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No Grave Like Home: Protecting the Deceased and Their Final Resting Places from Destruction Without Going Six Feet Under

by

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I. INTRODUCTION

Eternal resting places are under threat and the dead are finding that eternity is not forever afterall. History is more than a word; it is the foundation of our buildings, art, tools, and household items. Even the graves of our dead are part of our history. In particular, the resting places of the dead have a dual existence. While gravesites serve as hallowed places of permanent rest, more importantly, these sites often reveal how our ancestors lived and offer insights into our current way of life. America's "cultural resources" are the physical remains of people and their way of life, and are worth preserving.[1] Cultural and historical resources cannot be replaced if they are destroyed by land development, erosion, or relic hunters.[2] Our heritage as Americans, and human beings, belongs to everyone. Without protection, the loss of these archaeological or historic sites and artifacts

1. BUREAU OF LAND MGMT., U.S. DEP'T. OF THE INTERIOR, Revised Cultural Resource Manuals (1997), *available at* http://www.blm.gov/nhp/efoia/wo/fy97/im97-168.html.
[C]ultural resource: a broad, general term meaning any cultural property and any traditional lifeway value, as defined below.
1. Cultural property: a definite location of past human activity, occupation, or use identifiable through field inventory (survey), historical documentation, or oral evidence. The term includes archaeological, historic, or architectural sites, structures, or places with important public and scientific uses, and may include definite locations (sites or places) of traditional cultural or religious importance to specified social and/or cultural groups. Cultural properties are concrete, material places and things that are classified, ranked, and managed through the system of inventory, evaluation, planning, protection, and utilization described in this Manual series.
2. Traditional lifeway value: the quality of being useful in or important to the maintenance of a specified social and/or cultural group's traditional systems of (a) religious belief, (b) cultural practice, or (c) social interaction, not closely identified with definite locations. Another group's shared values are abstract, nonmaterial, ascribed ideas that one cannot know about without being told. Traditional lifeway values are taken into account through public participation during planning and environmental analysis.

2. *See generally* Hickman v. Carven, 784 A.2d 31 (Md. 2001). In *Hickman*, a large farm had been developed into a residential subdivision. The developer even imposed a covenant to prohibit the operation of a graveyard. One residential owner was told by that her house was built on a graveyard. She then proceeded to dig a twelve-inch hole in her yard, finding bones and casket parts. The local police, after investigating, found additional bones. Neighbors testified to the existence of an old private graveyard and a local funeral operator located evidence of an old graveyard, like "some hollow spaces at a depth of two feet, which he attributed to the disintegration of caskets." The homeowner had asserted that the developer had removed the graveyard's identifiers, like tombstones, with the use of a bulldozer because legitimately removing the bodies for reinternment was too expensive. *Id.* at 32-34; *see also* William Finn Bennett, *Storm Runoff Threatens Grave Sites*, NORTH COUNTY TIMES, *available at* http://www.nctimes.com/articles/2005/02/25/news/californian/23_27_052_24_05.txt (Feb. 24, 2005) (news article relating how flooded culverts and severe erosion threatened local grave sites).

will result in the loss of irreplaceable information of the past. As Judge Brannon once stated, "If relatives of blood may not defend the graves of their departed, who may?"[3] Judge Brannon's question merits exploration.

II. FEDERAL PROTECTION OF CULTURAL RESOURCES, INCLUDING HUMAN REMAINS AND BURIAL SITES

This paper presents an overview of some of the federal and state laws that protect historic gravesites and other cultural resources to better equip those who defend the rights of the dead. Today, most states, Florida being a specific illustrative example, take steps to protect cultural resources, such as asserting ownership of archaeological materials that are found on public land; and regulating mining of historic sites.[4] Likewise, the United States strives to protect historical burial sites and other national significant cultural resources. For example, many federal statutes provide sanctions against looting, such as the National Historic Preservation Act (NHPA)[5] and the Native American Graves Protection and Repatriation Act (NAGPRA).[6] Further, under some federal laws, people who buy or sell goods found in graves, deface or loot historic sites, or disturb Indian burial sites can be fined or imprisoned.[7]

A. *The Beginning: The 1906 Antiquities Act and The 1935 Historic Sites Act*

One of the first federal moves toward protecting America's historical and archaeological sites was the 1906 Antiquities Act.[8] The 1906 Antiquities Act was the first enabling legislation which prohibited taking any "historic or prehistoric ruin or monument, or any object of antiquity" from federal lands without a permit.[9] Historic gravesites can be considered ruins as well as objects of antiquity.[10] The Act sought to protect historic and prehistoric remains, while regulat-

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3. Ritter v. Couch, 76 S.E. 428, 430 (W. Va. 1912).

4. *See* FLA. STAT. ANN. § 267.061(1)(b) (West 2003); *see* LA. REV. STAT. ANN. § 680(B) (West 2005) (noting that in Louisiana activity that may disturb human remains or artifacts is permitted).

5. *See* 16 U.S.C. § 470ee(b) (2000).

6. *See* 25 U.S.C. § 3002(e) (2000) (listing the only instances intentional removal is permitted).

7. *See* 16 U.S.C. § 470ee (2000) (providing penalties for the unauthorized removal of archaeological resources).

8. Antiquities Act of 1906, 16 U.S.C. §§ 431-50 (2000).

9. *Id.* at § 433.

10. *See id.* at §§ 431.

ing activities affecting remains, establishing sanctions for disturbing or damaging remains, and authorizing presidents to designate National Monuments on federal lands.[11] However, the Act was limited in that only qualified institutions were awarded permits, collected objects had to be permanently placed in museums, and excavations had to benefit educational or scientific institutions or public museums.[12] Unfortunately, the minimal penalty provisions, like a $500 fine, did not deter looting and vandalism.[13] The Antiquities Act was limited to archaeological materials and human-made artifacts on federal lands and marine protected areas.[14]

The 1935 Historic Sites Act (HSA) expanded the federal role in historical preservation by declaring a U.S. policy "to preserve for public use historic sites, buildings and objects of national significance for the inspiration and benefit of the people of the United States."[15] Such historical sites and objects can include gravesites of historical significance.[16] The HSBA provided for penalties.[17] The Act also authorized the Secretary of the Interior, through the National Park Services, to operate and manage cultural resources for public benefit. Additionally, the Act authorized the development of cultural resource educational programs, the Advisory Board on National Parks, Historic Sites, Buildings, and Monuments, and gave the secretary the power to acquire exceptionally important properties, while cooperating with other federal agencies.[18]

B. *Department of Transportation Considerations*

The pathway of any new public road can go almost anywhere, even over the resting places of the dead. However, under the 1966 Department of Transportation Act (DOT), the Secretary of Transportation may not approve any program or project which requires use of any land from a historic site of national, state, or local significance.[19] Such projects are only approved if a two-part test is met: (1) there is no feasible and prudent alternative to the use of such land, and (2) the program includes "all possible planning to minimize harm" to such historic sites resulting from such use.[20] Project approval applies to all DOT activities, including those undertaken by the Federal Highway Administration and the Federal

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11. *See id.* at §§ 431-33.
12. *See id.* at § 432.
13. *See id.* at § 433.
14. *See id.* (fossils are not mentioned).
15. Historic Sites, Buildings, Objects, and Antiques Act, 16 U.S.C. § 461 (2000).
16. *See id.* at § 462.
17. *See id.* at § 462(k).
18. *See id.* at §§ 462-64.
19. 49 U.S.C. § 303(c) (2000).
20. *Id.*

Railroad Administration.[21] The law applies to all properties listed, or eligible for listing on the National Register, and to properties determined significant by other authorities, e.g., local historical commissions.[22] Historical gravesites are thus protected from newly planned public roads via DOT oversight.[23]

C. *The National Historical Preservation Act*

The 1966 National Historic Preservation Act (NHPA) provides for a National Register of Historic Places (NRHP) to include districts, sites, buildings, structures, and objects significant in American history, architecture, archaeology, and culture.[24] NHRP sites may bear national, state, or local significance.[25] Such historical "places" can include the material remains related to such a property or resource, like a graveyard or burial site.[26] The Act establishes State Historic Preservation Programs, and provides funding for the State Historic Preservation Officer and staff to conduct surveys and comprehensive preservation planning.[27] It also establishes standards for state programs and requires states to establish mechanisms for certifying local governments to participate in the National Register nomination and funding programs.[28]

Under the NHPA § 106 consultation process, federal agencies are required to identify historical or archaeological properties near proposed project sites, including properties eligible or already listed on the NRHP.[29] The Advisory Council on Historic Preservation (ACHP)[30] and the State Historic Preservation Officer (SHPO) have oversight responsibilities to implement the NHPA.[31] If a proposed action is determined to have an adverse effect on eligible or listed NRHP, the federal agency must consult with the SHPO and the ACHP to develop alternatives or mitigation measures that will allow the proposed action to proceed.[32] Generally, the § 106 consultation process has five basic steps: (1) identify and evaluate historic properties, (2) assess effects, (3) consult to reduce adverse effects on historic properties, (4) Council comment (the agency submits a Memo-

