

1 **H. B. 2826**

2
3 (By Delegates Perdue, Hatfield, Marshall,
4 Caputo and Fragale)

5
6 [Introduced January 24, 2011; referred to the
7 Committee on the Judiciary.]

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9
10 A BILL to amend and reenact §29-1-8a of the Code of West Virginia,
11 1931, as amended; to amend and reenact §37-13-2 and §37-13-4
12 of said code; and to amend and reenact §37-13A-5 of said code,
13 all relating to clarifying procedures for protection of graves
14 and burial sites, clarifying when disturbance is a crime and
15 enhancing the opportunity for public access to cemeteries on
16 private land and for public involvement in petitions to
17 excavate graves.

18 *Be it enacted by the Legislature of West Virginia:*

19 That §29-1-8a of the Code of West Virginia, 1931 as amended,
20 be amended and reenacted, that §37-13-2 and §37-13-4 of said code
21 be amended and reenacted; and that §37-13A-5 of said code be
22 amended and reenacted, all to read as follows:

23 **CHAPTER 29. MISCELLANEOUS BOARDS AND OFFICERS.**

24 **ARTICLE 1. DIVISION OF CULTURE AND HISTORY.**

25 **§29-1-8a. Protection of human skeletal remains, grave artifacts**

1 **and grave markers; permits for excavation and**
2 **removal; penalties.**

3 (a) *Legislative findings and purpose.* --

4 The Legislature finds that there is a real and growing threat
5 to the safety and sanctity of unmarked human graves in West
6 Virginia and the existing laws of the state do not provide equal or
7 adequate protection for all such graves. As evident by the
8 numerous incidents in West Virginia which have resulted in the
9 desecration of human remains and vandalism to grave markers, there
10 is an immediate need to protect the graves of earlier West
11 Virginians from such desecration. Therefore, the purpose of this
12 article is to assure that all human burials be accorded equal
13 treatment and respect for human dignity without reference to ethnic
14 origins, cultural backgrounds, or religious affiliations.

15 The Legislature also finds that those persons engaged in the
16 scientific study or recovery of artifacts which have been acquired
17 in accordance with the law are engaged in legitimate and worthy
18 scientific and educational activities. Therefore, this legislation
19 is intended to permit the appropriate pursuit of those lawful
20 activities.

21 ~~Finally, this legislation is not intended to interfere with~~
22 ~~the normal activities of private property owners, farmers, or those~~
23 ~~engaged in the development, mining or improvement of real property.~~

24

1 (b) *Definitions.* --

2 For the purposes of this section:

3 (1) "Human skeletal remains" means the bones, teeth, hair or
4 tissue of a deceased human body;

5 (2) "Unmarked grave" means any grave or location where a human
6 body or bodies have been buried or deposited for at least fifty
7 years and the grave or location is not in a publicly or privately
8 maintained cemetery or in the care of a cemetery association, or is
9 located within such cemetery or in such care and is not commonly
10 marked;

11 (3) "Grave artifact" means any items of human manufacture or
12 use that are associated with the human skeletal remains in a grave;

13 (4) "Grave marker" means any tomb, monument, stone, ornament,
14 mound, or other item of human manufacture that is associated with
15 a grave;

16 (5) "Person" means any individual, partnership, firm, society,
17 association, trust, corporation, other business entity or any
18 agency, unit or instrumentality of federal, state or local
19 government;

20 (6) "Disturb" means the excavating, removing, exposing,
21 defacing, mutilating, destroying, molesting, or desecrating in any
22 way of human skeletal remains, unmarked graves, grave artifacts or
23 grave markers;

24 (7) "Native American tribe" means any Indian tribe, band,

1 nation, or organized group or community which is recognized as
2 eligible for the special programs and services provided by the
3 United States to Indians because of their status as Indians;

4 (8) "Cultural affiliation" means the relationship of shared
5 group identity which can be reasonably traced historically or
6 prehistorically between a present day group and an identifiable
7 earlier group;

8 (9) "Lineal descendants" means any individuals tracing his or
9 her ancestry directly or by proven kinship; and

10 (10) "Proven kinship" means the relationship among people that
11 exists because of genetic descent, which includes racial descent.

