

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM K. BYCE, BRIAN JENICH, JAMES
MAGADINI, and THOMAS STOJSIK,

UNPUBLISHED
January 14, 2003

Plaintiffs-Appellants,

v

DEPARTMENT OF NATURAL RESOURCES,

No. 236727
Ingham Circuit Court
LC No. 00-092402-CE

Defendant-Appellee.

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs appeal as of right the order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10) in this action in which plaintiffs sought declaratory and injunctive relief to prevent the enforcement of Wildlife Conservation Order Amendment No. 9 of 2000 (WCO). This WCO prohibits the baiting and feeding of wild deer and elk in part of the state. We affirm.

Basic Facts and Procedural History

Plaintiffs previously sued the Michigan Department of Agriculture (MDA), challenging the MDA's authority to prohibit the feeding of wild deer to control the contagious disease bovine tuberculosis. In that action, the circuit court ruled that the MDA lacked the statutory authority to enforce a feeding ban for wild deer. In response to the ruling the Legislature enacted 1999 PA 66, which grants the Natural Resource Commission (NRC) the authority to prohibit all deer and elk feeding if necessary in order to properly manage wildlife populations or to control or eradicate disease. MCL 324.40111a.

Pursuant to MCL 324.40111a, the NRC issued the WCO prohibiting the feeding of deer and elk in all counties having one or more confirmed TB-positive deer within a specified period of time. Plaintiffs filed this action seeking declaratory and injunctive relief to prevent enforcement of the WCO. Defendant's motion for summary disposition on all counts was granted.

I

Plaintiffs argue that the trial court erred by granting summary disposition in favor of defendant because any order issued pursuant to MCL 324.40111a must conform to controlling

language on scientific wildlife management principles specified in MCL 324.40113a. We disagree. The WCO was issued under § 324.40111a, which grants defendant the authority to prohibit the *feeding* of wild deer and elk if the NRC considers a feeding ban “necessary to properly manage wildlife populations *or* to control or eradicate disease,” MCL 324.40111a(3) (emphasis added), not under § 40113a, which pertains to the *taking* of wild game. Accordingly, the provision of § 40133a relating to application of scientific wildlife management principles is inapplicable.

II

Plaintiffs argue they provided sufficient factual evidence challenging the scientific validity of the WCO to create a genuine issue of material fact. The validity of a rule promulgated by an administrative agency empowered to make rules is determined by a three-prong test: (1) whether the rule is within the subject matter of the enabling statute; (2) whether the rule complies with the legislative intent underlying the enabling statute; and (3) whether the rule is arbitrary or capricious. *Dykstra v DNR*, 198 Mich App 482, 484; 499 NW2d 367 (1993).

The WCO clearly falls within the scope of the enabling statute because § 324.40111a directs the NRC to establish orders regulating the feeding of wild deer and elk. The NRC may prohibit all deer and elk feeding in all or part of this state if the commission considers the prohibition to be necessary to properly manage wildlife populations or to control or eradicate disease. MCL 324.40111a(3). If a rule is rationally related to the purpose of the statute, it is neither arbitrary nor capricious, and if there is any doubt as to the validity of a rule, the rule must be upheld. *Id.* Plaintiffs challenge the validity of the WCO largely based on evidence of alternative methods to control or eradicate TB in wild deer. Plaintiffs’ disagreement with defendant’s chosen method does not present a genuine issue of material fact. The challenged WCO implements a feeding ban to control or eradicate bovine TB in wild deer and is rationally related to the Legislature’s purpose to control or eradicate communicable disease. Therefore, the WCO is neither arbitrary nor capricious.

III

Defendant moved for dismissal of counts II-V under MCR 2.116(C)(8), but plaintiffs argue that both parties and the court relied on matters outside of the pleadings. Although the trial court considered these issues under MCR 2.116(C)(8), this Court is unable to determine if the trial court relied on evidence beyond the pleadings. Therefore, we review the issues as if the motion had been granted under MCR 2.116(C)(10) and examine both the pleadings and the documentary evidence. See *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 183-184; 551 NW2d 132 (1996).

Due Process

Plaintiffs argue that the feeding ban violates their substantive due process rights because it arbitrarily and capriciously deprives them of their property right to feed wild deer on their land. However, plaintiffs have no property right in feeding wild deer that is subject to due process guarantees because wild game belongs to the people of the state. *Aikens v State Dep’t of Conservation*, 387 Mich 495, 501; 198 NW2d 304 (1972).

Equal Protection

Plaintiffs argue that the WCO violates equal protection because plaintiffs are banned from baiting and feeding deer on their land while the WCO exempts similarly situated farmers for “normal agricultural practices” who leave food in their fields to be eaten by deer. The Equal Protection Clauses of the United States Constitution and the Michigan Constitution provide that no person shall be denied the equal protection of the law. US Const, Am XIV; Const 1963, art 1, § 2. The categorization in this case does not involve suspect classifications or those to which the courts apply a heightened level of scrutiny; therefore, the WCO is reviewed under the rational-basis test. See *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000). Under the rational-basis test, plaintiffs must “negative every conceivable basis which might support” the WCO. *Muskegon Area Rental Ass’n, supra* at 464, quoting *Lehnhausen v Lake Shore Auto Parts Co*, 410 US 356, 364; 93 S Ct 1001; 35 L Ed 2d 351 (1973).

Landowners intentionally baiting and feeding wild deer are not similarly situated to farmers whose crops unintentionally provide food for wild deer. With regard to *intentional* feeding of wild game, the WCO treats farmers and other landowners equally. In addition, plaintiffs failed to challenge other conceivable bases to support the WCO’s distinction between farmers and landowners feeding deer, such as protection of the farming industry, intent of the activity, practicality, temporal differences, relative impact, etc. Accordingly, plaintiffs failed to meet their burden in proving the WCO violates their right to equal protection.

Michigan Environmental Protection Act (MEPA)

Plaintiffs argue that implementation of the WCO feeding ban will or is likely to impair or destroy the deer herd in the TB-control area in violation of the Michigan environmental protection act (MEPA), MCL 324.1701, *et seq.* The MEPA seeks to protect “the air, water, and other natural resources . . . from pollution, impairment, or destruction.” MCL 324.1701(1). To determine whether a plaintiff has established a prima facie case under the MEPA, the trial court must determine: (1) whether a natural resource is involved and (2) whether the effect of the challenged activity on the environment rises to the level of impairment that would justify the court’s injunction. *Dafter Sanitary Landfill v DNR*, 198 Mich App 499, 503-504; 499 NW2d 383 (1993).

The weight of authority on record supports reduction of the size of the deer herd in the infected areas to control or eradicate bovine TB, which would be beneficial for the long-term health of the deer herd. Plaintiffs failed to make a prima facie showing that the WCO is likely to pollute, impair, or destroy a natural resource within the meaning of MEPA.

Property Rights Preservation Act (PRPA)

Plaintiffs argue that the Property Rights Preservation Act (PRPA), MCL 24.421, *et seq.*, required defendant to review its takings assessment guidelines to consider the likelihood that a taking may result before issuing the WCO. Section 424 states: “Prior to taking a governmental action, the department of natural resources, the department of environmental quality, or the state transportation department, as appropriate, shall review the takings assessment guidelines prepared under section 3 and shall consider the likelihood that the governmental action may result in a constitutional taking.”

Although the PRPA required defendant to review its assessment guidelines before issuing the WCO, plaintiff established no prejudice resulting from defendant's alleged failure to comply with MCL 24.424. As previously discussed, the right to feed wild deer owned by the state is not a right incident to ownership of land and, therefore, no taking of property occurred.

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald