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Wingra Redi-Mix, Inc. d/b/a Wingra Stone Company,  
Petitioner-Respondent-Cross-Appellant-Petitioner,

v.

Appeal Nos. 2015AP001632  
2015AP001844

State Historical Society of Wisconsin,  
Respondent-Appellant-Cross-Respondent,

Ho-Chunk Nation,  
Intervenor-Co-Appellant-Cross-Respondent.

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**RESPONSE BRIEF OF THE HO-CHUNK NATION**

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On Petition for Review of the Decision of the  
Court of Appeals, District IV

On appeal from the Order of the Dane County Circuit Court Case No.  
2014CV2262, The Honorable John C. Albert, Presiding

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## I. INTRODUCTION

Supreme Court review of this case should be dismissed as improvidently granted. There are no “special” or “important” reasons for review. The issues before the Court do not present any real or significant questions of federal or state law or lead to developing, clarifying, or harmonizing the law. *See, Halbman v. Barrock*, 378 Wis.2d 17, 20-21, 902 N.W.2d 248, 249 (2017), *citing*, Wis. Stat. § 809.62(1r). Further review by this Court and publication of an opinion would not serve any purpose. In the alternative, this Court should affirm the Court of Appeals decision upholding agency action.

The Ward Mound Group (“WMG”) is a catalogued burial site that is protected under Wisconsin Statute § 157.70. It is located on a three-acre piece of land within the 57.22 acre Kampmeier Quarry. R 19:1608. The Kampmeier Quarry is owned by the Wingra Stone Company (“Wingra”) as part of its sand and gravel operations. R 19:1605, 1608. Wingra applied to the Director of the State Historical Society (“SHS”) for a permit authorizing the disturbance of the protected burial site. R 19:3-4. The permit application was submitted to the Division of Hearings and Appeals (“DHA”) for a contested hearing. R 19:2. The Administrative Law Judge (“ALJ”) assigned to hear the matter addressed each of the factors enumerated in Wisconsin Statute § 157.70(5)(c). In light of that analysis, the ALJ determined that Wingra failed to demonstrate, by a preponderance of the evidence,

that the requisite factors weighed in favor of the permit. R 19:1810. As a result, the ALJ denied Wingra's permit application. R 19:1816-1817.

Based on the foregoing, Wingra constructs a narrative of grievances arising out of alleged administrative missteps with far reaching legal ramifications worthy of Supreme Court consideration. In reality, Wingra simply disagrees with the ALJ's weighing of evidence and factual findings. *C.f., e.g.*, Wingra Pet. at 1 ("The court of appeals did not address the proper level of deference because it recharacterized Wingra's legal question as a factual issue, to which it applied the more lenient substantial evidence test."). This Court need only review the ALJ's decision to see that it is well reasoned, supported by substantial evidence in the record, and consistent with the ALJ's mandate in the instant case.

## **II. STATEMENT ON ORAL ARGUMENT AND PUBLICATION**

The Ho-Chunk Nation is not requesting oral argument on this matter – although it appears that argument has already been scheduled. The Ho-Chunk Nation does not believe that publication of an opinion in this matter is warranted. This case addresses no matters of first impression and/or of state-wide importance. The action at issue is simply a reasonable exercise of the state's authority to protect burial sites. There have been no abuses of any processes and/or misapplication of any law.

### III. STATEMENT OF THE CASE

#### A. Nature of the Case

The Ward Mound Group is a cataloged burial site that is protected under Wisconsin Statute § 157.70. It is located on a three (3) acre piece of land within the 57.22 acre Kampmeier Quarry. R 19:1608. The Kampmeier Quarry is owned by Wingra as part of its sand and gravel operations. R 19:1605, 1608. Wingra applied to the Director of the SHS for a permit authorizing the disturbance of the protected burial site. R 19:3-4. On January 10, 2011, the DHA received the Director's contested case referral. R 19:2. A two-day trial was conducted on January 13-14, 2014, after which the ALJ issued a decision denying the permit request. R 19:1802-1818. The ALJ assigned to hear the matter addressed each of the factors identified in Wisconsin Statute § 157.70(5)(c) and found that:

1. Since no party claimed a direct kinship to the Ward Mound Group, the interest did not apply to the instant case. R 19:1811.
2. The Ho-Chunk Nation maintained a legitimate tribal and religious affiliation in preserving the Ward Mound Group, and this interest weighed in favor of denying Wingra's permit request. *Id.*
3. The benefits of a scientific, environmental, or educational purpose were mixed, because there are benefits to preserving the mound as

well as excavating it. Therefore, this interest did not support granting or denying Wingra's permit request. R 19:1811-1812.

4. There was no aesthetic significance to the Ward Mound Group, however, the historical value of the Ward Mound Group weighed in favor of denying the permit request. R 19:1812.
5. The land use of the property is an active quarry, sand and limestone cannot be mined from underneath the Ward Mound Group, this weighs favor of granting a permit. R 19:1812
6. The use of the quarry as a residential subdivision after reclamation of the property was so remote and speculative, the interest could not be weighed in any meaningful way. *Id.*
7. The SHS did not identify any other interests related to the Ward Mound Group, so the interests that encompass any interest that the SHS deems to be in the public interest did not weigh into the balancing test. R 19:1813.
8. Wingra's public safety and benefits evidence, was not sufficient to find a measurable benefit to the public interest that would favor granting a permit to disturb the burial site. *Id.*

In light of the foregoing, the ALJ determined that Wingra failed to demonstrate, by a preponderance of the evidence, that the requisite factors weighed in favor of the



permit. R 19:1810. As a result, the ALJ denied Wingra's permit application. R 19:1816-1817.

