

STATE OF WISCONSIN CIRCUIT COURT BR. 7 WAUKESHA COUNTY

State ex rel. REDDELIEN ROAD NEIGHBORHOOD
ASSOCIATION, INC., ("RRNA"), et al,

Petitioners,

-vs-

Case No. 2010 CV 5341
MOTION HEARING

THE DEPARTMENT OF NATURAL
RESOURCES, ("DNR"),

Respondents.

Proceedings held in the above-entitled matter
on the 28th day of October, 2011, before the **Honorable**
J. MAC DAVIS, Circuit Court Judge presiding in Circuit Court
Branch 7, Waukesha County Courthouse, Waukesha, Wisconsin.

APPEARANCES:

ATTORNEY WILLIAM C. GLEISNER, 300 Cottonwood Avenue,
Suite No. 3, Hartland, Wisconsin 53029, appearing on behalf
of the Petitioners.

ASSISTANT ATTORNEY GENERAL DIANE L. MILLIGAN,
Department of Natural Resources, Wisconsin Department of
Justice, P.O. Box 7857, Madison, WI 53707-7857, appearing on
behalf of the Respondent.

Gail M. Villwock
Official Court Reporter

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1 TRANSCRIPT OF PROCEEDINGS

2 THE COURT: I'll call State ex rel Reddelien
3 Road Neighborhood Association, Inc. and others versus
4 the Department of Natural Resources, Case 2010 CV
5 5341. The appearances, please.

6 MS. MILLIGAN: Your Honor, appearing on
7 behalf of the Department of Natural Resources,
8 Assistant Attorney General Diane Milligan.

9 MR. GLEISNER: Appearing on behalf of the
10 Reddelien Road Neighborhood Association, Attorney
11 Bill Gleisner.

12 THE COURT: All right, we're here on a
13 couple of motions. The Association wants the Court to
14 offer its preliminary relief I guess you would say to
15 remand this and direct the DNR to have a contested
16 case hearing and allow them some discovery as part of
17 that. The DNR opposes that.

18 The DNR wants me to strike an affidavit
19 by Dr. O'Reilly. I'm going to deal with that right
20 now. It's denied. It's an inappropriate remedy even
21 in this kind of context; in addition, to wit, this
22 Court's view is substantively mooted by the subsequent
23 affidavit by Dr. O'Reilly.

24 So, it appears the issue here is the
25 difference of opinion in the Court's view of

1 significance is the DNR claims the Court does not have
2 the legal authority to do what the Association wants
3 me to do.

4 So, from the DNR's point of view we don't
5 get to some of the other things that might apply if
6 the Court were exercising discretion of some kind.

7 So, Mr. Gleisner, why don't you, it's your
8 motion, tell me why I should grant it, tell me where I
9 have the authority.

10 MR. GLEISNER: Certainly, your Honor. First
11 of all, your Honor, we respectfully state that we
12 believe there are three alternatives grounds for
13 remanding this case for a contested case hearing.

14 As to the first alternative in its
15 October 13th letter to this Court the DNA admits that
16 it overlooked the fact that the, we did in fact file
17 our request for a contested case hearing. In that
18 same October 13th letter the DNR claims
19 the Association had to appeal within 30 days of
20 the date of the attempted denial of the contested case
21 request and cites Section 227.53 (1)(a)2m. That
22 section reads: "Petition for review of cases other
23 than contested cases shall be served and filed within
24 30 days after personal service or mailing of the
25 decision by the agency."

1 It's respectfully submitted that 227.53 (1)
2 (a)2m can be read to mean that the denial of a
3 contested case hearing request is not subject to that
4 30 day rule.

5 As to the -- would you like me to wait, your
6 Honor, while you get there?

7 THE COURT: No, go ahead.

8 MR. GLEISNER: As to the second alternative
9 ground for remand, 227.42 contested case hearing is
10 how facts to determine under Chapter 227 so that the
11 trial court can conduct appellate review of the laws
12 applied to those facts through and by means of a
13 227.53 judicial review.

14 Besides expert evidence there are a number
15 of disputed facts that should be resolved before this
16 Court is called upon to conduct such a review.

