

FILED
02-22-2024
CLERK OF WISCONSIN
SUPREME COURT

SUPREME COURT OF WISCONSIN
Appeal No. 2023AP002020 - OA

Tony Evers, Governor of Wisconsin, Department of Natural Resources, Board of Regents of the University of Wisconsin System, Department of Safety and Professional Services and Marriage and Family Therapy Board, Professional Counseling and Social Work Examining Board,

Petitioners,

v.

Senator Howard Marklein, Representative Mark Born, in their official capacities as chairs of the joint committee on finance; Senator Chris Kapenga, Representative Robin Vos, in their official capacities as chairs of the joint committee on employment relations; Senator Steve Nass and Representative Adam Neylon, in their official capacities as co-chairs of the joint committee for review of administrative rules,

Respondents.

Original Action in the Wisconsin Supreme Court

**BRIEF IN SUPPORT OF UNOPPOSED
MOTION TO INTERVENE BY GATHERING WATERS, INC.**

Dated February 22, 2024

STAFFORD ROSENBAUM LLP

Erin K. Deeley, SBN 1084027
Jeffrey A. Mandell, SBN 1100406
Rachel E. Snyder, SBN 1090427
Carly Gerads, SBN 1106808
222 West Washington Avenue, Suite 900
Madison, Wisconsin 53703
608.256.0226

*Attorneys for Proposed Intervenor-Petitioner
Gathering Waters, Inc.*

TABLE OF CONTENTS

| | |
|---|----|
| INTRODUCTION | 3 |
| STATEMENT OF INTERESTS..... | 3 |
| LEGAL STANDARD FOR INTERVENTION | 8 |
| ARGUMENT | 9 |
| I. GATHERING WATERS SATISFIES ALL OF THE CRITERIA FOR MANDATORY INTERVENTION..... | 9 |
| A. This Motion to Intervene is Both Timely and Unopposed. | 10 |
| B. Gathering Waters’ Interests Are Sufficiently Related to This Matter. | 11 |
| C. The Disposition of this Case May Impair Gathering Waters’ Ability to Protect Its Interests..... | 13 |
| D. No Parties Adequately Represent Gathering Waters’ Interests. | 14 |
| II. GATHERING WATERS ALSO MEETS THE CRITERIA FOR PERMISSIVE INTERVENTION..... | 17 |
| CONCLUSION..... | 18 |

INTRODUCTION

Gathering Waters, Inc. (Gathering Waters) moves to intervene as a Petitioner to provide the Court with a comprehensive view of the Knowles-Nelson Stewardship Program. Gathering Waters can, uniquely, offer the perspective and accumulated experience of Knowles-Nelson Stewardship Program applicants, interested citizens, and organizations directly impacted by the Knowles-Nelson Stewardship Program and the Joint Committee on Finance's increased, unlawful interference with that program. As representative of the people and organizations directly impacted by this dispute, Gathering Waters' viewpoint is unique from the institutional interests currently represented. Gathering Waters is moving to intervene in this action to ensure that its perspective, as well as the views and interests of its 40-plus land trust members, are taken into consideration by this Court. Gathering Waters submits this brief in support of its Motion.

STATEMENT OF INTERESTS

Gathering Waters is Wisconsin's statewide alliance for land trusts, which are community-based, nonprofit organizations that work to permanently conserve land. (Affidavit of Mike Carlson ("Carlson Aff."), ¶6) Gathering Waters was founded in 1994, just a few years after the Legislature and then-Governor Tommy Thompson created the Warren Knowles-Gaylord Nelson Stewardship Program. (*Id.*, ¶¶8, 10-11); 1989 Wis. Act 31. The Knowles-Nelson Stewardship Program has been at the heart of Gathering Waters' organizational mission since the very beginning, as the

