STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Case Type: Other Civil
Court File No. 62-CV-13-5408
Judge John H. Guthmann

Lynn Rogers and Wildlife Research Institute,

Plaintiffs,

vs.

Minnesota Department of Natural Resources and its Commissioner, Tom Landwehr,

Defendants.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

INTRODUCTION

By letter dated June 28, 2013, the Commissioner of the Minnesota Department of Natural Resources ("DNR") notified Plaintiff Lynn Rogers that his DNR research permit issued pursuant to Minn. Stat. § 97A.401 (2012) would not be renewed. The research permit, first issued in 1999, authorized Rogers to undertake research of black bears within the State of Minnesota and authorized the placement of radio collars on a select number of bears. The Commissioner's reasoned decision was based upon extensive evidence compiled over more than a decade that Rogers' study activities were habituating the study bears to humans, resulting in unacceptable public safety concerns. In addition, the Commissioner noted the lack of published peer-reviewed literature resulting from the years of study and the documented incidents of unacceptable behavior with the study bears. Rogers was given a temporary permit directing him to remove all collars from the study bears by July 31, 2013.

Plaintiffs brought suit asking this Court to find that the Commissioner's decision is unsupported by evidence and in violation of Rogers' due process rights. Plaintiffs also bring the present motion for a temporary restraining order asking this Court to reinstate the DNR research

permit. This Court should deny the requested temporary relief because Plaintiffs fail to meet the applicable standards entitling them to such extraordinary relief.

FACTS

American Black Bears are the subject of considerable regulation for their protection pursuant to the game and fish laws. As defined in Minn. Stat. § 97A.015, subd. 39 "protected wild animals" include "big game." "Big game" is in turn defined to include "bears." Minn. Stat. § 97A.015, subd. 3 (2012). As a protected wild animal, a "person may not take, buy, sell, transport, or possess" a bear "without a license" unless otherwise authorized by the game and fish laws. Minn. Stat. § 97A.405, subd. 1 (2012). In addition to the license requirement, "a person may not possess or transport … bear … taken in the state unless a tag is attached to the carcass in a manner prescribed by the commissioner." Minn. Stat. § 97A.535, subd. 1 (2012). Minn. Stat. § 97A.418 provides a DNR commissioner with discretion to issue a permit "with reasonable conditions" for the handling of wild animals. By rule, the commissioner may issue research permits for the study of biology or natural history only if the commissioner determines "that the permitted act will not be detrimental to the species or cause harm to natural resources." Minn. R. 6212.1400, subp. 2.D (2013). Any violation of the terms or conditions of a research permit is grounds for immediate revocation of the permit. Minn. R. 6212.1400, subp. 8 (2013).

In August of 1998, DNR learned that Lynn Rogers had collared a bear without obtaining a permit as required by law. (Edward K. Boggess Affidavit ("Boggess Aff.") ¶ 9, EKB Ex. 15.) DNR issued a warning to Rogers, emphasizing that such activity could not be performed lawfully without a permit. (*Id.*) In April of 1999, Rogers applied for a Research and Education Permit from DNR. (Boggess Aff. ¶ 9, EKB Ex. 1.) Rogers asserted that the purpose of the permit was to "test optimal foraging hypotheses and refine computer model of home range and application to black bears." (*Id.*) Despite contrary recommendations by DNR staff,

then-Commissioner Garber nevertheless granted the permit for this purpose. (Boggess Aff. ¶ 9; *see also* Garber Aff.) In a subsequent letter dated July 17, 2000, Rogers stated that "the ultimate purpose of the project is to gather detailed behavioral data on movements, habitat use (including use of hibernacula), foraging, social interaction, and communication to test optimal foraging hypothesis and to refine models of home range use." (Boggess Aff. ¶ 9, EKB Ex. 2.)

DNR began to become concerned by Rogers' activity, and to communicate those concerns with him, at the very early stages of his permit activity. Particularly, DNR informed Rogers in February of 2000 that DNR-issued permits "do not allow you to use the permitted activities themselves (e.g. den site visits, walking with the radio-collared bears, etc.) to raise money." (Boggess Aff. ¶ 9, EKB Ex. 3.) In August of 2000, DNR reiterated that Rogers "could not use the radio-collared bears in fund-raising via the internet, as was the case last winter [winter of 1998-99] when the Discovery BearCam was electronically linked to the North American Bear Center website, which advertised for membership, Katmai Coastal tours, and offered other monetary items for sale. That continues to be prohibited under this permit, as would monetary compensation for ... any ... activity that involved any of the bears radio-collared under this permit." (*Id.*) In addition to its concerns regarding the monetary emphasis of Rogers' operation, DNR expressed its concerns as to the habituation of bears to human presence, and about bears Rogers referred to as "June" and "Solo" that allegedly approached and touched or harmed people. (*Id.*) DNR also noted concerns that from the information being provided by Rogers, "it is not at all clear what your research goals and methods are, how successful your pilot project has been, or whether more formal, long-term research goals can be achieved." *Id.* DNR reminded Rogers that it had "issued the most recent permit with the expectation and understanding your study would be of very limited scale,

consistent with [Rogers'] initial request for 'one or two bears', and that [Rogers] would abide strictly by the language and clear intent of the permit." *Id.*

