

1 CODE: 1090  
2 JULIE CAVANAUGH-BILL  
3 Nevada Bar No. 11533  
4 CAVANAUGH-BILL LAW OFFICES, LLC.  
5 Henderson Bank Building  
6 401 Railroad Street, Suite 307  
7 Elko, NV 89801  
8 (775) 753-4357  
9 (775) 753-4360-Facsimile

10 Attorney for Plaintiff

11 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
12 **IN AND FOR THE COUNTY OF WASHOE**

13 MARK SMITH, DONALD A. MOLDE  
14 AND THE MARK SMITH FOUNDATION,

15 Plaintiff/Petitioners,

16 vs.

17 STATE OF NEVADA, ex rel., THE  
18 NEVADA BOARD OF WILDLIFE  
19 COMMISSIONERS, STATE OF  
20 NEVADA, ex rel., ITS DEPARTMENT OF  
21 WILDLIFE,

22 Defendants/Respondents.

23 **CASE NO.: CV14-01870**

24 **DEPT. NO.: 6**

25 **FIRST AMEDED COMPLAINT AND FOR DECLARATORY AND**  
26 **INJUNCTIVE RELIEF WITH PETITION FOR ISSUANCE OF WRIT OF**  
27 **MANDAMUS AND/OR PROHIBITION**

28 COMES NOW Plaintiffs/Petitioners above named, as and for their complaint  
against Defendants/Respondents, allege as follows:

1. NRS 501.100 provides:

Wildlife in this State not domesticated and in its natural habitat is part of the natural resources belonging to the people of the State of Nevada.

The preservation, protection, management and restoration of wildlife within the State contribute immeasurably to the aesthetic, recreational and economic aspects of these natural resources.

1           2.       Plaintiffs Mark Smith and Donald A. Molde are individuals and residents of  
2 the State of Nevada. Plaintiff The Mark E. Smith Foundation is registered in Nevada as a  
3 501(c) (3) foundation.

4           3.       Plaintiffs have a direct interest in the dispute. Wildlife is part of the bounty  
5 of the State enjoyed by its citizens, and Defendants are vested with the obligation to be  
6 good stewards of it. Plaintiffs are interested in the protection of wildlife and thus in the  
7 agencies named herein adhering to their obligations. Molde is a lifelong advocate for this  
8 cause. Smith is too, and his foundation has worked hard on trapping issues, including the  
9 recent controversies involving the black bear trappings. Both are avid observers of  
10 wildlife. They frequent the areas where trapping occurs in Nevada for aesthetic and  
11 recreational purposes. There, they have endeavored and will continue to endeavor to view  
12 the wildlife present, including many of the non-target species, in order to appreciate its  
13 wonder and to study the ways and habits of the different wild species that inhabit Nevada.  
14 Molde has been active for years on trapping regulation and legislation, lobbying the  
15 Legislature and the Commission annually, and taking on a role of advocating more  
16 stringent trap visitation through statute and regulation.<sup>1</sup> His efforts were thwarted by the  
17 improper delegation addressed by this suit, and his and Smith's opportunities to enjoy the  
18 presence of non-target animals in the wild were also impeded. The Plaintiff Foundation is  
19 dedicated to preservation of wildlife. The Foundation acts to do this for the benefit of the  
20 public. Plaintiffs also have a further interest in ensuring the Commission acts under  
21 legislation that follows the Nevada Constitution.

22           4.       Defendant State of Nevada, ex rel., the Nevada Board of Wildlife  
23 Commissioners (hereafter "the Commission") consists of nine members appointed by the  
24 Governor of the State of Nevada and is charged with establishing policies related to  
25 wildlife in the State of Nevada pursuant to NRS 501.105 et seq. Defendants/Respondent

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26  
27 <sup>1</sup> Molde's dogs have been trapped in traps set by licensed trappers in Nevada. Mark  
28 Smith's photographic business and the Foundation's activities are infringed upon by the  
poorly neglected trapping. See Smith Declaration in reply to opposition to motion for  
preliminary injunction.

1 State of Nevada, ex rel., Nevada Department of Wildlife is a State agency charged with  
2 administering and enforcing laws concerning wildlife. It is named as a necessary party.

3 5. This Court has the jurisdiction to review the adequacy of an agency's  
4 rulemaking under NRS 233B.110.

