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SECOND JUDICIAL DISTRICT COURT
STATE OF NEVADA

NEVADA WILDLIFE ALLIANCE,
a non-profit corporation,
MARK E. SMITH FOUNDATION,
a non-profit corporation,
MARK SMITH, an individual,
DONALD MOLDE, an individual,

Plaintiffs,

vs.

STATE OF NEVADA, ex rel. its
Department of Wildlife ("NDOW"),
STATE OF NEVADA, ex rel. its
Board of Wildlife Commissioners,
TONY WASLEY, in his official capacity
as Director of NDOW,

Defendants.
_____/

CASE NO. CV18-01073
DPT. NO. 1

FIRST AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF
(EXEMPT FROM ARBITRATION: EQUITABLE RELIEF SOUGHT)

Plaintiffs, for their Complaint against Defendants, complain and aver as follows:

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"All animals are equal, but some animals are more equal than others."

-George Orwell, *Animal Farm*

I. Introduction

1. The Public Trust Doctrine commands Defendants manage Nevada's wildlife for all of its citizens. Defendants are not doing that. Defendants are instead engaged in an expensive, far-flung effort to kill mountain lions, coyotes and ravens indiscriminately and without necessity. This effort is an abominable affront to the Public Trust Doctrine and has to be stopped.

2. Equally important, Nevada's Constitution commands Nevada's government treat all of citizens with equality in a manner that does not deprive them of liberty without due process of law. Defendants are ignoring this fundamental, basic command, and they have to be stopped.

3. Defendants are following a law that violates these commands, a law that must be quashed so that Defendants can begin to once again satisfy their trust obligation by treating all Nevadans with equality and due process.

4. This is the objective of this lawsuit.

5. The Legislature has carved out a preference for big game hunters that discriminates against other Nevadans similarly situated without any justification, let alone any rational one. This preference gravely impacts the liberty interest Nevadans have in accessing wildlife that belongs to them.

6. The preference is found at Nevada Revised Statutes Chapter 501. There, NDOW is tasked with collecting a surcharge attendant to game tag applications of $3.00. NRS 501.253 4(b) mandates that at least 80% of the proceeds from this surcharge be used to kill "predators", meaning mountain lions, coyotes and ravens.

7. No one knows why the Legislature so mandated. Some surmise the mandate is based upon speculation that killing predators increases mule deer and sage grouse populations. This speculation is at odds with all science on the matter. Nevertheless, one can imagine that big game hunters would like more access to mule deer and sage grouse. If the Legislature enacted the mandate with this erroneous speculation in mind, it must be sent back to the drawing board.

8. Fortunately, the Legislature has elsewhere given the courts the power of correction when such deviations from the Constitution occur. It is on this basis that Plaintiffs enter this courthouse with their request for declaratory and injunctive relief.

9. The mandate provides in excess of $500,000 per year for killing predators. Expenditures on research and non-lethal predator control are significantly compromised by the 80% mandate.

10. The 2001 Legislature considered a similar mandate touted by sportsmen as a means of saving Nevada's deer herds. It was not until 2015 that the mandate finally inserted itself mysteriously into the bowels of an amendment to the statute regarding use of the surcharge.

11. Necessity is the mother of invention, but this invention had no necessity. Since implementation of predator killing programs in 2003, Nevada's mule deer numbers have been fairly stable, numbering around 100,000 – 110,000, with a very slight drop-off in the past couple of years. Put simply, the killing programs do not result in any surge of mule deer numbers.

12. Mule deer were virtually absent from Nevada during the latter part of the 19th

century. During the mid-1960's and again during the early 1980's, mule deer numbers briefly spiked dramatically in Nevada. Since the late 1980s, the mule deer population began a decline which continued for another decade before reaching its current level.

13. In 2004, NDOW published a comprehensive monograph regarding the history and status of the mule deer in Nevada. The author, Defendant Wasley, was the mule deer biologist for the agency at the time. His monograph provides no support for the mandate. His monograph shows that Nevada's mule deer numbers are affected by a complex set of environmental and habitat issues, and that predation is one of the least likely factors to influence mule deer numbers.

14. The preference violates Nevada's Constitution in several alarming ways. First, it is a special law designed as a revenue measure. It is a special law because it benefits a limited segment of the class of citizens who access Nevada's wildlife to the detriment of the remainder of that class, citizens who appreciate wildlife alive and well in its natural setting. Special laws cannot be designed to create revenue for State governmental operations, but this one does, rendering it unconstitutional. Second, it is a law that discriminates against all Nevadans who appreciate wildlife alive and well in its natural setting in favor of big game hunters, and unjustifiably denies equal protection of the law. Third, the mandate takes away the interest Nevadans have in observing wildlife without due process of law. Any one of these grounds are sufficient alone to cause the Court to grant relief. Collectively, these grounds cry out for decisive judicial intervention on an expedited basis.

