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MEMORANDUM

Date: November 15, 2021

To: The Honorable Chief Justice James Hardesty, Nevada Supreme Court

From: Rusty D. Jardine, Esq., Irrigation District Representative to the Nevada Supreme Court
Commission to Study the Adjudication of Water Law Cases

Re: Water Judge Qualifications

Procedural Summary and Purpose Statement

This Memorandum is submitted in response to the direction/assignment given to the Water Commission at its regular meeting conducted on October 1, 2021 -relating to the preferred qualifications of a “water judge.”

Comment 1- Gray Hair Bias

Many years ago, I sat upon a bench in the Salt Lake International Airport, either going to, or returning from, some destination.¹ A businessman sat down near-by; and, I learned in a conversation that ensued that he had for many-many years traveled by air all over the United States. While we waited to board our plane, a youthful airline pilot passed us by. My co-traveler then turned to me and said, “I don’t know about you, but I want my pilot to have lots and lots of gray hair!”

In air travel, as in all matters before the bench, there is great comfort in knowing that the person at the controls possesses the requisite skills, knowledge, training and experience with which to get us *safely* where we are going. While our judges need not bear the faces made heroic by happenings high above the earth or in the waters of the Hudson Bay, and by the gray hair that may adorn the likes of Tammie

¹ I was attending a water law CLE in Denver at which instruction was provided by Associate Justice Greg Hobbs, retired, then of the Colorado Supreme Court.

Jo Shults (Southwest Airlines) or Chesley “Sully” Sullenberger (U.S. Airways), it will always inspire great confidence among those that appear in contested water related matters knowing that the judge is learned; that he or she possesses the requisite skills, a thorough knowledge of the law, training in water issues, much experience, to which we may add the cool and demeanor of a Tammie Jo or a Scully – when important matters are being considered. Water is always important!

What I call a “Gray Hair Bias” is simply an acknowledgement of a highly favored attribute -something we want of all our judges: judicial excellence! The symbol may attend judges old or new -it may associate with many years on the bench -or just a few.

For me, judicial excellence started with the first remarks from the bench, including: “I have read your pleadings. I have examined the exhibits. And this is how we will begin...”

Comment 2-Judicial Excellence-General

In 2017, the Research Division of the National Center for State Courts issued a Report entitled “Elements of Judicial Excellence –A Framework to Support the Professional Development of State Trial Court Judges.” The Report identifies nine (9) elements that capture the general types of knowledge, skills, abilities, and other individual characteristics that judges themselves describe as contributing to judicial excellence.² The elements, nine (9) in all, are then organized into three areas: The first, *a citizen of the community* entails the ethical responsibilities of judicial work and the judge’s role in promoting personal and professional excellence in themselves and others.³ The second, *an informed and impartial decision-maker* refers to the knowledge, skills, abilities, and other characteristics important to judicial reasoning and fair decision-making.⁴ The third area, *a leader in the court process*, refers to elements related to management and leadership.⁵

The nine elements are as follows:⁶

1. Ethics & Integrity
2. Engagement
3. Well-Being
4. Knowledge of the Law & Justice System
5. Critical Thinking
6. Self-Knowledge & Self-Control
7. Managing the Case & Court Process
8. Building Respect & Understanding
9. Facilitating Resolution

I encourage members of the Commission to review the 2017 Report.

Comment 3-Judicial Excellence-Water Law Specific

² *Id. at 6.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

I serve as a member of the Board of Directors to the National Water Resource Association. Within our membership are water law attorneys from most western states including Idaho and Colorado –of which I make particular mention because of the existence of their water courts. Through our Association I elicited comments as to the qualifications necessary for a water judge. A comment received from Steve Leonhardt, Esq., of Colorado, was especially informative:⁷

From my observations and experience over several years, I believe it’s always important for water judges to have a good grasp of math, science and/or engineering, in order to follow and understand the contested expert testimony that is often a major factor in deciding water disputes. In more recent years, as the [Colorado] Supreme Court has fielded concerns about cases languishing on some of the Water Courts’ dockets, I believe the Justices have also considered case management skills as a significant factor in selecting water judges.

Very few of Colorado’s water judges have had experience in water law practice before taking the bench. But even without such experience, water judges have done their jobs well when they have been able to follow and understand expert testimony, weigh the expert’s credibility, and distill facts and opinions into appropriate findings. Having some experience and skill in complex litigation has also been helpful.

Colorado water laws have paid more attention to jurisdictional geography of the water courts than the qualifications of judges. It’s been important for water judges to have jurisdiction over water divisions, the boundaries of which generally match river basins rather than judicial districts or counties. I’m not sure if that’s one of the considerations your Commission is looking at, but it has been an important one in Colorado.

The experience of Steve Leonhardt was echoed by Norm Semanko, an Idaho water law attorney serving also as counsel for the Family Farm Alliance.⁸ Norm is the former Executive Director for the Idaho Water Users Association. Norm spoke highly of the special expertise had by Judge Eric Wildman of Idaho relating to both surface and ground water hydrology and case management. As we have previously noted, the Idaho water court process was carried on following the Snake River adjudication process. I learned too from Lawrence Martin of Washington, that the Yakima Basin adjudication was assigned to existing Superior Court judges that essentially learned on the job about water and water rights.⁹

I also spoke with Patrick Sigl, Supervising Attorney for Arizona’s Salt River Project.¹⁰ He began by expressing great interest in our Water Commission’s mission. He told me that the Arizona legislature is exploring similar measures. Like other attorneys with whom I spoke, he too emphasized the need for

⁷ Personal conversation conducted October 8, 2021.