Program is the most significant source of funding for land trusts to acquire land for conservation, recreation, and public enjoyment. (*Id.*, ¶9) Gathering Waters has over 40 member land trusts located across the state, whose missions are as distinct as the landscapes they work to conserve. (*Id.*, ¶¶10, 12, 14) While some land trusts focus on conserving high-quality prairies, forests, and wetlands, others protect family farms or support the development of urban parks and trails. (*Id.*, ¶12) Each land trust plays a vital role in the protection of land, water, and wildlife. (*Id.*) Gathering Waters is focused on helping land trusts, landowners, and communities protect the places that make Wisconsin special. (*Id.*, ¶21) Gathering Waters has repeatedly taken a lead role in rallying support for the Knowles-Nelson Stewardship Program's reauthorization and has created a statewide grassroots network called "Team Knowles-Nelson" to educate Wisconsinites on the Knowles-Nelson Stewardship Program and to support constituents in their communication with elected officials. (*Id.*, ¶31)

Gathering Waters' members have firsthand experience with the Knowles-Nelson Stewardship Program and the onerous process involved in applying for a grant. (*Id.*, ¶62) While Gathering Waters is not typically involved in the transactional details of individual land-conservation projects, it supports land trusts that apply for Knowles-Nelson funding through regular contact with Department of Natural Resources (DNR) grant and program staff, the Governor's office, and members of the Legislature on behalf of land trusts and other Knowles-Nelson Stewardship Program applicants and interested parties. (*Id.*, ¶28) Gathering Waters

stays abreast of administration of the program by the DNR, the projects DNR approves, and how those projects fare on review by the Joint Committee on Finance (JCF). (*Id.*, ¶32) The functioning and success of the Knowles-Nelson Stewardship Program is of paramount concern to Gathering Waters and its members. (*Id.*, ¶61) Gathering Waters and its members have an interest in, and are reliant upon, the orderly functioning of the Knowles-Nelson Stewardship Program to ensure state grant funding gets to lands across the state that need it most (and meet all Program criteria) and to ensure its members do not have to unnecessarily tap other philanthropic resources. (*Id.*, ¶¶69-70)

Traditionally, Gathering Waters' role has been to educate lawmakers about the Knowles-Nelson Stewardship Program and the work of land trusts. (*Id.*, ¶30) In recent years, its work has more often shifted to helping individual land trusts and their partners navigate the increasingly onerous and unpredictable review process of the JCF. (*Id.*) The number of JCF objections to Knowles-Nelson Stewardship Program projects has accelerated during Governor Evers's administration, including grants to Gathering Waters' member land trusts. (*Id.*, ¶¶33-35) Gathering Waters is familiar with many of the projects and JCF's objections to those projects included in Exhibit A to the Petition for Original Action. (*Id.*, ¶¶36-37)

Gathering Waters has witnessed a cooling effect on demand for funds from the Knowles-Nelson Stewardship Program as a result of JCF's interference with DNR-approved projects during Governor Evers's administration. (*Id.*, ¶38)

Gathering Waters has witnessed the withdrawal of applications and a reliance upon funding from sources other than Knowles-Nelson Stewardship Program. (*Id.*, ¶¶35, 41, 43) Gathering Waters has witnessed land trusts downsize their Knowles-Nelson Stewardship Program projects, apply for less than 50% matching funding, stop applying for funding in excess of the \$250,000 passive review threshold (even if the project costs are significantly greater), and stop applying for Project funding altogether, all as a result of JCF's increased micromanaging of Knowles-Nelson Stewardship Program projects and the uncertain and arbitrary nature of the JCF review process. (*Id.*, ¶¶39-40, 44, 47) Gathering Waters has also seen projects get outright denied and grants get reduced through JCF action. (*Id.*, ¶¶45-46)

As a result of increased JCF interference with the Knowles-Nelson Stewardship Program, Gathering Waters has had to shift its advocacy efforts. (*Id.*, ¶¶48-53) That is, Gathering Waters' advocacy and organizing efforts have had to take on a more public facing and more resource intensive role in the last five years. (*Id.*, ¶52) Gathering Waters had shifted its focus to not only educate individual Wisconsin residents on developments with the Knowles-Nelson Stewardship Program and facilitate their communication with legislators, but also educate members of the media to ensure the Knowles-Nelson Stewardship Program story is told in public. (*Id.*, ¶56) In the past several years, a large swatch of Gathering Waters' staff time has been devoted to this advocacy (equating to hundreds of thousands of dollars per year), resources Gathering Waters would otherwise invest

elsewhere and that land trusts could devote to additional conservation work if the system were operating more functionally. (*Id.*, ¶57) Additionally, as a result of JCF slashing or outright denying grants, Gathering Waters has had to expend a significant amount of resources helping land trusts and other interested parties identify and secure alternative funding sources for blocked projects. (*Id.*, ¶¶43, 45, 53)

