

Nevada Supreme Court Commission
To Study the Adjudication of Water Law Cases
Meeting Summary
October 1, 2021

Members Present:

Chief Justice Hardesty
Associate Chief Justice Ron Parraguirre
Tom Baker
Allen Biaggi
Bert Bryan
Gordon H. Depaoli
Judge Kathleen Drakulich
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
Laura A. Schroeder
Paul Taggart
Oscar (Oz) Wichman
John Zimmerman

Guests Present:

Adam Sullivan
Jay Dixon
Laurel Salito
Mauricia Baca
Jaina Moan
Doug Busselman
Stef Morris

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 1:09 p.m.
- Ms. Fairbank conducted the roll call, with all members present except John Entsminger and John McMasters.

II. Public Comment.

- There was no public comment.

III. Review and approval of minutes of June 25, 2021, meeting. (For possible action.)

- Minutes are not available, will be circulated before the next meeting

IV. Overview and discussion of the Division of Water Resources 2021-2023 biennial budget, impacts on statewide services and update on American Rescue Plan funding requests. (Discussion.)

- Chief Justice Hardesty is sharing the State Engineer's budget to give a demonstration of how underfunded the agency is for the work that the public expects to take place. State Engineer, Adam Sullivan, and Deputy State Engineer Micheline Fairbank, invited to present their budget update and discussion.
- American Rescue Plan funds (\$2.7 billion) available, and hopefully the State Engineer will be a recipient as they have identified.
- Presentation by Mr. Sullivan and Ms. Fairbank
 - Revenue sources are varied. Fees are all paid to the general fund, do not fund the agency. Budget priorities are determined on the Department level; DWR is one agency withing Department of Conversation and Natural Resources.
 - 2:07 Question from Allen Biaggi
 - Jeff Fontaine agreed regarding self-sufficiency and funding problems. CNRWA and HRWA have discussed budget reductions they have faced, and both boards support Division's request for ARP funds for State Engineer to restore budget and modernization programs. Send supporting comments to Nevada Recovery web portal.
 - Paul Taggart has compared other similar state agency budgets, but not similar to Nevada State Engineer/Division of Water Resources. Possible that Nevada has the smallest budgets. Mr. Taggart is volunteering to do the work.
 - Jason King talked about Association of Western State Engineers, formed to advise Western State Governors on issues regarding water. Past discussions in that group regarding this topic reflect that Nevada is in the bottom half of funding. Alaska said they had a small budget because they did not need to manage their water, so should Nevada then have the highest budget? In response to Mr. Biaggi, Division attempted to assess an annual use fee for all water users, around \$65 per year, or a sliding scale, but was not successful. Support from professionals and committee members in Legislative hearings but does not make the priorities for funding additional appropriations.
 - Question re cost estimate with USGS and DRI, Mr. Sullivan said the rates were calculated with lower overhead, but not necessarily matching funds.
- Justice Hardesty said timing is not certain on ARP distributions, but possibly at the same time as the special session anticipated for redistricting. Inquired for interest from Commission to express support for Division's request. It seems abundantly clear that there is serious need for increased adjudication, decreased processing time, development of stronger records in cases possibly subject to judicial review. Meeting these objectives require more funding. Chief Justice Hardesty requested comments.
 - Judge Schlegelmilch wants to see the actual proposals before taking a position on whether to support the Division's requests.
 - Rusty Jardine stated it benefits those of us who utilize the Division's services to support their request.

- Oz Wichman one of the unintended consequences of this Commission is that the Division will request more money, and I believe they need the support.
- Judge Drakulich supporting the Division is consistent with supporting the most important resource in the State.
- Laura Schroeder provided written comment in support.
- Micheline Fairbank offered to prepare a summary of requests to be circulated for consideration of the Commission before committing to supporting the request. Can be provided on Tuesday for further consideration.
- Vote on special meeting to consider materials and consider support for Division's request
 - Mr. Lister and Mr. Baker also voted in support before the meeting was adjourned.

