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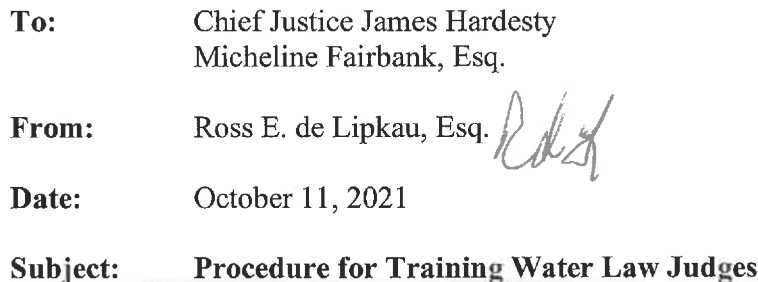
Memorandum



To: Chief Justice James Hardesty
Micheline Fairbank, Esq.

From: Ross E. de Lipkau, Esq.

Date: October 11, 2021

Subject: Procedure for Training Water Law Judges

It is my firm belief that when an objection to the State Engineer's Order of Determination is filed, all parties, including the Court, are bound by NRS 533.170. In particular, NRS 533.170 reads as follows: "and there shall be no other pleadings in the cause." That quoted language is clear and needs no interpretation. The Court therefore hears objections to the Order of Determination based upon the Order of Determination and all records submitted by the State Engineer. NRS 533.170(3) authorizes the court to . . . "take further testimony if deemed proper." Thus, oral argument is certainly authorized, but based strictly upon the record.

For example, in the Diamond Valley adjudication, the State Engineer expended 17 hearing days pursuant to NRS 533.150. During that period of time, all objectors to the preliminary Order of Determination were authorized to call witnesses and present historic information and hydrologic engineering testimony. Full opportunity was authorized by all objectors. The State Engineer and his staff took into account all of such testimony and evidence and rendered its Order of Determination. That document is based upon the State Engineer's education, experience, training, and engineering

knowledge. I do not believe that knowledge and expertise should be the subject of a "redo" by a district court.

In conclusion, I do not believe that under the existing law, objections to the Order of Determination are de novo. In part, this is based upon the law itself and the fact that no judge is experienced in matters known to the State Engineer and his staff. Assuming I am incorrect, why should the State Engineer waste the time of the claimants and hold objections to the preliminary Order of Determination when such would basically be a waste of time?

Irrespective of the final decision of whether judicial hearings on objections to the Order of Determination are de novo or not, I suggest that if "water judge(s)" are appointed, they should be given special training as follows:

Appeals from Ruling of State Engineer. Pursuant to NRS 533.450, all such appeals are expressly limited to the record on appeal. They are not de novo. *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979). Hearing on objections to the Order of Determination are set forth in NRS 533.170. Irrespective of whether such hearings are de novo or not, my suggestions for training and education for the water judges are as follows:

1. The Supreme Court selects a "water judge" who is an existing district court judge or perhaps a newly appointed judge.
2. That individual will spend a few days at the State Engineer's office observing the process for both handling appeals from rulings of the State Engineer and with the adjudication staff.
3. That person should sit through a one or two-day seminar listening to the State Engineer (or his representative), a member of the Supreme Court, the deputy attorney general assigned to the State Engineer, and private practice attorneys experienced in both appeals from rulings of the State Engineer (NRS 533.450) and the entire adjudication process as found in NRS 533.087 – NRS 533.320. Those representatives should agree to prepare a short list or outline of procedures to be followed in appeals from rulings of the State Engineer.

4. Depending upon whether appeals or objections to the Order of Determination pursuant to NRS 533.170 are de novo or not, the judge should be subject to the identical training as set forth above. If it is determined that the matter is de novo, the judge would be authorized to employ the State Engineer and his staff in the status of Special Master to the judge. No judge should make State Engineer decisions, as no judge is qualified to make such decisions.

SUPREME COURT MEMO

What is Proposed Scope of Nevada Water Judges

I. I believe the first issue to be decided is:

a. Pursuant to NRS 533.070(1), whether objections to the Order of Determination are de novo or not. That statute allows for some discretion. As NRS 533.450(1) states: "… but full opportunity to be heard must be had before judgment is pronounced." While NRS 533.170(3) states that "… the court may take further testimony if deemed proper, and shall then enter its findings of fact and judgment and decree."

As previously set forth in my memorandum dated October 11, 2021 (copy attached), I am convinced that appeals from ruling of the State Engineer are not de novo – *Revert v. Ray,* 95 Nev. 782, 603 P.2d 262 (1979) and the Court may not substitute its decision for that of the State Engineer, or reweigh the evidence. *Bacher, et. al. v. State Engineer,* 122 Nev. 1110, 146 P.3d 793 (2007). Thus, in either an appeal from ruling of the State Engineer or from the State Engineer's filing of the Order of Determination, I see no need for the Court to hear the evidentiary material twice. Judges are not qualified to make engineering, hydrologic, or crop inventory decisions.

Scope of Judicial Review:

a. Assuming water judges are properly trained to hear particular water right cases, I believe they should strictly adhere to the above doctrines. Their decision should be based on the record of appeal duly established by the State Engineer, with limited oral argument, if requested, pursuant to the above statutes. The Court should not take new or additional testimony or allow discovery. The reason is simple, as "two bites of the apple" run up costs and time, and are not authorized by law.

b. For appeals that are routine, such as State Engineer granting or denying an extension of time or perhaps an application to appropriate in a badly over-appropriated basin, I see no need for a trained water judge. That judge must be made aware of the fact the action is not de novo. The Deputy Attorney General representing the State Engineer should, I believe, fully inform the local district court judge of such legal standard.

II. A seldom-used statute is NRS 533.240. That statute allows for individual water right claimants to petition the district court for adjudication of a stream or stream system.

NRS 533.240 provides that the court, assuming it accepts the petition to adjudicate, shall direct the State Engineer to perform certain studies.

The State Engineer, with over more than 100 years of existence, has adjudicated approximately 108 statutory adjudications. There are, of course, a handful or so of determinations following the adjudication statute, NRS 533.240. In the event a petition is in fact brought to have the court adjudicate the matter, I definitely believe a trained water judge should be allowed to handle the matter. That judge would rely upon the State Engineer for engineering, hydrology, and similar areas within his field of expertise which would preclude having the matter tried twice.

CONCLUSION

I recommend the scope of the trained Water Judge should be as follows:

1. For appeals pursuant to NRS 533.450(1), routine or legal issues could be handled by the local district court judge.
2. All adjudications, whether pursuant to NRS 533.087 – 533.320 or NRS 533.240, should be assigned to the Water Judge.

3. Complex appeals pursuant to NRS 533.450(1) should be handled by the trained Water Judge.