

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT I

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Case No. 2021AP\_\_\_\_\_

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HUNTER NATION INC.,  
and LUKE HILGEMANN,

Plaintiffs-Respondents,

v.

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,

Defendants-Appellants.

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**COMBINED EMERGENCY PETITION  
FOR PERMISSIVE APPEAL  
AND SUPPORTING MEMORANDUM**

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**INTRODUCTION**

As set forth in the Notice of Appeal, this Court need not consider the petition for leave to appeal, since this appeal arises from an order granting a writ of mandamus—a final, appealable order that disposes of the entire matter in litigation. Wis. Stat. § 808.03(1).

But if this Court would conclude that Defendants Department of Natural Resources, et al. (the “Department”) is not entitled to an appeal as of right pursuant to Wis. Stat. § 808.03(1), then the Department more than satisfies the necessary criteria to warrant a permissive appeal. The appeal will materially advance termination of the litigation, the issues on appeal are the only questions in the case: whether Wis. Stat. § 29.185 requires a wolf hunt right now, and whether mandamus is proper to order that hunt. This core issue—whether to hold a wolf hunt over the next sixteen days—is an issue of general importance for the entire state. And if this Court fails to grant a permissive appeal now, the case will essentially end without appellate review.

On top of all of that, the Department is likely to succeed on the merits of its challenge to the circuit court’s mandamus order. The circuit court granted the writ based on its incorrect legal conclusions about the plain language of Wis. Stat. § 29.185, and without any showing of a “plain, positive duty” on the Department to hold a hunt now. This Court should accordingly grant the Governor leave to appeal the circuit court’s order.

Because only sixteen possible days of hunting now remain in the court-ordered wolf-hunting season, and because the Department is currently undertaking substantial efforts to comply with the circuit court’s order, the Department requests expedited decision on this petition, along with the requested stay. As described further in the stay motion, the Department respectfully requests that this Court issue its decision on this petition no later than 5:00 p.m. Monday, February 15.

## STATEMENT OF THE ISSUES PRESENTED

1. Whether Wis. Stat. § 29.185 requires the Department to immediately hold a wolf hunt.

The circuit court answered yes. This Court should answer no.

2. Whether a writ of mandamus is proper to order the Department to hold that hunt.

The circuit court entered an order issuing a writ. This Court should reverse the order and vacate the writ.

## STATEMENT OF THE CASE<sup>1</sup>

### I. Statute at issue.

Three subsections of Wisconsin's wolf-hunt statute control this case. First, Wis. Stat. § 29.185(1m) provides that “[i]f the wolf is not listed on the federal endangered list . . . the department shall allow the hunting and trapping of wolves and shall regulate such hunting and trapping *as provided in this section.*”

Second, the statute prohibits unlicensed hunting and trapping of wolves: “Except as authorized under a wolf harvesting license, no person may hunt or trap a wolf.” Wis. Stat. § 29.185(2)(a).

Third, the statute limits the number of seasons DNR may authorize and mandates when the season must start once wolves are delisted: DNR “shall 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.” Wis. Stat. § 29.185(5)(a).

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<sup>1</sup> These background facts are identical to those included in the stay motion.

## **II. Factual history.**

In 2012, facing the likely delisting of wolves from the federal endangered species list, the Wisconsin Legislature enacted Wis. Stat. § 29.185, authorizing the first legal wolf hunt in recent Wisconsin history. Hunts were held in 2012, 2013, and 2014, until the wolf was returned to the federal list in 2015 as a result of a federal court decision invalidating the previous delisting. *See Humane Soc’y of the United States v. Jewell*, 76 F. Supp. 3d 69 (D.D.C. 2014), *aff’d sub nom. Humane Soc’y of United States v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017).

### **A. The Department regulates wolf hunting using legally required science-based quotas.**

As required by Wis. Stat. § 29.185, the Department administered the 2012–2014 hunts using the best available scientific data to determine quotas. This quota-setting process is governed by statutory and administrative code provisions, and also involves court-recognized treaty obligations with Wisconsin’s Ojibwe tribes. *See, e.g.*, Wis. Stat. § 29.185(3)(bn)1. (Department “shall determine the number of licenses that will be available for a given year”); *see also* Wis. Admin. Code NR § 10.145(1m) (EmR. 1210) (quota-setting process).

