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OFFICE OF THE CLERK
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 2010



ENROLLED

**COMMITTEE SUBSTITUTE
FOR
House Bill No. 4457**

(By Delegates Brown, Talbott, Fragale, Caputo,
Hatfield, Wells, Fleischauer, Marshall and Perdue)



Passed March 11, 2010

In Effect Ninety Days From Passage

HB 4457

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COMMITTEE SUBSTITUTE

FOR

H. B. 4457

(BY DELEGATES BROWN, TALBOTT, FRAGALE, CAPUTO,
HATFIELD, WELLS, FLEISCHAUER, MARSHALL AND PERDUE)

[Passed March 11, 2010; in effect ninety days from passage]

AN ACT to amend and reenact §29-1-8a of the Code of West Virginia, 1931, as amended; to amend and reenact §37-13A-1, §37-13A-2 and §37-13A-5 of said code; to amend said code by adding a new section, designated §37-13A-7; and to amend and reenact §61-8-14 of said code, all relating to the access to and protection of cemeteries; clarifying procedures for protection of graves and burial sites; clarifying requirements and procedures for access to cemeteries and grave sites located on private land; clarifying conduct subject to criminal sanctions as it relates to the crime of disinterment of a dead body or damage to a cemetery.

Be it enacted by the Legislature of West Virginia:

That §29-1-8a of the Code of West Virginia, 1931, as amended, be amended and reenacted; that §37-13A-1, §37-13A-2 and §37-13A-5 of said code be amended and reenacted; that said code be amended by adding a new section, designated §37-13A-7; and that §61-8-14 of said code be amended and reenacted, all to read as follows:

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WEST VIRGINIA
SECRETARY OF STATE

CHAPTER 29. MISCELLANEOUS BOARDS AND OFFICERS.

ARTICLE 1. DIVISION OF CULTURE AND HISTORY.

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

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

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

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

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

24 (b) *Definitions.*--

25 For the purposes of this section:

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

28 (2) "Unmarked grave" means any grave or location where
29 a human body or bodies have been buried or deposited for at
30 least fifty years and the grave or location is not in a publicly
31 or privately maintained cemetery or in the care of a cemetery
32 association, or is located within such cemetery or in such care
33 and is not commonly marked;

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

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

40 (5) "Person" means any individual, partnership, firm,
41 society, association, trust, corporation, other business entity
42 or any agency, unit or instrumentality of federal, state or local
43 government;

44 (6) "Disturb" means the excavating, removing, exposing,
45 defacing, mutilating, destroying, molesting, or desecrating in
46 any way of human skeletal remains, unmarked graves, grave
47 artifacts or grave markers;

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

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

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

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

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

63 (1) No person may excavate, remove, destroy, or
64 otherwise disturb any historic or prehistoric ruins, burial
65 grounds, archaeological site, or human skeletal remains,
66 unmarked grave, grave artifact or grave marker of historical
67 significance unless such person has a valid permit issued to
68 him or her by the Director of the Historic Preservation
69 Section: *Provided*, That the supervising archaeologist of an
70 archaeological investigation being undertaken in compliance
71 with the federal Archaeological Resources Protection Act
72 (Public Law 96-95 at 16 USC 470(aa)) and regulations
73 promulgated thereunder is not required to obtain such permit,
74 but shall notify the Director of the Historic Preservation
75 Section that such investigation is being undertaken and file
76 reports as are required of persons issued a permit under this
77 section: *Provided, however*, That projects being undertaken
78 in compliance with section 106 of the National Historic
79 Preservation Act of 1966, as amended, or subsection (a),
80 section five of this article are not required to obtain such
81 permit for excavation, removal, destruction or disturbance of
82 historic or prehistoric ruins or archaeological sites.

83 (2) A person who, either by himself or herself or through
84 an agent, intentionally excavates, removes, destroys or

85 otherwise disturbs any historic or prehistoric ruins, burial
86 grounds or archaeological site, or unmarked grave, grave
87 artifact or grave marker of historical significance without first
88 having been issued a valid permit by the Director of the
89 Historic Preservation Section, or who fails to comply with the
90 terms and conditions of such permit, is guilty of a
91 misdemeanor and, upon conviction thereof, shall be fined not
92 less than \$100 nor more than \$500, confined in jail for not
93 more than six months, or both fined and confined.

