

# TRIBAL CULTURAL RESOURCES LAW IN CALIFORNIA

**A TRAINING SERIES FOR  
TRIBES**

**By Hon. Christine Williams**



# Unit 6: Repatriation Overview

Tribal Cultural Resources Law in California: A Training Series for Tribes



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# Instructions

This packet contains most, if not all, of the laws and resources mentioned throughout this unit of the training. A list of the included documents can be found on the next page titled, "Table of Resources." If there are any resources missing, they will be featured on page six of this packet titled, "Missing Documents." All documents featured in this packet are available for free online. Official versions of the document are included when available.

This packet is organized by the type of resources featured. Resources included are organized in the following order:

- Federal Legislative Materials
- California Legislative Materials
- Federal Code
- California Code
- Code of Federal Regulations (CFR)
- California Code of Regulations (CCR)
- Case Law
- Secondary Sources

Secondary Sources includes, among other documents, academic articles, reports, and studies.

Note: All California codes appear alphabetically (Health & Safety Code before Public Resources Code) then by section number (PRC § 5097.9, PRC § 5097.91, etc.).

# Table of Resources

## Legislative Materials

Assembly Bill 978 (2001)  
Assembly Bill 2836 (2018)  
Assembly Bill 275 (2020)

## Federal Code

Title 20, § 80q et seq. (20 USC § 80q et seq.)  
Title 25, § 3001 (25 USC § 3001)  
Title 25, § 3005 (25 USC § 3005)

## California Code

Government Code (GOV) § 8318  
Government Code (GOV) § 65352.3  
Government Code (GOV) § 65352.4  
Health and Safety Code (HSC) § 8010  
Health and Safety Code (HSC) § 8011  
Health and Safety Code (HSC) § 8012  
Health and Safety Code (HSC) § 8013  
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Health and Safety Code (HSC) § 8020  
Health and Safety Code (HSC) § 8021  
Health and Safety Code (HSC) § 8024  
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Health and Safety Code (HSC) § 8026  
Health and Safety Code (HSC) § 8027

Health and Safety Code (HSC) § 8028  
Health and Safety Code (HSC) § 8028.5  
Health and Safety Code (HSC) § 8029  
Public Resources Code (PRC) § 5097.94  
Public Resources Code (PRC) § 5097.991

## Case Law

Bonnichsen v. United States, 367 F.3d 864 (2004)

# Missing Documents

## Legislative Materials

Assembly Bill 12 (1991)

# **LEGISLATIVE MATERIALS**



LEGISLATIVE INFORMATION

[Home](#) | [Bill Information](#) | [California Law](#) | [Publications](#) | [Other Resources](#) | [My Subscriptions](#) | [My Favorites](#)**AB-978 Native American graves protection and repatriation.** (2001-2002)

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**Assembly Bill No. 978**

## CHAPTER 818

An act to add Chapter 5 (commencing with Section 8010) to Part 2 of Division 7 of the Health and Safety Code, relating to human remains.

[ Filed with Secretary of State October 13, 2001. Approved by Governor October 12, 2001. ]

## LEGISLATIVE COUNSEL'S DIGEST

AB 978, Steinberg. Native American graves protection and repatriation.

Existing law contains provisions regarding the regulation of human remains disposal and burials.

This bill, the California Native American Graves Protection and Repatriation Act of 2001, would require all state agencies and museums that receive state funding and that have possession or control over collections of human remains or cultural items, as defined, to complete an inventory and summary of these remains and items on or before January 1, 2003, with certain exceptions, would provide a process for the identification and repatriation of these items to the appropriate tribes, and would authorize the imposition of civil penalties for failure to comply with the requirements of this bill. The bill would also establish the Repatriation Oversight Commission, composed of 10 members, with specified duties relating to the repatriation process.

## THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

**SECTION 1.** Chapter 5 (commencing with Section 8010) is added to Part 2 of Division 7 of the Health and Safety Code, to read:

**CHAPTER 5. California Native American Graves Protection and Repatriation**  
**Article 1. General Provisions**

**8010.** This chapter shall be known, and may be cited as the California Native American Graves Protection and Repatriation Act of 2001.

**8011.** It is the intent of the Legislature to do all of the following:



- (a) Provide a seamless and consistent state policy to ensure that all California Indian human remains and cultural items be treated with dignity and respect.
- (b) Apply the state's repatriation policy consistently with the provisions of the Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), which was enacted in 1990.
- (c) Facilitate the implementation of the provisions of the federal Native American Graves Protection and Repatriation Act with respect to publicly funded agencies and museums in California.
- (d) Encourage voluntary disclosure and return of remains and cultural items by an agency or museum.
- (e) Provide a mechanism whereby lineal descendants and culturally affiliated California Indian tribes that file repatriation claims for human remains and cultural items under the Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) or under this chapter with California state agencies and museums may request assistance from the commission in ensuring that state agencies and museums are responding to those claims in a timely manner and in facilitating the resolution of disputes regarding those claims.
- (f) Provide a mechanism whereby California tribes that are not federally recognized may file claims with agencies and museums for repatriation of human remains and cultural items.

## **Article 2. State Cultural Affiliation and Repatriation**

**8012.** As used in this chapter, terms shall have the same meaning as in the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), as interpreted by federal regulations, except that the following terms shall have the following meaning:

- (a) "Agency" means any division, department, bureau, commission, board, council, city, county, city and county, district, or other political subdivision of the state, but does not include any school district.
- (b) "Burial site" means, except for cemeteries and graveyards protected under existing state law, any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which human remains were intentionally deposited as a part of the death rites or ceremonies of a culture.
- (c) "Commission" means the Repatriation Oversight Commission established pursuant to Article 3 (commencing with Section 8025).
- (d) "Cultural items" shall have the same meaning as defined by Section 3001 of Title 25 of the United States Code, except that it shall mean only those items that originated in California.
- (e) "Control" means having ownership of human remains and cultural items sufficient to lawfully permit a museum or agency to treat the object as part of its collection for purposes of this chapter, whether or not the human remains and cultural items are in the physical custody of the museum or agency. Items on loan to a museum or agency from another person, museum, or agency shall be deemed to be in the control of the lender, and not the borrowing museum or agency.
- (f) "State cultural affiliation" means that there is a relationship of shared group identity that can reasonably be traced historically or prehistorically between members of a present-day California Indian Tribe, as defined in subdivision (i), and an identifiable earlier tribe or group. Cultural affiliation is established when the preponderance of the evidence, based on geography, kinship, biology, archaeology, linguistics, folklore, oral tradition, historical evidence, or other information or expert opinion, reasonably leads to such a conclusion.
- (g) "Inventory" means an itemized list that summarizes the collection of human remains and associated funerary objects in the possession or control of an agency or museum. This itemized list may be the inventory list required under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).
- (h) "Summary" means a document that summarizes the collection of unassociated funerary objects, sacred

objects, or objects of cultural patrimony in the possession or control of an agency or museum. This document may be the summary prepared under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

(i) "Museum" means an entity, including a higher educational institution, excluding school districts, that receives state funds.

(j) "California Indian tribe" means any tribe located in California to which any of the following applies:

(1) It meets the definition of Indian tribe under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

(2) It is not recognized by the federal government, but is indigenous to the territory that is now known as the State of California, and both of the following apply:

(A) It is listed in the Bureau of Indian Affairs Branch of Acknowledgement and Research petitioner list pursuant to Section 82.1 of Title 25 of the Federal Code of Regulations.

(B) It is determined by the commission to be a tribe that is eligible to participate in the repatriation process set forth in this chapter. The commission shall publish a document that lists the California tribes meeting these criteria, as well as authorized representatives to act on behalf of the tribe in the consultations required under paragraph (4) of subdivision (a) of Section 8013 and in matters pertaining to repatriation under this chapter. Criteria that shall guide the commission in making the determination of eligibility shall include, but not be limited to, the following:

(i) A continuous identity as an autonomous and separate tribal government.

(ii) Holding itself out as a tribe.

(iii) The tribe as a whole has demonstrated aboriginal ties to the territory now known as the State of California and its members can demonstrate lineal descent from the identifiable earlier groups that inhabited a particular tribal territory.

(iv) Recognition by the Indian community and non-Indian entities as a tribe.

(v) Demonstrated membership criteria.

(k) "Possession" means having physical custody of human remains and cultural items with a sufficient legal interest to lawfully treat the human remains and cultural items as part of a collection. The term does not include human remains and cultural items on loan to an agency or museum.

(l) "Preponderance of the evidence" means that the party's evidence on a fact indicates that it is more likely than not that the fact is true.

**8013.** (a) Any agency or museum that has possession or control over collections of California Native American human remains and associated funerary objects shall complete an inventory of all these remains and associated funerary objects and, to the extent possible based on all information possessed by the agency or museum, do all of the following:

(1) Identify the geographical location, state cultural affiliation, and the circumstances surrounding their acquisition.

(2) List in the inventory the human remains and associated funerary objects that are clearly identifiable as to state cultural affiliation with California Indian tribes. These items shall be listed first in order to expedite the repatriation of these items.

(3) List the human remains and associated funerary objects that are not clearly identifiable by cultural affiliation but that, given the totality of circumstances surrounding their acquisition and characteristics are determined by a reasonable belief to be human remains and associated funerary objects with a state cultural

affiliation with one or more California Indian tribes. Consult with California Indian tribes believed by the agency or museum to be affiliated with the items, during the compilation of the inventory as part of the determination of affiliation. If the agency or museum cannot determine which California Indian tribes are believed to be affiliated with the items, then tribes that may be affiliated with the items shall be consulted during the compilation of the inventory.

(b) Any agency or museum that has possession or control over collections of California Indian unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of the objects based upon available information held by the agency or museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition, and state cultural affiliation, where readily ascertainable. The summary shall be in lieu of an object-by-object inventory. Each agency or museum, following preparation of a summary pursuant to this subdivision, shall consult with California Indian tribes and tribally authorized government officials and traditional religious leaders.

(c) Each agency or museum shall complete the inventories and summaries required by subdivisions (a) and (b) by January 1, 2003, or within one year of the date on which the commission issues the list of California Indian tribes provided for under paragraph (2) of subdivision (i) of Section 8012, whichever is later. To the extent that this section requires the inventory and summary to include items not required to be included in the inventory and summary under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), the agency or museum shall supplement its inventory and summary under this section to include those additional items.

(d) Upon request of a California Indian tribe, a museum or agency shall supply additional available documentation to supplement the information required by subdivisions (a) and (b). For purposes of this paragraph, "documentation" means a summary of existing museum or agency records, including inventories or catalogs, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding the acquisition and accession of California Native American human remains and cultural items subject to this section. This section shall not be construed to authorize the completion or initiation of any scientific study of human remains or cultural items.

(e) Within 90 days of completing the inventory and summary specified in subdivisions (a) and (b), the agency or museum shall provide a copy of the inventory and summary to the commission. The commission shall, in turn, publish notices of completion of summaries and inventories on its Web site for 30 days, and make the inventory and summary available to any requesting tribe or state affiliated tribe.

(f) The inventory and summary specified in subdivisions (a) and (b) shall be completed by all agencies and museums that have possession or control of Native American human remains or cultural items, regardless of whether the agency or museum is also subject to the requirements of the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.). Any inventory or summary, or any portion of an inventory or summary, that has been created to meet the requirements of the Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) may be used to meet the requirements of this chapter, if appropriate.

(g) Any agency or museum that has completed inventories and summaries on or before January 1, 2002, as required by the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) shall be deemed to be in compliance with this section provided that the agency or museum does both of the following:

(1) Provide a copy of the inventories and summaries to the commission by July 1, 2002, or within 30 days of the date on which the commission is formed, whichever is later.

(2) Prepare supplementary inventories and summaries as necessary to comply with subdivisions (a) and (b) for those portions of their collections that originate from California and that have not been determined to be culturally affiliated with federally recognized tribes which, in the case of inventories, are those portions of the collections of an agency or museum that have been identified on their inventories under the federal Native

American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) as "culturally unidentifiable," by January 1, 2003, or within one year of the date on which the commission issues the list of California Indian tribes provided for under paragraph (2) of subdivision (j) of Section 8012, whichever is later.

(h) If the agency or museum determines that it does not have in its possession or control any human remains or cultural items, the agency or museum shall, in lieu of an inventory or summary, state that finding in a letter to the commission at the commission's request.

(i) Following completion of the initial inventories and summaries specified in subdivisions (a) and (b), each agency or museum shall update its inventories and summaries whenever the agency or museum receives possession or control of human remains or cultural items that were not included in the initial inventories and summaries. Upon completion, the agency or museum shall provide a copy of its updated inventories and summaries to the commission. Nothing in this section shall be construed to mean that a museum or agency may delay repatriation of items in the initial inventory until the updating of all inventories and summaries is completed.

**8014.** A tribe claiming state cultural affiliation and requesting the return of human remains and cultural items listed in the inventory or summary of an agency or museum or that requests the return of human remains and cultural items that are not listed in the inventory but are believed to be in the possession or control of the agency or museum in the state shall do both of the following:

(a) File a written request for the human remains and cultural items with the commission and the agency or museum believed to have possession or control.

(b) Provide evidence that would establish that items claimed are cultural items and are culturally affiliated with the California Indian tribe making the claim. Evidence of cultural affiliation need not be provided in cases where cultural affiliation is reasonably established by the inventory or summary.

**8015.** (a) Upon receiving a written request for repatriation of an item on the inventory, the commission shall forward a copy of the request to the agency or museum in possession of the item, if the criteria specified in subdivision (b) of Section 8016 have been met. At this time, the commission shall also publish the request for repatriation on its Web site for 30 days. If there are no other requests for a particular item and there is not unresolved objection pursuant to subdivision (c) of Section 8016 within 90 days of the date of distribution and publication of the inventory or summary and completion of any federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) repatriation process related to the item, the agency or museum in possession of the item shall repatriate the requested item to the requesting party. This repatriation shall occur within 30 days after the last day of the 90-day period, or on a date agreed upon by all parties.

(b) Nothing in this section shall be construed to prohibit any requesting party, a tribe, an agency, or a museum from coordinating directly with each other on repatriation, or to prohibit the repatriation at any time of any undisputed items to the requesting party prior to completion of any requirements set forth in this chapter. The commission shall receive, for their records, copies of all repatriation agreements and shall have the power to enforce these agreements.

**8016.** (a) If there is more than one request for repatriation for the same item, or there is a dispute between the requesting party and the agency or museum, or if a dispute arises in relation to the repatriation process, the commission shall notify the affected parties of this fact and the cultural affiliation of the item in question shall be determined in accordance with this section.

(b) Any agency or museum receiving a repatriation request pursuant to subdivision (a) shall repatriate human remains and cultural items if all of the following criteria have been met:

(1) The requested human remains or cultural items meet the definitions of human remains or cultural items that are subject to inventory requirements under subdivision (a) of Section 8013.

(2) The state cultural affiliation of the human remains or cultural items is established as required under

subdivision (f) of Section 8012.

(3) The agency or museum is unable to present evidence that, if standing alone before the introduction of evidence to the contrary, would support a finding that the agency or museum has a right of possession to the requested cultural items.

(4) None of the exemptions listed in Section 10.10(c) of Title 43 of the Federal Code of Regulations apply.

(5) All other applicable requirements of regulations adopted under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), contained in Part 10 of Title 43 of the Code of Federal Regulations, have been met.

(c) Within 30 days after notice has been provided by the commission, the museum or agency shall have the right to file with the commission any objection to the requested repatriation, based on its good faith belief that the requested human remains or cultural items are not culturally affiliated with the requesting California tribe or are not subject to repatriation under this chapter.

(d) The disputing parties shall submit documentation describing the nature of the dispute, in accordance with standard mediation practices and the commission's procedures, to the commission, which shall, in turn, forward the documentation to the opposing party or parties. The disputing parties shall meet within 30 days of the date of the mailing of the documentation with the goal of settling the dispute.

(e) If, after meeting pursuant to subdivision (b), the parties are unable to settle the dispute, the commission, or a certified mediator designated by the commission in accordance with subdivision (b) of Section 8026, shall mediate the dispute.

(f) Each disputing party shall submit complaints and supporting evidence to the commission or designated mediator and the other opposing parties detailing their positions on the disputed issues in accordance with standard mediation practices and the commission's mediation procedures. Each party shall have 20 days from the date the complaint and supporting evidence were mailed to respond to the complaints. All responses shall be submitted to the opposing party or parties and the commission or designated mediator.

(g) The commission or designated mediator shall review all complaints, responses, and supporting evidence submitted. Within 20 days after the date of submission of responses, the commission or designated mediator shall hold a mediation session and render a decision within seven days of the date of the mediation session.

(h) When the disposition of any items are disputed, the party in possession of the items shall retain possession until the mediation process is completed. No transfer of items shall occur until the dispute is resolved.

(i) Tribal oral histories, documentations, and testimonies shall not be afforded less evidentiary weight than other relevant categories of evidence on account of being in those categories.

(j) If the parties are unable to resolve a dispute through mediation, the dispute shall be resolved by the commission. The determination of the commission shall be deemed to constitute a final administrative remedy. Any party to the dispute seeking a review of the determination of the commission is entitled to file an action in the superior court seeking an independent judgement on the record as to whether the commission's decision is supported by a preponderance of the evidence. The independent review shall not constitute a de novo review of a decision by the commission, but shall be limited to a review of the evidence on the record. Petitions for review shall be filed with the court not later than 30 days after the final decision of the commission.

**8017.** If there is a committee or group of tribes authorized by their respective tribal governments to accept repatriation of items originating from their region and culturally affiliated with those tribal governments, then the items may be repatriated to those groups.

**8018.** An agency or museum that repatriates human remains and cultural items in good faith pursuant to this chapter is not liable for claims by an aggrieved party or for claims of breach of a fiduciary duty or the public trust or of violation of state law that are inconsistent with this chapter. No action shall be brought on behalf of

the state or any other entity or person for damages or for injunctive relief for a claim of improper disposition of human remains or cultural items if the agency or museum has complied with the provisions of this chapter.

**8019.** Nothing in this section shall be construed to prohibit the governing body of a California Indian tribe or group authorized by Section 8017 from expressly relinquishing control over any human remains or control or title to any cultural item.

**8020.** Notwithstanding any other provision of law, and upon the request of any party or an intervenor, the commission or designated mediator may close part of a mediation session to the public if the commission or designated mediator finds that information required at the mediation session may include identification of the specific location of a burial site, human remains and cultural items or that information necessary for a determination regarding repatriation may compromise or interfere with any religious practice or custom.

**8021.** The filing of an appeal by either party automatically stays an order of the commission or a designated mediator on repatriation of human remains and cultural items.

### **Article 3. Repatriation Oversight Commission**

**8025.** (a) There is hereby established the Repatriation Oversight Commission composed of 10 members as follows:

(1) Two voting members appointed by the Governor from nominations made by federally recognized California tribes within the state. One member each shall represent the central and southern areas of the state.

(2) Two voting members appointed by the Speaker of the Assembly from nominations made by federally recognized California tribes within the state. One member each shall represent the northern and southern areas of the state.

(3) Two voting members appointed by the Senate Committee on Rules from nominations made by federally recognized California tribes within the state. One member each shall represent the northern and central areas of the state.

(4) One voting member appointed by the Governor from nominations submitted by state agencies or state-funded universities and colleges.

(5) One voting member appointed by the Governor from nominations submitted by the University of California.

(6) One voting member appointed by the Governor from nominations submitted by the California Association of Museums.

(7) One voting member of a nonfederally recognized tribe appointed by the Governor from nominations submitted by the Native American Heritage Commission.

(b) The executive secretary of the commission shall be appointed by the Governor and shall be an ex officio nonvoting member of the commission.

**8026.** The commission shall meet when necessary, and at least quarterly shall perform the duties specified in this section including, but not limited to, the following:

(a) Order the repatriation of human remains and cultural items in accordance with this chapter.

(b) Establish mediation procedures and, upon application of the parties involved, mediate disputes between California tribes and museums and agencies relating to the disposition of human remains and cultural items. The commission shall have the power of subpoena for purposes of discovery and may impose civil penalties against any agency or museum that intentionally or willfully fails to comply with the provisions of this chapter. Members of the commission shall receive training in mediation for purposes of this subdivision. The commission may delegate its responsibility to mediate disputes to a certified mediator.

- (c) Administer the budget of the commission.
- (d) Establish and maintain a website for communication between tribes and museums and agencies.
- (e) Upon the request of California tribes or museums and agencies, analyze and make decisions regarding providing financial assistance to aid in specific repatriation activities.
- (f) Accept grants or donations, real or in-kind, to carry out the purposes of this chapter.
- (g) By making recommendations to the Legislature, assist California tribes in obtaining the dedication of appropriate state lands for the purposes of reinterment of human remains and cultural items.
- (h) Request and utilize the advice and services of all federal, state, and local agencies as necessary in carrying out the purposes of this chapter.
- (i) Prepare and submit to the Legislature an annual report detailing commission activities, disbursement of funds, and dispute resolutions relating to the repatriation activities under this chapter.
- (j) Refer any known noncompliance with the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) to the United States Attorney General and the Secretary of the Interior.
- (k) Impose administrative civil penalties against any agency or museum that is determined by the commission to have violated any provision of this chapter.
- (l) Establish those rules and regulations the commission determines to be necessary for the administration of this chapter.

**8027.** (a) Members of the commission shall not receive a salary but shall be entitled to reimbursement for actual expenses incurred in the performance of their duties.

(b) The chairperson of the commission shall be elected by the members.

**8028.** (a) The term of any member of the commission shall be for three years, and each member shall serve no more than two consecutive terms. Staggered terms shall be established by the drawing of lots at the first meeting of the commission so that a simple majority of the members shall initially serve a three-year term, and the remainder initially a two-year term.

(b) If a vacancy occurs, a replacement shall be named by the same constituency as the constituency that was represented by the member whose membership is being replaced. Replacements shall serve only for the remainder of the vacant member's term.

#### **Article 4. Penalties and Enforcement Procedures**

**8029.** (a) Any agency or museum that fails to comply with the requirements of this chapter may be assessed a civil penalty by the commission, not to exceed twenty thousand dollars (\$20,000) for each violation, pursuant to regulations adopted by the commission. A penalty assessed under this section shall be determined on the record after the opportunity for a hearing.

(b) In assessing a penalty under this section, the commission shall consider the following factors, in addition to any other relevant factors, in determining the amount of the penalty:

- (1) The archaeological, historical, or commercial value of the item involved.
- (2) The cultural and spiritual significance of the item involved.
- (3) The damages suffered, both economic and noneconomic, by the aggrieved party.
- (4) The number of violations that have occurred.

(c) If any agency or museum fails to pay a civil penalty pursuant to a final order issued by the commission and the time for judicial review has passed or the party subject to the civil penalty has appealed the penalty or after a final judgment has been rendered on appeal of the order, the Attorney General shall act on behalf of the commission to institute a civil action in an appropriate court to collect the penalty.

(d) An agency or museum shall not be subject to civil penalties for actions taken in good faith to comply with the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

**8030.** The provisions of this chapter are severable. If any provision of this chapter or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.



## Assembly Bill No. 2836

### CHAPTER 823

An act to amend Section 8014 of, and to add Article 3 (commencing with Section 8025) to Chapter 5 of Part 2 of Division 7 of, the Health and Safety Code, and to amend Section 5097.94 of the Public Resources Code, relating to tribal affairs.

[Approved by Governor September 27, 2018. Filed with Secretary of State September 27, 2018.]

#### LEGISLATIVE COUNSEL'S DIGEST

AB 2836, Gloria. Native Americans: repatriation.

Existing law, the California Native American Graves Protection and Repatriation Act of 2001 (California act), requires all agencies and museums that receive state funding that have possession or control over collections of California Native American human remains or cultural items, as defined, to inventory those remains and items for the identification and repatriation of the items to the appropriate Indian tribes. The California act states the intent of the Legislature to apply the state's repatriation policy consistent with the federal Native American Graves Protection and Repatriation Act (federal act) and to facilitate the implementation of the provisions of the federal act with respect to publicly funded agencies and museums in California. Existing law establishes the Native American Heritage Commission and vests the commission with specified powers and duties.

Existing provisions of the California Constitution establish the University of California as a public trust under the administration of the Regents of the University of California. The California Constitution grants to the regents all the powers necessary or convenient for the effective administration of this public trust, subject to such legislative control as may be necessary to insure the security of its funds, compliance with the terms of the endowments of the university, and certain competitive bidding procedures.

