

# HOUSE BILL REPORT

## E2SHB 2624

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### As Amended by the Senate

**Title:** An act relating to human remains.

**Brief Description:** Concerning human remains.

**Sponsors:** By House Committee on Appropriations (originally sponsored by Representatives McCoy, Kessler, Appleton, Ormsby, VanDeWege, Hunt, Kenney, Darneille and Chase).

**Brief History:**

**Committee Activity:**

State Government & Tribal Affairs: 1/22/08, 1/29/08 [DPS];  
Appropriations: 2/8/08, 2/11/08 [DP2S(w/o sub SGTA)].

**Floor Activity:**

Passed House: 2/15/08, 63-31.  
Senate Amended.  
Passed Senate: 3/7/08, 41-5.  
House Refused to Concur.  
Senate Amended.  
Passed Senate: 3/12/08, 44-5.

### Brief Summary of Engrossed Second Substitute Bill

- Establishes statutory guidelines and procedures for inadvertent discoveries of skeletal human remains.
- Holds harmless from criminal and civil liability those individuals who inadvertently discover skeletal human remains provided they are acting in compliance with stated requirements and applicable with the law.
- Requires the Department of Archeology and Historic Preservation (DAHP) to develop and maintain a centralized database of all known cemeteries and known sites of burials of human remains in Washington.
- Creates the position of the State Physical Anthropologist in the DAHP to assist local governments in making determinations on the status of skeletal human

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

remains; and to provide excavation services to private landowners, as well as removal and reinterment when necessary.

- Requires that professional archeologists employed by the state meet the qualifications of the Secretary of the Interior's standards for a professional archeologist.
- Creates the Skeletal Human Remains Assistance Account.
- Creates the non-appropriated Skeletal Human Remains Assistance Account. Expenditures from the account may be used only for archeological determination, excavations, and removal and reinterment of skeletal human remains.

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## HOUSE COMMITTEE ON STATE GOVERNMENT & TRIBAL AFFAIRS

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 5 members: Representatives Hunt, Chair; Appleton, Vice Chair; Liias, Miloscia and Ormsby.

**Minority Report:** Do not pass. Signed by 3 members: Representatives Chandler, Ranking Minority Member; Armstrong, Assistant Ranking Minority Member; Kretz.

**Staff:** Colleen Kerr (786-7168).

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## HOUSE COMMITTEE ON APPROPRIATIONS

**Majority Report:** The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on State Government & Tribal Affairs. Signed by 21 members: Representatives Sommers, Chair; Dunshee, Vice Chair; Cody, Conway, Darneille, Ericks, Fromhold, Grant, Green, Haigh, Hunt, Kagi, Kenney, Kessler, Linville, McIntire, Morrell, Pettigrew, Schual-Berke, Seaquist and Sullivan.

**Minority Report:** Do not pass. Signed by 12 members: Representatives Alexander, Ranking Minority Member; Bailey, Assistant Ranking Minority Member; Haler, Assistant Ranking Minority Member; Anderson, Chandler, Hinkle, Kretz, McDonald, Priest, Ross, Schmick and Walsh.

**Staff:** Owen Rowe (786-7391).

### **Background:**

Three areas of Washington statute are relevant to discoveries of skeletal human remains: statutes governing the coroner's jurisdiction over human remains; the Indian Graves and Records Act; and the Abandoned and Historic Cemeteries and Historic Graves Act. Although these statutes all have provisions regarding human remains, it is not clear who makes

determinations whether inadvertently discovered skeletal human remains are specifically statutorily protected, when such determinations should be made, who has jurisdiction, or what is appropriate procedure.

Under current law, a private landowner may inadvertently discover human remains and be required to cover the entire cost of excavation for statutorily protected remains, as well as the removal and reinterment when necessary. For inadvertent discoveries, it is unclear whether the individual who reports such a discovery may be subject to criminal and civil liability. Further, the state does not maintain a centralized database of known historic cemeteries and burial sites for private local governments to use to determine whether a proposed development is on or near a cemetery or burial site to prevent such inadvertent discoveries. This information is valuable with regard to Indian graves, as historically Indians were often buried around the perimeter of the local cemetery.

Finally, not all counties have the capacity to quickly make determinations of whether skeletal human remains are affiliated with a crime or may be protected Indian or historic remains. In Washington, only counties with populations of 250,000 or greater may choose to have a professional medical examiner. Other counties have either elected coroners or prosecutor-coroners. Six counties have medical examiners.

- Counties with a medical examiner include: Clark, King, Pierce, Snohomish, Spokane, and Whatcom.
- Counties with populations between 40,000 - 250,000 have elected coroners: Benton, Chelan, Cowlitz, Franklin, Grant, Grays Harbor, Island, Kitsap, Lewis, Mason, Skagit, Stevens, Thurston, and Walla Walla.
- Counties with populations less than 40,000 have prosecutor-coroners: Adams, Asotin, Clallam, Columbia, Douglas, Ferry, Garfield, Jefferson, Kittitas, Klickitat, Lincoln, Okanagan, Pacific, Pend Oreille, San Juan, Skamania, Wahkiakum, and Whitman.

#### Provisions Regarding Dead Bodies

Statute requires that anyone who knows of the existence and location of a dead body coming under the jurisdiction of the coroner must immediately notify the coroner. Failing to give notice is a misdemeanor. The statutory language is "dead body" as opposed to "skeletal human remains;" the statute is not cross-referenced with those statutes that protect Indian graves or historic graves.

#### The Indian Graves and Records Act

Indian graves and records are statutorily protected. The knowing removal, mutilation, defacement, injury, or destruction of remains or goods protected under the statute is a Class C felony; Indian tribes maintain a civil action against anyone who violates this chapter.

Individuals who inadvertently disturb Indian human remains must reinter the remains under the supervision of the appropriate Indian tribe. The costs of such reinterment are to be paid by the Department of Archeology and Historic Preservation. Funds have not been appropriated for this purpose.

#### The Abandoned and Historic Cemeteries and Historic Graves Act

Statute also provides protection for abandoned and historic cemeteries and graves. An abandoned cemetery means a burial ground of the human dead for which the county assessor can find no record of an owner, or where the owner is deceased and lawful conveyance of title has not been made. A historical cemetery means any burial site or ground where the human remains were buried prior to November 11, 1889, except for certified religious, state or local cemeteries. The vandalism or grave-robbing of a cemetery under this section is also a Class C felony. The knowing removal, mutilation, defacement, injury, or destruction of graves protected under the statute is also a Class C felony. Individuals are also subject to a civil action.

### **Summary of Engrossed Second Substitute Bill:**

#### Guidelines and Procedures

New sections governing the inadvertent discovery of skeletal human remains are added to statutes regarding the coroner's jurisdiction over human remains, to the Indian Graves and Records Act, and to the Abandoned and Historic Cemeteries and Historic Graves Act.

Individuals who inadvertently discover skeletal human remains must immediately call the county coroner or medical examiner and local law enforcement. Those individuals who make the inadvertent discovery through ground disturbing activity must also cease the activity and make a reasonable effort to protect the area from further disturbance. Those individuals who are in compliance with these requirements and are otherwise in compliance with applicable law are held harmless from criminal and civil liability.

The coroner or medical examiner must make a determination of whether the remains are forensic or nonforensic within five days, provided that such a determination can be made in that time period based on the skeletal human remains available. Upon determination that the skeletal human remains are nonforensic, the coroner or medical examiner must notify the Department of Archeology and Historic Preservation (DAHP) within two business days. A determination that skeletal human remains are nonforensic does not create a presumption that the remains are Indian or non-Indian.

The DAHP must notify appropriate local cemeteries and affected tribes of the discovery of nonforensic skeletal human remains. Tribes must be notified via certified mail to the head of the appropriate tribal government within two business days. The DAHP must also contact the appropriate tribal cultural resources staff. The State Physical Anthropologist must make an initial determination of whether the nonforensic skeletal human remains are Indian or non-Indian within two business days. If the remains are Indian, the DAHP must notify the affected tribes within two business days via certified mail to the head of the appropriate tribal government and by contacting the appropriate tribal cultural resources staff. Affected tribes have five business days to notify the DAHP as to their interest in the remains.

The coroner or medical examiner will retain jurisdiction over all forensic human remains. The DAHP will have jurisdiction over all nonforensic remains until provenance of such remains is established.

Affected tribes are those with usual and accustomed areas in the jurisdiction where the remains were found, or those that submit to the DAHP maps that reflect the tribe's geographical area of cultural affiliation.

Forensic remains are those that come under the jurisdiction of the coroner as defined in statute.

Inadvertent discovery has the same meaning as used in the Indian Graves and Records Act. This definition includes disturbance through construction, mining, logging, agricultural activity, or any other activity.

#### Cemetery and Graves Database

The DAHP will develop and maintain a centralized database and geographic systems spatial layer of all known cemeteries and known sites of burial of human remains in Washington. The information in the database is subject to exemption from public disclosure pursuant to the Public Disclosure Act, but is available to federal, state, and local agencies for purposes of environmental review, and to tribes to protect their ancestors and to perpetuate their cultures.

#### State Physical Anthropologist

The position of the State Physical Anthropologist is created in the DAHP subject to appointment by the Director of the DAHP. The State Physical Anthropologist must:

- have a doctorate in either archeology or anthropology;
- have experience in forensic osteology or other relevant aspects of physical anthropology;
- and
- have at least one year's experience in laboratory reconstruction.

A medical degree with archeological experience in addition to required experience may substitute for a doctorate in archeology or anthropology.

The State Physical Anthropologist will have the primary responsibility of investigating, preserving, and when necessary, removing and reintering skeletal human remains that are not evidence of a crime. He or she will also be available to any local government or tribal government in Washington to assist in determining whether discovered remains are forensic or nonforensic and whether non-forensic remains are Indian or non-Indian.

