

February 15, 2022

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**Re: In the Matter of the Creation of a Commission to Study the Adjudication of
Water Law Cases in the Supreme Court of the State of Nevada, ADKT0576**

Dear Ms. Fairbank and Ms. Gradick:

This letter is in response to Justice Hardesty's direction, during the January 21, 2022 meeting of the Study Commission, that Commission members submit their thoughts on how a "water law case" might be defined for purposes of assignment to specially trained judges. Justice Hardesty also directed that Commission members address whether there was a need for specially trained water judges. It is also in response to Micheline's more detailed email of February 8, 2022.

Justice Hardesty's direction arose in the context of agenda item 3(a) "Discussion regarding Nevada District Court Water Judges Draft Rule, Presented by Judge John P. Schlegelmilch." He also asked Commission members to address whether they thought there was a need for specially trained judges. I suspect that my comments on that agenda item may have had something to do with those assignments. Therefore, initially I want to clarify what I intended to say, in case I did not make it clear when I said it.

First, I am not, convinced that a "specialty court," consisting of judges who are assigned water law cases as set forth in the proposed rule, is needed. I suggested that there first should be consideration of the reasons why one is needed and in that context what would constitute a "water case" for purposes of assignment to it. I also indicated that the scope of what constitutes a "water case" might affect the number of judges assigned to handle such cases, how they are selected and the judicial districts from which they would be selected. In short, I thought it was premature to discuss the content of a rule without knowing what significant issues such judges would be called upon to address.

However, I did not mean to suggest that special training and educational opportunities should not be made available to judges assigned water law cases. As I said in my letter concerning the creation of the Commission, I support measures to improve the education, training, specialization, timeliness and efficiency of Nevada courts and judges with respect to cases involving water. It may be that that can only happen in the context of a rule like the one proposed. The Commission should consider whether that is in fact the case.

It is useful to consider the background against which this Commission was created in the first instance. Based upon my participation in meetings arranged by the Division of Water Resources, it was clear that this Commission was proposed as an alternative to a Division of Water Resources legislative proposal to make the Nevada Court of Appeals, the court, which reviewed State Engineer decisions under NRS 533.450, rather than the district courts. That proposal, which was the subject of Assembly Bill 5, in the 2021 session, would have required an amendment to the Nevada Constitution. Moreover, not all matters decided by the State Engineer are reviewed under NRS 533.450. It was never clear to me, both, in discussions concerning AB 5, and with respect to the creation of this Commission whether the Division of Water Resources sought those changes because of a lack of education, experience and training of judges deciding cases under NRS 533.450, or, if there were additional reasons.

It would be helpful to me, and perhaps to other members of the Commission as well, to receive some information on presently pending “water law” matters both in the district courts and in the appellate courts. That information might include the number of such cases, how long they have been pending, the issues involved and the courts in which they are pending.

With respect to cases which should, if possible be assigned to judges with experience, education and training in water matters, I reviewed Chapters 533 and 534 of the Nevada Revised Statutes. In my judgment those cases would include:

1. Adjudications pursuant to NRS 533.165 – 533.195;
2. Cases brought under NRS 533.240 which is an adjudication which does not begin with an initial State Engineer order;
3. Cases or petitions arising under NRS 533.310 which are also a form of adjudication;
4. Matters involving review of State Engineer decisions made pursuant to NRS 533.364 involving interbasin transfers of groundwater;
5. Judicial review under NRS 533.450, involving State Engineer decisions cancelling permits; finding abandonment of a water right; finding forfeiture of a water right; or denying an extension of time to prevent a forfeiture;
6. Cases involving groundwater management plans pursuant to NRS 534.037;

7. State Engineer decisions involving projects for recharge, storage and recovery of water pursuant to NRS 534.250 et seq.; and

8. Review of State Engineer orders made pursuant to NRS 534.120 regarding designated groundwater basins and preferred uses.

The scope of what I have suggested above might expand or contract based upon what we learn about presently pending water law cases and the issues involved in those cases.

If it is the conclusion of the Commission that there is no effective way to provide education and training for judges handling water cases other than by creating a pool of district court judges who volunteer to receive such training, and to be assigned those cases wherever they arise, then the Commission should consider how best to do that. In that regard, I reviewed how Business and Family Law cases are handled. What I found was that the Legislature has established Family Courts and has enacted legislation to establish the number of judges serving the Family Courts. The legislation applies only in the Second and Eighth Judicial Districts. On the other hand, assignment of Business cases are handled in the Second and Eighth Judicial District Courts by a local rule which defines those cases, and which provides for assignment by the Chief Judge of those respective District courts.

The proposed Rule here would not create a “water court” per se. It is analogous to how Business cases are handled, but, it would bypass the local rule in favor of designation or recommendation by the Judicial Council and designation by the Chief Justice of the Nevada Supreme Court, pursuant to Article 6 §19 of the Nevada Constitution. Obtaining the information requested above concerning the number of pending water cases, where they are pending, the issues involved and the time they have been pending will be helpful in considering where to go from here. For example, if that data shows there is a need for special assignment of water law cases in either or both of the Second and Eighth Judicial districts, perhaps that might be accomplished by a local rule in those Districts, just as was done for business matters.

If that information shows there is a need for special assignment in the other judicial districts in the State, the local rule alternative might not be practical for the other districts in the state because for the most part they have only one or two judges. Nevertheless, the proposed rule might be modified for the rest of the judicial districts in the state. In my judgment, it is important that water law cases with venue in a particular District be heard, if at all possible, by a judge of that District, or at least by a judge from a District with similar issues and problems.

The problem for districts with only one or two judges might be solved by drawing from a combination of judicial districts based upon somewhat common water geography. For example, water law cases arising in judicial districts in the Carson, and Walker River Basins might be assigned to a specially trained judge or judges from the First, Third, Ninth and Tenth Judicial Districts. Water cases arising in the Humboldt River Basin might be assigned to similar volunteers from the Fourth, Sixth and Eleventh Judicial Districts. Cases from the remaining districts might be assigned to volunteers from the Fifth and Seventh Judicial Districts. Moreover, in situations where it was necessary, any of those judges could be assigned to hear cases in any of those districts.

Micheline Fairbank
Jamie Gradick
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I look forward to our next meeting and to the suggestions of other members of the Commission.

Respectfully,

Gordon H. DePaoli
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