The following are some examples of constitutional rules of interpretation:

- ***Unless a provision is ambiguous, the plain meaning prevails.*** If there is no ambiguity, the court may choose not to consider any evidence outside of the constitutional language at issue. Senate Joint Resolution 2 does not appear to be ambiguous, in the sense that it can be read in two different ways. However, the Joint Resolution is vague in the sense that it does not precisely define the scope of the right. This may lead a court to claim that it is ambiguous (because ambiguity and vagueness are frequently mixed), and resort thereafter to other evidence of meaning.

- ***Avoid absurd results.*** The issue of absurd results often arises when fact situations are presented to the court that were not envisioned by the drafters, or when there is a conflict between constitutional provisions.

- ***Extrinsic evidence related to adoption.*** Courts may review the legislative history surrounding adoption of a constitutional provision to determine what was intended by the Legislature.

- ***Extrinsic evidence related to legislation on the same subject.*** Courts may look to legislation interpreting constitutional provisions or to legislation that is adopted contemporaneous to the constitutional provision to determine intent.

COMMENTS ON 2001 SENATE JOINT RESOLUTION 2

The following are some observations regarding potential judicial interpretation of Senate Joint Resolution 2, as amended. These observations are expressed in terms of how the text of the Joint Resolution or certain evidence related to the Joint Resolution might influence the decision of a court. I have not assumed that a court might make an unexpected or unusual decision, although this is always a possibility.

- ***Plain meaning of the Joint Resolution.*** The Joint Resolution clearly does not create an absolute right to hunt and fish. The "right to fish, hunt, trap and take game" is qualified in the Joint Resolution by the language that follows: "subject only to reasonable restrictions as prescribed by law." Although the Joint Resolution creates a right, at the same time it authorizes the Legislature and its agent, the DNR, to regulate that right. Therefore, the language in the Joint Resolution clearly acknowledges that regulation of hunting, fishing, trapping and taking game will continue.

- ***Absurd results.*** Courts typically refer to rights created in the constitution as "fundamental rights." Fundamental constitutional rights are those that have an essential value to individual liberty in our society. When a court determines that a particular constitutional right meets this description, the court will often apply one of the higher standards of judicial review. Restrictions on many of the fundamental constitutional rights are subject to strict scrutiny, wherein the court will not apply a presumption of constitutionality to the legislation. The state, to defend the regulation, must show that the regulation is intended to achieve a compelling governmental interest and the regulation is narrowly tailored to serve that interest. This would make it very difficult for the state to defend most fish and game regulation. However, the Joint Resolution allows reasonable restrictions. It could be

considered an absurd result for a court to acknowledge that regulation of the right is permissible, but to make it extremely difficult for the state to regulate.

A more balanced approach, that harmonizes both the right and the regulation under the Joint Resolution, would be for the court to choose the intermediate standard of review. Regulations subject to the intermediate standard of review are given a presumption of constitutionality. Regulations must serve "significant" governmental interests, as contrasted with "compelling" governmental interests under the strict scrutiny standard. Regulations must be narrowly tailored, but not necessarily the least restrictive, and must leave open ample opportunities for citizens to exercise the right. Furthermore, even though a constitutional right is a fundamental right, courts recognize that not all burdens on fundamental rights bear heightened scrutiny. Some burdens may be sufficiently minor that they may be reviewed under the rational basis standard.

- ***Additional absurd results.*** As noted in *Krenz*, the ongoing availability of wild animals to hunt and fish depends on state regulation to conserve the fish and game. It could be considered an absurd result if the Joint Resolution could be used to negate a substantial amount of hunting and fishing regulation, if the result was to restrict game management authority and thus destroy the very activity that the Joint Resolution was intended to protect.

- ***"Reasonable restrictions" are authorized.*** This choice of language is important. Such restrictions could include the conservation of wild animals, as well as any other issues of public health, safety or welfare. This language should allow courts to approve regulations that respond to broader social issues, as well as conservation and game management. Social regulations are common in current fish and game regulations. For example, the nine-day deer gun season has no basis in deer herd management, but rather is based on tradition and public preference—a "social" regulation. Similarly, trophy size limits respond to angler preference rather than to fish management.

- ***Judicial precedent.*** Courts strongly tend to follow precedent in constitutional cases. The adherence to precedent increases the certainty that is provided by law. The *Krenz* case, cited above, is part of the Wisconsin precedent in fish and game law. This precedent suggests that courts are likely to make only modest changes to the standards for review of fish and game regulation, in that a substantial degree of judicial deference continues to be consistent with Senate Joint Resolution 2, as amended.

- ***Legislative history.*** I am unaware of any legislative history suggesting that the Joint Resolution is intended to restrict or negate any of the current fish and game regulations.

- ***Contemporaneous legislation.*** Senate Bill 45 and Assembly Bill 190 would prohibit the hunting of mourning doves. The outcome of legislative debate on these bills may suggest in part what is the Legislature's intent regarding the constitutional amendment. With the exception of these two bills, the Legislature is not considering any other legislation that would curtail any current hunting or fishing opportunities.

If I can provide further information on this subject, please feel free to contact me.

MCP:tlu:wu;rv

Sen. Baumgart:

Jim: The Courts have said only they can determine what is a reasonable restriction of a constitutional right. However, courts have deferred to government regulations for the public good or welfare. A right that is managed by law for the public good prohibits anti hunting legislation, but still allows state regulation with minimal court interference.

The original language ~~means the courts determine what~~ regulations are acceptable.

Tim Andrykt - DNR attorney

STATE OF WISCONSIN

To PR

Date 4/4 Time 3:41

WHILE YOU WERE OUT

M Todd

of

Phone 220-7687

Telephoned		Please Call	✓
Called to See You		Rush	
Returned Your Call		Will Call Again	

Message "Where is that stroker?"

Party Receiving Call

Henderson, Patrick
To: Dykman, Peter
Subject: SJR 2 Substitute Amendment Language

Peter,

I mistakenly sent you the wrong language earlier. What Senator Baumgart would like to have the bill say is:

"The people have the right to fish, hunt, trap and take game which shall be managed by law for the public good."

Sorry about any confusion this may cause. Please disregard the earlier email language. Thank you for your attention to this matter.

Pat Henderson
Office of Sen. Baumgart
6-2056

APPENDIX B—Continued

(b) If the amount realized on the bond is insufficient to satisfy all claims of the parties in full, it shall be distributed among the parties proportionally.

(3) In an action by a county upon the bond all persons for whose protection it was given and who make claim thereunder may be joined in the action. The county highway commissioner may take assignments of all demands and claims for labor or material and enforce the same in the action for the benefit of the assignors, and the judgment may provide the manner in which the assignors shall be paid.

History: 1973 c. 90; 1975 c. 147 s. 54; 1975 c. 224; 1977 c. 418; 1979 c. 32 s. 57; 1979 c. 110 s. 60(12); 1979 c. 176; Stats.1979 s. 779.14; 1985 a. 225; 1987 a. 399; 1989 a. 31, 290.

A subcontractor can maintain an action against the prime contractor and his surety if it is brought within one year after completion of work on the principal contract. Honeywell, Inc. v. Aetna Casualty & Surety Co. 52 W (2d) 425, 190 NW (2d) 499.

See note to 779.01, citing Jas. W. Thomas Const. Co., Inc. v. Madison, 79 W (2d) 345, 255 NW (2d) 551.

184 Wis.2d 645

John F. BARNES, Terry Young, Erik Brynildson, Mark Koeppl, Lu Kummerow and The Fund for Animals, Petitioners–Appellants–Petitioners,

v.

DEPARTMENT OF NATURAL RESOURCES, an agency of the State of Wisconsin, Respondent–Respondent.

No. 92–2603.

Supreme Court of Wisconsin.

Argued April 26, 1994.

Decided June 15, 1994.

Petition was filed with the Department of Natural Resources (DNR) to designate the bobcat as a threatened species pursuant to statute allowing persons to petition the DNR to amend list of endangered and threatened species. DNR declined to add the bobcat to the list, and petitioners sought judicial review. The Circuit Court, Dane County, P. Charles Jones, J., affirmed DNR's determination, and petitioners appealed. The Court of Appeals, 178 Wis.2d 290, 506 N.W.2d 155, affirmed, and petitioners sought further review. The Supreme Court, Shirley S. Abrahamson, J., held that DNR did not err in refusing to engage in rule-making proceeding in response to petition to add the bobcat to Wisconsin's list of threatened species, given inconclusive evidence of decline of bobcat population in Wisconsin.

Affirmed.

1. Fish ⇐12

Game ⇐3½

Legislature intended statute requiring designation and protection of endangered and threatened species to complement federal Endangered Species Act by strengthening potential for continued existence of endangered and threatened species within the state of Wisconsin. W.S.A. 29.415; Federal Endangered Species Act, § 2 et seq., 16 U.S.C.A. § 1531 et seq.

2. Fish ⇐12

Game ⇐3½

In amending statute requiring designation and protection of endangered and threatened species to allow persons to petition the Department of Natural Resources (DNR) to amend the list of such species, legislature intended to broaden role of persons outside the DNR in formulating list, without requiring the DNR to engage in rule making in response to every petition presenting scientific evidence; by providing that the DNR "may" review any listed or unlisted wild animal and "may by hearing and rule amend statewide list" of protected species, legislature committed such decisions to sound discretion of the DNR. W.S.A. 29.415(3)(c).