21. *See id.* at § 303 (noting that the Secretary may approve a transportation program or project).
22. *See id.*
23. *See id.*
24. 16 U.S.C. § 470w (2000).
25. *See id.* at § 470a(a).
26. *See id.* at § 470w.
27. *See id.* at § 470a(b)(1).
28. *See id.*
29. *See id.* at §§ 470f, 470h-2(a); 36 C.F.R. §§ 800.1-.2 (2005).
30. *See* 16 U.S.C. at § 470f; 36 C.F.R. at §§ 800.1-.2, .9.
31. *See* 36 C.F.R. at § 800.2(b)-(c).
32. *See id.* at § 800.14.

randum of Agreement to ACHP for review), and (5) proceed with the project if ACHP accepts the proposed action (according to the terms of the Memorandum of Agreement).[33]

The NHPA directs all federal agency heads to assume responsibility for preserving eligible or listed NRHS owned or controlled by their agency.[34] Federal agencies must also locate, inventory, and nominate properties to the National Register, use caution to protect such properties, and use those properties to the maximum extent feasible.[35] Such properties can encompass burial sites and graveyards of historical significance.

D. *The National Environmental Policy Act*

The 1969 National Environmental Policy Act (NEPA) was created to "preserve important historical, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment that supports diversity and variety of individual choice."[36] Under NEPA, federal agencies must protect environmental quality that may be adversely impacted as a result of proposed agency actions.[37] Cultural and historical sites are also to be protected.[38] Such cultural and historical sites can include graveyards and burial sites.[39] Under NEPA, agencies must prepare environmental impact statements for federally funded projects affecting cultural or historical resources, and these statements must include the comments of the ACHP.[40]

E. *The Archaeological Resources Protection Act*

The Ninth Circuit held the Antiquities Act was fatally vague and violated the Constitutional Due Process Clause, because the terms "object of antiquity," "ruins," and "monuments" were not statutorily defined.[41] Subsequently, the ARPA superceded the 1906 American Antiquities Act, defined archaeological terms, and provided criminal penalties for enforcement.[42] The ARPA protects archaeological resources on federal and Indian lands by prohibiting taking prehis-

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33. *See id.* at §§ 800.1, .13.
34. 16 U.S.C. at § 470f.
35. *See id.* at § 470h-2(a).
36. 42 U.S.C. § 4331(b)(4) (2000).
37. *See id.* at § 4331.
38. *Id.* at § 4331(b)(4).
39. *See id.*
40. *See id.* at § 4332; 36 C.F.R. § 800.8(a) (2005).
41. *See* U.S. v. Diaz, 499 F.2d 113, 114-15 (9th Cir. 1974).
42. *See* 16 U.S.C. at §§ 470bb, 470ee.

toric or historic artifacts from public lands without a permit.[43] The Act defines "archaeological resources" as "any material remains of past human life or activities which are of archeological interest ... [and are] at least 100 years of age," and the physical site, location or context in which they are found.[44] Under ARPA, an object, site, or other material is of "archaeological interest" if, through scientific study and analysis, information or knowledge can be obtained concerning human life or activities.[45] Notably, the ARPA requires permits for investigating or taking historic or archaeological artifacts from public, federal, or Indian lands.[46] Under the act, federal land managers need to establish programs to increase public awareness of the significance and must preserve archaeological resources.[47]

Under the ARPA, no person may generally remove, damage, or otherwise alter or deface archaeological resources located on public lands or Indian lands without a permit.[48] Furthermore, people generally may not sell, purchase, exchange, transport, or receive any archeological resource if such a resource was removed from public lands or Indian lands in violation of any federal, state, or local laws.[49] Civil and criminal penalties may be assessed against violators.[50] Any person who knowingly violates or causes others to violate any of the above prohibitions can, upon conviction, be fined between $10,000 and $100,000 and can receive up to five years in prison.[51]

It should be noted that the ARPA, while fairly comprehensive, has significant loopholes. For example, protection extends only to human-made artifacts and not to natural artifacts like fossils.[52]

F. *The Native American Graves Protection and Repatriation Act*

The Native American Grave Protection and Repatriation Act (NAGPRA), which provides particular protection for Native American burial

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43. *Id.* at § 470cc.
44. *Id.* at § 470bb(1).
45. *See* 43 C.F.R. § 7.3 (2005) (defining "archaeological interest" as items "capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation and explanation").
46. 16 U.S.C. at § 470cc.
47. *Id.* at § 470ii(c).
48. *Id.* at § 470ee(a).
49. *Id.* at §§ 470ee(b)-(c).
50. *Id.* at §§ 470ee-ff.
51. *Id.* at § 470ee(d) (discussing the penalties for first time offenders and subsequent offenses as well as increased penalties based upon the value of items taken).
52. *See id.* at § 470bb(1).

sites and human remains, contains two main provisions relevant to this discussion.[53] The first requires federal agencies and museums receiving federal funds to inventory their collections of human remains and associated funerary objects, and develop written summaries for unassociated funerary objects, sacred objects, and objects of cultural patrimony that are in the collections they own or control.[54] Based on those inventories, federally recognized Indian Tribes or Native Hawaiian organizations that are culturally affiliated with such objects, or from which culture they lineally descend, may request repatriation of those remains or objects.[55]

Second, the NAGPRA protects Native American graves and associated cultural items by prohibiting trafficking in human remains and related cultural items.[56] Where archaeological investigations and other land modifying activities inadvertently discover such items on federal and Indian lands, the overseeing federally agency or tribe must consult with the affiliated Native Americans.[57] Also, federal APRA permits are required for archaeological investigations of gravesites on federal or tribal lands.[58]

G. *Other Federal Resources Utilized for Cultural Resource Preservation*

In 1971, Executive Order No. 11593 directed all federal agencies, bureaus, and offices to: (1) locate and compile an inventory of the cultural resources for which they are trustee, (2) nominate all eligible and appropriate government properties under their jurisdiction to the NRHP, (3) develop procedures and take necessary action to preserve and protect federal cultural resources, (4) and ensure that agency activities contribute to the preservation and protection of non-federally owned cultural resources.[59] It must be noted that the federal government codified the "Council on Environmental Quality Guidelines for the Preparation of Environmental Impact Statements." This directed federal agencies to combine, to the extent possible, statements or findings concerning environ-

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53. *See* Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-13 (2000).

54. *Id.* at §§ 3003-04.

55. *Id.* at. § 3005.

56. *See id.* at § 3002(c) (explaining situations in which a person is allowed to remove Native American cultural items).

57. *Id.* at § 3002(d).

58. *Id.* at § 3002(c)(1).

59. *See* Exec. Order No. 11,593, 36 Fed. Reg. 8,921 (May 15, 1971), *available at* http://www.fsa.usda.gov/DAFP/cepd/epb/exec_orders/EO11593.pdf.

mental impact required by other authorities, including historical preservation concerns, as in § 106 of the NHPA and Executive Order 11593.[60]

President Bush signed the 2003 "Preserve America" Executive Order No. 13,287, which provides for the continued preservation and enjoyment of cultural and natural resources.[61] Essentially, the executive order provides federal support to create "preservation partnerships" with state and local governments.[62] The goal is to economically and productively utilize historic sites in a manner that would promote their feasible preservation.[63] In addition, the initiative will promote preservation and offer educational and recreational opportunities through heritage tourism.[64] "Heritage tourism" is "the business and practice of attracting and accommodating visitors to a place or area based especially on the unique or special aspects of that locale's history, landscape (including trail systems), and culture."[65] Generally, a historic site that is eligible to be listed on the NRHP can qualify as a property under this executive order, including historic graveyards and burial sites.[66]

Finally, the United States is a member of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.[67] UNESCO gives member countries the right to recover stolen or illegally imported antiquities from other member countries.[68] By 2001, there were more than 100 signatory countries.[69] American law

60. *See* 42 U.S.C. § 4332(B) (2000) ("identify and develop methods and procedures [like the Environmental Impact Statement], in consultation with the Council of Environmental Quality...."); 40 C.F.R. § 1500.3 (2005) ("Parts 1500 through 1508 [(relating to the Council of Environmental Quality's regulation of the Environmental Impact Statement, among other regulations) of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of...[NEPA]...."); Natural Res. Def. Council, Inc. v. Lujan, 815 F. Supp. 451, 452 (U.S. Dist. 1992) ("CEQ [Council of Environmental Quality] regulations require an agency contemplating 'major Federal action' to either prepare an EIS [Environmental Impact Statement] or to make a finding ...."). Under the Council of Environmental Quality's regulations, the preparation of an Environmental Impact Statement is supervised by a "lead agency" and, as necessary, the lead agency must request the assistance of "cooperating agenc[ies]" to insure that there is inter-agency cooperation in preparing a single Environmental Impact Statement. *See also* 40 C.F.R. § 1501.5-.6 (2005).

