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22 *Commissioners*

23 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
24 **IN AND FOR THE COUNTY OF WASHOE**

25 MARK SMITH, DONALD A. MOLDE,)	Case No. CV-14-01870
26 AND THE MARK SMITH FOUNDATION,)	
)	Dept. No. 6
27 Plaintiffs -Petitioners,)	
)	
28 v.)	
)	
19 STATE OF NEVADA, NEVADA BOARD OF)	
20 WILDLIFE COMMISSIONERS, STATE OF)	
21 NEVADA, DEPARTMENT OF WILDLIFE)	
)	
22 Defendants -Respondents.)	

23 **DEFENDANTS' OPPOSITION AND POINTS AND AUTHORITY**
24 **TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

25 Defendants, State of Nevada, Nevada Board of Wildlife Commissioners and State of
26 Nevada, Department of Wildlife, by and through its counsel, CATHERINE CORTEZ MASTO,
27 Attorney General for the State of Nevada, DAVID W. NEWTON, Senior Deputy Attorney
28 General, and HARRY B. WARD, Deputy Attorney General, hereby submits its Opposition to

1 Plaintiffs’ Motion for Preliminary Injunction. This Opposition is based on the attached Points
2 and Authorities.

3 **POINTS AND AUTHORITIES**

4 **I. Nature of the Motion**

5 This matter comes before this Honorable Court on Plaintiffs’ Motion for Preliminary
6 Injunction. Plaintiffs, Mark Smith (“Smith”), Donald A. Molde (“Molde”), and The Mark E.
7 Smith Foundation (“Foundation”) seek injunctive relief enjoining Defendants, State of Nevada,
8 Nevada Board of Wildlife Commission (“Commission”) and State of Nevada, Department of
9 Wildlife (“Department”) from enforcing the regulations regarding trap visitation intervals, and
10 enjoining the 2014–2015 fur trapping season.

11 **II. Introduction**

12 The Nevada Board of Wildlife Commissioners consists of nine (9) members appointed
13 by the Governor. NRS 501.167¹ The Commission is charged with the duty of establishing
14 policies and adopting regulations necessary for the preservation, protection, management and
15 restoration of wildlife and its habitat. NRS 501.105² Additionally, the Commission must
16 establish regulations necessary to carry out the provisions of title 45 and Chapter 488 of NRS,
17 including establishing seasons for hunting and trapping fur-bearing mammals, the daily and
18 possession limits, the manner and means of taking wildlife, including the sex, size or other
19 physical differentiation for each species, and, when necessary for management purposes, the
20 emergency closing or extending of a season, reducing or increasing of the bag or possession

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26 ¹ The Board of Wildlife Commissioners, consisting of nine members appointed by the Governor,
was created.

27 ² The Commission shall establish policies and adopt regulations necessary to the preservation,
28 protection, management and restoration of wildlife and its habitat.

1 limits on a species, or the closing of any area to hunting, fishing or trapping. NRS 501.181(4)³
2 County Advisory Boards (“CAB”) were created under NRS 501.260(1)⁴ to manage wildlife in
3 each of the several counties and are charged with the duty to solicit and evaluate local opinion
4 and advise the Commission on matters relating to the management of wildlife within their
5 respective counties. NRS 501.297⁵ The wildlife regulations established by the Commission
6 must be established after first considering the recommendations of the Department, the
7 County Advisory Boards and others who wish to present their views at an open meeting. NRS
8 501.181(4)⁶ Any regulations relating to the closure of a season must be based upon scientific
9 data concerning the management of wildlife. *Id.*⁷ The data upon which the regulations are
10 based must be collected or developed by the Department. *Id.*⁸

11 Plaintiffs have filed a Verified Complaint for Declaratory and Injunctive Relief. Plaintiffs
12 assert the Commission has failed and/or refused to carry out its statutory obligations to
13 preserve, protect, manage and restore wildlife within Nevada, which wildlife belongs to
14 Plaintiffs and all other residents of the State of Nevada. See Plaintiffs’ Complaint, pp. 2–10.

