

STATE OF SOUTH DAKOTA)
COUNTY OF FALL RIVER)

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

SUSAN HENDERSON, as Personal)
Representative of the Estate of Dora)
Henderson, Deceased,)
Plaintiff,)

COMPLAINT

v.)

FALL RIVER COUNTY WEED & PEST)
BOARD, A Subdivision of Fall River)
County, South Dakota,)
Defendant.)

Susan Henderson, by and through Roger A. Tellinghuisen of DeMersseman Jensen Tellinghuisen & Huffman, LLP, her attorneys, and for her cause of action against the Defendant, Fall River County Weed & Pest Board, a Subdivision of Fall River County, South Dakota, states and alleges as follows:

1. Plaintiff is the Personal Representative and sole heir to the estate of Dora Henderson who died on April 6, 2008.

2. Plaintiff's mother, at the time of her death, owned approximately 8,000 acres in Fall River County. A portion of this land is located in Section 15, Township 10 South, Range 3 East of the Black Hills Meridian, Fall River County, South Dakota.

3. On December 5, 2017, the Fall River County Weed & Pest Board (Board) issued a "Notice of Declaration of Infestation" wherein it declared the above referenced property to be infested with pests, to-wit: prairie dogs.

4. On December 14, 2017, Plaintiff received a copy of the "Declaration of Infestation" and "Notice of Declaration of Infestation" from the Board and the County Weed & Pest Supervisor, Nina Steinmetz.

5. According to the Notice of Declaration of Infestation, Plaintiff was given until April 1, 2018 to achieve an 80% kill on prairie dogs on the above described property.

6. Due to weather and winter conditions, Plaintiff has been unable to eradicate the prairie dogs as required by the Notice of Declaration of Infestation.

7. Plaintiff has requested additional time within which to comply with the Notice of Infestation, but the Board has refused her request.

8. Plaintiff has been informed by the Board by letter dated April 17, 2018 of its intentions to come onto the above described private property on April 30, 2018 to poison prairie dogs.

9. According to the Notice of Declaration, Plaintiff has been advised that the estimated cost of the remedial action the Board intends to take will cost the Plaintiff approximately \$8,800.

10. Plaintiff knows as fact that there are nesting bald eagles, golden eagles and burrowing owls on the above described property. See attached Affidavit of Susan Henderson.

11. Plaintiff believes that the contemplated activities of the Board as stated in the April 17, 2018 letter could lead to the disturbance and possibly the death of bald eagles and golden eagles which are federally protected pursuant to the Bald and Golden Eagle Protection Act, 16 U.S.C. 668-668c.

12. According to literature published by the U.S. Fish and Wildlife Service, bald eagles are most sensitive to human disturbance from about mid-December through May. A "disturbance" of bald eagles and golden eagles is a prohibited act under the Bald and Golden Eagle Protection Act (supra).

13. Burrowing owls are also protected under the Migratory Bird Act, 16 U.S.C.A. 703.

14. Burrowing owls nest in prairie dog holes. The use of the poison Fumitoxin tablets as the Board has stated it intends to use, will kill burrowing owls located on the property. See attached Affidavit of Susan Henderson.

15. Plaintiff understands the need to control prairie dogs. Plaintiff estimates that since December 2017 she has killed over 1,000 prairie dogs on the subject property. She has historically controlled prairie dogs with non-poisonous methods by drowning with water she applies with water tanks she has purchased specifically for this purpose. Plaintiff intends in the future to continue her own remedial action in the prairie dog town located on the subject property. But such action cannot be completed until late summer or early fall due to nesting bald eagles, golden eagles and burrowing owls located on the property.

16. If the Board is allowed to administer their poison on the subject property, there is a high likelihood that bald eagles, golden eagles and burrowing owls will be disturbed, damaged and/or killed.

17. There is no "emergency" that requires the killing of prairie dogs prior to later this summer when the nesting and hatching of eagle and burrowing owl fledglings will not be disturbed. Plaintiff's own remedial efforts have eradicated the prairie dogs

that were living on the above described property adjacent to the "Brunson fence" (an adjoining property to the east of the above described property) and next to State Road 471 (which lies north of the above described property). Prairie dogs are not now living near these two outside boundaries to the property described above.

18. Plaintiff has no other remedy at law to prevent the loss and/or destruction of these protected creatures.

19. A permanent injunction is necessary to prevent the Board from administering the contemplated poison on the subject property during the period between mid-December and the end of August because:

(a) Pecuniary compensation will not afford adequate relief when bald eagles, golden eagles and/or burrowing owls are disturbed, molested and/or killed during such efforts by the Board;

(b) It would be extremely difficult to ascertain any amount of compensation which would afford adequate relief; and

(c) The restraint is necessary to prevent a multiplicity of judicial proceedings.

20. A permanent injunction enjoining the Board from administering poisons on the subject property between mid-December and the end of August is mandatory because:

(a) Allowing Defendant to administer poisons on the subject property during this period of time will cause harm to Plaintiff that will be irreparable insofar as the loss or disturbance or molestation of bald eagles, golden eagles and/or burrowing owls on the property during that period of time;

(b) The injunction is necessary because of the lack of an adequate and complete remedy at law;

(c) Said conduct on the part of the Board is more likely than not to cause a disturbance, molestation and/or killing of bald eagles, golden eagles and/or burrowing owls in violation of the Bald and Golden Eagle Protection Act and the Migratory Bird Act; and

(d) Balancing equities and hardships to be suffered by the Defendant if this injunction is granted, is not disproportionate to the benefit to the Plaintiff in protecting the bald eagles, golden eagles and/or burrowing owls located on the subject property during the period of mid-December through the end of August.

WHEREFORE, Plaintiff prays for judgment as follows:

A. For a permanent injunction prohibiting Defendant from coming onto the subject property and engaging in the poisoning of prairie dogs during the period of mid-December to end of August;

B. For Plaintiff's costs and disbursements herein; and

C. For all other relief that the Court deems fair, just, proper, and equitable.

Dated this 23rd day of April, 2018.


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