STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1680

Center for Biological Diversity,
Howling for Wolves,
Petitioners,

vs.

Minnesota Department of Natural Resources, et al.,
Respondents.

Filed May 28, 2013
Petition dismissed
Bjorkman, Judge

Minnesota Department of Natural Resources

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Anna M. Seidman (pro hac vice), Safari Club International, Washington, D.C. (for amicus curiae Safari Club International)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Petitioners seek a declaratory judgment invalidating the expedited emergency rules enacted by respondent Minnesota Department of Natural Resources (DNR) for the 2012-13 wolf-hunting and -trapping seasons. Petitioners argue that the DNR adopted the rules in violation of statutory rulemaking procedures. Because petitioners lack standing to challenge the rules, we dismiss the petition.

FACTS

Effective January 27, 2012, the United States Fish and Wildlife Service removed Minnesota's wolves from the federal threatened and endangered species list, thereby removing them from the protection of the Endangered Species Act of 1973 (ESA), 16 U.S.C. §§ 1531-44 (2006). Revising the Listing of the Gray Wolf (Canis lupus) in the Western Great Lakes, 76 Fed. Reg. 81,666, 81,666 (Dec. 28, 2011). The delisting left management of the Minnesota wolf population to the state.

In anticipation of this change, the legislature eliminated a preexisting requirement that there be no open season for taking wolves until five years after delisting.[1] 2011 Minn. Laws 1st Spec. Sess. ch. 2, art. 5, § 51, at 804. The legislature provided instead that "[t]here shall be no open season for wolves until after the wolf is delisted under the [ESA]. After that time, [the DNR] may prescribe open seasons and restrictions for taking wolves but must provide opportunity for public comment." Minn. Stat. § 97B.645, subd.

[1] For all hunting and fishing statutes, "taking" includes shooting, killing, and trapping wild animals, or attempting to do so. Minn. Stat. § 97A.015, subd. 47 (2012).

9 (2012). After wolves were delisted, the legislature enacted Minn. Stat. § 97B.647 (2012), which governs the taking of wolves. 2012 Minn. Laws ch. 277, art. 1, § 65, at 1158. This legislation establishes that "[t]he open season to take wolves with firearms begins each year on the same day as the opening of the firearms deer hunting season." Minn. Stat. § 97B.647, subd. 2. The legislature further provided that the DNR commissioner "may by rule prescribe the open seasons for wolves according to this subdivision." *Id.*

Following the enactment of section 97B.647, the DNR began an expedited emergency rulemaking process to establish rules for the 2012-13 wolf-hunting and -trapping seasons. On May 21, 2012, the DNR issued a press release declaring that there would be a wolf-hunting and -trapping season in the coming fall and winter and that the DNR was "seeking public comment on details of the proposed season." The DNR explained that it would "only take comments through an online survey through June 20."

On August 20, the DNR published the 2012-13 rules for wolf hunting and trapping (the wolf rules), providing that up to 400 wolves could be taken during open hunting and trapping seasons between November 3, 2012, and January 31, 2013. 37 Minn. Reg. 279, 279-82 (Aug. 20, 2012). The DNR also published a notice stating that it adopted the wolf rules through the expedited emergency rulemaking process because "quota numbers, bag limits and season structure are developed on an annual basis so that the harvest and populations can be managed sustainably." *Id.* at 279.

Petitioners Center for Biological Diversity and Howling for Wolves commenced this declaratory-judgment action on September 19, 2012. Petitioners simultaneously filed

a motion for a preliminary injunction, which this court denied based on petitioners' failure "to identify any claimed irreparable harm attributable to the DNR rules." The supreme court denied petitioners' request for further review or an emergency injunction. We subsequently granted Safari Club International (Safari) leave to participate in this action as amicus curiae.

D E C I S I O N

This court has jurisdiction to determine the validity of an administrative agency's rule in a pre-enforcement declaratory-judgment action. Minn. Stat. § 14.44 (2012); *Rocco Altobelli, Inc. v. State, Dep't of Commerce*, 524 N.W.2d 30, 34 (Minn. App. 1994). If we conclude the challenged rule violates constitutional provisions, exceeds the agency's statutory authority, or was adopted in violation of statutory rulemaking procedures, we will declare the rule invalid. Minn. Stat. § 14.45 (2012).

Petitioners argue that the DNR violated statutory rulemaking procedures by adopting the wolf rules under expedited emergency rulemaking procedures, which do not require a notice-and-comment period. *See* Minn. Stat. § 84.027, subd. 13(b) (2012). Petitioners contend that the DNR should have followed the emergency rulemaking procedures of Minn. Stat. §§ 97A.0451-.0459 (2012), which require notice of the proposed rules and a 25-day public-comment period, because no "conditions exist that do not allow" compliance with those requirements. *See id.*, subd. 13(a)(1), (b) (2012).

We turn first to the threshold issue of standing.[2] This is because jurisdiction is essential to a court even hearing a matter. *See* Minn. R. Civ. P. 12.08(c) (requiring dismissal if court lacks jurisdiction). And standing is essential to a court's exercise of jurisdiction. *Enright v. Lehmann*, 735 N.W.2d 326, 329 (Minn. 2007); *see also Rocco Altobelli*, 524 N.W.2d at 34 (stating that this court must determine standing under Minn. Stat. § 14.44 before considering the validity of a challenged rule).

