

SENATE BILL REPORT

SB 5938

As Reported By Senate Committee On:
Government Operations & Elections, February 27, 2007

Title: An act relating to human remains.

Brief Description: Regarding the protection of graves and cemeteries.

Sponsors: Senators Haugen, Swecker, Fairley, Roach, Shin and Rasmussen.

Brief History:

Committee Activity: Government Operations & Elections: 2/22/07, 2/27/07 [DPS, w/oRec].

SENATE COMMITTEE ON GOVERNMENT OPERATIONS & ELECTIONS

Majority Report: That Substitute Senate Bill No. 5938 be substituted therefor, and the substitute bill do pass.

Signed by Senators Fairley, Chair; Oemig, Vice Chair; Roach, Ranking Minority Member; Kline, Pridemore and Swecker.

Minority Report: That it be referred without recommendation.

Signed by Senator Benton.

Staff: Amy Van Horn (786-7784)

Background: The Abandoned and Historic Cemeteries and Historic Graves Act: The Abandoned and Historic Cemeteries and Historic Graves Act (Chapter 68.60 RCW) governs abandoned cemeteries, historical cemeteries, and historic graves. Under the Act, an "abandoned cemetery" is a burial ground that has no known or living owner. A "historical cemetery" is a burial site or grounds with human remains buried prior to November 11, 1889, with some exceptions for such cemeteries still in operation. A "historic grave" is a grave or graves that were placed outside a cemetery dedicated under Washington law, prior to June 7, 1990, except for Indian graves and burial cairns protected under the Indian Graves and Records Act (Chapter 27.44 RCW). Finally, under the Act a "cemetery" is defined as any burial site, burial grounds, or place where five or more human remains are buried.

Under the Act, any abandoned or historical cemetery or grave that has not been dedicated as a cemetery under Washington law must be so dedicated. Private corporations may be licensed by the Department of Archaeology and Historic Preservation ("Department") to maintain and protect an abandoned cemetery. Willful disturbance of cemetery property and historic graves is punishable as a crime up to a class C felony.

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.

Persons who inadvertently disturb a historic grave, including through construction, must reinter the human remains under the supervision of the Department. Reinterment expenses are paid by the Department, to the extent that funds for this purpose are appropriated by the Legislature.

Summary of Bill: The bill as referred to committee not considered.

Summary of Proposed Substitute As Heard in Committee: The bill amends the Abandoned and Historic Cemeteries and Historic Graves Act.

Definitions: References to "abandoned cemetery" and "historical cemetery" are removed.

"Cemetery" is defined as a parcel of land recorded within the records of the county assessor as land intentionally set aside for the exclusive purpose of interring human remains. "Cemetery" expressly excludes any and all land covered by the Indian Graves and Records Act.

"Grave" is defined as a burial site or ground located outside a cemetery. "Grave" expressly excludes any Indian grave protected under the Indian Graves and Records Act.

"Human remains" is defined as a set of one human's remains or intermingled sets of more than one human's remains, whether or not the sets are complete human skeletons, together with all man-made things attached to or found in the immediate vicinity of the remains. "Human remains" expressly excludes Indian human remains protected under the Indian Graves and Records Act. If the Department of Archaeology and Historic Preservation cannot determine with reasonable scientific certainty whether remains are Indian or non-Indian, they must be treated as non-Indian human remains under this Act.

References to the Department of Community, Trade and Economic Development are replaced with references to the Department of Archaeology and Historic Preservation.

Other Amended Provisions: Non-Indian cemeteries or graves that have not been dedicated as a cemetery under Washington law may be so dedicated with the consent of the landowner.

Selling non-Indian human remains from a non-Indian grave is a class C felony. Failing to report a disturbance of non-Indian human remains is a misdemeanor.

Anyone who inadvertently disturbs non-Indian graves or cemeteries, including through construction, mining, logging, agricultural, or any other activity, must immediately report the disturbance to law enforcement officials. If law enforcement finds no evidence of a crime, within the next 48 hours they must report the disturbance to the Department. The Department must report the disturbance to the Cemetery Board and, if reasonably possible, to appropriate descendants. Removal and reinterment of non-Indian human remains must be by permit from and under the supervision of the Department.

