

1 CODE NO. 3370
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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE
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9 MARK SMITH, DONALD A. MOLDE, AND
10 THE MARK SMITH FOUNDATION,

Case No. CV14-01870

Dept. No. 6

11 Plaintiffs-Petitioners,

12 vs.

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14 STATE OF NEVADA, NEVADA BOARD OF
15 WILDLIFE COMMISSIONERS, STATE OF
16 NEVADA, DEPARTMENT OF WILDLIFE,

17 Defendants-Respondents.
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19 **ORDER GRANTING IN PART, DENYING IN PART, MOTION TO DISMISS**

20 Before this Court is a *Motion to Dismiss* filed January 28, 2016 by Defendants
21 STATE OF NEVADA, NEVADA BOARD OF WILDLIFE COMMISSIONERS and STATE OF
22 NEVADA, DEPARTMENT OF WILDLIFE through their counsel Harry B. Ward. Plaintiffs
23 filed their *Opposition to Defendants' Motion to Dismiss* on February 11, 2016 through their
24 counsel Julie Cavanaugh-Bill. Defendants filed their *Reply to Plaintiffs' Opposition to*
25 *Defendants' Motion to Dismiss* on February 2, 2016. The parties appeared before this Court
26 on May 9, 2016 to present oral argument on the instant *Motion*. The Court, having reviewed
27 the foregoing, the procedural posture of this case, and action taken by the State of Nevada
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1 Legislative Counsel Bureau, issues its *Order*.

2 **BACKGROUND AND PROCEDURAL HISTORY**

3 Plaintiffs filed their *Verified Complaint and for Declaratory and Injunctive Relief* on
4 August 29, 2014, as well as a *Motion for Preliminary Injunction*. Plaintiffs sought an
5 injunction enjoining Defendants from enforcing Commission General Regulation 450, LCB
6 File No. R087-14 ("R087-14" or the "Regulation"), a regulation regarding trap visitation
7 intervals for trapping wild game. Plaintiffs also sought to enjoin the 2014-2015 trapping
8 season. The Honorable Scott Freeman heard the *Motion for Preliminary Injunction* on
9 November 20, 2014 and denied it, finding the matter was not ripe for judicial determination
10 because Plaintiffs had not exhausted their administrative remedies by asking the
11 Department of Wildlife to pass upon the validity of the R087-14.
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14 On December 11, 2014, Plaintiffs filed their *First Amended Complaint and for*
15 *Declaratory and Injunctive Relief with Petition for Issuance of Writ of Mandamus and/or*
16 *Prohibition* ("FAC") which is the subject of Defendants' *Motion to Dismiss*. Plaintiff's FAC
17 generally avers the Nevada Board of Wildlife Commissioners (the "Commission") failed to
18 perform its duties to enact a trapping management plan that ensures the protection of non-
19 target animals from traps set for target animals. *FAC*. Plaintiffs allege the following causes
20 of action: (1) a writ of mandamus or prohibition compelling the Commission to set forth
21 reasonable regulations for the preservation and protection of wildlife and compelling the
22 Commission to properly consider data supplied by NDOW; (2) declaratory relief rendering
23 NRS 503.570(3) ineffective as an improper delegation of legislative power from the Nevada
24 Legislature to the Commission because it fails to provide adequate guidelines; (3) a writ of
25 mandamus or prohibition compelling the Commission to develop a plan for wildlife
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1 management as it relates to the trapping of non-target animals; and, (4) preliminary and
2 permanent injunctive relief for the Commission's action or inaction.

