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M E M O R A N D U M

DATE: October 21, 2016

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

FROM: Harry B. Ward, Deputy Attorney General

SUBJECT: Litigation Update – September 8, 2016

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1. *E. Wayne Hage v. United States*, (Federal Circuit, DC). Hage alleged, among other things, that the United States effected a taking of his private property when it allowed the release of elk on public lands. Hage alleged the release of elk reduced the available forage and water for his cattle. Trial held in Reno from May 3–21, 2004. NDOW sought to intervene as a defendant in the lawsuit, but was denied by the Claims Court. NDOW granted amicus status and filed a brief in support of the United States in the Claims Court. The Claims Court awarded Hage $4,372,355.20 for his takings claims and the U.S. appealed. NDOW filed an amicus brief in support of the United States with the Federal Circuit. Oral argument held on April 3, 2012. The Federal Circuit reversed and vacated the award of damages. The 9th U.S. Circuit Court of Appeals ruled in favor of the federal government remanding the case to a new federal judge because of apparent bias on the part of U.S. District Judge Robert Clive Jones.

2. *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. Oral argument held before the Ninth Circuit on June 12, 2013. July 22, 2013, decision from 9th Circuit. This appeal deals with what is essentially a footnote to the long-running litigation over how much water from the Truckee and Carson Rivers should be diverted to irrigation and how much should flow to Pyramid Lake. The 9th Circuit held: "We have before us appeals by Churchill County and the State of Nevada from the district court's judgment on remand. This judgment, however, did not alter the obligations of either the County or the State

pursuant to the 2005 judgment. They were not injured or affected in any way by the judgment on remand from Bell, and thus do not have standing on appeal." The panel dismissed appeals from Churchill County and the State of Nevada, withdrew the mandate in U.S. v. Bell, 602 F.3d 1074 (9th Cir. 2010), and amended the opinion, and vacated the judgment of the district court on remand in an action concerning diversion of water from the Truckee and Carson River to either irrigation use or for the benefit of the Pyramid Lake Paiute Indian Tribe. In the Bell case, the panel held that in calculating the amount of excess water diversions, the district court had failed to appropriately account for the margin of error with respect to the gauges that measured the flow of diversions. The panel held that it was mistaken in its understanding of the scope of the gauge of error and that it should not have limited recalculation to the four years in which the district court initially found excess diversions. The panel held that it should have ordered recalculation of the gauge error's impact in all the years potentially affected. The panel withdrew the mandate and ordered the district court to recalculate the effect of gauge error not only for the years 1974, 1975, 1978, and 1979, but for the years 1973, 1976, 1985, and 1986 as well to determine the amount of any excess diversions. The District Court ordered the parties to file briefs concerning the calculation of recoupment for excess diversions for the years of 1973, 1976, 1985 and 1986. NDOW filed its brief on August 1, 2014, asserting that it did not even own its water rights during the 1973-1988 recoupment periods and therefore should not be penalized for any excess diversions. NDOW also argued it did not receive any water rights in excess of its rights; did not benefit from any excess diversions by TCID; did not purchase its rights with notice of any claims, and did not participate in or have knowledge of any over-diversions. On May 11, 2015, the District Court held that the diversions made between January 15, 1985, and July 1, 1986, were not subject to recoupment. The Court also held that diversions in excess of the operational criterial and plan are subject to recoupment for the periods January 1, 1985, through January 15, 1985, November 15, 1985 through the end of 1986. The Court extended it order which ordered the parties to meet and confer and attempt to provide the court a stipulation as to the amount of recoupment that should be ordered consistent with the Court's May 11th Order. The Parties were ordered by the Court to submit briefs on the recoupment amounts by September 14, 2015. April 2016 appeal by United States back to the 9th Circuit (third time back) for recoupment amounts. The United States has dismissed their appeal at the 9th Circuit. However, Appellant Pyramid Lake Paiute Tribe is still pursuing their appeal and has requested an extension to file their opening brief.

3.

A.) 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 moved to dismiss certain claims against groundwater rights by the United States. The Court ruled in subfile 3:73-CV-00127-RCJ-WGC, 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 is to be dismissed. The Court dismissed the claims 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. The US appealed the decision to the Ninth Circuit Court of Appeals. In subfile 3:73-CV-00128-RCJ-WGC, Mineral County filed a motion for the court to recognize a public trust duty to provided water to Walker Lake to support the fishery therein. The Court held that Mineral County did not have standing to pursue the public trust claims. Mineral County has filed an appeal of this issue. The Court also went on to expound 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-justiciable political question as to whether to take the water.

The National Fish and Wildlife Federation purchased certain water rights and filed to move those rights to Walker Lake. The State Engineer approved the transfer. Under the Walker River Decree, all changes must be approved by the federal district court. The federal district court reversed the State Engineer and ordered him to reduce the amount of water transferred to reflect actual usage rather than just by the amount of the right. In addition, the Walker River Decree prohibits the transfer of water outside the Walker River Basin. The federal district court held that the Walker Lake is not a part of the Walker River basin for purposes of the decree. Many parties have appealed the district court decision including the Nevada Department of Wildlife to the 9th Circuit Court of Appeals.

B.) United States and Walker River Paiute Tribe v. Walker River Irrigation Dist., et al. (Verified Petition for Enforcement of The Walker River Decree), (USDC, Reno). The Nevada Department of Wildlife (NDOW) and the United States Fish and Wildlife Service (USF&WS) are constructing a project to restore the original channel of the Walker River through the Mason Valley Wildlife Management Area. The proposed new path of the river is the original channel at the time of the decree in 1940. The new path is supported by aerial photographs. The current channel was changed to its current state in the late 1960s.

