

## The New Burial Law – A Commentary

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When I first read the text of House Bill 2927, and learned that the Texas Historical Commission (THC) planned to apply it to archeological human remains, I could only describe it by using a quote from Scott Adams: “I think a couple of mediocre minds developed an unworkable solution.” Texas’ new burial law is beset with numerous flaws and, worse, flawed logic. It is unscientific, illiberal, and culturally insensitive.

First, let me tell you a little of my background and experience, so that you know that I am qualified to make the above statements. For over 10 years, I have devoted my career to the study of human remains and burial archeology in Texas. I have examined over 4,000 sets of human remains from every region of the state. My research has led me to work with Native American Graves Protection and Repatriation Act (NAGPRA) issues at the Texas Archeological Research Laboratory, the New York State Museum, and the Panhandle-Plains Historical Museum. I have worked on NAGPRA concerns with Mahicans, Mohawks, Senecas, Comanches, Kiowas, Caddos, and Apaches. I have even excavated prehistoric graves alongside tribal members. Furthermore, I have a personal connection to the issue. My direct ancestor, who first came to Texas in 1854, is buried in an unmarked grave.

I first learned of H.B. 2927 in September 2009, after its signature by the governor. At the TAS meetings in October of that year, it was confirmed that the legislation was to be applied to unmarked burials of archeological significance. This is despite the fact that the bill does not contain the words “prehistoric”, “archeology”, or “archeological.” I immediately set out to learn as much as I could about the legislation.

I talked with legislative offices and the people who provided testimony to the bill in the legislature. I learned that the THC, especially the Director of the Archeology Division, is directly responsible for this law. However, the State Archeologist and the regional archeologists apparently had little to do with its formulation or with the rule-making.

Originally, the bill was a response to the Texas Ranger Museum expansion in 2007. In short, new construction of the museum in Waco disturbed a (previously marked) historic cemetery. The THC conveyed to legislators that Texas cemetery law needed to be revised to prevent another event like this occurring. Surprisingly, the THC seemed to unaware of Attorney General Opinion JC0355, issued by then-Attorney General John Cornyn in 2001. Cornyn's opinion extended existing grave law to 19<sup>th</sup> century cemeteries (even those that were unmarked), thus making any new legislation in response to the Waco situation irrelevant.

In March, 2010 I filed an Open Records request with the THC on the formulation and rule-making of H.B. 2927. While I received many documents on the rule-making, the THC refused to release documents on the formulation of the law. Citing "attorney-client privilege" the THC decided that I (and by extension you) do not have the right to examine the process by which this law was developed.

From what I was allowed to see, it is apparent that the Waco cemetery situation was used as a ruse to alter current cemetery law. Cleverly, the THC gave themselves rule-making authority so they could write the bill they wanted, rather than interpret the one that was passed. I know this because I spoke with the offices of Donna Howard (D-Austin and the primary author of the bill) and Harvey Hildebran (R-Kerrville and one of

the co-authors)<sup>1</sup>. I asked, specifically, if H.B. 2927 applied to archeological remains. I was answered with an unhesitating and unequivocal “no.” In light of this information, it is not surprising that the THC is claiming attorney-client privilege<sup>2</sup>.

### An Undiscussed Idea

Perhaps one of the most surprising aspects of the new burial law is how little input was sought from outside the THC. In the words of Pericles’ *Funeral Oration*: “acts are foredoomed to failure when undertaken undiscussed.” I can find no evidence that THC officials sought the expertise of physical anthropologists, forensic investigators, or law enforcement. There also no evidence that any recognized tribe of Native Americans was consulted, or even notified, of the legislation. I know for a fact that THC officials purposefully sought to keep the law’s intent secret from private property interest groups.

The lack of consultation is responsible for most of the flaws in the burial legislation. THC staff has little experience in forensic anthropology or burial archeology. In fact, on several occasions I have had to conduct salvage excavation of human burials after the THC refused regulatory assistance to local communities. In February 2009, the City of Memphis appealed to the THC for help after a skull was found in the city park. They told Memphis that it was not a THC problem. I also watched as the THC did nothing to prevent the reburial of the Early Archaic Buckeye Knoll cemetery in 2001. The loss of scientific information from that site was an act of vandalism on par with the looting of Spiro Mounds.

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<sup>1</sup> the other authors of the bill included Charles “Doc” Anderson (R-Waco) and Jim Dunnam (R-Waco).

<sup>2</sup> providing false or misleading information to the legislature is a Class A Misdemeanor, punishable by a \$4,000 fine and up to a year in jail.

Had a physical anthropologist been involved in the formulation of the law, several pitfalls would have been avoided. Stunningly, there are no provisions for human remains of medico-legal (forensic) significance. As the rules are now written, a buried murder victim now constitutes a cemetery and is due all the protections of a designated plot. If police excavate a prehistoric grave in the course of a forensic investigation, they can now be prosecuted for disturbing a designated cemetery. H.B. 2927 made this act a felony.

The limitations on property use contained in the law will also make forensic investigation more difficult. The new burial law makes individual landowners legally and financially responsible for unmarked graves on their property, even if they had no previous knowledge of their existence. Because property owners will no longer be able to use their property as they see fit (including agricultural use), discovered human remains will simply go unreported. Eventually, a forensic case will be unreported, a victim will go unidentified, and a murderer will not face justice.

### Cultural Chauvinism

One of the most distressing aspects of the new law is the lack of inclusion of American Indians. The words “Native American” or “American Indian” do not appear anywhere in H.B. 2927. In the final rules issued by the THC, there is no provision for tribal consultation. While the THC would argue that this law helps to protect Native American graves, they have given no voice to the American Indian community. To borrow a quote from Jace Weaver, the THC desires “Indian presence with no Indians present.”