This bill would require the regents, or their designee, as a condition for using state funds to handle and maintain Native American human remains and cultural items, to establish and support a systemwide Native American Graves Protection and Repatriation Act Implementation and Oversight Committee, with specified membership, and, for any campus subject to the federal act, a campus implementation committee, with specified membership. The bill would require the regents, as a condition for using state funds to handle and maintain Native American human remains and cultural items, in consultation with the systemwide committee, to adopt and implement certain policies and procedures to better implement the federal act and to timely submit the policies and procedures to the Native American Heritage Commission for review and comment by July 1, 2019. The bill would make

conforming changes to the powers and duties of the Native American Heritage Commission. The bill would require the regents, as a condition for using state funds to handle and maintain Native American human remains and cultural items, to ensure that the campus committees implement the policies and procedures adopted by the regents and reviewed by the Native American Heritage Commission. The bill would provide that, if the regents use state funds to handle and maintain Native American human remains and cultural items, all claims for repatriation or claims of any violation of the policies and procedures shall be submitted to the campus committee for determination and would require the regents to adopt procedures to support appeals and dispute resolution in cases where a tribe disagrees with a campus determination regarding repatriation or disposition of cultural items directly to the systemwide committee. The bill would require the California State Auditor to conduct an audit commencing in the year 2019 and again in 2021 regarding the University of California's compliance with the federal and California acts and to report its findings to the Legislature and to all other appropriate entities.

*The people of the State of California do enact as follows:*

SECTION 1. (a) The Legislature finds and declares all of the following:

(1) In recent years, the State of California has made great strides toward treating Indian tribes with respect and dignity. The current treatment of Native American human remains and cultural items and the delayed repatriation of those human remains and items are incongruent with the values, including the importance of government-to-government consultation, respect for cultural resources, and California Indian heritage, that have been expressed and memorialized in other state policies. It is the intent of the Legislature to repatriate the thousands of human remains and cultural items at University of California museums and institutions that were removed from their final resting places to the appropriate California Native American tribes for proper care, as is required by federal and state law.

(2) Museums located within the University of California system are subject to the mandates of the federal Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. Sec. 3001 et seq.), its implementing regulations, and the California Native American Graves Protection and Repatriation Act of 2001 (Chapter 5 (commencing with Section 8010) of Part 2 of Division 7 of the Health and Safety Code). It is the policy of the state that Native American human remains and associated grave artifacts shall be repatriated.

(3) The Phoebe A. Hearst Museum of Anthropology at the University of California, Berkeley, contains one of the largest collections of Native American human remains and cultural items within the United States, and other University of California campuses and museums also contain collections of human remains and cultural items.

(4) The federal Native American Graves Protection and Repatriation Act and the California Native American Graves Protection and Repatriation Act are human rights laws.

(5) Article 12 of the United Nations Declaration on the Rights of Indigenous Peoples recognizes the right of indigenous peoples to the repatriation of their human remains, and recognizes that states shall seek to enable the access or repatriation of ceremonial objects and human remains through fair, transparent, and effective mechanisms developed in conjunction with the indigenous peoples concerned.

(6) It is the policy of the state to consult with California Native American tribes on issues that affect tribal governments and tribal communities.

(7) California Native American tribes have expertise with regard to their tribal history and practices, which concern the human remains and cultural items in the possession or control of the University of California.

(8) There is a history of inconsistent application of federal and state repatriation laws by some campuses within the University of California system. The California Native American Graves Protection and Repatriation Act of 2001 was passed specifically to facilitate the implementation of the federal Native American Graves Protection and Repatriation Act and to encourage the disclosure and return of human remains and cultural items by agencies and museums within California.

(9) The University of California's systemwide Policy on Curation and Repatriation of Human Remains and Cultural Items (UC Policy), amended on May 1, 2001, which is still operative at the time of this enactment, fails to include consultation with California Native American tribes that may be culturally affiliated with human remains and cultural items contained in collections held within the University of California system. The UC Policy provides as follows: "Campuses are encouraged to solicit input on significant policy matters, as appropriate, from members of Native American and Native Hawaiian groups and from additional University faculty members drawn from a variety of disciplines in which the study, treatment, curation, and repatriation of human remains is relevant. Campuses are encouraged to forward input received from such consultations to the Office of the President via their Advisory Group Representative." The absence of required consultation with California Native American tribes with respect to repatriation has resulted in some University of California campuses excluding or limiting the participation of stakeholders who could bring valuable knowledge to the repatriation process. This includes legitimate tribal representatives who may have interests and knowledge in the collections, or in the items in collections, as well as campus specialists in Native American or ethnic studies.

(10) This bill, as a condition for using state funds to handle and maintain Native American human remains and cultural items, would require that the University of California adopt systemwide and campus-level policies and processes that meet the intent of both federal and state law regarding the repatriation of human remains and cultural items, in consultation with California Native American tribes.

(11) The UC Policy does not equally consider the cultural and religious concerns of tribes with respect to repatriating human remains and cultural items to their tribal communities and instead is partial to the perceived educational and research potential that these human remains and cultural items may have for academia and science.

(12) The UC Policy does not currently include provisions to comply with Sections 10.10 and 10.11 of Part 10 of Title 43 of the Code of Federal Regulations, which took effect in 2010, requiring the identification and disposition of “culturally unidentifiable” human remains and cultural items. In 2001, a cost analysis prepared by the University of California for the California Native American Graves Protection and Repatriation Act of 2001 stated that the University of California at Berkeley had 8,600 California Native American human remains in its possession, 5,700, or two-thirds, of which were classified as “culturally unidentifiable.” This classification provides a basis for denying repatriation of these human remains, in violation of applicable federal regulations. If enacted, as a condition for using state funds to handle and maintain Native American human remains and cultural items, this bill would require the University of California to adopt policies and procedures regarding the disposition of “culturally unidentifiable” human remains pursuant to federal law.

(13) This bill, as a condition for using state funds to handle and maintain Native American human remains and cultural items, would establish a role for the Native American Heritage Commission in commenting and providing guidance on all policies and procedures adopted pursuant to its provisions.

(b) It is the intent of the Legislature, in enacting this act, to condition the use of state funds to handle and maintain Native American human remains and cultural items by the University of California so as to accomplish the following:

(1) Recognize that the repatriation of human remains and cultural items is a fundamental human right for all California Native American tribes.

(2) Recognize that the repatriation of Native American human remains and cultural items is an exercise of tribal sovereignty for California Native American tribal governments.

(3) Recognize that the repatriation of Native American human remains and cultural items is a priority for all campuses and museums within the University of California.

(4) Recognize the importance of complying with the federal Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. Sec. 3001 et seq.) and the California Native American Graves Protection and Repatriation Act of 2001 (Chapter 5 (commencing with Section 8010) of Part 2 of Division 7 of the Health and Safety Code), and require the University of California to review, revise, and update its policy and procedure requirements for the repatriation of Native American human remains and cultural items pursuant to federal and state law and their associated regulations in accordance with paragraph (5), to be implemented by each campus.

(5) Require the University of California to include in its policy a requirement for the establishment and maintenance of systemwide and campus-level committees, which would review and advise on matters related to the University’s compliance with legal requirements to make repatriations or dispositions of Native American human remains and cultural items.

(6) Require the University of California to include in its policy, mandatory eligibility criteria for individuals serving on a Native American Graves Protection and Repatriation Act Committee within the University of California system.

(7) Require tribal consultation and participation in reviewing and revising the University of California’s policy and procedure requirements, and any policy or procedure adopted by each campus, to comply with and implement those systemwide requirements, and in the process of repatriation of human remains and cultural items.

(8) Require that the Native American Heritage Commission comment upon and provide guidance on all policies and procedures adopted pursuant to this act.

(9) Establish a reporting requirement to the Legislature on the University of California’s progress with repatriation efforts under state and federal laws.

SEC. 2. Section 8014 of the Health and Safety Code is amended to read:

8014. A tribe claiming state cultural affiliation and requesting the return of human remains and cultural items listed in the inventory or summary of an agency or museum or that requests the return of human remains and cultural items that are not listed in the inventory but are believed to be in the possession or control of the agency or museum in the state shall do both of the following:

(a) File a written request for the human remains and cultural items with the commission and the agency or museum believed to have possession or control.

(b) Provide evidence that would establish that items claimed are cultural items and are culturally affiliated with the California Indian tribe making the claim. Evidence of cultural affiliation need not be provided in cases where cultural affiliation is reasonably established by the inventory or summary or a finding by a federal or state agency, published in the Federal Register, in compliance with the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

SEC. 3. Article 3 (commencing with Section 8025) is added to Chapter 5 of Part 2 of Division 7 of the Health and Safety Code, to read:

### Article 3. University of California Implementation

8025. (a) In order to better implement the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), the Regents of the University of California shall not use state funds for the

handling or maintenance of Native American human remains and cultural items unless the regents do all the following:

(1) Facilitate the establishment, composition, and function of systemwide and campus-level committees, established pursuant to Section 8026, with respect to reviewing and advising the university on matters related to the university's implementation of legal requirements to make repatriations or dispositions of Native American human remains and cultural items.

(2) (A) Adopt and implement systemwide policies regarding the culturally appropriate treatment of Native American human remains and cultural items while in the possession of a University of California campus or museum, including policies regarding research requests and testing following the submission of a request for repatriation.

(B) Adopt and implement clear and transparent policies and procedures on the systemwide requirements for submitting claims for the repatriation of human remains and cultural items, demonstrating cultural affiliation, notification to tribes of human remains and cultural items deemed culturally affiliated but that are not subject to a current repatriation claim, dispute resolution regarding repatriation claims, and any other relevant subject governed by the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) and this chapter.

(C) Adopt or amend systemwide University of California museum deaccessioning policies to explicitly provide for the deaccession of collections containing Native American human remains and cultural items to effect the timely and respectful repatriation of those items pursuant to valid claims submitted by a California Indian tribe.

(D) Adopt systemwide University of California policies and procedures for the identification and disposition of culturally unidentifiable human remains and cultural items as required by the federal Native American Graves Protection and Repatriation Regulations (43 C.F.R. Part 10). Those policies shall include updates to existing inventories in order to determine whether cultural affiliation can be determined, or to confirm that the human remains are "culturally unidentifiable" as defined in paragraph (2) of subsection (e) of Section 10.2 of Part 10 of Title 43 of the Code of Federal Regulations.

(3) Develop all policies and procedures pursuant to paragraph (2) in consultation with California Native American tribes on the contact list maintained by the Native American Heritage Commission. Each California Indian tribe that is on the contact list shall be invited to consult on the proposed policies and procedures. For purposes of this section, "consultation" has the same meaning as defined in Section 65352.4 of the Government Code.

(4) Timely submit the policies and procedures adopted pursuant to paragraph (2) to the commission, so they may review and comment upon them pursuant to subdivision (q) of Section 5097.94 of the Public Resources Code by July 1, 2019.

(5) Implement the systemwide policies adopted pursuant to paragraph (2) by January 1, 2020, and implement any campus policies within one year after the adoption of the systemwide policies.

(6) Ensure that each campus Native American Graves Protection and Repatriation Act Implementation Committee implements the policies and procedures adopted pursuant to paragraph (2).

(7) Adopt procedures to support appeals and dispute resolution in cases where a tribe disagrees with a campus determination regarding repatriation or disposition of human remains or cultural items directly to the systemwide Native American Graves Protection and Repatriation Act Implementation and Oversight Committee.

(b) A campus of the University of California may adopt policies to supplement the systemwide policies adopted pursuant to paragraph (2), if the campus determines that individual circumstances involving that campus are not adequately addressed in the adopted and approved systemwide policies, in consultation with California Native American tribes. A policy or procedure adopted by a campus pursuant to this subdivision shall not conflict with the approved systemwide policies.

8026. (a) (1) As a condition for using state funds to handle and maintain Native American human remains and cultural items, the Regents of the University of California shall establish a systemwide Native American Graves Protection and Repatriation Act Implementation and Oversight Committee, which shall also be known as the U.C. NAGPRA Committee.

(2) The membership of the committee shall be as follows:

(A) Two voting members of an Indian tribe as described in paragraph (1) of subdivision (j) of Section 8012, meeting the requirements of subdivision (c).

(B) One voting member of an Indian tribe as described in paragraph (2) of subdivision (j) of Section 8012, meeting the requirements of subdivision (c), or if none is available, a member of an Indian tribe as described in paragraph (1) of subdivision (j) of Section 8012, meeting the requirements of subdivision (c).

(C) Four voting members from the University of California. Not fewer than two of these members shall be affiliated with an American Indian or Native American Studies program and each of these members shall meet the requirements of subdivision (d).

(D) One nonvoting member from each campus of the University of California that is subject to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.). Each of these nonvoting members shall meet the requirements of subdivision (d).

(3) The regents or the regents' designee shall appoint members to the committee upon nomination by the commission.

(b) (1) The Regents of the University of California shall not use state funds for the handling or maintenance of Native American human remains and cultural items unless each campus of the University of California that is subject to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) establishes a campus Native American

Graves Protection and Repatriation Act Implementation Committee, which shall also be known as the NAGPRA Committee for that campus.

(2) The membership of the campus committee shall be as follows:

(A) Two voting members of an Indian tribe as described in paragraph (1) of subdivision (j) of Section 8012, meeting the requirements of subdivision (c).

(B) One voting member of an Indian tribe as described in paragraph (2) of subdivision (j) of Section 8012, meeting the requirements of subdivision (c), or if none is available, a member of an Indian tribe as described in paragraph (1) of subdivision (j) of Section 8012, meeting the requirements of subdivision (c).

(C) Three voting members from the University of California. At least one of these members shall be affiliated with an American Indian or Native American Studies program and each of these members shall meet the requirements of subdivision (d).

(3) The regents or the regents' designee shall appoint members to the committees upon nomination by the commission.

(4) All claims for repatriation or claims of any violation of the policies and procedures adopted pursuant to Section 8025 shall be submitted to the campus Native American Graves Protection and Repatriation Act Implementation Committee for determination.

(c) (1) A voting member of a California Indian tribe shall be an elder, spiritual leader, tribal leader, or tribal member, as designated by the governing body of the individual's tribe, with a minimum of five years' prior experience in any of the following:

(A) Repatriation of human remains and cultural items pursuant to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

(B) Cultural resources protection under tribal, state, and federal law.

(C) Consultation with state and federal entities and agencies.

(2) Preference shall be given to members of a California Indian tribe. If no members of a California Indian tribe meeting the qualifications of paragraph (1) are available, members of other tribes may serve.

(d) (1) A representative of the University of California shall meet the following criteria:

(A) Have a graduate degree in either Archaeology, Anthropology, Native American Studies, Ethnic Studies, Law, Sociology, Environmental Studies, or History, with a focus in California.

(B) Have a minimum of five years' experience working in his or her field of study.

(2) Preference shall be given to members who have demonstrated, through their professional experience, the ability to work in collaboration with Native American tribes successfully on issues related to repatriation or museum collection management.

(3) In the event that candidates from the University of California are not available or do not meet the criteria of paragraph (1), the University of



California representative positions may be filled by retired emeriti of the University of California who meet the criteria of paragraph (1).

8027. The Regents of the University of California may delegate responsibilities pursuant to this article to the President of the University of California or another person determined to be appropriate.

8028. The California State Auditor, in accordance with Chapter 6.5 (commencing with Section 8543) of Division 1 of Title 2 of the Government Code, shall conduct an audit commencing in the year 2019 and again in 2021 regarding the University of California's compliance with the federal Native American Graves Protection Repatriation Act (25 U.S.C. Sec. 3001 et seq.) and this chapter. The State Auditor shall report its findings to the Legislature and to all other appropriate entities.

8028.5. The provisions of this article are severable. If any provision of this article or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 4. Section 5097.94 of the Public Resources Code is amended to read:

5097.94. The commission shall have the following powers and duties:

(a) To identify and catalog places of special religious or social significance to Native Americans, and known graves and cemeteries of Native Americans on private lands. The identification and cataloguing of known graves and cemeteries shall be completed on or before January 1, 1984. The commission shall notify landowners on whose property the graves and cemeteries are determined to exist, and shall identify the Native American group most likely descended from those Native Americans who may be interred on the property.

(b) To make recommendations relative to Native American sacred places that are located on private lands, are inaccessible to Native Americans, and have cultural significance to Native Americans for acquisition by the state or other public agencies for the purpose of facilitating or assuring access thereto by Native Americans.

(c) To make recommendations to the Legislature relative to procedures that will voluntarily encourage private property owners to preserve and protect sacred places in a natural state and to allow appropriate access to Native American religionists for ceremonial or spiritual activities.

(d) To appoint necessary clerical staff.

(e) To accept grants or donations, real or in kind, to carry out the purposes of this chapter and the California Native American Graves Protection and Repatriation Act of 2001 (Chapter 5 (commencing with Section 8010) of Part 2 of Division 7 of the Health and Safety Code).

(f) To make recommendations to the Director of Parks and Recreation and the California Arts Council relative to the California State Indian Museum and other Indian matters touched upon by department programs.

(g) To bring an action to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred

shrine located on public property, pursuant to Section 5097.97. If the court finds that severe and irreparable damage will occur or that appropriate access will be denied, and appropriate mitigation measures are not available, it shall issue an injunction, unless it finds, on clear and convincing evidence, that the public interest and necessity require otherwise. The Attorney General shall represent the commission and the state in litigation concerning affairs of the commission, unless the Attorney General has determined to represent the agency against whom the commission's action is directed, in which case the commission shall be authorized to employ other counsel. In an action to enforce this subdivision the commission shall introduce evidence showing that a cemetery, place, site, or shrine has been historically regarded as a sacred or sanctified place by Native American people and represents a place of unique historical and cultural significance to an Indian tribe or community.

(h) To request and utilize the advice and service of all federal, state, local, and regional agencies, including for purposes of carrying out the California Native American Graves Protection and Repatriation Act of 2001 (Chapter 5 (commencing with Section 8010) of Part 2 of Division 7 of the Health and Safety Code).

(i) To assist Native Americans in obtaining appropriate access to sacred places that are located on public lands for ceremonial or spiritual activities.

(j) To assist state agencies in any negotiations with agencies of the federal government for the protection of Native American sacred places that are located on federal lands.

(k) (1) To mediate, upon application of either of the parties, disputes arising between landowners and known descendants relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials.

(2) The agreements shall provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction and provide for sensitive treatment and disposition of Native American burials, skeletal remains, and associated grave goods consistent with the planned use of, or the approved project on, the land.

(l) To assist interested landowners in developing agreements with appropriate Native American groups for treating or disposing, with appropriate dignity, of the human remains and any items associated with Native American burials.

(m) To provide each California Native American tribe, as defined in Section 21073, on or before July 1, 2016, with a list of all public agencies that may be a lead agency pursuant to Division 13 (commencing with Section 21000) within the geographic area with which the tribe is traditionally and culturally affiliated, the contact information of those public agencies, and information on how the tribe may request the public agency to notify the tribe of projects within the jurisdiction of those public agencies for the purposes of requesting consultation pursuant to Section 21080.3.1.

(n) (1) To assume the powers and duties of the former Repatriation Oversight Commission and meet, when necessary and at least quarterly, to perform the following duties:

(A) Order the repatriation of human remains and cultural items in accordance with the act.

(B) Establish mediation procedures and, upon the application of the parties involved, mediate disputes among tribes and museums and agencies relating to the disposition of human remains and cultural items. The commission shall have the power of subpoena for purposes of discovery and may impose civil penalties against any agency or museum that intentionally or willfully fails to comply with the act. Members of the commission and commission staff shall receive training in mediation for purposes of this subparagraph. The commission may delegate its responsibility to mediate disputes to a certified mediator or commission staff.

(C) Establish and maintain an Internet Web site for communication among tribes and museums and agencies.

(D) Upon the request of tribes or museums and agencies, analyze and make decisions regarding providing financial assistance to aid in specific repatriation activities.

(E) Make recommendations to the Legislature to assist tribes in obtaining the dedication of appropriate state lands for the purposes of reinterment of human remains and cultural items.

(F) (i) Prepare and submit to the Legislature an annual report detailing commission activities, disbursement of funds, and dispute resolutions relating to the repatriation activities under the act.

(ii) A report submitted to the Legislature pursuant to this subparagraph shall be submitted in compliance with Section 9795 of the Government Code.

(G) Refer any known noncompliance with the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) to the United States Attorney General and the Secretary of the Interior.

(H) Impose administrative civil penalties pursuant to Section 8029 of the Health and Safety Code against an agency or museum that is determined by the commission to have violated the act.

(I) Establish those rules and regulations the commission determines to be necessary for the administration of the act.

(2) For purposes of this subdivision, the following terms have the following meanings:

(A) “Act” means the California Native American Graves Protection and Repatriation Act (Chapter 5 (commencing with Section 8010) of Part 2 of Division 7 of the Health and Safety Code).

(B) “Tribe” means a “California Indian tribe” as that term is used in the act.

(o) (1) To establish and assess a fee on a person or public or private entity that is reasonably related to the cost of conducting a search of catalogs, described in subdivision (a), inventories, described in Section 5097.96, or lists, described in Section 21073, for that person or entity, which funds shall be available to the commission upon appropriation by the Legislature.

(2) The Legislature finds that, pursuant to subdivision (b) of Section 3 of Article XIII A of the California Constitution, the fees established pursuant to paragraph (1) are not taxes. To the extent that these fees are appropriated through the Budget Act for the purposes for which they are collected to provide services to the people of the State of California, the Legislature finds that these fees are not subject to Article XIII B of the California Constitution.

(p) Review and provide comment and guidance on all policies and procedures proposed pursuant to Article 3 (commencing with Section 8025) of Chapter 5 of Part 2 of Division 7 of the Health and Safety Code.

O

## Assembly Bill No. 275

### CHAPTER 167

An act to add Section 8318 to the Government Code, and to amend Sections 8011, 8013, 8015, 8016, 8017, 8025, and 8026 of, to amend the heading of Article 3 (commencing with Section 8025) of Chapter 5 of Part 2 of Division 7 of, and to repeal and add Sections 8012 and 8014 of, the Health and Safety Code, relating to Native American cultural heritage.

[Approved by Governor September 25, 2020. Filed with  
Secretary of State September 25, 2020.]

#### LEGISLATIVE COUNSEL'S DIGEST

AB 275, Ramos. Native American cultural preservation.

Existing law establishes the Native American Heritage Commission and vests the commission with specified powers and duties. Existing law requires the commission to publish a document that lists the California Indian tribes as well as to consult in matters pertaining to repatriation under the act.

The California Native American Graves Protection and Repatriation Act of 2001 requires all agencies and museums that receive state funding and have possession or control over collections of California Native American human remains and associated funerary objects to inventory those remains and objects for repatriation to the appropriate California Indian tribes, as specified. The act requires those entities to complete an inventory and summary of those objects, as specified, and to provide the inventories and summaries to the commission. The act provides a process by which a California Indian tribe can request the return of human remains and cultural items.

The act defines various terms, including "California Indian tribe" and "museum." The act defines "California Indian tribe" as a tribe that either meets the federal definition of Indian tribe or that is indigenous to California and is not reorganized by the federal government, is listed on the Bureau of Indian Affairs Branch Acknowledgment and Research petitioner list, and is determined by the commission to be a tribe that is eligible to participate in the repatriation process under the act. The act defines "museum" as an entity, including a higher educational institution, excluding school districts, that receives state funds.

This bill would revise various definitions, including, among others, the definition of "California Indian tribe" to include both a tribe that meets the federal definition of Indian tribe and a tribe that is not recognized by the federal government, but that is a native tribe located in California that is on the list maintained by the commission; the definition of "museum" to specify it receives state funds; the definition of "preponderance of the evidence" to specify that tribal traditional knowledge alone may be sufficient to meet

this standard; and the definition of “reasonable” to specify that tribal traditional knowledge can and should be used to establish reasonable conclusions with respect to determining cultural affiliation and identifying cultural items.

This bill would revise and recast the process of creating the inventories and summaries by, among other things, requiring consultation with California Indian tribes during the creation of the preliminary inventories and summaries and after submission to the commission. The bill also would revise and recast the process by which a direct lineal descendent or a California Indian tribe can request the return of human remains or cultural items. The bill would make technical, nonsubstantive changes.

This bill would require every state agency, as defined, with significant interaction with tribal issues, peoples, or lands, and request the Regents of the University of California, to designate one or more liaisons for the purpose of engaging in consultation with California Native American tribes on the tribal contact list and educating the agency on topics relevant to the state’s relationship with those tribes.

*The people of the State of California do enact as follows:*

SECTION 1. The Legislature finds and declares all of the following:

(a) In recent years, the State of California has made great strides towards treating California Indian tribes with respect and dignity. In 2019, the Governor issued Executive Order No. N-15-19 that recognized that the state historically sanctioned over a century of depredations and prejudicial policies committed by state actors against California Native Americans and apologized, on behalf of the citizens of the State of California, for the many instances of violence, maltreatment, and neglect California inflicted on tribes.

(b) Indigenous California was unique and different from any other part of native North America. It encompassed hundreds of thousands of people, thousands of villages, and over one hundred separate languages, with many more dialects of those languages. California Indians lived in deserts, on mountains, along the coastline, in the great central valley, on lakeshores, beside rivers, and in the lush foothills.

(c) California Indian tribes have suffered a unique set of circumstances, including, but not limited to, unratified treaties, termination, Indian indenture laws, the California mission system, boarding schools, and other violent and destructive policies and systems on a larger scale than anywhere else in the United States.

(d) These systems and government-sanctioned extinction policies and actions dispossessing California Indian tribes from their lands validated, permeated, and sustained a culture of historical mistreatment of California Indian tribes that existed brutally from around the 16th century through the early 20th century, with the aftermath of these policies and mistreatment still visible and tangible today.