A petitioner has standing to challenge an administrative rule under Minn. Stat. § 14.44 only "when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner." Minn. Stat. § 14.44; *Coal. of Greater Minn. Cities v. Minn. Pollution Control Agency*, 765 N.W.2d 159, 163 (Minn. App. 2009), *review denied* (Minn. Aug. 11, 2009). A petitioner must have a "direct interest" in the validity of the challenged rule that is "different in character from the interest of the citizenry in general." *Rocco Altobelli*, 524 N.W.2d at 34 (quotation omitted). But an organization whose members claim such an interest "may sue to redress injuries . . . to its members." *See State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 497-98 (Minn. 1996).

Petitioners first contend that they have standing because the DNR's use of the expedited emergency rulemaking process interfered with their members' ability to submit meaningful comments about the proposed rules. We disagree. While this court may

[2] Only Safari directly challenges petitioners' standing. While appellate courts generally will not consider arguments raised by an amicus that are not raised by the litigants themselves, this rule does not preclude consideration of an issue, such as standing, that a court can raise sua sponte. *See League of Women Voters v. Ritchie*, 819 N.W.2d 636, 645 n.7 (Minn. 2012) (addressing standing challenge raised only by amicus).

invalidate a rule adopted in violation of statutory rulemaking procedures, Minn. Stat. § 14.45, standing focuses on the effect of the rule, not alleged flaws in the rulemaking process. Only one whose rights are impaired by a challenged rule has standing to ask this court to invalidate it. Minn. Stat. § 14.44.

Petitioners next argue that they have standing because the rules themselves threaten their members' aesthetic interests in wolves "because they open hunting and trapping seasons and cause wolf deaths that otherwise would be unlawful." We are not persuaded. We recognize that the desire to use or observe an animal species for aesthetic purposes is "a cognizable interest for purpose of standing." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63, 112 S. Ct. 2130, 2137 (1992). But petitioners must allege that the wolf rules cause actual or imminent impairment of that interest. As this court recognized in denying injunctive relief, it was the legislature that established an open season on wolves, not the DNR. By statute, the open season "to take wolves with firearms begins each year on the same day as the opening of the firearms deer hunting season." Minn. Stat. § 97B.647, subd. 2. The DNR is authorized to promulgate rules for wolf hunting and trapping but does not have discretion to forego an open season on wolves.[3] *See id.* Accordingly, we consider whether petitioners allege impairment of their members' aesthetic interest in wolves or any other harm attributable to the rules that regulate the wolf-hunting season.

[3] At oral argument, the DNR asserted that it generally has discretion to forego open hunting seasons if it has concerns about population sustainability. But the DNR agreed that such a circumstance was not presented here and that the legislature essentially mandated an open season by passing section 97B.647.

In support of their challenge to the wolf rules, petitioners submitted declarations from eight of their members who live in, have traveled to, or have specific plans to travel to the areas of Minnesota where wild wolves live. All eight declarations state absolute opposition to hunting wolves. They express concern that wolves they have seen or heard will be killed and assert that wolf hunting and trapping will reduce the number of wolves in Minnesota. But the declarations do not identify how the wolf rules themselves impair the members' interests in wolves by effectuating and regulating the open wolf season that the legislature mandated.

In this respect, petitioners' challenge is similar to that in *Rocco Altobelli*. The hair-salon petitioners in that case challenged a rule regulating independent contractors who lease chairs in beauty salons. *Rocco Altobelli*, 524 N.W.2d at 32-33. The petitioners claimed that the rule injured petitioners and other salons that do not lease chairs to independent contractors by affording a tax benefit to salons that do. *Id.* at 34. We concluded that the challenged rule did not harm the petitioners but merely conformed to the statute that exempts independent contractors from paying into the workers' compensation fund, which was the real target of the petitioners' complaint. *Id.* at 34-35. Because the petitioners in that case identified no harm uniquely attributable to the challenged rule, they lacked standing. *See id.* Likewise, petitioners here challenge rules that effectuate and regulate a statutory mandate without identifying any harm uniquely attributable to the challenged rules.

Alternatively, petitioners claim that they qualify for taxpayer standing. A taxpayer without personal or direct injury may have standing, "but only to maintain an action that

restrains the 'unlawful disbursements of public money . . . [or] illegal action on the part of public officials.'" *Olson v. State*, 742 N.W.2d 681, 684 (Minn. App. 2007) (alteration in original) (quoting *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977)). Petitioners assert that this is a proper taxpayer claim because they seek to restrain illegal action on the part of public officials. We are not persuaded.

Taxpayer standing requires an allegation of harm to the petitioners *as taxpayers*. Petitioners must identify an unlawful "expenditure made as a result of the challenged [rules]." *See id.* at 685 (holding that challenge to tax exemption could not be pursued on solely taxpayer basis because it did not involve expenditure). Mere disagreement with a policy decision is insufficient to confer standing. *See Rukavina v. Pawlenty*, 684 N.W.2d 525, 531 (Minn. App. 2004), *review denied* (Minn. Oct. 19, 2004).

Petitioners allege that the wolf rules involve the expenditure of tax money, pointing to the printing of the wolf-regulation booklet and establishment of the electronic-licensing system. But the DNR routinely permits electronic licensing and annually publishes booklets to educate the public about hunting regulations, and petitioners do not contend that these expenditures would have been avoided had the DNR promulgated different rules or used a different rulemaking process. Because the expenditures associated with the wolf rules do not increase the "overall tax burden," they are not expenditures for the purpose of establishing taxpayer standing. *See Olson*, 742 N.W.2d at 685. Rather, it is apparent that petitioners' disagreement is with the legislature's policy decision to permit wolf hunting. Such a disagreement does not

present a controversy for judicial review of the rules that effectuate that legislative decision.

In sum, petitioners do not assert that the wolf rules cause unique harm to their aesthetic interest in wolves or the unlawful use of public funds. Petitioners therefore lack standing to challenge the wolf rules in this court.

Petition dismissed.