STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP0059

CLEAN WISCONSIN, INC.
and PLEASANT LAKE
MANAGEMENT DISTRICT,

Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent-Appellant,

WISCONSIN MANUFACTURERS
& COMMERCE, DAIRY BUSINESS
ASSOCIATION, MIDWEST FOOD
PROCESSORS ASSOCIATION,
WISCONSIN POTATO & VEGETABLE
GROWERS ASSOCIATION,
WISCONSIN CHEESE MAKERS
ASSOCIATION, WISCONSIN FARM
BUREAU FEDERATION, WISCONSIN
PAPER COUNCIL AND WISCONSIN
CORN GROWERS ASSOCIATION,

Intervenors-Co-Appellants.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES' RESPONSIVE MEMORANDUM OPPOSING THE WISCONSIN LEGISLATURE'S PETITION TO INTERVENE

INTRODUCTION

In its opening memorandum, the Department of Natural Resources ("Department") demonstrated that the

Legislature's request to intervene in this chapter 227 proceeding fails for two primary reasons: (1) its request does not come within the plain language of the legislative intervention statute, Wis. Stat. § 803.09(2m); and (2) even if it did, that intervention procedure conflicts with chapter 227's intervention procedure, so the chapter 227 procedure prevails. Applying the controlling procedure under chapter 227, the Legislature fails to establish the requirements to intervene here.

Nothing in the Legislature's or Intervenors Wisconsin Manufacturers and Commerce, et al.'s (WMC) opening memoranda shows otherwise. The Legislature cannot meet the statutory language of the legislative intervention provision. And even ignoring that threshold deficiency, nothing submitted overcomes the plain conflict between chapter 227's intervention procedure and the general civil procedures, including the appellate procedure. With the conflict plain between chapter 227's procedure and the general civil rules, the intervention procedure in chapter 227 must prevail.

Therefore, whether based on the Legislature's threshold failure to meet the statutory requirements for legislative intervention, or its failure to satisfy the controlling requirements for intervention under chapter 227, the Legislature's petition to intervene must be denied.

RESPONSE

I. The Legislature concedes that it is not entitled to intervene permissively.

In its petition to intervene, the Legislature stated that it "should be allowed to intervene permissively under Wis. Stat. § 803.09(2) because the Legislature has an interest in legislation that clearly defines the limits of administrative

agency authority." (Pet. to Intervene 3.) In its opening memorandum, however, the Legislature focuses exclusively on the general legislative intervention provision, Wis. Stat. § 803.09(2m), making no attempt to support permissive intervention under Wis. Stat. § 803.09(2). With the Legislature having abandoned permissive intervention entirely, no further discussion of that provision is necessary.

II. The Legislature's petition to intervene does not come within the plain language of the legislative intervention statute, Wis. Stat. § 803.09(2m).

As noted previously (Department Opening Mem. 4–5), even before reaching the question of any conflict between chapter 227's intervention procedure and the general civil rules, the Legislature's intervention request fails at the threshold: its request does not come within Wis. Stat. § 803.09(2m). The Legislature's opening memorandum does not overcome this threshold deficiency.

First, Wis. Stat. § 803.09(2m) applies only to "actions." This chapter 227 case, however, is a "special proceeding." *State ex rel. Town of Delavan v. Circuit Court for Walworth Cty.*, 167 Wis. 2d 719, 725, 482 N.W.2d 899 (1992) ("We have previously stated that a ch. 227 judicial review is a "special proceeding."). And while the term "action" used in the civil procedure rules *often* will encompass "special proceedings," this is so only if a "different procedure prescribed by ch. 227" does not foreclose application of the general civil rules. *Id.*; *see also State ex rel. Dep't of Nat. Res. v. Wis. Court of Appeals, Dist. IV*, 2018 WI 25, ¶ 18, 380 Wis. 2d 354, 909 N.W.2d 114. The Legislature provides no explanation why the general rule for intervention in "actions" should apply in this "special proceeding."

Next, even putting aside that this is not the type of case contemplated in the legislative intervention statute, that provision also requires that the case involve a party

"challeng[ing] the construction or validity of a statute, *as part of a claim or affirmative defense*." Wis. Stat. § 803.09(2m). The Legislature provides little explanation about the statute it believes is being "challenged" in this case (Leg. Opening Mem. 9 (focusing on Wis. Stat. § 227.10(2m)), rather than statutes governing high-capacity well approvals); but more importantly, the Legislature entirely fails to explain the "claim or affirmative defense" in which it believes that "challenge" arises.

