

TRIBAL CULTURAL RESOURCES LAW IN CALIFORNIA
A TRAINING SERIES FOR TRIBES
 By Hon. Christine Williams

Logos for: American Heritage Commission (California Native), UC Davis School of Law, Aoki Center, and Tribal Justice Project.

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Unit 5: Discovering, Disturbing and Trafficking Human Remains and Tribal Cultural Resources
 Tribal Cultural Resources Law in California: A Training Series for Tribes

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Motivations for Desecrating Native American Burials
 Pothunting, looting, grave robbing
 Why?

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Self Care Advisory - Disturbing Content

- This work is difficult, frustrating and can be upsetting.
- This unit will discuss the ongoing disturbance of Native American burials, both intentional and accidental.
- This unit will discuss the ongoing trafficking of Native American remains and burial items.
- This unit is designed to provide the best explanation of the legal framework available for tribal people to use as tools to restore peace to their people.
- The law(s) is not a complete solution for the problems created by the longstanding practice of disturbing the graves of our loved ones.

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An Apology From A Grave Robber

- In 2007 a man was convicted in Humboldt County Superior Court on a charge of unlawfully injuring, disfiguring, defacing or destroying an object or thing of archeological or historical value.
- He was found digging in the burial grounds of my village.
- A few weeks later, my cousin sent me an email with the subject line: "An apology from a grave robber"
- It was my family who bore the burden of making this right by our ancestors, his apology was of no comfort to me.
- His conviction was...somewhat.

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A Sad Unity

- Most people from Native American tribes in California know the pain of having an ancestor's grave disturbed.
- Native American identity is a complex thing that looks different for different people.
- I would venture that this particular loss and pain is one thing all of us who are from a tribe in California share.

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Genocidal Myths Justify Looting

- Race Science: now debunked pseudoscience hypothesis that races exist on a hierarchy with the white race being superior.
- Popularly includes Phrenology, the study of skull size to determine intelligence.
- Historic Preservation: The vanishing Indian myth
- Myth that all Native Americans would be extinct and as much “data” as possible needed to be collected to preserve their “historical existence”
- Invisible minority: Reducing burials to sellable property is an act of genocide

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From Burials to “Collections”

- The government encouraged excavations and looting graves of Native Americans at first in the name of science and historic preservation.
- It gained public acceptance.
- Monetary and trade markets evolved, and private individuals and public and private institutions gained pride for amassing “collections”.
- Sales, trades and loans spread burial contents around the country and around the world.
- We aren't the only ones...international indigenous people acknowledgment.

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Common Terms

- Trafficking is to deal, sell or trade in something illegal
- Excavate/excavation is to unearth or dig
- Pothunting, looting, grave robbing – all unofficial terms for unearthing, disturbing or excavating Native American burial sites

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Excavations & Discoveries Policy

Policies on excavation, discovery and disturbance of Human Remains and Associated Tribal Cultural Resources

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Ownership and Control of “New” Discoveries

- Relatives and Tribes “Own” Native American burial items
- Not a finders keepers' situation
- This applies to all lands in the United States.
- NAGPRA and Federal laws control on Federal and Tribal Lands (as well as Tribal Laws)
- California Codes control on state and private lands
- Therefore, if you have it, or you find it, you need to report it and give it back to the individual or group it belongs to, unless an agreement is made otherwise.
- Otherwise, it's a theft and a crime.

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Inadvertent v. Intentional

- Inadvertent discoveries: typically, someone is digging for a “project” and accidentally or unexpectedly discovers remains or burial items and then reports it under the law
- Intentional excavations and disturbances, 2 ways:
 1. Someone accidentally discovers remains and does not report it according to the law
 - Starts accidentally, turns into intentional disturbance
 - Applies whether they remove anything from the burial or cover items over
 2. Someone intentionally disturbs a Native American burial

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Right of Possession – National Standard

- (NAGPRA, 25 U.S.C. § 3001(13))
- Possession is the physical custody
- “Right of possession” means possession obtained with the voluntary consent of an individual or group that had authority of alienation.
- Applies to all burial items, from any time, found anywhere.
- Meaning, descendants and tribes have the “right of possession” unless they voluntarily consent to “alienate”, relinquish or give away that right to another entity.

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CA Policy Against Obtaining or Possessing Native American Grave Items

- (Pub. Resources Code, § 5097.99, subds. (a) & (b))
- No person shall obtain or possess any Native American artifacts or human remains which are taken from a Native American grave or cairn on or after January 1, 1984, except as otherwise provided by law or in accordance with an agreement reached between descendants and landowners under the law.
- Any person who does obtain or possess Native American burial items as described above is guilty of a felony.

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Possession, Control, Ownership – CA Codes

- (Health and Saf. Code, § 8012, subds. (e) and (j)).
- Possession – (from the perspective of a museum) means having physical custody of Native American human remains and cultural items.
- Control and Ownership - Control means having legal ownership of the items regardless of physical custody of the items.