3. Fish ⇐12

Game ⇐3

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3. Fish ⇐12
Game ⇐3½

Under statute requiring designation and protection of endangered and threatened species, and regulation implementing statute, petitioners seeking revision of list of endangered and threatened species are to present scientific evidence from which the Department of Natural Resources (DNR) may conclude that it appears likely, within the foreseeable future, that species will become endangered, or in other words, that species' continued existence appears likely within the foreseeable future to be in jeopardy; petitioners must demonstrate substantial decline in numbers of the species in the state and a substantial threat to remaining number or habitat of the species. W.S.A. 29.415(3)(a, c).

4. Fish ⇐12
Game ⇐3½

Responsibility of Department of Natural Resources (DNR) as custodian of Wisconsin's wildlife, is to review and evaluate fairly and impartially scientific evidence presented by petitioners who wish to amend the list of endangered and threatened species; DNR is not required to rely solely on representations of petitioners, but may undertake its own analyses of the scientific data and solicit opinions from experts within and outside the DNR; review and evaluation of scientific evidence by the DNR is not undertaken to prove petitioners wrong, but rather, to fulfill DNR's legislative mandate to gather scientific evidence for purposes of rule making, to maintain a balance between protection of wildlife and exploitation of the state's resources, and to conserve the wild plant and animal species of Wisconsin. W.S.A. 29.415(3)(c).

5. Game ⇐3½

Department of Natural Resources (DNR) did not err in refusing to engage in a rule making proceeding in accordance with statutory provisions in response to petition to add the bobcat to Wisconsin's list of threatened species, where scientific evidence presented by petitioner and by the DNR concerning population of bobcats in Wisconsin was inconclusive as to whether bobcat population was declining. W.S.A. 29.415(3)(c), 227.57(7).

For the petitioners-appellants-petitioners there were briefs by J. Reed Millsaps, and Maduff & Millsaps, Chicago, IL, and oral argument by J. Reed Millsaps.

For the respondent-respondent the cause was argued by Philip Peterson, Asst. Atty. Gen., with whom on the brief was James E. Doyle, Atty. Gen.

SHIRLEY S. ABRAHAMSON, Justice.

This is a review of a published decision of the court of appeals, *Barnes v. Dept. of Natural Resources*, 178 Wis.2d 290, 506 N.W.2d 155 (1993), affirming the judgment of the circuit court of Dane County, P. Charles Jones, circuit judge. The petitioners, John F. Barnes, Terry Young, Erik Byrnildson, Mark Koeppl, Lu Kummerow, and the Fund for Animals (Barnes) had petitioned the Department of Natural Resources (DNR) to add the bobcat to Wisconsin's list of threatened species pursuant to sec. 29.415(3)(c), Stats. 1991–92.[1] In August 1991, the DNR advised Barnes that it declined to add the bobcat to the list. Barnes then petitioned the circuit court for review of the DNR's determination, and the circuit court affirmed this determination. The court of appeals affirmed the judgment of the circuit court.

We affirm the decision of the court of appeals. Because we cannot conclude that the facts (here, scientific evidence) compelled the DNR to engage in a ch. 227 rulemaking procedure as a matter of law, we do not set aside the DNR's discretionary determination declining to engage in a ch. 227 rulemaking proceeding. Section 227.57(7), Stats. 1991–92. A remand to the DNR for further examination and action at this time would be of no avail. Section 227.57(7). *R.W. Docks & Slips v. Dept. of Natural Resources*, 145

1. Section 29.415(3)(c) provides: "The department may upon the petition of 3 persons review any listed or unlisted wild animal or wild plant if the persons present scientific evidence to warrant such a review, after which the department may by hearing and rule amend the statewide list."

Wis.2d 854, 429 N.W.2d 86 (Ct.App.1988). Furthermore, the DNR's determination was not outside the range of discretion delegated to it by law or otherwise an erroneous exercise of discretion. Section 227.57(8), Stats. 1991–92.

The parties, the circuit court, and the court of appeals cast the issue as, and focused their attention on, the validity of DNR's refusal to list the bobcat as a threatened species. At oral argument before this court, however, the parties acknowledged that the central issue before us is not whether the DNR should have added the bobcat to the list of threatened species, but whether in response to the Barnes petition the DNR should have embarked on a rulemaking procedure to determine whether the bobcat should be added to that list.[2] At oral argument the parties also acknowledged that if the Barnes petition were sufficient under the statute, the appropriate remedy would be to remand the matter to the DNR; the parties agreed that the court could not determine whether the bobcat should be added to that list.

This formation of the question before us is compelled by the language of sec. 29.415(3)(a) governing the formulation of the list of endangered and threatened species,[3] sec. 29.415(3)(c) governing petitions to the DNR to review the status of any listed or unlisted wild animal,[4] as well as Wis.Admin.Code NR 27.04, the administrative rule the DNR promulgated to implement sec. 29.415(3)(c).[5] Accordingly, the question we address is the following: Did the DNR err in refusing to engage in a ch. 227 rulemaking proceeding in accordance with sec. 29.415(3)(c) and the provisions of ch. 227, Stats. 1991–92, in response to the Barnes petition to add the unlisted bobcat to Wisconsin's list of threatened species?[6] Applying the statutory standards of review, we affirm the determination of the DNR. Because we cannot conclude that the facts (here, scientific evidence) compelled the DNR to engage in a ch. 227 rulemaking

2. The Barnes brief asserts that "the effect of a reversal in this case means that the WDNR would have to issue a proposed rule listing the bobcat as either a threatened or endangered species. The WDNR would then have to proceed with public notice and solicit public comments on the proposed rule." Brief at p. 41. Other parts of the Barnes brief ask this court to reverse the decision of the DNR and direct it to list the bobcat as a threatened or endangered species. Brief at 42.

3. Section 29.415(3)(a), Stats. 1991–92, provides: "The department shall by rule establish an endangered and threatened species list.... Wisconsin endangered species shall be compiled by issuing a proposed list of species approaching statewide extirpation. Wisconsin threatened species shall be compiled by issuing a proposed list of species appear likely, within the foreseeable future, to become endangered. Issuance of the proposed lists shall be followed by solicitation of comments and public hearing. Wild animals and wild plants shall be deemed approaching statewide extirpation if the department determines, based upon the best scientific and commercial data available to it, after consultation with other state game directors, federal agencies and other interested persons and organizations, that the continued existence of such wild animals and wild plants in this state is in jeopardy."

4. Section 29.415(3)(c), Stats. 1991–92, provides as follows: "The department may upon the petition of 3 persons review any listed or unlisted wild animal ... if the persons present scientific evidence to warrant such a review, after which the department may by hearing and rule amend the statewide list."

5. NR 27.04 provides as follows:

"(1) Petition for changes. (a) Requirements. Any 3 persons may petition the department to review that status of any listed or unlisted wild animal or wild plant. Such petitions must be dated, in writing, and submitted to the ENS. To be considered, requests must show in full the following information:

1. Names and addresses of persons petitioning;

2. Designation of the particular species in question;

3. Narrative explanation of the request;

4. Complete scientific supporting data for the request including evidence of Wisconsin residency, past numbers and geographic distribution, current numbers and geographic distribution, a substantial decline in numbers, and a substantial threat to remaining numbers or habitat or both; and

5. Signatures of the persons making the request.

"(b) Review. If the department finds the petitioners have presented substantial evidence to warrant review, the department shall proceed in accordance with ch. 227, Stats."

6. Because we construe the question in this case to be whether the DNR erred in refusing to hold a rulemaking hearing, we need not address issues raised by the parties concerning review of a DNR decision not to add a wild animal to Wisconsin's list of threatened species.

procedure as a matter of law, we do not set aside the DNR's discretionary determination declining to engage in a ch. 227 rulemaking proceeding. Section 227.57(7), Stats. 1991–92. The DNR investigated the matter and its written materials are before us. A remand to the DNR for further examination and action at this time would be of no avail. Section 227.57(7), Stats. 1991–92. *R.W. Docks & Slips v. Dept. of Natural Resources*, 145 Wis.2d 854, 429 N.W.2d 86 (Ct.App.1988). Furthermore, the DNR's determination declining to engage in a rulemaking proceeding was not outside the range of discretion delegated to it by law or otherwise an erroneous exercise of discretion. Section 227.57(8), Stats. 1991–92.

I.

We can summarize the facts as follows. Barnes petitioned the DNR to review the unlisted status of the bobcat and to designate it a threatened species pursuant to sec. 29.-415(3)(c). The petition complied with the technical requirements of the statute, setting forth the names, addresses and signatures of at least three petitioners and a narrative explanation of the request to designate the bobcat as a threatened species. The petition explained that historically, bobcats were found throughout Wisconsin, but that they have been reduced to one fifth of their former range. It included data gathered by the DNR since 1980 concerning bobcat hunting and trapping permits and bobcat kills. Barnes noted that although the number of hunting and trapping permits rose from 1980–89, the number of bobcats killed rose only until 1987 and then began to drop. On the basis of this data, Barnes argued that the number of bobcats killed per permit declined precipitously in 1988 and 1989. Barnes reasoned that if the bobcat population were stable, roughly the same number of bobcats per permit would be killed over time and that the declining number of kills implied a decline in the bobcat population. The petition cited information purporting to show that the decline in bobcats killed could not be explained by changes in the snow cover in the northern Wisconsin counties where most bobcats are killed.