15. Any rationale advanced by the Defendants in support of the mandate can be negated. Defendants did not present any scientific basis to the Legislature.

16. NDOW biologists have made efforts to demonstrate a benefit (to a statistical level of significance) to mule deer numbers by killing mountain lions and coyotes. NDOW predator killing Projects 14 &15, 17 and 18 cost hundreds of thousands of dollars and resulted in the deaths of thousands of coyotes and dozens of mountain lions without any demonstrable benefit to mule deer numbers.

17. The 2015 Legislature that imposed the mandate did not consult NDOW regarding the advisability or likelihood of success of such a mandate. There was no showing to the Legislature by the responsible managing agency that spending still more money to kill predators would bring any success other than more dead lions and coyotes.

18. Plaintiffs will now describe the parties to this action; the jurisdiction of the Court; Plaintiffs' standing; and that this is a proper venue. Plaintiffs will then analyze the unconstitutionality of the mandate, and pray for relevant relief.

II. The parties

19. Plaintiffs are residents of and/or do business Washoe County.

20. STATE OF NEVADA, ex rel. NDOW is the Department charged with implementing and enforcing the mandate.

21. STATE OF NEVADA, ex rel. the Wildlife Commission is the agency that must approve any wildlife management activity conducted with the surcharge proceeds.

22. TONY WASLEY is sued in his official capacity only because he is the

Director of NDOW, and thus oversees implementation and enforcement of the mandate.

23. Plaintiffs have thus named the necessary parties.

III. Jurisdiction

24. This Court has jurisdiction over this matter because it seeks to invoke the power of the Court to grant declaratory and corresponding injunctive relief.

25. Declaratory relief is available under NRS 30.030 ("Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding 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.") and 30.040(1) ("Any person interested under a deed, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.").

26. Article 6, §6 of the Nevada Constitution vests district courts with the power to issue injunctions. As an aid to its authority under the Declaratory Judgments Act, this Court has the power to issue supplemental relief. NRS 30.100; *Southern Nev. Homebuilders Ass'n v. City of N. Las Vegas*, 112 Nev. 297, 913 P.2d 1276 (1996)(this includes injunctive relief to prohibit enforcement of an invalid law), overruled on other grounds, *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964,(2001).

27. Plaintiffs are not basing this action upon any federal law, and no federal law preempts Plaintiffs' claim. The action is based upon the Nevada Constitution, and nothing else. It is not an action over which federal court would have original subject matter jurisdiction, and any attempt at removal would be frivolous, groundless and unreasonable, *i.e.*, subject to sanctions for improvident removal.

28. Plaintiffs have thus established this Court's jurisdiction.

IV. <u>Standing</u>

29. Plaintiffs have a direct interest in the dispute and suffer and will continue to suffer direct and concrete injury-in-fact.

30. Wildlife is part of the bounty of the State owned and enjoyed by its citizens, and Defendants are vested with the fiduciary obligation to be good stewards of it under NRS 501.100 and .105 and under the Public Trust Doctrine.

31. Plaintiffs are interested in the protection of wildlife and in seeing Defendants adhere to their fiduciary obligation in a constitutional way.

32. Plaintiffs Molde and Smith frequent areas where wildlife occurs in Nevada for aesthetic and recreational purposes. There, they endeavor to view wildlife, including predator species. Planitiffs enjoy observing all wildlife.

33. Plaintiffs derive scientific, recreational, conservation, educational, and aesthetic benefits from the existence and observation of native carnivores. Plaintiff Molde has a special affinity for mountain lions and coyotes.

34. Plaintiff Molde derives aesthetic and recreational enjoyment from searching for and observing coyotes in the wild. When out on the public lands, he considers it a good

day if he can see a coyote, and a great day if he can see two or three. Indiscriminate killing methods and the large numbers of coyotes killed in Nevada reduce his chances of seeing a coyote.

35. Plaintiff Molde is always looking for mountain lions and their signs, because he wants to see a mountain lion in the wild. He derives aesthetic and recreational enjoyment from searching for them and their tracks.

36. Wildlife photography has long been a hobby of Plaintiffs Molde and Smith, and they look for opportunities to take pictures, including of native carnivores. Smith also publishes and sells books that share some of the photographs he takes of wildlife.