17 For example, the DNR applied to itself for
18 storm water coverage, didn't advise the Hansons that
19 it was doing so in spite of the co-ownership of the
20 portion of the property, issued itself a decision a
21 mere three days later without seeking or considering
22 submissions by other interested parties including the
23 Hansons or experts that may call into question the
24 propriety of the DNR granting themselves a permit.

25 As to your authority, your Honor, pursuant

1 to 227.57 (7) a Circuit Court has both jurisdiction
2 and discretion to remand for a contested case hearing
3 regardless of whether a party requested such a
4 hearing.

5 227.57 (7) reads in part, and I quote: "If
6 the agency's action depends on facts determined
7 without a hearing, it may remand the case to the
8 agency for further examination and action within the
9 agency's responsibility."

10 Under the *Docks* decision, which we've cited
11 in our briefs, a trial court has broad discretion to
12 remand so the facts may be ascertained and developed
13 and a record created.

14 In *Docks* the DNR argued that the
15 appellant *Docks* never requested a hearing before the
16 Department, and that there is no specific provision in
17 227.57 (7) that authorizes the Court to order the
18 agency to hold hearings.

19 The Court of Appeals responded: "We will
20 accept both facts as true but neither is dispositive.
21 Section 227.57 (7) empowers the Court to remand to DNR
22 for action within the agency's responsibility.

23 And the Department's own rules contemplates
24 hearing under 227.42, the contested case hearing rule.

25 The fact that *Docks* did not request a

1 hearing the first time around does not limit the
2 Court's power to order DNR action within the range of
3 its responsibilities."

4 Here, unlike in *Docks*, we did request a
5 contested case hearing. And, in fact, we specifically
6 included it as part of our petition for judicial
7 review, and the gravamen of our prayer in our petition
8 is for a remand.

9 And that brings us to the Association's
10 third alternative ground for remand, your Honor. As
11 the DNR itself has acknowledged in a brief in
12 a companion case, and we have a copy of the brief with
13 us if the Court or Counsel would like to review it,
14 under 227.02 the Rules of Civil Procedure apply if
15 they do not conflict with other provisions of 227. We
16 respectfully submit that the petition for judicial
17 review is like a complaint and should be construed
18 according to the notice pleading standard under
19 802.02. As both the Supreme Court and Court of
20 Appeals have held when a document is attached to a
21 complaint and made a part of it the attached document
22 may be resorted to in determining the sufficiency of
23 the complaint.

24 The request for contested hearing is
25 attached to the petition for judicial review.

1 Also, the petition in this case was a
2 request in part for declaratory relief, or a
3 declaration of rights under 227.57 (9) asking that
4 this Court declare that the 30 day time limit on the
5 *Hartsook* decision does not begin to run until
6 December 16th of 2010.

7 The request for declaratory relief applied
8 to the *Hartsook* decision and was not limited to either
9 the petition for judicial review or the attached
10 request for a contested case hearing.

11 There is nothing in 227.42 or Chapter 227
12 which forbids immediately asking a circuit court to
13 utilize a contested case mechanism under 227.42 in
14 order to assure that full and complete justice is
15 achieved pursuant to the petition for judicial review.

16 Issue was joined in this case on January 6th
17 of 2010 by the DNR's Notice of Appearance, which under
18 227.53 (2) is like an answer. That Notice of
19 Appearance was filed four days before the attempted
20 January 10th denial by the DNR. Other than objecting
21 to the prayer for declaratory relief the DNR does not
22 object to or raise any issues regarding the inclusion
23 of request for a contested case hearing.

24 When the DNR did move to dismiss on
25 February 7th it only did so on the grounds of

1 timeliness after the Court's August 11th of 2011
2 order, which we believe is in the nature of a decision
3 on our request for the declaratory relief. The DNR
4 did not seek to amend its Notice of Appearance.

5 With regard to one other point, your Honor,
6 the reason we have asked the Court for discovery on
7 remand is that we want to get to the bottom of some of
8 the irregularities in this case that we mentioned a
9 few moments ago; and also in order to be certain that
10 we have the opportunity to depose the authors of the
11 Kapur and Gestra reports and Mr. Hartsook. By reason
12 of the DNR's motion to strike portions of Dr.
13 O'Reilly's affidavit, which you have already ruled on,
14 we believe the DNR would also like to get to the
15 bottom of some of these expert reports.

