STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT IV

CASE NO. 14-AP-2498

Wingra Redi-Mix, Inc. d/b/a Wingra Stone Company,

Petitioner-Appellant,

v.

Burial Sites Preservation Board,

Respondent-Respondent,

Ho-Chunk Nation,

Other Party-Respondent.

DANE COUNTY CIRCUIT COURT
CASE NO. 2013CV1180
THE HONORABLE ELLEN K. BERZ

RESPONSE BRIEF OF THE HO-CHUNK NATION

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I. INTRODUCTION

In this case, the Burial Sites Preservation Board ("BSPB") approved/adopted the decision of the Director of the State Historical Society (the "Decision"), which declined to remove the Ward Mound Group ("WMG") from the state of Wisconsin's Catalog of Burial Sites. State law, which was passed to protect/promote the public welfare, protects burial sites from desecration. *See, State ex rel. Saveland Park Holding Corp. v. Wieland,* 269 Wis. 262, *272,* 69 N.W.2d 217, 222 (1955*) quoting Day-Brite Lighting, Inc. v. State of Missouri,* 342 U.S. 421, 424 (1952) ("Public welfare" encompasses "spiritual as well as physical, aesthetic as well as monetary" values.).

The practical effect of this action was that Petitioner/Wingra Redi-Mix ("Wingra") remains unable to conduct sand and gravel operations on a small portion of one of its quarry properties.[1] Notwithstanding that this action impacted only about 5% of one of Wingra's multiple sites – leaving the remaining approximate 95% of this location open for sand and gravel operations – Wingra asserts myriad creative arguments for why this simple exercise of police powers results in dramatic constitutional and regulatory abuses.

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[1] The alleged harms complained of by Wingra were actually a result of the initial cataloging of the WMG in 1990 – not the denial of Wingra's petition to remove the WMG from the catalog which simply preserves the *status quo* and which is the only action at issue in the instant appeal.

In reality, there have been no abuses of any processes. Wingra has been provided ample opportunities to have its case heard, and there has been no deprivation of any constitutionally protected property interest. It is well settled that "incidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare, are not considered a taking of the property for which compensation must be made." *State ex rel. Saveland Park Holding Corp.*, 269 Wis. at 267, 69 N.W.2d at 220; *see, also, e.g., Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 2659 (1978) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law, and this Court has accordingly recognized in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. . .").

The Ho-Chunk Nation respectfully requests that Wingra's appeal be denied and that the Decision denying Wingra's request to decatalog the WMG be upheld. The Ho-Chunk Nation also requests that it be awarded its fees and costs incurred in having to defend against the instant appeal. As discussed herein, Wingra's action is frivolous – it is appropriate for the Court to award fees and costs pursuant to Wis. Stat. § 809.25(3).

II. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Ho-Chunk Nation is not requesting oral argument on this matter. The Nation believes that this case can be resolved on the briefs of the parties. The Nation

is, however, happy to participate in oral proceedings if the Court believes that such argument would be helpful.

The Ho-Chunk Nation does not believe that publication of an opinion in this matter is warranted. This case addresses no matters of first impression and/or of state-wide importance. The action at issue is simply a reasonable exercise of the state's authority to protect burial sites. There have been no abuses of any processes and no deprivation of any constitutionally protected interest.

III. STATEMENT OF THE CASE

A. Nature of the Case

In this case, the BSPB approved/adopted the decision of the Director of the State Historical Society (the "Decision"), which declined to remove the WMG from the state of Wisconsin's Catalog of Burial Sites. The practical effect of this action was that Wingra remains unable to conduct sand and gravel operations on a small portion – about five percent – of one of its quarries. i.e. the Decision on appeal simply preserved the *status quo*.

As discussed herein, the BSPB action was a reasonable exercise of the state's police powers. Wingra has been provided ample opportunities to have its case heard and there has been no deprivation of any of Wingra's constitutionally protected interests. As in the instant case, "incidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare, are

not considered a taking of the property for which compensation must be made." *State ex rel. Saveland Park Holding Corp.*, 269 Wis. at 267, 69 N.W.2d at 220.

B. Procedural Status Leading Up To Appeal

Representatives of the State Historical Society contacted and met with the owner of Wingra regarding the cataloging of the WMG on June 8, 1990. *Wingra Redi-Mix, Inc. v. BSPB*, Dane County Circuit Court, Case No. 13 CV 1180 at 3 (2014). (Hereinafter "Circuit Ct."); R 18:3. During this meeting, the owner of Wingra was informed that the mounds were burial sites subject to protection under state law and the cataloging process was explained to him. The WMG was subsequently surveyed and ultimately cataloged on December 17, 1990. R 18:3.

After Wingra was notified of the presence of the burial site on its property, but before the site was cataloged, Wingra could have requested the Director to approve excavation of the site to remove and analyze any human remains and related objects found in the burial site. Wis. Stat. § 157.70(4)(c)3.a. After such archaeological excavation and analysis, Wingra then could have sought continuation of its quarrying activity. Wis. Stat. § 157.70(4)(d). Wingra did not exercise this option. R 18:3. Wingra also could have appealed the decision to catalog the site by requesting an administrative contested case hearing under Wis. Stat. § 227.42. Wingra also chose not to exercise this option, and thus there was no appeal of the original decision to catalog the site. R 18:3.

