

FILED
02-15-2021
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
District IV

Appeal No. 2021AP256

HUNTER NATION INC., et al.,

Plaintiffs-Respondents,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES, et al.,

Defendants-Appellants

On Appeal from Jefferson County Circuit Court
The Honorable Bennett Brantmeier, Presiding
Jefferson County Case No. 21-CV-31

**NON-PARTY BRIEF OF SIERRA CLUB, THE HUMANE SOCIETY
OF THE UNITED STATES, AND THE CENTER FOR BIOLOGICAL
DIVERSITY IN SUPPORT OF DEFENDANT-APPELLANTS'
MOTION FOR AN EXPEDITED STAY OF THE CIRCUIT COURT'S
FEBRUARY 12, 2021 ORDER**

PINES BACH LLP
Christa O. Westerberg, SBN 1040530
122 West Washington Ave., Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
cwesterberg@pinesbach.com

TABLE OF CONTENTS

	<u>Page</u>
Introduction	1
Argument.....	2
I. DNR Has a Likelihood of Success on Appeal	2
II. The Public Interest Weighs Heavily in Favor of a Stay	6
A. A Stay Protects the Public Interest in Sustainable, Science-based Wolf Management	7
B. A Stay Protects the Public Interest in Stakeholder Participation	13
Conclusion.....	15
Certifications	17

TABLE OF AUTHORITIES

	Page(s)
 Cases	
<i>FAS, LLC v. Town of Bass Lake</i> , 2007 WI 73, 301 Wis.2d 321, 733 N.W.2d 287	5
<i>Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.</i> , 2011 WI 36, 333 Wis.2d 402, 797 N.W.2d 789	3
<i>State v. Gudenschwager</i> , 191 Wis.2d 431, 529 N.W.2d 225 (1995).....	2, 6
<i>State v. Herwig</i> , 17 Wis.2d 442, 117 N.W.2d 335 (1962).....	7
<i>Hubbard v. Messer</i> , 2003 WI 145, 267 Wis.2d 92, 673 N.W.2d 676	5
<i>State ex rel. Kalal v. Circuit Court for Dane County</i> , 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110	4
<i>Klein v. DOR</i> , 2020 WI App 56, 394 Wis.2d 66, 949 N.W.2d 608	2
<i>Schmidt v. Dep't of Res. Dev.</i> , 39 Wis.2d 46, 158 N.W.2d 306 (1968).....	3
<i>Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep't of Natural Res.</i> , 2004 WI 40, 270 Wis. 2d 318, 677 N.W.2d 612	5
<i>Wis. Legislature v. Palm</i> , 2020 WI 42, 391 Wis.2d 497, 942 N.W.2d 900	3
 Statutes	
2011 Wis. Act 169 §21(1)(b)	7

Wis. Stat. §29.011(1).....	7
Wis. Stat. §29.014(1).....	7
Wis. Stat. §29.185	<i>passim</i>
Wis. Stat. §29.185(3)(bn)1	7
Wis. Stat. §29.185(5)(a)	4, 5, 12
Wis. Stat. §29.185(5)(c)	5, 12
Wis. Stat. §227.10(2m).....	3

Other Authorities

DNR, Memorandum Re: 2014-15 Wolf Harvest <i>available at</i> https://p.widencdn.net/apsfdt/06-14-3B2	14
DNR, Memorandum Re: February 2021 Wolf Harvest, <i>available at</i> https://widnr.widen.net/view/pdf/sbdtbr1v2w/2021-02-2A-Special-meeting-wolf.quota.pdf	8, 10, 15
DNR, Press Release (Dec. 4, 2020), <i>available at</i> https://dnr.wisconsin.gov/newsroom/release/39871	9, 15
<i>Hearing on AB 502 Before the Assemb. Comm. on Natural Resources</i> , 2011 Leg., 100th Sess. 04:02:00 (Wis. 2012), https://wiseye.org/2012/02/01/assembly-committee-on-natural-resources-28/	9
<i>Hearing on SB 411 Before the S. Comm. on Natural Resources & Env't.</i> , 2011 Leg., 100th Sess. 02:22:16 (Wis. 2012), https://wiseye.org/2012/02/28/senate-committee-on-natural-resources-and-environment-part-1-of-3/	9