(e) These policies and actions resulted in the separation of the California Indian tribes from many of their cultural items and Native American human remains.

(f) Throughout the state's history, a key human rights violation has been that thousands of Native American human remains and items that are culturally affiliated with California Indian tribes are still not yet under the control of those tribes. Even though the tribal members are the legal decedents, these Native American human remains and cultural items remain under the control of private and state-funded institutions and museums.

(g) In 1990, the federal government enacted and implemented the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. Sec. 3001 et seq.) to address this nationwide human rights violation.

(h) In 2001, the State of California enacted Assembly Bill 978 (Chapter 818 of the Statutes of 2001), cited as the California Native American Graves Protection and Repatriation Act of 2001 (Chapter 5 (commencing with Section 8010) of Part 2 of Division 7 of the Health and Safety Code), to address the specific concerns of the California Indian tribes. The California Native American Graves Protection and Repatriation Act of 2001 was never fully implemented because it was not adequately funded.

(i) Unfortunately, today there are still thousands of Native American human remains and cultural items under the control of state-funded institutions and museums. Despite those institutions being subject to both the federal and state laws ordering repatriation of these human remains and cultural items back to the present-day living ancestors, the California Indian tribes, the institutions and museums have not complied.

(j) The California Native American Graves Protection and Repatriation Act of 2001 was enacted almost 20 years ago. The federal NAGPRA has been amended since 1990, and the California Native American Graves Protection and Repatriation Act of 2001 is due to be updated to align it with federal law and to also address the California-specific issues that have come to light over the past 30 years.

(k) In view of these findings, it is the intent of the Legislature that this act do all of the following:

(1) Facilitate the proactive repatriation of Native American human remains and cultural items to California Indian tribes.

(2) Require active outreach and consultation by publicly funded agencies and museums in California with California Indian tribes and lineal descendants for the purposes of carrying out repatriation, in particular with those Native American human remains and cultural items that have been deemed by publicly funded agencies and museums as culturally unidentifiable.

(3) Provide a process whereby the Native American Heritage Commission assists publicly funded agencies and museums in the identification of California Indian tribes for the purposes of this measure.

(4) Provide a process whereby California Indian tribes, recognized and nonfederally recognized, may seek the assistance of the Native American Heritage Commission to resolve disputes.

(5) Recognize that California Indian tribes have expertise with regard to their tribal history and practices that concern the Native American human remains, cultural items, and tribal cultural resources with which they are traditionally and culturally affiliated and, because the federal and state repatriation processes call for a sufficient degree of analysis, include tribal traditional knowledge about the land and resources at issue in all decisions related to repatriation processes. This includes treating tribal traditional knowledge as the authority with respect to determining cultural affiliation and the identification of cultural items so that it is given deferential weight to other lines of evidence. Tribal traditional knowledge meets the “reasonable” standard that is identified in California Native American Graves Protection and Repatriation Act of 2001.

(6) Establish a meaningful consultation process between California Indian tribes, lineal decedents, and publicly funded agencies and museums respecting confidentiality, at the earliest possible point in the process, for the purposes of achieving the repatriation outcome of returning ancestors and their belongings to tribes.

SEC. 2. Section 8318 is added to the Government Code, to read:

8318. (a) For purposes of this section, “state agency” means a department or agency of the state, the California State University, the University of California, and the Judicial Council of California.

(b) The Regents, on behalf of the University of California, are requested to designate, and every other state agency with significant interaction with tribal issues, peoples, or lands shall designate, one or more liaisons for the purpose of engaging in consultation with California Native American tribes on the contact list maintained by the Native American Heritage Commission pursuant to paragraph (2) of subdivision (c) of Section 8012 of the Health and Safety Code and educating the agency on topics relevant to the state’s relationship with those tribes.

SEC. 3. Section 8011 of the Health and Safety Code is amended to read:

8011. It is the intent of the Legislature to do all of the following:

(a) Provide a seamless and consistent state policy to ensure that all California Indian human remains and cultural items be treated with dignity and respect.

(b) Apply the state’s repatriation policy consistently with the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), which was enacted in 1990, as subsequently amended, while considering the unique history of California towards California Indian tribes and the canon of construction regarding federal Indian law with respect to laws must be interpreted as the Indians would have understood them, be construed liberally in favor of the Indians, resolve all ambiguities in the law in favor of the Indians, and preserve tribal property rights and sovereignty unless a contrary intent is clearly stated.

(c) Facilitate the implementation of the federal Native American Graves Protection and Repatriation Act with respect to publicly funded agencies and museums in California.



(d) Encourage voluntary disclosure and return of Native American human remains and cultural items by a private institution or museum.

(e) Provide a process whereby lineal descendants and culturally or geographically affiliated California Indian tribes that file repatriation claims for Native American human remains and cultural items under the Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) or under this chapter with California state agencies and museums may request assistance from the commission in ensuring that state agencies and museums are responding to those claims in a timely manner and in facilitating the resolution of disputes regarding those claims.

(f) Provide a process whereby California Indian tribes that are not federally recognized may file claims with agencies and museums for repatriation of human remains and cultural items.

SEC. 4. Section 8012 of the Health and Safety Code is repealed.

SEC. 5. Section 8012 is added to the Health and Safety Code, to read:

8012. Terms used in this chapter have the same meaning as defined in the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), and as interpreted by federal regulations, except that the following terms have the following meaning:

(a) "Agency" means a division, department, bureau, commission, board, council, city, county, city and county, district, or other political subdivision of the state.

(b) "Burial site" means, except for cemeteries and graveyards protected or recognized under another state law, a natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which human remains were deposited as a part of the death rites or ceremonies of a culture.

(c) "California Indian tribe" means a tribe located in California to which either of the following applies:

(1) It meets the definition of Indian tribe under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

(2) It is not recognized by the federal government, but is a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of consultation pursuant to Section 65352.3 of the Government Code.

(d) "Commission" means the Native American Heritage Commission established pursuant to Section 5097.91 of the Public Resources Code.

(e) "Consultation" means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, achieving agreement. Consultation between agencies or museums and California Indian tribes shall be conducted in a manner that is respectful of tribal sovereignty. Consultation also shall recognize the tribes' potential need for confidentiality with respect to tribal traditional knowledge and all tribal information shared during the consultation.

(f) “Control” means having ownership of Native American human remains and cultural items sufficient to lawfully permit an agency or museum to treat the object as part of its collection for purposes of this chapter, whether or not the human remains and cultural items are in the physical custody of the agency or museum. Human remains and cultural items on loan to an agency or museum from another person, agency, or museum shall be deemed to be in the control of the lender.

(g) “Cultural items” shall have the same meaning as defined in Section 3001 of Title 25 of the United States Code, as it read on January 1, 2020, except that it shall mean only those items that originated in California and are subject to the definition of reasonable, as defined in subdivision (l). An item is not precluded from being a cultural item solely because of its age.

(h) “Inventory” means an itemized list that summarizes the collection of Native American human remains and associated funerary objects in the possession or control of an agency or museum. This itemized list may include the inventory list required under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

(i) “Museum” means an agency, museum, person, or entity, including a higher educational institution, that receives state funds. For purposes of this subdivision, “receives states funds” means that the museum has received funds after January 1, 2002, from a state agency through a grant, loan, or contract, other than a procurement contract, or other arrangement by which a state agency makes available aid in the form of funds. State funds provided for any purpose to a larger entity of which the museum is a part of are considered as the museum receiving those funds for the purposes of this subdivision.

(j) “Possession” means having physical custody of Native American human remains and cultural items with a sufficient legal interest to lawfully treat the human remains and cultural items as part of a collection. “Possession” does not include human remains and cultural items over which the agency has control but that are currently on loan to another person or entity.

(k) “Preponderance of the evidence” means that the party’s evidence on a fact indicates that it is more likely than not that the fact is true. Tribal traditional knowledge alone may be sufficient to meet this standard. If there is conflicting evidence, tribal traditional knowledge shall be provided deference.

(l) “Reasonable” means fair, proper, rational, and suitable under the circumstances. Tribal traditional knowledge can and should be used to establish reasonable conclusions with respect to determining cultural affiliation and identifying cultural items.

(m) “State aboriginal territory” means lands identified as aboriginally occupied by one or more California Indian tribes. State aboriginal territory may be recognized by any of the following: consultation with California Indian tribes, treaties, including those agreed to but not ratified, a final judgment of the federal Indian Claims Commission or the United States Court of Claims, an act of the United States Congress, or an executive order.

(n) “State cultural affiliation” means that there is a reasonable relationship of shared group identity that can reasonably be traced historically or precontact between members of a present-day California Indian tribe and an identifiable earlier tribe or group. Cultural affiliation shall be established based on one or more of the following:

- (1) Geography.
- (2) Kinship.
- (3) Biology.
- (4) Archaeology.
- (5) Linguistics.
- (6) Folklore.
- (7) Oral tradition.
- (8) Historical evidence.
- (9) Tribal traditional knowledge.
- (10) Other information or expert opinion that reasonably leads to that conclusion.

(o) “Summary” means a document that summarizes the collection of unassociated funerary objects, sacred objects, or objects of cultural patrimony in the possession or control of an agency or museum. This document may include the summary prepared under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

(p) “Tribal traditional knowledge” means knowledge systems embedded and often safeguarded in the traditional culture of California Indian tribes and lineal descendants, including, but not limited to, knowledge about ancestral territories, cultural affiliation, traditional cultural properties and landscapes, culturoscapes, traditional ceremonial and funerary practices, lifeways, customs and traditions, climate, material culture, and subsistence. Tribal traditional knowledge is expert opinion.

SEC. 6. Section 8013 of the Health and Safety Code is amended to read:

8013. (a) On or before January 1, 2021, the commission shall develop a list of all California Indian tribes and their respective state aboriginal territories. The commission shall notify in writing all agencies, museums, and California Indian tribes that the commission maintains that list. This list is solely for the purpose of the repatriation of Native American tribal human remains and cultural items.

(b) (1) On or before January 1, 2022, each agency or museum that has possession or control of California Native American human remains and associated funerary objects shall complete an inventory, or update a preliminary inventory, of all these remains and associated funerary objects and, to the extent possible based on all information possessed by the agency or museum, do all of the following:

(A) Identify the geographical location, cultural affiliation, aboriginal territory, and the circumstances surrounding their acquisition.

(B) Consult, prior to new or additional inventory work being conducted, with affiliated California Indian tribes on any protocols to be used in the inventory process, including, but not limited to, all of the following:

- (i) Minimizing handling.

(ii) Using a lot approach with a minimum number of individuals set at one.

(iii) Identifying human remains and associated funerary objects, burial site, or ceremonial items with tribal expertise receiving deference.

(C) (i) List in the preliminary inventory the human remains and associated funerary objects that are clearly identifiable as to state cultural affiliation with California Indian tribes. These human remains and cultural items shall be listed first to expedite the repatriation of these items.

(ii) Tribal traditional knowledge shall be used to establish state cultural affiliation and identify associated funerary objects. The museum also shall record any identifications of cultural items that are made by tribal representatives. The identifications may include broad categorical identifications, including, but not limited to, the identification of everything from a burial site as a funerary object.

(D) List the human remains and associated funerary objects that are not clearly identifiable by state cultural affiliation but that, given the totality of circumstances surrounding their acquisition and characteristics, including the unique circumstances of California history, are determined by a reasonable belief to be human remains and associated funerary objects with a state cultural affiliation with one or more California Indian tribes. Consult with California Indian tribes reasonably believed to be culturally affiliated with the items, during the compilation of the preliminary inventory as part of the determination of affiliation. If the agency or museum cannot determine which California Indian tribes are believed to be culturally affiliated with the items, tribes that may be culturally affiliated with the items, in consultation with the commission, shall be consulted during the compilation of the preliminary inventory. The consultation shall be with California Indian tribes whose state aboriginal territory includes the area from which the human remains and associated funerary objects were removed.

(E) List the human remains and associated funerary objects that are not identifiable by state cultural affiliation, but, given the totality of the circumstances, including the unique circumstances of California history, are determined by a reasonable belief to have been removed from an area identified as the state aboriginal territory of one or more California Indian tribes.

(2) The museum or agency shall engage in consultation with California Indian tribes as part of the completion of the inventory required by this subdivision. The commission may assist with the identification of California Indian tribes, but the agency or museum bears the obligation to contact and consult with the California Indian tribes.

(F) Provide the original and any updated catalogues to the consulting California Indian tribes.

(c) (1) On or before January 1, 2022, an agency or museum that has possession or control over a California Indian tribe's unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written preliminary summary of the objects based upon available information held by the agency or museum. Because it may not be clear whether Native

American objects are cultural items, all museum collections of Native American ethnographic or archaeological objects shall be included in the preliminary summary. The preliminary summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition, state cultural affiliation, and state aboriginal territory, where reasonably ascertainable. The preliminary summary shall be in lieu of an object-by-object inventory to limit unnecessary handling and damage to the items. Each agency or museum, following preparation of a preliminary summary pursuant to this subdivision, shall consult with California Indian tribes and tribally authorized government officials and tribally authorized traditional religious leaders.

(2) The agency or museum shall engage in consultation with California Indian tribes as part of the completion of the preliminary summary required pursuant to this subdivision and shall defer to tribal recommendations for appropriate handling and treatment. The agency or museum also shall record any identifications of cultural items that are made by tribal representatives. The identifications may include broad categorical identifications, including, but not limited to, the identification of regalia objects as sacred objects or the identification of everything from a specific site as a sacred object because that site is a sacred site. The commission may assist with the identification of California Indian tribes, but the agency or museum bears the obligation to contact and consult with California Indian tribes.

(d) Within 90 days of completing the preliminary inventory and summary specified in subdivisions (b) and (c), the agency or museum shall provide a copy of the preliminary inventory and summary to the commission. The commission shall, in turn, publish notices of completion of preliminary inventories and summaries on its internet website for 30 days, and make the preliminary inventories and summaries available to any requesting potentially culturally affiliated California Indian tribe.

(e) The inventory and summary specified in subdivisions (a) and (b) shall be completed by all agencies and museums that have possession or control of Native American human remains or cultural items, regardless of whether the agency or museum is also subject to the requirements of the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.). Any inventory or summary, or any portion of an inventory or summary, that has been created to meet the requirements of the Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) may be used to meet the requirements of this chapter, if appropriate.

(f) An agency or museum that has completed an inventory and summary as required by the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) shall be deemed to be in compliance with this section provided that the agency or museum provides the commission with both of the following:

- (1) A copy of the inventory and summary.
- (2) Preliminary inventories and summaries to comply with subdivisions (b) and (c).

(g) (1) Upon the request of a lineal descendent or California Indian tribe, an agency or museum shall supply additional available documentation to supplement the information required by subdivisions (b) and (c). This section does not authorize the initiation or completion of any academic, museum, or scientific study of human remains or cultural items.

(2) For purposes of this subdivision, "documentation" means a summary of agency or museum records, including inventories or catalogs, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding the acquisition and accession of human remains and cultural items subject to this section.

(h) If the agency or museum determines that it does not have in its possession or control any human remains or cultural items, the agency or museum shall, in lieu of an inventory or summary, state that finding in a letter to the commission at the commission's request.

(i) Following completion of the preliminary inventory and summary specified in subdivisions (b) and (c), each agency or museum shall update its inventory and summary within 90 days of receiving possession or control of human remains or cultural items that were not included in the preliminary inventory and summary. Upon completion, the agency or museum shall provide a copy of its updated inventory and summary to the commission.

(j) Once an agency or museum has provided a copy of its preliminary inventory and summary to the commission, the agency or museum shall consult with California Indian tribes that may be culturally affiliated with the human remains and cultural items. The commission may assist with the identification of tribes, but the agency or museum bears the obligation to contact and consult with California Indian tribes. The consultation process shall include all of the following:

(1) Preliminary inventories and summaries shall be reviewed by culturally affiliated and potentially culturally affiliated California Indian tribes, who shall have the ability to concur or disagree with the information in the preliminary inventory or summary. Tribal concurrence, disagreement, or nonresponse shall be noted on the preliminary inventory or summary by the commission at the end of the 30-day review period. If a consulting California Indian tribe disagrees with the contents of the preliminary inventory or summary, the agency or museum shall either revise the preliminary inventory or summary to correct the disputed information or the commission shall offer to initiate dispute resolution as described in Section 8016.

(2) The status of the inventory or summary shall be changed from preliminary to final by the commission once all responding California Indian tribes listed in the inventory or summary concur with the information in the inventory or summary.

(3) An inventory or summary that has been finalized may be moved back to preliminary status at the request of a consulting California Indian tribe if inaccuracies are found in the finalized inventory or summary prior to repatriation.

(4) The designation of an inventory or summary as preliminary or final is intended to reflect whether consulting California Indian tribes agree with the decisions and identifications of the agencies and museums who are preparing these documents. An inventory or summary does not need to be marked as final for a California Indian tribe to place a claim. Nothing in this section shall be construed to mean that an agency or museum may delay the repatriation of items in a final inventory or summary.

(5) Commission staff shall note a summary of all claims and the claim status on the commission's internet website. The claim status may be pending, disputed, or accepted.

(6) Commission staff shall note the repatriation status on the commission's internet website. The repatriation status may be in process or completed.

(7) A claim may be submitted at any time and does not need to be resubmitted.

(8) A claim may be withdrawn at any time prior to transfer of control.

SEC. 7. Section 8014 of the Health and Safety Code is repealed.

SEC. 8. Section 8014 is added to the Health and Safety Code, to read:

8014. (a) A lineal descendent claiming a relationship with, and requesting return of, Native American human remains or cultural items listed in the inventory or summary of an agency or museum, or that requests the return of human remains or cultural items that are not listed in the inventory or summary of an agency or museum but that are believed to be in the possession or control of the agency or museum, shall do both of the following:

(1) File a claim for the human remains and cultural items with the commission and with the agency or museum believed to have possession or control.

(2) Demonstrate that the claimant can trace their ancestry directly and without interruption by means of the traditional kinship or village system of the appropriate California Indian tribe, or by the common law system of descendance, to a known individual whose human remains or cultural items are being claimed.

(b) A California Indian tribe claiming a relationship, state cultural affiliation, or state aboriginal territory with, and requesting return of, human remains or cultural items listed in the inventory or summary of an agency or museum, or that requests the return of human remains or cultural items that are not listed in the inventory or summary of an agency or museum but that are believed to be in the possession or control of the agency or museum, shall do both of the following:

(1) File a claim for the human remains and cultural items with the commission and with the agency or museum believed to have possession or control.

(2) Demonstrate one or both of the following:

(A) There is a relationship of shared group identity that can reasonably be traced historically or precontact with an earlier identifiable group from which the human remains or cultural items originated and the claiming

California Indian tribe. Evidence of state cultural affiliation need not be provided when reasonably established by a finding published in the Federal Register, in compliance with the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

(B) The human remains or cultural items were removed from the state aboriginal territory of the claiming California Indian tribe.

SEC. 9. Section 8015 of the Health and Safety Code is amended to read:

8015. (a) Upon receiving a written request for repatriation of an item on the inventory, the commission shall forward a copy of the request to the agency or museum in possession of the item, if the criteria specified in subdivision (a) of Section 8016 have been met. At this time, the commission shall also publish the request for repatriation on its internet website.

(b) This section does not prohibit a requesting lineal descendent or California Indian tribe, an agency, or a museum from coordinating directly with each other on repatriation. The commission shall receive, for their records, copies of all repatriation agreements and shall have the power to enforce these agreements.

SEC. 10. Section 8016 of the Health and Safety Code is amended to read:

8016. (a) An agency or museum receiving a repatriation request pursuant to Section 8014 shall repatriate human remains and cultural items if all of the following criteria have been met:

(1) The requested human remains or cultural items meet the definitions of human remains or cultural items that are subject to inventory and summary requirements under subdivisions (b) and (c) of Section 8013.

(2) The lineal descendent, state aboriginal territory, or state cultural affiliation of the human remains or cultural items is established as required under this section.

(3) The agency or museum is unable to present evidence that, if standing alone before the introduction of evidence to the contrary, would support a finding that the agency or museum has a right of possession to the requested cultural items.

(4) None of the exemptions listed in Section 10.10(c) of Title 43 of the Federal Code of Regulations apply. Scientific research shall be concluded within a reasonable period of time.

(5) All other applicable requirements of regulations adopted under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), contained in Part 10 of Title 43 of the Code of Federal Regulations, have been met, including, but not limited to, the completion of a summary and inventory, consultation with California Indian tribes, publication of notices of inventory completion and notices of intent to repatriate in the Federal Register, and, prior to disposition of culturally unidentifiable human remains to a tribe not recognized by the federal government, obtainment of the concurrence of the United States Department of the Interior.

(b) If there are no other requests for particular human remains or cultural items and there is no unresolved objection pursuant to paragraph (2) of



subdivision (d), the agency or museum shall repatriate the requested human remains or cultural items to the requesting California Indian tribe or group within 90 days after posting the request for repatriation on the commission's internet website, unless a notice of inventory completion or notice of intent to repatriate also is required under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.). If the federal notice period extends beyond the 90-day period, the agency or museum shall repatriate the requested human remains or cultural items to the requesting California Indian tribe or group within 30 days following the completion of the federal notice period. Repatriation deadlines specified in this subdivision may be waived upon agreement of all parties.

(c) Within 30 days after notice has been provided by the commission, the museum or agency shall have the right to file with the commission any objection to the requested repatriation, based on its good faith belief that the requested human remains or cultural items are not culturally affiliated with the requesting California Indian tribe, have not been removed from the California Indian tribe's state aboriginal territory, or are not subject to repatriation under this chapter.

(d) If there is more than one request for repatriation for the same item, if there is a dispute between the requesting party and the agency or museum, if there is a dispute as to the contents of an inventory or summary, or if a dispute arises in relation to the repatriation process, the commission shall notify the affected parties of this fact and the state cultural affiliation or state aboriginal territory of the item in question shall be determined in accordance with this subdivision.

(1) The disputing parties shall submit documentation describing the nature of the dispute, in accordance with standard mediation practices and the commission's procedures, to the commission, which shall, in turn, forward the documentation to the opposing party or parties. The disputing parties shall meet within 30 days of the date of the mailing of the documentation with the goal of settling the dispute.

(2) If, after meeting, the parties are unable to settle the dispute, the commission, or a certified mediator who has the qualifications and experience appropriate to the dispute's circumstances and has been designated by the commission, shall mediate the dispute. If the museum or agency is subject to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), any party also may request the assistance of the federal Native American Graves Protection and Repatriation Review Committee in resolving the dispute.

(3) Each disputing party shall submit complaints and supporting evidence to the commission or designated mediator and the other opposing parties detailing their positions on the disputed issues in accordance with standard mediation practices and the commission's mediation procedures. Each party shall have 20 days from the date the complaint and supporting evidence were mailed to respond to the complaints. All responses shall be submitted to the opposing party or parties and the commission or designated mediator.

(4) The commission or designated mediator shall review all complaints, responses, and supporting evidence submitted. Within 20 days after the date of submission of responses, the commission or designated mediator shall hold a mediation session and the parties shall come to a resolution or the mediator shall render a written decision within 7 days of the mediation session.

(5) When the disposition of human remains or cultural items is disputed, the party in possession of the human remains or cultural items shall retain possession until the mediation process is completed. Transfer or loan of human remains or cultural items shall not occur until the dispute is resolved.

(6) Deference shall be provided to tribal traditional knowledge, oral histories, documentation, and testimonies relative to other relevant categories of evidence.

(7) If the parties are unable to resolve a dispute through mediation, the dispute shall be resolved by the commission. The determination of the commission shall be deemed to constitute a final administrative remedy. Any party to the dispute seeking a review of the determination of the commission is entitled to file an action in the superior court seeking an independent judgment on the record as to whether the commission's decision is reasonable. The independent review shall not constitute a de novo review of a decision by the commission, but shall be limited to a review of the evidence on the record. Petitions for review shall be filed with the court not later than 30 days after the final decision of the commission.

(8) No later than June 30, 2021, the commission shall develop and adopt mediation procedures that will recognize the need for mediators with qualifications and experience appropriate to a dispute's circumstances. Dispute procedures may incorporate aspects of restorative justice practices.

SEC. 11. Section 8017 of the Health and Safety Code is amended to read:

8017. If there is a committee or group of California Indian tribes authorized by their respective tribal governments to accept repatriation of human remains and cultural items originating from their state aboriginal territory or culturally affiliated with those tribal governments, the items may be repatriated to those groups.

SEC. 12. The heading of Article 3 (commencing with Section 8025) of Chapter 5 of Part 2 of Division 7 of the Health and Safety Code is amended to read:

Article 3. Conditions on the Use of State Funds for the Handling or Maintenance of Native American Human Remains and Cultural Items

SEC. 13. Section 8025 of the Health and Safety Code is amended to read:

8025. (a) In order to better implement the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) and this chapter, the Regents of the University of California shall not use state

funds for the handling or maintenance of Native American human remains and cultural items unless the regents do all the following:

(1) Facilitate the establishment, composition, and function of systemwide and campus-level committees, established pursuant to Section 8026, with respect to reviewing and advising the university on matters related to the university's implementation of legal requirements to increase repatriation outcomes or dispositions of Native American human remains and cultural items to California Indian tribes.

