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November 26, 2008

Susan J. Festag
Clerk of the Colorado Supreme Court
2 East Fourteenth Avenue
Denver, CO 80203

Re: Proposed Changes to C.R.C.P. 90 and Uniform Local Rules for All State Water Court Divisions

Dear Ms. Festag:

This letter is submitted on behalf of Petros & White, LLC to provide comments on the changes proposed to C.R.C.P. 90 and the Uniform Local Rules for All State Water Court Divisions (collectively, the "Water Court Rules"). Our firm focuses its practice on counseling, litigation, and transactions involving water rights in Colorado. We represent clients in all seven of Colorado's water divisions, both as applicants and opposers in the water litigation process. The opinions offered herein are solely those of our firm, and not of any of our clients.

In general, we are concerned that the proposed changes to the Water Court Rules will increase the costs associated with water rights litigation in Colorado and further burden the water judges' dockets. Of particular concern are changes that could erode the established notice standard for water rights adjudications, would vest the water referee with increased powers at the expense of due process, and would shift the role of experts towards advocacy. Our specific concerns follow:

1. C.R.C.P. 90. Among the proposed revisions to C.R.C.P. 90 is the addition of an express requirement that applications filed with the water clerk must be determined to be "complete" as a prerequisite to publication in the monthly resume. This determination will depend on whether or not the application includes information that "substantially complies" with Uniform Local Rule ("ULR") 3 and the standardized forms periodically approved by the water judges. While seemingly innocuous, this proposed change to Rule 90 (together with the proposed change to ULR 3) could imperil two long-standing principles of Colorado water law:

A. Notice Pleading. To be adequate under current law, notice of a pending water rights application must "reveal to potential parties the nature of the claim being made, so that such parties can determine whether to conduct further inquiry into the full extent of those claims" and determine whether to participate in the proceedings. *In re Water Rights of Columbine Assocs.*, 993 P.2d 483, 489-90 (Colo. 2000). This "inquiry standard" does not require an applicant to plead every detail necessary to ultimately effectuate the claim. Indeed, certain details may not be known at the time of an application, and the need for such details may not be

apparent (or even possible to know) until revealed by a potentially impacted water user (e.g., protective terms and conditions).

The present standardized application forms developed by the water judges generally require information consistent with and limited to satisfying the aforementioned inquiry standard. However, we understand new forms are being considered that may significantly increase the level of detail necessary for inclusion in water court applications. To the extent such application forms are adopted in the future and require details beyond the minimum necessary to satisfy the existing inquiry standard, then the proposed changes to Rule 90 (and ULR 3) will effectively eclipse the present inquiry standard.

B. First Step. Certain water projects may be difficult to develop and put to use immediately, but nevertheless need the assurance of a priority before any substantial undertaking. The doctrine of conditional water rights has been developed in recognition of this dilemma, allowing an appropriator to secure a priority at the time an intent is formed (the "first step"), but conditioned on the diligent development of the appropriation and subsequent diversion and application of water to beneficial use.

Applications for conditional rights, in particular, may not provide the level of detail necessary to fully-implement a project, because an applicant "often waits to proceed with the detailed testing, design, and permitting necessary to determine the precise location and configuration of water structures until receiving a conditional decree." *City of Black Hawk v. City of Central*, 97 P.3d 951, 959-960 (Colo., 2004). We are concerned that the rigid "checklist" approach under the proposed revision to Rule 90 (and ULR 3) could preclude the publication of notice of an application seeking to confirm an appropriative first step. The resulting need to "front load" applications with substantial detail could delay the ability to file applications in the same calendar year as the formation of an intent to appropriate, ultimately reducing the value and yield of an intended project.

Given the above concerns, we recommend that any changes to Rule 90 (and ULR 3) include measures to ensure that the threshold for publishing notice of an application remains consistent with the established inquiry notice standard.

2. ULR 2. The proposed changes to ULR 2 appear acceptable, as they generally reflect the e-filing procedures already in practice for several years.

3. ULR 3. Our concerns related to the proposed changes to ULR 3 are the same as those stated above with respect to the proposed changes to C.R.C.P. 90.