For example, the Department “shall . . . annually” determine a wolf-harvest quota and must consider multiple types and sources of information to do so. Wis. Admin. Code NR § 10.145(1m) (EmR. 1210). These include many biological considerations like “[p]opulation estimates and trends,” “population goals,” “projected impacts of wolf harvest quotas,” “the ecological impacts of wolf predation,” the ecological importance of wolves,” “[t]he impact of disease, illegal harvest, and other causes of mortality on the wolf population,” and “[c]onsideration of conservation genetics.” Wis. Admin. Code NR § 10.145(1m)(a), (b), (c), (e), (f), (i), (l). Another

important consideration is Wisconsin's Ojibwe tribes' "[o]ff-reservation treaty rights established under *Lac Courte Oreilles Indians v. State of Wis.*, 775 F. Supp. 321, 323 (W.D. Wis. 1991) and on-reservation jurisdiction of Native American tribes." Wis. Admin. Code NR § 10.145(1m)(m).

The quota-setting process begins with estimating current wolf population numbers statewide, based on data from winter wolf-track surveys and GPS-collared wolves. Those data are then incorporated into a population model that projects wolf populations in various areas throughout the state. The model's population estimates form the basis for Department staff's initial quota proposal. (Dkt. 18 ¶¶ 7, 17–18; Dkt. 21:2.)

That proposal is then delivered to the Wolf Advisory Committee: a group of wolf experts, a tribal representative, and stakeholders in the wolf management process. The committee then reviews the proposed quota and available data and makes its own determination about a proposed quota. With the committee's input, Department staff then forward a quota recommendation to the Natural Resources Board for final approval. (Dkt. 18 ¶¶ 18–20; Dkt. 20.)

Before the Department issues licenses, Wisconsin's Ojibwe tribes are given the opportunity to make a declaration of intent to harvest up to fifty percent of the expected quota, based on the tribes' rights reserved by treaty. The tribes' declaration influences the number of licenses ultimately available through the state's limited draw. (Dkt. 18 ¶ 21; Dkt. 20.)

In past years, this quota-setting process—beginning with the completion of wolf-population surveys in late winter and ending with the Board's adoption of a final quota—has taken approximately three months. (Dkt. 18 ¶ 22; Dkt. 20.)

**B. The Department receives and processes applications for wolf-harvest licenses and distributes carcass tags to license recipients.**

While the quota is being developed, the Department receives applications for wolf-harvest licenses (hunting and trapping). In past years, the application period began on March 1, the first day of the new license year and the same day the application period opens for all other limited draw furbearers, and ran through August 1. For the wolf-harvest season set to begin in November of this year, the Department plans to open the license application period on March 1. (Dkt. 18 ¶¶ 23–25; Dkt. 23:1.)

After the application period closes, the Department begins awarding wolf-harvest licenses to successful applicants. Like the quota-setting process, “the number of wolf harvesting licenses to be issued” depends on multiple, code-required considerations. *See* Wis. Admin. Code NR § 10.145(1u). However, unlike the application process, awarding licenses cannot begin until the quota is finalized, because the number of licenses available through separate programs depends on the number of applications received. If the number of applications exceeds the number of licenses available under the quota, the Department must award fifty percent of licenses by random drawing and award the remaining fifty percent according to a preference-point system.<sup>2</sup> *See* Wis. Stat. § 29.185(3)(bn); (*see also* Dkt. 18 ¶ 26).

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<sup>2</sup> The preference-point system awards points to license applicants who are either unsuccessful in the lottery draw, or who opt to only receive a point (as opposed to an opportunity for a license) that year. Wis. Stat. § 29.185(3)(bn)3. Eventually, license applicants with enough accumulated preference points can receive a license based on those points. *See id.*

After the drawing is conducted, the Department updates its automated licensing system to ensure that successful applicants can purchase the correct license. Successful applicants are then notified and may purchase their license. Following purchase, the Department mails a carcass tag to license holders. (Dkt. 18 ¶ 27.)

