

1 **Code 2290**

CATHERINE CORTEZ MASTO

2 Nevada Attorney General

HARRY B. WARD

3 Deputy Attorney General

Nevada State Bar No. 11317

4 100 North Carson Street

Carson City, Nevada 89701

5 Telephone: (775) 684-1231

Fax: (775) 684-1108

6 Email: [hward@ag.nv.gov](mailto:hward@ag.nv.gov)

DAVID NEWTON

7 Senior Deputy Attorney General

Nevada State Bar No. 7843

8 555 E Washington Avenue

9 Las Vegas, Nevada 89101

Telephone: (702) 486-3898

10 Fax: (702) 486-3416

Email: [dnewton@ag.nv.gov](mailto:dnewton@ag.nv.gov)

11 *Attorneys for Defendants,*

*State of Nevada*

12 *Department of Wildlife and*

*Nevada Board of Wildlife*

13 *Commissioners*

14 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

15 **IN AND FOR THE COUNTY OF WASHOE**

16 MARK SMITH, DONALD A. MOLDE, )

17 AND MARK SMITH FOUNDATION )

18 Plaintiffs -Petitioners, )

v. )

19 STATE OF NEVADA, NEVADA BOARD OF )

20 WILDLIFE COMMISSIONERS, STATE OF )

21 NEVADA, DEPARTMENT OF WILDLIFE )

22 Defendants -Respondents. )

Case No. CV-14-01870

Dept. No. 6

24 **DEFENDANTS' MOTION TO DISMISS**

25 COMES NOW Defendants, State of Nevada, Nevada Board of Wildlife

26 Commissioners and State of Nevada, Department of Wildlife, by and through its counsel,

27 CATHERINE CORTEZ MASTO, Attorney General for the State of Nevada and HARRY B.

28 ///

1 WARD, Deputy Attorney General, hereby files its motion to dismiss. This Motion to Dismiss  
2 is based upon the following Points and Authorities:

3 **POINTS AND AUTHORITIES**

4 **I. Nature of the Motion**

5 This matter comes before this Honorable Court on Defendants' Motion to Dismiss.  
6 Defendants, State of Nevada, Nevada Board of Wildlife Commission ("Commission") and  
7 State of Nevada, Department of Wildlife ("Department") move this court for a dismissal for  
8 failure to state a claim upon which relief can be granted.

9 Additionally, Defendants reurge the jurisdictional issue of Plaintiffs' standing  
10 previously asserted in Defendants' Opposition to Plaintiffs' Motion for Injunctive Relief.

11 **II. Introduction**

12 Plaintiffs, Mark Smith ("Smith"), Donald A. Molde ("Molde") are individuals and  
13 residents of the State of Nevada. The Mark E. Smith Foundation ("Foundation") is registered  
14 with the Nevada Secretary of State's Office as a non-profit 501(c)(3) foundation.

15 Plaintiffs have filed a Verified Complaint for Declaratory and Injunctive Relief in this  
16 matter. Plaintiffs' Complaint alleges three causes of action: (i) the Commission failed to act  
17 reasonably to protect and preserve non-targeted species captured in traps; (ii) the Nevada  
18 Legislature transferred authority to regulate trap visitations from itself to the Commission;  
19 and (iii) the Commission failed to develop plans for wildlife management as it relates to  
20 trapping. Plaintiffs have also moved to enjoin the enforcement of the regulation and enjoining  
21 the 2014-2015 trapping season.

22 Defendant, State of Nevada, Nevada Board of Wildlife Commission consists of nine  
23 members appointed by the Governor of the State of Nevada. Defendant, State of Nevada,  
24 Department of Wildlife, is a state agency charged with the administration and enforcement of  
25 laws concerning wildlife. On August 16, 2014, the Commission adopted a regulation,  
26 LCB File No. R087-14, which included a "once every-other-day" trap visitation in delineated  
27 areas of populated and heavily used areas as well as a 96 hour minimum trap visitation in  
28 defined areas.

