

1 **H. B. 2366**

2
3 (By Delegates Perdue, Marshall and Caputo)
4 [Introduced February 13, 2013; referred to the
5 Committee on the Judiciary.]
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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.**

1 **§29-1-8a. Protection of human skeletal remains, grave artifacts**
2 **and grave markers; permits for excavation and**
3 **removal; penalties.**

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

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

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

22 ~~Finally, this legislation is not intended to interfere with~~
23 ~~the normal activities of private property owners, farmers, or those~~

1 ~~engaged in the development, mining or improvement of real property.~~

2 (b) *Definitions.* --

3 For the purposes of this section:

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

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

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

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

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

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

1 (7) "Native American tribe" means any Indian tribe, band,
2 nation or organized group or community which is recognized as
3 eligible for the special programs and services provided by the
4 United States to Indians because of their status as Indians;

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

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

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

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

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

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

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

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

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

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

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

1 (6) Each instance of excavation, removal, destruction,
2 disturbance or offering for sale or exchange under subdivisions (1)
3 through (5) of this subsection ~~shall constitute~~ constitutes a
4 separate offense.

5 (7) A penalty may not be imposed against a person for the
6 unintentional disturbance of a grave or human skeletal remains,
7 including disturbance where the existence of the grave or human
8 skeletal remains was unknown or not readily observable, if, upon
9 discovery, the person engaged in the farming, development, mining,
10 improvement or other activity ceases all such work immediately,
11 causes no further disturbance, makes reasonable efforts to prevent
12 further disturbance and complies with subsection (d) of this
13 section.

14 ~~(7)~~ (8) It is a complete defense in a prosecution under this
15 section if the defendant can prove by a preponderance of evidence
16 that:

17 (A) The alleged acts were accidental or inadvertent; ~~and that~~

18 (B) Reasonable efforts were made to preserve the remains
19 accidentally disturbed or discovered; ~~and that~~

20 (C) The accidental discovery or disturbance was properly
21 reported; and

22 (D) The defendant complied with subdivision (7) of this
23 subsection and subsection (d) of this section.

24 ~~(8)~~ (9) This subsection does not apply to actions taken in the

1 performance of official law enforcement duties.

2 (d) *Notification of discovery of human skeletal remains in*
3 *unmarked locations.* --

4 Upon the discovery of human skeletal remains, grave artifact
5 or grave marker in an unmarked grave on any publicly or privately
6 owned property, the person making such discovery shall immediately
7 cease any activity which may cause further disturbance, make a
8 reasonable effort to protect the area from further disturbance and
9 notify the county sheriff within forty-eight hours of the discovery
10 and its location. If the human remains, grave artifact or grave
11 marker appear to be from an unmarked grave, the sheriff shall
12 promptly, ~~and~~ prior to any further disturbance or removal of the
13 remains, notify the Director of the Historic Preservation Section.
14 The director shall cause an on-site inspection of the disturbance
15 to be made to determine the potential for archaeological
16 significance of the site: *Provided*, That when the discovery is
17 made by an archaeological investigation permitted under state or
18 federal law, the supervising archaeologist shall notify the
19 Director of the Historic Preservation Section directly.

20 If the Director of the Historic Preservation Section
21 determines that the site has no archaeological significance, the
22 removal, transfer and disposition of the remains shall be subject
23 to the provisions of article thirteen, chapter thirty-seven of this
24 code and the director shall notify the circuit court of the county

1 ~~wherein~~ where the site is located.

2 If the Director of the Historic Preservation Section
3 determines that the site has a potential for archaeological
4 significance, the director shall take such action as is reasonable,
5 necessary and prudent, including consultation with appropriate
6 private or public organizations, to preserve and advance the
7 culture of the state in accordance with the powers and duties
8 granted to the director, including the issuance of a permit for the
9 archaeological excavation or removal of the remains. If the
10 director determines that the issuance of a permit for the
11 archaeological excavation or removal of the remains is not
12 reasonable, necessary or prudent, the director shall provide
13 written reasons to the applicant for not issuing the permit.

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

15 Prior to the issuance of a permit for the disturbance of human
16 skeletal remains, grave artifacts, or grave markers, the director
17 of historic preservation shall convene and chair an ad hoc
18 committee to develop permit conditions. The committee shall be
19 comprised of the chair and six or eight members representing known
20 or presumed lineal descendants, private and public organizations
21 which have cultural affiliation to the presumed contents of the
22 site, the Council for West Virginia Archaeology and the West
23 Virginia Archaeological Society. In the case of Native American
24 sites, the membership of the committee shall be comprised of the

1 chair and six or eight members representing the Council for West
2 Virginia Archaeology, the West Virginia Archaeological Society and
3 known or presumed lineal descendants, preferably with cultural
4 affiliation to tribes that existed in the geographic area that is
5 now West Virginia.

6 In the case of a site of less than five acres, which is owned
7 by an individual or partnership, the ad hoc committee must be
8 formed within thirty days of application for same by the property
9 owner, must meet within sixty days of such application and must
10 render a decision within ninety days of such application.

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

1 alternatives to disturbance and other mitigative measures have been
2 considered.