37. Plaintiffs visit the public lands in Nevada, including wilderness and wilderness study areas, for recreation, wildlife photography, and taking walks.

38. Plaintiff Molde is a birder. He enjoys observing, searching for, and photographing birds. The raven is a designated predator. As a birder, Plaintiff enjoys observing ravens as he drives Nevada's back roads and highways. They are entertaining, and always busy doing something. Plaintiff derives recreational, conservation, and aesthetic benefits from the existence and observation of ravens.

39. Plaintiffs' ability to enjoy the presence of predator animals in the wild will be impeded absent the requested relief.

40. Plaintiffs have a further interest in ensuring unconstitutional statutes are not enforced and in seeing that Defendants treat citizens, including Plaintiffs, with equality.

41. Department 6 has recognized in a similar context that Plaintiffs Smith, Molde and the Mark E. Smith Foundation have standing. *Smith v. State*, Case No. CV14-01870, Order of November 3, 2016 at 5-7.

42. Plaintiffs Nevada Wildlife Alliance and Mark E. Smith Foundation are Nevada organizations dedicated to the preservation of wildlife on behalf of the public. The interests of Plaintiffs Molde and Smith set out above are consistent with the interests and mission of these organizations and the interests of the beneficiaries of these organizations. Nevada Wildlife Alliance ("NWA") is a Nevada-based 501c3, originally known as Nevadans for Responsible Wildlife Management when founded in 2014. The name was changed to Nevada Wildlife Alliance in 2015 to emphasize its members' interest in working in cooperative fashion with other wildlife conservation groups to pursue common interests. NWA is dedicated to the idea that wildlife management in Nevada must become more democratic and responsive to broader public views and interests. NWA is dedicated to providing education about wildlife matters to the public and to decision makers who influence and affect laws and regulations which affect wildlife. NWA helps facilitate the purpose and mission of other wildlife and animal advocacy groups, provides commentary where it is needed and interacts with public regulatory agencies to pursue its interests. NWA believes that all wildlife matters, including species called "predators" which traditionally receive differential treatment by wildlife management agencies in deference to ungulates and other favored species. NWA believes all wildlife species deserve fair and equal consideration in the management process. NWA's current pressing concern is in regard to mountain lions as they are impacted by incidental encounters with traps and snares, an issue not yet

addressed by the Nevada Department of Wildlife and the subject of the ongoing lawsuit in Department 6 of this Court. NWA believes the unnecessary random unregulated killing of mountain lions referenced in this action is an unknown and worrisome lion mortality factor that should not occur. The Mark E. Smith Foundation ("Foundation") was founded in 2008. The Foundation is a Nevada-based 501c3 non-profit organization with its headquarters in Incline Village, Nevada. It is dedicated to providing wildlife advocacy including for matters concerning bears, trapping, and democratic representation of the public's interest in wildlife policy setting. The Foundation does not have formal membership but rather uses the followers of its Facebook page as the membership; current membership is 390 with members resident principally in Nevada and secondarily in California. The Foundation has been active for the past 10 years in Nevada policy making for: urban bear management and black bear hunting; wildlife population measurements (including attempting to coordinate efforts by NDOW, the University of Nevada, Reno, and several major mining companies); coyote "killing contests;" trapping of bobcats and unintended take of cougars and other species (including protected species); and generally in the transparency of the Department of Wildlife and the Board of Wildlife Commissioners. The Foundations efforts include both promoting responsible management of Nevada's wildlife, and helping to create and sustain non-consumptive uses of wildlife such as wildlife viewing (which, according to the latest US Census, contributed more to Nevada's economy than did hunting.). The Foundation also provides pro bono support to Native Americans (including the Ute Mountain Ute Tribe in the Four Corner region) and government agencies (including NDOW as well as foreign governments), principally assisting with communications between the wildlife and mining

communities, which speak very different languages and often have difficulty reaching consensus.