⁸ Personal conversation conducted on or about October 8, 2021.

⁹ Personal conversation conducted on October 8, 2021.

¹⁰ The Salt River Project (SRP) is the umbrella name for two separate entities: The Salt River Project Agricultural Improvement and Power District –an agency of the State of Arizona that serves as an electrical utility for the Phoenix metropolitan area, and the Salt River Water User’s Association, a utility cooperative that serves as the primary water provider for much of central Arizona. I spoke with Patrick on November 10, 2021 at Chandler, Arizona.

experience in water law cases by sitting judges and the need for efficient case management. And like others, he added that experience was all too often garnered on the job.

John Thorson, in his article borne by the Idaho Law Review, entitled *A Permanent Water Court Proposal for a Post-General Stream Adjudication World* (2015), at page 39, stated as follows:

By comparison, an adjudicator of a water law dispute in the twenty-first century requires a facility in water law (quantity and quality), property law, equity, constitutional law with an emphasis on federalism, public land law, Indian law, Reclamation law, federal environmental law, the management of complex litigation, and the effective use of ADR and settlement methods.

In terms of evidence, this twenty-first century adjudicator relies greatly on expert testimony. He or she is faced with exhibits or administrative records often running in excess of 100,000 pages. He or she needs the ability to understand and apply scientific and technical evidence in a wide range of fields: hydrology (both surface and groundwater), geomorphology, economics, engineering, ichthyology, other ecological sciences, modeling, history and anthropology, global circulation models, adaptive management and ecosystem restoration, and traditional ecological knowledge (TEK). And, according to some commentators, we will soon be adding resilience theory and panarchy to the decision maker's educational curriculum.

More than ever, water-related dispute resolution requires the marriage of appropriately designed institutions and well-educated and experienced adjudicators. The institutions, whether judicial or quasi-judicial nominally located in the executive branch, should enable interdisciplinary understanding of water-related problems and legitimate outcomes. The adjudicators should bring dedication and expertise to their tasks, coupled with the willingness to appropriately consult relevant experts when the issues exceed their own knowledge. The water tribunal proposal previously discussed provides opportunities both for institutional improvement and the recruitment of capable adjudicators.

With aberrant weather and ever-increasing populations and economies, water resource management is emerging as the leading environmental issue of the twenty-first century. Conflicts and litigation are inevitable and, if wisely resolved, may make the difference between successful or failed adaptation to this new reality. Contemporary versions of Spain's historic tribunal de las aguas may play an important role in that successful adaptation.

As I evaluate the opinions of others on water judge qualifications, I cannot say that a judge requires as thorough an understanding of all areas of law suggested by John Thorson. The greater value, as Steve Leonhardt told me, even when the judges have had little experience in water law practice, is that "they have still done their jobs well when they have been able to follow and understand expert testimony, weigh the expert's credibility, and distill facts and opinions into appropriate findings." And, too, some experience and skill in complex litigation is helpful. I agree with others that proper case management is a very important value. Long ago, Judge Fairman taught me that among those best ways of serving a

client, in the practice of law, is seeing that a claim or controversy be placed before the court as soon as possible. That value certainly holds true in the management of cases by the court. "Delay," C. Northcote Parkinson said, "is the deadliest form of denial."¹¹

Comment 4-On the Job Training or Existing Expertise

Long ago, when my public service began in the Fourth Judicial District Court, my bosses included all district judges: Joseph O. McDaniel, Jack Ames, and Thomas Stringfield. Admirable to me was the ability of each of them to move from case type to another case type, for example, a complex civil matter such as medical malpractice to a murder trial. I do not recall any of them, when they went to the bench, having had training in principles of hydraulic engineering, surface or ground water hydrology, or experience in complex administrative practice before the State Engineer. I do know that each was very capable of following and understanding expert testimony, weighing expert witness credibility, and distilling facts and opinions into appropriate findings. I do not recall how cases were managed nor if they had any special expertise in areas such as water law. Their handling of such cases, like the experience of judges in other states, most likely would have involved on the job training. Admitting my bias, they would have dealt with such cases admirably. But each of them would have benefited greatly from any available training. There is so much to learn -as John Thorson states in his article.

At our last meeting, Judge Schlegelmilch stated that our sitting district court judges are capable of handling our water law cases. For the reasons stated above, with qualification, I agree. With the benefit of training through the National Judicial College, such as *Dividing the Waters*, water law principles find a home. But even then, the larger challenge is, or may be, efficient and timely management. Interest in a water case and its timely and efficient management are, I believe, the offspring of experience and/or specialized training. It is in that connection where the assignment of cases to judges bearing special interest and experience in water cases will be of greatest value to the people. The ability to find and follow the proper path through a mountainous record in a contested water case is an extraordinary challenge. That fact alone may cause delay. I think that challenge is best conquered by those judges that have an understanding of water issues coupled with a deep and abiding interest in the same.

Conclusion

Nevada's judges sitting in water law cases must have experience and/or training in water law cases. With that foundation, they would be best able to follow and understand expert testimony, weigh the expert's credibility, and then distill facts and opinions into appropriate findings. They would be able to wade through a record that invariably involves countless exhibits. Cases would be handled more expeditiously. With that foundation, the people of Nevada will be best served.

¹¹ See "Parkinson's Laws," Wikipedia.