Twenty years after the WMG was cataloged, on September 17, 2010, Wingra requested removal of the WMG from the catalog of burial sites. The Director issued a proposed decision on October 6, 2011. R 6:369-386. Wingra filed objections to the proposed decision on November 21, 2011. R 6:387-388. The Director issued a final decision on October 18, 2012. R 6:417-435. The decision denied the petition to remove the site from the catalog. The Director held that neither the site specific evidence nor the historical literature provided sufficient new evidence that the WMG does not contain human remains. R 18:4. Wingra appealed the Director's decision to the BSPB on November 14, 2012. R 6:436-437. The BSPB heard argument on March 8, 2013 and on March 13, 2013 and affirmed the Director's Final Decision. R 18:4.

On April 5, 2013 Wingra filed a Petition for Judicial Review in Dane County Circuit Court. On August 8, 2013, the Circuit Court issued a written decision affirming the BSPB's, and, in effect, the reasoning of the Director. *See*, Wingra's Opening Brief at 10 (hereinafter "Opening Br."). The instant appeal pursuant to Wis. Stat. § 227.52 *et seq*. followed.

C. Statement of Relevant Facts

The site surrounding the WMG has been operated as a sand and gravel quarry since 1961. R 6:419. Wingra purchased the land on which the WMG sits in 1982. *Id*. In 1986, the legislature passed 1985 Wisconsin Act 316, which provided for the protection of burial sites throughout the state. Act 316 was specifically

aimed at preserving prehistoric human burial sites that do not resemble modern well-tended cemeteries and, as such, are subject to a high degree of vandalism and inadvertent destruction. 1985 Wis. Act 316, § 1. The passage of Act 316 created Wis. Stat. § 157.70; R 18:2.

Wisconsin Statute § 157.70(2)(a) requires the Director of the State Historical Society to "identify and record in a catalog burial sites . . . and sufficient contiguous land necessary to protect the burial site from disturbance." *Id.* Wisconsin Stat. § 157.70(2)(b) also requires the Director to "identify and record in a catalog burial sites likely to be of archaeological interest or areas likely to contain burial sites." R 6:417.

On December 17, 1990, the Director cataloged the three acre WMG as a burial site. R 6:125-128, 422. The WMG is located within Wingra's Kampmeier quarry which is approximately 57.22 acres. R 6:83.

IV. STANDARD OF REVIEW

Wingra makes a number of claims in its Opening Brief that are subject to varying standards of review. As a practical matter, however, Wingra's arguments fail as both a matter of fact and law, regardless of the standard of review applied by this Court. [2]

[2] In the instant case, the BSPB expressly adopted the decision and finding of the Historical Society, i.e., the Court is essentially reviewing the determination of the Society. *See, e.g., Sea View Estates Beach Club, Inc. v. State Dept. of Nat. Res.*, 223 Wis.2d 138, 146, 588 N.W.2d 677, 670 (1998).

A. Wingra's First Three Claims Raise Questions of Fact – This Court Applies the Deferential "Substantial Evidence" Standard to Questions of Fact

As demonstrated below, the first three claims set forth by Wingra raise questions of fact. "[A]gency findings of fact are conclusive on appeal if (as in the instant case) they are supported by credible and substantial evidence." *See, Plevin v. Department of Transp.*, 267 Wis.2d 281, 289, 617 N.W. 2d 355, 359 (2003), *citing*, Wis. Stat. § 102.23(6).

1. Wingra's First Claim: Whether or Not the Director Reviewed Wingra's Documents - is a Question of Fact

Wingra's first claim asserts that "the Director erred in concluding that arguments relating to the basis for the 1990 Cataloging Decision could not be considered." Opening Br. at 12-17. The Decision, however, makes clear that the Director considered all of the documents in the Society's files, including all the documents submitted by Wingra, in denying Wingra's petition. R 6:419. Whether or not the Director considered Wingra's documents is a question of fact, not law. The Director's Decision is conclusive on appeal.

2. Wingra's Second and Third Claims: Whether or Not the WMG is a Burial Site - Are Questions of Fact

The second "legal" argument set forth by Wingra provides that, "the Director's reliance on the presence of effigy mounds as the basis for upholding the Cataloging of the WMG is an erroneous interpretation of the law." Opening Br. at

17-21. Again, however, this issue does not implicate an interpretation of law but rather is a question of fact. Wingra asserts, for example, that:

> [a]ccording to the Director, these 'statistics' demonstrate that in Minnesota, excavation of 256 mounds at 125 sites concluded that 75.9% contained human remains and an earlier informal study in Wisconsin determined that only 71% of mounds contained human remains. However, a review of SHS records showed that in excavations of 586 Indian mounds in Wisconsin, only 66% were found to be positive or probably positive.

Opening Br. at 17.