15 ³ NRS 501.181(4) – Establish regulations necessary to carry out the provisions of this title and of chapter
16 488 of NRS, including: (a) Seasons for hunting game mammals and game birds, for hunting or trapping fur-
17 bearing mammals and for fishing daily and possession limits, the manner and means of taking wildlife, including,
18 but not limited to, the sex. Size or other physical differentiation for each species, and when necessary for
19 management purposes, the emergency closing of extending of a season, reducing or increasing of the bag or
20 possession limits on a species, or the closing of any area to hunting, fishing or trapping. The regulations must be
21 established after first considering the recommendations of the Department, the county advisory boards to
manage wildlife and other who wish to present their views at an open meeting. Any regulations relating to the
closure of a season must be based upon scientific data concerning the management of wildlife. The data upon
which the regulations are based must be collected or developed by the Department. (b) The manner of using,
attaching, filling out, punching, inspecting, validating or reporting tags. (c) The delineation of game management
units embracing contiguous territory located in more than one county, irrespective of county boundary lines. (d)
The number of licenses issued for big game and, if necessary, other game species.

22 ⁴ There is hereby created a county advisory board to manage wildlife in each of the several counties.

23 ⁵ The boards shall solicit and evaluate local opinion and advise the Commission on matters relating to
the management of wildlife within their respective counties.

24 ⁶ NRS 501.181(4), states in part: The regulations must be established after first considering the
25 recommendations of the Department, the county advisory boards to manage wildlife and other who wish to
present their views at an open meeting.

26 ⁷ NRS 501.181(4), states in part: Any regulations relating to the closure of a season must be based
27 upon scientific data concerning the management of wildlife.

28 ⁸ NRS 501.181(4), states in part: The data upon which the regulations are based must be collected or
developed by the Department.

1 Plaintiffs aver that the Commissions’ failed to adopt regulations regarding maximum trap
2 visitation intervals and the capture of non-target wildlife in traps and snares that were
3 advocated by the Plaintiffs. See Plaintiffs’ Complaint, pp. 2–10. Plaintiffs have filed a motion
4 for a preliminary injunction seeking to enjoin the enforcement of the new regulation and the
5 2014–2015 fur trapping season. See Plaintiffs’ Motion for Preliminary Injunction.

6 **III. Jurisdiction and Standing**

7 Plaintiffs seek declaratory relief under NRS 30.030⁹ and 30.040(1)¹⁰. Additionally,
8 Plaintiffs assert they have a legal interest in the controversy under NRS 233B.110¹¹ and third
9 party standing under the federal equivalent to NRS 233B.110(1). See Plaintiffs’ Motion,
10 pp. 4–8. Firstly, Plaintiffs assert third party standing under NRS 233B.110(1), yet the Plaintiffs
11 fail to verify in their pleadings they have complied with the statute. NRS 233B.110(1) states,
12 in part: “A declaratory judgment may be rendered after the plaintiff has first requested the
13 agency to pass upon the validity of the regulation in question.” While it is admitted that Molde
14 has been to almost every Commission meeting and has voiced his opinion on trapping issues
15 numerous times, Molde’s Declaration in Support of Plaintiffs’ Motion for Preliminary Injunction
16 and his March 11, 2014, letter to the Trapping Committee (Exhibit 1) fails to strictly comply

18 ⁹ NRS 30.030 – Court of record within their respective jurisdictions shall have power to declare rights,
19 status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall
20 be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be
21 either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final
22 judgment or decree.

