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MEMORANDUM

To: Nevada Board of Wildlife Commissioners
Tony Wasley, Director, Nevada Department of Wildlife

From: Craig Burkett, Senior Deputy Attorney General

Date: January 5, 2021

Subject: Litigation Update

1. *United States, et al. v. Truckee-Carson Irrigation District, et al.* (9th Circuit, San Francisco). An appeal of a judgment against the TCID for excess diversions of water. NDOW appealed to protect its water rights and interests. The 9th Circuit dismissed NDOW from the case: “[NDOW was] not injured or affected in any way by the judgment on remand from *Bell*, and thus do not have standing on appeal.” In a subsequent appeal the 9th Circuit ruled that the “Tribe is entitled to recoup a total of 8,300 acre-feet of water for the years 1985 and 1986.” *U.S. v. Truckee-Carson Irrigation Dist.*, 708 Fed.Appx. 898, 902 (9th Cir. Sept. 13, 2017). TCID recently filed a Motion for Reconsideration based on *Kokesh v. Securities and Exchange Commission*, 137 S.Ct.1635 (2017). Argument on the Motion was heard February 4, 2019 and TCID’s Motion was denied. Since then, the parties have begun debating the calculations for satisfaction of the prior judgment. The parties submitted briefs explaining their view of the respective calculations and had a hearing on September 29, 2020 before Judge Miranda Du.

2. *United States and Walker River Paiute Tribe v. Walker River Irrigation Dist., et al. (Walker River Litigation)*, (USDC, Reno). This action involves federal, tribal and Mineral County claims for additional water from Walker River, in addition to those already established by the Walker River Decree. NDOW and others moved to dismiss certain claims against groundwater rights by the United States.

Subfile 3:73-CV-00127-RCJ-WGC (federal reserved rights)

This case involves claims by the United States for federal reserved water rights for all federal lands on the Walker River system. All claims are stayed except those concerning the Walker River Indian Reservation.

Currently, this case is before the District Court on remand from the Ninth Circuit Court of Appeals' May 22, 2018, decision. *The United States and the Tribe filed Amended Counterclaims on May 3, 2019. Answers to the Counterclaims were filed on August 1, 2019.* The next deadline is February 19, 2020 for the principle defendants and the United States to agree to a discovery plan. This deadline was extended from November 22, 2019.

On May 28, 2015, the District Court ruled that the United States' action to acquire federal reserved water rights for the Walker River Paiute Tribe and several smaller tribes within the Walker River watershed were to be dismissed on "preclusion"; a doctrine that means the U.S. had its chance to make claims at the time of the original decree but failed to do so and thus cannot make them now.

On May 22, 2018, the Ninth Circuit Court of Appeals reversed the District Court's decision mostly based on the fact that the United States and the Tribe had not been given a chance to brief the issue before the District Court. In fact, the District Court specifically requested that the issue of preclusion should not be briefed.

Subfile 3:73-CV-00128-RCJ-WGC (public trust doctrine)

This case involves a claim filed by Mineral County for the court to recognize a public trust duty to provide water to Walker Lake to support the fishery therein.

On May 28, 2015, the District Court held that Mineral County did not have standing to pursue the public trust claims. Mineral County filed an appeal of this issue. The Court expounded on the issue of whether the shift of water from irrigators to the lake under the public trust law would be a taking of property under the 5th Amendment. The Court held that it would be a taking and that the State would have to pay compensation to each water right holder that is displaced by water that would have to be sent to Walker Lake. Finally, the Court went on to hold that decision whether to take the water was a non-judicial political question.

On May 22, 2018, the Ninth Circuit Court of Appeals reversed the District Court holding that Mineral County did not have standing to pursue the public trust claim. However, rather than ruling on the substantive issues, the

Court held that the Public Trust Doctrine is a state-law issue that has not been squarely decided in Nevada. The Appeals Court sent one Certified Question to the Nevada Supreme Court. On August 22, 2018, the Ninth Circuit Court of Appeals amended its order and added a second Certified Question. Those two questions are as follows.

Does the public trust doctrine apply to rights already adjudicated and settled under the doctrine of prior appropriation and, if so, to what extent?"