Wingra is disputing the Director's factual, not legal, findings. Even, however, if we assume, *arguendo*, that 66% is an accurate percentage of mounds containing human remains - that still means that the WMG more likely than not contains human remains. i.e. the Director's factual decision is "supported by credible and substantial evidence." Again, the Decision is entitled to substantial deference.[3]

Wingra's third claim is that, "the Director's conclusion that site-specific evidence failed to establish that the WMG does not contain human remains was an erroneous application of the removal review process." Opening Br. at 21-24. This claim, again, essentially reasserts that Wingra does not agree with the Director's

[3] Wingra also attempts to frame this same fact based argument as a challenge to the Director's interpretation of the Administrative Code. Opening Br. at 19-20. It is, however, well settled that an agency's "interpretation of its own administrative rule is entitled to controlling weight unless such interpretation is inconsistent with the language of the regulation or clearly erroneous." *Plevin*, 267 Wis.2d at 289-290, 617 N.W.2d at 359.

factual finding - that effigy mounds are, *inter alia*, statistically likely to be burial sites. *E.g., id* at 22. Again, the Director's Decision is conclusive on appeal.

B. In The Alternative – If Wingra's First Three Claims Raise Questions of Law (They Do Not) the Director's Decision Would be Entitled to "Great Weight"

If we assume, *arguendo*, that Wingra's first three claims involve a question or interpretation of law, this Court would still accord "great weight" deference to the Director's Decision. "The 'great weight' standard is 'the general rule' in this state." *Sauk County v. Wisconsin Employment Relations Comm'n*, 165 Wis.2d 406, 413, 477 N.W.2d 267, 270 (1991). In other words, the "great weight" standard presumptively applies to an agency's interpretation of law. Wingra has provided no evidence/data that would rebut this presumption.

There are three distinct levels of deference afforded to agency interpretations of statute and conclusions of law. *Sauk County*, 165 Wis.2d at 413, 477 N.W.2d at 270. The first and highest amount of deference given to agency interpretation is the "great weight" standard. Under this standard, it is "only when the interpretation by the administrative agency is an irrational one that a reviewing court does not defer to it." *Id.* Under the "great weight" standard:

> [i]f the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency's conclusions are entitled to deference by the court. Where a legal question is intertwined with factual determinations or where the agency's interpretation and application of the law is of long standing, a court should defer to the

agency which has primary responsibility for determination of fact and policy.

Id.

The second level of review is referred to as either the "due weight" or "great bearing" standard. The court uses this standard if the "agency decision is 'very nearly' one of first impression." *Id.* at 413-414.[4] The lowest level standard of review is the *de novo* standard, in which no weight at all is given to the agency interpretation. *Id.* at 414.[5]

Pursuant to Wis. Stat. § 157.70(2), the Director of the State Historical Society is charged by the legislature with the duty of administering the statute. In 1986, the legislature passed 1985 Wisconsin Act 316 - the State Historical Society has been interpreting the statute and applicable regulations since then. i.e., its interpretation is long standing. *See, e.g.,* HS 2 and HS 1; *see, also, e.g., Jicha v. State Dept. of Industry, Labor and Human Rel.*, 169 Wis.2d 284, 292-293,485 N.W.2d 256, 259 (1992) (adoption of administrative rules interpreting/administering a statute is demonstrative of expertise in administering the law). Between 1988 and 2013, the State has cataloged approximately 243 effigy mounds. The archeologists for the

[4] Under a due weight deference standard, the court need not defer to an agency's interpretation which, while reasonable, is not the best and most reasonable interpretation. *UFE Inc. v. Labor and Industry Review Comm'n*, 201 Wis. 2d 274, 286, 548 N.W. 2d 57, 62 (1996).

[5] "If the case is one of first impression for the agency and the agency lacks any special expertise, the court must review the agency's conclusion *de novo*." *Tannler v. Wis. Dept. of Health and Social Services*, 211 Wis.2d 179, 184, 564 N.W.2d 735, 738 (1997).

Historical Society have authored and posted approximately 172 articles pertaining to human burial mounds on the Historical Society website. i.e., this is not a case of first impression as asserted by Wingra.[6] The State Historical Society employed its expertise or specialized knowledge in forming any interpretation of the law that might be at issue in this case. *See, e.g., Sea View Estates Beach Club, Inc.*, 223 Wis.2d at 146, 588 N.W.2d at 670 ("[T]he greater the experience and expertise of the agency in the area at issue, the greater the deference the agency should be afforded.").

The first three claims asserted by Wingra raise questions of fact. Even, however, if we assume, *arguendo*, that these are questions of statutory interpretation, the Director's Decision is entitled to "great weight" – the presumptive standard of review applied to agency interpretations of law.

