

DISTRICT COURT, CITY AND COUNTY OF
DENVER, STATE OF COLORADO
1437 Bannock Street
Denver, CO 80302
(720) 865-8301

Appeal from the Colorado Wildlife Commission's July
13, 2006 decision concerning Wildlife Regulation,
Chapter 3, Furbearers

**Plaintiffs-Appellants: SINAPU, a Colorado non-
profit corporation; FOREST GUARDIANS, a New
Mexico non-profit corporation;**

v.

**Defendants-Appellees: COLORADO WILDLIFE
COMMISSION and the COLORADO DIVISION
OF WILDLIFE, Administrative Agencies of the
State of Colorado.**

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Case Number: 06CV8933

Div./Ctrm.: _____

**FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF and NOTICE OF ADMINISTRATIVE APPEAL**

Plaintiffs, Sinapu and Forest Guardians, file this First Amended Complaint for Declaratory and Injunctive Relief and Notice of Administrative Appeal, challenging the Colorado Wildlife Commission's July 13, 2006 decision amending Wildlife Regulation, Chapter 3, Furbearers.

I. INTRODUCTION

1. Plaintiffs challenge the Colorado Wildlife Commission (“Commission”) regulation, promulgated July 13, 2006, allowing commercial and recreational trappers to trap American mink (*Mustela vison*) and American marten (*Martes Americana*) with box traps and then kill the animals for their pelts (“box trapping regulation”).

2. The box trapping regulation violates the Colorado Constitution, Art. 18 § 12(b) (“Amendment 14”), and the legislation implementing the Amendment, C.R.S. §§ 33-6-201 through 209. Colorado voters passed Amendment 14 with the intent to ban commercial and recreational trapping as well as inhumane methods of trapping.

3. The box trapping regulation also is arbitrary and capricious, in excess of statutory authority, not in accord with the necessary procedures, an abuse of discretion, and otherwise contrary to law in violation of the Colorado Administrative Procedure Act (“APA”), C.R.S. § 24-4-106. The Commission failed to conduct an adequate investigation to ensure maintenance of adequate populations of mink and marten and failed to provide scientific support for its decision.

4. Plaintiffs seek an order holding unlawful and setting aside the box trapping regulation, a declaration that the regulation is unconstitutional and contrary to law, and such other and further relief as the court may deem appropriate.

II. JURISDICTION AND VENUE

5. This Court has jurisdiction over this matter pursuant to C.R.S. § 24-4-106, which allows judicial review of agency action for “persons or parties adversely affected or aggrieved by agency actions.” Plaintiffs filed this action within 30 days of the effective date of the regulation. This Court also has jurisdiction pursuant to C.R.C.P. Rule 57 to declare the box trapping regulation unconstitutional.

6. Venue is proper in this Court pursuant C.R.C.P. 98 and C.R.S. § 24-4-106(4). The residence of a state agency under the Colorado APA is the city and county of Denver.

III. PARTIES

7. Plaintiff, Sinapu, sues on behalf of itself and its 550 members. Sinapu is a Colorado non-profit corporation maintaining its principal place of business in Boulder, Colorado. Sinapu is dedicated to the restoration and protection of native carnivores and their wild habitat in the Southern Rockies, and connected high plains and deserts. Most of Sinapu’s members live in Colorado. Sinapu members includes outdoor recreationists, wildlife watchers, wildlife photographers, biologists, and hunters. Sinapu’s staff and members have a wide range of interests in wildlife, from the aesthetic and ecological to the utilitarian. Sinapu’s staff and members derive scientific, recreational, educational, and aesthetic benefits from the American mink and American marten, as well as other wildlife. Members of Sinapu hike, backpack, raft, ski, and hunt in mink and marten habitat and enjoy viewing mink and marten or attempting to

view the species in the wild. Sinapu members have concrete plans to return to these areas in the future to continue these pursuits.

8. Sinapu regularly participates in state and federal wildlife management decisions regarding the restoration and protection of native carnivores such as wolves, coyotes, black-footed ferrets, minks, martens, pumas, and black bears. In 1996, Sinapu supported ballot measure Amendment 14, which banned commercial and recreational trapping. In 1996, some of Sinapu's staff and members collected the signatures necessary to have the measure placed on the ballot, and Sinapu supported the ballot measure in its newsletter. Sinapu participated in the Commission's public hearings in 2001 involving wildlife trapping. Sinapu was a party to the rulemaking process at issue here. Sinapu provided multiple sets of comments to the Commission opposing the box trapping regulation. Sinapu staff also testified at the Commission hearings. Defendant's decision to allow box trapping injures Sinapu's and its members' educational, scientific, aesthetic, conservation, and recreational interests in these animals. Sinapu's interest would be redressed by the relief sought.