**B. Procedural History Leading Up To Appeal**

On September 20, 2010, Wingra petitioned the SHS requesting to remove the Ward Mound Group from the catalog, or in the alternative to disturb the cataloged burial site for commercial excavation. R 19:3-4; *see, also* Wis. Stat. § 157.70(5). The SHS denied the first request to remove the burial site from the catalog. R 19:85. Wingra never appealed the SHS decision denying this initial request. On November 11, 2010, notice was sent to all parties listed on the registry of interested persons informing them of Wingra's request to disturb a cataloged burial site. R 19:27-32; *see, also* Wis. Stat. § 157.70(5)(b)1. The SHS received objections from the Ho-Chunk Nation, regarding Wingra's request to disturb the Ward Mound Group. R 19:35, 37-38. On January 10, 2011, the SHS referred the matter to the DHA for a contested case hearing pursuant to Wis. Stat. § 157.70(5)(c). R 19:2. Concurrently, SHS and Wingra agreed that Wingra could resubmit the request to remove the site from the catalog. R 19:85.

In January 2011, Wingra again petitioned the SHS to remove the Ward Mound Group from the burial site catalog. R 19:74. Accordingly, proceedings before the DHA were suspended while the removal petition was pending with the SHS. R 19:63-64. The SHS Director again denied Wingra's request to remove the

site from the catalog due, in part, to Wingra's failure to present sufficient evidence that the site did not contain human remains. R 19:84-102. The second request to remove the WMG from the catalog was appealed and is currently pending on separate Petition to this Court.

Following the issuance of the SHS Director's decision denying Wingra's request to remove the WMG from the catalog, proceedings within the DHA recommenced. R 19:103-107. On December 12, 2012, Wingra filed a motion with the ALJ requesting to disturb three anomalies within the WMG. R 19:120-122. As the basis for the motion, Wingra submitted several affidavits and a geophysical survey report prepared by Professor Dante Fratta, which attempted to assert that the burial site contained three areas that were unlikely to contain human remains. R 19:146-202. The report by Dr. Fratta, was the same report that Wingra attempted to utilize as the primary basis for their motion to remove the WMG from the catalog. This report has been rejected by experts in the field as inconclusive as to the presence or absence of human remains. R 19:331-334. Regardless of the report, according to Wingra, permitting excavation of the anomalies would verify whether human remains were present. R 19:121-122. Following briefing on the matter, the ALJ denied Wingra's request to excavate portions of the burial site. R 19:625-630.

Following these proceedings, ALJ Kaiser issued an *Amended Prehearing Conference Memorandum & Notice of Hearing*, rescheduling the contested case

hearing for January 13-14, 2014. R 19:811-812. The parties convened a two-day contested case hearing as scheduled. After submitting closing briefs, a decision denying Wingra's request to disturb a cataloged burial site was entered by the ALJ. R 1:8-23. Wingra timely appealed the DHA decision.

**C. Statement of Relevant Facts**

The WMG dates from a period hundreds-of-years before the first arrival of Europeans in Wisconsin and before the existence of any written records of human activities in the region. R 19:1534-35, 1542, 1714-1715.

[t]he site – located on a parcel then owned by a person named Ward – was first investigated and mapped for archaeological purposes in 1914 and 1925, and was found to include at least seven earthen mounds: a bird effigy, a mammal effigy, an oval mound and four linear mounds. See W.G. McLachlan, *Mounds of the Lake Waubesa Region*, 12 *The Wisconsin Archaeologist*, 151-153 (1914); Charles E. Brown, *Record of Wisconsin Antiquities*, 4 *The Wisconsin Archaeologist*, 37 (1925) (R. 19:1534-35, 1542 and 1714-1715).

*Id.*

The site surrounding the WMG has been operated as a sand and gravel quarry since 1961. R 19:1806. Wingra purchased the land on which the WMG sits in 1982. R 19:1606. In 1986, the legislature passed 1985 Wisconsin Act 316, which provided for the protection of burial sites throughout the state. Act 316 was specifically aimed at preserving prehistoric human burial sites that do not resemble modern well-tended cemeteries and, as such, are subject to a high degree of

vandalism and inadvertent destruction. 1985 Wis. Act 316, § 1. The passage of Act 316 created Wisconsin Statute § 157.70.

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

Representatives of the SHS contacted and met with the owner of Wingra regarding the cataloging of the WMG on June 8, 1990. R-App 3. During this meeting, the owner of Wingra was informed that the mounds were burial sites subject to protection under state law and the cataloging process was explained to him. The WMG was subsequently surveyed and ultimately cataloged on December 17, 1990. *Id.*

After Wingra was notified of the presence of the burial site on its property, but before the site was cataloged, Wingra could have requested the Director to approve excavation of the site to remove and analyze any human remains and related objects found in the burial site. Wis. Stat. § 157.70(4)(c)3.a. After such archaeological excavation and analysis, Wingra then could have sought continuation of its quarrying activity. Wis. Stat. § 157.70(4)(d). Wingra did not

exercise this option. R-App 3. Wingra also could have appealed the decision to catalog the site by requesting an administrative contested case hearing under Wisconsin Statute § 227.42. Wingra also chose not to exercise this option. As a result, there was no appeal of the original decision to catalog the site and agency action was final. *Id.*

**1. Wingra's Attempt to Have the WMG Removed From the Catalog**

Twenty years after the WMG was cataloged, on September 17, 2010, Wingra sent a letter to the SHS requesting that the WMG be removed from the catalog on the grounds that the site does not contain human remains and, therefore, was improperly cataloged as a burial site. R 19:3-4. In the alternative, if that decataloging request was denied, the letter requested a permit to disturb the site, pursuant to Wisconsin Statute 157.70(5)(b), for purposes of commercial excavation. R 19:3-4.