C. Wingra's "Due Process" and "Equal Protection" Claims are Subject to *De Novo* Consideration and Application of "Rational Basis" Review

Wingra's equal protection and due process claims are reviewed *de novo* by this Court, which applies the deferential "rational basis" standard. "Although substantive due process and equal protection clauses may have different implications, 'the analysis under both the due process and equal protection clauses

[6] Although not necessary to bolster an unrebutted presumption, to the extent some of these facts may not be in the record, this Court can, and should, take judicial notice of these facts that are generally known and that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See,* Wis. Stat. § 902.01; Wis. Stat. § 902.03.

is largely the same." *State v. Smith*, 323 Wis.2d 377, 391, 780 N.W.2d 90, 97 (2010); State *v. McGuire*, 328 Wis.2d 289, 307, 786 N.W.2d 227, 236-237 (2010). Where, as in the instant case, no fundamental right or suspect classification is implicated, the Director's action is reviewed under the deferential "rational basis" standard. That is, this Court need only determine whether the Director's action had a rational relationship to a legitimate governmental interest. *Smith v. City of Chicago*, 457 F.3d 643, 645 (7th Cir. 2006).

Under the rational basis test, government action "must be upheld . . . if there is any reasonably conceivable state of facts that could supply a rational basis for the classification . . . the rational-basis test is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data. *Id.* at 651. The "burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 652.

> The rational basis test has been characterized as creating a "frequently insurmountable task" for the challenger . . . to prove "beyond a reasonable doubt that the [state action] possesses no rational basis to any legitimate municipal objective. Moreover, [state actions] enjoy a presumption of validity, even when they are challenged on the basis of equal protection. An opponent of [state action] must establish the [action's] unconstitutionality beyond a reasonable doubt. . .

Thorp v. Town of Lebanon, 235 Wis.2d 610, 638, 612 N.W.2d 59, 74 (2000).

V. ARGUMENT

As discussed herein, regardless of the standard of review applied by the Court, Wingra's claims fail as a matter of fact and law.

A. The Director Considered Arguments Relating to the Basis for the 1990 Cataloging Decision in Denying Wingra's Petition for Removal

Wingra argues that the Director improperly refused to consider the evidence/arguments that Wingra made that challenged the validity of the 1990 Cataloging Decision and that these arguments were relevant to the "removal" process at issue in the instant case. Opening Br. at 12-17. Indeed, Wingra asserts that the Director refused to consider this information because Wingra failed to challenge the initial Cataloging of the WMG within any possible statute of limitations. *Id.* This argument conflates two issues in an apparent attempt to confuse the Court – it also misstates the facts and posture of the prior proceeding(s).

It is beyond dispute that the Director considered all relevant data, including information pertaining to the initial Cataloging of the site, in denying Wingra's petition for removal. According to the Decision:

> On October 6, 2011, the Director issued a proposed decision concluding that Wingra had failed to present sufficient evidence to establish that the Site does not contain human remains. In that decision, the Director considered (1) all of the materials and argument previously submitted by Wingra and the Nation; (2) all documentation related to the Site that is contained in the Society's files; (3) published scholarly treatises on Indian mounds and effigy mounds in Wisconsin and elsewhere; and (4) a report by Society archaeologist Amy Rosebrough, Ph.D. entitled "Native American Mounds as Burial Mounds and

> Markers." . . . On November 21, 2011, Wingra submitted objections to the proposed decision, together with a "Second Affidavit of Dante Fratta." The Director has carefully considered these materials, along with all materials that were previously submitted. The Director has also carefully reviewed relevant scholarly literature.

R 6:419; *see also* R 6:423, *citing* Wis. Admin. Code § HS 2.03(6)(b) ("[w]here such new evidence is presented, the Director is to consider all of the relevant evidence as it exists at the time of the removal petition . . .").

The above is, in-and-of-itself, a dispositive refutation of Wingra's first claim. As demonstrated above, the Director specifically considered all relevant information, including, *inter alia*, everything in the Society's files, in denying Wingra's removal petition. The Director's determination that Wingra could no longer directly challenge that 1990 Cataloging decision because it was time-barred (Decision at 7-9) had no bearing on the Director's willingness and ability to consider all relevant information. *See, supra*; *see, also, e.g.*, R 6:423 ("The Director has both inherent and implied authority to remove a site from the Catalog if sufficient evidence is presented that a site does not contain human remains."); *but, c.f.*, Opening Br. at 16 ("Contrary to the Director's determination, the Director has the authority and obligation to review and correct his or her prior cataloging decisions.").

B. The Director's Decision to Uphold the Cataloging of the WMG Was Not Erroneous

Wingra asserts that the Director erroneously cataloged the WMG as a "burial site" solely because it was an "Effigy Mound." Opening Br. at 17. As indicated above, the Director considered significant information on the nature of the WMG and other mounds in denying Wingra's removal petition. Notwithstanding, Wingra asserts that:

> [a]ccording to the Director, these 'statistics' demonstrate that in Minnesota, excavation of 256 mounds at 125 sites concluded that 75.9% contained human remains and an earlier informal study in Wisconsin determined that only 71% of mounds contained human remains. However, a review of SHS records showed that in excavations of 586 Indian mounds in Wisconsin, only 66% were found to be positive or probably positive.

Opening Br. at 17.

