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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case Nos. 2015AP1632 & 2015AP1844

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

Petitioner-Respondent-Cross Appellant,

v.

State Historical Society of Wisconsin,

Respondent-Appellant-Cross Respondent,

Ho-Chunk Nation,

Intervenor-Co-Appellant-Cross Respondent.

APPEAL FROM DANE COUNTY CIRCUIT COURT
CASE NO. 2014CV2262, ORDER DATED MAY 7, 2015,
THE HONORABLE JOHN C. ALBERT, PRESIDING

REPLY BRIEF OF CROSS APPELLANT

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INTRODUCTION

This appeal raises a host of errors in the Division of Hearings and Appeals' ("DHA") Decision denying Wingra's request for a permit to disturb a cataloged burial site, the WMG. These errors are particularly egregious because the statute at issue was interpreted to place a heavier, extra-statutory burden solely on the party seeking the permit. Given this one-sided application of the burden, the Decision appears to be the product of results-oriented decision-making. Wingra requests that this Court review the Decision to remedy these errors to ensure that the statute is applied as intended.

STANDARD OF REVIEW

The parties agree on two aspects of the standard of review: that, on a Chapter 227 appeal, (1) the appellate court reviews the agency's decision, and (2) questions of fact are reviewed under a "substantial evidence" standard. *Plevin v. Dep't of Transp.*, 2003 WI App 211, ¶ 11, 267 Wis. 2d 281, 671 N.W.2d 355.

The parties disagree, however, on the level of deference to be afforded to legal conclusions and statutory interpretation. The Ho-Chunk assert that because Wisconsin Statutes section 227.57(5) does not expressly provide for varying levels of deference, the "statutorily mandated 'erroneous' standard appears to be the equivalent of the 'great weight standard.'" (HCN Resp. at 8.) The case cited by the Ho-Chunk, however, expressly acknowledges the varying levels of deference under which a court reviews legal conclusions. *Hilton ex rel. Pages Homeowners'*

Ass'n v. Dep't of Nat. Res., 2006 WI 84, ¶ 17, 293 Wis. 2d 1, 717 N.W.2d 166 (deciding to give great weight deference to—in that particular case—DNR conclusions). The case law is clear that "[t]hree levels of deference may be applied to the conclusions and statutory interpretations of administrative agencies: great weight, due weight, and no weight," and no level of deference automatically applies. *Plevin,* 2003 WI App 211, ¶ 12 (citation omitted).

Here, DHA's legal conclusions do not warrant deference and should be reviewed *de novo*. SHS claims that DHA's conclusions are entitled to due weight deference because DHA was the agency charged with enforcement of the statute in question. (SHS Resp. at 6.) SHS states that this standard "is not so much based upon the agency's knowledge or experience"; however, this statement is at odds with the case SHS relies on, wherein the court was clear that when applying the "due weight" standard, "the agency has some expertise in the area in question, but has not developed that expertise to the extent that would necessarily place it in a better position to make judgments concerning the interpretation of the statute than a court." *Telemark Dev., Inc. v. Dep't of Revenue*, 218 Wis. 2d 809, 818, 581 N.W.2d 585 (Ct. App. 1998). The fact that the agency has been charged to enforce a statute is not enough. The agency must demonstrate that it has considered the statutory scheme in "a variety of factual situations and circumstances." *Id.* at 820 (citation omitted).

When DHA's experience is considered, DHA is not in a better position than a court to interpret Chapter 157. First, DHA is not devoted to interpreting the

burial sites preservation statute, or even generally focused on SHS matters. (Wingra Br. at 10-11.) Instead, DHA presides over hearings spanning a wide variety of legal topics. *See Hearings & Appeals, Wis. Dep't of Admin.,* http://www.doa.state.wi.us/divisions/Hearings-and-Appeals (last visited Feb. 3, 2016).

Second, neither DHA nor SHS established any relevant experience demonstrating that DHA is in a better position than a court to address the statutory interpretation questions of first impression in this case. In its Decision, DHA did not cite to any precedent or rules of DHA or the Burial Sites Preservation Board in rendering its conclusions of law. (R.19.) The Decision's only citation in the conclusions of law section is to the burial sites preservation statute itself. Because this is an issue of first impression and was decided by an agency that handles administrative matters generally, without specialized experience in interpreting the statute at issue, this Court should review DHA's conclusions of law *de novo*.

ARGUMENT

I. DHA INCORRECTLY APPLIED WISCONSIN STATUTES SECTION 157.70(5)(c)2 BECAUSE IT FAILED TO FIND AN *AFFILIATION* WITH *THE WMG*.

A. Finding an Affiliation with All Effigy Mounds in a Region Does Not Constitute an Affiliation with the Specific Burial Site.

In its initial brief, Wingra identified the clear language of Wisconsin Statutes section 157.70(5)(c)2, which requires that DHA consider those interests for and against granting a permit to disturb that relate to the specific burial site at

issue. DHA ignored this directive and instead considered interests relating to effigy mounds generally, which constitutes an erroneous interpretation of the statute.

In response, SHS and the Ho-Chunk attempt to shortcut the required proof by relying on an analogy instead of bearing their burden of showing an interest specific to the WMG. SHS and the Ho-Chunk argue that they demonstrated an affiliation between the Ho-Chunk and effigy mounds generally in southern Wisconsin, and therefore it logically follows that there is an affiliation with the WMG, an effigy mound in southern Wisconsin. This argument leads to the ability to circumvent the statute by allowing any party to show an interest in a specific burial site if the party can demonstrate an interest in the category of burial sites generally.[1] This method of proof goes against the plain language of the statute, which requires presenting evidence specific to the burial site. In this case, neither SHS nor the Ho-Chunk demonstrated any affiliation with the WMG. There was no testimony that the Ho-Chunk ever visited or viewed the WMG, that they have any knowledge specific to the WMG and its purported importance or history, or how the WMG relates to the Ho-Chunk's cultural or religious beliefs. It is clear that DHA, in relying on the circular analogy, inappropriately expanded the clear language of the statute to allow a showing of an interest in effigy mounds generally as opposed to an interest specific to the burial site.

[1] SHS goes so far as to say that the statute does not require affiliation with a specific burial site, ignoring the express language of the statute. (SHS Resp. at 9.)

SHS also argues that showing an affiliation with a class of burial sites, as opposed to a specific burial site, complies with the statute. But this position is based on a separate provision of the statute unrelated to consideration of a permit to disturb. Wisconsin Statutes section 157.70(2)(e) provides that a registry shall be established for those who can demonstrate an interest in either a specific burial site or a class of cataloged burial sites. SHS asserts that this same low bar should be applied to interests in a permit to disturb analysis. (SHS Br. at 12.)

The fact that the registry includes anyone with an interest in a class of cataloged burial sites does not support SHS's argument and, in fact, is entirely consistent with Wingra's interpretation. The plain language of the statute shows that the Legislature intended the registry to be generated from a broader list of persons with an interest in a class of burial sites, and it is these people who receive notice of a permit to disturb a particular burial site. The broader showing for inclusion on the registry is logical where the goal is to make sure any potentially interested person receives notice. An inclusive registry means that persons on the registry may receive notice of a permit to disturb a site, even though their interest in that site is not significant enough to warrant an objection.

The language the Legislature chose to use in the statute applicable to weighing whether a permit to disturb should be issued, on the other hand, is significantly more limited. The statutory language requires DHA to consider the "interest in not disturbing the burial site or the land." Wis. Stat. § 157.70(5)(c)1m (emphasis supplied). The Legislature could have, but did not, expand this to allow

a showing of an interest in a "class" of burial sites. The interest relevant on a permit to disturb is narrowly drafted to allow consideration of interests specific to the burial site or land at issue. When Wisconsin Statutes section 157.70 is read in its entirety, using broad language to define the registry and narrow language for the assessment of an individual site constitutes a cohesive regulatory scheme. *Wis. ex rel. Hensley v. Endicott*, 2001 WI 105, ¶ 19, 245 Wis. 2d 607, 629 N.W.2d 686. The more inclusive registry ensures that all potentially interested parties receive notice of a permit to disturb request. However, to have a valid interest in contesting a permit to disturb request, a person must show an interest directly related to the site at issue, given that the focus of a permit to disturb determination is site-specific. The statutory language relating to the registry does not support SHS's interpretation that a person can show an interest in an entire class of burial sites as opposed to a specific burial site.

