

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 31, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2014AP2498**

**Cir. Ct. No. 2013CV1180**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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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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APPEAL from an order of the circuit court for Dane County:  
ELLEN K. BERZ, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. This appeal concerns Wisconsin’s Burial Sites Preservation statute, WIS. STAT. § 157.70 (2015-16),<sup>1</sup> which requires the Director of the State Historical Society to “identify and record in a catalog burial sites in this state and ... sufficient contiguous land necessary to protect the burial site from disturbance.” Pursuant to § 157.70(2)(a), the Director added Native American effigy mounds referred to as the Ward Mound Group (the Ward Mounds) to the catalog in 1991. In its present condition, the Ward Mounds consist of a full effigy mound of a bird and a partial effigy mound of a canine. The Ward Mounds are on three acres owned by the Wingra Stone Company, formerly known as Wingra Redi-Mix, Inc., which petitioned the Director in 2010 to remove the Ward Mounds from the catalog pursuant to WIS. ADMIN. CODE § HS 2.03(6). Wingra Stone appealed the Director’s decision to the Burial Sites Preservation Board, which affirmed and adopted in whole the Director’s decision, and the circuit court affirmed the Board. Wingra Stone appeals. For the reasons that follow, we affirm the circuit court’s order affirming the Board’s decision.

## BACKGROUND

¶2 In 1914, the Ward Mounds were identified on what is now Wingra Stone’s property. Wingra Stone operates a sand and gravel quarry on that property. The Ward Mounds sit on three acres of that property.

¶3 In 1985, the Wisconsin legislature enacted 1985 Wis. Act 316, creating WIS. STAT. § 157.70, the Burial Sites Preservation statute, which requires the Director of the State Historical Society to “identify and record” known burial

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

sites in a catalog, thereby protecting the sites from disruption. WIS. STAT. § 157.70(2)(a). The Director may add burial sites to the catalog based on physical evidence, historical documentation, oral histories, and other information submitted to the Director. WIS. ADMIN. CODE § HS 2.03(2).

¶4 On April 18, 1990, the Dane County Indian Mounds Identification Project located a bird effigy and a partial canine effigy, referred to here as the Ward Mounds, on Wingra Stone's property. Project employees then met with the owner of Wingra Stone and informed him of the Ward Mounds and explained the cataloging process. The State Historical Society subsequently surveyed the Ward Mounds and a survey map identified the two mounds as a bird effigy and part of a canine effigy near Wingra Stone's gravel pit. A note on the survey map indicated that the Ward Mounds were endangered because of Wingra Stone's sand and gravel mining activities.

¶5 The Director of the State Historical Society signed a Notice of Location of Cataloged Burial Site regarding the Ward Mounds in December 1990, recorded the Notice in February 1991, and, pursuant to WIS. STAT. § 157.70(2), mailed a copy of the Notice to Wingra Stone in March 1991. The Notice included a cover letter from the Director, explaining that the Ward Mounds were now included in the Catalog and listing the statutes and regulations that apply to cataloging protected historical burial sites. Wingra Stone did not challenge the cataloging of the Ward Mounds at the time they were cataloged in 1991.

¶6 In September 2010, Wingra Stone sent a letter to the Director requesting that the Ward Mounds be removed from the burial sites catalog.<sup>2</sup> In that letter, Wingra Stone asserted that “[t]here is no definitive evidence that human remains have been buried in any of the mounds.”

¶7 On January 21, 2011, Wingra Stone submitted a petition to the Director seeking removal of the Ward Mounds from the catalog of burial sites, pursuant to WIS. ADMIN. CODE § HS 2.03(6). In its petition, Wingra Stone alleged as follows: (1) the Ward Mounds were cataloged in 1991 with no evidence of human remains, and the Director did not offer Wingra Stone an opportunity to appeal the Director’s decision to catalog the mounds, in violation of Wingra Stone’s right to due process; (2) effigy mounds “are understood to have functioned as ceremonial locations and only sometimes as burial sites”; and (3) a 1998 investigation on behalf of the Ho-Chunk Nation using “ground penetrating radar” identified only “one or more anomalies within the portions of one of the mound remnants,” which were “not dispositive of the presence of human remains.”