16 And for that reason, or for all those
17 reasons, your Honor, we would respectfully ask
18 that this Court remand this for a contested case
19 hearing. Thank you, your Honor.

20 THE COURT: Thank you. Attorney Milligan?

21 MS. MILLIGAN: Thank you, your Honor.

22 Reddelien Road did file a petition for contested
23 hearing. The petition was denied, and they attached a
24 copy of the denial letter to their pleading, to their
25 motion papers in this case. It wasn't an attempted

1 denial, it was a denial. It was denied based on
2 timeliness but also based on substance, because the
3 petition raised legal questions not factual questions.

4 They didn't seek judicial review within 30
5 days of that denial. And under 227.42 (2) a denial of
6 a request for a hearing shall be in writing, shall
7 state the reasons for denial, and is an order
8 reviewable under this chapter.

9 The denial letter was a separately
10 reviewable decision by the Department of Natural
11 Resources and it was not appealed.

12 They can't get a pre -- they can't get a
13 hearing this way that they didn't properly seek
14 administratively before the courts. And I have a case
15 cite for the Court, *Kosmatka versus DNR*, 77 Wis. 2d
16 558 at 568, and in that case the Court said: Where an
17 appeal is provided it is incumbent upon a litigant to
18 pursue the statutory appeal to its conclusion. He
19 cannot circumvent the statutory scheme by striking out
20 anew and asking another tribunal to rule on the
21 identical point at issue here.

22 So procedurally had Reddelien Road wanted a
23 pre-review contested case hearing they should have
24 appealed the hearing denial. They didn't do so, and
25 they can't get there through the back door through

1 this Court.

2 Their pleading strategy, petitioners say
3 that they put the demands for contested case hearing
4 in their petition for strategic purposes. They
5 strategically incorporate the demand for contested
6 case hearing in their petition for review of DNR's
7 decision because they wanted the Court to remand the
8 case to DNR before the Court does its review.

9 But as I said before the contested case
10 denial decision is a separate reviewable decision.
11 They can't preemptively challenge that decision by
12 incorporating the same complaints in their petition
13 for judicial review of the decision on its merits.

14 THE COURT: You used the word *preemptively*,
15 could you remind me of the dates of the sequence here.

16 THE COURT REPORTER: Your mic is not on.

17 MS. MILLIGAN: Sure, yes, your Honor, I can
18 do that. The petition for contested case hearing
19 was filed on December 20th and that was the same
20 day Reddelien Road Neighborhood Association asked DNR
21 for contested case hearing. DNR denied that request
22 on January 10th as counsel just noted four days after
23 we had already filed our Notice of Appearance in this
24 case. So, they -- they're trying to preemptively
25 challenge a decision made let's see, 11 --

1 21 days after they started this case. In other words,
2 you know, contrary to the arguments at pages 8 through
3 10 about complimentary and simultaneous requests, and
4 contrary to this notice pleading concept, 227, Chapter
5 227 demands strict compliance, and they can't
6 challenge the denial of a contested case hearing
7 petition before that petition was denied.

8 Regarding -- on the case law Reddelien Road
9 Neighborhood Association says it cited the *RW Docks*
10 case.

11 THE COURT: Could you back up?

12 MS. MILLIGAN: Sure.

13 THE COURT: So if we take any notice of the
14 Association's pleading, which contains the request for
15 contested hearing, in your view the fact that that was
16 made before the DNR had denied a request for contested
17 case hearing means we should ignore it. It needed to
18 come after the denial?

19 MS. MILLIGAN: Yes, if they're trying to
20 challenge that decision. It's a separate, a separate
21 standard for judicial review applies to denial
22 decision and to the substance of the storm water
23 permitting decision.

