

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Minnesota Department
of Natural Resources Special Permit
No. 16868 (December 12, 2012)
Issued to Lynn Rogers

**ORDER DENYING
ROGERS' MOTION FOR
DIRECTED VERDICT**

This matter is before Chief Administrative Law Judge Tammy L. Pust on Dr. Lynn Rogers' (Rogers) Motion for Directed Verdict. Rogers filed the motion on March 3, 2014. The Minnesota Department of Natural Resources (Department or DNR) filed its brief in opposition on the same date. Oral argument on the motion was held on March 3, 2014 at the Office of Administrative Hearings in St. Paul, Minnesota. The motion hearing record closed on that date.

David R. Marshall and Leah C. Janus, Fredrikson & Byron, P.A., appeared on behalf of Dr. Lynn Rogers.

David P. Iverson and Linda Jensen, Assistant Attorneys General, appeared on behalf of the Department.

Based on the submissions of the parties, the oral argument, and for the reasons set forth in the Memorandum attached hereto, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Rogers' Motion for Directed Verdict is **DENIED**.

Dated: March 4, 2014

s/Tammy L. Pust

TAMMY L. PUST
Chief Administrative Law Judge

MEMORANDUM

I. Factual and Procedural Background

Rogers is a wildlife biologist who has been engaged in the study of Minnesota's North American Black Bears since the 1970s. Annually since 1999, Rogers has applied for and been granted special permits by the Department allowing him to "capture, handle, radio collar, and monitor" bears "for research and education purposes."¹ The DNR issued the permits pursuant to the authority of Minn. Stat § 97A.401, subd. 3, which provides that the Commissioner "may" grant permits allowing individuals to "take [or] possess" wild animals in the state.

On or about June 28, 2013, the Department informed Rogers that his last issued permit would not be renewed following its scheduled expiration on June 30, 2013.² Rogers filed a challenge to this action in the Minnesota District Court for the Second Judicial District, Court File No. 62-CV-13-5408. Pursuant to an order issued in that action, the permit was continued pending a contested case proceeding as required by the Minnesota Administrative Procedure Act.³

On September 3, 2013, the Department filed a Notice and Order for Prehearing Conference and Order for Hearing, providing for a contested case hearing on the following issue:

Whether DNR has cause to not renew Special Permit No. 167868 [sic] (December 12, 2102) authorizing Respondent to capture, handle, monitor, and place radio collars on black bears for research and educational purposes.⁴

This filing initiated the present action at the Office of Administrative Hearings.

In an Order filed on February 18, 2014, the Administrative Law Judge granted Rogers' motion for partial summary disposition, in part, finding as a matter of law that Rogers' actions do not constitute a "taking" of wild animals, as that term is defined⁵ for purposes of Minn. Stat. § 97A.401, subd. 3.⁶ Viewing the record in the light most favorable to the Department as required in the context of the motion for partial summary disposition, the Administrative Law Judge denied Rogers' motion "with respect to whether Rogers, through his actions, is exercising sufficient possession and control of

¹ Special Permit No. 16868.

² June 28, 2013 correspondence from Commissioner Landwehr to Dr. Lynn Rogers.

³ Order on Stipulation, issued in Lynn Rogers and Wildlife Research Institute v. Minnesota Department of Natural Resources and Tom Landwehr, commissioner of the Minnesota Department of Natural Resources, Court File No. 62-CV-13-5408.

⁴ Notice and Order for Prehearing Conference and Order for Hearing dated August 31, 2013.

⁵ See Minn. Stat. § 97A.015, subd. 36.

⁶ ORDER GRANTING IN PART AND DENYING IN PART ROGERS' MOTION FOR PARTIAL SUMMARY DISPOSITION, dated February 18, 2014.

the subject bears such that he is required to obtain and maintain a permit under Minn. Stat § 97A.401, subd. 3.”⁷ The matter proceeded to hearing on this remaining issue, beginning on February 24, 2014. Following the close of the Department’s case-in-chief, Rogers now moves for a directed verdict.

In his motion, Rogers asserts that the Department has failed to meet its burden of establishing that he exercises sufficient possession and control over the bears to constitute actual or constructive possession of them. Rogers relies on the following arguments in support of his motion for a directed disposition: (1) evidence of feeding and close interaction with bears is insufficient to establish “possession” because both activities are legal in Minnesota without a permit; (2) feeding and interaction evidence cannot establish “control” because Rogers does not restrict the bears’ movements through his actions; and (3) radio collaring bears is an insufficient factual basis upon which to establish control. The Department insists that it has established possession, as defined in the permitting statute, through the admitted evidence of feeding, regular contact, intentional habituation of cubs through the location of their mothers via GPS-enabled collars, handling of cubs from birth, naming, and intentionally altering the animals’ natural behaviors by habituating them to have no fear of humans but instead to see them as a source of safety and food. Pointing to an established risk to public safety and a lack of scientific publication of the resulting research, the DNR asserts that it has met its burden of production to justify denial of a permit and thus opposes the motion.

