COURT OF APPEALS
DECISION
DATED AND FILED

July 10, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP902 **Cir. Ct. No. 2012CV3188**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

WISCONSIN FEDERATED HUMANE SOCIETIES, INC., DANE COUNTY HUMANE SOCIETY, WISCONSIN HUMANE SOCIETY, FOX VALLEY HUMANE ASSOCIATION, NORTHWOOD ALLIANCE, INC., NATIONAL WOLFWATCHER COALITION, JAYNE BELSKY, MICHAEL BELSKY AND DONNA ONSTOTT,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

CATHY STEPP, SECRETARY, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, WISCONSIN DEPARTMENT OF NATURAL RESOURCES AND WISCONSIN NATURAL RESOURCES BOARD,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS,

UNITED SPORTSMEN OF WISCONSIN, WISCONSIN BEAR HUNTERS ASSOCIATION, SAFARI CLUB INTERNATIONAL AND U.S. SPORTSMEN'S ALLIANCE FOUNDATION,

INTERVENORS-RESPONDENTS-CROSS-APPELLANTS,

ASPCA,

OTHER PARTY.

APPEAL and CROSS-APPEALS from an order of the circuit court for Dane County: PETER ANDERSON, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 LUNDSTEN, J. Six animal welfare organizations and three individuals, whom we refer to collectively as "the Societies" for ease of reference, appeal the circuit court's order denying declaratory and injunctive relief that the Societies sought relating to emergency rules that were promulgated by the Wisconsin Department of Natural Resources. More specifically, the Societies sought a declaration invalidating DNR rules to the extent that the rules authorize the training and use of dogs to hunt wolves, and an injunction prohibiting DNR from authorizing the training or use of dogs to track or trail wolves until further "reasonable restrictions" are promulgated.

¶2 The circuit court denied the Societies' requested relief as it relates to the use of dogs to hunt wolves. In the appeal before us, the Societies make multiple arguments challenging this denial. We identify and reject these arguments below.

¶3 Cross-appeals were brought by DNR and four hunting organizations that call themselves the "Hunting Coalition" (hereafter, "the Coalition").[1] DNR

[1] We refer only to "DNR" even though there are three government defendants-respondents-cross-appellants: DNR, DNR Secretary Cathy Stepp, and the Wisconsin Natural Resources Board. These three government parties filed combined briefs, and we follow their lead by referring to them collectively as "DNR." The Coalition filed combined briefs and consists of the United Sportsmen of Wisconsin, Wisconsin Bear Hunters Association, Safari Club International, and U.S. Sportsmen's Alliance Foundation.

On most issues, the Coalition's arguments are consistent with DNR's arguments. For the sake of simplicity, we generally refer only to "DNR" when describing either or both of their arguments. However, we will indicate if DNR's and the Coalition's arguments appear to diverge.

(continued)

and the Coalition challenge the circuit court's declaration that WIS. ADMIN. CODE § NR 17.04 is "invalid ... to the extent it authorizes the training of dogs on free-roaming, wild wolves." Among other arguments, DNR and the Coalition contend that the Societies lack standing to challenge the rule. We assume without deciding that the Societies have standing, but conclude, consistent with one of DNR's arguments, that the circuit court's ruling on § NR 17.04 has no legal effect and, therefore, reversal is not warranted.

¶4 Because, in the appeal, we reject the Societies' arguments, and because we conclude that the decision challenged in the cross-appeals has no legal effect, we affirm the circuit court.

Background

¶5 After a 2011 change in the gray wolf's status as an endangered species under federal law, our legislature passed 2011 Wis. Act 169, now codified at WIS. STAT. § 29.185, to license wolf hunting in Wisconsin.[2] Act 169 included nonstatutory provisions directing DNR to promulgate "any rules that are necessary to implement" § 29.185. *See* 2011 Wis. Act 169, §§ 6, 21; WIS. STAT. § 29.185(2) and (3). The act took effect on April 17, 2012. *See* 2011 Wis. Act 169; WIS. STAT. § 991.11.

¶6 WISCONSIN STAT. § 29.185(6) provides, in pertinent part:

Wisconsin Mainstream Hunters filed an amicus brief. The American Society for the Prevention of Cruelty to Animals also filed an amicus brief.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> A wolf harvesting license authorizes the hunting of wolves by using any of the following:
>
> ….
>
> 2. Dogs to track or trail wolves, subject to par. (c).
>
> ….
>
> (c) *Use of dogs*. 1. A person may hunt wolves using dogs beginning with the first Monday that follows the last day of the regular season that is open to hunting deer with firearms and ending on the last day of February of the following year.
>
> 2. No more than 6 dogs in a single pack may be used to trail or track a wolf, regardless of the number of hunters assisting the holder of the wolf harvesting license.
>
> 3. While a person is using a dog to hunt wolf, the person shall keep on his or her person any tag required for the dog under s. 95.21(2)(f), 174.053(2), or 174.07(1)(e).

¶7 Act 169, in a nonstatutory provision, directed DNR to promulgate emergency rules. *See* 2011 Wis. Act 169, § 21. Accordingly, DNR promulgated emergency rules that took effect in August 2012. The emergency rules contained two restrictions on the use of dogs to hunt wolves: a prohibition on the use of dogs to hunt at night, and a requirement that the dogs be tattooed or wear an identification collar.

¶8 The emergency rules imposed no restrictions on *training* dogs to hunt wolves.[3] A preexisting administrative rule, WIS. ADMIN. CODE § NR 17.04,

[3] Throughout this opinion, we refer simply to "training" without distinguishing between types of training. As far as we can tell from the parties' briefing, the types of training that are at issue are those that might bring dogs into close proximity to wolves. For example, as we understand it, "training" a dog to hunt wolves might involve teaching the dog to follow the scent of free-roaming wolves. In other words, training, like hunting, may involve using dogs to track and trail free-roaming wolves.

provides that "any person may train dogs on free-roaming wild animals without a dog training license," subject to certain limitations not at issue here.

¶9 The Societies sought circuit court review of DNR's rulemaking under WIS. STAT. § 227.40.[4] More specifically, the Societies sought declaratory and injunctive relief including:

> Judgment declaring that [DNR's] wolf hunting regulations, … to the extent they authorize the training and use of dogs to hunt wolves, violate state law for failure to include reasonable restrictions consistent with 2011 Act 169, which limits the use of dogs to track and trail wolves, and Wis. Stat. § 951.02, which prohibits mistreatment of animals;
>
> … [A] permanent injunction prohibiting DNR from issuing licenses or administering wolf hunting regulations that authorize the training or use of dogs to track or trail wolves until reasonable restrictions are promulgated to prevent or mitigate the risk of deadly physical encounters between dogs and wolves, and to ensure that the use of dogs is limited to tracking and trailing that allow no direct confrontations between dogs and wolves ….

[4] WISCONSIN STAT. § 227.40 provides, in pertinent part:

> **(1)** Except as provided in sub. (2), the exclusive means of judicial review of the validity of a rule shall be an action for declaratory judgment as to the validity of the rule …. The court shall render a declaratory judgment in the action only when it appears from the complaint and the supporting evidence that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff….
>
> ....
>
> **(4)**(a) In any proceeding pursuant to this section for judicial review of a rule, the court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures.