On January 4, 2011, the Director referred the matter to DHA for a contested case hearing. R 19:5-12. DHA assigned the matter to an administrative law judge who conducted a prehearing conference on January 20, 2011. R 19:49-52 and 1803. At that conference, Wingra reiterated its position that there were no human remains buried in the WMG and asked that its removal/decataloging request be included in the issues for the hearing. *Id.* The ALJ questioned whether DHA had authority to remove a burial site. The parties agreed to confer further about that

issue. *Id.* On January 21, 2011, Wingra filed a separate petition for removal of the WMG from the catalog, pursuant to Wis. Admin. Code HS § 2.03(6). On March 11, 2011, the parties filed a joint stipulated motion with DHA, asking that the hearing on Wingra's permit to disturb the WMG be postponed pending the outcome of Wingra's removal proceeding before the Director. R 19:71-75.

Evidence on the removal request was submitted to the Director for consideration. R 19:85-86. In support of its removal request, Wingra submitted, among other things, two affidavits and a geophysical survey report on the WMG prepared by Professor Dante Fratta. R 19:1236-74. In those documents, Professor Fratta attempted to determine the presence or absence of buried human remains in the WMG by conducting ground penetrating radar surveys and magnetic surveys of the site. *Id.*<sup>1</sup>

The Director issued a final decision on October 18, 2012. R 19:84-102. The decision denied the petition to remove the site from the catalog. The Director held that neither the site specific evidence nor the historical literature provided sufficient new evidence that the WMG does not contain human remains. R 19:96-101. Wingra appealed the Director's decision to the Burial Site Preservation Board ("BSPB"), pursuant to Wis. Admin. Code HS § 2.03(6)(c) (*See* R19:82-102), on

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<sup>1</sup> For a discussion of the materials submitted by Fratta, *See*, Ho-Chunk Response to Wingra's Brief in Case No. 2498 at 19-22.

November 14, 2012. R-App 4. The BSPB heard argument on March 8, 2013 and on March 13, 2013 and affirmed the Director's Final Decision. *Id.*

## **2. Wingra's Parallel Petition to Disturb the WMG**

On October 30, 2012, Wingra notified DHA of the Director's action and asked that the permit proceeding before DHA recommence. R 19:82-83. On November 1, 2012, DHA issued a notice recommencing the permit proceeding. R19:105-106. On December 10, 2012, Wingra filed a motion, with DHA, requesting a permit to excavate three anomalies in the WMG. R19:120-214. That motion and the subsequent motion for reconsideration was denied. R19:624-630, 658-659. Subsequently, the ALJ held two days of hearings on Wingra's original permit application. During the contested case hearing, the ALJ heard testimony regarding each of the statutorily mandated factors. *See* Wis. Stat. § 157.70(5)(c)2. These include a cultural, tribal or religious affiliation; a scientific, environmental or educational purpose; the historical and aesthetic significance of the burial site; land use; commercial purpose not related to land use; and the public interest. R 19:1811-1816. Based on the evidence, the ALJ denied Wingra's application to disturb the WMG. R 19:1803-1817.

## **IV. STANDARD OF REVIEW**

As indicated *supra*, Wingra attempts to recast various factual and evidentiary disputes as questions of law deserving of greater deference on review.

As a practical matter, Wingra's arguments fail as both a matter of fact and law, regardless of the standard of review applied by this Court.

**A. Questions of Fact are Subject to the Highly Deferential Substantial Evidence Test**

"[A]gency findings of fact are conclusive on appeal if they are supported by credible and substantial evidence." *See, Plevin v. Dep't of Transp.*, 267 Wis.2d 281, 289, 617 N.W.2d 355, 359 (2003). The law makes clear that, "the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record." Wis. Stat. § 227.57(6). The substantial evidence test is "highly deferential." The Court "may not substitute [its] view of the evidence for that of the [Director] when reviewing the sufficiency of the evidence . . . if any reasonable view of the evidence would sustain the [Director's] findings, they are conclusive." *Clark v. Waupaca County Bd. of Adjustments*, 186 Wis.2d 300, 304-305, 519 N.W.2d 782, 784 (App. 1994); *see, also, e.g.*, Wis. Stat. § 227.57(8) ("the court shall not substitute its judgment for that of the agency on an issue of discretion.").

**B. The Standard Applied to the Agency's Interpretation of a Regulation or Statute is Accorded Either "Great Weight" Deference or *De Novo* Review**



The standard of review applied to questions of law (such as the ALJ's interpretation of the statute or regulation) is less clear. Wisconsin Statute § 227.56(11) provides for *de novo* review of an "agency's interpretation of law if the agency action or decision restricts the property owner's free use of the property owner's property."<sup>2</sup> The denial of Wingra's permit did not, however, restrict the use of the property – it simply maintained the *status quo*.

If the ALJ's decision did not restrict the use of the WMG, then pursuant to Wisconsin Statute § 227.57(5), "[t]he court shall set aside or modify the agency action if it finds that the agency 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." Under similar circumstances, the Courts have analyzed, *inter alia*, the agency's experience to determine what level of judicial deference to afford an agency's interpretation of law. *e.g. Racine Harley-Davidson, Inc. v. State Div. of Hearings & Appeals*, 2006 WI 86, ¶¶ 12, 17-19, 292 Wis. 2d 549, 717 N.W.2d 184. The express language of the statute at issue, however, is clear and unequivocal. *See* Wis. Stat. § 157.70(5)(c). The statute mandates that the court set aside or modify an agency interpretation of law, only if it is, in pertinent part,

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<sup>2</sup> It is not clear whether the word "law" applies to both laws and regulations or just laws. *C.f., Plevin*, 267 Wis.2d at 289-290, 617 N.W.2d at 359. ("interpretation of its own administrative rule is entitled to controlling weight unless such interpretation is inconsistent with the language of the regulation or clearly erroneous.").