94 (3) A person who, either by himself or herself or through
95 an agent, intentionally excavates, removes, destroys or
96 otherwise disturbs human skeletal remains of historical
97 significance without first having been issued a valid permit
98 by the Director of the Historic Preservation Section, or who
99 fails to comply with the terms and conditions relating to
100 disinterment or displacement of human skeletal remains of
101 such permit, is guilty of the felony of disinterment or
102 displacement of a dead human body or parts thereof under
103 section fourteen, article eight, chapter sixty-one of this code
104 and, upon conviction thereof, shall be imprisoned in a state
105 correctional facility not more than five years.

106 (4) A person who intentionally withholds information
107 about the excavation, removal, destruction, or other
108 disturbance of any historic or prehistoric ruins, burial
109 grounds, archaeological site, or human skeletal remains,
110 unmarked grave, grave artifact or grave marker of historical
111 significance is guilty of a misdemeanor and, upon conviction
112 thereof, shall be fined not more than \$100, or confined in jail
113 not more than ten days, or both fined and confined.

114 (5) A person who, either by himself or herself or through
115 an agent, offers for sale or exchange any human skeletal
116 remains, grave artifact or grave marker obtained in violation
117 of this section is guilty of a misdemeanor and, upon

118 conviction thereof, shall be fined not less than \$1,000 nor
119 more than \$5,000 or confined in jail not more than one year,
120 or both fined and confined.

121 (6) Each instance of excavation, removal, destruction,
122 disturbance or offering for sale or exchange under
123 subdivisions (1), through (5) of this subsection shall
124 constitute a separate offense.

125 (7) It is a complete defense in a prosecution under this
126 section if the defendant can prove by a preponderance of
127 evidence that the alleged acts were accidental or inadvertent
128 and that reasonable efforts were made to preserve the remains
129 accidentally disturbed or discovered, and that the accidental
130 discovery or disturbance was properly reported.

131 (8) This subsection does not apply to actions taken in the
132 performance of official law enforcement duties.

133 (d) *Notification of discovery of human skeletal remains*
134 *in unmarked locations. --*

135 Upon the discovery of human skeletal remains, grave
136 artifact or grave marker in an unmarked grave on any
137 publicly or privately owned property, the person making such
138 discovery shall immediately cease any activity which may
139 cause further disturbance, make a reasonable effort to protect
140 the area from further disturbance and notify the county
141 sheriff within forty-eight hours of the discovery and its
142 location. If the human remains, grave artifact or grave marker
143 appear to be from an unmarked grave, the sheriff shall
144 promptly, and prior to any further disturbance or removal of
145 the remains, notify the Director of the Historic Preservation
146 Section. The director shall cause an on-site inspection of the
147 disturbance to be made to determine the potential for
148 archaeological significance of the site: *Provided, That when*

149 the discovery is made by an archaeological investigation
150 permitted under state or federal law, the supervising
151 archaeologist shall notify the Director of the Historic
152 Preservation Section directly.

153 If the Director of the Historic Preservation Section
154 determines that the site has no archaeological significance,
155 the removal, transfer and disposition of the remains shall be
156 subject to the provisions of article thirteen, chapter thirty-
157 seven of this code, and the director shall notify the circuit
158 court of the county wherein the site is located.

159 If the Director of the Historic Preservation Section
160 determines that the site has a potential for archaeological
161 significance, the director shall take such action as is
162 reasonable, necessary and prudent, including consultation
163 with appropriate private or public organizations, to preserve
164 and advance the culture of the state in accordance with the
165 powers and duties granted to the director, including the
166 issuance of a permit for the archaeological excavation or
167 removal of the remains. If the director determines that the
168 issuance of a permit for the archaeological excavation or
169 removal of the remains is not reasonable, necessary or
170 prudent, the director shall provide written reasons to the
171 applicant for not issuing the permit.