(2) (A) Adopt and implement systemwide policies regarding the respectful and culturally appropriate treatment of Native American human remains and cultural items while in the possession of a University of California campus or museum, including policies regarding research requests and testing of any identified or potential Native American human remains or cultural items.

(B) Adopt and implement clear and transparent policies and procedures on the systemwide requirements for submitting, processing, and implementing claims for the repatriation of human remains and cultural items, demonstrating cultural affiliation, notification to tribes of human remains and cultural items deemed culturally affiliated and unidentifiable and from whose state aboriginal territory the items were removed, but that are not subject to a repatriation claim, dispute resolution regarding repatriation claims, and any other relevant subject governed by the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), Part 10 (commencing with Section 10.1) of Subtitle A of Title 43 of the Code of Federal Regulations, and this chapter.

(C) Adopt or amend, in consultation with California Indian tribes, systemwide University of California museum collection management policies to explicitly provide for the deaccession of collections containing Native American human remains and cultural items to effect the timely and respectful return of those items pursuant to valid claims submitted by a California Indian tribe.

(D) Adopt systemwide University of California policies and procedures for the identification and disposition of culturally unidentifiable human remains and cultural items, as required by the federal Native American Graves Protection and Repatriation Regulations (43 C.F.R. Part 10). Those policies shall include updates to existing inventories in order to determine whether cultural affiliation can be determined, or to confirm that the human remains are "culturally unidentifiable" as defined in paragraph (2) of subsection (e) of Section 10.2 of Part 10 of Title 43 of the Code of Federal Regulations. These policies also shall include updates to existing inventories or summaries to identify cultural items that may not have been identified in the original inventories or summaries because traditional tribal knowledge was not incorporated into the identification process.

(3) Develop all policies and procedures pursuant to paragraph (2) in consultation with California Indian tribes on the contact list maintained by the Native American Heritage Commission pursuant to Section 8013. Each California Indian tribe appearing on the contact list shall be invited to consult

on the proposed policies and procedures. For purposes of this section, “consultation” has the same meaning as defined in Section 65352.4 of the Government Code.

(4) Timely submit the policies and procedures adopted pursuant to paragraph (2) to the commission, so they may review and comment upon them pursuant to subdivision (p) of Section 5097.94 of the Public Resources Code.

(5) Implement the systemwide policies adopted pursuant to paragraph (2) by January 1, 2021, and implement any campus policies within one year after the adoption of the systemwide policies.

(6) Ensure that each campus Native American Graves Protection and Repatriation Act Implementation Committee implements the policies and procedures adopted pursuant to paragraph (2).

(7) Adopt procedures to support appeals and dispute resolution when a tribe disagrees with a campus determination regarding repatriation or disposition of human remains or cultural items directly to the Office of the President of the University of California or a different oversight committee.

(b) A campus of the University of California may adopt policies to supplement the systemwide policies adopted pursuant to paragraph (2) of subdivision (a), if the campus determines that individual circumstances involving that campus are not adequately addressed in the adopted and approved systemwide policies, in consultation with California Indian tribes. A policy or procedure adopted by a campus pursuant to this subdivision shall not conflict with the approved systemwide policies.

SEC. 14. Section 8026 of the Health and Safety Code is amended to read:

8026. (a) (1) As a condition for using state funds to handle and maintain Native American human remains and cultural items, the Regents of the University of California shall establish a systemwide Native American Graves Protection and Repatriation Act Implementation and Oversight Committee, which shall also be known as the U.C. NAGPRA Committee.

(2) The membership of the committee shall be as follows:

(A) Three voting members of an Indian tribe as described in paragraph (1) of subdivision (c) of Section 8012, meeting the requirements of subdivision (c) of this section.

(B) One voting member of an Indian tribe as described in paragraph (2) of subdivision (c) of Section 8012, meeting the requirements of subdivision (c) of this section, or if none is available, a member of an Indian tribe as described in paragraph (1) of subdivision (c) of Section 8012, meeting the requirements of subdivision (c) of this section.

(C) Four voting members from the University of California. Not fewer than two of these members shall be affiliated with an American Indian or Native American Studies program and each of these members shall meet the requirements of subdivision (d).

(D) One nonvoting member from each campus of the University of California that is subject to the federal Native American Graves Protection

and Repatriation Act (25 U.S.C. Sec. 3001 et seq.). Each of these nonvoting members shall meet the requirements of subdivision (d).

(3) The regents or the regents' designee shall appoint members to the committee upon nomination by the commission.

(b) (1) The Regents of the University of California shall not use state funds for the handling or maintenance of Native American human remains and cultural items unless each campus of the University of California that is subject to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) establishes a campus Native American Graves Protection and Repatriation Act Implementation Committee, which shall also be known as the NAGPRA Committee for that campus.

(2) The membership of the campus committee shall be as follows:

(A) Two voting members of an Indian tribe as described in paragraph (1) of subdivision (c) of Section 8012, meeting the requirements of subdivision (c) of this section.

(B) One voting member of an Indian tribe as described in paragraph (2) of subdivision (c) of Section 8012, meeting the requirements of subdivision (c) of this section, or if none is available, a member of an Indian tribe as described in paragraph (1) of subdivision (c) of Section 8012, meeting the requirements of subdivision (c) of this section.

(C) Three voting members from the University of California. At least one of these members shall be affiliated with an American Indian or Native American Studies program and each of these members shall meet the requirements of subdivision (d).

(3) The regents or the regents' designee shall appoint members to the committees upon nomination by the commission.

(4) All claims for repatriation or claims of any violation of the policies and procedures adopted pursuant to Section 8025 shall be submitted to the campus Native American Graves Protection and Repatriation Act Implementation Committee for determination.

(c) (1) A voting member of a California Indian tribe shall be an elder, spiritual leader, tribal leader, or tribal member, as designated by the governing body of the individual's tribe, with a minimum of five years' prior experience in any of the following:

(A) Repatriation of human remains and cultural items pursuant to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

(B) Cultural resources protection under tribal, state, and federal law.

(C) Consultation with state and federal entities and agencies.

(2) Preference shall be given to members of a California Indian tribe. If no members of a California Indian tribe meeting the qualifications of paragraph (1) are available, members of other tribes may serve.

(d) (1) A representative of the University of California shall meet the following criteria:

(A) Have a graduate degree in either Archaeology, Anthropology, Native American Studies, Ethnic Studies, Law, Sociology, Environmental Studies, or History, with a focus in California.

(B) Have a minimum of five years' experience working in the applicable field of study.

(2) Preference shall be given to members who have demonstrated, through their professional experience, the ability to work in collaboration with Native American tribes successfully on issues related to repatriation or museum collection management.

(3) In the event that candidates from the University of California are not available or do not meet the criteria of paragraph (1), the University of California representative positions may be filled by retired emeriti of the University of California who meet the criteria of paragraph (1).

# FEDERAL CODE

(Pub. L. 95-414, §6, Oct. 5, 1978, 92 Stat. 912.)

EFFECTIVE DATE

Section effective, except for the provisions in subsec. (b) of this section, on the date of transfer of a deed or other instrument under the provisions of section 80k of this title, see section 7 of Pub. L. 95-414, set out as a note under section 80k of this title.

SUBCHAPTER XIII—NATIONAL MUSEUM OF THE AMERICAN INDIAN

§ 80q. Findings

The Congress finds that—

(1) there is no national museum devoted exclusively to the history and art of cultures indigenous to the Americas;

(2) although the Smithsonian Institution sponsors extensive Native American programs, none of its 19 museums, galleries, and major research facilities is devoted exclusively to Native American history and art;

(3) the Heye Museum in New York, New York, one of the largest Native American collections in the world, has more than 1,000,000 art objects and artifacts and a library of 40,000 volumes relating to the archaeology, ethnology, and history of Native American peoples;

(4) the Heye Museum is housed in facilities with a total area of 90,000 square feet, but requires a minimum of 400,000 square feet for exhibition, storage, and scholarly research;

(5) the bringing together of the Heye Museum collection and the Native American collection of the Smithsonian Institution would—

(A) create a national institution with unrivaled capability for exhibition and research;

(B) give all Americans the opportunity to learn of the cultural legacy, historic grandeur, and contemporary culture of Native Americans;

(C) provide facilities for scholarly meetings and the performing arts;

(D) make available curatorial and other learning opportunities for Indians; and

(E) make possible traveling exhibitions to communities throughout the Nation;

(6) by order of the Surgeon General of the Army, approximately 4,000 Indian human remains from battlefields and burial sites were sent to the Army Medical Museum and were later transferred to the Smithsonian Institution;

(7) through archaeological excavations, individual donations, and museum donations, the Smithsonian Institution has acquired approximately 14,000 additional Indian human remains;

(8) the human remains referred to in paragraphs (6) and (7) have long been a matter of concern for many Indian tribes, including Alaska Native Villages, and Native Hawaiian communities which are determined to provide an appropriate resting place for their ancestors;

(9) identification of the origins of such human remains is essential to addressing that concern; and

(10) an extraordinary site on the National Mall in the District of Columbia (U.S. Govern-

ment Reservation No. 6) is reserved for the use of the Smithsonian Institution and is available for construction of the National Museum of the American Indian.

(Pub. L. 101-185, §2, Nov. 28, 1989, 103 Stat. 1336.)

SHORT TITLE OF 2013 AMENDMENT

Pub. L. 113-70, §1, Dec. 26, 2013, 127 Stat. 1208, provided that: “This Act [amending provisions set out as a note under section 80q-5 of this title] may be cited as the ‘Native American Veterans’ Memorial Amendments Act of 2013.’”

SHORT TITLE OF 1996 AMENDMENT

Pub. L. 104-278, §1(a), Oct. 9, 1996, 110 Stat. 3355, provided that: “This Act [enacting section 80q-9a of this title and amending sections 80q-3, 80q-9, and 80q-10 of this title] may be cited as the ‘National Museum of the American Indian Act Amendments of 1996.’”

SHORT TITLE

Pub. L. 101-185, §1, Nov. 28, 1989, 103 Stat. 1336, provided that: “This Act [enacting this subchapter] may be cited as the ‘National Museum of the American Indian Act.’”

§ 80q-1. National Museum of the American Indian

(a) Establishment

There is established, within the Smithsonian Institution, a living memorial to Native Americans and their traditions which shall be known as the “National Museum of the American Indian”.

(b) Purposes

The purposes of the National Museum are to—

(1) advance the study of Native Americans, including the study of language, literature, history, art, anthropology, and life;

(2) collect, preserve, and exhibit Native American objects of artistic, historical, literary, anthropological, and scientific interest;

(3) provide for Native American research and study programs; and

(4) provide for the means of carrying out paragraphs (1), (2), and (3) in the District of Columbia, the State of New York, and other appropriate locations.

(Pub. L. 101-185, §3, Nov. 28, 1989, 103 Stat. 1337.)

§ 80q-2. Authority of Board of Regents to enter into agreement providing for transfer of Heye Foundation assets to Smithsonian Institution

The Board of Regents is authorized to enter into an agreement with the Heye Foundation, to provide for the transfer to the Smithsonian Institution of title to the Heye Foundation assets. The agreement shall—

(1) require that the use of the assets be consistent with section 80q-1(b) of this title; and

(2) be governed by, and construed in accordance with, the law of the State of New York.

The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over any cause of action arising under the agreement.

(Pub. L. 101-185, §4, Nov. 28, 1989, 103 Stat. 1337.)



**§ 80q-3. Board of Trustees of National Museum of the American Indian**

**(a) In general**

The National Museum shall be under a Board of Trustees with the duties, powers, and authority specified in this section.

**(b) General duties and powers**

The Board of Trustees shall—

(1) recommend annual operating budgets for the National Museum to the Board of Regents;

(2) advise and assist the Board of Regents on all matters relating to the administration, operation, maintenance, and preservation of the National Museum;

(3) adopt bylaws for the Board of Trustees;

(4) designate a chairman and other officers from among the members of the Board of trustees;<sup>1</sup> and

(5) report annually to the Board of Regents on the acquisition, disposition, and display of Native American objects and artifacts and on other appropriate matters.

**(c) Sole authority**

Subject to the general policies of the Board of Regents, the Board of Trustees shall have the sole authority to—

(1) lend, exchange, sell, or otherwise dispose of any part of the collections of the National Museum, with the proceeds of such transactions to be used for additions to the collections of the National Museum or additions to the endowment of the National Museum, as the case may be;

(2) purchase, accept, borrow, or otherwise acquire artifacts and other objects for addition to the collections of the National Museum; and

(3) specify criteria for use of the collections of the National Museum for appropriate purposes, including research, evaluation, education, and method of display.

**(d) Authority**

Subject to the general policies of the Board of Regents, the Board of Trustees shall have authority to—

(1) provide for restoration, preservation, and maintenance of the collections of the National Museum;

(2) solicit funds for the National Museum and determine the purposes to which such funds shall be applied; and

(3) approve expenditures from the endowment of the National Museum for any purpose of the Museum.

**(e) Initial appointments to Board of Trustees**

**(1) Membership**

The initial membership of the Board of Trustees shall consist of—

(A) the Secretary of the Smithsonian Institution;

(B) an Assistant Secretary of the Smithsonian Institution appointed by the Board of Regents;

(C) 8 individuals appointed by the Board of Regents; and

(D) 15 individuals, each of whom shall be a member of the board of trustees of the Heye

Museum, appointed by the Board of Regents from a list of nominees recommended by the board of trustees of the Heye Museum.

**(2) Special rule**

At least 7 of the 23 members appointed under subparagraphs (C) and (D) of paragraph (1) shall be Indians.

**(3) Terms**

The trustee appointed under paragraph (1)(B) shall serve at the pleasure of the Board of Regents. The terms of the trustees appointed under subparagraph (C) or (D) of paragraph (1) shall be 3 years, beginning on the date of the transfer of the Heye Foundation assets to the Smithsonian Institution.

**(4) Vacancies**

Any vacancy shall be filled only for the remainder of the term involved. Any vacancy appointment under paragraph (1)(D) shall not be subject to the source and recommendation requirements of that paragraph, but shall be subject to paragraph (2).

**(f) Subsequent appointments to Board of Trustees**

**(1) Membership**

Upon the expiration of the terms under subsection (e), the Board of Trustees shall consist of—

(A) the Secretary of the Smithsonian Institution;

(B) a senior official of the Smithsonian Institution appointed by the Board of Regents; and

(C) 23 individuals appointed by the Board of Regents from a list of nominees recommended by the Board of Trustees.

**(2) Special rule**

A<sup>2</sup> least 12 of the 23 members appointed under paragraph (1)(C) shall be Indians.

**(3) Terms**

The trustee appointed under paragraph (1)(B) shall serve at the pleasure of the Board of Regents. Except as otherwise provided in the next sentence, the terms of members appointed under paragraph (1)(C) shall be 3 years. Of the members first appointed under paragraph (1)(C)—

(A) 7 members, 4 of whom shall be Indians, shall be appointed for a term of one year, as designated at the time of appointment; and

(B) 8 members, 4 of whom shall be Indians, shall be appointed for a term of 2 years, as designated at the time of appointment.

**(4) Vacancies**

Any vacancy shall be filled only for the remainder of the term involved.

**(g) Quorum**

A majority of the members of the Board of Trustees then in office shall constitute a quorum.

**(h) Expenses**

Members of the Board shall be entitled (to the same extent as provided in section 5703 of title

<sup>1</sup> So in original. Probably should be capitalized.

<sup>2</sup> So in original. Probably should be "At".

5 with respect to employees serving intermittently in the Government service) to per diem, travel, and transportation expenses for each day (including travel time) during which they are engaged in the performance of their duties.

(Pub. L. 101-185, § 5, Nov. 28, 1989, 103 Stat. 1337; Pub. L. 104-278, § 2, Oct. 9, 1996, 110 Stat. 3355.)

#### AMENDMENTS

1996—Subsec. (f)(1)(B). Pub. L. 104-278 substituted “a senior official” for “an Assistant Secretary”.

### § 80q-4. Director and staff of National Museum

#### (a) In general

The Secretary of the Smithsonian Institution shall appoint—

(1) a Director who, subject to the policies of the Board of Trustees, shall manage the National Museum; and

(2) other employees of the National Museum, to serve under the Director.

#### (b) Offer of employment to Heye Foundation employees

Each employee of the Heye Museum on the day before the date of the transfer of the Heye Foundation assets to the Smithsonian Institution shall be offered employment with the Smithsonian Institution—

(1) under the usual terms of such employment; and

(2) at a rate of pay not less than the rate applicable to the employee on the day before the date of the transfer.

#### (c) Applicability of certain civil service laws

The Secretary may—

(1) appoint the Director, 2 employees under subsection (a)(2), and the employees under subsection (b) without regard to the provisions of title 5, governing appointments in the competitive service;

(2) fix the pay of the Director and such 2 employees without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates; and

(3) fix the pay of the employees under subsection (b) in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of such title, relating to classification and General Schedule pay rates, subject to subsection (b)(2).

(Pub. L. 101-185, § 6, Nov. 28, 1989, 103 Stat. 1339.)

### § 80q-5. Museum facilities

#### (a) National Museum mall facility

The Board of Regents shall plan, design, and construct a facility on the area bounded by Third Street, Maryland Avenue, Independence Avenue, Fourth Street, and Jefferson Drive, Southwest, in the District of Columbia to house the portion of the National Museum to be located in the District of Columbia. The Board of Regents shall pay not more than  $\frac{2}{3}$  of the total cost of planning, designing, and constructing the facility from funds appropriated to the Board of Regents. The remainder of the costs shall be paid from non-Federal sources.

#### (b) National Museum Heye Center facility

##### (1) Lease of space from GSA

###### (A) Terms

Notwithstanding section 586(a) and (b) of title 40, the Administrator of General Services may lease, at a nominal charge, to the Smithsonian Institution space in the Old United States Custom House at One Bowling Green, New York, New York, to house the portion of the National Museum to be located in the city of New York. The lease shall be subject to such terms as may be mutually agreed upon by the Administrator and the Secretary of the Smithsonian Institution. The term of the lease shall not be less than 99 years.

###### (B) Reimbursement of Federal buildings fund

The Administrator of General Services may reimburse the fund established by section 592 of title 40 for the difference between the amount charged to the Smithsonian Institution for leasing space under this paragraph and the commercial charge under section 586(a) and (b) of title 40 which, but for this paragraph, would apply to the leasing of such space. There are authorized to be appropriated to the Administrator such sums as may be necessary to carry out this subparagraph for fiscal years beginning after September 30, 1990.

##### (2) Construction

###### (A) Museum facility

The Board of Regents shall plan, design, and construct a significant facility for the National Museum in the space leased under paragraph (1).

###### (B) Auditorium and loading dock facility

The Administrator of General Services shall plan, design, and construct an auditorium and loading dock in the Old United States Custom House at One Bowling Green, New York, New York, for the shared use of all the occupants of the building, including the National Museum.

###### (C) Square footage

The facilities to be constructed under this paragraph shall have, in the aggregate, a total square footage of approximately 82,500 square feet.

##### (3) Repairs and alterations

After construction of the facility under paragraph (2)(A), repairs and alterations of the facility shall be the responsibility of the Board of Regents.

##### (4) Reimbursement of GSA

The Board of Regents shall reimburse the Administrator for the Smithsonian Institution's pro rata share of the cost of utilities, maintenance, cleaning, and other services incurred with respect to the space leased under paragraph (1) and the full cost of any repairs or alterations made by the General Services Administration at the request of the Smithsonian Institution with respect to the space.

**(5) Cost sharing****(A) General rules**

The Board of Regents shall pay  $\frac{1}{3}$  of the costs of planning, designing, and constructing the facility under paragraph (2)(A) from funds appropriated to the Board of Regents. The remainder of the costs shall be paid from non-Federal sources.

**(B) Responsibilities of New York City and State**

Of the costs which are required to be paid from non-Federal sources under this paragraph, the city of New York, New York, and the State of New York have each agreed to pay \$8,000,000 or an amount equal to  $\frac{1}{3}$  of the costs of planning, designing, and constructing the facility under paragraph (2)(A), whichever is less. Such payments shall be made to the Board of Regents in accordance with a payment schedule to be agreed upon by the city and State and the Board of Regents.

**(C) Limitation on obligations of Federal funds**

Federal funds may not be obligated for actual construction of a facility under paragraph (2)(A) in a fiscal year until non-Federal sources have paid to the Board of Regents the non-Federal share of such costs which the Board of Regents estimates will be incurred in such year.

**(6) Designation**

The facility to be constructed under paragraph (2)(A) shall be known and designated as the “George Gustav Heye Center of the National Museum of the American Indian”.

**(c) Museum Support Center facility**

The Board of Regents shall plan, design, and construct a facility for the conservation and storage of the collections of the National Museum at the Museum Support Center of the Smithsonian Institution.

**(d) Minimum square footage**

The facilities to be constructed under this section shall have, in the aggregate, a total square footage of at least 400,000 square feet.

**(e) Authority to contract with GSA**

The Board of Regents and the Administrator of General Services may enter into such agreements as may be necessary for planning, designing, and constructing facilities under this section (other than subsection (b)(2)(B)). Under such agreements, the Board of Regents shall transfer to the Administrator, from funds available for planning, designing, and constructing such facilities, such amounts as may be necessary for expenses of the General Services Administration with respect to planning, designing, and constructing such facilities.

**(f) Limitation on obligation of Federal funds**

Notwithstanding any other provision of this subchapter, funds appropriated for carrying out this section may not be obligated for actual construction of any facility under this section until the 60th day after the date on which the Board of Regents transmits to Congress a written anal-

ysis of the total estimated cost of the construction and a cost-sharing plan projecting the amount for Federal appropriations and for non-Federal contributions for the construction on a fiscal year basis.

(Pub. L. 101-185, §7, Nov. 28, 1989, 103 Stat. 1339.)

## CODIFICATION

“Section 586(a) and (b) of title 40” substituted in subsec. (b)(1)(A) for “section 210(j) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 490(j))”, “section 592 of title 40” substituted in subsec. (b)(1)(B) for “section 210(f) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 490(f))”, and “section 586(a) and (b) of title 40” substituted in subsec. (b)(1)(B) for “section 210(j) of such Act” on authority of Pub. L. 107-217, §5(c), Aug. 21, 2002, 116 Stat. 1303, the first section of which enacted Title 40, Public Buildings, Property, and Works.

## NATIONAL NATIVE AMERICAN VETERANS’ MEMORIAL

Pub. L. 103-384, Oct. 22, 1994, 108 Stat. 4067, as amended by Pub. L. 113-70, §2, Dec. 26, 2013, 127 Stat. 1208, provided that:

## “SECTION 1. SHORT TITLE.

“This Act may be cited as the ‘Native American Veterans’ Memorial Establishment Act of 1994’.

## “SEC. 2. FINDINGS.

“The Congress finds the following:

“(1) Native Americans across the Nation—Indians, Native Alaskans, and Native Hawaiians—have a long, proud and distinguished tradition of service in the Armed Forces of the United States.

“(2) Native Americans have historically served in the Armed Forces of the United States in numbers which far exceed their representation in the population of the United States.

“(3) Native American veterans count among themselves a number of Medal of Honor recipients. Their numbers are also conspicuous in the ranks of those who have received other decorations for valor and distinguished service.

“(4) Native Americans have lost their lives in the service of their Nation and in the cause of peace.

“(5) The National Museum of the American Indian was established as a living memorial to Native Americans. Its mission is to advance knowledge and understanding of Native American cultures, including art, history, language, and the contributions Native Americans have made to our society.

“(6) The National Museum of the American Indian is an extraordinary site and an ideal location to establish a National Native American Veterans’ Memorial.

“(7) A National Native American Veterans’ Memorial would further the purposes of the National Museum of the American Indian by giving all Americans the opportunity to learn of the proud and courageous tradition of service of Native Americans in the Armed Forces of the United States.

## “SEC. 3. AUTHORITY TO ESTABLISH MEMORIAL.

“(a) IN GENERAL.—The National Museum of the American Indian (established by the National Museum of the American Indian Act (20 U.S.C. 80q et seq.)), in close consultation with the National Congress of American Indians and other Native American groups, is authorized to construct and maintain a National Native American Veterans’ Memorial (hereafter in this Act referred to as the ‘memorial’).

“(b) LOCATION.—The memorial shall be located at a site determined to be suitable by the Museum on property under the jurisdiction of the Museum on the site described in section 7(a) of such Act (20 U.S.C. 80q-5(a)) (relating to housing the portion of the Museum to be located in the District of Columbia).

“(c) DESIGN AND PLANS.—(1) The National Congress of American Indians and the National Museum of the

American Indian are authorized to hold a competition to select the design of the Memorial. Any design so selected shall be compatible with both the purpose of the Museum, as set forth in section 3(b) of the National Museum of the American Indian Act (20 U.S.C. 80q-1 [(b)]), and with any existing design plans for the Museum's structure and its surroundings.

