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Gordon H. DePaoli
E-MAIL: gdepaoli@woodburnandwedge.com
DIRECT DIAL: (775) 688-3010

Via Electronic Mail mfairbank@water.nv.gov
Micheline Fairbank, Deputy Administrator
Nevada Division of Water Resources
Department of Conservation and Natural Resources
901 S. Stewart Street, Suite 2002
Carson City, Nevada 89701

Via Electronic Mail jgradick@nvcourts.nv.gov
Jamie Gradick
Administrative Office of the Courts
201 S. Carson St., Suite 250
Carson City, Nevada 89701

Re: Suggestions for Judicial Education Concerning Water Law Cases

Dear Ms. Fairbank and Ms. Gradick:

This is in response to, Chief Justice Hardesty's request that Commission members submit suggestions concerning education topics for judges handling cases involving water law.

From time to time all judges, trial judges in particular, deal with litigation involving areas of the law in which they may have had little or no experience, either before or after they became judges and which involve matters of technical expertise with which they may have little or no familiarity. I am not sure that litigation involving water law is so different from other areas of the law that judges will need special education on the law itself. However, providing some education on the basics of water law, particularly related to determination of water rights initiated before 1905 may be helpful.

The Legislature has declared that it is the policy of the State "to encourage the State Engineer to consider the best available science in rendering decisions concerning the available surface and underground sources of water in Nevada." Science is going to become more and more important in the coming years, especially in light of climate change. In my judgement, education which assists judges in understanding that science will be critical and should be the principal focus of education for judges handling water law cases.

There are many aspects of water law which result in litigation. They include, but are not limited to, new appropriations of water, changes to existing water rights, groundwater issues, water importation and exportation, surface and groundwater interconnection, and vested water rights adjudications. The role of the trial judge in those situations is different. In some situations, the judge will be reviewing a State Engineer decision under the provisions of NRS 533.450 with an obligation to defer to the expertise of the State Engineer. In other cases, like orders of

determination and adjudications the trial judge is considering the State Engineer's action de novo.

In those situations, involving judicial review of a State Engineer decision, the need is not so much a matter of education on water law per se, but rather on education or training on what sometimes are the very technical factual and scientific issues which may arise in those proceedings. Those issues may include conflict with existing water rights, whether there is unappropriated water on the source and potential surface and groundwater interconnection. Those issues are likely to be more complicated when the source of the water is groundwater.

In the future, I expect that there is going to be considerable litigation involving conflict between groundwater pumping and surface water flows and the water rights those surface flows support. Those issues will be even further complicated in Western Nevada where the surface water systems are regulated by a federal court and the groundwater systems are regulated by the State Engineer. For many years surface and groundwater were administered as though they were completely separate sources of supply. More recently, however, without any particular guidance the Legislature has declared it is the policy of the State to "manage conjunctively the appropriation, use and administration of all waters of the State, regardless of the source of the water." In addition, there are some who contend that surface and groundwater should be managed as a single source of supply.

Judges dealing with any of those issues will need some education on groundwater, groundwater modeling, surface water modeling and climate change modeling. In addition, education on the interconnection of surface and groundwater and the modeling of that interconnection will be needed. The material provided to the Commission in its June 25, 2021 meeting by Steve Snyder of the National Judicial College is a good example of the sort of education which I believe will be needed and helpful for judges.

Because the Legislature has required that claims of vested rights must be filed no later than December 31, 2027, or be deemed abandoned, there likely will be new vested right adjudications taking place at some point. Judges conducting de novo proceedings concerning State Engineer determinations of vested rights may need some general education on water appropriation under the common law. In situations as here, where the claims are being made in the 21st Century, for water rights initiated in the 19th Century, it is not going to be easy to make necessary factual determinations concerning those water rights. Those adjudications are going to present difficult factual and legal issues because there is virtually no one with first-hand knowledge of the initiation of those rights.

In those cases, judges need to have an understanding of both how Nevada's common law of water appropriation evolved and how Nevada's statutory water law evolved. Judges will need to have an understanding of what, under the common law, was required for the initiation of and the perfection of the water right. There are only a few Nevada cases which touch on those issues and those that do, do not do so with a lot of depth. In those cases it may also be helpful for judges to have some education on the history of the area involved and, on the problems, and issues faced by pioneers seeking to establish a living in an era when most of the work was done either by hand or with small horse drawn equipment and on the means by which water was

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delivered and distributed for irrigation. It will also be helpful for judges to understand the meaning and significance of basic water law concepts, like beneficial use as “the basis, the measure and the limit” of the right to use water, point of diversion, place of use, diversion rate, water duty, consumptive use, methods of water delivery and rotation of water, to name a few.

I look forward to considering the suggestions of all of the Commission members on this topic.

Respectfully,


Gordon H. DePaoli

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