Appeal No. 16-AP-1688, 16-AP-2502

SUPREME COURT OF WISCONSIN

Clean Wisconsin, Inc., Lynda Cochart, Amy Cochart, Roger DeJardin, Sandra Winnemueller, and Chad Cochart,

Petitioners-Respondents,

v.

Wisconsin Department of Natural Resources,

Respondent-Appellant,

and

Kinnard Farms, Inc.,

Intervenor-Co-Appellant.

PETITIONERS-RESPONDENTS' RESPONSE IN OPPOSITION TO WISCONSIN STATE LEGISLATURE'S PETITION TO INTERVENE

Petitioners-Respondents Clean Wisconsin, Inc. and Cochart et al. ("Petitioners-Respondents") submit this Response in Opposition to the Legislature's Petition to Intervene. The Legislature seeks to intervene under Wis. Stat. § 803.09(2m) or, in the alternative, Wis. Stat. §

803.09(2). Petitioners-Respondents concur with the Department of Natural Resources' (DNR) conclusion in their May 6, 2019, Response to the Legislature's Petition for Intervention that the Legislature is not able to intervene under Wis. Stat. §§ 803.09(2) and (2m). Rather than restate those arguments here, Petitioners-Respondents submit that, should this Court for any reason not be persuaded by DNR's specific bases for opposition, the additional arguments herein should compel this Court not to grant the Legislature's Petition.

Wis. Stat. § 803.09(2m) is subject to multiple challenges now before this Court. *League of Women Voters v. Evers*, Case No. 2019-AP-559; *Serv. Emps. Int'l Union (SEIU), Local 1 v. Vos*, Case No. 2019-AP-622. For reasons stated below, the Legislature does not qualify for permissive intervention pursuant to Wis. Stat. § 803.09(2). Accordingly, if this Court determines that Wis. Stat. § 803.09(2m) is invalid, the Legislature would be without grounds to intervene in this matter.

Petitioners-Respondents therefore respectfully request that the Court: (1) deny the Legislature's request to permissively intervene pursuant to Wis. Stat. § 803.09(2), both for reasons stated below and as stated in DNR's Response; and (2) deny the Legislature's request to intervene pursuant to Wis. Stat. § 803.09(2m) for the reasons stated in DNR's Response or, in the alternative, postpone decision on the Legislature's motion to intervene pursuant to Wis. Stat. § 803.09(2m) until the current legal challenges to that statute are resolved.

As the Court is presently hearing arguments in the above-referenced cases and has not yet set a date for oral argument in this case, postponement would not delay the proceedings such as to prejudice the interests of the parties.

As the Motion to Intervene was served by mail on April 25, 2019, this response is timely. *See* Wis. Stat. §§ 801.15(5)(a), 809.13 (allowing 11 days from service of motion to intervene, plus 3 additional days when service is accomplished by mail); *see also* Wis. Stat. § 809.82(1) ("In

computing any period of time prescribed by these rules, the provisions of s. 801.15 (1) and (5) apply.").

I. The Legislature's Authority to Intervene as of Right is Subject to Challenges Presently before the Court.

This Court decided on April 15, 2019, and April 19, 2019, to take review of *League of Women Voters v. Evers* and *SEIU, Local 1 v. Vos*, respectively. The plaintiffs-respondents in each of these cases have challenged the validity of, in relevant part, Wis. Stat. § 803.09(2m). If plaintiffs in either of these cases prevail on the merits of their challenge, the Legislature would be deprived of any right to intervene under that section. We understand that this Court will hear oral arguments in *League of Women Voters v. Evers* on May 15, 2019, and that oral arguments in *SEIU, Local 1 v. Vos* will be scheduled by a future order of the Court. Thus, Wis. Stat. § 803.09(2m) may no longer be valid law by the time the Court takes the present matter under consideration. We therefore ask that if the Court does not deny the Legislature's Petition for Intervention under Wis.

Stat § 803.09(2m), that the Court postpone decision on the Legislature's motion to intervene as of right until the challenges to Wis. Stat. § 803.09(2m) are resolved.

Petitioners-Respondents' request is also reasonable considering the Legislature's failure to meet the standard for permissive intervention, which leaves intervention under Wis. Stat. § 803.09(2m) as the only potential intervention authority relied on by the Legislature.

II. The Legislature does not Qualify for Permissive Intervention.

The Legislature moves in the alternative for permissive intervention pursuant to Wis. Stat. § 803.09(2). This provision provides, in its entirety:

> Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order or rule administered by a federal or state governmental officer or agency or upon any regulation, order, rule, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely motion may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

This provision does not apply to the Legislature's Petition for several reasons.

a. The Legislature has no Claim or Defense in Common with the Main Action.

A party may only intervene under this section when it possesses a claim or defense in common with the main action. Wis. Stat. § 803.09(2). The Legislature fails to articulate any claim or defense, much less one that is adequate for purposes of the intervention inquiry.