The United States Board of Water Commissioners (USBWC) has filed a Petition in the Federal District Court to stop the project or to require NDOW to dedicate a water right to the project for additional transportation loss. The USBWC is also claiming that the current work, which is not connected to the river, is using water because of some

groundwater seepage into the newly dug channel. The contractor has placed transducer in the channel above and below the project. The United States and NDOW have responded. However, the United States filed a motion to remove Judge Robert C. Jones from the case. A hearing is currently set for October 12, 2016.

4. *Clinton L. Felton v. Nevada Department of Wildlife, State of Nevada (Second Judicial District, Reno).* This matter is a Petition for Judicial review from a Decision by the Nevada Board of Wildlife Commissioners. On April 21, 2014, the Nevada Board of Wildlife Commissioners upheld the Department's November 14, 2013, decision to suspend Felton's hunting, fishing, and other licenses and permit privileges for a period of three (3) years. The Department's suspension of Felton's licenses and privileges are based upon wildlife convictions under NRS 503.570, failure to visit traps, and NRS 503.240, trapping on private land without permission. On December 12, 2014, the District Court Affirmed the Commission's decision. Petitioner has not filed an appeal in this matter. Order of Affirmance filed December 17, 2014. This matter can be closed when accounts receivable hold is lifted.

5. *Mark Smith, Donald A. Molde & Smith Foundation v. State of Nevada Board of Wildlife Commissioners & NDOW (Second Judicial District, Reno).* Plaintiffs brought action against Nevada Wildlife Commissioners and NDOW for Declaratory and Injunctive Relief regarding the recently promulgated trapping regulation (LCB File No. R087-14: Commission General Regulation 450). Plaintiffs assert the regulation is void and unenforceable. Plaintiffs move for injunctive relief requesting the court to enjoin the 2014-2015 trapping season and enforcement of the trap visitation regulation. Plaintiffs assert that the enabling statute NRS 503.570 is unconstitutional as it is a violation of the separation of powers doctrine. Plaintiffs aver that the legislature unlawfully delegated it law making function to the Commission to set trap visitation intervals and thus a violation of the separation of powers doctrine. Defendants filed a Response in Opposition to Plaintiffs' Motion for Injunctive Relief. Plaintiffs' filed their Reply to Defendants Opposition. A hearing was held on November 20, 2014, regarding Plaintiffs' Motion for Injunctive Relief. On November 26, 2014, the Court denied Plaintiffs' Motion for Injunctive Relief holding: "Upon review of the Motions and the oral arguments thereon, the Court finds injunctive relief is not warranted as this issue is not just ripe for judicial determination". On December 11, 2014, Plaintiffs' filed its First Amended Complaint and for Declaratory and Injunctive Relief with Petition for Issuance of Writ of Mandamus and/or Prohibition. Plaintiffs' Amended Complaint asserts that Plaintiff Molde's dog has been trapped on more than one occasion to establish legal standing on behalf of Molde. Plaintiffs' Writ of Mandamus asserts that the Commission is obligated by law to develop plans for wildlife management as it relates to the unintentional trapping of non-targeted animals. Defendants filed its responses to Plaintiffs' motions and Amended Complaint. Plaintiffs' have filed its Response to Defendants opposition. The Court has not requested oral arguments nor has the Court ruled in this matter. A status conference was held with the Court on March 3, 2016,

regarding the status of the case, discovery, and pending motions. The Court has reserved the date of May 9, 2016, for possible oral arguments on the pending motions. On April 4, 2016, Commission General Regulation 450 – LCB File No. R087-14 was adopted and recorded by the Secretary of State. The Court was informed of the adoption of Regulation 450 and the Department's decision to deny passing on the regulation pursuant to NRS 233B.110(1). *Discovery is ongoing*.

6. *Mark Sooy v. Nevada Department of Wildlife, State of Nevada (Ninth Judicial District, Reno).* This matter is a Petition for Damages and for injunctive relief for the reinstatement of plaintiff's bonus points. Plaintiff, Mark Sooy (Sooy) was the holder of an Elk Tag for the 2014 hunting season. On the first day of the hunting season, Sooy fell and broke his leg while hiking into his designated hunting area. Sooy went to the hospital, was released, and immediately went to the NDOW Ely office. Sooy asserts that an NDOW employee "promised and assured" him that if he returned his tag, he would be entitled to reinstatement of his bonus points. Sooy filled out the tag return form and turned in his tag. Nine days later, Sooy received a letter from NDOW returning his tag and denying his request for bonus point reinstatement pursuant to NAC 502.422. On March 31, 2016, Plaintiff filed suit for damages and injunctive relief. This matter was transferred to the First Judicial District, Carson City, Nevada. NDOW has filed an Answer in the matter and anticipates filing additional motions concerning the allegations presented by plaintiff in its original pleading. The First Judicial District, Carson City, has adopted local rules that require participation in mandatory arbitration. On August 29, 2016, the appointed arbitrator, Joan Wright, ordered the following: Arbitrator's fee of $250.00 to be deposited with arbitrator on or before September 1, 2016; exchange of all documents pursuant to NRCP 16.1 by September 2, 2016; discovery to be completed by October 21, 2016; pre-hearing statement due by November 23, 2016; and arbitration hearing on November 30, 2016.

**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.