61. *See* Exec. Order No. 13,287, 68 Fed. Reg. 10,635, Sec. 1 (Mar. 5, 2003).

62. *Id.* at Sec. 2.

63. *See id.* at Sec. 1-2.

64. *Id.* at Sec. 5.

65. *Id.* at Sec. 7.

66. *See id.*

67. *See* UNESCO, Convention on the Means of Prohibiting and Preventing the Elicit Import Export and Transfer of Ownership of Cultural Property, List of the 102 State Parties [hereinafter List] Oct. 3, 2003, http://www.unesco.org/culture/laws/1970/html_eng/page3.hstml.

68. UNESCO, Convention on the Illicit Movement of Art Treasures [hereinafter Art Treasures], art. 7, Nov. 14, 1970, 10 I.L.M. 289.

incorporated the 1970 UNESCO Convention in 1983, through the Convention on Cultural Property Implementation Act (CPIA).[70] The UNESCO broadly defines what can be protected, including specimens of anatomy, "property relating to history," and products of archaeological excavations.[71] Thus, human remains and objects from graveyards and burial sites can qualify for protection under the UNESCO Convention.[72]

III. AN ARCHETYPE STATE, FLORIDA: STATUTORY PROTECTION FOR CULTURAL RESOURCES

Each state has enacted laws to protect and preserve archaeological sites, and most use a permit system to regulate digging and artifact collection on public lands. Examining the laws and cases of a model state, like Florida, can illuminate the detailed intricacies of state protections. Florida law both reflects national trends and unique remedies. While federal law restricts the possession, movement, and sale of Native American sacred objects, trafficking in human remains is illegal in all states.[73] Florida statutes and case law protects artifacts and human burials on public and private lands.[74] However, ownership of artifacts generally depends upon where they are found. Artifacts discovered on private property belong to the landowner, and those recovered from State-owned land remain property of the State;[75] but Florida law permits those who recover isolated artifacts from parts of Florida rivers to keep them, if they report the find to the state.[76] Two caveats bear consideration: first, entering the State's or another person's property without permission to search for artifacts is trespass to land, and, second, removing artifacts from another's land without their consent is theft.[77]

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69. List, *supra* note 67.

70. *See* Convention on Cultural Property Implementation Act (CPIA), 19 U.S.C. §§ 2601-13 (2000).

71. List, *supra* note 67.

72. *See id.*

73. *See* Fla. Office of Cultural and Historical Programs, *Statutes and Rules Related to Historic and Abandoned Cemeteries and to Unmarked Human Remains* [hereinafter Statutes & Rules], http://www.flheritage.com/archaeology/cemeteries/index.cfm?page=Laws (last visited Jan. 25, 2006) (citing FLA. STAT. ANN. § 872.01 (West 2000)).

74. *See id.*

75. *See* Art Treasures, *supra* note 68, at art. 1; Statutes & Rules, *supra* note 73; FLA. STAT. ANN. § at 267.061(1)(b).

76. Fla. Office of Cultural and Historical Programs, *Underwater Archaeology*, http://dhr.dos.state.fl.us/archaeology/underwater/laws.cfm (last visited Feb. 9, 2006).

77. FLA. STAT. ANN, at §§ 810.09, 812.014.

Human remains and artifacts associated with human burials, found on land, are protected regardless of property ownership.[78]

In addition to simply defining legal ownership, Florida's legislature has enacted many statutes to further the goals of preserving and protecting the state's cultural heritage. The five statutes listed below were devised to fund and provide public access to archeological sites and protect unmarked human remains. The statutes are (1) Florida Museum of Natural History, (2) Emergency Archaeological Property Acquisition of 1988, (3) Florida Statute 267 "Florida Historical Resources Act," (4) the Florida Department of Law Enforcement's basic skills training for protection of archeological sites, and (5) Offenses Concerning Dead Bodies and Graves.[79]

A. *Florida Museum of Natural History*

Several states maintain a state-sanctioned Museum of Natural History, including Florida, Oregon, Virginia, Idaho, among others.[80] Principally, the Florida Museum of Natural History (FMNH) at the University of Florida must maintain a "depository . . . of archeological and ethnographic specimens and materials . . . to provide . . . a base for research on the . . . distribution of prehistoric . . . archeological sites, and an understanding of the aboriginal and early European cultures that occupied them."[81]

Such collections shall "belong to the state with title vested in the [museum]."[82] FMNH must comply "with pertinent state . . . archeological . . . rules."[83] Other institutions, departments, and agencies are authorized to deposit collections from archaeological sites to the FMNH.[84] The museum is authorized to "accept, preserve, maintain, or dispose of these specimens and materials in a manner which makes each collection and its accompanying data available for research

78. Statutes & Rules, *supra* note 73 (citing FLA. STAT. ANN. at § 872.02).

79. Fla. Museum of Natural History, FLA. STAT. ANN. at §§ 1004.56-.57; Emergency Archeology Property Acquisition Act of 1988, FLA. STAT. ANN. at § 253.027; Fla. Historical Resources Act, FLA. STAT. ANN. at §§ 267.011-.174; FLA. STAT. ANN. at § 943.1728; Offenses Concerning Dead Bodies and Graves, FLA. STAT. ANN. at §§ 872.01-.06.

80. A description of Florida's Museum of Natural History is an illustrative example of a national trend in cultural resource protection. Other states that have a museum of natural history include Connecticut, Louisiana, New Mexico, and Oklahoma. *See* CONN. GEN. STAT. § 10-383 (West 2002); IDAHO CODE ANN. § 33-3012 (West 2001); LA. REV. STAT. ANN. § 17:160.2 (West 2005); N.M. STAT. ANN. § 18-3A-2 (West 2005); OKLA. STAT. tit. 70, § 3309.1 (West 2005); OR. REV. STAT. § 358.880 (West 2003); VA. CODE. ANN. § 10.1-2000 (LexisNexis 1998).

81. FLA. STAT. ANN. at § 1004.56(1).

82. *Id.*

83. *Id.*

84. *Id.*

and use by FMNH staff, and by cooperating institutions, departments, agencies, and qualified independent researchers."[85]

B. *The Emergency Archaeological Property Acquisition Act*

The Emergency Archaeological Property Acquisition Act of 1988 is a unique funding solution in the protection of cultural resources.[86] The Emergency Archaeological Property Acquisition Act "creat[ed] a rapid method of acquisition for a limited number of specifically designated properties . . . [that] may bypass previously accepted methods of state land acquisition."[87] Money in the State Archeology/Burial Sites Fund can be used to "protect archeological properties that are of major statewide significance from destruction, as a result of imminent development, vandalism, or natural events."[88] The Act requires $2 million to be annually segregated in an account for emergency archeological acquisition.[89] It requires that funds be spent only for property that is an archeological resource of statewide significance, especially when the property is at risk due to state acquisition complications.[90]

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85. *Id.*

86. *Id.* at § 253.027(2). While researching the issue, it should be noted that North Carolina has a "Contingency and Emergency Fund" from which, if other funds are not available, historical or archeological properties could be purchased by the State. However, North Carolina has no distinct emergency fund reserved for purchase of cultural resources, unlike Florida. *See* N.C. GEN. STAT. § 121-9(f) (LexisNexis 2003).

87. FLA. STAT. ANN. at §§ 253.027(2), 253.027(5) (listing requirements for account expenditures for the emergency property archeological property acquisition).

88. *Id.* at § 253.027(2).

89. *Id.* at § 253.027(4).

90. *See id.* at § 253.027(4)-(5). Also, the funds should be spent only after these further considerations: (1) where the site is on, or meets the criteria of, the Conservation and Recreation Lands (CARL) acquisition list; (2) when no other source of "immediate funding is available to [buy] the property;" (3) when "the site is not otherwise protected by local, state, or federal laws," or "the acquisition is not consistent with the state comprehensive plan and the state land acquisition program;" (4) to prohibit money from the account from being spent "for excavation or restoration of the properties acquired," (5) for "preliminary surveys to determine if sites meet the criteria of the section," (6) to allow up to "$100,000 to be spent to inventory and evaluate archaeological and historic resources on properties purchased, or proposed for purchase, [under section] 259.032" of the Florida statutes; (7) or to direct the "Board of Trustees of the Internal Improvement Trust Fund shall consider the purchase of lands pursuant to this section upon its own motion or upon written request by any person, corporation, organization, or agency." *Id.* at § 253.027(5)-(6).