1 The Commission and the Department have filed their Opposition to Plaintiffs' Motion  
2 for Injunctive Relief and now move this court for a dismissal for failure to state a claim upon  
3 which relief can be granted. NRCP Rule 12 (b). Defendants also reurge its argument that  
4 Plaintiffs lack standing in this matter.

5 **III. Standards of Review**

6 Whether a party has a private right of action goes to the jurisdictional issue of  
7 standing, and questions of jurisdiction are never waived. *Baldonado v. Wynn Las Vegas,*  
8 *LLC*, 124 Nev. 951, 968-69, 194 P.3d 96, 107 (2008) (holding that a party lacks standing to  
9 pursue declaratory relief under a statute that does not provide a private right of action).  
10 Because standing is jurisdictional, challenges to standing can be raised at any time including  
11 for the first time on appeal. *Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 276, 44 P.3d  
12 506, 515-16 (2002)(questions of subject matter jurisdiction can be raised for the first time on  
13 appeal); *Applera Corp. v. MP Biomedicals, LLC*, 93 Cal.Rptr.3d 178, 192 (Ct.App.2009)  
14 (Standing is jurisdictional, thus lack of standing may be raised for the first time on appeal).

15 In reviewing a motion to dismiss, a court is bound to accept all factual allegations in  
16 the complaint as true, and must construe the pleadings liberally and draw every fair  
17 reference in favor of the plaintiff. The complaint cannot be dismissed pursuant to N.R.C.P.  
18 12(b)(5) for a failure to state a claim upon which relief can be granted unless it appears  
19 beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of  
20 fact, would entitle him to relieve. *Edgar v. Wagner*, 101 Nev. 226, 669 P.2d 110 (1985),  
21 cited, *Hale v. Burkhardt*, 104 Nev. 632, at 636, 764 P.2d 866 (1988).

22 **IV. ARGUMENT**

23 This Court lacks jurisdiction over the subject matter

24 1. This matter is not ripe.

25 NRS 233B.110(1) states, in part: "A declaratory judgment may be rendered after the  
26 plaintiff has first requested the agency to pass upon the validity of the regulation in question."  
27 A strict interpretation of the statute mandates that Plaintiffs must first request the Department  
28 to pass upon the regulation. Here, Plaintiffs have not requested the Department to pass upon

1 the regulation as required under the statute. Plaintiffs have not complied with the statute.  
2 Therefore, this matter is not ripe and therefore should be dismissed.

3 2. Plaintiffs' assertions are premature.

4 The law in question surrounding this case is in an embryonic state, which cannot  
5 support a judicial decision. As of this writing, the regulation in question has not been  
6 returned to the Legislative Counsel Bureau ("LCB") for inclusion in the next Legislative  
7 Commission meeting. The Legislative Commission must approve the regulation and the  
8 LCB must then file it with the Secretary of State to become effective. NRS 233B.067(1)<sup>1</sup>.  
9 Moreover, NRS 233B.110(1) states, in part: "The validity of applicability of any regulation  
10 may be determined in a proceeding for declaratory judgment in the district court...when it is  
11 alleged that the regulation, or its proposed application, interferes with or impairs, or threatens  
12 to interfere with or impair, the legal rights or privileges of plaintiff." Here, we do not even  
13 have an effective regulation before the Court to address. Furthermore, there is a possibility  
14 that the regulation in question could be objected to by the Legislative Counsel, not approved,  
15 and returned to the Commission. NRS 233B.067(1). Plaintiffs cannot assert a claim alleging  
16 that a non-yet-effective regulation, or the proposed application of a not-yet-effective  
17 regulation, interferes with or impairs the legal rights or privileges of Plaintiffs. *Abbott Labs. v.*  
18 *Gardner*, 387 U.S. 136, 148 (1967) (noting that courts are traditionally reluctant to grant  
19 certain remedies until a controversy is "ripe" for judicial resolution). Plaintiffs' claims for relief  
20 are not ripe, premature, and therefore must be dismissed.