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

173 Prior to the issuance of a permit for the disturbance of
174 human skeletal remains, grave artifacts, or grave markers, the
175 director of historic preservation shall convene and chair an ad
176 hoc committee to develop permit conditions. The committee
177 shall be comprised of the chair and six or eight members
178 representing known or presumed lineal descendants, private
179 and public organizations which have cultural affiliation to the
180 presumed contents of the site, the Council for West Virginia

181 Archaeology and the West Virginia Archaeological Society.
182 In the case of Native American sites, the membership of the
183 committee shall be comprised of the chair and six or eight
184 members representing the Council for West Virginia
185 Archaeology, the West Virginia Archaeological Society, and
186 known or presumed lineal descendants, preferably with
187 cultural affiliation to tribes that existed in the geographic area
188 that is now West Virginia.

189 In the case of a site of less than five acres, which is
190 owned by an individual or partnership, the ad hoc committee
191 must be formed within thirty days of application for same by
192 the property owner, must meet within sixty days of such
193 application, and must render a decision within ninety days of
194 such application.

195 All such permits shall at a minimum address the
196 following conditions: (1) The methods by which lineal
197 descendants of the deceased are notified prior to the
198 disturbance; (2) the respectful manner in which the remains,
199 artifacts or markers are to be removed and handled; (3)
200 scientific analysis of the remains, artifacts or markers and the
201 duration of those studies; (4) the way in which the remains
202 may be reburied in consultation with any lineal descendants,
203 when available; (5) methods for the respectful curation of
204 recovered items; and (6) such other conditions as the director
205 may deem necessary. Expenses accrued in meeting the
206 permit conditions shall be borne by the permit applicant,
207 except in cases where the deceased descendants or sponsors
208 are willing to share or assume the costs. A permit to disturb
209 human skeletal remains, grave artifacts or grave markers will
210 be issued only after alternatives to disturbance and other
211 mitigative measures have been considered.

212 In addition, a person applying for a permit to excavate or
213 remove human skeletal remains, grave artifacts, grave

214 markers, or any historic or prehistoric features of
215 archaeological significance may provide to the ad hoc
216 committee information he or she deems appropriate and shall:

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

221 (2) Provide data and results of any excavation, study or
222 collection in annual reports to the Director of the Historic
223 Preservation Section and submit a final report to the director
224 upon completion of the excavation;

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

228 (4) Provide any additional information the ad hoc
229 committee deems necessary in developing the permit
230 conditions.

231 The permits shall be issued for a period of two years and
232 may be renewed at expiration. The permits are not
233 transferable but other persons who have not been issued a
234 permit may work under the direct supervision of the person
235 holding the permit. The person or persons to whom a permit
236 was issued must carry the permit while exercising the
237 privileges granted and must be present at the site whenever
238 work is being done.

239 Notwithstanding any other penalties to which a person
240 may be subject under this section for failing to comply with
241 the terms and conditions of a permit, the permit of a person
242 who violates any of the provisions of this subsection shall be
243 revoked.

244 As permits are issued, the Director of the Historic
245 Preservation Section shall maintain a catalogue of unmarked
246 grave locations throughout the state.

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

248 To serve as an incentive for the protection of unmarked
249 graves, the owner, having evidence of the presence of
250 unmarked graves on his or her property, may apply to the
251 Director of the Historic Preservation Section for a
252 determination as to whether such is the case. Upon making
253 such a determination in the affirmative, the Director of the
254 Historic Preservation Section shall provide written
255 certification to the landowner that the site containing the
256 graves is a cemetery and as such is exempt from property
257 taxation upon presentation of the certification to the county
258 assessor. The area of the site to receive property tax exempt
259 status shall be determined by the Director of the Historic
260 Preservation Section. Additionally, a property owner may
261 establish protective easements for the location of unmarked
262 graves.

263 (g) *Additional provisions for enforcement; civil penalties;*
264 *rewards for information. --*

265 (1) The prosecuting attorney of the county in which a
266 violation of any provision of this section is alleged to have
267 occurred may be requested by the Director of the Historic
268 Preservation Section to initiate criminal prosecutions or to
269 seek civil damages, injunctive relief and any other
270 appropriate relief. The Director of the Historic Preservation
271 Section shall cooperate with the prosecuting attorney in
272 resolving such allegations.