DNR continued to relay its apprehensions about Rogers' activities under the Research permit in the intervening years, yet Rogers continued to expand his operation despite the clear reservations communicated to him by DNR. In 2007, DNR's concerns regarding habituation of study bears to area humans increased as it began to receive reports of unnatural bear behavior. (Boggess Aff. ¶ 10; *see also* Louis J. Cornicelli Affidavit ("Cornicelli Aff.") ¶¶ 4-10.) In response, DNR stated to Rogers that "the reported behavior of this bear towards humans [including pushing an individual tending to a dock] is not normal for a wild bear, and may be a direct result of your activities, which have habituated the bear to human presence." (Boggess Aff. ¶ 10, EKB Ex. 4.) On June 26, 2008, DNR issued its conclusions from its review of Rogers' bear project proposal. DNR noted that its primary concern was "whether [Rogers'] methodology would affect bears in a way that could jeopardize public safety." (Kimberly Middendorf Affidavit ("Middendorf Aff.") Ex. 1.) At that point in time, DNR believed that although Rogers' "methods have definitely changed bear behavior," the public safety risks associated could be adequately managed by modifying the permit the permit to require Rogers to "report any and all incidents of physical contact between study bears and people" as well as any injuries resulting from permitted activities. (*Id.*) The review also cautioned that "the lack of a clear experimental study design, statistical methods, and resulting peer-reviewed publications during the last decade of [his] work makes meaningful evaluation of [Rogers'] conclusions about bear behaviors…impossible." (*Id.*) Rogers was reminded that "this permit can be revoked at any time" if "further information or experience indicates that [Rogers'] methodology is creating an unacceptable risk to public safety." (*Id.*)

In 2011, Commissioner Tom Landwehr met personally with Rogers to discuss the Commissioner's growing concerns about Rogers' activities. (*See* Boggess Aff. ¶ 13, EKB Ex. 7.) The Commissioner requested "an updated research plan" because Rogers had "been working for many years under a DNR permit and an older research plan[.]" (*Id.*) Rogers was required to update the research plan, including, among other things, a "full description of the study area" to "justify the continued use of radio-collared bears and to understand what the end goals and ultimate timeline" was for Rogers' project. (*Id.*) Of significant concern to the Commissioner was the hand feeding of bears. (*Id.*) The Commissioner informed Rogers that hand feeding of bears must not be allowed to be performed by anyone other than Rogers or his assistant, Sue Mansfield and several named associates. (*Id.*) Commissioner Landwehr informed Rogers that allowing juveniles and course participants to feed bears by hand "simply has to stop. It is extraordinarily irresponsible to foster this type of interaction-both for the humans and for the bears." (*Id.*) In a letter to Rogers on January 31, 2012, the Commissioner remarked on Rogers' statement that he had allowed "over 650 people" to hand-feed bears and reiterated that "this type of contact by the public with study bears is unacceptable and is not authorized" under the DNR permit. (Boggess *Id.* at EKB Ex. 8.)

By 2012, the risks to public safety associated with habituated study bears had risen beyond a level acceptable to DNR. Attempting to again balance Rogers' desire to maintain permission to handle bears with the interests of the public's safety, the Commissioner renewed the permit with new conditions. (Boggess Aff. ¶ 14.) In May of 2012, Director of Fish and Wildlife, Edward Boggess, wrote to Rogers recounting recent study bear-human incidents and documenting a pattern of unacceptable behavior by these habituated bears. (Boggess Aff. ¶ 15.) The Commissioner again renewed the permit for 2012-2013, but cautioned Rogers that while

some bears may have been tolerant of humans prior to Rogers' activity, those activities were habituating many more bears to expect to be hand-fed by humans. (*Id.* at EKB Ex. 8.) The Commissioner also expressed concern that Rogers continued to increase the number of study bears every year by collaring different bears over the course of the permit history. (Boggess Aff. ¶ 16.) As the Commissioner learned more about bites and other harm caused by study bears, as well as Rogers' documented unprofessional treatment of study bears, his concern grew.

By 2012, the risks to public safety associated with habituated study bears had risen to a level intolerable to DNR. (Cornicelli Aff. LJC Ex. 18, ¶ 13.) Attempting to again balance Rogers' desire to maintain permission to handle bears with the interests of the public's safety, the Commissioner renewed the permit with new conditions. (Boggess Aff. ¶ 14.) In May of 2012, Director of Fish and Wildlife, Edward Boggess, wrote to Rogers recounting recent study bear-human incidents and documenting a pattern of unacceptable behavior by these habituated bears. (Boggess Aff. ¶ 15, EKB Ex. 9.) The Commissioner again renewed the permit for 2012-2013, but cautioned Rogers that while some bears may have been tolerant of humans prior to Rogers' activity, those activities were habituating many more bears to expect to be hand-fed by humans. (Boggess Aff. EKB Ex. 5) The Commissioner also expressed concern that Rogers continued to increase the number of study bears every year by collaring different bears over the course of the permit history. (Boggess Aff. ¶ 16, EKB Ex. 5.) Rogers responded to the conditions imposed by DNR on his activities and DNR's concerns as "hindrances to research and publication." (Compl. Ex. B at 6) Rogers appears to contend he cannot effectively perform research on bears unless given unlimited latitude under a permit without conditions the Commissioner deems reasonable for the protection of the public and the species. (*See* Compl. Ex. B at 4-8.) Clearly aware that his permit was not likely to be renewed, Rogers submitted an

82-page document in support of renewal titled "Permit Perspectives." (Cornicelli Aff. LJC Ex. 6.)