The Barnes petition noted that the bobcat evolved as a predator, bearing few young; it is thus ill-equipped as a species to cope with overharvesting by hunters and trappers. The Barnes petition asserted that the DNR had poorly managed the Wisconsin bobcat population by attempting to maintain the population at the 1970s level, with no accurate estimate of what that base population has been. According to the petition, it was irresponsible for the DNR to allow continued hunting and trapping of bobcats given the indications from the hunting data that the bobcat population was not stable and the general lack of good information about the number of bobcats in existence in the state. The Barnes petition further claimed that the bobcat's continued existence in Wisconsin is in jeopardy and that it is thus qualified for inclusion on the state's list of threatened species under sec. 29.415(3).

In review of and in response to this petition, the DNR prepared an "Environmental Analysis and Decision on the Need for an Environmental Impact Statement." This Analysis included a survey of the scientific literature on the bobcat and its management and assessments of the stability of Wisconsin's bobcat population prepared both by DNR staff and two wildlife biologists not connected with the DNR. The assessments were based in large part on hunting and trapping data and on information gleaned from bobcat carcasses.

In its 1989 assessment of the status of Wisconsin's bobcat population, the DNR staff indicated that its models suggest that there were approximately 1500 bobcats in Wisconsin. Neither annual mortality rates nor winter track counts indicated that the bobcat population was declining. The assessment concluded that limiting the annual bobcat harvest by quota, a proposal then-under discussion, was unnecessary. The staff noted that at least 150 bobcats would have to be harvested annually in order to ensure the continued accuracy of the population model used by the DNR.

The two outside wildlife biologists, Drs. L.B. Keith and Stan Temple of the University of Wisconsin Department of Wildlife Ecology, expressed concern over the stability of

the bobcat population, but agreed that the data with respect to whether the bobcat is a threatened species are inconclusive. Keith's analysis of the data yielded mean estimates of 670 and 1,176 bobcats, well below the DNR's estimate of 1500. In addition, he pointed to other factors suggesting that even his estimates were too high. He concluded:

> For reasons that I think are clear to everyone at WDNR, none of the 4 available indices to bobcat population trends in Wisconsin by itself is satisfactory. That is, neither the registered harvest, the harvest per licensed hunter, the track count index, nor the scent-post survey are presently capable of tracking the year-to-year or long-term population trends. *What this obviously means is that WDNR cannot demonstrate a stationary population, nor can the advocates of more protection demonstrate a population decline.* I suggest that obtaining an accurate annual population index, whose precision can be estimated and is acceptable, should be a high-priority item. You will note that one "possible" conclusion from the analysis I conducted is that the Wisconsin bobcat population is declining. (emphasis in original.)

Professor Temple also complained about the lack of reliable data on Wisconsin's bobcat population. Temple noted that the DNR's bobcat management program was clearly deficient in some respects, most notably the lack of an accurate estimate of the population size. He observed that "[a]lthough the petition by Barnes et al. raise some important issues, they are no more able to prove any of their assertions than the DNR is able to prove theirs. The reason for this stand off—with each side arguing their case on the basis of inconclusive evidence—is a lack of accurate information on the size of the Wisconsin bobcat population." Temple criticized the reliability of the methods used by both the Wisconsin and Minnesota departments of natural resources to calculate the estimate of 1500 bobcats in Wisconsin. In contrast, he estimated the population at about 872 bobcats. Although Temple expressed concern that the rising proportion of kittens in the 1983–88 harvest suggested bobcats overharvesting, he could not conclude that the bobcat population in Wisconsin is threatened.[7]

The DNR concluded that it did "not feel at this time that classifying [the] bobcat as a threatened species [was] necessary." The DNR characterized the data relied upon by the petitioners as "very questionable—based mainly on the harvest rate which varies greatly due to hunting conditions and fur prices." The DNR observed that the "general opinion of biologists in Wisconsin is that the bobcat population is nearly stable or slightly declining. A slightly declining population does not mean that the population is threatened."

The DNR's Environmental Analysis considered four alternatives for bobcat population management: (1) retaining the present policy unchanged, (2) adding the bobcat to the state's list of threatened species, (3) listing the bobcat as a unique protected species, and (4) developing a quota system for bobcat harvest. The DNR concluded that the quota system was the preferred alternative.[8] After soliciting public comment, but without conducting a public hearing, the DNR concluded that "there is no basis to list the bobcat as a threatened species for there is no evidence to support a finding that the bobcat is likely within the foreseeable future, on the basis of scientific evidence to become endangered."

Barnes petitioned the circuit court to review the DNR's determination pursuant to sec. 227.53,[9] arguing that the DNR's decision declining to list the bobcat as a threatened species was not supported by substantial evidence. Barnes argued that where scientific data are inconclusive, the DNR should err on

7. In reviewing the analyses of these two biologists, DNR staff asserted that they found errors. Adjusted for these errors, Keith's mean estimates of pre-birth bobcat populations would be 960 and 1920 and Temple's estimate would be 1100.

8. The DNR established a quota system for bobcats pursuant to this recommendation.

9. Section 227.53(1), Stats. 1991–92, provides: "Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter."

the side of caution and add the bobcat to the list. The circuit court affirmed the DNR's decision on the grounds that lack of information is not a basis for listing a species as threatened. The court of appeals affirmed.

II.

The question before this court is not whether the DNR erred in refusing to add the bobcat to the list of threatened species, but rather whether the DNR erred in refusing to engage in a ch. 227 rulemaking proceeding.

[1] Our review of the DNR's decision not to engage in a ch. 227 rulemaking proceeding must begin with an appraisal of the legislature's intent in enacting sec. 29.415 which requires designation and protection of endangered and threatened species. From the statute's statement of purpose, sec. 29.415(1), it is clear that the legislature intended this statute to complement the federal Endangered Species Act by strengthening the potential for the continued existence of endangered and threatened species within this state. It sets forth legislative findings that individuals and government agencies "are tending to destroy the few remaining whole plant-animal communities in this state" and explains that preservation of these communities "is of the highest importance." Thus the legislature's intent to protect and maintain Wisconsin's wild animals and wild plants is clear.

The legislature entrusted to the DNR the responsibility of formulating a list of species eligible for protection under the act. Section 29.415(3)(a) requires the DNR to establish a list of endangered and threatened species. Threatened and endangered species are treated separately in the statute.[10] A threatened species is defined by sec. 29.415(2)(b) as "any species of wild animals or wild plants which appear likely, within the foreseeable future, on the basis of scientific evidence to become *endangered*." (emphasis added). The word "endangered" is not defined in the statute but the phrase "endangered species" is defined by sec. 29.415(2)(a) as a species "whose continued existence as a viable component of this state's wild animals ... is determined by the department to be in jeopardy on the basis of scientific evidence." We use the word "protected" to refer to both endangered and threatened species.

In compiling the initial list of threatened species, the DNR was required to issue a proposed list of "species which appear likely, within the foreseeable future, to become endangered." Section 29.415(3)(a), Stats. 1991–92. This is the same language as the legislature uses to define threatened species in sec. 29.415(2)(b).[11] Issuance of the proposed list was to be followed by solicitation of comments and a public hearing. The DNR has listed numerous species, although very few mammals, are included as endangered or threatened. *See* Wis.Admin.Code NR 27.03.

A recurring strain in sec. 29.415 is that the DNR is to formulate and revise the state's list of protected species on the basis of scientific data. *See* sec. 29.415(2)(a) ("scientific evidence"); sec. 29.415(2)(b) ("scientific evidence"); sec. 29.415(3)(a) ("best scientific and commercial data available"); sec. 29.415(3)(b) ("scientific data"); sec. 29.415(3)(c) ("scientific evidence"), Stats. 1991–92.

The legislature mandated a process of careful consideration by the DNR of which species are to be included on the state's list of protected species. In doing so, the legislature intended to ensure judicious use of the

10. The DNR's brief asserts that Barnes presents the issue of whether the bobcat is threatened, not endangered. We need not decide, as Barnes's brief urges, that although sec. 29.415 separates species into endangered and threatened categories, the statute treats the two the same except under sec. 29.415(6)(b).

11. The legislature sets forth a similar procedure for compiling a list of endangered species. In compiling a list of endangered species the DNR issues "a proposed list of species approaching statewide extirpation.... Wild animals ... shall be deemed approaching statewide extirpation if the department determines, based upon the best scientific and commercial data available to it, after consultation with other state game directors, federal agencies and other interested persons and organizations, that the continued existence of such wild animals and wild plants in this state is in jeopardy." Section 29.415(3)(a), Stats. 1991–92. Thus sec. 29.415(3)(a) uses the same language to refer to endangered species as the definition of endangered species in sec. 29.415(2)(a).

agency's resources for protecting endangered and threatened species. The statute balances concern for conservation of the state's wildlife against the potential for unnecessarily lengthening the list of protected species.