In past years in which a wolf hunt was held, the time for issuing licenses and distributing carcass tags has run between six and ten weeks. This process is completed before the season opens so that all hunters and trappers can receive their tags before opening day, ensuring that all license holders have equal opportunity to harvest. (Dkt. 18 ¶¶ 28–29.)

### **C. Wolves are delisted in early 2021.**

On November 3, 2020, the United States Fish and Wildlife Service announced a final rule that would remove the gray wolf from the federal endangered species list, effective early 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 after that announcement, and before the wolf was delisted, DNR 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, as required by Wis. Stat. § 29.185(5)(a). (*See* Dkt. 18 ¶¶ 9–10; Dkt. 19, 21:1.)

During that time the Department has continued its preparations and outreach for the upcoming November season. As one example, Department staff and volunteers are currently collecting data necessary for population estimates that will drive the quota for the 2021 wolf hunt. For another example, the Department is working with trapper-education providers to ensure that enough classes will be scheduled over

the upcoming months to accommodate demand for the course, which is required to harvest a wolf by trapping. (Dkt. 18 ¶¶ 11–14; Dkt. 20–23.)

After wolves were delisted on January 4, 2021, two legislative committees held a joint informational hearing to discuss the Department’s plans for the 2021 wolf hunt, including whether it was possible to hold an early season starting immediately. The Department representative—Keith Warnke, the Administrator of the Division of Fish, Wildlife, and Parks—explained in written testimony that the wolf-hunt statute instructs the Department to conduct a single annual wolf season, which must begin on the first Saturday in November.

Warnke also detailed the logistical requirements of implementing a wolf harvest season, discussed above. In particular, he emphasized the time necessary to gather population data and develop a science-based harvest quota; the process of coordinating with Wisconsin’s tribal partners and the Ojibwe tribes’ option to make a harvest declaration; and the process by which the Natural Resources Board ultimately adopts a final quota. (Dkt. 18 ¶ 30; Dkt. 20–21.)

The Natural Resources Board also held a hearing on the question of wolf hunting in 2021, and whether a hunt could occur immediately. After hearing from Administrator Warnke as well as the Department’s Deputy Secretary, Todd Ambs, and dozens of stakeholders in the wolf-management process, the Board ultimately rejected a motion that would have instructed the Department to hold a hunt before November 2021. (Dkt. 18 ¶¶ 33–36; Dkt. 22–23.)

### **III. Procedural history.**

Plaintiffs filed this lawsuit ten days after the Natural Resources Board declined to order a February hunt. (See Dkt. 1.) Plaintiffs claimed that Wis. Stat. § 29.185(1m)



and (5)(a) require the Department to hold a wolf hunt immediately and through the end of February, and sought a temporary injunction or, in the alternative, a writ of mandamus ordering the Department to do so. (Dkt. 1; 6.)

Following expedited briefing and a hearing, the circuit court denied Plaintiffs' request for a temporary injunction but granted the writ of mandamus. The court concluded that the Department had a plain, positive duty to hold a hunt in January and February 2021; that Plaintiffs had a clear right to hunt wolves under both Wis. Stat. § 29.185 and Wis. Const. art. I § 26; that Plaintiffs would be substantially damaged by not being able to hunt wolves before November; and that, because the court had denied a temporary injunction, the Plaintiffs had no adequate remedy at law.<sup>3</sup> The court thus ordered that the Department must "allow the hunting and trapping of wolves in an open season through the end of February 2021." (Dkt. 41 (writ); *see also* Dkt. 39 (order).)

After the court issued its order, the Defendants sought to clarify the scope of the court's mandate, pointing out the multiple and lengthy steps that are involved in "allow[ing] the hunting and trapping of wolves" (Dkt. 41:2) and requesting guidance on which of those steps the Department was required to skip or alter. The court declined to provide any specification of its order, stating instead that the Legislature had already directed what was to occur and that it was not the circuit court's role to redefine that process.