As the Commissioner learned more about bites and other harm caused by study bears, as well as Rogers' documented unprofessional treatment of the study bears, it became apparent that the substantial risks to public safety and to bears was no longer outweighed by any research Rogers might eventually contribute to this field. (Boggess Aff. ¶ 19.) Neither the application for renewal or the "Permit Perspectives" persuaded DNR that the value of any research that may or may not ever be produced outweighed the very real threats to public safety posed by Rogers' activities. (Cornicelli Aff. ¶¶ 4-5.) Accordingly, the Commissioner informed Rogers of his decision not to renew the permit by letter dated June 28, 2013. (Boggess Aff. ¶ 19.) The Commissioner afforded Rogers a month in which to wrap up and remove collars from the bears and cameras from dens. (Boggess Aff. ¶ 19.) Upon Rogers' objection to the decision, the Commissioner reaffirmed his decision on July 19, 2013 and notified Rogers of his opportunity to challenge the permit decision in a contested case before an administrative law judge. (Boggess Aff. ¶ 20.) Because an agency decision is not final until the time to appeal has passed, the Commissioner's permit decision is not a "final decision" until August 21, 2013. Rogers, however, appears uninterested in pursuing appropriate administrative relief. (*See* Compl.)

In support of this decision, DNR has documented numerous injuries to neighbors, course participants, and others. According to the WRI Facebook site, a study bear bit a juvenile male's hand. (Cornicelli Aff. LJC Ex. 20.) As course participant Ms. Wheaton Lindsey reports, she witnessed a course participant bitten by one of the study bears, and was herself almost bitten twice. (Jill Wheaton Lindsey Affidavit ("Lindsey Aff.").) Neighbor Barb Soderberg recounts the dangers she and her family routinely experience as a result of Rogers' habituation of bears.

(*See* Barb Soderberg Affidavit ("Soderberg Aff").) The study bears fare no better, as angry or fearful neighbors and hunters become increasingly intolerant of their unnatural behavior. Rogers himself acknowledges that he has mistreated these bears. (Cornicelli Aff. LJC Ex. 18.) DNR contends that the only reasonable decision it could have made under all of the circumstances is to put an end to the untenable practices occurring under the guise of "research." (*See e.g.* Boggess Aff.; David L. Garshelis Affidavit ("Garshelis Aff."); Cornicelli Aff; Soderberg Aff.; Lindsey Aff.)

ARGUMENT

I. STANDARD FOR A TEMPORARY INJUNCTION.

The Minnesota Supreme Court has recognized that injunctive relief is an extraordinary remedy that should be sparingly granted. *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 260 Minn. 499, 504, 110 N.W.2d 348, 351 (1961). It is not sufficient for a movant to merely raise the possibility that injunctive relief is appropriate; instead, the party seeking a such relief must make a *prima facie* showing that such relief is affirmatively required. *Thompson v. Barnes*, 294 Minn. 528, 534, 200 N.W.2d 921, 926 (Minn. 1972). Consequently, a party seeking injunctive relief bears the heavy burden of demonstrating that there is no adequate remedy at law and that an injunction must be issued to prevent irreparable harm. *Cherne Indus., Inc. v. Grounds & Assoc., Inc.*, 278 N.W.2d 81, 92 (Minn. 1979); *Medtronic, Inc. v. Advanced Bionics Corp.*, 630 N.W.2d 438, 451 (Minn. Ct. App. 2001). A plaintiff's burden is stringent:

> [injunctive] relief should be awarded only in clear cases that are reasonably free from doubt and when necessary to prevent great and irreparable injury. The complainant has the burden of proving the facts that entitle him or her to relief.

42 Am. Jur. 2d Injunctions § 17 (2011).

Minnesota courts look to the following factors in analyzing a motion for temporary injunctive relief:

(1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief;

(2) The harm to be suffered by the plaintiff if a temporary restraining order is denied as compared to that inflicted on the defendant if the restraining order issues pending trial;

(3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief;

(4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, state and federal; and

(5) The administrative burdens involved in judicial supervision and enforcement of the temporary restraining order.

Dahlberg Bros., Inc. v. Ford Motor Co., 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965).

II. THIS COURT SHOULD DENY PLAINTIFFS' MOTION FOR TEMPORARY RELIEF.

Plaintiffs go to great lengths to argue the lack of a factual basis to support the Commissioner's decision to not renew Rogers' research permit and claim great harm if their requested relief is not granted.[1] This Court, however, should not reach the substantive issue raised by Plaintiffs because it is without subject matter jurisdiction. Notwithstanding this fact, as explained fully in the affidavits filed in support of this Memorandum, the long history between the parties demonstrates a reasonable basis for the Commissioner's decision, and any harm asserted by Plaintiffs is greatly exaggerated, speculative and not supported by Plaintiffs' own

[1] Defendants reserve the right to assert that Plaintiff WRI does not have standing to challenge the Commissioner's decision not to renew the research permit issued to Rogers alone.

submittals. (*See* Boggess Aff. ¶¶ 5, 9-19; Cornicelli Aff. ¶ 4, LJC Ex. 6.) Despite Plaintiffs' hyperbolae, they have not met their heavy burden entitling them to their requested relief.

A. The Commissioner And DNR Are Likely To Succeed On The Merits.

1. The District Court is without subject matter jurisdiction to consider Plaintiffs' cause of action.

As a quasi-judicial decision of the Commissioner, this Court is without subject matter jurisdiction to consider Plaintiffs' cause of action. "Unless otherwise provided by statute or appellate rule, to obtain judicial review of an administrative agency's quasi-judicial decision, a party must petition the court of appeals for a writ of certiorari." *Micius v. St. Paul City Council*, 524 N.W.2d 521, 523-34 (Minn. Ct. App. 1994) (citing *Meitzel v. County of Redwood*, 521 N.W.2d 73, 75-76 (Minn. Ct. App. 1994). Where no statute or rule expressly vests judicial review in the district court, the avenue of review is exclusively certiorari jurisdiction. *Township of Honner v. Redwood County*, 518 N.W.2d 639, 641 (Minn. Ct. App. 1994).