SHS's final argument improperly relies on extrinsic evidence to contradict the plain language of the statute. SHS cites a concurring opinion to imply that the Wisconsin Supreme Court has held that legislative findings in session law have the force of law. (SHS Br. at 12.) However, in that same case, the majority stated: "[w]here statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation, such as legislative history." *Wis. ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 50, 271 Wis. 2d 633, 681 N.W.2d 110 (noting that extrinsic sources means "resources outside the statutory text—typically items of legislative history"). The Court did not create an exception for session law from its

rule relating to extrinsic evidence. In fact, the Court stated: "[e]xtrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public." *Id.* at ¶ 44. In this case, where the statute is unambiguous, consideration of extrinsic evidence is both unnecessary and inappropriate.

Wisconsin Statutes section 157.70(5)(c)2 unambiguously requires that the parties demonstrate an interest in the burial site or the land at issue. Neither SHS nor the Ho-Chunk showed an affiliation with the WMG, instead relying on an analogy to demonstrate an affiliation between the Ho-Chunk and effigy mounds in southern Wisconsin generally. In finding that an affiliation existed, DHA ignored the language of the statute and this conclusion must be set aside or modified.

B. DHA Broadened the Term "Affiliation" Beyond its Common Usage.

As addressed in Wingra's initial brief, DHA failed to properly apply Wisconsin Statutes section 157.70(5)(c)2 by not requiring the Ho-Chunk to demonstrate an affiliation with the WMG but instead, reduced the burden by allowing the Ho-Chunk to demonstrate a "keen interest" in effigy mounds. (Wingra Br. at 15-17.) Further, the evidence of an affiliation was solely oral history. Contrary to SHS and the Ho-Chunk's assertions, Wingra does not assert that oral history is not entitled to any weight; but rather, based on its lack of indicia of trustworthiness, it must considered in light other available contradictory

archeological and scientific evidence. (*Id.* at 17-18.)

SHS asserts that Wingra's argument is based on a verbal distinction that does not appear in the statute. Wingra, however, discussed the meaning of "affinity" in order to compare that term with the Legislature's chosen term, "affiliation." Because words are given their common and accepted meaning when interpreting a statute, Wingra raised the distinction to demonstrate the meaning of the word the Legislature chose, as opposed to a word the Legislature could have chosen, which would have allowed for a lesser showing.

SHS and the Ho-Chunk also argue that the evidence sufficiently demonstrated a cultural or religious affiliation between the Ho-Chunk and the WMG based on oral history. The oral history presented by Ho-Chunk witnesses provided that, generally, effigy mounds were for burial and protection, and the Ho-Chunk believe that any burial mound site is scared. (R.19:1769, 1785.) DHA found the Ho-Chunk's incorporation of "all Native American features in the Four Lakes regions" into their religion and culture constituted an affiliation.

In finding that a general incorporation of all "features" in an entire region can constitute an affiliation, DHA broadened the language of the statute. What DHA's interpretation allows for is an association with an entire region to constitute a cultural or religious affiliation even absent evidence of how the WMG has been incorporated into the Ho-Chunk's cultural or religious beliefs. DHA's finding of an affiliation is an erroneous application of the statute because a regional affiliation is not an affiliation with the specific burial site at issue, and must be set aside or

modified.

II. DHA ERRONEOUSLY IMPOSED AN EXTRA-STATUTORY BURDEN ON WINGRA REGARDING LAND USE.

Wingra's opening brief laid out the uncontradicted evidence demonstrating its interest relating to land use as an active quarry and quantifying the value of that land use. (Wingra Br. at 20.) DHA acknowledged this testimony, but then determined that Wingra should have shown that the materials in the quarry were scarce or the inability to mine the area would impose a present hardship on Wingra. (R.19:1807.) This heightened standard does not have a basis in the statute and essentially requires Wingra to show that it would be unable to survive without the permit to disturb. DHA overreached when it made determinations about what is best for Wingra's business given that DHA is in no position, and exceeds its authority, to speculate as to what amount of work, what number of employees and what business opportunities are sufficient or appropriate for Wingra. The statute does not give DHA the authority of a central planner to mold and pass judgment on the business plan of a private entity.

SHS and the Ho-Chunk assert that DHA did not impose a heightened burden on Wingra but considered the present benefits to Wingra consistent with the statute. (SHS Br. at 19.) However, the statute only provides that DHA consider "land use." Wis. Stat. § 157.70(5)(c)2(d). The statute does not limit Wingra to presenting evidence \ related to immediately necessary land use, nor does DHA provide any basis for discounting future land use or land use that was not currently

essential to Wingra.

