

H. B. 2893

(By Delegates Manypenny, Marshall, Moore, Wells,
Caputo, Longstreth and Fleischauer)

[Introduced March 11, 2013; referred to the
Committee on the Judiciary then Finance.]

A BILL to amend and reenact §29-1-8a of the Code of West Virginia,
1931, as amended; and to amend and reenact §37-13a-1 and §37-
13a-5, all relating to preservation of cemeteries; requiring
cultural surveys be performed before certain construction
projects by natural gas pipeline companies; setting forth
requirements; authorizing the Director of the Historic
Preservation Section of the Division of Culture and History to
issue permits for nonjurisdictional gathering lines;
establishing a permit fee; requiring property owners to
provide access to cemeteries and burial sites under certain
circumstances; permitting injunctive relief; requiring
attorney fees and costs be awarded when injunctive relief is
granted; prohibiting natural gas pipelines, wells and
associated facilities from being constructed within one
hundred feet of a cemetery or grave site; and providing an

1 effective date.

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

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

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

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

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

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

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

23 The Legislature also finds that those persons engaged in the

1 scientific study or recovery of artifacts which have been acquired
2 in accordance with the law are engaged in legitimate and worthy
3 scientific and educational activities. Therefore, this legislation
4 is intended to permit the appropriate pursuit of those lawful
5 activities.

6 Finally, this legislation is not intended to interfere with
7 the normal activities of private property owners, farmers, or those
8 engaged in the development, mining or improvement of real property.

9 (b) *Definitions.* --

10 For the purposes of this section:

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

13 (2) "Unmarked grave" means any grave or location where a human
14 body or bodies have been buried or deposited for at least fifty
15 years and the grave or location is not in a publicly or privately
16 maintained cemetery or in the care of a cemetery association, or is
17 located within such cemetery or in such care and is not commonly
18 marked;

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

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

24 (5) "Person" means any individual, partnership, firm, society,

1 association, trust, corporation, other business entity or any
2 agency, unit or instrumentality of federal, state or local
3 government;

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

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

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

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

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

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

21 (1) No person may excavate, remove, destroy, or otherwise
22 disturb any historic or prehistoric ruins, burial grounds,
23 archaeological site, or human skeletal remains, unmarked grave,
24 grave artifact or grave marker of historical significance unless

1 such person has a valid permit issued to him or her by the Director
2 of the Historic Preservation Section: *Provided, That the*
3 supervising archaeologist of an archaeological investigation being
4 undertaken in compliance with the federal Archaeological Resources
5 Protection Act (Public Law 96-95 at 16 U.S.C. 470(aa)) and
6 regulations promulgated thereunder is not required to obtain such
7 permit, but shall notify the Director of the Historic Preservation
8 Section that such investigation is being undertaken and file
9 reports as are required of persons issued a permit under this
10 section: *Provided, however, That projects being undertaken in*
11 compliance with section 106 of the National Historic Preservation
12 Act of 1966, as amended, or subsection (a), section five of this
13 article is not required to obtain such permit for excavation,
14 removal, destruction or disturbance of historic or prehistoric
15 ruins or archaeological sites.

16 (2) A person who, either by himself or herself or through an
17 agent, intentionally excavates, removes, destroys or otherwise
18 disturbs any historic or prehistoric ruins, burial grounds or
19 archaeological site, or unmarked grave, grave artifact or grave
20 marker of historical significance without first having been issued
21 a valid permit by the Director of the Historic Preservation
22 Section, or who fails to comply with the terms and conditions of
23 such permit, is guilty of a misdemeanor and, upon conviction
24 thereof, shall be fined not less than \$100 nor more than \$500,

1 confined in jail for not more than six months, or both fined and
2 confined.

3 (3) A person who, either by himself or herself or through an
4 agent, intentionally excavates, removes, destroys or otherwise
5 disturbs human skeletal remains of historical significance without
6 first having been issued a valid permit by the Director of the
7 Historic Preservation Section, or who fails to comply with the
8 terms and conditions relating to disinterment or displacement of
9 human skeletal remains of such permit, is guilty of the felony of
10 disinterment or displacement of a dead human body or parts thereof
11 under section fourteen, article eight, chapter sixty-one of this
12 code and, upon conviction thereof, shall be imprisoned in a state
13 correctional facility not more than five years.