3 The parties filed a *Joint Stipulation to Take Judicial Notice* on April 13, 2016,
4 indicating R087-14 was adopted April 4, 2016 by the State of Nevada Legislative Counsel
5 Bureau, and this Court took judicial notice of the adopted regulation.
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7 On May 9, 2016, this Court heard oral argument on the instant *Motion to Dismiss*.
8 Pursuant to this Court's request, the parties informed the Court what portions of their
9 respective pleadings were moot as of the date of passage of R087-14. The parties also
10 addressed the procedural requirements of NRS 233B.110, and the fact Plaintiffs had not
11 requested NDOW to pass upon the validity of the regulation prior to challenge. *Minutes*,
12 5/9/16. The Court directed Plaintiffs to comply with NRS 233B.110, which Plaintiff did. See
13 *Notice of Request to NDOW to Pass Upon the Validity of Regulation* filed 5/11/16 and
14 *Defendant Department of Wildlife's Response to Plaintiffs' Request to Pass Upon the*
15 *Regulation* filed 5/26/16.
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18 After consideration of the foregoing procedural history and background, the Court
19 turns to its analysis of the standard of review for a motion to dismiss and the governing law.

20 **STANDARD OF REVIEW; APPLICABLE LAW AND ANALYSIS**

21 A complaint should be dismissed under NRCP 12(b)(5), "only if it appears beyond a
22 doubt" that the plaintiff is entitled to no relief under any set of facts that could be proved in
23 support of the claim. Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. 224, 228, 181
24 P.3d 670, 672 (2008). The court determines "whether or not the challenged pleading sets
25 forth allegations sufficient to make out the elements of a right to relief." Bemis v. Estate of
26 Bemis, 114 Nev. 1021, 1024, 937 P.2d 437, 438 (1998). The court recognizes all the
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1 factual allegations in the plaintiff's complaint as true, and draws all inferences in favor of the
2 non-moving party. Id. Dismissal is appropriate "where the allegations are insufficient to
3 establish the elements of a claim for relief." Stockmeier v. Nevada Dept. of Corr.
4 Psychological Review Panel, 124 Nev. 313, 316, 183 P.3d 133, 135 (2008). "A complaint
5 must set forth sufficient facts to establish all necessary elements of a claim for relief so that
6 the adverse party has adequate notice of the nature of the claim and relief sought." Hay v.
7 Hay, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984) *citing* Johnson v. Travelers Ins. Co., 89
8 Nev. 467, 472, 515 P.2d 68, 71 (1973).

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11 A party may seek declaratory relief under the following conditions:

12 (1) there must exist a justiciable controversy; that is to say, a controversy in
13 which a claim of right is asserted against one who has an interest in contesting
14 it; (2) the controversy must be between persons whose interests are adverse;
15 (3) the party seeking declaratory relief must have a legal interest in the
16 controversy, that is to say, a legally protectible [sic] interest; and (4) the issue
17 involved in the controversy must be ripe for judicial determination.

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19 Knittle v. Progressive Cas. Ins. Co., 112 Nev. 8, 10, 908 P.2d 724, 725 (1996) *citing* Doe v.
20 Bryan, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).

21 A writ of mandamus "is available to compel the performance of an act that the law
22 requires as a duty resulting from an office, trust, or station or to control an arbitrary or
23 capricious exercise of discretion." Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex
24 rel. County of Washoe, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) *citing* NRS 34.160.

25 Similarly, "a writ of prohibition is available to arrest the proceedings of a district court
26 exercising its judicial functions, when such proceedings are in excess of the jurisdiction of
27 the district court." Scrimmer v. Eighth Judicial Dist. Court ex rel. County of Clark, 116 Nev.
28 507, 512, 998 P.2d 1190, 1193 (2000) *citing* NRS 34.330.

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1 Both writs "are extraordinary remedies, and it is within the discretion of this court to
2 determine if a petition will be considered." Scrimmer, 116 Nev. at 512. Neither writ should
3 issue if a petitioner has a "plain, speedy and adequate remedy in the ordinary course of
4 law." NRS 34.170; Scrimmer, 116 Nev. at 512. The petitioner "bears the burden of
5 demonstrating that extraordinary [writ] relief is warranted." Winkle v. Foster, 127 Nev. 488,
6 491, 269 P.3d 898, 900 (2011). A remedy does not fail to be speedy and adequate
7 because pursuing it through the "ordinary course of law" requires more time to pursue it
8 than mandamus relief. Washoe County v. City of Reno, 77 Nev. 152, 156, 360 P.2d 602,
9 603 (1961).