The Coalition intervened.

¶10 The circuit court denied the Societies the relief they sought in a final order entered January 16, 2013. The circuit court did, however, declare that WIS. ADMIN. CODE § NR 17.04(1) is "invalid … to the extent it authorizes the training of dogs on free-roaming, wild wolves."[5]

¶11 We reference additional facts as needed in the discussion below.

Discussion

¶12 We begin our discussion with two observations.

¶13 First, this challenge to *emergency* rules would not be before us had the legislature not exempted wolf hunting rulemaking from the normal emergency rulemaking procedures. Normal procedures effectively force agencies to use emergency rules for a limited time and to promptly promulgate permanent rules by setting a limit on the time during which emergency rules remain in effect. Emergency rules normally remain in effect for only 150 days. WIS. STAT. § 227.24(1)(c). Here, however, nonstatutory provisions in Act 169 provide that the emergency rules will "remain in effect until the date on which the permanent rules take effect." 2011 Wis. Act 169, § 21(1)(b).

¶14 These and other Act 169 provisions exempt the challenged emergency rules here from each of the following requirements that normally apply, as well:

[5] We omit a considerable amount of procedural history because it is not material to our decision.

- The "preservation of the public peace, health, safety or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the [permanent rule] procedures." Section 227.24(1)(a).

- An extension of the effective period of emergency rules may not exceed 60 days, and "the total period for all extensions may not exceed 120 days." Section 227.24(2)(a).

- Any extension requires evidence of a "threat to the public peace, health, safety or welfare that can be avoided only by extension" of the rule or part of a rule. Section 227.24(2)(b)1.

- Any extension requires evidence "that it is impossible for the agency to promulgate a permanent rule prior to the expiration date of the emergency rule." Section 227.24(2)(b)2.

See 2011 Wis. Act 169, § 21(1)(b). As a result, permanent rules have not been promulgated, and we are now asked to review emergency rules that have been in effect far longer than the standard 150-day period.[6]

¶15 Second, even though Act 169 permits DNR to delay promulgating permanent and more comprehensive administrative rules, it is not apparent why, now some two years later, DNR has not replaced the emergency rules with permanent rules. As far as we can tell, there has been ample time to do so. Further, as far as the record and the parties' arguments disclose, all agree that DNR has the authority and the intention to adopt permanent rules that will include further restrictions on the training and use of dogs to hunt wolves. In particular, DNR represents in its briefing before this court that "permanent rules to regulate both using dogs to track and trail wolves during wolf hunts and training dogs to

[6] The Societies do not challenge these Act 169 exemptions from the ordinary emergency rule requirements, nor do the Societies argue that DNR failed to follow any applicable rulemaking procedures.

track and trial wolves in off-season are scheduled for public hearings and targeted for adoption in 2014." The other parties do not dispute this DNR representation, and none of the parties have updated us on any progress in this regard. So far as we can tell, nothing about this court proceeding prevents DNR from moving ahead with permanent rules.

¶16 The fact remains, however, that Act 169 places no permanent rule-making time limit on DNR, and DNR has not yet promulgated permanent rules. Accordingly, we turn to the parties' arguments in the appeal and cross-appeals relating to the "emergency" rules.

THE SOCIETIES' APPEAL

¶17 The Societies make two main arguments in their appeal. First, the Societies argue that DNR's rulemaking is invalid because it conflicts with both the enabling act, 2011 Wis. Act 169, and animal mistreatment statutes in WIS. STAT. ch. 951. Second, the Societies argue that DNR's emergency rulemaking was arbitrary and capricious because DNR failed to provide an explanation for its decision. We address and reject these arguments in sections 1 and 2 below.[7]

¶18 In addition to these arguments, the Societies may mean to argue that DNR's emergency rulemaking is invalid because, under ***Liberty Homes, Inc. v. DILHR***, 136 Wis. 2d 368, 401 N.W.2d 805 (1987), the record facts do not reasonably support DNR's failure to adopt additional dog use restrictions. We say

[7] As we understand it, the Societies see both the hunting and the training activities as presenting similar risks to dogs and wolves and as largely indistinguishable for purposes of the Societies' main arguments. Thus, we often refer to restrictions on these two types of activities collectively as "dog use restrictions" when addressing the Societies' arguments.

that the Societies "may" mean to make this argument because the Societies do not do so in a straightforward way. Rather, as explained below, the Societies argue that ***Liberty Homes*** contains a standard that is essentially the same as a federal standard, a proposition we reject in section 2 below. Nonetheless, it may be that the Societies still hope to prevail under the standard that *is* contained in ***Liberty Homes***. Accordingly, we address the ***Liberty Homes*** standard in section 3 below and explain why, under that standard, the Societies' argument falls short.

¶19 In section 4 below, we explain why we do not rely on DNR's argument that judicial review under WIS. STAT. § 227.40 is never available when the agency decision in question is a decision not to exercise discretionary rulemaking authority.

1. Whether DNR Rulemaking Conflicts with Act 169 And The Animal Mistreatment Statutes

¶20 The Societies argue that DNR exceeded its statutory rulemaking authority by failing to include additional dog use restrictions in DNR's emergency rules, resulting in a conflict between the rules and both Act 169 and the animal mistreatment statutes, WIS. STAT. ch. 951. Whether DNR exceeded its rulemaking authority is a question of statutory interpretation that we review de novo. ***Wisconsin Citizens Concerned for Cranes & Doves v. DNR***, 2004 WI 40, ¶¶5-6, 13, 270 Wis. 2d 318, 677 N.W.2d 612.

¶21 The Societies and DNR agree on our de novo standard of review for this issue, and they further agree that ***Wisconsin Citizens*** sets forth the applicable principles.[8] The court in ***Wisconsin Citizens*** explained:

> The nature and scope of an agency's powers are issues of statutory interpretation. When interpreting a statute, our goal is to discern the intent of the legislature, which we derive primarily by looking at the plain meaning of the statute.…
>
> ….
>
> In ***Seider***, we clearly stated that we apply a de novo standard in "'exceeds statutory authority' cases under Wis. Stat. § 227.40(4)(a)." ***Seider***, 236 Wis. 2d 211, ¶25. Therefore, we will not defer to an agency's interpretation on questions concerning the scope of the agency's power….
>
> In determining whether an administrative agency exceeded the scope of its authority in promulgating a rule, we must examine the enabling statute to ascertain whether the statute grants express or implied authorization for the rule. ***Wis. Hosp. Ass'n v. Natural Res. Bd.***, 156 Wis. 2d 688, 705, 457 N.W.2d 879 (Ct. App. 1990). It is axiomatic that because the legislature creates administrative agencies as part of the executive branch, such agencies have "only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates." ***Kimberly-Clark Corp. v. PSC***, 110 Wis. 2d 455, 461-62, 329 N.W.2d 143 (1983). *See also* ***DOR v. Hogan***, 198 Wis. 2d 792, 816, 543 N.W.2d 825 (Ct. App. 1995). Therefore, an agency's enabling statute is to be strictly construed. ***Id.*** We resolve any reasonable doubt pertaining

[8] No party argues that the emergency nature of the rules is significant in our analysis of this issue. The parties rely on case law involving the validity of permanent rules. We will assume without deciding that the pertinent law governing permanent rules likewise governs emergency rules.

