

STATE OF MICHIGAN

IN THE CIRCUIT COURT OF THE COUNTY OF INGHAM

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MICHIGAN BEAR HUNTERS ASSOCIATION,  
INC., a Michigan non-profit corporation,

Plaintiff,

MICHIGAN STATE UNITED COON HUNTERS  
ASSOCIATION, MICHIGAN HUNTING DOG  
FEDERATION and UPPER PENINSULA  
BEAR HOUNDSMEN ASSOCIATION,

Intervening Plaintiffs,

v

MICHIGAN NATURAL RESOURCES COMMISSION  
and MICHIGAN DEPARTMENT OF NATURAL  
RESOURCES,

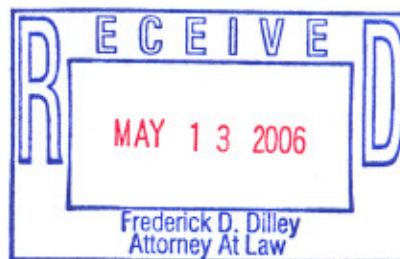
Defendants.

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OPINION AND ORDER

DOCKET NO. 04-1525-CE

HON. NETTLES-NICKERSON



**PRESENT: HONORABLE BEVERLEY NETTLES-NICKERSON  
CIRCUIT COURT JUDGE**

This Court, having presided over a preliminary injunction hearing, reviewed the testamentary evidence of the Michigan Bear Hunters Association *et al* (hereafter referred as Plaintiffs) and the Michigan Natural Resources Commission and the Michigan Department of Natural Resources (hereafter referred as Defendants), exhibits, Plaintiffs' and Defendants' closing statement, all supporting documentation and correspondence, and being fully apprised of the issues, states the following:

## INTRODUCTION

### FINDINGS OF FACT

On June 4, 2004, Defendants issued an order establishing an open season of eleven (11) days for the trapping of bobcat to commence December 10, 2004, and conclude on December 20, 2004, in a designated bobcat management zone in Michigan's Northern Lower Peninsula (NLP). Plaintiffs contend there is a likelihood that the addition of a bobcat trapping season to the preexisting bobcat hunting season would impair a natural resource of Michigan, contrary to MCL 324.1701(1). Plaintiffs brought suit against the Defendants to halt the new trapping season in the NLP.

The trapping of bobcats has not been permitted in the NLP since 1955. In 2000, the Furbearer Working Group (FWG) made a recommendation that a short, private-land-only, experimental bobcat trapping season be permitted in the NLP only if a population estimation technique could assess the bobcat population. This recommendation was rejected by most of the Northeast and Northwest management unit biologists.

In early 2004, Jim Campbell, former commissioner of the Natural Resources Commission (NRC), requested Defendants study the issue of opening a trapping season in the NLP. In January 2004, Dwayne R. Etter, PhD., a wildlife research biologist working for Defendants, requested members of the agency's FWG to assess the possibility of opening a bobcat trapping season in the NLP. Seven of the eight Wildlife Management Unit Supervisors did not recommend opening a bobcat trapping season in the NLP.<sup>1</sup>

After the designated season, Defendants issued its "2004 Bobcat Trapper Harvest in the

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<sup>1</sup> Dr. Dwayne Etter's Testimony.



Northern Lower Peninsula” (2004 Report), which indicated that approximately three hundred twenty-six (326) trappers participated in the designated trapping season and captured an estimated eighty-three (83) bobcats.<sup>2</sup> The combined 2004-2005 bobcat harvest in the NLP from both hunting and trapping was two hundred sixty-five (265) animals.

At the preliminary hearing Plaintiffs’ expert testified the bobcat is a unique natural resource of the State of Michigan because it is the only confirmed resident species of wild feline in Michigan’s ecosystem.<sup>3</sup> The sustainable harvest of a bobcat population without impairing the resource was disputed by Plaintiffs and Defendants. Plaintiffs contend a sustainable harvest should not exceed fifteen percent (15%) while Defendants rely on a value at twenty percent (20%).<sup>4</sup>

#### STANDARD OF REVIEW

An injunction is an extraordinary remedy that should only be granted when justice requires. *Fancy v Egrin*, 177 Mich App 714, 720; 442 NW2d 765 (1989). The party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued. MCR 3.310(A)(4).