“(2) Any design so selected shall be subject to the approval of the Board of Regents of the Smithsonian Institution.

“SEC. 4. PAYMENT OF EXPENSES AND USE OF NAME.

“(a) RESPONSIBILITY OF NATIONAL CONGRESS OF AMERICAN INDIANS AND NATIONAL MUSEUM OF THE AMERICAN INDIAN.—The National Congress of American Indians and the National Museum of the American Indian shall be responsible for acceptance of contributions for, and payment of the expenses of, the establishment of the memorial. No Federal funds may be used to pay any expense of the establishment of the memorial.

“(b) USE OF NAME.—Use of the name of the Smithsonian Institution or the National Museum of the American Indian in any material regarding the memorial produced by the National Congress of American Indians, other than in a manner simply describing the location of the memorial, shall be subject to consultation with, and the approval of, the Board of Regents of the Smithsonian Institution.”

**§ 80q-6. Custom House office space and auditorium**

**(a) Repairs and alterations**

The Administrator of General Services shall make such repairs and alterations as may be necessary in the portion of the Old United States Custom House at One Bowling Green, New York, New York, which is not leased to the Board of Regents under section 80q-5(b) of this title and which, as of November 28, 1989, has not been altered.

**(b) Authorization of appropriation**

There is authorized to be appropriated to the Administrator of General Services \$25,000,000 from the fund established pursuant to section 592 of title 40 to carry out this section and section 80q-5(b)(2)(B) of this title.

(Pub. L. 101-185, § 8, Nov. 28, 1989, 103 Stat. 1341.)

CODIFICATION

“Section 592 of title 40” substituted in subsec. (b) for “section 210(f) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 490(f))” on authority of Pub. L. 107-217, § 5(c), Aug. 21, 2002, 116 Stat. 1303, the first section of which enacted Title 40, Public Buildings, Property, and Works.

**§ 80q-7. Audubon Terrace**

**(a) In general**

The Board of Regents shall—

(1) assure that, on the date on which a qualified successor to the Heye Foundation at Audubon Terrace first takes possession of Audubon Terrace, an area of at least 2,000 square feet at that facility is accessible to the public and physically suitable for exhibition of museum objects and for related exhibition activities;

(2) upon written agreement between the Board and any qualified successor, lend objects from the collections of the Smithsonian Institution to the successor for exhibition at Audubon Terrace; and

(3) upon written agreement between the Board and any qualified successor, provide training, scholarship, technical, and other assistance (other than operating funds) with respect to the area referred to in paragraph (1) for the purposes described in that paragraph.

**(b) Determination of charges**

Any charge by the Board of Regents for activities pursuant to agreements under paragraph (2) or (3) of subsection (a) shall be determined according to the ability of the successor to pay.

**(c) Definition**

As used in this section, the terms “qualified successor to the Heye Foundation at Audubon Terrace”, “qualified successor”, and,<sup>1</sup> “successor” mean an organization described in section 501(c)(3) of title 26, and exempt from tax under section 501(a) of title 26, that, as determined by the Board of Regents—

(1) is a successor occupant to the Heye Foundation at Audubon Terrace, 3753 Broadway, New York, New York;

(2) is qualified to operate the area referred to in paragraph (1) for the purposes described in that paragraph; and

(3) is committed to making a good faith effort to respond to community cultural interests in such operation.

(Pub. L. 101-185, § 9, Nov. 28, 1989, 103 Stat. 1342.)

**§ 80q-8. Board of Regents functions with respect to certain agreements and programs**

**(a) Priority to be given to Indian organizations with respect to certain agreements**

In entering into agreements with museums and other educational and cultural organizations to—

(1) lend Native American artifacts and objects from any collection of the Smithsonian Institution;

(2) sponsor or coordinate traveling exhibitions of artifacts and objects; or

(3) provide training or technical assistance;

the Board of Regents shall give priority to agreements with Indian organizations, including Indian tribes, museums, cultural centers, educational institutions, libraries, and archives. Such agreements may provide that loans or services to such organizations may be furnished by the Smithsonian Institution at minimal or no cost.

**(b) Indian programs**

The Board of Regents may establish—

(1) programs to serve Indian tribes and communities; and

(2) in cooperation with educational institutions, including tribally controlled colleges or universities (as defined in section 1801(a) of title 25), programs to enhance the opportunities for Indians in the areas of museum studies, management, and research.

**(c) Indian Museum Management Fellowships**

The Board of Regents shall establish an Indian Museum Management Fellowship program to provide stipend support to Indians for training in museum development and management.

<sup>1</sup> So in original. The comma probably should not appear.

**(d) Authorization of appropriations**

There is authorized to be appropriated \$2,000,000 for each fiscal year, beginning with fiscal year 1991, to carry out subsections (b) and (c).

(Pub. L. 101-185, §10, Nov. 28, 1989, 103 Stat. 1342; Pub. L. 105-244, title IX, §901(d), Oct. 7, 1998, 112 Stat. 1828; Pub. L. 110-315, title IX, §941(k)(2)(B), Aug. 14, 2008, 122 Stat. 3465.)

## AMENDMENTS

2008—Subsec. (b)(2). Pub. L. 110-315 substituted “tribally controlled colleges or universities (as defined in section 1801(a) of title 25)” for “tribally controlled community colleges (as defined in section 1801 of title 25)”.

1998—Subsec. (b)(2). Pub. L. 105-244 made technical amendment to reference in original act which appears in text as reference to section 1801 of title 25.

## EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105-244 effective Oct. 1, 1998, except as otherwise provided in Pub. L. 105-244, see section 3 of Pub. L. 105-244, set out as a note under section 1001 of this title.

**§ 80q-9. Inventory, identification, and return of Indian human remains and Indian funerary objects in possession of Smithsonian Institution****(a) Inventory and identification**

(1) The Secretary of the Smithsonian Institution, in consultation and cooperation with traditional Indian religious leaders and government officials of Indian tribes, shall—

(A) inventory the Indian human remains and Indian funerary objects in the possession or control of the Smithsonian Institution; and

(B) using the best available scientific and historical documentation, identify the origins of such remains and objects.

(2) The inventory made by the Secretary of the Smithsonian Institution under paragraph (1) shall be completed not later than June 1, 1998.

(3) For purposes of this subsection, the term “inventory” means a simple, itemized list that, to the extent practicable, identifies, based upon available information held by the Smithsonian Institution, the geographic and cultural affiliation of the remains and objects referred to in paragraph (1).

**(b) Notice in case of identification of tribal origin**

If the tribal origin of any Indian human remains or Indian funerary object is identified by a preponderance of the evidence, the Secretary shall so notify any affected Indian tribe at the earliest opportunity.

**(c) Return of Indian human remains and associated Indian funerary objects**

If any Indian human remains are identified by a preponderance of the evidence as those of a particular individual or as those of an individual culturally affiliated with a particular Indian tribe, the Secretary, upon the request of the descendants of such individual or of the Indian tribe shall expeditiously return such remains (together with any associated funerary objects) to the descendants or tribe, as the case may be.

**(d) Return of Indian funerary objects not associated with Indian human remains**

If any Indian funerary object not associated with Indian human remains is identified by a preponderance of the evidence as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe, the Secretary, upon the request of the Indian tribe, shall expeditiously return such object to the tribe.

**(e) Interpretation**

Nothing in this section shall be interpreted as—

(1) limiting the authority of the Smithsonian Institution to return or repatriate Indian human remains or Indian funerary objects to Indian tribes or individuals; or

(2) delaying actions on pending repatriation requests, denying or otherwise affecting access to the courts, or limiting any procedural or substantive rights which may otherwise be secured to Indian tribes or individuals.

**(f) Authorization of appropriations**

There is authorized to be appropriated \$1,000,000 for fiscal year 1991 and such sums as may be necessary for succeeding fiscal years to carry out this section and section 80q-9a of this title.

(Pub. L. 101-185, §11, Nov. 28, 1989, 103 Stat. 1343; Pub. L. 104-278, §3, Oct. 9, 1996, 110 Stat. 3355.)

## AMENDMENTS

1996—Subsec. (a). Pub. L. 104-278, §3(a), designated existing provisions as par. (1), added pars. (2) and (3), and redesignated former pars. (1) and (2) as subpars. (A) and (B), respectively, of par. (1).

Subsec. (f). Pub. L. 104-278, §3(b), inserted “and section 80q-9a of this title” after “to carry out this section”.

**§ 80q-9a. Summary and repatriation of unassociated funerary objects, sacred objects, and cultural patrimony****(a) Summary**

Not later than December 31, 1996, the Secretary of the Smithsonian Institution shall provide a written summary that contains a summary of unassociated funerary objects, sacred objects, and objects of cultural patrimony (as those terms are defined in subparagraphs (B), (C), and (D), respectively, of section 3001(3) of title 25, based upon available information held by the Smithsonian Institution. The summary required under this section shall include, at a minimum, the information required under section 3004 of title 25.

**(b) Repatriation**

Where cultural affiliation of Native American unassociated funerary objects, sacred objects, and objects of cultural patrimony has been established in the summary prepared pursuant to subsection (a), or where a requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion,

then the Smithsonian Institution shall expeditiously return such unassociated funerary object, sacred object, or object of cultural patrimony where—

(1) the requesting party is the direct lineal descendant of an individual who owned the unassociated funerary object or sacred object;

(2) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the Indian tribe or Native Hawaiian organization; or

(3) the requesting Indian tribe or Native Hawaiian organization can show that the unassociated funerary object or sacred object was owned or controlled by a member thereof, provided that in the case where an unassociated funerary object or sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object.

**(c) Standard of repatriation**

If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony pursuant to this subchapter and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Smithsonian Institution did not have the right of possession, then the Smithsonian Institution shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

**(d) Museum obligation**

Any museum of the Smithsonian Institution which repatriates any item in good faith pursuant to this subchapter shall not be liable for claims by an aggrieved party or for claims of fiduciary duty, public trust, or violations of applicable law that are inconsistent with the provisions of this subchapter.

**(e) Statutory construction**

Nothing in this section may be construed to prevent the Secretary of the Smithsonian Institution, with respect to any museum of the Smithsonian Institution, from making an inventory or preparing a written summary or carrying out the repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony in a manner that exceeds the requirements of this subchapter.

**(f) “Native Hawaiian organization” defined**

For purposes of this section, the term “Native Hawaiian organization” has the meaning provided that term in section 3001(11) of title 25.

(Pub. L. 101-185, §11A, as added Pub. L. 104-278, §4, Oct. 9, 1996, 110 Stat. 3355.)

**§ 80q-10. Special committee to review inventory, identification, and return of Indian human remains and Indian funerary objects**

**(a) Establishment; duties**

Not later than 120 days after November 28, 1989, the Secretary of the Smithsonian Institution shall appoint a special committee to mon-

itor and review the inventory, identification, and return of Indian human remains and Indian funerary objects under section 80q-9 of this title and unassociated funerary objects, sacred objects, and objects of cultural patrimony under section 80q-9a of this title. In carrying out its duties, the committee shall—

(1) with respect to the inventory and identification, ensure fair and objective consideration and assessment of all relevant evidence;

(2) upon the request of any affected party or otherwise, review any finding relating to the origin or the return of such remains or objects;

(3) facilitate the resolution of any dispute that may arise between Indian tribes with respect to the return of such remains or objects; and

(4) perform such other related functions as the Secretary may assign.

**(b) Membership**

The committee shall consist of 7 members, of whom—

(1) 4 members shall be appointed from among nominations submitted by Indian tribes and organizations;

(2) at least 2 members shall be traditional Indian religious leaders; and

(3) the Secretary shall designate one member as chairman.

The Secretary may not appoint to the committee any individual who is an officer or employee of the Government (including the Smithsonian Institution) or any individual who is otherwise affiliated with the Smithsonian Institution.

**(c) Access**

The Secretary shall ensure that the members of the committee have full and free access to the Indian human remains and Indian funerary objects subject to section 80q-9 of this title and to any related evidence, including scientific and historical documents.

**(d) Pay and expenses of members**

Members of the committee shall—

(1) be paid the daily equivalent of the annual rate of basic pay payable for grade GS-18 of the General schedule under section 5332 of title 5; and

(2) be entitled (to the same extent as provided in section 5703 of such title, with respect to employees serving intermittently in the Government service) to per diem, travel, and transportation expenses;

for each day (including travel time) during which they are engaged in the performance of their duties.

**(e) Rules and administrative support**

The Secretary shall prescribe regulations and provide administrative support for the committee.

**(f) Report and termination**

At the conclusion of the work of the committee, the Secretary shall be so<sup>1</sup> certify by report to the Congress. The committee shall cease

<sup>1</sup> So in original. Probably should be “shall so”.

to exist 120 days after the submission of the report.

**(g) Nonapplicability of Federal Advisory Committee Act**

The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the committee.

**(h) Authorization of appropriations**

There is authorized to be appropriated \$250,000 for fiscal year 1991 and such sums as may be necessary for succeeding fiscal years to carry out this section.

(Pub. L. 101-185, §12, Nov. 28, 1989, 103 Stat. 1344; Pub. L. 104-278, §5, Oct. 9, 1996, 110 Stat. 3357.)

REFERENCES IN TEXT

The Federal Advisory Committee Act, referred to in subsec. (g), is Pub. L. 92-463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

AMENDMENTS

1996—Subsec. (a). Pub. L. 104-278, §5(1), in first sentence, inserted “and unassociated funerary objects, sacred objects, and objects of cultural patrimony under section 80q-9a of this title” before period.

Subsec. (b). Pub. L. 104-278, §5(2)(A), substituted “7 members” for “five members” in introductory provisions.

Subsec. (b)(1). Pub. L. 104-278, §5(2)(B), substituted “4 members” for “three members” and struck out “and” at end.

Subsec. (b)(2), (3). Pub. L. 104-278, §5(2)(C), (D), added par. (2) and redesignated former par. (2) as (3).

REFERENCES IN OTHER LAWS TO GS-16, 17, OR 18 PAY RATES

References in laws to the rates of pay for GS-16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, §101(c)(1)] of Pub. L. 101-509, set out in a note under section 5376 of Title 5.

**§ 80q-11. Inventory, identification, and return of Native Hawaiian human remains and Native Hawaiian funerary objects in possession of Smithsonian Institution**

**(a) In general**

The Secretary of the Smithsonian Institution shall—

(1) in conjunction with the inventory and identification under section 80q-9 of this title, inventory and identify the Native Hawaiian human remains and Native Hawaiian funerary objects in the possession of the Smithsonian Institution;

(2) enter into an agreement with appropriate Native Hawaiian organizations with expertise in Native Hawaiian affairs (which may include the Office of Hawaiian Affairs and the Malama I Na Kupuna O Hawai'i Nei) to provide for the return of such human remains and<sup>1</sup> funerary objects; and

(3) to the greatest extent practicable, apply, with respect to such human remains and funerary objects, the principles and procedures set forth in sections 80q-9 and 80q-10 of this title with respect to the Indian human re-

mains and Indian funerary objects in the possession of the Smithsonian Institution.

**(b) Definitions**

As used in this section—

(1) the term “Malama I Na Kupuna O Hawai'i Nei” means the nonprofit, Native Hawaiian organization, incorporated under the laws of the State of Hawaii by that name on April 17, 1989, the purpose of which is to provide guidance and expertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues; and

(2) the term “Office of Hawaiian Affairs” means the Office of Hawaiian Affairs established by the Constitution of the State of Hawaii.

(Pub. L. 101-185, §13, Nov. 28, 1989, 103 Stat. 1345.)

**§ 80q-12. Grants by Secretary of the Interior to assist Indian tribes with respect to agreements for return of Indian human remains and Indian funerary objects**

**(a) In general**

The Secretary of the Interior may make grants to Indian tribes to assist such tribes in reaching and carrying out agreements with—

(1) the Board of Regents for the return of Indian human remains and Indian funerary objects under section 80q-9 of this title; and

(2) other Federal and non-Federal entities for additional returns of Indian human remains and Indian funerary objects.

**(b) Authorization of appropriations**

There is authorized to be appropriated \$1,000,000 for fiscal year 1991 and such sums as may be necessary for succeeding fiscal years for grants under subsection (a).

(Pub. L. 101-185, §14, Nov. 28, 1989, 103 Stat. 1345.)

**§ 80q-13. Grants by Secretary of the Interior to assist Indian organizations with respect to renovation and repair of museum facilities and exhibit facilities**

**(a) Grants**

The Secretary of the Interior may make grants to Indian organizations, including Indian tribes, museums, cultural centers, educational institutions, libraries, and archives, for renovation and repair of museum facilities and exhibit facilities to enable such organizations to exhibit objects and artifacts on loan from the collections of the Smithsonian Institution or from other sources. Such grants may be made only from the Tribal Museum Endowment Fund.

**(b) Indian organization contribution**

In making grants under subsection (a), the Secretary may require the organization receiving the grant to contribute, in cash or in kind, not more than 50 percent of the cost of the renovation or repair involved. Such contribution may be derived from any source other than the Tribal Museum Endowment Fund.

**(c) Tribal Museum Endowment Fund**

**(1) Establishment**

There is established in the Treasury a fund, to be known as the “Tribal Museum Endow-

<sup>1</sup> So in original. Probably should be “and”.

ment Fund” (hereinafter in this subsection referred to as the “Fund”) for the purpose of making grants under subsection (a). The Fund shall consist of (A) amounts deposited and credited under paragraph (2), (B) obligations obtained under paragraph (3), and (C) amounts appropriated pursuant to authorization under paragraph (5).

**(2) Deposits and credits**

The Secretary of the Interior is authorized to accept contributions to the Fund from non-Federal sources and shall deposit such contributions in the Fund. The Secretary of the Treasury shall credit to the Fund the interest on, and the proceeds from sale and redemption of, obligations held in the Fund.

**(3) Investments**

The Secretary of the Treasury may invest any portion of the Fund in interest-bearing obligations of the United States. Such obligations may be acquired on original issue or in the open market and may be held to maturity or sold in the open market. In making investments for the Fund, the Secretary of the Treasury shall consult the Secretary of the Interior with respect to maturities, purchases, and sales, taking into consideration the balance necessary to meet current grant requirements.

**(4) Expenditures and capital preservation**

Subject to appropriation, amounts derived from interest shall be available for expenditure from the Fund. The capital of the Fund shall not be available for expenditure.

**(5) Authorization of appropriations**

There is authorized to be appropriated to the Fund \$2,000,000 for each fiscal year beginning with fiscal year 1992.

(Pub. L. 101-185, §15, Nov. 28, 1989, 103 Stat. 1345.)

CODIFICATION

Subsec. (d) of this section, which required the Secretary of the Interior, in consultation with the Secretary of the Treasury, to submit an annual report to Congress on activities under this section, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104-66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, page 108 of House Document No. 103-7.

NATIVE AMERICAN CULTURAL CENTER IN OKLAHOMA CITY, OKLAHOMA; FEASIBILITY STUDY AND REPORT

Pub. L. 102-196, Dec. 9, 1991, 105 Stat. 1620, directed Secretary of the Interior to conduct a study and make a report to Congress on the feasibility of establishing a Native American Cultural Center in Oklahoma City, Oklahoma, and made appropriations for that purpose.

**§ 80q-14. Definitions**

As used in this subchapter—

(1) the term “Board of Regents” means the Board of Regents of the Smithsonian Institution;

(2) the term “Board of Trustees” means the Board of Trustees of the National Museum of the American Indian;

(3) the term “burial site” means a natural or prepared physical location, whether below, on, or above the surface of the earth, into which,

as a part of a death rite or ceremony of a culture, individual human remains are deposited;

(4) the term “funerary object” means an object that, as part of a death rite or ceremony of a culture, is intentionally placed with individual human remains, either at the time of burial or later;

(5) the term “Heye Foundation assets” means the collections, endowment, and all other property of the Heye Foundation (other than the interest of the Heye Foundation in Audubon Terrace) described in the Memorandum of Understanding between the Smithsonian Institution and the Heye Foundation, dated May 8, 1989, and the schedules attached to such memorandum;

(6) the term “Heye Museum” means the Museum of the American Indian, Heye Foundation;

(7) the term “Indian” means a member of an Indian tribe;

(8) the term “Indian tribe” has the meaning given that term in section 5304 of title 25;

(9) the term “National Museum” means the National Museum of the American Indian established by section 80q-1 of this title;

(10) the term “Native American” means an individual of a tribe, people, or culture that is indigenous to the Americas and such term includes a Native Hawaiian; and

(11) the term “Native Hawaiian” means a member or descendant of the aboriginal people who, before 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii.

(Pub. L. 101-185, §16, Nov. 28, 1989, 103 Stat. 1346.)

**§ 80q-15. Authorization of appropriations**

**(a) Funding**

There is authorized to be appropriated to the Board of Regents to carry out this subchapter (other than as provided in sections 80q-5(b)(1)(B), 80q-6, 80q-8, 80q-9, 80q-10, 80q-12, and 80q-13(c)(5) of this title)—

(1) \$10,000,000 for fiscal year 1990; and

(2) such sums as may be necessary for each succeeding fiscal year.

**(b) Period of availability**

Funds appropriated under subsection (a) shall remain available without fiscal year limitation for any period prior to the availability of the facilities to be constructed under section 80q-5 of this title for administrative and planning expenses and for the care and custody of the collections of the National Museum.

(Pub. L. 101-185, §17, Nov. 28, 1989, 103 Stat. 1347.)

SUBCHAPTER XIV—NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY AND CULTURE

**§ 80r. Findings**

Congress finds that—

(1) since its founding, the United States has grown into a symbol of democracy and freedom around the world, and the legacy of African Americans is rooted in the very fabric of the democracy and freedom of the United States;



(1) preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages;

(2) allow exceptions to teacher certification requirements for Federal programs, and programs funded in whole or in part by the Federal Government, for instruction in Native American languages when such teacher certification requirements hinder the employment of qualified teachers who teach in Native American languages, and to encourage State and territorial governments to make similar exceptions;

(3) encourage and support the use of Native American languages as a medium of instruction in order to encourage and support—

(A) Native American language survival,

(B) educational opportunity,

(C) increased student success and performance,

(D) increased student awareness and knowledge of their culture and history, and

(E) increased student and community pride;

(4) encourage State and local education programs to work with Native American parents, educators, Indian tribes, and other Native American governing bodies in the implementation of programs to put this policy into effect;

(5) recognize the right of Indian tribes and other Native American governing bodies to use the Native American languages as a medium of instruction in all schools funded by the Secretary of the Interior;

(6) fully recognize the inherent right of Indian tribes and other Native American governing bodies, States, territories, and possessions of the United States to take action on, and give official status to, their Native American languages for the purpose of conducting their own business;

(7) support the granting of comparable proficiency achieved through course work in a Native American language the same academic credit as comparable proficiency achieved through course work in a foreign language, with recognition of such Native American language proficiency by institutions of higher education as fulfilling foreign language entrance or degree requirements; and

(8) encourage all institutions of elementary, secondary and higher education, where appropriate, to include Native American languages in the curriculum in the same manner as foreign languages and to grant proficiency in Native American languages the same full academic credit as proficiency in foreign languages.

(Pub. L. 101-477, title I, §104, Oct. 30, 1990, 104 Stat. 1155.)

**§ 2904. No restrictions**

The right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs.

(Pub. L. 101-477, title I, §105, Oct. 30, 1990, 104 Stat. 1155.)

**§ 2905. Evaluations**

(a) The President shall direct the heads of the various Federal departments, agencies, and instrumentalities to—

(1) evaluate their policies and procedures in consultation with Indian tribes and other Native American governing bodies as well as traditional leaders and educators in order to determine and implement changes needed to bring the policies and procedures into compliance with the provisions of this chapter;

(2) give the greatest effect possible in making such evaluations, absent a clear specific Federal statutory requirement to the contrary, to the policies and procedures which will give the broadest effect to the provisions of this chapter; and

(3) evaluate the laws which they administer and make recommendations to the President on amendments needed to bring such laws into compliance with the provisions of this chapter.

(b) By no later than the date that is 1 year after October 30, 1990, the President shall submit to the Congress a report containing recommendations for amendments to Federal laws that are needed to bring such laws into compliance with the provisions of this chapter.

(Pub. L. 101-477, title I, §106, Oct. 30, 1990, 104 Stat. 1156.)

**§ 2906. Use of English**

Nothing in this chapter shall be construed as precluding the use of Federal funds to teach English to Native Americans.

(Pub. L. 101-477, title I, §107, Oct. 30, 1990, 104 Stat. 1156.)

**CHAPTER 32—NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION**

Sec.	
3001.	Definitions.
3002.	Ownership.
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3004.	Summary for unassociated funerary objects, sacred objects, and cultural patrimony.
3005.	Repatriation.
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3010.	Special relationship between Federal Government and Indian tribes and Native Hawaiian organizations.
3011.	Regulations.
3012.	Authorization of appropriations.
3013.	Enforcement.

**§ 3001. Definitions**

For purposes of this chapter, the term—

(1) “burial site” means any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited.