4. ULR 6. The revisions to ULR 6 generally seek to compress the elapsed time between filing of application and entry of a ruling to approximately fourteen months. While a noble goal, components of this proposed rule present significant concern:

A. Due Process. The proposed changes to ULR 6 authorize the water referee to confer with and obtain information from the parties and the division engineer (ULR 6(b)); to make investigations, including site visits, without formal hearing (ULR 6(k)); and to require the applicant (although not expressly the opposers) and the division engineer to provide further information as part of such investigations (ULR 6(m)). The water referee is further authorized to enter a ruling following his/her informal investigations and/or resolution of the application between the parties, without being specifically bound to the opinions of the experts and/or the terms of resolution developed by the parties.

The extent and potential application of the above proposed authorities of the water referee are troubling. First, the water referee's proposed authority to conduct informal, off the record investigations appears contrary to intent of Canon 3.A(4) of the Colorado Code of Judicial Conduct, in that the proposed rule change encourages *ex parte* communications concerning the pending application. Moreover, allowing a water referee to enter a ruling based on off the record investigations and unknown evidence raises procedural due process issues under the 14th Amendment of the U.S. Constitution and Article II, Section 25 of the Colorado Constitution. See *Interstate Commerce Commission v. Louisville & Nashville R. R.*, 227 U.S. 88, 93, 33 S.Ct. 185, 187, 57 L.Ed. 431, 434 (1912) (Due process standards require that "(a)ll parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.").

The above legal issues aside, our experience in an actual, pending case demonstrates that the proposed ULR 6 authorities are likely to increase litigation costs for not only the parties in a case, but also for the people of the State of Colorado. Specifically, in our case, we filed a water court application to which several parties filed statements of opposition. Upon reaching resolution with the opposers, via stipulations approved by the water referee, a proposed ruling consistent with the stipulations was submitted to the water referee. Without notice to any of the parties, a ruling was subsequently entered by the water referee with a number of substantive changes, including the removal of terms and conditions specifically negotiated between the parties. The applicant and opposers filed protests, prompting the state and division engineers to move to intervene. The matter has not yet been resolved and all parties continue to incur additional costs.

Considering the above, any changes to ULR 6 must preclude *ex parte* contacts by the water referee and *sua sponte* modification of proposed rulings based on informal, off the record proceedings.

B. Procedural Bottlenecks. We believe the fourteen-month timeframe proposed by ULR 6 may prove very difficult to achieve in actual practice. Water courts typically experience an application surge in late December of each year. Under the proposed changes to ULR 6, all of these year-end applications will be set for status conferences the following March/April and (if not re-referred) governed by a one-year case management plan. Like a pack of runners racing towards a narrowing path, we foresee many of these applications becoming

stalled as the applicants' attorneys and experts simply become overwhelmed with the concurrent case management plan deadlines (even assuming the Division Engineer issues timely and case-specific summaries of consultation). The water referees will inevitably be flooded with motions to extend the deadlines. This process will repeat as the case management plans next require opposing parties to respond to all their cases at essentially the same time. Rather than face this procedural logjam, many applicants may choose to simply re-refer their case at the initial status conference, swelling the water judges' dockets with cases that might otherwise settle under an extended timeframe before the water referee.

To avoid the above problems, we suggest increasing the proposed timeline to a more manageable two years. Further, to make the case management plan a truly effective tool, it needs to have "teeth" to enforce the deadlines established by the plan. Our experience is that an applicant, in particular, may often have an application delayed by non-responsive opposing parties. The proposed authority to dismiss a statement of opposition (ULR 6(o)) is a positive tool in that regard.

5. **ULR 11.** We have three primary concerns with the proposed changes to URL 11:

A. Meeting of Experts. Proposed ULR 11(b)(5)(D) mandates two meetings between expert witnesses for the parties, at which the experts are charged with narrowing and resolving issues. Attorneys and the parties themselves are expressly prohibited from participation in these meetings. We perceive a number of problems with this proposal:

1. With the parties excluded, what authority will the experts have to actually resolve issues?
2. With attorneys excluded, how will the experts "resolve" mixed questions of law and fact?
3. Experts are trained in technical matters, not as negotiators. Requiring experts to negotiate with each other in a vacuum will force them to become advocates for their client, and will place a premium on experts with tactical skills over technical knowledge.
4. The proposed meetings will increase litigation costs, as it will be necessary to prepare and debrief the experts.
5. The meetings of the experts are redundant (again adding unnecessary litigation costs), in that ULR 11(b)(3) already requires the parties' attorneys to confer about the issues in dispute.
6. The proposed rule assumes that all parties will retain an expert. This may not be so, as an opposing party may hold an applicant to "strict proof" of its claims, and limit opposition to cross-examination of the applicant's expert at trial.

