

**REVISED PROPOSED REGULATION OF
THE STATE ENGINEER**

LCB File No. R129-08

October 29, 2008

EXPLANATION – Matter in *italics* is new; matter in brackets ~~[omitted material]~~ is material to be omitted.

AUTHORITY: §§1-29, NRS 532.120 and 533.365.

A REGULATION relating to water; revising certain provisions governing hearings to consider protests before the State Engineer; and providing other matters properly relating thereto.

Section 1. Chapter 533 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 7, inclusive, of this regulation.

Sec. 2. 1. *A party requesting an order by the State Engineer concerning a matter subject to a protest hearing must style the request as a “motion” and:*

(a) If made during a hearing, submit the motion:

(1) In writing; or

(2) Orally, within the time specified by the State Engineer; or

(b) If it is not made during a hearing, submit the motion in writing.

2. Each motion must include a citation to any authority upon which the motion relies.

3. Each written motion must be filed with the Office of the State Engineer and served upon all parties of record.

4. The State Engineer may direct that any motion made at a hearing must be reduced to writing and filed and served in accordance with this section and section 3 of this regulation.

5. *A written motion, other than one made during a hearing, must be served not later than 14 days before the date set for hearing, unless a different time is specified by the State Engineer.*

6. *Any party against whom a motion is directed may file a response to the motion. The response must be in writing, unless the motion was made orally during the hearing.*

7. *A response to a written motion must be filed with the Office of the State Engineer not later than 5 business days after receipt of service of the motion.*

8. *The party presenting the motion may file a written reply to the response, which must be served on all parties not later than 5 business days after receipt of service of the response.*

9. *Two copies of any motion, response or reply must be timely filed with the Office of the State Engineer.*

Sec. 3. *Any pleading or other document filed in a protest hearing must be served by regular mail on each party or his attorney or other agent on the date the pleading or document is filed with the Office of the State Engineer. Service of the pleading or document:*

1. *Shall be deemed complete on the date of mailing.*

2. *Upon the attorney or agent shall be deemed service upon the party.*

Sec. 4. *Any pleading or other document required to be filed with the Office of the State Engineer shall be considered filed on the date the signed original of the pleading or document is actually received in the Office of the State Engineer. The State Engineer will not accept for filing any such pleading or document that is submitted electronically or by facsimile machine.*

Sec. 5. *The State Engineer may allow a pleading to be amended or corrected. Except as otherwise provided by a specific statute, the State Engineer may disregard any defect or error in a pleading which does not affect any substantial right of a party.*

Sec. 6. *If the State Engineer authorizes rebuttal evidence, the party may offer in its rebuttal only rebuttal evidence that directly explains, counteracts or disproves facts offered into evidence by other parties of record.*

Sec. 7. *Petitions for reconsideration or rehearing will not be accepted. A person may appeal a decision of the State Engineer pursuant to NRS 533.450.*

Sec. 8. NAC 533.010 is hereby amended to read as follows:

533.010 1. The provisions of this chapter:

(a) Govern the practice and procedure of hearings before the State Engineer on protests against applications to appropriate water or to change the place of diversion, manner of use or place of use of an existing water right under NRS 533.365.

(b) ~~{Must}~~ **May** be liberally construed to secure the just, speedy and economical determination of all issues presented to the State Engineer.

2. ~~{In special cases, where}~~ **Where** strict compliance is found to be impracticable or unnecessary, ~~{and affected persons are given proper notice of any procedural changes,}~~ the State Engineer may permit deviation from the provisions of this chapter.

Sec. 9. NAC 533.060 is hereby amended to read as follows:

533.060 “Person presenting public comment” means a person attending the hearing and expressing ~~{~~

~~—1.—General}~~ **general** support or opposition regarding a particular project proposal ~~{}~~ **or a comment on** the facts already in evidence or ~~{the}~~ **on any** related public policy . ~~{; or~~

~~—2.—An opinion regarding the adequacy of environmental documents relating to a particular project proposal.}~~

Sec. 10. NAC 533.080 is hereby amended to read as follows:

533.080 “Protestant” means a person filing a protest in a timely manner with the *Office of the* State Engineer against an application to appropriate water or to change the place of diversion, manner of use or place of use of an existing water right ~~§~~, *or a successor in interest to a protestant as set forth in NRS 533.370.*

Sec. 11. NAC 533.110 is hereby amended to read as follows:

533.110 1. ~~{A person presenting public comment must give notice that he intends to appear and present comment at a protest hearing by signing in at the hearing location before the hearing.~~

~~—2.}~~ A person presenting public comment:

- (a) Will not be sworn in or otherwise asked to affirm the truth of his testimony; and
- (b) Shall not attempt to present facts into evidence during his testimony.