DHA's Decision demonstrates that not only did it apply a heightened burden, but it imposed that burden solely on Wingra. Although DHA did find that the land use interest weighed in favor of granting the permit, this interest was given less weight than it was entitled due to the heightened standard burden. Because there is no basis for this extra-statutory burden, especially imposed in such a one-sided results-oriented manner, DHA's conclusions regarding the land use interest are erroneous and should be set aside or modified.

III. DHA SIMILARLY IMPOSED A HEIGHTENED BURDEN ON WINGRA IN REGARD TO ITS COMMERCIAL PURPOSE INTEREST.

In its opening brief, Wingra discussed the evidence presented by Kevin Meicher at the January 2014 hearing. Meicher, a certified general appraiser, testified as to Wingra's interest in a "commercial purpose not related to land use." (Wingra Br. at 24-25.) Meicher's unrefuted testimony establishes that the highest and best use of the property on which the WMG is located, after completion of mining, would be a residential subdivision. (R.19:1812.) Meicher further testified that the mesa on which the WMG sits would be a detriment to the property's future value and also may prohibit development of the land, as Meicher could not see a plan or use that would incorporate the mesa. (R.19:1651.) Although neither SHS nor the Ho-Chunk provided testimony to refute Meicher, DHA chose to ignore the commercial purpose interest, claiming that Wingra could refile its petition in the future if a development plan as Meicher described was not possible. (R.19:1812.)

In doing so, DHA went beyond the considerations of the statute to impose a heightened burden on Wingra and required Wingra to not only show the commercial purpose of the land but also that a future commercial purpose was not possible with the WMG on the land. The statute does not require this heightened showing.

SHS and the Ho-Chunk argue that DHA did consider Wingra's commercial purpose interest evidence but found it too speculative. However, the evidence presented by Wingra was not speculative. Meicher opined, based on his experience as a certified general appraiser, that he did not foresee a development plan for a residential subdivision that included a 50-foot-tall mesa. Rather than accept the uncontradicted evidence, DHA chose to speculate that such a development plan would be possible in spite of expert testimony stating otherwise. *Hackl v. Icon Health & Fitness, Inc*., No. 08-CV-871, 2010 WL 2384591, *3 (E.D. Wis. June 8, 2010) (expert testimony concerning opinion of future events is sufficiently reliable and admissible); *see also McGarrity v. Welch Plumbing Co.,* 104 Wis. 2d 414, 429, 312 N.W.2d 37 (1981).

SHS asserts that Meicher's testimony was "equivocal" because, after mining activities are completed, Wingra would be required to slope the vertical faces of the mine walls as part of reclamation. (Wingra Br. at 23.) SHS then speculates that sloping the walls of the mesa would somehow no longer make the mesa a detriment to development. There is no support in the record, however, for the proposition that a 50-foot mesa with sloped walls would be any less detrimental to

a residential subdivision than one with vertical walls.

The testimony provided by Meicher constituted evidence of a commercial purpose of the property use that weighed in favor of granting the permit. Rather than accept the uncontroverted evidence, DHA instead required Wingra to prove an absolute—that the commercial purpose was not possible unless the permit to disturb was granted. This heightened burden is not derived from the statute, and DHA's determination that the commercial purpose did not weigh in favor of granting the permit to disturb must be vacated or modified.

IV. DHA ERRONEOUSLY REFUSED TO CONSIDER WHETHER THE WMG CONTAINED HUMAN REMAINS.

Wingra attempted to present evidence of whether the WMG contained human remains. (Wingra Br. at 22-24.) DHA ruled, however, that this issue was beyond the scope of the hearing. (R.19:1806.) In light of that ruling, Wingra submitted an offer of proof demonstrating that not only has it never been shown that the WMG contains human remains, but it is unlikely the WMG contains such remains. (R.19:1421-1528, 1599.) Whether the WMG contains human remains is directly relevant to determining whether a permit to disturb the WMG should be granted because, if there are no human remains, there is no burial site for which a permit is needed.

SHS argues that DHA lacks authority to consider whether human remains are present because the permit to disturb statute presupposes the existence of human remains. (SHS Br. at 20.) SHS's assertion stems from the fact that the

statute does not directly instruct DHA to determine whether human remains are present. This is not a basis to claim that the statute and accompanying administrative code "presupposes" that there is a burial site.

In fact, Wisconsin Administrative Code HS § 2.04(2) explicitly allows testing to determine whether a property contains a burial site. This testing is not limited to uncataloged burial sites and supports Wingra's argument that there is no presumption that the site is a burial site. It further is consistent with this provision that Wingra should be allowed to present evidence showing that the WMG is not a burial site and, as such, that there is no interest in denying the permit to disturb.

