

Water Law Judge Education
Allen Biaggi
October 10, 2021

Judges ruling on water cases must have the basic knowledge of water law and the natural environment to make informed and rational decisions. I assume a water law judge would come into the role being well versed in normal judicial proceedings related to testimony, expert witnesses, rules of evidence, the role of a regulatory agency in decision making, etc. In addition, proceedings related to water also demand the judge to be educated in the complexities of Nevada Water Law, its real-world applications, and the natural environment. Finally, the technical aspects of water (how much is there, how does it move, how is it measured, how is it used, for example) are needed in the Water Judge's knowledge base.

Following are areas where I believe a Water Judge would need to be educated in order to ensure sound and rationale decision making.

- Basics of Nevada Water Law related to surface and ground water allocation including:
 - The role of the State Engineer
 - Prior appropriation
 - Beneficial use
 - Preferred uses
 - Forfeiture/abandonment
 - The definition of perennial yield and how it is used in ground water management and allocation
 - Over appropriation and what it mean to water allocation
 - Closed basins
 - Curtailment
 - Domestic wells and their unique requirements in Nevada Water Law
 - Temporary water rights (mining)
 - Water rights sales, transfer, leasing
 - Supplemental ground water rights
 - State water law and federal land managers
 - The Winters Doctrine
 - Stock watering
 - The role of federal decrees in state water law
 - The Division of Water Resource's administrative processes and relationship to the evidentiary process of cases appealed to the court system
 - Definition of impacts to other users/rights
 - Overview of interbasin and intercounty transfers
 - The role of numerical models in ground water management and impact prediction
 - What is mitigation, when is it used, and does it work
 - The role of water conservation and allocation
 - The role of short-and long-term monitoring and ground water allocation

- Nevada geology and basic hydrology, the Basin and Range, and Nevada's 256 water basins.
 - Basic groundwater hydrology including its presence in the subsurface and its movement.
 - Various methods of predicting ground water flow and capture
 - Water volume measurements (i.e. acre foot, cfs, gpd)
 - Groundwater recharge
 - Impacts when ground water is pumped (cones of depression, flow, impact to local and regional aquifers)
 - Surface and ground water interactions and conjunctive management
 - Instream flows
 - Evapotranspiration
 - Municipal water use and conservation efforts
 - Agricultural water, crop variety and water use
 - Water and environmental quality
 - Subsurface ground water storage

December 16, 2021

To: Honorable Chief Justice Hardesty and the Commission on Adjudication of Water Law Cases

From: Commissioner Allen Biaggi and Joseph Guild, Esq.

Re: Water Law Courts and Qualifications of Judges and Recommendation for the Establishment of an Administrative Oversight Board

This memo follows the e-mail from Allen Biaggi dated October 10, 2021, entitled “Water Law Education” which outlined some of the areas of water law and basic hydrology with which a judge hearing a water law case should have an understanding and education. Obviously, judicial education is a critical factor in ensuring just, defensible, and legal water decisions. Additionally, the Commission has discussed in past meetings the concept of establishing an administrative oversight board for the Division of Water Resources. Such a board could significantly reduce the judicial caseload by resolving water disputes within the Executive Branch.

There has been discussion in the meetings and a memorialized presentation by a commissioner for the creation of specialized water courts. While this idea has merit and should be further explored, the authors do not believe Nevada is ready for a water court system as presented. We are reminded by the several hurdles faced by the State to create an intermediate appellate court in Nevada. As such, a water court is unlikely to materialize soon, if ever. There is also a growing consensus on the commission that judges hearing water cases will require more training and education and that the reduction of the judiciary water caseload, in the first place, is worthy of further consideration.

I. Judicial Education

There is a solution to the question of how to equip the courts with more training and education about the complexities of the water law and the science of hydrology.

NRS 2.120 (1) states in pertinent part, “The Supreme Court shall make rules not inconsistent with the Constitution and laws of the State for ... the government of the district courts....”

(2) “The Supreme Court, by rules adopted and published from time to time, shall regulate original and appellate civil practice and procedure... for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits....”

The Court, after advice from this commission on the matter, could require training and education including continuing education of judges in the water law, and a course in the hydrologic sciences prior to being certified by the Court to hear such matters. Obviously, there are a number of judges on the District Court Bench who would qualify because of prior education, life experience, or experience as a practitioner or judge, who would not require such training or education to become certified. However, there are those who could benefit greatly from the training, and this would also benefit our jurisprudence.

The training of judges to hear water law adjudication cases could be accomplished in accordance with the procedures for education set forth in NRS 3.027 through NRS 3.029 with appropriate amendments by the Legislature to achieve proper implementation of this suggestion.

For example, NRS 3.027 requires newly elected or appointed judges to receive instruction at the national Judicial College or elsewhere in basic court procedures and general competencies of a judge. The same requirement could be extended for judges desiring to hear water law adjudication cases. This is not to suggest that this overview of the idea for judicial training is complete. The purpose of this memo is to generate a discussion among the commissioners to create a training and education plan more specifically, if the commission decides this is one way to proceed.

The commission has already heard some references to the National Judicial College program at the University of Nevada Reno entitled "Parting the Waters." A more comprehensive presentation of the program is anticipated in a future meeting of the Commission by Judge Schlegelmilch.

Additionally, more discussion on Deputy Administrator Fairbank's idea for the possibility of ADR by certified water law experts to deal with water law matters more efficiently is warranted.

Finally, Judge Hardesty mentioned the possible creation of a water law procedure primer, like the recently produced Nevada Criminal Procedure manual. This idea has merit and should be explored in more detail to put all water law judges on the "same page," so to speak.

II. Establishment of an Administrative Review Board

Addressing the number and complexity of water related cases emanating from the Division of Water Resources is the primary function of the Supreme Court's Commission to Study the Adjudication of Water Law Cases. An avenue that should be considered by the Commission is the preliminary matter of how to reduce the number of cases brought before the courts in the first place.

One means of accomplishing this is through the establishment of an Administrative Oversight Board for the Division of Water Resources (DWR). This body would review contested cases arising from DWR and provide an opportunity for review and resolution prior to entering the Nevada judicial system.

Other regulatory agencies in Nevada have similar oversight bodies that perform this quasi-judicial function. These bodies include, as mandated by statute for agencies under their jurisdiction, the Nevada Public Utilities Commission, State Environmental Commission, State Board of Agriculture, and the Wildlife Commission.

Any person aggrieved by a decision of the agency may appeal that action to the oversight board. The boards have clearly defined rules of procedure, evidence, and testimony. After consideration of all information of all parties, the board may affirm, deny, or modify the agency's decision. The ruling of the board may be appealed to a court of competent jurisdiction where the board's full record is submitted as evidence.

Experience has shown that many contested matters are resolved at this administrative level, thereby achieving the result of reducing the Court's caseload. Those that are appealed to the judiciary have superior records of evidence and definition of decision making by both the agency and oversight body.

An administrative board for DWR would need to be created by statute with members having expertise in water and water rights related matters. The board should consist of at least five members

appointed by the Governor whose qualifications may be determined by geographical location, education, professional experience, industry sector, conservation, or representation of the general public. Renumeration for members is subject to the legislation.

We appreciate the work of the Commission and the interest of the Court in seeking a more efficient, informed system and stand ready to assist in any way possible.