~~{3.}~~ 2. The State Engineer may ~~§~~:

~~—(a) Limit}~~ *limit* the time allowed for public comment . ~~§; and~~

~~—(b) Allow questions to be addressed to a person presenting public comment.}~~

Sec. 12. NAC 533.120 is hereby amended to read as follows:

533.120 If the State Engineer designates a person to preside over a protest hearing, the person ~~{so designated}~~ may , *if authorized by the State Engineer*, make the ultimate ruling in the hearing . ~~{, unless otherwise limited by the State Engineer.}~~

Sec. 13. NAC 533.140 is hereby amended to read as follows:

533.140 1. An applicant may, within 45 days after service of a notice of protest, file an answer to a protest filed against his application. ~~{The answer must be accompanied by the filing fee prescribed by NRS 533.435.}~~

2. ~~{An applicant filing such an answer shall, within 2 days after he files the answer, serve a}~~
A copy of the answer *must be served* upon the protestant who filed the protest to which the answer responds ~~{}~~ *on the same day the answer is filed with the Office of the State Engineer.*

Sec. 14. NAC 533.150 is hereby amended to read as follows:

533.150 1. A protestant may withdraw his protest by filing with the *Office of the* State Engineer a written request for withdrawal of the protest at any time before the time scheduled for the protest hearing.

2. ~~{If a protestant withdraws his protest by filing his written request for withdrawal less than 72 hours before the time scheduled for the protest hearing:~~

~~—(a) The protestant shall pay to the State Engineer an amount equal to the costs associated with preparing to hold the hearing, as determined by the State Engineer; and~~

~~—(b) Unless more than one protest was filed against the application, the State Engineer will proceed to act upon the application in the same manner as if no protest had been filed.~~

~~—3.}~~ The applicant and protestant may enter into a stipulation regarding the application or related protest. When signed and filed with the Office of the State Engineer, such a stipulation may be treated as a withdrawal of the protest. The filing of such a stipulation does not:

- (a) Make the State Engineer a party to the agreement;
- (b) Establish a water right not previously acquired pursuant to law; or
- (c) Bind the State Engineer or any other protestant not a party to the stipulation.

Sec. 15. NAC 533.160 is hereby amended to read as follows:

533.160 ~~{1.}~~ Prehearing discovery is not a matter of right, but may be conducted in compliance with a stipulation between the parties or upon order of the State Engineer.

~~{2. If the State Engineer orders that a deposition be taken, he will notify the concerned parties at least 15 days before the date set for the deposition. The notice will set forth the name of the party to be deposed and the time, place and general subject matter on which the party will be deposed.~~

~~—3. No party may use testimony contained in a deposition in the place of a witness's testimony during the hearing, except upon order of the State Engineer and upon a showing of extreme circumstances preventing the witness from appearing at the hearing.]~~

Sec. 16. NAC 533.170 is hereby amended to read as follows:

533.170 1. The State Engineer may ~~[, upon 15 days' notice to the parties,]~~ hold a prehearing conference to:

- (a) Formulate or simplify the issues involved in the proceeding;
- (b) ~~[Record]~~ **Obtain** admissions of fact or stipulations of the parties;
- (c) Determine or obtain documents necessary for the hearing;
- (d) Identify the witnesses and the subject matter of their expected testimony and ~~[, if necessary,]~~ limit the number of witnesses ~~[;]~~ **, if necessary;**

(e) Rule on any motions;

~~[(e)]~~ **(f)** Arrange for the exchange of:

- (1) Proposed exhibits;
- (2) Prepared testimony of experts;
- (3) Lists of witnesses;
- (4) Lists of exhibits; or
- (5) Other materials the State Engineer deems to be necessary;

~~[(f)]~~ **(g)** Limit the time and scope of the examination of witnesses;

~~[(g)]~~ *(h)* Establish an agenda for the hearing which is most suitable to the particular case, including the order in which parties will present their respective cases; and

~~[(h)]~~ *(i)* Discuss and resolve other matters which may promote orderly conduct, expedite the hearings or achieve a settlement.