The Michigan Supreme Court set forth the standard to consider whether or not a preliminary injunction should issue:

[1] harm to the public interest if an injunction issues; [2] whether harm to the applicant in the absence of a stay outweighs harm to the opposing party if the stay is granted; [3] the strength of the applicant’s demonstration that the applicant is likely to prevail on the merits; and [4] demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted. *Michigan State Employees Ass’n v Dept of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93

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<sup>2</sup> One hundred fifty-one bobcats were captured and sixty-eight were released.

<sup>3</sup> Testimony of Dr. Tewes.

<sup>4</sup> Testimony of Dr. Tewes.

(1984).

## ANALYSIS

### *Harm to the Public Interest*

Plaintiffs argue there is no harm to public interest if an injunction should issue because the injunction would prevent the depletion of a State natural resource, i.e., bobcats. There is a constitutional mandate that the protection of the conservation and development of the natural resources of the state are a paramount concern. Const 1963, art 4, § 52.

Defendants assert that an injunction that halts trapping of game, an activity engaged in by many members of the public, would harm the public interest by prohibiting the public from engaging in this activity.

### *Weight of the Harm*

Plaintiffs argue the harm is the depletion of the bobcat in the NLP. The evidence submitted by Plaintiffs suggests that it is likely that impairment of the bobcat population will take place. The population of the bobcat cannot be replenished by the bobcats in the Upper Peninsula (UP) because the existing NLP bobcat population is unique and accustomed to the local habitat (i.e., climate, prey, diseases, and parasite communities).<sup>5</sup> Attempting to restore an impaired NLP bobcat population from a non-local source would require many years at substantial public expense and would likely be unsuccessful.

Defendants argue that because bobcat hunting exists in both the UP and NLP and trapping exists in the UP, the addition of a trapping season to the NLP does not harm the bobcat population but would provide a benefit to both hunters and trappers. At most, hunters of bobcats

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<sup>5</sup> Testimony of Plaintiffs' Expert Dr. Tewes.



(like Plaintiffs) may take longer to catch a bobcat during the hunting season because some of the bobcats have already been harvested during the earlier trapping season.

In addition, the trapping season is in conformity with the Michigan Environmental Protection Act (MEPA). The State's actions are designed to ensure that a sustainable NLP bobcat population continues to exist for the benefit of both hunters and trappers.

#### *Merits of the Case*

Plaintiffs contend that when Dr. Etter requested that members of the FWG voice their comments about a bobcat trapping season in the NLP, the recommendation was clearly against the trapping season. According to the deposition testimony of Dr. Etter, seven out of the eight Management Unit Supervisors do not recommend the proposition of a trapping season in the NLP. In addition, Plaintiffs maintain there was no serious debate among Defendants' scientists as indicated by the nearly unanimous opinion that Defendants should not sanction a bobcat trapping season in the NLP.

Moreover, David Bostick, Defendants' Furbearer Specialist, stated that more information on the bobcat population is needed because the bobcat study by Central Michigan University was limited.<sup>6</sup> Mr. Bostick further stated that "[i]nterpreting harvest data has been problematic for bobcat over the last 10 years" and the State does not have another effective technique to gather sufficient information on the bobcat population.<sup>7</sup>

Plaintiffs argue the evidence submitted demonstrate Defendants failed to exercise sound scientific management by adopting the 2004 NLP bobcat trapping season because there was an

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<sup>6</sup> Plaintiffs' Trial Exhibit 31.

<sup>7</sup> Plaintiffs' Trial Exhibit 31.

absence of sufficient data and analysis to support the conclusion that an adequate population existed to permit a trapping season that would not impair the bobcat resource.

In addition, Plaintiffs argue that the data from the Central Michigan Study,<sup>8</sup> Preuss Study,<sup>9</sup> and the Svoboda Study<sup>10</sup> indicate the percentage of the total NLP population harvested in 2004 was 19.5%, 20.5%, and 44.4% respectively. These results show that the harvest exceeds 15% of the bobcat population indicating over-harvesting and impairment.

Defendants argue that the witnesses and exhibits demonstrate the adequacy of bobcat population available to the State in 2004 and 2005 and rely on the concept of adaptive management.<sup>11</sup> The Defendants' policy of applying adaptive management principles and the Commission's highly restrictive conditions for the 2005 NLP trapping season, as well as all future seasons, make it more likely than not, that a sufficient number of bobcats will continue to exist in the NLP to support an eleven (11) day bobcat trapping season.

