



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 4

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

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

RE: Options for Committee Discussion

DATE: September 23, 2016

This Memo summarizes options for further consideration and potential proposed legislation by the Study Committee on the Preservation of Burial Sites. Invited speakers and committee members have raised the options in this Memo during the committee's meetings on August 2 and September 8, 2016. At the September 8 meeting, the committee used Legislative Council staff Memo No. 1 as a guide, though it did not discuss the topics on pages four through six of Memo No. 1 due to time constraints. The study committee's agenda for the October 5, 2016 meeting includes a discussion of those remaining topics from Memo No. 1.

REQUIREMENT OF "SUFFICIENT CONTIGUOUS LAND"

Background

Generally, no person may disturb a burial site or the cataloged land contiguous to a cataloged burial site. [s. 157.70 (2r), Stats.] The Wisconsin Historical Society (WHS) Director must identify and record in a catalog burial sites and, for cataloged sites that are not platted as a cemetery, sufficient contiguous land necessary to protect a burial site from disturbance. For that purpose, "sufficient contiguous land" means land that is within **at least five feet** from any part of a burial site. [s. 157.70 (2) (a), Stats.]

While WHS must catalog a minimum of five feet of contiguous land, WHS typically works with landowners as a matter of practice to include a buffer of contiguous land that is at least 15 feet from the burial site. According to WHS, a 15-foot buffer allows room for work vehicles between burial sites and any new construction.

Options

- Modify the width requirement of “at least five feet” for sufficient contiguous land to “at least 15 feet” to conform to current WHS practice.
- Modify the width requirement of “at least five feet” for sufficient contiguous land to require a different width.
- Create a distinction for disturbances to a burial site versus the contiguous land.

INFORMATION FOR LAND PURCHASERS

Background

Under current law, information related to the location of any burial site, the disclosure of which is likely to result in a disturbance, is statutorily exempt from Wisconsin’s Open Records Law. [s. 157.70 (2) (a), Stats.] Concerns regarding possible looting or vandalism prompted this exemption. WHS provided the committee with a copy of its “Request to Obtain Information about Archaeological and/or Burial Sites,” a form that private landowners, realtors, and potential property buyers may mail to WHS to obtain information regarding a site.

Current law requires a landowner to disclose the existence of burial sites on the real estate disclosure form for vacant land. [s. 709.033, Stats.] No such disclosure requirement exists for residential real estate. [s. 709.03, Stats.]

Options

- Require sellers to disclose any burial site to potential buyers in all types of real estate transactions.
- Allow for electronic submission of the form titled “Request to Obtain Information about Archaeological and/or Burial Sites” to WHS.
- Require WHS to create a searchable, online database of burial sites. For this option, the committee may wish to consider the following questions:
 - What information would be searchable?
 - Should the database be made available to the public?
 - Should access to the database be limited in some manner?
 - Should access be subject to WHS approval?

“CATALOGED” AND “UNCATALOGED” TERMINOLOGY

Background

Current law requires WHS to identify and record the following items in a catalog: burial sites, generally; burial sites likely to be archaeological interest; and areas likely to contain burial sites. [s. 157.70 (2) (a) and (b), Stats.] However, as a matter of current practice, WHS staff state

that they generally will allow a burial site to remain uncataloged if the landowner is not interested in having the burial site cataloged.

Although the burial sites preservation law applies to all burial sites in Wisconsin, the procedure for disturbing a burial site differs depending upon whether the burial site is cataloged or uncataloged. [s. 157.70 (4) and (5), Stats.] Generally, cataloged burial sites receive greater protection in that the standard for disturbance is more rigorous.

At the committee's meeting on September 8, 2016, members discussed that the distinction was intended to allow for sites with more archaeological documentation to be cataloged. Under WHS administrative rules, a request to include a burial site in the catalog must provide, among other requirements, documentation of the burial site, which may include physical evidence, adequate historical documentation, and oral histories. [s. HS 2.03 (1) (c) and (2), Wis. Adm. Code.]

Options

- Employ different terms other than “cataloged” and “uncataloged” to reflect the distinction between burial sites that are afforded different levels of protection. For this option, the committee may wish to consider the following questions:
 - Should the availability of archaeological information form the basis of distinction? If not, what should?
 - Which terms reflect the appropriate distinction determined by the committee?
 - Is an alternative, third category appropriate?
- Remove any distinction and subject all burial sites to the same standard and procedure. For this option, the committee may wish to consider the following questions:
 - What standard and procedure for disturbance would apply to all burial sites?
 - Does removal of the distinction between cataloged and uncataloged require a modification to the definition of “burial site”?
 - How would this change affect burial sites currently identified as “cataloged” or “uncataloged”?
- Maintain use of current terms.