5 6. The Commission has failed and/or refused to carry out its statutory  
6 obligations to preserve, protect, manage and restore wildlife within Nevada, which wildlife  
7 belongs to Plaintiffs and all other residents of the State of Nevada. The Commissions  
8 failures include but are not limited to the following particulars:

9 a. As provided by existing law, the Commission regulates the use of leg hold traps and  
10 other types of traps and snares for capture of so-called "furbearing" animals in  
11 Nevada which include among others: bobcats, foxes, coyotes, beaver and muskrat.  
12 The Commission has determined at its August 16, 2014 meeting that, with limited  
13 exception, such traps and snares are to be visited by the trapper setting such devices  
14 across Nevada but once every 96 hours (4 days), the maximum interval allowed by  
15 Nevada law and the longest visitation interval in the United States apart from  
16 Montana and Alaska. Such traps and snares are inherently non-selective and will  
17 capture any wild animal, bird or domestic animal which contacts and triggers the  
18 trap or snare. Data from the Nevada Department of Wildlife, over a recent span of 8  
19 years, shows that unintended victims of such traps or snares (so-called "non-target  
20 species") number in the thousands, ranging from pack rats, rabbits, golden eagles  
21 and domestic dogs and cats to mountain lions.

22 b. It is legal to trap bobcats (*lynx rufus*) in Nevada but not mountain lions (*puma*  
23 *concolor*). Because of escalating fur prices, particularly for bobcat pelts (which  
24 may exceed \$1000 per pelt), trappers vigorously pursue bobcats by use of leg hold  
25 traps and snares in all parts of Nevada. Since mountain lions and bobcats live in  
26 similar habitat and have similar habits, mountain lions frequently encounter such  
27 devices. In doing so, mountain lions suffer loss of toes, foot pad injuries, other leg  
28 and foot injuries, broken and/or missing teeth (from biting the trap or attached  
chain), and/or combinations of such injuries. Some mountain lions have died from

1 starvation due to foot injuries sustained from trap encounters which render the  
2 animals unable to successfully pursue prey. Mountain lions legally hunted and  
3 killed in Nevada are required to have a “check-in” inspection by Nevada  
4 Department of Wildlife officials. Such inspections show that about 1 of every 6  
5 mountain lions legally killed by hunters show evidence of trap or snare injuries.  
6 These injuries are not seen in mountain lions living in states where leg hold traps  
7 and snares are not used. Plaintiff’s information and belief is that there are many  
8 mountain lions in Nevada, belonging to Plaintiffs and all citizens of Nevada that  
9 have been injured, killed, and/or have died of starvation because of such traps and  
10 snares and will continue to be so injured and killed without protective action by the  
11 Commission.<sup>2</sup>

- 12 c. The above example of unintentional injury and death suffered by mountain lions  
13 applies equally to all other of the thousands of non-target wildlife and domestic  
14 animals captured in traps and snares over a decade. Each of these non-target  
15 species, whether a simple pack rat, a golden eagle, or a domestic dog, can suffer  
16 similar harm. All affected wildlife belong to the public as part of the public trust  
17 doctrine as specified in a series of U.S. Supreme Court cases (i.e., *Hughes v.*  
18 *Oklahoma; Callopy v. Wildlife Commission; O’Brien v. Wyoming*) and pursuant to  
19 NRS 501.100.
- 20 d. Traps and snares are not benign. Injuries that occur to unintentional victims of  
21 these devices include but are not limited to: leg and foot injuries, missing toes and  
22 claws, broken or missing teeth, dislocated joints, broken bones, permanent crippling  
23 paw injuries and others. The longer a trap or snare victim resides in the device  
24 before release, the more likely that injury and/or death will occur. Such animals can

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25 <sup>2</sup>List of non-target species caught by trappers and reported to the Nevada Department of  
26 Wildlife: rabbit, domestic dog, domestic cat, mountain lion, other, livestock, game,  
27 badger, bear, bobcat, chipmunk, ermine, feral pig, ground squirrel, pack rat, pond turtle,  
28 skunk, golden eagle, hawk, owl, blue heron, chukar, coot, duck, goose, magpie, quail, rail,  
raven.

1 also die sooner from causes such as predation by other animals or exposure.  
2 Regardless, the quicker a non-target victim of a trap or snare is released, the less  
3 chance it has for injury and/or death and the better its chance for survival.

4 6. The Commission is obligated by law to adopt regulations setting the time  
5 interval within which trappers must visit their traps and snares and release the animals  
6 therefrom. Such deliberation by the Commission should take into account its duty to  
7 protect non-target species from injury and/or death from accidental trap and snare  
8 encounters. The Commission has failed in this obligation in that it has placed the  
9 convenience of trappers over consideration of a need to protect wildlife and domestic  
10 animals from unnecessary harm, injury, suffering and death.