273 (2) Persons convicted of any prohibited act involving the
274 excavation, removal, destruction, disturbance or offering for

275 sale or exchange of historic or prehistoric ruins, burial
276 grounds, archaeological site, human skeletal remains,
277 unmarked grave, grave artifact or grave marker under the
278 provisions of subdivisions (1) and (2), subsection (c) of this
279 section shall also be liable for civil damages to be assessed
280 by the prosecuting attorney in consultation with the Director
281 of the Historic Preservation Section.

282 Civil damages may include:

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

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

287 (iii) Any and all costs associated with recovery of data,
288 and analyzing, publishing, accessioning and curating
289 materials when the prohibited activity is so extensive as to
290 preclude the restoration of the unmarked burials or grave
291 markers;

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

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

297 (vi) Any and all costs associated with the determination
298 and collection of the civil damages.

299 When civil damages are recovered, the proceeds, less the
300 costs of the prosecuting attorney associated with the
301 determination and collection of such damages, shall be
302 deposited into the Endangered Historic Properties Fund and

303 may be expended by the Commissioner of Culture and
304 History for archaeological programs at the state level,
305 including the payment of rewards for information leading to
306 the arrest and conviction of persons violating the provisions
307 of subdivisions (1) and (2), subsection (c) of this section.

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

314 (h) *Disposition of remains and artifacts not subject to*
315 *reburial.* --

316 All human skeletal remains and grave artifacts found in
317 unmarked graves on public or private land, and not subject to
318 reburial, under the provisions of subsection (e) of this
319 section, are held in trust for the people of West Virginia by
320 the state and are under the jurisdiction of the Director of
321 Historic Preservation. All materials collected and not
322 reburied through this section shall be maintained with dignity
323 and respect for the people of the state under the care of the
324 West Virginia State Museum.

CHAPTER 37. REAL PROPERTY.

ARTICLE 13A. GRAVES LOCATED UPON PRIVATELY OWNED LANDS.

§37-13A-1. Access of certain persons to cemeteries and graves located on private land.

1 (a) Any authorized person who wishes to visit a cemetery
2 or grave site located on privately owned land and for which

3 no public ingress or egress is available, shall have the right to
4 reasonable ingress or egress for the purposes described in
5 subsection (b) after providing the owner of the privately
6 owned land with reasonable notice as defined in section two
7 of this article.

8 (b) The right of access to cemeteries or grave sites
9 provided in subsection (a) shall be during reasonable hours
10 and only for the purposes of:

11 (1) Visiting graves;

12 (2) Maintaining the grave site or cemetery;

13 (3) Burying a deceased person in a cemetery plot by those
14 granted rights of burial to that plot; and

15 (4) Conducting genealogy research.

16 (c) (1) The access route to the cemetery or grave site may
17 be designated by the landowner if no traditional access route
18 is obviously visible by a view of the property. If no
19 traditional access route is obviously visible by a view of the
20 property, the landowner is not required to incur any expense
21 in improving a designated access route.

22 (2) Unless the property owner has caused a traditional
23 access route to the cemetery or grave site to be unusable or
24 unavailable, the property owner is not required to make any
25 improvements to their property to satisfy the requirement of
26 providing reasonable ingress and egress to a cemetery or
27 burial site pursuant to this section.

28 (d) A property owner who is required to permit
29 authorized persons reasonable ingress and egress for the
30 purpose of visiting a cemetery or grave site and who acts in

31 good faith and in a reasonable manner pursuant to this section
32 is not liable for any personal injury or property damage that
33 occurs in connection with the access to the cemetery or grave
34 site.

35 (e) Nothing in this section shall be construed to limit or
36 modify the power or authority of a court in any action of law
37 or equity to order the disinterment and removal of the
38 remains from a cemetery and interment in a suitable location.

§37-13A-2. Definitions.

1 In this article:

2 (1) “Authorized person” means:

3 (A) A family member, close friend or descendant of a
4 deceased person;

5 (B) A cemetery plot owner; or

6 (C) A person engaged in genealogy research.

7 (2) “Governmental subdivision” means any county
8 commission or municipality.