(2) “cultural affiliation” means that there is a relationship of shared group identity which can be reasonably traced historically or

prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

(3) “cultural items” means human remains and—

(A) “associated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and associated funerary objects are presently in the possession or control of a Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.<sup>1</sup>

(B) “unassociated funerary objects” which shall mean objects that, as a part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, where the remains are not in the possession or control of the Federal agency or museum and the objects can be identified by a preponderance of the evidence as related to specific individuals or families or to known human remains or, by a preponderance of the evidence, as having been removed from a specific burial site of an individual culturally affiliated with a particular Indian tribe,

(C) “sacred objects” which shall mean specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents, and

(D) “cultural patrimony” which shall mean an object having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by any individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group.

(4) “Federal agency” means any department, agency, or instrumentality of the United States. Such term does not include the Smithsonian Institution.

(5) “Federal lands” means any land other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native Corporations and groups organized pursuant to the Alaska Native Claims Settlement Act of 1971 [43 U.S.C. 1601 et seq.].

(6) “Hui Malama I Na Kupuna O Hawai'i Nei” means the nonprofit, Native Hawaiian organization incorporated under the laws of the State of Hawaii by that name on April 17, 1989, for the purpose of providing guidance and ex-

pertise in decisions dealing with Native Hawaiian cultural issues, particularly burial issues.

(7) “Indian tribe” means any tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.]), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(8) “museum” means any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American cultural items. Such term does not include the Smithsonian Institution or any other Federal agency.

(9) “Native American” means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

(10) “Native Hawaiian” means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

(11) “Native Hawaiian organization” means any organization which—

(A) serves and represents the interests of Native Hawaiians,

(B) has as a primary and stated purpose the provision of services to Native Hawaiians, and

(C) has expertise in Native Hawaiian Affairs, and

shall include the Office of Hawaiian Affairs and Hui Malama I Na Kupuna O Hawai'i Nei.

(12) “Office of Hawaiian Affairs” means the Office of Hawaiian Affairs established by the constitution of the State of Hawaii.

(13) “right of possession” means possession obtained with the voluntary consent of an individual or group that had authority of alienation. The original acquisition of a Native American unassociated funerary object, sacred object or object of cultural patrimony from an Indian tribe or Native Hawaiian organization with the voluntary consent of an individual or group with authority to alienate such object is deemed to give right of possession of that object, unless the phrase so defined would, as applied in section 3005(c) of this title, result in a Fifth Amendment taking by the United States as determined by the United States Court of Federal Claims pursuant to 28 U.S.C. 1491 in which event the “right of possession” shall be as provided under otherwise applicable property law. The original acquisition of Native American human remains and associated funerary objects which were excavated, exhumed, or otherwise obtained with full knowledge and consent of the next of kin or the official governing body of the appropriate culturally affiliated Indian tribe or Native Hawaiian organization is deemed to give right of possession to those remains.

(14) “Secretary” means the Secretary of the Interior.

(15) “tribal land” means—

(A) all lands within the exterior boundaries of any Indian reservation;

<sup>1</sup> So in original. The period probably should be a comma.

(B) all dependent Indian communities;<sup>2</sup>

(C) any lands administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act, 1920, and section 4 of Public Law 86-3.

(Pub. L. 101-601, §2, Nov. 16, 1990, 104 Stat. 3048; Pub. L. 102-572, title IX, §902(b)(1), Oct. 29, 1992, 106 Stat. 4516.)

### Editorial Notes

#### REFERENCES IN TEXT

This chapter, referred to in text, was in the original “this Act”, meaning Pub. L. 101-601, Nov. 16, 1990, 104 Stat. 3048, known as the Native American Graves Protection and Repatriation Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out below and Tables.

The Alaska Native Claims Settlement Act of 1971, referred to in par. (5), probably means the Alaska Native Claims Settlement Act. See note below.

The Alaska Native Claims Settlement Act, referred to in par. (7), is Pub. L. 92-203, Dec. 18, 1971, 85 Stat. 688, as amended, which is classified generally to chapter 33 (§1601 et seq.) of Title 43, Public Lands. For complete classification of this Act to the Code, see Short Title note set out under section 1601 of Title 43 and Tables.

The Hawaiian Homes Commission Act, 1920, referred to in par. (15)(C), is act July 9, 1921, ch. 42, 42 Stat. 108, as amended, which was classified generally to sections 691 to 718 of Title 48, Territories and Insular Possessions, and was omitted from the Code.

Section 4 of Public Law 86-3, referred to in par. (15)(C), is section 4 of Pub. L. 86-3, which is set out as a note preceding section 491 of Title 48.

#### AMENDMENTS

1992—Par. (13). Pub. L. 102-572 substituted “United States Court of Federal Claims” for “United States Claims Court”.

### Statutory Notes and Related Subsidiaries

#### EFFECTIVE DATE OF 1992 AMENDMENT

Amendment by Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

#### SHORT TITLE

Pub. L. 101-601, §1, Nov. 16, 1990, 104 Stat. 3048, provided that: “This Act [enacting this chapter and section 1170 of Title 18, Crimes and Criminal Procedure] may be cited as the ‘Native American Graves Protection and Repatriation Act’.”

### § 3002. Ownership

#### (a) Native American human remains and objects

The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed)—

(1) in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

(2) in any case in which such lineal descendants cannot be ascertained, and in the case of unassociated funerary objects, sacred objects, and objects of cultural patrimony—

(A) in the Indian tribe or Native Hawaiian organization on whose tribal land such objects or remains were discovered;

(B) in the Indian tribe or Native Hawaiian organization which has the closest cultural affiliation with such remains or objects and which, upon notice, states a claim for such remains or objects; or

(C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe—

(1) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects, or

(2) 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 than the tribe or organization specified in paragraph (1), in the Indian tribe that has the strongest demonstrated relationship, if upon notice, such tribe states a claim for such remains or objects.

#### (b) Unclaimed Native American human remains and objects

Native American cultural items not claimed under subsection (a) shall be disposed of in accordance with regulations promulgated by the Secretary in consultation with the review committee established under section 3006 of this title, Native American groups, representatives of museums and the scientific community.

#### (c) Intentional excavation and removal of Native American human remains and objects

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 if—

(1) such items are excavated or removed pursuant to a permit issued under section 470cc of title 16 which shall be consistent with this chapter;

(2) such items are excavated or removed after consultation with or, in the case of tribal lands, consent of the appropriate (if any) Indian tribe or Native Hawaiian organization;

(3) the ownership and right of control of the disposition of such items shall be as provided in subsections (a) and (b); and

(4) proof of consultation or consent under paragraph (2) is shown.

#### (d) Inadvertent discovery of Native American remains and objects

(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 head of any other agency or instrumentality of the United States, having primary management authority with respect to Federal lands and the appropriate Indian tribe or Native Hawaiian organization with respect to tribal lands, if known or readily ascertainable, and, in the case of lands that have been selected by an Alaska Native Corporation or group organized pursuant to

<sup>2</sup> So in original. Probably should be followed by “and”.

(A) which identifies each Native American human remains or associated funerary objects and the circumstances surrounding its acquisition;

(B) which lists the human remains or associated funerary objects that are clearly identifiable as to tribal origin; and

(C) which lists the Native American human remains and associated funerary objects that are not clearly identifiable as being culturally affiliated with that Indian tribe or Native Hawaiian organization, but which, given the totality of circumstances surrounding acquisition of the remains or objects, are determined by a reasonable belief to be remains or objects culturally affiliated with the Indian tribe or Native Hawaiian organization.

(3) A copy of each notice provided under paragraph (1) shall be sent to the Secretary who shall publish each notice in the Federal Register.

**(e) Inventory**

For the purposes of this section, the term “inventory” means a simple itemized list that summarizes the information called for by this section.

(Pub. L. 101-601, § 5, Nov. 16, 1990, 104 Stat. 3052.)

**Editorial Notes**

REFERENCES IN TEXT

This chapter, referred to in subsec. (b)(2), was in the original “this Act”, meaning Pub. L. 101-601, Nov. 16, 1990, 104 Stat. 3048, known as the Native American Graves Protection and Repatriation Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 3001 of this title and Tables.

**§ 3004. Summary for unassociated funerary objects, sacred objects, and cultural patrimony**

**(a) In general**

Each Federal agency or museum which has possession or control over holdings or collections of Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written summary of such objects based upon available information held by such agency or museum. The summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition and cultural affiliation, where readily ascertainable.

**(b) Requirements**

(1) The summary required under subsection (a) shall be—

(A) in lieu of an object-by-object inventory;

(B) followed by consultation with tribal government and Native Hawaiian organization officials and traditional religious leaders; and

(C) completed by not later than the date that is 3 years after November 16, 1990.

(2) Upon request, Indian Tribes<sup>1</sup> and Native Hawaiian organizations shall have access to records, catalogues, relevant studies or other pertinent data for the limited purposes of deter-

mining the geographic origin, cultural affiliation, and basic facts surrounding acquisition and accession of Native American objects subject to this section. Such information shall be provided in a reasonable manner to be agreed upon by all parties.

(Pub. L. 101-601, § 6, Nov. 16, 1990, 104 Stat. 3053.)

**§ 3005. Repatriation**

**(a) Repatriation of Native American human remains and objects possessed or controlled by Federal agencies and museums**

(1) If, pursuant to section 3003 of this title, the cultural affiliation of Native American human remains and associated funerary objects with a particular Indian tribe or Native Hawaiian organization is established, then the Federal agency or museum, upon the request of a known lineal descendant of the Native American or of the tribe or organization and pursuant to subsections (b) and (e) of this section, shall expeditiously return such remains and associated funerary objects.

(2) If, pursuant to section 3004 of this title, the cultural affiliation with a particular Indian tribe or Native Hawaiian organization is shown with respect to unassociated funerary objects, sacred objects or objects of cultural patrimony, then the Federal agency or museum, upon the request of the Indian tribe or Native Hawaiian organization and pursuant to subsections (b), (c) and (e) of this section, shall expeditiously return such objects.

(3) The return of cultural items covered by this chapter shall be in consultation with the requesting lineal descendant or tribe or organization to determine the place and manner of delivery of such items.

(4) Where cultural affiliation of Native American human remains and funerary objects has not been established in an inventory prepared pursuant to section 3003 of this title, or the summary pursuant to section 3004 of this title, or where Native American human remains and funerary objects are not included upon any such inventory, then, upon request and pursuant to subsections (b) and (e) and, in the case of unassociated funerary objects, subsection (c), such Native American human remains and funerary objects shall be expeditiously returned where the requesting Indian tribe or Native Hawaiian organization can show cultural affiliation by a preponderance of the evidence based upon geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion.

(5) Upon request and pursuant to subsections (b), (c) and (e), sacred objects and objects of cultural patrimony shall be expeditiously returned where—

(A) the requesting party is the direct lineal descendant of an individual who owned the sacred object;

(B) the requesting Indian tribe or Native Hawaiian organization can show that the object was owned or controlled by the tribe or organization; or

(C) the requesting Indian tribe or Native Hawaiian organization can show that the sacred

<sup>1</sup> So in original. Probably should not be capitalized.

object was owned or controlled by a member thereof, provided that in the case where a sacred object was owned by a member thereof, there are no identifiable lineal descendants of said member or the lineal descendants, upon notice, have failed to make a claim for the object under this chapter.

**(b) Scientific study**

If the lineal descendant, Indian tribe, or Native Hawaiian organization requests the return of culturally affiliated Native American cultural items, the Federal agency or museum shall expeditiously return such items unless such items are indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States. Such items shall be returned by no later than 90 days after the date on which the scientific study is completed.

**(c) Standard of repatriation**

If a known lineal descendant or an Indian tribe or Native Hawaiian organization requests the return of Native American unassociated funerary objects, sacred objects or objects of cultural patrimony pursuant to this chapter and presents evidence which, if standing alone before the introduction of evidence to the contrary, would support a finding that the Federal agency or museum did not have the right of possession, then such agency or museum shall return such objects unless it can overcome such inference and prove that it has a right of possession to the objects.

**(d) Sharing of information by Federal agencies and museums**

Any Federal agency or museum shall share what information it does possess regarding the object in question with the known lineal descendant, Indian tribe, or Native Hawaiian organization to assist in making a claim under this section.

**(e) Competing claims**

Where there are multiple requests for repatriation of any cultural item and, after complying with the requirements of this chapter, the Federal agency or museum cannot clearly determine which requesting party is the most appropriate claimant, the agency or museum may retain such item until the requesting parties agree upon its disposition or the dispute is otherwise resolved pursuant to the provisions of this chapter or by a court of competent jurisdiction.

**(f) Museum obligation**

Any museum which repatriates any item in good faith pursuant to this chapter shall not be liable for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state<sup>1</sup> law that are inconsistent with the provisions of this chapter.

(Pub. L. 101-601, §7, Nov. 16, 1990, 104 Stat. 3054.)

**Editorial Notes**

REFERENCES IN TEXT

This chapter, referred to in subsecs. (a)(3), (5)(C), (c), (e), and (f), was in the original "this Act", meaning

<sup>1</sup> So in original. Probably should be capitalized.

Pub. L. 101-601, Nov. 16, 1990, 104 Stat. 3048, known as the Native American Graves Protection and Repatriation Act, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 3001 of this title and Tables.

**§ 3006. Review committee**

**(a) Establishment**

Within 120 days after November 16, 1990, the Secretary shall establish a committee to monitor and review the implementation of the inventory and identification process and repatriation activities required under sections 3003, 3004 and 3005 of this title.

**(b) Membership**

(1) The Committee<sup>1</sup> established under subsection (a) shall be composed of 7 members,

(A) 3 of whom shall be appointed by the Secretary from nominations submitted by Indian tribes, Native Hawaiian organizations, and traditional Native American religious leaders with at least 2 of such persons being traditional Indian religious leaders;

(B) 3 of whom shall be appointed by the Secretary from nominations submitted by national museum organizations and scientific organizations; and

(C) 1 who shall be appointed by the Secretary from a list of persons developed and consented to by all of the members appointed pursuant to subparagraphs (A) and (B).

(2) The Secretary may not appoint Federal officers or employees to the committee.

(3) In the event vacancies shall occur, such vacancies shall be filled by the Secretary in the same manner as the original appointment within 90 days of the occurrence of such vacancy.

(4) Members of the committee established under subsection (a) shall serve without pay, but shall be reimbursed at a rate equal to the daily rate for GS-18 of the General Schedule for each day (including travel time) for which the member is actually engaged in committee business. Each member shall receive travel expenses, including per diem in lieu of subsistence, in accordance with sections 5702 and 5703 of title 5.

**(c) Responsibilities**

The committee established under subsection (a) shall be responsible for—

(1) designating one of the members of the committee as chairman;

(2) monitoring the inventory and identification process conducted under sections 3003 and 3004 of this title to ensure a fair, objective consideration and assessment of all available relevant information and evidence;

(3) upon the request of any affected party, reviewing and making findings related to—

(A) the identity or cultural affiliation of cultural items, or

(B) the return of such items;

(4) facilitating the resolution of any disputes among Indian tribes, Native Hawaiian organizations, or lineal descendants and Federal agencies or museums relating to the return of such items including convening the parties to the dispute if deemed desirable;

<sup>1</sup> So in original. Probably should not be capitalized.

# CALIFORNIA CODE

**State of California**

**GOVERNMENT CODE**

**Section 8318**

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8318. (a) For purposes of this section, “state agency” means a department or agency of the state, the California State University, the University of California, and the Judicial Council of California.

(b) The Regents, on behalf of the University of California, are requested to designate, and every other state agency with significant interaction with tribal issues, peoples, or lands shall designate, one or more liaisons for the purpose of engaging in consultation with California Native American tribes on the contact list maintained by the Native American Heritage Commission pursuant to paragraph (2) of subdivision (c) of Section 8012 of the Health and Safety Code and educating the agency on topics relevant to the state’s relationship with those tribes.

(Added by Stats. 2020, Ch. 167, Sec. 2. (AB 275) Effective January 1, 2021.)

**State of California**

**GOVERNMENT CODE**

**Section 65352.3**

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65352.3. (a) (1) Prior to the adoption or any amendment of a city or county's general plan, proposed on or after March 1, 2005, the city or county shall conduct consultations with California Native American tribes that are on the contact list maintained by the Native American Heritage Commission for the purpose of preserving or mitigating impacts to places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code that are located within the city or county's jurisdiction.

(2) From the date on which a California Native American tribe is contacted by a city or county pursuant to this subdivision, the tribe has 90 days in which to request a consultation, unless a shorter timeframe has been agreed to by that tribe.

(b) Consistent with the guidelines developed and adopted by the Office of Planning and Research pursuant to Section 65040.2, the city or county shall protect the confidentiality of information concerning the specific identity, location, character, and use of those places, features, and objects.

(Amended by Stats. 2005, Ch. 670, Sec. 3. Effective October 7, 2005.)



**State of California**

**GOVERNMENT CODE**

**Section 65352.4**

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65352.4. For purposes of Section 65351, 65352.3, and 65562.5, “consultation” means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party’s sovereignty. Consultation shall also recognize the tribes’ potential needs for confidentiality with respect to places that have traditional tribal cultural significance.

(Added by Stats. 2004, Ch. 905, Sec. 8. Effective January 1, 2005.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8010**

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8010. This chapter shall be known, and may be cited as the California Native American Graves Protection and Repatriation Act of 2001.

(Added by Stats. 2001, Ch. 818, Sec. 1. Effective January 1, 2002.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8011**

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8011. It is the intent of the Legislature to do all of the following:

(a) Provide a seamless and consistent state policy to ensure that all California Indian human remains and cultural items be treated with dignity and respect.

(b) Apply the state's repatriation policy consistently with the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), which was enacted in 1990, as subsequently amended, while considering the unique history of California towards California Indian tribes and the canon of construction regarding federal Indian law with respect to laws must be interpreted as the Indians would have understood them, be construed liberally in favor of the Indians, resolve all ambiguities in the law in favor of the Indians, and preserve tribal property rights and sovereignty unless a contrary intent is clearly stated.

(c) Facilitate the implementation of the federal Native American Graves Protection and Repatriation Act with respect to publicly funded agencies and museums in California.

(d) Encourage voluntary disclosure and return of Native American human remains and cultural items by a private institution or museum.

(e) Provide a process whereby lineal descendants and culturally or geographically affiliated California Indian tribes that file repatriation claims for Native American human remains and cultural items under the Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) or under this chapter with California state agencies and museums may request assistance from the commission in ensuring that state agencies and museums are responding to those claims in a timely manner and in facilitating the resolution of disputes regarding those claims.

(f) Provide a process whereby California Indian tribes that are not federally recognized may file claims with agencies and museums for repatriation of human remains and cultural items.

(Amended by Stats. 2020, Ch. 167, Sec. 3. (AB 275) Effective January 1, 2021.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8012**

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8012. Terms used in this chapter have the same meaning as defined in the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), and as interpreted by federal regulations, except that the following terms have the following meaning:

(a) “Agency” means a division, department, bureau, commission, board, council, city, county, city and county, district, or other political subdivision of the state.

(b) “Burial site” means, except for cemeteries and graveyards protected or recognized under another state law, a natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which human remains were deposited as a part of the death rites or ceremonies of a culture.

(c) “California Indian tribe” means a tribe located in California to which either of the following applies:

(1) It meets the definition of Indian tribe under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

(2) It is not recognized by the federal government, but is a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of consultation pursuant to Section 65352.3 of the Government Code.

(d) “Commission” means the Native American Heritage Commission established pursuant to Section 5097.91 of the Public Resources Code.

(e) “Consultation” means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values and, where feasible, achieving agreement. Consultation between agencies or museums and California Indian tribes shall be conducted in a manner that is respectful of tribal sovereignty. Consultation also shall recognize the tribes’ potential need for confidentiality with respect to tribal traditional knowledge and all tribal information shared during the consultation.

(f) “Control” means having ownership of Native American human remains and cultural items sufficient to lawfully permit an agency or museum to treat the object as part of its collection for purposes of this chapter, whether or not the human remains and cultural items are in the physical custody of the agency or museum. Human remains and cultural items on loan to an agency or museum from another person, agency, or museum shall be deemed to be in the control of the lender.

(g) “Cultural items” shall have the same meaning as defined in Section 3001 of Title 25 of the United States Code, as it read on January 1, 2020, except that it shall mean only those items that originated in California and are subject to the definition

of reasonable, as defined in subdivision (*l*). An item is not precluded from being a cultural item solely because of its age.

(h) “Inventory” means an itemized list that summarizes the collection of Native American human remains and associated funerary objects in the possession or control of an agency or museum. This itemized list may include the inventory list required under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

(i) “Museum” means an agency, museum, person, or entity, including a higher educational institution, that receives state funds. For purposes of this subdivision, “receives state funds” means that the museum has received funds after January 1, 2002, from a state agency through a grant, loan, or contract, other than a procurement contract, or other arrangement by which a state agency makes available aid in the form of funds. State funds provided for any purpose to a larger entity of which the museum is a part of are considered as the museum receiving those funds for the purposes of this subdivision.

(j) “Possession” means having physical custody of Native American human remains and cultural items with a sufficient legal interest to lawfully treat the human remains and cultural items as part of a collection. “Possession” does not include human remains and cultural items over which the agency has control but that are currently on loan to another person or entity.

(k) “Preponderance of the evidence” means that the party’s evidence on a fact indicates that it is more likely than not that the fact is true. Tribal traditional knowledge alone may be sufficient to meet this standard. If there is conflicting evidence, tribal traditional knowledge shall be provided deference.

(*l*) “Reasonable” means fair, proper, rational, and suitable under the circumstances. Tribal traditional knowledge can and should be used to establish reasonable conclusions with respect to determining cultural affiliation and identifying cultural items.

(m) “State aboriginal territory” means lands identified as aboriginally occupied by one or more California Indian tribes. State aboriginal territory may be recognized by any of the following: consultation with California Indian tribes, treaties, including those agreed to but not ratified, a final judgment of the federal Indian Claims Commission or the United States Court of Claims, an act of the United States Congress, or an executive order.

(n) “State cultural affiliation” means that there is a reasonable relationship of shared group identity that can reasonably be traced historically or precontact between members of a present-day California Indian tribe and an identifiable earlier tribe or group. Cultural affiliation shall be established based on one or more of the following:

- (1) Geography.
- (2) Kinship.
- (3) Biology.
- (4) Archaeology.
- (5) Linguistics.
- (6) Folklore.
- (7) Oral tradition.

(8) Historical evidence.

(9) Tribal traditional knowledge.

(10) Other information or expert opinion that reasonably leads to that conclusion.

(o) “Summary” means a document that summarizes the collection of unassociated funerary objects, sacred objects, or objects of cultural patrimony in the possession or control of an agency or museum. This document may include the summary prepared under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

(p) “Tribal traditional knowledge” means knowledge systems embedded and often safeguarded in the traditional culture of California Indian tribes and lineal descendants, including, but not limited to, knowledge about ancestral territories, cultural affiliation, traditional cultural properties and landscapes, culturescapes, traditional ceremonial and funerary practices, lifeways, customs and traditions, climate, material culture, and subsistence. Tribal traditional knowledge is expert opinion.

(Repealed and added by Stats. 2020, Ch. 167, Sec. 5. (AB 275) Effective January 1, 2021.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8013**

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8013. (a) On or before January 1, 2021, the commission shall develop a list of all California Indian tribes and their respective state aboriginal territories. The commission shall notify in writing all agencies, museums, and California Indian tribes that the commission maintains that list. This list is solely for the purpose of the repatriation of Native American tribal human remains and cultural items.

(b) (1) On or before January 1, 2022, each agency or museum that has possession or control of California Native American human remains and associated funerary objects shall complete an inventory, or update a preliminary inventory, of all these remains and associated funerary objects and, to the extent possible based on all information possessed by the agency or museum, do all of the following:

(A) Identify the geographical location, cultural affiliation, aboriginal territory, and the circumstances surrounding their acquisition.

(B) Consult, prior to new or additional inventory work being conducted, with affiliated California Indian tribes on any protocols to be used in the inventory process, including, but not limited to, all of the following:

(i) Minimizing handling.

(ii) Using a lot approach with a minimum number of individuals set at one.

(iii) Identifying human remains and associated funerary objects, burial site, or ceremonial items with tribal expertise receiving deference.

(C) (i) List in the preliminary inventory the human remains and associated funerary objects that are clearly identifiable as to state cultural affiliation with California Indian tribes. These human remains and cultural items shall be listed first to expedite the repatriation of these items.

(ii) Tribal traditional knowledge shall be used to establish state cultural affiliation and identify associated funerary objects. The museum also shall record any identifications of cultural items that are made by tribal representatives. The identifications may include broad categorical identifications, including, but not limited to, the identification of everything from a burial site as a funerary object.

