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TO: Nevada Supreme Court Commission to Study the Adjudication of Water Law  
Cases (ADKT 0576)

FROM: Christopher W. Mixson

DATE: February 15, 2022

RE: Comments on Proposal to Create Specially Trained Water Judges

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Dear Justice Hardesty and Members of the Commission,

Please accept these comments in response to the discussion at the January 21, 2022, meeting of the Commission to Study the Adjudication of Water Cases in Nevada. By way of background, at the conclusion of that meeting, Justice Hardesty asked each member of the Commission to prepare written comments providing our position on the need for specially trained water judges in Nevada, and if there were to be such a pool of specialty judges, our position on the scope of the assignments, duties, and cases for such judges. Further, on February 8, 2022, Commission member Micheline Fairbank from the Nevada Division of Water Resources provided a list of topics that the Commission members are asked to provide feedback on, namely:

- Whether you think a “water court” or “trained water judges” is appropriate;
- What the scope of those judicial tasks should be;
- If specially trained water judges are not needed, provide a viewpoint on that as well;
- What would you define as either a water court or cases assigned to specially trained judges in water; and,
- How would you define a “water” case or the jurisdiction of a water “court”?

To respond first to Justice Hardesty’s fundamental query regarding the actual need for specially trained water judges in Nevada<sup>1</sup>, sufficient information has not yet been provided to the Commission to render

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<sup>1</sup> The first topic listed in Ms. Fairbank’s February 8, 2022, email to the Commission asks a similar question, although it also asks whether a “water court” is appropriate. As I understand the formation of the Commission under the auspices of the Nevada Supreme Court, I do not know whether formation of a “water court” by the Nevada Supreme Court would be possible, as opposed to Justice Hardesty’s previous proposal to establish a process by which district court judges could be

an opinion on that question. I believe that a change to judicial review of cases involving water rights in Nevada should be undertaken based upon a more clearly articulated problem or shortcoming in the existing manner of judicial review. Through the Commission meetings to date, individual members of the Commission have discussed a variety of perceived problems, which I think more data would help to clarify.

One problem that has been raised is that the district court judges in Nevada have a heavy caseload, which is compounded when a new water case is assigned to them, and results in delayed decisionmaking. I would like to see more data developed regarding heavy caseload experienced by the district courts, including water cases. At the first Commission meeting in April 2021, Judge Gonzalez requested that data be presented to show the volume of “water cases” in the district courts. I have been looking forward to seeing similar data, especially the number of water cases for each judicial district and further broken down into the specific types of water cases, such as petitions for judicial review of State Engineer decisions, water rights adjudications, and other “water cases.” This data would aid the Commission better understand the frequency with which water cases are being heard by Nevada’s district court judges, and in which districts, and how that affects an already heavy caseload.

I am interested in whether the majority of water cases are filed in the rural county district courts versus the urban districts. My assumption is that the district court judges most likely to become specially trained water judges may be the judges from the rural judicial districts to the extent those judges already have sufficient knowledge and experience in water cases. If that were the case, then it could result in the assignment of the specialized water judges from the rural districts to hear water cases filed in the rural districts, which may not necessarily serve to alleviate the heavy caseload concern, and may actually exacerbate it for those rural judges.

Also in the context of the high caseload of Nevada’s district court judges, there has been discussion of the potential for a large influx of cases in the coming years in the district courts regarding formal adjudications of pre-statutory vested rights in many of Nevada’s groundwater basins. I believe it would be helpful to the Commission if the Division of Water Resources could provide more specific data regarding the anticipated number of such adjudications that are expected to require judicial review in the future.

Based upon the above considerations, in order to better understand the potential need to establish specialized water judges to remedy the problem created by the workload of Nevada’s district court judges, I believe the Division of Water Resources should provide more detailed data regarding the actual number of water cases in Nevada’s district courts, and the estimated number in the coming years. This data would aid the Commission in better evaluating whether specially trained water judges would resolve the problem identified by the heavy workloads of the district court judges resulting in delayed decisionmaking.

