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SUBJECT: Assignment re water court questions

Justice Hardesty and Members of the Commission:

Thank you for the opportunity to provide input on this important subject matter. The greatest pleasure I have in serving this body is learning from and listening to the commission members — all of whom have served with respect, dignity and integrity despite many differences outside of this arena. Below is my attempt at best answering the questions remitted to the commission by Deputy Fairbank on February 8.

However, I offer the following preface:

This commission has not yet substantiated with cumulative and quantitative data why we need to make a change to the current system. While I believe this question-and-answer exercise is worthwhile for the commission, I am left thinking this is premature. We have had presentations on Division of Water Resources (DWR) funding and budgetary priorities, the significance of Groundwater Dependent Ecosystems, and topics like *Dividing the Waters* curriculum. We have debated conflicts pertaining to factual findings of the State Engineer and legal conclusions of district courts. We have gone so far as to solicit and review opinions on when the Nevada State Engineer and district courts failed to follow the law.

However, we have not had a presentation to help us answer a pertinent question: **Should Petitions for Judicial Review (“PJR”) be the subject of water courts?** The presentations from Oz Wichman and Judge Schlegelmilch essentially assumed PJRs would be subject to a so-called water court. DWR’s June 2021 memo to the commission — which opines on a select few decisions from the Nevada Supreme Court and District Courts — implies but does not plainly state why a water court with PJRs in its jurisdiction would provide more certainty for state officials. Moreover, the DWR memo raises red flags about judicial subjectivity and editorializes about the District Court’s decisions in cases like *White Pine County v. State Engineer*, *Revert v. Ray*, *King v. St. Claire*, and *Happy Creek v. State Engineer*. The memo admittedly doesn’t quantify the extent of a problem or why a water court would solve a given problem. However, it does highlight the tightrope DWR walks every day – underscoring a need for greater discussion

on how the mélange of statutes and district court opinions from PJRs purportedly hamstrings DWR and others.

Nevertheless, the final hour of the last commission meeting included a range of opinions and healthy discussion on why PJRs should or shouldn't be included in a water court. The meeting, if anything, revealed an elephant in the room: PJRs.

During our commission meetings we've heard a lot of discussion about the effects of data as it relates to water modeling, availability, quantity and so on. It is time we discuss data with respect to district court reviews that arrive via PJRs.

Commissioners need access to a few data points that DWR can surely access:

- *How many petitioners filed for judicial review stemming from matters pertaining to NRS §533 and §534 in the last decade?*
- *How many of those decisions resulted in appeals to the Nevada Supreme Court?*
- *How many current cases exist in Nevada's 11 judicial districts regarding matters pertaining to NRS §533 and §534?*
- *How many cases exemplify adjudicative negligence on behalf of district court judges that could warrant a Water Court?*

The data will enhance debate and serve as the foundation for any decision this body ultimately makes. The public could easily perceive the creation of a Water Court as a de facto critique of our district court system. There will certainly be media attention, scholarly interest, and other avenues of attraction from entities outside of the commission for years to come. At this point, we have not substantiated with enough evidence that we are ready to make decisions about the necessity of a water court.

Moreover, the suggested data points listed above also precede a presentation we're expecting at our next meeting from the Division of Water Resources. The update and analysis on pre-statutory adjudications is akin to what I am suggesting as it relates to PJRs. With the forthcoming December 31, 2027, deadline, the presentation should give us an objective look at what DWR and the public can expect in the coming years as it relates to water cases entering the state's District Courts. Adjudications of that kind, like PJRs, are included in the water courts of other states, which makes the upcoming presentation extremely valuable. We need to have the same for PJRs.

Again, I believe the following questions are a bit premature because we have not yet clearly outlined and defined a problem that a hypothetical water court would solve. I withhold the right to change my thinking on any of the answers provided below.

