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JULIE CAVANAUGH-BILL
Nevada Bar No. 11533
CAVANAUGH-BILL LAW OFFICES, LLC.
Henderson Bank Building
401 Railroad Street, Suite 307
Elko, NV 89801
(775) 753-4357
(775) 753-4360-Facsimile

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

MARK SMITH, DONALD A. MOLDE
AND MARK E. SMITH FOUNDATION

CASE NO.: CV14-01870

Plaintiff-Petitioners,

DEPT. NO: 6

vs.

STATE OF NEVADA, NEVADA
BOARD OF WILDLIFE COMMISSIONERS,
STATE OF NEVADA, DEPARTMENT
OF WILDLIFE,

Defendants-Respondents.

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, though their undersigned counsel, submit their Reply in Support of Motion
for Preliminary Injunction as follows:

Introduction

Defendants blindly assert that "Plaintiffs' ultimate goal, the elimination of trapping in
Nevada, is not before the Court." While it is true that this issue is not before the Court, it is
also true that this is not Plaintiffs' ultimate goal.

Such assertions are typical of the entire opposition, which lacks legal authority, ignores
important arguments made by Plaintiffs, and fails to support its factual assertions.

In Plaintiff's Motion for Preliminary Injunction, Plaintiffs are seeking preliminary and
interlocutory injunctive relief enjoining Defendants from enforcing the regulation regarding

1 trap visitation intervals, and in turn enjoining the 2014-2015 fur trapping season, until further
2 order of the Court, in order to prevent irreparable injury to and to preserve the status quo
3 pending final judgement.

4 Plaintiffs contend that they do have standing in this matter, that the matter is ripe for
5 adjudication, that the Plaintiff's have shown a reasonable likelihood of success on the merits,
6 and that preliminary injunctive relief is appropriate because Plaintiffs have demonstrated that
7 they will suffer irreparable harm absent an injunction.

8 **This matter is ripe for adjudication**

9 Defendants assert that because the regulatory process has not achieved finality by
10 having the regulation filed with the Secretary of State after review by the Legislative
11 Commission, the matter is not ripe for review. The question of ripeness resembles that of
12 standing. *Matter of T.R.*, 119 Nev. 646, 651, 80 P.3d 1276, 1279-80 (2003). Standing focuses
13 upon the status of the party bringing the action, whereas ripeness focuses on the timing of the
14 action. *Id.* Relevant factors are the hardship to the parties of delaying judicial review and the
15 suitability of the issue for review. *Id.* In *Herbst Gaming, Inc., vs. Heller*, 122 Nev. 877, 141
16 P.3d 1224 (2006), opponents of the Nevada Clean Indoor Air Act initiative sought to remove
17 the initiative from the general election ballot. They sought a pre-election injunction. Heller
18 argued the matter was not ripe until after the election. Although not applicable in that case,
19 the Court noted that in a situation where the subject matter of the initiative was not proper,
20 a pre-election attack would be ripe. The Court gave the example of an initiative that presented
21 an administrative issue as opposed to legislative issue. 122 Nev. at 883-84, 141 P.3d at 1228.
22 Where a statutory initiative's subject is administrative rather than legislative, it is improper
23 subject matter, "since the statutory initiative power is limited to legislative acts." *Id.*, citing
24 *Garvin v. District Court*, 118 Nev. 749, 59 P.3d 1180 (2002); *Citizens for Train Trench Vote*
25 *v. Reno*, 118 Nev. 574, 53 P.3d 387 (2002); and *Glover v. Concerned Citizens for Fugate Park*,
26 118 Nev. 488, 50 P.3d 546 (2002). In this case, Plaintiffs are challenging the regulation as
27 a product of the improper delegation of legislative authority to an administrative agency.
28 Plaintiffs are challenging the improper exercise of legislative authority. By reverse analogy
from *Herbst Gaming*, the subject matter at issue is properly before the Court.

