



**WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM**

Memo No. 2

TO: MEMBERS OF THE STUDY COMMITTEE ON THE PRESERVATION OF BURIAL SITES

FROM: Amber Otis, Staff Attorney, and Anna Henning, Senior Staff Attorney

RE: Burial Preservation Laws in Wisconsin's Neighboring States

DATE: September 1, 2016

This Memo highlights select provisions from burial preservation laws enacted in Wisconsin's neighboring states. The following summaries are intended only as an overview, not an exhaustive explanation of each state's law.

MINNESOTA

Minnesota's burial preservation law applies to all human burials, human remains, or human burial grounds found on or in all public or private lands or waters within the state. Unauthorized disturbances or removal of human burial grounds are punishable as a felony. [Minn. Stat. § 307.08 (1), (2) (a) (2015).]

The state archaeologist must authenticate all burial grounds. Authentication is at the discretion of the state archaeologist upon request by an agency, a landowner, or other appropriate authority. Under Minnesota law, "burial ground" means a discrete location that is known to contain or has high potential to contain human remains based on physical evidence, historical records, or reliable informant accounts. [Minn. Stat. § 307.08 (3a) and (13) (f).]

Non-Indian burial grounds may not be relocated without the consent of the appropriate authority. Indian burial grounds may not be relocated unless the request to relocate is approved by the Indian Affairs Council. If burial grounds are authenticated on private lands, the state may undertake efforts to purchase and protect them instead of removing the burial grounds to another location. [Minn. Stat. § 307.08 (8).]

A landowner seeking to develop or disturb nonburial areas within authenticated or recorded burial grounds must apply to the state archaeologist in the case of non-Indian burials

and to the Indian Affairs Council in the case of Indian burials. Landowners with an authenticated or suspected human burial ground on their property are obligated to inform prospective buyers of the burial ground. [Minn. Stat. § 307.08 (7).]

Minnesota's Department of Administration has issued a publication with detailed information on Minnesota's law and procedures titled "State archaeologist's procedures for implementing Minnesota's Private Cemeteries Act (MS 307.08)," available at: <https://www.leg.state.mn.us/docs/2009/other/090256.pdf>.

ILLINOIS

Under the Illinois Human Skeletal Remains Protection Act, a person is guilty of a Class A misdemeanor if the person knowingly disturbs or allows the disturbance of human skeletal remains, grave artifacts in unregistered graves, and grave markers protected by the Act, unless the person obtains a permit issued by the Historic Preservation Agency. [20 Ill. Comp. Stat. 3440/4; 20 Ill. Comp. Stat. 3440/5; 20 Ill. Comp. Stat. 3440/7; and 20 Ill. Comp. Stat. 3440/10.]

The term "human skeletal remains" includes "bones and decomposed fleshy parts of a deceased human body." "Unregistered graves" means any grave or location where a human body is buried or deposited, over 100 years old, and not in a cemetery registered under applicable Illinois cemetery laws. [20 Ill. Comp. Stat. 3440/1.]

The Act directs the Historic Preservation Agency to develop regulations, in consultation with the Illinois State Museum, for the issuance of permits for the removal of human skeletal remains and grave artifacts from unregistered graves or the removal of grave markers. If a permit is granted, the applicant is responsible for all costs accrued in the removal. [20 Ill. Comp. Stat. 3440/13.]

Under the administrative regulations, the Director of the Illinois Historic Preservation Agency must grant a permit application for archaeological burial excavation if the director finds all of the following: (1) the applicant is qualified to carry out the permitted activity; (2) the proposed activity is undertaken in the public interest for the purpose of furthering archaeological or scientific knowledge or to allow economic development or construction to proceed; (3) the currently available technology and the technology the applicant proposes to use are such that the significant information contained in the archaeological resource can be retrieved; and (4) the funds and time the applicant proposes to commit are such that the significant information contained in the archaeological resource can be retrieved. [Ill. Admin. Code tit. 17, § 4170.310 (c).]

