

Staff Brief

Preservation of Burial Sites

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INTRODUCTION

The burial sites preservation law, codified in s. 157.70, Stats., provides procedures, requirements, and prohibitions relating to cataloging and disturbing burial sites in this state. The law was enacted in the 1985 Legislative Session and is implemented by the Wisconsin Historical Society (WHS). Although the law was initially prompted by concerns regarding a potential disturbance to a tribal burial ground, the law applies to any burial site in the state.

Current law generally prohibits disturbing any “burial site,” broadly defined to mean any place where human remains are buried. However, burial sites may be disturbed in certain circumstances. Generally, different standards and procedures apply to cataloged and uncataloged burial sites.

This Staff Brief provides background information, summarizes current law, and identifies certain considerations that may arise as the committee carries out its assignment. The Staff Brief includes the following parts:

- **Part I** provides pertinent background information, including an overview of the history of s. 157.70, Stats., and a brief summary of current events and pending litigation relating to burial sites.
- **Part II** summarizes current law relating to the preservation of burial sites.
- **Part III** identifies preliminary considerations that the committee may wish to consider as it deliberates potential modifications to current law.

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PART I - BACKGROUND

1985 WISCONSIN ACT 316

In 1984, the chairperson of the American Indian Study Committee¹ created the Subcommittee on Indian Burial Sites to study issues relating to the preservation and protection of Indian burial sites. The formation of the subcommittee was prompted by a situation involving a possible disturbance to a tribal burial ground on Madeline Island, but the subcommittee's deliberations had a more general focus.

At that time, state law provided certain protections for archeological sites located on state lands and generally prohibited the disinterment of human bodies in the context of cemeteries. However, the extent to which the law at that time applied to older or unmarked burial sites was not clear. Through its deliberations, the subcommittee noted the disparity between protections for well-defined cemeteries and unmarked burial sites. The subcommittee determined that some burial sites were subject to vandalism, looting, and inadvertent destruction. However, in addition to recognizing the need to protect burial sites, the subcommittee also recognized the interests of landowners in making use of their property.

The subcommittee developed draft legislation, which it characterized as striking a balance among all parties who may have an interest in a burial site, including descendants of the persons interred in the burial site, individuals who have a cultural or religious affiliation with persons interred in the burial site, landowners, appropriate commercial interests, and scientists.

After receiving the report and draft legislation from the subcommittee, the American Indian Study Committee reviewed and modified the draft legislation and recommended a final bill draft for introduction by the Joint Legislative Council. After relatively minor modification through the legislative process, the bill draft became 1985 Wisconsin Act 316.

The Act sets forth the legislative intent to do the following:

- Assure that all human burials be accorded equal treatment and respect for human dignity without reference to ethnic origins, cultural backgrounds or religious affiliations.
- Provide adequate protection for all interests related to any human burial site encountered during archaeological excavation, metallic or nonmetallic mining, construction, agricultural activities, environmental impact assessments or other ground-disturbing activities, without causing avoidable or undue delay or hardship to any person who has an interest in using the land on which the burial site is located.

¹ The American Indian Study Committee was the former name of the Legislative Council Special Committee on State-Tribal Relations, which is statutorily directed to study issues relating to American Indians and the American Indian tribes and bands in this state and develop specific recommendations and legislative proposals relating to these issues. [s. 13.83 (3), Stats.]

- Balance the interests of scientists, landowners, developers, and others with an interest in a burial site, including those with a kinship interest and those with a general cultural, tribal, or religious affiliation with the burial site.

[1983 Wis. Act 316, Sec. 1.]

The Act created s. 157.70, Stats., which set forth procedures for the preservation of human burial sites; created a burial sites preservation board attached to the historical society; established a tax exemption; and provided certain penalties and remedies.

