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SUPREME COURT OF WISCONSIN
Appeal 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

INTERVENORS–CO-APPELLANTS' RESPONSE MEMORANDUM IN SUPPORT OF WISCONSIN LEGISLATURE'S PETITION TO INTERVENE

Intervenors–Co-Appellants support the Wisconsin Legislature's petition to intervene in this case. In their opening memoranda in opposition to such petition, DNR and Clean Wisconsin claim Wis. Stat. § 227.53(1)(d) excludes intervention at the appellate level, thereby ignoring the context and history of Chapter 227.

Chapter 227, Subchapter III (Administrative Actions and Judicial Review), governs procedure for judicial review at the circuit court level only. Where appellate level procedure applies, Chapters 808 (Appeals and Writs of Error) and 809 (Rules of Appellate Procedure) govern. This can be plainly seen from the statute's overall use of the word "court" meaning circuit court and the language and history of Wis. Stat. § 227.58.

- Chapter 227, Subchapter III, uses the word "court" over eighty times, referring to the "circuit court" every time except twice.[1]

- Wis. Stat. § 227.53(1)(d), the provision DNR argues is the exclusive means for intervention at both the circuit and appellate levels, uses the term "court" only to mean "circuit court."[2]

- The only relevant mention of term "appellate court" in Chapter 227, Subchapter III, is Wis. Stat. § 227.58, which allows any party to "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)."[3]

- In addition to referencing Chapter 808 relating to appellate procedures, the Judicial Council Note to Wis. Stat. § 227.58 states that: "Civil appeal procedures are governed by chs. 808 and 809, stats."[4]

- DNR argues Wis. Stat. § 227.53(1)(d) cannot be applied at the appellate level because a petition to intervene under this provision "must be resolved before the circuit court takes up the petition for judicial review."[5]

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[1] Wis. Stat. § 227.58; Wis. Stat. § 227.60.
[2] As recognized by DNR in DNR Mem. Regarding the Wisconsin Legislature's Pet. to Intervene (June 19, 2019), at 17.
[3] The other, Wis. Stat. § 227.60, involves a grant of jurisdiction when determining validity of laws when attacked in federal court.
[4] 1983 Wis. Act 219, Intervenors-Co-Appellants' Mem. in Supp. of Wisconsin Legislature's Pet. to Intervene (June 19, 2019), Exhibit A.
[5] DNR Mem. Regarding the Wisconsin Legislature's Pet. to Intervene (June 19, 2019), at 7.

The Court asked the parties to address the interplay between Wis. Stat. § 227.53(1)(d) and Wis. Stat. §§ 809.13 and 803.09(2m) as they relate to Wisconsin Legislature's petition to intervene. It's quite simple. There is no interplay. Wis. Stat. § 227.53(1)(d) relates exclusively to intervention at the circuit court level. Up to this point, DNR and Clean Wisconsin agree with us. But through flawed logic they create this flawed syllogism: If Chapter 227 controls judicial review of agency decisions and if Wis. Stat. § 227.53(1)(d) is the only provision within Chapter 227 pertaining to petitions to intervene, then there *cannot* exist a right to intervene at the appellate level outside of Wis. Stat. § 227.53(1)(d). More logically, we believe, if Wis. Stat. § 227.53(1)(d) pertains to petitions to intervene only at circuit court level and this petition is at the appellate level, then the Court must look to appellate procedures set forth at Wis. Stat. §§ 809.13 and 803.09(2m) as they relate to Wisconsin Legislature's petition to intervene.

Thus, rather than strain to find an interplay or otherwise harmonize these provisions for appellate intervention, there is a binary question before the Court: Does Wis. Stat. §§ 809.13 and 803.09(2m) control this petition to intervene at the appellate level, as we assert, or, as DNR and Clean Wisconsin argue, does Wis. Stat. § 227.53(1)(d) render Wis. Stat. §§ 809.13 and 803.09(2m) inoperative at the appellant level? Put another way, when enacting for itself a right to intervene did

the Legislature unwittingly place a hidden kill button for all administrate law cases at the appellate level? We think not.

Given that Wis. Stat. § 227.53(1)(d) does not render Wis. Stat. § 803.09(2m) inoperative, it sets forth the controlling standard—a standard the legislature meets.[6]

Although the statutory language and context is clear on this issue, we believe a broader perspective on DNR and Clean Wisconsin positions is warranted. If they are correct, petitions to intervene in Chapter 227 proceedings are only allowed at the circuit court level. Beyond eliminating the ability of the Legislature to intervene here under Wis. Stat. § 803.09(2m), DNR's position wipes out any opportunity to participate at the appellate level by *any* parties in *any* Chapter 227 cases, whether that be under Wis. Stat. §§ 803.09(1) (as matter of right) or 803.09(2) (permissive intervention) or 803.09(2m) (legislative intervention).

Those farmers whose water well permits approved by DNR were vacated by the circuit court reasonably expected the Attorney General and DNR would continue to defend the permits. They were wrong, and since DNR's bait and switch

[6] To meet Wis. Stat. § 809.13(2m), the legislative intervention statute, three things must happen. First, a party must challenge "the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute." Second, the legislature must then choose to intervene as prescribed in Wis. Stat. §13.365. Third, these things met, the legislature can then intervene "at any time in the action as a matter of right by serving a motion upon the parties as provided in s. 801.14." In the present case, the Legislature fulfilled all three steps. Intervenors-Co-Appellants' Mem. in Supp. of Wisconsin Legislature's Pet. to Intervene (June 19, 2019), at 13-15.

occurred at the appellate level, under DNR's interpretation of Wis. Stat. § 227.53(1)(d), the farmers are forever locked out of this case even though as "parties to the proceeding [they had] the *right to participate* in the proceedings for review." (Emphasis added.) Such a sweeping bar to participate in judicial review is inconsistent with the plain meaning of the statutes and the policy underpinnings supporting permissive access to our courts.

CONCLUSION

For the reasons discussed, Intervenors–Co-Appellants ask the Court to recognize the Legislature's right to intervene.

Respectfully submitted,

/s/

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Dairy Business Association,
Midwest Food Processors Association,
Wisconsin Potato & Vegetable Growers Association,
Wisconsin Cheese Makers Association,
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