43. Courts have long recognized standing in suits related to wildlife laws interfering with enjoyment of wildlife. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 562-63, 112 S. Ct. 2130, 2137 (1992) (desire to observe an animal species is a cognizable interest for purposes of standing*); Sierra Club v. Morton*, 405 U. S. 727, 734, 92 S.Ct. 1361 (1972) (same); *see also Animal Welfare Inst. v. Martin*, 623 F.3d 19 (1st Cir. 2010) (plaintiffs had standing to bring litigation based on claims that injury or death to the endangered lynx, as a result of the state's failure to prohibit trapping devices, which would likely result in the individual's lessened enjoyment in recreation in the area); *Jayne v. Rey*, 780 F. Supp. 2d 1099 (D. Idaho 2011) (potential harm to two endangered species, grizzly bears and caribou, would cause injury to plaintiff who would have less enjoyment in visiting the area); *Defs. of Wildlife v. Hall,* 807 F. Supp. 2d 972 (D. Mont. 2011) (plaintiffs had sufficient injury when defendant's action threatened extinction of wolves, an endangered species, which would harm plaintiff's alleged interest in observing the wolves); *Coal. for a Sustainable Delta v. FEMA*, 711 F. Supp. 2d 1152 (E.D. Cal. 2010) (plaintiffs' alleged injury to aesthetic interest in viewing threatened endangered fish was sufficient for standing); *Oregon Natural Desert Ass'n v. Tidwell*, 716 F. Supp. 2d 982 (D. Or. 2010) (defendant's management of lands in ways that threaten injury to an endangered species, the

steelhead trout, caused plaintiffs to suffer injury sufficient for standing purposes when plaintiffs would be sad by the demise of the fish).

44. As shown elsewhere in this Amended Complaint, the proffered data shows the likelihood of injury to Plaintiffs' constitutional interests is not speculative. *Los Angeles v. Lyons,* 461 U.S. 95, 102, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983) ("Past wrongs were evidence bearing on whether there is a real and immediate threat of repeated injury").

45. Plaintiffs seek a remedy that will halt the enforcement of an unconstitutional law. There is thus a likelihood that a court ruling in Plaintiffs' favor would remedy the injury. *Duke Power Co. v. Carolina Environmental Study Group, Inc*., 438 U.S. 59, 74-75 and n. 20, 98 S. Ct. 2620 (1978) (plaintiff to show that relief requested will redress the injury in order to achieve standing).

46. Plaintiffs therefore have established their standing.

V. Venue

47. Venue is proper here because Defendants do business in Washoe County, the activity at issue occurs here, and the operative facts arise here.

VI. The mandate

48. NRS 502.253(1) requires a surcharge of $3.00 be charged by NDOW for each game tag application. The statute allocates use of the surcharge to:

(a) Developing and implementing an annual program for the management and control of

predatory wildlife;

(b) Wildlife management activities relating to the protection of nonpredatory game animals and sensitive wildlife species; and

(c) Conducting research necessary to determine successful techniques for managing and controlling predatory wildlife.

49. In 2015, the legislature added new subsection 4(b):

> The Department:
>
> Shall not adopt any program for the management and control of predatory wildlife developed pursuant to this section that provides for the expenditure of less than 80 percent of the amount of money collected pursuant to subsection 1 in the most recent fiscal year for which the Department has complete information for the purposes of lethal management and control of predatory wildlife.

50. The measure containing the change was AB 78 in the 2015 Legislature. The Legislative Counsel's digest to that bill provides in pertinent part:

> Existing law provides that in addition to any fee charged and collected for a game tag, a fee of $3 must be charged for processing each application for a game tag, the revenue from which must be deposited with the State Treasurer for credit to the Wildlife Fund Account in the State General Fund and used by the Department for costs related to certain programs, management activities and research relating to wildlife. (NRS 502.253) Section 4 of this bill revises the provisions governing the use of this money. . ..

51. The revision places priority on the use described in NRS 502.253(1)(a), and requires at least 80% of all fees collected be used only on programs designed to effectuate lethal management and control of predatory wildlife. Thus, lethality is given priority over other uses of the surcharge, *i.e*., non-lethal means of managing and controlling predatory wildlife (NRS 502.253(1)(a)), management activities related to non-predatory wildlife and sensitive wildlife (NRS 502.253(1)(b)) and research for techniques of managing and controlling predatory wildlife (NRS 502.253(1)(c)).

VII. The classification

52. The class at issue are persons who wish access to Nevada wildlife.

53. The mandate benefits a sub-class, big game hunters, over another sub-class, the many who appreciate wildlife alive and well in its natural setting. The mandate takes wildlife away from Plaintiffs to favor big game hunters.

54. The mandate is designed to improve one sub-class's position over that of another sub-class. The preference at issue in this complaint draws a stark line between a limited number of big game hunters and the remainder of the public, some of whom may (or may not) have an intrinsic appreciation of wildlife, but all of whom are beneficiaries of the Public Trust Doctrine as it pertains to wildlife.