Since its enactment, the Legislature has amended s. 157.70, Stats., in the following substantive ways: to allow for the charging of fees to cover the cost of excavation; to allow for the cataloging of “sufficient contiguous land” (defined as land that is within at least five feet from any part of a burial site) necessary to protect the burial site from disturbance; to add “historical and aesthetic significance” of a burial site as an interest for consideration when analyzing a permit request; to permit a cemetery authority to accept certain fees or remuneration from a funeral establishment; to address the opening and closing of burial places in a cemetery owned or operated by a cemetery authority; and to allow in certain circumstances a cemetery authority to rebury human remains without authorization.

RELATED FEDERAL LAW

In addition to Wisconsin’s law, federal law may apply to the preservation of burial sites in some circumstances. For example, the Native American Graves Protection and Repatriation Act (NAGRA) applies only to federal or tribal lands. [25 U.S.C. § 3001 et seq.] In light of the committee’s specific focus on s. 157.70, Stats., this Staff Brief focuses only on Wisconsin’s law.

BRIEF SUMMARY OF CURRENT EVENTS AND PENDING LITIGATION

Recent events have prompted both media coverage and litigation concerning the burial sites preservation law. For example, media coverage in the Milwaukee area focused on the disturbance and excavation of several thousand graves as a result of Froedtert Hospital’s expansion.

Other recent events have prompted litigation regarding the application of and procedures in s. 157.70, Stats. Three cases are currently pending before the Wisconsin Court of Appeals, two of which the court consolidated.

In *Wingra Redi-Mix, Inc. d/b/a Wingra Stone Company v. Burial Sites Preservation Board*, Case No. 14-AP-2498, the Wingra Redi-Mix, Inc. (“Wingra”), which operates a sand and gravel quarry, seeks reversal of WHS’s denial of Wingra’s petition to remove a burial site from the catalog. In *Wingra Redi-Mix, Inc. d/b/a Wingra Stone Company v. State Historical Society of Wisconsin*, Consolidated Case Nos. 15-AP-1632 and 15-AP-1844, the underlying issue concerns the denial of a permit to disturb a cataloged burial site. WHS, together with the Ho-Chunk Nation, seek reversal of the circuit court’s decision to reopen the record for additional testimony before the Division of Hearings and Appeals. Wingra seeks reversal of the division’s denial of the permit. The parties have submitted briefs in these appeals and are awaiting the court’s decisions.

PART II – OVERVIEW OF CURRENT LAW

Section 157.70, Stats., is the primary state statute governing the preservation of burial sites. Administrative rules promulgated by WHS pursuant to that statute and codified in chs. HS 1 and 2, Wis. Adm. Code, provide additional detail and procedures regarding the preservation of burial sites.

SCOPE AND KEY DEFINITIONS

Section 157.70, Stats., the burial sites preservation law, provides certain statutory protections for all burial sites in Wisconsin. The definition of “burial sites” is foundational for the scope of the law.

The burial site preservation law defines “burial site” as any place where human remains are buried. “Human remains” means any part of the body of a deceased person in any stage of decomposition. [s. 157.70 (1) (b) and (f), Stats.]

DUTIES OF THE WISCONSIN HISTORICAL SOCIETY DIRECTOR

WHS implements many aspects of the burial sites preservation law. In addition to the various other duties described below, the WHS Director, or his or her designee, must do all of the following:

- Identify and catalog burial sites likely to be of archaeological interest and areas likely to contain burial sites.
- Make recommendations concerning burial sites on private property for acquisition by the state or other public agencies to preserve the burial sites.
- Provide for and publicize a telephone service which allows any person in this state to call, without charge, the director to report a discovery or disturbance of a burial site.
- Establish a registry for any person who the Burial Sites Preservation Board determines has interest in a cataloged burial site or class of cataloged burial sites.
- Assist owners in identifying persons who must be notified of proposed disturbances to burial sites.
- Assist Indian tribes, state agencies, and other persons in any negotiation with any federal agency for the preservation of burial sites and human remains.
- Mediate certain disputes relating to disturbances and proposed disturbances of burial sites.
- Cause cataloged burial sites to be recorded by county registers of deeds.

[s. 157.70 (2), Stats.]

