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REPLY TO: RENO OFFICE

## Memorandum

**To:** Chief Justice James Hardesty

**From:** Ross E. de Lipkau, Esq. *RdL*

**Date:** April 21, 2021

**Subject:** Water Law, Adjudications

The question is: Should water law be amended to alter Appeals from Ruling of State Engineer (NRS 533.450(1)) and the adjudication process pursuant to NRS 533.090 – 533.320?

### CONCLUSION

The answer is no, if existing law and judicial precedent are strictly followed.

### ANALYSIS

The water law is special in character and must be carefully followed. *In re Filippini*, 66 Nev. 17, 202 P.2d 535 (1949); *G. and M. Properties v. Second Judicial District Court in & for Washoe County*, 95 Nev. 301, 594 P.2d 714 (1979). Unfortunately, legal counsel have recently abused the District Court's inherent powers of equity to effectively eliminate the important procedural and substantive safeguards built into the water law. Allegations of equity should be limited and not allowed as a routine part of all legal actions involving the State Engineer.

#### **A. APPEAL FROM RULING – NRS 533.450**

When appealing a ruling or decision of the State Engineer, the aggrieved party “may have the same reviewed by a proceeding for that purpose, insofar as may be in the nature of an appeal...” NRS 533.450(1). The hearing before the District Court must be based upon the records submitted to and prepared by the State Engineer’s office. This is routine, and the State Engineer submits his Record on Appeal to the District Court. No new evidence is to be presented, “but full opportunity to be heard must be had before judgment is pronounced.” NRS 533.450(2). This is identical to oral argument before the Nevada Supreme Court. No new evidence of any kind is to be submitted. The District Court in water cases sits exclusively as an appellate court. Hearings on rulings of the State Engineer are not *de novo* but are instead based strictly upon the Record on Appeal. *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979).

#### **B. STATUTORY ADJUDICATION PROCEEDINGS – NRS 533.030 – 533.320**

The State Engineer, after an on-site inspection of the property and water sources and a review of his records and documents, enters his Preliminary Order of Determination (NRS 533.140(3)) based upon his findings.

Objections to the Preliminary Order of Determination may be filed with the State Engineer. NRS 533.145. If objections are filed, the State Engineer sets a hearing on Objections to the Preliminary Order of Determination. NRS 533.150. At that hearing, experts are frequently called upon to discuss and present evidence regarding engineering, agriculture, and hydrologic matters. The hearings are quite extensive and can last many days.

The State Engineer, based upon his experience and expertise, then enters his Order of Determination. NRS 533.160. Objections to the Order of Determination must be filed at least five days prior to the judicial proceeding. NRS 533.170(1). This act is jurisdictional, as “late filings” cannot be heard. *G. and M. Properties, supra*. NRS 533.170(2) reads as follows: “The order of

determination by the State Engineer and the statements or claims of claimants and exceptions made to the order of determination shall constitute the pleadings, and there shall be no other pleadings in the cause.”

Accordingly, in a water law appeal the District Court cannot receive further evidence or authorize discovery and the introduction of new evidence via expert or lay witnesses. The matter is, as set forth above, not *de novo*. It is based upon the State Engineer’s record – and nothing else. Oral arguments on appeals from the State Engineer’s Order of Determination are handled identically to appeals from rulings of the State Engineer. Again, the matter is similar to oral argument before the Nevada Supreme Court. District Courts are not authorized to substitute their decision for that of the State Engineer. *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979).

Accordingly, I believe that hearings from appeals rendered by the Nevada State Engineer, as well as objections to his Order of Determination, are not *de novo*.

#### SUGGESTION

There is no need to make legislative changes to the water law. Rather, my suggestion is for the Nevada Supreme Court to appoint three District Court judges (active or senior) to handle all water rights matters. The three judges should be fully schooled and educated in appeals from rulings of the State Engineer and the adjudication process. The instructors could perhaps be from the Judicial College, the Nevada Supreme Court, the Nevada State Engineer, and possibly attorneys in private practice who are experienced in Nevada water law.

While perhaps not necessary, one possible legislative change would be to make clear that the District Court cannot *under any circumstances* authorize discovery or take any new evidence when considering an appeal from the State Engineer. Just as the Nevada Supreme Court cannot take new evidence on an appeal, the same is true in water law appeals. Further, the District Court’s equitable powers in water law cases should be limited solely to remanding a matter to the State Engineer.