C. *Florida Historical Resources Act*

Under the Florida Historical Resources Act, "all treasure trove, artifacts, and such objects having intrinsic or historical and archaeological value which have been abandoned on state-owned lands or state-owned sovereign submerged lands shall belong to the state with the title thereto vested in the Division of Historical Resources" (DHR).[91] The Florida Historical Resources Act authorizes the DHR to (1) adopt rules as deemed necessary to carry out its duties and responsibilities; (2) enter into contracts or agreements with other public and private entities; (3) accept gifts and loans; and (4) directs law enforcement agencies to assist DHR in carrying out its duties.[92]

Florida's policy on historic properties is to administer state-owned or state-controlled historic resources in a spirit of stewardship and trusteeship, contribute to the preservation of non-state-owned historic resources, and encourage organizations and individuals who undertake preservation by private means.[93] The DHR will "acquire, maintain, preserve, interpret, exhibit, and make available for study objects [that] have intrinsic historical or archaeological value relating to the history, government, or culture of the state," including tangible personal property.[94] The Act authorizes DHR to arrange for the disposition of such specimens at accredited state institutions, and to loan specimens to permit-holding institutions (like museums) for study, display, and curatorial responsibilities.[95] DHR, however, is in part, authorized to "implement a program to administer finds of isolated historic artifacts from state-owned river bottoms whereby [DHR] may transfer ownership of such artifacts to the finder in exchange for information about the artifacts and the circumstances and location of [the] dis-

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91. *Id.* at § 267.061(1)(b).

92. *Id.* at § 267.031(1)-(4).

93. *Id.* at § 267.061(1). Florida's policies on historic properties is also to: "(1) Provide leadership in the preservation of the state's historic resources;. . . . (4) Foster conditions, using measures that include financial and technical assistance, for a harmonious coexistence of society and state historic resources; (5) Encourage the public and private [use] of the state's historically built environment; and (6) Assist local governments to expand and accelerate their historic preservation programs and activities."

94. *Id.* at § 267.115.

95. *Id.* at § 267.12(3). Also, the DHR is authorized to arrange for the temporary or permanent loan of any historical or archaeological object in its custody to assist in historical or archaeological studies, provide for interpretive exhibits and other educational programs that promote Florida history and DHR programs, or assist DHR in ensuring proper curation of the objects; and sell or transfer an historical or archaeological object, to ensure that the object will receive more appropriate care or to acquire another object which better serves the interests of the state. *Id.* at § 267.115(2)-(3).

covery."[96] The DHR can designate any "archaeological site of significance to the scientific study or public representation of the state's historical, prehistorical, or aboriginal past as a 'state archaeological landmark'" or any "interrelated grouping of significant archaeological sites as a 'state archaeological landmark zone.'"[97] The Act requires such designations to be made only with the private owner's prior written consent.[98]

Persons are prohibited from conducting field investigation activities on land designated as an archaeological site, without first securing a permit from DHR.[99] However, the DHR may allow permitted archaeological activities to be undertaken by reputable museums, universities, or other qualified entities that have "or will secure the archaeological expertise for performing systematic archeological field research, comprehensive analysis, and interpretation in the form of publishable reports and monographs" which must be submitted to DHR.[100] State institutions that DHR designates as "accredited institutions" are allowed to conduct archaeological field activities on state-owned or controlled lands, or within the boundaries of a state archaeological landmark zone, without obtaining an individual permit for each project.[101]

The Florida Historical Resources Act prohibits persons from undertaking certain archeological activities; including conducting archaeological field investigations on, or removing, defacing, destroying, or altering any archaeological site or specimen on state-owned land, including state-designated landmarks (except for permitted activities or activities done by accredited institutions).[102] The penalties for violation are harsher for people undertaking these prohibited activities by means of excavation, in part because of the large and deep holes that excavation can leave behind.[103] One reason for the harsher penalties is that excava-

96. *Id.* at § 267.115(9).

97. *Id.* at § 267.11.

98. *Id.*

99. *See id.*

100. *Id.* at § 267.12(1). "The division may issue permits for excavation and surface reconnaissance on state lands or lands within the boundaries of designated state archaeological landmarks or landmark zones to institutions which the division shall deem to be properly qualified to conduct such activity."

101. *Id.* at § 267.12(2). The accredited institution must first give written notice of all anticipated archaeological activities to DHR, with sufficient information (e.g., a written Scope of Work, maps, etc.) reasonably required to ensure the proper preservation, protection, and excavation of the archaeological resources. No archaeological activity may begin until DHR has determined within fifteen days of receipt of notification, that the planned project will be in conformity with its adopted guidelines, regulations, and criteria.

102. *Id.* at § 267.13(1)(a).

103. *See* COMPLIANCE REVIEW SECTION, DIV. OF HISTORICAL RES., *Management Procedures for Archaeological and Historical Sites and Properties on State-Owned or Controlled Lands*

tion can disturb the spatial arrangement of archeological artifacts and human remains.[104] For example, penalties where no excavation was involved include a fine not exceeding $1000 and/or less than a year in prison.[105] Committing the offenses via excavation can increase the penalties to a fine up to $5000 and/or up to five years in prison.[106] Also, it must be noted that a person is guilty of a first degree misdemeanor when, in some manner, he/she alters a historical object to illegitimately enhance its commercial value, or falsely identifies or offers for sale an object as an original historical specimen if the object is not an original specimen.[107]

D. *Florida Department of Law Enforcement Concerns*

The Florida Department of Law Enforcement (FDLE), Criminal Justice Standards and Training Commission establishes standards for instructing law enforcement officers in basic skills relating to protecting archaeological sites and artifacts. These standards are established in consultation with Florida's DHR, Game and fresh Water Fish Commission, and Department of Environmental Protection. FDLE then applies the standards in designing and updating a training course to help its officers protect the State's archaeological sites and artifacts.[108]

IV. AN ARCHETYPE STATE, FLORIDA: PROTECTION SPECIFICALLY FOR BURIED HUMAN REMAINS

Buried human remains in Florida have distinctive legal protections, both statutory and court-sanctioned. Under, Florida law, knowledge of the gravesite's existence can define which law is applicable.

A. *Statutory Protection for Unmarked Human Burials*

The Florida legislature has enacted statutes pertaining to unmarked human burials, intending that "all human burials and human skeletal remains be

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1 [hereinafter Compliance Review], Aug. 1995, http://www.dep.state.fl.us/parks/planning/farms/DHRCulture/Statement.pdf. (discussing that disturbance of an archaeological site destroys the spatial arrangement of objects, even though objects themselves may be recoverable).

104. *See id.*
105. FLA. STAT. ANN. at §§ 267.13(1)(a), 775.082(4)(a), 775.083(1)(d).
106. *Id.* at §§ 267.13(1)(b), 775.082(3)(d), 775.083(1)(c).
107. *Id.* at § 267.13(3).
108. *Id.* at § 943.1728.

accorded equal treatment and respect based upon common human dignity without reference to ethnic origin, cultural background, or religious affiliation."[109] Yet, Florida is just one of several states that has enacted similar statutes, statutes designed to protect once forgotten human remains.[110] This section discusses some of the laws that may apply in the event that historical human remains are encountered unexpectedly.

The mandates of Florida Statutes apply when "human burials, human skeletal remains, or associated burial artifacts" have been discovered within the state.[111] An "unmarked human burial" is statutorily defined as "any human skeletal remains or associated burial artifacts" or any location connected with such remains (whether artifacts were located there or legitimately believed to be present) and the location is not marked as a gravesite.[112]

Upon discovery of an unmarked human burial, other than during an authorized archaeological excavation, "all activity that may disturb the unmarked human burial shall cease immediately, and the district-medical examiner [DME] shall be notified."[113] After receiving notification of the unmarked human burial, the DME has thirty days "to determine if he or she shall maintain jurisdiction or refer the matter to the State Archaeologist."[114] If the unmarked human burial is determined not to be "involved in a legal investigation and represents the burial of an individual who has been dead 75 years or more, [the DME] shall notify the State Archaeologist."[115]

Upon receiving notice from the DME, the DHR of the Department of State may assume jurisdiction over and responsibility for the unmarked human burial.[116] This procedure is conducted to "initiate efforts for the proper protection of the burial and the human skeletal remains and associated burial artifacts."[117] The State Archaeologist must attempt to locate and consult with people who may have familial, community, tribal, or even ethnic relationship with the deceased to

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109. *See id.* at § 872.05(1).