The terms "claim" and "defense" are not defined in Wis. Stat. ch. 803. However, "defense" as used in this subsection has been interpreted in accordance with its common legal meaning. "In the context of WIS. STAT. § 803.09(2), 'defense' conveys that the person seeking to intervene, although not named as a defendant, *could be* a defendant to a claim in the main action or a defendant to a similar or related claim." *Helgeland v. Wis. Municipalities*, 2006 WI App 216, ¶ 40, 296 Wis. 2d 880, 724 N.W.2d 208 (emphasis in original); *decision affirmed by Helgeland v. Wis. Municipalities*, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d

1. Plainly, the Legislature could not be a defendant in this action, brought by Petitioners-Respondents to require DNR to comply with constitutional and statutory requirements.

Supporting this conclusion, the Court in *Helgeland* further elaborated that a "'claim' or 'defense' is more than arguments or issues a non-party wishes to address and is the type of matter presented in a pleading." *Id.* ¶ 41. The Legislature has identified no "claim" it could have presented in a pleading. Given the posture of this case, it makes no sense for the Legislature to have a claim at all. The Legislature is seeking to intervene as respondent-appellants; they are asking to *respond* to claims made by Petitioners-Respondents. Any arguments would take the form of defenses, not claims.

Instead of identifying a "claim or defense," the Legislature describes a generalized interest in limits on administrative agency authority that amounts to a mere policy preference. The Legislature's Petition states that the Legislature has an "interest and claim" in the "construction,

scope, and application of Act 21." Legislature's Pet. to Intervene at 5. It is unclear if the Legislature intends "interest" and "claim" to be synonyms in this instance, but the balance of the Legislature's argument does not use the term "claim" again. The only further description of this "claim" is that "the Legislature has an interest in legislation that clearly defines the limits of administrative agency authority." *Id.*

The general policy interest identified in the Legislature's Petition might permit the Legislature to file an amicus brief. *See* Wis. Stat. § 809.19(7)(a) (requiring potential amici to describe their "interest" in the case). But a general policy interest is not a "claim or defense" for purposes of permissive intervention. *Helgeland*, 2006 WI App 216, ¶ 40.

The interest described by the Legislature also would not satisfy the requirement for intervention under Wis. Stat.

§ 803.09(1).[1] *See Helgeland*, 2006 WI App 216, ¶ 16 ("Legislators may often have a preference for how the judicial branch should interpret a statute, but such mere preferences do not constitute sufficiently related or potentially impaired interests within the meaning of WIS. STAT. § 803.09(1)"). Just as the Legislature has no "claim," it has no tangible interest in the outcome of this case that separates it from any member of the public.

Indeed, the Legislature's asserted interest is insufficient to demonstrate standing in this judicial review of DNR's decision regarding the challenged Kinnard Farms permit. This appeal is a judicial review of an administrative decision under Wis. Stat. ch. 227. Statute requires that the underlying administrative decision "adversely affect the substantial interests" of the party seeking review. Wis. Stat. § 227.52. The Legislature thus not only has no "claim," it

[1] The Legislature references but does not provide an argument for intervention under Wis. Stat. § 803.09(1), which allows for intervention by movants with a protected property interest. *See* Legislature's Pet. to Intervene at 2.

does not have any tangible interest in the outcome that would confer standing in this type of case.

The insufficiency of the Legislature's asserted "claim" is further borne out by the specific requirement for permissive intervention by state government officials and agencies under Wis. Stat. § 803.09.

b. The Legislature is not an Officer or Agency that Administers the Statutes in Question.

Wis. Stat. § 803.09(2) provides a more specific intervention standard for state governmental actors. This provision authorizes state government officers or agencies to intervene when a party "relies for ground of claim or defense upon any statute or executive order or rule administered by a federal or state governmental officer or agency or upon any regulation, order, rule, requirement or agreement issued or made pursuant to the statute or executive order[.]" The Legislature cannot intervene under this authority for a pair of simple reasons.

First, the Legislature is neither an "officer" nor an "agency" and as such cannot intervene under Wis. Stat. § 803.09(2). *See* Wis. Stat. § 227.01(1) (defining "agency"). Though not defined by statute, a plain language reading of "officer" clarifies that the Legislature is not an officer for purposes of permissive intervention.

Second, this provision allows an officer or agency to intervene as a party only to the extent that the officer or agency "administers" the implicated statute, rule, or executive action. Here, DNR administers the statute at issue. Again, a plain language analysis of Wis. Stat. ch. 281 clarifies that the Legislature does not administer these statutory provisions.

Thus, even if the Legislature had articulated a valid "claim or defense," the Legislature would not qualify for permissive intervention because the Legislature is not a state governmental entity that is authorized to seek permissive intervention by statute. Wis. Stat. § 803.09(2) provides that the agencies and officers administering the disputed

statutes, rules, or executive orders are the appropriate state government intervenors. Those agencies and officers, unlike the Legislature, will be charged with implementing the Court's ruling in this case. Here the relevant agency is DNR, already a party to this case.

For the reasons stated above, we ask the Court to deny the Legislature's Petition for permissive intervention under Wis. Stat. § 803.09(2).

CONCLUSION

Petitioners-Respondents respectfully ask that the Court deny the Legislature's Petition to Intervene in the above-captioned case.

Dated this 9th day of May, 2019.

Respectfully submitted,

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