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July 27, 2015

The Honorable Peter Wirth
Chair, Water and Natural Resources Committee

The Honorable Candy Spence Ezzell
Vice Chair, Water and Natural Resources Committee

Members of the Water and Natural Resources Committee

Re: Opposition to Proposed Changes to Protestant Standing in Water Rights Hearings

Dear Senator Wirth, Representative Ezzell, and Committee Members:

Thank you for allowing us to present these comments to the Water and Natural Resources Committee concerning the proposed changes to protestant standing in water rights hearings, as previously introduced in Section 3 of SB 665 during the 2015 regular session. Our firm specializes in water law and litigation, and has represented both applicants and protestants in State Engineer permit proceedings for many years. We believe the changes represent a serious step backward in assuring that the people of New Mexico receive fair hearings. Protestants serve an important function, and their participation in the hearing process should not be burdened by unnecessary requirements of proof or limitations on the evidence and arguments they can present.

The proposed changes to Section 72-12-3 NMSA 1978 require that protestants provide evidence of their standing immediately upon protest, limit the ability of protestants to participate in administrative hearings, and allow applicants to request recovery of attorneys fees and costs for frivolous protests. These changes are unnecessary, conflict with other provisions in the Water Code, and are contrary to the public interest.

Summary of Reasons for Opposition

- Current State Engineer regulations already protect applicants who question protestant standing.
- The Water Code provides specifically that *all* parties may present evidence and argument on *all* issues.
- Threatening protestants with payment of an applicant's attorney's fees and costs is unnecessary and merely intended to discourage protests.

Explanation of Reasons for Opposition

State Engineer regulations already provide adequate protections to applicants who question or oppose a protestant's standing. The regulations provide:

Special procedure for standing of protestant upon docketing. The standing of protestants may be challenged by the applicant, WRD, or the hearing examiner at any point once an application has been docketed by the hearings unit. Upon such challenge, the protestant shall be required:

(1) if alleging impairment to the protestant's water right, to provide evidence of a valid existing water right, including but not limited to, the protestant's OSE water right file number(s) or if there is no OSE file number, then a description of the affected water right(s) that specifies the place and purposed of use, amount of water placed to beneficial use, point of diversion and the water source (aquifer or stream) by name, and priority date; or

(2) if alleging conservation or public welfare issues, to provide evidence that the protestant will be substantially and specifically affected by the granting of the application.

See 19.25.2.9(E) NMAC. Thus, if an applicant (or other party) challenges a protestant's standing, the protestant can be required to come forward with proof of standing at that time. This is consistent with other legal proceedings, which aim to discourage "gotcha" litigation and invariably allow for the amendment of pleadings, presentation of evidence, etc. once an issue is raised.

By incorporating the provisions of the State Engineer regulations into law and simultaneously requiring that evidence of standing be included in a protestant's very first filing—the letter of protest—proposed paragraphs E, F and G effect a *major* change in procedure. No longer will protestants—who often have few resources and are typically unrepresented by counsel—be given an opportunity to prove up their standing (a technical legal issue to begin with) once the issue is raised; instead, their standing will be determined solely from their letters of protest, which must be filed quickly and with only a bare minimum of information. (See attached General Protest Procedure.) The very likely consequence will be that many if not most protests will be dismissed and legitimate concerns never heard. Given the protections already provided by the State Engineer's regulations, this change is wholly unnecessary.

Likewise unnecessary are other changes proposed by paragraphs E, F and G: (i) a provision "[t]hat alleged impairment to the protestant's water right cannot also be the basis to claim the protestant is substantially and specifically affected by the granting of the application;" (ii) limiting a protestant's participation to those issues contained in the letter or protest; and (iii) allowing applicants to request recovery of their attorney's fees and costs incurred for frivolous protests. These changes can only be intended to further discourage and limit public participation in the permitting process.

Limiting a party's participation and evidence as proposed is contrary to other statutory provisions governing State Engineer proceedings. Section 72-2-17 of the Water Code provides specifically that in the conduct of State Engineer hearings, "opportunity shall be afforded *all* parties to appear and present evidence and argument *on all issues involved*," and "a party may have and be represented by counsel and may conduct cross-examination required for a *full and true disclosure of the facts*." 72-2-17(B)(1) and (3) (emphasis added). How is it in the public interest to restrict a party, with standing to participate, in the evidence he or she can present or the arguments he or she can make? The law already provides for the exclusion of irrelevant, immaterial or unduly repetitious evidence. 72-2-17(B)(2). Why place the entire burden of investigating and responding to permit applications on the Water Rights Division of the State Engineer's office, which is often under-staffed and typically over-worked? Water Rights staff and attorneys are generally not familiar with local circumstances and concerns, which are better raised by local parties, who are often able to present evidence and arguments not pursued by either applicant or the Water Rights Division. Why exclude such evidence if it is relevant to the issues in the case? Protestants who have standing to participate should be able to participate fully on all issues, and evidence that is relevant and not repetitive should be admitted, regardless of which party offers it.

The proposed limitations on evidence also make no sense given that political subdivisions of the state (for example, an acequia or mutual domestic water consumers association) have automatic standing to protest and participate and cannot be restricted in the evidence or arguments they can present. See 72-12-3(D). Why then is it necessary to restrict other parties based on their standing. In *City of Artesia v. Public Employees Retirement Ass'n*, 2014-NMCA-009, cert. denied, the New Mexico Court of Appeals ruled recently that if one party has standing in a case, the court need not reach the issue of standing of other parties when it makes no difference to the merits of the case. Is that law now to be upended in State Engineer proceedings? Not only will hearing examiners be required to conduct detailed investigations into the individual standing of each protestant, but they will have to apply different standards of admissibility to each party's evidence during the course of the hearing. No trial courts are required to proceed on this basis. Rather than expedite resolution of State Engineer permit proceedings, these changes will only complicate and delay them.