23 ¹⁰ NRS 30.040(1) – Any person interested under a deed, written contract or other writings constituting a
24 contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or
25 franchise, may have determined any question or construction or validity arising under the instrument, statute,
26 ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

27 ¹¹ NRS 233B.110 – (1) The validity of applicability of any regulation may be determined in a proceeding
28 for declaratory judgment in the district court in and for Carson City, or in and for the county where the plaintiff
resides, when it is alleged that the regulation, or its proposed application, interferes with or impairs, or threatens
to interfere with or impair, the legal rights or privileges of plaintiff. A declaratory judgment may be rendered after
the plaintiff has first requested the agency to pass upon the validity of the regulation in question. The court shall
declare the regulation invalid if it finds that it violates constitutional or statutory provisions or exceeds the
statutory authority of the agency. The agency whose regulation is made the subject of the declaratory action shall
be made a party to the action. (2) An agency may institute an action for declaratory judgment to establish the
validity of any one or more of its own regulations. (3) Actions for declaratory judgment provided for in subsections
1 and 2 shall be in accordance with the Uniform Declaratory Judgments Act (chapter 30 or NRS), and the
Nevada Rules of Civil Procedure. In all actions under subsections 1 and 2, the plaintiff shall serve a copy of the
complaint upon the Attorney General, who is also entitled to be heard.

1 with the statute. Plaintiffs have not requested the Department to pass upon the regulation as
2 required under the statute. Furthermore, as of this writing, the regulation in question has not
3 even been returned to the Legislative Counsel Bureau (“LCB”) for inclusion in the next
4 Legislative Commission meeting. The Legislative Commission must approve the regulation
5 and the LCB must then file it with the Secretary of State to become effective.
6 NRS 233B.067(1)¹² Plaintiffs’ claims for relief are premature and therefore must
7 be dismissed.

8 Secondly, Plaintiffs assert they have legal standing because they have a legally
9 protected interest in this matter as they are avid observers of wildlife and wildlife is part of the
10 bounty of the State to be enjoyed by all of its citizens. See Plaintiffs’ Motion, pp. 6–7.
11 Plaintiffs also aver they have an interest in the protection of wildlife and are lifelong advocates
12 for the protection of wildlife. See Plaintiffs’ Motion, pp. 6–7. Standing has long been one of
13 the most common challenges in environmental cases especially in federal cases. The
14 standing requirement in federal courts derives from Article III’s limitations on the court’s
15 jurisdiction to hear only “Cases” and “Controversies”. Because the federal court standing
16 requirement is based in Article III, it does not apply to state courts. Here, Plaintiffs argue that
17 NRS 233B.110(1) should be liberally construed to provide Plaintiffs with standing.
18 See Plaintiffs’ Motion, p.6. However, Plaintiffs cannot demonstrate standing under
19 NRS 233B.110(1) because Plaintiffs cannot prove the regulation interferes with or impairs
20 their “legal rights” or “privileges.”

21
22 ¹² NRS 233B.067(1) - After adopting a permanent regulation, the agency shall submit the informational
23 statement prepared pursuant to NRS 233B.066 and one copy of each regulation adopted to the Legislative
24 Counsel for review by the Legislative Commission to determine whether the regulation conforms to the statutory
25 authority pursuant to which it was adopted and whether the regulations carries out the intent of the Legislature in
26 granting that authority. The Legislative Counsel shall endorse on the original and the copy of each adopted
27 regulation the date of receipt. The Legislative Counsel shall maintain the copy of the regulation in a file and
28 make the copy available for public inspection for 2 years. (5) If the Legislative Commission, or the Subcommittee
to the Review Regulations if the regulation was referred, approves the regulation, the Legislative Counsel shall
promptly file the regulation with the Secretary of State and notify the agency of the filing. If the Commission or
Subcommittee objects to the regulation after determining that: (a) If subsection 2 is applicable, the regulation is
not required pursuant to a federal statute or regulation; (b) The regulation does not conform to statutory authority;
or (c) The regulation does not carry out the legislative intent, the Legislative Counsel shall attach to the regulation
a written notice of the objection, including, if practicable, a statement of the reasons for the objection, and shall
promptly return the regulation to the agency.