This case arose after the DNR had established a list of threatened species under sec. 29.415(3)(a). The legislature requires the DNR to review the list periodically and, authorizes the DNR, following public hearing, to revise it. Section 29.415(3)(b), Stats. 1991–92.[12] This case, however, does not fall within the statute governing the DNR's periodic review of the list under sec. 29.415(3)(b).

In this case persons outside the DNR have petitioned the DNR to review the status of an unlisted species, asserting that the bobcat is threatened. We therefore must examine sec. 29.415(3)(c), the statutory provision governing such petitions.

From its enactment in 1971, the statute has provided a mechanism for persons to petition the DNR for revisions of the list. The original Endangered Species Act provided that on the petition of three persons, the DNR "shall" review "any fish and wildlife *on the statewide list* if such persons present scientific evidence to warrant such a review, after which the department may by hearing and order amend the statewide list." Section 29.415(3)(c), Stats. 1971–72 (emphasis added). In other words, this provision apparently empowered individuals to petition the DNR to remove a particular species from the list, but not to add it to the list of endangered species.

In 1977, sec. 29.415 was amended to protect not only endangered species, but threatened species as well. 1977 Wis.Laws ch. 370. The provision allowing persons to petition the DNR to amend the list was changed to permit three persons to seek review of any "listed or unlisted wild animal or wild plant." Rather than stating that the DNR "shall" review the status of a species whenever scientific evidence warrants such review, sec. 29.415(3)(c) as adopted in 1977 provides that the DNR "may" review any listed or unlisted wild animal if the petitioners "present scientific evidence to warrant" such a review.

Section 29.415(3)(c), Stats. 1991–92, provides as follows: "The department may upon the petition of 3 persons review any listed or unlisted wild animal ... if the persons present scientific evidence to warrant such a review, after which the department may by hearing and rule amend the statewide list."

[2] The 1977 change suggests that a legislative intent to broaden the role of persons outside the DNR in formulating the list of endangered and threatened species, without requiring the DNR to engage in rulemaking in response to every petition presenting scientific evidence. By providing that the DNR "may" review any listed or unlisted wild animal and "may by hearing and rule amend the statewide list" of protected species, the legislature committed such decisions to the sound discretion of the DNR.

Unfortunately sec. 29.415(3)(c) does not clearly specify the steps the DNR must take when a petition is filed. The DNR has adopted a rule, Wis.Admin.Code NR 27.04(1), setting forth a procedure for submission and consideration of petitions similar to the one the legislature created for the DNR to follow when it initially establishes the list. Under NR 27.04(1), the petition must include the following information: the names, addresses, and signatures of persons petitioning; designation of the particular species in question; a narrative explanation of the request and "[c]omplete scientific supporting data for the request including evidence of Wisconsin residency, past numbers and geographic distribution, current numbers and geographic distribution, *a substantial decline in numbers and a substantial threat to remaining numbers or habitat or both.*" (emphasis added.) The rule goes on to state that "if the department finds the petitioners have presented substantial evidence to warrant a review, the department shall proceed in accordance with ch. 227, Stats." Wis.Admin.Code NR 27.04(1)(b).

12. Sec. 29.415(3)(b) provides: "The department shall periodically review and, following public hearing, may revise its endangered and threatened species list. A summary report of the scientific data used to support all amendments to the state's endangered and threatened species list shall be maintained by the department."

Under the statutory scheme as interpreted by the rule, the DNR's role is to propose inclusion of a species on the threatened list on the basis of scientific evidence either at the creation of the list, at its periodic review of the list, or at the request of three petitioners. The DNR proposes inclusion of a wild animal as a threatened species if the species appears "likely, within the foreseeable future, to become endangered." Sections 29.415(2)(b), (3)(a), Stats. 1991–92. Both parties correctly equate the statutory phrase "likely, within the foreseeable future, to become endangered" with the phrase "likely, within the foreseeable future, that its continued existence will be in jeopardy." [13] In keeping with this standard, the DNR rule requires the petitioners to provide scientific information showing "a substantial decline in numbers and a substantial threat to remaining numbers or habitat or both."

[3] To summarize, under sec. 29.415(3)(c) and Wis.Admin.Code NR 27.04, the petitioners are to present scientific evidence from which the DNR may conclude that it appears likely, within the foreseeable future, that the species will become endangered, or in other words, that the species' continued existence appears likely within the foreseeable future to be in jeopardy. To do that, the petitioners must demonstrate a substantial decline in the numbers of the species in the state and a substantial threat to the remaining numbers or habitat of the species. Section 29.415(3)(a) and (3)(c) and Wis.Admin.Code NR 27.04(1)(a)4.

[4] The DNR's responsibility as custodian of Wisconsin's wildlife is to review and evaluate the scientific evidence presented by the petitioners fairly and impartially. The DNR is not required to rely solely on the representations of the petitioners, but may undertake its own analyses of the scientific data and solicit opinions from experts within and outside the DNR. This review and evaluation of the scientific evidence is not undertaken to prove the petitioners wrong, but rather, to fulfill the DNR's legislative mandate to gather scientific evidence for purposes of rulemaking, to maintain a balance between protection of wildlife and exploitation of the state's resources, and to conserve the wild plant and animal species of Wisconsin.

In this case, the DNR advised Barnes that it would not add the bobcat to Wisconsin's list of threatened species, because the DNR determined that it did not appear likely in the foreseeable future that the bobcat would become endangered. The DNR should have advised Barnes that the scientific evidence did not demonstrate a likelihood that bobcats would become endangered in the foreseeable future and that therefore the DNR would not engage in a ch. 227 rulemaking proceeding. We examine next the standard of review applicable to the DNR's determination not to engage in a ch. 227 rulemaking proceeding.

III.

[5] The DNR has reviewed the status of an unlisted wild animal on the basis of the scientific evidence available and rendered a discretionary decision not to engage in a ch. 227 rulemaking proceeding. Even though the case is before us on review of the decision of the court of appeals, we are in reality reviewing the DNR's decision. *Richland School Dt. v. Dept. Industry, Labor and Human Relations*, 174 Wis.2d 878, 890, 498 N.W.2d 826 (1993). To review the DNR's decision, we must decide the appropriate standard of review.

Several standards set forth in sec. 227.57 for review of administrative determinations are applicable to this case: Our review is confined to the record. Section 227.57(1), Stats. 1991–92. The court must affirm the DNR's action unless it finds a ground for not doing so. Section 277.57(2), Stats. 1991–92.[14]

13. Both the DNR's brief and the Barnes brief agree that because sec. 29.415 defines "threatened species" by reference to the word "endangered," the phrase "in jeopardy," which is used in the statute to describe an endangered species, also applies to a threatened species.

Thus both parties appear to define a threatened species as any species which is likely to become an endangered species within the foreseeable future. 68 Wis.O.A.G. 9, 10 (OAG 6–79, 1979).

14. Section 227.57(2) provides: "Unless the court finds a ground for setting aside, modifying, re-

The court is to treat separately "disputed issues of agency procedure, interpretations of law, determinations of fact or policy within the agency's exercise of delegated discretion." Sec. 227.57(3), Stats. 1991–92. 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. Section 227.57(7), Stats. 1991–92. If the agency is exercising its discretion, the court shall reverse or remand if it finds that the exercise of discretion is outside the range of discretion delegated to the agency by law. Section 227.57(8), Stats. 1991–92. The legislature also requires a court to accord "due weight" to the "experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it." Section 227.57(10), Stats. 1991–92. Furthermore, the statutes admonish a court not to "substitute its judgment for that of the agency on an issue of discretion." Section 227.57(8).[15]

The legislature delegated to the DNR the task of determining which wildlife in this state should be protected under sec. 29.415. Consideration of a petition to review the status of any listed or unlisted wild animal is clearly committed to the DNR's discretion. Sec. 29.415(3)(c) expressly states that the DNR "may" review such petitions and "may" amend the statewide threatened species list by hearing and rule. Thus this case involves the DNR's exercise of discretionary authority. Discretion contemplates a process of reasoning. According to the statute, the DNR is to act on the basis of scientific evidence and consistent with the applicable law.

IV.

The Barnes petition included scientific evidence, primarily based on harvest statistics, purporting to show that the bobcat population in Wisconsin was declining. The record demonstrates that many, but not all, of the scientific analyses of the bobcat population are based on information gathered from the bobcat harvest. Thus it would be incorrect to dismiss an argument that the bobcat population is declining simply on the grounds that harvest data is *per se* unreliable. Harvest data can be compared to and complemented by other information; it can be analyzed, perhaps more sensitively, by different methods; and a variety of conclusions can be drawn from the same set of data.

As it should, the DNR supplemented the information included in the petition. It subjected the available data to different methods of analysis and to evaluation by wildlife biologists outside the DNR. The clear conclusion to be drawn from the information included in the record and from the opinions of the experts is that the evidence concerning the population of bobcats is inconclusive. Indeed, both University of Wisconsin wildlife biologists made clear that the absence of information concerning bobcat numbers handicapped their analyses of the stability of the statewide population. Nonetheless, they could not conclude on the basis of the information available that the bobcat is a threatened species. They urged the DNR to undertake further study of the bobcat population to determine with greater certainty whether it is, in fact, declining. Inherent in the DNR's duty to review and revise the list of protected species is a responsibility to monitor potentially declining wild animal and plant populations. Sec. 29.415(3)(b).