However, the director must deny an application if any of the following apply: (1) in the case of economic development or construction, reasonable and feasible alternatives to removal of the human remains exist; (2) in the case of archaeological or scientific research, such research is not deemed to be scientifically significant or necessary; (3) the proposed funding level is not sufficient to complete the proposed project; (4) the application is inadequate or deficient; (5) any question exists as to the ownership of the resulting materials; (6) the key project personnel are

not adequately trained or lack sufficient experience to successfully complete the proposed project; (7) the facilities and institutional support for the applicant are inadequate to successfully complete the project; (8) the applicant or institution has not satisfactorily complied with the conditions of past permits issued under the Act or other archaeological law in Illinois; or (9) the applicant or institution has demonstrated history, within the previous five years, of not completing similar scale archaeological projects in a timely and successful fashion. [Ill. Admin. Code tit. 17, § 4170.310 (d).]

IOWA

Iowa Code § 263B governs the protection of ancient burials and ancient human skeletal remains in Iowa. Under Iowa law, the state archaeologist has the primary responsibility for investigating, preserving, and reintering discoveries of ancient human remains. Furthermore, the state archaeologist has the authority to deny permission to disinter human remains that the state archaeologist determines have state and national significance from a historical or scientific standpoint for the public's inspiration and benefit. A person who intentionally disinters such human remains, or any human remains from a burial site, may be guilty of criminal mischief in the third degree, an aggravated misdemeanor. [Iowa Code §§ 263B.7, 263B.9, 716.5 (1) (d) and (e).]

Pursuant to the Iowa Administrative Code, the Office of the State Archaeologist (OSA) must be notified upon the discovery of ancient burial grounds, human physical remains or suspected human physical remains believed to be over 150 years in age. The OSA director has the authority to deny permission to disinter human physical remains from aboriginal ossuaries, grave sites, cemeteries or any other archaeological deposit determined to have state and national significance from the standpoint of history or science. [Iowa Admin. Code r. 685-11.1.]

A site will be judged "significant" if it has been demonstrated by archaeological investigation, including excavation and analysis appropriate to the context, that it possesses at least one of the following qualities: substantial information bearing on the biology of past populations; substantial information bearing on the technology, society or ideology of past populations; or potential for public interpretation of past lifeways. [Iowa Admin. Code r. 685-11.1 (1).]

If a site is deemed "significant," any human physical remains recovered during testing may be reinterred at the original burial site rather than at one of the designated state cemeteries. Sites that are judged not to be significant will be salvaged by the OSA or its designated representative. The OSA will not assume financial responsibility for "intermediate- to large-scale actions" involving the removal of human physical remains from private lands but must participate in the authorization and coordination of any such action on federal, state, county, municipal or private lands. [Iowa Admin. Code r. 685-11.1 (3), (5).]

The OSA publishes several resources, including an overview of Iowa's laws concerning burial sites, available at:

<https://archaeology.uiowa.edu/file/731/download?token=IPb71kUi>, and a field procedures

manual for archaeologists, available at:

<https://archaeology.uiowa.edu/file/732/download?token=3Vqtk9o>.

INDIANA

Under Indiana law, a person commits a Class A misdemeanor if the person disturbs the ground within 100 feet of a burial ground for the purpose of “excavating or covering over the ground or erecting, altering, or repairing any structure” without having a plan approved by the Department of Natural Resources. If, in the course of any actions previously listed, a person disturbs buried human remains or grave markers, the offense is a Level 6 felony. [Ind. Code § 14-21-1-26.5 (b) and (f).]

“Burial ground” means ground in which human remains are buried, including the surrounding area that is either marked by permanent visible boundary or “determined by the department based on records or surveys of the land containing the historic or prehistoric site in which human remains, mounds, or burial objects are reported to occur.” “Human remains” means any part of the body of a human being in any state of decomposition or any state of preservation. [Ind. Code §§ 14-21-1-3, 14-21-1-7.]

