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DISTRICT IV

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CASE NO. 14-AP-2498

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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.

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

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**REPLY BRIEF  
OF PETITIONER-APPELLANT**

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## **INTRODUCTION**

In its initial brief, Wingra Redi-Mix, Inc. ("Wingra") demonstrated that the Director of the State Historical Society ("SHS") wrongly denied Wingra's petition to decatalog the Ward Mound Group ("WMG") by erroneously applying the provisions of the administrative code and imposing a heightened burden on Wingra. Moreover, the Director afforded undue weight—inappropriately dispositive weight—to the "evidence" supporting the denial of the petition. This combination facilitated the Director's results-oriented Decision, but did not follow the law. In their response briefs, the Ho-Chunk Nation ("Ho-Chunk") and the Burial Sites Preservation Board ("BSPB") focus on suspect technical legal issues to avoid addressing the substantive issue—whether sufficient evidence exists to indicate that the WMG contains human remains. The evidence demonstrates the absence of human remains, therefore Wingra's removal petition should have been granted. Wingra respectfully requests that this Court reverse the Director's Decision and grant Wingra's petition or remand for further action under a correct interpretation of the law.

## **STANDARD OF REVIEW**

The parties agree on the standard of review other than the weight that should be given to the Director's interpretation of applicable regulations. *De novo* review is appropriate because the interpretation of the code provisions on removal petitions 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). This specific legal

principle trumps the "general rule" relied upon by the Ho-Chunk in its otherwise unsupported claim that the Director's decision is entitled to "great weight."

(Ho-Chunk Resp. ("HCN Resp.") at 9.) BSPB asserts that this Court's review of legal conclusions is "plenary" but provides no argument in support. (BSPB Resp. at 16.)

The Director's Decision itself supports *de novo* review. The Director does not cite to precedent or rules of SHS or BSPB in rendering conclusions of law relating to the petition. Moreover, there is no specific discussion in the Decision or the record of the Director's experience with removal petitions or interpreting that provision of the administrative code. The experience discussed by the Ho-Chunk, concerning cataloging effigy mounds generally (which is not part of the record of this case), does not go to the issue of first impression in this case—determination of the removal petition under the administrative code. The Director's interpretations of law should be subject to *de novo* review.

## **ARGUMENT**

### **I. THE DIRECTOR ERRONEOUSLY AFFORDED DISPOSITIVE UNDUE WEIGHT TO "EVIDENCE" THAT DID NOT RELATE SPECIFICALLY TO THE WMG.**

The Director erroneously interpreted the administrative code to elevate statistics and presumptions over science, history and facts. The Director is required to remove a site from the Catalog where "there is sufficient evidence to indicate that a cataloged site does not contain any burials . . . ." Wis. Admin.

Code HS § 2.03(6)(b). These provisions do not require that the Director give information or inferences supporting the cataloging unquestioning effect.

Wingra showed in its opening brief that the Director gave undue weight to presumptions and statistical generalizations regarding effigy mounds in denying Wingra's removal petition. (Wingra Br. at 17-18.) The statistics regarding what percentage of effigy mounds have been found to be positive or "probably positive" for human remains is not probative of the circumstances relating to the WMG. (See Wingra Br. at 17-18.) The Director also ignored the quality (or lack thereof) of the record of the initial cataloging of the WMG—which indisputably failed to establish the presence of human remains. (R.6; A-App. 018-19.) The Director's determination that the "basis" for the 1990 Cataloging Decision is entitled to decisive effect is not the standard in the administrative code. This decisive weight hardly gives effect to the applicable provision, which is intended to remove sites from the Catalog that do not contain human remains.

Apparently understanding that the facts do not support the Director's Decision, BSPB tries to frame the issue as a legal question: whether Wingra bears the burden of proof in this matter. (BSPB Resp. at 17.) BSPB asserts that Wingra bears the burden because it is the "general rule." (*Id.*) The issue, however, is not whether Wingra was required to present evidence (which it indisputably did), but whether the unquestioning acceptance of the statistics and presumptions were appropriate under the administrative code. Reliance on a "general rule" concerning the burden of proof does not address nor resolve this error.

