

**FILED**  
**11-18-2021**  
**Clerk of Circuit Court**  
**Cindy R. Hamre Incha**  
**2021CV000031**

**BY THE COURT:**

**DATE SIGNED: November 18, 2021**

Electronically signed by Honorable Bennett J. Brantmeier  
Circuit Court Judge

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 4

JEFFERSON COUNTY

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**HUNTER NATION INC. and  
LUKE HILGEMANN,**

Plaintiffs,

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
DECISION & ORDER**

-vs-

**WISCONSIN DEPARTMENT OF  
NATURAL RESOURCES,  
WISCONSIN NATURAL RESOURCES  
BOARD and PRESTON COLE in his official  
capacity as Secretary of the Wisconsin  
Department of Natural Resources,**

Case No. 21CV31

Defendants.

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The above captioned matter came on for Oral Argument on August 24, 2021 at 1:30 p.m. before the Honorable Bennett J. Brantmeier. The Plaintiffs appeared by Attorney Anthony Francis LoCoco and Attorney Lucas Thomas Vebber. The Defendants appeared by Assistant Attorney General Gabe Johnson-Karp. The Court Dacasted or livestreamed the hearing for the general public to view.

The Parties filed competing Motions for Summary Judgment agreeing that there are no genuine issues of material fact and the matter can be resolved as a matter of law. Summary Judgment is appropriate when “[t]he judgment sought (can) be rendered if the pleadings, . . . together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law” . . . §802.08 Wis. Stats.

Plaintiffs assert they are entitled to a “Declaratory Judgment.” Defendants argue the controversy is “moot.”

The Court had previously dispensed with the Mandamus requested relief by issuing a Writ of Mandamus, ordering the DNR to follow the legislative mandate to hold a wolf season in February, 2021. Although Defendants appealed that decision, the Court of Appeals held “the grant of mandamus does not resolve the entire matter in litigation” because “the claims for declaratory relief remain pending.” An examination of the pleadings herein establish that the justiciable controversy remains.

“Plaintiffs seek a declaration that Defendants . . . [violated] state statutes requiring . . . the hunting and trapping of wolves.” (See Doc. 4 Complaint para. 33; Denied by DNR Doc. 76 para. 33). They are also alleging a constitutional violation.

“Wisconsin Stat. §29.185(1m) provides that [i]f the wolf is not listed on the federal endangered list and is not listed on the state endangered list, the department [of natural resources (“DNR”)] **shall** allow the hunting and trapping of wolves.” (Doc. 4 Complaint para. 36 (emphasis added); DNR Answer, Doc. 76 para. 36 . . . “Wis. Stats. §29.185(1m) speaks for itself.”)

“Wisconsin Stat. §29.185(5)(a) requires the DNR to “establish a single annual open season for both hunting and trapping wolves that begins on the first Saturday in November of each year and ends on the last day of February of the following year.”” (Doc. 4 Complaint para. 37; DNR Answer Doc. 76 para. 37 . . . “Wis. Stats. §29.185(5)(a) speaks for itself.”)

“Because the wolf is not currently listed on the federal or state endangered species lists, Defendants are required to permit hunting and trapping of wolves through the end of February. They possess no discretion to simply wait until the next season comes around. Defendants’ own

apparent estimation that the hunting and trapping of wolves is not a pressing matter is irrelevant in light of the Legislature's decision.” (Doc. 4 Complaint para. 38; DNR Answer denies the allegations in paragraph 38). “Paragraph 38 contains legal conclusions to which no responsive pleading is required. To the extent a response is required, DNR denies. . .” (Doc. 76 Answer para. 38 (emphasis added)).