In this day and age, to write an unmarked burial law and not include tribal governments is unfathomable. To deny American Indians a voice in this process is

nothing but old fashioned cultural chauvinism. I thought Texas was past the point in its history where White bureaucrats decided for Indians what was best for them. The THC has proven me wrong.

From the records I obtained from the THC, including Native American voices was never considered. Consequently, there are no provisions for respecting indigenous burial traditions or views concerning excavation and handling of human remains. The rules formulated by the THC favor quick reburial with no consultation; American Indian involvement is neither sought nor, apparently, wanted.

### Illiberal and Unscientific Archeology

Archeology is supposed to be a science. Unfortunately, the THC has decided that it is instead a vehicle for personal agendas. Human remains are precious, irreplaceable records of human life in the past. Unlike the study of stone tools and material culture, human remains hold information that is directly applicable to modern life. The fields of epidemiology, physiology, genetics, skeletal biology, and forensic anthropology draw from studies of early human remains to improve the lives of people all over the world.

An examination of the final rules reveals that skeletal analysis is not required or even encouraged. Human remains are expected to be reinterred as quickly as possible. Since there are no physical anthropologists on staff at the THC, perhaps it is not surprising that the leadership is ignorant of an entire field of anthropology.

The final rules also make no provision for the salvage excavation of graves in danger of destruction from erosion or looting. The only way a grave may be quickly removed is either 1) someone is buried in the wrong plot or 2) a natural disaster. The

Director of the Archeology Division of the THC told me that he would rather human remains be destroyed by erosion than salvaged.

If you find graves that have been looted, you can not take action to salvage them unless you go through the cumbersome process that the THC has set up for removal. This process relies on the discretion of a District Judge. It may take months, even years, to get an order (or your request may be denied altogether). In the meantime, human remains will be destroyed and information about the past will be gone forever.

### Private Property is Not a Right

Under the current rules formulated by the THC, once a grave is found on your property, it is no longer your own. For example, if someone finds a grave while plowing their field or building a house that activity must cease. If you want to continue to use your property as you see fit, you must undertake the following process:

- 1) Notification of discovery a cemetery (even if its only one grave) to the THC
- 2) File a petition in a District Court<sup>3</sup> in the county where the burials are located requesting the cemetery be de-designated and for approval to exhume and obtain an order from the court allowing exhumation
- 3) Obtain a permit from the Texas State Registrar to disinter; and
- 4) Submit a legal notice of the cemetery with the County Clerk's Office for the county where the burials are located
- 5) Request an exhumation permit<sup>4</sup> from the Texas State Registrar's Office

Once you have a disinterment permit, you must then hire a professional remove the grave. In other words, the entire legal and financial burden falls upon the landowner.

In their rule-making, the THC exempted themselves from all responsibility. In an early draft of the rules, the THC planned to guide landowners through the process and take responsibility for filing paperwork. This was struck from subsequent versions. In

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<sup>3</sup> this requires hiring a lawyer

<sup>4</sup> fees must be paid for permits

the margins of the original draft there was a hand-written note that read “why do we have to do this?”

The result of this new process is easy to forecast. Graves simply will not be reported. Prehistoric remains will be destroyed and forensic cases will go unsolved. Worse yet, it is not hard to imagine that a landowner would bulldoze a grave rather than be held financially and legally responsible for its care. Recently, I was told that the THC could not take responsibility for the grave removal process because it was not in their budget. The budget of landowners is apparently not a concern.

### A Better Solution

Had the THC taken the care to examine other state unmarked burial laws, they would have formulated something that would work well for Texas. Probably the best model is found in Arizona statutes regarding unmarked graves on private land. It must, of course, be modified to fit situations in our state, but it could have been easily done if vision and leadership had been part of the process. Briefly, here is a better roadmap to success:

- I. Expressly exempt human remains of medico-legal significance from the statutes.
- II. Affirm the constitutional rights of private property and make no restrictions on land use.
  - a. the state shall have 10 business days to take action to either remove a burial or convince a landowner to protect the grave in place
- III. Inform and consult with tribal governments as soon as possible after discovery
  - a. Require consultation with representatives from federally recognized Native American tribes regarding the treatment and protection of human remains and funerary objects.
- IV. Affirm the importance of human skeletal remains in scientific research. Hasty reburial is injurious to anthropological science and ignores the importance of archeological human remains to studies of epidemiology, physiology, and skeletal biology.
  - a. Arrange for culturally unaffiliated remains (and remains not subject to NAGPRA) and associated funerary objects to be housed in a museum or curatorial facility in keeping with the principles of archeological science.

Culturally unaffiliated human remains and associated funerary objects will be subject to the NAGPRA process.

These recommendations are only a framework and are not intended to be complete. A complete law will require consultation with private property groups, American Indian tribes, and the scientific community. There should be no attempt to hide the law from the People of Texas or their elected representatives.

Given all that has occurred, it is time for a change in leadership at the Archeology Division of the THC. We need someone who will serve the archeological community, not a personal agenda. We need an individual who sees the THC as a service organization, who will not deny regulatory assistance, and will listen instead of lecture. It is time for the Director of the Archeology Division to resign.

#### A Call to Action

The next session of the Texas Legislation will soon be upon us. We will have the opportunity to correct the mistakes made by the THC. If you are opposed to this unscientific, culturally-biased law, contact your state representatives and senators. Inform property rights groups and voice your opinion. Encourage legislative action to repeal this law. The THC is responsible for this travesty and has used extra-legislative practices circumvent the people's elected representatives. Do not let them get away with it.