"erroneous." The statute does not provide for varying levels of deference based on agency experience or on any other factor for that matter. By analogy, the statutorily mandated "erroneous" standard appears to be the equivalent of the "great weight standard." *Hilton v. Dep't of Natural Res.*, 2006 WI 84, ¶ 17, 293 Wis. 2d 1, 717 N.W.2d 166 (even if there is more than one proper interpretation of the statute, so long as the agency's interpretation is not erroneous, it must stand). Moreover, it is well settled that remedial legislation, as at issue here, must be construed broadly to effect its purpose. See *Racine Harley-Davidson, Inc.*, 2006 WI at ¶¶ 92-93.

## V. ARGUMENT

In determining whether to issue a permit to disturb a cataloged burial site, like the WMG, the controlling statutory language provides, in pertinent part, that:

[i]n making the determination, the division shall consider the interest of the public in addition to the interests of the parties. If any of the following classes of interest are represented in the hearing, the division shall weight the interests in the following order of priority:

- a. Direct kinship
- b. A cultural, tribal, or religious affiliation
- c. A scientific, environmental or educational purpose
- cm. Historical and aesthetic significance of the burial site
- d. land use
- e. a commercial purpose not related to land use which is consistent with the purposes of this section.
- f. any other interest which the board deems to be in the public interest.

Wis. Stat. § 157.70(5)(c)(2).

As demonstrated below, the ALJ properly weighed each of these factors. His decision was supported by substantial evidence in the record. Nothing more is at issue in this case.

**A. Wingra's Allegations Raise Questions of Fact Recast in an Attempt to Illicit a Less Deferential Standard of Review**

Wingra begins its "argument" by reasserting the standard of review it believes should be applied. Wingra Pet. at 37-45. Applicable standards of review are discussed *supra*. According to Wingra, DHA erroneously interpreted the statute by: (1) allowing for consideration of evidence related to effigy mounds generally as opposed to specifically related to the WMG; (2) imposing a heightened burden solely on the permit applicant; (3) mandating priority consideration of the public interest; and (4) creating an irrebutable presumption that the WMG contains human remains. Wingra Pet. at 39.

To the extent there is any inkling of support in the record for any of these allegations, the issue(s) raised go to the ALJ's consideration of the facts and evidence that were before him when making his determination. If the Court believes that Wingra raises legitimate issues of law, the applicable standard of review is set forth *supra*.

**B. The ALJ's Treatment of the WMG as a Burial Site Was Not a Violation of Law**

Wingra asserts that the WMG is an "effigy mound" that should not be subject to protection because the statute only protects "burial sites." Wingra Pet. at 45-48. That is, Wingra argues that the WMG should not have been placed on the catalog of burial sites because it did not contain human remains. Further, according to Wingra, this somehow equates to a misinterpretation of the statute by the ALJ. Whether or not the WMG was accurately cataloged as a burial site was, however, an issue that was beyond the scope of this instant action. The instant action was for a permit to disturb a cataloged burial site.

Whether or not the WMG contains human remains has no bearing on the balancing of statutory interests that the ALJ was mandated to perform in determining whether or not to issue Wingra a permit. *See, e.g.,* R 19:628-629 ("The consideration for the Director in deciding whether a site should be designated a catalogued burial site is whether human remains exist at the site. The consideration for the Division is whether, upon balancing the interests listed at Wis. Stat. 157.70(5)(c)2.a-f, a disturbance of the catalogued burial site should be allowed . . . The Division does not have authority to de-catalogue a burial site and has no expertise in making findings regarding the existence of human remains."); R 19:807-808 ("The Ward Mound Group is a cataloged burial site. The Division of Hearings and Appeals does not have authority to find that a site was improperly

catalogued as a burial site. The issue for the Division . . . is ‘whether the benefits to the permit applicant in disturbing the burial site or the land outweigh the benefits to all other persons shown on the registry under sub. (2)(e) to have an interest in not disturbing the burial site or the land.’”). This is dispositive of the issue. The Court need go no further. The ALJ properly determined that whether or not the WMG contains human remains was not at issue in the instant proceeding.<sup>3</sup>

Notwithstanding the foregoing, Wingra argues that the WMG should not have been catalogued as a “burial site” because it does not contain human remains – even though Wingra admittedly cannot demonstrate that the WMG does not contain human remains. Whether or not human remains are present in the WMG is an issue that was determined by the SHS when they catalogued the WMG in 1990. *See, gen.* R 19:624-630, 807-809. Wingra could, and should, have challenged that decision in 1990. It chose not to.<sup>4</sup>

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<sup>3</sup> The statistics and facts asserted by Wingra to support the proposition that the WMG should not be a burial site are wrong and/or misleading. The actual justification/evidence is discussed in greater detail in The Ho-Chunk Nation’s Response to Wingra’s Brief in Case No. 2498 at 19-25.