The Director's allocation of decisive weight to "evidence" in opposition the petition is erroneous. The Director's assertion that he cannot review the quality of evidence in support of BSPB's position is not grounded in the administrative code. Rather, the removal provision requires a party to introduce evidence indicating a lack of human remains. Wis. Admin. Code HS § 2.03(6)(a). Persons on the registry and the SHS are then given the opportunity to respond to the new evidence. (*Id.*) Then, the Director determines whether "there is sufficient evidence to indicate that [the] cataloged site does not contain any burials. . . ." Wis. Admin. Code HS § 2.03(6)(b). Nothing in these provisions permits the Director to grant dispositive weight to a presumption concluding that all effigy mounds are burial sites, especially where the "evidence," i.e., statistics, do not support that presumption. Applying the provision as written requires the Director to accurately assess whether the WMG contains human remains. Because the Director improperly afforded the presumption and statistics undue and dispositive weight, the Director's Decision should be reversed and modified or remanded.

## **II. THE DIRECTOR ERRONEOUSLY APPLIED A HEIGHTENED BURDEN ON WINGRA.**

In contrast to the generalizations and technical legal arguments relied upon by BSPB, Wingra proffered specific, verifiable evidence that supported its petition. (Wingra Br. at 17-23.) Had an erroneous heightened burden not been imposed on Wingra and had all evidence been properly considered, the Director would have been compelled to grant Wingra's removal petition.

Wingra presented the only site-specific evidence in this matter: two reports by Dr. Dante Fratta, the only expert to testify specifically about the WMG. In response, the Ho-Chunk argue that denial of the petition was appropriate because finding that the WMG more likely than not contains human remains is sufficient. (HCN Resp. at 15.) The Ho-Chunk ignore the standard for removal: "sufficient evidence to indicate that a cataloged site does not contain any burials" and claim that the non-site specific evidence demonstrating a 66% chance of human remains is sufficient for denial. The Ho-Chunk do not otherwise address the evidence presented by Wingra.

The Director's allocation of the weight given to evidence in opposition the removal petition is erroneous. The requirement that Wingra conclusively demonstrate a lack of human remains is not contained in the administrative code. Rather, the removal provision requires a party to introduce evidence indicating a lack of human remains, which Wingra did through Dr. Fratta. Wis. Admin. Code HS § 2.03(6)(a). After the opportunity for a response, the Director then analyzes whether "there is sufficient evidence to indicate that [the] cataloged site does not contain any burials. . . ." Wis. Admin. Code HS § 2.03(6)(b). Nothing in these sections requires or provides for the heightened standard that the Director imposed on Wingra.

Both BSPB and the Director attempt to discredit Dr. Fratta because he did not *conclusively* establish that there are no human remains at the WMG. (BSPB Resp. at 24; R.6; A-App. 021.) The Director's heightened standard required



Wingra to present conclusive evidence of a negative, *i.e.*, the absence of human remains. Dr. Fratta explained that such evidence, with respect to the WMG, can only be provided by excavation. The Director disagreed, not by referring to the record but by speculating that such conclusive evidence could be provided if the surface features at the site were mistakenly identified as effigy mounds or if there was excavation or looting prior to the cataloging. (R.6; A-App. 023.) The Director substituted his speculation for the only site-specific evidence, and refused to allow activities to confirm the presence or absence of human remains. In doing so, the Director prevented all parties from finding out the truth about the WMG. This underscores the impropriety of the standard imposed by the Director, which inescapably led to a decision not grounded in fact. Because the Director applied an extra-statutory heightened burden solely on Wingra, the Director's Decision should be reversed and modified or remanded.

### **III. THE DIRECTOR IS ENTITLED TO RECONSIDER THE BASIS FOR THE 1990 CATALOGING DECISION PURSUANT TO HIS IMPLIED AUTHORITY.**

The Director's position, that he was unable to assess the basis for the 1990 Cataloging Decision in addressing Wingra's petition, is incorrect as a matter of law and prevented the Director from reaching a decision that was grounded in both law and fact. Freed from the unsupported constraints that the Director imposed on himself, the Director would have appropriately granted Wingra's petition.

As Wingra demonstrated in its opening brief, as part of an administrative agency, the Director has those implied powers necessary to effectuate the

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. Here, the Director has the implied authority to reconsider the basis for the 1990 Cataloging Decision because this allows the Director to (A) carry out the purpose of the statute; (B) fully exercise the powers expressly granted; and (C) perform an express duty. *State ex rel. Treat v. Puckett*, 2002 WI App. 58, ¶ 10, 252 Wis. 2d 404, 643 N.W.2d 515. The Director is expressly charged with maintaining the Catalog. A necessary extension of that power is the ability to correct erroneous cataloging decisions. *City of Oak Creek ex rel. Water & Sewer Util. Comm'n v. Pub. Serv. Comm'n*, 2006 WI App 83, ¶ 27, 292 Wis. 2d 119, 716 N.W.2d 152. Contrary to the Director's position, nothing bars the Director from reconsidering the 1990 Cataloging Decision.