THE BURIAL SITES PRESERVATION BOARD

The Burial Sites Preservation Board, which is attached to WHS for administrative purposes, consists of the following nine members:

- Three members selected from a list of names submitted by the Wisconsin Archeological Survey who have professional qualifications in the fields of archeology, physical anthropology, history, or a related field.
- Three members who are members of federally recognized Indian tribes or bands in this state, selected from names submitted by the Great Lakes Inter-Tribal Council and the Menominee Tribe, who are knowledgeable in the field of tribal preservation planning, history, archaeology, or a related field or are elders, traditional persons or spiritual leaders of their tribes.
- The state archeologist and the state historic preservation officer (as nonvoting members).
- The WHS Director.

[s. 15.705 (1), Stats.]

The Burial Sites Preservation Board must meet every three months. It is required to make certain determinations relating to the procedures outlined below. In addition, the board must do all of the following:

- Determine which Indian tribes in the state have an interest in any cataloged burial sites or classes of cataloged burial sites, and notify the WHS Director of those interests for entry in the registry.
- Determine which applicants for entry in the registry have an interest in a cataloged burial site or class of cataloged burial sites.
- As it deems necessary, review certain determinations made by the WHS Director or an administrative law judge relating to the proposed disturbance of a cataloged burial site.
- As it deems appropriate, approve transfers of burial sites made by municipalities.

[s. 157.70 (2m), Stats.]

PROTECTION OF BURIAL SITES

Catalog of Burial Sites

As noted above, the WHS Director must identify and record burial sites likely to be of archaeological interest or areas likely to contain burial sites in a catalog. The director is also authorized to utilize a special inspection warrant to identify and record burial sites in the catalog. For sites that are not located in a platted cemetery, the cataloged area must include sufficient

contiguous land (defined to mean land that is within at least five feet from any part of a burial site). [s. 157.70 (2) (a) and (b), Stats.]

Administrative rules promulgated by WHS provide additional detail regarding the procedures for cataloging burial sites. They allow persons other than the director to request to add a burial site to the catalog. To apply, applicants must supply the following information to the director:

- The applicant's name and address and telephone number.
- The burial site owner's name and address and telephone number.
- Documentation of the burial site.
- A photographic print of the burial site and the accompanying negative to document the condition of the site at the time of the application.
- A town, range, and section description of the site's location.
- A sketch showing the known area of the site in relation to named roads, lakes, or rivers.
- A copy of the pertinent United States geological survey topographic quadrangle map or a plat noting the location of the burial site.

[s. HS 2.03 (1), Wis. Adm. Code.]

Proper documentation of the burial site may include: physical evidence, as demonstrated by archeological or written historical reports showing the presence of human bone or grave makers; adequate historical documentation; oral depositions, affidavits, or oral histories; or any additional information requested by the director. [s. HS 2.03 (2), Wis. Adm. Code.]

If an application is inaccurate, incomplete, or inadequate, the director must return the request to the applicant within 30 days of receipt with an explanation of the deficiencies. If the application is complete and accurate to the best of the director's knowledge, the director is required to enter the site into the state catalog of burial sites. [s. HS 2.03 (3), Wis. Adm. Code.]

A cataloged burial site may receive tax exempt status. [s. 70.11 (13), Stats.] The WHS rules specify the requirements for receiving the tax exemption. Specifically, before a person may claim the tax exemption, the director or person interested in cataloging the burial site must determine the specific boundaries of the burial site and prepare a plan map of such boundaries. The map must be tied to a legal point of reference, such as an existing property corner marker or an existing geodetic survey maker, or other such marker that can be relocated through reference to records of public land title and the official points of reference in the field. If prepared by a person other than the director, the person must submit the specific legal description of the site's boundaries to the director for review. If the director deems the legal description inaccurate, incomplete, or inadequate, the director must return it to the applicant within 30 days with an explanation of the deficiencies. If the legal description is complete and accurate to the best of the director's knowledge, the director shall record the burial site with the register of deeds in the county in which the site is located. [s. HS 2.03 (4), Wis. Adm. Code.]