#### Professional Archeologist Qualifications

Professional archeologists employed by the state must be qualified to the federal Secretary of the Interior's standards for professional archaeologist. Archeologists not meeting this standard may be conditionally employed by working under the supervision of a professional archeologist for a period of four years provided the employee is working toward the required qualifications. The four year period is not subject to renewal. During the four year period, a professional archeologist is responsible for all findings.

#### Account

The Skeletal Human Remains Assistance Account (Account) is created in the custody of the treasurer. Expenditures from the Account must be authorized by the Director of Archeology and Historic Preservation only after the archeological determination and excavation, and

removal and reinterrment when necessary, of inadvertently discovered skeletal human remains.

**EFFECT OF SENATE AMENDMENT(S):**

The definition of "affected tribes" is amended to include other tribes that have historical and cultural affiliation in the jurisdiction where the remains were found so that tribes that are not federally recognized shall be notified by DAHP upon the discovery of skeletal human remains that have been determined to be Indian by the State Physical Anthropologist. Additionally, a new subsection is added to sections 1-3 that provides: Nothing in this section constitutes, advocates, or otherwise grants, confers, or implies federal or state recognition of those tribes that are not federally recognized pursuant to 25 C.F.R. part 83, procedures for establishing that an American Indian group exists as an Indian tribe.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** The bill takes effect 90 days after adjournment of session in which bill is passed. However, the bill is null and void unless funded in the budget.

**Staff Summary of Public Testimony:** (State Government & Tribal Affairs)

(In support) This bill derives from proposed legislation in the Senate last year that went to protecting pioneer graves. That bill did not pass, but it began the discussion between various stakeholder groups and the tribes. The inadvertent discovery of skeletal human remains in the course of property development can happen with the common and regular use of a back hoe and can completely disrupt a project. This was clearly evident this past summer in Beckett Point where a project for a development that was connecting to the sewer came to a complete halt upon the discovery of human remains. Part of the problem is that the sections of statute dealing with human remains are disconnected and not cross-referenced. Additionally, there are no time lines or consistent guidelines for local governments, developers, or private landowners to follow when there is a discovery of skeletal human remains and therefore no predictability.

The State Physical Anthropologist is an integral part of the bill. It provides capacity to both the state and to local governments, but also fills an important role in consultation with the tribes. It also takes the burden and expense off private landowners when they inadvertently discover protected skeletal human remains during development.

The bill specifically provides equal protection of all graves. It remedies gaps in Washington statute and provides a necessary foundation for future legislation regarding determination of disposition of the remains.

(With concerns) The coroners and medical examiners support the intent of the proposed legislation, but need to make sure that they are acting to the letter of the law and that the statute is not changed so that the state coroners lose their national accreditation. In particular,

it is important that coroners retain their jurisdiction over those remains that may be associated with a crime and that determination can be difficult and lengthy to make.

The bill is not clear with regard to later process. For example, what happens to remains that are not Native American and not forensic? For Native American remains, there are also issues regarding coordinating with the appropriate local governments. How will this affect those inter-local agreements that are already in place?

(Opposed) There is still uncertainty and potentially catastrophic cost by leaving the initial determination of whether remains are Indian or non-Indian with the State Physical Anthropologist and not specifying who makes the final determination. Additionally, developers hope that the area where activity must be stopped can be limited in its scope so that not all development has to stop.

**Staff Summary of Public Testimony:** (Appropriations)

(In support) This bill results from a budget proviso from last year for the Governor's Office on Indian Affairs and the Department of Archeology and Historic Preservation to take a look at the problem of the inadvertent discovery of human remains. We feel that the issues have been addressed in this legislation; please support this bill.

Everyone knows there is a problem, but we cannot quantify the caseload at this time. This bill addresses the notification requirements when a discovery of human remains occurs. The mapping piece accounts not just for Indian remains, but for pioneer cemeteries as well; this will allow the Department to account for everyone buried before statehood and forward.

(Opposed) None.

**Persons Testifying:** (State Government & Tribal Affairs) (In support) Representative McCoy, prime sponsor; Ralph Monroe, Secretary of State (retired), Frances Charles, Lower Elwha Klallam Tribe; Miguel Perez Gibson, Colville Tribe; Al Johnnie, Lummi Indian Business Council; Steve Robinson, Northwest Indian Fisheries Commission; and David Sullivan, Jefferson County.

(With concerns) Dr. Eric L. Kiesel, Kathy Taylor, and Greg Sandstrom, Washington Association of Coroners and Medical Examiners.

(Opposed) Timothy Harris, Building Industry Association of Washington.

**Persons Testifying:** (Appropriations) Miguel Perez-Gibson, Colville Tribes; and Mike Moran, Samish, Hoh, and Umatilla Tribes.

**Persons Signed In To Testify But Not Testifying:** (State Government & Tribal Affairs) None.

**Persons Signed In To Testify But Not Testifying:** (Appropriations) None.