Both SHS and the Ho-Chunk assert that Wingra should not be allowed to address the human remains issue in this proceeding because it is being addressed in the related appeal. However, there is no bar to the argument simultaneously proceeding in both appeals given that that related appeal is still pending.

DHA erroneously barred Wingra from introducing evidence showing the absence of human remains at the WMG. There is no statutory presupposition that human remains exist at the burial site and Wingra should have been able to present this evidence as it would have been dispositive on the permit to disturb determination. A burial site is "any place where human remains are buried." Wis. Stat. § 157.70(1)(b). If Wingra had been allowed to show that there are no human remains buried at the WMG, DHA would have concluded that no permit was necessary as there would be no burial site to protect. DHA erred when it precluded Wingra from presenting evidence relating to whether human remains are buried at

the WMG.

V. DHA'S FINDING REGARDING THE SCIENTIFIC AND EDUCATIONAL INTEREST IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

DHA's finding that scientific, environmental and educational interests are neither in favor nor against granting the permit lacks support of substantial evidence in the record. Wingra demonstrated that there are existing benefits, both scientific and educational, that would be best served by granting the permit. Specifically, these purposes would be served by excavating the effigy mounds and allowing the mounds and any artifacts buried therein to be studied. (Wingra Br. at 26-27.) SHS's expert agreed that important scientific information could be derived from this excavation. (R.19:1723.) These benefits are concrete, and it is undisputed that a number of the original mounds and part of the canine mound have already been destroyed; and the mesa is continuously subject to weathering and natural deterioration, which will destabilize it over time. (R.19:1610, 1614, 1620-23.)

SHS and the Ho-Chunk's evidence on the scientific and educational benefits is speculative at best. They ignore the fact that the mounds are being destroyed over time and focus on the fact that the mounds are nonrenewable and excavation would destroy them. SHS asserts that future technology "could lead to scientific knowledge that would be unavailable if they [the WMG] were excavated today." (SHS Br. at 26.) However, no testimony on these purported technological advances was presented at the hearing. It appears that SHS bases this assertion

solely on its own speculation.

VI. THE RECORD DOES NOT DEMONSTRATE THAT THE WMG IS HISTORICALLY SIGNIFICANT.

As Wingra argued in its opening brief, no evidence was presented at the hearing as to the WMG's historical significance. (Wingra Br. at 29.) What DHA found was that *all* effigy mounds have historical significance. (R.19:1812.) As previously noted, this blanket finding protecting effigy mounds generally is inconsistent with the statute.

SHS argues that its expert, Dr. Birmingham, testified to the historical interest of the WMG. (SHS Br. at 32.) Birmingham testified, however, that he treated this "in general as a situation where [he] could give expert testimony objectively on any kind of site including the [WMG]." (R.19:1732.) Birmingham did not present specific testimony regarding the WMG and admitted that he had never been to the WMG. (R.19:1746.) Further, Birmingham confirmed his earlier testimony in which he stated that there was no historical significance to the WMG. (R.19:1754.) At the hearing, SHS did not follow up with Birmingham on this statement. However, in its response brief, SHS attempts to rehabilitate Birmingham and provide information that is contrary to his clear testimony. This is inappropriate and endeavors to create evidence that is not within the record. DHA's finding that there is a historical interest specific to the WMG is not supported by substantial evidence in the record.

CONCLUSION

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

- find that DHA erroneously applied Wisconsin Statutes section 157.70 by: extending the statute to cover effigy mounds generally; failing to require an affiliation; imposing a heightened burden on Wingra as to land use and the commercial purpose; and erroneously barring Wingra from providing evidence on whether the WMG contained human remains;
- find that DHA's conclusion on (1) commercial purpose; (2) scientific, environmental or educational purpose; and (3) historical significance were not supported by substantial evidence in the record; and
- vacate, modify or remand the Decision to DHA for further proceedings consistent with this Court's conclusions.

Dated this 15th day of February, 2016.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wisconsin Statutes section 809.19(8)(b) and (c), as amended by this Court's order dated February 9, 2016, allowing Petitioner Respondent Cross Appellant to file a single reply brief with up to 4,000 words, for a brief produced with a proportional serif font (Times New Roman, 13 point). The length of this brief is 3,992 words.

Dated this 15th day of February, 2016.

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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 Wisconsin Statutes section 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 15th day of February, 2016.

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