Following this review and evaluation of the Barnes petition and the scientific evidence about the bobcat, the DNR concluded, without a public hearing, that the bobcat did not appear likely, within the foreseeable future, to become endangered. As we have ex-

manding or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action."

15. Section 227.57(8) provides: "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."

plained, the DNR was required under the statute only to determine whether it should engage in a ch. 227 rulemaking proceeding. The scientific evidence does not support the Barnes petition that it appears likely, within the foreseeable future, that the bobcat will become endangered. On the other hand, the scientific evidence upon which the DNR relied does not demonstrate that the bobcat population is healthy. The evidence is simply inconclusive.

Barnes invites us to hold, as a matter of law, that when evidence about the stability of a population is inconclusive, the DNR ought to err on the side of caution and designate the species as protected, or at least engage in a ch. 227 rulemaking proceeding. Barnes stresses the legislature's intent to conserve the state's wildlife and its use of the term "in jeopardy" to describe the status of the wild animals and plants that are to be included on the state's list of protected species.[16] For support, Barnes cites *Northern Spotted Owl v. Hodel*, 716 F.Supp. 479 (W.D.Wash.1988), which states that when "none [of the experts] concluded that the northern spotted owl is not at risk of extinction[,]" the owl should be protected. In the case at bar, Barnes contends that none of the experts concluded that the bobcat is not in jeopardy. Thus it follows, Barnes argues, that the DNR's decision not to add the bobcat to Wisconsin's list of threatened species is arbitrary and capricious.

Barnes misconstrues the logic of *Northern Spotted Owl*. All of the experts in that case agreed that the owl would become extinct unless the Fish and Wildlife Service designated it as an endangered species; no expert stated that the spotted owl was not at risk of extinction. The court considered the Service's decision not to protect the owl arbitrary and capricious because the Service failed to cite any evidence that the spotted owl was not at risk of extinction. *Northern Spotted Owl*, 716 F.Supp. at 482–483.

The facts of the case at bar are very different. Here no expert stated that the bobcat is threatened. No expert concluded that there was scientific evidence showing that the bobcat was likely, within the foreseeable future, to become endangered. As Barnes' brief concedes, the evidence shows that "it was impossible to tell whether the bobcat was threatened or non-threatened." Brief at p. 39. The DNR has cited evidence suggesting that the bobcat population is stable or slightly declining and has concluded that the decline does not render the bobcat a threatened species.

For Barnes to succeed we must accept his contention that "if it is an even call whether the bobcat is at risk or danger, it is in jeopardy." Neither the DNR nor this court interprets the statute as Barnes does. By emphasizing that the species be designated as protected upon the basis of available scientific evidence, the legislature envisioned that some showing be made that a species is in need of protection. To construe unproven decline as justifying inclusion on the state's list of threatened species would undermine the legislative policy of targeting the DNR's resources to those species proven to be in need of protection.

Perhaps most important, the legislature committed to the DNR's sound discretion the determination of which species should be protected in Wisconsin. This discretion is not unfettered. Implicit in the DNR's obligation to review and revise the list is a responsibility to monitor potentially declining animal and plant populations so that scientific evidence will be available. But there is no indication in the case at bar that the DNR abdicated its responsibility or did anything but thoroughly evaluate and carefully consider the Barnes petition to add the bobcat to Wisconsin's list of threatened species.

Applying the statutory standards of review, we affirm the DNR's determination. Because we cannot conclude that the facts (here, scientific evidence) compelled the DNR to engage in a ch. 227 rulemaking procedure as a matter of law, we do not set aside the DNR's discretionary determination declining to engage in a ch. 227 rulemaking proceeding. Section 227.57(7), Stats. 1991–

16. Barnes argues that the common usage of the term "in jeopardy" is at risk, at peril, or in danger. Barnes contends, however, that jeopardy should be interpreted to mean that something merely be at risk or at peril in an evenly divided game.

92. The DNR investigated the matter and its written materials are before us. A remand to the DNR for further examination and action at this time would be of no avail. Section 227.57(7). *R.W. Docks & Slips v. Dept. of Natural Resources*, 145 Wis.2d 854, 429 N.W.2d 86 (Ct.App.1988). Furthermore, the DNR's determination declining to engage in a rulemaking proceeding was not outside the range of discretion delegated to it by law or otherwise an erroneous exercise of discretion. Section 227.57(8), Stats. 1991–92.

For the reasons set forth, we affirm the decision of the court of appeals.

The decision of the court of appeals is affirmed.

185 Wis.2d 153

STATE of Wisconsin, Plaintiff–Respondent,

v.

Kathleen BRAUN, Defendant–Appellant–Petitioner.†

No. 91–0923.

Supreme Court of Wisconsin.

Argued April 26, 1994.

Decided June 22, 1994.

Appeal was taken from order of the Circuit Court, Milwaukee County, Ted E. Wedemeyer, Jr., J., which dismissed postconviction petition because of convict's fugitive status. The Court of Appeals affirmed, 178 Wis.2d 249, 504 N.W.2d 118. The Supreme Court, Geske, J., held that: (1) convict's fugitive status served as abandonment of application for relief on the merits; (2) when convict escaped during pendency of postconviction motion, she forfeited all claims that she either raised or could have raised in her motion; and (3) dismissal served as final adjudication of the postconviction motion and had res judicata effect on future attempts to litigate those claims.

Affirmed.

1. Criminal Law ⇐1134(3)

Question of statutory construction is question of law which Supreme Court decides independently and without deference to reasoning of lower courts.

2. Criminal Law ⇐998(4)

Convict's fugitive status serves as abandonment of application for postconviction relief on the merits. W.S.A. 974.02, 974.06.

3. Criminal Law ⇐998(21)

Any issue not raised in original, supplemental, or amended postconviction motion based on constitutional violation or any issue which has been finally adjudicated on direct appeal may not be the basis of a subsequent motion, except when the court determines that sufficient reason exists that would excuse the failure to raise the issue on direct appeal. W.S.A. 974.06(4).

4. Criminal Law ⇐998(4)

When defendant escaped during pendency of postconviction motion, she forfeited all claims which she either raised in that motion or which she could have raised in that motion. W.S.A. 974.02.

5. Criminal Law ⇐998(4, 19)

Dismissal of postconviction relief because of convict's fugitive status served as a final adjudication of the postconviction motion and had res judicata on future tips to litigate those claims. W.S.A. 974.02.

6. Criminal Law ⇐998(21)

Defendant who asserted no reason why claim that prosecutor misrepresented actual plea negotiations between state and accomplish during defendant's trial could not have been asserted in postconviction motion could not raise it in second motion. W.S.A. 974.02, 974.06.

For the defendant-appellant-petitioner there were briefs by Stephen M. Glynn, Robert R. Henak and Shellow, Shellow & Glynn, S.C., Milwaukee and o phen M. Glynn.

For the plaintiff-resp argued by Daniel J. Gen., with whom on th Doyle, Atty. Gen.

GESKE, Justice.

This is a review of the court of appeals, Wis.2d 249, 504 N.W which affirmed orders Milwaukee County, T

1. Section 974.06, Stats **974.06 Postconvicti** the time for appeal provided in s. 974.02 custody under sente convicted and placec bation program und right to be released sentence was impos constitution or the c state, that the court impose such sentenc in excess of the maxi is otherwise subject move the court whi vacate, set aside or **(2)** A motion for original criminal ac ceeding and may b supreme court may motion. **(3)** Unless the m ords of the action person is entitled t (a) Cause a copy upon the district att ten response within court. (b) If it appears and if the defenda indigent, refer the defender for an in appointment of co (c) Grant a pror (d) Determine th of fact and conclu finds that the judg jurisdiction, or tha not authorized by collateral attack, o denial or infringe rights of the perso vulnerable to colla vacate and set th discharge the pers or grant a new tri may appear appr **(4)** All grounds son under this sec her original, suppl

† Motion for reconsideration filed July 12, 1994.

Important Information!

Senator Jim Baumgart, Chair of the Senate Environmental Resources Committee, has scheduled a public hearing in Manitowoc on the following:

SENATE JOINT RESOLUTION 2
To create section 26 of article I of the constitution; relating to: the right to fish, hunt, trap, and take game (first consideration).
Introduced by Senators **Baumgart**, Decker, Schultz, Shibilski, Zien, Breske, A. Lasee, Burke, Harsdorf, M. Meyer, George and Plache; cosponsored by Representatives Gunderson, Ott, Reynolds, Musser, Plouff, Petrowski, Plale, Kreuser, Balow, F. Lasee, Suder, Krawczyk, Pettis, Johnsrud and Gronemus, by request of the Sheboygan County Conservation Association.