II. Standard for Directed Verdict

The Office of Administrative Hearings has generally followed the standards developed in judicial courts when considering motions for summary or involuntary disposition in contested case matters.⁸ The test for a directed verdict⁹ is not significantly different from the test for summary judgment.¹⁰ A court may grant a motion for a directed verdict “only in those unequivocal cases where (1) in the light of the evidence as a whole, it would clearly be the duty of the trial court to set aside a contrary verdict as being manifestly against the entire evidence, or where (2) it would be contrary to the law applicable to the case.”¹¹ If the evidence, viewed together, is not so clear that only one conclusion can be drawn from it, a directed verdict should not issue.¹² In ruling upon the motion, the Administrative Law Judge must assume that all evidence favorable to the

⁷ *Id.*, p. 14.

⁸ Minn. R. 1400.6600.

⁹ Minn. R. Civ. P. 50.01.

¹⁰ *Howie v. Thomas*, 514 N.W.2d 822 (Minn. Ct. App. 1994).

¹¹ *Plate v. St. Mary’s Help of Christians Church*, 520 N.W.2d 17 (Minn. Ct. App. 1994); *Peterson v. Little-Giant Glencoe Portable Elevator Div. of Dynamics Corp. of Am.*, 366 N.W.2d 111 (Minn. 1985).

¹² See *Schmanski v. Church of St. Casimir of Wells*, 243 Minn. 289, 291-92, 67 N.W.2d 644, 646 (1954); *Herron v. Green Tree Acceptance, Inc.*, 411 N.W.2d 192, 195 (Minn. Ct. App. 1987), *review denied* (Minn. Sept. 30, 1987).

non-moving party is true, including the reasonable inferences drawn from that evidence.¹³

III. Analysis and Conclusion

A. “Possession” Defined.

The Department’s permitting statute¹⁴ defines “possession” as follows:

Possession means both actual and constructive possession and control of the things referred to.¹⁵

Pursuant to the analysis of these terms as set forth in the Administrative Law Judge’s earlier order, which is incorporated herein by reference, “‘actual possession’ is evidenced by direct physical control,¹⁶ while ‘constructive possession’ is evidenced by the power and intention to exercise control either directly or through others.”¹⁷

In this case, the Department bears the burden of establishing that Rogers has either direct physical control over the study bears, or the power and intent to exercise control over them. Whether the Department has met that burden is dependent upon an analysis of the facts now in the record.

B. The Legality of Feeding and Interacting Does Not Shield These Facts From Consideration in the Relevant Statutory Determination.

In the present motion, Rogers acknowledges that the Department has established that he hand-feeds bears and that he closely interacts with them. Noting that each of these activities is legal in Minnesota, Rogers concludes that neither activity can constitute sufficient evidence of “control” to bring his conduct within the ambit of the permitting statute. He goes so far as to assert: “If the Court ruled that Dr. Rogers’ legal conduct is the conduct that constitutes ‘control,’ this would effectively make feeding and closely interacting with bears illegal in Minnesota.”¹⁸

Rogers is accurate that it is legal to feed bears in Minnesota. He is also accurate that it is legal to closely interact with bears. In this argument, Rogers apparently uses the term “legal” to mean “there is no law specifically prohibiting it.” Using the term in this manner, Roger is correct. There is no statute or common law which makes it unlawful

¹³ *Citizen's Nat'l Bank v. Taylor*, 368 N.W.2d 913, 917 (Minn.1985); *Clafin v. Commercial State Bank*, 487 N.W.2d 242, 247 (Minn. Ct. App.1992), *review denied* (Minn. Aug. 4, 1992).

¹⁴ Minn. Stat. § 97A.401, subd. 3.

¹⁵ Minn. Stat. § 97A.015, subd. 36.

¹⁶ See *Koecher v. Koecher*, 374 N.W.2d 542, 546 (Minn. Ct. App. 1985).

¹⁷ ORDER GRANTING IN PART AND DENYING IN PART ROGERS’ MOTION FOR PARTIAL SUMMARY DISPOSITION (original footnote omitted).

¹⁸ Dr. Lynn Rogers Memorandum of Law in Support of Motion for Directed Verdict, p. 4.

to feed a bear, whether from a trough or one's hand or even one's own mouth. Likewise, there is no law against walking, resting or even dancing with a bear. That is, there is no statute or common law in Minnesota which expressly prohibits any of these specific activities.