Given these issues, we recommend ULR 11(b)(5)(D) be stricken in its entirety from the proposed revisions to the Water Court Rules. Alternately, the scope of any such mandatory meetings should be strictly limited to identifying undisputed matters (deleting the phrase "to

attempt to resolve disputed issues; and to identify the remaining issues in dispute" from ULR 11(b)(5)(D)(I) & (II)).

B. Deposition Timing. ULR 11(b)(10) would preclude deposing an applicant's expert until 30 days after the filing of an opposer's expert disclosures. However, a full understanding of the nature and basis of the applicant's expert's opinions may be necessary for an opposing expert to develop and disclose his/her opinions. Denying an opposing party the opportunity to fully understand a case and allow its expert to develop fully informed opinions until after his/her disclosures are due will lead to additional costs associated with supplemental opinions and invite late disclosures disputes. We therefore recommend deleting the proposed change to ULR 11(b)(10).

C. Additional disclosures. ULR 11(b)(5)(C)(I) requires experts to include a list of "all expert reports authored by the expert in the preceding five years." The scope of this rule should be clarified to apply solely to reports disclosed pursuant to C.R.C.P. 26(a)(2). There are several large water engineering firms that represent numerous clients across the state (and in other states). As currently proposed, URL 11(b)(5)(C)(I) could be interpreted to require the disclosure of thousands of reports, including reports not prepared in connection with litigation.

6. Expert Declaration. A proposed "Declaration of Expert" is appended to ULR 11, to be signed and attached to all expert witness disclosures. Section 3 of the Declaration requires disclosure of "whether, and to what extent, the content of" the expert's report was "drafted or changed by any other person."

We are concerned that the foregoing requirement will have a chilling effect on discussions between experts and their clients and representing attorneys, as parties will fear diminishing the perceived credibility of the expert's report(s). If so, then a party's ability to debate, test and fully understand issues, weaknesses and strategies will be impaired, potentially reducing opportunities for settlement. This requirement may also lead to increased litigation costs, as parties elect to simultaneously hire testifying and non-testifying experts. Moreover, Section 3 of the Declaration is contrary to pending revisions to Rule 26(b)(4)(B) and (C) of the Federal Rules of Civil Procedure (copy enclosed), that, if adopted, will generally protect both an expert's draft reports and attorney-consultant communications from disclosure.

In light of the above, we recommend that the final sentence of Section 3 of the Declaration be stricken, and replaced with the following, developed by the Colorado Bar Association's Water Law Section:

> I have not included anything in my report(s) which has been suggested to me by anyone (including particularly my instructing lawyers) without forming my own independent view on the matter.

We appreciate the opportunity to provide comments to the proposed Water Court Rules.

Sincerely,

PETROS & WHITE, LLC

By: _____
David S. Hayes

DSH/lh
Enclosure

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

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(2) Disclosure of Expert Testimony.

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report - prepared and signed by the witness - if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data ~~or other information~~ considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

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*New material is underlined; matter to be omitted is lined through.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, the Rule 26(a)(2)(A) disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705;and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D~~C~~) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E~~D~~) *Supplementing the Disclosure*. The parties must supplement these disclosures when required under Rule 26(e).

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(b) Discovery Scope and Limits.

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(4) Trial Preparation: Experts.

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial Preparation Protection for Draft Reports or Disclosures.* 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.

(C) *Trial Preparation Protection for Communications Between Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) Relate to compensation for the expert's study or testimony;

(ii) Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed, or

(iii) Identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

(D~~B~~) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E~~C~~) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D~~B~~); and

(ii) for discovery under (D~~B~~), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.