2. ~~[(Unless otherwise ordered for good cause shown, the)]~~ *The* failure of a party to attend a prehearing conference constitutes a waiver of any objection to the rulings made at the prehearing conference.

3. The rulings ~~[(made by the State Engineer and the)]~~, *action taken or* agreements made ~~[(between the parties)]~~ at a prehearing conference:

(a) Will be made a part of the record;

(b) Control the course of subsequent proceedings unless modified at the hearing by the State Engineer; and

(c) Are binding upon all parties.

4. In any hearing, the State Engineer may require each party of record to appear for a conference before testimony is taken or may recess the hearing for such a conference.

Sec. 17. NAC 533.180 is hereby amended to read as follows:

533.180 ~~[(A protest hearing will be conducted as a quasi-judicial proceeding with the)]~~ *The* objective of ~~[(developing)]~~ *a protest hearing is to develop* an adequate record upon which the State Engineer may rely to make a sound decision, without causing unnecessary delay and expense to participating parties or to the Office of the State Engineer.

Sec. 18. NAC 533.190 is hereby amended to read as follows:

533.190 1. Protest hearings will be held at the time and place designated by the notice of hearing. ~~[The State Engineer will attempt to find a location which will accommodate the parties and optimize the resources of the Office of the State Engineer.]~~

2. Each party to a protest hearing, his counsel or other agent and any spectators shall conduct themselves in a respectful manner during the hearing. If a person conducts himself in a disrespectful manner, the State Engineer may expel him from the hearing.

Sec. 19. NAC 533.210 is hereby amended to read as follows:

533.210 1. Issues to be considered during a hearing will be determined from the contents of the application and any protests. ~~[, and may include any issues that may arise under chapters 533 and 534 of NRS.]~~

2. The State Engineer may define or limit the issues to be considered. ~~[If new issues arise for the first time during the hearing, the State Engineer may allow these issues to be pursued, if appropriate and relevant.]~~

Sec. 20. NAC 533.230 is hereby amended to read as follows:

533.230 ~~[1.]~~ Before the hearing, the State Engineer may require the parties to identify the persons intending to offer direct oral testimony at the hearing. ~~[The State Engineer will notify the parties of this requirement in any manner determined by the State Engineer to give the parties notice of this requirement.]~~

~~—2.— The State Engineer will not require the advance identification of persons who intend to offer rebuttal testimony.~~

~~—3.— If a party fails to comply with a prehearing order to identify a witness and this failure results in prejudice to the opposing party, the State Engineer may:~~

~~—(a) Refuse to allow that witness to testify; or~~

~~—(b) Disregard any portion of the testimony.]~~

Sec. 21. NAC 533.240 is hereby amended to read as follows:

533.240 1. All oral testimony of witnesses appearing on behalf of a party must be given under oath or affirmation. For the purposes of this section, public commentary is not considered to be testimony.

2. A witness may give his oral testimony as his own narrative or his attorney or agent may direct his oral testimony.

3. ~~[A witness who gives his oral testimony under oath or affirmation must submit to cross-examination.]~~ *The applicant may cross-examine a protestant's opposing witness. A protestant may not cross-examine another protestant's witness.*

4. If the State Engineer determines that a witness lacks expertise, experience or direct knowledge to testify on the subject on which the witness is testifying, the State Engineer may strike the testimony of the witness and dismiss the witness from testifying in the hearing.

Sec. 22. NAC 533.250 is hereby amended to read as follows:

533.250 1. When the particular facts of an application and protest indicate that many witnesses will appear at the hearing or that a considerable amount of technical testimony will be necessary, the State Engineer may require parties and witnesses to submit their testimony in written form before the hearing date.

2. If written testimony is submitted, the witness shall also appear at the hearing to:

(a) Affirm that his written testimony is true and correct and that he personally prepared it or directed its preparation; and

(b) Submit to cross-examination.

3. Written testimony will not be read into the record, but must be entered into evidence as an exhibit. The State Engineer may, however, require a witness who has submitted written testimony to summarize it at the hearing.

~~{4. If written testimony is required, the State Engineer will inform the parties of this requirement in any manner determined by the State Engineer to give the parties notice of this requirement. The notice will also inform the parties of the related obligation to appear at the hearing.}~~

Sec. 23. NAC 533.260 is hereby amended to read as follows:

533.260 1. ~~{The State Engineer will consider only:~~

~~—(a) Oral or written testimony submitted under oath or affirmation;~~

~~—(b) Facts of which administrative notice has been taken pursuant to NAC 533.300; and~~

~~—(c) Facts or other information entered into the record by stipulation.}~~ *All evidence offered in a hearing, including the testimony of a witness, must be relevant. For the purpose of this subsection, evidence is relevant only if the evidence:*

(a) Has a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would without the evidence; and

(b) Is directly related to the subject matter of the proceeding.