In the context of supporting an intervention request, a "claim" or "defense" comprises something "more than arguments or issues a non-party wishes to address and is [instead] the type of matter presented in a pleading—either allegations that show why a party is entitled to the relief sought on a claim or allegations that show why a party proceeded against is entitled to prevail against the claim." *Helgeland v. Wis. Municipalities*, 2006 WI App 216, ¶ 41, 296 Wis. 2d 880, 724 N.W.2d 208; *see also id.* ¶ 42 ("The words 'claim or defense' manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit . . . ; it . . . requires an interest sufficient to support a legal claim or defense." (quoting *Diamond v. Charles*, 476 U.S. 54, 76–77 (1986) (O'Connor, J., concurring))).

To support its intervention, the Legislature points to no claim or defense in a pleading in which anyone "challenged" a statute. Instead, as the source of the "challenge," it cites one party's appellate *argument* and the court of appeals' *order* certifying the case to this Court. (*See* Leg. Opening Mem. 9.) Indeed, at multiple points in its discussion of the elements of intervention, the Legislature seems to avoid the requirement that a challenge to a statute must arise "as part of a claim or affirmative defense." (*See id.* at 7, 9.)

This case involves a challenge to the Department's decisions to issue high-capacity well approvals. No party has

challenged the construction or validity of a statute as part of a claim or affirmative defense. Without this statutory requirement satisfied, the Legislature's petition to intervene must be denied.

III. The Legislature and WMC's opening memoranda do not meaningfully address the clear conflict between the procedure for intervention in chapter 227 and the civil rules, including the appellate rules.

Wisconsin courts have consistently reaffirmed that where the procedures of chapter 227 conflict with the general rules of civil procedure—chapters 801 to 847 of the statutes—"the dictates of ch[apter] 227 must prevail." *State ex rel. Dep't of Nat. Res.*, 380 Wis. 2d 354, ¶ 18 (quoting *Wagner v. State Med. Examining Bd.*, 181 Wis. 2d 633, 639, 511 N.W.2d 874 (1994); *accord Circuit Court for Walworth Cty.*, 167 Wis. 2d at 727. That is, if there is a conflict between *any* civil procedure rule—including an appellate procedure—the procedure in chapter 227 controls. Because appellate intervention by the Legislature under Wis. Stat. § 803.09(2m) here would directly conflict with the requirements of intervention for chapter 227 proceedings, the procedure in chapter 227 controls and intervention must be denied. (*See* Department Opening Mem. 7–12, 13–18.)

Nonetheless, in their opening memoranda, the Legislature and WMC emphasize the absence of a specific procedure for appellate intervention in chapter 227 proceedings, arguing that without any specific appellate procedure for chapter 227, the general rules of appellate procedure control here. (*See* Leg. Opening Mem. 10–17; WMC Opening Mem. 6–13.) In doing so, they do not meaningfully address the clear, plain language of Wis. Stat. § 227.53(1)(d), or explain why the plain conflict between that procedure and the general rules for intervention (Wis. Stat. § 803.09) do not apply with equal force when those general procedures are

incorporated into the appellate rule, Wis. Stat. § 809.13. Instead, they point to Wis. Stat. § 227.58 as establishing that *only* chapters 808 and 809 apply in appeals in chapter 227 proceedings. (*See* Leg. Opening Mem. 10–11; WMC Opening Mem. 8–11.) This argument is unsupported by the single statute they cite; squarely refuted by case law; and contrary to common sense.

First, Wis. Stat. § 227.58 does not exclude chapter 227's procedures on appeal. Rather, Wis. Stat. § 227.58 borrows only a notice of appeal deadline. It states only that a party seeking appellate review "may secure a review of the final judgment of the circuit court by appeal to the court of appeals within the time period specified in s. 808.04(1)." Wis. Stat. § 227.58. Plainly, this statute says nothing about the applicability of appellate procedures generally.