Even if we assume, *arguendo*, that 66% is an accurate percentage of mounds containing human remains and that this was the only data considered by the Director - that still means that the WMG more "likely" than not contains human remains. i.e. the Director's factual decision is "supported by credible and substantial evidence" and is not erroneous. The Director reviewed detailed site specific, historic, and archeological data, as well as data on effigy mounds in general, in denying Wingra's petition to decatalog the WMG. No legitimate assertion of fact or law supports Wingra's claim that the action of the Director in the instant case amounted to an "erroneous interpretation of the law."

C. The Director's Conclusion, That Site-Specific Evidence Failed to Establish That the WMG Does Not Contain Human Remains, Was Not an Erroneous Application of the Removal Review Process

Wingra simply realleges the misstatements of fact in its first two claims to support its third. According to Wingra:

> [t]he Director's Decision must be vacated because the Director failed to consider all the relevant evidence of whether the WMG contained human remains and, instead, relied solely on the presumption that all effigy mounds are burial sites.

Opening Br. at 21. As demonstrated, *supra*, the Director considered all relevant evidence in denying Wingra's removal petition. The Director did not rely solely on the statistical data regarding effigy mounds – which, in any event, confirms that the WMG likely contains human remains. The fact that Wingra is unhappy with the Director's Decision does not, without more, amount to an "erroneous application of the law."

D. This Case Presents No Violation of Any of Wingra's Constitutionally Protected Rights

Contrary to Wingra's assertion (*see, e.g.*, Opening Br. at 33) there has been no abrogation of Wingra's constitutionally protected property interest. Wingra does not assert that it is a member of a suspect or protected class or that it has suffered a violation of a protected "life" or "liberty" interest. Wingra asserts only that it has been deprived of a constitutionally protected property interest. That is, according to Wingra, the Director's actions have resulted in an unconstitutional taking of Wingra's property.

As discussed below, however, neither the statute itself nor its application by the Director has resulted in a "taking" of Wingra's property. Moreover, in the absence of an infringement of a constitutionally protected right, Wingra cannot state a claim for a deprivation of a right to procedural and/or substantive due process. Wingra's equal protection claim(s) are equally flawed as a matter of fact and law.

It is well settled that a state's exercise of its powers for the public good, as in the instant case, is presumed to be constitutionally valid and will be "upheld if any state of facts either known or unknown which could be reasonably assumed affords support for it." *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 596, 82 S. Ct. 987, 991 (1962). It is equally well settled that the burden of establishing the "unreasonableness" of a state action falls squarely on the appellant. *See, id.* Wingra has not, and indeed cannot, carry this burden in the instant case.

1. There Has Been No Unconstitutional "Taking" of Wingra's Rights to Property

Wingra asserts that "the Director's application of the statute to Wingra is unconstitutional because it retroactively takes Wingra's property." *E.g.*, Opening Br. at 37. For there to be a regulatory taking, however, the government must have deprived Wingra of "all or substantially all practical use of [its] property." *See, Eberle v. Dane County Bd. of Adjustment*, 227 Wis.2d 609, 622, 595 N.W.2d 730, 737 (1999) ("[t]he rule applied by Wisconsin and federal courts is that a regulation or government action must deny the landowner all or substantially all practical uses

of a property in order to be considered a taking for which compensation is required.").

Wingra has not been deprived of "all or substantially all practical uses of [its] property." *See, id.* Even if Wingra cannot mine on the WMG, it can still conduct its sand and gravel operations, just as it has for years, on the vast majority of its contiguous holdings. The WMG consists of approximately three acres within Wingra's 57.22 acre Kampmeier quarry. *See,* R 6:83, 417. The prohibition on mining on the WMG leaves approximately 95% of Wingra's contiguous property available for sand and gravel operations.[7]

In considering a similar argument as that made by Wingra, the U.S. Supreme Court made clear that the assertion:

> that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. . . **"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.** In deciding whether a particular governmental action has effected a taking, the Court focuses rather both on the character of the action and on the **nature and extent of the interference with rights in the parcel as a whole . . ."**

[7] Even on the three acres at issue, Wingra remains free to conduct "normal agricultural or silvicultural practices. . ." 157.70(2r). Wingra is not deprived of all practical use of its property.

Penn Cent. Transp. Co., 438 U.S. at 130 (emphasis added); *see also, e.g., Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 748 (1997) (Scalia, O'Connor and Thomas concurring in part), *citing, Penn Cent. supra* ("a regulatory taking generally does not occur so long as the land retains substantial (albeit not its full) value.").

