

BEFORE THE NEW MEXICO OIL CONSERVATION DIVISION

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APPLICATION OF LOS LOBOS RENEWABLE
POWER, LLC TO PLACE GEOTHERMAL WELLS
LDG-55-7 AND LDG 53-7 ON INJECTION IN
SECTION 7, TOWNSHIP 25 SOUTH, RANGE 19
WEST, NMPM, HIDALGO COUNTY, NEW MEXICO

Case No. 14948

(Alternatively Captioned: APPLICATION OF LOS LOBOS
RENEWABLE POWER, LLC (FORMS G-112) FOR
APPROVAL TO INJECT INTO A GEOTHERMAL
AQUIFER THROUGH TWO PROPOSED GEOTHERMAL
INJECTION WELLS AT THE SITE OF THE PROPOSED
LIGHTNING DOCK GEOTHERMAL POWER PLANT,
HIDALGO COUNTY, NEW MEXICO.)

LOS LOBOS' OPPOSITION TO CONTINUANCE

Los Lobos Renewable Power, LLC ("Los Lobos"), by and through its attorney Michelle Henrie, LLC, respectfully asks the Oil Conservation Division (OCD) Hearing Examiner to deny protestant AmeriCulture, Inc.'s (AmeriCulture's) request for a continuance of the protest hearing to a date uncertain.

BACKGROUND

On or about December 13, 2012, Los Lobos submitted Form G-112 packages seeking approval to inject native geothermal water into the geothermal reservoir via two existing wells: LDG 55-7 and LDG 53-7. AmeriCulture sent a protest letter dated December 26, 2012. It also sent an email dated January 10, 2013. In these communications, AmeriCulture alleges two things. First, that the water chemistry from the production well (LDG 45-7) will be different than the natural water chemistry at the injection wells. Second, that well LDG 55-7 (a proposed injection well) is hydraulically connected to AmeriCulture's production well, SW #1.

The Notice of Hearing issued January 4, 2013 indicates that the "This hearing is being conducted pursuant to the Geothermal Resources Conservation Act, NMSA 1978 Sections 71-5-1 through 71-5-24, as amended, and Rules set forth in 19.14 NMAC, especially 19.14.93.8

NMAC, concerning permitting of geothermal injection and disposal wells.” The Notice further states that “issues to be addressed concern whether the proposed injection will contaminate any underground source of drinking water or otherwise cause waters of the State of New Mexico to exceed applicable water quality standards, and whether such injection will cause waste of geothermal resources or impair correlative rights of geothermal users, as defined in 19.14. 1.7.C NMAC.”

The matter was originally set for the January 24, 2013 Examiner Hearing. On January 16, 2013, due to the unavailability of Los Lobos’ hydrogeological expert, John Shomaker, Ph.D., Los Lobos requested and AmeriCulture agreed to a continuance. Mr. Seawright wrote: “A February 7th date will probably work for AmeriCulture, though AmeriCulture must yet confirm the availability of our counsel for that date. We concur with the postponement of the hearing to February 7th, with the understanding that our counsel’s availability on the 7th is still undetermined. Nonetheless, we will endeavor to keep the February 7th date.” Bear in mind that AmeriCulture already had three weeks since it submitted its protest to secure counsel. Also note that as of January 16th, AmeriCulture knew that it may need to secure alternate counsel if it intended to proceed with the February 7th hearing date.

Two weeks later, on January 30, 2013, AmeriCulture notified Los Lobos and OCD that it had finally heard from its “intended counsel,” who apparently took several weeks to check her or his calendar and discover that s/he “will not be able to represent AmeriCulture on February 7th, or on any alternative docket dates in the near future.” Mr. Seawright wrote: “Consequently, AmeriCulture must secure alternative counsel prior to the hearing. We have made contact with our preferred alternate counsel, who should be able [to] confirm their availability by next week.”

AmeriCulture filed its protest on December 26th 2012. It is now more than a month later before AmeriCulture contacted “alternate counsel”.

AmeriCulture admits that “alternative counsel should be able to become familiar with the case in fairly short order.” It also admits that Mr. Seawright “represented” AmeriCulture at the 2008/2009 hearing on the same issues. Mr. Seawright also “represented” AmeriCulture at the OCD-initiated settlement conference on January 18, 2013.

ARGUMENT

In New Mexico, appellate courts review motions for continuance for abuse of discretion and based on the facts made known to the trial court at the time of the motion. Rubin v. Rubin, 120 N.M. 592, 904 P.2d 41 (N.M.App.,1995.). A denial of a continuance that is within the trial court's discretion does not deprive a litigant of due process. Yadon v. Quinoco Petroleum, Inc., 114 N.M. 808, 845 P.2d 1262, (Ct.App.1992), cert. denied, 114 N.M. 720, 845 P.2d 814 (1993). A continuance requested at the last-minute need not be granted. Lopez v. City of Albuquerque, 118 N.M. 682, 884 P.2d 838 (Ct.App.), cert. denied, 118 N.M. 533, 882 P.2d 1046 (1994).