55. Plaintiffs are persons within the sub-class of persons who want to enjoy all wildlife in its natural setting. They oppose a statutory classification that treats them less favorably than big game hunters.

56. The sub-classes are similarly situated in that they both want to have a chance at recreation derived from exposure to wildlife in its natural state. The statute discriminates in favor of big game hunters, to the detriment of those who enjoy a wildlife population in a natural balance.

VIII. Legal bases for the relief

A. The classification is a special law to raise State revenue.

57. Article 4 of the Nevada Constitution gives law-making power to the

Legislature. Nev. Const. art. 4, §1. It also limits that power to protect Nevada citizens from unequal treatment under the law-making power. Nev. Const. art. 4, §§20 and 21. §20 prohibits special laws that assess and collect taxes for state purposes.

58. A special law is one that pertains to a part of a class as opposed to all of a class. *Clean Water Coalition v. M Resort, LLC*, 127 Nev. 301, 312, 255 P.3d 247, 255 (2011), citing *State of Nevada v. Cal. Mining Co.*, 15 Nev. 234, 249 (1880) (describing a special law as one that "imposes special burdens, or confers peculiar privileges upon one or more persons in no wise distinguished from others of the same category"). For example, in *Cal. Mining Co.*, the Legislature passed a law ratifying exemptions a district attorney had given from paying interest on delinquent taxes to certain taxpayers. The tax law, which applied to all Nevada taxpayers, required interest be collected. By carving out exemptions for a small group of taxpayers, the Legislature had endorsed a favor given by the DA to the small group of taxpayers, thus passing a special law. The class at issue is persons who desire access to Nevada wildlife. One sub-class is big game hunters. Another sub-class is persons who desire to access wildlife alive and well in its natural state, including predators.

59. The mandate falls within a statutory provision that requires NDOW to charge a $3.00 surcharge for each game tag application. That provision lists the uses to which NDOW may put the surcharge. The preference requires that 80% of the surcharge be used to kill predator wildlife. These provisions, taken together, confer a privilege on big game hunters, who are part of a class of the public who seek to access wildlife. The privilege is to increase prey populations available to the sub-class of big game hunters, thereby burdening the sub-class of those who seek to access wildlife of all kinds, including predator populations. The preference is thus a special law that treats Nevada citizens unequally. As such, it

violates Article 4, §20 if it is part of an assessment of a tax for state purposes.

60. The mandate is part of an assessment for State purposes. An assessment is the imposition of a tax at a certain rate. The $3.00 surcharge is an assessment. The fees collected are to be used by NDOW for a State purpose.

61. The next question is whether it is a tax. It is a tax. This depends on whether the surcharge (1) applies to the direct beneficiary of a particular service, (2) is allocated directly to defraying the costs of providing the service, and (3) is reasonably proportionate to the benefit received. *Clean Water Coalition*, 127 Nev. at 315, 255 P.3d at 257. If these criteria fit the surcharge, only then is is *not* a tax. *Id*. The criteria do not fit, and the surcharge is thus a tax. The surcharge statute is designed to fund a broad array of wildlife management efforts, not a beneficiary of a particular service. NDOW can and does apply surcharge revenue to research and development in addition to a predator killing program. All Nevada citizens are the beneficiaries of those efforts. The surcharge is disproportionate because it defrays not just administrative costs of processing game tag applications, it defrays the cost of a broad aspect of NDOW's wildlife management efforts in research and development programs as well as the predator killing program. The surcharge is not proportionate because it raises hundreds of thousands of dollars, far in excess of that needed to process game tag applications. The criteria do not fit, and the fees surcharge is thus a tax for State purposes. The statute is a special law that is a tax for State purposes. It is thus unconstitutional because it violates Article 4, §20 of the Nevada Constitution.

62. When the law seeks revenue in an amount that supports its objective, the law

is a tax. *Clean Water Coalition*, 127 Nev. at 316, 255 P.3d at 258. The statute seeks revenue for NDOW's efforts to manage wildlife. The amounts collected, in the hundreds of thousands, support the idea that the fees are not to defray the administrative cost of processing game tag applications. The surcharge is for an entire program of wildlife management, research and development. The fees are not a mere regulatory assessment for a single project, as the fees were in *Clean Water Coalition*. The fees are for NDOW's use in wildlife management, research and development.

63. The mandate confirms that even if the surcharge was not a tax before 2015, it became one when the Legislature added the mandate in 2015 because earmarking proceeds to a use that differs from the original intended use is consistent with a revenue raising purpose. *Clean Water Coalition*, 127 Nev. at 317, 255 P.3d at 258.

