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A REVIEW OF THE TENNESSEE STATE CEMETERY LAW  
AND ITS EFFECT UPON ARCHAEOLOGICAL DATA  
RECOVERY AND SITE PRESERVATION

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ABSTRACT

This article presents past and present interpretations of the Tennessee state cemetery law. Recent legislation extends prehistoric graves the same legal protection as historic interments. Under the new law, such prevalent events as looting of Indian graves and haphazard destruction of prehistoric cemeteries are now illegal. Termination of land use as cemetery procedures are used to excavate and relocate known prehistoric graves prior to site destruction. One unfortunate consequence of this statute has been an excessive loss of valuable non-mortuary archaeological information.

Introduction

Prehistoric Indian sites have been a source of curiosity to state residents ever since Tennessee was first settled in the 18th century. The mystery surrounding these occupations has led to numerous tales concerning the origin and decline of their inhabitants. Probably the most fascinating aspect of these sites to the general public has been the potential presence of human burials. Traditionally, this interest has not been oriented toward the skeletal remains, but rather the grave goods associated with the buried individuals. The quest for these often exotic artifacts has led to wholesale destruction of important sites across the state of Tennessee.

Countless prehistoric graves have been severely disturbed in search of stone, bone, and ceramic artifacts for sale or display. Among the consequences of these actions has been the loss of valuable archaeological information and the haphazard discarding of human remains. Numerous visits to vandalized cemeteries have revealed artifactual and skeletal material strewn along the surface. If these graves had been those of early white settlers, the perpetrators would likely have been arrested for graverobbing. Possibly of more importance, however, is that the general public would have taken a dim view of such activities. Unfortunately, the looting of graves has long been considered an acceptable hobby if the remains are of prehistoric origin (Figure 1).

Recent interpretations of the state cemetery law accord prehistoric graves the same protection as historic interments. This paper examines past

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Dr. Young poses with one of his archaeological finds—the skull of a mound-builder and several bowls. The latter are usually soft and porous with molars when taken from the graves.

Figure 1. A relic collector displays several "finds" in this photograph which appeared with an article in a Nashville newspaper (Dahnke 1954). This man, a local physician, indicated he could dig 20 to 25 graves a day.

and current interpretations of the cemetery law, particularly its application to prehistoric sites with human remains. Opinions as to the strengths and shortcomings of this law are also reviewed.

#### The State Cemetery Law in Tennessee

Despite past efforts by concerned organizations and individuals to preserve significant aboriginal sites in Tennessee, the existence (and enforcement) of a law protecting prehistoric Indian graves constitutes a relatively new concept for the general public to comprehend. As recent as 1977 the state Attorney General's office, in verbal response to an inquiry by the State Historic Preservation Office (SHPO), informally conveyed that the state cemetery law (as it read then) was not originally intended to cover prehistoric Indian remains. Accordingly, if a cemetery case involving prehistoric graves was brought to court, the presiding judge would have no precedents to guide him in his decision. The Attorney General indicated the SHPO had the option of obtaining a formal court opinion on the intent of the law, or changing the cemetery law to specifically include prehistoric remains. This matter was not pursued at that time.

A critical step toward the protection of prehistoric graves took place in 1984 when the cemetery vandalism law (Tennessee Code Annotated [39-3-1327]) was passed. Episodes of vandalism in several West Tennessee historic graveyards had prompted one legislator to draft stern legal measures against this destructive activity. Ironically, this legislation was not originally concerned with prehistoric graves. During the legislative debate over this bill, however, the sponsor was asked if the law would protect Indian burials at Reelfoot Lake. The sponsor indicated that this law would indeed cover these as well as all other graves. This response established the legislative intent of the cemetery law as being the protection of all human burials from vandalism, whether they be prehistoric or historic. The Tennessee Department of Conservation legal counsel reiterated this interpretation in a 1984 memorandum (Linda Drees to Lee Ellis, August 3).

Another important step for the protection of prehistoric skeletal remains was precipitated by an incident during the fall of 1985. A local developer had announced plans to build a subdivision within an area which included the Gordontown site (40DV6), a significant Mississippian village (Myer 1928). Fortunately, the developer displayed a refreshing concern for the cultural resources and entered into a joint investigative effort with the Tennessee Division of Archaeology to record as much information as possible prior to site destruction. This cooperation included the developer hiring an archaeologist to work with the Division. During the fall of 1985 through the spring/summer of 1986, each proposed house lot was uncovered and examined for archaeological features prior to development. The most numerous feature class recorded by these investigations was human burials.