9. Plaintiff Forest Guardians sues on behalf of itself and its adversely affected members. Forest Guardians is a New Mexico non-profit corporation that maintains its principal place of business in Santa Fe, New Mexico. It also maintains an office in Denver, Colorado. Forest Guardians has more than 1,400 members, many of whom reside in Colorado. Forest Guardians is committed to protecting flora, fauna, natural processes, and native habitats in Colorado, New Mexico, Arizona, Utah, and Texas. Forest Guardians' members have scientific, educational, and recreational interests in mink and marten. Members recreate in mink and marten habitat and have viewed these species in the wild. They will continue these pursuits in the future. Forest Guardians participated in the proceedings regarding the box trapping regulation by providing comments to the Commission opposing the regulation.

10. The Division of Wildlife ("DOW") is a division of the Department of Natural Resources, an administrative agency of the State of Colorado created under C.R.S. § 24-33-101 et seq.

11. The Commission is the governing body of the DOW. The Commission is an eleven-member panel made up of nine individuals, along with two *ex officio* (nonvoting) members, the Commissioner for the Department of Agriculture and the Director for the Department of Natural Resources. C.R.S. § 33-1-103(1)(b)(1). The Commission is an administrative agency of the State of Colorado created under C.R.S. § 33-1-103.

IV. FACTS AND GENERAL ALLEGATIONS

A. History of Colorado Amendment 14

12. In the 1990's, Colorado voters expressed through ballot initiatives their concerns about the humane treatment of animals and DOW's failure to address those concerns. In 1992, voters passed the "Cub Amendment," which limited the black bear hunting season. This Amendment, which passed by a 70% majority, protects females with dependent young. The Amendment signaled a strong shift in voters' perceptions about hunting practices.

13. At about the same time, many Coloradoans began voicing opposition to allowed trapping practices. DOW and state lawmakers became concerned that the voters would pass additional ballot measures regarding trapping. As a result, in 1993, Governor Roy Romer called the first and only state wildlife convention. Over 600 people attended. The purpose of the convention was to garner support for updates to DOW's long-range plan and to address growing public concern about wildlife trapping.

14. After the convention, DOW came to two conclusions: 1) Colorado should continue to use hunting and trapping as a means to reduce damage to private property, including livestock; and 2) Colorado should develop and apply standards for trapping practices that are consistent with the public's expectations for the humane treatment of animals.

15. DOW's Long Range Plan, adopted in 1994, required DOW to "develop and apply standards for trapping practices that are consistent with public expectations for humane treatment of animals." In accordance with the Long Range Plan and as part of efforts to update its Furbearer Management Program, DOW's Human Dimensions Department conducted a study, published in 1995, of Coloradoans' attitudes about trapping. The study found that 61% of Colorado residents would vote to ban all trapping in Colorado. *See Colorado Residents' Attitudes Toward Trapping in Colorado* (DOW, No. 24, July 1995). Based on these results, the study found that a trapping policy that would be acceptable to a broad spectrum of the Colorado general public would include a ban on trapping solely for the purposes of recreation or for economic gain among other provisions.

16. Also as part of its efforts to implement the Long Range Plan and update the Furbearer Management Program, DOW developed an outreach program that would include all of the affected interests with respect to trapping. Led by DOW biologist Bruce Gill, the agency conducted a stakeholder process, which required the solicitation of opinions by wildlife advocates, as well as trappers and ranchers.

17. DOW's trapping stakeholder group met for seven months. DOW provided information on the science and technology of trapping practices (i.e. soft catch traps, stops on snares), the laws governing wildlife management, and known biological data. At the end of the process, DOW developed four alternatives for the stakeholders. DOW hoped to find consensus and move the group's recommendation to the Wildlife Commission. The four "options" were:

- a. Permit trapping only when needed to protect the public's health and safety.
- b. Permit trapping only for public health and safety *and* to manage furbearers that cause damage to livestock and property.
- c. Same as two, but also permit "commercial and recreational fur harvesting."
- d. Permit trapping by anyone under the then current regulations but require more humane methods of trapping (i.e. abolish steel-jawed leg-hold traps and neck snares without stops).