1 Environmental standing litigation began in the U. S. Supreme Court pursuant to federal
2 Administrative Procedure Act (“APA”) lawsuits. The APA’s judicial review provisions allow
3 persons who are “adversely affected or aggrieved by” federal agency actions to sue those
4 agencies.¹³ In the early 1970s, the U.S. Supreme Court decided *Sierra Club v. Morton*, 405
5 U.S. 727 (1972), in which the Sierra Club challenged the U.S. Forest Service’s decision to
6 allow a ski resort to be built in Mineral King Valley. The Sierra Club claimed that it had
7 standing to litigate on its “special interest” in preserving wild places and the right to protect the
8 “public interest” in preserving the valley. In a 4–3 decision, the Supreme Court disagreed.
9 While the Court accepted that environmental and aesthetic injuries could create standing, it
10 stated that “the ‘injury in fact’ test requires more than an injury to a cognizable interest. It
11 requires that the party seeking review be himself among the injured.” *Sierra Club v. Morton*,
12 405 U.S. 727, 730, 734–35 (1972). Some 20 years later, the Supreme Court again addressed
13 the issue of environmental standing and the individualized injury requirement in *Lujan v*
14 *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In this case, Defenders of Wildlife challenged
15 the Secretary of the Interior’s interpretation that the Endangered Species Act did not apply to
16 the federal agency actions overseas. The Court found that the plaintiffs lacked standing and it
17 clearly categorized standing as a constitutional requirement. The *Defenders of Wildlife* Court
18 set out three elements for standing. Relying in part on the *Sierra Club* decision, the *Defenders*
19 *of Wildlife* Court declared that “[f]irst, the plaintiff must have suffered an ‘injury in fact’—an
20 invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual
21 or imminent, not “conjectural or hypothetical.”” *Id* at 560. “Second, there must be a causal
22 connection between the injury and the conduct complained of – the injury has to be ‘fairly
23 trace[able] to the challenged action of the defendant, and not . . . the result of the independent
24 action of some third party not before the court.” *Id.* at 560–61. “Third, it must be ‘likely,’ as
25 opposed to merely ‘speculative’ that the injury will be ‘redressed by a favorable decision.”
26 *Id.* at 561. This three-part standing test has become the baseline for assessing standing in
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¹³ 5 U.S.C. §§ 701-706 (2006)

1 federal environmental cases and in the absence of Nevada case law it should be followed in
2 the instant case.

3 The *Defenders of Wildlife* Court held that the plaintiffs failed to meet the injury-in-fact
4 requirement and emphasized that a plaintiff's asserted injury-in-fact must be particularized to
5 that plaintiff; concrete, and actual or imminent, not speculative. *Id* at 562–63 Similarly, here
6 Plaintiffs fail to demonstrate any actual or imminent injury-in-fact. Furthermore, Plaintiffs'
7 arguments regarding any future injuries to non-target species are purely speculative. Finally,
8 Plaintiffs' alleged injury, if any, is the result of the independent action of a third party (trappers)
9 not before the court. As such, Plaintiffs' standing claims must fail.

10 **IV. Standards of Review**

11 It is a well-settled law in Nevada that review of an administrative agency's decision is
12 confined to the record, see *Desert Valley Constr. v. Hurley*, 120 Nev. 499, 502, 96 P.3d 739,
13 741 (2004); NRS 233B.135(1)(B), and “[t]he burden on appeal [in a petition for review] is on
14 the party opposing the administrative decision.” *Wright v. State, Nevada Depart. of Motor*
15 *Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005); NRS 233B.135(2).

16 Factual findings should be reviewed only for “clear error or an arbitrary [or capricious]
17 abuse of discretion” by the administrative agency, and should be affirmed if supported by
18 “substantial evidence.” *City of North Las Vegas v. Warburton*, 127 Nev. __, __, 262 P.3d 715,
19 718 (2011); *Helms v. State, Environmental Protection Division*, 109 Nev. 310, 313, 849 P.2d
20 279, 281 (1983). “Substantial evidence” is evidence that “a reasonable mind might accept as
21 adequate to support a conclusion.” *Desert Valley Constr. v. Hurley*, 120 Nev. 499, 502, 96
22 P.3d 739, 741 (quoting *Construction Indus. v. Chaule*, 119 Nev. 348, 352, 74 P.3d 595, 597
23 (2003)). Indeed, a reviewing court is not to “reweigh the evidence or pass on the credibility of
24 witnesses.” *Wright*, 121 Nev. at 125, 110 P.3d at 1058.

