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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: July 30, 2020

Subject: Litigation Update

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. The 9th 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 9th 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.

3. *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.

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 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.

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?

The Nevada Supreme Court accepted both Certified Questions and briefing is *complete*. Oral argument was completed Tuesday, March 3, 2020. After the Nevada Supreme Court issues its opinion, the case will return to the Ninth Circuit Court of Appeals.

4. *Mark Smith, Donald A. Molde & Smith Foundation v. State of Nevada Board of Wildlife Commissioners & NDOW*. Plaintiffs brought action against Nevada Board of Wildlife Commissioners and NDOW for Declaratory and Injunctive Relief regarding the trapping regulation (LCB File No. R087-14: Commission General Regulation 450). Plaintiffs assert the regulation is void and unenforceable. Plaintiffs assert that the enabling statute NRS 503.570 is unconstitutional as it is a violation of the separation of powers doctrine. 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.

The Commission and NDOW filed a Motion for Summary Judgment and the Plaintiffs filed a Motion for Partial Summary Judgment. The District Court granted the Motion for Summary Judgment. Plaintiffs appealed to the Nevada Supreme Court, and argument was completed before a three member panel on February 16, 2020. On April 23, 2020, the Court entered an Order affirming the District Court's dismissal. The Appellants filed a Petition for Reconsideration of that decision, which was denied. Most recently, the Appellants requested an extension to consider another Petition for Reconsideration, this time to the Court *en banc*. The Court granted the extension, and we are awaiting another Petition for Reconsideration.

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. The Attorney General's Office has appealed on the limited issue of whether the California court may exercise jurisdiction over Nevada without its consent. A Petition for Writ of Certiorari has been filed with the U.S. Supreme Court. The Writ has been granted and the matter has been sent back to the District Court. *The Superior Court of California has since granted the State's original motion to quash service of the Complaint on the theory of sovereign immunity.*

6. *Nevada Wildlife Alliance v. Nevada*, Second Judicial District, CV 18-01073, Dept I. Plaintiffs challenge the constitutionality of NRS 502.253 (4)(b) which requires that

The Department:

(b) Shall not adopt any program for the management and control of predatory wildlife developed pursuant to

this section that provides for the expenditure of less than 80 percent of the amount of money collected pursuant to subsection 1 in the most recent fiscal year for which the Department has complete information for the purposes of lethal management and control of predatory wildlife.

The First Amended Complaint was served on June 5, 2018. The Complaint generally alleges that Plaintiffs activities in viewing wildlife should be classified as a fundamental constitutional right and that the law should have to pass the highest level of review.

A Motion to Dismiss was filed on July 19, 2018. The Motion argues that viewing wildlife should be reviewed under the rational basis test for constitutionality. “Under the rational basis standard, legislation will be upheld so long as it is rationally related to a legitimate governmental interest.” *Williams v. State*, 118 Nev. 536, 542, 50 P.3d 1116, 1120 (2002). The Motion to Dismiss was denied.

The case is scheduled for a seven day trial (non-jury) commencing January 25, 2021.

Discovery has commenced in the case. The Plaintiffs have served interrogatories and requests for production on the Defendants, and responses have been served. The Plaintiffs have also taken the depositions of UNR Professor Kelley Stewart, and NDOW Director Tony Wasley.

7. *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. The parties have conducted extensive discovery. Defendants filed a Motion for Summary Judgment, and a Motion for Dismissal as Sanction for Discovery Abuses. The motion for Sanctions has been removed to the Discovery Commissioner for decision. Briefing is not yet complete on the Summary Judgment motion.

A new week long trial date has been scheduled to initiate August 2, 2021.

**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.