Nevertheless, the fact that one can generally¹⁹ feed a bear without running afoul of the law does not lead to the necessary conclusion that the fact of bear-feeding is irrelevant to a determination of "control" for purposes of the permit statute. Likewise, the fact that one can interact with a bear without breaking any law does not logically require the conclusion that one's level of interaction with a wild animal is irrelevant to an analysis of "control."

The statute does not provide that a permit is required to feed a bear, or that a permit is required to interact with a bear. The statute mandates that a permit is required in every case in which an individual has actual or constructive possession of a bear, which is established when the individual has either direct physical control over a bear or the power and intent to exercise control over a bear. Therefore, evidence related to feeding of bears and close interaction with bears can be relevant to a determination of whether the individual has sufficient control to meet either of these standards.

As an example, the Department's evidence established that on one occasion an individual held food just above a bear's head in an effort to get the bear to stand on its hind legs in order to reach the food. Once the bear stood up and reached for the food, the person moved the food just out of the bear's reach with the clear intent to get the bear to move again in order to obtain the food. When the bear moved as intended, the person again moved the food, this time in a different direction, which again caused the bear to move by shuffling his posture and pose in the direction of the moved food. By continuing this movement of the food, the individual caused the bear to appear to "dance." Although Minnesota's statutes do not require an individual to obtain a permit in order to feed the bear, the feeding of the bear in this example could be an activity by which the individual demonstrates "the power and intent to exercise control over" the bear. The individual wanted the bear to dance for the amusement of those gathered to watch, and the individual's actions did in fact cause the bear to dance. Therefore, a reasonable inference would be that the individual had constructive possession over the bear. The evidence of constructive possession would include the individual's action of feeding the bear.

As such, it is clear that the legal nature of the act of bear-feeding does not insulate the evidence of feeding from the legal analysis of control. In like manner, the fact that it is legal to interact with a bear does not isolate the facts related to human/bear interaction from the legal analysis of whether actual or constructive possession has been sufficiently evidenced in the record.

¹⁹ There are some exceptions to this general rule. For example, feeding a bear poison would not be legal; such could constitute cruelty to animals under Minn. Stat. § 343.21, subd. 7.

C. The Unrestricted Movement of the Bears Does Not Negate a Finding of Actual or Constructive Possession.

Rogers next argues that his actions of feeding and interacting with the bears cannot lead to a determination of possession and control in that the bears remain “free to come and go as they please.”²⁰ Relying on various cases from other jurisdictions, Rogers concludes that the evidence adduced by the Department in its case-in-chief is legally insufficient to meet its burden of production because the bears’ abilities to wander at their own volition effectively prevents the required finding of possession. This argument is unpersuasive. The cited cases, albeit instructive, are distinguishable from the facts at issue and therefore not controlling

Koop v. United States,²¹ involved charges of baiting birds and using live decoys in hunting in violation of the Migratory Bird Act.²² In an effort to avoid prosecution, Koop argued that the birds were not wild ducks but were instead domesticated, as evidenced by the fact that they were hatched on his property, confined through their first winter and provided food. The court found insufficient evidence that Koop had possession and control of the ducks by noting that they could fly wherever they chose. Koop could not distinguish the birds he raised from any others, and when they migrated he had no way of knowing whether these specific birds returned the following spring.²³ Importantly, Koop could not show that the birds taken during the hunt were limited to those hatched on his property.

Rogers’ dispositive reliance on this case appears misplaced. Though it is true that Rogers’ bears could generally roam wherever they chose, the evidence in the present record also indicates that Rogers could distinguish each of his 50+ bears, one from another, and knew exactly where each of the bears was located via the GPS coordinates transmitted in the collars Rogers’ placed around their necks. Rogers’ interactions with particular bears far exceeded the types of interaction Koop had with particular birds. These facts sufficiently distinguish the present case from any controlling precedential value found in *Koop*.

Likewise, in *Hollywood Park Humane Society v. Town of Hollywood Park*,²⁴ the town took steps to allow the trapping, transporting and processing of deer as a means of addressing an overpopulation issue causing safety concerns. Residents sought to stop the action, claiming that it constituted an unconstitutional “taking” of deer they had fed, cared for and considered as family pets. In the trial court’s decision cited by Rogers, the court found that the plaintiffs had no property interest in the deer notwithstanding the fact that they fed the deer and allowed them to traverse their

²⁰ Dr. Lynn Rogers Memorandum of Law in Support of Motion for Directed Verdict, p. 5.

²¹ 296 F.2d 53 (8th Cir. 1961).

²² 16 U.S.C. §§ 703-711 and 18 U.S.C. § 2.

²³ *Id.* at 59-61.

²⁴ No. SA-03-CA-1312, 2004 U.S. Dist. LEXIS 783 (W.D. Tex. Jan. 23, 2004).

property. However, uncited by Rogers is the related appellate decision wherein the court noted that state's definitional standard for possession:

While it might legally be possible for an individual to acquire a property right in a wild animal, including a deer, this right is qualified and limited to those instances in which the person claiming ownership has **removed the animal from nature, confined it**, and placed it under the person's dominion and control.²⁵

As this standard of possession differs markedly from that at issue in the present case, this case likewise is not controlling.