¶8 The Ho-Chunk Nation was permitted to join the proceedings as an interested party,<sup>3</sup> and opposed Wingra Stone’s removal petition. The Nation filed

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<sup>2</sup> The same letter requested, in the alternative, permission to disturb the mounds for purposes of excavating the quarry. The Director referred Wingra Stone’s request to disturb the Ward Mounds to the Division of Hearings and Appeals, which held a contested case hearing on Wingra Stone’s petition to disturb the Ward Mounds. The petition to disturb case is before us on a separate appeal and cross-appeal in case Nos. 2015AP1632 and 2015AP1844, respectively. We decide that companion appeal this same day.

<sup>3</sup> The Ho-Chunk Nation filed a separate response brief opposing Wingra Stone’s appeal of the Board’s decision denying Wingra Stone’s removal petition. Because the Board’s brief raises essentially the same arguments as the Ho-Chunk Nation’s brief, we will address the Board’s arguments only, with the exception of the Ho-Chunk Nation’s request for reasonable attorney fees and costs on frivolous grounds.

a brief with the Director opposing the petition on three grounds, one of which was that the “Site is located in the heart of the ancestral homelands of the Ho-Chunk people and is revered by them as a sacred location with which they claim a cultural, tribal, and religious affiliation.”

¶9 The Director denied the petition in a “Final Decision.” Wingra Stone appealed the Director’s decision to the Board. The Board received briefs from the parties, held a contested hearing, and reviewed the Final Decision. The Board affirmed the Director’s Final Decision and adopted it as its own. Wingra Stone sought judicial review in the circuit court pursuant to WIS. STAT. ch. 227, and the court affirmed the Board’s decision. Wingra Stone appeals.

## DISCUSSION

¶10 On appeal, Wingra Stone challenges the decision of the Board denying Wingra Stone’s petition to remove the Ward Mounds from the Catalog of Human Burial Sites. Wingra Stone brings this appeal under WIS. STAT. ch. 227. Accordingly, we are required to affirm the Board’s decision unless we find “a ground for setting aside, modifying, remanding or ordering agency action.” WIS. STAT. § 227.57(2).

¶11 In reviewing an administrative agency’s decision under WIS. STAT. ch. 227, “we review the decision of the administrative agency and not the decision of the circuit court.” *Plevin v. DOT*, 2003 WI App 211, ¶11, 267 Wis. 2d 281, 671 N.W.2d 355. We must set aside or remand an administrative agency’s decision if it is based on findings of fact that are not supported by substantial evidence in the record. WIS. STAT. § 227.57(6). We will uphold the agency’s factual findings if they are reasonable. *Kitten v. DWD*, 2002 WI 54, ¶5, 252 Wis. 2d 561, 644 N.W.2d 649.

¶12 The procedure for removing a site from the catalog is provided in the administrative code. “If evidence is ever presented to the director to indicate that a cataloged burial site does not contain human remains,” the director must provide notice to interested parties and give sixty days for them to respond to the new evidence. WIS. ADMIN. CODE § HS 2.03(6)(a). “After 60 days, if the director decides that there is *sufficient evidence* to indicate that a cataloged site does not contain any burials, the director shall ... [r]emove the site from the catalog.” § HS 2.03(6)(b)1. (emphasis added).

¶13 Wingra Stone, as the moving party seeking a change in the status quo by petitioning to have the Ward Mounds removed from the burial sites catalog, has the burden of proving that removal is warranted on the ground that the “site does not contain human remains.” WIS. ADMIN. CODE § HS 2.03(6); *State v. West*, 2011 WI 83, ¶65, 336 Wis. 2d 578, 800 N.W.2d 929.

¶14 The parties’ briefs on appeal mostly speak in terms of the propriety of the Director’s decision. However, we clarify that it is the Board’s decision that is under review. Here, the Board held a contested hearing and issued a decision that affirmed and adopted in full the Director’s final decision. Thus, moving forward, we mostly reference the Board’s decision in our discussion. We sometimes reference the Director’s actions, but only to the extent that such actions are those of the Director alone, and not the Board’s by adoption.

