

Nevada Supreme Court Commission
To Study the Adjudication of Water Law Cases
Meeting Summary
January 21, 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
Judge Gary Fairman
Rick Felling
Jeff Fontaine
Judge Elizabeth Gonzalez
Rusty Jardine
Jason King
Ross de Lipkau
Bevin Lister
Chris Mixon
Karen Peterson
Kyle Roerink
Judge John P. Schlegelmilch
Paul Taggart
Oscar (Oz) Wichman
John Zimmerman

Guests Present:

Adam Sullivan
Melissa Flatley
Joe Guild
Caitlin Skulan
Sev Carleson
Steph Morris
Ian Carr
Stephen Bartell
Chris Mahanna
Annalise Porter
James Bolotin
Chauncy

Staff Present:

Jamie Gradick, AOC

I. Call to Order and Determination of Quorum

- 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 1:30 p.m.
- Ms. Fairbank conducted the roll call, with all members present except Jon McMasters and Laura S. Schroeder.

II. Public Comment.

- Steve Bartell, Assistant Chief with the United States Department of Justice, speaking on behalf of the United States provided public comment. Mr. Bartell stated that the federal government is interest in findings of commission. Water law and federal water rights, reserved rights and tribal rights, are unique and complex. The federal government supports judicial education for water cases and it appears that two

members have suggested educating Judges on federal water rights. Mr. Bartell stated that judicial education should be neutral aimed at educating, not advocating. Mr. Bartell offered that federal representatives would be available to assist with the topic of judicial education and the United States requests opportunity to provide written comments on education or proposal to the extent that opportunities are provided to the public. Justice Hardesty responded that recommendations will be presented through administrative docket to the Nevada Supreme Court Justices, and that the process requires a public hearing and allows for interested parties to submit written comment and public comment.

- Severin Carlson, stated that he agrees with Judge Schlegelmilch proposed rules. Mr. Carlson offered that whatever the number of judges is appointed to a future panel, it was his hope that the judges on the water panel would travel to judicial district where the cases are heard. Specifically, NRS 533.450(1) relating to judicial review disputes relating to water proceedings must occur in the location where water is at issue. Anecdotally, the cases are more often in the rural areas of Nevada. Justice Hardesty responded that the proposed rules require proceedings to occur in the district where the controversy occurs. The proposal for three judges is a minimum, and the hope is that more judges would be interested in volunteering for the role.

2. State Engineer's Update Regarding Governor's Response to Division of Water Resources American Rescue Plan Act Requests. (For possible action.)

- State Engineer, Adam Sullivan provided the Commission with a report regarding the Division of Water Resources' requests for appropriations from Nevada's share of the American Rescue Plan Act. Mr. Sullivan stated that the Division's request for reimbursement of basin designation funds that were used to pay staff, used to prevent layoffs due to budget reductions has not received traction. The Division's requests relating to the digitization of the Division's records, to fund the water resource initiative with USGS and DRI to update water budget data around the state appear to be under consideration, and based upon interest from the Governor's office, the digitization effort appears to be the most promising request. However, review and approval is a result of cooperation between Governor, Treasurer, and Legislative representatives. The Division has been told that due to large number of competing requests, nothing has been funded but also have not been denied. The Division continues to pursue other alternatives to funding initiatives outside of ARPA.

3. Continued Discussion regarding Proposal of Commissioner Oscar Wichman Regarding Water Court and Alternatives. (Discussion)

- Justice Hardesty appreciated comments and input on education for judges and stated that he intends to appoint a sub-committee of the Commission to review inputs and reduce to a single set of suggestions of subjects to assess and vote on.
- Judge Schlegelmilch asked Steve Bartell to contact National Judicial College, Dividing the Waters if interested in being federal law expert. Dividing the Waters considering Lake Powell project in fall/spring, currently in planning.