Indiana law recognizes two types of plans: (1) archaeological plans, for the recovery, analysis, and disposition by scientific methods of evidence and information about life and culture in past ages; and (2) development plans, for the erection, alteration, or repair of any structure, or for the excavation or covering of any ground related to construction. The law authorizes the Natural Resources Commission to adopt rules establishing standards for both types of plans. [Ind. Code §§ 14-21-1-8, 14-21-1-25.]

Under the Natural Resources Commission’s rules, no person may disturb the ground, or continue a disturbance following an accidental discovery, for the purpose of discovering or removing artifacts, burial objects, grave markers, or human remains without a prior permit. A permit application consists of a proposed archaeological plan and an application to conduct a scientific investigation. The applicant must demonstrate consideration of landowners’ rights and interests, including: a determination of the ownership of any recovered human remains, burial object, or artifact; landowner’s consent for an applicant’s access to the site for conducting archaeological activities; and landowner’s consent for the department’s access to determine compliance. [312 Ind. Admin. Code 22-1-14, 22-2-3.]

A development plan is required for those wishing to disturb the ground for purposes of erecting, altering, or repairing a structure within 100 feet of ground in which human remains are buried. To apply for a development plan, an applicant must submit to the Division of Historic Preservation and Archaeology identifying information, timelines, location mappings, a description of the activity and likely impact, historical information and documentation, and precise boundaries (determined at the applicant’s expense), as well as written permission from the owner of the cemetery or any area to be entered or disturbed. The Division may approve, conditionally approve, or deny the application. [312 Ind. Admin. Code 22.5-1-2, 22.5-1-3, 22.5-2-1, 22.5-2-3, and 22.5-2-5.]

Indiana's Department of Natural Resources publishes a "Q&A" document regarding its archaeology law, available at: http://www.in.gov/dnr/historic/files/hp_archaeolaw.pdf, and further information regarding development plans near burial grounds, available at: <http://www.in.gov/dnr/historic/files/cemdevelopplan.pdf>.

NORTH DAKOTA

In North Dakota, a person is guilty of a felony if the person willfully disturbs a human burial site, human remains, or burial goods found in or on any land, or incites or attempts to do the same without legal authority. [N.D. Cent. Code § 23-06-27 (3).] North Dakota's law exempts from this crime situations in which the state is notified of the need to disinter and move the contents of human burial sites that are recorded with the state historical society to prevent the destruction of the human burial sites by actions including the construction of highways, dams, reservoirs, coal mines, power generation and transmission facilities, pipelines, farming practices, and other developments. In these situations, the disinterred human remains and burial goods must be studied and reinterred pursuant to rules adopted by the state Department of Health and the State Historical Society. However, the law instructs that, where feasible, developments should avoid disturbance of the human burial sites. [N.D. Cent. Code § 23-06-27 (7).]

"Human burial site" means any place of interment, by any means, of human remains or burial goods, which is designated by a grave marker or other burial structure or which is not so designated, but is, in fact, discovered or believed to exist on the basis of archaeological or historical evidence. "Human remains" means any part of the body of a deceased human being in any stage of decomposition. [N.D. Cent. Code §§ 23-06-27 (1) (c) and (d).]

For lands owned by the state, a permit from the director of the State Historical Society is required for investigating, excavating, or other recording of cultural resources. "Cultural resources" includes prehistoric or historic archaeological sites, burial mounds, and unregistered graves. The applicant must agree to deliver to the director all of the archaeological or historical materials found and removed from the land. For private lands, a permit is required for any purpose other than identifying, evaluating, or mitigating adverse effects on cultural resources. The applicant must agree to deliver all of the human remains and burial goods found and removed from the land to the director. [N.D. Cent. Code §§ 55-03-00.1, 55-03-01.1, and 55-03-02.]

If an inadvertent discovery or disturbance of a human burial site, human remains, or burial goods occurs, the director of the State Historical Society must provide notice to a representative of the Intertribal Reinterment Committee, regardless of whether the society intends to study the disturbed burial site and its contents. Within 24 hours, the representative must inspect the burial site and determine whether the burial can be adequately and safely restored and protected in its original location or, in the alternative, disinterred completely and reinterred in another location. [N.D. Admin. Code §§ 40-02-03-03, 40-02-03-05.]