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Ownership and Control After 1990 - NAGPRA

- (NAGPRA, 25 U.S.C. § 3002(a))
- The ownership or control of Native American cultural items excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed):
 - 1) Lineal descendants of the Native American; or
 - 2) The Indian tribe on whose tribal land the discovery was made; or
 - 3) The Indian tribe which has the closest cultural affiliation with such remains or objects; or
 - 4) The Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered; or
 - 5) If it can be shown by a preponderance of the evidence that a different tribe has a stronger cultural relationship with the remains or objects, in the Indian tribe that has the strongest demonstrated relationship.

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Federal Policy Against Intentional Excavation

- (NAGPRA, 25 U.S.C. § 3002(c))
- The intentional removal from or excavation of Native American cultural items from Federal or tribal lands for purposes of discovery, study, or removal of such items is permitted only with a federal permit or proof of consent from the tribe.

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CA Policy Against Intentional Excavation

- (Pub. Resources Code, §§ 5097.99 subd. (b), 5097.993; Health & Saf. Code, § 7050.5 subd. (a))
- Every person who knowingly mutilates or disinters, wantonly disturbs, or willfully removes any human remains in or from any location other than a dedicated cemetery without authority of law is guilty of a felony.

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Federal Policy Against Trafficking Burial Items

- (18 U.S.C. § 1170)
- A person who knowingly commits any of the following may be punished by imprisonment, a fine, or both:
 - Sells, purchases, uses for profit, or transports for sale or profit Native American human remains or cultural items.
 - Criminal violation of NAGPRA, should be reported to the Federal Bureau of Investigations.

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CA Policy Against Trafficking Burial Items

- (Pub. Resources Code § 5097.99, subd. (b))
- Any person who knowingly or willfully obtains or possesses any Native American artifacts or human remains which are taken from a Native American grave or cairn after January 1, 1988, except as otherwise provided by law or in accordance with an agreement reached pursuant to subdivision (l) of Section 5097.94 or pursuant to Section 5097.98, is guilty of a felony which is punishable by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code.

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CA Policy Against Disturbance of Other Tribal Cultural Resources

- (Pub. Resources Code § 5097.993, subds. (a) & (b))
- It is a misdemeanor to lawfully and maliciously excavate upon, removes, destroys, injures, or defaces a Native American historic, cultural, or sacred site if the act was committed with specific intent to vandalize, deface, destroy, steal, convert, possess, collect, or sell a Native American historic, cultural, or sacred artifact, art object, inscription, or feature, or site.
- Individuals committing these crimes are also subject to a civil penalty.

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Process for Discoveries

What is required under the law for discoveries of Native American Graves and associated items

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Federal or Tribal Lands

NAGPRA

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Inadvertent Discovery Process

- (NAGPRA, 25 U.S.C. § 3002(d)(1))
- Any person who knows, or has reason to know, that such person has discovered Native American cultural items on Federal or tribal lands after November 16, 1990:
 - Shall notify, in writing, the Secretary of the Department, or other agency of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe.
 - If the discovery occurred in connection with an activity, including (but not limited to) construction, mining, logging, and agriculture,
 - the person shall cease the activity in the area of the discovery,
 - make a reasonable effort to protect the items discovered before resuming such activity,
 - and provide notice under this subsection.
 - Following the notification under this subsection, and upon certification the activity may resume after 30 days of such certification.

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Disposition of Items

- (NAGPRA, 25 U.S.C. § 3002(d)(2))
- The disposition and control of the items shall follow the rule for ownership and control and shall be with the descendants or the tribe.

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California Private or State Lands

CA Codes: Health and Safety Code Section 7050.5 and Public Resources Code Section 5097.98

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Initial Discovery – County Coroner

- (Health & Saf. Code, § 7050.5, subs. (b) & (c))
- Possible remains uncovered outside of a dedicated cemetery.
- All work in the area must immediately stop.
- County Coroner must be called.
- Area must be appropriately protected until the Coroner makes their determination about cause of death and Native American heritage.
- Coroner determines within 2 working days if the remains are likely Native American
- If yes, then Coroner notifies the NAHC within 24 hours.