- Justice Hardesty proceeded to appoint a judicial education subcommittee consisting of Judge Drakulich as the Chair, Judge Schlegelmilch, Allen Biaggi, Paul Taggart and Chris Mixson as the members. The purpose of the subcommittee is to simplify suggestions and identify a list of subjects that judges should be educated on.
- Justice Hardesty continued with the presentation and discussion of ideas by Wichman, including the discussion of rules proposed by Judge Schlegelmilch and Judge Fairman.
- Oz Wichman suggested increasing the number of judges from 3 to 5. Specifically, one judge from District 1, 2, 3, or 9; another judge from District 8; and the remaining judges from the other districts but no two judges from the same District. Mr. Wichman supports judges traveling to where cases will be heard. Justice Hardesty responded that water cases are very voluminous records, and difficult to ask rural judges to hear these cases.
- Judge Fairman says part of the rule needing work relates to peremptory challenges, particularly as to judges who may be commissioned as water judges. Judge Fairman suggested consideration that a replacement judge could be knowledgeable without being a commissioned water judge. Such that if you have a competent judge, should the case stay in that district? Justice Hardesty inquired whether judges that are sitting on water cases, do they need to have received certification or education required under the rule? The rule is not intend to circumvent requirements through peremptory challenge to a judge that has been designated as a water judge.
- Judge Drakulich asked how “published” is defined in paragraph 6. Justice Hardesty said the theory is to allow water judge to publish, as Supreme Court and Court of Appeals do, to have citable caselaw for persuasive purposes though not binding. The discussion continued with Judge Schlegelmilch that the same process that occurs with the Court of Appeal should be the process for water judges. The water judges would discuss whether a particular decision is published, and the Nevada Supreme Court would make the final decision regarding publication without opining on the outcome.
- Judge Drakulich also commented that sections 3.1 and 3.2 of the proposed rule – when a case shall and may be transferred – are reminiscent of business court docket rule in Second Judicial District. A specialty court judge can review suitability of case and return to main pool of judges. Justice Hardesty made comparison to business court in Eighth Judicial District Court, where parties may think the cases are worthy of water court adjudication but the judge may not. Judge Gonzales said it was up to the specialty court judge to determine suitability, what is a non-appealable determination. Judge Fairman said determination of suitability may help by defining scope of whether something is a water case.
- Judge Schlegelmilch responded that he tried to avoid the “minutiae” of the overall jurisdictional authority of the water court. This rule establishes district court water judges. Procedural rules established through administrative docket regarding scope of the court would be developed on this topic. Potential areas include wastewater treatment, water right disputes, to sales of water- other than the piece that arises from appeals pursuant to NRS 533.450. Judicial review, adjudication are clearly “water” cases. Mining water, environmental impacts in relation to water could possibly be topics. Justice Schlegelmilch stated that he did not want to include specific educational requirements in the rule as such is the purview of the Supreme Court

rather than the rule. Judge Schlegelmilch continued, stating that the Commission could appropriately consider what the educational requirements should be, and forward *in addition* to the report of the Commission. In relation to peremptory challenges, he stated he considered wanting to remove ability to preempt water court judge. He went on to state that water judges are specially qualified to handle these cases, but expressed concern that preemption could be used as a way to forum shop. Two judges required under the rule- one from urban (Districts 2 and 8), one from rural (all other Districts); any other judge could apply, be vetted, and approved by Chief Justice of Supreme Court. But, Judge Schlegelmilch addressed that there needs to be consideration of how many judges will realistically apply, and that a minimum of five judges may not be interested or available.

- Ross de Lipkau said initial discussions were whether review of State Engineer decisions are de novo or not. Should have a clear understanding of what the case is that will be heard by the water court.
- Kyle Roerink said outstanding question exists of whether PJR and adjudications be encompassed in this proposal or is it only adjudications, as that is a significant issue and question that he has been thinking about and hasn't necessarily seen that discussion before the Commission to really determine the scope of this proposal or any proposal to come from the Commission. Justice Hardesty responded that the purpose of the water court is to bring expertise to these areas, so why not hear both. Mr. Roerink said what is the need on Petitions for Judicial Review that demonstrates the necessity of a water court for those issues. Expediency is a benefit to hearing only adjudications.
- Paul Taggart noted that there hasn't been a determination that a water court is truly necessary. He continued stating that the Commission should not involve substantive water law questions, but was intended to discuss procedure and rules. The way the proposed rule is written, parties can opt-in to water court, but adjudications go to water court. Petitions for Judicial Review are the primary reason the Commission exists and the question to be decided. And, whether every water case (PJR and adjudications) must be heard by a water judge hasn't been fully addressed. Mr. Taggart stated that he is more comfortable with the idea that it is when the local judge or judges cannot hear a case, and it goes to senior judge panel and a water court would be utilized as an alternative to senior judge panel. He continued that he believes that it is necessary to define scope of what a water case would be, including whether it would include petitions for judicial review. But, it is also a good idea to have framework for judicial education done, but fair to have judicial council as part of decision making.
- Mr. DePaoli stated that he is not yet convinced that a specialty water court is necessary. He believes that before considering the rule the Commission must consider the scope of issues that the court will be considering. Influences the number of judges needed, as well as what Districts they come from.
- Judge Drakulich had the business court framework in mind in discussing water court. There are clear areas that are within the jurisdiction of the business court, and then a catch-all where a judge/judges make a determination as to qualification. The broad categories of cases that could be water need to be identified with specificity to avoid a

three-judge panel that is overwrought with too many cases. Balancing with issues and judges interested in serving as water judges.