<i>Hunting and Trapping of Wolves: Hearing on AB 502 Before the Assemb. Comm. on Natural Resources</i> , 2011 Leg., 100th Sess. 04:02:00 (Wis. 2012), https://wiseeye.org/2012/02/01/assembly-committee-on-natural-resources-28/	9
NRB, February 2021 Special Meeting Agenda https://dnr.wisconsin.gov/About/NRB/2021/February-Special	11
NRB, Special Meeting (Jan. 22, 2021), https://dnrmedia.wi.gov/main/Play/731c92f70bb84be69b8f69ef1ccbb99c1d?catalog=9da0bb432fd448a69d86756192a62f1721	11
DNR, Testimony before Joint Informational Hearing on DNR Wolf Management (Jan. 13, 2021), <i>available at</i> https://www.wpr.org/sites/default/files/dnr_wolf_management_written_testimony.pdf	6
Wis. Admin. Code §NR 10.145(1m).....	7, 8
Wisconsin Constitution Art. I § 26.....	5

INTRODUCTION

Sierra Club, Humane Society of the United States, and the Center for Biological Diversity (“Amici”) submit this brief in support of Defendant-Appellants Wisconsin Department of Natural Resources, Natural Resources Board, and Secretary Preston Cole’s (collectively, “DNR’s”) motion for expedited stay of the circuit court’s February 12, 2021, mandamus order directing DNR to open an immediate wolf hunting season.

That order should be stayed and, ultimately, reversed. The order overrode the expert agency’s determination that opening such a season would violate tribal consultation requirements and circumvent the agency’s obligation to set quotas based in science and stakeholder input. DNR is now forced to declare open season on hundreds of wolves, on the basis of outdated population reduction goals the agency has disclaimed, without accounting for the harms from concentrating that hunt in breeding season.

This extreme and unprecedented outcome flows from the circuit court’s erroneous interpretation of Wis. Stat. §29.185 (the “Wolf Hunt Statute”) that defies its plain language. Properly read, that statute does not compel but *prohibits* DNR from opening the immediate season ordered below—and for good reason. The circuit court’s order requires DNR to

bypass procedures fundamental to the agency's ability to do its statutory duty to sustainably and scientifically manage wolves for the benefit of the public.

This Court should grant DNR's expedited request for a stay, as they have a likelihood of success on appeal and the public interests weigh heavily in favor of a stay.

ARGUMENT

Amici support DNR's argument that it meets all four factors for a stay under *State v. Gudenschwager*, 191 Wis.2d 431, 529 N.W.2d 225 (1995). Amici focus on two of those factors here: DNR's likelihood of success on appeal, and the harm to the public interest from not granting a stay.

I. DNR Has a Likelihood of Success on Appeal

DNR is likely to succeed on appeal because the circuit court erred by issuing a writ of mandamus where the strict standards for that extraordinary remedy had not been met. Mandamus may only compel performance of a "clear and unequivocal" or "positive and plain" duty, and only to effectuate a plaintiff's "clear legal right." *See Klein v. DOR*, 2020 WI App 56, ¶36, 394 Wis.2d 66, 949 N.W.2d 608. No such duty or right exists here, because

the Wolf Hunt Statute does not require DNR to open a wolf hunting season immediately upon federal delisting. *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶83, 333 Wis.2d 402, 797 N.W.2d 789 (“A circuit court's discretionary determination based on an error of law is an erroneous exercise of discretion. Whether a circuit court applied the appropriate and applicable law is a question of law that an appellate court determines independently of the circuit court but benefiting from its analysis.”).