Specifically, Defendants' Expert Dr. Etter testified that, even if hunters and trappers were very successful, the NLP bobcats would not be depleted because there are sufficient adjacent areas that are closed to hunting or trapping which would serve as refuges for bobcats. Dr. Etter further testified that bobcats have a high survival and reproductive rate.

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<sup>8</sup> Plaintiffs' Trial Exhibit 48

<sup>9</sup> Plaintiffs' Trial Exhibit 41: "Predicting Spatial Distribution and Relative Abundance of Bobcats in the Northern Lower Peninsula of Michigan by Timothy S. Preuss

<sup>10</sup> Plaintiffs' Trial Exhibit 51: "Habitat Use Home-Range Size and Relative Abundance of Bobcats (*Lynx Rufus*) in the Northern Counties of Michigan's Lower Peninsula, by Nathan Svoboda.

<sup>11</sup> Defendants' Experts Dr. Etter and Dr. William Moritz explained that Adaptive Management is a concept where Defendants evaluate the available scientific information before implementing a decision. Defendants would monitor the results and make necessary adjustments in order to achieve the intended goal. In the present case, Defendants would allow a trapping season, monitor the results, and modify the season if the results were different than predicted.



### *Irreparable Injury*

Plaintiffs argue that the NLP bobcat population is discrete that is biologically separate and geographically isolated.<sup>12</sup> The NLP bobcat population is isolated and is different from the Upper Peninsula bobcat population which is considered a mainland population because of its connection to the bobcat population in Wisconsin. Impairment of the NLP bobcat resource cannot be readily remedied by attempted replacement or restoration from another bobcat population because the existing NLP bobcat population has developed adaptations via long-term interaction between its genome and the local habitat, including the local climate and its variation, the local prey and its variations, the local disease and parasite communities, and related phenomena.

Defendants argue the bobcat lives throughout the lower forty-eight states and extend north into southern Canada. If the total harvest in the NLP causes the population to decline in particular spots within the designated hunting and trapping areas, there is sufficient adjacent areas closed to hunting or trapping that serve as refuges for bobcats in the NLP so that the bobcat population could naturally restock in any depleted areas. Although researchers have identified genetic differences between the bobcat of the Upper and Lower Peninsulas, these differences are not sufficient to render the population incapable of interbreeding. NLP bobcats are capable of interbreeding with any other North American bobcat.

### **OPINION**

### **CONCLUSIONS OF LAW**

Under MEPA Plaintiffs “may maintain an action in the circuit court having jurisdiction

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<sup>12</sup> Testimony of Plaintiffs’ Expert Dr. Tewes.

where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water and other natural resources[.]” MCL 324.1701(1). Specifically, plaintiffs may seek relief from conduct that “has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy” a protected natural resource. MCL 324.1703(1).

In the context of MEPA, to impair is “[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner.” *Michigan United Conservation Clubs v Anthony*, 90 Mich App 99, 105-106; 280 NW2d 883 (1979) quoting Black’s Law Dictionary (Rev 4<sup>th</sup> Ed). *Whittaker Gooding Co v Scio Twship Zoning Bd of Appeals*, 117 Mich App 18, 22; 323 NW2d 574 (1982). [T]he standard of the [MEPA] is probable rather than guaranteed harm[.] *Michigan United Conservation Clubs, supra* at 109.

Upon a *prima facie* showing of likely impairment by plaintiff, the defendant has the burden to prove “that there is no feasible and prudent alternative to defendant’s conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state’s paramount concern for the protection of its natural resources from pollution, impairment, or destruction.” MCL 324.1703(1).

“The court may grant temporary and permanent equitable relief or may impose conditions on the defendant that are required to protect the air, water, and other natural resources or the public trust in these resources from pollution, impairment, or destruction.” MCL 324.1704(1).

Defendant, Michigan Natural Resources Commission, (Commission) has the exclusive authority to regulate the taking of bobcats. MCL 324.40113a(2). MCL 324.40103(1)(d). The Commission “shall, to the greatest extent practicable, utilized principles of *sound scientific*



*management* in making decisions regarding the taking of [bobcats].” MCL 324.40113a(2).

(Emphasis added)

In the present case, this Court finds that Plaintiffs have demonstrated that Defendants’ decision to sanction a bobcat trapping season in the NLP is likely to impair the bobcat population. The bobcat harvest for the last six seasons averaged two hundred thirty-seven (237) bobcats which is demonstratively higher than the previous 10-year average of one hundred seventy-five (175).<sup>13</sup> Hunter success, which is measured by catch per unit effort, has increased from twenty (20) days to kill a bobcat in 1998 to approximately fifty-six (56) days.<sup>14</sup> This Court finds that a rising harvest of bobcats in conjunction with an attendant falling catch per unit effort are indicative of a decreasing bobcat population and is symptomatic of over-harvesting. Plaintiffs have presented a *prima facie* showing of likely impairment of the bobcat resource.