Although the Coalition, like the other parties, does not suggest that the emergency rule context matters, we are uncertain if the Coalition agrees with the other parties on our standard of review for this issue. Regardless, ***Wisconsin Citizens Concerned for Cranes & Doves v. DNR***, 2004 WI 40, 270 Wis. 2d 318, 677 N.W.2d 612, makes clear that our standard of review is de novo. *See* ***id.***, ¶¶5-6, 13.

> to an agency's implied powers against the agency. ***Kimberly-Clark Corp.***, 110 Wis. 2d at 462. Wisconsin has adopted the "elemental" approach to determining the validity of an administrative rule, comparing the elements of the rule to the elements of the enabling statute, such that the statute need not supply every detail of the rule. ***Wis. Hosp. Ass'n***, 156 Wis. 2d at 705-06 (citing ***Kimberly-Clark Corp.***, 110 Wis. 2d at 461-62). If the rule matches the elements contained in the statute, then the statute expressly authorizes the rule. ***Grafft v. DNR***, 2000 WI App 187, ¶7, 238 Wis. 2d 750, 618 N.W.2d 897. However, if an administrative rule conflicts with an unambiguous statute or a clear expression of legislative intent, the rule is invalid. ***Seider***, 236 Wis. 2d 211, ¶¶72-73.

Id., ¶¶6, 13-14 (footnote and some citations omitted).

¶22 Our focus here is on the final sentence in the above ***Wisconsin Citizens*** passage, namely, whether "an administrative rule conflicts with an unambiguous statute or a clear expression of legislative intent." *See* ***id.***, ¶14. The Societies assert that the question of whether there is a conflict is "[t]he core of the elemental analysis." Whether or not that is generally true, it is the thrust of the Societies' arguments here.

¶23 The Societies' more specific argument starts with the following four assertions:

- A provision of the new wolf hunting law, WIS. STAT. § 29.185(6), limits the use of dogs in the wolf hunt to "track[ing]" and "trail[ing]" wolves, and does not allow the use of dogs to confront or physically engage wolves (hereafter the "track-and-trail limitation").

- WISCONSIN STAT. ch. 951 criminalizes the cruel mistreatment of animals.[9]

[9] The Societies rely on two statutes in WIS. STAT. ch. 951, in particular, WIS. STAT. §§ 951.02 and 951.08. Section 951.02 provides that "[n]o person may treat any animal, whether belonging to the person or another, in a cruel manner." "'Cruel' means causing unnecessary and (continued)

- The nonstatutory provisions in Act 169 require DNR to promulgate rules that are "necessary to implement" the statutory scheme.

- Undisputed evidence before DNR showed that hunting wolves with dogs and training dogs to hunt wolves will lead to violent and deadly dog/wolf encounters unless there are additional dog use restrictions in DNR's rules.

¶24 According to the Societies, it follows from these four assertions that DNR failed to comply with its obligation to promulgate additional dog use restrictions "necessary to implement" the statutory scheme. The Societies reason that DNR's rules allow or enable violations of the track-and-trail limitation and the animal mistreatment statutes, thereby creating a conflict with WIS. STAT. § 29.185(6) and WIS. STAT. ch. 951. In this way, so the argument goes, DNR failed to promulgate "necessary" rules and, therefore, exceeded its rulemaking authority.[10]

¶25 DNR does not dispute the Societies' first three assertions listed above, and we agree that those assertions are obviously accurate.

¶26 As to the fourth, an assertion about what the evidence in this case shows, we question its relevance for purposes of determining whether DNR

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excessive pain or suffering or unjustifiable injury or death." WIS. STAT. § 951.01(2). Section 951.08 provides, in part:

> No person may intentionally instigate, promote, aid or abet as a principal, agent or employee, or participate in the earnings from, or intentionally maintain or allow any place to be used for a cockfight, dog fight, bullfight or other fight between the same or different kinds of animals or between an animal and a person.

[10] The American Society for the Prevention of Cruelty to Animals makes a similar argument based on WIS. STAT. ch. 951 in its amicus brief.

exceeded its authority. In ***Wisconsin Citizens*** and the cases cited in that decision, the courts analyzed the question of agency authority exclusively as a matter of statutory interpretation. The analyses in those cases make no reference to whether evidence supported the agency's rulemaking *as a factual matter*. *See* ***Wisconsin Citizens***, 270 Wis. 2d 318, ¶¶14-47; ***Seider v. O'Connell***, 2000 WI 76, ¶¶18-79, 236 Wis. 2d 211, 612 N.W.2d 659; ***Kimberly-Clark Corp. v. PSC***, 110 Wis. 2d 455, 461-68, 329 N.W.2d 143 (1983); ***Grafft v. DNR***, 2000 WI App 187, ¶¶4-15, 238 Wis. 2d 750, 618 N.W.2d 897; ***Wisconsin Hosp. Ass'n v. Natural Res. Bd.***, 156 Wis. 2d 688, 705-17, 457 N.W.2d 879 (Ct. App. 1990). Further, some cases suggest that a claim under WIS. STAT. § 227.40 that a rule is unsupported by the facts is a constitutional due process challenge, not an exceeds-authority challenge. *See* ***Liberty Homes***, 136 Wis. 2d at 373-75; ***Wisconsin Hosp. Ass'n***, 156 Wis. 2d at 704-05, 708.

¶27 We thus question whether the Societies' fourth assertion—an assertion about what the evidence shows—is a proper consideration when determining whether DNR exceeded its authority. Regardless, we will assume for the limited purpose of the Societies' exceeds-authority argument that the undisputed evidence before DNR showed that violent and deadly dog/wolf encounters will occur more frequently absent additional dog use restrictions. That is, we will assume, solely for purposes of resolving the Societies' argument on this topic, that the Societies' fourth factual assertion is both true and pertinent. Still, we reject the argument because the Societies' conclusion does not follow from its assertions. More specifically, it does not follow from the four assertions that DNR's failure to promulgate additional dog use restrictions "conflicts" with the track-and-trail limitation or with the animal mistreatment statutes.

¶28 As to the track-and-trail limitation, the Societies argue that DNR's failure to promulgate additional dog use restrictions "necessary to ensure compliance with [the track-and-trail limitation]" creates a situation DNR "knows will result in violations of [the track-and-trail limitation]." That is, the Societies contend that an agency's insufficient effort to prevent violations of a law necessarily *conflicts* with that law. We reject this reasoning.