64. The mandate is a special law for the purpose of raising revenue, and should be stricken, and Defendants should be enjoined from enforcing it.

B. <u>The classification violates the Equal Protection Clause</u>.

65. The right to equal protection of law is guaranteed by Article 4, §21 of the Nevada Constitution. *Rico v. Rodriguez*, 121 Nev. 695, 702-03, 120 P.3d 812, 817 (2005). "Equal protection of the law has long been recognized to mean that no class of persons shall be denied the same protection of the law which is enjoyed by other classes in like circumstances." *Allen v. State*, 100 Nev. 130, 135, 676 P.2d 792, 795 (1984) citing *Truax v. Corrigan*, 257 U.S. 312, 336 (1921) and *In the Matter of McGee*, 44 Nev. 23, 189 P. 622 (1920).

> Article 4, Section 21, of the Nevada Constitution provides in pertinent part that "all laws shall be general and of uniform operation through the State.". . ..

Laakonen v. Eighth Judicial Dist. Court, 91 Nev. 506, 508-09, 538 P.2d 574, 575 (1975).

66. "[W]here a law contains no classification or a neutral classification and is applied evenhandedly, it may nevertheless be challenged as in reality constituting a device designed to impose different burdens on different classes of persons." *Rico*, 121 Nev at 703, 120 P.3d at 817. The mandate is a device designed to impose different burdens on different sub-classes of the class of persons who desire access to wildlife.

67. Wildlife belongs to the people. Equal protection of the people means equal access to the wildlife that belongs to them. The preference diminishes the people's access. On its face, it discriminates. Even if it does not discriminate on its face, it has a disparate effect between big game hunters and others who access wildlife.

68. Here is a chart comparing wildlife watching to hunting in Nevada, compiled by the U.S. Fish and Wildlife Service:

	2011	2006	2001
Total Wildlife Watching Participants	643,000	686,000	334,000
Total Hunting Participants	43,000	63,000	49,000
Nevada Population	2,700,551	2,623,050	2,132,498

69. The mandate thus violates the Equal Protection Clause.

C. **Defendants cannot meet the rational basis test.**

70. "Equal protection is offended if the prohibition is an unreasonable classification without basis in fact, and unrelated to the objective sought to be accomplished." *Doubles Ltd. v. Gragson*, 91 Nev. 301, 303, 535 P.2d 677, 679 (1975). "The Legislature may make reasonable classifications with respect to persons, businesses, property and other activities but those classifications must not be arbitrary and must be based upon some difference in the classes having a substantial relation to the legitimate object to be accomplished." *Boyne v. State*, 80 Nev. 160, 164, 390 P.2d 225, 227 (1964).

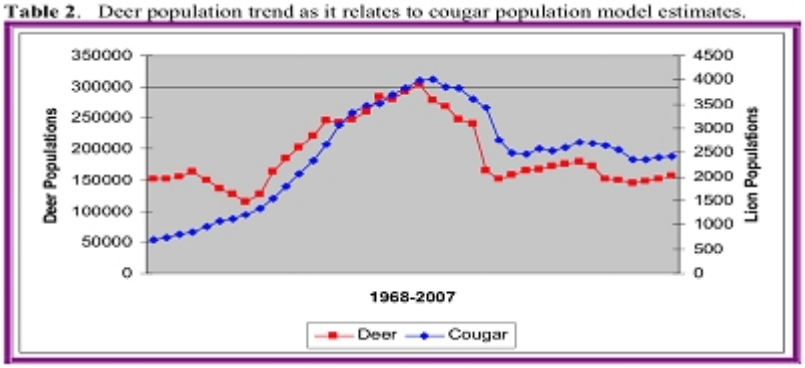
71. For example, in *Barnes v. District Court*, 103 Nev. 679, 748 P.2d 483 (1987), the Court faced a statute that required *in forma pauperis* applicants to file an attorney's affidavit of merit in order for the application to be processed. Petitioners' applications were rejected by the clerk's office for want of the affidavits. The justification proffered for the statute was that it spared the state the burden of financing frivolous lawsuits. Because the requirement could also foreclose indigents with meritorious cases from pursuing claims, because they too could not afford the affidavits, the requirement was not rationally related to the proffered objective of the statute. 103 Nev. at 684-685, 748 P.2d at 487. In other words, the statute reached beyond the proffered objective and spared the State the burden of financing not just frivolous lawsuits, but meritorious lawsuits as well. The preference causes the statute of which it is a part to benefit one sub-class to the burden of another.