(D) List the human remains and associated funerary objects that are not clearly identifiable by state cultural affiliation but that, given the totality of circumstances surrounding their acquisition and characteristics, including the unique circumstances of California history, are determined by a reasonable belief to be human remains and associated funerary objects with a state cultural affiliation with one or more California Indian tribes. Consult with California Indian tribes reasonably believed to be culturally affiliated with the items, during the compilation of the preliminary inventory as part of the determination of affiliation. If the agency or museum cannot determine which

California Indian tribes are believed to be culturally affiliated with the items, tribes that may be culturally affiliated with the items, in consultation with the commission, shall be consulted during the compilation of the preliminary inventory. The consultation shall be with California Indian tribes whose state aboriginal territory includes the area from which the human remains and associated funerary objects were removed.

(E) List the human remains and associated funerary objects that are not identifiable by state cultural affiliation, but, given the totality of the circumstances, including the unique circumstances of California history, are determined by a reasonable belief to have been removed from an area identified as the state aboriginal territory of one or more California Indian tribes.

(2) The museum or agency shall engage in consultation with California Indian tribes as part of the completion of the inventory required by this subdivision. The commission may assist with the identification of California Indian tribes, but the agency or museum bears the obligation to contact and consult with the California Indian tribes.

(F) Provide the original and any updated catalogues to the consulting California Indian tribes.

(c) (1) On or before January 1, 2022, an agency or museum that has possession or control over a California Indian tribe's unassociated funerary objects, sacred objects, or objects of cultural patrimony shall provide a written preliminary summary of the objects based upon available information held by the agency or museum. Because it may not be clear whether Native American objects are cultural items, all museum collections of Native American ethnographic or archaeological objects shall be included in the preliminary summary. The preliminary summary shall describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition, state cultural affiliation, and state aboriginal territory, where reasonably ascertainable. The preliminary summary shall be in lieu of an object-by-object inventory to limit unnecessary handling and damage to the items. Each agency or museum, following preparation of a preliminary summary pursuant to this subdivision, shall consult with California Indian tribes and tribally authorized government officials and tribally authorized traditional religious leaders.

(2) The agency or museum shall engage in consultation with California Indian tribes as part of the completion of the preliminary summary required pursuant to this subdivision and shall defer to tribal recommendations for appropriate handling and treatment. The agency or museum also shall record any identifications of cultural items that are made by tribal representatives. The identifications may include broad categorical identifications, including, but not limited to, the identification of regalia objects as sacred objects or the identification of everything from a specific site as a sacred object because that site is a sacred site. The commission may assist with the identification of California Indian tribes, but the agency or museum bears the obligation to contact and consult with California Indian tribes.

(d) Within 90 days of completing the preliminary inventory and summary specified in subdivisions (b) and (c), the agency or museum shall provide a copy of the preliminary inventory and summary to the commission. The commission shall, in



turn, publish notices of completion of preliminary inventories and summaries on its internet website for 30 days, and make the preliminary inventories and summaries available to any requesting potentially culturally affiliated California Indian tribe.

(e) The inventory and summary specified in subdivisions (a) and (b) shall be completed by all agencies and museums that have possession or control of Native American human remains or cultural items, regardless of whether the agency or museum is also subject to the requirements of the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.). Any inventory or summary, or any portion of an inventory or summary, that has been created to meet the requirements of the Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) may be used to meet the requirements of this chapter, if appropriate.

(f) An agency or museum that has completed an inventory and summary as required by the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) shall be deemed to be in compliance with this section provided that the agency or museum provides the commission with both of the following:

- (1) A copy of the inventory and summary.
- (2) Preliminary inventories and summaries to comply with subdivisions (b) and (c).

(g) (1) Upon the request of a lineal descendent or California Indian tribe, an agency or museum shall supply additional available documentation to supplement the information required by subdivisions (b) and (c). This section does not authorize the initiation or completion of any academic, museum, or scientific study of human remains or cultural items.

(2) For purposes of this subdivision, “documentation” means a summary of agency or museum records, including inventories or catalogs, relevant studies, or other pertinent data for the limited purpose of determining the geographical origin, cultural affiliation, and basic facts surrounding the acquisition and accession of human remains and cultural items subject to this section.

(h) If the agency or museum determines that it does not have in its possession or control any human remains or cultural items, the agency or museum shall, in lieu of an inventory or summary, state that finding in a letter to the commission at the commission’s request.

(i) Following completion of the preliminary inventory and summary specified in subdivisions (b) and (c), each agency or museum shall update its inventory and summary within 90 days of receiving possession or control of human remains or cultural items that were not included in the preliminary inventory and summary. Upon completion, the agency or museum shall provide a copy of its updated inventory and summary to the commission.

(j) Once an agency or museum has provided a copy of its preliminary inventory and summary to the commission, the agency or museum shall consult with California Indian tribes that may be culturally affiliated with the human remains and cultural items. The commission may assist with the identification of tribes, but the agency or

museum bears the obligation to contact and consult with California Indian tribes. The consultation process shall include all of the following:

(1) Preliminary inventories and summaries shall be reviewed by culturally affiliated and potentially culturally affiliated California Indian tribes, who shall have the ability to concur or disagree with the information in the preliminary inventory or summary. Tribal concurrence, disagreement, or nonresponse shall be noted on the preliminary inventory or summary by the commission at the end of the 30-day review period. If a consulting California Indian tribe disagrees with the contents of the preliminary inventory or summary, the agency or museum shall either revise the preliminary inventory or summary to correct the disputed information or the commission shall offer to initiate dispute resolution as described in Section 8016.

(2) The status of the inventory or summary shall be changed from preliminary to final by the commission once all responding California Indian tribes listed in the inventory or summary concur with the information in the inventory or summary.

(3) An inventory or summary that has been finalized may be moved back to preliminary status at the request of a consulting California Indian tribe if inaccuracies are found in the finalized inventory or summary prior to repatriation.

(4) The designation of an inventory or summary as preliminary or final is intended to reflect whether consulting California Indian tribes agree with the decisions and identifications of the agencies and museums who are preparing these documents. An inventory or summary does not need to be marked as final for a California Indian tribe to place a claim. Nothing in this section shall be construed to mean that an agency or museum may delay the repatriation of items in a final inventory or summary.

(5) Commission staff shall note a summary of all claims and the claim status on the commission's internet website. The claim status may be pending, disputed, or accepted.

(6) Commission staff shall note the repatriation status on the commission's internet website. The repatriation status may be in process or completed.

(7) A claim may be submitted at any time and does not need to be resubmitted.

(8) A claim may be withdrawn at any time prior to transfer of control.

(Amended by Stats. 2020, Ch. 167, Sec. 6. (AB 275) Effective January 1, 2021.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8014**

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8014. (a) A lineal descendent claiming a relationship with, and requesting return of, Native American human remains or cultural items listed in the inventory or summary of an agency or museum, or that requests the return of human remains or cultural items that are not listed in the inventory or summary of an agency or museum but that are believed to be in the possession or control of the agency or museum, shall do both of the following:

(1) File a claim for the human remains and cultural items with the commission and with the agency or museum believed to have possession or control.

(2) Demonstrate that the claimant can trace their ancestry directly and without interruption by means of the traditional kinship or village system of the appropriate California Indian tribe, or by the common law system of descendency, to a known individual whose human remains or cultural items are being claimed.

(b) A California Indian tribe claiming a relationship, state cultural affiliation, or state aboriginal territory with, and requesting return of, human remains or cultural items listed in the inventory or summary of an agency or museum, or that requests the return of human remains or cultural items that are not listed in the inventory or summary of an agency or museum but that are believed to be in the possession or control of the agency or museum, shall do both of the following:

(1) File a claim for the human remains and cultural items with the commission and with the agency or museum believed to have possession or control.

(2) Demonstrate one or both of the following:

(A) There is a relationship of shared group identity that can reasonably be traced historically or precontact with an earlier identifiable group from which the human remains or cultural items originated and the claiming California Indian tribe. Evidence of state cultural affiliation need not be provided when reasonably established by a finding published in the Federal Register, in compliance with the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

(B) The human remains or cultural items were removed from the state aboriginal territory of the claiming California Indian tribe.

(Repealed and added by Stats. 2020, Ch. 167, Sec. 8. (AB 275) Effective January 1, 2021.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8015**

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8015. (a) Upon receiving a written request for repatriation of an item on the inventory, the commission shall forward a copy of the request to the agency or museum in possession of the item, if the criteria specified in subdivision (a) of Section 8016 have been met. At this time, the commission shall also publish the request for repatriation on its internet website.

(b) This section does not prohibit a requesting lineal descendent or California Indian tribe, an agency, or a museum from coordinating directly with each other on repatriation. The commission shall receive, for their records, copies of all repatriation agreements and shall have the power to enforce these agreements.

(Amended by Stats. 2020, Ch. 167, Sec. 9. (AB 275) Effective January 1, 2021.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8016**

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8016. (a) An agency or museum receiving a repatriation request pursuant to Section 8014 shall repatriate human remains and cultural items if all of the following criteria have been met:

(1) The requested human remains or cultural items meet the definitions of human remains or cultural items that are subject to inventory and summary requirements under subdivisions (b) and (c) of Section 8013.

(2) The lineal descendent, state aboriginal territory, or state cultural affiliation of the human remains or cultural items is established as required under this section.

(3) The agency or museum is unable to present evidence that, if standing alone before the introduction of evidence to the contrary, would support a finding that the agency or museum has a right of possession to the requested cultural items.

(4) None of the exemptions listed in Section 10.10(c) of Title 43 of the Federal Code of Regulations apply. Scientific research shall be concluded within a reasonable period of time.

(5) All other applicable requirements of regulations adopted under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), contained in Part 10 of Title 43 of the Code of Federal Regulations, have been met, including, but not limited to, the completion of a summary and inventory, consultation with California Indian tribes, publication of notices of inventory completion and notices of intent to repatriate in the Federal Register, and, prior to disposition of culturally unidentifiable human remains to a tribe not recognized by the federal government, obtainment of the concurrence of the United States Department of the Interior.

(b) If there are no other requests for particular human remains or cultural items and there is no unresolved objection pursuant to paragraph (2) of subdivision (d), the agency or museum shall repatriate the requested human remains or cultural items to the requesting California Indian tribe or group within 90 days after posting the request for repatriation on the commission's internet website, unless a notice of inventory completion or notice of intent to repatriate also is required under the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.). If the federal notice period extends beyond the 90-day period, the agency or museum shall repatriate the requested human remains or cultural items to the requesting California Indian tribe or group within 30 days following the completion of the federal notice period. Repatriation deadlines specified in this subdivision may be waived upon agreement of all parties.

(c) Within 30 days after notice has been provided by the commission, the museum or agency shall have the right to file with the commission any objection to the requested repatriation, based on its good faith belief that the requested human remains or cultural items are not culturally affiliated with the requesting California Indian tribe, have not been removed from the California Indian tribe's state aboriginal territory, or are not subject to repatriation under this chapter.

(d) If there is more than one request for repatriation for the same item, if there is a dispute between the requesting party and the agency or museum, if there is a dispute as to the contents of an inventory or summary, or if a dispute arises in relation to the repatriation process, the commission shall notify the affected parties of this fact and the state cultural affiliation or state aboriginal territory of the item in question shall be determined in accordance with this subdivision.

(1) The disputing parties shall submit documentation describing the nature of the dispute, in accordance with standard mediation practices and the commission's procedures, to the commission, which shall, in turn, forward the documentation to the opposing party or parties. The disputing parties shall meet within 30 days of the date of the mailing of the documentation with the goal of settling the dispute.

(2) If, after meeting, the parties are unable to settle the dispute, the commission, or a certified mediator who has the qualifications and experience appropriate to the dispute's circumstances and has been designated by the commission, shall mediate the dispute. If the museum or agency is subject to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), any party also may request the assistance of the federal Native American Graves Protection and Repatriation Review Committee in resolving the dispute.

(3) Each disputing party shall submit complaints and supporting evidence to the commission or designated mediator and the other opposing parties detailing their positions on the disputed issues in accordance with standard mediation practices and the commission's mediation procedures. Each party shall have 20 days from the date the complaint and supporting evidence were mailed to respond to the complaints. All responses shall be submitted to the opposing party or parties and the commission or designated mediator.

(4) The commission or designated mediator shall review all complaints, responses, and supporting evidence submitted. Within 20 days after the date of submission of responses, the commission or designated mediator shall hold a mediation session and the parties shall come to a resolution or the mediator shall render a written decision within 7 days of the mediation session.

(5) When the disposition of human remains or cultural items is disputed, the party in possession of the human remains or cultural items shall retain possession until the mediation process is completed. Transfer or loan of human remains or cultural items shall not occur until the dispute is resolved.

(6) Deference shall be provided to tribal traditional knowledge, oral histories, documentation, and testimonies relative to other relevant categories of evidence.

(7) If the parties are unable to resolve a dispute through mediation, the dispute shall be resolved by the commission. The determination of the commission shall be

deemed to constitute a final administrative remedy. Any party to the dispute seeking a review of the determination of the commission is entitled to file an action in the superior court seeking an independent judgment on the record as to whether the commission's decision is reasonable. The independent review shall not constitute a de novo review of a decision by the commission, but shall be limited to a review of the evidence on the record. Petitions for review shall be filed with the court not later than 30 days after the final decision of the commission.

(8) No later than June 30, 2021, the commission shall develop and adopt mediation procedures that will recognize the need for mediators with qualifications and experience appropriate to a dispute's circumstances. Dispute procedures may incorporate aspects of restorative justice practices.

(Amended by Stats. 2020, Ch. 167, Sec. 10. (AB 275) Effective January 1, 2021.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8017**

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8017. If there is a committee or group of California Indian tribes authorized by their respective tribal governments to accept repatriation of human remains and cultural items originating from their state aboriginal territory or culturally affiliated with those tribal governments, the items may be repatriated to those groups.

(Amended by Stats. 2020, Ch. 167, Sec. 11. (AB 275) Effective January 1, 2021.)



**State of California**

**HEALTH AND SAFETY CODE**

**Section 8018**

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8018. An agency or museum that repatriates human remains and cultural items in good faith pursuant to this chapter is not liable for claims by an aggrieved party or for claims of breach of a fiduciary duty or the public trust or of violation of state law that are inconsistent with this chapter. No action shall be brought on behalf of the state or any other entity or person for damages or for injunctive relief for a claim of improper disposition of human remains or cultural items if the agency or museum has complied with the provisions of this chapter.

(Added by Stats. 2001, Ch. 818, Sec. 1. Effective January 1, 2002.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8019**

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8019. Nothing in this section shall be construed to prohibit the governing body of a California Indian tribe or group authorized by Section 8017 from expressly relinquishing control over any human remains or control or title to any cultural item.

(Added by Stats. 2001, Ch. 818, Sec. 1. Effective January 1, 2002.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8020**

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8020. Notwithstanding any other provision of law, and upon the request of any party or an intervenor, the commission or designated mediator may close part of a mediation session to the public if the commission or designated mediator finds that information required at the mediation session may include identification of the specific location of a burial site, human remains and cultural items or that information necessary for a determination regarding repatriation may compromise or interfere with any religious practice or custom.

(Added by Stats. 2001, Ch. 818, Sec. 1. Effective January 1, 2002.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8021**

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8021. The filing of an appeal by either party automatically stays an order of the commission or a designated mediator on repatriation of human remains and cultural items.

(Added by Stats. 2001, Ch. 818, Sec. 1. Effective January 1, 2002.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8024**

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8024. For purposes of this article, “consultation” has the same meaning as defined in Section 65352.4 of the Government Code.

(Added by Stats. 2020, Ch. 110, Sec. 44. (SB 820) Effective September 18, 2020.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8025**

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8025. (a) In order to better implement the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) and this chapter, the Regents of the University of California shall not use state funds for the handling or maintenance of Native American human remains and cultural items unless the regents do all the following:

(1) Facilitate the establishment, composition, and function of systemwide and campus-level committees, established pursuant to Section 8026, with respect to reviewing and advising the university on matters related to the university's implementation of legal requirements to increase repatriation outcomes or dispositions of Native American human remains and cultural items to California Indian tribes.

(2) (A) Adopt and implement systemwide policies regarding the respectful and culturally appropriate treatment of Native American human remains and cultural items while in the possession of a University of California campus or museum, including policies regarding research requests and testing of any identified or potential Native American human remains or cultural items.

(B) Adopt and implement clear and transparent policies and procedures on the systemwide requirements for submitting, processing, and implementing claims for the repatriation of human remains and cultural items, demonstrating cultural affiliation, notification to tribes of human remains and cultural items deemed culturally affiliated and unidentifiable and from whose state aboriginal territory the items were removed, but that are not subject to a repatriation claim, dispute resolution regarding repatriation claims, and any other relevant subject governed by the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), Part 10 (commencing with Section 10.1) of Subtitle A of Title 43 of the Code of Federal Regulations, and this chapter.

(C) Adopt or amend, in consultation with California Indian tribes, systemwide University of California museum collection management policies to explicitly provide for the deaccession of collections containing Native American human remains and cultural items to effect the timely and respectful return of those items pursuant to valid claims submitted by a California Indian tribe.

(D) Adopt systemwide University of California policies and procedures for the identification and disposition of culturally unidentifiable human remains and cultural items, as required by the federal Native American Graves Protection and Repatriation Regulations (43 C.F.R. Part 10). Those policies shall include updates to existing inventories in order to determine whether cultural affiliation can be determined, or to confirm that the human remains are "culturally unidentifiable" as defined in

paragraph (2) of subsection (e) of Section 10.2 of Part 10 of Title 43 of the Code of Federal Regulations. These policies also shall include updates to existing inventories or summaries to identify cultural items that may not have been identified in the original inventories or summaries because traditional tribal knowledge was not incorporated into the identification process.

(3) Develop all policies and procedures pursuant to paragraph (2) in consultation with California Indian tribes on the contact list maintained by the Native American Heritage Commission pursuant to Section 8013. Each California Indian tribe appearing on the contact list shall be invited to consult on the proposed policies and procedures. For purposes of this section, "consultation" has the same meaning as defined in Section 65352.4 of the Government Code.

(4) Timely submit the policies and procedures adopted pursuant to paragraph (2) to the commission, so they may review and comment upon them pursuant to subdivision (p) of Section 5097.94 of the Public Resources Code.

(5) Implement the systemwide policies adopted pursuant to paragraph (2) by January 1, 2021, and implement any campus policies within one year after the adoption of the systemwide policies.

(6) Ensure that each campus Native American Graves Protection and Repatriation Act Implementation Committee implements the policies and procedures adopted pursuant to paragraph (2).

(7) Adopt procedures to support appeals and dispute resolution when a tribe disagrees with a campus determination regarding repatriation or disposition of human remains or cultural items directly to the Office of the President of the University of California or a different oversight committee.

(b) A campus of the University of California may adopt policies to supplement the systemwide policies adopted pursuant to paragraph (2) of subdivision (a), if the campus determines that individual circumstances involving that campus are not adequately addressed in the adopted and approved systemwide policies, in consultation with California Indian tribes. A policy or procedure adopted by a campus pursuant to this subdivision shall not conflict with the approved systemwide policies.

(Amended by Stats. 2020, Ch. 167, Sec. 13. (AB 275) Effective January 1, 2021.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8026**

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8026. (a) (1) As a condition for using state funds to handle and maintain Native American human remains and cultural items, the Regents of the University of California shall establish a systemwide Native American Graves Protection and Repatriation Act Implementation and Oversight Committee, which shall also be known as the U.C. NAGPRA Committee.

(2) The membership of the committee shall be as follows:

(A) Three voting members of an Indian tribe as described in paragraph (1) of subdivision (c) of Section 8012, meeting the requirements of subdivision (c) of this section.

(B) One voting member of an Indian tribe as described in paragraph (2) of subdivision (c) of Section 8012, meeting the requirements of subdivision (c) of this section, or if none is available, a member of an Indian tribe as described in paragraph (1) of subdivision (c) of Section 8012, meeting the requirements of subdivision (c) of this section.

(C) Four voting members from the University of California. Not fewer than two of these members shall be affiliated with an American Indian or Native American Studies program and each of these members shall meet the requirements of subdivision (d).

(D) One nonvoting member from each campus of the University of California that is subject to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.). Each of these nonvoting members shall meet the requirements of subdivision (d).

(3) The regents or the regents' designee shall appoint members to the committee upon nomination by the commission.

(b) (1) The Regents of the University of California shall not use state funds for the handling or maintenance of Native American human remains and cultural items unless each campus of the University of California that is subject to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) establishes a campus Native American Graves Protection and Repatriation Act Implementation Committee, which shall also be known as the NAGPRA Committee for that campus.

(2) The membership of the campus committee shall be as follows:

(A) Two voting members of an Indian tribe as described in paragraph (1) of subdivision (c) of Section 8012, meeting the requirements of subdivision (c) of this section.



(B) One voting member of an Indian tribe as described in paragraph (2) of subdivision (c) of Section 8012, meeting the requirements of subdivision (c) of this section, or if none is available, a member of an Indian tribe as described in paragraph (1) of subdivision (c) of Section 8012, meeting the requirements of subdivision (c) of this section.

(C) Three voting members from the University of California. At least one of these members shall be affiliated with an American Indian or Native American Studies program and each of these members shall meet the requirements of subdivision (d).

(3) The regents or the regents' designee shall appoint members to the committees upon nomination by the commission.

(4) All claims for repatriation or claims of any violation of the policies and procedures adopted pursuant to Section 8025 shall be submitted to the campus Native American Graves Protection and Repatriation Act Implementation Committee for determination.

(c) (1) A voting member of a California Indian tribe shall be an elder, spiritual leader, tribal leader, or tribal member, as designated by the governing body of the individual's tribe, with a minimum of five years' prior experience in any of the following:

(A) Repatriation of human remains and cultural items pursuant to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

(B) Cultural resources protection under tribal, state, and federal law.

(C) Consultation with state and federal entities and agencies.

(2) Preference shall be given to members of a California Indian tribe. If no members of a California Indian tribe meeting the qualifications of paragraph (1) are available, members of other tribes may serve.

(d) (1) A representative of the University of California shall meet the following criteria:

(A) Have a graduate degree in either Archaeology, Anthropology, Native American Studies, Ethnic Studies, Law, Sociology, Environmental Studies, or History, with a focus in California.

(B) Have a minimum of five years' experience working in the applicable field of study.

(2) Preference shall be given to members who have demonstrated, through their professional experience, the ability to work in collaboration with Native American tribes successfully on issues related to repatriation or museum collection management.

(3) In the event that candidates from the University of California are not available or do not meet the criteria of paragraph (1), the University of California representative positions may be filled by retired emeriti of the University of California who meet the criteria of paragraph (1).

(Amended by Stats. 2020, Ch. 167, Sec. 14. (AB 275) Effective January 1, 2021.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8027**

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8027. The Regents of the University of California may delegate responsibilities pursuant to this article to the President of the University of California or another person determined to be appropriate.

(Added by Stats. 2018, Ch. 823, Sec. 3. (AB 2836) Effective January 1, 2019.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8028**

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8028. The California State Auditor, in accordance with Chapter 6.5 (commencing with Section 8543) of Division 1 of Title 2 of the Government Code, shall conduct an audit commencing in the year 2019 and again in 2021 regarding the University of California's compliance with the federal Native American Graves Protection Repatriation Act (25 U.S.C. Sec. 3001 et seq.) and this chapter. The State Auditor shall report its findings to the Legislature and to all other appropriate entities.

(Added by Stats. 2018, Ch. 823, Sec. 3. (AB 2836) Effective January 1, 2019.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8028.5**

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8028.5. The provisions of this article are severable. If any provision of this article or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(Added by Stats. 2018, Ch. 823, Sec. 3. (AB 2836) Effective January 1, 2019.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8029**

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8029. (a) Any agency or museum that fails to comply with the requirements of this chapter may be assessed a civil penalty by the commission, not to exceed twenty thousand dollars (\$20,000) for each violation, pursuant to regulations adopted by the commission. A penalty assessed under this section shall be determined on the record after the opportunity for a hearing.

(b) In assessing a penalty under this section, the commission shall consider the following factors, in addition to any other relevant factors, in determining the amount of the penalty:

- (1) The archaeological, historical, or commercial value of the item involved.
- (2) The cultural and spiritual significance of the item involved.
- (3) The damages suffered, both economic and noneconomic, by the aggrieved party.
- (4) The number of violations that have occurred.

(c) If any agency or museum fails to pay a civil penalty pursuant to a final order issued by the commission and the time for judicial review has passed or the party subject to the civil penalty has appealed the penalty or after a final judgment has been rendered on appeal of the order, the Attorney General shall act on behalf of the commission to institute a civil action in an appropriate court to collect the penalty.

(d) An agency or museum shall not be subject to civil penalties for actions taken in good faith to comply with the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).

(Added by Stats. 2001, Ch. 818, Sec. 1. Effective January 1, 2002.)

**State of California**

**HEALTH AND SAFETY CODE**

**Section 8030**

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8030. The provisions of this chapter are severable. If any provision of this chapter or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

(Added by Stats. 2001, Ch. 818, Sec. 1. Effective January 1, 2002.)