QUESTIONS REMITTED TO COMMISSIONERS ON FEBRUARY 8, 2022:

Is a “water court” or “trained water judges” appropriate:

Another way to frame the question: Is not having a water court or trained water judges inappropriate? We have yet to provide substantial evidence to answer the question. Other states have demonstrated a need for water courts and those have not been cast in the public eye as inappropriate. Furthermore, as it relates to training, Nevada has already laid a groundwork for providing continuing education to judges who are in a position to adjudicate cases relating to NRS §533 and §534 via the Dividing the Waters program. It would be fair to describe those as appropriate. However, I think the term “trained water judges” implies that judges are currently “untrained” or “uneducated” on matters of water law. Is this an implication that the majority of district court judges do not understand water law? Regardless, I unequivocally believe this commission is fully committed to developing a continuing education curriculum that is in the public interest and up-to-date on exploring matters relating to NRS §533 and §534 for all district court judges.

Could it be appropriate to create a water court? Indeed. But am I ready to say so unequivocally? No. As it relates to water courts, this body has not yet had sufficient debate on whether the current state of affairs necessitates a niche legal arena dealing with NRS §533 and §534. We have three options in my view: 1) The status quo. 2) A court that adjudicates PJRs and/or the hierarchy of priority dates for surface water and groundwater systems. 3) A court that only deals with adjudications relating to priority dates i.e. a pre-statutory, vested rights adjudication. Access to the latter two systems could also be predicated on a narrow set of circumstances as well.

What should be the scope of those judicial tasks:

Continuing education requirements pertaining to water in this state should be mandatory for all district court judges. The courses and corresponding materials should not be administered or published by DWR or any other entity that appears in court to defend their own interests on matters relating to NRS §533 and §534.

If there were water courts in addition to continuing education requirements, there would be a question of including PJRs, basin adjudications and any other matters related to NRS §533 and §534. There also remains a question as to whether participation in those water courts would be mandatory rather than optional or consent-based among all parties involved in a petition or other adjudication. Additionally, there’s question as to whether the water court would involve all matters pertaining to the relevant statutes or would it be more limited in scope. Would it address the procedural and the technical as it relates to adjudications of water matters — or only the latter?

If specially trained water judges are not needed, provide a viewpoint on that as well:

The premise of the question is based upon whether or not we believe Nevada District Court judges are competent enough to interpret statute and synthesize arguments from plaintiffs and defendants. Would a reasonable person believe that NRS §533 and §534 warrant a special legal

jurisdiction? Would a reasonable person believe that the majority of district court judges are incapable of handling matters regarding NRS §533 and §534? Would a reasonable person believe that it is better if a judge from outside of his/her/their county is a better arbiter of natural resource disputes or adjudications than a judge from a different community?

This commission has not yet debated why water law is more complex than matters relating to taxation, product liability, or public utilities — matters known for their complex litigation that take place in district courts. Nor have we discussed in detail why a water court should be a specialty area akin to something like family law, where there are significant caseloads and intangible emotional components.

We have not defined a problem. But we have had commissioners advocate for specific solutions without much reasoning as to why it would solve a specific problem. Until we substantiate any existing problems as a commission, I believe it is premature to decide on the necessity of a water court.

What would you define as either a water court or cases assigned to specially trained judges in water:

1). A court that adjudicates PJRs and/or the hierarchy of priority dates for surface water and groundwater systems. 2). A court that only deals with adjudications relating to priority dates (pre-statutory, vested rights).

How would you define a “water” case or the jurisdiction of a water “court”:

Matters regarding NRS §533 and §534 — and §532 for consistency. As mentioned above, there remains a question about the procedural and technical elements of those provisions.

Conclusion

In closing, I believe we must consider three issues before taking votes:

- 1). Define the problem we are trying to solve: Why should a water court hear PJRs and other matters relating to NRS §533 and §534.
- 2). Acquire necessary data before concluding a water court is necessary/unnecessary.
- 3). Revisit the water court proposals from Oz Wichman and Judge Schlegelmilch along with the questions posed on February 8 after thorough discussion on the data points requested above.

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