

Nevada Supreme Court Commission
To Study the Adjudication of Water Law Cases
Meeting Summary
June 25, 2021

Members Present:

Chief Justice Hardesty
Associate Chief Justice Ron Parraguirre
Tom Baker
Allen Biaggi
Bert Bryan
Gordon H. Depaoli
Judge Kathleen Drakulich
John Entsminger
Micheline Fairbank
Rick Felling
Jeff Fontaine
Judge Elizabeth Gonzalez
Jason King
Ross de Lipkau
Bevin Lister
Chris Mixon
Karen Peterson
Kyle Roerink
Judge John P. Schlegelmilch
Therese Ure Stix (for Laura A. Schroeder)
Paul Taggart
Oscar (Oz) Wichman
John Zimmerman

Guests Present:

Adam Sullivan

Staff Present:

Jamie Gradick, AOC

I. Call to Order Roll Call

- Chief Justice Hardesty, Chair of the Commission to Study the Adjudication of Water Law Cases, Administrative Docket No. 0576, called the meeting to order at 1:07 p.m.
- Ms. Fairbank conducted the roll call with all member present except Judge Gary Fairman, Rusty Jardine, and John McMasters.

II. Public Comment

- There was no public comment.

III. Review and approval of Minutes of April 16, 2021

- Chief Justice Hardesty noted that there were corrections he would like to have made to the minutes. Oz Wichman asked that his comments on page 8 be changed to reflect “Southern Nevada” rather than south Nevada, life or live should be “lifetime appointments,” and change ya and ney to “yea or nay.” Ross deLipkau asked that his estimate of statutory adjudications be corrected, and the number is 94. Action deferred to next meeting.

IV. Description of cases and statutes in which decisions and responsibilities of State Engineer come in conflict with judicial decision or impacted statewide water resource management issues, by Adam Sullivan, P.E., Acting State Engineer and Micheline Fairbank, Esq.

- Chief Justice Hardesty introduced Adam Sullivan, P.E., Acting State Engineer and Micheline Fairbank, Esq., to discuss their memo “Summary and Overview of Cases Where Conflicts Between Statute, State Engineer Duties, and Judicial Decisions Impact Statewide Resource Management.” (Meeting Materials.)
- Mr. Sullivan explained that his approach to this question was to identify some of the primary themes or commonalities experienced by the Division of Water Resources that represents the challenges as an Executive Branch/Agency, and in summary those themes are *de novo* review and the standard of substantial evidence, secondly the use of equitable relief, and third deference to the State Engineer on technical questions. Judicial reviews hold the administrative agency to a high standard with well documented interpretation and application of the law. But where there is uncertainty in the rules that guide the agency, it interjects some confusion and inefficiency in the process both for water users and for the public in general, and also for State Engineer staff who put extensive effort into evaluating the records before them and doing the right thing in accordance with the water law.
- Micheline Fairbank started with judicially-created impediments to the ability of the State Engineer to perform core functions. There is a perceived movement by the court away from the substantial evidence review to what is described as a *de novo* review of State Engineer decisions. Decisions guided by statutory obligations of the State Engineer are reversed in equity. Equitable relief –while it serves the purpose of the individual water right holder– can serve as a judicial impediment to the management goals and statutory responsibility of the State Engineer’s office. Another area is where State Engineer staff put tremendous time into reviewing evidence and making a scientific analysis which is disregarded on appeal, and judges undertake their own calculations or technical analysis rather than remand the matter back to the State Engineer. The State Engineer is charged to serve as the unbiased expert.
- Chief Justice Hardesty opened discussion on equitable relief. Referred to memo by Ross de Lipkau (Meeting Materials). Equitable relief creates a number of inconsistencies in outcomes. This is a challenge I think for the courts and a topic that merits further discussion. Request that the memos submitted by the State Engineer and by Mr. de Lipkau be expanded to track the jurisprudence of the court in its utilization and resort to equitable relief as a method or a vehicle for resolving a water rights case. Open for others to participate with their own memo for the next Commission meeting. Chief Justice Hardesty also said that when remanding a case, courts need to understand that the Judge does not decide the case, but sends it back to the original administrative hearing officer to resolve factual questions. Legal questions or interpretation of the statutes do not receive deference. Request that the State Engineer provide some examples of instances when a District Court resolved what should have been a remand and why.
- Judge Schlegelmilch asked why the State Engineer does not appeal decisions that it is unhappy about. In *Fulstone*, the State Engineer filed a writ in relation to some extra-record testimony, and the Supreme Court denied the writ and said the State Engineer could appeal if they did not like the outcome of the proceedings. But it appears that the State Engineer wants ultimate discretion, and to not appeal any of the District Court adverse rulings because they do not want to be bound by law that is issued by the Nevada Supreme Court. Many of these extra-judicial actions, or extra-record issues, were not appealed: *Fulstone*, *Happy Creek*, *Rockwood Lithium*, *Pahrump Fair Water*, *White Pine*. These decisions were all *on* a legal issue not a factual issue, and ruled on *de novo*. Although the State Engineer has the authority and has some persuasion