Respondents cannot refute the Director's authority to reconsider the 1990 Cataloging Decision. BSPB does not address the Director's inherent authority to reconsider its previous decision. The Ho-Chunk assert that the Director did consider Wingra's arguments relating to the 1990 Cataloging Decision, as part of its consideration of Wingra's removal petition. (HCN Resp. at 13-14.) The Ho-Chunk's assertion, however, overlooks the fact that merely noting the evidence in support of the 1990 Cataloging Decision in the determination of the removal petition is distinct from assessing its basis. Here, the Director did the former, but not the latter, based upon his mistaken belief that he could not reconsider the 1990 Cataloging Decision.

Wingra seeks both reconsideration of the 1990 Cataloging Decision and a proper determination of its removal petition, which is achieved in part by evaluating the evidence (or lack thereof) underpinning the 1990 Cataloging Decision. That decision had numerous errors that the Director is entitled to reconsider pursuant to his inherent authority. These errors were not considered as part of the determination on the removal petition, and include whether there was a basis for the 1990 Cataloging Decision and the lack of a written decision for the 1990 Cataloging Decision. This reconsideration is an appropriate component of addressing Wingra's petition for removal.

The Director erroneously concluded that he could not consider Wingra's challenges to the 1990 Cataloging Decision, but never acknowledged or recognized that he had the implied authority to do just that and never explained why he chose not to exercise that authority. Instead, the Director incorrectly assumed that he was bound by the 1990 Cataloging Decision regardless of its lack of merit. This Court should set aside this legal conclusion and remand to the Director to consider whether the 1990 Cataloging Decision should be reconsidered.

#### **IV. THE CATALOGING AND SUBSEQUENT FAILURE TO REMOVE THE WMG FROM THE CATALOG DENIES WINGRA EQUAL PROTECTION OF THE LAW.<sup>1</sup>**

As Wingra demonstrated in its opening brief, the Director's Decision denies Wingra equal protection because, due to the effigy mounds on its property, Wingra is treated differently than other property owners whose property is subject to the burial sites preservation statute. (Wingra Br. at 24-32.) The five factors to be considered in determining whether a rational basis exists to justify a legislative classification in an equal protection analysis are: (1) the classifications are based upon substantial distinctions which make one class really different from another; (2) the classification must be germane to the law's purpose; (3) the classification is not based upon existing circumstances only or so constituted as to preclude addition to the members in a class; (4) the law must apply equally to each class member; and (5) where substantially different legislation among classes exists, differences must be based on the characteristics of each class in a regard for the public good. *GTE Sprint Commc'ns Corp. v. Wis. Bell, Inc.*, 155 Wis. 2d 184, 194, 454 N.W.2d 797 (1990).

Wingra demonstrated that the Director treats property differently if it contains an effigy mound as opposed to other burial sites. (Wingra Br. at 27-28.) The Director, keeping the entirety of the WMG cataloged, without an indication

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<sup>1</sup> Wingra's equal protection arguments are in addition to and not dependent on its arguments regarding the erroneous legal conclusions in Sections I and II and are not a concession that the WMG contains human remains. Further, the equal protection claims remain viable even if the Court does not rule in Wingra's favor on the legal interpretation arguments.

that such the entirety must be cataloged as containing human remains, amounts to the Director blindly cataloging the effigy mounds, as opposed to cataloging the portion of the effigy mound that even arguably contains human remains. BSPB asserts that the effigy mound itself is a burial site. (BSPB Br. at 29.) This, however, ignores the language of the statute that merely states that a grave marker, such as an effigy mound, may be evidence of a burial site. The fact that the WMG are effigy mounds does not automatically entitle the entire mound to cataloging, especially where the evidence supporting the presumption is suspect and not site-specific.

Further underscoring Wingra's argument that the statute is not applied equally is that the statute only requires the Director to catalog "sufficient contiguous land" around non-dedicated burial sites, which excludes cemeteries. Wis. Stat. § 157.70(2)(a). BSPB asserts that Wingra was not deprived of equal protection because "dedicated" cemeteries are treated as a single burial site, which results in a similar effect to the "sufficient contiguous land" requirement. (BSPB Br. at 30.) This argument fails because it misinterprets the statute.

