NOT FOR PUBLICATION

FILED

AUG 3 2022

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SPOKANE INDIAN TRIBE; UNITED STATES OF AMERICA,

Plaintiffs-Appellees,

v.

DAN SULGROVE; LESLIE SULGROVE; CHAMOKANE LANDOWNERS ASSOCIATION, INC.,

Objectors-Appellants,

v.

DAWN MINING CORP; STATE OF WASHINGTON; CHRISTOPHER M. NEWHOUSE,

Defendants-Appellees.

No. 21-35502

D.C. No. 2:72-cv-03643-SAB

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Stanley A. Bastian, Chief District Judge, Presiding

Argued and Submitted July 5, 2022
Portland, Oregon

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: WATFORD, R. NELSON, and LEE, Circuit Judges.

Objectors are Chamokane Creek Basin ("Basin") landowners who challenge the modification of a judgment that affects water rights in the Basin. We dismiss the appeal because Objectors lack standing.

1. The United States established a reservation for the Spokane Indian Tribe ("Tribe"), which included a right to Basin water to fulfill the purpose of this reservation. The United States filed the original lawsuit seeking judicial confirmation of the Tribe's water rights in the Basin. This lawsuit did not include permit-exempt users in the Basin.

After a trial, the district court found that the Tribe held a water right senior to most other Basin water users. The court also determined the water rights for the named Defendants. The court did not adjudicate the water rights of certain de minimis users, finding that these uses of water should always be available.

About 25 years later, a report showed that the Basin's water flow was not meeting the Tribe's water right. The suspected cause was either that de minimis water users were using more water than allowed under Wash. Rev. Code § 90.44.050, or that the number of de minimis users had increased. The Tribe, the United States, and Washington ("Government Parties") proposed a settlement to fix the issue, but avoid adjudicating these users. This settlement included a provision that the United States and Tribe would not sue non-parties for drawing less than one

acre-foot per year (about 900 gallons per day), and any enforcement under state law would require State approval.

The Government Parties presented the settlement to the district court and requested that the judgment be modified. The district court entered an order to show cause as to why the court should not approve the settlement and modify the judgment. The court received five objections, including a joint objection by Appellant-Objectors.

After a hearing, the district court approved the settlement and modified the judgment. Importantly, the court made the following change: "The undisputed evidence is that normal stock water use . . . and domestic water use is de minimus and does not include impoundments. The [Judgment] is therefore adjusted to reflect that these uses are not included in the judgment and should always be available," to "Water for domestic use and normal stock water use at the carrying capacity of the land without the use of impoundments is included in this Judgment, but it is neither adjudicated nor quantified at this time." Objectors appealed this decision.

2. "The standing Article III requires must be met by persons seeking appellate review." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64 (1997). This requirement is jurisdictional and cannot be waived, *see Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019), and must be considered "whether or not the issue was raised in the district court," *Maricopa-Stanfield Irrigation & Drainage*

Dist. v. United States, 158 F.3d 428, 433 (9th Cir. 1998). At a minimum, standing requires that Objectors show "(1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision." *Va. House of Delegates*, 139 S. Ct. at 1950.

3. Objectors argue that the original language protected de minimus water users like them from future curtailment and regulation. They maintain that the district court performed a general stream adjudication, and that the judgment affected all water users in the Basin, not just the water users brought into court.

These arguments are flawed because the original judgment provided no protection for Objectors. First, "[a] general adjudication . . . is a process whereby all those claiming the right to use waters of a river or stream are joined in a single action to determine water rights and priorities between claimants." *State Dep't of Ecology v. Acquavella*, 674 P.2d 160, 161 (Wash. 1983). Even though the district court made some stray comments suggesting that the adjudication may be a general stream adjudication,[1] it did not do so because not all water users in the Basin were joined. Only permitted water users were joined; de minimis water users, like Objectors, were not.

[1] For example, the original judgment defined the Basin "to include the entire Chamokane Creek System," and that the district court had "jurisdiction to adjudicate the surface and ground waters of the" Basin.

Second, Washington law directly contradicts the theory that exempt uses are protected from adjudication. "[A]n appropriator's right to use water . . . is subject to senior water rights." *Whatcom County v. Hirst*, 381 P.3d 1, 9 (Wash. 2016). This applies to permit-exempt and de minimis uses because "any withdrawal of water impacts the total availability of water," and thus "an appropriator's right to use water from a permit-exempt withdrawal is subject to senior water rights." *Id.* Even with the language in the original judgment, Objectors could have been sued at any time by senior water holders such as the Tribe.

Further, the modified judgment and settlement agreement protects Objectors more than before. The agreement states that the Government Parties will not adjudicate permit-exempt users that draw less than one acre-foot per year. This gives Objectors some legal protection where originally there was none.

4. Because Objectors cannot claim a redressable injury caused by the modification of the judgment, the appeal is **DISMISSED.**

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- A response, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send an email or letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista (maria.b.evangelista@tr.com));
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 10. Bill of Costs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form10instructions.pdf

9th Cir. Case Number(s)

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The Clerk is requested to award costs to *(party name(s))*:

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