¶29 There is a difference between failing to take available steps to prevent violations of a law and creating a "conflict" with a law. An example highlights the flaw in the Societies' logic. Suppose everyone agreed that there are ten viable dog use restrictions that would reduce violent physical encounters between dogs and wolves when dogs are used to hunt wolves and, consequently, that the adoption of all ten restrictions would promote compliance with the track-and-trail limitation. Under these circumstances, does DNR create a "conflict" by adopting just three of the ten rules? By adopting six of the rules? Must all ten rules be adopted to avoid a conflict? The Societies do not and could not provide satisfactory answers to such questions because, although the promulgation of more dog use restrictions might, to varying degrees, promote compliance with the track-and-trail limitation, at no point along this continuum does the failure to adopt rules create a "conflict."

¶30 The Societies do not demonstrate that any of the cases they rely on adopt a view of "conflict" consistent with their theory here. And, our own review of cases brought to our attention, and cases we have located, does not uncover support for the Societies' view of what constitutes a "conflict." For example, in ***Seider*** the administrative rule in question authorized an insurance exclusion that plainly could not be reconciled with a statutory requirement. More particularly, the supreme court in ***Seider*** concluded that there was a conflict between an

administrative rule that excluded parts of a dwelling used for commercial purposes and a statute that required insurance companies to pay policy limits for damage to "real property" that is "owned and occupied by the insured as a dwelling." The ***Seider*** court reasoned that the statutory language unambiguously required policy limit coverage for dwellings regardless of commercial use. ***Seider***, 236 Wis. 2d 211, ¶¶3, 46-47, 69-75.

¶31 The Societies cite no case in which a court found a conflict simply because a rule—or lack of a rule—might be said to insufficiently prevent or to increase the likelihood of a statutory violation. We observe that in ***Seider***, one of the few cases we have located where a court found a conflict, it was clear that application of the administrative rule would violate the statute in all instances. That stands in stark contrast to the situation here.

¶32 Accordingly, assuming the Societies are correct factually that the record supports the view that the promulgation of additional dog use restrictions will lead to a reduction in violent dog/wolf encounters, we nonetheless do not agree that the Societies have demonstrated a conflict, much less a "conflict" within the meaning of applicable case law.

¶33 As to the animal mistreatment statutes, the Societies' argument fails for the same reason. Assuming the Societies are correct factually that the record supports the view that the promulgation of additional dog use restrictions will lead to a reduction in criminal violations of WIS. STAT. ch. 951, the Societies have not demonstrated a "conflict" within the meaning of applicable case law. Although the promulgation of more dog use restrictions might, to varying degrees, promote compliance with animal mistreatment laws, at no point along the continuum does the failure to adopt restrictions create a "conflict" with such laws.

¶34 Before moving on, we note that the parties discuss our decision in ***State v. Kuenzi***, 2011 WI App 30, 332 Wis. 2d 297, 796 N.W.2d 222. However, although ***Kuenzi*** supports the Societies' position that persons using dogs to hunt wolves might be subject to prosecution under animal mistreatment statutes, we perceive no reason why our ***Kuenzi*** decision affects the outcome here.

¶35 In ***Kuenzi***, we held that WIS. STAT. § 951.02 could be applied to individuals who used snowmobiles to maim and kill deer even though those activities fell within the broad general definition of "hunting" in WIS. STAT. ch. 29. *See* ***Kuenzi***, 332 Wis. 2d 297, ¶¶2-3, 5, 27. ***Kuenzi*** teaches that, even in a hunting context, criminal "cruel mistreatment of wild animals" "must be assessed based on the backdrop of common hunting practices" and, in that context, the question is whether the alleged acts caused "'unnecessary and excessive pain or suffering or unjustifiable injury or death.'" ***Id.***, ¶34 (quoting WIS. STAT. § 951.01(2)). Thus, it may be, depending on the circumstances, that § 951.02 could be applied to someone who used or trained a dog to hunt wolves if that person deviates from common hunting practices and unnecessarily causes excessive pain and suffering or unjustifiable injury or death to an animal. But we fail to see why this possibility sheds light on whether DNR exceeded its authority by failing to promulgate additional rules covering the use of dogs to hunt wolves.

¶36 Accordingly, we reject the Societies' argument that DNR exceeded its authority by creating a conflict.

2. Whether DNR's Rulemaking Was Arbitrary And Capricious Because DNR Failed To Provide An Explanation

¶37 The Societies argue that we must invalidate DNR's rules as "arbitrary and capricious" if DNR failed to "provide any reasons or rational

explanation for its decision not to include restrictions on hunting or training to hunt wolves with dogs." We explain more fully below why we reject this argument, but first make two observations.

¶38 First, as we have indicated, the Societies seek judicial review of DNR's emergency rules under WIS. STAT. § 227.40. Under § 227.40, there are three types of challenges: "1) constitutional, 2) exceeding statutory authority or 3) failure to comply with statutory regulatory procedures." *See* ***Liberty Homes***, 136 Wis. 2d at 377 (listing types of challenges in WIS. STAT. § 227.05 (1981-82) that are now listed in § 227.40). The court in ***Liberty Homes*** indicated that courts should require the party challenging a rule under this statute to "clearly state which type of challenge … is being made" in order to facilitate judicial review. *See* ***id.*** As to their arbitrary-and-capricious argument, the Societies do not clearly state which type of challenge they are making, and the type is not readily apparent to us. Arguably, we could decline to address the Societies' argument based on its failure to clearly state which type of challenge is being made. We will, however, address the Societies' arbitrary-and-capricious argument.

¶39 Second, although the Societies fail to make clear whether their arbitrary-and-capricious argument is intended to be a due process challenge, this may be the most logical way to construe their argument. First, WIS. STAT. § 227.40(4)(c) allows for judicial review of state agency rulemaking on constitutional grounds. Second, the Societies in their briefing twice make passing reference to a constitutional challenge to rules, implying that they are making a constitutional challenge here. Third, the Societies' challenge appears to be fact-based, and the court in ***Liberty Homes*** indicated that a challenge "that [a] rule lacks sufficient factual support" was "a constitutional substantive due process challenge." *See* ***Liberty Homes***, 136 Wis. 2d at 374; *see also* ***Wisconsin Hosp.***

Ass'n, 156 Wis. 2d at 705 (citing ***Liberty Homes*** for the proposition that "[a] challenge based on an inadequate factual basis in the record to support a rule is a constitutional due process claim").

¶40 Having made those observations, we return to the Societies' arguments. According to the Societies, our standard of review under WIS. STAT. § 227.40 of agency rulemaking involves assessing whether an agency's expressed reasoning is sufficient to justify the agency's rules, and the agency's failure to articulate reasoning on some pertinent aspect of the rules is per se arbitrary and capricious. Thus, as we understand it, the Societies argue that, even if there are facts in the record that reasonably support the agency's rulemaking, that is not enough without an agency's explanation of its reasoning based on those facts.

¶41 The Societies assert that the arbitrary-and-capricious standard they advance "derives from federal cases." In keeping with this, they rely primarily on a federal case addressing *federal* agency rulemaking, ***Motor Vehicle Manufacturers Ass'n of the United States v. State Farm Mutual Automobile Insurance Co.***, 463 U.S. 29 (1983). Additionally, the Societies argue that ***Liberty Homes***, a Wisconsin case, contains "essentially the same" standard as ***Motor Vehicle Manufacturers***.

