



## WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

**2017 Wisconsin Act 222**  
[2017 Assembly Bill 118]

**Preservation of and  
Disturbances to Burial Sites**

2017 Wisconsin Act 222 makes various changes to the burial sites preservation law. The legislation was recommended for introduction by the Joint Legislative Council's Study Committee on the Preservation of Burial Sites. Key provisions of the Act are summarized below.

### **PROCEDURE AND EVIDENCE FOR RECORDING A SITE IN A CATALOG**

The Act specifies types of evidence that the director of the Wisconsin Historical Society (WHS) must consider when determining whether to record a burial site in a catalog and clarifies certain aspects of the WHS director's cataloging authority. Prior law directed the director to utilize a special inspection warrant procedure to identify burial sites and record such sites in a catalog. Prior law also directed the director to record sites that are likely to be of archaeological interest or areas likely to contain burial sites in the catalog. Prior law did not specify types of evidence that the director must consider when determining whether to record a site in the catalog.

The Act removes the directive to record sites that are likely to be of archaeological interest or areas likely to contain burial sites in a catalog. The Act amends the directive regarding the cataloging of burial sites to clarify that the director may, but is not required to, utilize a special inspection warrant when identifying and recording burial sites in a catalog. The Act also requires the director to consider the following types of evidence from any person when determining whether to record a site in the catalog: (1) physical evidence, as demonstrated by archaeological or written historical reports showing the presence of human remains or grave markers; (2) historical documentation; (3) oral depositions or affidavits; and (4) oral histories.

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This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature's Web site at: <http://www.legis.wisconsin.gov>.

## **PROCEDURE FOR CONTESTING A DECISION TO RECORD A SITE IN THE CATALOG**

The Act creates a new procedure that applies when a landowner wishes to contest the WHS director's decision to record a site in the catalog. At least 30 days prior to the date on which the director intends to record a site in the catalog, the director must notify the landowner that the site will be recorded in the catalog unless the owner requests a hearing before the Burial Sites Preservation Board. From the time of that notice and until all proceedings concerning whether to record a site in the catalog are concluded, no person may conduct any soil disturbance activity on the site or land, unless the director determines that the proposed activity will not disturb the burial site. Prior law, unaffected by the Act, contains a general prohibition against disturbances to all burial sites.

If the owner requests a hearing before the date on which the site is to be recorded in the catalog, the board must hold a hearing within 90 days of the hearing request. At the hearing, the director has the burden of proving that there is sufficient evidence to catalog the site, using types of evidence specified under the Act. Following a hearing, the board must issue a decision regarding whether sufficient evidence exists to record the site in the catalog. The owner shall have the right to a contested case hearing on the board's decision.

If a hearing to contest the decision to record the site in the catalog has been requested, the Act requires the director to physically inspect the land prior to recording a site in the catalog, if the director has not already done so.

## **SUFFICIENT CONTIGUOUS LAND SURROUNDING A BURIAL SITE**

The Act increases the minimum width of sufficient contiguous land that must be included around a burial site that is recorded in the catalog. Under prior law, "sufficient contiguous land" meant land that is at least five feet from any part of a burial site. The Act defines "sufficient contiguous land" to mean at least 10 feet from any part of a burial site, unless the director determines, based on the unique characteristics of the land, that a shorter distance is sufficient to protect the burial site from disturbance.

## **BURIAL SITES PRESERVATION BOARD COMPOSITION**

The Act modifies the method for selecting members of Indian tribes or bands to serve as members of the Burial Sites Preservation Board. Under prior law, three members of the board were selected from names submitted by the Great Lakes Inter-Tribal Council and the Menominee Tribe. Under the Act, those three members of the board are selected from names submitted by federally recognized Indian tribes or bands in this state.

## **SCOPE OF THE REGISTRY OF INTERESTED PERSONS**

The Act modifies the scope of the registry of persons interested in burial sites. Under prior law, the WHS director was to maintain a registry of persons with an interest in a cataloged burial site or class of cataloged burial sites. Under the Act, the registry includes persons with an interest in any burial site.

## **NOTICE TO INTERESTED PERSONS OF APPLICATION FOR PERMIT TO DISTURB**

The Act requires the WHS director, rather than an applicant as under prior law, to notify any interested person shown on the registry of a proposed disturbance and information regarding the person's right to a hearing.