V. Discussion of the needs for judicial determinations in administering the adjudication of vested water rights pursuant to NRS 533.087 through 533.320. (Discussion)

- Micheline Fairbank talked about the determination of pre-statutory claims of vested water rights. Conducting the investigation of adjudication is time intensive. Then goes to District Court and is shifted into another time-intensive process. Compare to other state's processes.
 - Idaho, Montana and New Mexico have specific courts for adjudication of pre-statutory rights. Idaho done for the Snake River adjudication, 35-year process. Montana is adjudicating the entire state. New Mexico has a single judge appointed to conduct adjudications.
- Judicial review of State Engineer decisions is a different procedure than the adjudication process. The proceedings in District Court can take decades. Demand will increase in 2027 with the deadline to file claims of vested rights, and subsequently more pressure to proceed at the District Court level. Proposed consideration of a court or judge that is solely concerned with adjudication of pre-statutory vested rights in an effort to complete these proceedings expeditiously.
- Benefit of having decrees finalized is that future management decisions are dependent upon the decree of the Court for pre-statutory rights. DWR is required to determine validity of claim before adjudication by a court.
- Ross de Lipkau does not see a reason to change procedures, but District Court judges should follow the law. His April 2021 memo said adjudication is dependent upon the experience of the State Engineer to determine beneficial use of claims of vested right. The Nevada Adjudication procedures are based on Oregon law. Findings are to be based upon an field investigations of the State Engineer's staff and a hearing is held by the State Engineer on the Preliminary Order of Determination. The findings of the field investigations and hearing on objections to the Preliminary Order of Determination are compiled into the Order of Determination that is filed before the District Court, which has the effect of being a complaint and no other pleadings shall be filed. The Court then determines whether the findings are based upon the State Engineer's expertise and a decree is issued. Mr. de Lipkau's opinion is that allow for

extensive additional evidence, depositions and expert testimony is contrary to what is intended by the law. He continued that judicial training on these matters would be appropriate and a pool of judges available to hear adjudications. This is not a change in the law, but strict enforcement of the law as written.

- Paul Taggart disagrees with Mr. de Lipkau, de novo review occurs at the District Court. Current system will not be effective with the number of adjudications that need to be done. 256 groundwater basins that need to be adjudicated. Adjudications are based on review of historical documentation. Need to rank the top 10 and focus on those. Current procedures require that a trial be repeated before the District Court when it has already been completed before the State Engineer. Having a few judges available to adjudications, possibility to develop rules regarding review of historic records. Digitization of documents is important not only the State Engineer but also local governments (county recorders).
- Gordon DePaoli disagrees with Mr. de Lipkau. Legislature did intend that decree court would be de novo. (missed) Chief Justice Hardesty asked whether specially trained judges are required for de novo review. Mr. DePaoli said that District Judges are very capable of dealing with adjudications. The problem is the other demands on their time, but they are capable.
- Mr. de Lipkau asked if there is a full-blown hearing before State Engineer, statutes say no further pleadings allowed before district court, that District Judge gets to hear de novo evidence requiring expertise to determine credibility or weight. Participants get two shots on the procedure before State Engineer and then District Court.
- Laura Schroeder provided a written comment that based on her experience in other states, one judge appointed to handle all adjudications would be a benefit to judicial economy. Idaho system has worked the best in her experience.
- Judge Schlegelmilch said this is the heart of the Commission. Nice to know how State Engineer is processing their caseload. Thought the purpose of the Commission was to look at cases and how to adjudicate in the fairest, quickest and timeliest manner. Agree with Mr. DePaoli that District Judges are capable, and with Mr. Taggart that there should be guidelines, but timelines may not be the way to go. The exceptions in an adjudication are the answer; it is a de novo proceeding. The Court has to take evidence and testimony as provided in the statutes. Rather than Water Court, consider proposal in Utah that 3 or 4 district judges are designated water judges, with specialized education to do water adjudication, prior appropriation, etc. Parties can request an opt..
- Chief Justice Hardesty emphasized that funding the agency that generates the records is critical to the overall process. Upcoming meetings will cover education, panels, etc. Recognizing that some District Judges may need supplemental training and education to supplement their understanding of the law and what they need to decide.
- Jason King said he's a big proponent of completing adjudications for providing certainty to water right holders. Considered that the lack of adjudications in Nevada was due to the lack of resources for Division staff to complete field work and studies necessary for adjudications.