Gathering Waters' members have firsthand experience with the Knowles-Nelson Stewardship Program and JCF's recent, increased objections and interference with DNR-approved grants under the Program. (*Id.*, ¶63) Gathering Waters and its members are particularly concerned with the troubling trend of anonymous, and seemingly arbitrary, objections to worthy conservation projects that would benefit Wisconsin, as the process lacks transparency and accountability for lawmakers. (*Id.*, ¶64) Gathering Waters and its members are particularly concerned with the troubling trend of JCF's increased delay, objections, and cuts to funding for projects approved by DNR for funding under the Knowles-Nelson Stewardship Program. (*Id.*, ¶¶65-66) JCF's interference in the Knowles-Nelson Stewardship Program is causing harm to Gathering Waters' land trust members and individual donors in Wisconsin who care about conservation and are being blocked from using established Wisconsin law to accomplish the impact that they want in their local communities. (*Id.*, ¶71)

LEGAL STANDARD FOR INTERVENTION

This Court may permit intervention if Gathering Waters demonstrates that it meets certain criteria, as provided under Wis. Stat. § 803.09. State law provides two avenues for intervention: mandatory intervention under § 803.09(1) and permissive intervention under § 803.09(2).

To intervene as a matter of right under Wis. Stat. § 803.09(1), a proposed intervenor must show that:

1. its petition to intervene is timely;
2. it claims an interest sufficiently related to the subject of this action;
3. disposition of this action may as a practical matter impair or impede its ability to protect that interest; and
4. the existing parties do not adequately represent its interest.

See Helgeland v. Wis. Municipalities, 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d

1. Courts take a “flexible and pragmatic approach to intervention as of right.” *Id.*, ¶40 n.30. “[T]here is interplay between the requirements,” which “must be blended and balanced to determine whether [Proposed Intervenors] have a right to intervene.” *Id.*, ¶39 (footnote omitted). “The analysis is holistic, flexible, and highly fact-specific.” *Id.*, ¶40.

The test for permissive intervention is even more flexible. A court may grant permissive intervention to anyone who would be a proper party. *See, e.g., City of Madison v. Wis. Emp’t Relations Comm’n*, 2000 WI 39, ¶11 n.11, 234 Wis. 2d 550,

610 N.W.2d 94. The court “shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Wis. Stat. § 803.09(2). Section 803.09(2) makes clear that allowing a proposed intervenor like Gathering Waters to intervene is within the Court’s discretion, so long as Gathering Waters’ position and the main action share a common question of law or fact. *Helgeland*, 2008 WI 9, ¶120.

ARGUMENT

Gathering Waters qualifies for both mandatory and permissive intervention. Thus, whichever avenue the Court follows, intervention is appropriate here, and Gathering Waters’ Motion should be granted.

I. GATHERING WATERS SATISFIES ALL OF THE CRITERIA FOR MANDATORY INTERVENTION.

Gathering Waters meets all four requirements for mandatory intervention. Moreover, Wisconsin courts view intervention favorably as a tool for “disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Helgeland*, 2008 WI 9, ¶44 (quoting *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 548-49, 334 N.W.2d 252 (1983)). Together, these facts militate strongly in favor of intervention here. The four statutory requirements must be “blended and balanced to determine whether [a party has] the right to intervene.” *Id.*, ¶39 (footnote omitted). The “holistic, flexible” analysis that the Wisconsin Supreme Court has prescribed, *id.*, ¶40 (footnote omitted), makes

clear that Gathering Waters satisfies the legal standard and its Motion should be granted.