25 Issues of law, however, including those involving statutory interpretation, are reviewed
26 *de novo*. *Warburton*, 127 Nev. at __, 262 P.3d at 718. However, an agency's view or
27 interpretation of its statutory authority is persuasive, even if not controlling. *State v. State*
28 *Engineer*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988). The Commission did not act

1 arbitrarily or capriciously when it set the trap visitation requirements in the regulation. The
2 court should not disturb the decision of the Commission and great deference should be given
3 to the Commission's decision.

4 Additionally, in Nevada a preliminary injunction is proper only when the moving party
5 can demonstrate it will suffer irreparable harm for which compensatory damages would not
6 suffice if the action complained of is not halted and that it has a reasonable likelihood of
7 success on the merits. See NRS 33.010; *Boulder Oaks Cmty. Ass'n v. B&J Andrews, LLC*,
8 125 Nev. 397, 403, 215 P.3d 27, 31 (2009). Injunction will issue only if there is a reasonable
9 probability that real injury will occur if injunction does not issue. *Clark County School Dist. V.*
10 *Buchanan*, 112 Nev. 1146, at 1150, 924 P.2d 716 (1996), *Hansen v. Eighth Judicial Dist.*
11 *Court*, 116 Nev. 650, at 658, 6 P.39 982 (2000). Here, Plaintiffs' Motion for Injunctive Relief
12 must fail as they do not meet the two prong test for injunctive relief.

13 **V. ARGUMENT**

14 A. The Plaintiffs do not have a reasonable likelihood of success on the merits

15 1. There is no separation of powers violation.

16 Plaintiffs assert that the legislature violated the separation of powers doctrine
17 mandated by the Nevada Constitution by delegating its law making function to the
18 Commission and authorizing the Commission to promulgate fur trapping visitation intervals.
19 Plaintiffs aver that NRS 503.570(3)¹⁴ is unconstitutional and therefore the trapping regulation
20 is void. (See Plaintiffs' Motion, p.2-3).

21 The separation of powers doctrine prohibits one branch of government from impinging
22 on the powers of another. The State of Nevada has embraced this doctrine and incorporated
23 it into its constitution. *Commission on Ethics v. Hardy*, 125 Nev. 285, 291-92, 212 P.3d 1098,
24 1103, (2009), see also Nev. Const. art. 3, § 1. The Nevada Constitution vests the state's

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26 ¹⁴ NRS 503.570 (3) The Commission shall adopt regulations setting forth the frequency at which a
27 person who takes or causes to be taken wild mammals by means of traps, snares or similar devices which do
28 not, or are not designed to, cause immediate death to the mammals must visit a trap, snare or similar device.
The regulations must require the person to visit a trap, snare or similar device at least once each 96 hours. In
adopting the regulations, the Commission shall consider requiring a trap, snare or similar device placed in close
proximity to a populated or heavily used area by persons to be visited more frequently than a trap, snare or
similar device which is not placed in close proximity to such an area.

1 legislative power in a Legislature comprised of two bodies, the Senate and Assembly. *Id.* See
2 *also* Nev. Const. art. 4, § 1. Specifically, Article 4, Section 1 provides that “[t]he Legislative
3 authority of this State shall be vested in a Senate and Assembly which shall be designated
4 ‘The Legislature of the State of Nevada.’” *Id.* See *also* Nev. Const. art. 5, § 1.

5 It is undisputed the legislature delegated to the Commission the authority to determine
6 the frequency of trap visitation in Nevada and mandated the Commission to consider more
7 frequent trap visitations for traps in populated or heavily used areas. NRS 503.570(3) It is
8 further undisputed that the Commission, as per the statutory directive, promulgated a
9 regulation relating to trapping; specifying the minimum period during which a person must visit
10 or cause to visit certain traps, snares or similar devices. See Plaintiffs’ Exhibit 3: LCB File No.
11 R087–14.