The legislature defined "Dedicated" as "platted for use exclusively as a cemetery . . . ." Wis. Stat. § 157.061(4). This definition does not establish that a cemetery is treated as a single burial site, but only that it is land platted for use as a cemetery. BSPB injects the phrase "burial site" into the definition in order to achieve its desired result. (BSPB Br. at 30.) ("A '[d]edicated' burial site is one 'platted for use exclusively as a cemetery.'" BSPB's revision of the definition does

not lead to the conclusion that a cemetery is a single burial site.

BSPB's argument underscores the fact that cemeteries are treated differently in other regards. A cemetery, even if considered a single burial site, does not need to request a permit to disturb the burial site when vacating or replatting the cemetery. Instead, it can directly petition the circuit court. Wis. Stat. § 157.07. This alternative procedure is inexplicably not available for effigy mounds, where the property owner must proceed through administrative proceedings. Other statutes further undermine BSPB's assertion that a cemetery is a single burial site, and thus comparable to an effigy mound. For example, section 157.10 provides that a cemetery is comprised of multiple, discrete lots owned by individuals, with the remainder of the land owned by the cemetery authority. Wis. Stat. § 157.10. in short, BSPB's attempt to equate cemeteries with effigy mounds, in claiming that both are treated similarly as a single burial site, is not supported by the law.

Further, the Director's Decision, protecting an entire effigy mound, is not germane to the statute's goal of protecting burial sites. Instead, cataloging burial sites where human remains *are* buried is germane to the language of the statute. Specifically, the Director should have required evidence of the existence and location of human remains, and determined the amount of land that must be cataloged. Rather than limit the burial site to the areas where human remains are likely to be buried, the Director continued to catalog the entire effigy mound.

Wingra's opening brief also noted that this unequal treatment is based on

existing circumstances only and the Director's treatment singles out prehistoric effigy mounds and thus affects a closed class.<sup>2</sup> Wingra also demonstrated that application of the statute affects similarly situated members differently because the amount of land cataloged in excess of what is likely to be a burial site depends solely on the size of the effigy mound.

Wingra's argument regarding the public good is misconstrued by BSPB. Wingra agrees that the public good is served by protecting burial sites, but the public good is not best served by protecting structures under the guise of protecting burial sites, at the expense of private landowners. Contrary to BSPB's position, the public good is best served by applying the statutes as written and without allowing BSPB to use the statute to expand its authority to catalog effigy mounds generally.

The Ho-Chunk's response fails to cite the current equal protection standard applied by the Wisconsin Supreme Court in *GTE Sprint*, 155 Wis. 2d at 196 and cite older state standards and federal standards, requiring a different showing of "intentional, systematic and arbitrary discrimination" which are not binding on this Court. (HCN Resp. at 27-30.) As such, the Ho-Chunk's arguments on equal protection are misplaced.

Wingra has been subject to unequal treatment compared to other property

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<sup>2</sup> BSPB asserts that the closed-class doctrine is inapposite. (BSPB Br. at 36.) While Wisconsin courts have noted the lack of case law on the closed-class standard, this does not change the fact that the Director's Decision affects a closed class. *See State ex rel. Cannon v. Moran*, 107 Wis. 2d 669, 691 n.18, 321 N.W.2d 550 (Ct. App. 1982) *rev'd on other grounds*.

owners whose land is subject to the burial sites preservation statute due to the fact that its property contains effigy mounds. This unequal treatment is unjustified and not germane to the purpose of the statute. As such, the Director's Decision should be vacated.

**V. THE DIRECTOR'S DETERMINATION OF THE REMOVAL PETITION DEPRIVED WINGRA OF DUE PROCESS.**

As Wingra discussed in its opening brief, the Director's Decision deprived Wingra of due process because it was arbitrary and capricious, lacked a meaningful opportunity for challenge and relied on removal provision that is void as vague. (Wingra Br. at 32-41.)

The Director's Decision was arbitrary because it conclusively relied on generalizations and a presumption, despite contrary evidence. BSPB asserts that the Director's Decision was not arbitrary because the Director considered the evidence and did not apply *per se* status to effigy mounds. (BSPB Br. at 40.) However, the Director stated that the presumption and statistical evidence were not subject to reconsideration. (R.6; A-App. 018-19.) A proceeding where the decision-maker only assesses one side's evidence necessarily results in a determination that is arbitrary. BSPB underscores this defect by noting the minimal or even nonexistent evidence needed to initially catalog the site: "[t]he code does not require a particular quantum of documentation before a burial site may be recorded in the burial site catalog." (BSPB Resp. at 15.) As such, the Director is giving conclusive effect to the 1990 Cataloging Decision, despite its



lack of a basis. Further, Wingra never received a written decision documenting the basis for that decision.