72. NDOW data shows that with millions spent on predator control since the turn of the century, deer populations have remained relatively steady. Thus, the notion that the mandated preference will result in an increase in deer populations is debunked by

NDOW's own figures.

73. The biological view widely accepted is that, generally speaking, the availability of preferred prey species greatly influences the number of predator species. Such a relationship is suggested by this graph presented by NDOW staff at the Ninth Mountain Lion Workshop a few years ago. Lion numbers track deer numbers with a lag of a year or two:

Table 2. Deer population trend as it relates to cougar population model estimates.



74. Those who appreciate wildlife alive and well in its natural state generally believe that wildlife species, indeed Nature itself, has a tendency and ability to self-balance, to self-correct and to seek a stable predictable level of existence that insures viability and diversity. The idea that a class of wildlife species called "predators" needs "control", *i.e.,* killing, to artificially enhance other species favored and killed by big game hunters is a perversion of what is known and remarkable about wildlife itself.

75. NDOW has never demonstrated public support for the mandate. No survey has ever been taken by the agency making inquiry of the general public. The preference arose from misguided notions by a few sportsmen and a Las Vegas legislator. For the most part, the general public has little if any awareness of the issue.

76. Defendants thus cannot demonstrate any rational basis for the mandate, and even if they could, they could not show how the mandate fosters that rationale.

D. <u>The Legislature's overreach further shows it had no rational basis</u>.

77. The mandate conflicts with NRS 501.105, which provides in pertinent part: "The Commission shall establish policies and adopt regulations necessary to the preservation, protection, management and restoration of wildlife and its habitat."

78. The mandate conflicts with NRS 501.181(3)(b), which provides: "The Commission shall . . . [e]stablish policies for areas of interest including . . . [t]he management and control of predatory wildlife."

79. The Legislature's usurpation of Defendants' authority is not in furtherance of any legitimate governmental objective associated with the delegation of the public trust to NDOW. This comes perilously close to violating the separation of powers doctrine.

80. "The separation of powers; the independence of one branch from the others; the requirement that one department cannot exercise the powers of the other two is fundamental in our system of government." *Galloway v. Truesdell*, 83 Nev. 13, 19, 422 P.2d 237, 242 (1967). The Nevada Constitution confines the power of the legislature to enacting laws, and does not permit the legislature to execute laws already enacted.

81. "Briefly stated, legislative power is the power of law-making representative bodies to frame and enact laws, and to amend or repeal them." *Galloway*, 83 Nev. at 20, 422 P.2d at 242.; Nev. Const. Art. 3, §1. "The executive power extends to the carrying out and enforcing the laws enacted by the Legislature." *Id.*; Nev. Const. Art. 5, §7.

82. The mandate is the result of an amendment to NRS 502.235, Senate Amendment No. 261 in the 2015 Legislature. It is thus *probably* not a direct infringement upon separation of powers. But its effect, especially without explanation for its introduction and passage, shows it is an arbitrary imposition of legislative will.

83. The statute before the mandate allowed Defendants to use the game tag application surcharge to be used for:

> (a) Developing and implementing an annual program for the management and control of predatory wildlife;
>
> (b) Wildlife management activities relating to the protection of nonpredatory game animals and sensitive wildlife species; and
>
> (c) Conducting research necessary to determine successful techniques for managing and controlling predatory wildlife.

84. In accordance with this delegation of discretion, Defendants developed annual programs. For example, NDOW estimated it would have $526,700 from the surcharge in FY2014, and it estimated $526,360 in total expenditures for its FY2014 predator management programs, approximately $255,000, or 50% of which would be for lethal programs. NDOW estimated it would have $961,500 in FY2018, estimated $961,500 in total expenditures for its FY 2018 predator management programs, approximately $819,000, or 85%, of which would be for lethal programs. The mandate thus caused an increase in lethal program expenditures of 35%, using this lone example.

85. Yet, Defendants cannot show that absent the mandate, their management of predators by lethal means was deficient. Defendants did the job without the mandate. Defendants could continue to do the job without the mandate. The existence of NDOW's authority "necessarily casts considerable doubt upon the proposition that [the mandate]

could have rationally been intended to [further guide that authority]." *U. S. Dept. of Agriculture v. Moreno* , 413 U.S. 528, 536-37, 93 S. Ct. 2821(1973). A purpose to discriminate in an effort to protect powerful groups cannot justify the passage of the preference. *Id*. at 534-35.