D. Evidence of Collaring is Relevant to a Determination of Control.

Rogers argues that the Department has failed to produce any evidence that he exercises control over the bears when he places or maintains GPS-collars on them. Asserting that the record is void with regard to proof of control related to his actions specific to collaring, Rogers relies on a California case, *Moerman v. State*,²⁶ for the proposition that evidence of collaring is legally insufficient to establish control.

Moerman is a takings case in which the plaintiff sought compensation from the state of California for a herd of tule elk which had invaded his property. As a conservation measure in the face of near extinction of the species, the state had begun relocating elk to their native ranges beginning in the 1970s. Moerman sued the state in 1991, arguing that the state had exercised control over the animals by monitoring them through ear tags and radio collars. As Rogers correctly notes, the court found that these limited facts were insufficient to establish control.²⁷

Unlike in *Moerman*, the present matter does not rest on such limited facts. In the present case, the record is replete with evidence of Rogers' placement and maintenance of radio collars resulting in the habituation of bears in Eagles Nest Township. As such, this case is distinguishable and not controlling.

E. Viewed as a Whole, the Evidence Includes Sufficient Support for a Finding of Actual or Constructive Possession.

In the context of the current motion for a directed disposition, the Administrative Law Judge must view the facts in the light most favorable to the Department, the non-moving party. With respect to the relevant determination of whether Rogers has exercised sufficient possession and control over the bears in order to require a permit

²⁵ *Hollywood Park Humane Soc. v. Town of Hollywood Park*, 261 S.W.3d 135, 140 (Tex. App. 2008) (emphasis added).

²⁶ 17 Cal. App. 4th 452, 458 (Cal. Ct. App. 1993).

²⁷ *Id.*, at 5.

under the Department's statutory authority, the admitted evidence establishes the following:

- Rogers²⁸ feeds bears by offering food from his hands and from his mouth, as well as by placing food in troughs and on the ground where bears can easily access it.
- On most occasions, Rogers is physically present when the bears are fed at the Wildlife Research Institute.
- Rogers has named the bears and is able to distinguish them, one from another.
- Rogers regularly vocalizes around the bears and thereby acclimates them to the sound of his voice issuing various commands and other communications.
- Rogers physically interacts with the bears on a regular, even daily, basis and thereby accustoms them to his touch.
- Without the use of drugs or sedatives, Rogers places collars on bears by conditioning them, through feeding, to feel sufficiently safe in his presence such that they choose to allow a collar to be placed around their neck.
- By monitoring the coordinates transmitted by their radio collars, Rogers is constantly aware of the bears' locations and can, and does, interrupt and join them at his will.
- Rogers was able, on at least one occasion, to coax a bear to enter the field house at the Wildlife Research Institute via a front window.
- Rogers was able, on at least one occasion, to punch a bear in the face when the bear approached too close, without causing the bear to strike back or flee but instead causing it to retreat a few feet and remain in proximity to Rogers for a period of time.
- Rogers has placed cameras in bear dens, allowing him to access cubs while still dened.
- Rogers physically handles cubs with the effect of conditioning them to his physical presence.

²⁸ The record refers to both Rogers and Susan Mansfield, staff at the Wildlife Research Institute and Rogers' agent for purposes of activities related to same.

- Rogers has conditioned bears to his physical presence to the extent that certain animals have allowed him to rest on the ground adjacent to them.
- Rogers has taught others to hand- and mouth-feed bears.
- Rogers has encouraged and taught others to physically interact with bears by touch, including by petting, kissing and sitting next to bears.
- Rogers feeds and interacts with both collared and noncollared bears.
- Bear cubs conditioned to human contact disperse into the greater region, bearing no outward physical manifestation of their habituation.
- Habituated, human-conditioned and/or tame bears approach people in an unnatural manner because their natural fear of humans has been altered.
- Bears that are strongly human tolerant and habituated to food pose an increased public safety risk to people.
- The Department has historically interpreted its statutory authority to require a permit before allowing an individual to radio collar bears or other wild animals.

These pieces of evidence, considered collectively and viewed in the light most favorable to the Department, could be sufficient to establish possession as defined in the permitting statute. At this point in the proceedings, if more than one conclusion can be drawn from the evidence, a directed verdict should not be granted. While a conclusive determination regarding possession cannot be made until the presentation of all evidence in the case, the record at present does not exclusively establish the conclusion Rogers seeks: that it would be contrary to law to find that he has exercised sufficient control over the bears such that a permit is required. Therefore, the motion for directed disposition is denied.

T. L. P.