18. The stakeholders could not come to an agreement about which option should be adopted. In the end, DOW recommended exclusion of Options 1 and 4, and crafted a compromise position that blended parts of Options 2 and 3. The DOW recommended to the Commission:

- a. Bans on trapping seasons of several species, including grey, kit, and swift foxes; lynx; martens; opossums; ringtails; western-spotted, eastern-spotted, and hog nosed skunks; and long- and short-tailed weasels.
- b. Permitted trapping of coyotes, striped skunks, raccoons, badgers, bobcats, muskrats, beavers, and red foxes, because they were perceived as a threat to livestock growers or caused personal property damage.
- c. Prohibition of steel-jawed traps (to be replace them with padded traps), and a requirement that traps be checked within 24 hours (reducing the trap check period from one week to one day, to address concerns about the humane treatment of wildlife).

19. The Commission adopted DOW's recommendations and amended the wildlife regulations. DOW incorporated the recommendations into its Furbearer Management Plan. DOW's interpretation of the result of the stakeholder process and the Furbearer Management Plan has always been that, "Trapping strictly for the sale of furs or for recreation has been eliminated. Seasons were left open only on eight species which have historically damaged property, agriculture or human health and safety." *Division of Wildlife, Furbearer Management Plan, available at* <<http://wildlife.state.co.us>> (8/9/06).

20. In 1996, Colorado citizens, led by University of Denver Professor of Biology Robert Angell, developed a ballot initiative to broaden further the restrictions on trapping in Colorado. This initiative, known as Amendment 14, was placed on the November 1996 ballot and adopted by Colorado voters.

21. The intent of the drafters of Amendment 14 and those who voted in favor of it was to ban commercial and recreational trapping on all public lands in Colorado and limit trapping and poisoning to 30 days per year on private lands during lambing, calving, and seasons when livestock are the most vulnerable to predation. Amendment 14, now Colorado Constitution, Article 18 §12(b), provides as follows:

- (1) It shall be unlawful to take wildlife with any leghold trap, any instant kill body-gripping design or trap, or by poison or snare in the state of Colorado.
- (2) The provisions of subsection (1) of this section shall not prohibit:
 - (a) The taking of wildlife by use of the devices or methods described in subsection (1) of this section by federal, state, county, or municipal departments of health for the purpose of protecting human health or safety.
 - (b) The use of the devices or method described in subsection (1) of this section for controlling:
 - (I) wild or domestic rodents, except for beaver or muskrat, as otherwise authorized by law; or
 - (II) wild or domestic birds as otherwise authorized by law;
 - (c) The use of non-lethal snares, traps specifically designed not to kill, or nets to take wildlife for scientific research projects, for falconry, for relocation or for medical treatment pursuant to regulations established by the Colorado Wildlife Commission; or

- (d) The use of traps, poisons or nets by the Colorado division of wildlife to take or manage fish or other non-mammalian aquatic wildlife.
- (3) Notwithstanding the provisions of this section 12, the owner or lessee of private property primarily used for commercial livestock or crop production, or the employees of such owner or lessee, shall not be prohibited from using the devices or method described in subsection (1) of this section on such private property so long as:
 - (a) such use does not exceed one thirty day period per year; and
 - (b) the owner or lessee can present on-site evidence to the division of wildlife that ongoing damage to livestock or crops has not been alleviated by the use of non-lethal or lethal control methods which are not prohibited.
- (4) The provisions of this section 12 shall not apply to the taking of wildlife with firearms, fishing equipment, archery equipment, or other implements in hand as authorized by law.
- (5) The general assembly shall enact, amend, or repeal such laws as are necessary to implement the provisions of this section 12, including penalty provisions, not later than May 1, 1997.
- (6) As used in this section, unless the context otherwise requires:
 - (a) The term “taking” shall be defined as provided in section 33-1-1-2(43), C.R.S., on the date this section is enacted.
 - (b) The term “wildlife” shall be defined as provided in section 33-1-102(51), C.R.S., on the date this section is enacted.

22. By its plain terms, Amendment 14 bans trapping of any kind in Colorado, with the exception of certain carefully delineated circumstances that do not include commercial or private trapping or fur harvesting. Neither the drafters nor the voters intended to allow box trapping for commercial or recreational purposes, where the trappers would kill the animal after trapping it live.

