



CITY OF FERNLEY

CITY COUNCIL

AGENDA REPORT

Meeting Date: January 19, 2022

REPORT TO:	Mayor and City Council
REPORT THRU:	Daphne Hooper, City Manager
REPORT FROM:	David Rigdon, Special City Water Attorney
REVIEWED BY:	Brandi Jensen, City Attorney
REVIEWED BY:	Denise Lewis, City Treasurer

FINANCIAL IMPACT: Yes: <input checked="" type="checkbox"/> No: <input type="checkbox"/>	CURRENTLY BUDGETED: Yes: <input checked="" type="checkbox"/> No: <input type="checkbox"/>	FUND/ACCOUNT: 510-810-698
---	---	--

ACTION REQUESTED: Consent Ordinance Resolution Motion Receive/File

AGENDA ITEM: Staff Report (For Possible Action):
Approve an appeal to the Ninth Circuit Court of Appeals of the decision by the United States District Court (District of Nevada) in *City of Fernley v. Ernest Conant, et al.* (Case No. 3:21-cv-00119-MMD-CLB) dismissing Fernley's complaint with prejudice and without leave to amend.

Business Impact (per NRS Chapter 237):

A Business Impact Statement is Attached.

A Business Impact Statement is not required because this is not a rule (term excludes vehicles by which legislative powers are exercised under NRS Chapters 271, 278, 278A, or 278B).

Agenda Item Brief:

1. On December 13, 2021, the United States District Court (Judge Miranda Du) entered an order dismissing Fernley's complaint against the Bureau of Reclamation related to the proposed Truckee Canal Extraordinary Maintenance Project.
2. The order dismissing the case was with prejudice and without leave to amend the complaint meaning that, if the case is not appealed, Fernley has no further recourse.
3. On January 10, 2022, Fernley filed a motion asking the District Court to amend its order and allow Fernley to amend its complaint.
4. Staff is seeking authorization to appeal the Court's order to the Ninth Circuit Court of Appeals if the District Court denies the motion to amend.

See attached report for background, analysis, alternatives.

RECOMMENDED MOTION:

"I move to authorize Taggart & Taggart, Ltd. to file an appeal with the Ninth Circuit Court of Appeals of the decision by the United States District Court (District of Nevada) in *City of Fernley v. Ernest Conant, et al.* (Case No. 3:21-cv-00119-MMD-CLB) which dismissed Fernley's complaint with prejudice and without leave to amend

ALTERNATIVES:

The Council could decide not to authorize filing the appeal. If it did so, the case will effectively be over and Fernley will have no legal means to seek changes to the proposed project.

BACKGROUND:

The Bureau of Reclamation has proposed a project known as the "Truckee Canal Extraordinary Maintenance Project" which will place an impermeable liner in the Truckee Canal. The proposed lining of the Canal will cut off the significant quantity of recharge (estimated at between 12,000 and 18,000 afa) that the canal provides to the local aquifer. Groundwater modeling indicates that the project will result in a lowering of the groundwater table which could impact over 70% of domestic wells in the area.

Prior to constructing the project, Reclamation was required to create an Environmental Impacts Statement (EIS) to analyze potential impacts to the local environment. Fernley participated as a cooperating agency in the development of the EIS. Throughout this process Fernley advocated that the Bureau implement one of several solutions that would fix the long-term maintenance issues with the Canal without lining it. Reclamation ignored Fernley's requests and focused the EIS solely on lining alternatives. Reclamation also refused Fernley's repeated requests to fully analyze the impacts that lining the canal will have on the local groundwater aquifer.

The final EIS was published in September 2020 and a Record of Decision (ROD) was issued by Reclamation on December 15, 2020.

On January 20, 2021, the City Council authorized Taggart & Taggart, Ltd. (the City's outside legal counsel for water issues) to file "all legal actions required to overturn the Record of Decision for the Truckee Canal Extraordinary Maintenance Project."

On March 10, 2021, on behalf of the City, Taggart & Taggart, Ltd. filed a complaint against Reclamation and its Regional Director (Ernest Conant) in the United States District Court (District of Nevada). Judge Miranda Du was assigned to hear the case.

On May 28, 2021, Reclamation filed a motion asking the Court to dismiss Fernley's complaint. Briefing on the motion was completed on August 9, 2021. On December 8, 2021, the Court held a hearing on the motion and on December 13, 2021, issued an order dismissing the case with prejudice and without leave to amend. A copy of the Order is attached to this staff report.

Pursuant to Federal Rule of Procedure 59, on January 10, 2022, Fernley filed a motion asking the Court to amend its Order to allow Fernley to file an amended complaint. A copy of that motion is attached to this staff report.

If the motion is denied, Fernley's only recourse is to file an appeal with the Ninth Circuit Court of Appeals. Such an appeal must be filed within 60 days of the entry of the Order (by February 11, 2022). Under the ruling in *Comm. on Ethics v. Hansen*, 134 Nev. 304 (2018), the City Council must authorize any appeal.

ANALYSIS:

In the interest of protecting the attorney-client communications and attorney work product privileges, Taggart & Taggart will provide the Council with a private legal briefing to discuss the relative merits of the Court's Order and/or any appeal of that order. Taggart & Taggart will also attend the Council meeting to answer questions related to the litigation.

LEGAL IMPLICATIONS:

An order of dismissal with prejudice and without leave to amend effectively ends the case and will leave Fernley with no legal means to seek changes to the project. Accordingly, if the Court denies Fernley's motion to amend, Fernley's only recourse is an appeal to the Ninth Circuit.

FINANCIAL IMPLICATIONS:

An appeal to the Ninth Circuit will have costs associated with filing the appeal, drafting appellate briefs, and arguing the case before a panel of appellate judges (oral arguments will likely be held in San Francisco, CA). The City Manager has included money within Taggart & Taggart's annual budget to use for this litigation. Taggart & Taggart and the City Manager anticipate that the costs of this appeal will not exceed those budgeted amounts.

ATTACHMENTS:

- 1) December 13, 2021, Order dismissing the case with prejudice and without leave to amend.
- 2) January 10, 2022, Fernley Motion to Alter or Amend Judgement.