2. The State Engineer may exclude testimony that is irrelevant, incompetent or unduly repetitious by:

(a) Requesting a party to cease his line of examination or narrative; or

(b) Refusing to consider the testimony when making his final determination.

3. Evidence may be admitted if it is the type commonly relied upon by reasonable and prudent persons in the conduct of their affairs. Any part of the evidence may be received in written form when a hearing is expedited.

Sec. 24. NAC 533.280 is hereby amended to read as follows:

533.280 1. The State Engineer may require in advance of the hearing:

(a) Identification of each exhibit that a party intends to use ; ~~{to support or illustrate a particular position;}~~ and

(b) Exchange of exhibits between certain designated parties.

~~{→ If applicable, the State Engineer will notify the parties of this requirement in any manner determined by the State Engineer to give the parties notice of this requirement.}~~

2. If a party fails to comply with a prehearing order to identify or exchange exhibits , ~~{and the lack of notice would result in prejudice to the opposing party,}~~ the State Engineer may refuse to accept the exhibit into evidence.

Sec. 25. NAC 533.290 is hereby amended to read as follows:

533.290 1. Exhibits that will be introduced as evidence must be:

(a) In a ~~{form that is}~~ readily reproducible ~~{;}~~ *form specified by the State Engineer;* and

(b) On paper that is 8 1/2 by 11 inches or that may be folded to that size ~~{;}~~ , *unless otherwise specified by the State Engineer.*

2. Larger charts, maps, drawings or other materials will not be introduced into evidence but may be used for demonstrative purposes.

3. ~~{Parties must give each other an opportunity to review each other's exhibits before the State Engineer will accept them into evidence.}~~

~~—4.]~~ An original and one copy of each exhibit that is offered into evidence must be submitted to the State Engineer . ~~[or presiding officer.]~~

4. If any evidence is included in a written or printed statement, book or other document that contains any other material not relevant and not intended to be admitted into evidence, the statement, book or document may not be received or admitted in whole. Counsel or other parties offering the evidence or exhibit shall present, in convenient and proper form for filing, a copy of the relevant portions of the statement, book or document.

Sec. 26. NAC 533.300 is hereby amended to read as follows:

533.300 **1.** The State Engineer may take administrative notice of or accept into evidence by reference to their contents:

~~[1.]~~ **(a)** Files and records of the Office of the State Engineer;

~~[2.]~~ **(b)** Public records that have been prepared by other governmental agencies;

~~[3.]~~ **(c)** Facts of which judicial notice may be taken by the courts of this state; and

~~[4.]~~ **(d)** Technical or scientific matter that:

~~[(a)]~~ **(1)** Has been generally accepted by the relevant scientific community; and

~~[(b)]~~ **(2)** Is within the field of expertise of the Office of the State Engineer.

2. The expertise, technical competence and specialized knowledge of the State Engineer or any employee of the State Engineer may be used in the evaluation of evidence.

Sec. 27. NAC 533.330 is hereby amended to read as follows:

533.330 If a party fails to appear at ~~[a scheduled protest hearing and no continuance has been granted,]~~ *the time and place set for a prehearing conference or hearing without prior notification to* the State Engineer ~~[will hear the evidence of the witnesses who have appeared~~

~~and will proceed to consider the matter and dispose of it on the basis of the evidence presented.],~~
the State Engineer may dismiss that party and related protest.

Sec. 28. NAC 533.350 is hereby amended to read as follows:

533.350 The State Engineer has full discretion in each case to determine the order in which the parties introduce their evidence and the general procedure to be followed during the course of each protest hearing. The presentation will ordinarily be in the following order:

1. The State Engineer will call the proceeding to order and announce the matter to be heard.
2. ~~[If a prehearing investigation was conducted it will be so noted.]~~
- ~~—3.— The State Engineer will explain the order and agenda of the hearing.~~
- ~~—4.]~~ The State Engineer will inquire as to whether the parties are represented by counsel or other agent.

~~[5.]~~ 3. The State Engineer will offer the exhibits of the State Engineer into evidence. Any party may then object to that evidence.