Agencies are creatures of statute without even implied powers. *Wis. Legislature v. Palm*, 2020 WI 42, ¶51, 391 Wis.2d 497, 942 N.W.2d 900. Under Wis. Stat. §227.10(2m), agencies may only take actions “explicitly required or explicitly permitted by statute or by a rule.” Agencies must strictly conform to their statutory authority, *Schmidt v. Dep't of Res. Dev.*, 39 Wis.2d 46, 56-57, 158 N.W.2d 306 (1968), and courts must “narrowly construe imprecise delegations of power to administrative agencies.” *Palm*, 391 Wis.2d 497, ¶51.

DNR stayed within its statutory authority here, because the Wolf Hunt Statute expressly forecloses the agency from opening a season in January or February. The statute provides that DNR “shall establish a *single*

annual open season for both hunting and trapping of wolves *that begins on the first Saturday in November of each year* and ends on the last day of February of the following year.” Wis. Stat. §29.185(5)(a) (emphasis added). Opening a February 2021 season would violate the Legislature’s directive that any season must “begin[] on the first Saturday in November”—no later, and no earlier. *Id.* Further, opening a February 2021 season in advance of the statutorily required season beginning in November 2021 would force the agency to run afoul of its mandate to open only “a single annual season” in any year. *Id.*

DNR’s decision to wait until November 2021 to open a wolf season is consistent with—and required by—the plain text of the statute. *See State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110 (“In construing or interpreting a statute the court is not at liberty to disregard the plain, clear words of the statute.”) (quotation omitted).¹ Canons of statutory construction further necessitate this reading. For example, under the canon *expressio unius est exclusio alterius*, it is

¹ DNR has correctly interpreted the statute as authorizing a single annual wolf hunting season that starts in November, not any earlier. For this reason, the Court should reject the circuit court’s conclusion that DNR had “unclean hands” by not immediately preparing a wolf hunt upon federal delisting, which became effective on January 4, 2021. (Hr’g Trp. At 83:22-84:3, 94:25-96:14.)

significant that the Wolf Hunt Statute expressly allows the DNR to *close a season early* under certain conditions, Wis. Stat. §29.185(5)(c), but grants no similar discretion for *opening a season late*. See *FAS, LLC v. Town of Bass Lake*, 2007 WI 73, ¶27, 301 Wis.2d 321, 733 N.W.2d 287.

The circuit court failed to interpret the statute “so as not to render any portion of [it] superfluous.” *Hubbard v. Messer*, 2003 WI 145, ¶9, 267 Wis.2d 92, 673 N.W.2d 676. Its order renders meaningless the statutory terms “single” (which disallows the DNR from opening *two* “annual” seasons in a calendar year) and “begins” (which requires any season to start in November). Wis. Stat. §29.185(5)(a). Here, DNR was only delegated the explicit authority to establish a single wolf hunting season that begins in November, and no authority to begin a season in January, February, or any other time.² The circuit court also failed to consider the scientific and policy reasons behind the November start (Hr’g Trp. at 71:4-13), which further demand giving full effect to the statutory language. Section II.A.2., *infra*.

² Art. I § 26 of the Wisconsin Constitution imposes no separate duty to open an immediate wolf hunting season, let alone one that would violate the parameters set by the Wolf Hunt Statute. The amendment “does not impose any limitation upon the power of the state or DNR to regulate hunting, other than that any restrictions on hunting must be reasonable.” *Wis. Citizens Concerned for Cranes & Doves v. Wis. Dep’t of Natural Res.*, 2004 WI 40, ¶ 46, 270 Wis. 2d 318, 677 N.W.2d 612. That standard is met here.

In short, DNR had no “plain and positive duty” to open a January-February hunting season. The Wolf Hunt Statute did not require it to open such a season; its plain text *prohibited* the agency from doing so. As DNR has a likelihood of success on appeal, the circuit court erroneously failed to grant a stay of its mandamus order.