## **ELECTRONIC SUBMISSION**

The Act requires WHS and the Burial Sites Preservation Board to accept, by any electronic means approved by the director, any application and other document required under the burial sites preservation law.

## **REAL ESTATE DISCLOSURE**

The Act requires that an owner of real property that includes one to four dwelling units disclose to a prospective buyer whether the owner is aware of one or more burial sites on the property. The Act adds this disclosure as a mandatory component of the "Real Estate Condition Report" used in residential real estate transactions. The Act directs the prospective buyer to contact WHS for further information regarding the presence, preservation, and potential disturbance of burial sites.

## **DEFINITION OF NOTIFY**

For purposes of the burial sites preservation law, the Act defines "notify" to mean "communicate by letter or by electronic mail or other electronic means approved by the director."

## **ANNUAL REPORT REQUIREMENT**

The Act creates a new annual report requirement. Under the Act, the WHS director must submit an annual report to the Legislature that contains all of the following information: (1) the director's current recommendations concerning burial sites on private property for acquisition by the state or public agencies; (2) the number of burial sites recorded in the catalog at the time the report is prepared; (3) a summary of disturbance activities authorized under the uncataloged site disturbance procedure; (4) a summary of applications received under the cataloged site disturbance procedure; (5) a summary of appeals to the Burial Sites Preservation Board to contest a decision to record a site in the catalog; (6) a summary of any other activities of the board; and (7) a summary of all violations of the burial sites preservation law and all penalties imposed as a result of those violations. The initial report must be submitted seven months after the Act takes effect.

## **PROCEDURE FOR REMOVAL FROM THE CATALOG**

The Act requires the WHS director, on the director's own initiative or in response to a request from the owner or another interested person, to propose that land be removed from the catalog, if the director determines that no burial site is present on the land because of any of the following: (1) naturally occurring changes to the landscape; (2) removal of human remains from

the burial site pursuant to removal and disposition procedures; or (3) newly discovered evidence that, if known at the time of the determination to record in the catalog, and taking into account the types of evidence required to be considered when determining whether to record a burial site or land in the catalog, would have resulted in a determination not to record in the catalog the burial site or land. If the director proposes to remove land from the catalog, the director must notify the owner, interested persons, county or local historical societies, the relevant municipality, and, if applicable, the person who submitted an application to have the site recorded. The director must provide those persons with an opportunity to comment.

Following the comment period, the director must review any comments, make appropriate modifications, issue a decision, and provide notice of the decision to the same persons who received the notice of the proposal. Those persons may appeal the director's decision within 30 days. Such appeals are heard by the Burial Sites Preservation Board. Any person who was notified and given the opportunity to comment has the right to a contested case hearing conducted by the Division of Hearings and Appeals regarding the board's decision. In the event that no appeal is filed, or the board upholds the director's decision and no contested case hearing is requested, or if a decision to remove land from the catalog is upheld by the division following a contested case hearing, the Act requires the director to remove the land from the catalog and submit a request to the relevant register of deeds to record a notice that the land has been removed from the catalog.

#### **TIMELINE FOR CERTAIN PROCEDURES CONCERNING UNCATALOGED SITES**

The Act requires the WHS director to immediately provide confirmation to a person who reports a disturbance or possible disturbance to a burial site that the director has received the report. Within 30 days after providing that confirmation, the director must notify an owner that the owner may or may not cause or permit a proposed activity. If the director requires the owner to either modify the activity or excavate the burial site, the director must notify the owner of the owner's right to cause or permit the activity within 30 days of determining that the owner has satisfied one of those requirements.

#### **DISPOSITION OF REMAINS DETERMINED TO BE OF TRIBAL DESCENT**

The Act requires the WHS director, or the Division of Hearings and Appeals under the procedure for cataloged burial sites, to request that the Wisconsin Inter-Tribal Repatriations Committee or its designee determine the appropriate disposition of any remains and objects that are determined by a qualified archaeologist to be of tribal descent. Prior law generally required the WHS director, or, in some cases, the division, to determine the appropriate disposition of human remains and objects removed from a burial site.

*Effective date:* Generally, 2017 Wisconsin Act 222 takes effect on August 1, 2018, except the Act provides an effective date of July 1, 2018, for the changes relating to the real estate disclosure form.

*Prepared by:* Amber Otis, Staff Attorney

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