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Of Counsel ROSS E. DE LIPKAU (NV)

REPLY TO: RENO OFFICE

Memorandum

To: Chief Justice James Hardesty
Micheline Fairbank, Esq.

From: Ross E. de Lipkau, Esq. 

Date: October 11, 2021

Subject: Procedure for Training Water Law Judges

It is my firm belief that when an objection to the State Engineer's Order of Determination is filed, all parties, including the Court, are bound by NRS 533.170. In particular, NRS 533.170 reads as follows: "and there shall be no other pleadings in the cause." That quoted language is clear and needs no interpretation. The Court therefore hears objections to the Order of Determination based upon the Order of Determination and all records submitted by the State Engineer. NRS 533.170(3) authorizes the court to . . . "take further testimony if deemed proper." Thus, oral argument is certainly authorized, but based strictly upon the record.

For example, in the Diamond Valley adjudication, the State Engineer expended 17 hearing days pursuant to NRS 533.150. During that period of time, all objectors to the preliminary Order of Determination were authorized to call witnesses and present historic information and hydrologic engineering testimony. Full opportunity was authorized by all objectors. The State Engineer and his staff took into account all of such testimony and evidence and rendered its Order of Determination. That document is based upon the State Engineer's education, experience, training, and engineering

knowledge. I do not believe that knowledge and expertise should be the subject of a “redo” by a district court.

In conclusion, I do not believe that under the existing law, objections to the Order of Determination are de novo. In part, this is based upon the law itself and the fact that no judge is experienced in matters known to the State Engineer and his staff. Assuming I am incorrect, why should the State Engineer waste the time of the claimants and hold objections to the preliminary Order of Determination when such would basically be a waste of time?

Irrespective of the final decision of whether judicial hearings on objections to the Order of Determination are de novo or not, I suggest that if “water judge(s)” are appointed, they should be given special training as follows:

Appeals from Ruling of State Engineer. Pursuant to NRS 533.450, all such appeals are expressly limited to the record on appeal. They are not de novo. *Revert v. Ray*, 95 Nev. 782, 603 P.2d 262 (1979). Hearing on objections to the Order of Determination are set forth in NRS 533.170. Irrespective of whether such hearings are de novo or not, my suggestions for training and education for the water judges are as follows:

1. The Supreme Court selects a “water judge” who is an existing district court judge or perhaps a newly appointed judge.
2. That individual will spend a few days at the State Engineer’s office observing the process for both handling appeals from rulings of the State Engineer and with the adjudication staff.
3. That person should sit through a one or two-day seminar listening to the State Engineer (or his representative), a member of the Supreme Court, the deputy attorney general assigned to the State Engineer, and private practice attorneys experienced in both appeals from rulings of the State Engineer (NRS 533.450) and the entire adjudication process as found in NRS 533.087 – NRS 533.320. Those representatives should agree to prepare a short list or outline of procedures to be followed in appeals from rulings of the State Engineer.

4. Depending upon whether appeals or objections to the Order of Determination pursuant to NRS 533.170 are de novo or not, the judge should be subject to the identical training as set forth above. If it is determined that the matter is de novo, the judge would be authorized to employ the State Engineer and his staff in the status of Special Master to the judge. No judge should make State Engineer decisions, as no judge is qualified to make such decisions.