86. In its introduction to its FY2018 predator management plan, NDOW noted:

> NDOW is a state agency that must balance the biological needs of wildlife, statutory mandates, and social desires of the public. In the 2015 legislative session, Assembly Bill 78 was adopted which in part amended NRS 502.253 (4) (b) to read: [The Department] "Shall not adopt any program for the management and control of predatory wildlife developed pursuant to this section that provides for the expenditure of less than 80 percent of the amount of money collected pursuant to subsection 1 in the most recent fiscal year for which the Department has complete information for the purposes of lethal management and control of predatory wildlife." NDOW intends to comply with statute and apply the tools of scientific predation management in biologically sound, socially responsible means.

87. The mandate has thus greatly reduced the relative dollars spent on non-lethal programs and research. The mandate, statistically, has severely curtailed Defendants' discretion in developing and implementing an annual program for the non-lethal management and control of predatory wildlife, in pursuing wildlife management activities relating to the protection of non-predatory game animals and sensitive wildlife species, and in conducting research necessary to determine successful techniques for managing and controlling predatory wildlife.

88. NDOW has promulgated predator management programs that were presumptively valid. NDOW had the authority to determine the scope of those programs. Given this, the preference is irrational and violates the Equal Protection Clause.

E. Defendants cannot meet the strict or intermediate scrutiny tests.

89. "All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing, and Protecting property and pursuing and obtaining safety and happiness[.]" Nev. Const. Art. 1, Section 1 (2014). Viewing and protecting wildlife makes Plaintiffs happy. It is part of their pursuit of happiness. The classification thus affects Plaintiffs' liberty interest in the pursuit of happiness guaranteed as a fundamental right by the Nevada Constitution. This liberty interest has been recognized by Department 6. *Smith v. State, supra*.

90. Where the classification affects a fundamental right, the strict scrutiny test applies. *State Farm Fire & Casualty Co. v. All Elec.*, 99 Nev. 222, 232, 660 P.2d 995, 1002 (1983) ("A statute which is not based upon a suspect classification and which does not impinge on a fundamental right satisfies the equal protection clause if the classification is rationally related to legitimate government interest."). "Under the strict scrutiny approach, legislation should be sustained only if it is narrowly tailored and necessary to advance a compelling state interest." *Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000). If Defendants cannot satisfy the rational basis test, they certainly cannot show that the mandate is narrowly tailored to meet a compelling or even a substantial state interest. The mandate thus violates Plaintiffs' right to equal protection.

F. The mandate violates substantive due process.

91. ""Generally, substantive due process analysis applies when state action is alleged to unreasonably restrict an individual's constitutional rights."" *Las Vegas*

Convention & Visitors Auth. v. Miller, 124 Nev. 669, 695-96, 191 P.3d 1138, 1155 (2008), quoting *Mont. for Justice v. State ex rel. McGrath*, 334 Mont. 237, 146 P.3d 759, 767 (Mont. 2006). "No person shall be deprived of life, liberty, or property, without due process of law." Nev. Const. Art. I, §8(5). The question is whether the statute is narrowly tailored so as to serve a compelling interest. *Kirkpatrick v. Eighth Judicial Dist. Court*, 119 Nev. 66, 74, 64 P.3d 1056, 1061-62 (2003). As discussed, Defendants cannot show the mandate is narrowly tailored so as to serve a compelling state interest. Therefore, the mandate is void as it violates Plaintiffs' substantive due process right.

IX. **The relief sought**

92. The Court should declare the 80% mandate unconstitutional and thus void.

93. The Court should enjoin Defendants from following or enforcing the preference.

94. Plaintiffs have no adequate remedy at law. They are not harmed in a way that they can collect money damages.

95. Plaintiffs will suffer irreparable harm absent the requested relief. That harm cannot be undone by any judgment, which will be prospective in its operation.

96. An ongoing constitutional violation is irreparable harm.

97. The balance of hardships weighs in favor of injunctive relief.

98. Injunctive relief will be in the public interest.

99. Plaintiffs are entitled to attorneys fees and costs as private attorneys general.

X. Ad damnum

Wherefore, Plaintiffs pray for judgment in their favor and against Defendants with a declaration that the preference violates their rights to equal protection and due process, with corresponding injunctive relief enjoining Defendants from further enforcing or implementing the preference, and such other and further relief as the Court deems just and proper.

I certify this document does **NOT** contain the Social Security Number of any person.

Dated May 31, 2018

__/s/Jeffrey A. Dickerson__
JEFFREY A. DICKERSON