> The quasi-judicial act is an act of a public officer, commission, or board that is 'presumably the product or result of investigation, consideration and deliberate human judgment based upon evidentiary facts of some sort commanding the exercise of their discretionary power. It is the performance of an administrative act which depends upon and requires the existence or non-existence of certain facts which must be ascertained and the investigation and determination of such facts cause the administrative act to be termed quasi-judicial.'

Meitzel, 521 N.W.2d at 75, quoting *Oakman v. City of Eveleth*, 162 Minn. 100, 108-09, 203 N.W. 514, 517 (1925).

The Commissioner's decision here to not renew Rogers' research permit is a quasi-judicial act not subject to the jurisdiction of this Court. First, there is no dispute that neither the applicable statute, Minn. Stat. § 94A.401 (2012), nor its implementing rule, Minn. R. 6212.1400 (2011), vests the district court with jurisdiction. *Compare* Minn. Stat. § 462.361, subd. 1 (2012) (vests district court with subject matter jurisdiction to review zoning decisions of

municipal boards of adjustment). Second, that the Commissioner is to exercise his discretionary judgment when considering permit requests is reflected in the controlling rule itself. (*See* Boggess Aff. ¶ 7.) Specifically, the rule states that "[t]he commissioner will determine whether the applicant meets the criteria for issuance of the permit." Minn. R. 6212.1400, subp. 1 (2011). The rule then states that "a permit may not be issued unless the commissioner has first determined that the permitted act will not be detrimental to the species or cause harm to natural resources." Minn. R. 6212.1400, subp. 2.D (2011). Among the conditions considered by the Commissioner on whether to issue, renew, or revoke a permit is whether the "activity will advance knowledge, understanding, interpretation, or management of the species" and whether the "activity interferes with other public use, research, educational, or management activities." Minn. R. 6212.1400, subp. 2.E (2011). In addition, "all permits as provided by this part are subject to immediate cancellation by the commissioner upon determination that such cancellation is necessary for the conservation of the natural resources of the state, for the welfare of particular specimens, or is in the public interest." Minn. R. 6212.1400, subp. 8 (2011). As evidenced by these criteria, the Commissioner exercises discretion in his review of each permit application, applies the legal criteria to the permit request, and make a reasoned decision based upon the facts available to him through the application process and subsequent investigation. Consequently the permitting decision here is a quasi-judicial decision reviewed by the court of appeals, not this Court.[2]

[2] Nothing prevents Plaintiffs from moving the Court of Appeals for the temporary relief they seek here. *See* Minn. R. App. Pro. 115.03, subd. 2(b) "[u]pon motion, the Court of Appeals may review the agency's or body's decision on a stay and the terms of any stay." The Commissioner has declined to stay his decision on Rogers' permit, a decision reviewable by the Court of Appeals. *See DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 142-43 (Minn. Ct. App. 2007) (request to stay a final city decision must be made in the first instance to the city and thereafter (Footnote Continued on Next Page)

While Plaintiffs' argue to the contrary, there has been an extensive exchange of correspondence, documentation, and verbal communication between Rogers and DNR for years regarding his permitted activities which forms the basis of the record upon which the Commissioner exercised his decision here.[3] (See Boggess Aff. ¶¶ 9-16; Cornicelli Aff. ¶ 13.) The Commissioner performed his quasi-judicial act based upon the record before him and appropriately decided to not renew Rogers' permit. This act is accurately termed as quasi-judicial and, therefore, Plaintiffs' remedy is to petition the Court of Appeals for appropriate relief.

2. The Declaratory Judgment Act does not form a basis for this Court to Exercise jurisdiction.

The district court has no subject matter jurisdiction to review agency decisions pursuant to the Declaratory Judgment Act. It is important to note that "a declaratory judgment does not create substantive rights nor does it provide a court with additional jurisdiction." 2 Minn. Prac. Civil Rules Annotated R. 57 (4th ed.). Accordingly, merely framing their complaint as one for "declaratory judgment" or "equitable relief" does not automatically imbue this Court with subject matter jurisdiction. (*See* Pls.' Compl. at Count I.) While DNR, as an agency of the executive branch, does not have inerrant authority of the judicial branch, it plainly can, and must, consider defenses routinely raised by permit holders. *See Matter of Westling Mfg., Inc.*, 442 N.W.2d 328 (Minn. Ct. App. 1989). Minnesota case law establishes that issues traditionally decided by the district court, including declaratory judgment actions, fall outside the district court's subject matter jurisdiction if it implicates an administrative agency's quasi-judicial

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reviewable by the appellate court). Thus, Plaintiffs' claim that they have no remedy but to seek district court relief is clearly meritless.

[3] As demonstrated by DNR's responses to multiple, and ongoing, Government Data Practices (Minn. Stat. ch. 13 (2012)) requests from Plaintiffs in 2013. (Cornicelli Aff. ¶ 13.)

decision. *See Anderson v. County of Lyon*, 784 N.W.2d 77, 81 (Minn. Ct. App. 2010) (no subject matter jurisdiction to hear declaratory judgment action on contract claim implicating agency's quasi-judicial decision); *see also Willis v. County of Sherburne*, 555 N.W.2d 277, 282 (Minn. 1996) (involving termination of single employee).