STANDARD FOR REMOVING A BURIAL SITE FROM THE CATALOG

Background

Section 157.70, Stats., does not include a provision for removing a burial site from the catalog. However, WHS administrative rules allow for removing 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, WHS must notify interested parties, who then have 60 days to respond regarding the new evidence. After 60 days, if the WHS Director decides that sufficient evidence indicates that a cataloged burial site does not contain any burials, the Director must remove the burial site from the catalog and take certain other actions. [s. HS 2.03 (6) (a) and (b), Wis. Adm. Code.]

Options

- Codify in s. 157.70, Stats., a provision for removal of a burial site from the catalog that mirrors the current provision in the administrative code.
- Codify in s. 157.70, Stats., a provision for removal of a burial site from the catalog, but amend the standard and procedure for removal from that which is currently provided in the administrative code. For this option, the committee may wish to consider the following sub-options:
 - Clarify or modify the standard that applies to the initial showing of evidence indicating a burial site does not contain human remains.
 - Clarify or modify the standard of “sufficient evidence” governing the WHS Director’s decision to remove a burial site from the catalog.
 - Amend the procedure to shift the burden to WHS after an initial presentation of evidence by the landowner or person seeking removal.
 - Amend the procedure to place the burden on WHS without any showing by the landowner or person seeking removal.
- Maintain the current provision for removing a burial site from the catalog in the administrative code.

LANDOWNER COMPENSATION

Background

Current law does not provide a landowner with any direct compensation, other than a tax exemption, as a result of cataloging a site on the landowner’s property. At the September 8 meeting, the committee discussed that while a court’s decision would be fact specific, it is unlikely that cataloging would constitute an unconstitutional taking of property where only a portion of the land parcel is cataloged.

Though compensation may not be constitutionally required, members suggested that compensation may provide an incentive for both cataloging and preservation. Members also suggested use of archaeological easements and asked for further information regarding use of such easements in other states. (See Memo No. 6 for a summary of these findings.)

Options

- Grant archaeological easements for burial sites on private property. For this option, the committee may wish to consider the following questions:
 - What entity (state or local) would acquire the easements?
 - Would the easements be donated or purchased? If purchased, what funding source would be used for acquisition?
 - Who would be responsible for management of the burial site?
- Provide landowners with monetary compensation for burial sites on private property. For this option, the committee may wish to consider the following questions:
 - From what source would the compensation be funded?
 - How would the value or amount of compensation be determined?
 - How would the payment be structured, i.e. one-time payment, annual tax credit, etc.?

TRIBAL INVOLVEMENT IN DISPOSITIONAL DECISIONS

Background

Under current law, if human remains and objects related to burial are removed pursuant to either the uncataloged or cataloged procedure, the WHS Director must determine the person to whom the remains and objects should be transferred for reinterment, unless the administrative law judge determines disposition at a hearing under the cataloged procedure. [s. 157.70 (6) (a), Stats.]

Before determining disposition, 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 of interests in making the transfer: (1) direct kinship; (2) cultural, tribal, or religious affiliation; (3) 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. The Director must submit a written report of any disposition action taken by the director, which the Burial Sites Preservation Board has the authority to review and modify. [s. 157.70 (6) (a) to (e), Stats.]

At the committee's August 2 meeting, WHS proposed the creation of a Native American organization to determine the appropriate disposition of human remains and objects related to the burial, if excavation has been approved and the analysis determines the remains and objects are of tribal descent. This topic is included in Legislative Council staff Memo No. 1 under the heading "Miscellaneous Procedural Changes," which the committee will discuss at its next meeting.

Option

- Create a tribal organization to determine to whom excavated tribal remains and objects should be transferred for reinterment or other appropriate disposition. For this option, the committee may wish to consider the following questions:
 - Would the current procedure remain in effect for remains which the analysis determines are not of tribal descent?
 - Would the board have the authority to review and modify the tribal organization's disposition decisions?
 - What would the WHS Director's role, if any, be in relation to a new tribal organization of this nature?
 - How would membership of the tribal organization be determined?

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