Hearing Information:

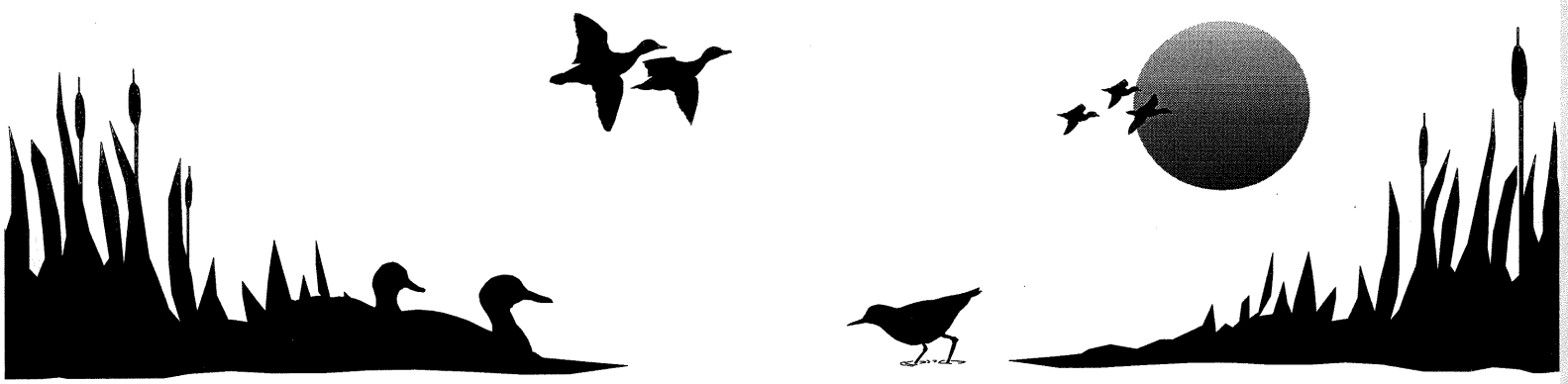
Date:	Tuesday, February 6, 2001
Time:	2:00 P.M.
Place:	Manitowoc Public Library 707 Quay St., Manitowoc, WI

Please spread the word about the hearing to sports people from the Sheboygan and Manitowoc Area. It is very important that we have a good turnout to testify and/or register in favor of Senate Joint Resolution 2.

Hopefully more people can attend the hearing as it is scheduled to start at 2:00 P.M. Those who get off of work earlier in the afternoon can come at 3:00 P.M. or a little later.

PLEASE NOTE THIS HEARING ON YOUR CALENDAR!

If you have any questions, please call the Madison Office of Senator Baumgart at the toll-free number: 1-888-295-8750.



REGARDING SENATE JOINT RESOLUTION 2

Proposed Amendment as Currently Drafted –

"Individuals have the right to hunt, fish and trap and take game subject only to reasonable restrictions prescribed by law."

If this wording was plagiarized from another state, it demonstrates the problem of plagiarizing where the other state may have a dissimilar constitution or indifference to the reason for the amendment. If not plagiarized the reason and source of the wording remains extremely questionable.

By wording the amendment in this manner you run into the very problem our founding fathers confronted and then solved in Article III, Section 2 of the U.S. Constitution. The Constitution must control what laws can be passed by the legislative body. You cannot have the legislative body define what the Constitution means. It would be "the tail wagging the dog." Rights emanate from the Constitution; not the legislative nor executive branches and they cannot limit nor expand those rights by statutes or vetoes. It is solely for the judicial branch to define the Constitution. This novel "blending of powers," rather than separation of powers creates no rights we do not already enjoy and can only lead to absurd results. The law hates absurdities.

Even if you could in theory get over this insurmountable hurdle, the wording of the proposed amendment is irreparably flawed.

"Reasonable." What does that word mean? It refers to the "reasonable man" standard in the law, i.e. what a reasonable man would think of this. It is an open door to litigation as that standard can vary from day to day or year to year. Furthermore, you run into the legislature defining the Constitution and as the legislature

is presumed to act in a "reasonable" manner, by case law, the legislature could abolish any viable meaning to the amendment by a simple up and down vote.

"Restrictions." The word in and of itself infers this is not an expansion of Constitutional rights; rather, a limitation of those rights.

"Law." The Constitution prescribes what the law can be, not the other way around.

We cannot open the door to more restrictions rather than more rights. The proposed amendment does this in no uncertain terms. It gives us nothing we do not already have and opens the door to total abolition of hunting, fishing and trapping by a simple vote of the legislature.

We have all seen the absurdities in arguments over the U.S. 2nd amendment. All you can do is try and cover these types of problems into the foreseeable future.

Ten years from now you may have a group claiming hunt, fish and trap was meant only to allow taking of pictures of live animals. Therefore, there needs to be wording that the amendment allows for the taking into possession animals by "lethal" means.

Arguments about felons or nonresidents being allowed to carry guns and hunt have already surfaced under the umbrella of the amendment. Therefore the word "citizenship" needs to be in the amendment (felons are currently persons not considered to have full rights of citizenship).

What about 6 year old children, the mentally ill or persons under guardianship enjoying the protection of the amendment? The word "status" needs to be inserted.

As for the arguments that this could lead to shooting guns within the cities or other dangerous practices, both state and federal case law have already addressed these problem repeatedly by stating "public health, safety and welfare" always take precedence. As an example "freedom of speech" does not protect yelling "fire" in a crowded theater

What about shooting of endangered species? Any such problem would be eliminated by using the wording "consistent with current conservation methods at the time of the adoption of this amendment."

The needed wording for this amendment was already passed by the Wisconsin Conservation Congress, in a near unanimous 1998 vote. To restate that basic wording:

"The people shall have the right to hunt, fish and trap animals by lethal means and consistent with current conservation methods at the time of the adoption of this amendment unless otherwise prohibited by citizenship or status.

Sincerely,

2/1/01

John R. Bergstrom
Attorney at Law
Vice Chairman Rock County Delegation to Wisconsin Conservation Congress

Edgerton, Wisconsin

fishing, particularly ice Freeport, Ill., so they were ter at sun-up and sunset.

Wisconsin's bow hunters got sold out

PAT DURKIN

Snowmobiling and bow-hunting groups were rewarded and penalized, respectively, for their self-interest by the state's Natural Resources Board on Jan. 24 when it revised the public's Deer 2000 recommendations for future deer hunts.

Snowmobilers paraded in front of the board to oppose a statewide gun-hunt each December for antlerless deer, saying hunters would cause conflicts and threaten safety. They said this with straight faces, even though snowmobile accidents killed 38 people last winter. Given that deer hunters accounted for three shooting fatalities the past two years, and that each victim was a hunter, the math suggests snowmobilers have bigger worries.

The only thing more amazing was that the NRB agreed (by a 4-3 vote). The board drew a line across northern Wisconsin — mostly along Highway 8 — and declared there would be no December gun-hunt north of there.

Such precious irony.

The board also used the occasion to slam the Wisconsin Bowhunters Association (WBH) for its long-running opposition to creating and lengthening gun seasons. The bow-hunting group opposed attempts in the early 1990s to increase the gun season to 16 days. The WBH also opposed October antlerless-only gun-hunts in recent years, even though the bow season was extended four days in areas affected by the Zone T hunts. Therefore, the NRB voted by 5-2 to eliminate a Deer 2000 proposal that would have extended the early archery season four days statewide. The proposal called for ending bow season the Thursday prior to the gun-deer opener.

Board member Herb Behnke, Shawano, did not disguise the political payback.

"Going back 10 years, the Wisconsin Bowhunters Association has always said we couldn't take away even one day of their hunt," Behnke said. "They told us this year that they wanted nothing to do with the October gun-hunt. If we had given them those four days in mid-November, they would put their Berlin Wall around it. We gave them nearly three extra weeks in December and January. I think that was enough."

While Behnke's irritation with the WBH is clear, I wish the board hadn't taken out its frustrations on the 200,000 archers who aren't members of the organization. Still, that's life in the political arena.

By loudly and consistently opposing the October gun-hunts while slapping away the olive branch of four extra bow-hunting days in mid-November, the WBH lost that opportunity for all bow-hunters. When future October gun-hunts are mandated by overly abundant deer populations — and they will be — bow-hunters will no longer enjoy the compensatory four-day extension in mid-November.

I think there's a lesson in there about diplomacy. This leaves us with the NRB's inexplicable decision to remove 25 percent of the state from the December antlerless hunt. Some board members say the concession to snowmobilers, skiers and tourism interests shows they're sensitive to concerns of other user groups.

Fine. But how do those groups propose we better manage deer in the state's northern quarter? Wildlife biologists were encouraged by the numbers of antlerless deer removed by North Woods gun-hunters during the December 2000 season. That tool is now lost unless it's restored during review by Senate and Assembly committees later this year.

By caving in to fears and stereotypes about deer hunters, the board abdicated its responsibility to wisely manage our natural resources.

Former Madisonian Patrick Durkin is editor of Deer & Deer Hunting magazine. Write to him at 721 Wesley St., Waupaca, WI 54981; or by e-mail at Patdurkin@gglbbs.com.

How they voted

To eliminate the proposed December gun-hunt for antlerless deer in the northern quarter of Wisconsin: vote passed, 4-3.

Votes in favor: Catherine L. Stepp, Sturtevant; Herb Behnke, Shawano; Stephen D. Willett, Phillips; Howard D. Poulson, Madison.

Votes opposed: Trygve A. Solberg, Minocqua; James E. Tiefenthaler, Waukesha; Gerald M. O'Brien, Stevens Point.