Defendants orally moved for a stay pending appeal. They pointed to the reasonable likelihood of success on appeal, particularly because the wolf-hunt statute does not impose a "plain, positive duty" regarding how (or even

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<sup>3</sup> The Department has requested an expedited transcript of the hearing; however, the transcript was not available at the time of this filing. Once received, the Department will promptly file a copy of the transcript with this Court.

whether) the Department must conduct a wolf hunt under the current circumstances. The Department also emphasized the substantial and irreparable harm the agency would suffer without a stay, due to the extraordinary administrative efforts that would be required to implement a wolf hunt over the next seventeen days. These difficulties, the Department pointed out, were amplified by the circuit court's refusal to clarify its order, leaving the Department to choose between complying with statutory and regulatory obligations and facing contempt for alleged noncompliance with the court's order. These harms, the Department noted, are public harms, in the form of potentially wasted government resources, thus further supporting a stay.

The court denied the stay, reiterating its analysis in support of mandamus and holding that those same considerations supported denying the stay.

## **ARGUMENTS IN SUPPORT OF PETITION**

### **I. This Court need not consider this petition for leave to appeal the circuit court's order for mandamus is a final, appealable order.**

First, this Court need not consider this petition for leave to appeal, because the Department has a right to appeal the circuit court's order granting a writ of mandamus.

In *State ex rel. Tiner v. Milwaukee County*, 81 Wis. 2d 277, 278–79, 260 N.W.2d 393 (1977), the court confronted this very issue. The notice of appeal in that case was taken from a writ of mandamus ordering Milwaukee County to provide emergency relief to a class of individuals who faced having their heat shut off. *See id.* at 278. Recognizing that appeals “are taken from either judgments or orders,” not simply writs, the court recognized that “the document issuing the writ is denominated an ‘order,’” and that its award of relief by preemptory writ of mandamus “is

therefore a final judgment.” *Id.* The supreme court thus treated the appeal as “one from a judgment granting the petition for a writ of mandamus.” *Id.*

So it is here. The circuit court entered an order granting the writ of mandamus, which requires the Department to immediately hold a wolf hunt through the end of February. This is the ultimate relief that Plaintiffs sought, and this situation is therefore identical to the situation in *Tiner*.

In opposing the entry of a final order below, Plaintiffs contended that their requests for declaratory relief preserve some segment of the litigation as yet to be resolved. The circuit court’s conclusion, however, indicated that nothing remains to be resolved, since the court plainly declared its view that the Department violated the law by not holding a wolf hunt starting on January 4, 2021, and that it was presently required to do so.<sup>4</sup>

This Court should accept the notice of appeal without further consideration of this petition for leave to appeal. If it accepts the notice of appeal, it need not consider this petition for leave to appeal.

**II. If the circuit court order is not final, the Department more than satisfies the criteria necessary to warrant a permissive appeal.**

Should this Court disagree and hold that the Department may not appeal the circuit court’s order as of right, then the Department easily meets the criteria for this Court to grant a permissive appeal.

Pursuant to Wis. Stat. § 808.03(2), an order not appealable as of right may be appealed to this Court if it

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<sup>4</sup> The Department has requested an expedited transcript of the hearing; however, the transcript was not available at the time of this filing. Once received, the Department will promptly file a copy of the transcript with this Court.

determines that the appeal will: (a) materially advance termination of the litigation or clarify further proceedings in the litigation; (b) protect the petitioner from substantial or irreparable injury; or (c) clarify an issue of general importance in the administration of justice. This Court must also examine whether the defendant has a substantial likelihood of success on the merits. *State ex rel. Hass v. Wisconsin Ct. of Appeals*, 2001 WI 128, ¶ 13, 248 Wis. 2d 634, 636 N.W.2d 707

**A. An appeal here will materially advance termination of the litigation.**

To start, an appeal here will materially advance termination of the litigation. Wis. Stat. § 808.03(2)(a).

The circuit court rested its reasoning for granting mandamus on its legal conclusion that Wis. Stat. § 29.185 requires the Department to hold a wolf hunt right now. That was incorrect and is likely to be reversed on appeal.

The various errors in the circuit court’s reasoning are set forth more fully in the Department’s accompanying stay motion and are not repeated in full here. In sum, four separate errors would support reversal.

