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## MEMORANDUM

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**DATE:** February 20, 2018

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

**FROM:** Bryan L. Stockton, Senior Deputy Attorney General  
Joshua Woodbury, Deputy Attorney General

**SUBJECT:** Litigation Update

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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 9<sup>th</sup> 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 9<sup>th</sup> Circuit. The 9<sup>th</sup> 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 (9<sup>th</sup> 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 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 critical 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 its 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 11<sup>th</sup> Order. The panel 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.*, 2017 WL 4127808, at 3 (9<sup>th</sup> Cir. Sept. 13, 2017)

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 and others 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 and the Walker River Paiute Tribe 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 provide water to Walker Lake to support the fishery therein. The district 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 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-justiciable political question.

The National Fish and Wildlife Federation purchased certain water rights and filed change applications to move those rights to in-stream use and for 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 9<sup>th</sup> Circuit Court of Appeals.

Oral argument was heard on August 30, 2017 in Pasadena, California, and the case is submitted to the panel for decision.

4. *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 Board of 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 its law-making function to the Commission to set trap visitation intervals and thus a violation of the separation of powers doctrine. 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 their 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 their Response to Defendants opposition.

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). On January 17, 2017, Plaintiffs’ filed a partial Motion for Summary Judgment asserting the Legislature improperly delegated authority to the Commission to promulgate a trapping regulation. NDOW filed its Opposition to Motion for Partial Summary Judgment on January 31, 2017. Plaintiffs filed their Reply on February 7, 2017. On April 10, 2017 the court issued an order denying the Motion for Summary Judgment and held that “the fact that the Legislature provided sufficient standards and guidelines for the Commission will be deemed established in all further proceedings.” Plaintiffs filed an appeal to the Nevada Supreme Court on July 18, 2017. The appeal was withdrawn by the Plaintiffs. Discovery closed on February 8, 2018. Trial is set for August 13-24, 2018.

5. *Mark Smith v. Brian Wakeling et al.*, (California Superior Court). 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 and his non-profit wildlife advocate entities.

A hearing was held on December 11, 2017 on Defendants’ Motion to Quash Service of Summons and a Motion to Strike. Because all named parties are Nevada residents, the Truckee, California Court held that substantial justice requires the action be heard in Nevada. The Court stayed the case, pending a resolution of all issues in Nevada.

*\*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.*