

New Mexico Acequia Association

Presentation to the Water and Natural Resources Legislative Interim Committee

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Standing in Water Right Protests: An Agricultural Perspective

Protests to Water Permit Applications are an Important Part of the Review Process

Water right appropriations and water transfers, or changes in point of diversion, purpose of use, and place of use, are important public policy decisions. Current law recognizes the ability of a person or entity potentially affected by a permit application before the State Engineer to file a protest. Protestants play an important role in advancing the public interest in New Mexico because their participation in the administrative hearing process provides the opportunity for a wide range of issues to be considered.

Determination of Standing in the Administrative Hearing Process is Well-Defined

The current process already considers the whether a protestant has legitimate standing in a permit proceeding. State Engineer regulations already provide protections to applicants who question a protestant's standing. At any point in the hearing process, the applicant or the hearing examiner can challenge a protestant at which point the protest has to produce evidence of a valid water right, and, in the case of conservation or public welfare, evidence about how the application would specifically and substantially affect the protestant.

Administrative Hearings are a Significant Challenge for Many Protestants

Under the current process, a potential protestant has a very limited window in which to respond to a permit application before the State Engineer. Notice consists of a fine-print, brief, and highly technical description in the legal section of a newspaper of general circulation. If someone has an interest in the application, he or she would face a significant time constraint in meeting the protest deadline. Generally, an individual protestant would have limited access to legal and technical resources and the only way for a protestant to safeguard their right to raise concerns is to prepare a letter of protest and submit it to the State Engineer by the specified deadline. If a protestant manages to meet the deadline, once the case is docketed, that protestant has a very rigorous schedule to follow that includes deadlines for exhibits and a challenging process that includes cross examination. The administrative hearing process requires diligence and access to resources for a protestant to mount an effective case. This is a significant challenge for many protestants, many of whom have limited financial resources.

SB 665 proposes a major change in the procedure of filing a protest to a permit application

- Requires that a protestant provide evidence of standing immediately and "up front" in the protest.
- Limits the participation of a protestant to those issues identified in the letter of protest.
- Allows the applicant to recover attorney's fees and costs for "frivolous" protests.

A new requirement for protestants to provide evidence in their letter of protest is not practical for many individuals who are potentially affected. There are already several obstacles for protestants that would be exacerbated by any changes in how standing is determined. First, the legal deadlines for published notice and timely submission of a letter of protest do not allow adequate time for a protestant to assemble the required legal and technical resources to compile evidence in support of their protest.

Also, from a practical standpoint, the nature and extent of an application is information that is presented during the administrative hearing process so the protestant may not know “up front” the full extent of the potential negative impact in terms of impairment, conservation, or public welfare. Only through the proceedings would more complete information about both the application and the protest be revealed. While the intent of proposed changes in SB 665 is intended to limit protests to those with valid “standing,” the outcome would be that some valid and legitimate protests could be dismissed because of their inability to meet the more rigorous procedural requirements.

An unintended consequence of the proposed statutory changes in SB 665 would be that it would shift the burden of proof for protests based on conservation of water and public welfare away from the applicant to the protestant. As a practical matter, much of the information relevant about the application that would determine how the protestant would be affected would be presented during the administrative hearing process. By requiring the protestant to articulate specifically and substantially the nature of the impact of the application in the initial letter of protest, the proposed changes from SB 665 would create a significant and new burden on protestants. This would have the ultimate effect of discouraging individuals and entities from filing legitimate protests.

Lastly, the proposed language would allow the applicant to recover attorney’s fees and costs from the protestants if there is a determination that the protest was “frivolous,” which is a subjective term. This would have a chilling effect on the public participation that is embedded in the laws of New Mexico. One concern from a protestant perspective is that an applicant may motion to dismiss a protest as frivolous before the facts of the case have been heard thoroughly by the hearing examiner.

In conclusion, the proposed changes from SB 665 that affect the procedure for determining standing in a protest to a permit application would have negative impacts on potential protestants. The State Legislature should consider the unintended consequences of limiting participation in the protests with a requirement of producing evidence of standing. Such a change in policy may exclude legitimate protests and could disenfranchise individuals or entities with limited resources from raising valid concerns about a permit application.

- The existing protest process is already difficult for persons and entities, including farmers, ranchers, acequias, and other agricultural entities that represent senior water right holders. The process requires adherence to strict deadlines and access to legal counsel and financial resources.
- There is no need to make the current process more burdensome. Both the applicant and the hearing examiner have the tools needed to challenge the standing of a protestant through the administrative hearing process.
- If the legislature wants to uphold the public policy goal of providing a fair and balanced process for water permit applications that protects the due process protections of protestants while also providing an efficient process for applicants, a policy objective to consider would be to increase the number of hearing examiners in the Office of the State Engineer to process applications in a timely manner.