First, the circuit court misinterpreted the wolf-hunt statute, Wis. Stat. § 29.185(5)(a). The circuit court’s reading erroneously assumed that the Department could start 2020’s season on a random day in 2021, rather than, as the statute commands, on “the first Saturday in November.” The court’s interpretation was unmoored from the statutory text and is likely to be reversed on appeal.

Second, by simply ordering the Department to “allow the hunting and trapping of wolves in an open season through the end of February 2021” (Dkt. 41:2),<sup>5</sup> the circuit court

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<sup>5</sup> Docket entries cited herein are included as attachments to the accompanying stay motion.

misinterpreted the mandamus standard by ordering the Department to fulfill a duty that is not “plain and positive.” Ordering mandamus here when the Department may exercise of discretion as to when and how *preparation* of the hunt is implemented, was erroneous.

Third, the circuit court refused to provide any guidance on its vague “follow the law” mandate, leaving the Department to guess the meaning of that order, potentially leaving it open to the penalty of contempt.

Fourth, the circuit court did not meaningfully analyze the factors relevant to the Department’s stay request, and effectively relied on its analysis of the mandamus elements to deny the stay. This legal error also constitutes an erroneous exercise of discretion.

Each of these errors, discussed at greater length in the stay motion, independently illustrates how this appeal will materially advance this litigation—by ending it.

**B. An appeal here will protect the Department, and in turn the people of Wisconsin, from significant, irreparable injury.**

Second, an interlocutory appeal here is necessary to protect the Department, and in turn the Wisconsin public, from irreparable injury. Wis. Stat. § 808.03(2)(b).

The Department is already suffering irreparable harm as it seeks to comply with the circuit court’s order. Department staff and resources are being diverted from other important, pressing work. These commitments of time and resources “will result in costs irrevocable.” *Garcia-Mir v. Meese*, 781 F.2d 1450, 1456 (11th Cir. 1986).

A separate harm to the Department arises from the uncertainty of the circuit court’s “follow the law” mandate. Without clear guidance about how the Department must proceed over the next sixteen days, time and resources will be

wasted simply trying to figure out what the court's order required, and which of the Department's statutory, regulatory, and treaty-related obligations it must choose to forgo to comply with the court's order. This effort will be all the more fraught with allegations of contempt looming over every decision.

The public will also suffer irreparable harm without an immediate appeal. Under the circuit court's order, the Department must hurriedly implement a hunt, contrary to law and the Department's intended practice of conducting a wolf hunt based on sound science and a transparent, collaborative process. This includes incorporating the interests and input of Wisconsin's Ojibwe tribes. Without an immediate appeal, these interests will be permanently damaged.

An immediate appeal is thus necessary to avoid further harm to the Defendants and the public.

**C. The Department's authority to conduct a wolf hunt under Wis. Stat. § 29.185 is an issue of general importance.**

Third, the scope of the Department's authority to hold a wolf hunt under Wis. Stat. § 29.185 is unquestionably an issue of general importance in the administration of justice. Wis. Stat. § 808.03(2)(c). There has been substantial debate on this issue, most immediately over the past three months since the federal government announced that wolves would be removed from the federal endangered species list. (*See* Dkt. 18 ¶¶ 37–41; Dkt. 3–5.)

Equally important in the administration of justice is determining the propriety of mandamus relief directed at a state agency under circumstances like those presented here. Other than commanding the Department to hold a “single annual season” for wolves, which must begin “on the first Saturday in November,” the wolf hunt statute provides no

plain or positive directive on the Department's authority or duty to *start* a wolf season in January or February. Whether mandamus relief is appropriate in this circumstance is certain to recur and is very important in the effective functioning of state government.

**D. The Department is likely to succeed on the merits of the appeal.**

For the reasons outlined above regarding materially advancing the litigation, and further explained in the accompanying stay motion, the Department is likely to succeed on the merits of this appeal.

**CONCLUSION**

This Court need not consider this petition for leave to appeal because the Department may appeal as of right the circuit court's order granting the writ of mandamus. But if this Court concludes otherwise, then this Court should grant this petition for leave to appeal.

Dated this 12th day of February, 2021.

Respectfully submitted,

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