- Justice Hardesty says he is surprised that the Commission has not made a decision that a specialty water court be made. There are 90 District Court Judges in the State, roughly 60% of those judges have served less than 5 years. Justice Hardesty cited to the fact that turnover in courts has been significant. Of those people who have become judges through election process, 40% have been from the criminal side. He asked: Is water law an area that requires expertise to handle these cases? Should these cases be heard by a judge who has been a public defender for 12 years? Support idea that Commission provide guidance to the Nevada Supreme Court on scope of what a water court should be. If the Commission is not convinced that the judiciary needs to develop special education in this area, then disband the committee. Justice Hardesty stated that the Commission was intended to suggest a process by which judges would be specialized and handle this docket. Must address the scope, educational requirements, then the Nevada Supreme Court has no guidance whatsoever. Judges do not own the cases that they preside over; they operate at the directive of the Chief Justice of the Supreme Court. Qualifications of people that hear the process are the important issue.
- Ms. Fairbank said her initial response to the proposal of two judges who have pending water cases, put together their thoughts on what a water court would look like. The proposal carries some weight regarding origin of proposal. She shared that her personal perspective of could be accomplished by a specialty water court. She stated that the primary interest is in a fair process – meaning that the Court that presides over water disputes not only has the time, but the interest and capacity to invest in understanding the complex issues.
- Mr. Fontaine agree that benefit to having cases hear by judge aware of water law and water issues. His concern is primarily that rural areas continue to be represented. Logistical concerns about how water court judges have necessary understanding and training in that system. Also, a concern about the fiscal impact on rural counties. Mr. Fontaine asked for clarification on assignment of cases to water court – is it one or both party's request. Random assignment means next in line. Judge Schlegelmilch clarified that it would be by the request of either party to transfer to water court. Not intended to be setup as a water court, but to have a panel of judges with specialized education in water. And that it is recognizing that the issues are complex, and wanting to have judges available to parties who may choose to have the matter decided by a judge with special education.
- Mr. Zimmerman agrees that water case needs to be better defined and what those cases entail. In 3.1 of the proposed Rule, before a case is assigned to a water judge in another district, should be approved by all parties to a matter. He supports Judge Schlegelmilch's comments on judicial education and improving knowledge.
- Mr. Wichman intended that the solution was to appoint experienced judges with exclusive ability to hear water cases. Any case that arises out of a decision by the State Engineer would be heard by the water court, not any case that might involve water.

- Judge Schlegelmilch asked for permission to suggest scope described as “limited” if only decisions from the State Engineer, water disputes in the middle, and environmental issues the broadest understanding of the scope of the water court.
- Justice Hardesty requests that committee members by the middle of February provide whether you think “water court” or “trained water judges” what should be the scope of those judicial tasks. As well, if specially trained water judges are not needed, provide that viewpoint as well. Two-fold: one, set out scope of either water court or cases assigned to specially trained judges in water; second, do you believe we need specially trained water judges in the areas covered in the educational listing provided. The Commission can make changes to the draft rule based on responses, can provide a breakdown of responses for the next meeting.

4. Division of Water Resources Overview of Adopted Administrative Regulations Regarding Extensions of Time to File Proof of Completion of Work and Proof of Beneficial Use. (Discussion.)

Ms. Fairbank presented on adoption of regulations regarding extensions of time to file proof of completion of work and proof of beneficial use. Effective on December 22, 2021, upon approval by Legislative Commission. Provide more substance regarding contents and requirements for what is necessary in extensions of time, assists in providing sufficient information in reviewing application for demonstration of good faith and reasonable diligence. Also establishes criteria used in reviewing applications against statutory standard, to increase transparency. New forms and procedures will be available on the Division’s website; regulations are currently posted. Prospective application of the regulation and will be reviewed every three years rather than 10.

5. Topics for future meetings. (Discussion.)

Responses due by Feb 15 will form topics for future meetings as raised in today’s meeting. Mr. Fontaine asked for State Engineer to provide overview of adjudications and the process. Mr. Sullivan said he will be available for the next meeting.

8. Adjournment (3:25)