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

22 (5) A person who, either by himself or herself or through an
23 agent, offers for sale or exchange any human skeletal remains,
24 grave artifact or grave marker obtained in violation of this

1 section is guilty of a misdemeanor and, upon conviction thereof,
2 shall be fined not less than \$1,000 nor more than \$5,000 or
3 confined in jail not more than one year, or both fined and
4 confined.

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

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

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

16 (d) *Notification of discovery of human skeletal remains in*
17 *unmarked locations. --*

18 Upon the discovery of human skeletal remains, grave artifact
19 or grave marker in an unmarked grave on any publicly or privately
20 owned property, the person making such discovery shall immediately
21 cease any activity which may cause further disturbance, make a
22 reasonable effort to protect the area from further disturbance and
23 notify the county sheriff within forty-eight hours of the discovery
24 and its location. If the human remains, grave artifact or grave

1 marker appear to be from an unmarked grave, the sheriff shall
2 promptly, and prior to any further disturbance or removal of the
3 remains, notify the Director of the Historic Preservation Section.
4 The director shall cause an on-site inspection of the disturbance
5 to be made to determine the potential for archaeological
6 significance of the site: *Provided*, That when the discovery is
7 made by an archaeological investigation permitted under state or
8 federal law, the supervising archaeologist shall notify the
9 Director of the Historic Preservation Section directly.

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

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

1 archaeological excavation or removal of the remains is not
2 reasonable, necessary or prudent, the director shall provide
3 written reasons to the applicant for not issuing the permit.

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

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

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

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

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

22 (1) Provide a detailed statement to the Director of the
23 Historic Preservation Section giving the reasons and objectives for
24 excavation or removal and the benefits expected to be obtained from

1 the contemplated work;

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

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

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

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

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

21 As permits are issued, the Director of the Historic
22 Preservation Section shall maintain a catalogue of unmarked grave
23 locations throughout the state.

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

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

14 (g) *Additional provisions for enforcement; civil penalties;*
15 *rewards for information. --*

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

23 (2) Persons convicted of any prohibited act involving the
24 excavation, removal, destruction, disturbance or offering for sale

1 or exchange of historic or prehistoric ruins, burial grounds,
2 archaeological site, human skeletal remains, unmarked grave, grave
3 artifact or grave marker under the provisions of subdivisions (1)
4 and (2), subsection (c) of this section shall also be liable for
5 civil damages to be assessed by the prosecuting attorney in
6 consultation with the Director of the Historic Preservation
7 Section.

8 Civil damages may include:

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

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

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

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

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

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

23 When civil damages are recovered, the proceeds, less the costs
24 of the prosecuting attorney associated with the determination and

1 collection of such damages, shall be deposited into the Endangered
2 Historic Properties Fund and may be expended by the Commissioner of
3 Culture and History for archaeological programs at the state level,
4 including the payment of rewards for information leading to the
5 arrest and conviction of persons violating the provisions of
6 subdivisions (1) and (2), subsection (c) of this section.

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

12 (h) *Disposition of remains and artifacts not subject to*
13 *reburial.* --

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

23 (i) (1) Effective January 1, 2014, a person constructing a
24 natural gas pipeline, not subject to federal regulatory

1 jurisdiction, shall complete a preconstruction cultural survey of
2 all rights-of-ways, access roads and material storage areas not
3 being developed along an existing right-of-way.

4 (2) Surveys required by subdivision (1) of this subsection
5 shall be conducted within one hundred feet of a proposed right-of-
6 way, access road and material storage area, in accordance the
7 standards established by the West Virginia State Historic
8 Preservation Office pursuant to State Review Process of the
9 Standards and Procedures for Administering State Historic
10 Preservation Programs, 82 CSR 2-5.

11 (3) If a culture survey conducted pursuant to subdivision (1)
12 of this subsection discovers the presence of an unmarked cemetery
13 or grave, the person making the discovery shall immediately report
14 the discovery to the appropriate individuals pursuant to subsection
15 (d) of this section.

16 (4) The director may issue permits as necessary pursuant to
17 subsection (e) of this section to a person constructing
18 nonjurisdictional natural gas gathering lines. A report submitted
19 to the West Virginia State Historic Preservation Office shall be
20 accompanied by a \$750 fee.

21 (5) Natural gas pipelines, natural gas wells and other
22 facilities related to the exploration, production or transportation
23 of natural gas may not be constructed within one hundred feet of a
24 cemetery or grave site.