There is no infringement of any constitutionally protected property interest in this case. Wingra has not been deprived of "all or substantially all practical uses of [its] property." *See, Eberle, supra; see, also, e.g.*, 157.70(2r); *State ex rel. Saveland Park Holding Corp.*, 269 Wis. at 267, 69 N.W.2d at 220 ("incidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare, are not considered a taking of the property for which compensation must be made."). There has been no regulatory taking. As a result, there has been no deprivation of any constitutionally protected interest in property that would trigger a constitutional right to due process. *See, e.g., State ex rel. Madison Landfills, Inc. v. Dane County*, 183 Wis.2d 282, 291-292, 515 N.W2d 322, 326 (1994), *citing Waste Management, Inc. v. DNR*, 149 Wis.2d 817, 824 (1989) (no property interest in a favorable administrative determination or approval).

a. In the Alternative – Wingra's "Taking" Claim is Not Properly Before This Court

Wingra argues that the Director's refusal to decatalog the WMG constitutes an unconstitutional retrospective taking in violation of due process. That is, the Director's application of the statute subjects landowners who owned land prior to the passage of Act 316 to a new obligation with respect to a past transaction. Opening Br. at 8. Any restriction on the use of the property was, however, placed on the property when the WMG was initially cataloged. The Director's Decision denying decataloging merely preserves that *status quo* – it does not result in a taking. The time period within which a challenge to the initial cataloging could have been brought is long past and not before this Court. Because the purported taking occurred when the property was initially cataloged, a constitutional challenge to the purported taking would have been properly litigated in a challenge to the initial cataloging, not in the instant forum. (*See, gen.* R 18:22-24).

2. Without an Infringement of Wingra's Constitutionally Protected Property Interest – Wingra Cannot State a Claim for Substantive and/or Procedural Due Process

Wingra appears to concede that both its substantive and procedural due process claims require a showing that there has been a "taking." Opening Br. at 33; *see, also, e.g., Penterman*, 211 Wis.2d at 473-474, 480, 565 N.W. 2d at 530, 533 ("The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving any person of life, liberty, or property without due process of law. The

Supreme Court has interpreted the constitutional guarantee of due process to protect both procedural and substantive rights."); *State ex rel. Madison Landfills, Inc.*, 183 Wis.2d at 291-292, 515 N.W.2d at 326, *citing Waste Management, Inc. v. DNR*, 149 Wis.2d at, 824 (no property interest in a favorable administrative determination or approval). Wingra asserts only the deprivation of an allegedly protected property interest. As set forth above, no action of the Director in this case rises to the level of a deprivation of a constitutionally protected interest in property.

a. Even if we Assume, *Arguendo*, a Violation of a "Protected Interest" Wingra's Due Process Claims Fail on Their Merits

That this case does not implicate a constitutionally protected right is, in-and-of-itself, determinative on Wingra's asserted deprivation of due process. *See, supra.* Even, however, if we assume, *arguendo*, that there was a "taking," Wingra's due process claims fail as a matter of law.

(1) Procedural Due Process is Satisfied if, as in the Instant Case, Wingra was Provided with Adequate Procedural Protections

"The requirement of procedural due process is met if a state provides adequate post-deprivation remedies." *Thorp*, 235 Wis.2d at 642, 512 N.W.2d at 76; *State ex rel. Strykowski v. Wilkie*, 81 Wis.2d 491, 512, 261 N.W.2d 434, 444 (1978) ("Due process is flexible and requires only such procedural protections as the particular situation demands."); *Mazurek v. Miller*, 100 Wis.2d. 426, 436, 303

N.W.2d 122, 127 (1981) ("Due process is satisfied 'if the statutory procedures provide an opportunity to be heard in court at a meaningful time and in a meaningful manner; the availability of judicial review satisfies the requirements of due process.").

After Wingra was notified of the presence of the burial site on its property, but before the site was cataloged, Wingra could have requested the Director to approve excavation of the site to remove and analyze any human remains and related objects found in the burial site. Wis. Stat. § 157.70(4)(c)3.a. After such archaeological excavation and analysis, Wingra then could have sought continuation of its quarrying activity. Wis. Stat. § 157.70(4)(d). Wingra did not exercise this option. Wingra also could have appealed the decision to catalog the site by requesting an administrative contested case hearing under Wis. Stat. § 227.42. Wingra also chose not to exercise this option, and thus there was no appeal of the original decision to catalog the site. (*See, gen.* R 18:3).

Twenty years after the WMG was cataloged, on September 17, 2010, Wingra requested removal of the WMG from the catalog of burial sites. The Director issued a proposed decision on October 6, 2011. Wingra filed objections to the proposed decision on November 21, 2011. The Director issued a final decision on October 18, 2012. The decision denied the petition to remove the site from the catalog. The Director held that neither the site specific evidence nor the historical literature provided sufficient new evidence that the WMG does not contain human remains.

R 18:4. Wingra appealed the Director's decision to the BSPB on November 14, 2012. The BSPB heard argument on March 8, 2013 and on March 13, 2013 and affirmed the Director's Final Decision. *Id.*

On April 5, 2013 Wingra filed a Petition for Judicial Review in Dane County Circuit Court. R 1:1. On August 8, 2013, the Circuit Court issued a written decision affirming the BSPB's, and, in effect, the reasoning of the Director. Opening. Br. at 10. The instant appeal pursuant to Wis. Stat. § 227.52 is essentially Wingra's third or fourth bite at the apple. *See, also, e.g.*, Wis. Stat. § 32.10 (providing specific process for any property owner to institute a "condemnation" proceeding in court.).

In other words, Wingra has been provided both administrative and judicial processes that were more than sufficient to satisfy any procedural due process obligation – if one existed. Indeed, the availability of the instant appeal filed pursuant to Wis. Stat. § 227.52, *et seq*. likely satisfies any requirement for procedural due process vis-à-vis the challenged agency action.