23. The Colorado legislature implemented Amendment 14 by passage of C.R.S. §§ 33-6-201 through 209. Section 33-6-201 represents that the purpose of the statute is “to honor the expressed desire of the people of Colorado to promote humane methods of animal control and discourage the use of inhumane methods while preserving the ability to protect human life, health, safety, and property by taking wildlife when there is no practical alternative.”

24. Section 33-6-206, C.R.S. further recognizes the prohibited use of non-lethal snares, except for purposes of:

- (a) bona fide scientific research;
- (b) falconry;
- (c) relocation permitted in accordance with rules of the division; or
- (d) medical treatment of the animal being captured.

The statute does not allow the use of non-lethal capture devices for recreational or commercial trapping.

B. History of the Box Trapping Regulation

25. In 2001, the Colorado Trappers' Association ("CTA") petitioned the Commission requesting permission to box trap, for commercial and recreational purposes, ten prohibited species, including swift and grey foxes, marten, western and eastern spotted skunks, long- and short-tailed weasels, mink, ringtail, and opossum. The Commission, after considering the matter over several months, refused to grant the petition because of a lack of scientific data.

26. Subsequently, sometime prior to February 27, 2006, CTA submitted an undated and unsigned "Issue Submittal Form" to the Commission that again requested permission to box trap swift and grey foxes, long- and short-tailed weasels, martens, minks, ringtails, western-spotted skunks, and opossums. It stated the purpose of the request as: "The small amount of box-trapping that will occur will be able to re-start the data stream, by providing tooth, carcass, and DNA samples to DOW to head off a listing attempt of these species."

27. The "Colorado Wildlife Commission Policy and Procedure" (adopted March 10, 2005) requires petitions to include enough information to allow the Commissions to make an initial determination as to whether to consider the petition, and to state clearly the rule that is proposed for modification. CTA's initial petition did neither.

28. Although Amendment 14 and its implementing statute allow non-lethal trapping for "bona fide scientific research," CTA's request did not meet the standards articulated in the Commission's rules for such research, which require:

systematic investigative or experimental activities which are carried out for the purpose of acquiring new and relevant knowledge pertaining to wildlife biology, ecology or management, or the revision of accepted conclusions, theories, or laws in the light of newly discovered facts, and which are conducted in a humane fashion by qualified personnel, and the results of which would meet the accepted standards for publication in a refereed scientific journal.

Colorado Wildlife Commission Policy and Procedure, Chapter 13, Article 1, #1300.

29. Notwithstanding such lack of any bona fide scientific purpose, the Commission agreed to consider the petition at a hearing on March 9, 2006. In preparation for this hearing, CTA submitted a letter to the Commissioners that revealed that the true purpose of the petition was to allow commercial and recreational trapping. The letter states that approval "would allow both big and small game hunters to take personal trophies," and "would provide opportunity for fur harvesters to take them for sale of pelts, skulls, taxidermy and other products."

30. On March 1, 2006, Sinapu and approximately a dozen conservation groups submitted written comments to the Commission urging it to deny consideration of CTA's petition, citing its conflict with Amendment 14 and the lack of scientific basis for the proposal.

31. At the March 9, 2006 hearing, Sinapu and others also testified against the petition. CTA provided no scientific support for the petition, nor did it explain how its petition could be approved in the face of Amendment 14. Nevertheless, the Commission voted to move the petition forward as part of its three-step process.

32. On May 4, 2006, the Commission held a second hearing. At the hearing, DOW biologists recommended that the Commission reject the petition and maintain the “status quo.”

33. However, on June 30, 2006, the DOW changed its position. It submitted to the Commission a 3-page document called “Analysis of Furbearer Seasons,” which recommended trapping seasons on opossum, mink, marten, long- and short-tailed weasels, and swift foxes. DOW submitted this document to the Commission two days after deadline for the public to submit comments to DOW.

34. The Analysis of Furbearer Seasons does not provide scientific support for the box trapping regulation. In the Analysis, DOW admits “no studies haven been done [for mink] in Colorado” and “no intensive studies of marten [have been conducted] in Colorado since the 1950’s.” The document relies on anecdotal evidence and DOW’s “Terrestrial staff opinion,” but not empirically-derived scientific studies. The document included the following criteria for allowing additional trapping: the economic value of pelts, whether or not species caused “damage” (i.e. agricultural losses to farmers or ranchers), and whether the pelts could fetch a good price for the trappers.