<sup>4</sup> Not only was this the wrong forum and proceeding within which to challenge cataloging, Wingra is, *inter alia*, estopped from re-litigating this issue in the context of seeking a permit to disturb the site. *See, e.g., Acharya v. AFSCME*, 146 Wis. 2d 693, 696-697, 432 N.W.2d 140, 142 (Ct. App. 1988) (“‘Estoppel by record’ is a rule which prevents a party from relitigating what was actually litigated – or which might have been litigated – in a former proceeding.”); *Menard, Inc. v. Liteway Lighting Products*, 2005 WI 98, ¶ 26, 282 Wis. 2d 582, 595-596, 698 N.W.2d 738, 745 (“Under the doctrine of claim preclusion a final judgment is conclusive in all subsequent actions between the same parties or their privies as to all matters which were litigated or which might have been litigated in former proceedings.”). These rules of estoppel are not limited to judicial

**C. The ALJ's Consideration of Evidence on a "Tribal Affiliation" Did Not Violate the Law**

Wingra next asserts that, "rather than require that SHS and the Ho-Chunk present evidence specific to the purported burial site at issue, DHA interpreted the statute to allow SHS and the Ho-Chunk to make a showing of interests in burial sites or effigy mounds generally." Wingra Pet. at 50, 48-58. Specifically, Wingra asserts that the "DHA's Decision [improperly] equates a finding of a purported affiliation with effigy mounds or the Four Lakes region generally with an affiliation with the WMG specifically." Wingra Pet. at 52. Again, this misstates the nature of the ALJ's finding as well as the facts at issue. The ALJ's finding, that the Ho-Chunk have a religious/cultural/tribal affiliation with the WMG, is supported by substantial evidence in the record – this, again, does not raise a question of statutory interpretation.

As an initial matter, Wingra is arguing (contrary to the scientific and factual support of even their own experts) that the expert testimony, evidence, and analysis applied to effigy mounds in the Four Lakes region, does not apply to the WMG – even though the WMG are effigy mounds in the Four Lakes region.<sup>5</sup> This defies the express reasoning of the ALJ's decision, logic, and generally accepted archeological practices. It is undisputed that the effigy mounds in the Four Lakes

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proceedings, but apply equally to administrative proceedings such as those at issue in the instant case. *See, Acharya*, 146 Wis. 2d at 696-697, 432 N.W.2d at 142.

region were built during the Late Woodland period by Native American peoples that inhabited the region during prehistoric times. R 19:1808. It is also undisputed that the WMG are effigy mounds that are located in the Four Lakes region that fall specifically into this category. *Id.* Evidence of an affiliation with all of the effigy mounds in the Four Lakes region necessarily includes an affiliation with the WMG effigy mounds.

Notwithstanding the foregoing, the evidence showed, and the ALJ found, that the Ho-Chunk had a direct cultural and religious affiliation with effigy mounds in the Four Lakes region, specifically including the WMG:

[t]he oral history of the Ho-Chunk claims a presence in the Four Lakes region since the beginning of time. The Ho-Chunk view the Four Lakes region as their ancestral land. Dennis Funmaker, a Ho-Chunk elder, testified that he considers all the Native American Peoples identified by archeologists as occupiers of the Four Lakes region as ancestors of the Ho-Chunk. Even if one discounts the Ho-Chunk oral history because of a lack of physical evidence to support their presence during the effigy mound building time period, **a cultural, tribal, and religious affiliation has developed between the Ho-Chunk and the WMG.**

R 19:1809 (emphasis added); *see, also, id.* at 1811 (“The Ho-Chunk have a legitimate tribal and religious affiliation with the WMG and an interest in preserving the site.”).

Mr. Funmaker, a tribal elder and member of the Ho-Chunk Traditional Court was certified as an expert in Ho-Chunk culture, religion, tribal history and

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<sup>5</sup> All of this evidence/analysis was provided specifically in the context of Wingra’s petition to disturb the WMG.

practice, at the hearing, without objection. *See* R 19:1766-1767. Mr. Funmaker also made clear that the WMG, specifically, was of cultural/religious/tribal significance to the Ho-Chunk people. According to Mr. Funmaker, in part:

Ms. Maki-Wallander: And based on your knowledge, would you say that the Ho-chunk people have a religious, cultural and tribal affiliation to all the effigy mounds in the Madison area, including the Ward Mound Group?

Mr. Funmaker: Yes. Like I said, I hate to keep repeating myself, . . .

R 19:1770. Further, according to Mr. Funmaker:

[t]his bird mound, it's one of our symbols, it's one of our religious symbols, our sky clan. They belong to that bird clan. And our chief clan, our chief is sitting back there and he belongs to that bird clan, the eagle clan, chief clan . . . Panthers are very sacred to us and so a lot of times we offer sacrifice, things, for the great spirit and east, west, sun, moon, things like that.

R 19:1769. Mr. Funmaker also testified, for example, that:

this desecration of this Ward Mound Group is horrendous, I mean to put it, there's a word that I can't think of right now but it's terrible. I don't know who thinks they can tear apart mounds, dig in there and take out things and . . . Evidently, I mean, like it was reported here that there was seven mounds and there's only two left. I mean, are people that greedy . . .

R 19:1770.

There is substantial and credible evidence in the record that supports the ALJ's finding, that the Ho-Chunk have a cultural/religious/tribal "affiliation" with the WMG.<sup>6</sup>

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<sup>6</sup> The statute actually anticipates protecting interests in categories or classes of burial sites. *E.g.*, Wis. Stat. § 157.70(2)(e) (Requiring the Director of the SHS to establish a registry of persons who are determined by the burial site preservation board to "have an interest in a cataloged burial site *or class of cataloged burial sites.*") (emphasis added).



**D. The ALJ Did Not Violate the Law When He Considered the Evidence Presented Regarding Historical/Scientific/Educational Values of the WMG**

Wingra restates the same argument it made above but places it in the context of the historical/scientific/educational factors identified in the statute. Wingra Pet. at 54-59. Thus, according to Wingra, “there was no showing of a scientific or educational value specific to the WMG . . . Likewise, DHA’s basis for finding a historical significance boils down to an improper decision to protect all effigy mounds. . .” Wingra Pet. at 55.