3 In addition, a person applying for a permit to excavate or
4 remove human skeletal remains, grave artifacts, grave markers, or
5 any historic or prehistoric features of archaeological significance
6 may provide to the ad hoc committee information he or she deems
7 appropriate and shall:

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

12 (2) Provide data and results of any excavation, study or
13 collection in annual reports to the Director of the Historic
14 Preservation Section and submit a final report to the director upon
15 completion of the excavation;

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

18 (4) Provide any additional information ~~the ad hoc committee~~
19 ~~deems necessary~~ requested by the ad hoc committee in developing the
20 permit conditions.

21 The permits shall be issued for a period of two years and may
22 be renewed at expiration. The permits are not transferable but
23 other persons who have not been issued a permit may work under the
24 direct supervision of the person holding the permit. The person or

1 persons to whom a permit was issued must carry the permit while
2 exercising the privileges granted and must be present at the site
3 whenever work is being done.

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

8 As permits are issued, the Director of the Historic
9 Preservation Section shall maintain a catalogue of unmarked grave
10 locations throughout the state.

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

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

1 (g) *Additional provisions for enforcement; civil penalties;*
2 *rewards for information. --*

3 (1) The prosecuting attorney of the county in which a
4 violation of any provision of this section is alleged to have
5 occurred may be requested by the Director of the Historic
6 Preservation Section to initiate criminal prosecutions or to seek
7 civil damages, injunctive relief and any other appropriate relief.
8 The Director of the Historic Preservation Section shall cooperate
9 with the prosecuting attorney in resolving such allegations.

10 (2) Persons convicted of any prohibited act involving the
11 excavation, removal, destruction, disturbance or offering for sale
12 or exchange of historic or prehistoric ruins, burial grounds,
13 archaeological site, human skeletal remains, unmarked grave, grave
14 artifact or grave marker under the provisions of subdivisions (1)
15 and (2), subsection (c) of this section ~~shall also be~~ are liable
16 for civil damages to be assessed by the prosecuting attorney in
17 consultation with the Director of the Historic Preservation
18 Section.

19 Civil damages may include:

20 ~~(i)~~ (A) Forfeiture of any and all equipment used in disturbing
21 the protected unmarked graves or grave markers;

22 ~~(ii)~~ (B) Any and all costs incurred in cleaning, restoring,
23 analyzing, accessioning and curating the recovered material;

24 ~~(iii)~~ (C) Any and all costs associated with recovery of data,

1 and analyzing, publishing, accessioning and curating materials when
2 the prohibited activity is so extensive as to preclude the
3 restoration of the unmarked burials or grave markers;

4 ~~(iv)~~ (D) Any and all costs associated with restoring the land
5 to its original contour or the grave marker to its original
6 condition;

7 ~~(v)~~ (E) Any and all costs associated with reinterment of the
8 human skeletal remains; and

9 ~~(vi)~~ (F) Any and all costs associated with the determination
10 and collection of the civil damages.

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

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

24 (h) *Disposition of remains and artifacts not subject to*

1 *reburial.* --

2 All human skeletal remains and grave artifacts found in
 3 unmarked graves on public or private land, ~~and~~ not subject to
 4 reburial under the provisions of subsection (e) of this section,
 5 are held in trust for the people of West Virginia by the state and
 6 are under the jurisdiction of the Director of Historic
 7 Preservation. All materials collected and not reburied through
 8 this section shall be maintained with dignity and respect for the
 9 people of the state under the care of the West Virginia State
 10 Museum.

11 **CHAPTER 37. REAL PROPERTY.**

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

14 **§37-13-2. Action; contents of petition.**

15 Any owner of private lands, may, as plaintiff, institute an
 16 action for the purposes set forth in section one of this article by
 17 filing a petition before the circuit court of the county in which
 18 the lands affected are located. ~~Such~~ The petition shall show the
 19 title to ~~such~~ the lands, the condition of the graves in question,
 20 the interests of all persons in ~~such~~ the lands and in the remains
 21 in ~~such~~ the graves, so far as known, the reasons why removal is
 22 sought and the proposed disposition of such remains. The petition
 23 shall further show that plaintiffs have made reasonable and

1 diligent effort to ascertain the identity of each deceased and each
 2 deceased's surviving next of kin, heirs-at-law, administrator,
 3 executor or personal representative. A copy of the petition shall
 4 be provided by electronic means or regular mail to the historic
 5 preservation section of the Division of Culture and History and to
 6 the state Genealogical Society at its last known address. The
 7 court may, if ~~deemed~~ considered necessary, appoint a guardian ad
 8 litem to protect the interests of known or unknown persons in
 9 interest, whether living or dead.

10 **§37-13-4. Hearing; discretion in granting or refusing relief;**
 11 **order.**

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

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

1 **§37-13A-5. Cause of action for injunctive relief.**

2 (a) An authorized person denied or threatened with the denial
3 of reasonable access under the provisions of this article,
4 including the denial of permission to use vehicular access, may
5 institute a proceeding in the magistrate court or circuit court of
6 the county in which the cemetery or grave site is located to enjoin
7 the owner of the private lands on which the cemetery or grave site
8 is located, or his or her agent, from denying the authorized person
9 reasonable ingress and egress to the cemetery or grave site for the
10 purposes set forth in this article. In granting relief, the court
11 may set the frequency of access, hours and duration of the access.

12 (b) The court or the judge thereof may issue a preliminary
13 injunction in any case pending a decision on the merits of any
14 application filed without requiring the filing of a bond or other
15 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.