1 Defendants give no indication or reason to believe that the regulation will not become
2 final. It may be final by the time the Court rules.

3 Furthermore, before passing the new regulation, the Commission failed to fulfill its
4 statutory duty pursuant to NRS 501.181 to develop a plan of wildlife management that would
5 take into account proper trapping practices in order to protect and preserve non-targeted
6 mammals and birds. Also, the Commission disregarded new information from the
7 Department of Wildlife showing that thousands of animals, birds, domestic animals and
8 household pets, all non-target species, caught, injured and/or killed over a decade of time (See
9 Molde Declaration attached to the Motion for Preliminary Injunction. These matters,
10 including the need for a comprehensive trapping management plan addressing non-target
11 animals, needed to be addressed before the Commission passed the new regulation.

12 Therefore, Defendants' ripeness argument should be disregarded because the matter
13 is justiciable at this point.

14 **Plaintiffs have standing**

15 Defendants challenge standing under NRS 233B.110(1) on the ground that "Plaintiffs
16 cannot prove the regulation interferes with or impairs their legal rights" or "privileges." Then,
17 after stating that federal standing cases do not apply in state court, Defendants discuss two
18 of the most famous United States Supreme Court cases on the topic of standing.

19 Plaintiff's do have standing. Nevada Revised Statute 233B.110(1) does not define
20 "legal rights" or "privileges". NRS 233B.110 does provide standing to plaintiffs whose legal
21 rights or privileges are impaired or if the regulation "threatens to interfere with or impair, the
22 legal rights or privileges of the plaintiff." NRS 233B.110(1). "The Court shall declare the
23 regulation invalid if it finds that it violates the constitutional or statutory provisions or exceeds
24 the statutory authority of the agency." *Id.* Further, *Reno v. Reno Newspaper, Inc.*, 105 Nev.
25 886, 784 P.2d 974 (1987) holds that public entities can be enjoined if they exceed their
26 authority.

27 Plaintiffs assert that the regulation violates the separation of powers doctrine by
28 delegating legislative authority to an administrative agency, part of the executive branch, and
by not providing adequate criteria by which to implement the legislation. This violates the

1 Constitution of the State of Nevada, a Constitution Plaintiffs want their legislature to follow.
2 Plaintiffs are thus aggrieved under these provisions.

3 Additionally, Plaintiffs have delineated their interest in wildlife preservation in general
4 and in particular with respect to the treatment of non-targeted species. In addition to those
5 federal cases finding standing in analogous settings cited in the moving brief, the pursuit of
6 happiness is also a fundamental right Defendants overlook in downplaying Plaintiffs'
7 interests. But a constitutional right should not be downplayed. "All men are by Nature free
8 and equal and have certain inalienable rights among which are those of enjoying and
9 defending life and liberty; Acquiring, Possessing, and Protecting property and pursuing and
10 obtaining safety and happiness[.]" Nev. Const. Art. 1, Section 1 (2014). Viewing and
11 protecting wildlife makes Plaintiffs happy. It is part of their pursuit of happiness. The
12 regulation impairs that pursuit of happiness.

13 The Plaintiff's have a keen interest and high motivation to ensure that they are able to
14 pursue this happiness in their endeavors with wildlife. It dismays them to know that non-
15 targeted species are falling prey to the traps longer than necessary. Regulation of visitation
16 intervals is a legislative interest which motivates this litigation.

17 Plaintiffs also have a liberty interest in enjoying public lands and the wildlife that lives
18 on public land. *City of Chicago v. Merales*, 527 U.S. 41, 119 S.Ct. 1849, 1858 (1999)
19 (plurality opinion) ("[a]n individual's decision to remain in a public place of his choice is as
20 much a part of this liberty as the freedom of movement inside frontiers that is 'a part of our
21 heritage,' or the right to move 'to whatsoever place one's own inclination may direct.'")
22 (citations omitted) (internal citations omitted).