- 1. The general rule in New Mexico is that continuances are granted for "good cause" at the discretion of the trier of fact. Trial Handbook for New Mexico Lawyers § 3:1 (Continuances, generally); 17 Am. Jur. 2d Continuance § 6 (Generally). AmeriCulture has so far failed to provide any facts to establish “good cause” for its motion. Absent evidence of “good cause,” AmeriCulture’s request for a continuance must be denied.**

AmeriCulture’s failure to timely secure counsel is not “good cause.” To date, AmeriCulture has given no good reason why it took over a month for its “intended counsel” to look at the calendar.

Further, AmeriCulture gives no reason why “intended counsel” is unavailable. One might speculate (because one would have to) that “intended counsel” has scheduling conflicts with court appearances. However, attendance of counsel on another court does not give an

automatic or absolute right to a continuance. 17 C.J.S. Continuances § 53 (Absence or disability of counsel—Caused by attendance on another court). The rights of litigants in one court are not to be determined by the condition of the docket in another. Id.

AmeriCulture also gives no reason why “intended counsel’s” firm colleagues could not handle the case. See, e.g., Rehabilitation Facility at Austin, Inc. v. Cooper, 962 S.W.2d 151 (Tex. App., Austin 1998) (continuance denied where attorney from the same law firm as lead counsel available to handle the case). If, as Mr. Seawright states, “alternative counsel should be able to become familiar with the case in fairly short order,” so too, one would expect “intended counsel’s” firm colleagues should be able to become familiar with the case in fairly short order. Los Lobos would like to know why “intended counsel’s” firm colleagues neglected to start preparing for the hearing weeks ago.

AmeriCulture’s failure to timely hire counsel is similar to the situation where counsel withdraws prior to trial. It is “well settled that the mere fact that an attorney in a civil case withdraws from the cause or is discharged therefrom does not give the party an absolute right of continuance.” 48 A.L.R.2d 1155, § 2 (Withdrawal or discharge of counsel in civil case as ground for continuance); see also Wyrsh v. Milke, 92 N.M. 217, 585 P.2d 1098 (Ct. App. 1978) (denial of motion for continuance); Texas, S. F. & N. R. Co. v Saxton, 7 N.M. 302, 34 P. 532 (1893) (denial of motion for continuance). When the ground for a continuance is the withdrawal of counsel, one of the considerations is whether the movant shows that the failure to be represented at trial was not due to its own fault or negligence. See, e.g., In re J.P., 365 S.W.3d 833 (Tex. App. Dallas 2012). This is an important consideration, and should be addressed by the Hearing Examiner in the case at bar. As stated in Miller v Grier S. Johnson, Inc., 191 Va. 768, 62 S.E.2d 870 (1951), “Mere failure of a litigant to employ counsel until just prior to the date set

for trial is not a ground for continuance. Neither is withdrawal or discharge of counsel under the same circumstances. If such were the rule a litigant could indefinitely avoid trial by changing counsel."

To date, AmeriCulture has presented no affidavits, no evidence, no showing whatsoever establishing what efforts, if any, it has taken to hire an attorney during the month that has elapsed between filing the protest and now. In a motion for a continuance due to the absence of a party, a supporting affidavit "should state sufficient facts showing the reason for the absence and the necessity of the party's presence, and, if the party is a necessary witness, the material facts to be proved; the use of diligence should also be set out." 17 C.J.S. Continuances § 109 (Statement of grounds—Absence or disability of party). Similarly, in a motion for a continuance due to the absence of a witnesses or evidence, a supporting affidavit "must, by express allegations, and a statement of facts, show that diligence has been used to procure the absent testimony or give sufficient excuse for want of the diligence which the law requires." 17 C.J.S. Continuances § 111 (Statement of grounds—Absence of witnesses or evidence). Facts showing due diligence are important because "[l]ack of due diligence in proceeding with the cause is a decisive factor in determining the propriety of the trial court's exercise of its discretion." El Paso Elec. v. Real Estate Mart, Inc., 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982).

So too, Los Lobos believes that AmeriCulture's motion for a continuance, on the grounds of absence of an attorney, must be supported by evidence and detailed facts, and must show (if it can be shown) that AmeriCulture has been diligent in procuring an attorney. This evidence is important, because New Mexico recognizes that counter affidavits and oral evidence are admissible in opposition to a motion and affidavit for a continuance. Askew v. Rice, 48 N.M.

146, 146 P.2d 865 (1944). At this point in time, counter evidence is impossible because AmeriCulture has wholly failed to provide any facts to establish “good cause” for its motion.

Absent evidence of “good cause,” AmeriCulture’s request for a continuance must be denied.