A. This Motion to Intervene is Both Timely and Unopposed.

There is “no precise formula to determine whether a [petition] to intervene is timely,” but the critical factor is whether the proposed intervenor acted “promptly.” *Bilder*, 112 Wis. 2d at 550. Whether an intervenor acted promptly is determined by “when the proposed intervenor discovered its interest was at risk and how far litigation has proceeded.” *Olivarez v. Unitrin*, 296 Wis. 2d 337, 348, 723 N.W.2d 131 (Ct. App. 2006 (citing *Roth v. LaFarge Sch. Dist. Bd. of Canvassers*, 247 Wis. 2d 708, 634 N.W.2d 882 (Ct. App. 2001))). The Court also should consider whether intervention will prejudice the original parties. *Bilder*, 112 Wis. 2d at 550.

Gathering Waters’ Motion is timely. This Court limited the issues in this original action when it granted review on February 2, 2024. Only at that moment did it become clear that Gathering Waters’ interests were elevated to the degree necessitating intervention. Gathering Waters has promptly acted to file this Motion, accompanied by its opening merits brief, within the timeline prescribed in the Court’s February 2, 2024, Order. Except for the Petition for Original Action and the Respondents’ opposition, no additional merits briefing has yet occurred in this case. Gathering Waters’ intervention would not complicate or delay matters, as a briefing schedule and oral argument date have already been set and Gathering Waters is not seeking to change any of those deadlines.

Nor would there be any prejudice to other parties if the Court grants Gathering Waters' motion to intervene. As detailed in Gathering Waters' contemporaneously filed Motion, no party to this action opposes Gathering Waters' intervention. *See* Gathering Waters' Unopposed Motion To Intervene at 5.

B. Gathering Waters' Interests Are Sufficiently Related to This Matter.

No specific test exists for determining whether interests are sufficient to warrant intervention. Instead, a court is tasked with analyzing the facts and circumstances in light of the "policies underlying the intervention statute." *Helgeland*, 2008 WI 9, ¶¶43-44 (footnotes omitted). A proposed intervenor's interest must be of "direct and immediate character" such that "the intervenor will either gain or lose by the direct operation of the judgment." *Id.*, ¶45 (quoting *City of Madison*, 2000 WI 39, ¶11 n.9).

Gathering Waters has a direct and immediate interest in a case that is centered on the Knowles-Nelson Stewardship Program, a program that has been at the heart of Gathering Waters' organizational mission since its founding 30 years ago. (Carlson Aff., ¶19) Gathering Waters has over 40 member land trusts which, despite varying in their mission and focus, generally work in their communities to protect and preserve natural spaces forever. (*Id.*, ¶¶10, 12-14) The Knowles-Nelson Stewardship Program is the most significant source of funding for land trusts to

acquire land for conservation, recreation, and public enjoyment and it helps land trusts protect the places that make Wisconsin special. (*Id.*, ¶¶19-21)

Gathering Waters' members have extensive experience with the Knowles-Nelson Stewardship Program and the onerous process involved in applying for a grant. (*Id.*, ¶62) Gathering Waters and its members have an interest in, and are reliant upon, the orderly functioning of the Knowles-Nelson Stewardship Program to ensure state grant funding gets to lands across the state that need it most (and meet Program criteria) and to ensure its members do not have to unnecessarily tap other philanthropic resources. (*Id.*, ¶¶69-70) The functioning and success of the Knowles-Nelson Stewardship Program is of paramount concern to Gathering Waters and its members. (*Id.*, ¶61) Gathering Waters stays abreast of administration of the program by the DNR, the projects DNR approves, and how those projects fare on review by the JCF. (*Id.*, ¶32)

As a result JCF's increased interferences with, and objections to, Knowles-Nelson Stewardship Program projects during Governor Evers's administration, Gathering Waters has had to significantly alter its day-to-day operations (*Id.*, ¶¶34-35, 48-51, 53-56) Additionally, Gathering Waters' advocacy and organizing efforts have shifted and become far more burdensome. (*Id.*, ¶52) A large amount of Gathering Waters' staff time has been devoted to advocacy (equating to hundreds of thousands of dollars per year), resources Gathering Waters would otherwise

invest elsewhere and that land trusts could devote to additional conservation work if the system were more functional. (*Id.*, ¶57)