21  
22 <sup>1</sup>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  
26 in 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                   3. Plaintiffs lack standing.

2                   In the present matter, Plaintiffs seek declaratory and injunctive relief under NRS  
3 30.030<sup>2</sup> and 30.040(1)<sup>3</sup>. Additionally, Plaintiffs assert this Court has jurisdiction to review the  
4 adequacy of an agency’s rulemaking under NRS 233B.110<sup>4</sup>.

5                   For the last forty years, perhaps no procedural doctrine has had more influence on the  
6 course of constitutional adjudication in federal courts than the set of often mystifying  
7 doctrines known as “standing to sue.” The standing requirement in federal courts derives  
8 from Article III’s limitations on the court’s jurisdiction to hear only “Cases” and  
9 “Controversies.” Because the federal court standing requirement is based in Article III, it  
10 does not apply to state courts. Here, Plaintiffs assert they have legal standing because they  
11 have a legally protected interest in this matter as they are interested in the protection of  
12 wildlife and have been lifelong advocates for this cause. See Plaintiffs’ Complaint, p. 2 and  
13 Motion for Preliminary Injunction, pp. 6–7. Plaintiffs also aver they are avid observers of  
14 wildlife and that they frequent the areas where trapping occurs in Nevada for aesthetic and  
15 recreational purposes. See Plaintiffs’ Complaint, p. 2 and Motion for Preliminary Injunction,  
16 pp. 6–8. In the U.S. Supreme Court’s 1992 decision, *Lujan v Defenders of Wildlife*, 504 U.S.

---

17  
18                   <sup>2</sup>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  
20 shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration  
may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of  
a final judgment or decree.

21                   <sup>3</sup>NRS 30.040(1) – Any person interested under a deed, written contract or other writings constituting a  
22 contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract  
or franchise, may have determined any question or construction or validity arising under the instrument, statute,  
23 ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

24                   <sup>4</sup>NRS 233B.110 – (1) The validity of applicability of any regulation may be determined in a proceeding  
for declaratory judgment in the district court in and for Carson City, or in and for the county where the plaintiff  
25 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  
26 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  
27 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  
28 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.

1 555, 562-63 (1992) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)), the Court  
2 accepted that “the desire to use or observe an animal species, even for purely aesthetic  
3 purposes, is undeniably a cognizable interest for purpose of standing.” However, litigants  
4 must demonstrate they have suffered an injury-in-fact that is caused by the defendant’s  
5 conduct and is likely redressable by a grant of the Plaintiff’s prayer-for relief. *Id.* at 560-61.

6 In *Defenders of Wildlife*, the Court set out three elements for standing. Relying in part  
7 on the *Sierra Club* decision, the *Defenders of Wildlife* Court declared that “[f]irst, the plaintiff  
8 must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a)  
9 concrete and particularized, and (b) ‘actual or imminent, not “conjectural or hypothetical.””  
10 *Id.* at 560. “Second, there must be a causal connection between the injury and the conduct  
11 complained of – the injury has to be ‘fairly trace[able] to the challenged action of the  
12 defendant, and not . . . the result of the independent action of some third party not before the  
13 court.” *Id.* at 560–61. “Third, it must be ‘likely,’ as opposed to merely ‘speculative’ that the  
14 injury will be ‘redressed by a favorable decision.” *Id.* at 561. This three-part standing test  
15 has become the baseline for assessing standing in federal environmental cases and in the  
16 absence of Nevada case law, it should be followed and applied in the instant case.

17 a.) Injury-in-fact

18 The injury-in-fact requirement of standing was historically the U.S. Supreme Court’s  
19 first concern and the most litigated element of the *Defender of Wildlife* three-part test. Since  
20 *Defenders of Wildlife*, the Supreme Court has resolved standing issues in a number of  
21 environmental and natural resources cases. In the absence of Nevada rules and case law  
22 for state court standing in environmental and natural resources cases, an analyses and  
23 application of the *Defender of Wildlife* three-part test is controlling.