As a practical matter, the State is obligated to protect all effigy mounds if, as in this case, they are cataloged burial sites. Notwithstanding, what the ALJ actually found on the “historical significance” issue was as follows:

[t]he evidence indicates that the effigy mounds in the WMG were constructed between 1300 and 900 years ago by Native Americans. Effigy mounds are a feature unique to the Midwestern United States and were especially prevalent in southern Wisconsin. Archeologist estimate at one time there were between 15,000 and 20,000 effigy mounds. It is estimated that approximately twenty percent of those effigy mounds remain (testimony of Robert Birmingham, tr. p. 157). All remaining effigy mounds have historic significance as a link to Wisconsin’s prehistoric past. *There is no authority under which effigy mounds on private property are protected in general. Only effigy mounds that have been designated as cataloged burial sites have any legal protection from disturbance . . . the historical value of the WMG is significant and this interest weighs against permitting the disturbance.*

R 19:1812 (emphasis added). At the administrative hearing Society Government Assistance and Training Specialist Chip Brown, Society archaeologist Leslie Eisenberg, and former Wisconsin state archaeologist Robert Birmingham all

testified about the archaeological/scientific importance of the WMG. R. 19:1685-1758.

The ALJ's findings the scientific and educational value of the site were also supported by credible and substantial evidence in the record. A brief review of the ALJ's findings demonstrates that his analysis is well reasoned and thoughtful, and that his conclusions are based on substantial evidence. According to the ALJ:

... benefits of this interest is mixed. Scientific and educational purposes can be achieved by excavating the effigy mounds and studying them before the land beneath them is mined for sand and limestone. Undoubtedly some scientifically and educationally valuable information would be obtained by archeologically excavating the mounds. On the other hand, once the site is destroyed it is gone forever. There are also scientific and educational purposes that can be achieved by preserving the WMG. There is scientific and education value in being able to view an extant effigy mound. It is tempting to say that the scientific and educational purposes associated with preserving the mounds outweigh those of excavating them and studying the contents because the possibility of excavating the mounds will always exist and once the mounds are destroyed they are gone forever. However, the risk also exists that the mesa which has been created by mining all around the WMG will collapse and then opportunity to study the mounds by archeological excavation will be lost. No environmental purposes associated with the WMG is apparent. Overall, this interest weighs neither in favor of nor against permitting the disturbance of the WMG.

R 19:1812.

In other words, the ALJ's determination that, "overall, this interest weighs neither in favor or nor against permitting . . ." is based on a reasoned analysis and weighing of relevant factors. Whether or not the ALJ properly considered and

weighed the evidence regarding the historic/scientific/educational value of the WMG does not implicate any question of law.

**E. The ALJ Did Not Impose a “Heightened Burden” on Wingra**

Wingra claims that the “DHA declined to consider Wingra’s commercial purpose interest, stating it was too remote and speculative” and that this resulted in the imposition of a heightened burden. Wingra Pet. at 61, 59-65 In reality, the ALJ did not decline to consider this factor. Indeed, he specifically considered it as required by statute. Wingra just disagrees with the weight the ALJ gave the evidence. There is no evidence or indication of any “heightened burden” placed on Wingra. Wingra misstates the ALJ’s findings and takes words out of context to support its claim.

Wingra introduced testimony that the site could be used for residential purposes after the quarry was closed and reclaimed – in about 50 years. The ALJ considered this factor in his balancing. In his findings of fact, the ALJ discusses the testimony provided by Wingra’s expert on this issue:

[t]he useful remaining life of the Kampmeier Quarry is estimated at up to 50 years (testimony of Robert Shea, tr. p. 30). There is no reclamation plan in place for the site after quarrying activities end; however, Kevin Meicher, a real estate appraiser who testified on behalf of Wingra, testified that it is likely the site will be developed as a residential development with some commercial development mixed in (tr. p. 55). Mr. Meicher testified that a mesa with vertical walls over 100 feet tall will be detrimental to the development of the site. However, when the site is reclaimed, the quarry walls will need to be sloped for stability reasons. If no permit to disturb the WMG is issued and the site is left intact, the sides of the mesa that will exist could be sloped similarly.

R 19:1809.

Further, with regard to “a commercial purpose not related to land use,” the ALJ provided:

Kevin Meicher testified that the highest and best use of the Kampmeier Quarry site is as a sand and limestone quarry. There was no suggestion of any commercial purposes for the land on which the WMG is located other than as a quarry. The proposed use of the Kampmeier quarry after mining is complete is so remote and speculative that it is difficult to weigh this interest in any meaningful way. However, one would expect that a residential subdivision could be developed without disturbing the 10,000 square foot catalogued burial site. If for some unexpected reason that is not possible, a new application for a permit to disturb a catalogued burial site could be filed at that time.

R 19:1812.

In short, the ALJ considered the proposed use of the quarry after mining was complete and determined that residential development was “so remote and speculative that it [was] difficult to weigh this interest in any meaningful way.” He did not refuse to consider the proposed use because it was too “remote and speculative.” Wingra takes these words out of context in an effort to support an otherwise unsupportable version of the facts. Wingra Pet. at 61.<sup>7</sup>

Regardless of whether or not a permit to disturb the WMG is granted, the land will be used as a sand and limestone quarry for about the next 50 years, i.e.,

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<sup>7</sup> Wingra also asserts that “[r]ather than consider this interest, DHA instead speculated, without any support from the record, that ‘one would expect that a residential subdivision could be developed without disturbing’ the mesa” Wingra Pet. at 62. This language is, again, taken out of context and does not stand for the proposition for which it is cited. The ALJ, *inter alia*, did consider this factor. On this basis alone Wingra’s claim fails.

there is no other conceivable “commercial purpose not related to land use . . .” for the foreseeable future. The ALJ’s determination that, “[t]he proposed use of the Kampmeier quarry after mining is complete is so remote and speculative that it is difficult to weigh this interest in any meaningful way. . .” (*id*), is supported by credible evidence and conclusive on appeal. *See, Plevin*, 2003 WI App. at ¶ 11. The ALJ did not “exclude,” ignore, or “fail to consider” this evidence. Notwithstanding, Wingra asserts that “[w]hile the statute allows DHA to weigh the interests, and thus attribute less weight to interests that may not be as immediate, this is vastly different from completely writing off interests for which undisputed evidence was presented.” Wingra Pet. at 63-64. Here, the ALJ simply attributed less weight to this interest than Wingra would have liked.

