

**Report on the Unmarked Burial Site Treatment Plan Committee  
Pursuant to Act 151 of the 2010 Legislature**

**Report Prepared for**

**House Committee on General, Housing and Military Affairs  
and  
Senate Committee on Economic Development, Housing and General Affairs**

**January 15, 2011**

**Respectfully Submitted by:**

**Giovanna Peebles, Chair**  
SHPO/State Archeologist, VT Division for Historic Preservation

**John Crock**  
Director, UVM Consulting Archeology Program

**Chris D'Elia**  
President, Vermont Bankers Association

**Amanda Ibey**  
Government Affairs Director, Home Builders & Remodelers  
Association of Northern Vermont

**John Kessler**  
Agency Counsel, Agency of Commerce & Community Development

**Dave Lacy**  
Archeologist, U.S. Forest Service, Green Mountain National Forest

**Chief April St. Francis Merrill**  
Abenaki Band at Missisquoi

**Eric Osgood**  
Director, Vermont League of Cities and Towns

**Dave Skinas**  
Archeologist, USDA Natural Resource Conservation Service

**Guest:**  
**Andrew Mikell**  
Vermont Attorneys Title Corporation

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### **Legislative framework**

The Vermont legislature passed Act No. 151 (H. 281), “*An act relating to the removal of bodily remains,*” at the end of the 2010 session (<http://www.leg.state.vt.us/docs/2010/Acts/ACT151.pdf>). The act created a nine member unmarked burial site treatment plan committee “*to develop procedures for addressing issues relating to known or discovered unmarked burial sites of human remains, including developing treatment plans to be used when an unmarked burial site is discovered on private property.*” The act required that the committee be comprised of the following nine members:

*“(1) The commissioner of economic, housing and community development or the commissioner’s designee.*

*(2) The state archeologist or designee.*

*(3) A representative from the Vermont League of Cities and Towns.*

*(4) A representative from a Native American group based in Vermont who has experience in handling unmarked burial sites, appointed by the Commissioner of Economic, Housing and Community Development.*

*(5) A federal archeologist from the Natural Resources Conservation Service of the U.S. Department of Agriculture.*

*(6) The U.S. Forest Service, Green Mountain National Forest archeologist.*

*(7) The director of the University of Vermont consulting archeology program.*

*(8) A representative from the Vermont Bankers Association Inc.*

*(9) A representative from the Home Builders and Remodelers Association of Vermont.”*

The committee was charged with three tasks. First, “develop procedures for responding to reports of a discovery of an unmarked burial site.” Second, “develop various treatment plans for addressing issues that attend the discovery of an unmarked burial site on private property.” Third, submit a written report on or before January 15, 2011, outlining the procedures and treatment plans to the House Committee on General, Housing and Military Affairs and the Senate Committee on Economic Development, Housing and General Affairs. The act defines a treatment plan as “an outline of the process for providing appropriate and respectful treatment of the burial site while considering the rights of the landowner.”

The act further requires that each treatment plan include the following, as appropriate:

(A) Methods for determining the presence of an unmarked burial site, including archeological surveys and assessments and other nonintrusive techniques.

(B) Methods for handling development and excavation on property on which there is a known burial site or there is likely to be one.

(C) Options for owners of property on which human remains are discovered or known to be located.

(D) Procedures for protecting, preserving, or moving the burial site and the human remains.

(E) Time frames for implementation of the treatment plan.

(F) Procedures for resolving disputes among stakeholders.

### **Background**

Unmarked burials are discovered across Vermont from time to time in a variety of contexts. In some areas, such as Monument Road in the Towns of Swanton and Highgate, Burlington’s North End, and elsewhere as stated in this report, discovery of unmarked burials is fairly predictable. In other cases, unmarked burials are encountered at random with no previous expectation that such a burial exists in that location. In all cases, unmarked burials are an unwelcome surprise. In cases of unmarked Native American burials, Abenaki and other Native communities are enormously pained and physically sickened by such discoveries and resultant impacts to their ancestral remains.

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Thus, unmarked burials:

- a) require protection at the onset of discovery;
- b) pose a series of complex questions to and decisions by a variety of stakeholders;
- c) may result in potential financial burdens to property owners and/or others;
- d) need permanent recognition; and
- e) require procedures upon discovery and a plan to ensure appropriate and respectful treatment of the remains and a satisfactory outcome for stakeholders.