in relation to statutory interpretation, the legal issue and the statute in itself is de novo reviewed by the District Court. *St. Clair* made it abundantly clear that factual issues are given deference of substantial evidence and legal issues are reviewed de novo. District courts are the appellate courts, and cases are remanded sometimes multiple times for additional factual findings, but the factual findings are not made as directed by the District Court and they come back on appeal on the same issue. Without a good body of case law to direct the State Engineer on what can and cannot be done, the State Engineer will continue to do it the same way. Judge Schlegelmilch also inquired on forfeiture and abandonment actions, how is a contest made to decisions of the State Engineer. The State Engineer has you file paperwork saying you have to prove beneficial use, but there is no hearing, there is no way to request a hearing, and the State Engineer can deny a hearing. The only hearings done are for adjudications and protested applications. Permit decisions have a thin record because there is no hearing. A lot of cases are remanded for factual findings and forces the State Engineer to have a hearing.

- Chief Justice Hardesty invited Ms. Fairbank to respond. Ms. Fairbank's response was that the State Engineer did appeal *Pahrump Fair Water*, and also appealed *Happy Creek*. There are many calculations that go into the decision of whether or not to appeal a particular case, and a certain degree of sensitivity with regards to the furthering public perceptions of being in an adversarial relationship with the members of the public and water right holders served by the State Engineer. These are substantive issues, and the State Engineer looks forward to being able to continue to have constructive dialogue.
- Chief Justice Hardesty asked what the procedures of the State Engineer for hearings in abandonment and forfeiture cases are, whether there are rules or statutes that require it. Ms. Fairbank explained that there are no statutory requirements for conducting a hearing. Overall the State Engineer is conducting many more hearings in response to criticism regarding the state of the record. Otherwise the decision whether to hold a hearing is an evaluation of the totality of the facts and circumstances and is within the discretion of the State Engineer. The State Engineer is engaging in rulemaking despite not having done so historically. The agency is trying to move and progress forward, out of the 19th century.
- Chief Justice Hardesty stated he thinks rulemaking would mitigate some of the issues that arise in the litigation he's seen. What would it take to undertake a significant rulemaking effort to fill in some of those gaps? To perhaps create requirements for hearings where factual matters can be developed so that the records are clearer and there will not be as many remands.
- Ms. Fairbank explained that although the State Engineer is not generally subject to the Administrative Procedures Act of NRS 233B for rulemaking, the State Engineer is choosing to follow those requirements for the adoption and promulgation of regulations. There is an assessment of what areas are appropriate to identify for new regulations, then to engage in a public outreach and stakeholder-input. There are numerous public workshops to get feedback. Long regulations are not popular. There appears to have been lukewarm acceptance on the State Engineer promulgating regulations, so a lot of communication and making the case to water users that this is an important aspect to providing clearly defined rules of engagement that protect both those that are working with the State Engineer while also creating decisions that are not only well-informed, but defensible.