12 Plaintiffs’ argument that the legislature set the maximum visitation period of 96 hours
13 *for the regulation* is misguided. The legislature did not delegate its lawmaking responsibilities
14 to the Commission; the legislature merely set a “ceiling” on the trap visitation in
15 NRS 503.570(3) of **at least** [emphasis added] once every 96 hours. NRS 503.570 is an
16 “enabling statute” authorizing and directing the Commission to adopt regulations regarding the
17 frequency of trap visitations. After countless weeks, days and hours of meetings by the
18 Nevada Board of Wildlife Commissioners and the Trapping Committee, all in compliance with
19 the Nevada Open Meeting Laws at which Plaintiffs religiously attended and participated, the
20 Commission promulgated a regulation relating to trapping and specifying minimum trap
21 visitation intervals. See Plaintiffs’ Exhibit 3, LCB File No. R087–14.

22 Here, the legislature properly delegated to the Commission the authority to promulgate
23 stricter minimum trap visitation intervals with a ceiling of a 96 hour visitation period.
24 NRS 503.570(3) authorizes and mandates the Commission to adopt regulations regarding the
25 frequency of trap visitations. Therefore, in the absence of a codified regulation the minimum
26 trap visitation interval will be 96 hours, by “default”, as per NRS 503.570(3).

27 The legislature did not violate the separation of powers doctrine by setting a maximum
28 96 hour trap visitation in NRS 503.570(3). The Commission did not act capriciously or

1 arbitrarily when it set the trap visitation requirements in the regulation. NRS 503.570, the
2 Commissions' "enabling statute," is not unconstitutional and the promulgated regulation is
3 therefore not void.

4 2. NRS 503.570 sets forth criteria for the Commission to consider in its adoption
5 of regulations.

6 NRS 503.570¹⁵ clearly sets forth criteria for the Commission to consider in its adoption
7 of regulations: visiting a trap at least once each 96 hours and the consideration of a more
8 frequent visitation of traps placed in close proximity to populated or heavily used areas.

9 By operation of law, the wildlife regulations established by the Commission must be
10 established after first considering the recommendations of the Department, the County
11 Advisory Boards and others who wish to present their views at an open meeting.¹⁶
12 Additionally, permanent regulations go through a rigorous administrative rulemaking
13 procedure dictated by chapter 233B of the NRS which includes: workshops, LCB pre-adoption
14 reviews, public adoption hearings, LCB post-adoption reviews, and a Legislative Commission
15 review. The regulation is then filed with the Secretary of State's Office and eventually
16 codified. Throughout the many workshops and public meetings, the public was entitled to
17 submit oral and written comments concerning the proposed regulation.¹⁷

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20 ¹⁵ NRS 503.570 – (1) A person taking or causing to be taken wild mammals by means of traps, snares
21 or similar devices which do not, or are not designed to, cause immediate death to the mammals, shall, if the
22 traps, snares or similar devices are placed or set to take mammals, visit or cause to be visited each trap, snare
23 or similar device at a frequency specified in regulations adopted by the Commission pursuant to subsection 3
24 during all of the time the trap, snare or similar device is placed, set or used to take wild mammals, and remove
25 therefrom any mammals caught therein. (2) The provision of subsection 1 do not apply to employees of the State
26 Department of Agriculture or the United States Department of Agriculture when acting in their office capacities.
(3) The Commission shall adopt regulations setting forth the frequency at which a person who takes or causes to
be taken wild mammals by means of traps, snares or similar devices which do not, or are not designed to, cause
immediate death to the mammals must visit a trap, snare or similar device. The regulations must require the
person to visit a trap, snare or similar device at least once each 96 hours. In adopting the regulations, the
Commission shall consider requiring a trap, snare or similar device placed in close proximity to a populated or
heavily used area by persons to be visited more frequently than a trap, snare or similar device which is not
placed in close proximity to such an area.

27 ¹⁶ See NRS 501.181(4), *supra* note 3.

28 ¹⁷ NRS 233B.061 (1) – All interested persons must be afforded a reasonable opportunity to submit data,
views or arguments upon a proposed regulation, orally or in writing.