For the proposition that chapters 808 and 809 supply the *exclusive* procedure in chapter 227 appeals, the Legislature and WMC rely on a Judicial Council note to the statute, stating that "[c]ivil appeal procedures are governed by chs. 808 and 809." Wis. Stat. § 227.58 (Jud. Council Note 1983); (*see* Leg. Opening Mem. 10–11; WMC Opening Mem. 8–10). Even putting aside that this nonstatutory statement is not binding, it says nothing about the exclusivity of chapters 808 and 809. Rather, this proposition is a direct corollary to the unremarkable principle that, absent a conflict, civil procedure rules apply in chapter 227 proceedings in the circuit courts. *See* Wis. Stat. § 227.02 ("Compliance with this chapter does not eliminate the necessity of complying with a procedure required by another statute."); *see also Circuit Court for Walworth Cty.*, 167 Wis. 2d at 724 (Chapter 227 "contemplates the *limited* use of those civil procedure statutes which do not conflict with ch. 227."). Nothing in the Judicial Council note alters the general rule that the rules of civil procedure—including appellate procedure—will apply in chapter 227 proceedings

so long as they "do not conflict with ch. 227." *Wagner*, 181 Wis. 2d at 641.

Second, and relatedly, case law makes clear that chapters 808 and 809 are not exclusive, and that courts instead look to *all* the rules of civil procedure—trial and appellate—when determining whether a conflict exists. *See, e.g., State ex rel. Dep't of Nat. Res.*, 380 Wis. 2d 354, ¶ 18 (recognizing that conflict inquiry applies to all rules of civil procedure, from Wis. Stat. chs. 801 to 847; and collecting cases). Indeed, Wisconsin courts have applied that conflict analysis between the procedures in chapter 227 and the appellate procedures in chapters 808 and 809. *See, e.g., Metro. Greyhound Mgmt. Corp. v. Wis. Racing Bd.*, 157 Wis. 2d 678, 698, 460 N.W.2d 802 (Ct. App. 1990) (recognizing that motion for reconsideration pending appeal, brought under Wis. Stat. § 808.075 in a chapter 227 appeal, was "no more alien to that process than are any of the other civil-procedure provisions that govern cases pending before the trial and appellate courts, and which do not conflict with Chapter 227"); *see also State ex rel. Dep't of Nat. Res.*, 380 Wis. 2d 354, ¶ 20 (discussing absence of conflict between chapter 227 and Wis. Stat. § (Rule) 809.61, and collecting cases); *see also id.* ¶¶ 9, 43 (recognizing applicability of supervisory writ procedure under Wis. Stat. § 809.71 in chapter 227 proceeding).

Third, the argument that chapters 808 and 809 displace chapter 227 on appeal defies common sense. If that argument were correct, the Legislature (or any other party lacking standing to intervene under chapter 227) could simply wait to intervene on appeal, knowing that they would only be

required to satisfy the general intervention procedures, rather than those specific to chapter 227 proceedings.[1]

Nothing in Wisconsin statutes or case law supports such a nonsensical end-around of chapter 227's clear intervention procedure. With the conflict plain between chapter 227's requirements and the general intervention provisions in chapters 803 and 809, chapter 227's intervention procedure must prevail, including on appeal.

IV. The legislative intervention provision is not applicable as a "more specific" statute.

After asserting that there is no conflict between Wis. Stat. §§ 227.53(1)(d) and 803.09(2m) (Leg. Opening Mem. 12–16), the Legislature argues in the alternative that, if there were a conflict, the legislative intervention provision would trump the chapter 227 procedure as the more "specific" of the two. (*Id.* at 15–16.) This is incorrect.

As discussed, the statutes and case law are clear: "When a conflict occurs between the rules of civil procedure and ch. 227, the dictates of ch. 227 must prevail." *State ex rel. Wis. Dep't Nat. Res.*, 380 Wis. 2d 354, ¶ 18 (quoting *Wagner*, 181 Wis. 2d at 639); *see also* Wis. Stat. § 801.01(2) ("Chapters 801 to 847 govern procedure and practice . . . *except where different procedure is prescribed by statute or rule.*"). There is no need to resort to the "general v. specific" canon of construction because Wisconsin courts and

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[1] Notably, WMC essentially concedes this logic when it acknowledges that, had the Legislature sought to intervene in the circuit court, "further analysis [would be required] on the interplay between Wis. Stat. § 227.53(1)(d) and Wis. Stat. § 803.09(2m)." (*See* WMC Opening Mem. 12 n.8.) If analysis into that "interplay" would be required in circuit court, that "interplay" is necessarily pertinent on appeal, where Wis. Stat. § 809.13 expressly incorporates the standards for intervention under Wis. Stat. § 803.09.

statutes definitively resolve the interpretive issue. Indeed, applying this canon would undermine decades of case law resolving conflicts in favor of chapter 227's procedures.