9 (3) “Reasonable ingress and egress” or “reasonable
10 access” means access to the cemetery or grave site within ten
11 days of the receipt of written notice of the intent to visit the
12 cemetery or grave site. If the property owner cannot provide
13 reasonable access to the cemetery or grave on the desired
14 date, the property owner shall provide reasonable alternative
15 dates when the property owner can provide access within five
16 days of the receipt of the initial notice.

17 (4) “Reasonable notice” means written notice of the date
18 and time the authorized person intends to visit the cemetery

19 or grave site delivered to the property owner at least ten days
20 prior to the date of the intended visit.

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

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

§37-13A-7. Existence of cemetery or grave site, notification.

1 If a governmental subdivision is notified of the existence
2 of a cemetery, or a marked grave site that is not located in a
3 dedicated cemetery, within its jurisdiction, the governmental
4 subdivision shall, as soon as is practicable, notify the owner
5 of the land upon which the cemetery or burial site is located
6 of the cemetery's or grave site's existence and location. The
7 Governmental subdivision shall, upon notification of grave
8 site location, document the location. Data collected shall be
9 deposited with the Division of Culture and History. The
10 notification shall include an explanation of the provisions of
11 this article.

CHAPTER 61. CRIMES AND THEIR PUNISHMENT

**ARTICLE 8. CRIMES AGAINST CHASTITY, MORALITY
AND DECENCY.**

**§61-8-14. Disinterment or displacement of dead body or part
thereof; damage to cemetery or graveyard;
penalties; damages in civil action.**

1 (a) Any person who unlawfully and intentionally disinters
2 or displaces a dead human body, or any part of a dead human
3 body, placed or deposited in any vault, mausoleum or any
4 temporary or permanent burial place, removes personal
5 effects of the decedent removes or damages caskets,
6 surrounds, outer burial containers, or any other device used
7 in making the original burial; transports unlawfully removed
8 human remains from the cemetery; or knowingly receives
9 unlawfully removed human remains from the cemetery is
10 guilty of a felony, and, upon conviction thereof, shall be
11 confined in a state correctional facility for a determinate
12 sentence of not more than five years.

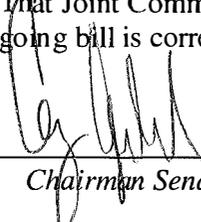
13 (b)(1) Any person who intentionally desecrates any tomb,
14 plot, monument, memorial, or marker in a cemetery, or any
15 gate, door, fence, wall, post, or railing, or any enclosure for
16 the protection of a cemetery or any property in a cemetery,
17 graveyard, mausoleum or other designated human burial site
18 is guilty of a misdemeanor, and, upon conviction thereof,
19 shall be fined not more than \$2,000.00, or confined in jail not
20 more than one year, or both fined and confined.

21 (2) Any person who intentionally and without legal right
22 destroys, cuts, breaks, removes, or injures any building,
23 statuary, ornamentation, landscape contents, including a tree,
24 shrub, flower, or plant, within the limits of a cemetery, is
25 guilty of a misdemeanor, and, upon conviction thereof, shall

26 be fined not more than \$2,000.00, or confined in jail not more
27 than one year, or both fined and confined.

28 (3) For the purposes of this subsection, “desecrate”
29 means destroying, cutting, mutilating, effacing, injuring,
30 tearing down, removing, defacing, damaging or otherwise
31 physically mistreating in a way that a reasonable person
32 knows will outrage the sensibilities of persons likely to
33 observe or discover his or her actions.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.



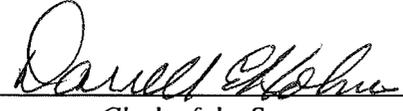
Chairman Senate Committee



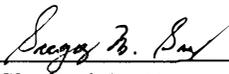
Chairman House Committee

Originating in the House.

In effect ninety days from passage.



Clerk of the Senate



Clerk of the House of Delegates

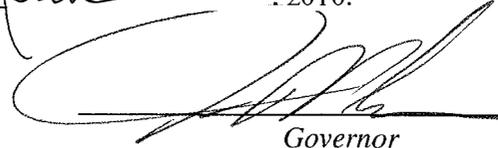


President of the Senate



Speaker of the House of Delegates

The within is approved this the 22nd
day of March, 2010.



Governor

PRESENTED TO THE
GOVERNOR

MAR 19 2010

Time

10:40am