12 (c) *Acts prohibited; penalties; exceptions.* --

13 (1) No person may excavate, remove, destroy, or otherwise
14 disturb any historic or prehistoric ruins, burial grounds,
15 archaeological site, or human skeletal remains, unmarked grave,
16 grave artifact or grave marker of historical significance unless
17 such person has a valid permit issued to him or her by the Director
18 of the Historic Preservation Section: *Provided*, That the
19 supervising archaeologist of an archaeological investigation being
20 undertaken in compliance with the federal Archaeological Resources
21 Protection Act (Public Law 96-95 at 16 USC 470(aa)) and regulations
22 promulgated thereunder is not required to obtain such permit, but
23 shall notify the Director of the Historic Preservation Section that
24 such investigation is being undertaken and file reports as are

1 required of persons issued a permit under this section: *Provided,*
2 *however,* That projects being undertaken in compliance with section
3 106 of the National Historic Preservation Act of 1966, as amended,
4 or subsection (a), section five of this article is not required to
5 obtain such permit for excavation, removal, destruction or
6 disturbance of historic or prehistoric ruins or archaeological
7 sites.

8 (2) A person who, either by himself or herself or through an
9 agent, intentionally excavates, removes, destroys or otherwise
10 disturbs any historic or prehistoric ruins, burial grounds or
11 archaeological site, or unmarked grave, grave artifact or grave
12 marker of historical significance without first having been issued
13 a valid permit by the Director of the Historic Preservation
14 Section, or who fails to comply with the terms and conditions of
15 such permit, is guilty of a misdemeanor and, upon conviction
16 thereof, shall be fined not less than \$100 nor more than \$500,
17 confined in jail for not more than six months, or both fined and
18 confined.

19 (3) A person who, either by himself or herself or through an
20 agent, ~~intentionally~~ excavates, removes, destroys or otherwise
21 disturbs a grave or human skeletal remains ~~of historical~~
22 ~~significance~~ whose existence is known without first having been
23 issued a valid permit by the Director of the Historic Preservation
24 Section or a permit issued pursuant to article thirteen, chapter

1 thirty-seven of this code, or who fails to comply with the terms
2 and conditions relating to disinterment or displacement of human
3 skeletal remains of such permit, is guilty of the felony of
4 disinterment or displacement of a dead human body or parts thereof
5 under section fourteen, article eight, chapter sixty-one of this
6 code and, upon conviction thereof, shall be imprisoned in a state
7 correctional facility not more than five years.

8 (4) A person who intentionally withholds information about the
9 excavation, removal, destruction, or other disturbance of any
10 historic or prehistoric ruins, burial grounds, archaeological site,
11 or human skeletal remains, unmarked grave, grave artifact or grave
12 marker of historical significance is guilty of a misdemeanor and,
13 upon conviction thereof, shall be fined not more than \$100, or
14 confined in jail not more than ten days, or both fined and
15 confined.

16 (5) A person who, either by himself or herself or through an
17 agent, offers for sale or exchange any human skeletal remains,
18 grave artifact or grave marker obtained in violation of this
19 section is guilty of a misdemeanor and, upon conviction thereof,
20 shall be fined not less than \$1,000 nor more than \$5,000 or
21 confined in jail not more than one year, or both fined and
22 confined.

23 (6) Each instance of excavation, removal, destruction,
24 disturbance or offering for sale or exchange under subdivisions (1)

1 through (5) of this subsection shall constitute a separate offense.

2 (7) A penalty may not be had against any person for the
3 unintentional disturbance of a grave or human skeletal remains,
4 including disturbance where the existence of the grave or human
5 skeletal remains was unknown, if, upon discovery, the person
6 engaged in the farming, development, mining, improvement or other
7 activity ceases all such work immediately upon discovery, treats
8 the discovered grave or skeletal remains with respect by no further
9 disturbance and other appropriate acts, and complies with
10 subsection (d) of this section.

11 ~~(7)~~ (8) It is a complete defense in a prosecution under this
12 section if the defendant can prove by a preponderance of evidence
13 that the alleged acts were accidental or inadvertent and that
14 reasonable efforts were made to preserve the remains accidentally
15 disturbed or discovered, and that the accidental discovery or
16 disturbance was properly reported.