**F. Neither the Priority Given to the “Public Interest,” Nor the Issue of Statutory Interpretation are Relevant to the Instant Proceeding**

Wingra argues that “DHA failed to follow the legislative mandate to consider the public interest as the first priority in applying the Burial Sites Preservation statute.” Wingra Pet. at 66, 66-69. The ALJ found, in part, that Wingra’s allegations of public safety and public benefits of an active quarry did not support a finding of a measurable benefit to the public interest that would favor granting a permit to disturb the site, R 19:1813. Wingra simply disagrees with the ALJ’s findings of fact and attempts to cast that disagreement as a matter of

statutory interpretation. Wingra's argument, that the ALJ did not grant the permit because he failed to treat the "public interest" as "first priority," is wrong.

The statute at issue provides, in pertinent part, that:

. . . the [DHA] shall conduct a hearing to determine whether the benefits to the permit applicant in disturbing the burial site . . . outweigh the benefits to all other persons shown on the registry . . . to have an interest in not disturbing the burial site . . . *In making the determination, the division shall consider the interest of the public in addition to the interests of the parties.* If any of the following classes of interest are represented in the hearing, the division shall weight the interests in the following order of priority:

- a. Direct kinship
- b. A cultural, tribal, or religious affiliation
- c. A scientific, environmental or educational purpose
- cm. Historical and aesthetic significance of the burial site
- d. land use
- e. a commercial purpose not related to land use which is consistent with the purposes of this section.
- f. *any other interest which the board deems to be in the public interest.*

Wis. Stat. § 157.70(5)(c)2. (emphasis added)<sup>8</sup>

Accordingly, the ALJ determined that "[t]he issue for hearing is whether the benefits to the applicant in disturbing the burial site outweigh the benefits to all

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<sup>8</sup> The "public interest" is invoked in the first paragraph and in subparagraph f of the statute. There is no discussion of the priority to be given to the language in the first paragraph. Subparagraph f is to be given lowest priority. If "priority" and statutory interpretation was an issue, there is no support for Wingra's proposition that the "public interest" must be given highest priority based on the express language of the statute. In interpreting the statute it would, however, be important to note that the purpose of the statute is to catalog and protect "burial sites likely to be of archaeological interest or areas likely to contain burial sites." Wis. Stat. § 157.70(2)(b). Wis. Stat. § 157.70(5) is a remedial statute enacted to protect all classes of burial sites within the state. Remedial legislation must be construed broadly to effect its purpose. *See, Racine Harley-Davidson, Inc. v. State Div. of Hearings & Appeals*, 2006 WI 86, ¶¶ 92-93, 292 Wis. 2d 549, 717 N.W.2d 184.

other persons shown on the registry . . . to have an interest in not disturbing the burial site. The interest, if any, of the public will also be considered.” R 19:1806.

Further, according to the ALJ:

[t]he most reasonable interpretation of the statutory language is that all represented interests shall be considered and that the Division is required to balance the competing interest[s] and determine the fairest result. This is the most reasonable interpretation because if one accepted the Director’s interpretation, the word “weight” would be superfluous. It is also unlikely that the legislature would have intended that a relatively insignificant benefit of a high priority interest should take precedence over a substantial benefit to a lower priority interest. That said, the Division is required to consider interests in a specific order and give greater priority to the interests in the order they are listed.

R 19:1813. Thus, the ALJ expressly exercised discretion in determining the weight to be provided to the factors, including the public interest. As a result, the discussion of the “priority” given under the statute – as opposed to the weight accorded by the ALJ – is largely academic.

Moreover, the ALJ determined that there was no measurable “public interest” to be taken into account in his analysis. Thus, the weight and/or priority given to the “public interest” was not relevant to the determination. Specifically, with regard to the “public interest,” the ALJ found that, “[t]he SHS has not identified any other interests related to the WMG. Accordingly, this interest is not applicable.” R 19:1813. The ALJ further found that:

. . . in addition to the listed interests, Wis. Stat. § 15[7].70(5)(c)2 requires the “Division to consider the interest of the public in addition to the interests of the parties.” Wingra attempts to use this requirement to throw

in all the benefits of the uses for the sand and limestone that will be mined beneath the WMG into the balancing equation. For example, Wingra contends that the benefits to the public safety from the use of the materials in road construction and improvement projects should be considered. This might be reasonable if the materials were scarce and the road projects were placed in jeopardy if the materials beneath the WMG could not be mined, no evidence that that is the case was presented. Wingra did provide testimony to the effect that the Kampmeier Quarry is well located to provide materials for several large ongoing or planned road projects. However, there does not appear to be a need at this time to access the materials beneath the WMG for Wingra to supply material for these projects. Accordingly, there is no measurable benefit to the public interest in highway safety that would result from permit(ing) the disturbance of the WMG.

Similarly, Wingra claimed the jobs it provides to its employees as a potential public benefit if it is allowed to disturb the WMG. Again, there is no evidence that Wingra will be compelled to reduce its work force in the foreseeable future if it is not allowed to disturb the WMG site. The evidence is that sufficient material exists to keep Wingra's employees busy in the Kampmeier Quarry for a long time whether or not Wingra can mine the WMG site. The jobs Wingra provides should not be considered a public benefit flowing from the disturbance of the WMG.

R 19:1813.

