

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE CREATION
OF A COMMISSION TO STUDY THE
ADJUDICATION OF WATER LAW
CASES.

No. ADKT 0576

FILED

DEC 27 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

*REPORT OF THE COMMISSION TO STUDY THE ADJUDICATION
OF WATER LAW CASES*

On March 9, 2021, the Nevada Supreme Court entered an order in ADKT 0576 creating the Commission to Study the Adjudication of Water Law Cases. The Commission was formed for the purpose of making recommendations to improve education, training, specialization, timeliness, and efficiency of Nevada's district courts in the judicial review process of water law cases.

The Commission conducted seven meetings between April 16, 2021, and December 15, 2022. All agendas, meeting minutes, and documents considered by the Commission have been posted on the Supreme Court's website. Commission membership was comprised of professionals experienced in water law issues, key stakeholders, and members of the Nevada judiciary, as shown in Exhibit "A" attached hereto.

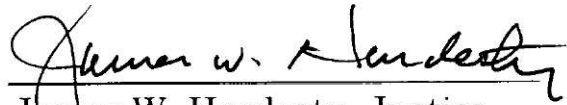
Under the direction of Judge Kathleen Drakulich, the Commission's Subcommittee to Review Judicial Experience and Educational Requirements for Certification as a Specialty Water Judge, developed judicial education curriculum requirements, hereto attached as Exhibit "B", to be offered by the Administrative Office of the Courts' (AOC) Judicial Education Unit. Following extensive discussion and debate, the Commission unanimously approved the curriculum on April

22-40443

19, 2022, and recommends that the Nevada Supreme Court adopt the Subcommittee's recommendation.

Under the direction of Associate Justice James Hardesty, the Commission's Subcommittee to Finalize Proposed Rules for Water Law Adjudications, reviewed Commission membership input to develop rules, hereto attached as Exhibit "C", for the appointment of district court judges adjudicating Nevada water law cases and the creation of a 3-year pilot program to implement and study the results of these rules. Following review and discussion, the Commission unanimously approved this rule on December 15, 2022, and recommends that the Nevada Supreme Court adopt the Subcommittee's recommendation.

Accordingly, the Commission requests that the Nevada Supreme Court schedule this Report for hearing and approve the Commission's recommendations.


James W. Hardesty, Justice

cc: Paola Armeni, President, State Bar of Nevada
Kimberly Farmer, Executive Director, State Bar of Nevada
All District Court Judges
Clark County Bar Association
Washoe County Bar Association
First Judicial District Bar Association
Douglas County Bar Association
All Committee Members
Administrative Office of the Courts

EXHIBIT A

Commission to Study the Adjudication of Water Law Cases Members

Justice James W. Hardesty, Commission Chair

Chief Justice Ron Parraguirre, Supreme Court

Micheline Fairbank, Nevada Division of Water Resources Department of
Conservation and Natural Resources

Jason King, Practicing Water Rights Engineer/Hydrologist

Rick Felling, Practicing Water Rights Engineer/Hydrologist

John Entsminger, Urban Municipal Water Purveyor

John R. Zimmerman, Esq., Urban Municipal Water Purveyor

Jeff Fontaine, Esq., Rural Water Interests/Water District

Laura Schroeder, Esq., Rural Water Interests/Water District

Bevan Lister, Agricultural

Tom Baker, Agricultural

Rusty Jardine, Esq., Irrigation Districts

Bert Bryan, Irrigation Districts

Ross de Lipkau, Esq., Mining

Allen Biaggi, Mining

Kyle Roerink, Environmental/NGOs

Karen Peterson, Esq., Practicing Water Rights Attorney/Rural Counties

Oscar (Oz) Wichman, Rural Counties

Christopher W. Mixson, Esq., Inter-Tribal Council of Nevada, Inc.

Paul G. Taggart, Esq., Practicing Water Rights Attorney/Domestic Wells

Gordon H. DePaoli, Esq., Practicing Water Law Attorney

Judge Kathleen Drakulich, Washoe County

Judge John P. Schlegelmilch, Lyon County

Judge Gary Fairman, White Pine County

Judge Elizabeth Gonzalez, Clark County

Jon McMasters, Walker River Paiute Tribe

EXHIBIT B

Nevada Supreme Court Commission to Study the Adjudication of Water Cases **(ADKT 0576)**

Recommendations of the Subcommittee to Review Judicial Experience and Educational Requirements for Certification as a Specialty Water Judge

The following are recommendations for the experience and/or education that state district court judges should have to qualify for certification as a Specialty Water Judge pursuant to a court rule that may be considered by the Water Commission.

The judicial education requirements proposed in this list were first compiled from the submissions of the members of the Commission as a whole, and then refined and prioritized by the Subcommittee for Judicial Education Requirements. The Subcommittee proposes that the below criteria be used for determining whether an applicant to be selected as a specialty water judge meets a sufficient threshold of knowledge of Nevada water law and the necessary hydrologic topics, which knowledge can come from a combination of practical experience or relevant education.