17 ~~(8)~~ (9) This subsection does not apply to actions taken in the
18 performance of official law-enforcement duties.

19 (d) *Notification of discovery of human skeletal remains in*
20 *unmarked locations. --*

21 Upon the discovery of human skeletal remains, grave artifact
22 or grave marker in an unmarked grave on any publicly or privately
23 owned property, the person making such discovery shall immediately
24 cease any activity which may cause further disturbance, make a

1 reasonable effort to protect the area from further disturbance and
2 notify the county sheriff within forty-eight hours of the discovery
3 and its location. If the human remains, grave artifact or grave
4 marker appear to be from an unmarked grave, the sheriff shall
5 promptly, and prior to any further disturbance or removal of the
6 remains, notify the Director of the Historic Preservation Section.
7 The director shall cause an on-site inspection of the disturbance
8 to be made to determine the potential for archaeological
9 significance of the site: *Provided*, That when the discovery is
10 made by an archaeological investigation permitted under state or
11 federal law, the supervising archaeologist shall notify the
12 Director of the Historic Preservation Section directly.

13 If the Director of the Historic Preservation Section
14 determines that the site has no archaeological significance, the
15 removal, transfer and disposition of the remains shall be subject
16 to the provisions of article thirteen, chapter thirty-seven of this
17 code, and the director shall notify the circuit court of the county
18 wherein the site is located.

19 If the Director of the Historic Preservation Section
20 determines that the site has a potential for archaeological
21 significance, the director shall take such action as is reasonable,
22 necessary and prudent, including consultation with appropriate
23 private or public organizations, to preserve and advance the
24 culture of the state in accordance with the powers and duties

1 granted to the director, including the issuance of a permit for the
2 archaeological excavation or removal of the remains. If the
3 director determines that the issuance of a permit for the
4 archaeological excavation or removal of the remains is not
5 reasonable, necessary or prudent, the director shall provide
6 written reasons to the applicant for not issuing the permit.

7 (e) *Issuance of permits.* --

8 Prior to the issuance of a permit for the disturbance of human
9 skeletal remains, grave artifacts, or grave markers, the director
10 of historic preservation shall convene and chair an ad hoc
11 committee to develop permit conditions. The committee shall be
12 comprised of the chair and six or eight members representing known
13 or presumed lineal descendants, private and public organizations
14 which have cultural affiliation to the presumed contents of the
15 site, the Council for West Virginia Archaeology and the West
16 Virginia Archaeological Society. In the case of Native American
17 sites, the membership of the committee shall be comprised of the
18 chair and six or eight members representing the Council for West
19 Virginia Archaeology, the West Virginia Archaeological Society, and
20 known or presumed lineal descendants, preferably with cultural
21 affiliation to tribes that existed in the geographic area that is
22 now West Virginia.

23 In the case of a site of less than five acres, which is owned
24 by an individual or partnership, the ad hoc committee must be

1 formed within thirty days of application for same by the property
2 owner, must meet within sixty days of such application, and must
3 render a decision within ninety days of such application.

4 All such permits shall at a minimum address the following
5 conditions: (1) The methods by which lineal descendants of the
6 deceased are notified prior to the disturbance; (2) the respectful
7 manner in which the remains, artifacts or markers are to be removed
8 and handled; (3) scientific analysis of the remains, artifacts or
9 markers and the duration of those studies; (4) the way in which the
10 remains may be reburied in consultation with any lineal
11 descendants, when available; (5) methods for the respectful
12 curation of recovered items; and (6) such other conditions as the
13 director may deem necessary. Expenses accrued in meeting the
14 permit conditions shall be borne by the permit applicant, except in
15 cases where the deceased descendants or sponsors are willing to
16 share or assume the costs. A permit to disturb human skeletal
17 remains, grave artifacts or grave markers will be issued only after
18 alternatives to disturbance and other mitigative measures have been
19 considered.