24 We have litigated this across the hall
25 regarding another permit for the same case. The

1 question before the Court for a contested case hearing
2 denial is: Did they meet the standards in 227.42?
3 It's a separate decision, a separate application of
4 law to the separate facts. They're perfectly --

5 THE COURT: You just confused me with that
6 answer because I thought you were talking about the
7 timing of this, and now you went off and talked about
8 a different standard.

9 MS. MILLIGAN: Yeh, there is a timing
10 problem and a substance problem.

11 THE COURT: So you didn't want to talk about
12 the timing problem I asked you about?

13 MS. MILLIGAN: Oh, I tried to, your Honor.

14 THE COURT: Go ahead.

15 MS. MILLIGAN: Okay. They sought judicial
16 review. They filed the petition in this court
17 21 days before their hearing request was denied. They
18 can't challenge something -- they can't challenge
19 something that hasn't happened yet by filing a
20 petition with this Court.

21 If they had wanted to challenge the denial
22 decision they had 30 days after January 10th to do so,
23 and they did not.

24 THE COURT: So what is this -- what is the
25 specific requirement paperwork of pleading-type

1 requirement to do the challenge? Is there any -- in
2 civil courts there isn't much in the way of exact, you
3 just have to make, get your point across, notice
4 pleadings; is it somehow different for this?

5 MS. MILLIGAN: Yes. Chapter 227 is --
6 strict compliance is required in order for the Court
7 to have jurisdiction, and there needs to be a
8 decision, and then you need to appeal within 30 days
9 or the Court lacks subject matter. It used to be
10 subject matter jurisdiction, now it is competency to
11 hear something.

12 So the Court can't hear a case that
13 hasn't -- that hasn't, isn't even ripe. And you can
14 really, you can only challenge one decision at a time
15 in a petition for judicial review.

16 The Court is empowered to remand this case
17 for a contested case hearing after it does its
18 judicial review but not before it does its judicial
19 review.

20 The *RW Docks* case that is cited by the
21 petitioners the Court did its review on page 858 of
22 that decision, it notes that the trial court reviewed
23 the reports and evaluations supporting DNR's decision,
24 and also considered *Docks* objections to several of the
25 agency's conclusions.

1 After the parties briefed the case, after
2 the Court looked at the record, the Court decided that
3 there wasn't enough there and they wanted to remand.

4 But what the Court is being asked here is to
5 remand before it looks at the record. Reddelien Road
6 wants you to disagree with them that, that the record
7 isn't good enough. And then in fact in their brief
8 they say that there's no record has ever been created.
9 But to the contrary, there was a record, we filed it
10 with this Court.

11 The Court needs to review the record before
12 it decides the record is inadequate and a remand is
13 appropriate.

14 We cited the *Barnes* case that went past *RW*
15 *Docks* and tried to explain that, yes, you can have a
16 remand but only if the court doesn't -- only if the
17 facts don't compel any particular action, and if the
18 petitioner meets their burden of showing that summary
19 affirmance isn't warranted.

20 So maybe we'll be in this position if the
21 Court is not satisfied after review, but there is no
22 provision in Chapter 227 for a pre-hearing review
23 other than through 227.42, and they closed the door on
24 that process themselves.

25 THE COURT: Now, well, that's -- I wanted to

1 ask you about how your first set of arguments relate
2 to your second set of arguments. If I agree you're
3 correct about the timing argument, do they still get
4 to get a judicial review and the possibility of a
5 remand? Or not?

6 MS. MILLIGAN: Most certainly, your Honor.

7 THE COURT: Okay.

8 MS. MILLIGAN: And that's what 227.57(7)
9 contemplates.

10 THE COURT: Explain that to me.

11 MS. MILLIGAN: So if we just go through
12 227.57 sub (1) talks about the review shall be
13 confined to the record unless leave is granted to take
14 testimony.

15 THE COURT: I didn't mean so much that.
16 But, how it relates -- excuse my obtuseness but I
17 don't do this kind of case very often, if they haven't
18 made a request for contested case hearing they lose on
19 that but they still get to appeal what you have done,
20 the standards that apply are different, if they meet
21 the standards we might end up going back to a
22 contested case hearing. But they would have to meet
23 those different standards; is that your point?

