

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

LOS LOBOS' OPPOSITION TO FURTHER 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) second request for a continuance.

ARGUMENT

1. A continuance should not be granted when the party requesting the continuance is responsible for the reasons for the need for the continuance.

AmeriCulture sent its protest letter on December 26, 2012. As of December 26, 2012, AmeriCulture knew or should have known that it needed counsel. A hearing was set on January 4, 2013. If AmeriCulture did not already know that it needed counsel, there was no question after January 4, 2013 because, as AmeriCulture has argued: "in the absence of counsel, Petitioner [AmeriCulture] would have to be represented by its expert witness, AmeriCulture President Damon Seawright, thereby arguably calling into question important expert testimony by said expert witness." *1st Motion for Continuance at p. 1.*

According to representations made by AmeriCulture via email and its first Motion for Continuance, despite knowing that it needed counsel, and knowing as soon as January 16, 2013 that its "intended counsel" may be unavailable, AmeriCulture delayed contacting "alternate counsel" until January 30, 2013. *Email of January 30, 2013, 2:29 PM, and 1st Motion for Continuance at p. 1.* In its Motion, AmeriCulture represented that "Despite willingness of

alternative counsel to represent Petitioner, counsel has not verified ability to represent Petitioner. Said verification is anticipated shortly.” *1st Motion for Continuance at p. 1*. Yet for reasons that have not been explained nor justified, “alternate counsel” waited twelve more days to become engaged. Even though the parties have known since February 5, 2013 that this matter would be heard on February 21, 2013, AmeriCulture’s counsel waited yet another week to enter his appearance. Having neither pled nor proven any facts supporting the delay, which appears to have been solely in the hands of AmeriCulture and its counsel, the Hearing Examiners have no credible basis to believe that “[u]ndersigned counsel does not have adequate time to sufficiently prepare for participation in the currently scheduled February 21, 2013 hearing.” *2d Motion for Continuance at p. 1*. This request is nothing more than another delay tactic in AmeriCulture’s relentless quest to kill the Los Lobos project.

2. A continuance should not be granted when the request is nothing more than a delay tactic.

By email dated of January 30, 2013, 2:29 PM, AmeriCulture represented that “Based on our initial discussion, our preferred alternative counsel should be able to become familiar with the case in fairly short order.” This conclusion is reasonable, given that AmeriCulture’s new counsel, Charles N. Lakins, represented Rosette, Inc., in litigation involving the Lightning Dock geothermal resource. Rosette, Inc. v U.S. Dept. of the Interior, 2007-NMCA-136, 142 N.M. 717, 169 P.3d 704. Clearly, in comparison any other attorney who could handle this representation, Mr. Lakins’ familiarity with the facts is relatively very high.

Further, in the Rosette case, AmeriCulture’s neighbor lost its “push the envelope” arguments (<http://www.lakinslawfirm.com/reported%20opinions.htm>), but did get one concession from the Court of Appeals. In Section D of the opinion, ¶¶ 59-69, the Court of Appeals undertook an extensive analysis of the New Mexico geothermal statutes and regulations

and determined that when geothermal use described in 71-5-2.1 NMSA 1978 involves State Lands, the State Land Office may not receive royalties for such a use. *Id.*, ¶¶62-63. Certainly Rosette's attorney (Mr. Lakins) would have briefed this issue, which benefitted Rosette. Clearly, in comparison any other attorney who could handle this representation, Mr. Lakins' familiarity with geothermal statutes and regulations is relatively very high.

There is a third reason that AmeriCulture would represent that "our preferred alternative counsel should be able to become familiar with the case in fairly short order." This reason is well stated in the Committee Commentary to Rule 16-103 NMRA of the Rules of Professional Conduct, Comment 1: "A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion...." Mr. Lakins was well aware of the February 21, 2013 hearing date when he accepted AmeriCulture's case, as evidenced by the simultaneous filing of his entry of appearance and the motion to continue.

Despite having made the above representation, a few days later, on February 4, 2013, AmeriCulture changed its position entirely and argued that "The case is complex and once Petitioner secures substitute counsel, counsel will require additional time to prepare for the hearing and otherwise develop other necessary components to effectively represent Petitioner."

1st Motion for Continuance at p. 1. This reversal is evidence that the continuation request is nothing more than a delay tactic.

- 3. AmeriCulture's Motion to Continue to March 7, 2013, already has been considered by the Division. This request was answered by Order No. R-13675 ordering that the matter be heard on February 21, 2013.**

Despite taking a second bite at the apple, AmeriCulture provides nothing material in addition to what it has already argued. Los Lobos stated its position clearly in the Objection to Continuance brief filed February 4, 2013. With citations to authority, Los Lobos argued:

- A. AmeriCulture's failure to timely secure counsel is not "good cause." It has failed to adequately explain weeks of delay before contacting "alternate counsel" and another twelve days before "alternate counsel" would engage. 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."
- B. A proper motion for a continuance should include a supporting affidavit evidencing facts showing due diligence. "Lack 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). This evidence is important, because New Mexico recognizes that counter evidence is admissible to opposition 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.

AmeriCulture addressed none of Los Lobos' arguments. It has made no effort to show good cause. AmeriCulture's second motion to continue is not any different than its first. The Division has already denied AmeriCulture's request to continue the hearing to March 7, 2013.

4. 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 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

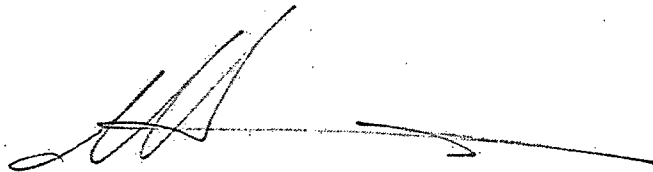
¹ Meghan Starbuck Downs, Ph.D., concluded that plant construction would generate a total impact of 1,151 jobs for the state, and a total increase in Gross State Product (Value Added) of \$65.5 million.

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 second request for a continuance to March 7, 2013.

Respectfully Submitted,
MICHELLE HENRIE, LLC

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

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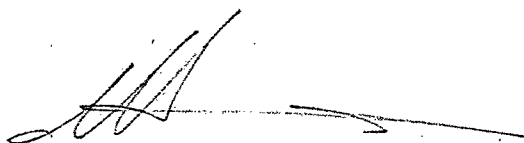
CERTIFICATE OF SERVICE

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 12th, 2013:

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Dated this 12th day of February, 2013.

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

Michelle Henrie