



June 26, 2020

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES
DIVISION OF WATER RESOURCES
901 South Stewart Street, Suite 2002
Carson City, Nevada 89701-5250

Re: Comments on Proposed Amendment to and Adoption of NAC 533 Regulations

To Whom It May Concern:

Thank you for providing this opportunity to comment on the Nevada Division of Water Resources' ("NDWR's") proposed amendment to NAC 533 regulations governing practice and procedure before the State Engineer, and adoption of NAC 533 regulations pursuant to AB 62 relating to extensions of time to file a proof of construction of works and proof of beneficial use.¹ These comments are submitted by the Central Nevada Regional Water Authority ("CNRWA"). CNRWA is a nine-county unit of local government that collaboratively and proactively addresses water resource issues common to all member Counties (Churchill, Elko, Esmeralda, Eureka, Humboldt, Lander, Nye, Pershing and White Pine), and whose mission is to protect the water resources in member counties so these counties will not only have an economic future, but their valued quality of life and natural environment is maintained. Accordingly, CNRWA has a substantial interest in the proposed revisions to NAC 533.

Let us begin by expressing our concern with DWR's rulemaking process for the proposed amendment to and adoption of NAC 533 Regulations. We recognize that due to COVID-19 restrictions the Division of Water Resources was forced to make adjustments in order to comply with the requirements of NRS 233B (Nevada Administrative Procedure Act). However, given the complexities and significant impacts of the proposed regulations as well as the large number of public comments provided prior to and during the public workshop held on June 24th CNRWA believes that additional stakeholder engagement is warranted even if the delay results in the adoption of temporary regulations. CNRWA further suggests that the Division focus its attention on adopting regulations pursuant to Assembly Bill 62 relating to applications for extensions of time to file a proof of construction of works and proof of beneficial use and address regulations governing procedures for hearings before the

¹ We have reviewed but do not offer comments on the proposed regulations concerning water right surveyor licenses, as this is a matter of professional licensing that is not within the scope of our present concerns.

Nevada Division of Water Resources and State Engineer and regulations for the licensing of Nevada Licensed Water Right Surveyors at a later date.

The following are our Section-By-Section Comments on the Proposed Amendments and Additions to NAC Chapter 533. CNRWA defers to individual counties that have provided county-specific information or positions that may be in conflict with CNRWA's position:

DEFINITIONS:

Sec. 3 "Beneficial Use" defined

If DWR believes additional clarity is needed in the already statutory definitions of "beneficial use" DWR should seek that clarity through the Legislature and not regulation. The definition of beneficial in NRS 533.035 is sufficient and NRS 533.045 and NRS 533.070 also add to the existing requirements contained in NRS 533.035 to define beneficial use.

Sec. 4 "Claimant" defined²

CNRWA, as a nine-county unit of local government, and each of its member counties has the explicit authority to represent the public interest of their citizens. We disagree that only a claimant may file an objection. We argue it is impossible for the State Engineer to consider the public interest if local governments explicitly representing the public interests are not able to object. Local plans and policies must be given a voice, through allowing local governments as objectors, in water appropriations and adjudications.

Sec. 6 "Interested Party" defined.

The language of this definition lacks any explanation for its scope within State Engineer and DWR proceedings, or the context in which it is intended to apply. As a result, this definition raises the potential for confusion with the existing "interested person" standard for filing protests to water rights applications under NRS 533.365. This definition of "interested party" is significantly more restrictive than the "interested person" language in NRS 533.365, and there is no reason to narrow the concerned public's ability to protest applications for new water rights or to change existing water rights. This definition should be refined to specify the types of proceedings in which the "interested party" standard is intended to apply. In addition to distinguishing NRS 533.365, it should be made clear that this new standard has no bearing on the right of "any person feeling aggrieved" to seek judicial review under NRS 533.450.

Further, use of the term "protectable interest" here is confusing as that term is only used in the statutes in relation to domestic wells.

² This same comment applies to other sections including Sections 7 and 8 where those respective definitions link back to the terms "claimant, objector, or interested party" and to Sections 53 – 55 where "there is no provision for intervention of interested parties to respond to an objection."

Sec. 22 “Supplemental irrigation” defined.

The language of this definition should be modified to make it clear that the total diversion or use of water under the supplemental water right and base right together may not exceed the amount of the base right in any given year (i.e., a total combined duty).

PRACTICE AND PROCEDURES IN PROTEST HEARINGS BEFORE STATE ENGINEER:

RULES OF GENERAL APPLICABILITY FOR PARTIES AND COMMENTERS:

Sec. 29 Discretionary Intervention.

This section represents a constructive attempt to address the need to provide for circumstances in which a person or group of people may not have obtained standing by filing protests but has a cognizable interest in the water right application which would make it more equitable and appropriate to allow their participation in the proceedings on that water right application. However, the use of the newly defined “interested party” definition in this section appears to be significantly more restrictive than either the “interest person” standard for protests under NRS 533.365 or the “person feeling aggrieved” standard for appeals under NRS 533.450. Using the existing “interested person” standard from NRS 533.365 would be more consistent with legislative intent to allow broad public participation in such proceedings that is reflected in both those existing statutory provisions.

Sec. 30 NAC 533.142 Motions: Procedure; contents; responses; replies (NRS 532.120, 533.365).