¶42 As we explain below, the Societies do not persuade us that the ***Motor Vehicle Manufacturers*** standard is a due process standard that applies to state agency rulemaking, and, although ***Liberty Homes*** *does* apply to state agency rulemaking, ***Liberty Homes*** does not impose an explanation requirement.

*a. **Motor Vehicle Manufacturers***

¶43 There is no dispute that ***Motor Vehicle Manufacturers*** supports the proposition that a *federal* agency's rulemaking will be set aside if the rulemaking is "arbitrary and capricious," and that one reason federal agency rulemaking can be found to be arbitrary and capricious is if the agency fails to provide an explanation of the reasons for its rulemaking. More specifically, the Court in ***Motor Vehicle Manufacturers*** stated that, under 5 U.S.C. § 706(2)(A), a federal agency's informal rulemaking may be set aside when it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *See* ***Motor Vehicle Mfrs.***, 463 U.S. at 41 (quoting 5 U.S.C. § 706(2)(A)).[11] The Court further stated that a federal agency's rulemaking is arbitrary and capricious if the agency does not "articulate a satisfactory explanation for its action" or "cogently explain

[11] 5 U.S.C. § 706 states that "[t]he reviewing court shall"

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

why it has exercised its discretion in a given manner." *See* ***id.*** at 33-34, 43, 48-49; *see also* ***Preston v. Meriter Hosp., Inc.***, 2005 WI 122, ¶¶32, 34, 284 Wis. 2d 264, 700 N.W.2d 158 (applying ***Motor Vehicle Manufacturers*** to federal agency rulemaking); ***Preston v. Meriter Hosp., Inc.***, 2008 WI App 25, ¶¶36, 38, 307 Wis. 2d 704, 747 N.W.2d 173 (same).

¶44 However, the Societies do not explain, and we are unable to tell, how any of the cited cases, or any other authority the Societies provide, supports the view that WIS. STAT. § 227.40 authorizes us to overturn *state* agency rules if the agency does not explain the reasons for its rulemaking. The Societies make a general assertion that "[the Wisconsin] Supreme Court frequently relies upon federal law in applying chapter 227." While that general assertion may be true, *frequently* does not mean *always*.

¶45 Furthermore, the three cases that the Societies offer in their reply brief do not persuade us that the ***Motor Vehicle Manufacturers*** standard applies here. Two of those cases, ***Wisconsin's Environmental Decade, Inc. v. PSC***, 69 Wis. 2d 1, 230 N.W.2d 243 (1975), and ***Mortensen v. Pyramid Savings & Loan Ass'n***, 53 Wis. 2d 81, 191 N.W.2d 730 (1971), involve standing to challenge a state agency decision. *See* ***Wisconsin's Envtl. Decade***, 69 Wis. 2d at 4-20; ***Mortensen***, 53 Wis. 2d at 83-86. The court in those cases observed that federal and state standing rules are "similar" or involve "similar" reasoning. *See* ***Wisconsin's Envtl. Decade***, 69 Wis. 2d at 10; ***Mortensen***, 53 Wis. 2d at 84 n.2. Neither case supports the proposition that judicial review of federal and state agency rulemaking is in all respects the same. The third case is ***Wisconsin State Telephone Ass'n v. PSC***, 105 Wis. 2d 601, 314 N.W.2d 873 (Ct. App. 1981). It is true that in ***Wisconsin State Telephone*** we applied federal law to state agency rulemaking. And the pertinent question there was a constitutional one, namely,

whether the agency's rulemaking violated due process. *See* ***id.*** at 604-05, 610-11. But, in that context, we applied a standard that is more deferential than the one in ***Motor Vehicle Manufacturers*** for purposes of determining whether agency action is "arbitrary and capricious." *See* ***Wisconsin State Telephone***, 105 Wis. 2d at 611. Specifically, we explained that "the test for the court to apply is whether 'any state of facts reasonably can be conceived that would sustain [the rule].'" ***Id.*** (quoting federal cases). Accordingly, we fail to see how ***Wisconsin State Telephone*** supports the Societies' argument. In any event, as we will see, ***Liberty Homes*** overruled ***Wisconsin State Telephone***, but not in a way that supports the Societies' position.

¶46 Thus, the Societies have failed to demonstrate that the explanation requirement in ***Motor Vehicle Manufacturers*** applies to our WIS. STAT. § 227.40 review of state agency rulemaking.

b. ***Liberty Homes***

¶47 The Societies assert, as we understand it, that ***Liberty Homes*** contains "essentially the same" standard as ***Motor Vehicle Manufacturers***. That is, the Societies argue that ***Liberty Homes*** imposes on agency rulemaking an explanation requirement. We disagree. ***Liberty Homes*** does not hold that courts may invalidate agency rulemaking as arbitrary and capricious if the agency does not explain the reasons for its rulemaking. Rather, we agree with DNR that ***Liberty Homes*** requires only that the record contain facts that reasonably support the agency rulemaking at issue.

¶48 ***Liberty Homes*** involved a due process challenge to a rule on the ground that it lacked sufficient factual support. ***Liberty Homes***, 136 Wis. 2d at 374. The ***Liberty Homes*** court concluded that, in this type of challenge, the court

does not "presume facts not of record" or ask whether the court could "'reasonably conceive that facts exist to justify the rule.'" *See* ***id.*** at 382-83 (quoted source omitted). Rather, the court considers the facts *of record* to determine whether the rule is reasonably related to a legitimate governmental objective. *See* ***id.*** at 384-85. In other words, there must be facts in the record to support the rule; it is not enough that the court could conceive of facts that would support the rule. Accordingly, ***Liberty Homes*** expressly overruled the more deferential standard in ***Wisconsin State Telephone***. *See* ***Liberty Homes***, 136 Wis. 2d at 383 ("reject[ing]" the any-facts-reasonably-conceived "approach … utilized by the court of appeals in [***Wisconsin State Telephone***]").

¶49 Nowhere does the ***Liberty Homes*** court suggest that courts may invalidate agency rulemaking under a WIS. STAT. § 227.40 due process challenge if the agency fails to provide an explanation of the reasons for its rulemaking. Instead, as the court in ***Liberty Homes*** said in summarizing its decision, "[o]ur task is simply to ascertain whether [the agency's] choice is reasonably supported by any facts in the record." ***Liberty Homes***, 136 Wis. 2d at 393.[12]

[12] The court's decision in ***Liberty Homes, Inc. v. DILHR***, 136 Wis. 2d 368, 401 N.W.2d 805 (1987), is replete with similar statements:

- "[T]here must be facts of record which demonstrate a reasonable basis for the agency's rule." ***Id.*** at 371.
- "The court must undertake a thorough study of the record in order to determine whether the agency *could reasonably have concluded* that the rule chosen would effectuate the governmental objective it sought to implement." ***Id.*** (emphasis added).
- "The court must uphold the rule if there are any facts in the record which support the rule chosen by the agency to

(continued)

¶50 In arguing that ***Liberty Homes*** requires agencies to explain their reasons for rulemaking, the Societies rely on the following ***Liberty Homes*** passage:

> What is the role of the court, given that it can be neither a rubber-stamp nor a super-agency? We conclude that it is the proper role of the court to *undertake a study of the record which enables the court to penetrate to the reasons underlying agency decisions* so that it may satisfy itself that the agency has exercised reasoned discretion by a rule choice that does not deviate from or ignore the ascertainable governmental objective.