The director must notify the applicant, owner, all registered persons for that burial site or class of burial sites, the local unit of government, and the relevant historical societies when a particular burial site has been cataloged and recorded with the county register of deeds. [s. HS 2.03 (5), Wis. Adm. Code.]

Procedure for Removing a Burial Site From the Catalog

Administrative rules promulgated by WHS provide for removal of burial sites from the catalog in certain circumstances. Under the rules, upon presentation of evidence indicating that a cataloged burial site does not contain human remains or all human remains have been removed in accordance with the statutory disturbance procedures, discussed below, the director must notify the owner, the applicant who initiated the catalog request, all persons on the registry for that burial site, county or local historical societies, and the local unit of government having jurisdiction over the burial site. These persons have 60 days within receipt of notification to respond to the director regarding the new evidence. [s. HS 2.03 (6) (a), Wis. Adm. Code.]

After 60 days, if the director decides that sufficient evidence indicates that the cataloged site does not contain any burials, the director must do all of the following: (1) remove the site from the catalog; (2) submit a request to the register of deeds to delete or cancel the documentation for a burial site on that property; and (3) notify the owner, the applicant who initiated the catalog request, all persons on the registry for that burial site, county or local historical societies, and the local unit of government of the decision to remove the burial site from the catalog. [s. HS 2.03 (6) (b), Wis. Adm. Code.]

Registry of Interested Persons

The registry of interested persons establishes those persons who have an interest in any particular cataloged burial site or class of cataloged burial sites. "Interest" means an interest based on any of the following: direct kinship; a cultural, tribal, or religious affiliation; a scientific, environmental or educational purpose; land use; a commercial purpose not related to land use which is consistent with the purposes of s. 157.70, Stats.; or any other interest which the board deems to be in the public interest. The WHS rules require a registry applicant to complete the appropriate form provided by the board, and include the location of the pertinent burial site or sites and documentation of the applicant's interest based upon the aforementioned qualifying categories. The board must review the application at its next quarterly meeting with notice to the applicant. Based on the documentation, the board determines by majority vote whether the applicant has an interest warranting registry membership. [s. 157.70 (1) (g), Stats., and s. HS 1.03 (1), (2), and (4), Wis. Adm. Code.]

The WHS rules specify that the director claims an interest in all burial sites under s. 157.70 (1) (g) 6., Stats., as the head of the agency representing the state's interest in preservation of the state's cultural heritage. [s. HS 2.04 (3), Wis. Adm. Code.]

Prohibition Against and Reporting of Disturbances to Burial Sites

Subject to limited exceptions (described below), no person may intentionally cause or permit the disturbance of a burial site or cataloged land contiguous to a cataloged burial site. [s. 157.70 (2r), Stats.]

With limited exceptions, any person must immediately report to the director if he or she knows or has reasonable grounds to believe that a burial site or land contiguous to a cataloged burial site is or may be disturbed. [s. 157.70 (3) (a), Stats.] Upon receiving notice, the director must determine whether or not the burial site is cataloged pursuant to s. 157.70 (2) (a), Stats. The director may authorize limited appropriate subsurface exploration to determine whether a property contains a burial site, provided there is reason to believe that a burial site may be present. [s. HS 2.04 (2), Wis. Adm. Code.]

Section 157.70, Stats., sets forth two separate procedures for obtaining authorization to disturb a burial site, depending on whether the burial site is cataloged or uncataloged.

Procedure for Obtaining Authorization to Disturb Uncataloged Burial Sites

Notice to Owners and Interested Persons

If a potential disturbance is reported for a uncataloged burial site, the director must immediately notify the owner of the burial site of the statutory procedure and related liabilities and penalties for lack of compliance. The director may, in his or her discretion, provide notice of the reporting to the board and any person who has or may have an interest in the burial site. No owner who has received notice may intentionally cause or permit any activity which would disturb the burial site without the director's authorization. [s. 157.70 (4) (a) and (b), Stats.]