A meeting between the Division of Archaeology, the Tennessee Indian Commission, the state Attorney General, and the State Archaeological Advisory Council was held during the Gordontown project to discuss the applicability of

the cemetery law to the excavation of human remains at Gordontown. These agencies agreed the project should continue without delay since everything was proceeding in an orderly manner. All future projects that involved the disturbance and/or removal of Indian graves would have to go through the termination of land use as cemetery process, the same statute through which historic cemetery removals are handled.

Also during this meeting, the state Attorney General suggested that a provision be inserted in the cemetery law to protect the Division of Archaeology from charges of graverobbing. Thus, the cemetery vandalism law was amended in 1986 to exempt the Division (and other archaeologists approved by the state archaeologist) from the graverobbing statute. This amendment was passed with full knowledge of the Tennessee Indian Commission.

A major problem for the state at present is attempting to inform the public that the cemetery law does in fact protect prehistoric burials. The following is a presentation of the current state cemetery law as outlined in Tennessee Code Annotated [39-3-1327]:

Vandalism of house of worship, graveyards, cemeteries, etc. -  
Excavations at archaeological sites.

(a) No person shall willfully destroy, deface, move or injure any church, synagogue, temple, mosque, or any cemetery thereof, grave, gravesite, monument, tomb, gravestone, bronze memorial, statuary, mausoleum, or similar item wherever located or destroy, deface, move or injure any fence or enclosure in or around the same, or injure any tree, plant, or shrub therein.

(b) Nothing in this section, shall be construed to prohibit the moving of a grave, gravesite, monument, tomb, gravestone, bronze memorial, statuary, mausoleum, or similar item upon the written authorization of the decedent's personal representative and, if living, his spouse, or as otherwise provided by law.

(c)(1) Violation of the provisions of this section shall be a felony and any person thereof shall be fined three thousand dollars (\$3,000) or imprisoned in the penitentiary not less than one (1) year nor more than five (5) years, or both, in the discretion of the court.

(2) Any act as to each such church, synagogue, temple, mosque, tombstone, monument, gravestone, bronze memorial, statuary, mausoleum, or similar item shall be a separate offense.

(d) Provided, however, nothing in this section, nor any section of chapter 6, part 7 of this title, shall be construed to prohibit the excavation of human remains or graves found in archaeological sites if such activity is conducted by the department of conservation, division of archaeology, or other qualified professional archaeologists as approved by the state archaeologist.

Procedures for Implementing and Enforcing the Cemetery  
Statute for Prehistoric Sites

Enforcement of the Tennessee cemetery law as it applies to prehistoric graves can be viewed as a standardized set of procedures (Table 1). The process is initiated with the exposure of human graves and subsequent landowner decision for dealing with them. Generally, when known or suspected human burials are encountered, the state archaeologist's office is to be notified and requested to examine the remains. Other qualified archaeologists (approved by the state archaeologist) may also be asked to inspect suspected burials. If inspection determines the skeletal material is indeed human and of prehistoric origin, then the state archaeologist's office retains jurisdiction over the case.

Once the presence of prehistoric human graves has been documented, all activity (whether public or private) in the known or suspected cemetery area is postponed immediately. Two alternatives are then available to the landowner. He/she may choose to permanently discontinue the activity that exposed the burials, at which time the remains are covered over and the case closed. If the landowner wishes to continue land altering activities within the cemetery area, the statute protecting human remains is enforced.

Once the landowner **decides** to continue any destructive activity (bulldozing, grading, **trenching**, terracing, etc.) in the cemetery area, he/she must petition the **County Chancery Court** to terminate the use of the area as a cemetery. The termination of use law, a property statute, is used since the case involves a parcel of land that was previously dedicated as a cemetery. This dedication is legally valid regardless of the age or race of the interred. Furthermore, descendants of the buried individuals retain the right to visit the cemetery whenever they wish. In other words, if you as a landowner have a cemetery on your property, the relatives of whoever is buried there have certain rights to your land. Should a landowner wish to remove these rights in order to obtain sole control of his/her property, then the **"termination of land use as cemetery" process** is followed. By order from the **County Chancery Court**, the burials in the existing cemetery can be relocated (transferred) to another cemetery. The termination statute (Tennessee Code Annotated [46-4-101, et seq.]) is presented below:

46-4-101. Grounds affected - Facts which justify termination of use.