20 In addition, a person applying for a permit to excavate or
21 remove human skeletal remains, grave artifacts, grave markers, or
22 any historic or prehistoric features of archaeological significance
23 may provide to the ad hoc committee information he or she deems
24 appropriate and shall:

1 (1) Provide a detailed statement to the Director of the
2 Historic Preservation Section giving the reasons and objectives for
3 excavation or removal and the benefits expected to be obtained from
4 the contemplated work;

5 (2) Provide data and results of any excavation, study or
6 collection in annual reports to the Director of the Historic
7 Preservation Section and submit a final report to the director upon
8 completion of the excavation;

9 (3) Obtain the prior written permission of the owner if the
10 site of such proposed excavation is on privately owned land; and

11 (4) Provide any additional information the ad hoc committee
12 deems necessary in developing the permit conditions.

13 The permits shall be issued for a period of two years and may
14 be renewed at expiration. The permits are not transferable but
15 other persons who have not been issued a permit may work under the
16 direct supervision of the person holding the permit. The person or
17 persons to whom a permit was issued must carry the permit while
18 exercising the privileges granted and must be present at the site
19 whenever work is being done.

20 Notwithstanding any other penalties to which a person may be
21 subject under this section for failing to comply with the terms and
22 conditions of a permit, the permit of a person who violates any of
23 the provisions of this subsection shall be revoked.

24 As permits are issued, the Director of the Historic

1 Preservation Section shall maintain a catalogue of unmarked grave
2 locations throughout the state.

3 (f) *Property tax exemption for unmarked grave sites. --*

4 To serve as an incentive for the protection of unmarked
5 graves, the owner, having evidence of the presence of unmarked
6 graves on his or her property, may apply to the Director of the
7 Historic Preservation Section for a determination as to whether
8 such is the case. Upon making such a determination in the
9 affirmative, the Director of the Historic Preservation Section
10 shall provide written certification to the landowner that the site
11 containing the graves is a cemetery and as such is exempt from
12 property taxation upon presentation of the certification to the
13 county assessor. The area of the site to receive property tax
14 exempt status shall be determined by the Director of the Historic
15 Preservation Section. Additionally, a property owner may establish
16 protective easements for the location of unmarked graves.

17 (g) *Additional provisions for enforcement; civil penalties;
18 rewards for information. --*

19 (1) The prosecuting attorney of the county in which a
20 violation of any provision of this section is alleged to have
21 occurred may be requested by the Director of the Historic
22 Preservation Section to initiate criminal prosecutions or to seek
23 civil damages, injunctive relief and any other appropriate relief.
24 The Director of the Historic Preservation Section shall cooperate

1 with the prosecuting attorney in resolving such allegations.

2 (2) Persons convicted of any prohibited act involving the
3 excavation, removal, destruction, disturbance or offering for sale
4 or exchange of historic or prehistoric ruins, burial grounds,
5 archaeological site, human skeletal remains, unmarked grave, grave
6 artifact or grave marker under the provisions of subdivisions (1)
7 and (2), subsection (c) of this section shall also be liable for
8 civil damages to be assessed by the prosecuting attorney in
9 consultation with the Director of the Historic Preservation
10 Section.

11 Civil damages may include:

12 (i) Forfeiture of any and all equipment used in disturbing the
13 protected unmarked graves or grave markers;

14 (ii) Any and all costs incurred in cleaning, restoring,
15 analyzing, accessioning and curating the recovered material;

16 (iii) Any and all costs associated with recovery of data, and
17 analyzing, publishing, accessioning and curating materials when the
18 prohibited activity is so extensive as to preclude the restoration
19 of the unmarked burials or grave markers;

20 (iv) Any and all costs associated with restoring the land to
21 its original contour or the grave marker to its original condition;

22 (v) Any and all costs associated with reinterment of the human
23 skeletal remains; and

24 (vi) Any and all costs associated with the determination and

1 collection of the civil damages.

2 When civil damages are recovered, the proceeds, less the costs
3 of the prosecuting attorney associated with the determination and
4 collection of such damages, shall be deposited into the Endangered
5 Historic Properties Fund and may be expended by the Commissioner of
6 Culture and History for archaeological programs at the state level,
7 including the payment of rewards for information leading to the
8 arrest and conviction of persons violating the provisions of
9 subdivisions (1) and (2), subsection (c) of this section.