Determination

Using information available concerning the burial site and the proposed activity, the director must determine whether the proposed activity will disturb the burial site and whether the registry shows that any person has an interest in the burial site. [s. 157.70 (4) (c) 1., Stats.]

If the director determines **either**: (1) the proposed activity will not disturb the burial site; **or** (2) the proposed activity will disturb a burial site in which no person is shown on the registry to have an interest, then the director must notify the owner of the owner's right to cause or permit the activity. [s. 157.70 (4) (c) 2., Stats.]

If the director determines that: (1) the proposed activity will disturb a burial site in which any other person who is not the owner is shown on the registry to have an interest; **and** (2) that interest is substantial, then the director must notify the owner that the owner may not cause or permit the proposed activity, unless the owner **either** changes the proposed activity so as not to disturb any burial site, or authorizes the director (or a qualified archaeologist, a defined term under the section) to excavate the burial site to remove and analyze any human remains and objects related to the burial. If the owner chooses excavation, the owner must allow reasonable time, beginning within 30 days of when ground conditions permit, for disposition. [s. 157.70 (4) (c) 3., Stats.]

Record and Report

If the director determines that the owner has satisfied the requirement to either change the proposed activity or authorize the director or a qualified archaeologist to excavate the burial site, the director shall notify the owner of the owner's right to cause or permit any activity consistent with either the excavation or the alternate proposed activity. If an excavation occurs, the director must enter as a record in the catalog all human remains and objects related to the burial that were not removed from the burial site. [s. 157.70 (4) (e), Stats.] If the human remains and objects related to the burial are left undisturbed, the director must record the burial site's location and enter it into the catalog. [s. HS 2.04 (4) (b), Wis. Adm. Code.]

Finally, for any determinations pursuant to the uncataloged procedure set forth above, the director must submit a written report to the board. [s. 157.70 (4) (f), Stats.]

Procedure for Obtaining Authorization to Disturb Cataloged Burial Sites

Application for Permit and Notice to Interested Persons

Without a permit from the director, no person may intentionally cause or allow any activity which might disturb a cataloged burial site or cataloged land contiguous to a cataloged burial site. [s. 157.70 (5) (a), Stats.]

To obtain a permit, an applicant must submit the following information to the director: the applicant's name and address; the nature and purpose of the disturbance; the names of the persons on the registry who have been notified; and proof of the notification to interested persons in the form of a certified mail receipt or in the form of other documentation accepted by the director. [s. HS 2.04 (5) (d), Wis. Adm. Code.]

Upon request, the director must send the applicant the names of all persons on the registry for the cataloged site or land on which the proposed activity may occur, as well as the forms to notify these persons of the applicant's request. This form must state the purpose of the disturbance, the interested person's right to request a hearing by the Division of Hearing and Appeals, the purpose of such hearing, and the consequences if no hearing is requested. [s. 157.70 (5) (b), Stats.; s. HS 2.04 (5) (a) and (b), Wis. Adm. Code.]

Procedure Without a Hearing

If no hearing is requested and the director deems a hearing unnecessary, the director determines whether to issue the permit. The director must grant the permit if the director determines 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 to have an interest in not disturbing the burial site or land. In making the determination, the director shall consider the public's interest in addition to any other interests. If the director determines that any of the following classes of interest are represented, the director must weigh the interests in the following order of priority:

- Direct kinship.
- A cultural, tribal, or religious affiliation.
- A scientific, environmental, or educational purpose.

- Historical and aesthetic significance of the burial site.
- Land use.
- A commercial purpose not related to land use which is consistent with the purposes of s. 157.70, Stats.
- Any other interest which the director deems to be in the public interest.

[s. 157.70 (5) (c) 1m., Stats.]

WHS rules require the director to decide whether to grant the permit within 30 days from the most recent date on which the director received certified letters sent by the applicant. [s. HS 2.04 (5) (e), Wis. Adm. Code.]