Id. at 385-86 (emphasis added). The Societies apparently read this passage to mean that a reviewing court cannot "penetrate ... the reasons underlying [an] agency decision" if those reasons are not explained by the agency on the record. Read in context, however, this passage is not a statement that agencies must provide reasons for rulemaking or that courts must overturn an agency rulemaking decision that does not state the reasons for a rule. Rather, the ***Liberty Homes*** court was making the point that courts review the *facts of record* to determine whether those facts—not some hypothetical or presumed facts—provide a reasonable basis for the agency's rulemaking. Indeed, the next sentence in the ***Liberty Homes*** passage, which the Societies omit, is this: "In other words, the court must engage in a review process which allows it to determine whether, in light of the

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> effectuate the governmental policy objective sought to be attained." ***Id.*** at 381.
>
> - "If the agency rule is based on reasonable and relevant facts, the reviewing court must affirm." ***Id.*** at 387.
>
> - "Under this approach to judicial review the agency's action must be upheld if there are any facts in the record from which a reasonable person could reach the conclusion the agency reached." ***Id.***

governmental objective, there is a rational connection between the facts in the record and the rule adopted by the agency." ***Id.*** at 386.

¶51 In sum, neither ***Motor Vehicle Manufacturers*** nor ***Liberty Homes*** supports the Societies' assertion that courts overturn state agency rulemaking under WIS. STAT. § 227.40 if an agency fails to explain the reasons for its rulemaking. Accordingly, to the extent the Societies rely on DNR's failure to explain its rulemaking decisions, we reject the Societies' argument.

3. Whether There Are Any Record Facts Supporting DNR's Failure To Promulgate Additional Dog Use Restrictions

¶52 As explained above, the ***Liberty Homes*** test asks "whether [the agency's] choice is reasonably supported by any facts in the record." ***Liberty Homes***, 136 Wis. 2d at 393. In this section, we assume that the Societies mean to argue that, under the ***Liberty Homes*** test, DNR's rulemaking is flawed because there are no facts in the record that reasonably support DNR's decision not to promulgate additional emergency rules. However, even if the Societies mean to make this argument, it fails because the Societies do not present a supporting argument in keeping with ***Liberty Homes***.

¶53 To the extent the Societies make a ***Liberty Homes*** argument, the argument falls short because the Societies selectively focus on evidence supporting their view while ignoring or downplaying contrary evidence. For example, the Societies point to testimony by a former DNR wildlife biologist supporting the proposition that, without additional dog use restrictions, violent conflicts between wolves and dogs are inevitable, in part because wolves cannot be "treed" like other animals such as bear or bobcats. However, the Societies do not satisfactorily explain why it was not reasonable for DNR to rely on competing

testimony. For example, DNR and the Coalition identify testimony by individuals who had experience with dogs tracking wolves incidental or inadvertent to coyote or bobcat hunting. Those hunters stated that they had not witnessed any violent interactions between the dogs and the wolves in those instances. One experienced bear hunter testified that on several occasions over the past ten years his dogs had trailed wolves but he had not experienced wolves stopping to fight with the dogs. That hunter and another hunter gave testimony suggesting that the wolves were more likely to simply outrun the dogs than to turn and fight.

¶54 The burden placed on the Societies by ***Liberty Homes*** is to show that there is no evidence supporting DNR's decision making; it is not enough to point to some evidence that would have supported different decision making. The ***Liberty Homes*** court explained: "The question is not whether the agency could have chosen a different action, albeit reasonable; nor is the question whether the facts of record would lead the court to conclude that a different course had greater support in the record; nor is the question whether the court concludes that a different course would be wiser.... [Rather, the question is] simply ... whether [the agency's] choice is reasonably supported by any facts in the record." ***Liberty Homes***, 136 Wis. 2d at 387, 393.

¶55 The circuit court understood that the Societies' argument did not satisfy the standard that courts use to review agency rulemaking decisions. The circuit court summed it up well when the court explained its view that DNR considered alternatives and the evidence and made a "rational" decision, even if DNR's decision was not the only rational decision or the decision the circuit court would have made.

¶56 The Societies may be making an additional argument specific to training restrictions. As we understand it, the Societies argue that there is no rational reason for DNR to have concluded, as DNR apparently has, that training restrictions are "necessary" and, thus, will be included in the permanent rules but, at the same time, not "necessary" in the emergency rules. The Societies argue that "[t]he only reasonable inference" from DNR's apparent intent to adopt training rules when it promulgates permanent rules is that training rules are "necessary" now in the emergency rules and DNR arbitrarily chose to "punt that issue down the road." As a general argument, this has some appeal. That is, generally speaking it might seem reasonable to say that, if a dog use restriction rule is necessary for future training, it is necessary for current training. But neither the circuit court before was, nor are we now, concerned with generalities. The Societies' argument may suffer other flaws, but it plainly lacks factual development specific to particular restrictions and the record here. Accordingly, we address this argument no further.

¶57 Before moving on, we emphasize that the threshold problems with the Societies' arguments that we have identified mean that we do not reach the merits of DNR's emergency rulemaking decisions. Also, we do not weigh in on whether DNR could reasonably promulgate *permanent* rules without additional dog use restrictions. Plainly, the full record for the permanent rules has yet to be developed, and whether that record will support the permanent rules that DNR promulgates is a question that is not before us.

4. The DNR Argument That We Do Not Adopt

¶58 We choose to address a DNR argument that we do not and need not adopt. As we understand it, DNR argues that the question of what, if any, dog use

restrictions are "necessary" under 2011 Wis. Act 169 is a purely discretionary determination for DNR, and that there is no judicial review under WIS. STAT. § 227.40 of an agency's decision *not* to exercise discretionary rulemaking authority.[13] In other words, DNR argues that the only thing at issue here is the *absence* of discretionary rulemaking, and that there is no review of that issue under § 227.40. Although we do not and need not adopt this DNR argument, we comment on it because of its prominence in DNR's briefing and because it raises interesting issues that may arise again in the course of litigation over dog use restrictions.

¶59 First, this DNR argument appears to depend on the underlying premise that the Societies challenge only DNR's refusal to exercise discretionary authority. And, on this topic, DNR seemingly takes the position that it may always decline to exercise discretionary authority. However, another view of the Societies' challenge is that they challenge DNR's decision making under the particular facts in this case. In other words, the Societies challenge DNR's exercise of its discretionary authority to implement emergency rules that, in the Societies' view, failed to include sufficient dog use restrictions and that the rules were therefore unreasonable based on the record. Although the Societies here do not develop a sufficient argument along this line, we question whether a developed argument could be defeated by DNR's assertion that there is never judicial review of an agency's decision not to exercise discretionary rulemaking authority.

[13] DNR states that, if it had a nondiscretionary duty to engage in additional rulemaking, there would be review by mandamus.