But what's more, even if a "general v. specific" inquiry were warranted, chapter 227's procedure are more specific. The legislative intervention provision is one of three generally applicable intervention provisions in chapter 803. *See* Wis. Stat. § 803.09. That chapter sets forth general rules of civil procedure applicable in all "actions." *See* Wis. Stat. § 801.01(2) (stating scope of chapters 801 through 847). Thus, the provision on which the Legislature relies here would be the same provision on which it would rely to intervene in almost any other case, "at any time," "in state or federal court." Wis. Stat. § 803.09(2m).

Contrasted with this general procedure, Wis. Stat. § 227.53(1)(d) is far more specific. It applies in one type of state-court proceeding—judicial review under chapter 227. It is limited by time and interest, and thus contemplates intervention only under limited circumstances. Accordingly, if this new "general v. specific" inquiry were warranted here, the result would nonetheless be the same.

V. The Legislature's asserted "interest" is insufficient to support its intervention in this chapter 227 proceeding.

In support of its argument that the legislative intervention provision and Wis. Stat. § 227.53(1)(d) do not conflict, the Legislature asserts that, by virtue of Wis. Stat. § 803.09(2m), it has an "interest" sufficient to support its intervention under Wis. Stat. § 227.53(1)(d). In particular, the Legislature asserts that it has an "inherent[ ] interest[ ]" in cases involving "challenges to laws." (Leg. Opening Mem. 15–16.) This argument proves too much and betrays the Legislature's lack of standing to intervene here.

If the Legislature were an "interested" person as required under Wis. Stat. § 227.53(1)(d), the separate legislative intervention provision, Wis. Stat. § 803.09(2m), would be unnecessary. The Legislature could simply assert its "interest" within the existing, controlling procedure under chapter 227. But the Legislature, of course, cannot satisfy Wis. Stat. § 227.53(1)(d). (*See* Department Opening Mem. 7–12, 13–17.) To hold otherwise and allow the Legislature to satisfy the standing requirement based on its broad "interest in legislation" (Pet. to Intervene 7), or in "challenges to laws" (Leg. Opening Mem. 15–16), would eviscerate chapter 227's standing requirements and effectively allow the Legislature to intervene in every chapter 227 case involving statutory interpretation.

Nothing the Legislature has submitted demonstrates why it is entitled to intervene here. Not only is its request outside the scope of the statute on which it relies (*see supra* § II; Department Opening Mem. 4–5); but it also fails to establish that it satisfies the controlling standard for intervention under chapter 227 (*see supra* §§ III–V; Department Opening Mem. 13–18). With no viable statutory basis to intervene, the Legislature's petition must be denied.

VI. WMC's arguments in support of legislative intervention are unavailing.

Many of WMC's arguments overlap with the Legislature's arguments in support of intervention, which are addressed above. Of the few that do not overlap, none are persuasive as to why the Legislature should be allowed to intervene.

A. WMC's "real parties in interest" argument lacks factual and legal support.

WMC suggests that the "real parties [in] interest" in this case are the high-capacity well applicants, and that the Legislature must be allowed to intervene to protect their interests. (WMC Opening Mem. 5.) This is a non sequitur: those "real parties in interest" could have been involved throughout, and the fact that they were not does not alter the fact that no statute authorizes the Legislature to intervene here.

If the high-capacity well applicants wanted to participate in the judicial review proceeding, chapter 227 provides a specific procedure by which they could have done so. *See* Wis. Stat. § 227.53(1)(d), (2). Indeed, as shown in the companion case, Case No. 2016AP1688, some permittees *do* choose to participate in judicial review proceedings. (*See* Case No. 2016AP1688, R. 4 (Kinnard Farms' notice of appearance and statement of position).) Here, the applicants did not try to participate in the case at *any* stage. *Cf. State v. Stanley*, 2012 WI App 42, ¶ 13 n.3, 340 Wis. 2d 663, 814 N.W.2d 867 (recognizing situation in which "aggrieved" real party in interest may be allowed to appeal). Moreover, WMC and the other existing intervenors have ably represented the well applicants' interests throughout this case. (*See* R. 82; 83:5, 8; 112.)