Procedure With a Hearing

Upon timely request from the applicant or any notified person, or if no such requests are made but the director determines that a hearing is necessary, the director must request the Division of Hearings and Appeals to conduct a hearing regarding whether the director should issue the permit. The division must schedule a hearing before an administrative law judge within 45 days of the director's request. [s. 157.70 (5) (c) 2., Stats., and s. HS 2.04 (5) (h), Wis. Adm. Code.]

Similar to the director's determination when no hearing is held, an administrative law judge must issue a determination in favor of granting the permit if it determines the benefits to the permit applicant in disturbing the burial site or the land outweigh the benefits to all persons shown on the registry to have an interest in not disturbing the burial site or the land. In making the determination, the judge must consider the public's interest in addition to any other interests. If any of the following classes of interest are represented, the division must weigh the interests in following order of priority:

- Direct kinship.
- A cultural, tribal, or religious affiliation.
- A scientific, environmental, or educational purpose.
- Historical and aesthetic significance of the burial site.
- Land use.
- A commercial purpose not related to land use which is consistent with the purposes of s. 157.70, Stats.
- Any other interest which the board deems to be in the public interest.

[s. 157.70 (5) (c) 2., Stats.]

The administrative law judge must make a decision within 30 days from the close of the hearing and submission of all documents and briefs. If the judge determines to grant a permit, then the judge may also determine the person to whom the human remains and objects related to the burial in the burial site should be transferred for analysis and reinterment or other appropriate

disposition when the burial site is disturbed. [s. 157.70 (5) (c) 2m., Stats., and s. HS 2.04 (5) (h), Wis. Adm. Code.]

Procedure After Determination by Director or Division

If the director (or an administrative law judge, if a hearing occurs) determines to grant a permit, the owner must authorize the director or a qualified archaeologist approved by the director to excavate the burial site to remove, within a reasonable time for disposition, any human remains and objects related to the burial in the burial site to be disturbed under the permit. Any permits issued may be subject to s. 157.111, Stats., which governs the opening and closing of burial places in a cemetery owned or operated by a cemetery authority, and may be subject to any other condition or exemption necessary to limit the disturbance of a burial site or to minimize any other burden on any person affected by granting the permit. [s. 157.70 (5) (c) 3. and 4., Stats.]

Any party in a hearing may appeal a determination by the director (or the administrative law judge) to the board within 15 business days of when the notice of the determination was mailed. On appeal, the board reviews the existing record and may not accept evidence that was not introduced at a previous hearing. Section HS 1.04, Wis. Adm. Code, sets forth the appellate procedure in greater detail, including form, notice, and answer requirements. [s. 157.70 (5) (c) 5., Stats., and s. HS 1.04 (1) and (6) (c), Wis. Adm. Code]

Disposition of Human Remains from a Burial Site

If human remains and objects related to the burial are removed pursuant to either the uncataloged or cataloged procedure, the director may not decide the final disposition of any excavated human remains and objects related to the burial until the remains, related objects, and other artifacts recovered in the course of the excavation have received appropriate analysis and the director has received a satisfactory report. Section HS 2.05, Wis. Adm. Code, sets forth the disposition procedure, including application and notice requirements. [s. HS 2.05 (1), Wis. Adm. Code.]

The director or, if applicable, the administrative law judge, must attempt to identify interested persons to whom the human remains and objects related to the burial should be transferred for analysis and reinterment. The director must notify any person in the registry with an interest in the analysis and reinterment or appropriate disposition of such human remains and objects. Upon receipt of a written application by any such person, the director must transfer the remains and objects to that applicant. [s. 157.70 (6) (a), Stats.]

If there is more than one applicant, the director must adhere to the following priority order in making the transfer: (1) direct kinship; (2) a cultural, tribal, or religious affiliation; (3) a scientific, environmental, or educational purpose; and (4) any other interest which the board deems to be in the public interest. If the director cannot identify a person with an interest in reinterment or other disposition, the director must provide for reinterment or other disposition in an appropriate manner. Any reinterment must be cataloged. Finally, the director must submit a written report of any disposition action taken by the director, which the board has the authority to review and modify. [s. 157.70 (6) (a) to (e), Stats.]