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specially assigned by the Chief Justice to hear cases filed in other district courts. The establishment of a formal “water court” where “water cases” are filed in the first instance does not appear to fall under that existing authority, and I assume could require a constitutional amendment to the extent it alters the jurisdiction of the existing county district courts.

Another problem presented to the Commission, which specially trained water judges are proposed to remedy, is the lack of experience or knowledge that Nevada's district court judges may possess of the intricacies of Nevada's body of water law. I appreciate the challenge that could arise when a complicated water case is assigned to a district court judge with no previous experience in Nevada water law<sup>2</sup>. It would be my hope that the data I propose be gathered by the Division of Water Resources and provided to the Commission regarding the number of water cases heard by the various district courts could shed light on the frequency at which water cases may have been assigned to judges who do not have previous relevant experience. If this is the problem that the Commission is asked to resolve, I believe that having specialized education readily available to Nevada's district court judges on an as-needed basis is an excellent idea. I believe this Commission is an ideal body to make recommendations for the curriculum that could be included in specialized educational opportunities, whether that education is for the purpose of establishing a pool of qualified judges to be assigned to water cases, or whether it is for the purpose of educating any district court judge who may be assigned a water case in the normal course.

The second topic the Commission members were asked by Justice Hardesty to consider is the scope or definition of "water cases" that should be heard by the proposed specially trained water judges. Should the Commission proceed with making a recommendation to the Nevada Supreme Court for designating specially trained water judges to hear district court water cases throughout Nevada, the scope of such designations should be carefully considered. Specialized water judges should only be assigned to cases within a relatively limited and well-defined scope, such as particularly complicated matters or matters that are likely to result in important statewide precedent or application. The Nevada State Engineer makes decisions on a wide range of water matters, not all of which would necessitate judicial review before a specially-designated water judge. For example, the State Engineer makes decisions regarding whether water rights holders have met certain statutory deadlines, and judicial review of such decisions may not be aided by a district court judge with specialized knowledge of Nevada water law. For example, at the January 2022 Commission meeting, the notion was raised that the water judges could hear cases involving water quality or related matters. I do not believe it would be prudent to include any matters outside of those that may arise under Chapters 533 and 534 of the Nevada Revised Statutes, which would properly limit the scope of such specialized judicial assignments to matters involving judicial review of appropriative water rights and related matters subject to the permitting authority of the Division of Water Resources.

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<sup>2</sup> Some of the presentations and written memoranda of Commission members included a cursory review of legal decisions that those authors felt were wrongly decided, along with the implication that a specially trained judge would have instead come to the "correct" decision. I do not believe the information provided to the Commission thus far has established that there is a large or recurring problem of Nevada's district court judges making "wrong" decisions in water cases. It is not clear to me that the examples of such "wrongly decided" cases were assigned to district court judges with little relevant knowledge or experience. On the whole, in my experience Nevada's district court judges are doing their best to understand Nevada's water law and are making generally sound final decisions. And in instances when a party to a district court case feels the district court judge made a poor decision, there is (and under any "water judge" or "water court" proposal would remain) the option to appeal to the Nevada Supreme Court. Because decisions of the proposed water judges would remain subject to appeal, it may not follow that creating such specialized district court judges would have any effect on the number of appeals of water cases taken to the Nevada Supreme Court.

In addition to the scope of water cases subject to special assignment, the Commission should consider the procedure for such assignments. For example, it may be preferable for assignment to a water judge be subject to the consent of all the parties to the case, particularly in light of the importance of water cases being heard by the district court judges elected to serve their specific counties. Similarly, I also think that there is significant merit to the idea that the water judge proposal have a mechanism where water judge assignments can be reviewed on a case-by-case basis and either approved or rejected. I think there is merit to the procedure Judge Drakulich discussed for the specialized business courts, where a panel of business judges has the ability to deny or reject an assignment of a case to the business court.

As always, thank you for the opportunity to serve on this Commission.