This chapter, which is enacted for the public welfare in the exercise of the police powers of the state of Tennessee, shall apply to any burial ground in the state of Tennessee, including any land owned or controlled by cemetery companies, which the court to which jurisdiction is given by this chapter finds, for any of the reasons hereinafter stated, is unsuitable for its use as such and as a resting place for the dead whose remains are buried therein, or the further use of which for said purposes the said court finds, for any said reasons, is inconsistent with due and proper reverence or

Table 1. An Outline of the Primary Procedures for the Removal and Relocation of Prehistoric Burials.

1. Observed or suspected burials are reported to the state archaeologist's office (Tennessee Division of Archaeology).
2. The state archaeologist or other qualified archaeologist (approved by state archaeologist visits the site to confirm that human remains are indeed present and prehistoric in origin.
3. Attorney for the landowner completes an affidavit (initially prepared by the state archaeologist) as to the specific facts and observations of the burial site in question.
4. Landowner engages the services of a qualified archaeologist to conduct the grave removal.
5. Attorney for landowner prepares a petition to chancery court under the termination of land use as cemetery law.
6. Attorney for landowner prepares the chancery court order under provisions of the termination statute.
7. After court order is signed, archaeologists remove graves under the general supervision of the Division of Archaeology.
8. State archaeologist prepares an affidavit indicating all remains have been removed from project area. Construction can now begin (or continue) within project area.
9. Consulting archaeologist prepares report of findings for the state archaeologist.
10. Skeletal remains turned over to Division of Archaeology for analysis and reburial.
11. Remains sent to University of Tennessee Department of Anthropology for osteological analysis (under contract with the Division).
12. After analysis completed, skeletal remains sent back to the Division of Archaeology and reburied in accord with court order.

respect for the memory of the dead or otherwise unsuitable for said purposes, the said reasons being:

- (1) The said burial ground having been abandoned; or
- (2) The said burial ground being in a neglected or abandoned condition; or
- (3) The existence of any conditions or activities about or near the said burial ground which the court finds render the further use of same for the purposes aforesaid inconsistent with due and proper reverence or respect for the memory of the dead, or for any other reason unsuitable for the said purposes.

46-4-102. "Interested person" defined.

The words "interested persons" whenever used in this chapter, mean any and all persons who have any right or easement or other right in, or incident or appurtenant to, a burial ground as such, including the surviving husband, wife, and children, or if no surviving husband, wife or children, the nearest relative or relatives by consanguinity of any one or more deceased whose remains are buried in any burial ground.

46-4-103. Suits for termination of use of land, removal and reinterment and for disposal of land - Municipal authority extended.

Any interested person or persons, and/or any county in this state which any such burial ground is situated, and/or any municipality in this state if any such burial ground is situated in such municipality or within one (1) mile of the lawful corporate limits thereof and not beyond the limits of the county in which any part of any such municipality is situated and not within the lawful corporate limits of any other municipality in Tennessee, may bring or join in a suit in the chancery court of the county in which any such burial ground is situated, for the following purpose or purposes: to have the remains of all deceased persons buried in said ground removed therefrom and reburied in a suitable repository to be obtained for that purpose before their removal from such burial ground; to terminate the use of, and all rights and easements to use such ground as a burial ground, and all rights and easements incident or appurtenant to said ground as a burial ground; and thereupon to partition or sell for partition the said ground if the court finds that it belongs to two (2) or more persons and if any one or more of the owners thereof shall apply for such partition. The authority of all municipalities in the state of Tennessee is extended, for the sole purpose of bringing or joining in any such suit by any such municipality, but for no other purpose, to a distance of one (1) mile from the lawful corporate limits thereof but not beyond the limits of the county in which any part of any such municipality is situated and not so as to come within the lawful corporate limits of any other municipality of the state of Tennessee.

In any such suit all interested persons who are not complainants shall be made defendants, and the owner or owners of the land or of any right of reversion or other right or interest therein, if such owner or owners shall be or include other than the interested persons, shall also be made defendants. Interested persons who are minors or otherwise incompetent or under disability may become complainants by guardian or next friend. All known defendants who are minors or otherwise incompetent or under disability shall be represented by guardian ad litem. Nonresident and unknown defendants may be proceeded against by order of publication, and publication, in the manner provided by law.

46-4-104. Granting of relief - Provision for reinterment.