24 Firstly, Plaintiffs claims of “harm” under the standing doctrine are not viable. It is  
25 uncontested that “pocketbook” or “wallet” injury usually qualifies for standing, but  
26 “ideological” or “psychic” harm never does. *Sierra Club v. Morton*, 405 U.S. 727, 739  
27 (1972)(mere harm to ideological interest will not suffice). In the *Sierra Club* case, the Sierra  
28 Club challenged the U.S. Forest Service’s decision to allow a ski resort to be built in Mineral

1 King Valley. The Sierra Club claimed that it had standing to litigate on its “special interest” in  
2 preserving wild places and the right to protect the “public interest” in preserving the valley.  
3 The Supreme Court disagreed. While the Court accepted that environmental and aesthetic  
4 injuries could create standing, it stated that “the ‘injury in fact’ test requires more than an  
5 injury to a cognizable interest. It requires that the party seeking review be himself among the  
6 injured.” *Sierra Club v. Morton*, 405 U.S. 727, 730, 734–35 (1972). The Supreme Court  
7 remains opposed to permitting standing in purely ideological cases. *Nike, Inc., v. Kasky*, 539  
8 U.S. 654, 662 (2003). Here, Plaintiffs assert an “ideological” or “psychic” harm in that non-  
9 targeted species are being caught incidental to trapping targeted species. See Plaintiffs’  
10 Complaint, p. 2 and Motion for Injunctive Relief, pp 3–5. Plaintiffs fail the injury-in-fact test  
11 because their alleged emotional harm associated with knowing non-targeted species are  
12 being caught is not a “cognizable” or “concrete” harm. This type of alleged “bystander” harm  
13 does not confer standing to Plaintiffs.

14 Secondly, Plaintiffs must demonstrate a concrete, actual, or imminent injury-in-fact  
15 that is particularized to the Plaintiffs. The *Defenders of Wildlife* Court emphasized a plaintiff’s  
16 asserted injury-in-fact must be particularized to that plaintiff, concrete, and actual or  
17 imminent, and not speculative. *Lujan v Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992).  
18 Here, Plaintiffs cannot demonstrate the failure to reduce the trap visitation in the regulation  
19 from once every 96 hours to a lesser interval is an injury-in-fact particularized to Plaintiffs. It  
20 is undisputed that trapping is still legal in Nevada. It is further undisputed that non-targeted  
21 species are trapped incidental to legal trapping. Moreover, it is mere speculation as to how  
22 many, if any, non-targeted animals will be rescued and released if the present 96 hour trap  
23 visitation interval is reduced. The unfortunate injuries and/or deaths to non-targeted species  
24 are not an injury-in-fact specialized to Plaintiffs.

25 Finally, the Plaintiffs cannot demonstrate they were injured or harmed in some social,  
26 moral, philosophical, or political sense, which is what the injury-in-fact doctrine effectively  
27 asks. The inadvertent trapping of non-targeted animals is not an injury-in-fact to  
28 Plaintiffs herein.

1                   b.) Causation

2                   Generally, the causation prong does not pose the same kind of litigation challengers  
3 as injury-in-fact because plaintiffs purposefully sue defendants that are normally responsible  
4 for the problem complained of by plaintiffs. However, in the case at bar, this challenge is a  
5 major hurdle that Plaintiffs cannot overcome. Under *Defenders of Wildlife* the plaintiff's injury-  
6 in-fact must be "fairly traceable" to the defendant's conduct. *Lujan v Defenders of Wildlife*,  
7 504 U.S. 555, 560 (1992). Under *Defenders of Wildlife* "...there must be a causal connection  
8 between the injury and the conduct complained of – the injury has to be 'fairly trace[able] to  
9 the challenged action of the defendant, and not . . . the result of the independent action of  
10 some third party not before the court.'" *Id.* at 560–6. Here, Plaintiffs' alleged injury, if any, is  
11 the result of the independent action of a third party (trappers) not before the court. It is the  
12 independent action of trappers and their traps that are unfortunately catching non-targeted  
13 species and thus causing the alleged harm to Plaintiffs. Reducing the trap visitation in the  
14 regulation from once every 96 hours to a lesser interval is not going to change the inevitable  
15 catching of non-targeted species. The chain of causation between Plaintiffs' alleged harm  
16 and Defendants' promulgation of the regulation are far too weak for the chain as a whole to  
17 sustain Plaintiffs' standing in this matter. Plaintiffs' alleged harm is not from the trapping  
18 intervals set forth in the regulation; it is from the legal trapping in the State of Nevada.  
19 Plaintiffs' alleged harm is caused by someone other than Defendants and therefore their  
20 claim must be dismissed.