II. The Public Interest Weighs Heavily in Favor of a Stay

Staying the circuit court’s order will “do no harm to the public interest” – rather, the well-established public interests in sustainable wildlife management and public participation militate in favor of a stay. *Gudenschwager*, 191 Wis.2d at 440. DNR recognizes that “implementing a wolf season requires adequate time not only to develop a science-based quota but also to engage the public and tribal partners in the development of a season plan that adequately reflects the interests of diverse stakeholders throughout Wisconsin.”³ A stay is necessary to protect the public interest in sustainable wolf management—shared by hunters and non-consumptive users alike—from the devastating consequences experts warn would be caused by the rushed hunting season ordered by the circuit court. A stay

³ DNR, Testimony, Joint Informational Hearing on DNR Wolf Management (Jan. 13, 2021), *available at* https://www.wpr.org/sites/default/files/dnr_wolf_management_written_testimony.pdf

would also protect the public interest in inclusive and transparent public process, including consultation with sovereign tribes.

A. A Stay Protects the Public Interest in Sustainable, Science-based Wolf Management

Wisconsin law recognizes the public interest in conservation of the state's wildlife, and the attendant responsibility of the state to manage populations "in trust for the benefit of the people of the state." *State v. Herwig*, 17 Wis.2d 442, 446, 117 N.W.2d 335 (1962); *see also* Wis. Stat. §29.011(1) (title to "all wild animals...is vested in the state for the purposes of regulating the enjoyment, use, disposition, and conservation of these wild animals"). DNR is charged with regulating hunting to conserve game populations and ensure future recreational opportunities. *Id.* §29.014(1). The Wolf Hunt Statute directs DNR to implement quotas by "determin[ing] the number of licenses that will be available for a given year," leaving to DNR's expertise the process and substantive considerations for developing those quotas. Wis. Stat. §29.185(3)(bn)1; 2011 Wis. Act 169 §21(1)(b). DNR's quota-setting regulation lists scientific factors upon which the agency "shall base" annual quotas. Wis. Admin. Code §NR 10.145(1m) (EmR1210 §27).

DNR is legally bound to address these factors but the circuit court's order prevents it from doing so. Instead, the agency has recently recommended a 200-wolf quota without consideration of the regulatorily-required scientific factors.⁴ A stay is necessary to protect the public interest in the sustainability of Wisconsin's wolf population from the damage that will result.

1. Population Estimates and Management Goals. Compliance with the order necessitates DNR disregarding two scientific considerations key to the agency's legal obligation to conserve wolves: "[p]opulation estimates and trends" and "[p]opulation goals established in a species management plan approved by the [NRB]." *Id.* As to the first, DNR Administrator Keith Warnke testified before the circuit court that DNR has no accurate population count at this time, that the last available numbers are from May 2020, and that the agency cannot estimate the current population based on those numbers. (Hr'g Trp. at 57:4-58:19.) As to the second, DNR recognizes the urgent need to update its decades-old Wolf Management Plan—especially its scientifically invalidated population goal of 350

⁴ DNR, "Memorandum Re: February 2021 wolf harvest," *available at* <https://widnr.widen.net/view/pdf/sbdtbr1v2w/2021-02-2A-Special-meeting-wolf-quota.pdf?t.download=true&u=ulxjqn> ("2021 Green Sheet").

wolves statewide—and its intent to do so before opening a November 2021 season.⁵ But the circuit court’s order has forced DNR to set quotas based on this outdated plan, calibrated to aggressively reduce the population toward a debunked goal.⁶

Wolf experts have testified that the 350-wolf management goal set in 1999 was based on disproven scientific assumptions and badly needs revision. Former Department wolf expert Richard Thiel — who served as a wolf biologist for the agency for 34 years and co-drafted the Wolf Management Plan — testified before the Senate⁷ and Assembly⁸ committee hearings on the Wolf Hunt Statute. Mr. Thiel stated that he became “very uncomfortable” with intentionally reducing Wisconsin’s wolf population to 350, and understood the basis for that goal “because I co-wrote it, and it is based on information that is 20 years old.”⁹ He noted that population goals

⁵ DNR, Press Release (Dec. 4, 2020), *available at* <https://dnr.wisconsin.gov/newsroom/release/39871>

⁶ See 2021 Green Sheet (recommending 200-wolf quota based on 350-wolf management goal).