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Following 48 Hours – NAHC & Lineal Descendants

- (Pub. Resources Code, § 5097.98, subs. (a) & (b))
- NAHC is contacted by a County Coroner of a discovery of Native American Human Remains.
- NAHC shall notify the most likely descendant of the remains.
- The descendants may within 48 hours inspect the site with permission from the landowner.
- The descendants may make recommendations for the immediate (short-term) appropriate treatment and disposition of the remains.
- Landowner shall ensure that the immediate area is not damaged or disturbed by further activity until tribal consultation occurs

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Tribal Consultation on Preferred Treatment

- (Pub. Resources Code, § 5097.98, subs. (b) & (c))
- Tribal Consultation is legally required between the landowner and the descendants and may include:
 - A. The nondestructive removal and analysis of the human remains and burial items.
 - B. Preservation of the human remains and associated items in place.
 - C. Relinquishment of the human remains and associated items to the descendants for treatment.
 - D. Other culturally appropriate treatment.
- The parties may also agree to extend discussions, considering the possibility that additional Native American human remains, are located in the project area. (See Pub. Resources Code § 5097.98, subd. (f))

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Tribal Consultation Confidentiality

- (Pub. Resources Code, § 5097.98, subd. (c))
- Keeping the information provided confidential is required by all parties involved.

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NAHC Mediation (Optional)

- (Pub. Resources Code, § 5097.98, subds. (e), (g) & (h))
- If the Landowner rejects the recommendations from the tribal consultation process or there are no recommendations,
- If requested, the Native American Heritage Commission (NAHC) will attempt to mediate an agreement pursuant to Public Resources Code section 5097.94, subdivision (k).
- Landowner action taken under an agreement will be exempt from the CA Environmental Quality Act and the CA Coastal Act.

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No Agreement on Recommendations

- (Pub. Resources Code, § 5097.98, subds. (e) & (f))
- If no agreement can be reached the landowner shall:
- Reinter: (re-bury) the human remains and associated items with appropriate dignity on the property in a location not subject to further and future disturbance.
- Record: record the new burial site in one of the following ways:
 1. Record the site with the NAHC
 2. Utilize an open-space or conservation easement
 3. Record a "Notice of Reinterment of Native American Remains" with the county under the name of the landowner

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Penalties – Criminal and Civil

For Disturbing & Trafficking Native American Grave Items and Beyond

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Federal Penalties for Trafficking Burial Items

- (18 U.S.C. § 1170)
- A person who knowingly sells, purchases, uses for profit, or transports for sale or profit Native American human remains or cultural items be punished by imprisonment, a fine, or both:
- First violation = fine and/or imprisonment of up to 1 year
- Second violation = fine and/or imprisonment of up to 5 years
- Fines determined by 18 U.S.C. Section 3571 and depends on whether the crime is charged as a misdemeanor or a felony

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Penalty for Intentional Excavation – Burial

- (Pub. Resources Code, § 5097.99, subd. (c))
- Any person who removes, without authority of law, any Native American artifacts or human remains from a Native American grave or cairn with an intent to sell or dissect or with malice or wantonness is guilty of a felony
- Which is punishable by imprisonment for a term of 16 months or 2 or 3 years pursuant to subdivision (h) of Section 1170 of the Penal Code.

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Misdemeanor Disturbance of other Tribal Cultural Resources

- (Pub. Resources Code, § 5097.993, subds. (a) & (b))
- It is a misdemeanor to unlawfully and maliciously excavate upon, remove, destroy, injure, or deface a Native American historic, cultural, or sacred site if the act was committed with specific intent to vandalize, deface, destroy, steal, convert, possess, collect, or sell a Native American historic, cultural, or sacred artifact, art object, inscription, or feature, or site. [Very broad!!]
- Applies on public or private land.
- Landowners not exempt, must follow inadvertent discovery procedures.
- Punishable up to one year in jail and fine up to \$10,000 or both.

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Civil Violation

- (Pub. Resources Code, § 5097.994, subs. (a) & (b))
- A person who violates subdivision (a) of Section 5097.993 is subject to a civil penalty not to exceed \$50,000 per violation.
- A civil penalty may be imposed for each separate violation of 5097.993 subdivision (a) in addition to any other civil penalty imposed for a separate violation of any other provision of law.
- This applies broadly to disturbances of all Tribal Cultural Resources if the violation was committed with bad intent.

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Penalty Amount for Civil Violation

- (Pub. Resources Code, § 5097.994, subd. (c))
- Maximum \$50,000 per violation.
- In determining the amount of a civil penalty, the court shall consider the extent of the damage to the resource.
- In making the determination of damage, the court may consider:
 - The commercial or archaeological value of the resource, and
 - The cost to restore and repair the resource.

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Who can bring a Civil Action?

- (Pub. Resources Code, § 5097.994, subd. (d))
- A civil action may be brought by:
 - The district attorney,
 - The city attorney, or
 - The Attorney General, or
 - The Attorney General upon a complaint by the Native American Heritage Commission.

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Moneys collected from Civil Penalties

- (Pub. Resources Code, § 5097.994, subd. (e))
- For actions brought by a city or county moneys shall be distributed to the city or county that brought the action.
- For actions brought by the Attorney General moneys shall be distributed to the Native American Heritage Commission.
- These moneys shall first be utilized to repair or restore the damaged site, and
- The remaining moneys shall be available to the City, County or Attorney General (whomever filed the action) to offset costs incurred in enforcing this law.

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