21                   c.) Redressability

22                   In the present matter, Plaintiffs seek declaratory relief and move to enjoin the  
23 enforcement of the regulation. Under *Defenders of Wildlife*, plaintiffs must show a favorable  
24 decision will likely redress Plaintiffs' injury-in-fact. *Lujan v Defenders of Wildlife*, 504 U.S.  
25 555, 561 (1992). The *Defenders of Wildlife* Court held "...it must be 'likely,' as opposed to  
26 merely 'speculative' that the injury will be 'redressed by a favorable decision.'" *Id.* at 56.  
27 Here, redressability is not likely because even if the regulation were changed to a very short  
28 trap visitation, unfortunately there would still be non-targeted animals trapped incidental to



1 targeted species. As such, Plaintiff's requested relief to change the trap visitation intervals to  
2 shorter times would be unlikely to remedy Plaintiff's alleged injury.

3 Finally, there is nothing the Defendants can do that would correct the alleged "harm"  
4 fallen on Plaintiffs. Plaintiffs are not challenging the 96 hour trap visitation period found in the  
5 statute. Here, Plaintiffs are challenging the authority of the legislature to allow the  
6 Commission under NRS 503.570 to set trapping visitation in its regulation. In the event the  
7 Department "passes upon the validity of the regulation" in question under NRS 233B.110(1),  
8 trapping will still be legal in Nevada with a 96 hour ceiling visitation requirement under NRS  
9 503.570(3). In the event this Court enjoins the enforcement of the regulation in question,  
10 likewise, trapping will still be legal in Nevada with a 96 hour ceiling visitation requirement  
11 under NRS 503.570(3). Plaintiffs requested relief cannot be redressed by enjoining the  
12 regulation regarding trap visitations. Therefore, the only possible way to redress Plaintiffs'  
13 claims for relief in this matter is to eliminate all trapping in the State of Nevada and this  
14 argument is not before the Court.

15 **V. CONCLUSION**

16 Plaintiffs' do not have standing in this matter. Plaintiffs cannot demonstrate they have  
17 suffered an injury-in-fact that is caused by the defendants' conduct and is likely redressable  
18 by a grant of the Plaintiffs' prayed-for relief.

19 Furthermore, Plaintiffs' general factual allegations of injury resulting from the  
20 defendants' conduct do not support a claim for which relief may be granted.

21 DATED this 15<sup>th</sup> day of October 2014.

22 CATHERINE CORTEZ MASTO  
23 Attorney General

24 By:           /s/ Harry B. Ward            
25 HARRY B. WARD  
26 Deputy Attorney General  
27 DAVID NEWTON  
28 Senior Deputy Attorney General

*Attorneys for Respondent,  
State of Nevada  
Department of Wildlife*



1 **CERTIFICATE OF SERVICE**

2 I, Cynthia Beebe, certify that I am an employee of the Office of the Attorney General,  
3 State of Nevada, and on this 15<sup>th</sup> day of October 2014, I filed with this Court through their  
4 Electronic Filing System the foregoing **Defendants' Motion to Dismiss** to the following:

5 Julie Cavanaugh-Bill  
6 401 Railroad Street, Suite 307  
7 Elko, Nevada 89801  
8 [julie@cblawoffices.org](mailto:julie@cblawoffices.org)

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