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

Re: Comments on Proposed Water Court Rules

Dear Ms. Festag:

I write in order to provide our firm's comments concerning amendments to the Uniform Water Court Rules. Our firm has focused its practice primarily on water rights matters for in excess of 20 years, and therefore wishes to share its comments and opinions on the proposed revisions, in hopes that such comments might be of benefit in the final revisions. As a preface, we wish to commend all involved in developing these proposed amendments, particularly in light of the increased authority granted to the Water Referees of the various divisions, and the efforts to streamline the water rights adjudication process. In general, we are in agreement with and fully endorse the proposed amendments which are so intended. However, we wish to provide some critical comment of one proposed amendment in particular – Rule 11. Of particular concern is the concept of the *"Meeting of the Experts To Refine And To Attempt to Resolve Disputed Issues"* contemplated at Rule 11(D).

The Proposed "Meeting of the Experts" is Conceptually Flawed.

Clearly the intent of the proposed "meeting of the experts", as specifically provided in the proposed Rule 11(D), is to facilitate a narrowing of the actual issues in dispute, in an effort to streamline Water Court proceedings. Admittedly, proceedings in the various Water Courts often concern issues of a complex scientific and engineering nature, necessitating a "refining" of such issues in order to preserve precious judicial resources. However, that same complexity often results in a greater frequency of "mixed questions of fact and law", issues which require both a legal and a scientific analysis. For this reason, it is our opinion that the "meeting of experts", as proposed, has several potential consequences which make it less than desirable as a procedural tool for simplifying litigation.

a. Unauthorized Practice of Law.

Expert witnesses are retained by applicants and opposers alike for the purpose of providing qualified expert testimony as to factual issues surrounding water rights litigation. They are not hired to be advocates for a party, nor are they hired for cooperative purposes to direct the course of the litigation, and the issues discussed therein. Such roles are historically, and properly, the role of legal counsel representing the parties. Issues which seem purely factual to a scientist or engineer may have significant legal consequences as well, once viewed from the larger legal perspective of a case. Negotiations between opposing expert witnesses as to what issues may be disputed or undisputed necessarily places purely factual witnesses in the role of advocate, and often times will place expert witnesses inadvertently in the position of advocating what turns out to be at least a mixed question of fact and law. Attorneys carry malpractice insurance to protect against material error in such negotiations – expert witnesses may not be so insured, and may risk violation of Colorado law prohibiting the unauthorized practice of law. Further, to place the responsibility for such advocacy on expert witnesses may result in clients selecting their expert consultants not on their scientific expertise and qualifications alone, but rather on debating and advocacy skills, a scenario which does not serve the development of good factual evidence. There is no pressing need to put expert witnesses, hired for the limited purposes of testifying to factual issues, in such a position.

b. There is No Streamlining Effect.

The intent of the proposed Rule 11 in requiring a "meeting of the experts" is to streamline litigation by narrowing the issues to be litigated only to those in dispute. It is our opinion that requiring opposing expert witnesses to participate in what amounts to an unsupervised settlement conference, will in fact have the opposite effect. Many attorney's may instruct their respective expert witnesses to limit their participation in such meetings, and refrain from discussing certain aspects of the case which could be construed as legal questions, or at least mixed questions of fact and law. Indeed, an attorney would be remiss not to do so, and at risk of claims of malpractice, were such negotiations and discussions to materially effect the prosecution of the case. It is not difficult to imagine opposing experts getting together to meet, and finding that neither party is authorized to discuss any relevant portion of their disclosures, having been instructed by their respective counsels to be listeners, rather than speakers. As a result, both the opposing party and applicant will be forced to incur additional cost and expense (1) in having their respective counsel brief expert witnesses prior to the "meeting of the experts"; and (2) in having their respective expert witnesses meet to discuss potentially nothing material, all because such a meeting is required by proposed Rule 11. The likely effect of proposed Rule 11, as drafted, is not to streamline litigation, but rather to complicate litigation, and increase the cost burdens upon all parties involved.

c. Mechanisms for Narrowing & Refining the Scope of Litigation Already Exist.

As discussed above, the proposed Rule 11 places expert consultants hired to provide only factual testimony in the unenviable position of being unauthorized legal

advocates, and as a result may act to obstruct rather than streamline the litigation process. However, the current Uniform Water Court Rules and C.R.C.P. already provide ample mechanisms for narrowing the scope of litigated issues – there is no need to fix that which is not broken. The current form of Rule 11 of the Uniform Water Court Rules adheres to C.R.C.P. Rule 16, as modified by Rule 11, to require disclosures, conferring and exchanging of information between parties, and settlement discussions. As a practical matter, such activities between counsel, in combination with the preparation of, and comment upon, proposed rulings prior to re-referral, more often that not result in a substantial refining of the disputed issues, and of those issues which can be stipulated to prior to trial. No party wishes to expend time, effort, and funds arguing issues upon which the parties agree, and it is our experience that the goals of the proposed Rule 11 are already substantially met by existing rules, practice, and procedure.

Proposed Revisions if Amendment of Rule 11 Deemed Necessary.

Should it be deemed absolutely necessary to provide some further revision to Rule 11, we wish to provide our suggestions as to revisions which might enhance and expedite the litigation process while minimizing the risks discussed above.

a. Meeting of the Experts to Include Legal Counsel.