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12 The test for mandamus is whether a judgment could be obtained in a proceeding at
13 law. Washoe County, 77 Nev. at 157. The object of prohibition is to restrain a district court
14 from acting without authority or outside of its jurisdiction. NRS 34.330; Smith v. Eighth
15 Judicial Dist. Court In & For County of Clark, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

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17 With the foregoing authority in mind, the Court turns to the application of governing
18 law to the merits of Defendants' *Motion to Dismiss*.

19 **A. Plaintiffs Have Standing and Declaratory Relief is an Appropriate**
20 **Remedy**

21 This Court notes the arguments of Defendant that are now moot in light of the fact the
22 regulation is now effective; Plaintiffs asked Defendants to pass upon the validity of the
23 Regulation; and, Defendants declined. Accordingly, Defendants' *Motion to Dismiss*
24 challenges Plaintiffs' standing under NRS 233B.110(1), contending Plaintiffs cannot prove
25 the Regulation interferes with or impairs their legal rights or privileges. *MTD*, p. 5:10-21.
26 Defendants assert Plaintiffs' interest in wildlife does not constitute standing because, while
27 this argument provides a basis for standing in federal court, Article III's "Cases and
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1 Controversies" requirement does not apply at state court level.

2 This Court disagrees. Section 30.040 of the Nevada Revised Statutes provides, in
3 part, "any person . . . whose rights, status or other legal relations are affected by a statute,
4 municipal ordinance, contract or franchise, may have determined any question of
5 construction or validity arising under the instrument, statute, ordinance, contract or franchise
6 and obtain a declaration of rights, status or other legal relations thereunder." NRS
7 30.040(1). Further, NRS 233B.110 permits a plaintiff to challenge "the validity or
8 applicability of any regulation" in a declaratory judgment proceeding "when it is alleged that
9 the regulation, or its proposed application, interferes with or impairs, or threatens to interfere
10 with or impair, the legal rights or privileges of the plaintiff." NRS 233B.110(1).

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13 In this case, Plaintiffs assert several legal rights to support standing: first, the
14 Regulation violates the separation of powers doctrine by delegating legislative authority to
15 an administrative agency and not providing adequate criteria to implement legislation;
16 second, Plaintiffs have an interest in ensuring the Constriction of the State of Nevada is
17 followed; and third, Plaintiffs have a constitutionally protected liberty interest to enjoy public
18 lands and wildlife. Plaintiffs argue NRS 233B.110 should be construed liberally to provide
19 standing. Finally, Plaintiffs assert they have *jus tertii* standing¹ on behalf of the non-target
20 animals.
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23 In this case, construing all factual allegations in favor of Plaintiffs and drawing all
24 inferences in the FAC as true, as this Court is required to do under the standard of review,
25 this Court finds dismissal is inappropriate at this juncture. The Court finds NRS 30.040 and
26 NRS 233B.110(1) provide Plaintiffs with statutory standing to sue, because the Legislature
27 provides Plaintiffs with that statutory right. See Stockmeier v. Nevada Dept. of Corr.
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¹ *Jus tertii* is Latin for "The right of a third party."

1 Psychological Review Panel, 122 Nev. 385, 393–94, 135 P.3d 220, 225–26 (2006),
2 *abrogated on other grounds by* Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 181
3 P.3d 670 (2008). Specifically, in this case, Plaintiffs have a constitutionally protected
4 interest in public lands and wildlife, because "the desire to use or observe an animal
5 species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose
6 of standing." Lujan v. Defs. of Wildlife, 504 U.S. 555, 562-63, 112 S. Ct. 2130, 2137 (1992);
7 and see Nev. Const. art. I, § 1. Here, Plaintiffs assert R087-14 affects their constitutionally
8 protected right to view wildlife, as well as their pursuit of happiness. The Court finds
9 Plaintiffs have standing to challenge the validity of R087-14.
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12 The Court also finds declaratory relief is the appropriate remedial avenue for Plaintiffs
13 to seek relief. As Defendants concede, their arguments concerning ripeness are moot in
14 light of the passage of the Regulation. Further, the Court finds Plaintiffs may seek
15 declaratory relief pursuant to NRS 30.030 and NRS 30.040(1).
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17 **B. Relief in the form of Writ of Mandamus or Prohibition is not warranted**