11 7. NRS 503.570 provides:

12 1. A person taking or causing to be taken wild mammals by means of traps, snares  
13 or similar devices which do not, or are not designed to, cause immediate death to  
14 the mammals, shall, if the traps, snares or similar devices are placed or set to  
15 take mammals, visit or cause to be visited each trap, snare or similar device at a  
16 frequency specified in regulations adopted by the Commission pursuant to  
17 subsection 3 during all of the time the trap, snare or similar device is placed set  
18 or used to take wild mammals, and remove therefrom any mammals caught  
19 therein.

20 \*\*\*

21 3. The Commission shall adopt regulations setting forth the frequency at which a  
22 person who takes or causes to be taken wild mammals by means of traps, snares  
23 or similar devices which do not, or not designed to, cause immediate death to the  
24 mammals must visit a trap, snare or similar device. The regulations must  
25 require the person to visit a trap, snare or similar device at least once each 96  
26 hours. In adopting the regulations, the Commission shall consider requiring a  
27 trap, snare or similar device placed in close proximity to a populated or heavily  
28 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.

8. The Commission, by its actions and inactions, has ignored dramatic non-  
target data relative to the numbers of non-target animals and birds which were captured,

1 injured and died in traps and snares. Said data was collected by the Nevada Department of  
2 Wildlife from licensed trappers who appeared to respond to the mandatory self-report in a  
3 full and complete manner. Plaintiffs' information and belief is that other trappers did not  
4 fill out the self-report in an honest manner, and a significant segment of licensed trappers  
5 failed to respond at all. Plaintiff's information and belief is that the available non-target  
6 data is but the "tip of the iceberg" and that the true extent of non-target victims is  
7 unknown. By failing to consider said data collected by the Nevada Department of  
8 Wildlife, the Commission, by promulgating a 96-hour trap visitation interval, virtually  
9 state-wide, has maintained the very conditions under which non-target animals and birds  
10 have been adversely impacted over the past decade and has failed to offer, or even to  
11 consider, other reasonable forms of protection for such animals and birds.

12 9. By using the terms "populated" and "heavily used" in enacting NRS  
13 503.570, the legislature, in Plaintiffs' information and belief, recognized a perceived  
14 public safety threat expressed by members of the public who are concerned about the  
15 safety and well-being of children, pets, other domestic animals, and financial and  
16 personal risk to themselves should they encounter a circumstance where an unintended  
17 victim is caught in a trap or snare and where the member would feel obligated or  
18 compelled to extract the victim from the trap or snare without adequate knowledge or  
19 equipment to insure a safe release and to avoid personal injury and need for subsequent  
20 medical or veterinarian treatment.

21 10. Plaintiffs recognize that trapping of furbearing mammals using leg hold traps  
22 and other kinds of traps and snares is a legal means of killing wildlife in Nevada and this  
23 Complaint does not seek to make such trapping illegal. This Complaint, based upon the  
24 above, and the additional allegations below, seeks relief to require the Commission  
25 properly to undertake its obligations to adopt regulations, considering all data collected by  
26 its staff at the Nevada Department of Wildlife as well as concerns expressed by members  
27 of the non-trapping public about such data and practices, as it impacts wildlife as well as  
28 public safety, so as to shorten the 96 hour trap visitation interval and take other measures  
to afford target and non-target wildlife species and domestic animals additional protections

1 against grievous and unnecessary suffering and harm from such devices. The Complaint  
2 also seeks interim relief in the form of a declaration that the Commission's 96 hour trap  
3 visitation interval is ineffective for the reasons above, with a corresponding injunction  
4 postponing the trapping season (beginning October, 2014 for most furbearers; beginning  
5 December, 2014 for bobcats) until final decision herein and/or further order of the Court.

6 **FIRST CLAIM FOR RELIEF**

7 11. Plaintiffs refer to and by such reference incorporates herein each, every, and  
8 all averments contained in paragraphs 1-10 hereinabove as though fully set forth at this  
9 point.