110. While varying in the minute details, several states have similar "unmarked human burials" statutes, including Delaware, Louisiana, Massachusetts, Missouri, Nebraska, and North Carolina. *See* DEL. CODE ANN. tit. 7 § 5401 (West 2005); LA. REV. STAT. ANN. § 8:681 (West 2005); MASS. GEN. LAWS ch. 9, § 26A (West 2002); MO. REV. STAT. § 194.407 (West 2004); NEB. REV. STAT. ANN. § 12-1201 to 1208 (LexisNexis 2003); N.C. GEN. STAT. § 70-26 to 52 (LexisNexis 2003).

111. FLA. STAT. ANN. at § 872.05(1).

112. *Id.* at § 872.05(2)(f).

113. *Id.* at § 872.05(4).

114. *Id.* at § 872.05(4)(a).

115. *Id.*

116. *Id.* at § 872.05(6).

117. *Id.*

determine the proper disposition of the deceased.[118] Frequently, no links to family or community can be identified. To determine, in such cases, the proper disposition of the burial, the State Archaeologist should

> "consult with persons with relevant experience, including: (1) a human skeletal analyst, (2) two Native American members of current state tribes recommended by the Governor's Council on Indian Affairs, Inc., if the remains are those of a Native American, (3) two representatives of related community or ethnic groups if the remains are not those of a Native American, (4) an individual who has special knowledge or experience regarding the particular type of the unmarked human burial."[119]

The State Archaeologist is required to "determine whether the unmarked human burial is historically, archaeologically, or scientifically significant. If the burial is deemed significant, reinterment may not occur until the remains have been examined by a human skeletal analyst designated by the State Archaeologist."[120] Furthermore, if the unmarked human burial is significant and if the parties (as discussed above) with whom the State Archaeologist is required to consult agree, "the human skeletal remains and the associated burial artifacts thereof shall belong to the state [of Florida] with the title thereto vested in the [DHR]."[121]

When the remains are classified as archaeologically or scientifically significant, the archaeologist will negotiate a "Scope of Work" or a "Management Plan" with the State Archaeologist. A Management Plan may include disinterment or preservation in place. If disinterment is selected, the archaeologist works with a physical anthropologist to carefully remove the remains for forensic examination. Following completion of the forensic investigation, a Management report is provided to facilitate decisions regarding whether site development activities may proceed in the vicinity of the discovery.[122] Florida Master Site File forms will be completed and updated as needed and in compliance with Florida law; the archaeologist then submits a Final Report to the State Archaeologist.[123]

It should be noted that the Florida Master Site File (MSF) "is a paper file archive and a computer database of all known historical structures and archaeo-

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118. *Id.* at § 872.05(6)(b).

119. *Id.* at § 872.05(6)(c).

120. *Id.* at § 872.05(6)(a).

121. *Id.* at § 872.05(6)(c).

122. *See id.* at §§ 872.05(5)(a), (c), 872.05(7); FLA. ADMIN. CODE ANN. r. 1A-44.003, .005 (2005).

123. FLA. STAT. ANN. at § 267.031(5)(n); *see* Fla. Office of Cultural & Historical Programs, *Florida Master Site File* [hereinafter Master Site File], http://www.flheritage.com/preservation/sitefile/ (last visited Jan. 31, 2006); Fla. Office of Cultural & Historical Programs, *Archaeological Site Form: Florida Master Site File* (1997), http://www.flheritage.com/preservation/sitefile/ar_form_v22.pdf (last visited Jan. 31, 2006) (forms can be utilized to record information pertaining to gravesites and burial grounds).

logical sites in Florida."[124] Organized alphabetically by county, the MSF currently lists more than 105,000 structures and sites which "represent the known physical remains of Florida's prehistoric and historic cultural heritage."[125] The MSF is maintained in Tallahassee by the DHR's Bureau of Historical Preservation, within Florida's Department of State.[126] Documented properties in the MSF are usually older that fifty years, and must have historical or scientific importance.[127] Archaeologists can report new sites electronically using the Bureau's "Archaeology Site Form"; new sites are "assigned numbers sequentially as they are recorded."[128] Researchers can access site survey reports and Archaeological Site Forms online using computerized search tools, including keyword, subject, and author search capability.[129]

B. *Protection for Known, Private Graveyards*

As land is transferred from one property owner to another through the generations, do subsequent landowners have an obligation to preserve the cemetery or can they simply pave over the buried dead so that the dead become the forgotten? While Florida's statutory law specifically protects *unmarked* human burials, protection of *marked* or known gravesites often must rely on Florida's case law. Overall, Florida case law reflects national trends in private graveyard protection. For example, Florida's case-on-point, *Mingledorff v. Crum*, draws on other states' prior case law.[130] A review of the following pertinent cases defines the legal protections that marked, but otherwise unprotected, gravesites possess.

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124. Master Site File, *supra* note 123.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* The U.S. National Archaeological Database (NADB) is an invention of more than 350,000 reports on archaeological investigation and planning. Although the database is largely comprised on "gray" literature (unpublished, uncataloged, and of limited circulation), it represents a large amount of the primary data reported on archaeological sites in the U.S. The NADB's search engine provides direct access to the bibliographic data; reports can be searched by keyword, state, county, worktype, title, cultural, affiliation, material, year of publication, and author. U.S. DEP'T OF THE INTERIOR, NAT'L PARK SERV., *Archeology Program, NADB: National Archeological Database*, http://www.cr.nps.gov/aad/TOOLS/nadb.htm (last visited Jan. 30, 2006).

130. *See* Mingledorff v. Crum, 388 So. 2d 632, 635-36 (Fla. Dist. Ct. App. 1980).

1. *Florida's Case-On-Point:* Mingledorff v. Crum

Mingledorff is a Florida case-on-point that addresses the open question of family graveyards.[131] The plaintiffs, descendants of people who were buried in an approximate 4,000 square foot cemetery on land owned by the defendant, desired that the cemetery be declared a public cemetery.[132] The plaintiffs also wanted the right to visit and maintain the cemetery and to have the right of future burial as long as space was available.[133]

In discussing the dedication of a public cemetery, the court defines a common law dedication as: (1) "setting aside land for a public use", (2) the property owner's words or acts must show an intent that the land is dedicated to a public use, and, (3) "acceptance by the public of the dedication."[134] However, a public dedication cannot be restrictive in its nature; it must be to the whole public.[135] Based on these general public dedication guidelines, the court concluded that the cemetery was not a public cemetery, dedicated for use by the public. Instead, the court found that it was a private cemetery utilized only by the former property owner's family.[136]

Having settled that the cemetery was not a pubic dedication, the court then turned to whether landowners could ever set aside land for a private family cemetery, and, if so, what rights did the descendants of those buried in the cemetery have.[137] The court cited to the second restatement of American Jurisprudence and non-Florida cases (e.g., *Hines v. State* and *Heiligman v. Chambers)* in fleshing out the bare bones of Florida case law in regards to this narrow concern.[138]

First, the court reasoned that landowners could dedicate a portion of their property as a private burial ground. Reserving a private burial site can be express or implied, "by acts, acquiescence, or other conduct evincing clearly such a pur-

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131. *Id.* at 633.

132. *Id.*

133. *Id.* In its subsequent analysis, the court emphasized the facts that there were visible graves and the former property owner's dedication of land as a cemetery had been documented. *Id.* at 634-35.

134. *Id.* at 634 (citing Palmetto v. Katsch, 98 So. 352 (Fla. 1923); Miami v. F. E. C. R. Co., 84 So. 726 (Fla. 1920)).

135. *Id.* at 635 (citing Burnham v. Davis Island, Inc., 87 So. 2d 97 (Fla. 1956)).

136. *Id.* The graves had gone back to before the 1900s and subsequent owners have sporadically maintained the cemetery. ("His widow, Mrs. Fannie Roberts, from time to time cleared and cleaned the cemetery," after the property owner died in 1938. "When the Parrishes acquired the property in the 1950's... people came up to clear the area, and Mrs. Parrish gave some of the grass to sprig the lots.") Also, the court found that the defendant knew of the cemetery's existence.

137. *Id.*

138. *Id.* at 635-36.

pose."[139] Where there is such a dedication and the land is used as a burial ground, such land cannot be for any other use. These private burial plots can be open to those who have a right to be buried there (if plots are available); and are accessible for visitation, repair, and beautification.[140] Rights to access the cemetery are limited by reasonable time and manner.[141] The cemetery needs to be maintained in a tidy and dignified fashion.[142] The property owner has a right to access one's other property at all times, and his other property can not be damaged or his enjoyment thereof be disturbed.[143] Finally, the cemetery loses its special status once abandoned, when it is no longer a "resting place for the dead, with anything to indicate the existence of graves as long as it is known and recognized by the public as a graveyard."[144]

Furthermore, the court specifically and uniquely defined some aspects of the general legal propositions discussed above. First, the court did not focus on whether the reserved burial plot was a dedication, a trust, or an easement.[145] Second, the court limited the rights of accessibility to individuals who are relatives

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139. *Id.* at 635; *see also* Andrus v. Remmert, 146 S.W.2d 728, 730 (Tex. 1941) (it should be noted that where a portion of a dedicated cemetery remains unused, "it appears that there is no reasonable expectation that such surplus land will ever be used for burial purposes at any reasonable time in the future, such surplus land should be treated as abandoned as a cemetery." (otherwise, the unused portion of a cemetery can be partitioned and abandoned)).