“Defendants’ failure to permit the hunting and trapping of wolves violates both §§29.185(1m) and 29.185(5)(a).” (Doc. 4 Complaint para. 39; DNR Answer denies, Doc. 76 para. 39 (emphasis added)). Plaintiff then asserts losses as a result of the alleged DNR violations (see Doc. 4 Complaint para. 40). “Plaintiffs seek a declaration that by refusing to permit the hunting and trapping of wolves Defendants are violating the constitutional right of Plaintiff Hilgemann and the constitutional rights of the Wisconsin members of Plaintiff Hunter Nation to fish, hunt, trap and take game.” (Doc. 4 Complaint para. 42; DNR Answer denies that Plaintiffs are entitled to the relief requested in Paragraph 42; Doc. 76 para. 42). (Emphasis added).

“Article I, §26 of the Wisconsin Constitution provides that “the people have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law.”” (Doc. 4 Complaint para. 43; Doc. 76, DNR Answer para. 43 speaks for itself). “The Wisconsin Legislature has seen fit to permit the hunting and trapping of wolves from November through February. The ability to hunt during these times is of constitutional dimension.” (Doc. 4 Complaint para. 46; DNR Answer denies the allegations in paragraph 46). “Paragraph 46 contains legal conclusions to which no responsive pleadings is required. To the extent a response is required, DNR denies”. . . (Doc. 76 para. 46 (emphasis added)).

“By ignoring the Legislature’s lawful commands, Defendants are violating those constitutional rights.” (Doc. 4 Complaint para. 47; DNR Answer denies, Doc. 76 para. 47).

“Further, Defendants’ decision to wait until November 2021 to permit hunting is not “reasonable” within the meaning of Wis. Const. art. I, § 26.” (Doc. 4 Complaint para. 48); Denied by DNR Answer (Doc. 76 para. 48).

Although an examination of the pleadings show that legal issues are disputed between the Parties, the facts are not, making a decision, as a matter of law, appropriate. Plaintiff asserts that the appointed agency (DNR) should not be left to act as they believe or at the direction of the executive branch, they must follow the legislative mandate. The DNR through its answers and actions dispute Plaintiffs’ assertion.

From the review of the pleadings, it is clear to the Court that the DNR was on notice that Plaintiff is seeking a declaratory judgment of first impression alleging that the DNR’s actions, of not holding a wolf hunt when the wolf was delisted mid-season, violated their statutory and constitutional rights which is clearly disputed by the DNR. The Court addresses the parties’ claims.

### **FINDINGS OF FACT<sup>1</sup>**

1. The Parties have put to issue their legal positions as alleged in the pleadings, a portion of which are recited above.
2. An elected legislative body passed the wolf hunting law which was signed into effect by elected Governor Walker.
3. The DNR is the state agency required by law to establish an open season for hunting and trapping wolves. If the Legislature had wished to except the DNR from permitting the hunting of wolves when delisting occurs mid-season, it could easily have done so but did not.

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<sup>1</sup> The Court adopts as if set full herein, the findings, conclusions and orders from the Writ of Mandamus.

4. Plaintiff is not seeking money damages, but a declaration and injunction to prevent a future harm.

5. Plaintiffs' claims seek prospective relief. The controversy over the listing or delisting of the gray wolf has for decades resulted in a constant tug-of-war often accompanied by litigation. The phrasing of Wis. Stat. §29.185(1m) itself – use of delisting as a trigger for DNR's obligations – is a reflection of the substantial possibility of future delistings during mid-season. Plaintiffs' claim is for "Prospective Relief" which is established by the thorough review of the pleadings and the continued controversy between the parties on the requirements of the law. The circumstance alleged in the complaint continue to cast a substantial adverse effect on the Plaintiff.

6. Once a hunt is lost, it cannot be recovered.

7. Plaintiff showed multiple mid-season delistings that have occurred in recent years. Long before delisting occurred, the DNR knew it was coming. On March 15, 2019, the USFWS proposed removing the gray wolf from the federal endangered species list. 84 Fed. Reg. 9648 (March 15, 2019).