10 12. The Commission is obligated by law to set forth reasonable regulations for  
11 the preservation, protection, and management of all wild animals and birds in the State of  
12 Nevada, including the above-mentioned "non-target" animals and birds. The Commission  
13 has failed and/or refused to do so. In such failure and refusal, the Commission has also  
14 ignored and/or not properly considered the data supplied by the Nevada Department of  
15 Wildlife as to damage, injury and death suffered by non-target wildlife and domestic  
16 animals in the State of Nevada when such are captured in leg hold and other traps and  
17 snares intended only to capture targeted furbearing mammals.

18 13. Plaintiffs are damaged by this failure and refusal of the Commission to act to  
19 reasonably protect and preserve said non-target animals and birds belonging to Plaintiffs  
20 and other people in the State of Nevada.

21 14. Writs of mandate and/or prohibition should issue to compel the Commission  
22 to set forth reasonable regulations for the preservation, protection, and management of all  
23 wild animals and birds in the State of Nevada, including the above-mentioned "non-target"  
24 animals and birds. The Commission has failed and/or refused to do so. In such failure and  
25 refusal, the Commission has also ignored and/or not properly considered the data supplied  
26 by the Nevada Department of Wildlife as to damage, injury and death suffered by non-  
27 target wildlife and domestic animals in the State of Nevada when such are captured in leg  
28 hold and other traps and snares intended only to capture targeted furbearing mammals.





1 Plaintiffs’ belief and information is that the Commission chose to take the narrowest and  
2 unreasonable view of possible definitions of these terms and phrases in order to favor  
3 trapper convenience over the welfare of non-target species. The delegation to the  
4 Commission as set forth in NRS 503.570 (3) to “consider” a shorter trap visitation interval  
5 in “populated” and “heavily used” areas without clarity or specificity of meaning was an  
6 improper delegation of legislative power, prohibited by the Constitution of the State of  
7 Nevada, including its separation of powers clause and structure.

8 21. Such delegation was improper because the Legislature failed to provide the  
9 Commission with adequate guidelines or criteria for engaging in fact-finding that could  
10 lead to a better regulation. This failure not only defeats the delegation, but renders the  
11 regulation ineffective.

### 12 **THIRD CLAIM FOR RELIEF**

13 22. Plaintiffs refer to and by such reference incorporates herein each, every, and  
14 all averments contained in paragraphs 1-21 hereinabove as though fully set forth at this  
15 point.

16 23. The Commission is obligated by law to develop plans for wildlife  
17 management as the steward of Nevada’s wildlife. The Commission has failed to consider  
18 or develop a plan to manage wildlife as it relates to trapping of non-target animals  
19 (including domestic pets and other domestic animals) and has chosen to continue with the  
20 default trap visitation requirement of 96 hours for nearly the entire state, insuring  
21 unnecessary continued suffering, harm, injury and death for non-target species each and  
22 every trapping season.

23 24. To Petitioners’ information and belief, the Commission has failed to develop  
24 a plan to manage wildlife as it relates to trapping of non-target animals and birds due to  
25 improper deference to the convenience of trappers without support within the law to show  
26 that such deference to trappers and their inherently dangerous activity as practiced on  
27 public lands within Nevada outweighs the concerns of the non-trapping public for the  
28 welfare and safety of wildlife and domestic animals. The Commission devoted its  
attention primarily to trapper concerns about hardships visiting trap lines during bad

1 weather, illness, vehicle problems, employment obligations and “threats” of trapping  
2 closer to populated areas should the Commission see fit to shorten the trap visitation  
3 interval. The Commission virtually ignored concerns about animal suffering, harm, injury  
4 and death from trapper neglect while voicing an inability to understand the non-trapping  
5 public’s concerns about animal suffering as it relates to trapping.

6 25. As most of the trapping of furbearing animals in Nevada by private trappers  
7 occurs on public lands, a proper plan of wildlife management as it relates to trapping of  
8 non-target animals and birds may require federal assessments and impact statements  
9 related to the National Environmental Protection Act, the Endangered Species Act and  
10 other potentially applicable federal laws and corresponding regulations. By failing or  
11 refusing to undertake such a proper plan of wildlife management, the Commission has  
12 avoided the need for such considerations of applicable federal law. Avoiding the  
13 obligation to develop a plan avoids the need for such expensive undertakings.

14 26. A writ of mandate and/or prohibition should issue compelling the  
15 Commission to develop such a plan.

16 **FOURTH CLAIM FOR RELIEF**

17 27. Plaintiffs refer to and by such reference incorporates herein each, every, and  
18 all averments contained in paragraphs 1-26 hereinabove as though fully set forth at this  
19 point.

20 28. A preliminary and permanent injunction is available to Plaintiffs as the  
21 Commission’s action and inaction, if allowed to continue, will cause irreparable harm to  
22 Plaintiffs for which compensatory relief is inadequate. The Plaintiffs have a reasonable  
23 likelihood of success on the merits. *Attorney General v. NOS Communications*, 120 Nev.  
24 65, 67, 84 P.3d 1052, 1053 (2004); *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029  
(1987).

25 29. Article 6, Section 6 of the Nevada Constitution vests District Courts of  
26 Nevada with the power to issue injunctions. Pursuant to NRS 30.030 and 30.040, this  
27 Court has injunctive jurisdiction over the matter. Public entities can be enjoined if they  
28

1 exceed their authority. *Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 890, 784 P.2d 974,  
2 977 (1989).

3 30. Plaintiffs have no adequate remedy at law. The failures noted above are not  
4 compensable by an award of monetary damages. The public interest will be served in the  
5 event the Plaintiffs are successful herein.

6 WHEREFOR, Plaintiffs/Petitioners pray as follows:

7 1. For a Declaration that the delegation set forth in NRS 503.570 (3) for the  
8 Commission to “consider” a shorter trap visitation period in certain areas without clear  
9 definition or meaning of “populated” and “heavily used” and without adequate guidelines  
10 or criteria is an improper delegation of legislative power and so the resulting regulation at  
11 issue is void. Should the Court make this finding, Plaintiffs also request that the Court  
12 enjoin the Commission from establishing further trapping season(s) until such time as the  
13 legislature cures the inadequacy of its delegation.

14 2. For a Declaration that the action of the Commission at its August 16, 2014  
15 meeting, keeping the maximum trap visitation interval at 96 hours statewide (with minor  
16 exceptions), failed to meet its statutory duty to protect target and non-target wildlife  
17 species and domestic animals from unnecessary suffering, harm, injury and death and so is  
18 void, and enjoining the Commission from establishing further trapping season(s) until a  
19 proper regulation is promulgated subject to this Court’s review of the new regulation and  
20 the process leading to its adoption.

21 3. For an Order requiring the Commission to hold such hearings as are  
22 necessary to adopt a “trapping management plan” as it relates to trapping of target and  
23 non-target wildlife species, domestic animals, and public safety, to include such elements  
24 as (but not limited to): shorter trap visitation interval; standards for size, type, number,  
25 trigger tension and other characteristics of traps and snares; setback requirements from  
26 roads and public spaces for all forms of traps, trapper education, quotas; and other  
27 reasonable measures to avoid or minimize suffering, harm, injury and death of said  
28 animals and birds, and with Court approval of the completed “plan” before  
implementation.

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4. For an Order requiring the Commission to insure a fair balance of views on any committee or planning group considering a “trapping management plan”, to include Plaintiffs and other members of the non-trapping public, so that trapper convenience is balanced with the concerns of Nevadans who do not trap wildlife and who regard the well-being, safety and protection of target and non-target wildlife species and domestic animals as the proper priority.

5. For a preliminary injunction followed by a permanent injunction requiring that the Commission stay the commencement of future furbearing animal trapping season(s) until such time as the above mentioned hearings have been held, a “trapping management plan” has been developed with participation by Plaintiffs and all other concerned parties and has met with Court approval.

6. For costs of suit and a reasonable amount as and for attorney fees.

7. For such other and further relief as this Court deems appropriate and proper.

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

Dated this \_\_\_\_ day of December, 2014

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

By: \_\_\_\_\_  
JULIE CAVANAUGH-BILL  
NV Bar No: 11533

1 **CERTIFICATE OF SERVICE**

2 Pursuant to Rule 5(b) of the Nevada Rules of Civil Procedure, I certify under  
3 penalty of perjury that I am an employee of CAVANAUGH-BILL LAW OFFICES, LLC,  
4 and on this date, I caused the foregoing documents to be served on all parties to this action  
5 by delivering a true copy thereof as follows:  
6

- 7
- 8  **Faxed**
  - 9  **Hand Delivered**
  - 10  **Regular Mail**
  - 11  **Certified Mail**
  - 12  **Overnight Mail**
  - 13  **E-Mail**
- 14

15

16 Harry B. Ward  
17 Deputy Attorney General

18 David Newton  
19 Sr. Deputy Attorney General

20 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2014.

21

22 \_\_\_\_\_  
23 Employee of Cavanaugh-Bill Law  
24 Offices, LLC

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