18 As set forth above, Plaintiffs seek relief in the form of a writ of mandamus or
19 prohibition, compelling the Commission to undertake certain actions, such as consider data
20 and implement a trapping management system for non-target animals. Defendants seek to
21 dismiss this relief on the basis writ relief is an extraordinary remedy and is not warranted.
22 Defendants assert prohibition is not warranted because the Commission undertook its
23 statutory duties in promulgating R087-14. Defendants also assert mandamus cannot be
24 used to compel a discretionary act – in this case, forcing the Commission to consider certain
25 data and undertake reasonable regulations to protect non-target animals. Defendants recite
26 a narrative of steps, unestablished in the record in this case, the Commission undertook to
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1 support their arguments. The Court finds these arguments are better suited to summary
2 judgment.

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4 Further, as clearly set forth above, whether to grant writ relief is well within the
5 discretion of this Court. This Court finds that the extraordinary remedy of writ relief is not
6 warranted in this case. The legal remedy in the form of a judgment arising from a
7 proceeding at law can give Plaintiffs plain, speedy, and adequate relief. Plaintiffs have not
8 met their burden that a writ of mandamus or prohibition is appropriate.² As such, this Court
9 declines to issue the writs for mandamus or prohibition.
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11 **C. Plaintiffs' request for a permanent injunction was not disposed of by the**
12 **Court's prior Order.**

13 Finally, although not raised in briefing, the parties discussed during oral argument
14 whether Plaintiffs' Fourth Claim for Relief was still viable based on the *Order* entered
15 November 26, 2014 denying Plaintiffs' *Motion for Preliminary Injunction* filed August 29,
16 2014.

17 The Court's *Order* entered November 26, 2014 denied injunctive relief on the basis
18 Regulation R087-14 was not yet in effect and thus declaratory judgment was not
19 appropriate. The Court found the issue was not ripe. It did not make a determination on the
20 merits of Plaintiffs' request for an injunction.
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22 In Plaintiffs' FAC, their Fourth Claim for Relief seeks injunctive relief. The merits of
23 this claim have yet to be considered and decided. As such, this Court finds the Fourth
24 Claim for Relief remains a viable form of relief, dependent upon the success of Plaintiffs on
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27 ² In fact, upon review of Plaintiffs' *Opposition to Defendants' Motion to Dismiss*, the Court notes that while
28 Plaintiffs discussed the merits of their action as it concerns their separation of powers argument, they spent
little discussion supporting the proposition extraordinary relief was appropriate. Further, they do not
adequately address why their claims cannot be heard in a proceeding at law. See *Opposition*, pp. 8-11. In
fact, the crux of Plaintiffs' *Opposition* hinges on their position the Regulation violates the separation of powers
doctrine.

1 their other claims.

2 Accordingly, and good cause appearing,

3 IT IS HEREBY ORDERED the *Motion to Dismiss* is GRANTED, in part, and
4 DENIED, in part, in accordance with this Order. Plaintiffs may proceed with declaratory and
5 injunctive relief as requested in the *First Amended Complaint*.
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7 IT IS FURTHER ORDERED the writs of mandamus and prohibition will not issue.

8 Dated this 3rd day of November, 2016.

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12 DISTRICT JUDGE
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CERTIFICATE OF SERVICE

I certify that I am an employee of THE SECOND JUDICIAL DISTRICT COURT;
that on the 7th day of November, 2016, I electronically filed the foregoing with the
Clerk of the Court system which will send a notice of electronic filing to the following:

HARRY WARD, ESQ.

JULIE CAVANAUGH-BILL, ESQ.

And, I deposited in the County mailing system for postage and mailing with the
United States Postal Service in Reno, Nevada, a true and correct copy of the attached
document addressed as follows:

Huda Brc
Judicial Assistant