Therefore, protecting those "real parties'" interests does not require allowing the Legislature to intervene—particularly when no statute allows it.

B. The unpublished *Rockland* decision adds nothing to WMC's argument about the exclusivity of chapters 808 and 809 in chapter 227 appeals.

In support of its argument that the procedures in chapter 227 and the appellate rules "are sequential and mutually exclusive" (WMC Opening Mem. 10), WMC points to a footnote in an unpublished decision, *Town of Rockland v. Green Bay Metro. Sewerage Dist.*, 2011 WI App 1, 330 Wis. 2d 833, 794 N.W.2d 926, to show that the appellate intervention statute, Wis. Stat. § 809.13, provides the exclusive procedure for intervention in a chapter 227 proceeding. *Rockland* is off-point and unpersuasive.

That case involved an attempt by the City of De Pere to intervene in the circuit court in a chapter 227 proceeding for judicial review. *See Town of Rockland*, 330 Wis. 2d 833, ¶ 8. After the circuit court denied De Pere's petition to intervene, the city appealed that decision as well as the circuit court's judgment on the merits. *See id.* The court of appeals affirmed, holding that the city was not a proper party on appeal. *Id.* ¶ 9. In a footnote to that holding, the court stated that, "'A person who is not a party to an appeal may file in the court of appeals a petition to intervene in the appeal.' Wis. Stat. [§] Rule 809.13. De Pere has not, however, moved to intervene in this appeal." *Id.* ¶ 9 n.5.

WMC suggests that this footnote "states the obvious": that Wis. Stat. § 809.13 contemplates intervention on appeal in a chapter 227 proceeding, and therefore *only* chapter 809—not chapter 227—applies on appeal. (WMC Opening Mem. 10.) The quote from *Rockland* is far from persuasive on the point WMC tries to make. The statement was made in a footnote, in an unpublished decision, in a case in which no one actually sought to intervene on appeal. The court did not—and had no occasion to—examine the question presented in this case.

In any event, this Court need not address whether there is some circumstance in which appellate intervention in a chapter 227 case would be appropriate, because the question here is narrower. Here, under any analysis, the Legislature would need to have a proper statutory basis, including meeting the chapter 227 standard. In this case, as discussed, the Legislature fails to establish a right to intervene under the legislative intervention statute; *additionally*, that intervention would also conflict with chapter 227.

Lastly, WMC is incorrect when it asserts that the Department's position would "wipe[ ] out any opportunity to participate at the appellate level by *any* parties in *any* Chapter 227 cases." (WMC Opening Mem. 3.) That is not so: parties to a chapter 227 proceedings are automatically parties to an appeal. Here, the Legislature was *not* a party to this chapter 227 case and did not even attempt to make itself one, and for good reason. If it wishes to have its voice heard, it can proceed like others who wish to weigh in as nonparties, by seeking leave to file an amicus brief.[2] *See* Wis. Stat. § (Rule) 809.19(7).

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[2] WMC also asserts (without supporting citations) that intervention *must* be allowed so that nonparties to an appeal can have the ability "to affect settlement or dismissal." (WMC Opening Mem. 3.) The statutes make no provision for participation by nonparties to control disposition of an appeal. If nonparties who cannot satisfy the statutory requirements of standing wish to participate in a chapter 227 proceeding on appeal, they are free to seek to participate as amici.

CONCLUSION

For the reasons discussed here and in the Department's opening memorandum, the Legislature's petition to intervene should be denied.

Dated this 9th day of July, 2019.

Respectfully submitted,

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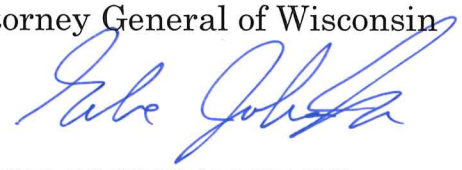

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