To eliminate the proposed statewide four-day extension of the early archery deer season: passed, 5-2.

Votes in favor: Catherine L. Stepp, Sturtevant; Herb Behnke, Shawano; Stephen D. Willett, Phillips; Howard D. Poulson, Madison; Gerald M. O'Brien, Stevens Point.

Votes opposed: Trygve A. Solberg, Minocqua; James E. Tiefenthaler, Waukesha.

— *Pat Durkin*

16 days in Wayne

Meeting March 2 Friday

Mon 19th

Legislative Briefs from the Wisconsin Legislative Reference Bureau

Legislative Brief 02–3 Corrected October 2, 2002

CONSTITUTIONAL AMENDMENT GIVEN "FIRST CONSIDERATION" APPROVAL BY THE 2001 WISCONSIN LEGISLATURE

INTRODUCTION

A proposal to amend the Wisconsin Constitution to create the right to hunt, fish, trap, and take game was adopted on first consideration by the 2001 Wisconsin Legislature. It will be eligible for second consideration by the 2003 Legislature.

Section Created	Resolution	Subject
Article I, Sec. 26	2001 Senate Joint Resolution 2 (Enrolled Joint Resolution 16)	The right to hunt, fish, trap, and take game.

Amendment Process. Article XII, Section 1, of the Wisconsin Constitution requires that every constitutional amendment must be adopted by two successive legislatures and ratified by the electorate before taking effect. A proposed change is introduced in the legislature for "first consideration" in the form of a joint resolution that must pass both houses but does not have to be submitted to the governor for approval. It must be published for 3 months before the next election. If the resolution is adopted on first consideration, a new joint resolution embodying the identical constitutional text must be approved on "second consideration" by the next legislature. The second joint resolution specifies the wording of the ballot question and sets the referendum date. The third and final step involves submitting the question to a statewide referendum vote where a majority of those casting ballots must ratify the amendment.

THE RIGHT TO HUNT, FISH, TRAP, AND TAKE GAME

Amendment Text. The text of the constitutional change, as approved in 2001 Enrolled Joint Resolution 16, reads:

Section 26 of article I of the constitution is created to read:

[Article I] Section 26. The people have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law.

Background. An earlier attempt to guarantee the right to hunt, fish, and trap was proposed in almost identical wording in 1997 Senate Joint Resolution 36, which did not pass on first consideration. A related amendment to guarantee the right to bear arms, which received second consideration in that same session, was ratified in November 1998 by an almost 3-to-1 margin. The vote created Article I, Section 25, which reads: "The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose."

The proposed new amendment would expand the protection of hunting from a "lawful purpose", dependent upon legislative action, to a guaranteed right that could only be limited by reasonable restrictions. Trapping and fishing would be added to the guaranteed rights.

Prepared by Sarah Basford, Legislative Reference Bureau Staff

Federal and State Guarantees. While the Second Amendment to the U.S. Constitution guarantees the right to bear arms, regulation of hunting, fishing, trapping and other taking of game generally falls under the jurisdiction of state and local governments. According to the National Conference of State Legislatures, seven states currently have constitutional amendments protecting or guaranteeing hunting and fishing: Alabama, California, Minnesota, North Dakota, Rhode Island, Vermont, and Virginia. Attempts to create similar amendments have failed in Idaho and Colorado.

Wisconsin provides certain protections for hunting, fishing, and trapping through state statutes and administrative law. A Wisconsin Legislative Council Staff memorandum, dated July 10, 2000, cites examples, including the provision for state title to wild animals for the benefit of hunters in Section 29.011 (1), Wisconsin Statutes, and the rules of the Department of Natural Resources (DNR) establishing open and closed seasons to conserve game and fish and improve the quality of the sport. Based on 1997 Wisconsin Act 170, state law for the most part prohibits local units of government from interfering with hunting, fishing, or trapping (s. 29.038), and DNR has the authority to void nonconforming local ordinances. Another statute (s. 29.083), enacted by 1989 Wisconsin Act 190, prohibits interference with lawful hunting, fishing, or trapping activity by private parties trying to prevent the taking of a wild animal.

PROPONENTS AND OPPONENTS OF THE PROPOSED AMENDMENT

Arguments in Support of the Proposal. Proponents of the constitutional amendment cite the need for further state protection of fishing, hunting, and trapping rights. They are concerned that certain interest groups will successfully challenge these activities through political action that leads to increasingly restrictive regulation. The chief argument of supporters is that the legislature and DNR can easily alter statutory laws and administrative rules, thereby leaving hunting, fishing, and trapping rights constantly vulnerable to political pressure.

Arguments in Opposition to the Proposal. A major part of the opposition to the proposed amendment arises from animal rights activists who argue that hunting is inhumane and should not be guaranteed as a constitutional right. Other opponents of a guaranteed right to hunt and fish claim that these activities are already protected by current law and the constitution is not an appropriate place for such policy matters. They are concerned that making such activities a right creates the potential for court challenges to any regulation proposed by the legislature or DNR, no matter how beneficial such policies might be for the respective sports. They also contend it could affect wildlife protection, create safety problems in more densely populated areas, and raise issues about property owners' rights.

CONSTITUTIONAL AMENDMENT

Right To Hunt - Fish - Trap

SJR - 2
Senate Joint Resolution #2

ARJ - 1
Assembly Joint Resolution #1

Letters to the Editor

SJR-2 Constitutional Amendment

by Ralph R. Fritsch

SJR-2, the Constitutional Amendment guaranteeing the state's citizens the right to hunt, fish and trap passed the Senate last week and now is headed to the Assembly for approval.

SJR-2 was introduced by Sen. James Baumgart and co-sponsors when it hit the Senate floor for full body approval. As in any bill in front of legislators with varying opinions, an amendment, "the people have the right to fish, hunt, trap and take game which shall be managed by law for the public good", was added. We feel this amendment weakens the body of this bill.

It is our opinion that the original version of this bill is stronger and would better serve our concerns. The original wording we would like the Assembly to re-amend back into SJR-2 is the following: "The people have the right to fish, hunt, trap and take game subject only to reasonable restrictions as prescribed by law."

The Assembly will be meeting in open public session meetings in March and April. Watch your local papers for meeting dates and locations near you. We need you to contact your Assembly and Senate legislators and state your support for SJR-2, the original version. Time is an important factor here. Contact your representatives and give them the word.

This constitutional amendment will go a long way to secure our right to hunt, fish and trap both now and for future generations.

CONSTITUTIONAL AMENDMENT

Right To Hunt - Fish - Trap

SJR - 2
Senate Joint Resolution #2

ARJ - 1
Assembly Joint Resolution #1

Letters to the Editor

The Future of Hunting and Fishing in Wisconsin

The protection of Wisconsin's hunting and fishing heritage is an issue that is very important to me. I believe we must protect our sporting traditions to ensure future generations will have the same opportunities to hunt and fish that we had when we were growing up. That is why I have authored Assembly Joint Resolution (AJR) 1, which would amend Article 1 of the Wisconsin state constitution to include, ***"Individuals have the right to fish, hunt, trap, and take game subject only to reasonable restrictions as prescribed by law."***

Currently, there are seven states that have enacted some form of constitutional protection of hunting and fishing rights, similar to AJR 1. Of those seven states, four, Alabama, Minnesota, North Dakota, and Virginia have passed their constitutional amendments in the last five years. The plain truth is the people and groups that disagree with our sporting heritage are becoming more active than ever in their attempts to restrict our hunting and fishing rights. That is why four states have recently passed similar amendments, and why Wisconsin must be proactive in protecting the outdoor traditions that we all believe in.

Recently, the state Senate passed a similar amendment. Their version removed the words "subject only to reasonable restrictions as prescribed by law," and replaced them with "managed by law for the public good." Because there is no definition in state law of "public good" I believe this language would create a loophole, which would unintentionally allow government bureaucrats and the courts to make decisions regarding our hunting and fishing rights. In fact, one state Senator, who has been openly critical of this proposal, went so far as to question whether hunters and anglers would really want this amendment with language that would allow the courts to be able to define what is "public good." That is why I will fight restore the original language of AJR 1 which would connect the rights of hunting and fishing to already enacted laws and rules, rather than the notion of "public good."

This year at the annual Conservation Congress Spring Hearings that are held in every county on the second Monday in April, hunters, anglers, and conservationists will have the opportunity to make their voices heard. My version of the Right to Hunt and Fish Amendment, AJR 1, has been included as an Executive Council Advisory Question. Attendees of the Spring Hearings will be asked if they support adding the following amendment to the Wisconsin state constitution: ***"individuals have the right to fish, hunt, trap and take game subject only to reasonable restrictions as prescribed by law."***

In addition, the Assembly Natural Resources Committee will be holding public hearings across the state. These hearings will provide you with the opportunity to share with the committee members your views and concerns about the right to hunt, fish and trap. The Committee will be accepting testimony on both versions of this amendment currently being considered by the state legislature. If you would like to testify or attend these public hearings, they will take place on the following dates, times, and places:

Wednesday, March 28
Abbotsford High School
307 North 4th Avenue
Abbotsford, Wisconsin
1:30 pm

Wednesday, April 4
Raymond Town Hall
2255 South 76th Street
Franksville, Wisconsin
11:00 am

Wednesday, April 11
Wisconsin State Capitol
Room 417, North
Madison, Wisconsin
10:00 am

(Editor Comment: Although several of these public hearings took place before this issue circulation, comments are still welcomed.)