If the public trust doctrine applies and allows for reallocation of rights settled under the doctrine of prior appropriation, does the abrogation of such adjudicated or vested rights constitute a "taking" under the Nevada Constitution requiring payment of just compensation?

The Nevada Supreme Court accepted both Certified Questions and briefing is *complete*. Oral argument was completed Tuesday, March 3, 2020. After the Nevada Supreme Court issues its opinion, the case will return to the Ninth Circuit Court of Appeals.

On September 18, 2020, the Nevada Supreme Court rendered its Decision answering the Ninth Circuit Court of Appeals Certified Questions. The Nevada Supreme Court held that: (1) the public trust doctrine applies to rights already adjudicated and settled under the doctrine of prior appropriation; (2) the public trust doctrine applies to all waters within the state; and (3) the public trust doctrine does not permit reallocating water rights already adjudicated and settled under the doctrine of prior appropriation. Because the Court held the public trust doctrine does not allow for a reallocation of rights, there was no need to answer the second question.

The case has returned to the Ninth Circuit Court of Appeals. The Court asked parties to file Supplemental Briefs to address what effect the Nevada Supreme Court's decision has on the case. NDOW filed its Supplemental Brief on October 16, 2020 arguing that the effect of the decision precludes Mineral County's claims and that the District Court's decision dismissing the case must be affirmed. We await the Ninth Circuit Court of Appeals' further instruction or final decision.

On January 28, 2021, the Ninth Circuit Court issued its Opinion. The panel affirmed in part, and vacated in part, the district court's dismissal of Mineral County's complaint:

In light of the Nevada Supreme Court's Decision, the panel held that the district court properly dismissed the County's public trust claim to the extent it sought a reallocation of water rights adjudicated under the Decree and settled under the doctrine of prior appropriation. The panel vacated the judgment of the district court and remanded with instruction to consider the county's public trust doctrine claim to the extent it sought remedies that would not involve a reallocation of adjudicated water rights. The panel remanded to the district court to consider in the first instance the County's arguments that were not properly addressed by the district court. The panel rejected as untimely the County's challenge to the 1936 Decree itself.

On April 21, 2021, the Department of Wildlife and other Principal Defendants filed a Joint Status Report submitted pursuant to the court's Minute Order of March 23, 2021. The Status Conference took place on April 28, 2021.

On September 21, 2020 Plaintiffs' motion for summary judgment (ECF No. [2638]) was granted. Plaintiffs are entitled to judgment as a matter of law in their favor as to Defendants' Third, Seventh, Twelfth, and Fourteenth Affirmative Defenses. Nevertheless, Principal Defendants retain all other affirmative defenses and litigation remains ongoing.

Principal Defendants have filed status reports regarding the status of access to tribal archives for discovery purposes. These archives remain closed due to the pandemic.

Mineral County v. Lyon County, 136 Nev. Adv. Op. 58 (2020)

Subfile 3:73-CV-00125-RCJ-WGC (main adjudication docket)

This subfile is not a case in the traditional sense, but rather constitutes the ongoing court-managed administration of the Walker River Decree. Decreed rights must be adjusted and administered consistent with the Court's decisions documented in the court's docket.

Water Master's Budget: Every year the Water Master is required to submit an administration budget for the court's approval. For the year 2021 to 2022, the Water Master did not request, as it did for the year 2020 to 2021, that special assessments be levied against any users seeking to modify decreed rights for instream flow purposes. NDOW has no reason to oppose the Budget as requested for the years 2021 to 2022.

Walker Basin Conservancy's Permit Approvals: On February 25, 2021, NDOW filed a Petition for the Temporary Modification of the Walker River Decree in accordance with Permit No. 89964-T, for the benefit of Walker Lake. This is a matter of course for any change in the Decreed water rights. NDOW is awaiting the Court's order.

3. *Nevada Wildlife Alliance v. Nevada*, Second Judicial District, CV 18-01073, Dept I. Plaintiffs challenge the constitutionality of NRS 502.253 (4)(b) which requires that

The Department:

(b) Shall not adopt any program for the management and control of predatory wildlife developed pursuant to this section that provides for the expenditure of less than 80 percent of the amount of money collected pursuant to subsection 1 in the most recent fiscal year for which the Department has complete information for the purposes of lethal management and control of predatory wildlife.