140. Mingledorff, 388 So. 2d at 635; *see generally* Van Buskirk v. Standard Oil Co., 134 A. 676, 678-79 (N.J. 1926). The family had essentially ceased future burials and all (or many bodies) buried had been previously exhumed prior to the present case. The court determined that the family was barred from bringing suit to stop the subsequent legitimate owner from developing the land based on the right of visitation based on the doctrine of latches. The family had waited to bring suit only after the cemetery had ceased to function as a cemetery.

141. Mingledorff, 388 So. 2d at 636.

142. *Id.*

143. *Id.* at 636-37.

144. *Id.* at 636; *see also* Mayes v. Simons, 8 S.E.2d 73, 74 (Ga. 1940). The court's description of an apparent abandoned cemetery, if not an actual abandoned cemetery was:

> The evidence showed that the last burial in the plot claimed as a cemetery occurred in the year 1868, and, although conflicting in some respects, authorized findings to the effect that the graves in question were never marked except by rocks, without inscription, on the side of one of them, the size and number of the rocks not being shown in the record; that by neglect and inattention for more than fifty years the graves had ceased to bear any sign likely to attract attention to their existence as such; that the space so occupied had lost all appearance as a cemetery before the husband of the principal defendant purchased the property upon which such cemetery lot may have been formerly situated; and that such purchase was made in good faith, and without knowledge or notice of the existence of such cemetery.

145. *See* Mingledorff, 388 So. 2d at 636.

via blood or marriage to those buried in the cemetery.[146] The right of burial includes all the incidental activities with it, e.g., the right to a suitable graveside service; moreover, funeral home employees can access the site as necessary to perform their functions.[147] Graves must be maintained in a clean and dignified fashion so that the area is healthy and inoffensive.[148] Markers added to the cemetery must be as "are customary in the community."[149] The court further directed the relatives of the deceased who showed interest in maintaining the graves to have the cemetery surveyed, existing graves and future burial sites within the cemetery's boundary identified, and to establish the means and schedule of maintenance of the cemetery.[150] Therefore, the court concluded that so long as the plaintiffs' duties are fulfilled, the land held in fee simple by the defendant was subject to an "easement and trust" of the plaintiff's family burial ground.[151]

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146. *See id.*; *see also* Turner v. Turner, 48 Va. Cir. 114, 115 (Va. Cir. Ct. 1999) ("The meaning of the word 'family' depends on the field of law in which the word is used . . . More broadly, 'family' can mean all descendants of a common progenitor. The court agrees...the word 'family' was used in its broader sense...[the ancestor who established the family graveyard] could not have intended to reserve a burial ground only for his immediate family....").

147. *See* Mingledorff, 388 So. 2d at 636.

148. *See id.* (explaining that maintenance requires the cemetery's graves and markers must be maintained, flowers and grasses must be planted, weeds should be controlled, and even stagnant water and dead flowers should be removed); *see also* Barrick v. Hockensmith, 69 Pa. D. & C.2d 475, 482-83 (Pa. Ct. Com. Pl. 1975) ("The duty of maintenance:...may not remove monuments or devote a portion of the burial ground to commercial use:...duty of maintenance thus exceeds a duty to avoid flagrant desecration, but falls short of a duty to conduct future burials...extends not only to mowing grass and similar menial chores. It reaches as well defendants' use of the structure which adjoins the burial ground").

149. Mingledorff, 388 So. 2d at 637.

150. *Id.*

151. *Id. See generally* Garland v. Clark, 88 So. 2d 367, 369 (Ala. 1956) (addressing the issue of what is not a public dedication of land); *see also* 13 AM. JUR. 2D *Cemeteries* § 4 (2004). The church's cemetery, utilized generally by the church's members, utilized both a public road and the church's private adjacent track of land for accessing the cemetery. Garland, 88 So. 2d at 368. Members of deceased relatives sought to prevent the use of the adjacent track for other purposes that would prevent access to the cemetery. The relatives had argued that the adjacent track had been dedicated to the public as a means to access the cemetery. *Id.* 369. The court reasoned that a public dedication must be a dedication to the public at large and not for a particular part of the public. *Id.* at 370-71. The cemetery was not dedicated to the public because it was reserved for the church's members. Therefore, as visitors had access to the cemetery by other means, the adjacent track was not preserved. *Id.* at 371; *see generally* Sibbel v. Fitch, 34 A.2d 773 (Md. 1943). The plaintiff sought access to a cemetery via a "new" road across private land where the cemetery had been previously accessed by an "old" road for decades. The original reservation for a right of way did not describe the literal location of the right of way. The court reasoned that long use of the "old" road defined and fixed the road as the right of way, as if the "old" road was so originally reserved in the title. Sibbel, 34 A.2d at 774-75; *see also* Chandler v. Henry, No. CA97-1530, 1998

2. *Rights and Duties of the Landowner and Relatives of the Deceased*

As the court in *Mingledorff* relied on non-Florida case law and foundational case law of the second restatement of American Jurisprudence, some of this pertinent case law is worth briefly reviewing. The cases *Gibson v. Barry Cemetery Ass'n, Vidrine v. Vidrine*, and *Concerned Loved Ones and Lot Owners Ass'n of Beverly Hills Memorial Gardens v. Pence* addressed property owners' and deceased's relatives' rights and duties.[152]

Gibson, a Texas case, in part, demonstrates the general rule that relatives of the deceased in a particular cemetery, by that fact alone, do not have any title to the land.[153] Relatives generally have only the right of "visitation, ornamentation, and the protection of the graves of such relatives as are buried thereon from desecration."[154]

In *Vidrine,* a Louisiana case, a cemetery was dedicated to the public.[155] The court found that the rights of the relatives were essentially a covenant running with the land, binding the present property owner via an implied contractual relationship.[156] The owner could not remove or disturb a grave or bar relatives from visiting or maintaining graves.[157] Also, the property that made up the cemetery could not be used for purposes not in keeping with its use as a cemetery, and the owner could not reduce the size of the cemetery.[158] However, the property

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Ark. App. LEXIS 556, at *10 (Ark. Ct. App. Sept. 2, 1998) (holding that a footpath rather than a road, accessible by a car, was acceptable access to a protected cemetery).
McDonough v. Roland Park Co., a Maryland case, dealt with a missing graveyard where a deed left a reservation. 57 A.2d 279, 280 (Md. 1948); *see also* 13 AM. JUR. 2D *Cemeteries* § 27 (2004). The deed of a former property owner had set aside a fifty square foot portion of the property to be used as a family burial ground. McDonough, 57 A.2d at 280. However, no evidence of the graveyard existed- no monuments or tombstones or no witnesses to verify the existence of a graveyard. *Id.* at 282. The court reasoned that a reservation of land needs to be sufficiently described to pinpoint its particular location within the parcel of land. Otherwise, to hold an insufficiently described reservation as valid would be to hold the entire parcel of land as hostage to a description of a fifty square foot cemetery. The court found that the reservation was void. *Id.*

152. Gibson v. Berry Cemetery Ass'n, 250 S.W.2d 600 (Tex. Civ. App. 1952); Vidrine v. Vidrine, 225 So. 2d 691 (La. Ct. App. 1969); Concerned Loved Ones and Lot Owners Ass'n of Beverly Hills Mem'l Gardens v. Pence, 383 S.E. 2d 831 (W.Va. 1989) [hereinafter Beverly Hills]; *see also* 13 AM. JUR. 2D *Cemeteries* § 21 (2005).

153. *See* Gibson, 250 S.W.2d at 601.

154. *Id.* at 602.

155. Vidrine, 225 So. 2d at 692-93.

156. *Id.* at 697.