At various other times in the last three decades ad hoc groups of various stakeholders have come together to gather ideas and recommendations to protect and treat unmarked burials. Since 2007, intensive discussion by stakeholders coalesced into draft legislation intended to strengthen protections of unmarked burials and lay out procedures to be applied upon discovery and for performing subsequent treatment. Discussions during the 2009-2010 sessions in the House Committee on General, Housing and Military Affairs and Senate Committee on Economic Development, Housing and General Affairs resulted in legislative recognition that protection and treatment of unmarked burials are significant public issues that merit further discussion, analysis and legislation.

The result of these legislative discussions was the formation of the Unmarked Burial Site Treatment Plan Committee which met four times in the fall and early winter of 2010; a sub-committee met a fifth time. Detailed meeting notes were taken by the Chair and are on file at the VT Division for Historic Preservation.

#### **Key Points of Discussion and Committee Consensus:**

##### **1) Our collective experience with unmarked burials indicates that:**

- Unmarked burials need to be found ahead of time whenever and wherever possible.
- Landowners and communities are key stakeholders that need to be immediately involved.
- There is currently no legal process or procedure to protect or treat unmarked burials.
- Responses to unmarked burials are ad hoc and voluntary. Legislation and clear guidance is necessary.
- There is anecdotal evidence that unmarked burials are discovered from time to time and never reported due to fear of stopping a project.
- Pervasive lack of knowledge, misperception, and fear around the potential for unmarked burials make education a key component in the effort to provide greater protections to unmarked burials.
- The unmarked burial fund established in 18 V.S.A. § 5212b is vital to the protection and treatment of unmarked burials. See Attachment 1.

##### **2) The following stakeholders are core to respectful and appropriate treatment of unmarked burials, upon discovery and after treatment:**

- Property owners
- Town governing boards including Select Board, Town Clerk, Planning and Zoning departments, and cemetery commissions and associations
- Law enforcement
- Medical examiners
- Native American communities
- Archeologists
- Excavators
- Realtors

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- Title Insurance companies
- State Archeologist and VT Division for Historic Preservation
- Commissioner of Economic Development, Housing and Community Development
- VT Department of Health

#### **3) Costs for treating unmarked burials:**

- Costs are generally modest and predictable.
- Approximate costs for treating 1 or 2 burials consist of assessment (~ \$ 2,000), treatment plan implementation (~ \$ 6,000), and deed registering (~ \$ 1,000).
- The Unmarked Burial Fund is key to helping landowners.
- Once marked but now unmarked cemeteries (see below) present their own special issues and the Committee seeks legislative guidance on whether the Unmarked Burial Fund should pay for assessments and treatment plans in those contexts.
- The fund should not pay for treatment plans in these contexts: elective reburial of known remains; federal lands; undertakings that are subject to Section 106 review as a result of having federal dollars, licenses, or permits; and perhaps others upon further discussion with legislature.
- Need flexibility and a shared process through consultation.

#### **4) Registering Unmarked Burials:**

- A properly indexed Notice of an unmarked burial, map, and copy of the treatment plan (which includes the final disposition of the remains) must be filed in the land records.
- A property owner may choose to grant development rights to preserve an area, thereby creating a notification in the deed.
- A property owner may choose to work with the State Archeologist and designate a State Archeological Landmark under 22 VSA 14 Section 763. This would also be registered in the land records.
- The Committee seeks legislative guidance whether statutes relating to land records need to be revised to accommodate recording unmarked burials.

#### **5) Impacts to private property owners:**

- Most property owners do not purchase title insurance, thus, they cannot take advantage of that avenue if a complex instance of unmarked burials is found.
- Property owners with title insurance can contact their title insurance company in a case where an unmarked burial site appears to contain multiple burials and avoidance in place is chosen as the preferred treatment.
- The Committee seeks legislative guidance on whether current laws allow municipalities to consider reducing a tax bill if all or part of a property is encumbered with an unmarked burial site.

#### **6) Many “Unmarked Burial Sites” were once “marked:**

- Various instances of “unmarked” burials - - for example, the War of 1812 cemetery in the Burlington North End and Johnson cemetery - - were once marked.
- Fences and markers have been removed or are obliterated and are no longer visible.
- These special areas demand tailored treatment.
- We can predict that burials will be found somewhere in these areas.