Such removal and reinterment, and other relief described in 46-4-103, including partition or sale or partition if payed for and if the court finds the conditions for partition exist as provided in 46-4-103, shall be granted, authorized, decreed and ordered by the court upon the court finding, upon the hearing of the cause upon the entire record, including the pleadings and proof, that any one or more of the reasons specified in 46-4-101 exist, and that due to the same the said burial ground is unsuitable for use as a burial ground as a resting place for the dead whose remains are buried therein, or that the further use thereof for the said purposes is inconsistent with due and proper reverence or respect for the memory of the dead, or for any other reason unsuitable for the said purposes; but said removal and reinterment and said other relief shall be granted, authorized, ordered and decreed only upon it being shown to the satisfaction of the court that definite arrangements have been made, or before said removal will be made, for reinterment of all of said remains in a place found by the court to be suitable for such reinterment; that for said purpose there have been obtained or before said removal there will be obtained either the fee simple title to said place of reinterment or adequate permanent right and easement to use the same for such reinterment, and adequate permanent right and easement of access thereto for visitation; that the removal and reinterment of all said remains will be done with due care and decency, and that suitable memorial or memorials will be erected at the place of reinterment.

The primary components of a termination petition for prehistoric sites include the petitioner's name and address, a legal description of the project property, a summary of events which led to the exposure of human remains, a formal request to remove and relocate the remains, and a listing of conditions and procedures by which the removal will be performed. An affidavit from a professional archaeologist (usually the state archaeologist) should be submitted with the petition, indicating that, among other things, the graves are indeed prehistoric in nature and their expedient recovery is necessary to protect them from vandalism and relic collectors. Once the court order is signed, a professional archaeologist is hired by the landowner to remove the burials using standard archaeological methods and techniques. The

Division of Archaeology supervises, but does not actively participate in the removal unless specifically requested by the landowner.

A statement about historic graves would be appropriate at this time. Should the exposed burials be identified as historic (18th to 20th century), the state archaeologist does not usually retain control over the case. Exceptions to this policy may include graves from contact period or Civil War sites, those on state and federally-owned lands, or those cases where the landowner has specifically asked the state archaeologist to investigate (Fielder and Symes 1987; Tennessee Division of Archaeology 1987). If a landowner desires to continue the destructive activity which initially uncovered the remains, then a court order must be obtained similar to the process outlined for prehistoric sites. In the case of historic burials, however, the landowner hires a licensed funeral home to conduct the grave removal and reinterment rather than a consulting archaeologist.

After excavation of the prehistoric graves is completed, the state archaeologist prepares an affidavit stating all human burials within the proposed project area have been removed. The landowner may then proceed with construction plans as originally scheduled. Concurrently, the consulting archaeologist prepares a summary report on the cemetery removal for the state archaeologist. This report includes (but is not limited to) a discussion of the project background, field methodology, burial analysis, identification of artifacts recovered, and project results. Upon receipt of the report, the consultant turns over all recovered burials, artifacts, and records to the Division of Archaeology for curation. The burials are then sent to the University of Tennessee Anthropology Department in Knoxville (under contract with the Division) for a detailed osteological analysis. After the analysis is completed, the remains are returned to the Division of Archaeology for subsequent reburial.

#### Application of the Cemetery Law, A Prehistoric Example From Middle Tennessee

This section reviews the first case in which the recent state cemetery law was applied to a prehistoric site with human remains. Interestingly, this locale was initially reported to the Division of Archaeology by Nashville police during the Gordontown project. An examination of the impacted area by the state archaeologist determined the remains were indeed prehistoric. A letter was then written to the landowner indicating the termination of land use procedure would have to be followed if the property was ever developed.

Despite this early notice, earth-moving activities during the late winter/early spring of 1987 uncovered a number of stone-box graves on this property, which overlooks the Stones River in east Nashville. Local residents observed human skeletal remains and other materials scattered across the surface, and contacted the Division of Archaeology. Division personnel responded to this notice and, upon examination of the area, determined that approximately 15 burials had been exposed. Additional graves were expected to occur within the project area.

Attempts to contact the landowner determined that the property had been acquired by another party. The new landowner was informed that a prehistoric Indian cemetery was present on the property, and that specific guidelines pertaining to cemetery disturbance and removal were outlined in Tennessee Code Annotated [46-4-101, et seq.]. All construction within the development was postponed at that time until an order from the Chancery Court of Davidson County could be obtained to terminate the area as a cemetery.

The impacted cemetery, site 40DV234, was first recorded on April 1, 1987. However, due to delays and other matters the court order was not signed until July 14, 1987. A consulting archaeologist was immediately hired (by the landowner) upon issuance of the order to remove all graves within the proposed project zone. The fifteen burials initially uncovered by construction were exhumed first. The project area was then mechanically stripped to subsoil to locate and record any previously unexposed graves. Fifty-three burials were eventually removed from the site.

A sizable habitation area, denoted by such features as structural remains and trash pits, was uncovered in the project area during the grave removal activities. These features received minimal attention since the exhumation of burials was the focus of the court order. The ramifications of this approach are discussed in the following section.