I. SPECIFIC LEGAL, TECHNICAL AND/OR PRACTICAL KNOWLEDGE AND EXPERIENCE

A. Role of the Courts in Water Cases

1. Distinction between general stream/aquifer adjudications, water rights decrees, and petitions for judicial review of State Engineer decisions:
 - a. Background for adjudications including
 1. proving up pre-statutory/vested water rights claims under common law;
 2. role of State Engineer in developing final order of determination;
 3. role of State Engineer in enforcing water rights decrees
 - b. Background of administrative law and its application to judicial review of State Engineer decisions.
2. Other legal concepts in water cases:
 - a. equitable relief;
 - b. extraordinary writs;
 - c. expert witnesses;
 - d. special masters;
 - e. injunctions and stays;

B. Role of the State Engineer and Administrative Agencies in Water Matters

1. Administrative and Evidentiary Proceedings
2. Process for obtaining a statutory water right, and a change to an existing water right, including the process for permitting and certificating a water right

- a. water availability, conflicts with existing rights, detriment to the public interest
 - b. interbasin transfers
- 2. Conjunctive management of surface water and groundwater
- 3. Overappropriation and curtailment
 - a. curtailment by priority
 - b. preferred uses
 - c. critical management areas and groundwater management plans
- 4. Other administrative concepts
 - a. consumptive and non-consumptive use;
 - b. mitigation, including 3M plans and legal underpinnings;
 - c. adaptive management;
 - d. climate change and drought;
 - e. environmental protection criteria (federal/state law) and instream flows;

C. Practical knowledge or experience of use of water in Nevada

- 1. Uses of Water in Nevada
 - a. farming and irrigation, rotation of water, ditches and ditch companies;
 - b. stockwatering;
 - c. mining;
 - d. municipal & industrial;
 - e. instream flows and environmental uses;
 - f. water storage, reservoirs, aquifer storage;
 - g. well drilling and construction;
 - h. domestic wells
- 2. Local and Regional differences in water uses and management throughout Nevada

II. GENERAL LEGAL KNOWLEDGE AND EXPERIENCE

A. General Principles of Nevada Water Law

- 1. Doctrine of prior appropriation in Nevada and in other western states
 - a. historic role of water law in Nevada;
 - b. administrative management systems for water allocation, including water rights applications, permits, certificates, change applications
 - c. role of real property law in water cases;
 - d. attributes of a water right: point of diversion, place of use, manner of use, diversion rate, works of diversion, water duty, proof of beneficial use, perfection, pre-statutory vs. statutory
 - e. water delivery and conveyance
 - f. supplemental and temporary water rights
- 2. Concept of beneficial use including:
 - a. usufructory nature of a water right;

- b. 'use it or lose it' principle, including forfeiture and abandonment;
 - c. water speculation and its relation to Nevada water law;
 - d. perfection and proof of beneficial use;
- 3. Role of federalism in Nevada water law, including proper deference of federal government to state administration of water resources and federal reclamation law;
- 4. federal river decrees;
- 5. Principles of the public interest principle and public trust doctrine;
- 6. Different types water rights, including federal reserved (Indian and non-Indian), vested rights, statutory rights, domestic use/domestic wells, temporary use, stockwater

III. SCIENTIFIC AND TECHNICAL KNOWLEDGE AND EXPERIENCE

- A. Hydrology, Geology and Nevada's Environment
 - 1. The water cycle.
 - 2. The definitions of surface water, groundwater, evapotranspiration, an aquifer, and recharge.
 - 3. Movement of surface and ground water through the environment, including cones of depression, short- and long-term aquifer responses, stress tests
 - 4. The definition of a ground water basin and the 256 basins located in Nevada.
 - 5. The definition of a well and how are they constructed and drilled.
 - 6. An overview of local and regional differences in water management and an awareness of jurisdictional geography.
 - 7. The definition of perennial yield, how is it derived and used in water resource management.
 - 8. Definitions of a "water balance"
- B. Water measurement and water modeling

IV. CONTINUING EDUCATION

Specialty Water Judge should be required to continue both their legal and technical/scientific education after selection. They should be required to take a minimum number of continuing education credits on the following subjects:

- A. Updates on modifications to Nevada water statutes and water law
- B. Updates on hydrology, water modeling and limitations, water measurement, including use of "Hydrologic Modeling Benchbook"

V. OTHER RECOMMENDATIONS

The Judicial Education Subcommittee recommends the following:

- A. Develop (and regularly update) of a compendium of important caselaw, federal decrees, and decisions of the State Engineer regarding Nevada Water Law;

- B. Establish a judicial training program on water, water technology and water law.
- C. Provide for the availability of unbiased experts for judges to call upon in water litigation.
- D. Encourage Nevada counties and other jurisdictions to contribute to the expenses of judicial training and associated travel expenses.
- E. Make allowances for judges to attend annual Nevada Water Resource Association conferences and ongoing technical sessions.