(2) Wingra Similarly Asserts No Legitimate Substantive Due Process Claim

Again, the threshold question in determining whether a party's right to substantive due process has been violated turns on the existence of a constitutionally protected interest. *See, e.g., Thorp*, 235 Wis.2d at 641, 612 N.W.2d at 76. No such right is at issue in this case.

Notwithstanding the foregoing, substantive due process prevents the government from engaging in conduct that "shocks the conscience." *In Re Commitment of Laxton*, 254 Wis.2d 185, 214 nt. 8, 647 N.W.2d 784, 799 nt. 8 (2002); *In re Commitment of Schulpius*, 287 Wis.2d 44, 62, 707 N.W.2d 495, 504 (2006) ("The test to determine if the state conduct complained of violates substantive due process is if the conduct 'shocks the conscience or interferes with rights implicit in the concept of ordered liberty.'"). In addition, when analyzing a substantive due process claim, the Court also considers "whether the government officer's conduct was either a deliberate decision to deprive [Wingra] of its [constitutionally protected] interest or reflected the officer's deliberate indifference to that interest." *Id.* Nothing the state has done here "shocks the conscience." Wingra does not assert that the Director acted with nefarious intent or in a way to intentionally deprive Wingra of a protected property interest. Indeed, there is nothing in the record to show that the Director's actions were motivated by anything other than a good faith interest to protect burial sites.

This same standard has often been referred to as the "rational basis" test. That is, this Court need only determine whether the Director's action had any rational relationship to a legitimate governmental interest. *Smith v. City of Chicago*, 457 F.3d 643, 645 (7th Cir. 2006); *State v. McGuire*, 328 Wis.2d at 307, 786 N.W.2d at 237. Under the rational basis test, government action "must be upheld . . . if there is any reasonably conceivable state of facts that could supply a rational basis for the

classification. . . the rational-basis test is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data. *Smith v. City of Chicago*, 457 F.3d at 651. The "burden is upon the challenging party to eliminate any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 652.

> The rational basis test has been characterized as creating a "frequently insurmountable task" for the challenger . . . to prove "beyond a reasonable doubt that the [state action] possesses no rational basis to any legitimate municipal objective. Moreover, [state actions] enjoy a presumption of validity, even when they are challenged on the basis of equal protection. An opponent of [state action] must establish the [action's] unconstitutionality beyond a reasonable doubt. . .

Thorp, 235 Wis.2d at 638, 612 N.W.2d at 74.

Wingra asserts that:

> [t]he statute was not applied in a manner related to a legitimate government interest. The government interest underlying the statute is the protection of burial sites, defined as sites where human remains are present. Rather than apply the statute in a reasonable matter and determining whether the WMG is a burial site, the statute was applied to protect effigy mounds generally. . .

Opening Br. at 33.

That is, according to Wingra, the Director's Decision has the effect of protecting grave markers (effigy mounds) instead of burial sites. *Id* at 34. On its face, Wingra's claim fails to prove "beyond a reasonable doubt that the [state action]

possesses no rational basis to any legitimate [governmental] objective." *Thorp*, 235 Wis.2d at 638, 612 N.W.2d at 74.

The Director's Decision to protect the entire WMG is consistent with both the purpose and the language of the statute. A "grave marker" is "any surface indication of a burial including stone monuments, spirit houses, wooden crosses, and prehistoric Indian mounds." Wis. Admin. Code § 2.02(8). "While the statute does not protect grave markers *per se*, the regulations state that a grave marker indicates a nearby burial site, which the statute does protect. In other words, a grave marker is one reasonable indication the Director can use when determining whether an area is a burial site. The intent behind the enactment of Act 316 was to show respect for the deceased of all cultures and to clearly state that ancient burial sites should be afforded the same respect as modern cemeteries. *See,* 1985 Wis. Act 316, § 1. As such, an effigy mound must be accorded the same consideration as a modern grave marker, such as a headstone in a marked cemetery." R 18:9-10.

Under the rational basis test, government action "must be upheld . . . if there is any reasonably conceivable state of facts that could supply a rational basis for the classification . . . the rational-basis test is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data." *Smith v. City of Chicago*, 457 F.3d at 651. There is a rational basis for the Directors refusal to remove the WMG from the catalog of burial sites.

3. Wingra Fails to Make a Valid Claim Under the Equal Protection Clause of the State and Federal Constitution(s)

"The equal protection clause of the fourteenth amendment is violated if an ordinance is administered 'with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights'. . . evidence that a municipality has enforced an ordinance in one instance and not in others would not in itself establish a violation of the equal protection clause. There must be a showing of an intentional, systematic and arbitrary discrimination." *Village of Menomonee Falls v. Michelson*, 104 Wis.2d 137, 145, 311 N.W.2d 658, 662 (1981); *State ex rel. Murphy v. Voss,* 34 Wis.2d 501, 510, 149 N.W.2d 595, 599 (1967) ("The aim of the equal protection of the laws' clause is to assure that every person within the state's jurisdiction will be protected against intentional and arbitrary discrimination, whether arising out of the terms of a statute or the manner in which the statute is executed. . ."); *Nabozny v. Podlesny*, 92 F.3d 446, 453-54 (7th Cir. 1996) ("[T]o establish liability under the Equal Protection Clause, a plaintiff must show that a defendant acted with a nefarious discriminatory purpose. . ."); *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000) ("to make out a *prima facie* case the plaintiff must present evidence that the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the defendant's position."). Wingra fails to assert personal animus and/or nefarious or

discriminatory purpose on the part of the state. There is no violation of equal protection in this case.