10 (3) The Commissioner of Culture and History is authorized to
11 offer and pay rewards of up to \$1,000 from funds on deposit in the
12 Endangered Historic Properties Fund for information leading to the
13 arrest and conviction of persons who violate the provisions of
14 subdivisions (1) and (2), subsection (c) of this section.

15 (h) *Disposition of remains and artifacts not subject to*
16 *reburial.* --

17 All human skeletal remains and grave artifacts found in
18 unmarked graves on public or private land, and not subject to
19 reburial, under the provisions of subsection (e) of this section,
20 are held in trust for the people of West Virginia by the state and
21 are under the jurisdiction of the Director of Historic
22 Preservation. All materials collected and not reburied through
23 this section shall be maintained with dignity and respect for the
24 people of the state under the care of the West Virginia State

1 Museum.

2 **CHAPTER 37. REAL PROPERTY.**

3 **ARTICLE 13. REMOVAL, TRANSFER AND DISPOSITION OF REMAINS IN**
4 **GRAVES LOCATED UPON PRIVATELY OWNED LANDS.**

5 **§37-13-2. Action; contents of petition.**

6 Any owner of private lands, may, as plaintiff, institute an
7 action for the purposes set forth in section one of this article by
8 filing a petition before the circuit court of the county in which
9 the lands affected are located. ~~Such~~ The petition shall show the
10 title to ~~such~~ the lands, the condition of the graves in question,
11 the interests of all persons in ~~such~~ the lands and in the remains
12 in ~~such~~ the graves, so far as known, the reasons why removal is
13 sought, and the proposed disposition of such remains. The petition
14 shall further show that plaintiffs have made reasonable and
15 diligent effort to ascertain the identity of each deceased and each
16 deceased's surviving next of kin, heirs-at-law, administrator,
17 executor or personal representative. A copy of the petition shall
18 be provided by electronic means or regular mail to the historic
19 preservation section of the Division of Culture and History and to
20 the state Genealogical Society at its last known address. The court
21 may, if ~~deemed~~ considered necessary, appoint a guardian ad litem to
22 protect the interests of known or unknown persons in interest,
23 whether living or dead.

1 **§37-13-4. Hearing; discretion in granting or refusing relief;**
2 **order.**

3 No sooner than ~~three~~ six weeks from the filing of such
4 petition the court shall take evidence upon relief sought, together
5 with any evidence presented in opposition thereto. In granting or
6 denying ~~such~~ relief the court shall consider, as well as other
7 evidence adduced, evidence as to the wishes of all persons
8 concerned, whether living or deceased, including evidence offered
9 by the historic preservation section of the Division of Culture and
10 History and the state Genealogical Society, or National Historic
11 Preservation and shall exercise a sound discretion in granting or
12 refusing, in whole or in part, the relief sought. If the court is
13 satisfied with the propriety of the relief sought by plaintiffs it
14 shall enter an order granting the same, either in whole or in part.

15 **ARTICLE 13A. GRAVES LOCATED UPON PRIVATELY OWNED LANDS.**

16 **§37-13A-5. Cause of action for injunctive relief.**

17 (a) An authorized person denied or threatened with the denial
18 of reasonable access under the provisions of this article,
19 including the denial of permission to use vehicular access, may
20 institute a proceeding in the magistrate court or circuit court of
21 the county in which the cemetery or grave site is located to enjoin
22 the owner of the private lands on which the cemetery or grave site
23 is located, or his or her agent, from denying the authorized person

1 reasonable ingress and egress to the cemetery or grave site for the
2 purposes set forth in this article. In granting relief, the court
3 may set the frequency of access, hours and duration of the access.

4 (b) The court or the judge thereof may issue a preliminary
5 injunction in any case pending a decision on the merits of any
6 application filed without requiring the filing of a bond or other
7 equivalent security.

NOTE: The purpose of this bill is to preserve and protect family cemeteries by clarifying procedures for protection of graves and burial sites, clarifying when disturbance is a crime and enhancing the opportunity for public access to cemeteries on private land and for public involvement to petition to excavate graves.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.