1 In the case at bar, Molde submitted both oral and written comments concerning the
2 proposed regulation including his views on: more frequent trap visitations; “populated” and
3 “heavily used areas”; and non-targeted species trapped incidental to targeted species. See
4 Plaintiffs’ Declaration and Exhibit 1. Here, the Commission was mandated by statute to
5 consider requiring a more frequent trap visitation in populated and heavily used areas. The
6 Wildlife Commissioners’ Trapping Committee conducted numerous open meetings concerning
7 the topic of “populated” and “heavily used areas.” After hours and hours of public comment on
8 the subject, after volumes and volumes of documents submitted by Plaintiffs and others, after
9 the mapping and re-mapping of “populated” and “heavily used areas,” the Trapping
10 Committee made recommendations to the Commission concerning the proposed regulation.
11 Thereafter, the Commission promulgated a regulation regarding trap visitations which included
12 shorter visitation times for populated areas. On August 16, 2014, the Commission adopted its
13 regulation which included a “once each calendar day” trap visitation in delineated areas of
14 populated and heavily used areas as well as a 96 hour minimum trap visitation in defined
15 areas. See Plaintiffs’ Exhibit 3, LCB File No. R087–14.

16 3. The Commission considered non-targeted species trapped incidental to trapping of
17 targeted species.

18 Plaintiffs assert the Commission failed to consider the Non-target Summary Data
19 Reported to NDOW in its decision to adopt the regulation. See Plaintiffs’ Motion, p. 3.
20 Contrary to Plaintiffs’ argument, a fact finding function was performed by the Trapping
21 Committee and Commission during its administrative rulemaking procedures before the
22 adoption of the regulation in question. On March 11, 2014, Molde sent a seven page letter to
23 the Nevada Board of Wildlife Commissioners, Trapping Committee which included Non-Target
24 Summary Data Reported to NDOW. See Plaintiffs’ Motion, Exhibit 3. Molde also attended all
25 meetings of the Commission Trapping Regulation Committee with one exception during the
26 past year. See Molde’s Declaration in support of Motion. During the public comment periods,
27 Molde presented data, pictures, and arguments to the Commission and the Trapping
28

1 Committee concerning non-target species caught in traps. By law¹⁸, the Commission must
2 consider Molde’s (and all others) written and oral submissions regarding the
3 proposed regulation.

4 The Commission fully considered all written and oral comments it received regarding
5 non-target species trapped incidental to trapping targeted species before it promulgated the
6 regulation. The Commission did not act arbitrarily or capriciously when it set the trap visitation
7 requirements in the regulation.

8 B. The Plaintiffs cannot demonstrate that they will suffer irreparable harm

9 1. Plaintiffs have not suffered irreparable harm.

10 Plaintiffs cannot demonstrate that they, the Plaintiffs herein, will suffer irreparable harm
11 as a result of the promulgated regulation. Plaintiffs must demonstrate a concrete injury or
12 assert an injury-in-fact particularized to the Plaintiffs. *Lujan v. National Wildlife Federation*, 497
13 U.S. 871, 560 (1992). It is undisputed that non-targeted species are trapped incidental to
14 trapping targeted species; however, such is not an injury-in-fact particularized to Plaintiffs.

15 Additionally, Plaintiffs cannot show that a causal connection exists between an injury, if
16 any, complained of and the conduct of Defendants. Plaintiffs’ injury has to be fairly traceable
17 to the challenged action of the Defendants and not the result of an independent action of
18 some third party not before the court. *Id* at 560-61. Here, the licensed trappers, and their
19 traps, are causing the “harm” complained of by Plaintiffs, not the Defendants.

20 Finally, after injury-in-fact, redressability is the most common prong of *Defenders of*
21 *Wildlife* standing test. Under *Defenders of Wildlife*, plaintiffs must show a favorable decision
22 will likely redress Plaintiffs’ injury-in-fact. Here, redressability is not possible because even if
23 the regulation was changed to an even shorter trap visitation, there would still be non-targeted
24 animals trapped incidental to targeted species. Plaintiffs’ ultimate goal, the elimination of
25 trapping in Nevada, is not before the Court.