24 MS. MILLIGAN: That's correct, yeh. 227.57
25 (7) has two different clauses. If the agency's action

1 depends on facts determined without a hearing, which
2 is where we are now, the Court shall set aside,
3 modify, or order agency action if the facts compel a
4 particular action as a matter of law. So that's the
5 Court's first option when there is no contested case
6 hearing.

7 Alternatively, it can remand the case, it
8 may remand the case to the agency for further
9 examination and action within the agency's
10 responsibility.

11 And the *Barnes* court goes on to explain --

12 THE COURT: Mr. Gleisner's argument is
13 that the Court doesn't have to, doesn't really have to
14 do the first part if it can just jump right to the
15 second part because it says *or*; do you agree?

16 MS. MILLIGAN: No, I don't, your Honor.

17 THE COURT: What is your basis for claiming
18 you have to go through the first step to get to the
19 second step?

20 MS. MILLIGAN: The *Barnes* case.

21 THE COURT: Okay.

22 MS. MILLIGAN: The *Barnes* case walks --
23 walks through the process where we start with you
24 review the record and sub (2) states: Unless the
25 Court finds the grounds for setting aside, modifying,

1 remanding, or ordering agency action it shall affirm
2 the agency's decision.

3 So, we start with the record, we start with
4 the default where the burden is on them to show that
5 the Court should not affirm.

6 And during that relief, or during that
7 review when the Court is considering its options under
8 227.57 remand is just one option if it believes it
9 further examination is necessary.

10 But what we have here is Reddelien Road is
11 trying to tell you to jump to that before you even
12 reviewed the record, before you've heard argument,
13 before they have argued about the conclusions of the
14 Department. We have a decision, we have a record, and
15 the Court could also determine that the record we have
16 supports the decision that was made, and then this
17 case is over.

18 There were a couple of other points that
19 counsel made that I would like to briefly address.
20 The first is, you know, they would like to depose the
21 engineers that wrote the reports that DNR looked at
22 when they made the decision. And they -- they're
23 using 227.57(1) as -- as a hook or as the grounds for
24 that request. But that provision only says if there
25 are procedural irregularities testimony may be taken

1 regarding those.

2 So, even if there were some irregularities
3 with the service, even if they were supposed to tell
4 the Hansons, that doesn't get them, that doesn't allow
5 them to depose DNR's staff or DNR's experts on their
6 conclusions about storm water.

7 They want to -- they want to have a
8 substantive analysis, they want to have discovery.
9 The only way to get that was to have asked for
10 contested case hearing before, or if the Court agrees
11 after review that such is necessary it could ask as
12 relief.

13 THE COURT: Would you explain that last
14 sentence or part of the sentence again.

15 MS. MILLIGAN: Sure. If the Court when it
16 is going through 227.57 (7), or, I'm sorry, 227.57 if
17 it's separately analyzing legal questions, factual
18 questions, procedural questions there are different
19 paragraphs that give the Court options for ordering
20 remedies for each type of action.

21 So during the Court's review, based on the
22 record, if it doesn't affirm and if they make the
23 proper showings then we could still end up with a
24 remand under sub (7). But there are about three if's
25 there before we get there.

1 THE COURT: And if we get there what is
2 your -- what were you saying about depositions?
3 They're allowed, or not?

4 MS. MILLIGAN: Well, I was trying to say
5 they're not allowed under 227.57 (1), which is where
6 they're asking. If the Court does remand under sub
7 (7) it is the -- it is up to the ALJ to decide the
8 manner of discovery.

9 And briefly on that point in the
10 petitioner's brief they talk about a contested case
11 hearing that is currently pending before an
12 Administrative Law Judge on another aspect of this
13 same boat launch, and they argue that, DNR's attorneys
14 argue the discovery wasn't warranted and kind of leave
15 the Court hanging there. But I want the Court to know
16 that there have been depositions in this other
17 administrative part tribunal.

18 And the case, the code that I cite in my
19 response brief, it's a DNR, it's an NR Administrative
20 Code provision sets forth the rules that that -- that
21 that ALJ followed.