If the disturbed burial can be adequately and safely restored and protected in its original location, and any requisite consent of the private landowner has been secured, the Intertribal

Reinterment Committee must cause the burial to be backfilled, stabilized, and protected from further disturbance by the human activities or natural processes which caused the disturbance in the first instance. If restoration at the original location is not feasible and any requisite consent of the private landowner has been secured, the intertribal reinterment committee must cause the disinterred human remains and any and all burial goods to be reinterred on Indian lands within the boundaries of the appropriate Indian reservation, as determined by the Intertribal Reinterment Committee. [N.D. Admin. Code § 40-02-03-05.]

SOUTH DAKOTA

In South Dakota, no person may knowingly disturb or allow disturbance of human skeletal remains or funerary objects unless authorized by the state archaeologist. The term "human skeletal remains" is defined as "the bones of a human being." South Dakota's statutory burial law authorizes the State Historical Society Board of Trustees to promulgate rules governing authorization for disturbances, restrictions on such disturbances, and disposition procedures. [S.D. Codified Laws §§ 34-27-21 (1), 34-27-26, 34-27-30.]

Under the administrative rules, a permit from the state archaeologist is required for any archaeological survey or excavation conducted on any state-owned property or "for the exhumation of human burials outside the control of cemetery authorities." An applicant for an archaeological permit must explain the scope of work, including schedule, research design, and proposed methodology, and employ a qualified professional archaeologist. The state archaeologist must approve the scope of work prior to the issuance of the permit. [S.D. Admin. R. 24:52:08:01.]

In cases where a human burial must be exhumed, an applicant must meet the requirements for an archaeological permit listed above. In addition to those requirements, the applicant must demonstrate the need for exhumation, explain the other options that have been considered, and retain a qualified skeletal analyst to be part of the exhumation staff. [S.D. Admin. R. 24:52:09:01.]

For reference, South Dakota's permit application is available at: <http://history.sd.gov/archaeology/downloads/arch-permit-form.pdf>.

NEBRASKA

The legislative purpose of Nebraska's Unmarked Human Burial Sites and Skeletal Remains Protection Act is, in part, to ensure that all unmarked human burial sites are left undisturbed to the maximum extent possible, unless such sites are in reasonable danger of destruction, such sites need to be moved for a highway, road, or street construction project, or evidence of criminal wrongdoing exists. "Human burial site" means the specific place where any human skeletal remains are buried and the immediately surrounding area. [Neb. Rev. Stat. §§ 12-1203 (4), 12-1204 (2).]

The law requires any person who discovers human skeletal remains or burial goods associated with an unmarked human burial to immediately cease activity and report the

discovery to law enforcement. Failure to make such a report constitutes a Class III misdemeanor. The State Historical Society must assist law enforcement in examining the discovered material to attempt to determine its origin and identity. Under Nebraska's law, "human skeletal remains" means the body or any part of the body of a deceased human in any stage of decomposition. [Neb. Rev. Stat. §§ 12-1204 (3), 12-1205 (1), 12-1208 (1).]

Intact remains are to be left in place, while disinterred remains may be collected and turned over to descendent parties or the county attorney for reburial. If the remains or burial goods are of American Indian origin, the society must inform the Commission on Indian Affairs and any known relatives or, if no relatives are known, "any Indian tribes reasonably identified as tribally linked to such remains or goods" in order to ascertain the reburial wishes of the relative or tribe. The tribe is responsible for the expense of reburial. [Neb. Rev. Stat. § 12-1208.]

The Act has a specific provision for inadvertent discoveries by the Department of Roads. The Department of Roads must work with the appropriate state agencies charged with preserving historical, archeological, and paleontological remains to have these agencies remove and preserve the remains disturbed or to be disturbed by highway construction and to use highway funds, when appropriated, for this purpose. [Neb. Rev. Stat. §§ 12-1205 (2), 39-1363.]

AO:AH:ty