Wingra essentially formulates two arguments as to why it believes the state action at issue violates equal protection. First, Wingra argues that it is being treated differently under the law because it has a three-acre effigy mound on its site. This, in turn results in a larger (3 acre) impact on Wingra than many other locations that have smaller or no effigy mounds on their site. Opening Br. at 24, 26, 27-31. According to Wingra:

> [t]he inequality arises because, under the Director's enforcement of the statute, the Director chooses among human remains by cataloging an area dependent upon a mound's size and shape. Consequently, human remains buried in an effigy the size of the WMG bird effigy are accorded a broader area of undisturbable space than other human remains of the same "prehistoric" time if buried in a smaller effigy.

Opening Br. at 30.

The second, and related, equal protection argument that Wingra makes is that "prehistoric effigy mounds" are afforded "unequal" protection under the Director's application of the law because they tend to be bigger and may have more of a buffer area. i.e., prehistoric effigy sites are being treated differently than more modern burial sites. Opening Br. at 29-31.

"To demonstrate an equal protection claim in the land use context [however] . . . the plaintiff must demonstrate 'governmental action wholly impossible to relate to legitimate governmental objectives." It is not "wholly impossible to relate the

Director's decision to Catalog the WMG to a "legitimate governmental objective."[8] To show that it is "impossible to relate the Director's Decision to a legitimate governmental objective, Wingra must, for example, demonstrate "the malicious conduct of a governmental agent. . . conduct that evidences a 'spiteful effort to "get" him for reasons wholly unrelated to any legitimate state objective." *Sprint Spectrum L.P. v. City of Carmel, Indiana*, 361 F.3d 998, 1002 (7th Cir. 2004). In short, even if we assume all of Wingra's allegations to be true, they fail to state a violation of equal protection.

Moreover, as was pointed out by the Circuit Court, Wingra's "equal protection argument is untimely and not properly before this Court because it is directed at the initial cataloging of the site and not the denial of decataloging. The creation of the classes alleged by Wingra, if such a creation took place at all, took place at the time of the initial cataloging of the site. The buffer area was determined when the site was initially cataloged and could have been challenged at the

[8] In 1986, the legislature passed 1985 Wisconsin Act 316 ("Act 316"), which provided for the protection of burial sites throughout the state. Act 316 was specifically aimed at preserving prehistoric human burial sites that do not resemble modern well-tended cemeteries and, as such, are subject to a high degree of vandalism and inadvertent destruction. 1985 Wis. Act 316, § 1. The passage of Act 316 created Wis. Stat. § 157.70. Under 157.70(2)(a), the Director of the State Historical Society has a duty to "identify and record in a catalog burial sites" in Wisconsin. For burial sites that are not "dedicated" or platted for exclusive use as a cemetery, the Director must also catalog "sufficient contiguous land necessary to protect the burial site from disturbance." 157.70(2)(a); 157.70(1)(c); 157.061(4). It is also the duty of the Director to catalog burial sites likely to be of archaeological interest or areas likely to contain burial sites. 157.70(2)(b).

appropriate time. There was no challenge to the original cataloging decision in 1990 and the time for such an appeal has long since expired." (*See*, R 18:26).

VI. CONCLUSION

Wingra fails to state any legally cognizable claim for relief. In other words, the instant appeal is not well founded in either fact or law. Notwithstanding that this action impacted only about 5% of one of Wingra's multiple sites – leaving the remaining approximately 95% of this location open for sand and gravel operations – Wingra asserts myriad creative arguments for why this simple exercise of police powers results in dramatic constitutional and regulatory abuses.

In reality, the action at issue is a reasonable exercise of the state's authority to protect burial sites. There have been no abuses of any processes. Wingra has been provided ample opportunities to have its case heard, and there has been no deprivation of any constitutionally protected property interest.

The Ho-Chunk Nation respectfully requests that Wingra's appeal be denied and that the Decision denying Wingra's request to decatalog the WMG be upheld. The Ho-Chunk Nation also requests that it be awarded its fees and costs incurred in having to defend against the instant appeal. Wingra's action is frivolous – it is appropriate for the Court to award fees and costs pursuant to Wis. Stat. § 809.25(3).

Dated this 24th day of April, 2015.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. §809.19 (8)(b) and (c) for a brief and appendix produced with a proportional serif font (Times New Roman, 13 point). The length of this brief is 7,584 words.

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CERTIFICATION OF ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19 (12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certification has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 24th day of April, 2015. RESPECTFULLY:

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