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- Towns with these types of cemeteries should consider special zoning for these special areas identifying how these areas should be treated. Zoning requirements for disclosure in a deed are important. The zoning ordinance becomes the treatment plan.
- The Committee seeks legislative guidance on who should pay for treatment plan implementation in these special cases. Should the municipality - - or the property owner - - and the State (through the Unmarked Burial Fund) share the cost? Should the state pick up the whole cost to incentivize reporting and minimize the financial burden for a municipality? Or, none of the cost? However, if the state does not pick up some or all of the cost, there's no incentive to report the burial(s)

#### **7) Procedures for resolving disputes among stakeholders:**

- The Unmarked Burial Site Treatment Plan Committee will resolve disputes among stakeholders.
- The Committee may choose to retain a mediator if appropriate. The cost for a mediator will be borne by the state. (The Vermont Civil Rights Commission offers a Mediation Program at no cost if the issue falls within an area of interest to them.)

#### **8) Education is key:**

- Anecdotal information indicates that fear of delays and unpredictable/undue costs results in under-reporting and destruction of unmarked burials.
- People do not know how to deal with discoveries.
- People do not know who to contact about unmarked burials.
- People are afraid of unknown costs relating to unmarked burials.
- There need to be incentives to encourage reporting. For example, relieve excavators of the costs associated with treatment plans and make sure time frames are set and honored.
- Although Vermont state laws exist on marked cemeteries and unmarked burial sites, people remain unfamiliar with them. "Who's responsible?" and "Who pays?" are the basic questions. The updated "*Digging Deep. Unearthing the Mysteries of Burial and Cemetery Law*" publication by the Secretary of State's Office (2010) is an important source of information and is now available on the Internet.
- Much more education is necessary.
- Mapping on the Internet recorded cemeteries and, where appropriate, unmarked cemeteries is key. Native American communities shall decide whether or not a Native unmarked burial is publicly mapped.

### **Treatment Plans**

The attached *Unmarked Burial Discovery General Treatment Plan* (Attachment 2) resulted from a consensus among the treatment plan subcommittee members that a single simplified treatment plan outlining the steps, timeline, and potential cost range is most useful to stakeholders involved in unmarked burial discoveries. Previous draft treatment plans in flow chart format attempted to show process differences between Native American and Euro-American/African-American burial discovery. However, the flow charts were too complicated for easy interpretation given the large number of stakeholder contact and evaluation steps necessary to show the full range of possible outcomes. In addition, upon review, the subcommittee identified few process differences based on ethnicity. They further noted that the age and affiliation of the human remains may not be known until archeological evaluation is initiated; in some cases, those determinations may not be possible.

Two critical factors must be established in determining the extent of work and cost necessary to mitigate impact to unmarked burials:

- 1) Is more than one burial present?
- 2) Is avoidance in-place possible or not?

Given the above factors, the sub-committee adopted a generalized treatment plan as the best approach to outline unmarked burial procedures. The following provides a step-by-step narrative to more fully describe the potential range of actions indicated in the plan in Attachment 2.

### **Step 1: Potential Human Remains Encountered**

This is the critical first step after human remains are identified. The site is secured so no further disturbance occurs. The Medical Examiner or law enforcement is notified.

### **Step 2: Medical Examiner/Law Enforcement Determination**

The Medical Examiner or law enforcement determines if the human remains are contemporary or historic. If the remains are historic, the Medical Examiner or law enforcement notifies the State Archeologist. When indeterminate bone fragments are found, the State Archeologist may be contacted sooner to assist in identification.

### **Step 3: State Archeologist or Designee's Site Visit**

Once the remains are determined to be historic, the State Archeologist, or his or her designee, conducts a site visit. At this stage, it is crucial to notify stakeholders and conduct any additional stabilization of the site. Landowner, any contractor/developer, and excavator should be contacted if not already informed of the remains. If Native American remains are confirmed or suspected, it is important to notify the Missisquoi Abenaki, other nearby Abenaki communities, and any appropriate federally recognized Native American Tribe. If possible, this notification should occur before sunset on the day of discovery. Other potential stakeholders include town officials (Select Board, Town Clerk, Planning and Zoning departments), local historic societies, and relevant cemetery commissions and associations. If the remains are exposed or could be affected by weather or construction activity, site stabilization should include covering with waterproof tarp and protective fencing put in place.