Having made a *prima facie* showing of likely impairment Defendants have the burden to provide a feasible and prudent alternative to protect the bobcat resource from impairment or destruction. MCL 324.1703(1). The evidence presented indicate the response by the vast majority of the Wildlife Management Unit Supervisors, to the proposal of allowing a bobcat trapping season in the NLP, did not support the addition of trapping in the NLP.<sup>15</sup> Only one of the eight Management Unit Supervisors recommended a limited trapping season. Defendants ignored the increase bobcat harvest, the decrease in hunter success, and the overwhelming opinion against a bobcat trapping season in the NLP. Defendants have not demonstrated a prudent alternative to protect the bobcat resource from impairment or destruction.

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<sup>13</sup> Plaintiffs’ Trial Exhibit 39.

<sup>14</sup> Plaintiffs’ Trial Exhibit 38.

<sup>15</sup> Testimony of Dr. Dwayne Etter

This Court finds that, at the time Defendants made the decision in 2004 to allow a bobcat trapping season in the NLP, they failed to exercise sound scientific management. Defendants adopted the 2004 NLP bobcat trapping season in the absence of sufficient study, data, and analysis to support the conclusion that an adequate population existed to permit the referenced season without sufficient controls to avoid impairing the bobcat resource. Defendants were aware that: (1) hunter catch per unit effort was falling; (2) NLP bobcat harvest was increasing; (3) eighty-eight percent of its Wildlife Management Supervisors did not recommend a trapping season; (4) MDNR bobcat scientist Dr. Dwayne Etter opposed a trapping season; and (5) the Central Michigan University (CMU) Study<sup>16</sup> of the NLP bobcat population recommended further investigation before any trapping season be considered.

In addition, population estimates of the NLP bobcat varied considerably.<sup>17</sup> Initially, Professor Thomas M. Gehring, Ph.D., estimated the minimum bobcat population to be eight hundred forty-three (843), but changed the number to one thousand seven hundred ninety-four (1,794) when he stated the original figure was the adult population and that approximately forty-seven (47) percent of the population was adults. At trial, Dr. Gehring speculated the bobcat population could be as high as three thousand three hundred (3,300). Additional population estimates were calculated based on the studies of graduate students Timothy Preuss and Nathan Svoboda who were both under the supervision of Dr. Gehring. Based upon the Preuss Study and Svoboda Study, the bobcat population was estimated to be one thousand seven hundred twenty-three (1,723) and seven hundred ninety-five (795) respectively.

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<sup>16</sup> Plaintiffs' Exhibit 48: "Independent Review of Status of the Bobcat Population in the Northern Lower Peninsula of Michigan" by Thomas M. Gehring, Timothy S. Preuss, and Bradley A. Potter.

<sup>17</sup> Testimony of Dr. Tewes.



This Court finds that Plaintiffs have presented a prima facie case that a bobcat trapping season in the NLP would impair the bobcat resource. Defendants did not rebut the presumption of impairment and did not base the decision to allow a limited bobcat trapping season on sound scientific evidence.

**ORDER**

**NOW, THEREFORE**, the Michigan Natural Resources Commission's decision to permit a bobcat trapping season in the Northern Lower Peninsula is **REVERSED**.

**IT IS FURTHER ORDERED** that the Michigan Natural Resources Commission is permanently enjoined from sanctioning a bobcat trapping season in the Northern Lower Peninsula until it complies with MCL 324.1703 and MCL 324.40113a.

**IT IS SO ORDERED.**

In compliance with MCR 2.602(A)(3), this Court finds that this decision resolves the last pending claim and closes the case.

Dated: 5-12-06

**BEVERLEY NETTLES-NICKERSON**

Hon. Beverley Nettles-Nickerson  
Circuit Court Judge

**PROOF OF SERVICE**

I hereby certify that I served a copy of the above Order upon the attorneys of record by placing said Order in an envelope addressed to each and placing same for mailing with the United States Mail at Lansing, Michigan, on \_\_\_\_\_, 2006.

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Thomas Kim  
Court Officer

cc: Frederick D. Dilley  
Elaine D. Fischhoff