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November 25, 2008

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

RE: Request for Comments on Proposed Changes to Water Court Rules

Dear Ms. Festag:

On behalf of the Colorado State Engineer and the Colorado Office of the Attorney General, I submit these Comments in response to the recent Colorado Supreme Court Rules Committee Notice of Hearing and Request for Comments for Water Court Rules.

The Colorado State Engineer and the Colorado Attorney General greatly appreciate the efforts put forth by the Colorado Supreme Court and the Water Court Rules Committee to improve current Colorado Water Court Adjudicatory procedure. The Colorado State Engineer and the Colorado Attorney General believe the proposed changes to the Water Court Rules will help to address concerns expressed by water users and support the adoption of the proposed changes. The State Engineer and the Attorney General believe that minor clarifications to the proposed rules would prove useful to further facilitate Water Court procedure. Specifically, the State Engineer and the Attorney General have the following comments on the proposed changes:

- Rule 11, Uniform Local Rules for All State Water Court Divisions, paragraph (b)(5)(D). The Rules Committee proposes adding this paragraph to provide for a meeting of experts to identify and help resolve disputed issues. The State Engineer and the Attorney General fully support this and any similar approach that encourages discussion between engineering experts. The State Engineer and the Attorney General also note that there may be matters in which more than one person from the State Engineer's and Division Engineer's Offices may be asked to testify as an expert. Due to resource concerns, the State Engineer and the Attorney General also request that only one representative from the State Engineer's and/or Division Engineers' office be required to attend these discussions.
- Rule 11, Uniform Local Rules for All State Water Court Divisions, paragraph (b)(5)(E). The Rules Committee proposes adding this paragraph for purposes of requiring experts in water court matters to prepare a "Declaration of Expert." The specific proposed

declaration is set forth at Appendix 1 to Chapter 36, Colorado Water Court Forms, Form 2. The State Engineer and the Attorney General support the requirement that water court experts prepare an expert declaration. However, paragraph (2) of the proposed Declaration requires experts to state “I have also disclosed whether, and to what extent, the content of my written report was drafted or changed by any other person.” As written, this proposal would potentially require experts to disclose even trivial grammatical or typographical revisions to written reports. The State Engineer and the Attorney General propose that this paragraph be modified to require experts to state “I have also disclosed whether, and to what extent, the substantive opinions within content of my written report ~~was~~were drafted or changed by any other person.”

- Rule 6, Uniform Local Rules for All State Water Court Divisions, paragraph (d). The Rules Committee proposes adding this paragraph to clarify that the division engineer will file a written report on the consultation with the referee within thirty days of the date the referee initiates consultation. This paragraph further provides that the referee shall initiate consultation promptly after the last day for filing statements of opposition. The State Engineer and the Attorney General note that this provision would require the Division Engineer to prepare a report on the consultation prior to having received the applicant’s engineering and prior to having reviewed information provided by other objectors. The division engineer does not object to preparing a report at such an early stage in the water court proceeding. However, the State Engineer and the Attorney General believe that, in order for the Division Engineer’s report to be useful to the referee and to the applicant, the Division Engineer must have the ability to revise his report based upon the applicant’s engineering and other information provided throughout the course of a Water Court proceeding. The proposed changes to Rule 6 address this concern by including a sentence in paragraph (d) providing that “[t]he division engineer may submit additional written reports upon receipt of new information and shall provide them to the referee and all parties.” The State Engineer and the Attorney General believe it essential that this paragraph include this sentence or a similar sentence authorizing the Division Engineer to revise his initial report.
- Rule 6, Uniform Local Rules for All State Water Court Divisions, paragraph (g). This paragraph provides for an initial status conference within sixty days after the deadline for filing of statements of opposition. This paragraph further authorizes the referee to invite or require the Division Engineer’s participation in this conference. The State Engineer fully supports this and similar procedures which allow the Division Engineer to participate in water court matters without assuming party status. However, the State Engineer and Attorney General request that the Division Engineer be provided formal notice if the Division Engineer is asked to attend this initial status conference. The State Engineer and Attorney General similarly request that the Division Engineer be provided formal notice with respect to any similar proceeding in which the Division Engineer is asked or expected to attend, including proceedings under C.R.S. § 37-92-304(3).

The State Engineer and the Attorney General thank you for the opportunity to submit these written comments and with the submission of these comments do not believe it necessary to participate in the formal hearing on this matter set for December 3, 2008.

Sincerely,

FOR THE ATTORNEY GENERAL



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