¶15 Before moving on to the merits, we provide one further clarification. Under WIS. ADMIN. CODE § HS 2.03(6)(a), the limited issue is whether the Board erred in concluding that Wingra Stone failed to provide sufficient evidence that the Ward Mounds do not contain human remains. On appeal, some of Wingra Stone’s arguments are confusing because they appear to be directed at the propriety of the

original cataloging decision. For example, Wingra Stone argues that the Board incorrectly determined that the Board lacks the authority to reconsider a prior cataloging decision. However, Wingra Stone does not challenge the original cataloging, nor could it at this late date. Rather, the issue here is whether the Board properly denied Wingra Stone's petition for removal from the catalog. Accordingly, we address Wingra Stone's various arguments only to the extent that they might support an attack on the Board's rejection of the removal petition.

¶16 As we have indicated, the Board's inquiry under WIS. ADMIN. CODE § HS 2.03(6)(a) is limited to determining whether a person seeking removal of a burial site from the catalog has presented sufficient evidence that there are no human remains in the burial site. And, as we have explained, on that question, Wingra Stone had the burden of proof.

¶17 On appeal, Wingra Stone argues that the Board unreasonably concluded that Wingra Stone did not present, in the words of the administrative code, "sufficient evidence to indicate that a cataloged site does not contain any burials," that is, human remains. Wingra Stone also make a series of arguments that attempt to recast its principal argument in alternative terms.

¶18 We first explain why the record shows that Wingra Stone failed to present sufficient evidence that the Ward Mounds do not contain human remains and why we conclude that substantial evidence supports the Board's denial of Wingra Stone's removal petition. We next address and reject Wingra Stone's arguments in support of its position that it presented sufficient evidence to support its petition for removal. We then address Wingra Stone's alternative arguments challenging the Board's decision.

1. *There was Substantial Evidence to Support the Board's Decision*

¶19 The Board considered the following evidence: (1) a report prepared by Amy Rosebrough, Ph.D., an archaeologist for the State Historical Society; (2) a report from Wingra Stone's expert witness, Professor Dante Fratta, a geologist with the University of Wisconsin, and two affidavits from him with attachments; (3) historical evidence that Wingra Stone claimed "establishes that the Ward Mound Group is not a burial site"; and, (4) historical and academic literature on the topic of effigy mounds. Based on our review of the Board's decision, we conclude that the Board did not err in concluding that Wingra Stone failed to present sufficient evidence to establish that the Ward Mounds do not contain human remains. We turn first to the report by Dr. Rosebrough.

¶20 Dr. Rosebrough's report discusses statistical data from a Minnesota published archaeological study; she also conducted her own review of the State Historical Society's records from prior archaeological excavations of Indian mound sites in Wisconsin. The Board found that, based on the data contained in Rosebrough's report from the studies and records of excavated Indian mound sites in Minnesota and Wisconsin, "most effigy mounds are burial sites." More specifically, the Board found that, based on the data in Rosebrough's report, "in the absence of contravening evidence, prehistoric Indian mounds—including effigy mounds [as in this case]—are properly considered to be human burial sites." The Board then concluded that the evidence presented by Wingra Stone did not provide sufficient "contravening" evidence to establish that the Ward Mounds do not contain human remains. We now turn our attention to the evidence presented by Wingra Stone.



¶21 Wingra Stone presented a report by Professor Fratta (the Fratta report), two affidavits from Professor Fratta, and historical literature on the topic at issue.

¶22 The Board considered first the site-specific evidence presented by Wingra Stone, comprising of a report by Professor Fratta, and averments by Professor Fratta in two affidavits submitted with his report. Professor Fratta conducted a ground penetrating radar investigation of a cross-section of the “body” of the bird effigy and a cross-section passing through one of the wings of the bird, and identified only three “anomalies” in the two cross-sections. In his second affidavit, Professor Fratta averred that “[t]he nature of the located anomalies [detected by radar] could not be established from the [radar]’s survey’s data alone,” meaning that the results were inconclusive. For that reason, Professor Fratta conducted a magnetic survey along the same cross-sections of the bird effigy, which indicated that the three anomalies had ferromagnetic properties that Professor Fratta concluded “do not match magnetic signatures typically associated with simply human ... remains.” Dr. Fratta’s report acknowledged that the “magnetic signatures, in an archaeological application, could signal the presence of old fire pits.”