Thus, there was no demonstrable public interest to weigh/prioritize – the priority applied to the public interest is inconsequential. Wingra did not demonstrate that “the benefits to the permit applicant in disturbing the burial site or the land outweigh the benefits to all other persons shown on the registry . . .” Wis. Stat. § 157.70(5)(c)2; R 19:1810. In making that determination, the ALJ expressly exercised discretion in “weighing” the interests, including the public interest. R 19:1813.<sup>9</sup>

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<sup>9</sup> 1985 Wisconsin Act 316(1)(f) expressly provides that “[e]xisting law on cemeteries reflects the value society places on preserving human burials sites, but the law does not



**G. The Fact that the ALJ Recognized the WMG as a Cataloged Burial Site was Not an Erroneous Interpretation of the Law**

The WMG is a cataloged burial site. This is a statement of fact that is beyond (reasonable) dispute. The ALJ found, *inter alia*, that consideration of whether the WMG was properly cataloged was beyond the scope of the analysis/balancing required to decide whether to grant Wingra a permit to disturb the WMG. Wingra argues that the DHA's refusal to consider whether the WMG was a burial site was an "erroneous interpretation of the Burial Sites Preservation statute. . ." Wingra Pet. at 71, 69-76.

As discussed *supra*: (1) Wingra should have challenged the initial placement of the WMG on the Catalogue of Burial Sites in 1990 but failed to do so; (2) there was a concurrent/parallel proceeding brought by Wingra to have the WMG removed from the Catalogue – which is also currently before this Court; and (3) the statute expressly lists the factors to be considered in determining whether to grant a permit to disturb a burial site. Whether or not the site contains human remains is not one of the factors identified in the statute.

As the ALJ pointed out:

[t]he Wisconsin Legislature expressly set forth the legal test the Division must employ to determine whether a permit should be granted to disturb a

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clearly provide equal and adequate protection or incentives to assure preservation of all human burial sites in this state. . ."; See, also, e.g., *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 272, 69 N.W.2d 217, 222 (1955), quoting *Day-Brite Lighting, Inc. v. State of Missouri*, 342 U.S. 421, 424 (1952) ("Public welfare" encompasses "spiritual as well as physical, aesthetic as well as monetary" values.).

burial site. Specifically, the Division shall conduct a hearing and determine whether the benefits to the permit applicant in disturbing the burial site outweigh the benefits to all other persons shown on the registry to have an interest in not disturbing the burial site within the confines of certain enumerated categories. . .

. . . Wingra disputes that any human remains are present in the WMG and is challenging the designation of the WMG as a catalogued burial by the SHS in another forum. For purposes of this proceeding, the site is presumed to contain human remains and to have been properly designated as a catalogued burial site. The issue is whether Wingra should be allowed to disturb a catalogued burial site. This determination requires a balancing of the competing statutory interests and assigning a weight to each interest that is present in this matter.

R 19:1810; *see, also, e.g.*, R 19:1803 (“During a prehearing conference conducted in this matter, the attorney representing Wingra reiterated its position that no human remains exist in the WMG and that the site was improperly catalogued as a burial site. The undersigned Administrative Law Judge questioned whether the Division has authority to de-catalogue a burial site. Subsequently, Wingra petitioned the SHS to have the site de-catalogued as a burial site.”).

Wingra’s argument – that the ALJ’s refusal to consider whether the WMG was properly catalogued in 1990 – was based on an erroneous interpretation of the statute – has no basis in law or fact.

## VI. CONCLUSION

Supreme Court review of this case should be dismissed as improvidently granted. There are no “special” or “important” reasons for review. The issues before the Court do not present any real or significant questions of federal or state

law or lead to developing, clarifying, or harmonizing the law. *See, Halbman v. Barrock*, 378 Wis.2d 17, 20-21, 902 N.W.2d 248, 249 (2017), *citing*, Wis. Stat. § 809.62(1r). Further review by this Court and publication of an opinion would not serve any purpose. In the alternative, this Court should affirm the Court of Appeals decision upholding agency action.

The ALJ assigned to hear this matter addressed each of the factors enumerated in Wis. Stat. § 157.70(5)(c). In light of that analysis, the ALJ determined that Wingra failed to demonstrate, by a preponderance of the evidence, that the requisite factors weighed in favor of the permit. R 19:1810. As a result, the ALJ denied Wingra's permit application. R 19:1816-1817. Wingra's narrative of grievances arising out of alleged administrative missteps with far reaching legal ramifications has no reasonable basis in law or fact. Wingra simply disagrees with the ALJ's weighing of evidence and factual findings. *Cf., e.g.*, Wingra Pet. at 1 ("The court of appeals did not address the proper level of deference because it recharacterized Wingra's legal question as a factual issue, to which it applied the more lenient substantial evidence test."). This Court need only review the ALJ's decision to see that it is well reasoned, supported by substantial evidence in the record, and consistent with the ALJ's mandate in the instant case.

Respectfully Submitted on this 8<sup>th</sup> day of March, 2018.

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SUPREME COURT OF WISCONSIN

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Wingra Redi-Mix, Inc. d/b/a Wingra Stone Company,  
Petitioner-Respondent-Cross-Appellant-Petitioner,

v. Appeal Nos. 2015AP001632  
2015AP001844

State Historical Society of Wisconsin,  
Respondent-Appellant-Cross-Respondent,

Ho-Chunk Nation,  
Intervenor-Co-Appellant-Cross-Respondent.

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FORM AND LENGTH CERTIFICATION

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I hereby certify this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) for a brief and appendix produced with proportional serif font. The length of this brief is 8,320 words.

Dated this 8<sup>th</sup> day of March, 2018

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CERTIFICATE OF COMPLIANCE

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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, 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 certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 8<sup>th</sup> day of March, 2018.

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