26
27 _____
28 ¹⁸ NRS 233B.061(3) – With respect to substantive regulations, the agency shall set a time and place for
an oral public hearing, but if no one appears who will be directly affected by the proposed regulation and
requests an oral hearing, the agency may proceed immediately to act upon any written submissions. The agency
shall consider fully all written and oral submissions respecting the proposed regulation.

1 Plaintiffs have failed to demonstrate that they will suffer irreparable harm and therefore,
2 their claims must fail.

3 2. The Public Interest and harm to others

4 In the matter before the Court, a preliminary injunction enjoining the enforcement of the
5 regulation and the 2014–2015 trapping season would bring harm to others and is not in the
6 public interest. In considering preliminary injunctions, courts also weigh the potential
7 hardships to the relative parties and others and the public interest. *Clark Co. School Dist. V.*
8 *Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996). Before the district court may
9 issue a preliminary injunction, the moving party must show: (1) that there is a likelihood that
10 he or she will be successful on the merits, (2) that there is a reasonable probability that the
11 nonmoving party’s conduct will cause irreparable harm for which damages will not be an
12 adequate remedy, and, (3) that the moving party’s potential hardships outweigh any hardships
13 to the nonmoving party caused by implementing the injunction. *University Sys. V. Nevadans*
14 *Sound Gov’t*, 120 Nev 712, 721, 100 P.3d 179, 187 (2004). The district court will also consider
15 the public interest. *Id.*

16 Here, public interest favors the enforcement of the promulgated regulation. As pointed
17 out by Plaintiffs, albeit unintentionally, there is a public interest in checking traps more
18 frequently in close proximity to a populated or heavily used area. As indicated in Plaintiffs’
19 Exhibit 1, domestic dogs and cats unfortunately also fall victim to species trapped incidental to
20 trapping of targeted species. With a shorter trap visitation time, the chance of a successful
21 rescue is greater. Therefore, the public interest favors a regulation that lessening the
22 visitation interval in populated and heavily used areas for the health and safety of their pets.

23 Additionally, the balancing of hardships to Defendants and others by enjoining the
24 2014–2015 trapping season must be considered. First of all, 1,300 licensed trappers in
25 Nevada (Molde Declaration) will be prevented from trapping and thus the loss of their
26 livelihood must be considered. There is also a trickle-down economic benefit to the state
27 through the trapping industry. Secondly, the Department will lose trapping fees collected from
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1 the 1,300 plus trappers. As with all state agencies, the collection of fees is important to
2 its budget.

3 In considering the preliminary injunction, this Court must weigh the potential hardships
4 to the parties and others, and the public interest. The balancing of hardships and the public
5 interests do not favor injunctive relief in this matter.

6 **VI. CONCLUSION**

7 This court should reject the novel and unsupported factual and legal arguments
8 advanced by Plaintiffs. Plaintiffs have failed to satisfy their burden of demonstrating that they
9 are entitled to injunctive relief. They cannot demonstrate that they will suffer irreparable harm
10 in this matter. Moreover, Plaintiffs cannot prove any injury-in-fact that is concrete, actual, and
11 particularized to the Plaintiffs.

12 Additionally, Plaintiffs do not have a reasonable likelihood of success on its argument
13 that the legislature violated the separation of powers doctrine by setting a maximum 96 hour
14 trap visitation in NRS 503.570(3). NRS 503.570 is an enabling statute that merely set a 96
15 hour trap visitation ceiling. The statute is not unconstitutional and the regulation is not void.

16 Finally, the Commission did not act arbitrarily or capriciously when it set the trap
17 visitation requirements in the regulation. Therefore, the Defendants respectfully request that
18 Plaintiffs' Motion for Preliminary Injunction be denied.

19 DATED this 25th day of September 2014.

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AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 25th day of September 2014.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General, State of Nevada, and on the 25th day of September 2014, I served the foregoing Summary of Record on Appeal by Electronic Service to the address below:

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/s/ Cynthia A. Beebe
Cynthia A. Beebe, Legal Secretary II