Burial Sites on Public Lands

Current law includes an additional protection for burial sites on publicly owned lands. A municipality may not transfer any burial site to any person who is not a municipality unless the transfer provides for preservation of the burial site from any disturbance by any person **and** is approved by the board. A municipality must strive to take positive action to preserve any burial site on land it owns through appropriate land use management including appropriate multiuse purposes such as nature preserves. For purposes of s. 157.70, Stats., “municipality” means numerous types of local government entities in addition to cities, towns, villages, counties, and includes the state. [s. 157.70 (6m), Stats.]

EXCEPTIONS TO OPEN RECORDS LAW

Section 157.70 includes several exceptions to Wisconsin’s Open Records Law. The following information is not subject to s. 19.35 (1), Stats.:

- Any information in the catalog related to the **location of any burial site**, the disclosure of which would be likely to result in the disturbance of the burial site or the cataloged land contiguous to the burial site. [s. 157.70 (2) (a), Stats.]
- Any information in the catalog related to the **location of any burial site likely to be of archaeological interest or of any area likely to contain a burial site**, the disclosure of which would be likely to result in the disturbance of the burial site or the cataloged land contiguous to a cataloged burial site. [s. 157.70 (2) (b), Stats.]
- Any **information in the registry related to the location of any burial site**, the disclosure of which would be likely to result in disturbance of the burial site. [s. 157.70 (2) (e), Stats.]
- Any part of a record from a hearing of which the location of a burial site is the subject of the testimony. Note that such part of the hearing must also be conducted in a session closed to the public. [s. 157.70 (5) (c) 1., Stats.]

ENFORCEMENT

The burial sites preservation law provides for a civil remedy and certain criminal penalties for violations of the law.

Civil Action

Current law authorizes any person to bring an action for an injunction to prevent further disturbance to the burial site (or cataloged land contiguous to the burial site). A person who is found to have intentionally disturbed a burial site without permission of the WHS Director is liable for attorney fees and damages or other appropriate relief to any person with an interest in preserving a burial site or reintering human remains in the burial site. [s. 157.70 (8), Stats.]

Investigation and Penalties

The burial sites preservation law requires the Attorney General or the relevant district attorney to aid in any investigation, inspection, hearing, or trial to enforce the burial sites preservation law, if requested to do so by the Burial Sites Preservation Board.

The law provides for civil forfeitures for violations of the law. The amounts of those forfeitures depend on the type of activity, as follows:

- Not less than \$100 nor more than \$1,000 for failing to report a disturbance to a burial site (or contiguous cataloged land).
- Not less than \$500 nor more than \$2,000 for intentional, unauthorized disturbance of an undedicated and uncataloged burial site for which the person has not received a notice from the WHS Director.
- Not less than \$1,000 nor more than \$10,000 for intentional, unauthorized disturbance of an uncataloged burial site that has been dedicated or for which the person has received notice from the WHS Director.
- Not less than \$1,000 nor more than \$10,000 for intentional, unauthorized disturbance of a cataloged burial site.

[s. 157.70 (10) (a) to (d), Stats.]

The law provides for special criminal penalties for disturbances done for purposes of commercial gain. Specifically, any person who disturbs a burial site for commercial gain may be fined not to exceed two times the gross value gain or two times the gross loss caused by the disturbance, whichever is greater, plus court costs and the costs of investigation and prosecution, reasonably incurred, or imprisoned for one year in the county jail, or both. [s. 157.70 (10) (e), Stats.]

PART III – ISSUES FOR CONSIDERATION

The study committee is directed to review the burial sites preservation law to determine whether the statute satisfies objectives articulated in 1985 Wisconsin Act 316, including adequately balancing and protecting various, specified types of interests in burial sites. The issues for consideration detailed below are intended to provide a starting point for the committee's deliberations.

SCOPE AND DEFINITIONS

One approach to determining whether various interests are adequately balanced or protected may be to assess whether the scope of the burial site preservation law is appropriately drawn. In doing so, the study committee may wish to consider whether certain defined terms should be modified or clarified.