I want to make sure that whatever language we ultimately pass in the state Legislature is in the best interest of everyone in Wisconsin. However, I do believe our version will provide hunters and anglers better protection from unreasonable laws and restrictions on their rights. Because this proposal is a constitutional amendment, it will have to be passed by both the Senate and Assembly in two legislative sessions and then approved by the voters in a statewide referendum. When this proposal finally gets to the people of Wisconsin, I believe it will pass with 80% of the vote. There are that many people in Wisconsin that believe it is their right to go out and hunt and fish, and this proposal will provide a legal framework to protect those rights.

If you have any questions or comments or would like more specific information, please feel free to contact my office. You can reach me at (608) 266-3363 or toll free at 1-888-534-0083 or write to me at: P.O. Box 8952, Madison, WI 53708.

Representative Scott Gunderson,
83rd District

CONSTITUTIONAL AMENDMENT

Right To Hunt - Fish - Trap

SJR - 2
Senate Joint Resolution #2

ARJ - 1
Assembly Joint Resolution #1

Letters to the Editor

Sporting Heritage: Constitutional Amendment Passage a "Silver Medal"

Madison — Advocates of a state constitutional right to hunt, fish and trap gave qualified praise today, when the State Senate passed Senate Joint Resolution 2, which would guarantee those rights for future generations. The Sporting Heritage Coalition, founded in 1998 to advocate on behalf of sportsmen's rights, hailed the passage of the legislation but expressed "some disappointment" over changes added by Capitol lawyers that made the proposal "overly broad and vague."

"This is a good day for sportsmen and women across Wisconsin, but not a great day," stated Bob Seitz, President and co-founder of Sporting Heritage. "While we're happy the Senate passed SJR 2 on a unanimous vote, the proposal was amended at the last minute and was substantially watered down."

Seitz referred to an 11th hour amendment that changed the joint resolution from "The people have the right to hunt, fish, trap and take game, subject only to reasonable restrictions as prescribed by law" to "The people have the right to fish, hunt, trap and take game which shall be managed by law for the public good."

"The problem with this amendment is that 'for the public good' is an extremely broad standard and could subject the legislation to constitutional challenges in the future," Seitz said. "A judge could interpret 'the public good' to mean virtually anything and could potentially render this protection meaningless."

Seitz said the legislation as it was originally drafted was done to specifically allow the DNR to continue to regulate hunting, fishing and trapping and manage the state's natural resources. This includes leaving in place all existing gun safety and game management laws and programs. He said that the original version did not attempt to "turn back the clock" on safety and game management, but was intended to preserve the status quo.

"We needed the strongest possible language to protect the rights of sportsmen, but in the end, the lawyers got their way and we got the silver medal. Now we will have to focus our efforts on fixing this in the Assembly."

Seitz said that ultimately, the proposal should serve as a rallying point for the sporting community to act now while support for hunting and fishing is strong, rather than to wait until the threat from animal rights groups to ban hunting and fishing is strong enough to succeed.

Amending the state constitution requires that the proposal pass two consecutive sessions of the Legislature and then be passed in a statewide referendum on the general election ballot. Passage of SJR 2 represents the first of several hurdles to be cleared before the right to hunt and fish becomes a permanent constitutional protection.

Sporting Heritage Coalition is a non-profit corporation that advocates on behalf of sportsman's rights. Formed in 1998 to add the right to keep and bear arms in the Wisconsin constitution, Sporting Heritage is located in Monticello, WI and can be reached at www.sportingheritage.org.

Bob Seitz,
Sporting Heritage Coalition

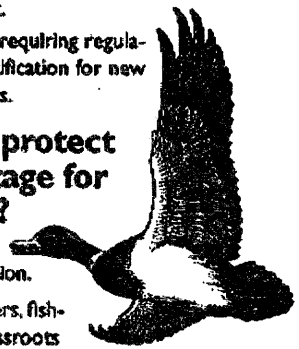
What would the "reasonable restrictions" version allow?

- While no one can determine completely what a future court will rule, "reasonable restrictions" is intended to allow the continuation of current laws which regulate safety and conserve wildlife.
  - Examples of safety: blaze orange for gun deer season, shotgun only in densely populated areas.
  - Examples of conservation: seasons, licenses, bag limits.
  - By having to show a restriction to be "reasonable," the amendment requires objective regulation, like our current system of setting seasons and bag limits on sound wildlife biology instead of subjective factors like emotion, feelings and human rights applied to animals.
  - Attorneys agree that, while "public good" can apply to anything, "reasonable restrictions" is likely to be interpreted by the court to apply to factors related to safety and wildlife conservation.

Does the "reasonable restrictions" version allow our current wildlife regulations, such as the Nine-Day Deer Hunt, to remain in place?

Yes!

- Courts give strong weight to 'legislative intent.' They assume that, if the legislature did not bother to change a regulation or law at the time they passed a constitutional amendment, the amendment was not intended to change that regulation or law.
  - That is why none of our current restrictions on gun possession were struck down when the Right to Keep and Bear Arms passed.
  - The amendment is meant to protect against future 'unreasonable' restrictions.
- The requirement is that the regulator must justify restrictions as "reasonable."
  - They do not have to show they are using the best possible regulation, only a "reasonable" one.
  - Is it too much to expect that restriction of hunting fishing and trapping be "reasonable!"
- The argument that current wildlife regulations will be thrown out is a 'red-herring' used to justify gutting this protection. Both supporters and opponents in the Senate realize this fact.
- There is nothing wrong with requiring regulators to show reasonable justification for new types of restrictions and bans.



What can I do to protect our sporting heritage for my grandchildren?

- Join Sporting Heritage Coalition.
- Our goal is to unite all hunters, fishermen and trappers in a grassroots organization devoted to defending one another. An attack on one is an attack on all.
- Our grassroots effort passed the Right to Keep and Bear Arms and united sportsmen to make the Sporting Heritage Amendment a major issue in the Legislature.
- We began this campaign and with your help, we will finish it.
- Bring your organization into the Coalition. Every hunting, fishing, trapping, conservation or shooting organization is welcome. We need everyone.
- Circulate petitions. Petitions can be printed from **www.sportingheritage.org** or by calling or writing us.
- Contact your legislator. Tell them to support the Sporting Heritage Amendment with the "reasonable restrictions" language.
- Host an event or invite us to meet with your organization.

Contact Us

Sporting Heritage Coalition, Inc.

Bob Seitz, President
Bill Skewes, Vice-President
Toni Seitz, Executive Assistant
P.O. Box 285
Monticello, Wisconsin 53570
Toll Free: (877) 275-3920
www.sportingheritage.org

SPORTING HERITAGE COALITION

protecting our right to hunt & fish

Sporting Heritage Amendment

The Right to Hunt, Fish and Trap

Committee: Make hunting a legal right

The amendment would need approval from two consecutive legislatures and voters statewide.

Associated Press WSJ 4/12/01

A state Assembly committee unanimously endorsed a constitutional amendment that would make hunting wild game a legal right in Wisconsin.

The Natural Resources Committee voted 12-0 Wednesday to amend the Wisconsin Constitution to guarantee the right to hunt, fish and trap, sending the resolution to the Assembly.

"This amendment will ensure our children and grandchildren will have the same opportunities to hunt and fish that we had when we were growing up," said Rep. Scott Gunderson, R-Waterford.

The amendment would give people the right to fish, hunt, trap and take game "subject only to reasonable restrictions as prescribed by law."

Mike Bruhn, an aide to Gunderson, said the Assembly is expected to vote on the so-called "sporting heritage amendment" May 1.

The change would have to pass two consecutive legislatures and be approved in a statewide referendum to be added to the constitution.

Supporters, who include Attorney General Jim Doyle, argue about 200 animal rights groups want to chip away at the rights to hunt, fish and trap, threatening a key piece of Wisconsin's rural heritage. They say constitutional protection is necessary because laws protecting hunting are too vulnerable to politics and social change.

Critics contend the amendment is unnecessary because hunting and fishing rights aren't being threatened. They also say the constitution is no place for political statements from special interest groups.

December 22, 2000

TO: All Legislators

FROM: Senator Jim Baumgart

RE: COSPONORING LRB 1510/1 – Relating to the right to fish, hunt, trap and take game.

During the 1997 legislative session I authored and introduced this resolution that would provide for a constitutional amendment, protecting the people's right to hunt, fish and trap within Wisconsin's borders. Wisconsin has a rich heritage of outdoor recreation and it is important that we take steps to protect that legacy for future generations.

If you would like to sign on to **LRB 1510/1**, please call my office at **6-2056** by **January 2, 2001.**

Analysis by the Legislative Reference Bureau

This proposed constitutional amendment, proposed to the 2001 legislature on first consideration, provides that the people have the right to fish, hunt, trap and take game subject only to reasonable restrictions as prescribed by law.

A constitutional amendment requires adoption by two successive legislatures, and ratification by the people, before it can become effective.

At the request of the Sheboygan County Conservation Association