~~[6.]~~ 4. The ~~[protestant followed by the applicant, or their attorneys or agents, may respectively]~~ *State Engineer may offer the parties the opportunity to* make opening statements which briefly summarize what their proposed testimony and exhibits are intended to establish. Opening statements must not contain evidence. ~~[Cross-examination regarding the contents of an opening statement will not be allowed.]~~

~~—7.]~~ 5. The ~~[protestant followed by the applicant, or their attorneys or agents,]~~ *parties* shall ~~[respectively]~~ present their cases in chief ~~[which include:]~~ *in the order established by the State Engineer, including:*

(a) Testimony, either by ~~[his]~~ *each party's* own narrative or by direct examination conducted by ~~[his]~~ *each party's* attorney or agent;

- (b) Cross-examination;
- (c) Redirect examination; and
- (d) Recross-examination . ~~{ }~~

→ ~~{in that order.}~~ The same order of examination will be followed for each witness . ~~{of the protestant and then for each witness of the applicant. Questions to clarify a point or correct a mistake may be allowed at any time.}~~

~~—8.}~~ 6. The State Engineer may question ~~{the protestant, the applicant and}~~ any ~~{of their}~~ witnesses ~~{ }~~ *during their testimony.*

~~{9.}~~ 7. After all testimony and comments have been received on behalf of the applicant and protestant, the State Engineer will admit into evidence, subject to objection ~~{, the}~~ *and ruling, any remaining* exhibits that have not already been admitted during *the course of* the hearing. The State Engineer may rule on the admissibility of a questioned exhibit after hearing arguments or he may take the objections under submission and announce the ruling on admissibility as part of the final decision.

~~{10.}~~ 8. The State Engineer may ~~{permit a}~~ *allow* closing ~~{statement from the protestant, followed by one from the applicant,}~~ *statements* that briefly ~~{summarizes}~~ *summarize* the points respectively made ~~{in the case in chief. Cross-examination regarding the contents of a closing statement will not be allowed.}~~

~~—11.—~~ Interested persons and persons presenting public comment may present their respective comments. The State Engineer may examine any interested person or person presenting public comment.

~~—12.}~~ *during the hearing.*

9. Public comment may be taken at the end of each hearing. If warranted, the State Engineer may vary the time for taking public comment.

10. The State Engineer may indicate whether legal briefs must be filed. If he orders the filing of briefs, he will ~~{state}~~ *indicate* which subjects must be addressed in the briefs and the schedule for their submission. Briefs ordered under this subsection must be filed with the Office of the State Engineer and must be accompanied by an acknowledgment or an affidavit showing service on the other party.

~~{13.}~~ *11.* Unless the State Engineer orders otherwise, the State Engineer will close the record of the hearing, may take the matter under submission and will rule as provided in ~~{subsection 4 of NRS 533.370.}~~ *chapters 533 and 534 of NRS.*

Sec. 29. NAC 533.040, 533.100, 533.130 and 533.270 are hereby repealed.

TEXT OF REPEALED SECTIONS

533.040 “Interested person” defined. “Interested person” means a person who fails to file a protest in a timely manner but who is recognized by the State Engineer, pursuant to NAC 533.100, as a person entitled to testify at the hearing.

533.100 Recognition as interested person.

1. A person who wishes to be recognized by the State Engineer as an interested person must file a written request for recognition with the Office of the State Engineer and pay a fee in the

amount prescribed by NRS 533.435 for filing a protest, at least 30 days before the hearing or prehearing conference at which he wishes to be recognized.

2. The State Engineer will grant the request for recognition only upon a showing that extreme circumstances prevented the person from filing his own protest in a timely manner.

3. An interested person may only testify on matters of law, broad public issues or matters concerning how any action of the State Engineer with regard to a particular application may affect the operation of a specific water transportation and supply project.

533.130 Pleadings: Forms for filing protest.

1. The forms for filing a protest are available upon request and furnished without charge by the State Engineer.

2. A protestant need not use the filing form furnished by the State Engineer but the filing must be in substantially the same form and contain the same information as that requested in the form furnished by the State Engineer.

533.270 Hearings: Subpoenas.

1. The State Engineer may, on his own motion, issue a subpoena requiring the attendance of a witness at a protest hearing.

2. A party may request that the State Engineer issue a subpoena requiring the attendance of any other witness necessary to present pertinent testimony. The request must be in writing and served on the State Engineer no later than 10 working days before the hearing. The request must set forth the reason for the subpoena.