¶23 The Board first considered observations in the Fratta report that “magnetic signatures, in an archaeological application, could signal the presence of old fire pits.” From this and academic research<sup>4</sup> by the Director on the topic,

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<sup>4</sup> Samuel Barrett and Ernest Hawkes, *The Kratz Creek Mound Group: A Study in Wisconsin Indian Mounds*, BULLETIN OF THE PUBLIC MUSEUM OF THE CITY OF MILWAUKEE, 3(1) (1919), Warren Wittry and E. G. Bruder, *Salvage Operations at the Kolterman Mound Group*, THE WISCONSIN ARCHAEOLOGIST 36(1), 3-12 (1955), and W. C. McKern, *The Neale and McClaughry Mound Groups*, BULLETIN OF THE PUBLIC MUSEUM OF THE CITY OF MILWAUKEE, 3(3) (1928).

the Board pointed out that old fire pits are often found in effigy mounds “in direct association with or in close proximity to human remains.” In other words, nothing in the Fratta Report contradicts the possibility that there are old fire pits *and* human remains in the Ward Mounds, which is a common occurrence in Indian burial mounds according to the literature cited by the Director. On the topic of magnetic signatures, the Board also observed that the Fratta report did not say that the “magnetic signatures are inconsistent with the presence of human remains.”

¶24 The Board then turned its attention to two academic papers that Professor Fratta relied on to support his conclusion that the Ward Mounds do not contain human remains. The Board focused on Professor Fratta’s second affidavit, where he averred that “GPR anomalies representative of human remains appear as hyperbola-showing point reflectors if present,” and he did not find reflectors “across the wings of the bird effigy.” In other words, according to Professor Fratta, because the ground penetrating radar did not find reflectors “across the wings of the bird effigy,” there is no evidence that the bird effigy mound contains human remains. In support, Professor Fratta relied on two academic articles on the topic: P.S. Miller, *Disturbances in the Soil: Finding Buried Bodies and Other Evidence Using Ground Penetrating Radar*, JOURNAL OF FORENSIC SCIENCES 41(4), 648-52 (1996), and W.E. Whittaker and G.R. Storey, *Ground-Penetrating Radar Survey of the Sny Magill Mound Group, Effigy Mounds National Monument, Iowa*, GEOARCHAEOLOGY: AN INTERNATIONAL JOURNAL, 23(4), 474-99 (2008).

¶25 The Board was not persuaded by the significance that Professor Fratta attached to the above observations, noting that Professor Fratta did not demonstrate expertise in “the use of geophysical analysis in archaeological applications.” The Board also rejected Professor Fratta’s reliance on the Miller

article because the “article does not discuss the efficacy of [ground penetrating radar] in detecting human remains of early civilizations.” On the contrary, the Board pointed to the abstract of the article, which states, “[ground penetrating radar] does not usually provide direct information that there is a body or other specific object beneath the ground ....” The Board noted that the focus of the Miller paper is the use of ground penetrating radar to detect *recent* soil disturbances and that there is no evidence in the effigy mounds in this case of any recent soil disturbances.

¶26 The Board was also critical of Professor Fratta’s reliance on the Whittaker and Storey article because the article does not support the professor’s conclusions. Rather, the article concludes to the contrary, stating, “[ground penetrating radar] cannot yet answer every question about a mound, such as the presence or absence of human remains.”

¶27 The analysis provided by the Director and adopted by the Board identifies crucial flaws in Professor Fratta’s expert opinion: (1) ground penetrating radar is not effective at detecting human remains in prehistoric burial sites; (2) even assuming the magnetometer data reveals the three radar anomalies indicating human activity, rather than human remains, such activity is not inconsistent with the presence of human remains; and (3) the technology Professor Fratta used in his investigation of the mounds was not developed for the purpose of discovering human remains.

¶28 Turning to the historical literature Wingra Stone relied on, Wingra Stone represented to the Director that the literature indicates that animal effigy

mounds were used as ceremonial locations and only sometimes as burial sites, whereas conical mounds were used often as burial sites.<sup>5</sup> The Board reviewed this literature and pointed out that the authors cited by Wingra Stone clearly state the opposite, namely that “[m]ost effigy mounds contain human burials.” Based on its reading of that literature, the Board concluded that “historical literature does not establish that the catalogued Site contains no human remains.”

¶29 We conclude that there was substantial evidence to support the Board’s conclusion that Wingra Stone failed to provide sufficient evidence that the Ward Mounds do not contain human remains.