157. *Id.*

158. *Id.*; *see also* Chace v. Leising, 72 N.Y.S.2d 743, 744-45 (N.Y. Sup. Ct. 1947) (the defendants' act of cutting down trees that caused the limbs to fall and break cemetery headstones constituted improper interference with a protected cemetery).

owner had the right to charge for burial lots, regulate the placement of burial plots, and regulate how burials were conducted as long as such requirements were characteristic of previous burials in the cemetery.[159]

The West Virginia *Beverly Hills* case involved a cemetery owner who sold twenty acres of seventy acres of land that had been originally conveyed to be a cemetery.[160] The twenty acres were used for cutting timber and potential coal mining.[161] The court held that, when determining what activities are permissible within cemetery boundaries, it would determine whether the activity is "so unrelated to cemetery purposes that it will not be sanctioned without legislative authority."[162] Mining operations, however, are not related to cemetery purposes.[163] The court remanded the case, in part, to have the trier of fact determine if all seventy acres were dedicated to a cemetery.[164]

3. *When a Cemetery Ceases to be a Cemetery*

Wilder v. Evangelical Lutheran Joint Synod and *Tracy v. Bittle*, in part, expand upon the fate of a cemetery when it too finally breathes its last dying breath.[165]

Wilder, a Wisconsin case, stood for the proposition that a cemetery lost its special status against property owners only when those already buried in a cemetery were exhumed and removed by lawful means.[166] A cemetery does not lose its special status simply because people have ceased to be buried in it.[167]

Tracy, a Missouri case, explored what is an abandoned graveyard.[168] First, when a graveyard is abandoned (and bodies remaining properly exhumed), the land reverts to its original purpose or use without no overriding limitations.[169] Abandonment was described as "when these graves shall have worn away; when they who now weep over them shall have kindred resting places themselves;

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159. Vidrine, 225 So. 2d at 697-98.
160. Beverly Hills, 383 S.E.2d at 833.
161. *Id.*
162. *Id.* at 835.
163. *Id.*
164. *Id.* at 838-39.
165. Wilder v. Evangelical Lutheran Joint Synod of Wis. & Other States, 227 N.W. 870 (Wis. 1929); Tracy v. Bittle, 112 S.W. 45, 45 (Mo. 1908); *see also* 14 AM. JUR. 2D *Cemeteries* § 27 (2005) (stating that a cemetery does not lose its character when further burials are prohibited).
166. Wilder, 227 N.W. at 871.
167. *Id.* In the case, relatives of those buried in the cemetery sought to prevent the landowner, a college, from using the cemetery for purposes other than that of a cemetery, such as having a garage on the cemetery. *Id.* at 872.
168. *See* Tracy, 112 S.W. at 47.
169. *Id.* at 50.

when nothing shall remain to distinguish this spot from common earth around, and it shall be wholly unknown as a graveyard...."[170]

4. Heiligman v. Chambers & Hines v. State

Finally, the cases of *Heiligman* and *Hines*, specifically cited by the court in *Mingledorff*, reaffirm the general legal guidelines that govern a family cemetery's birth, life, and demise.[171]

In the Oklahoma case *Heiligman*, the plaintiffs sought to prevent the removal of bodies from a private burial ground.[172] The burial ground was regarded as a legitimate family plot because the land had been segregated by a wall, people laid to rest in a proper manner, and their graves properly marked.[173] The general rule was that a private burial ground created a trust upon the property owner to preserve the land as a cemetery and not interfere with the rights of relatives of the deceased to access the cemetery for visitation and maintenance.[174] The court noted that properly marked cemeteries put subsequent owners of the land on notice of the cemetery's existence.[175] The court also noted that abandonment was not achieved by merely failing to cut grass or maintain tombstones; only removal of the buried can cause the graveyard to be abandoned.[176]

In *Hines*, a Tennessee case, a family cemetery had been established, utilized, and sufficiently maintained by the descendants of those buried within it.[177] The court found that a dedication of land for a burial ground need not be express in the land's deed, but can be implied, as the graves could be seen, the relatives had sufficiently maintained the cemetery, and the property owner had been put on notice.[178] Furthermore, the court declared a dedication of land for a burial ground is a trust held by subsequent landowners for the benefit of the deceased's relatives.[179] The relatives would have the right to access the graveyard and be buried in the graveyard if plots are available.[180] Also, the relatives generally would have the duty to maintain the cemetery and perform activities in a reason-

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170. *Id.* at 49.
171. Heiligman v. Chambers, 338 P.2d 144 (Okla. 1959); Hines v. State, 149 S.W. 1058 (Tenn. 1911).
172. Heiligman, 338 P.2d at 146.
173. *Id.* at 148.
174. *Id.* at 147 (examining other states' holdings for this case of first impression).
175. *Id.* at 148.
176. *Id.*
177. Hines, 149 S.W. at 1059.
178. *Id.*
179. *Id.*
180. *Id.*

able manner and time, "so as not to unnecessarily injure the owner of the farm in its cultivation and use."[181]

5. *Other Graveyard Legal Points in Florida*

While *Mingledorff* is a case-on-point in regard to the legal status of the private family plots, other Florida cases and laws reaffirm and illuminate aspects of the legal status of Florida's family plots.

Although this Florida case involves a public cemetery, it establishes that the rights of those with an interest in preserving a cemetery's static condition are not unlimited.[182] In *City Comm'n v. Woodland Park Cemetery Co.*, a cemetery dedicated to the public is zoned residential.[183] The cemetery's owners want a portion of the cemetery zoned commercial to allow for a commercial building.[184] The zoning request was denied.[185] The owners argued that they were subject to "reverse spot zoning," a situation where an individual property owner was arbitrarily zoned as to not "make reasonable use of its property in accord with the character of the adjacent area."[186] In the instant case, the court found reversed spot zoning did occur as it was unreasonable and bore no substantial relationship with public concerns; the court struck down the arbitrary zoning classification.[187] As to defining changing conditions, the court reasoned that the road upon which the cemetery was situated had, over a period of fifty or more years, gone from an underdeveloped country road to a four-lane heavily traveled thoroughfare with commercial development on both sides.[188]

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181. *Id.*

182. *See generally* City Comm'n of Miami v. Woodlawn Park Cemetery Co., 553 So. 2d 1227 (Fla. Dist. Ct. App. 1989) (holding that a city is allowed to rezone part of a cemetery as being commercial to allow for the building of a funeral home).

183. *Id.* at 1228.

184. *Id.* at 1228-29. Situated near a major thoroughfare, the frontage of the thoroughfare is zoned commercial and behind this commercial frontage are residential neighborhoods. The cemetery's owners sought to only rezone 1.3 acres in order to build a funeral home with parking.

185. *Id.* at 1230.

186. *Id.* Generally, a governing authority can utilize its police power to zone where there is a substantial relationship to public health, welfare, safety, and morals. Zoning restrictions that are "fairly [reasonably] debatable" are given great deference by the court and are held as constitutional. However, courts have held zoning restrictions that have caused reverse spot zoning as illegal. In the face of changing community conditions, where zoning becomes so unreasonable that an owner's property is essentially taken, a court can strike down the arbitrary zoning classification. *Id.* at 1231.

187. *See id.* at 1232-34.

188. *Id.* at 1234. The court referred to the cemetery as a "literal zoning peninsula," an individual parcel not in keeping with the character of the rest of the area. *Id.* Two arguments made in the case concerned changing traffic patterns and aesthetic and practical value. *Id.* at 1235-37.

While private family burial plots (of less than two acres) are exempted from Florida's regulation of funeral and cemetery services and regulation of easements, certain statutory definitions and mandates seem to reaffirm the case law discussed above. First, exempted from regulation were religious cemeteries of less than five acres and family plots of less than two acres.[189] Second, "care and maintenance" of cemeteries includes upkeeping all aspects of a cemetery, like its tombstones and its walkways and roads and lawn maintenance, so that a cemetery is "well-cared for and [in a] dignified condition, so that the cemetery does not become a nuisance or place of reproach and desolation in the community."[190] Third, if a licensed cemetery company wishes to utilize land dedicated as

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The first argument claimed that changed zoning caused traffic patterns to shift which lead to a decrease in neighborhood integrity. *Id.* at 1235. Next, it was argued that building the funeral home would alter the cemetery's aesthetic value as a bird sanctuary and undermine its primary purpose of providing future burial plots. *Id.* at 1236-37. While not dismissing the argument, the court concluded that the funeral on 1.3 acres did not disturb the cemetery's aesthetic and practical values. *Id.* at 1237. Although, both arguments ultimately failed due to the facts specific to the case, it is worth noting that zoning can be fairly debatable if it maintains the neighborhood integrity and preserves the neighborhood's residential character. *Id.* at 1234.

