was filed pursuant to C.R.C.P. 121, § 1-26. A printable version of the electronically signed order is available in the Court's electronic file.