As a result, Wingra was not permitted a meaningful opportunity to challenge the 1990 Cataloging Decision or to argue for the WMG's removal. Although BSPB asserts that Wingra had a meaningful opportunity to challenge the 1990 Cataloging Decision, Wingra has no articulated basis for that decision. (BSPB Br. at 41.) Accordingly, Wingra could not have properly challenged it. Further, regarding the removal petition, the heightened standard requiring Wingra to provide conclusive evidence of a negative, *i.e.*, no human remains, while barring Wingra from undertaking the only means of obtaining that conclusive evidence, excavation, makes the process meaningless.

In an effort to salvage the decisions, BSPB argues that Wingra could have immediately excavated the site when the statute was enacted and prior to being informed of the effigy mounds in 1990, or that it could have challenged the cataloging in 1990. (BSPB Br. at 43-44.) BSPB also asserts that Wingra's vested interest in its property was not infringed because Wingra could have excavated the site during a six month window between the statute's publication and effective date or until Wingra had a reason to believe it had a burial site that might be disturbed. (BSPB Br. at 45.) The Ho-Chunk makes similar arguments. (HCN Br. at 21-23.) As Wingra previously noted, Wingra's ability to challenge the cataloging was rendered impossible by the Director's failure to issue a written decision. Further, the argument that Wingra should have immediately excavated the effigy mounds

in response to the statute's publication is disingenuous at best and surely not the policy that the legislature or this Court wants to be the response to proposed legislation.

Finally, the removal provisions are void for vagueness because they fail to provide a clear standard, which resulted in the Director applying a heightened standard that Wingra could not have anticipated. BSPB asserts that the void for vagueness doctrine can only be applied where the statute regulates conduct or subjects the violators to penalties. (BSPB Br. at 48.) The 2006 decision cited by BSPB makes this statement, but more recent cases have considered the doctrine in cases involving a determination of a petition as in this case. *See Tomlin v. Vill. of Orfordville*, No. 2009AP3028, 2012 WL 955503, ¶ 6, (Wis. Ct. App. Mar. 22, 2012) (unpublished) (considering whether an ordinance contains sufficient standards to govern a village board's licensing decision). BSPB has no other response to Wingra's void for vagueness argument, which is a concession. *See Trinity Lutheran Church v. Dorschner Excavating, Inc.*, 2006 WI App 22, ¶ 36, 289 Wis. 2d 252, 710 N.W.2d 680 (arguments not refuted are deemed conceded).

**VI. THE HO-CHUNK'S REQUEST FOR FEES AND COSTS IS IMPROPER AND LACKS MERIT.**

The Ho-Chunk inappropriately makes its request for an award pursuant to section 809.25(3) in its response brief. The law is clear, however, that such a request must be made by motion filed no later than the filing of respondent's brief. *See* Wis. Stat. § 809.25(3); *Howell v. Denomie*, 2005 WI 81, ¶ 19, 282 Wis. 2d

130, 698 N.W.2d 621 (a motion under section 809.25(3) made as a statement in a brief is insufficient).

Further, Wingra's appeal is not frivolous. *See Baumeister v. Automated Prods., Inc.*, 2004 WI 148, ¶¶ 26, 28, 277 Wis. 2d 21, 690 N.W.2d 1 (the assertion of frivolousness is "an especially delicate area since it is here that ingenuity, foresightedness and competency of the bar must be encouraged and not stifled" and "doubts should be resolved in favor of finding a claim nonfrivolous . . .") (citation omitted) (internal quotation marks omitted). There is no evidence of bad faith and the legal issues in this case are of first impression and have deprived Wingra of a substantial property interest, therefore Wingra is entitled to pursue an appeal to ensure proper interpretation. The Ho-Chunk's request for an award pursuant to section 809.25(3) should be denied.

### **CONCLUSION**

For the foregoing reasons, Wingra respectfully requests that this Court vacate and modify the Director's Decision or remand for further action under a correct interpretation of the law.

Dated this 18th day of May, 2015.

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c), as amended by this Court's order dated May 11, 2015 allowing Petitioner-Appellant to file a single reply brief with up to 4,000 words, for a brief and appendix produced with a proportional serif font (Times New Roman, 13 point). The length of this brief is 3,962 words.

Dated this 18th day of May, 2015.

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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 18th day of May, 2015.

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