Whether Rogers meets the criteria established by rule for renewal of a permit is plainly a quasi-judicial decision made by the executive branch pursuant to the process set forth by statute and rule. Rogers' failure to avail himself of an administrative remedy of a contested case hearing offered to him by the Commissioner renders the agency's decision final and leaves Rogers with no remaining remedy but to petition for appellate court review. *See* Minn. Stat. § 14.69 (2012). (Boggess Aff. ¶ 20.) This Court's lack of subject matter-jurisdiction does not leave Plaintiffs without a legal remedy; rather, they must choose the correct remedy.

3. Plaintiffs have failed to exhaust administrative remedies.

To the extent Rogers is entitled to an administrative process to satisfy any due process rights be may have, this Court is also without subject matter jurisdiction to consider Plaintiffs' cause of action because Rogers has failed to exhaust his administrative remedies. The U.S. Supreme Court has stated that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Ship Building*, 303 U.S. 41, 50-51, 58 S.Ct. 459, 463 (1938). Minnesota courts have adopted this general policy. *See e.g. County of Blue Earth v. Minnesota Dept. of Labor*, 489 N.W.2d 265, 267 (Minn. Ct. App. 1992). The rationale for requiring exhaustion of administrative remedies includes the following:

1. The rule permits full development of the facts and an adequate record prior to judicial review;

2. It gives the agency a chance to employ the discretion delegates to it, and the expertise expected of it, by the legislative branch;

3. It is generally more efficient to exhaust the administrative process without premature interruptions, delay, and judicial interference;

4. The appellant might succeed before the agency, making judicial review unnecessary;

5. It provides an opportunity for the agency to correct its own errors; and

6. Constant resort to judicial review would weaken the agency's confidence in it.

William J. Keppel, *Minnesota Administrative Practice and Procedure,* Vol. 21 at 400-01 (1998) (citing *McKart v. United States,* 395 U.S. 185, 195 (1963)). To the extent that Rogers wishes to challenge the Commissioner's decision to decline to renew his permit, DNR has provided him with the opportunity to make his case through the Administrative Procedures Act, Minn. Stat. ch. 14 (2102). His relief is therefore limited to an administrative appeal through the contested case process. There is no provision of law that affords Rogers the means to refuse to pursue the administrative process and rather seek alternative relief from this Court to challenge the exercise of the Commissioner's discretion in a permitting matter. In the absence of such a provision, this Court must decline Plaintiffs' invitation to review the Commissioner's exercise of discretion.

4. Rogers has been provided due process.

Plaintiffs fail to acknowledge the lengthy documented history Rogers has had with DNR regarding this permit to the extent that they contend that Rogers has not had adequate due process prior to the Commissioner's decision not to renew his permit. (Pl's Compl. at 25-30.) As described above, DNR staff and the Commissioner have repeatedly raised concerns with Rogers regarding public safety, including his propensity to allow participants in this field study course to physically interact with bears, as well as his lack of publication of the results of his lengthy study. (Boggess Aff. ¶¶ 10-16, Cornicelli Aff. ¶ 13.) Rogers has been made well aware

of DNR's concerns and expectations of his research for years,[4] as he acknowledges in both his May 31, 2013, permit application (Pls.' Compl. Ex. B), and his June 2013 "Permit Perspectives" submission (Cornicelli Aff. ¶ 4, LJC Ex. 6). Notwithstanding these ongoing communications, Rogers has failed to provide DNR with evidence that he has complied with DNR's expectations. (Boggess Aff. ¶ 17.) "Due process requires that deprivation of property be preceded by notice and an opportunity to be heard." *Comm'r of Natural Res. v. Nicollet County Public Water/Wetlands Hearing Unit*, 633 N.W.2d 25, 29 (Minn. Ct. App. 2001). The record reflects that the Commissioner has provided Rogers with repeated notice of DNR's concerns and has provided ample opportunity for him to respond.

"Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902 (1976). In *Mathews*, the United States Supreme Court identified three factors to be considered in determining the adequacy of the due process: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation; and third, the nature of the government interest. Regarding the private interest[5], Rogers asserts that he is dependent upon his permit not only for his research but to fund Plaintiff WRI as well as the North American Bear Center. (Pl's Mem. at 31.) While his efforts to support these organizations are laudable, these are not the reasons Rogers has cited in his permit application. (Boggess Aff. ¶ 17.) Nor is providing funding support for a private nonprofit a permitted purpose for issuing a permit under Minn. R. 6212.1400 (2011). (Cornicelli Aff. ¶ 12.) Rather, the research permit's purpose is to authorize the gathering of data with the ultimate goal of producing peer-reviewed literature, as is

[4] Contrary to Rogers' allegation of a "secret investigation." (Pls.' Mem. at 29.)
[5] For purposes of Plaintiffs' present motion, Defendants will assume that Rogers has a property interest in the DNR-issued research permit.

the purpose of all research permits issued by the Commissioner. (*See* Boggess Aff. ¶ 17; Cornicelli Aff. ¶ 13.) In fact, Rogers himself has stated that the purpose of the research permit is "to gather detailed behavioral data on movements, habitat use (including use of hibernacula), foraging, social interactions, and communication to test optimal foraging hypotheses and to refine models of home range use." (Boggess Aff. ¶¶ 9, 17; Cornicelli Aff. ¶ 12.) In short, the purpose of DNR's research permit was to provide Rogers with the opportunity to closely work with wildlife of the State in order to acquire data used to produce professional publications and not to support a growing tourist attraction. (*Id.* ¶ 17.) Consequently, the only private interest impacted by the Commissioner's decision here is Rogers' ability to continue to collar and locate otherwise free-roaming bears.