## 2. *Wingra Stone’s Arguments*

¶30 Wingra Stone argues that the Board ignored Wingra Stone’s evidence and unfairly weighed the evidence for and against removal. This argument is meritless. The Board’s decision shows a careful, thorough, and detailed analysis of all the evidence presented by Wingra Stone. Indeed, as the above recitation of the evidence the Board considered shows, it engaged in a comprehensive analysis of Wingra Stone’s on-site evidence and the historical and academic literature Wingra Stone argued supported its removal petition.

## 3. *Wingra Stone’s Alternative Arguments*

¶31 Alternatively, Wingra Stone recasts its challenge to the Board’s decision as unsupported by substantial evidence under a variety of separate guises, none of which provides a basis for us to alter our rejection of its challenge.

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<sup>5</sup> R. A. BIRMINGHAM & L. E. EISENBERG, INDIAN MOUNDS OF WISCONSIN 5, 54 (2000).

¶32 Wingra Stone begins by arguing that the Board erred by applying an incorrect “statutory standard.” More specifically, Wingra Stone asserts that the Board imposed an incorrect “heightened” burden of proof on Wingra Stone by requiring affirmative proof that the Ward Mounds do not contain human remains. However, the regulation itself imposes on Wingra Stone the burden of presenting “sufficient evidence to indicate that a cataloged site does not contain any burials” or “human remains.” WIS. ADMIN. CODE § HS 2.03(6)(a), (b). The Board simply applied the standard found in the code.

¶33 Wingra Stone continues by arguing that the standard set by the administrative code is impossible to meet. We understand Wingra Stone to argue that it is impossible to prove that human remains are not present in the Ward Mounds without excavating, but that the Board has denied Ward Stone from using this method. This argument erroneously presupposes that the statute and related code provisions must create a process that allows some sort of definitive analysis of an effigy mound, including excavation, for the purpose of detecting the presence or absence of human remains. However, the very purpose of cataloging is the prevention of disruption, and therefore, it is plainly reasonable to place restrictions on excavation.

¶34 Wingra Stone next argues that the Board applied this provision so as to violate its substantive due process rights. More specifically, Wingra Stone argues that the Board’s application of the provision does not advance a government interest and is arbitrary and capricious because its decision will preserve some effigy mounds that do not contain human remains. This argument, like the last, flounders because Wingra Stone does not demonstrate why, once cataloged, it is unreasonable to put a high burden on a party seeking removal in order to protect an identified effigy mound burial site.

¶35 Alternatively, and finally, Wingra Stone argues that the “high” standard set by WIS. ADMIN. CODE § HS 2.03(6) is void on vagueness grounds, because it “does not provide objective standards” for the Board to apply to the evidence presented by a petitioner for removal. However, Wingra Stone does not explain how it is that the required “objective standards” are not provided by the “substantial evidence” standard set forth in WIS. STAT. § 227.57(6). This argument by Wingra Stone is an assertion, not a developed argument.<sup>6</sup>

### CONCLUSION

¶36 In summary, we conclude that Wingra Stone’s challenge to the initial 1991 decision is not properly before us and therefore we do not address arguments that bear on that topic. We also conclude that there was substantial evidence to support the Board’s decision that the Ward Mounds do contain human remains, and reject Wingra Stone’s arguments to the contrary. As for the Ho-Chunk Nation’s request for an award of reasonable attorney fees and costs under WIS. STAT. § 809.25(3), we deny the request. We therefore affirm the circuit court’s decision affirming the decision of the Board.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

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<sup>6</sup> The Ho-Chunk Nation, participating as an interested party under WIS. ADMIN. CODE § HS 2.03(6), requests an award of reasonable attorney fees and costs it incurred in defending this appeal on the ground that this appeal is frivolous, pursuant to WIS. STAT. § 809.25(3). However, the Ho-Chunk Nation failed to comply with that statute, which requires that a party file a motion with the court “no later” than the filing of that party’s appellate brief. WIS. STAT. § 809.25(3); *see also Howell v. Denomie*, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621. The Ho-Chunk Nation failed to file a motion. Instead, it solely makes its frivolous appeal argument in its appellate brief. We lack the authority to address the merits of the request and deny it on that basis.