⁷ *Hunting and Trapping of Wolves: Hearing on SB 411 Before the S. Comm. on Natural Resources & Env’t.*, 2011 Leg., 100th Sess. 02:22:16 (Wis. 2012), <https://wiseye.org/2012/02/28/senate-committee-on-natural-resources-and-environment-part-1-of-3/> (“Senate hearing”).

⁸ *Hunting and Trapping of Wolves: Hearing on AB 502 Before the Assemb. Comm. on Natural Resources*, 2011 Leg., 100th Sess. 04:02:00 (Wis. 2012), <https://wiseye.org/2012/02/01/assembly-committee-on-natural-resources-28/> (“Assembly hearing”).

⁹ Assembly hearing at 04:27:17.

change as counting becomes more accurate, and that managing wolves down to 350 “is just not reasonable at this point in time.”¹⁰

Professor Tim Van Deelan—a wildlife biologist who has served and collaborated with DNR and several hunting groups, co-authored the Wolf Management Plan, and served on the Wolf Advisory Committee¹¹—testified similarly, explaining that the population target was based on an outdated assessment of Wisconsin’s “carrying capacity” for wolves, which DNR now understands is far higher, and that setting quotas to meet that goal “run[s] the risk of destabilizing the population.”¹²

2. Harmful Impacts of an Unprecedented Late-Winter Hunting Season. Disregarding science and public process to force a hunting season would be harmful at any time, but experts agree that it would be especially destructive now because it would interfere with wolf breeding season and DNR’s annual population survey. Former DNR wolf expert Adrian Wydeven, who served as a wildlife biologist for DNR for over 30 years and

¹⁰ *Id.* at 04:34:02.

¹¹ Assembly hearing at 03:22:50; Senate hearing at 02:46:33.

¹² Assembly hearing at 03:32:36.

led the state's wolf recovery program from 1990-2013, testified at NRB's January 22, 2021 special meeting.¹³ He explained:

Starting a wolf harvest in mid-winter could potentially disrupt breeding activity, cause packs to dissolve, and cause other negative effects on wolf populations. Mid-winter disruptions of wolf behavior may also disrupt the ability of wolf trackers to be able to obtain reasonable counts on the wolf population. All portions of Wisconsin wolf range will be open to hunting with hounds, which has the potential of being very disruptive to wolf territorial and breeding behavior.¹⁴

Asked why DNR could not simply set a quota based on the percentages utilized for past wolf hunts, Mr. Wydeven explained that “[w]e are still dealing in an area of totally unknown,” as the state has never had a hunt even extend *into* January or February.¹⁵ Each previous wolf hunt ended “well before we have our breeding season occur in wolves.”¹⁶ He added that hunting during breeding season is likely to cause “additive mortality” exceeding established quotas by “disrupting breeding behavior within packs” and killing “females that already have had pups.”¹⁷

His testimony echoes DNR biologist Richard Thiel's before the legislative committees in 2012, which expressed concerns about “a harvest

¹³ NRB, Special Meeting 02:08:25 (Jan. 22, 2021), <https://dnrmedia.wi.gov/main/Play/731c92f70bb84be69b8f69ef1ccbb99c1d?catalog=9da0bb432fd448a69d86756192a62f1721> (“NRB meeting”).

¹⁴ NRB meeting at 02:09:55.

¹⁵ NRB meeting at 02:19:55.

¹⁶ *Id.*

¹⁷ *Id.*

for wolves that includes all of the breeding season, January and February.”¹⁸ Mr. Thiel warned that a February hunting season would disrupt DNR’s ability to “professionally manage this state’s wolf population,” as it “would knowingly interfere with” the annual population census: “[DNR’s] best tool in measuring the size of that population.”¹⁹

This testimony underscores the importance of adhering to the Wolf Hunt Statute and giving effect to every word, including its provision that a hunt begin in early November. Wis. Stat. §29.185(5)(a). The Wolf Hunt Statute as adopted allows a season to continue *through* February, but the Legislature never contemplated that a hunting season would be held *only* in February. Such a biologically unsound proposal was neither proposed nor adopted, and the Legislature was specifically informed of the dangers of wolf-hunting in February. The Wolf Hunt Statute reflects these concerns by providing that a wolf hunting season must only begin in November, and granting DNR authority to close wolf hunts before the end of the season “if necessary to effectively manage the state's wolf population.” *Id.* §29.185(5)(a), (c).