As discussed above, "burial site" is currently defined to mean any place where human remains are buried. "Human remains" means any part of the body of a deceased person in any stage of decomposition. [s. 157.70 (1) (b) and (f), Stats.] The law does not further define "site" or "decomposition."

The study committee may wish to examine whether such additional definitions may be needed. For example, the study committee might consider whether the definition of "human remains" should be modified to clarify whether "any stage of decomposition" may include remains that originated as ash or have otherwise been reduced to small particles, and, if not, whether any alternative requirements or procedures should apply to a site in which human remains are fully decomposed but the site maintains sacred value or archeological interest.

Likewise, the study committee may wish to define the boundaries of a "site." According to WHS staff, the practice has been to treat a whole cemetery, rather than individual graves, as a single "burial site." Conversely, each individual tribal effigy mound, rather than associated groups of effigy mounds, is typically considered to constitute a single "burial site."

Alternatively, the committee may wish to consider whether the scope of the law should be clarified without modifying key definitions.

DISTINCTION BETWEEN UNCATALOGED AND CATALOGED BURIAL SITES

As the study committee considers whether current law adequately balances and protects various interests, it might note the importance of cataloging in the current statutory framework. Under current law, whether a burial site is cataloged dictates the applicable procedure and standard for disturbance. Current law directs the WHS Director to create a catalog of burial sites and authorizes the director to use a special inspection warrant for that purpose. Section 157.70, Stats., requires the director to identify and record in the catalog burial sites that are likely of archeological interest, areas likely to contain burial sites, and certain reinterment sites. As discussed, WHS

administrative rules also require the director to catalog burial sites for which a complete application has been submitted. Current law does not otherwise specify when cataloging must or should be done.

WHS staff report that WHS has utilized the special inspection warrant process to catalog burial sites very rarely. More typically, cataloging decisions are made in cooperation with the landowner. According to WHS staff, WHS likely would not catalog a burial site if the landowner is uninterested in having the burial site cataloged.

The study committee may wish to consider whether current law should be modified to further specify when burial sites must (or must not) be cataloged.

STANDARDS FOR DISTURBING A CATALOGED BURIAL SITE

The study committee may wish to consider whether the standards to be applied by the WHS director or an administrative law judge in evaluating whether a burial site may be disturbed should be modified or clarified. As described above, when reviewing an application for a permit to disturb a cataloged burial site, the WHS director (or an administrative law judge, if a hearing is required) must determine whether the benefits to the permit applicant outweigh benefits to all other persons shown on the registry to have an interest in not disturbing the burial site or land. In making that determination, the director must also consider the public's interest. If the director determines that certain classes of interest are represented, the director must weigh those interests in a specified order of priority, described above.

In addition to examining whether those standards and the order of priority adequately balance the various interests asserted, the study committee might consider whether current law is sufficiently clear regarding how those standards are to be applied. For example, the committee may wish to consider the manner in which the specific interests are evaluated and weighted when more than one interest is represented. The committee may also wish to consider whether the manner in which the general consideration of "the public interest" relates to the specific list of priorities for the various asserted interests should be clarified. Alternatively, or in addition, the study committee may wish to discuss whether the scope of "public interest" should be clarified in this context.

ADMINISTRATIVE RULES PROVISIONS

As discussed above, WHS' administrative rules add additional detail regarding the procedures and requirements set forth in s. 157.70, Stats. Although the committee's charge is focused on s. 157.70, Stats., the committee may wish to consider whether any of the administrative rules provisions should be codified or modified in the statute. As an example, part of the study committee's charge is to examine whether modifications to the burial sites procedures are necessary to protect all interests "without causing avoidable or undue delay or hardship to any person who has an interest in using the land." However, most of the timelines in the current process are set forth in the administrative rules rather than in s. 157.70, Stats. Thus, the committee may choose to examine whether various timelines set forth in the administrative rules should be

modified, or statutorily codified, to ensure that current procedures do not cause “avoidable or undue delay.”