Courts also look to the risk of erroneous deprivation in determining the adequacy of the process provided. As discussed above, the record clearly demonstrates that the decision not to renew Rogers' permit is based upon years of written and verbal communications, warnings, and expectations expressed. (*See, e.g.,* Boggess Aff. ¶¶ 5, 9-19.) Rogers has been given an ample opportunity to be heard and to provide responses to DNR's expressed concerns.[6] While Plaintiffs clearly dispute the result, there were adequate safeguards in place to prevent erroneous deprivation of Rogers' permit.

Last, courts consider the nature of the government interest. The laws of Minnesota provide that "ownership of wild animals of the state is in the state, in its sovereign capacity for the benefit of all of the people of the state." Minn. Stat. § 97A.025 (2012). DNR and the Commissioner in turn are charged with the management of the State's wild animals. Minn. Stat.

[6] In fact, Rogers and has even been provided with the opportunity for an administrative contested case pursuant to Minn. Stat. ch. 14 (2012), an offer that Rogers has refused to accept, as well as an opportunity to make his case to the Governor. (Boggess Aff. ¶ 20.)

ch. 97A-97C (2012). Thus, DNR and the Commissioner have a strong interest in assuring permits issued allowing for the "taking"[7] of the state's wild animals for research activities that actually lead to usable research results and are not used as the basis for secondary associated organizations, whether nonprofit or for profit. DNR and the Commissioner must also balance the need to promote and encourage research with assuring the public safety and the safety of the specimens being studied. *See* Minn. R. 6212.1400, subp. 2.D (2011). As the record reflects, public safety is of paramount concern and when public interest becomes paramount, it can result in the "immediate cancellation" of any permit by the Commissioner. Minn. R. 6212.1400, subp. 8 (2011).

The *Mathews* factors clearly weigh in favor of the conclusion that DNR and the Commissioner have provided sufficient process to Rogers prior to the revocation of his permit to assure that he has had ample opportunity to respond to DNR's concerns, to minimize the risk of erroneous action, and to assure that the government's interest was adequately protected.

5. The Commissioner had cause to not renew Rogers' research permit.

To the extent this Court is compelled to review the basis of the Commissioner's decision not to renew Rogers' research permit, the Commissioner submits that there was just cause supporting his decision set forth in his July 28, 2013, letter.[8] (*See* Boggess Aff. EKB Ex. 12.)

First, the Commissioner stated that "[y]ou have produced no peer-reviewed literature based on the permitted activities, in spite of our insistence for many years that this is a critical element of legitimate research." This concern (and requirement of the permit) was made known

[7] A "taking" of a wild animal is defined to include pursuing, capturing, and trapping. Minn. Stat. § 97A.015, subd. 47 (2012).

[8] Contrary to his assertions here, the reasons for the Commissioner's decision were well known to Rogers, as reflected in his June 2013 "Permit Perspective" paper submitted to the Commissioner and his May 31, 2013, permit application. (*See* Cornicelli Aff. LJC Ex. 6; Pls.' Compl. Ex. B.)

to Rogers on numerous occasions for many years. (*See* Boggess Aff. ¶¶ 10-16.) While Rogers contends that he has published peer review literature and published extensively (Pl's Mem. at 10-13), as noted in the Affidavit of Louis J. Cornicelli at paragraph 11, of the items cited by Rogers as being published during the permitting period from 1999 through 2012 most were not in peer-reviewed publications, and those that were arguably peer-reviewed either deal with a data-gathering period well before the issuance of the permit here (1999), are ancillary to the data collected under the current permit, or were written well before the permit was issued in 1999. The conclusion is clear—notwithstanding many years of DNR communication about this condition, Rogers has been operating under his current DNR permit for 14 years[9] but has failed to publish the data in any form that can be used by other professionals. (Cornicelli Aff. ¶ 11; Boggess Aff. ¶ 19.)

DNR does not dispute that Rogers has become a well-known figure as a result of his work with bears or that his research has led to other endeavors, such as the creation of a field study course by Plaintiff WRI, the founding the North American Bear Center,[10] the creation of a popular website, and the garnering of extensive media coverage. As Rogers has been notified on numerous occasions, the purpose of a DNR research permit is to publish results. As noted above, Rogers himself has stated the purpose of the research permit is "to gather detailed behavioral data on movements, habitat use (including use of hibernacula), foraging, social interactions, and communications to test optimal foraging hypotheses and to refine models of

[9] For an unknown period of time prior to 1999 Rogers was collaring at least one bear without a permit in clear violation of the law. (Boggess Aff. ¶ 9.)

[10] Plaintiffs fail to note that DNR has not revoked or refused to continue the game farm license for the bears maintained at the North American Bear Center. (Cornicelli Aff. ¶ 3, LJC Ex. 3.) The Center will be able to continue to display those bears as long as it remains compliant with the conditions contained within that permit. (*Id.*)

home range use." (Boggess Aff. ¶¶ 9, 17.) Thus, the terms of the permit limit the purpose to scientific research, not the many side activities that have been cultivated. But none of these ancillary activities substitute for the reasonable DNR expectation that peer reviewed publications result from the data collected over the last 14 years. Consequently, DNR has cause to refuse to renew Rogers' permit on this condition alone.

