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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:** September 7, 2022

**Subject:** Litigation Update

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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 9<sup>th</sup> 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 9<sup>th</sup> 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.

On February 22, 2022, Anthony Walsh substituted in as counsel in place of Tori Sundheim.

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.

On September 21, 2021 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.

Discovery remains ongoing.

The parties are exploring settlement options. NDOW and DWR have met with WRID April 20, 2022 to clarify settlement concepts.

*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 5<sup>th</sup> 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?

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

On June 30, 2021, Mineral County filed its Second Amended Complaint. Mineral County asserted that by permitting excessive and unreasonable upstream consumptive uses to reduce average annual inflows to Walker Lake to the detriment of the Lake's public trust values, the Decree Court and State of Nevada have violated this continuing duty under the public trust doctrine to maintain Walker Lake in a reasonable state of environmental health.

On October 28, 2021, the Principal Defendants filed a Motion to Dismiss Mineral County's Second Amended Complaint. The main arguments for

dismissal are as follows: Paragraph XIV of the Walker River Decree does not give the Court subject matter jurisdiction to grant Declaratory Relief as to Nevada's, or the Court's purported obligation to Walker Lake; Mineral County's public trust claim is also inconsistent with the public trust doctrine as interpreted by the above Nevada supreme court opinion.

Plaintiff's response to the Motion to Dismiss was originally scheduled to be due on April 30, 2022. However, due to Plaintiff's Counsel's ongoing and difficult recovery from COVID-19, the parties have stipulated to extend the response time by one month.

*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. *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.

A week long trial was completed beginning February 8, and concluding February 14. The trial Judge dismissed multiple claims and Defendants after conclusion of the Plaintiff's case. A single claim was submitted to the jury as to whether the Nevada Department of Wildlife defamed the Plaintiff in libel. The jury returned a defense verdict on the remaining claim.

An additional claim (styled a Petition for Writ of Mandamus) has been submitted directly to the Judge. That claim originally sought public records related to the Plaintiff's removal from the NDOW Facebook page in 2012. In his Petition, Plaintiff instead argued he was entitled to attorney's fees for the Defendants' failure to produce documents in response to a records request he filed in 2017 related to the alleged defamation claims. The Defendants filed a motion to strike that brief on the basis it was not properly before the court, and also filed an opposition arguing there was no entitlement to the fees.

*The Court heard oral argument on the Petition on August 1 and ruled in favor of the Defendants, finding that there had been no violation of the Public Records Act. The parties are working to get before the Court a formal Judgment, after which post trial motions and an appeal by the Plaintiffs are likely.*

4. A Petition for Judicial Review of the Wildlife Commission's decision to uphold a three year revocation of a license held by Ben Collard has been filed in the 8<sup>th</sup> Judicial District Court, Clark County, Nevada. *The Petitioner has completed service on the Defendants and the Record on Appeal has been filed with the Court. The Petitioner will next file his memorandum of points and authorities, which will be due in early October. The Defendants will then have 30 days to file a reply.*

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

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