22 So, just in conclusion, the way to get a
23 contested hearing before the Court conducts its review
24 is to file a request. And if that request is denied
25 then they need to petition for judicial review and

1 work their way through that process.

2 The Court may order remand as relief if the
3 facts don't compel a particular resolution,
4 and if Reddelien Road Neighborhood Association meets
5 its burden. But there is no legal basis for getting a
6 pre-review remand in this case. So, the State
7 respectfully requests that you deny their motion.

8 THE COURT: Mr. Gleisner?

9 MR. GLEISNER: Thank you, your Honor. Your
10 Honor, first of all, I'm glad that counsel has
11 conceded that there can be a remand for a contested
12 case hearing.

13 Now the issue is the timing of that. We
14 would respectfully observe that it is probably in the
15 best interests of judicial economy if that occurs
16 first.

17 We would also note that counsel for the
18 State has not answered the issue that we have raised
19 with regard to 227.53 (1)(a)2m, which was raised by
20 them for the first time in their October 13th letter
21 to us and to the Court. That provision says:
22 "Petitions for review of cases other than contested
23 cases shall be served and filed within 30 days after
24 personal service or mailing of the decision by the
25 agency."

1 I would respectfully submit the legislature
2 in its wisdom did not put a time limit on seeking
3 contested case hearing review. It did put a time
4 limit on other cases, such as, for example, a judicial
5 review.

6 I would also respectfully note that I don't
7 think that a remand is an issue of jurisdiction for
8 this Court.

9 THE COURT: Shouldn't it be kind of hard for
10 me to swallow the idea that there is no time limit on
11 the time to petition for a review of an uncontested
12 case? Is that what you're arguing?

13 MR. GLEISNER: I am, your Honor, because the
14 legislature hasn't provided one. I would be eager to
15 hear, and I would interrupt my argument to hear what
16 counsel for the DNR --

17 THE COURT: Attorney Milligan, if that's
18 where he is citing it does say: Other than contested
19 cases, where do I look for any limit on contested
20 cases?

21 MS. MILLIGAN: Sub (2) deals with contested
22 cases, and 2m deals with other than contested cases.

23 And when I was talking about how they had
24 30 days to appeal the hearing denial decision, I
25 didn't cite 2m but that's where it comes in. They had

1 30 days after January 10th of 2011 to appeal the
2 hearing denial decision because there was no contested
3 case hearing on the hearing denial decision.

4 So you combine 222.42 (2) and 22 -- I'm
5 sorry, 227.42 (2) and 227.53 (1)2m say they have
6 30 days.

7 THE COURT: Go ahead, Mr. Gleisner.

8 MR. GLEISNER: Thank you, your Honor. Just
9 for the record I disagree. But going on beyond that,
10 227.57 (7), your Honor, says that: "If the agency's
11 action depends on facts determined without a hearing,
12 without going any further, your Honor, I don't believe
13 that there is any dispute that there wasn't a hearing.

14 The application to Mr. Hartsook occurred on
15 the 1st of November of 2010. He issued his decision
16 on the 3rd of or 4th of November of 2010. And, of
17 course, it goes without saying that there couldn't
18 have been a hearing because nobody knew about this
19 until long after the time for appeal had passed.

20 227.57 (7) goes on to say that if there is a
21 hearing -- strike that, if the agency's action depends
22 on facts determined without a hearing one of the
23 options of the Circuit Court as a matter of discretion
24 is it may remand the case quoting now, "It may remand
25 the case to the agency for further examination and

1 action within the agency's responsibility."

2 There is nothing there that says that it
3 must wait until after there has been an adjudication,
4 and I respectfully submit that I don't believe *Docks*
5 says that.

6 I would like to skip to one other point that
7 Counsel made, and that is with respect to what can be
8 done on a remand. 227.57 (9) provides, and I'll just
9 read the entire thing because I think it is easier,
10 your Honor: "The Court's decision shall provide
11 whatever relief is appropriate irrespective of the
12 original form of the petition. If the Court sets
13 aside agency action, or remands the case to the agency
14 for further proceedings it may make such interlocutory
15 order as it finds necessary to preserve the interest
16 of any party and the public, pending further
17 proceeding or agency action."