- Allen Biaggi said he appreciates that the State Engineer has made attempts to comply with the spirit of NRS 233B rulemaking, but made a distinction between adoption of regulations by DWR and by other State agencies where there is an oversight body to approve regulations. There is a missing step in the DWR regulatory process by not having that oversight body addressing their regulations. That would take a statutory change, but it is something that he has wondered about for many years.
- Chief Justice Hardesty asked whether the staff and fiscal challenge of developing regulations has been quantified.
- Paul Taggart said he did not know if this had ever been quantified, but wanted to give the State Engineers Office credit for presently taking on the regulatory adoption process. He thinks that Mr. Biaggi's comment illustrates that if the State Engineer had to comply with the APA then many of the problems discussed today would be resolved: how records are developed, who parties are in cases. Either change the State Engineer's exemption from the APA contested case provisions, or develop regulations that create the process for developing records in cases. When there are hearings at the Division, they are well done they're exhaustive, the witnesses are subject to cross examination and so forth and the record is built. Where extra record evidence is being considered by District Courts arises in those cases where there was no hearing. If the record is not developed by the State Engineer, then it is developed in the court for consideration of the State Engineer's process. Mr. Taggart mentioned preliminary injunction hearing, stay hearings under NRS 533.450; those have been done with witnesses on specific issues of potential harm if the stay is not granted. Mr. Taggart supported doing a memo on equitable relief. The State Engineer does not have equitable powers, the courts clearly do. Should a District Judge remand to the State Engineer for factual finding on equitable issues? When only the court can decide whether equity exists or should exist as a remedy, only that Judge really knows the questions they want to ask. The purpose of the Commission is not to rub salt in wounds, it is so we can think about how to improve the judicial review process. If there is a way to improve how the record is collected that's fine, but not to start talking about what the courts are doing right or what they're doing wrong.
- Chief Justice Hardesty said that the quality of what the judge does or what the judges are able to do is dictated in part on what the State Engineer produces or is able to produce. If that is a problem either because of absence of rulemaking or because of unclear hearings or records, that is something that has to be a part of the recommendations this Commission makes.
- Judge Drakulich [comments cut in after she had been speaking] spoke to her familiarity with the regulation making process at the Public Utilities Commission. They issue a notice of regulation development to all of the stakeholders. The stakeholders propose a body of regulations. The notice that is issued by the agency defines the scope of what it is they are looking for. Stakeholders take that scope, develop proposed regulations, they are filed with the administrative agency and then the administrative agency orders the stakeholders to meetings. The extent to which the stakeholders have issues that are outstanding, two things get presented to the administrative agency: the stipulated regulation and the list of issues that remain unstipulated and then a hearing is held on those that are unstipulated and ultimately the regulatory body makes that decision and it's the stipulated regulation plus those issues resolved by the administrative body that get forwarded to the LCB.

V. **Summary of topical areas where the State Engineer and Division of Water Resource fail to follow Nevada's water law as written by Bevan Lister and Tom Baker.** *(Please see meeting materials for additional information).*

- Mr. Bevan Lister provided a brief summary of the memo provided in the meeting materials packet.
 - The memo provides an outline of cases identified as examples of findings within the court system and offers a list of suggestions for change.
 - It is not a comprehensive list and is intended to initiate discussion on the subject.
- Chief Justice Hardesty raised scheduling and timeliness concerns and referenced the Great Basin case as an example.
 - Delays may be due to a lack of fiscal or staff resources.
 - Statutory time requirements are not always feasible.
- Chief Justice Hardesty shared AB424 as an example of this; under this law, judges are required to conduct detention hearings within 48 hours for arrestees taken into custody. This is not always possible, particularly in the rural jurisdictions.
- Chief Justice Hardesty asked for input regarding the “internal workings and processing” and commented that the adjudication delay in these cases impact the public’s confidence in the system.
- Ms. Fairbank explained that applications languish for a variety of reasons including:
 - Applicant’s request - a large number of applicants request that their applications be tabled.
 - Capacity and lack of staffing resources - this office is responsible for various management issues throughout the State.
 - Expedited applications – take precedence over permit or permit change applications.
- Mr. Sullivan commented that, because of staff limitation, the department must prioritize where there are statutory deadlines to approve or deny a pending application, to issue temporary applications, to rule on a protested case, to act on non-use, etc.
- Chief Justice Hardesty thanked Mr. Sullivan and Ms. Fairbank for their input, acknowledged that the statutes go to prioritizing the State Engineer Office’s work, and suggested that it might be useful for the Commission to identify areas “where the State Engineer’s Office needs support and staffing.”
 - Developing a plan would be useful in adequately communicating budgetary and staffing needs to the Legislature.
- Mr. King commented that funding has been an ongoing concern; there has been very little legislative support.
 - Every session, the Legislature asks for data on the Office’s application backlog, a majority of the delayed applications are due to pending adjudications in the courts.
 - The State Engineer’s office found that the “backlog” wasn’t not getting work done but things being stuck in the system due to waiting on certain things, like adjudications, to be done before being able to move forward.
- Mr. King commented that additional staffing would certainly help this situation.
- Mr. Entsminger commented that the Colorado River Commission, which is smaller than the State Engineer’s Office is completely funded by fees from hydro power users and water users.