The revision of the existing regulation to shorten the time for motions, responses, and replies is ill-advised. Under the proposed new time frame, motions may be filed so close to the start of a hearing that replies on those motions will be due and likely will be filed on the very date that has been set for the start of the hearing. That would not provide the State Engineer with adequate time to consider the briefing and rule on the motion before the commencement of the hearing, and it would not provide the parties with an adequate opportunity to adjust their evidentiary presentations should that be necessary in the wake of the State Engineer’s ruling on the motion. Motions made shortly before hearings commence often raise issues that may result in rulings that significantly alter the scope of witness testimony and other evidence that may be required or allowed in the hearing. Shortening the time frame for the filing of motions, responses, and replies so that there will not be any advance time to adjust to State Engineer rulings on such issues could put the parties, and potentially the State Engineer’s office, in the position of having to incur unnecessary expense and inconvenience that would be avoided simply by retaining a time frame that ensures all filings on motions are filed at least a week in advance of the date set for the hearing.

Sec. 32 NAC 533.144 Pleadings or other documents: Date on which considered filed; unacceptable methods of filing.

Given the increasing prevalence of electronic filing and service throughout federal and state court and administrative systems, it is unclear why the State Engineer will not accept electronic filing of pleadings or other documents, so long as adequate proof of service on opposing parties is made by the filing party. Electronic filing also has the potential to save both the parties and the State Engineer's office considerable expense associated with the existing physical filing requirement. Accordingly, we encourage the DWR and State Engineer to consider revising this regulation to allow for electronic filing.

HEARINGS:

Sec. 25 NAC 533.170 Prehearing conferences and Sec. 26 NAC 533.180 Hearings: Objective.

These sections refer to "the hearing or public meeting" as if the two types of proceedings were interchangeable in the context of protested water rights applications. Also, here, and throughout in other sections (such as Section 27) there is a confusing mix of use of the term "public hearing" and "public meeting." The difference, if any, should be clarified. It is unclear, and potentially confusing, when a public meeting might be considered an adequate substitute for a hearing with sworn testimony, the introduction of additional evidence, argument by the applicant and protestant(s), and an opportunity for public comment (such as a protested application hearing versus a hearing on a designation of a basin as a Critical Management Area). Without some standards for or explanation of when a public meeting (or public hearing) would be considered a sufficient form of proceeding, there appears to be some risk of failing to provide adequate due process to the parties in a proceeding on a protested water right application. Therefore, this section should be revised to provide clarification as to the circumstances in which the State Engineer might hold a public meeting in lieu of a hearing on a protested water right application.

Sec. 29³ NAC 533.210 Hearings: Permissible issues. (NRS 532.120, 533.365).

This section should be modified to include the applicant's answer to a protest, along with the application and the protest, as basis for determining what issues will be considered during a hearing.

Secs. 36-38, 40-43, and 45 (NAC 533.265, 533.280, 533.290, 533.310, 533.320, 533.330, 533.340, and 533.360).

It is unclear why the word "participant" or "participants" is being substituted for "party" or "parties" in these sections governing various procedural aspects of protest hearings, or what the definition of "participant(s)" is in the context of such hearings. In at least the first

³ The numbering is out of sequence and there are duplicate Sections 29, among others.

instance of this change, and perhaps in every section where the change from “party” or “parties” to “participant” or “participants” is made, there should be some explanation provided regarding the reason for the change and the significance or effect of the change.

ADDITIONAL PROCEDURES FOR PROTESTED APPLICATIONS:

Sec. 46 Pleadings: Forms for filing protest.

For the benefit and convenience of the public, this section should state that the form for filing a protest will be posted and available for download on the DWR website. This already appears to be the case, but we believe that it would be helpful to let the interested public know expressly in this section.

ADDITIONAL PROCEDURES FOR PETITIONS FOR REVIEW OF CANCELLED PERMITS:

Sec. 51 Standing.

This section should be modified to provide standing for protestants to the original water right application, as well as the petitioner, without having to make the showing required of would-be intervenors under Section 29 (Discretionary Intervention).

EXTENSIONS OF TIME TO PLACE WATER TO BENEFICIAL USE:

Sec. 57 Criteria for review and approval or denial of an application for extension of time to perfect an appropriation:

Consideration should include a recognition of the need for rural governments to protect local water resources to ensure adequate local water supply and resiliency in the face of future growth and drought conditions as well as the likely inability of rural governments and small community water systems to rely on water outside of their locally available supplies. Moreover, Senate Bill 150 enacted in 2019 Legislative Session requires all counties and cities to prepare water resource plans which include the identification of water resources for current and future demand. These plans are intended to be reviewed by the Division of Water Resources and should be referenced as a basis for considering the granting of extensions in the proposed regulations.

Sec. 58 Protests and Hearings on an Application for Extension of Time.

This new protest and hearing process would prove to be a burden on CNRWA member counties’ efforts to have long-term planning and securing of water for community needs decades into the future. CNRWA recognizes a problematic history of excessive extensions of time having been applied for and granted, which negatively affects both other water rights applicants’ efforts to put water from the same source to beneficial use and the public’s right to ensure that the water resources of the state are being managed to effectively protect the

public interest. Given the fact that abuses of the extension process already have resulted in decades of delay in placing water to beneficial use and in harm to other would-be beneficial users of water and the public interest, it is appropriate to limit serial applications moving forward. However, with the proposed clarification on “significant actions” above (with the changes we suggest), the State Engineer will be able to apply an equal hand in considering applications for extensions of time effectively curing, moving forward, the past abuses of this process.

CONCLUSION:

Thank you for considering Central Nevada Regional Water Authority’s comments regarding the proposed additions to and revisions of NAC 533. Please contact me at ccjfontaine@gmail.com or 775-443-7667 if you would like to discuss CNRWA’s comments.

Sincerely,

A handwritten signature in cursive script that reads "Jeff Fontaine".

Jeff Fontaine

Executive Director

Central Nevada Regional Water Authority