¶60 Second, if DNR's argument is as broad as we understand it to be, we question its implications. In essence, the consequence of DNR's argument would be to insulate discretionary rulemaking from judicial review, regardless whether the agency has partially exercised discretionary authority or wholly refused to exercise all discretionary authority, and regardless of the factual record before the agency.

¶61 Third, we are uncertain whether DNR's argument might be affected by ***Barnes v. DNR***, 184 Wis. 2d 645, 516 N.W.2d 730 (1994), a case the parties do not address. In ***Barnes***, the supreme court reviewed a DNR decision not to engage in discretionary rulemaking. *See* ***id.*** at 646-47, 648-49, 654. The court in ***Barnes*** reviewed that decision for an erroneous exercise of agency discretion. *See* ***id.*** at 654, 666. It may be that the parties do not address ***Barnes*** because ***Barnes*** is procedurally distinguishable on one or more grounds. In particular, the different statutory scheme at issue in ***Barnes*** included a procedure to petition DNR, and DNR's denial of the petition apparently triggered judicial review under WIS. STAT. §§ 227.52, 227.53, and 227.57.[14] *See* ***Barnes***, 184 Wis. 2d at 648-49, 654 & n.9,

[14] WISCONSIN STAT. §§ 227.52, 227.53, and 227.57 provide, in part:

> **227.52 Judicial review; decisions reviewable.** Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except as otherwise provided by law [and other listed exceptions that do not apply here].
>
> **227.53 Parties and proceedings for review. (1)** Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review of the decision as provided in this chapter and subject to all of the following procedural requirements ….
>
> ....

(continued)

657-58, 661-62. Here, in contrast, the Societies seek judicial review under WIS. STAT. § 227.40, which expressly addresses judicial review of rules. Still, we are uncertain whether ***Barnes*** might be read broadly enough to apply here or to indicate that § 227.57 might apply here. For now, it is sufficient to say that the parties do not discuss ***Barnes***, and we do not express an opinion on its possible application here.[15]

> **227.57 Scope of review.**...
>
> ….
>
> **(7)** If the agency's action depends on facts determined without a hearing, the court shall set aside, modify or order agency action if the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility.
>
> **(8)** The court shall reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgment for that of the agency on an issue of discretion.

[15] DNR states that it has "fail[ed] to find any Wisconsin precedent for the proposition that an agency can be held to account for *not exercising* authority it has been given the discretion to exercise." However, at least broadly speaking, ***Barnes v. DNR***, 184 Wis. 2d 645, 516 N.W.2d 730 (1994), would appear to be one such authority.

The Coalition takes the position that WIS. STAT. § 227.57 applies in cases brought under WIS. STAT. § 227.40 because, according to the Coalition, § 227.40 "does not identify separate standards." The Coalition is wrong insofar as § 227.40 contains at least some standards of review. *See* § 227.40(4)(a) ("court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures").

DNR'S AND THE COALITION'S CROSS-APPEALS

¶62 We turn now to DNR's and the Coalition's cross-appeals. DNR and the Coalition argue that the circuit court erred when it purported to invalidate to a limited extent WIS. ADMIN. CODE § NR 17.04.[16] WISCONSIN ADMIN. CODE § NR 17.04 provides, in part:

> **(1)** AUTHORITY. Except as described in subs. (2) and (3), any person may train dogs on free-roaming wild animals without a dog training license.

The circuit court ruled that § NR 17.04 is "invalid … to the extent it authorizes the training of dogs on free-roaming, wild wolves."

¶63 DNR and the Coalition make several arguments, but one of DNR's arguments raises a threshold question that, we conclude, is dispositive: What legal effect, if any, does this circuit court ruling have?

¶64 We acknowledge that some of the circuit court's statements during its oral decision suggest that the court intended in its ruling on WIS. ADMIN. CODE

[16] DNR also argues that the circuit court incorrectly determined that the Societies have standing. We need not decide this issue. Even if the Societies have standing, for reasons we have explained in addressing their appeal the Societies do not persuade us that they are entitled to any relief. Under these circumstances, we may assume standing, without deciding the issue. *See* ***League of Women Voters of Wis. Educ. Network, Inc. v. Walker***, 2013 WI App 77, ¶93 n.13, 348 Wis. 2d 714, 834 N.W.2d 393 (concluding that the standing of challengers to voter identification laws need not be resolved because we rejected the challenge on the merits), *review granted*, 2014 WI 3, 352 Wis. 2d 350, 842 N.W.2d 359; *see also* ***McConkey v. Van Hollen***, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855 (explaining that, unlike in federal courts, standing in Wisconsin is not a matter of jurisdiction).

DNR also contends that the Societies' complaint fails to state a claim. We need not resolve this issue because we resolve all disputed issues in favor of DNR on other grounds. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts need not address non-dispositive issues).

§ NR 17.04 to effectively prohibit hunters from training dogs to hunt wolves. However, we conclude that the circuit court's final ruling on this topic is clear, and this clear ruling has no such effect. More specifically, we agree with DNR that the circuit court's ruling has no legal effect because § NR 17.04 is not what allows training dogs to hunt wolves in the first place.[17]

¶65 DNR argues that the circuit court's ruling has no legal effect because the ruling purports to invalidate something that WIS. ADMIN. CODE § NR 17.04 does not do. More specifically, DNR argues that § NR 17.04(1) merely *acknowledges* a preexisting right to train dogs on free-roaming wild animals for purposes of hunting, a right that does not depend on any administrative rule. DNR's cross-appeal brief states:

> The [circuit court's] premise, that Wis. Admin. Code § 17.04(1) "authorizes the training of dogs on free-roaming, wild wolves," is false. As with Wis. Admin. Code ch. NR 10 with regard to hunting wolves, Wis. Admin. Code § 17.04(1) does not "authorize" the training of dogs on wolves.
>
> ....
>
> The circuit court's [ruling] invalidating Wis. Admin. Code § NR 17.04(1), to the extent that it "authorizes" the training of dogs to track and trail wolves, mistakenly assumes that training dogs to hunt wildlife is prohibited unless authorized by rule.

[17] We note the unusual effect of our agreement with DNR's argument is that it defeats DNR's cross-appeal. That is, our agreement with DNR that the circuit court's WIS. ADMIN. CODE § NR 17.04 ruling has no legal effect means that we affirm the circuit court with respect to the cross-appeal. The question might be asked: Why did DNR cross-appeal the circuit court's ruling on § NR 17.04 when DNR's position is that the ruling has no legal effect? One likely explanation is that DNR was uncertain whether we would adopt its argument that the ruling has no legal effect. For that matter, DNR could not have known whether the Societies would, as we later explain in the text, effectively concede the issue.