- It may be prudent to look at higher applications fees, perhaps a “per acre-foot kind of charge on permits” to remove the State Engineer reliance on the general fund and get a self-sustaining revenue stream.
- Mr. Roerink commented that “flouting due process rights” should never be a staffing or a funding issue and expressed concerns regarding NRS 533.370(2) and the ruling in the *White Pine* case.
- Chief Justice Hardesty suggested that the Commission examine budgets and staffing in other, comparable jurisdictions.

VI. Presentation on the Dividing the Waters judicial education program, educational opportunities and other programs through the National Judicial College by Judge John P. Schlegelmilch

- Chief Justice Hardesty introduced Judge John P. Schlegelmilch for his presentation on the Dividing the Waters judicial education program.
- Judge John P. Schlegelmilch referenced some web pages he provided the meeting and introduced Steve Snyder, the Executive Director of the Dividing the Waters at the National Judicial College to give the Commission an idea of what exactly Dividing the Waters is, what it’s doing and what it’s looking at in the future.
- Mr. Snyder said Dividing Waters, started in 1993, is:
 - An educational Program run by judges (Conveners) from several states, for judges on water resource issues:
 - ♦ Water law
 - ♦ Hydrology
 - ♦ Related water sciences
 - ♦ Water management
 - ♦ Environmental sciences
 - Affiliate for the National Judicial College in Reno
 - Program is designed for scientific understanding of water issues for judges, among other water issues.
- Mr. Snyder described some of the events and activities provided to judges including field trips to actually see on the ground water structures, facilities etc. in addition to learning how other western states are dealing with the similar issues, among other resources provided by the program.
- Mr. Snyder said they have developed some written resources for judges. The most recent one is what we’re calling “Ground Water Bench Book.”
- The program is funded by various foundations and states, but all have been impacted by COVID-19 and the future is somewhat uncertain. A proposal has been made to develop an up-to-date online water law training program for judges that will be available to judges when they need it and when they get assigned to a case, they can go to that as a resource.
- Chief Justice Hardesty asked if there is a tuition charge. Currently there is a charge of about \$500 for partial cost recovery and scholarships are available to reduce that more. Mr. Snyder was not certain if this will be sustainable in the future.

- Chief Justice Hardesty asked if those states mandated to, are required to take education from the Dividing Waters or alternative sources. Mr. Snyder indicated New Mexico has its own system and he believes Dividing Waters is the only source for the other states.
- Chief Justice Hardesty's final question was if the Dividing Waters offer courses that focus on mitigation measures in over-appropriated ground basin areas or basin management. Mr. Snyder said yes, indirectly in the past. But the proposed online course's first segment is dealing with mitigation measures in a drought and a mega drought.
- Paul Taggart asked Mr. Snyder how long it will be for the on-line product to be available and if it will be a kind of format to bring a judge up to speed right away. Mr. Snyder said they are in the process of developing it to be useful to judges, lawyers, legislators and even interested public, but probably will not be available in the near future due to the first major step of funding and doing it right.
- Judge John P. Schlegelmilch added that anyone with questions can ask Mr. Snyder or the other conveners in Dividing Waters for more suggestions from other states. He said they are really good courses from his experience and also mentioned a new webinar series on Tribal issues. Dividing Waters continues to try to educate judges on some things that are specific, some things that are more general and just being able to reach out to other judges provides a lot of insight.
- Judge John P. Schlegelmilch brought up the Nevada Water Resources Association as an excellent group for some technical knowledge. They do field trips and talk about everything from well drilling to water rights.

VIII. Next meeting of the commission scheduled for August 27th at 1:00pm.

- Chief Justice Hardesty reminded the Commission that the next meeting is scheduled for August 27th at 1:00pm and asked if there any commission member who cannot attend.
- Judge Gonzales: I'm in trial, I'll try and take a break from this trial but we'll see how it goes.
- Bevan Lister: Thank you your honor and I hope I'm not speaking out of turn but being somewhat familiar with Judge Fairman's schedule I know that he has trial courts every Friday.
- Therese Stix for Laura Schroeder: I need to unmute myself, thank you your honor. I briefly looked at Laura Schroeder's schedule and she is out of the country but I can attend in her place and take notes for her.
- Judge Drakulich: I've got six cases set that week, will see if I can't schedule around that day.
- Chief Justice Hardesty said he would be reaching out with some homework, asking members of the commission to make some presentations on some of the topics that I'll be asking you to comment about. One in particular for Mr. Mixon on behalf of the tribes.

IX. Seeing no Public Comment

- Chief Justice Hardesty opened for public comment, there was none.

X. Adjournment

- There being no further discussion, the meeting was adjourned at 3:02 p.m.