The second reason stated in the Commissioner's July 28, 2013, letter was "[y]our habituation of bears to humans—including hand feeding and close interactions to bears and people—creates a very real public safety issue. You have stated that there are more than 50 bears in the Ely area that have been subjects of your work; this creates a large and long-term habituation issue." (Boggess Aff. EKB Ex. 12.) Rogers disputes the Commissioner's assertion that a public safety issue exists. (Pl's. Mem. at 21-23; Cornicelli Aff. LJC Ex. 6 at 19-23.) However, the facts, of which Plaintiffs are clearly aware, support the Commissioner's decision.

As discussed above, by far the most accepted view regarding the habituation of bears to humans is that it should not occur. (Garshelis Aff. ¶¶ 5, 10-11, 20.) More specifically, it is the widely held opinion among wildlife and bear professionals that recreational bear feeding compromises public safety and often results in detrimental outcomes for bears.[11] (*Id.* ¶ 7.)

Specific to Rogers' studies, DNR has an extensive collection of nuisance bear incident reports for the general area of Rogers' study, many involving collared bears, including an occurrence where a habituated bear had to be shot by a DNR conservation officer when it would not leave a garage. (Boggess Aff. ¶ 16.) DNR has also expressed to Rogers its concern about hand feeding bears by participants in his field study course, and the potential danger of that

[11] DNR refers the Court to the Affidavit of David L. Garshelis for a full discussion on this issue.

interaction to both the participants and the bears.[12] (*Id.*) In a letter dated May 23, 2012, DNR staff provided Rogers with an itemized a list of recent study bear-human incidents documented by DNR staff that month in and around the City of Tower and Bear Head Lake State Park and documenting a pattern of unacceptable behavior by apparently habituated bears. (*Id.* ¶ 15.) In a subsequent letter dated December 21, 2012, the Commissioner informed Rogers of ongoing and growing concerns DNR had with nuisance or damage from habituated bears in the last year alone. (*Id.* ¶ 16) Rogers' assertion that bears pose no danger runs contrary to his own "fact sheet" he distributes to his clients who participate in his field study course. (Wheaton Lindsey Aff. JWL Ex. 18.) Specifically, Rogers states that "[f]ear makes bears defensive and causes them to retreat, slap, or bite." (*Id.*) In addition, Rogers states "[w]hen you reach out to pet, they take it as an offensive act. Usually they just back away, but occasionally they respond defensively with nip, slap to stop the 'attack.'" (*Id.*)

It is undisputed that DNR has been fielding an ever-increasing number of complaints regarding habituated bears in and around Rogers' study area. (Cornicelli Aff. ¶¶ 6-10.) Numerous reports identify these bears as having radio collars. (*Id.* ¶ 7.) The general descriptions are that the bears do not exhibit normal fear of humans. (*Id.*) While is some individuals are comfortable with having bears in close proximity to their residence, others fear for their safety or the safety of their children. (*Id.* ¶ 10.) Consequently, while Rogers asserts that humans have nothing to fear of bears that are the subject of his research (Pls.' Mem. at 20-25), the reports made to DNR demonstrate that many individuals do fear the presence of bears and do not wish to be approached by bears that have been habituated by human contact. (Cornicelli Aff.

[12] A justified concern considering the experience of one course participant who reported a bear bite and other aggressive behavior by an "observed" bear. (Wheaton Lindsey Aff. ¶¶ 2-3.)

¶ 10.) Creating circumstances that place bears and people to close proximity is not in the best interests of the public, a concern that DNR and the Commissioner must, and did, consider in weighing the reissuance of Rogers' permit here.

Last, the Commissioner stated as his third reason to not renew Rogers' permit that DNR had become "aware of incidents that have been documented in various social media of extreme unprofessional behavior with research bears." (Boggess Aff. ¶ 19, EKB Ex. 12.) Contrary to his statements (Pls.' Mem. at 25), Rogers is fully aware of the behavior that is referenced by DNR and, in fact, one such occurrence is currently available on social media. (Boggess Aff. ¶ 18; Cornicelli Aff. ¶ 13.) In addition, DNR has warned Rogers numerous times of its concerns regarding Rogers allowing members of the public participating in his field study course to have physical contact with the bears.[13] (Boggess Aff. ¶ 12; *see also* Cornicelli Aff. ¶ 13.)

As the discussion above demonstrates, DNR had cause on any of the three bases to deny Rogers' permit application for continuation of his research permit. Taken together, they demonstrate overwhelming support for the Commissioner's decision.

The primary factor in determining whether temporary relief is granted is the movants' probability of success on the merits in the underlying action. *Local 59 v. Minneapolis Federation of Teachers, AFL-CIO v. Minneapolis Public Schools, Special School Dist. No. 1*, 512 N.W.2d 107, 110 (Minn. Ct. App. 1994). As the above discussion illustrates, DNR and the Commissioner are highly likely to succeed on the merits of this case. On that basis alone, this Court should deny the requested relief.

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[13] This included direction given by DNR in 2008 to report all interactions between course participants and bears, a requirement that apparently went unheeded on at least one occasion. (Cornicelli Aff. ¶ 14.)