Gathering Waters' members have firsthand experience with the Knowles-Nelson Stewardship Program and JCF's recent, increased objections and interference with DNR-approved grants under the Program. (*Id.*, ¶63) Gathering Waters and its members are particularly concerned with the troubling trend of anonymous, and seemingly arbitrary, objections to worthy conservation projects that would benefit Wisconsin, as the process lacks transparency and accountability for lawmakers. (*Id.*, ¶64) Gathering Waters and its members are particularly concerned with the troubling trend of JCF's increased delay, objections, and cuts to funding for projects approved by DNR for funding under the Knowles-Nelson Stewardship Program. (*Id.*, ¶66) JCF's interference in the Knowles-Nelson Stewardship Program is causing harm to Gathering Waters' land trust members and individual donors in Wisconsin who care about conservation and are being blocked from using established Wisconsin law to accomplish the impact that they want in their local communities (*Id.*, ¶71)

C. The Disposition of this Case May Impair Gathering Waters' Ability to Protect Its Interests.

The outcome of this litigation “may, as a practical matter, impair or impede [the] ability to protect interests that may be related to the subject of [the] action.” *Helgeland*, 2008 WI 9, ¶75 (footnote omitted). Just as a court should “approach

intervention as of right generally,” this inquiry is taken under a “pragmatic approach ... focus[ed] on the facts of each case and the policies underlying the intervention statute.” *Id.*, ¶79.

This Court’s conclusions on the separation-of-powers issues presented in this case will affect Gathering Waters. If Petitioners succeed, the Knowles-Nelson Stewardship Program should, hopefully, return to a properly functioning, effective, successful program wherein state grant funding gets to lands across the state that need it most (and meet Program criteria) and Gathering Waters’ members do not have to unnecessarily deplete other philanthropic resources. If Respondents succeed, JCF’s interference with DNR-approved projects may increase, and Gathering Waters will need to continue adapting its advocacy and devoting greater time and resources to this problem, as it done in the past five years. (Carlson Aff., ¶¶48-57) Ultimately the Court’s decision in this case will undoubtedly impact the success of the Knowles-Nelson Stewardship Program going forward, as well as the role Gathering Waters and its land trust members play.

D. No Other Party Adequately Represents Gathering Waters’ Interests.

“[T]he showing required for providing inadequate representation ‘should be treated as minimal.’” *Helgeland*, 2008 WI 9, ¶85 (quoting *Armada Broad., Inc. v. Stirn*, 183 Wis. 2d 463, 476, 516 N.W.2d 357 (1994)). “If the interest of the proposed intervenor is not represented at all, or if all existing parties are adverse to

the proposed intervenor, the proposed intervenor is not adequately represented.” Jay E. Grenig, 3 Wis. Prac., Civil Procedure (4th ed.) § 309.2.

The Legislature undoubtedly does not represent Gathering Waters’ interests in this matter, as JCF’s actions have caused Gathering Waters to substantively change its day-to-day operations and expend time and resources in a significantly different way to achieve the ends already enshrined in statute. (Carlson Aff., ¶¶48-57) Additionally, JCF has been directly adverse to Gathering Waters and some of its land trust members, who have had their DNR-approved projects held in limbo, slashed, or outright rejected. (*Id.*, ¶¶42, 45-46)

Nor does Governor Evers or DNR adequately represent Gathering Waters’ interests. Those Petitioners administer the Knowles-Nelson Stewardship Program, faithfully executing the statutory and regulatory framework that applies. They do not share, and have no duty to represent, Gathering Waters’ private interests in the Knowles-Nelson Stewardship Program or the interests of its 40-plus land trust members. Put simply, the people who administer a program (here, Petitioners) and the users of that program (here, Gathering Waters) necessarily approach their work from different angles and, accordingly, do not always see things the same way. While the DNR and Gathering Waters may ultimately seek the same result and may make some overlapping arguments, such similarities do not preclude intervention, nor do they compel the conclusion that Gathering Waters’ interests are already adequately represented. Indeed, it is sufficient that Intervenor show that

“representation of [their] interest ‘may be’ inadequate.” *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747, 601 N.W.2d 301 (Ct. App. 1999) (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)).