The First Amended Complaint was served on June 5, 2018. The Complaint generally alleges that Plaintiffs activities in viewing wildlife should be classified as a fundamental constitutional right in that they are being denied the pursuit of happiness under the Nevada constitution due to the predator removal.

Both parties filed Motions for Summary Judgment. On January 11, 2021, the district court issued an Order granting the motions for summary judgment filed by the Defendants and issued an Order dismissing the case.

On January 12, 2021, the Plaintiffs filed an Appeal of the dismissal to the Nevada Supreme Court. On February 23, 2021, The Plaintiffs' filed their opening brief. The Respondents' Answering Brief was filed April 9, 2021. The Appellants Reply Brief was filed May 4, 2021.

On October 22, 2021, the Nevada Supreme Court issued a written affirming the Order of the District Court dismissing the case. The Appellants then filed a Request for Re-hearing of that decision for en banc consideration of the Court, and that request was denied as well. This case will be closed shortly.

4. *Smith v. Wakeling*, Second Judicial District, CV18-01389, Dept. 7. Smith brings an action for Defamation based on statements of certain NDOW employees. The principal basis for Smith’s claim is a slide included in a presentation to Truckee law enforcement addressing concerns with wildlife advocates, and questioning whether their actions solicit harassment or engage in domestic terrorism. Smith alleges that purported misrepresentations about him have damaged his reputation.

Smith also claims his rights under the First Amendment were infringed when he was blocked from commenting on an NDOW Facebook page. Smith was blocked in 2012 for multiple violation of the rules governing use of the page. Smith moved for a preliminary injunction. A hearing on the Motion was held on July 27, 2018. The Court denied the Injunction, but ordered NDOW to allow Smith access to the Facebook page and at the same time admonished Smith to follow the terms of use.

Smith filed an Amended Complaint, adding the entities named as Plaintiffs in the Ridgetop Holdings LLC v. Wakeling case in California, as Plaintiffs in this case. NDOW and the individually named Defendants Answered Plaintiff’s First Amended Complaint on August 29, 2018. The parties have conducted extensive discovery. Defendants filed a Motion for Summary Judgment, and a Motion for Dismissal as Sanction for Discovery Abuses.

The motion for Sanctions was granted in part and denied in part by the Discovery Commissioner. He granted the Defendants the right to conduct another deposition of Mark Smith, and name an expert witness, but denied dismissal.

The Summary Judgment motion filed by the Defendants’ was denied.

The parties attended a mediation before Robert Enzenberger on June 25, 2021. The mediation was unsuccessful.

The case was recently continued, and a week long trial is now scheduled to initiate February 8, 2022. The parties are in the process of preparing evidentiary motions in preparation for trial.

6. *Desert Survivors v. United State Department of the Interior* (U.S. District Court, California) Case No. 3:20-cv-6787

This action, filed by multiple non-profit “environmental” entities seeks to challenge a decision issued by the U.S. Fish and Wildlife Service in March,

2020, withdrawing a 2013 proposed rule to list the Bi-State distinct population segment (DPS) of greater sage-grouse in California and Nevada (the Bi-state Sage Grouse) as threatened under the Endangered Species Act.

This action follows multiple decisions related to the bird. In 2013, the Service issued a decision to list the bird as threatened. In 2015, the Service withdrew that decision, finding listing was not warranted.

Litigation involving the same parties initiated following the 2015 decision. In 2018, the federal district court in California issued an Order critical of that decision, requiring the Service undertake an additional effort to evaluate the bird's status in view of the Court's primary finding, that the Service had not properly applied the definition of "significant" in the Service's Significant Portion of Its Range Policy under the Endangered Species Act.

The State of Nevada has chosen to file an amicus brief in support of the U.S. Fish and Wildlife Service's most recent decision not to list the bird. The State is presently engaged in and has a long history of leadership in efforts to conserve the Bi-State Sage Grouse, and continues to engage multiple private and public entities in efforts to maintain its long term viability. The State is concerned that a decision to list the bird as threatened is not needed in light of its efforts and would further interfere with the multiple pieces in place to assist the bird.

**Indicates the matter is resolved and will not appear on future litigation updates.*

Italicized material, if any, (other than case name) is updated information since the last litigation update.