Jones v. Travick addressed the nuisance factor in relation to cemeteries. 75 So. 2d 785, 785 (Fla. 1954). The court states that the general rule for cemeteries, as exemplified in American Jurisprudence was not per se private nuisance, while a funeral home or undertaking business was regarded as a nuisance. *Id.* Nuisance arises if such an operation is established in a purely residential neighborhood. *Id.* at 786-87. The theory behind a funeral being a private nuisance was that ultimately such an establishment would create "an atmosphere detrimental to the use and enjoyment of residence property." *Id.* at 786. The court in the instant case founded that the rule as applied to funeral homes should also apply to cemeteries in residential areas. *Id.* at 787. The court reasoned that cemeteries' impact to residential communities is similar to that of funeral homes. *Id.* (stating "that the passage of funeral possession with mourners and last rites...recurring in close proximity to a residence may deprive the home of the comfort and repose to which the owner is entitled"). Furthermore, due to the particular facts of this case, the court noted that the plaintiff's fear of consuming water from the wells that percolated through the deceased' remains seemed reasonable, despite lack of evidence of any possible contamination. *Id.* at 788 (quoting "one witness testified that he 'certainly would not want to consumer it [water] off the dead"). For the reasons discussed, the court concluded that a cemetery should not be built next to peoples' residences. *Id*; *see also* Overby v. Piet, 163 So. 2d 532 (Fla. Dist. Ct. App. 1964).

It should be noted that, in *Langford v. Brickell*, via bankruptcy proceedings, creditors sought to partition the land to sell because their interest in a piece of land was held with others as tenants in common, each tenant holding an undivided interest in the land. 138 So. 75, 76 (Fla. 1931). In the center of this property was a family burial ground, and this burial ground was the reason that the partition of the land was challenged. *Id.* at 76. The court found for the remaining tenants in common, and the creditors could not partition the land to sell their share. *Id.* at 76-77. The court reasoned that the creditors' rights could not be such as to interfere with an disturb the tenants' in common rights to enjoy and possess the property. *Id.*

189. FLA. STAT. ANN. § 497.003(1)(A), (G) (West 2002).

190. *Id.* at § 497.005(8).

a cemetery for other purposes, the company must obtain approval from the Department of Financial Services and notify the public of the potential sale. The state agency must balance all interested parties' concerns, and may grant approval; if approved, the company must exhume all bodies prior to the alternate use or sale of the land.[191] Fourth, in general, Florida's separate regulation of easements affirms the right of ingress and egress from cemeteries for the deceased's relatives and the expectation that either the landowner or the deceased's relatives can maintain the cemetery.[192] These characteristics of legal cemeteries correspond to expectations as discussed in the case law.

C. *In Florida: Synopsis of Private Graveyard Law*

As it stands today in Florida, what protection does a family or other small private cemetery have against the onslaught of land development?

First, a private landowner can utilize a portion of his or her land and set it aside as a private or family burial plot.[193] Regardless of the way 'dedication' is defined, dedicating land as a cemetery instills upon the cemetery a special status or protection from the ordinary transactions and expectations of landowners.[194] Generally, it is understood that visible indicators (monuments headstones, etc.) of the cemetery is sufficient to put the landowner on notice of the cemetery's special status.[195]

A cemetery must maintain its special status, for its status is lost upon its abandonment.[196] A cemetery is abandoned only when all traces of its being a

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191. *Id.* at § 497.270.

192. *Id.* at § 704.08.

193. Mingledorff v. Crum, 388 So. 2d 632, 635 (Fla. Dist. Ct. App. 1980). This dedication of land can be viewed as an easement, a trust, or as a reservation. *See id.* at 635-36. A dedication of land for a family plot is not a public dedication, as the entire general public does not have a right to utilize the cemetery. *Id.* at 635. A dedication of land as a cemetery can be express, as sufficiently identified in the land's deed, or implied by acts or particular circumstances. Implied dedication can be established by such facts as the cemetery having graves clearly marked with tombstones and its borders being sufficiently defined. *See* McDonough v. Roland Park Co., 57 A.2d 279, 281 (Md. 1948) (discussing factors court looked at in determining if there was an implied dedication).

194. *See* Mingledorff, 388 So. 2d at 633.

195. *See* Hines v. State, 149 S.W. 1058, 1059 (Tenn. 1911). Finally, it must be noted that, whether express or implied, a dedication of land must be in a manner so that the specific location of the cemetery on the land can be readily known. A dedication of an unknown one-acre cemetery can not be imposed on the whole of a several-acre parcel, such a dedication will probably become void. *See* McDonough, 57 A.2d at 282.

196. *See* Wilder v. Evangelical Lutheran Joint Synod of Wis. & Other States, 227 N.W. 870, 871 (Wis. 1929); Tracy v. Bittle, 112 S.W. 45, 47 (Mo. 1908) (quoting 5 Am. & Eng. Ency. of

cemetery ceases to exist and the people laid to rest within it were lawfully exhumed.[197] Such abandonment does not include mere failure to regularly maintain the cemetery or cessation of new burials, instead it includes lack of knowledge of the cemetery's existence as exemplified when there are no living witnesses who know of the cemetery's location or borders (where not enclosed with a fence).[198]

Generally, the relatives of the deceased have the right to future burials as long as plots are available. They also have the right of visitation and the right of egress and ingress from the cemetery.[199] Relatives of the deceased are expected to maintain the cemetery in a dignified and healthy manner.[200] Maintenance generally includes lawn maintenance and beautification, like removing weeds and planting flowers.[201] Maintenance also includes maintaining roads or walkways and tombstones and other markers.[202] Accessing the cemeteries must be done at reasonable times and in a reasonable manner.[203] Generally, the activities related to the cemetery should not disturb the property owner's enjoyment and use of his or her remaining property.[204]

In contrast, the property owner, while retaining title to the land the cemetery occupies, cannot sell or utilize the land in a manner that is not consistent with the cemetery's purpose.[205] The owner can not prevent the relatives' right of access and burial.[206] However, the owner who also happens to oversee or manage

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Law 2d 784, that "the public right of exclusive enjoyment continues until the place loses its identity as a burying ground").

197. *See* Wilder, 227 N.W. at 871-72; Tracy, 112 S.W. at 49.

198. *See* McDonough, 57 A.2d at 282 (finding lack of evidence of a graveyard indicative that there is no graveyard, or if there ever was a graveyard, it has since been abandoned); Heiligman v. Chambers, 338 P.2d 144, 148 (Okla. 1959) (holding that failure to maintain does not constitute abandonment); Mingledorff, 388 So. 2d at 636 (finding respect for resting place and rights of surviving descendents creates a right in the burial plot).

199. *See* Gibson v. Berry Cemetery Ass'n, 250 S.W.2d 600, 601-02 (Tex. Civ. App. 1952) (discussing an easement for relatives to visit and protect the graves); *see also* Mallock v. S. Mem'l Park, Inc., 561 So. 2d 330, 332 (Fla. Dist. Ct. App. 1990) ("The relatives and descendants . . . shall have an easement for ingress and egress . . .") (citing FLA. STAT. ANN. § 704.08 (West 1987)).

200. *See* Hines v. State, 149 S.W. 1058, 1060 (Tenn. 1911) (finding that there can be no adverse possession or ouster as long as the graves are maintained).

201. Mingledorff, 388 So. 2d at 637.

202. *Id.* at 636.

203. Hines, 149 S.W. at 1059.

204. *See id.*

205. *See* Gibson, 250 S.W. 2d at 601-02 (stating that descendants of buried persons are not vested title); Vidrine v. Vidrine, 225 So. 2d 691, 697-98 (La. Ct. App. 1969) (finding that the owner retains ownership but has limited rights because the cemetery is an irrevocable covenant running with the land); Heiligman v. Chambers, 338 P.2d 144, 147-48 (Okla. 1959) (citing Hines, 149 S.W. at 1058) (stating that the owner must hold title in trust for grantees, devisees, and heirs).

206. *See* Gibson, 250 S.W. 2d at 601-02; Vidrine, 225 So. 2d at 697.

the cemetery (like a church that oversees its church cemetery) can regulate the cemetery and charge appropriate fees for its upkeep and future burials.[207]

Under Florida Statute § 497.270, governing entities can permit or even require the removal of human remains so that land can be utilized for other purposes.[208] Afterall, once the deceased have been removed from a cemetery, the cemetery can be regarded as abandoned, and the special status of the land it occupied will be lost.[209] Therefore, as long as exhuming human remains is a legitimate option, the special status of a cemetery probably cannot perpetually exist.

IV. CONCLUDING CONSIDERATIONS

The dead cannot draw sufficient breath to defend their legal rights and preserve what is left of both their persons and final resting places. Often, preservation of cultural resources, like human remains and gravesites, falls to relatives of the deceased, the federal and state governments, or those who act to prevent destruction by developers' construction projects. Knowledge of legal resources, like the federal ARPA and Florida case law (reflecting national trends), can be the legal means to preserving cultural resources. May the dearly departed finally rest in peace.

207. *See* Vidrine, 225 So. 2d at 697-98
208. FLA. STAT. ANN. § 497.270 (West 2002).
209. Vidrine, 225 So. 2d at 697-98; FLA. STAT. ANN. at § 497.270.