1 **CHAPTER 37. REAL PROPERTY.**

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

3 **§37-13A-1. Access of certain persons to cemeteries and graves**
4 **located on private land.**

5 (a) Any authorized person who wishes to visit a cemetery or
6 grave site located on privately owned land and for which no public
7 ingress or egress is available, shall have the right to reasonable
8 ingress or egress for the purposes described in subsection (c) of
9 this section after providing the owner of the privately owned land
10 with reasonable notice as defined in subsection (b) of this
11 section.

12 (b) An authorized person intending to visit the cemetery or
13 grave site for the purpose of installing a monument or grave marker
14 pursuant to subdivision (2), subsection (c) of this section, shall
15 give reasonable notice to the property owner which is to include a
16 description of the monument or grave marker to be installed. As
17 used in this article, "reasonable notice" means written notice of
18 the date and time the authorized person intends to visit the
19 cemetery or grave site delivered to the property owner at least ten
20 days prior to the date of the intended visit.

21 (c) The right of access to cemeteries or grave sites provided
22 in subsection (a) of this section shall be during reasonable hours
23 and only for the purposes of:

1 (1) Visiting graves;

2 (2) Maintaining the grave site or cemetery, including the
3 installation of a monument or a grave marker: *Provided*, That a
4 property owner may deny access to the cemetery or grave site
5 because the owner objects to the installation of the type or style
6 of the monument or grave marker that has been described in the
7 notice given pursuant to subsection (b) of this section;

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

10 (4) Conducting genealogy research.

11 (d) (1) The access route to the cemetery or grave site may be
12 designated by the landowner if no traditional access route is
13 obviously visible by a view of the property. If no traditional
14 access route is obviously visible by a view of the property, the
15 landowner is not required to incur any expense in improving a
16 designated access route.

17 (2) Unless the property owner has caused a traditional access
18 route to the cemetery or grave site to be unusable, ~~or~~ unavailable
19 or requires specialized training to traverse, the property owner is
20 not required to make any improvements to their property to satisfy
21 the requirement of providing reasonable ingress and egress to a
22 cemetery or burial site pursuant to this section.

23 (e) A property owner who is required to permit authorized
24 persons reasonable ingress and egress for the purpose of visiting

1 a cemetery or grave site and who acts in good faith and in a
2 reasonable manner pursuant to this section is not liable for any
3 personal injury or property damage that occurs in connection with
4 the access to the cemetery or grave site.

5 (f) Nothing in this section shall be construed to limit or
6 modify the power or authority of a court in any action of law or
7 equity to order the disinterment and removal of the remains from a
8 cemetery and interment in a suitable location.

9 **§37-13A-5. Cause of action for injunctive relief.**

10 (a) An authorized person denied reasonable access under the
11 provisions of this article, including the denial of permission to
12 use vehicular access or the denial of permission to access the
13 cemetery or grave site to install a monument or grave marker, may
14 institute a proceeding in the circuit court of the county in which
15 the cemetery or grave site is located to enjoin the owner of the
16 private lands on which the cemetery or grave site is located, or
17 his or her agent, from denying the authorized person reasonable
18 ingress and egress to the cemetery or grave site for the purposes
19 set forth in this article. In granting relief, the court may set
20 the frequency of access, hours and duration of the access. If a
21 traditional access route has become unusable or unavailable due to
22 the actions of the landowner, an authorized person may petition the
23 circuit court to order the landowner to make necessary repairs to
24 the traditional access route or to develop a new access route of

1 the same kind as previously existed.

2 (b) The court or the judge thereof may issue a preliminary
3 injunction in any case pending a decision on the merits of any
4 application filed without requiring the filing of a bond or other
5 equivalent security. The circuit court shall award reasonable
6 attorney fees and costs to any authorized person who is granted
7 injunctive relief pursuant to subsection (a) of this section.

NOTE: The purpose of this bill is to require cultural surveys be performed before construction by natural gas pipeline companies. The bill sets forth requirements. The bill authorizes the Director of the Historic Preservation Section of the Division of Culture and History to issue construction permits. The bill establishes a permit fee. The bill requires property owners to provide access to cemeteries and burial sites under certain conditions. The bill permits injunctive relief. The bill requires attorney fees and costs be awarded when injunctive relief is granted. The bill prohibits natural gas pipelines, wells and associated facilities from being constructed within one hundred feet of a cemetery or grave site.

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