EXHIBIT C

District Court Water Judges

This rule provides for the specialized education and appointment of district court judges adjudicating Nevada water law cases in a fair, just, and timely manner.

Rule _____. District Court Water Judges.

- 1. Water Law Cases defined:** As used in this rule, a “water law case” is a case filed in the district court relating to a petition for judicial review or action:
 - (a) arising under NRS Chapters 532, 533, or 534
 - (b) pertaining to an adjudication of pre-statutory claims of vested water rights, or
 - (c) involves an order or decision made pursuant to NRS Chapters 535 and 536 which order or decision is expressly reviewable pursuant to the provisions of NRS 533.450.
- 2. Appointment of district court judges to water law cases by the chief justice:** Pursuant to Nev. Const. art. 6, § 19, as the administrative head of the Nevada court system, the chief justice shall assign district judges to adjudicate water law cases within their judicial district or to adjudicate such cases in other judicial districts.
 - (a) In making the appointment, the chief justice shall consider:
 1. the knowledge, education, and experience of the district court judge in relation to cases involving water law, the adjudication of water rights, and other water related issues; or
 2. the judge’s participation in specialized continuing education in the area of water law as proscribed and approved by the supreme court.
 - (b) A district court judge shall seek appointment to adjudicate water law cases by submitting a written application on a form approved by the

¹Nevada Constitution Art. 6 § 19

1. The chief justice is the administrative head of the court system. Subject to such rules as the supreme court may adopt, the chief justice may:
 - (a) Apportion the work of the supreme court among justices.
 - (b) Assign district judges to assist in other judicial districts or to specialized functions which may be established by law.
 - (c) Recall to active service any retired justice or judge of the court system who consents to such recall and who has not been removed or retired for cause or defeated for retention in office and may assign him to appropriate temporary duty within the court system.
2. In the absence or temporary disability of the chief justice, the associate justice senior in commission shall act as chief justice.

supreme court. The approved application form shall be available at the supreme court clerk's office. The supreme court may refer an applicant to the administrative office of the court for investigation into the education and background qualifications of the applicant necessary to satisfy section (a)(1) above.

3. Filing and assignment of a water law case. Upon the filing or first responsive pleading of a water law case, a party to the action shall inform the court that the case must be assigned to a district court judge within the judicial district appointed to adjudicate water law cases. In the event no district court judge within the district has been appointed to adjudicate water law cases, the chief justice shall assign a district court judge qualified to adjudicate water law cases to hear and decide the case. In any event, the case shall be adjudicated in the district in which the action was filed subject to any separate determination of venue.

4. Assignments and Reporting. Assignment of cases involving water law to a water judge shall be made on a random rotating basis.

4.1 A water law case **shall** be transferred to a water judge.

4.2 Any case in which the subject matter relates to water law issues **may** be transferred to a water judge in the following circumstances:

- (a) Following the initiation of the case, upon stipulation of the parties and approval of the district judge presiding over the case;
- (b) Upon request of a party to the case when the party makes such a request as part of the complaint filed or the first responsive pleading and the request is approved by the presiding district judge; or
- (c) The presiding district judge, in their discretion and after consultation with the parties, finds that a water judge is better suited to preside over the case. A request to have the case assigned to a water judge may be considered and granted at any time in the discretion of the presiding district judge.

4.3 Each judicial district shall provide an annual report to the supreme court as proscribed in the Uniform System of Judicial Reporting that describes the filings, assignments to district court judges, dispositions, settlements, and such

other information as may be necessary to describe the adjudication of water law cases.

- 5. Peremptory Challenge of a district court water judge.** In those instances where one of the water judges is peremptorily challenged pursuant to SCR 48.1, or recuses or is disqualified, the case shall be assigned to another water judge. If all water judges in the judicial district are ineligible to sit, then the case shall be assigned by the chief justice to an appointed water judge from another judicial district.
- 6. Posting Decisions.** If a water judge files a final order or judgment in a water law case, the water judge shall cause the order or judgment to be transmitted to the administrative office of the courts and the state engineer for posting on the website. Such an order or judgment may be cited in future proceedings.
- 7. Term.** Water judges shall serve only so long as they are district court judges and continue to satisfy educational requirements approved by the supreme court. Water judges may, however, resign their special assignment as a water judge, at their own request or the request of the chief justice, while still serving as district court judges.
- 8. Caseload.** If a water judge does not have a full workload of water law cases, the judge shall hear non-water law district court cases to maintain a full workload of cases.
- 9. Venue.** Nothing in this rule affects venue.
- 10. Review.** This rule implements a pilot program for at least three years. At the conclusion of the pilot program, the supreme court's Water Commission to Study the Adjudication of Water Law Cases shall conduct a review of this rule and the use of water judges to adjudicate water law cases and submit a report to the supreme court with findings and conclusions. This rule shall remain in effect until amendment or repeal by the supreme court.