### **Step 4: State Archeologist or Designee's Assessment**

In most cases, additional site assessment beyond the initial site visit will be required to resolve the issue. The primary goals of the assessment are to:

- 1) Determine whether or not the remains can be avoided in place or if they will need to be removed.
- 2) Develop a written treatment plan to address the specific situation.

The landowner decides whether to avoid the human remains or remove them. Avoidance of the remains is generally encouraged to limit the cost of the treatment plan and to maintain the original integrity of the burial location to the extent possible. Both removal and avoidance of the human remains may require baseline documentation including, but not limited to:

- background research
- monitoring of additional construction activity
- archeological investigations to establish site limits and content

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Some or all of these activities may take place during the site assessment to inform the development of the written treatment plan, or, may be components of the specific treatment plan. If the unmarked burial(s) can be avoided and no additional ground disturbing activity that has the potential to impact any additional remains is proposed, a written treatment plan may not be necessary beyond a stipulation defining an appropriate buffer zone around the burial. This information will be attached to the property deed and filed with the land records. In other cases, the written treatment plan will contain a scope-of-work which at a minimum identifies:

- methods for documenting the burial
- any removal procedures
- reburial location
- relevant time frame
- reporting requirements
- cost
- physically and permanently marking the location of the burial site, if appropriate
- registering the burial site in the land records
- procedures for resolving disputes among stakeholders.

### **Step 5: Stakeholder Agreement**

All stakeholders must agree with the treatment plan prior to plan implementation. Any proposed Unmarked Burial Fund expenditures must be first approved by the Commissioner of Economic, Housing, and Community Development. If agreement on a specific treatment plan is not reached, the dispute must be brought to the Unmarked Burial Site Treatment Plan Committee for resolution. If no resolution is forthcoming, professional mediation or other appropriate dispute services will be undertaken with the Commissioner's approval. It should be noted that implementation of the treatment plan may result in new discoveries requiring the modification or addition of components to the original plan. In such an event, a re-evaluation of the plan, including a new agreement, would be necessary to complete the implementation.

### **Step 6: Deed Registry**

If an unmarked burial(s) is avoided in place, a properly indexed Notice of the unmarked burial, a map, and a copy of the treatment plan (which includes the final disposition of the remains) will be filed in the land records. A property owner may choose to grant development rights to preserve an area, thereby creating a notification in the deed. A property owner may choose to work with the State Archeologist and designate a State Archeological Landmark under 22 VSA 14 Section 763. This would also be registered in the land records.

### **Next Steps**

The Unmarked Burial Site Treatment Plan Committee looks forward to discussing this report with the House Committee on General, Housing and Military Affairs and Senate Committee on Economic Development, Housing and General Affairs. No legislation is being proposed at this time until after discussion with the committees.

#### **Definitions set forth in Act 151**

**Treatment plan** means "an outline of the process for providing appropriate and respectful treatment of the burial site while considering the rights of the landowner."

**Unmarked burial site** means "the location of any interment of human remains, evidence of human remains, including the presence of red ochre, associated funerary objects, or a documented concentration of burial sites, but does not include a cemetery, mausoleum, or columbarium or any other site that is clearly marked as a site containing human remains."

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### **Additional references**

**Best Practices Standards For Indexing Land Record Instruments.** A Joint Publication of the Office of the Secretary of State and the Vermont Municipal Clerks and Treasurer's Association. May 2002.

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**Digging Deep. Unearthing the Mysteries of Burial and Cemetery Law.** VT Secretary of State's Office. 2010.

[http://www.sec.state.vt.us/municipal/Digging\\_Deep.pdf](http://www.sec.state.vt.us/municipal/Digging_Deep.pdf)

(NOTE: This publication updates the 2008 booklet and is current through January 2011).

### **Acknowledgements**

The VT Department of Economic Development, Housing, and Community Development and the VT Division for Historic Preservation gratefully acknowledge the diligence, commitment, and work of the Unmarked Burial Site Treatment Plan Committee members, listed on the cover. Andrew Mikell, Vermont Attorneys Title Corporation, participated in one meeting and provided us with helpful information and ideas. The report was authored by Giovanna Peebles, State Historic Preservation Officer/State Archeologist. Scott Dillon drafted the important section on Treatment Plans. Several Committee members and Commissioner Noelle Mackay provided helpful comments on the draft report. Medical Examiner Steve Shapiro provided guidance on the specific terminology in Steps 1 and 2.

