

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.

ADKT 0576

FILED

JUL 07 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  CHIEF DEPUTY CLERK

*ORDER ADOPTING RULES AND CURRICULUM RELATED TO
SPECIALIZED EDUCATION AND APPOINTMENT OF SPECIALTY
WATER LAW JUDGES*

WHEREAS, on February 8, 2021, James W. Hardesty, then Chief Justice of the Nevada Supreme Court, filed a petition requesting that the Nevada Supreme Court consider creating a Commission to Study the Adjudication of Water Law Cases in Nevada's Courts (Commission). The court filed an order creating the Commission on March 9, 2021. On December 27, 2022, Chief Justice Hardesty filed a report of the Commission's recommendations relating to the judicial review process of water law cases.

WHEREAS, this court solicited public comment on the petition and a public hearing was held in this matter on March 21, 2023; and

WHEREAS, this court concludes that adoption of proposed rules related to specialized education and appointment of district court judges and the Commission's recommendations on the judicial education curriculum requirements for certification as a specialty water law judge is warranted; accordingly,

IT IS HEREBY ORDERED that the proposed rules related to specialized education and appointment of district court judges as specialty water law judges shall be adopted and shall read as set forth in Exhibit A.

IT IS FURTHER ORDERED that the Commission's recommendations on the judicial education curriculum requirements for certification as specialty water law judges shall be adopted as set forth in Exhibit B.

IT IS FURTHER ORDERED that the rules and recommendations shall be effective six months from the date of this order. The clerk of this court shall cause a notice of entry of this order to be published in the official publication of the State Bar of Nevada. Publication of this order shall be accomplished by the clerk disseminating copies of this order to all subscribers of the advance sheets of the Nevada Reports and all persons and agencies listed in NRS 2.345, and to the executive director of the Nevada State Bar. The certificate of the clerk of this court as to the accomplishment of the above-described publication of notice of entry and dissemination of this order shall be conclusive evidence of the adoption and publication of the foregoing rules and recommendations.

Dated this 7TH day of July, 2023.

Stiglich, C.J.
Stiglich

Cadish, J.
Cadish

Pickering, J.
Pickering

Herndon, J.
Herndon

Lee, J.
Lee

Parraguirre, J.
Parraguirre

Bell, J.
Bell

cc: Julie Cavanaugh-Bill, President, State Bar of Nevada
Kimberly Farmer, Executive Director, State Bar of Nevada
Bradley Crowell, Director, Department of Conservation and
Natural Resources
Adam Sullivan, State Engineer
All District Court Judges
Clark County Bar Association
Washoe County Bar Association
First Judicial District Bar Association
Douglas County Bar Association
Administrative Office of the Courts

EXHIBIT A
ADOPTION OF SUPREME COURT RULE 18
NEVADA RULES FOR DISTRICT COURT WATER JUDGES

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

2. 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.

3. Designation 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 designate district judges to adjudicate water law cases within their judicial district or to adjudicate such cases in other judicial districts.

- (a) In making the designation, 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; and
 - 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 designation to adjudicate water law cases by submitting a written application on a form approved by the 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.

4. 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 designated to adjudicate water law cases. In the event no district court judge within the district has been designated 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.

5. Assignments and reporting. Assignment of cases involving water law to a water judge shall be made on a random basis.

5.1. A newly-filed water law case shall be transferred to a water judge.

5.2. 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 assigned to a water judge may be considered and granted at any time in the discretion of the presiding district judge.

5.3. Each judicial district shall provide an annual report to the supreme court as prescribed 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.

6. 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 a designated water judge from another judicial district.

7. 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.

8. Term. A water judge shall serve only so long as the judge is a district court judge and continues to satisfy educational requirements approved by the supreme court. A water judge may, however, resign the special designation as a water judge, at the judge's own request or the request of the chief justice, while still serving as a district court judge.

9. 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.

10. Venue. Nothing in this rule affects venue.

11. Review. This rule implements a pilot program for at least three years. Annually, the Commission shall collect status reports from the district courts and submit a report to the supreme court with findings and conclusions regarding the progress of the program. This rule shall remain in effect until amendment or repeal by the supreme court.

12. Effective date. This rule shall become effective for new water law cases filed six months after the date of this order.

EXHIBIT B

Nevada Requirements for Designated Water Judges

I. SPECIFIC LEGAL, TECHNICAL AND/OR PRACTICAL KNOWLEDGE

- 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

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

- 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 Judges should be required to continue both their legal and technical/scientific education after designation. They will be required to take a minimum number of two continuing education credits annually 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"