B. The Balance Of Harms Favors Defendant DNR And The Commissioner.

Dahlberg also requires a balancing of the severity of the impact on the defendant should the temporary injunction be granted and the hardship occurring to the plaintiff should an injunction be denied. *Cramond v. AF-CIO*, 267 Minn. 229, 234, 126 N.W.2d 252, 256 (1964). A temporary injunction should only be granted if the court finds it necessary to prevent great and significant injury. *City of Mounds View v. Metropolitan Airports Comm'n,* 590 N.W.2d 355, 357 (Minn. Ct. App. 1999); *see also Twp. Of Burnsville v. City of Bloomington*, 264 Minn. 133, 139, 117 N.W.2d 746, 750 (1962). The harm must be real, and it must be substantial. *Indep. School Dist. No. 35, Marshall County v. Englstad*, 274 Minn. 366, 370, 144 N.W.2d 245, 248 (1960). "Failure to show irreparable harm is, by itself, a sufficient ground on which to deny a temporary injunction." David F. Herr & Roger S. Haydock, *Civil Rules Annotated* § 65.14 (5th ed. 2012), *citing Morse v. City of Waterville,* 458 N.W.2d 728, 729 (Minn. Ct. App. 1990).

Plaintiffs assert that they will be irreparably harmed by the loss of Rogers' permit due to his inability to complete his research. (Pls.' Mem. at 30-32.) However, he pays short shrift to the fact that he has had 14 (or more) years to gather data for his research. While he alleges that once collars are removed he will lose the ability to locate and continue his research if successful in having his permit reinstated, his habituation of the bears would appear to make it fairly simple to relocate the bears he has collared in the past. Regarding the loss of bears through hunting (Pls.' Mem. at 31), it is undisputed that there is no prohibition against the taking of bears with collars during the legal hunting season *see* Minn. Stat. § 97B.401-.431 (2012); Minn. R. 6232.2600-.3500 (2011), so being collared does not reasonably protect a bear from being taken.

Plaintiffs' assertion that the loss of the permit will cause "financial detriment" because WRI[14] will be forced to stop offering field study courses (Pls.' Mem. at 31) highlights the fact that DNR's research permit was issued to Rogers for research activities and not to WRI to support ancillary field courses.[15] (Cornicelli Aff. at 12.) Again, this is not a license for the operation of a nonprofit organization; rather, it is a permit to authorize contact by the permittee with a limited number of bears for the purpose of gathering data for research and publication. (*Id.*) This is the purpose for which permits can be issued under the applicable rule, Minn. R. 6212.1400 (2011). (*Id.*) The reasoning offered by Plaintiffs would obligate the Commissioner to issue and continue the research permit in dispute here in perpetuity. (*Id.*)

On the other hand, the continuation of activities the permit allows Defendants believe put the public at risk. Habituated bears have been a problem in the location of Rogers' research and will continue to be problem if the activities of concern to DNR are allowed to continue. This factor weighs in favor of DNR.

C. A Temporary Injunction Would Be Contrary To Public Policy.

Another *Dahlberg* factor to be considered is the public interest. As already discussed above, the issue in this case is clearly one of public safety and public policy. The habituation of bears as a result of Plaintiffs' operations have led to unacceptable risks to the public. While Plaintiffs may disagree with Commissioner's concern about the public safety aspect of Rogers' continuing operation under his permit, there is no question that the public has expressed its concerns to DNR, and rightly so. (Cornicelli Aff. ¶ 10.) While Plaintiffs assert that it is in public interest for Rogers to complete his research (Pls.' Mem. at 33), he has had ample time to

[14] As noted above, Defendants dispute that WRI even has standing to challenge the Commissioner's decision here.

[15] It is important to note that these field study course have clearly added to the habituation of the bears subject to Rogers' research.

collect his data and produce results. Plaintiffs specifically acknowledge that Rogers has been "accumulating research on various aspects of black bear behavior pursuant to permitted activities since June 1999." (Pls.' Mem. at 33.) A discontinuation of his permit will not prevent Rogers from completing his research and publish his results. In addition, to issue research permits based upon the financial reward secondarily flowing to the permittee is bad public policy. (*See* Cornicelli Aff. ¶ 12.)

D. The Nature And Background Of The Relationship Between The Parties Favors Denial Of Temporary Injunctive Relief.

Defendants do not dispute Plaintiffs' assertion that the parties have a long-standing relationship. (Pls.' Mem. at 33.) However, this long-standing relationship demonstrates that Rogers has been well aware of Defendants' concerns and expectations for many years. Due to this long-standing relationship, Plaintiffs had the knowledge that the permit could be discontinued at any time. That Plaintiffs failed to prepare for this distinct possibility when they have had years of warning weighs against the issuance of the requested relief. [16]

CONCLUSION

Plaintiffs' do not have the possibility of success on the merits because they have chosen the wrong forum to challenge the Commissioner's permitting decision. Even if the merits are reached, the Commissioner's decision is clearly supported by the record here. Plaintiffs have also failed to meet their heavy burden of demonstrating irreparable harm. Consequently, Defendants respectfully ask the Court to deny the requested relief. The limited and highly speculative value of any future research results to not weigh the risk to public safety as carefully determined by the Commissioner and his staff.

[16] Defendants agree with Plaintiffs that there would be no administrative burden on the court of granting the requested relief. (Pls.' Mem. at 34.)

Dated: July 26, 2013

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
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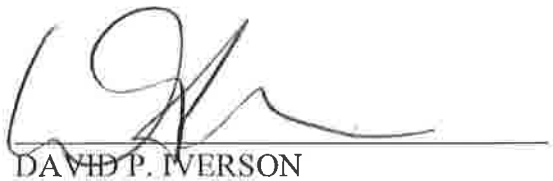

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MINN. STAT. § 549.211 ACKNOWLEDGMENT

The party on whose behalf the attached document is served acknowledges through its undersigned counsel that sanctions, including reasonable attorney fees and other expenses, may be awarded to the opposite party or parties pursuant to Minn. Stat. § 549.211 (2012).

Dated: July 26 / 2013

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