It is our opinion that it is fair neither to the process nor to the participants to force expert witnesses to act as advocates for their respective parties. To the extent that a forced "settlement conference" is to be included in the pre-trial procedure outlined by Rule 11, such conference should include both expert fact witnesses and legal counsel, so that attorneys might address and resolve undisputed questions of law, experts might resolve undisputed questions of fact, and all participants can work together to resolve those mixed questions of law and fact. To be sure, there are instances where we as attorneys may see the benefit of taking a back seat and allowing expert witnesses to compare notes and see if progress can be made on factual issues – but such legal strategy must remain the domain of the party responsible for the prosecution of the case, the lawyers retained for that task. Any requirement for the "meeting of the experts" should include participation of the respective attorneys involved in such meeting, or at a minimum the discretion of the parties to include or exclude their respective attorneys' participation. To the extent that any summary report of the "meeting of experts" is to be prepared for the parties, as considered in proposed Rule 11(D)(II), such report must be prepared jointly by counsel, not expert witnesses, for the reasons discussed above.

b. Meeting of the Experts Limited to Purely Factual Matters.

While difficult to discern without the participation of counsel, any discussions by expert witnesses must be limited to those matters which they are qualified and legally permitted to negotiate – factual and scientific issues. It is easy to conceive of experts discussing the proper methodology for determining how historic consumptive use might be determined, but when such experts then decide, without legal consultation, the period over which such a HCU study might be conducted, they are treading upon potentially material

legal matters. **It is this issue of factual v. legal v. mixed issues which requires the participation of attorneys in any settlement conference or "meeting of experts" – issues with legal ramifications are not always easy to discern.**

c. Timelines for Meeting and Reporting Must be Expanded.

While understanding that the scheduling of the proposed "meetings of the experts" are intended to streamline and accelerate the litigation process, the timelines proposed in the proposed Rule 11 are in our opinion unworkable. For instance, at proposed Rule 11(D)(II), it is required that the expert witnesses meet *"within 25 days after the opposer's expert disclosures are made"*. This requires that Applicant's expert obtain, review, analyze and develop rebuttal opinions, and be prepared to discuss and defend such opinions, all within a three-week period. While such tight timetables might be workable if expert consultants worked only one case at a time, economic realities require that such consultants, like water attorneys, have more than one client and more than one case proceeding at any given time. **It is our recommendation that this 25 day requirement be expanded to at least the 45 day requirement found in Rule 11(D)(I).**

Also in proposed Rule 11(D)(II), is the requirement that "*within 5 days after such meeting the experts shall jointly submit to the parties a written statement setting forth the disputed issues arising from the expert disclosures that they believe remain for trial*". As discussed above, it is our opinion that any such summary settlement report be generated by counsel, so as to ensure that any legal or mixed legal and factual issues are discussed by the parties qualified to do so. However, regardless of who is to prepare any such report, a timeline of 5 days is simply an unreasonable period of time in which to do so. To the extent that some agreement refining the remaining issues might be orally reached during the settlement conference, we have all experienced the sometimes difficult task of putting such oral agreements in writing. **A 20 day timeline for preparation of a summary report by counsel would be more reasonable and is recommended.**

d. Expert Declaration Should Not Discourage Cooperation with Counsel.

The proposed Form 2 to Appendix 1 concerning the "declaration of expert" contains a statement which could act to discourage the cooperative relationship between water attorneys and expert witnesses. In paragraph (3) of the proposed Form 2, the expert witness is required to state that:

> I have also disclosed whether, and to what extent, the content of my written report was drafted or changed by any other person.

While this language may seem innocuous enough, and we understand the intent in keeping the opinions of expert witnesses unbiased and based upon that expert's experience, this statement could also be interpreted to discourage valuable discourse between counsel and expert witnesses which might act to focus (i.e. "change") the final work product of the expert witness. Further, the mere suggestion that such language is necessary implies that either (1) expert witnesses are inherently prone to writing the

opinions of counsel instead of the factual expert opinions for which they are hired; or (2) attorneys are inherently prone to attempt to insert their own opinions for that of expert witnesses – it is not our experience that either of these implied ethical violations are common in practice before the Water Courts.

The cooperative relationship between counsel and expert witnesses is vital in discovering factual background information, upon which counsel may base legal arguments. Likewise, the legal arguments anticipated by counsel may at times cause expert witnesses to view data from another perspective, and make revisions to expert witness reports on that basis. This symbiotic relationship is vital to both thorough and competent fact finding, and to the maintenance of our adversarial litigation process, of which the Water Courts are a part. We propose the following alternate language to replace the above quoted language from Paragraph (3) of Form 2:

> All opinions contained within my written report are entirely my own, based upon my experience and expertise.

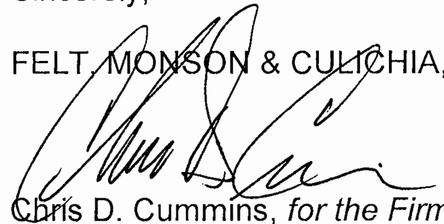
It is our opinion that such language will protect the integrity of expert opinions, while likewise protecting the vital interactive relationship between counsel and expert witnesses.

Conclusion.

Our firm believes the overall content of the proposed changes to the Uniform Water Court Rules are appropriate and beneficial to a more efficient and expedited resolution of water matters. However, our firm also believes the concept of required meetings between opposing experts must at a minimum be modified to allow for counsel participation as part of a mandatory settlement process, in order to protect expert witnesses from inadvertently participating in the unauthorized practice of law, to ensure that advocates remain advocates and witnesses remain witnesses, and in order to ensure that legal issues and matters of mixed questions of fact and law are given the proper legal analysis as part of the settlement, negotiation, and "refining" of disputed issues. Finally, our firm believes that it is essential to preserve the cooperative relationship between expert witnesses and counsel in order to ensure both the factual integrity of expert reports, and proper advocacy for the clients involved in water rights litigation. Thank you for your consideration of these comments, and please do not hesitate to contact us with any questions you may have.

Sincerely,

FELT, MONSON & CULICHIA, LLC



Chris D. Cummins, *for the Firm*