VI. Continued Discussion of Judicial Education Needs and Opportunities. (Discussion.)

a. Presentation by Nature Conservancy regarding environmental considerations in Nevada's Water Law. (Discussion.)

- Laurel Saito on behalf of The Nature Conservancy. Joined with Mauricia Baca, State Director, Jaina Moan, External Affairs Director. Providing advice on how natural systems can be considered in these adjudications. The Nature Conservancy supports the Division's requests for ARP. The Nature Conservancy is an international group founded by scientists to protect natural areas. Outstanding question of how ecosystems fit in to consideration of public interest. Overburdened rural judges may not have sufficient resources. Request that decisions consider impacts on natural systems. Offered resources from The Nature Conservancy to assist in understanding groundwater and ecosystem relationships.
- Chief Justice Hardesty invited Ms. Saito to monitor the activities of the Commission and welcomed their participation and comment in the future.

b. Overview of proposal for Nevada water courts by Oz Wichman. (Discussion.)

- Oz Wichman provided information on the background of hydrographic regions. Discussed potential creation of water court in conversation with Adam Sullivan and Micheline Fairbank. Talked to the public and water professionals. There are four proposals provided in the packet. Mr. Wichman adds to the third proposal that if five water court judges are assigned, that the full body of the court would weigh-in on a decision for automatic peer review; but maybe consider a panel or the full panel in other cases. Map drawn based on availability of facilities and regional division.
- Chief Justice Hardesty commented on some challenges from existing law, possibly the Constitution. Chief Justice has the ability to assign judges to tasks or districts, to avoid constitutional conflicts. Mr. Wichman's proposal is a good start.
- Paul Taggart appreciated Mr. Wichman's work. Not sure if it makes sense to divide into districts, but proposal is worth discussion. Said although he was initially skeptical about the need in Nevada for specialized water courts, information presented does make sense for the Commission to consider this. Suggestion that one judge from each area hear cases in that area, but also have a five-judge panel of water judges. Either have cases filed and screened and sent to panel or to single panel, depending on whether state-wide significance or error case. Supreme Court benefits from educated panel of judges having input on cases being heard. Statutory restrictions on how appeals are heard. Maps may effect Judges hearing cases in different districts.
- Bevan Lister found the concepts interesting. His question is whether the budget, support staff, be housed within the Supreme Court or would it be

separate funding. Mr. Wichman said there are discussions about this and considered that judges would share common staff at first. One important concept is that the judges need to be scattered about. Mr. Lister asked if there are enough cases for the judges to be busy full-time. Mr. Wichman said that per the AG's office, the caseload at any given time is about 50 cases. Mr. de Lipkau's memo talked about three judges handling cases. But there are more than three regions that are not Reno, Vegas or Elko, so it would be more burdensome for some water users. Mr. Lister requested that replacement of judge be made available through petition to county commission.

c. Discussion and ideas for legal and technical education requirements for Nevada judges adjudicating water law cases. (Discussion.)

- Chief Justice Hardesty shared that Judge Schlegelmilch is now on the board of Dividing the Waters and is working on developing a curriculum for judicial education. Request for things that a "water judge" should be educated about. Within the next 30-45 days, send an email to Jamie Gradick and Micheline Fairbank with suggested requirements to be made a part of judicial education to sit on these cases. Ideas could be hydrology, legal matters, anything.

VII. Topics for future meetings. (Discussion.)

- Chief Justice Hardesty thanked Paul Taggart for his work on a memo regarding equitable relief and related matters. Mr. Taggart stated that district courts are not solely appellate review but should be limited to proper circumstances. Recommendations and ideas included on directing district court about when they are exercising their equitable powers, procedures that can be followed.
- Mr. Taggart added that the Colorado water court commission, would like to invite retired Supreme Court justice to speak to our commission. Would recommend that the Commission consider adopting a mission statement that the purpose is to consider the improvement of water adjudication without modifying the water law.

VIII. Schedule subsequent meeting(s). (For possible action.)

- Poll will be sent to schedule meeting to discuss materials submitted by Adam Sullivan and Micheline Fairbank regarding ARP funds.

IX. Public Comment.

- No public comment.

X. Adjournment

- There being no further discussion, the meeting was adjourned at 3:58 p.m.