2. **Continuances are not favored because courts must guard against unreasonable delay. El Paso Elec. v. Real Estate Mart, Inc., 98 N.M. 490, 650 P.2d 12 (Ct. App. 1982). Courts should be wary of granting continuances that may prejudice opposing parties who are ready for trial. Id. See also Adamek v. Plano Manufacturing Co., 64 Minn. 304, 66 N.W. 981 (a continuance due to the absence of counsel may be denied if the requested delay would work a hardship on the opposing party) (1896). Los Lobos is ready and willing to proceed, and will be prejudiced by further delay.**

Los Lobos is developing a utility-scale geothermal power facility to provide base-load renewable electricity to Public Service Company of New Mexico (PNM). Los Lobos is contractually bound to PNM to build its plant and deliver electricity in 2014. PNM needs Los Lobos’ geothermal power to meet the “other” quota of its renewables portfolio, and this source of electricity has been specifically approved by the NM Public Regulation Commission (Case No. 12-000131-UT, Order dated December 11, 2012). Furthermore, the federal program in which Los Lobos participates, the Section 1603 Program of the American Recovery and Reinvestment Act, requires Los Lobos to build its plant and deliver electricity before 2014. If Los Lobos cannot deliver electricity before 2014, Los Lobos’ contract with PNM is in jeopardy and Los Lobos loses the Section 1603 incentives that have allow this project to stay financially viable.

Los Lobos has already conceded it will need to develop the project in phases and has scaled back its Phase 1 plant from 15 MWh (which would require drilling more wells) to 5-10 MWh (using existing wells) to meet these timeframes. The upcoming test that would be authorized by the protested G-112 forms is a necessary threshold. Without this test, Los Lobos

cannot engineer and size the geothermal power plant. With each passing day, it becomes less likely that Los Lobos will be able to build the power plant and transmission prior to the December 31, 2013 deadline. If Los Lobos comes to a point where it cannot complete these tasks on time, it will likely stop the project and not spend any more money in New Mexico—a loss of jobs in Hidalgo County¹ and a loss of revenues (royalties) that BLM shares with the State (50%) and with Hidalgo County (25%).

Los Lobos has previously raised its concerns over OCD's decision to refer this matter to a hearing. Los Lobos finds nothing in the geothermal regulations that say OCD "shall" (or even "may") schedule a hearing if a protest is filed. To the contrary, under the applicable geothermal regulations, "the application will be set for public hearing, *if the applicant so requests.*"

19.14.93.8(C) NMAC. Los Lobos did not request a hearing. Los Lobos has serious concerns about the delay caused by the hearing track and possible appeals. Los Lobos cannot afford to lose any more time if this geothermal power facility is going to be built.

AmeriCulture is well aware of Los Lobos' critical path and the disastrous effect of delay. The OCD-initiated settlement conference established that AmeriCulture's "protest" is nothing more than an attempt to reopen the 2008/2009 Hearing (which AmeriCulture did not appeal) and to force reconsideration of decided issues, rejected claims, theories and unsupported "evidence." AmeriCulture also admitted at the settlement conference that it intends to build its own personal-use geothermal power plant. This seems to be the real situation fueling AmeriCulture's continued opposition to Los Lobos' project since 2008. It appears to Los Lobos that

¹ Meghan Starbuck Downs, Ph.D., concluded that plant construction would generate a total impact of 1,151 jobs for the state, and a total increase in Gross State Product (Value Added) of \$65.5 million.

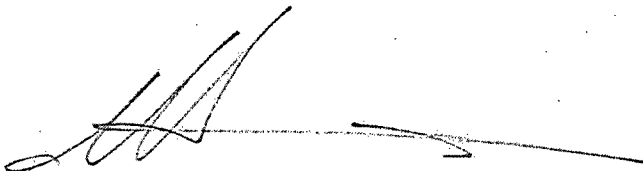
AmeriCulture is misusing agency processes to improperly gain a business advantage over a perceived competitor and delay the proposed testing.

Los Lobos will be prejudiced by continued delay. Los Lobos is facing a serious deadline. This deadline is outside of Los Lobos' control. By December 31, 2013, Los Lobos must build its power plant and transmission lines, and actually deliver geothermal energy to New Mexico's grid. Los Lobos needs to get to work. This proceeding is the only thing that has caused work to stop, and legal and procedural precedence don't support even conducting it. Los Lobos is ready and willing to continue testing and construction now, and will be severely prejudiced by any further delay.

CONCLUSION

For the foregoing reasons, Los Lobos respectfully asks the Hearing Examiner to deny AmeriCulture's request for a continuance.

Respectfully Submitted,
MICHELLE HENRIE, LLC

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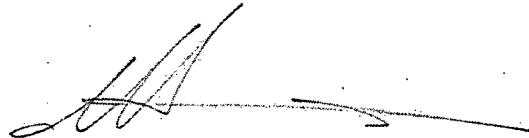
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Pre-Hearing Statement was e-mailed and mailed first-class, postage pre-paid, to the following on February 4th, 2013:

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Dated this 4th day of February, 2013.

A handwritten signature in black ink, appearing to read 'Michelle Henrie', with a long horizontal line extending to the right.

Michelle Henrie