23 Further, Defendants acknowledge that in *Sierra Club v. Morton*, 405 U.S. 727 (1972),
24 the Court recognized that the desire to observe an animal species is a cognizable interest for
25 purposes of standing. Defendants leave unscathed the string citation to federal authorities
26 recognizing the existence of standing in substantially similar circumstances.

27 Plaintiff's also have third party standing to sue because they have a legally cognizable
28 interest in the dispute as citizens. Wildlife is part of the bounty of the State enjoyed by its
citizens, and Defendants are vested with the obligation to be good stewards of it. The

1 Plaintiffs serve as the voice for the non-target species who are needlessly trapped in Nevada
2 as the species cannot raise a voice in court and cannot sue.

3 Defendants claim that any alleged injury “is the result of the independent action of a
4 third party (trappers) not before the court.” (Opposition pg. 7, line 8). However, it is the
5 Commission and NDOW who are charged with monitoring and regulating trapper activity.

6 Defendants allege that Plaintiffs fail to show any actual or imminent injury-in-fact
7 pursuant to *Lujan v. Defenders of Wildlife*, 504 U.S. 55 (1992). However, as described in the
8 attached Declaration of Mark Smith, Plaintiff’s illustrate that there is actual or imminent
9 injury in fact to the Plaintiffs. The trapping of non-targeted animals in Nevada has caused
10 infringement on Plaintiff’s enjoyment of Nevada’s vast public lands, and has an economic
11 impact as described by Plaintiff Mark Smith. (See Smith Declaration). These impacts are not
12 conjectural or hypothetical, but are concrete and particularized. There is not only irreparable
13 harm to the non-target animals being trapped, but there is irreparable harm to the Plaintiffs.

14 Defendants also overlook that before referring to NRS 233B.110(1), Plaintiffs refer
15 to NRS 30.040(1), which allows any person whose legal rights, status or other legal relations
16 are effected by a statute to have determined any question of construction or validity arising
17 under the statute.

18 Before proceeding to discuss the two United States Supreme Court cases, Defendants
19 leave the discussion of NRS 233B.110(1) without any discussion of Plaintiffs’ painstaking
20 application of the holding in *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444, (1986).

21 Defendants do not respond to Plaintiffs’ argument that statutory standing is to be
22 construed more liberally than constitutional standing.

23 **Standard of review**

24 Defendants cite to the standards of review from a contested agency case. This motion
25 does not present the question of whether the commission acted appropriately or not. The issue
26 presented is twofold, (1) whether the legislature improperly delegated legislative authority and
27 (2) whether it did so with adequate criteria. These are purely legal issues. Although the
28 standing question involves factual issues, the determination of the validity of the regulation
is a question of law. Therefore, if there is any “review” standard, it is *de novo*.

Issuance of injunctive relief is warranted because Plaintiffs have established a reasonable likelihood of success of the merits, and Defendants have not shown otherwise

Defendants argue that there is no issue on separation of powers because the legislature merely capped the ceiling on visitation and then authorized and directed the Commission to adopt regulations regarding frequency of trap visitation. In this regard, Defendants refer to NRS 503.570 as an “enabling statute.” Defendants provide no authority for what an “enabling statute” is or for the proposition that “enabling statutes” are exceptions to the separation of powers doctrine. Nor does this argument change the fact that the legislature “enabled” the Commission to legislate.

Defendants contend that the requirement that the Commission consider more frequent visitation in populated or heavily used areas constitutes adequate criteria. The legislature did not define those terms. The Court can take judicial notice of the fact that there are many other populated areas and many other heavily used areas besides Reno and Las Vegas in the State of Nevada. The Declaration of Mark Smith attached to this Reply explains that thousands of individuals enjoy the Nevada outback. Hunting, angling, wildlife viewing and photography are huge economic benefits to the State, and individuals do not just visit the areas of Reno and Las Vegas to enjoy wildlife. (See Smith Declaration). This is a matter of public interest that needs to be fully addressed by the Commission. Defendants provide no evidence that the Commission considered more timely trap visitation in those areas.