In fact the DNR bolstered Plaintiffs' argument in their brief:

“On November 3, 2020, the United States Fish and Wildlife Service published a final rule delisting the gray wolf from the federal list of endangered species, effective January 4, 2021.” *See Removing the Gray Wolf (Canis lupus) from the List of Endangered and Threatened Wildlife 85 Fed. Reg. 69778, 69778 (Nov. 3, 2020)*. Soon thereafter the Department issued a press release reaffirming its support for state management of wolves and its commitment to holding a wolf hunt in 2021 consistent with Wisconsin law. The Department announced that the 2021 wolf season would begin on November 6, 2021(See Doc. 18 ¶9-10 Ex. 1, 3:1). Defendants' Brief in Support of Summary Judgment; Document 86, para. 2 [sic].

8. In the DNR's view, because the delisting was effective "mid-season", that is during the statutorily prescribed November to February open season, it could simply decline to hold the remainder of the 2020-21 season and instead wait until November 2021.

9. Plaintiffs have members who would like to exercise their constitutional and statutory rights to hunt wolves but, because of DNR's failure to follow state law, they have been unable to do so in the past and will be unable to do so again in the future if DNR is not ordered to cease its illegal conduct. They have suffered and will again suffer a violation of those rights.

10. The DNR keeps the scientific data of the gray wolf current each year and despite having current information available and knowing the delisting was coming, it met to discuss if they would be holding a season (when they knew the gray wolf was going to be delisted mid-season) and not a meeting on how they were going to hold the season as directed by the Legislature.

### **CONCLUSIONS OF LAW**

11. The DNR's refusal to immediately establish an open season for the hunting and trapping of wolves through the end of February 2021, when the wolf was delisted between November 2020 and February 2021, violated Wis. Stat. §§29.185(1m), (5)(a) and Wis. Const. Art. I § 26.

12. The relief sought by Plaintiff have prospective effect and are not moot. An appointed agency of government must follow the law established by the elected Legislature and does not have discretion not to.

13. A declaration as to past violations would not merely "resolve a difference of opinion," but would have the prospective effect of "teach[ing] the [government actor] what to do

under the law to avoid future violations.” *State ex rel. Badke v. Village Bd. of Greendale*, 173 Wis. 2d 553, 567, 494 N.W.2d 408 (1993).

14. Alternatively, Plaintiffs’ claims fit the exception to mootness as they are of “great public importance.” State law not federal guides this Court. (1) A justiciable suit was filed here on a live controversy between the Parties; (2) Defendant has been found by this Court to have violated the Wisconsin Statutes and Wisconsin Constitution; (3) the State agency continues to refuse to acknowledge that it did so or to provide sufficient assurances that it will not violate and follow the law in the future. The final Judgment by this Court is necessary as the issue is of “great public importance.”

15. Plaintiffs’ claims are ripe and the declaratory relief sought is appropriate and will serve a useful purpose. Ripeness requires that the facts be sufficiently developed to avoid Court entangling themselves in the abstract disagreements. *Loy v. Bunderson*, 107 Wis. 2d 400 (1982).

16. Given the Writ of Mandamus was limited in scope to a single event (the February 2021 hunt), nothing prevents the DNR from ignoring the law and engaging in exactly the same conduct the next time the gray wolf is delisted mid-season.

17. Plaintiffs’ claims are not barred by sovereign immunity. Plaintiffs are not seeking monetary damages. In fact, a declaratory judgment action does not require Plaintiff to file a notice of claim and injury on the governmental body before bringing suit. See, *Schmeling v. Phelps*, 212 Wis. 2d 898, 569 N.W.2d 784 (Ct. App. 1997). Nor is Ch. 227 Wis. Stats. the appropriate avenue for Plaintiff to bring suit into Circuit Court.

18. Requiring Plaintiff to rush back into court seeking another emergency Writ of Mandamus each time a mid-season delisting occurs is not an efficient use of judicial resources

and will only produce additional uncertainty in the law and impact Plaintiffs' statutory and constitutional rights.