All excavations were performed between July 17, 1987 and August 5, 1987. A report summarizing the project background, field methodology, burials removed, recovered artifacts, and project results was submitted to the state archaeologist as a condition of the court order (DuVall and Dowd 1988). Upon receipt of this manuscript, all burials, artifacts, and field records were transferred to the Division of Archaeology for curation. The skeletal remains were then sent to the University of Tennessee for thorough osteological analysis. Upon completion of the analysis, these remains will be returned to the Division and reburied in a suitable and respectful manner.

#### A Discussion of the Cemetery Statute and Its Impact Upon Prehistoric Sites

Without question the cemetery law provides important protective measures against the unauthorized digging of prehistoric Indian burials. However, the authorized relocation of prehistoric cemeteries often adversely impacts previously undisturbed archaeological resources associated with the graves. The potential for destroying more archaeological information than is gained from the relocation process provides an interesting background in which to review the law's strengths and weaknesses.

For many years prehistoric graves (especially the stone-box graves of Middle Tennessee) uncovered during construction related earth-moving activities were viewed as a nuisance to be covered over as quickly as possible. In contrast, relic collectors saw these exposures as a great opportunity to acquire valuable ceramic and stone artifacts. Fortunately, these formerly commonplace events are illegal under recent interpretations of the state cemetery law. The statute now requires all landowners to protect

prehistoric human burials on their property. Any artifacts associated with the skeletal remains are considered to be part of the burial and are also protected from vandalism.

Prehistoric graves removed in accordance with the cemetery law represent a significant pool of information for archaeologists. Supervised excavations, using standard archaeological techniques, have recorded details which otherwise may have been destroyed by funeral home methods. The time consuming techniques used by archaeologists to uncover skeletal remains differ significantly from the conventional funeral home procedure which generally consists of two men using large shovels and lots of elbow grease. Archaeologically recovered burials can yield important comparative data on mortuary patterns, social status, diet, and pathologies. However, studies that utilize this information should take into account the fact that these burials may not be a representative sample of the mortuary population at the site (DuVall and Dowd 1987). The cemetery law requires the relocation of only those particular graves which occur within the specific project area.

Ideally, the cemetery statute should encourage site preservation as the landowner (or potential landowner) must consider the costs and possible bad publicity of Indian grave removal. Several landowners have avoided known cemeteries by finding alternative project locations. These cases usually reflect the landowner's personal concern for Indian culture rather than a consideration of money. Realistically, the relocation of a project to avoid known Indian burials is a rare occurrence.

Probably the most significant drawback to the cemetery law is the lack of attention other archaeological resources within the cemetery area receive during the removal process. Since the cemetery law is not a cultural resource protection law (such as Section 106 of the National Historic Preservation Act of 1966), court orders issued for the relocation of prehistoric burials do not require an assessment of non-burial features which occur in the cemetery area. Several relocation cases in the Nashville area have uncovered undisturbed village areas with numerous habitation features, including structures, trash pits, and hearths (DuVall n.d.; DuVall and Dowd 1987, 1988). Most developers operate on a tight timetable and are reluctant to authorize any more work than is absolutely necessary for grave removal. As a result, consulting archaeologists can commit little to no time (other than rough sketch maps) toward the investigation of non-cemetery features uncovered during the relocation process. An excessive amount of valuable archaeological information is being severely disturbed or destroyed as a result of enforcing the cemetery law.

#### Concluding Remarks

Many readers can probably recall an occasion when a prehistoric cemetery was uncovered and subsequently destroyed by a construction project. Requests by archaeologists to postpone development in these cemetery areas long enough to record the available site information were often met with less than enthusiastic responses. Some landowners (although possibly interested in Indian culture) viewed these salvage requests as an unacceptable loss of

project time and money, whereas others were just not sympathetic to the goals of archaeology. In this light, the protection of prehistoric sites under the cemetery law can be considered a victory for those persons who helplessly observed the destruction of Indian graves in the past.

In contrast, the supervised removal of prehistoric burials contributes to the destruction of other archaeological resources which occur in the cemetery area. Hopefully, some type of procedural change will be forthcoming which allows consulting archaeologists to thoroughly investigate site features uncovered by removal related activities. During the last prehistoric cemetery relocation in the Nashville area (DuVall n.d.), the Division of Archaeology provided staff personnel to minimally investigate structures and other features uncovered during the search for graves. However, the Division cannot guarantee that such personnel will be available for other cemetery removals. Solutions to this consequence of the cemetery removal process need to be proposed in the near future to stop this unintentional loss of cultural information.

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