35. On July 6, 2006, Sinapu, Forest Guardians, and approximately one dozen other organizations submitted comments to the Commission and DOW critiquing the Furbearer Analysis. Sinapu also submitted a summary of the scientific literature concerning swift foxes.

36. On July 10, 2006, Sinapu submitted a second scientific literature review concerning minks, martens, and grey foxes to the Commission and DOW.

37. On July 13, 2006, the Commission held a third and final hearing of the trappers' petition. Sinapu and others again testified against CTA’s proposal. Sinapu also submitted a third literature review, this one concerning martens, their distribution, and effects of trapping on their populations. At the hearing at least one proponent of the petition acknowledged that the intent of Amendment 14 was to ban recreational trapping of any kind.

38. Nonetheless, at the conclusion of the July 13, 2006 hearing, the Commission made the decision to permit the trapping of mink and marten with box traps for recreational and commercial purposes.

V. FIRST CLAIM FOR RELIEF

(Declaratory Judgment Pursuant to C.R.C.P. 57 and Violation of Colorado APA, C.R.S. § 24-4-106 – Regulations in Violation of Colorado Constitution and Contrary to Law)

39. Plaintiffs incorporate the foregoing paragraphs by reference.

40. Colorado Constitution, Article 18, § 12(b) and C.R.S. §§ 33-6-201 through 209 ban all recreational and commercial trapping. Under these provisions box trapping is allowed only for certain limited purposes, which do not include commercial and recreational uses. These provisions also prohibit any inhumane trapping.

41. The box trapping regulation, allowing trapping of mink and marten for commercial and recreational purposes, violates the Constitution and C.R.S. §§ 33-6-201 through 209. The regulation does not fall within any of the exceptions to these provisions. It also may permit inhumane methods of take, as the Commission has not considered what methods box trappers may use to kill wildlife and whether they are inhumane.

42. The Commission's actions are contrary to constitutional right, in excess of statutory authority, and contrary to law within the meaning of C.R.S. § 24-4-106. This Court can declare the Commission's actions unconstitutional under C.R.C.P. 57.

VI. SECOND CLAIM FOR RELIEF

(Violation of Colorado APA, C.R.S. § 24-4-106)

43. Plaintiffs incorporate the foregoing paragraphs by reference.

44. Pursuant to C.R.S. § 33-1-106(1), the Commission must “maintain adequate and proper populations of wildlife species.” Additionally, the Commission may make a decision affecting wildlife populations only after it conducts an investigation and determines the action is “necessary to assure maintenance of adequate populations of wildlife or to preserve the proper ecological balance of the environment.” C.R.S. § 33-1-106(1)(a).

45. Where the Commission considers a rule that “involves scientific or technological issues,” the agency must include an “evaluation of the scientific or technical rationale justifying the rule.” C.R.S. § 24-4-103(4)(c).

46. In adopting the box trapping regulation, the Commission failed to conduct a proper investigation. The Commission did not determine that the regulation was necessary to assure maintenance of adequate populations of wildlife or to preserve the proper ecological balance of the environment. Moreover, the Commission failed to consider scientific evidence. Further, although the Commission had previously decided not to allow commercial and recreational box trapping because of a lack of scientific data, the Commission altered its position without requiring any additional data. In addition, the Commission did not provide *any* evaluation of the scientific rationale for the rule. Instead, the Commission relied on purely economic factors.

47. The Commission also failed to follow its own regulations and policies for considering public petitions, and the requirements of C.R.S. § 24-4-103 for rulemaking proceedings.

48. The Commission's decision to allow box trapping is arbitrary and capricious, in excess of statutory authority, not in accord with the necessary procedures, an abuse of discretion, based on findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence, and otherwise contrary to law, in violation of C.R.S. § 24-4-106.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the Court to:

1. Declare unconstitutional and unlawful, set aside, and enjoin the box trapping regulation pursuant to C.R.S. § 24-4-106 and C.R.C.P. 57 and 65;
2. Grant Plaintiffs their costs, attorneys' fees and such other and relief the Court may deem just and proper.

Dated: October 10, 2006

Respectfully submitted,

*/s/Susan Morath Horner
(Original signature on file at the offices of Cohen
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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of October, 2006, I submitted a true and accurate copy of the foregoing to LexisNexis File & Serve, for service upon the following:

Timothy Monahan
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1525 Sherman Street, 5th Floor
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/s/Susan Morath Horner
(Original signature on file at the offices of
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