## ATTACHMENT 1

### **18 VSA § 5212b. UNMARKED BURIAL SITES SPECIAL FUND**

(a) The unmarked burial sites special fund is established in the state treasury for the purpose of protecting, preserving, moving or reintering human remains discovered in unmarked burial sites.

(b) The fund shall be comprised of any monies appropriated to the fund by the general assembly or received from any other source, private or public. Interest earned on the fund, and any balance remaining in the fund at the end of a fiscal year, shall be retained in the fund. This fund shall be maintained by the state treasurer, and shall be managed in accordance with subchapter 5 of chapter 7 of Title 32.

(c) The commissioner of economic, housing and community development may authorize disbursements from the fund for use in any municipality in which human remains are discovered in unmarked burial sites in accordance with a process approved by the commissioner. The commissioner may approve any process developed through consensus or agreement of the interested parties, including the municipality, a Native American group historically based in Vermont with a connection to the remains, owners of private property on which there are known or likely to be unmarked burial sites, and any other appropriate interested parties, provided the commissioner determines that the process is likely to be effective, and includes all the following:

(1) Methods for determining the presence of unmarked burial sites, including archaeological surveys and assessments and other nonintrusive techniques.

(2) Methods for handling development and excavation on property on which it is known that there is or is likely to be one or more unmarked burial sites.

(3) Options for owners of property on which human remains in unmarked burial sites are discovered or determined to be located.

(4) Procedures for protecting, preserving or moving unmarked burial sites and human remains, subject, where applicable, to the permit requirement and penalties of this chapter.

(5) Procedures for resolving disputes.

(d) If unmarked burial sites and human remains are removed, consistent with the process set forth in this section and any permit required by this chapter, there shall be no criminal liability under 13 V.S.A. § 3761.

(e) The funds shall be used for the following purposes relating to unmarked burial sites:

(1) To monitor excavations.

(2) To protect, preserve, move, or reinter unmarked burial sites and human remains.

(3) To perform archaeological assessments and archaeological site or field investigations, including radar scanning and any other nonintrusive technology or technique designed to determine the presence of human remains.

(4) To provide mediation and other appropriate dispute resolution services.

(5) To acquire property or development rights, provided the commissioner of economic, housing and community development determines that disbursements for this purpose will not unduly burden the fund, and further provided the commissioner shall expend funds for this purpose only with the concurrence of the secretary of commerce and community development and after consultation with the legislative bodies of any affected municipality or municipalities.

(6) Any other appropriate purpose determined by the commissioner to be consistent with the purposes of this fund.

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(f) When an unmarked burial site is first discovered, the discovery shall be reported immediately to a law enforcement agency. If, after completion of an investigation pursuant to section 5205 of this title, a law enforcement agency determines that the burial site does not constitute evidence of a crime, the law enforcement agency shall immediately notify the state archeologist who may authorize appropriate action regarding the unmarked burial site.

# Unmarked Burials Discovery General Treatment Plan

## ATTACHMENT 2

Process	Timeline	Cost
<b>Step 1</b>		
Human Remains or Potential Human Remains Encountered  Secure site and notify Medical Examiner/Law Enforcement	Immediate	None
<b>Step 2</b>		
Medical Examiner/Law Enforcement  1. Determine if remains are contemporary or historic 2. If historic, notify State Archeologist	Immediate – 48 hours	None
<b>Step 3</b>		
State Archeologist or Designee  1. Conduct Site Visit 2. Notify Stakeholders	Immediate - 48 hours	None
<b>Step 4</b>		
State Archeologist or Designee/Stakeholders  1. Conduct Site Assessment 2. Determine Appropriate Treatment: Avoidance or Removal. 3. Develop Written Treatment Plan (as necessary)	1-14 days	0-\$2000
<b>Step 5</b>		
All Stakeholders  1. Stakeholder Agreement 2. Treatment Plan Implementation	1-30 days	0-\$6000 for avoidance/removal of 1-2 individuals. Costs for more than 2 burials determined on a case by case basis
<b>Step 6</b>		
Deed Registry (if applicable)	45-60 days	\$1000