18 I think that does afford the Court latitude
19 with regard to the ordering of discovery. And so I
20 would respectfully argue that irrespective of (1)(a)
21 2m we did seek a contested case hearing. We did seek
22 a declaration. Because as to both of the contested
23 case hearing and as to the petition for judicial
24 review because counsel for the DNR present in court
25 informed us that it wasn't timely and they were going

1 to object. And so we combined the two. I don't see
2 anything in Chapter 227 that prevents that. And I
3 think it would be, especially in view of the
4 irregularities that we discussed in our briefs,
5 beneficial to the Court to have some insight into how
6 this matter was handled in terms of timing, and in
7 terms of not giving Mr. Hanson notice, and in terms of
8 the experts, before the judge is called upon, before
9 your Honor is called upon to make a decision. Thank
10 you, your Honor.

11 THE COURT: Could I ask you to go back
12 to Attorney Milligan's argument that because you filed
13 your petition for contested case hearing before there
14 was a denial of that by the DNR, that you lost out on
15 that point?

16 MR. GLEISNER: Your Honor, I think that the
17 fact is that we did request a contested case hearing,
18 we did make that part of our petition for judicial
19 review. And we viewed the attempted denial on the
20 10th of January as to be outside of the pleadings as
21 it were. DNR counsel did not address or in any way
22 object to the attachment of the request for a
23 contested case hearing at all in this matter and in
24 this court, and didn't seek to amend its notice of
25 appearance, which I say is like an answer.

1 We respectfully would suggest in short, your
2 Honor, that we did timely ask for a contested case
3 hearing. At best there -- it's muddy as to whether or
4 not 227.53 (1) (a) (2m) has any effect on the timing of
5 an appeal.

6 And beyond all of that, your Honor, I do
7 think that this Court is not facing a jurisdictional
8 issue as it would be if we were dealing with a
9 petition for judicial review because 227.57 (7) allows
10 the Court the latitude to remand for a contested case
11 hearing. And, Ms. Milligan, I'm sorry, DNR counsel
12 has already conceded that that is one of the options
13 the Court has.

14 Thank you, your Honor.

15 THE COURT: Anything else, Attorney
16 Milligan?

17 MS. MILLIGAN: No. Other than it is just
18 one of the options that the Court has after it hears
19 our arguments and while we're reviewing their decision
20 that is being challenged.

21 THE COURT: All right. I'm not going to be
22 able to rule on this motion today. I need to go back
23 and look over it again. I'm going to set another
24 date. Either or both of you are welcome to appear by
25 phone the next time. My goal is to rule from the

1 bench on that occasion.

2 And depending on what I do that date
3 schedule or plan our next steps here.

4 MR. GLEISNER: As the Court reviews its
5 calendar November is pretty difficult for us.
6 We prefer something in December, any time in December
7 would work actually.

8 THE COURT: I guess that's okay with me. Do
9 you have any problem with that, Attorney Milligan?

10 MS. MILLIGAN: No, your Honor.

11 THE COURT: What about Monday,
12 December 12th, in the afternoon, 3:00 o'clock?

13 MS. MILLIGAN: That works for me, your
14 Honor.

15 MR. GLEISNER: Just give me one quick
16 second, your Honor. I think that is good. But give
17 me one quick second.

18 THE COURT: I thought seconds were
19 consistently the same length. But you say some of
20 them are quick and some of them aren't.

21 MR. GLEISNER: I'm there now, your Honor. I
22 apologize. It's pretty fast, but I'm old, I
23 apologize. Yes, the 12th. But what time did you say,
24 your Honor?

25 THE COURT: 3:00 p.m.

1 MR. GLEISNER: Yes, your Honor, that is
2 Monday the 12th.

3 THE COURT: Yup, Monday, December 12th.
4 3:00 p.m.

5 MR. GLEISNER: I apologize for the delay.

6 THE COURT: Either of you want to appear by
7 phone that day just let the clerk know and we'll
8 arrange that.

9 MS. MILLIGAN: Thank you.

10 MR. GLEISNER: Thank you, your Honor.

11 THE COURT: Okay.

12 (Hearing concluded)

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