Also unnecessary and punitive is the provision allowing applicants to recover attorney's fees and costs for frivolous protests. Not only is "frivolous protest" not defined, but applicants already have adequate remedies to determine early in the process both the basis of a protestant's standing (19.25.2.9(E) NMAC) and the nature of his or her claims (discovery). If protestants have no standing, or their claims are unfounded, they can be dispensed with as they are in any other litigation, without the added threat of fees and costs awarded to applicants.

In conclusion, the proposed changes are unnecessary, counter-productive, and primarily intended to discourage protestant participation. In the many protested application proceedings in which we have participated, issues of standing rarely arise, and when they do, they are resolved quickly and generally fairly. Evidence is tendered and arguments are made in accordance with the NM rules of civil procedure—hearing examiners have never been reluctant to exercise their authority

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to limit protestants when they considered their evidence or argument irrelevant, repetitive, or otherwise objectionable.

We respectfully urge the Committee to recommend against the proposed changes.

Sincerely,

A handwritten signature in blue ink, appearing to read "Connie Odé". The signature is fluid and cursive, with a prominent flourish at the end.

Connie Odé

General Protest Procedure in State Engineer Administrative Hearings

1. The applicant files an application with the Office of the State Engineer (OSE).
2. The State Engineer requires the applicant to publish a prepared form of notice of the application in a local newspaper once a week for three consecutive weeks.
3. The notice generally provides:
 - The name of the applicant;
 - The type of application filed;
 - A description of the water rights in question (amount, general location, purpose of use); and
 - The manner of and deadline for filing protests.(See sample notice attached.)
4. The deadline for filing protests is within ten (10) days after the date of last publication. This provides the protestant between 10 and 25 days to file a protest.
5. Assuming valid protests are filed, the State Engineer assigns the case to a hearing examiner and the OSE Hearings Unit for an administrative hearing similar to a non-jury trial. The Water Rights Division of the OSE is automatically a party.
6. The hearing examiner then sets a scheduling conference, by which time the applicant and each protestant must pay a \$25.00 hearing fee.

Notice is hereby given that on April 3, 2015 Tanya Leherissey on behalf of Union del Llano MDWCA, P.O. Box 9, Llano, NM 87543, filed Application No. RG-69911, RG-69911-S, and RG-94448 with the OFFICE OF THE STATE ENGINEER for Permit to Combine and Commingle Groundwater rights. The applicant seeks to use well RG-69911 (formerly owned by Cuchilla del Llano MDWUA), located at a point where X=1,815,044 feet and Y=1,864,363 feet, New Mexico State Plane Coordinate System, NAD 1983, Central Zone, also described as within the Llano Santa Barbara Tract, Section 22, Township 21 North, Range 12 East N.M.P.M, and well RG-69911-S (also formerly owned by Cuchilla del Llano MDWUA), located at a point where X=1,815,124 feet and Y=1,864,363 feet, also described as within the Llano Santa Barbara Tract, Section 22, Township 21 North, Range 12 East N.M.P.M, with rights to divert up to 29.41 acre-feet of water per annum (afa), in conjunction with well RG-94448 (declared by Llano de San Juan MDWCA), and located at a point where X=1,808,409 feet and Y=1,870,092 feet, also described as within the Llano Santa Barbara Tract, Section 16, Township 21 North, Range 12 East N.M.P.M, with a declared right to divert up to 36.8 afa. The applicant seeks to combine the described water rights to divert up to 66.21 afa for community water system purposes within the service area of the Union del Llano MDWCA on land owned by various owners in the area, described as 750 acres within Sec. 16 & 21, T21N, R8E. Service area is approximately 2.3 miles long paralleling Llano Road (aka Taos County Rd. 639), beginning approximately .3 miles northwest of intersection with State Road 73 running in a southeasterly direction approximately 2.3 miles, as shown on map accompanying this application. Wells RG-69911 and RG-69911-S are approximately 150 feet south of Upper Llano Road, 3.66 miles Southeast of Penasco. Well RG-94448 is approximately 30 feet North of Upper Llano Road, 2.25 miles Southeast of Penasco. Applicant states the two Associations merged and now seek to combine the water rights and systems to provide safe drinking water to the community. The place and purpose of use of water will remain the same. All points of diversion and places of use in this application are located within Taos County.

Any person, firm or corporation or other entity having standing to file objections or protests shall do so in writing (legible, signed, and include the writer's complete name and mailing address). The objection to the approval of the application must be based on: (1) Impairment; if impairment you must specifically identify your water rights; and/or (2) Public welfare/conservation of water; if public welfare or conservation of water within the state of New Mexico, you must show you will be substantially affected. The written protest must be filed, in triplicate, with Tom Blaine, P.E., State Engineer, Bataan Memorial Building, Room 102, P.O. Box 25102, Santa Fe, NM 87504, within ten (10) days after the date of last publication of this Notice. Facsimiles (fax) will accepted as a valid protest as long as the hard copy is sent within 24-hours of the facsimile. Mailing postmark will be used to validate the 24-hour period. Protest can be faxed to Office of the State Engineer, (505)827-6682. If no valid protest is filed, the State Engineer will evaluate the application in the most timely manner practical based on its potential for impairment to existing waters rights, public welfare, and conservation of water within the state.

NOTE TO PUBLISHER: Immediately after last publication, publisher is requested to file affidavit of such publication with the State Engineer, Bataan Memorial Building, Room 102, P.O. Box 25102, Santa Fe, New Mexico, 87504-5102.