Gathering Waters will offer a different perspective on the Knowles-Nelson Stewardship Program than can be provided by the original, institutional parties. The Legislature created the program, the DNR administers the program, and Gathering Waters (and its land trusts members and individual donors) form many of the constituents who apply for and (attempt to) use the program. While Gathering Waters is not looking to present new issues for the Court’s consideration, its participation will provide the Court with a more complete, cohesive view of the case.

Gathering Waters will offer views informed by the key perspectives and experiences of Knowles-Nelson Stewardship Program applicants, interested citizens, and organizations directly impacted by the Knowles-Nelson Stewardship Program and JCF’s increased, unlawful interference with that Program. Gathering Waters would explain how the harm caused by JCF’s interference extends to its land trust members and individual donors in Wisconsin who care about conservation and are frustrated in achieving the impact they want in their local communities. Each of Gathering Waters’ member land trusts has its own board of directors, typically consisting of local community leaders who are passionate about conservation efforts—they deserve to have a voice in this dispute. (Carlson Aff., ¶15)

Because no party represents Gathering Waters' interests, all four criteria for mandatory intervention are satisfied. Accordingly, the Court should grant the motion to intervene.

II. GATHERING WATERS ALSO MEETS THE CRITERIA FOR PERMISSIVE INTERVENTION.

Alternatively, Gathering Waters should be allowed to intervene with this Court's permission. A court may grant permissive intervention to anyone who would be a proper party. *See, e.g., City of Madison*, 2000 WI 39, ¶11 n.11. In considering a request for permissive intervention, the Court shall "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Wis. Stat. § 803.09(2). Absent prejudice, intervention is within the Court's discretion, as long as the movant's claim or defense and the main action "have a common of law or fact in common." *Helgeland*, 2008 WI 9, ¶120.

Apart from the institutional interests already represented in this action, Gathering Waters, as Wisconsin's statewide alliance for land trusts (Carlson Aff., ¶6), is an appropriate embodiment of the non-institutional interests implicated by this case. The Knowles-Nelson Stewardship Program has been at the heart of Gathering Waters' organizational mission since the very beginning (*id.*, ¶19) in its representation of now 40-plus member land trusts located across the state (*id.*, ¶10). Gathering Waters' members are intimately impacted by the Knowles-Nelson

Stewardship Program, the onerous process involved in applying for a grant, and the extent of JCF authority. (*Id.*, ¶¶34, 62-67) The functioning and success of the Knowles-Nelson Stewardship Program is of paramount concern to Gathering Waters and its members. (*Id.*, ¶61)

Allowing Gathering Waters to participate would not prejudice either party to this proceeding nor cause any undue delay. The Court accepted review of the first issue presented in the Petition for Original Action on February 2, 2024 and Gathering Waters took prompt action to draft this Motion and supporting affidavit, as well as its underlying merits brief. Except for the Petition for Original Action (and the Respondents' opposition), no briefs have been filed yet.

The lack of prejudice here is evidenced by the non-opposition of the other parties, as they would surely speak up to this Court if they believed Gathering Waters' intervention in this case would be prejudicial. Indeed, Gathering Waters, in order to ensure the orderly administration of this case, simultaneously files its merits brief. While that submission does not alter the issues this Court has agreed to hear, it presents a non-institutional perspective of said issues in order to aid this Court's well-rounded and robust consideration.

CONCLUSION

For the foregoing reasons, Proposed Intervenor-Petitioner Gathering Waters, Inc. respectfully requests that this Court grant its motion to intervene and accept its

opening merits brief for filing, which is being simultaneously filed with this Motion and brief.

Dated: February 22, 2024.

STAFFORD ROSENBAUM LLP

By: *Electronically signed by Erin K. Deeley*

Erin K. Deeley, SBN 1084027

Jeffrey A. Mandell, SBN 1100406

Rachel E. Snyder, SBN 1090427

Carly Gerads, SBN 1106808

222 West Washington Avenue, Suite 900

Madison, Wisconsin 53703

608.256.0226

*Attorneys for Proposed Intervenor-Petitioner
Gathering Waters, Inc.*