Defendants refer to a plethora of Commission and Trapping Committee activity. None of this activity is documented by the Defendants.

Defendants assert that the Commission considered the data regarding non-target species. It provides no support for this assertion.

Even if the assertions regarding the work of the Trapping Committee and the Commission as set forth in the opposition are accurate, that all of the work was done by the Trapping Committee, who made a recommendation that was rubber stamped by the Commission. The legislature delegated to the *Commission* the responsibility for considering the criteria. The legislature did not delegate to the Trapping Committee that responsibility.

Preliminary injunctive relief is appropriate because Plaintiffs have demonstrated that they will suffer irreparable harm, and Defendants have not shown otherwise.

Here, Defendants go back into a standing argument, utilizing the federal constitutional standard. Again, Defendants at the outset recognized that the Nevada standard is not as strict, as pointed out above and in the opening brief, and that our Court has held that statutory standing is more liberal than constitutional standing.

Defendants argue that the redressability aspect of federal standing does not exist because with shorter trap visitation, “there would still be non-targeted animals trapped incidental to targeted species.” Defendants provide no evidentiary foundation for this assertion. On the next page, however, Defendants assert that “with a shorter trap visitation time, the chance of a successful rescue is greater.” In terms of the public interest, then, Defendants would have to agree that shorter intervals in any location in the State would accomplish that purpose and thus serve the public interest.

Defendants assert that 1,300 trappers are going to forfeit their licenses and lose money, and the Department will lose license fees. Defendants provide no statistical analysis supported by evidence to support this assertion. The trappers have not intervened to assert any interest in this controversy.

Conclusion

Plaintiffs move pursuant to NRCP 7(b)(1), NRCP 65(a) and NRS 30.100 for preliminary and interlocutory relief against the Defendants. The matter is ripe because the subject matter of the statute, and in turn the regulation, are at issue. Standing exists because Plaintiffs have an interest in the controversy from two standpoints. One, Plaintiffs wish to preserve wildlife for the opportunity to enjoy it. Plaintiffs also are impacted by the Defendants actions. Two, Plaintiffs are aggrieved by an improper delegation of legislative authority that violates the constitution. Plaintiffs enjoy a reasonable likelihood of success on the merits because, as discussed in the opening brief, it is plain to see that the legislature delegated its authority to the Commission to make law and did so without adequate criteria. The harm to Plaintiffs vis-a-vis observing wildlife and vis-a-vis enjoying a legislature that acts constitutionally is irreparable. Indeed, the violation of the Constitution itself is irreparable

1 harm.

2 WHEREFORE, the Court should issue injunctive relief in the form requested in the
3 moving papers.

4 The undersigned does hereby affirm the preceding document does not contain the
5 Social Security number of any person.

6 DATED this ___ day of ___, 2014.

7 CAVANAUGH-BILL LAW OFFICES, LLC
8 401 Railroad Street, Suite 307
9 Elko, NV 89801

10 By: _____

11 JULIE CAVANAUGH-BILL
12 NV Bar No: 11533
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CERTIFICATE OF SERVICE

Pursuant to Rule 5(b) of the Rules of Civil Procedure, I certify under penalty of perjury that I am an employee of CAVANAUGH-BILL LAW OFFICES, LLC, and on this date, I caused the foregoing documents to be served on all parties to this action by delivering a true copy thereof as follows:

☐ **Faxed**
☐ **Hand Delivered**
☐ **Regular Mail**
☐ **Certified Mail**
☐ **Overnight Mail**
☐ **E-Mail**

Harry B. Ward
Deputy Attorney General

David Newton
Sr. Deputy Attorney General

DATED this _____ day of _____, 2014.

Employee of Cavanaugh-Bill Law Offices,
LLC