¹⁸ Senate hearing at 02:24:14, 02:26:58.

¹⁹ *Id.* at 02:27:31.

If this Court denies a stay, DNR will be forced to open an immediate wolf season uninformed by science, with potentially catastrophic effects. Hundreds of wolves will be killed in a matter of weeks pursuant to quotas calibrated toward aggressive population reduction goals set by the dead hand of a 1999 Management Plan regarded by experts, including DNR, as biologically unsupportable. Worse, the court-ordered hunt will open during breeding season, exposing pregnant females to widespread mortality and disrupting DNR's ability to count wolves to inform future management. A stay is necessary to protect the public interest of all Wisconsin citizens in the sustainability of the state's wolves.

B. A Stay Protects the Public Interest in Stakeholder Participation

A stay would also protect the public interest in transparency and public input in a decision-making process of great public concern. DNR has explained its usual process for developing hunting quotas that reflect science and stakeholder input; rushing a hunt for the remainder of February will – and has already begun to – necessitate skirting these important steps. Mot. For Expedited Stay at 5-11 (Feb. 12, 2021).

DNR has already been forced, for example, to skip convening the Wolf Advisory Committee—a key mechanism for evaluating recent science

and considering stakeholder and tribal input.²⁰ What public process *has* been afforded has been rushed and ineffectual. NRB notified the public the afternoon of Friday, February 12th that it would accept comment on the wolf quota until the morning of the Sunday, February 14th, but did not actually publish the quota itself until the Saturday, February 13th, and did not allow “[r]equests to testify.”²¹ The published DNR quota recommendation that followed stands in stark contrast to similar proposals from previous years, which involved stakeholder and tribal involvement, analysis of critical scientific factors, and quotas allocated and justified by zone.²²

These rushed steps do not mean that it is administratively possible, let alone in the public interest, for DNR to proceed with a February hunt. But this Court should not hold the agency’s attempts to avoid being held in contempt against them. A stay is necessary to prevent DNR from being pushed further down a path that shortcuts science and agency regulations, and replaces public participation and legally required tribal consultation with empty gestures.

²⁰ See 2021 Green Sheet.

²¹ <https://dnr.wisconsin.gov/About/NRB/2021/February-Special>.

²² Compare 2021 Green Sheet with <https://p.widencdn.net/apsfdt/06-14-3B2> (2014 Green Sheet).

Before opening its planned November 2021 season, DNR intends to engage with stakeholders as it revisits its outdated Management Plan and reconsiders the population goals that inform seasonal quotas.²³ It is exactly this type of full and public process that DNR must be allowed to conduct. Failure to grant a stay will deny DNR and stakeholders invested in sustainable wildlife management the ability to ensure that quotas are based on sound science and reflect public values.

CONCLUSION

The Circuit Court improperly granted the extraordinary writ of mandamus and erroneously denied DNR's request for a stay. Because DNR is likely to succeed on appeal, public interest strongly favors a stay, and the circuit court failed to consider the appropriate factors, *amici* respectfully request that this Court grant DNR's motion.

²³ DNR, Press Release (Dec. 4, 2020), *available at* <https://dnr.wisconsin.gov/newsroom/release/39871>

Respectfully submitted this 15th day of February, 2021.

PINES BACH LLP

/s/ Christa O. Westerberg

Christa O. Westerberg, SBN 1040530

*Attorneys for Sierra Club, The Humane Society of the
United States, and Center for Biological Diversity,
Amicus Curiae*

122 West Washington Ave
Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
cwesterberg@pinesbach.com

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief contains 13 point font size for body text and 11 point font size for footnotes. The length of this brief is 3,000 words.

I further certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

/s/Christa O. Westerberg

Christa O. Westerberg, SBN 1040530