19. The Court concludes that “[U]nder Wisconsin law, [i]f the wolf is not listed on the federal endangered list and is not listed on the state endangered list, the department [of natural resources] **shall** allow the hunting and trapping of wolves.” Plaintiffs’ Brief in Support of Summary Judgment; Doc. 82 para. 6 quoting Wis. Stat. §29.185(1m). (Emphasis added).

20. The DNR, knowing that the gray wolf would be delisted mid-season, violated Plaintiffs’ statutory and constitutional rights by not setting a wolf season as directed by the Legislature.

21. The Plaintiff acted timely with bringing their action. Defendants’ argument of lack of timeliness supports Plaintiffs’ claim for a final Judgment to avoid this scenario in the future.

22. The Court concludes there is “justiciable controversy”. Plaintiffs possess statutory and constitutional rights which have been violated once by DNR and will be violated again in the future if DNR repeats its conduct.

23. The Court concludes the parties’ interests are adverse. Plaintiff believes DNR must hold a hunt upon any mid-season delisting and DNR believes Plaintiff does not have a right to the hunt and that the DNR is entitled to not immediately hold a hunt.

24. Plaintiff has a legal and constitutional interest in the controversy. The issue is ripe for judicial determination.

25. Again, the Legislature’s law and directives were clear, “mandatory and unequivocal” and directs the DNR to hold a hunt and not to exercise discretion, there will be a hunt. *DSG Evergreen Family Ltd. Partnership v. Town of Perry*, 2020 WI 23, ¶¶43-46, 390 Wis.

2d 533, 939 N.W.2d 564. The Declaratory Judgments Act does not require litigants to wait until a wrong has been “committed” or even “threatened.” *Lister*, 72 Wis. 2d at 307.

As stated in Plaintiffs’ briefing:

“Plaintiffs past harm is relevant in multiple ways: it shows that its fears of future injury are not hypothetical, “sufficiently develop[s] [the facts] to allow a conclusive adjudication,” and distinguishes this case from those in which the answer to only an abstract question is sought.” (Plaintiffs’ Reply Brief in Support of Motion for Summary Judgment; Doc. 92, para.12) [Internal cites omitted].

26. The threat of future injury has been shown by Plaintiff as based upon history and DNR actions, it is sufficiently probable that the DNR conduct will threaten Plaintiffs’ established rights.

27. The statutory and constitutional violations of the rights to hunt are not adequately compensable in damages.

28. When an alleged deprivation of a constitutional right is involved, no further showing of irreparable injury is necessary.

29. The equities weigh in favor of relief. Plaintiffs’ common law, statutory and constitutional rights to hunt require that the DNR obey the commands of the Legislature. The legislative directive on how to manage Wisconsin wolf population must be followed and the need to preserve judicial and litigant resources considered.

30. Statutory authority is explicit. DNR has no power to delay or cancel a wolf hunting season that appears in a statute.

31. The DNR violated §§29.185(1m) and (5)(a) and constitutional provisions when it refused to immediately establish an open season for the hunting and trapping of wolves through the end of February 2021.

**DECISION AND ORDERS**  
**DECLARATORY JUDGMENT**

The Court grants Plaintiff a Declaratory Judgment concluding and ordering that Defendants' refusal to establish an open season for the hunting and trapping of wolves on January 4, 2021 and ending on February 28, 2021, violated the legislative mandate in Wis. Stat. §§29.185(1m) and 29.185(5)(a) and Wis. Const. Art. I, § 26.

**PERMANENT INJUNCTION**

The Court grants Plaintiff a permanent Injunction requiring the DNR, when the wolf is listed on the federal and/or state endangered lists on the first Saturday in November of a given year but is no longer on those lists as of a subsequent date occurring prior to the last day of February of the following year (delisted mid-season), to begin the single annual open season required by the Legislature (Wis. Stat. §29.185(5)(a)) on that subsequent delisting date and end the season on the last day of that February.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL.