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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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.

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

**OPENING BRIEF
OF PETITIONER-APPELLANT**

Reinhart Boerner Van Deuren s.c.
22 East Mifflin Street, Suite 600
Madison, WI 53703
*Attorneys for Petitioner-Appellant
Wingra Redi-Mix, Inc. d/b/a
Wingra Stone Company*

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INTRODUCTION

This appeal is before this Court pursuant to Wisconsin Statutes section 227.52, *et seq.*, and is an appeal from the action of the Burial Sites Preservation Board ("BSPB") in affirming the decision of the Director of the State Historical Society (the "Decision") in its entirety. In the Decision, the Director denied Wingra's request to remove the Ward Mound Group (the "WMG") from the state of Wisconsin's Catalog or Registry of Burial Sites (the "Catalog").¹

The Decision must be reversed and vacated because:

- The Director erred in concluding that he could not consider Wingra's arguments on the validity and scope of the original decision to catalog the WMG;
- The Director misapplied Wisconsin Statutes section 157.70 by extending that statute's protection to effigy mounds generally, which constitutes an erroneous application of Wisconsin Statutes section 157.70;
- In concluding, contrary to the evidentiary record, that there is not sufficient evidence that the WMG does not contain human remains, the Director failed to properly apply the review process relating to the removal of human remains;

¹ Although Wingra is technically seeking review of the action of the BSPB, the BSPB adopted and attached the entirety of the Decision as a basis for its action, and did not add any further substantive comments to the Decision. (BSPB Decision, at 2.) As such, Wingra's arguments challenge the findings and conclusions of the Decision as adopted by the BSPB. For convenience, Wingra will refer to the Decision and the Director's reasoning as the matter subject to review.

- The Decision unlawfully denies Wingra's right to equal protection; and
- The Decision unlawfully denies Wingra's right to due process.

Given these errors of law and fact, Wingra respectfully requests that this Court reverse and vacate the BSPB's action of affirming the Decision.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Wingra does not believe oral argument is necessary because Wingra believes the briefs will fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of Court time or cost to the parties.

Because this appeal raises important issues of first impression relating to the interpretation of Wisconsin Statutes section 157.70 and is of substantial and continuing public interest, Wingra requests publication of this Court's decision.

ISSUES PRESENTED

1. Issue: Did the Director err in concluding that Wingra's challenges to the validity and scope of the cataloging decision were time-barred and could not be considered?

Answered by the Trial Court: No.

2. Issue: Did the Director err in concluding that all prehistoric Indian mounds, including effigy mounds, are properly considered to be human burial sites?

Answered by the Trial Court: No.

3. Issue: Did the Director err in concluding that Wingra did not provide new evidence sufficient to establish that the WMG does not contain human remains?

Answered by the Trial Court: No.

4. Issue: Did the Decision deny Wingra's right to equal protection?

Answered by the Trial Court: No.

5. Issue: Did the Decision deny Wingra's right to due process?

6. Answered by the Trial Court: No.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Wingra has operated a gravel and sand quarry in the Town of Blooming Grove in Dane County, Wisconsin since 1961 (the "Kampmeier quarry"). (R. 6 at 419; A-App. 010.) Since 1982, Wingra has owned the Kampmeier quarry. (*Id.*) Certain effigy mound remnants, known as the WMG, are located in the Kampmeier quarry. (*Id.*) The WMG is comprised of a bird effigy and a damaged partial canine or mammal effigy. (*Id.*) The contours of the formally cataloged portion of the property is comprised of a mesa, approximately three acres in size and standing approximately fifty feet above the quarry floor. (*Id.*)

In 1990, the then-Director of the State Historical Society (the "SHS") began the process for placing the WMG on the Catalog that is administered pursuant to Wisconsin Statutes section 157.70(2). In mid-1990, Wingra was informed that two effigy mounds on its property were considered to be burial sites. (R. 6 at 421;

A-App. 012.) On September 14, 1990, the SHS obtained a special inspection warrant from the Dane County Circuit Court to survey and catalog the effigy mounds on Wingra's property. (*Id.*) The Director completed the cataloging of the site by executing a Notice of Location of Cataloged Burial Site, which the Director signed on December 17, 1990 (the "1990 Cataloging Decision"). (R. 6 at 419; A-App. 010.) The 1990 Cataloging Decision was recorded with the Dane County Register of Deeds and, on March 8, 1991, a copy of the Notice was sent to Wingra. (*Id.*) The notice of the 1990 Cataloging Decision did not: (A) reference any evidence or quasi-judicial process that led to the cataloging; (B) include findings of fact, conclusions of law or the rationale for the decision to catalog the WMG as required by Wisconsin Statutes section 227.47; or (C) advise Wingra of its right to request reconsideration and/or judicial review as required by Wisconsin Statutes section 227.48(2). (*See* R. 6 at 125-128, A-App. 057-060.)

Since the 1990 Cataloging Decision, Wingra has conducted an active mining operation at Kampmeier Quarry. However, Wingra's mining operation is limited due to the cataloged status of the WMG because Wisconsin Statutes section 157.70(2r) prohibits the disturbance of the burial site or the cataloged land contiguous to the cataloged burial site. (R. 6 at 361, ¶ 4, A-App. 095; *see also* Wis. Stat. § 157.70(2r).) Wingra estimates that the materials beneath the WMG, approximately 1.5 million tons of minable material, has a value of approximately \$10 million when fully extracted and processed. (R. 6 at 361, ¶¶ 8-9, A-App. 096.)

Wingra retained University of Wisconsin-Madison Associate Professor Dante Fratta, Ph.D. to analyze whether ground-penetrating radar ("GPR") could detect the existence of human remains at the WMG. (R. 6 at 321, ¶ 1; A-App.061.) Dr. Fratta conducted GPR analysis of the WMG and found three GPR anomalies along the body of the bird mound. (R. 6 at 339; A-App.079.) These three anomalies were then analyzed by a magnetometer survey, which showed ferromagnetic materials buried both inside and outside the birdy effigy. (R. 6 at 346; A-App.086.) Dr. Fratta concluded that the anomalies had "ferromagnetic properties different than human or animal remains." (R. 6 at 347; A-App.087.) Dr. Fratta also noted that to conclusively determine the nature of the anomalies, other types of surveying, such as excavation, would need to be conducted. (R. 6 at 348; A-App.088.)

II. PROCEDURAL HISTORY

A. Wingra files a Petition to Remove the WMG from the Catalog.

On September 17, 2010, Wingra filed its initial request to remove the WMG from the Catalog on the grounds that there was no definitive evidence that human remains were buried at the WMG. Alternatively, Wingra sought a permit to disturb the WMG to excavate and preserve the contents of the WMG and then engage in commercial excavation. (R. 6 at 418; A-App.009.) On October 21, 2010, the SHS denied Wingra's request to remove the WMG from the Catalog. (*Id.*) Wingra's request for a permit to disturb the WMG moved forward in a separate proceeding. (*Id.*)

Wingra and the SHS agreed that Wingra could reapply to remove the WMG from the Catalog. (*Id.*) On January 21, 2011, Wingra's attorney initiated this removal proceeding by submitting a second written petition, as provided for in Wisconsin Administrative Code HS § 2.03(6). (*Id.*) The Director notified all interested persons with a registered interest in the location and those interested persons had 60 days to respond to Wingra's petition. (*Id.*; Wis. Admin. Code HS § 2.03(6)(a).)

- In support of its second petition for removal, Wingra asserted that:
- The 1990 Cataloging Decision was invalid because it was not supported by evidence of the presence of human remains within the WMG;
- Wingra did not have the opportunity to appeal the Director's Cataloging Decision;
- Effigy mounds built at the same time as the WMG are understood to have functioned as ceremonial locations and only occasionally as burial sites;
- GPR anomalies found at the WMG site failed to demonstrate the presence of human remains.

(R. 6 at 299.)

The Ho-Chunk Nation (the "Ho-Chunk") filed a response in opposition to Wingra's petition. (R. 6 at 419; A-App.010.)

Wingra subsequently filed a brief, with affidavits and exhibits, in support of its petition. (*Id.*) Wingra's brief established that:

- The WMG is not a burial site nor is it likely to be a burial site. First, the WMG was cataloged without evidence of the actual or likely presence of human remains. Second, although two effigy mounds are located at the WMG, this "evidence" of a burial site, when considered in conjunction with Dr. Fratta's report, establishes that human remains are not likely to be present at the WMG. (R. 6 at 311-12.)
- The Director was not prohibited from reviewing the 1990 Cataloging Decision. Rather, the Director is authorized, by its inherent and implied power, to reconsider the decision to catalog the WMG. Reconsideration of the 1990 Cataloging Decision is consistent with the Director's inherent authority and a similar implied authority is consistent with Wisconsin Statutes section 157.70. (R. 6 at 312-18.)
- Cataloging the WMG constitutes an unconstitutional taking. Wingra was not provided notice when the Director cataloged the WMG. Rather, Wingra received notice almost three months after the 1990 Cataloging Decision was executed. Further, Wingra was not compensated for this taking of its property, which has resulted in a permanent taking of \$10 million in minable, merchantable materials. (R. 6 at 318-19.)

B. The Director Denies Wingra's Petition to Remove the WMG from the Catalog.

On October 6, 2011, the Director issued a proposed decision on Wingra's second petition concluding that Wingra failed to present sufficient evidence to

establish that the Site did not contain human remains. (R. 6 at 419; A-App.010.)

Wingra submitted objections to the proposed decision, along with a supplemental affidavit from its expert, Dr. Fratta. (*Id.*) The Ho-Chunk did not submit any objections to the proposed decision.

On October 18, 2012, the Director issued a final decision on Wingra's petition to remove the WMG from the Catalog. The Director's Decision makes the following findings and conclusions relevant to this appeal:

- The Director has the authority to consider Wingra's removal petition under Wis. Admin. Code HS § 2.03(6);
- Wingra's challenges to the basis for the 1990 Cataloging Decision are barred by the statute of limitations;
- If challenges to the basis for the 1990 Cataloging Decision are not time-barred, statistical data justifies the basis for and scope of the property cataloged; and
- Wingra did not provide new evidence sufficient to establish a basis for the removal of the WMG from the Catalog.

The basis for the Director's specific conclusions will be addressed in additional detail in the Argument sections.

C. Wingra Appeals to the BSPB for Review of the Director's Decision.

On November 14, 2012, Wingra filed an appeal with the BSPB seeking review of the Director's Decision. (*See* R. 6 at 436-43.) The specific grounds asserted for the review were:

- The Decision erroneously protects "grave markers" under the guise of protecting burial sites, which is a misapplication of the statute;
- The Decision erroneously concludes that verbal evidence of prior removal of human remains would allow removal of the WMG from the Catalog, but Dr. Fratta's physical evidence cannot command the same removal;
- The Decision improperly extends to grave markers the express protection reserved for burial sites;
- The Decision to protect grave markers disregards equal protection of the law by affording Native American effigy mounds more protection than relics of other cultures; and
- The Decision protects as burial sites places where human remains no longer exist, which is an erroneous application of the statute.

The SHS filed a response to Wingra's appeal and the BSPB conducted a hearing on March 8, 2013. On March 13, 2013, the BSPB affirmed the Director's Decision in its entirety. The Director's Decision is incorporated into the BSPB decision by its attachment with the BSPB Decision.

D. Wingra Files a Petition For Review in Dane County.

On April 5, 2013, after receiving the BSPB's decision, Wingra filed a Petition for Judicial Review in Dane County Circuit Court. (R. 1.) Wingra's Petition for Judicial Review asserted similar grounds for appeal as it had raised to the BSPB. On August 8, 2013, Judge Ellen K. Berz issued a written decision affirming the BSPB, and, in effect, the reasoning of the Director. (R. 18.) The decision became final on September 8, 2014, when Judge Berz entered a Final Order Affirming Administrative Agency Decision. (R. 19.) The circuit court filings are part of this record, but given that the court's decision is not subject to review (see below), Wingra will not focus on the details of the parties' briefing or the trial court's decision.

STANDARD OF REVIEW

Wisconsin Statutes chapter 227 governs administrative procedure and review and it is under this chapter, specifically Wisconsin Statutes section 227.52, that Wingra seeks its appeal of the Director's Decision. When an appellate court considers a Chapter 227 appeal, the court "review[s] the decision of the administrative agency and not the decision of the circuit court." *Plevin v. Dep't of Transp.*, 2003 WI App. 211, ¶ 11, 267 Wis. 2d 281, 671 N.W.2d 355. As such, the appellate court applies the same standard of review as the trial court.

The standard of review for an agency decision pursuant to Wisconsin Statutes section 227.52 depends on whether the court is reviewing a question of

law or a question of fact. *Sea View Estates Beach Club, Inc. v. State Dep't of Natural Res.*, 223 Wis. 2d 138, 148, 588 N.W.2d 667 (Ct. App. 1998).

Questions of fact are reviewed under the substantial evidence standard. *Id.*; Wis. Stat. § 227.57(6). Under this standard, the reviewing court may set aside an agency decision where, in light of the entire record, the evidence is "such that a reasonable person could not have reached the decision from the evidence and its inferences." *Sea View Estates Beach Club*, 223 Wis. 2d at 148. Credible evidence does not include evidence based on speculation or conjecture. *Plevin*, 2003 WI App. 211, ¶ 11.

For questions of law, such as the questions of statutory construction at issue in this case, the court must set aside the agency's decision where it "has erroneously interpreted a provision of law and a correct interpretation compels a particular action, or it shall remand the case to the agency for further action under a correct interpretation of the provision of law." Wis. Stat. § 227.57(5). In its assessment of the agency's interpretation, the court applies one of three levels of deference to the agency's interpretation: (A) great weight; (B) due weight; or (C) *de novo* review. *Id.* In this situation, *de novo* review of the agency interpretation is appropriate, as the interpretation of Wisconsin Statutes section 157.70(5)(c)2 is an issue of first impression. *Tannler v. Wis. Dep't of Health & Soc. Servs.*, 211 Wis. 2d 179, 184, 564 N.W.2d 735 (1997). It is apparent that this is an issue of first impression, because the Director's Decision does not cite to precedent or rules of the SHS or the BSPB in rendering his

conclusions of law interpreting Wisconsin Statutes section 157.70 or the related administrative code. *See Kelley Co., v. Marquardt*, 172 Wis. 2d 234, 245, 493 N.W.2d 68 (1992) (finding that an agency had no experience or expertise and the issue was one of first impression where "the hearing examiner relied on no precedent and had no rules to aid him in arriving at his conclusion of law. . .").

Third, questions of whether the Director denied Wingra due process and equal protection are reviewed *de novo*. Questions of due process and equal protection are questions about which a court, and not the Director or the BSPB, is the expert and for which the review is *de novo*. *Wright v. LIRC*, 210 Wis. 2d 289, 296, 565 N.W.2d 221 (Ct. App. 1997); *see also Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 24, 350 Wis. 2d 554, 835 N.W.2d 160 (questions of equal protection are reviewed independently). As such, all legal conclusions in this appeal should be reviewed *de novo*.

ARGUMENT

I. THE DIRECTOR ERRED IN CONCLUDING THAT ARGUMENTS RELATING TO THE BASIS FOR THE 1990 CATALOGING DECISION COULD NOT BE CONSIDERED.

The Director's conclusion that challenges to the validity of the 1990 Cataloging Decision are time-barred is erroneous because these arguments go directly to the considerations of whether to remove the WMG from the Catalog pursuant to Wisconsin Administrative Code HS § 2.03(6)(b). In describing the review for purposes of removing a site from the Catalog pursuant to the Administrative Code, the Decision confirms that the Director is to "consider all of

the relevant evidence as it exists *at the time of the removal petition* and is to determine whether 'there is sufficient evidence to indicate that a cataloged site does not contain any burials[.]'" (R. 6 at 423; A-App. 014 (citing Wis. Admin. Code HS § 2.03(6)(b)).) Despite this acknowledgment, the Director then goes on to hold that he cannot consider Wingra's arguments to the extent they challenge the validity and scope of the 1990 Cataloging Decision because those arguments are time-barred. Based on this statute of limitations theory, the Director held that he could not consider Wingra's arguments regarding the basis for cataloging the land and the size of the land cataloged.

The Director's conclusion that he could not consider Wingra's arguments challenging the basis for cataloging the WMG fails for three reasons. First, Wingra's arguments regarding the basis for the 1990 Cataloging Decision are directly relevant to its petition for removal. Wingra's argument is that when "all of the relevant evidence as it exists at the time of the removal petition" is considered, Wingra's petition to remove the WMG should be granted. The evidence to be considered includes Wingra's evidence based on Dr. Fratta's affidavits and report but also includes evidence relevant to the original 1990 Cataloging Decision, such as the basis for concluding that the WMG was a burial site. The Director was to consider all of this evidence in determining whether sufficient evidence indicated that the WMG did not contain a burial. The Director's failure to consider all relevant evidence, such as evidence showing that the WMG is not a burial site, is an erroneous application of Wisconsin Administrative Code HS § 2.03(6)(b).

Second, the Director has the inherent authority to reconsider its own decision. *State Pub. Intervenor v. Wis. Dept. of Natural Res.*, 177 Wis. 2d 666, 676, 503 N.W.2d 305 (1993) *rev'd on other grounds* (an administrative agency has the power to reconsider its own decisions inasmuch as the power to decide carries with it the power to reconsider). Likewise, Wisconsin courts have stated that "not only may an agency reopen and reconsider its order on a particular problem, but it may also adopt or entertain a different view of the law in subsequent cases." *Union State Bank v. Galecki*, 142 Wis. 2d 118, 124, 417 N.W.2d 60 (Ct. App. 1987). An agency's power (its jurisdiction) to reconsider is lost only: (A) when reconsideration occurs at the time of judicial review or (B) in circumstances where to do so—such as when rights have vested as a consequence of the decision or judicial review of the decision—would be arbitrary, capricious or an abuse of discretion. *Stacy v. Ashland Cnty. Dep't. of Pub. Welfare*, 39 Wis. 2d 595, 602, 159 N.W.2d 630 (1968) (an administrative agency may reopen its decision if there are altered conditions unless there is a legislative restriction).

Here, the Director never lost his jurisdiction to reconsider because, among other reasons, the time to appeal the 1990 Cataloging Decision has never lapsed. The decision to deprive Wingra of the use of its property initiates a Class 2 proceeding, yet no hearing was granted or notice of appeal rights following the decision was ever given, the latter of which is required to trigger a deadline for

judicial review. *See* Wis. Stat. § 227.48(2).² As it is undisputed that the Notice provided to Wingra regarding the SHS decision to catalog the WMG does not contain a notice of Wingra's right to petition for rehearing and/or judicial review, Wingra's time to seek review has not yet begun to run.

Similarly, while the 1990 Cataloging Decision deprived Wingra of the legitimate right to use its entire property, and did so without any evidence to support the deprivation, no entity can claim a "vested" right in the WMG as a burial site. As a consequence, it would be arbitrary, capricious and an abuse of discretion to not allow reconsideration of the factually erroneous 1990 Cataloging Decision.

Third, the Director has the implied authority to reconsider the basis for the decision to catalog the WMG. Every administrative agency has those implied powers necessary to effectuate its legislatively imposed mandate, unless the scope of those powers is "clipped by statute." *State ex rel. Rupinski v. Smith*, 2007 WI App 4, ¶ 25, 297 Wis. 2d 749, 728 N.W.2d 1. Further, a power will be implied when it is necessary to: (A) carry out the purpose of the statute; (B) fully exercise the powers expressly granted; or (C) perform an express duty. *State ex rel.*

² Specifically, that section requires:

Each decision shall include notice of any right of the parties to petition for rehearing and administrative or judicial review of adverse decisions, the time allowed for filing each petition and identification of the party to be named as respondent. No time period specified under s. 227.49(1) for filing a petition for rehearing, under s. 227.53(1)(a) for filing a petition for judicial review or under any other section permitting administrative review of an agency decision begins to run until the agency has complied with this subsection.

Wis. Stat. § 227.48(2).

Treat v. Puckett, 2002 WI App. 58, ¶ 10, 252 Wis. 2d 404, 643 N.W.2d 515. The Director's authority to reconsider the cataloging decision for the WMG passes all three tests.

The statute provides the Director with the duty, under Wisconsin Statutes section 157.70(2)(a), to catalog burial sites. In order to fulfill the purpose of the statute, *i.e.*, catalog burial sites, the Director must be able to remove sites where it has been demonstrated that there is no burial site. *See* Wis. Admin. Code HS § 2.03(6). To not allow this review would limit the Director's ability to exercise the powers granted by preventing it from correcting its own errors once they have come to light. Denying the Director the ability to reconsider his or her decisions would insulate incorrect cataloging decisions from the Director's review and would thus be the antithesis of properly performing the cataloging function. Finally, the statute does not limit or prohibit the Director from reconsidering cataloging decisions and the Administrative Code expressly authorizes this by providing provisions for removal.

Contrary to the Director's determination, the Director has the authority and obligation to review and correct his or her prior cataloging decisions. If the Director cannot reconsider an improvident and unsupported decision to catalog evidence as a burial site, then the Director cannot: (A) fulfill the purpose of the statute—to catalog all burial sites as that term is defined by the statute; (B) thereby fully exercise the powers granted; and (C) properly perform the cataloging

function. Consequently, the Director's power to reconsider a cataloging decision, where no rights have vested, must be necessarily implied.

II. 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.

The Director's presumption that all effigy mounds are burial sites for purposes of cataloging is an erroneous expansion of the duties imposed on the Director under Wisconsin Statutes section 157.70(2). Despite the above contention that the claims are time-barred, the Director purports to consider Wingra's argument that the basis for the 1990 Cataloging Decision is not an appropriate basis under the statute. The Director directly addresses Wingra's argument that the 1990 Cataloging Decision is invalid because it is based solely on the fact that the WMG is comprised of effigy mounds. The Director states that "[s]tatistical data from archeological excavations of burial sites indicates that most effigy mounds are burial sites." (R. 6 at 426; A-App. 017.) According 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. (*Id.*) 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. (*Id.*) Despite the evidence proffered by Wingra, through Dr. Fratta, that the WMG does not contain human remains, the Director

concluded that all effigy mounds, presumably including the WMG, "are properly considered to be human burial sites." This statement is a misapplication of the statute and an inappropriate expansion of the SHS's cataloging authority, and must be vacated and reversed.

The ultimate goal of statutory interpretation is to ascertain the intent of the legislature. *See Rolo v. Goers*, 174 Wis. 2d 709, 715, 497 N.W.2d 724 (1993). Statutory construction begins with looking at the plain language of the statute and, if that language is unambiguous, the interpretation goes no further. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. When construing the plain language of the statute, the "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* at ¶ 46. In addition, "[w]here statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Id.*

The statute grants the Director authority to place a property or portion of a property in the Catalog if, but only if, the "site" is an actual or likely "burial site" for "any part of the body of a deceased person in any stage of decomposition." Wis. Stat. §§ 157.70(2), (1)(b), (1)(f). This statute seeks to protect those places "where human remains are buried." Wis. Stat. § 157.70(1)(b). The statute clearly envisions that human remains are currently buried at a site because the statute does not state that it protects places where human remains are *or were* buried. By its

plain terms this section is not an effigy mound protection provision and the existence of a mere effigy mound does not provide a basis for cataloging. Rather, a decision to catalog requires the presence or likelihood of identifiable human remains.

The definition of "human remains" provided in the statute is critical to the cataloging determination. The statute defines human remains as "any part of the body of a deceased person in any stage of decomposition." Wis. Stat.

§ 157.70(1)(b). A burial site that no longer contains decomposing human remains is not a "burial site" under Wisconsin Statutes section 157.70(1)(b). Even if this language could be considered ambiguous, it should be interpreted in accordance with the term "burial site." That definition requires that human remains *are* buried at the site. If there are no human remains, *i.e.*, if the decomposition process has concluded, the site is not a burial site. *See City of Milwaukee v. Hampton*, 204 Wis. 2d 49, 56, 553 N.W.2d 855 (Ct. App. 1996) ("when an ordinance is susceptible to two meanings, it must be construed to avoid an unreasonable or unconstitutional result").

Further, the Administrative Code does not compel the Director to find that a burial site exists based on the finding of an effigy mound. Instead, the Administrative Code provides that grave markers, which include prehistoric Indian mounds, *may* be considered as documentation of a burial site. Wis. Admin. Code HS §§ 2.02(8), 2.03(2)(a). The Administrative Code should not be construed to

override the definitions provided for in the statute, which require the presence or likelihood of human remains to constitute a burial site.

Finally, it is apparent from the very removal provision at issue that the goal of the Catalog is not to protect grave markers or effigy mounds generally. The statute allows a site to be removed from the Catalog if the property owner demonstrates that the human remains at the site have been removed pursuant to a permit to disturb. Wis. Admin. Code HS § 2.03(6)(a). The provisions for the permit to disturb require the decision maker, when such a permit is granted, to "determine the person to whom the human remains and objects related to the burial in the burial site should be transferred for analysis and reinterment or other appropriate disposition when the burial site is disturbed." Wis. Stat.

157.70(5)(c)2m. This provision plainly provides protection, in the form of analysis, reinterment or other appropriate disposition, for the human remains and objects related to the burial. Given that the site is being excavated, this does not express an interest or intent to protect the grave markers but rather the human remains and/or objects buried beneath such a marker.

The clear intention of the statute is to protect burial sites where human remains are located, and not grave markers generally. As such, the Director's presumption that the WMG is a burial site, based solely on the presence of effigy mounds, was an erroneous conclusion of law under the statute. Requiring the WMG's cataloged status to continue even though there is no evidence that it actually contains identifiable human remains is contrary to the plain meaning of

the statute. Consequently, the statute is applied improperly when cataloging is used—as the Director does with respect to the WMG—to protect effigy mounds without proof that identifiable human remains exist within the mound.

III. 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.

The 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. In the Decision, the Director failed to review all available evidence to make a determination about the appropriateness of removal. Instead, the Director considered the evidence for and against removal separately. This disjunctive approach results in a finding of lack of sufficient evidence, which is not supported by the record when viewed as a whole. In Section III of the Decision, the Director determines that the "statistics" referenced in Section II, *supra*, comprise a sufficient basis for cataloging the WMG. The Director notes that this conclusion is "in the absence of contravening evidence." (R. 6 at 427; A-App. 011.) This conclusion is invalid because contravening evidence supplied by Wingra should have been taken into account as part of this determination.

Wingra presented evidence via Dr. Fratta, based on GPR and magnetometer surveying of three "anomalies" located in the body of the bird effigy. Anomalies are locations where the GPR signals reflect from subsurface layers, buried objects

and other inclusions with impedance contrast. (R. 6 at 327; A-App. 067.)

Dr. Fratta's surveying established that anomalies had "ferromagnetic properties different than human or animal remains." (R. 6 at 347; A-App. 087.) The report further noted that invasive surveying would be required to conclusively determine the nature of the anomalies. (R. 6 at 348; A-App. 088.) The Director agreed with Dr. Fratta's findings, noting that "[t]he magnetic signatures do suggest that something other than human remains is present at three locations within the mound and at one location outside the mound." (R. 6 at 432; A-App. 023.)

In addition to the evidence from Dr. Fratta, Wingra presented evidence via historical literature establishing that effigy mounds cannot be conclusively considered to be burial sites. This is so because effigy mounds, as opposed to conical mounds, were not constructed as burial sites and may have functioned as ceremonial sites. (R. 6 at 433; A-App. 024.) Rather than consider this information in conjunction with Dr. Fratta's report, the Director again relied on "statistics" to assert that most effigy mounds are burial sites. (*Id.*)

The Director stated that he must "consider all of the relevant evidence as it exists *at the time of the removal petition* and is to determine whether 'there is sufficient evidence to indicate that a cataloged site does not contain any burials.'" (R. 6 at 423; A-App. 014.) Instead of following his own guidance, the Director imposed a heightened burden on Wingra, requiring Wingra to conclusively establish the absence of human remains. (*Id.*) The Director did not consider the

Fratta report and the historical literature on the "statistics" regarding effigy mounds.

The Director's requirement that Wingra conclusively prove that human remains do not exist at the burial site is contrary to the statutory standard. First, as previously noted, this cannot be achieved without invasive surveying, which the SHS already has rejected. This removes from Wingra any ability to meet the Director's heightened standard. Second, the Director's suggestion that Wingra could show that the WMG should be removed from the Catalog because it was "misidentified as a prehistoric Indian mound" or was "a naturally or artificially occurring feature of land" is disingenuous, at best. The Director was aware that Wingra is not disputing that the WMG is an effigy mound. Rather, the entire matter rests on whether WMG is a burial site, and given the Director's previous decision, whether the Director could exceed its statutory authority and protect effigy mounds as a class despite the plain language of the statute.

The Director's determination that Wingra's petition for removal of the WMG from the Catalog should be denied is based on a purposeful disregard for the standard set forth in the Director's own Decision. The Director considered the evidence for and against removal separately, so as not to be forced to weigh the evidence in favor of removal against the weak statistical evidence in support of the WMG remaining on the Catalog. The Director's failure to follow his own recognized procedure is due to the Director's desire to treat effigy mounds, and the property on which they sit, differently than other property, contrary to the uniform

treatment mandated by the statutes and administrative code. As a result, after reviewing the statistical evidence, the WMG's place on the Catalog was a foregone conclusion. The Director's determination that Wingra did not provide sufficient evidence in support of removing the WMG from the Catalog demonstrates an improper application of the statute and must be vacated.

IV. THE DIRECTOR'S DECISION DENIES WINGRA EQUAL PROTECTION OF THE LAW BY TREATING IT DIFFERENTLY BASED ON THE PRESENCE OF THE WMG ON ITS PROPERTY.

The Director's Decision results in Wingra, due to the presence of effigy mounds on its property, being treated differently (by losing substantially more land) under the cataloging statute than other property owners. The Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Wisconsin Constitution prohibit Wisconsin from denying the equal protection of the law to any person within its jurisdiction. In Wisconsin, the similarity in protection afforded under the state and federal equal protection clauses mandates that the same legal analysis applies for both. *Treiber v. Knoll*, 135 Wis. 2d 58, 68, 398 N.W.2d 756 (1987).

The equal protection clause assures that those who are similarly situated will be treated in a similar manner. *GTE Sprint Commc'ns v. Wis. Bell, Inc.*, 155 Wis. 2d 184, 201, 454 N.W.2d 797 (1990) (holding that a tax imposed on some, but not all, telecommunications service providers who made certain purchases violated equal protection). States violate the equal protection guaranty when the legislature has made an irrational or arbitrary classification that has no reasonable

purpose or relationship to the facts or to a proper state policy. *Milwaukee Brewers Baseball Club v. Wis. Dep't. of Health & Social Servs*, 130 Wis. 2d 79, 99, 387 N.W.2d 254 (1986). Government activity that falls within the equal protection clauses includes actions of state employees in administering and enforcing those statutes. *Engsberg v. Town of Milford*, 601 F. Supp. 1438 (W.D. Wis. 1985) *aff'd*, 785 F.2d 312 (7th Cir. 1986).

In determining the amount of land to catalog around the WMG, the Director relied solely on the size of the effigy mounds, as opposed to the location of burial sites results. This determination results in Wingra being treated differently than other property owners under the statute. For other property owners with purported burial sites on their property, *i.e.*, sites not designated "grave markers" by the statute, the Director and/or the SHS would be required by the statute to provide evidence of the presence or likely presence of human remains. Further, if that evidence existed, the land cataloged would be the burial site and "sufficient contiguous land necessary to protect the burial site from disturbance," rather than, as the Director applied the statute to Wingra, the entire effigy mounds plus additional contiguous land. In Wingra's case, this disparate mode of enforcement adversely affects a substantial property interest: confiscating far more land and minerals than necessary to protect any hypothetically present human remains.

Assuming, *arguendo*, that the three GPR anomalies in the WMG bird's body could contain human remains, the Director nevertheless applied the statute

unnecessarily and unequally to Wingra. The WMG anomalies—these (hypothetical) human remains—are confined to an area located in the center body of the bird effigy. In contrast, the actual cataloged area of the entire bird is almost three acres. Cataloging the entire WMG bird effigy under the guise of protecting burial sites—as the Director has—results in disparate treatment of Wingra due to the presence of an effigy mound on its property.

The Director acknowledged that the effigies of the WMG were likely constructed between 400 A.D. and 1,200 A.D. for ceremonial purposes and only *possibly* as burial sites. (R. 6 at 433; A-App. 024); *see also* Robert A. Birmingham and Leslie E. Eisenberg, *Indian Mounds of Wisconsin*, 5, 54 (2000). Despite this evidence indicating that effigy mounds are not synonymous with burial sites, the Director applied the statute to protect from disturbance not just the human remains but the entire effigy mound, a spatial degree of protection the Director does not extend to other burial sites under the statute. The result is to discriminate among burial sites based on culture (those who used effigy mounds as burial sites) and, effectively, religion.

The Wisconsin Supreme Court employs five analytical factors to determine whether a rational basis exists to justify a legislative classification in an equal protection analysis:

- (1) All classifications must be based upon substantial distinctions which make one class really different from another;
- (2) The classification adopted must be germane to the purpose of the law;

(3) The classification must not be based upon existing circumstances only, and must not be so constituted as to preclude addition to the members included within a class;

(4) To whatever class a law may apply, it must apply equally to each member thereof; and

(5) Where substantially different legislation among classes exists, those differences must be based on the characteristics of each class in a regard for the public good.

GTE Sprint, 155 Wis. 2d at 194.

As demonstrated below, the statute, as applied by the Director to Wingra, creates a classification for which there is no rational basis. As such, the Decision must be reversed as violating Wingra's right to equal protection.

A. The Treatment of Wingra's Property Different from Other Property that Contains a Burial Site is Not "Based Upon Substantial Distinctions Which Make [It] Really Different From Another."

Equal protection demands that "the classification must be based upon substantial distinctions which make one class really different from another"

GTE Sprint, 155 Wis. 2d at 194. This factor is not satisfied here. There is no substantial distinction justifying the Director's disparate treatment of burial sites marked by effigy mounds as opposed to other burial sites. Rather, the classes created by the Director's enforcement of the statute are derived entirely from the Director's arbitrary desire to protect effigy mounds as opposed to burial sites, as

provided by the statute. Thus, protecting the whole of an effigy mound creates a protection not otherwise available to other human remains covered by the statute, and this "protection" results in a serious detriment to the property owner.

Consequently, the classes effectively created by the Director's enforcement of the statute are not "substantial" with respect to any real differences among property owners with effigy mounds on their property versus property owners with other burial sites on their property, because the area of mandated nondisturbance has no relationship to the type of burial marker. As such, the Director's mode of enforcing the statute on properties where effigy mounds are located fails the first requirement of equal protection.

B. The Classifications Created by The Director's Enforcement of the Statute Are Not "Germane to the Purpose of the Law."

In order to pass muster under the equal protection clause, classifications adopted "must be germane to the purpose of the law." *GTE Sprint*, 155 Wis. 2d at 194. Here, the purpose of the statute is to protect burial sites where human remains are present. The classifications created by the Director's enforcement of the statute are, however, not "germane" to that purpose because the Director's enforcement treats certain grave markers, like the WMG bird effigy, differently than human remains buried outside of grave markers altogether. The Director's protection of effigy mounds, under the guise of simply protecting burial sites, is not germane to the purpose of the law.

Yet, the Director's implementation of the statute protects, in the case of WMG's bird effigy, several thousand square feet in the shape of the bird's wings. The bird's wings are less than two feet deep, a depth at which the Rosebrough Report found it unlikely human remains would be buried. Therefore, it is apparent that the shape of the buffer bears no relation to the need to protect any human remains underneath the bird's wings. In contrast, human remains found in circumstances other than a mound are not only generally limited to the five-foot area unless that buffer is demonstrated to be insufficient, but the buffer's shape is dictated by geometry, not the entire expanse of an effigy mound. The inequality results from the purely arbitrary differentiation by the Director between properties with effigy mounds and those without. By protecting effigy mounds extending well beyond a contiguous buffer of five feet and limiting to five feet the buffers for burial sites without grave markers, the Director's method of enforcement creates a superior and an inferior class of property owners subject to Wisconsin Statutes section 157.70 not germane to the statute's purpose.

C. Classifications Created By The Director's Enforcement Of The Statute Are "Based Upon Existing Circumstances Only," And "Constituted As To Preclude Addition To The Members Included Within A Class."

Equal protection prohibits classifications that are (1) "based upon existing circumstances only," or (2) "constituted as to preclude addition to the numbers included within a class." *GTE Sprint*, 155 Wis. 2d at 194. The class of protection created by the Director's enforcement of the statute fails both of these tests.

The class created by the Director's enforcement of the statute, *i.e.*, properties with effigy mounds, is based solely upon circumstances currently in existence. The effigy mounds singled out by the Director are prehistoric and, as such, are already in existence and not subject to creation now or in the future. Therefore, the entire class of properties subject to this classification—prehistoric effigy mounds—exists. Further, given the fact that prehistoric effigy mounds will not continue to be created, the classification created by the Director is constituted so as to preclude the addition of members to the class. By creating a class of properties on existing circumstances only and precluding additional members of the class, the Director violates the third requirement of equal protection.

D. The Statute Does Not "Apply Equally To Each Member Of The Classes It Creates."

Equal protection requires that "to whatever class a law may apply, it must apply equally to each member thereof" *GTE Sprint*, 155 Wis. 2d at 194. Here, even the members of the class of properties containing effigy mounds are protected unequally. The 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. Because the statute, when enforced

as an effigy protection device, does not apply equally to each member of a class to which it applies, it violates the fourth requirement of equal protection.

E. The Statute As Enforced By The Director Fails To Base The Classes Created On Characteristics Of Each Class In A Regard For The Public Good.

Equal protection also requires that where the legislation itself creates substantial differences among classes, those differences must be based on the public good. *GTE Sprint*, 155 Wis. 2d at 194. The statute as enforced by the Director does not meet this standard because no characteristic of burial sites necessitates an entitlement to greater protection from disturbance simply because they are located in or under a prehistoric effigy mound. The public good, pursuant to the plain language of the statute, is served by protecting burial sites where human remains are buried, not effigy mounds.

Providing a buffer for human remains based on the arbitrary condition of being buried in an effigy and further on the size and shape of the effigy denies the owner of private land where the effigy is located the use and enjoyment of his or her land. This provides no public good in regard to protection of burial sites. To the contrary, such disparate treatment detracts from the public good since governmental power to protect human remains is being applied unnecessarily and unequally and to take additional private property than the statute justifies. Consequently, the Director's enforcement of the statute as an effigy protection device violates the fifth requirement of equal protection.

The Director violates the equal protection clauses of the federal and state constitutions by expanding the statute's function from equal respect for burial sites of all cultures, ethnicities and religions into a provision employed to protect, selectively, the artifacts of only particular cultures.

V. THE DIRECTOR'S DECISION DENIES WINGRA'S RIGHT TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS.

The Director's Decision violates the due process clause in four ways. First, the Director's application of the cataloging statute is not reasonable but, instead, is arbitrary and capricious. Second, the removal process, as it is being enforced by the Director, impermissibly prevents a meaningful opportunity to challenge the cataloging of private property. Third, the Director's application of the cataloging statute to Wingra results in an unconstitutional retroactive taking. And finally, the statute is void for vagueness.

A. Wingra's Substantive Due Process has Been Violated Because the Decision was Arbitrary and Capricious and Retroactively Resulted in a Taking of Wingra's Property.

Substantive due process "protects citizens against the arbitrary action of government." *Eternalist Found., Inc. v. City of Platteville*, 225 Wis. 2d 759, 776, 593 N.W.2d 84 (Ct. App. 1999). Here, the Director's application of the statute violates the due process clauses of the federal and state constitutions because, as it is being applied to Wingra, it is arbitrary and capricious and not reasonably related to a legitimate government interest. *Liberty Homes, Inc. v. Dep't of Indus., Labor & Human Relations*, 136 Wis. 2d 368, 375, 401 N.W.2d 805, 807 (1987)

(noting that law offends due process where it is "unreasonable, arbitrary or capricious"). Substantive due process claims apply to a violation of a property interest. *Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 45, 235 Wis. 2d 610, 612 N.W.2d 59. In considering a substantive due process challenge, a court examines "whether the statute is a reasonable and rational means to the legislative end." *State v. Luedtke*, 2014 WI App 79, ¶ 16, 355 Wis. 2d 436, 447, 851 N.W.2d 837, 842 *review granted*, 2014 WI 122, 855 N.W.2d 694 (citation omitted) (internal quotation marks omitted).

As a preliminary note, Wingra, indisputably, has been subjected to a deprivation of its property rights by application of the cataloging statute. *Penterman v. Wisconsin Elec. Power Co.*, 211 Wis. 2d 458, 480, 565 N.W.2d 521 (1997) ("it is well settled that the rights of ownership and use of property have long been recognized by this state.") The Decision prevents Wingra from mining the three-acre area of land that has been cataloged. As such, Wingra has been deprived of the value of the materials beneath the surface, which Wingra estimates is approximately \$10 million in minable materials.

The 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 manner and determining whether the WMG is a burial site, the statute was applied to protect effigy mounds generally. The Director's Decision, as noted previously, did not take into account all evidence to determine

if that evidence supported a finding that the WMG was a burial site. Instead, the Director relied solely on unconvincing statistics to assert that the effigy mounds must be burial sites. This conclusory finding was made without weighing the evidence presented by Wingra (from Dr. Fratta's surveying and the historical literature on the use of effigy mounds) against these statistics. The statistics were given conclusive weight, and based on the questionable nature of those statistics, this action was arbitrary and unreasonable. Further, the action is not reasonably related to the stated government interest—protecting burial sites—but rather is directly related to the SHS's expansion of the statute so as to protect all effigy mounds with its full force. The preservation of effigy mounds has not been determined by the Legislature to be a government interest. The use of the statute by the Director to mandate the preservation of effigy mounds, particularly when it is at the expense of private landowners, is similarly arbitrary and capricious. Because the Director enforces the statute arbitrarily and capriciously and does so in pursuit of an interest that is not contemplated by the statute, his enforcement unconstitutionally denies the process due under the federal and state constitutions.

B. The Decataloging Provisions, as Applied to Wingra, Impermissibly Prevent a Meaningful Opportunity to Challenge the WMG's Cataloging.

It is the "fundamental requirement of due process" that a party has "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation omitted) (internal quotation marks omitted). Here, the decataloging provisions are being enforced to

effectively prevent a challenge to both the validity and accuracy of a cataloging decision by applying an unjustified heightened standard and preferring nonsite-specific information over site-specific information—as the Director does with respect to the WMG—to justify continued cataloged status.

The Decision improperly applies a heightened burden of proof on Wingra and requires that Wingra "establish that there are no remains on the cataloged site." (R. 6 at 427; A-App. 018.) The Director's requirement that Wingra establish the lack of human remains requires that Wingra conclusively show that there are no human remains in the WMG. The administrative code requires that Wingra indicate a lack of human remains and the Director to find sufficient evidence to support this indication. Wis. Admin. Code HS § 2.03(6)(a)-(b) . Although the difference is subtle, it is apparent that the administrative code provisions do not anticipate or intend the heightened standard applied by the Director. Further, to apply such a standard, requiring a conclusive showing, the Director fails to provide any citation confirming the appropriateness of its use. Finally, the Director's own statement on how the removal determination is made, requiring the Director to "consider all of the relevant evidence as it exists at the time of the removal petition and is to determine whether 'there is sufficient evidence to indicate that a cataloged site does not contain any burials,'" confirms that evidence presented by Wingra is to be weighed against the evidence in support of cataloging to reach a decision. (R. 6 at 423; A-App. 014.) This statement and the text of Wis. Admin. Code HS § 2.03(6)(a)-(b) implies that the

burden of proof is to show a lack of human remains by a preponderance of the evidence.

As noted, Wingra provided evidence showing that the anomalies in the bird effigy are not consistent with human or animal remains. (R. 6 at 348; A-App. 088.) Further, Wingra provided additional support for its argument that not all effigy mounds can be considered to be burial sites. This is further supported by the SHS's own evidence, a study showing that only 66% of excavated Wisconsin effigy mounds were found to be positive or probably positive for human remains. Wingra has provided site-specific evidence showing a lack of human remains at the WMG, yet the Director continues to maintain an apparently irrefutable presumption that all effigy mounds are burial sites. The Director's conclusion that Wingra failed to show a lack of human remains by a preponderance of the evidence is not supported by the record.

The Director's heightened burden is further inappropriate because it requires Wingra to prove the impossible in these particular circumstances. Dr. Fratta concluded, and the SHS witness confirmed, that the only way to conclusively determine the nature of the anomalies is excavation. (*Id.*) The Director makes this statement well aware that the SHS vigorously opposed Wingra's request for a permit to disturb and the Division of Hearings and Appeals has already denied Wingra's request for a permit to disturb. In an effort to minimize the absurdity of the requirement that Wingra prove the impossible, the Director states that Wingra could conclusively show a lack of human remains at

the site if it shows that the site had already been excavated or had been looted.
(R. 6 at 432; A-App. 023.)

The process that has been applied to Wingra since the 1990 Cataloging Decision has prevented Wingra from mounting a meaningful challenge to the WMG's cataloged status. Wingra was notified that the WMG was cataloged months after the 1990 Cataloging Decision was made. The notice provided to Wingra did not comply with the statute requiring that Wingra receive information on how to seek a hearing or judicial review of the decision. Further, once Wingra did attempt to challenge the decision and petition for removing the WMG from the catalog, the Director has done everything in its power to impede Wingra's due process right to a meaningful opportunity to challenge the cataloged status. The Director has applied an unjustified heightened burden on Wingra; the Director has knowingly misapplied the removal considerations; and the Director has created an irrebuttable presumption in favor of effigy mounds and has thus grossly expanded the statute's protections. For these reasons, this Court should find that Wingra's due process rights have been violated and vacate the Decision.

C. The Director's Application of the Statute to Wingra is Unconstitutional Because It Retroactively Takes Wingra's Property.

When a party asserts an "as-applied challenge" to a statute, the reviewing court does not presume the constitutionality of the legislation. *Soc'y Ins. v. LIRC*, 2010 WI 68, ¶ 27, 326 Wis. 2d 444, 786 N.W.2d 385. A law has a prohibited retroactive effect when it creates new obligations, imposes a new duty or attaches

new legal consequences to transactions that occurred before the law was enacted. *State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 172, 580 N.W.2d 203 (1998).

The court applies a two-pronged approach to determine whether a statute comports with due process. *Soc'y Ins.*, 2010 WI 68, ¶ 28. First, the court determines if there has been a retroactive effect, which turns on whether the party has a "vested" right. *Id.*, ¶ 29. If the party has such a right, then the court examines whether a rational basis exists, which involves "weighing the public interest served by retroactively applying the statute against the private interest that retroactive application of the statute would affect." *Id.*, ¶ 30 (citation omitted) (internal quotation marks omitted).

Wingra had a vested right in its property once Wingra purchased that property. *Neiman v. Am. Nat'l Prop. & Cas. Co.*, 2000 WI 83, ¶ 14, 236 Wis. 2d 411, 613 N.W.2d 160 ("a right is vested when it has been so far perfected that it cannot be taken away by statute") (citation omitted) (internal quotation marks omitted). Wingra's vested right in its property extends to the entire parcel. Here, Wingra purchased the parcel of land on which the WMG sits in 1982 with the expectation that the entire property could be quarried, and based the purchase price of the parcel on that prospect. However, since the 1990 Cataloging Decision, Wingra's property rights have been negatively impacted by its inability to mine on a three-acre portion of the land. The application of the cataloging statute on Wingra's property has affected Wingra's right to use its property and to

earn income from its property. Because Wingra has identified a retroactive effect, the court must now apply the second prong, the balancing test.

The second step requires that the court weigh the private interest affected against the public interest served by the retroactive application. *Soc'y Ins.*, 2010 WI 68, ¶ 49. As noted above, applying the cataloging statute retroactively to Wingra affects Wingra's ability to use and earn an income from a three-acre portion of its property. Wingra estimates that the minable, merchantable value of the materials under the cataloged site is \$10 million. Further, because the purchase of the property is complete, Wingra cannot renegotiate the purchase price or otherwise recoup its losses. *See Id.*, ¶ 48 (recognizing the challenging party's inability to recoup losses caused by the statute as part of the retroactive effect). Further, the inability to recoup losses will likely be compounded if Wingra ever tries to sell the property once quarrying is completed, given the untouchable 3-acre, 50-foot tall mesa on the property. It is apparent that the loss inflicted by the statute is substantial and enduring.

In contrast, the public benefit stemming from the retroactive application of this statute to Wingra and the WMG is negligible, at best. First, based on Dr. Fratta's surveying, it is unlikely that the WMG contains a burial site, which the statute is intended to protect. Second, even if the WMG contains a burial site, it would be in the bird effigy, which does not justify a three-acre taking. Finally, if this court will conflate the burial site and effigy mounds as the agency has, the value of the effigy mounds to the public is minimal. As noted, the WMG consists

of two effigy mounds, one of which is substantially destroyed. The WMG is not accessible to the public nor will it be in the near future, as it is located on an active quarry and sits atop a 50-foot mesa. The WMG is not viewable either from the mesa or from an aerial perspective due to overgrowth obscuring the features.

Looking at the effect of the cataloging statute as applied retroactively to Wingra and the WMG, it is apparent that Wingra's interest outweighs the public interest. Wingra has lost a substantial value from its property, which it is unlikely to ever recoup. The cataloged site has limited benefits to the public, especially given the likelihood that the WMG is not a burial site. When the two interests are weighed, Wingra's interest is more substantial. The Court must reject the Director's application of the statute to Wingra as unconstitutional.

D. Wisconsin Administrative Code HS section 2.03(6) Is Void For Vagueness, as Applied.

An element of procedural due process is that the law must "set forth fair notice of the conduct prohibited or required and proper standards for enforcement of the law and adjudication." *In re Commitment of Dennis H.*, 2002 WI 104, ¶ 16, 255 Wis. 2d 359, 647 N.W.2d 851 (citation omitted) (internal quotation marks omitted). A law also fails for vagueness if it "fails to provide those who must enforce and apply the law objective standards with which to do so." *Id.* (citation omitted) (internal quotation marks omitted).

Wisconsin Administrative Code HS section 2.03(6), governing petitions for removal, does not provide objective standards with which to adjudicate these

provisions. The code section simply states that the Director must determine whether "there is sufficient evidence to indicate that a cataloged site does not contain any burials" Wis. Admin. Code HS § 2.03(6)(b). It is unclear from this statement whether the Director must find, as the Director required in this case, conclusive evidence that human remains do not exist (and apparently have never existed) at the site in question. It is also unclear whether the Director is entitled to require such a high showing because Wisconsin Administrative Code HS § 2.03(2) purportedly creates a presumption of a burial site where an effigy mound is located.

The vague procedure for seeking removal of a site from the Catalog has allowed the Director of the SHS—an entity with a desire to protect not only burial mounds, as permitted by Wisconsin Statutes section 157.70, *et seq.*, but to extend that authority to protect historical artifacts such as effigy mounds—to create and set a heightened showing for removal petitions that is not apparent from the regulations. Wingra could not have expected the Director to apply this standard based on its reading of the statute and accompanying administrative code provisions. As such, given the lack of objective standards needed to apply the removal proceeding regulations, this regulation, as it is applied to Wingra, violates procedural due process for vagueness.

CONCLUSION

For the foregoing reasons, Wingra respectfully requests that this Court:

- Vacate the Director's conclusion that Wingra's arguments on the validity and scope of the 1990 Cataloging Decision the WMG are time-barred;
- Vacate the Director's application of Wisconsin Statutes section 157.70 due to its expansion of the statute's protection to effigy mounds generally, which constitutes an erroneous application of the statute;
- Vacate the Director's conclusion that the evidence does not establish that the WMG does not contain human remains;
- Vacate the Director's Decision as it unlawfully denies Wingra's right to equal protection; and
- Vacate the Director's Decision as it unlawfully denies Wingra's right to due process.

Dated this 23rd day of February, 2015.

Reinhart Boerner Van Deuren s.c.
22 East Mifflin Street, Suite 600
Madison, WI 53703

Mailing Address:
P.O. Box 2018
Madison, WI 53701-2018
Telephone: 608-229-2200
Facsimile: 608-229-2100

Bryan K. Nowicki
WI State Bar ID No. 1029857
bnowicki@reinhartlaw.com
John H. Zawadsky
WI State Bar ID No. 1008654
jzawadsky@reinhartlaw.com
Brittany Lopez Naleid
WI State Bar ID No. 1065846
bnaleid@reinhartlaw.com

BY /s/ Bryan K. Nowicki
Attorneys for
Petitioner-Appellant
Wingra Redi-Mix, Inc. d/b/a
Wingra Stone Company

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 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 9,957 words.

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Reinhart Boerner Van Deuren s.c.
22 East Mifflin Street, Suite 600
Madison, WI 53703

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P.O. Box 2018
Madison, WI 53701-2018
Telephone: 608-229-2200
Facsimile: 608-229-2100

Bryan K. Nowicki
WI State Bar ID No. 1029857
bnowicki@reinhartlaw.com
John H. Zawadsky
WI State Bar ID No. 1008654
jzawadsky@reinhartlaw.com
Brittany Lopez Naleid
WI State Bar ID No. 1065846
bnaleid@reinhartlaw.com

BY /s/ Bryan K. Nowicki
Attorneys for
Petitioner-Appellant
Wingra Redi-Mix, Inc. d/b/a
Wingra Stone Company

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 23rd day of February, 2015.

Reinhart Boerner Van Deuren s.c.
22 East Mifflin Street, Suite 600
Madison, WI 53703

Mailing Address:
P.O. Box 2018
Madison, WI 53701-2018
Telephone: 608-229-2200
Facsimile: 608-229-2100

Bryan K. Nowicki
WI State Bar ID No. 1029857
bnowicki@reinhartlaw.com
John H. Zawadsky
WI State Bar ID No. 1008654
jzawadsky@reinhartlaw.com
Brittany Lopez Naleid
WI State Bar ID No. 1065846
bnaleid@reinhartlaw.com

BY /s/ Bryan K. Nowicki
Attorneys for
Petitioner-Appellant
Wingra Redi-Mix, Inc. d/b/a
Wingra Stone Company