¶66 In support, DNR points to ***Wisconsin Citizens***, a case in which the court explained that the "Right to Hunt" amendment did not affect the court's analysis because there is a common law right to hunt. *See* ***Wisconsin Citizens***, 270 Wis. 2d 318, ¶45. DNR cites ***Wisconsin Citizens*** for the proposition that WIS. ADMIN. CODE § NR 17.04(1) is not the source of authority providing the freedom to train dogs to hunt wolves, but a "mere acknowledgment or codification of that freedom, just as Article I, Section 26 of the Wisconsin Constitution is a codification of the common law right to hunt." DNR asserts that, "[l]ike hunting, training dogs to hunt wildlife is a freedom until subjected to state regulation." *See* ***Wisconsin Citizens***, 270 Wis. 2d 318, ¶45 ("'In the absence of legislation the citizen may doubtless pursue, take, and dispose of fish and game as he sees fit and without restraint, so long as he violates no private rights ....'" (quoting ***State v. Nergaard***, 124 Wis. 414, 420, 102 N.W. 889 (1905))).

¶67 We note that the Coalition takes a position that is different from, but not inconsistent with, DNR's position. The Coalition asserts that the circuit court's ruling on WIS. ADMIN. CODE § NR 17.04 "*for all practical purposes*, ban[s] training dogs on wolves in all circumstances until further agency action" (emphasis added). The Coalition's "practical purposes" argument does not dispute DNR's view that the circuit court's ruling, as a legal matter, fails to ban training. Rather, the Coalition explains its "practical purposes" concern by stating that "few if any trainers would run the legal risk of venturing into the field to test whether a prohibition exists." Essentially, the Coalition wants the circuit court's training ruling overturned because of the possibility that some will read it as a prohibition

on training dogs.[18] This means that, if we agree with DNR's argument about the non-effect of the circuit court's ruling on this topic, the Coalition's concern falls away. Accordingly, we proceed to address DNR's argument.

¶68 To recap DNR's argument, it is this. Training dogs to hunt wolves is part and parcel of the right to hunt and, whatever that right consists of, it exists independent of WIS. ADMIN. CODE § NR 17.04.[19] Thus, the validity or invalidity of § NR 17.04 does not affect the right of hunters to train dogs to hunt wolves.

¶69 The Societies do not state that they disagree with DNR's argument that the circuit court's training ruling has no legal effect, much less provide supporting argument. In particular, the Societies do not respond to DNR's argument that there is a stand-alone right to train dogs on free-roaming wild animals regardless of WIS. ADMIN. CODE § NR 17.04, and do not challenge

[18] Notably, the parties do not discuss the circuit court's authority to impose a general prohibition on all persons prohibiting them from training dogs to hunt wolves. We wonder whether the circuit court had the authority to grant such injunctive relief had the Societies requested it. Furthermore, if the circuit court's ruling had the effect of prohibiting training dogs on wolves, it is unclear to us from the parties' arguments how that prohibition could be enforced. In particular, we wonder whether there would be some authority under which DNR would have been able to issue citations to individuals who train dogs to hunt wolves. These are questions we need not address, but they would seem to be substantial questions should there be new challenges to DNR rulemaking decisions on this topic.

[19] We note that the circuit court expressly declined to address an assertion by one of the Coalition's groups that there is a constitutional right to train dogs as part of hunting. The circuit court appeared to conclude that this argument was insufficiently raised or developed and declined to address it, stating that the court had been asked only to address the "validity of rules." This explanation is reasonable as far as it goes. But it remains true for purposes of this appeal that the only reason the circuit court's ruling on WIS. ADMIN. CODE § NR 17.04 would matter is if § NR 17.04 is the pertinent source of authority that allows the training of dogs to hunt wolves. Thus, as far as we can tell, the question whether there is a right to train dogs to hunt wolves—whether derived from the constitution, common law, or both—is a threshold question we should decide because it determines whether the circuit court's ruling on § NR 17.04 has any legal effect.

DNR's reliance on ***Wisconsin Citizens*** or otherwise develop an argument that there is no right independent of § NR 17.04.

¶70 Rather than dispute DNR's argument, the Societies ignore it. The Societies sometimes make assertions suggesting that WIS. ADMIN. CODE § NR 17.04 is what allows training dogs on wolves. For example, the Societies state, without explanation, that "it is § NR 17.04 that allows the unconstrained use of dogs for training." But such assertions are, at best, unsupported assumptions contained within other arguments made by the Societies.

¶71 Accordingly, based on DNR's developed argument and the other parties' failure to disagree, it is undisputed that there is a right to train dogs to hunt wolves that does not depend on WIS. ADMIN. CODE § NR 17.04. Moreover, even if the parties do not agree, the Societies present no reason why ***Wisconsin Citizens*** is not controlling authority that leads to the conclusion that the right exists independent of § NR 17.04.

¶72 We therefore conclude that the circuit court's ruling on WIS. ADMIN. CODE § NR 17.04(1) has no legal effect because § NR 17.04(1) is not what allows individuals to train dogs on wolves for purposes of hunting. Because the circuit court's ruling has no legal effect, we see no basis to reverse that ruling.

¶73 Thus, as things stand now, there is no prohibition on training dogs to hunt wolves. We stress that this does not mean there are no limitations on the right to train dogs to hunt wolves. For example, WIS. ADMIN. CODE § NR 17.04 contains limited, preexisting restrictions that apply to *all* training of dogs on free-roaming wild animals. Additionally, as we have already explained, WIS. STAT. § 951.02 prohibits training dogs on wolves in a way that would constitute cruel mistreatment of a dog or a wolf.

¶74 Our resolution of the cross-appeals suggests that the Societies, rather than DNR and the Coalition, should have appealed the circuit court's dog training ruling. In this respect, we observe that our conclusion that the circuit court's training ruling has no legal effect should come as no surprise to the Societies. For starters, DNR's no-effect argument is prominently made in DNR's briefing and the Societies' decision not to rebut DNR's no-effect argument suggests the Societies had no legal basis for thinking the circuit court's ruling had a legal effect on dog training. Presumably, if the Societies had such a basis, they would have responded to DNR's no-legal-effect argument. In addition, the circuit court made clear the limited nature of its ruling. When the circuit court ruled orally, it stated that WIS. ADMIN. CODE § NR 17.04(1) is "invalid to the extent it authorizes the training of dogs to hunt wolves without further restriction." This language was enough of a red flag that the attorney for the Societies requested clarification. Specifically, the Societies' counsel asked the circuit court to clarify whether the court's § NR 17.04 ruling meant that training dogs on wolves "is prohibited under state law," and the circuit court answered "No" and repeated that it was ruling only that § NR 17.04(1) was "invalid to the extent it authorizes the training of dogs to hunt wolves—wild-roaming wolves." This answer should have served to underscore that the court did not purport to impose some sort of general ban on training and did not perceive that its ruling amounted to a general ban. Rather, the court plainly communicated that the effect of its ruling hinged on the extent to which § NR 17.04 is the pertinent authority permitting persons to train dogs to hunt wolves.

¶75 To sum up our resolution of the cross-appeals, we affirm the circuit court's WIS. ADMIN. CODE § NR 17.04(1) ruling because there is no reason to reverse it. We agree with DNR that the ruling has no legal effect. This conclusion

means that we need not reach other arguments made by DNR and the Coalition in their cross-appeals.

Conclusion

¶76 For the reasons stated above, we affirm the circuit court's order.

¶77 No costs to any party.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.