A cause for a civil action is created for a disturbance of a non-Indian grave, to include an injunction, damages, or other relief. The action must be brought within two years of the plaintiff's discovery of the violation. The plaintiff may receive \$500 or actual damages, whichever is greater; and punitive damages in the case of a willful violation. The court may award reasonable attorneys fees to the prevailing party.

EFFECT OF CHANGES MADE BY RECOMMENDED SUBSTITUTE AS PASSED COMMITTEE (Government Operations & Elections): The substitute bill contains the following provisions:

A Joint Legislative Task Force is created: A Task Force is convened to study the issues surrounding the discovery of human remains, both Indian and non-Indian. The Task Force will have a Chair, appointed by the Governor, who is experienced in tribal relations. In addition to the Chair, the Task Force will comprise four members of the Legislature, and one representative each from the Department of Archaeology and Historic Preservation, the Department of Licensing, and the Governor's Office of Indian Affairs. The Task Force must consult with all interested Indian tribes in the state, and make findings and recommendations to the Legislature by December 2007.

A Reporting Process is Established: Anyone who discovers human remains, graves, or a cemetery, must report the discovery to law enforcement; failure to do so is a misdemeanor. Law enforcement then must report the discovery to the Department of Archaeology and Historic Preservation. If the discovery contains Indian human remains, graves, or cemeteries, law enforcement must promptly report the discovery to the affected Indian tribes.

Civil Penalties are established under the Historic Graves Act (RCW 68.60): The civil penalties currently available under the Indian Graves Act (RCW 27.44) are extended to the Historic Graves Act (RCW 68.60).

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: Yes.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: The original intent of this bill was to protect all graves, Indian and non-Indian, equally. Out of respect for Indian tribes who objected to provisions in the original bill, the substitute bill removes all amendments to the Indian Graves and Records Act. This bill is directed not only at road construction, but at home construction. Old cemeteries are not protected, and neither are bones that people discover when they build houses. Home-builders are discovering human bones now, and they do not report them. In decades past poor people have had to bury their children on their own property, and those graves have no protection now. There is no requirement to report the discovery of human bones in this state, and pioneer cemeteries are vandalized routinely. This bill was planned in good faith, and representatives of many Indian tribes were invited to the planning meetings. Sadly, the substitute bill is only a shadow of the original bill.

CON: The substitute bill removes the historical cemetery designation from the Abandoned and Historic Cemeteries and Historic Graves Act, and that would be very damaging to many tribes. It would remove tribes from processes to protect their ancestral burial sites that tribes have participated in for decades. There also is no provision in the substitute bill that would require the Department of Archaeology and Historic Preservation (Department) to consult with Indian tribes when human remains or graves are discovered. Tribes must be involved in any decision-making process where the protection of ancestral Indian graves is at stake. Tribes

have not had a fair and equitable opportunity to comment on either version of the bill. The tribes are committed to working with the Legislature and state agencies to achieve solutions that protect all graves. Tribes would benefit from a requirement to report the discovery of any human remains in the state.

OTHER: Right now, no law requires a person to report a discovery of human remains. Even if a person does report a discovery to a law enforcement agency, law enforcement agencies are not required to report a discovery of human remains to the Department. Therefore, the Department cannot keep a record of all of the historic grave sites in the state. The Attorney General has opined that the Abandoned and Historic Cemeteries and Historic Graves Act was never intended to apply to Indian graves.

Persons Testifying: PRO: Senator Haugen, prime sponsor.

CON: Al Scott Johnnie, Lummi Nation; Frances G. Charles, Lower Elwha Klallam Tribe; Ron Charles, Regina Beckwith, Port Gamble S'Klallam Tribe; Gilbert King George, Muckleshoot Tribe Spiritual Leader.

OTHER: Allyson Brooks, Director, Washington Department of Archaeology and Historic Preservation; Dawn Vyvyan, Yakama Nation; Ralph Munro, citizen.