**State of California**

**PUBLIC RESOURCES CODE**

**Section 5097.94**

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5097.94. The commission shall have the following powers and duties:

(a) To identify and catalog places of special religious or social significance to Native Americans, and known graves and cemeteries of Native Americans on private lands. The identification and cataloguing of known graves and cemeteries shall be completed on or before January 1, 1984. The commission shall notify landowners on whose property the graves and cemeteries are determined to exist, and shall identify the Native American group most likely descended from those Native Americans who may be interred on the property.

(b) To make recommendations relative to Native American sacred places that are located on private lands, are inaccessible to Native Americans, and have cultural significance to Native Americans for acquisition by the state or other public agencies for the purpose of facilitating or assuring access thereto by Native Americans.

(c) To make recommendations to the Legislature relative to procedures that will voluntarily encourage private property owners to preserve and protect sacred places in a natural state and to allow appropriate access to Native American religionists for ceremonial or spiritual activities.

(d) To appoint necessary clerical staff.

(e) To accept grants or donations, real or in kind, to carry out the purposes of this chapter and the California Native American Graves Protection and Repatriation Act of 2001 (Chapter 5 (commencing with Section 8010) of Part 2 of Division 7 of the Health and Safety Code).

(f) To make recommendations to the Director of Parks and Recreation and the California Arts Council relative to the California State Indian Museum and other Indian matters touched upon by department programs.

(g) To bring an action to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, pursuant to Section 5097.97. If the court finds that severe and irreparable damage will occur or that appropriate access will be denied, and appropriate mitigation measures are not available, it shall issue an injunction, unless it finds, on clear and convincing evidence, that the public interest and necessity require otherwise. The Attorney General shall represent the commission and the state in litigation concerning affairs of the commission, unless the Attorney General has determined to represent the agency against whom the commission's action is directed, in which case the commission shall be authorized to employ other counsel. In an action to enforce this subdivision the commission shall introduce evidence showing that a cemetery, place,

site, or shrine has been historically regarded as a sacred or sanctified place by Native American people and represents a place of unique historical and cultural significance to an Indian tribe or community.

(h) To request and utilize the advice and service of all federal, state, local, and regional agencies, including for purposes of carrying out the California Native American Graves Protection and Repatriation Act of 2001 (Chapter 5 (commencing with Section 8010) of Part 2 of Division 7 of the Health and Safety Code).

(i) To assist Native Americans in obtaining appropriate access to sacred places that are located on public lands for ceremonial or spiritual activities.

(j) To assist state agencies in any negotiations with agencies of the federal government for the protection of Native American sacred places that are located on federal lands.

(k) (1) To mediate, upon application of either of the parties, disputes arising between landowners and known descendants relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials.

(2) The agreements shall provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction and provide for sensitive treatment and disposition of Native American burials, skeletal remains, and associated grave goods consistent with the planned use of, or the approved project on, the land.

(l) To assist interested landowners in developing agreements with appropriate Native American groups for treating or disposing, with appropriate dignity, of the human remains and any items associated with Native American burials.

(m) To provide each California Native American tribe, as defined in Section 21073, on or before July 1, 2016, with a list of all public agencies that may be a lead agency pursuant to Division 13 (commencing with Section 21000) within the geographic area with which the tribe is traditionally and culturally affiliated, the contact information of those public agencies, and information on how the tribe may request the public agency to notify the tribe of projects within the jurisdiction of those public agencies for the purposes of requesting consultation pursuant to Section 21080.3.1.

(n) (1) To assume the powers and duties of the former Repatriation Oversight Commission and meet, when necessary and at least quarterly, to perform the following duties:

(A) Order the repatriation of human remains and cultural items in accordance with the act.

(B) Establish mediation procedures and, upon the application of the parties involved, mediate disputes among tribes and museums and agencies relating to the disposition of human remains and cultural items. The commission shall have the power of subpoena for purposes of discovery and may impose civil penalties against any agency or museum that intentionally or willfully fails to comply with the act. Members of the commission and commission staff shall receive training in mediation for purposes of this subparagraph. The commission may delegate its responsibility to mediate disputes to a certified mediator or commission staff.



(C) Establish and maintain an Internet Web site for communication among tribes and museums and agencies.

(D) Upon the request of tribes or museums and agencies, analyze and make decisions regarding providing financial assistance to aid in specific repatriation activities.

(E) Make recommendations to the Legislature to assist tribes in obtaining the dedication of appropriate state lands for the purposes of reinterment of human remains and cultural items.

(F) (i) Prepare and submit to the Legislature an annual report detailing commission activities, disbursement of funds, and dispute resolutions relating to the repatriation activities under the act.

(ii) A report submitted to the Legislature pursuant to this subparagraph shall be submitted in compliance with Section 9795 of the Government Code.

(G) Refer any known noncompliance with the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.) to the United States Attorney General and the Secretary of the Interior.

(H) Impose administrative civil penalties pursuant to Section 8029 of the Health and Safety Code against an agency or museum that is determined by the commission to have violated the act.

(I) Establish those rules and regulations the commission determines to be necessary for the administration of the act.

(2) For purposes of this subdivision, the following terms have the following meanings:

(A) "Act" means the California Native American Graves Protection and Repatriation Act (Chapter 5 (commencing with Section 8010) of Part 2 of Division 7 of the Health and Safety Code).

(B) "Tribe" means a "California Indian tribe" as that term is used in the act.

(o) (1) To establish and assess a fee on a person or public or private entity that is reasonably related to the cost of conducting a search of catalogs, described in subdivision (a), inventories, described in Section 5097.96, or lists, described in Section 21073, for that person or entity, which funds shall be available to the commission upon appropriation by the Legislature.

(2) The Legislature finds that, pursuant to subdivision (b) of Section 3 of Article XIII A of the California Constitution, the fees established pursuant to paragraph (1) are not taxes. To the extent that these fees are appropriated through the Budget Act for the purposes for which they are collected to provide services to the people of the State of California, the Legislature finds that these fees are not subject to Article XIII B of the California Constitution.

(p) Review and provide comment and guidance on all policies and procedures proposed pursuant to Article 3 (commencing with Section 8025) of Chapter 5 of Part 2 of Division 7 of the Health and Safety Code.

(Amended by Stats. 2018, Ch. 823, Sec. 4. (AB 2836) Effective January 1, 2019.)

**State of California**

**PUBLIC RESOURCES CODE**

**Section 5097.991**

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5097.991. It is the policy of the state that Native American remains and associated grave artifacts shall be repatriated.

(Added by Stats. 1991, Ch. 370, Sec. 2.)

# CASE LAW

**367 F.3d 864 (2004)**

**Robson BONNICHSEN; C. Loring Brace; George W. Gill; C. Vance Haynes, Jr.; Richard L. Jantz; Douglas W. Owsley; Dennis J. Stanford; D. Gentry Steele, Plaintiffs-Appellees,**

**v.**

**UNITED STATES of America; United States Army; United States Army Corps of Engineers; David A. Fastabend; Francis P. McManamon; Edward J. Kertis; Thomas E. White; Gale A. Norton; Craig Manson; Robert B. Flowers; National Park Service; United States Department of the Interior, Defendants-Appellants, Nez Perce Tribe of Idaho; Confederated Tribes of the Umatilla Indian Reservation; Confederated Tribes & Bands of the Yakama Indian Nation; Confederated Tribes of the Colville Reservation; Society for American Archaeology; National Congress of American Indians, Wanapum Band, Defendants-Intervenors.**

**Robson Bonnichsen; C. Loring Brace; George W. Gill; C. Vance Haynes, Jr.; Richard L. Jantz; Douglas W. Owsley; Dennis J. Stanford; D. Gentry Steele, Plaintiffs-Appellees,**

**v.**

**United States of America; United States Army; United States Army Corps of Engineers; David A. Fastabend; Francis P. McManamon; Edward J. Kertis; Thomas E. White; Gale A. Norton; Craig Manson; Robert B. Flowers; National Park Service; United States Department of the Interior, Defendants, Nez Perce Tribe of Idaho; Confederated Tribes of the Umatilla Indian Reservation; Confederated Tribes & Bands of the Yakama Indian Nation; Confederated Tribes of the Colville Reservation, Defendants-Intervenors-Appellants.**

Nos. 02-35994, 02-35996.

**United States Court of Appeals, Ninth Circuit.**

Argued and Submitted September 10, 2003.

Filed February 4, 2004.

Amended April 19, 2004.

Ellen J. Durkee, Environment & Natural Resources Division, Department of Justice, Washington, D.C., for the defendants-appellants.

Thomas P. Schlosser and Rob Roy Smith, Morisset, Schlosser, Jozwiak & McGaw, Seattle, WA, Melissa Compobasso, Nespelem, WA, for intervenor-appellant Confederated Tribes of the Colville Reservation.

Naomi Stacy, Pendleton, OR, for intervenor-appellant Confederated Tribes of the Umatilla Indian Reservation.

David J. Cummings, Lapwai, ID, for intervenor-appellant Nez Perce Tribe.

Thomas Zeilman and Tim Weaver, Toppenish, WA, for intervenor-appellant Yakama Nation.

Joseph P. Siofele, Pro Se, Moreno Valley, CA, appellant.

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Bradley K. Baker, Porter, Wright, Morris & Arthur, LLP, Columbus, OH, for the amicus Ohio Archaeological Council.

S. Shawn Stephens, Locke Liddell & Sapp, LLP, Houston, TX; Joe H. Thrash, Assistant Attorney General, Austin, TX, for the amicus Texas Historical Commission.

Walter Echo-Hawk, Native American Rights Fund, Boulder, CO; Jack F. Trope, Association of American Indian Affairs, Rockville, MD, for the amici Association of American Indian Affairs and Morning Star Institute.

Michael J. Fanelli, Covington & Burling, Washington, D.C., for the amicus Society for American Archaeology.

Sherry Hutt, Pro Se, Paradise Valley, AZ, amicus.

Ellis J. Neiburger, Waukegan, IL, for the amicus Ethnic Minority Council of America.

Christopher A. Amato, Albany, NY; Joseph J. Heath, Syracuse, NY, for the amicus Haudenosaunee Standing Committee on Burial Rules and Regulations.

Dr. Andrei Simic, Pro Se, Los Angeles, CA; Dr. Harry Glynn Custred, Jr., Pro Se, Hayward, CA, amici.

Timothy Sandefur, Sacramento, CA, for the amicus Pacific Legal Foundation.

Dr. Ives Goddard, Pro Se, Washington, D.C.; Dr. William Shipley, Pro Se, Santa Cruz, CA, amici.

Before: ALDISERT,<sup>[\*]</sup> GRABER, and GOULD, Circuit Judges.

## ORDER

The opinion published at 357 F.3d 962 (9th Cir.2004) filed on February 4, 2004 is amended so that footnote 20 should read:

In so holding, we necessarily determine that no reasonable person could conclude on this record that Kennewick Man is "Native American" under NAGPRA. See *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 366-67, 118 S.Ct. 818, 139 L.Ed.2d 797 (1998) (holding that under the substantial evidence standard the reviewing court "must decide whether on this record it would have been possible for a reasonable jury to reach the [agency's] conclusion").

With this amendment, the Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R.App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

No further petition for rehearing or rehearing en banc will be accepted in these cases.

IT IS SO ORDERED.

## OPINION

GOULD, Circuit Judge:

This is a case about the ancient human remains of a man who hunted and lived, or at least journeyed, in the Columbia

Plateau an estimated 8340 to 9200 years ago, a time predating all recorded history from any place in the world, a time before the oldest cities of our world had been founded, a time so ancient that the pristine and untouched land and the primitive cultures that may have lived on it are not deeply understood by even the most well-informed men and women of our age. Seeking the opportunity of study, a group of scientists as Plaintiffs<sup>[1]</sup> in this case brought an action against, *inter alia*, the United States Department of the Interior, challenging various Indian tribes<sup>[2]</sup> claim to one of the most important American anthropological and archaeological discoveries of the late twentieth century, and challenging the Interior Department's decision honoring the tribes' claim. The discovery that launched this contest was that of a human skeleton, estimated by carbon dating to be 8340 to 9200 years old, known popularly and commonly as "Kennewick Man," but known as "the Ancient One" to some American Indians<sup>[3]</sup> who now inhabit regions in Washington, Idaho, and Oregon, roughly proximate to the site on the Columbia River at Kennewick, Washington, where the bones were found. From the perspective of the scientists Plaintiffs, this skeleton is an irreplaceable source of information about early New World populations that warrants careful scientific inquiry to advance knowledge of distant times. Yet, from the perspective of the intervenor-Indian tribes the skeleton is that of an ancestor who, according to the tribes' religious and social traditions, should be buried immediately without further testing.

Plaintiffs filed this lawsuit seeking to stop the transfer of the skeleton by the government to the tribes for burial, and the district court held in favor of the scientists-Plaintiffs.<sup>[4]</sup> The Secretary of the Interior and the intervenor-Indian tribes appeal. We have jurisdiction under 28 U.S.C. § 1291 and affirm the judgment of the district court barring the transfer of the skeleton for immediate burial and instead permitting scientific study of the skeleton.

I

In July 1996, teenagers going to a boat race discovered a human skull and bones near the shore of the Columbia River just outside Kennewick, Washington.<sup>[5]</sup> The remains were found on federal property under the management of the United States Army Corps of Engineers ("Corps") and, at the request of the county coroner, were removed for analysis by an anthropologist, Dr. James Chatters, pursuant to an Archaeological Resources Protection Act of 1979 ("ARPA"), 16 U.S.C. §§ 470aa-470mm, permit. Because of physical features such as the shape of the skull and facial bones, anthropologists at first thought the remains were those of an early European settler. But the anthropologists then found a stone projectile point embedded in the skeleton's upper hip bone. The object's design, when viewed with x-rays and CT scans of the hip, resembled a style that was common before the documented arrival of Europeans in the region. Further study of the remains revealed characteristics unlike those of a European settler, yet also inconsistent with any American Indian remains previously documented in the region. A minute quantity of metacarpal bone was radiocarbon dated. The laboratory estimated the age of the bones to be between 8340 and 9200 years old.<sup>[6]</sup>

The skeleton attracted attention because some of its physical features, such as the shape of the face and skull, differed from those of modern American Indians. Many scientists believed the discovery might shed light on the origins of humanity in the Americas. On August 31, 1996, Dr. Douglas Owsley, Division Head for Physical Anthropology at the Smithsonian Institution in Washington, D.C., made arrangements for Dr. Chatters to bring this important find to the Smithsonian's National Museum of Natural History for further study.<sup>[7]</sup>

Indian tribes from the area of the Columbia River opposed scientific study of the remains on religious and social grounds.<sup>[8]</sup> Four Indian groups (the "Tribal Claimants") demanded that the remains be turned over to them for immediate burial. The Tribal Claimants based their demand on the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et seq.* The Corps agreed with the Tribal Claimants and, citing NAGPRA, seized the remains on September 10, 1996, shortly before they could be transported to the Smithsonian. The Corps also ordered an immediate halt to DNA testing, which was being done using the remainder of the bone sample that had been

submitted earlier for radiocarbon dating. After investigation, the Corps decided to give the remains to the Tribal Claimants for burial. As required by NAGPRA, the Corps published a "Notice of Intent to Repatriate Human Remains" in a local newspaper on September 17, 1996, and September 24, 1996.

The scientists and others, including the Smithsonian Institution, objected to the Corps' decision, arguing that the remains were a rare discovery of national and international significance. In late September and early October 1996, several scientists asked Major General Ernest J. Herrell, Commander of the Corps' North Pacific Division, to allow qualified scientists to study the remains.

The scientists did not convince the Corps to permit them to study the remains, and commenced this litigation on October 16, 1996, in the United States District Court for the District of Oregon. In an opinion issued June 27, 1997, the district court<sup>[9]</sup> denied the Corps' motion for summary judgment, finding that the Corps had "acted before it had all of the evidence," "did not fully consider or resolve certain difficult legal questions," and "assumed facts that proved to be erroneous." *Bonnichsen II*, 969 F.Supp. 628, 645 (D.Or.1997). The district court vacated the Corps' earlier decision on disposition of the remains and remanded the case to the Corps for further proceedings. *Id.* at 644-45. The district court also denied, without prejudice, Plaintiffs' motion to study the remains and directed the Corps to consider, on remand, "whether to grant [P]laintiffs' request [under ARPA] for permission to study the remains." *Id.* at 632, 651.

On March 24, 1998, the Corps and the Secretary of the Interior entered into an agreement that effectively assigned to the Secretary responsibility to decide whether the remains were "Native American" under NAGPRA, and to determine their proper disposition. The Department of the Interior then assumed the role of lead agency on this case.

Almost two years after this matter was remanded, the Secretary's experts began to examine the remains in detail. The experts estimated that Kennewick Man was 5' 9" to 5' 10" tall, 45 to 50 years of age when he died, and 15 to 20 years old when the projectile point became embedded in his hip. The experts could not determine, from non-destructive examination of the skeleton alone, when Kennewick Man lived. However, analysis of sediment layers where the skeleton was found supported the hypothesis that the remains dated back not less than 7600 years ago and Kennewick Man could have lived more than 9000 years ago (the date indicated by the initial radiocarbon dating of the skeleton). Further study of the sediment was recommended, but the Corps' decision to bury the discovery site in April 1998 prevented completion of those studies.<sup>[10]</sup>

The experts compared the physical characteristics of the remains — e.g., measurements of the skull, teeth, and bones — with corresponding measurements from other skeletons. They concluded that Kennewick Man's remains were unlike those of any known present-day population, American Indian or otherwise.

The Secretary's experts cautioned, however, that an apparent lack of physical resemblance between the Kennewick Man's remains and present-day American Indians did not completely rule out the possibility that the remains might be biologically ancestral to modern American Indians. Moreover, although Kennewick Man's morphological traits did not closely resemble those of modern American Indian populations, the Secretary's experts noted that Kennewick Man's physical attributes are generally consistent with the very small number of human remains from this period that have been found in North America.

Relying solely on the age of the remains and the fact that the remains were found within the United States, on January 13, 2000, the Secretary pronounced Kennewick Man's remains "Native American" within NAGPRA's meaning. And on September 25, 2000, the Secretary determined that a preponderance of the evidence supported the conclusion that the Kennewick remains were culturally affiliated with present-day Indian tribes. For this reason, the Secretary announced his final decision to award Kennewick Man's remains to a coalition of the Tribal Claimants. The Corps and the Secretary also denied Plaintiffs' request to study the remains.

Plaintiffs filed an amended complaint in the district court challenging the Secretary's decisions. The district court again ruled in Plaintiffs' favor. As pertinent to this appeal, the district court vacated the Secretary's decisions as contrary to the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"), on the ground that the Secretary improperly concluded that NAGPRA applies.<sup>[11]</sup> Bonnichsen III, 217 F.Supp.2d at 1138-39. The district court also held that, because NAGPRA did not apply, Plaintiffs should have the opportunity to study Kennewick Man's remains under ARPA. Defendants and the Tribal Claimants appealed, and we stayed the district court's order granting Plaintiffs-scientists' study of the remains pending our decision herein.<sup>[12]</sup>

## II

We first address an issue of jurisdiction. The Tribal Claimants argue that we lack jurisdiction because: (1) Plaintiffs' alleged injuries are not "redressable" by court action, and (2) Plaintiffs lack standing to bring claims alleging violations of NAGPRA because Plaintiffs do not seek to invoke interests within the "zone of interests" protected by NAGPRA.

## A

As a general rule, the three constitutional standing requirements are imposed by the "case" or "controversy" provision of Article III:

(1) that the plaintiff have suffered an "injury in fact" ...; (2) that there be a causal connection between the injury and the conduct complained of ...; and (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bennett v. Spear, 520 U.S. 154, 167, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997). The Tribal Claimants do not dispute that Plaintiffs meet the first two constitutional standing requirements, and we so hold. But the Tribal Claimants argue that Plaintiffs do not meet the third requirement. The Tribal Claimants contend that Plaintiffs cannot show that the alleged injury, losing the opportunity to study Kennewick Man's remains, would be redressed by a favorable court decision because, the Tribal Claimants contend, NAGPRA, not ARPA, applies to this case, precluding redress of Plaintiffs' alleged injury. Stated another way, Defendants' theory is that Plaintiffs' injury is not redressable because Plaintiffs are not entitled to relief.

This argument is incorrect. The question in deciding whether a plaintiff's injury is redressable is not whether a *favorable decision* is likely but whether a favorable decision *likely will redress* a plaintiff's injury. See Bennett, 520 U.S. at 167, 117 S.Ct. 1154. In deciding whether a plaintiff's injury is redressable, courts assume that plaintiff's claim has legal merit. See Hall v. Norton, 266 F.3d 969, 976-77 (9th Cir.2001) ("The purpose of the standing doctrine is to ensure that the plaintiff has a concrete dispute with the defendant, not that the plaintiff will ultimately prevail against the defendant."). Were the rule otherwise, courts would never have jurisdiction to entertain a lawsuit that appeared, at the pleading stage, and before evidence was considered, likely to fail on the merits. Such a rule would be illogical.

Here, if NAGPRA does not apply (as we must assume in determining whether Plaintiffs have standing), ARPA applies, per the district court's ruling. Kennewick Man's remains are of archaeological significance and were collected pursuant to an ARPA permit. Neither Appellant disputes that ARPA gives Plaintiffs the opportunity to study Kennewick Man's remains if NAGPRA does not apply. We conclude that it is likely that Plaintiffs' injury will be redressed by a favorable decision on the NAGPRA issue, and thus Plaintiffs have constitutional standing.

## B



Second, the Tribal Claimants argue that Plaintiffs lack standing to bring claims alleging violations of NAGPRA because Plaintiffs do not seek to invoke interests within the "zone of interests" that NAGPRA protects. The Tribal Claimants urge that Congress enacted NAGPRA only with the interests of American Indians in mind, so only American Indians or Indian tribes can file suit alleging violations of NAGPRA. We reject this argument.

The "zone of interests" test invoked by the Tribal Claimants is a judge-made "prudential standing requirement," independent of the three immutable constitutional standing requirements of Article III. See Bennett, 520 U.S. at 163, 117 S.Ct. 1154. Congress can modify or abrogate the zone of interests test, see *id.*, and Congress did exactly that in NAGPRA's broadly worded "enforcement" section. That statute, 25 U.S.C. § 3013, provides that "[t]he United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter." Section 3013 by its terms broadly confers jurisdiction on the courts to hear "any action" brought by "any person alleging a violation." *Id.* (emphasis added).

The Supreme Court has held that such broad statutory language effectively negates the prudential zone of interests test. In Bennett, the Court decided "to take the term 'any person' at face value," and held that "any person" could enforce the Endangered Species Act, which provides that "any person may commence a civil suit on his own behalf ... to enjoin any person ... alleged to be in violation of any provision of this chapter." 520 U.S. at 165 & n. 2, 117 S.Ct. 1154; 16 U.S.C. § 1540(g). In Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 210-11, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972), the Court held that standing was expanded to the full extent permitted under Article III by the Civil Rights Act of 1968. That statute provided, "[a]ny person who claims to have been injured by a discriminatory housing practice" may sue. 42 U.S.C. § 3610(a) (1986 ed.) (emphasis added).

Like the statutes at issue in Bennett and Trafficante, § 3013 of NAGPRA contains the broad "any person" formulation and includes no textual limitation on federal court jurisdiction. Moreover, § 3013 does not contain the more restrictive formulations Congress sometimes uses to limit standing. See, e.g., 15 U.S.C. § 298(b) (authorizing suit only by "competitors, customers, or subsequent purchasers"). We hold that § 3013 does not limit jurisdiction to suits brought by American Indians or Indian tribes. "Any person" means exactly that, and may not be interpreted restrictively to mean only "any American Indian person" or "any Indian Tribe."<sup>[13]</sup>

It is true that Plaintiffs are seeking to prevent the Secretary from repatriating human remains, rather than to compel the Secretary to repatriate them. But the "any person" formulation applies to all causes of action authorized by § 3013. The formulation applies not only to actions against the Secretary asserting under-enforcement of NAGPRA, but also to actions against the Secretary asserting over-enforcement. See Bennett, 520 U.S. at 166, 117 S.Ct. 1154 ("[T]he 'any person' formulation applies to all the causes of action authorized by [the Endangered Species Act] ... not only to actions against the Secretary asserting underenforcement ... but also to actions against the Secretary asserting overenforcement..."). We conclude that we have jurisdiction over Plaintiffs' claims that NAGPRA was violated.<sup>[14]</sup>

### III

Our review of the Secretary's decision to transfer Kennewick Man to the Tribal Claimants is governed by the APA, which instructs courts to "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

NAGPRA vests "ownership or control" of newly discovered Native American human remains in the decedent's lineal descendants or, if lineal descendants cannot be ascertained, in a tribe "affiliated" with the remains. 25 U.S.C. § 3002(a). NAGPRA mandates a two-part analysis. The first inquiry is whether human remains are Native American within the statute's meaning. If the remains are not Native American, then NAGPRA does not apply. However, if the remains are Native American, then NAGPRA applies, triggering the second inquiry of determining which persons or tribes are most

closely affiliated with the remains.

The parties dispute whether the remains of Kennewick Man constitute Native American remains within NAGPRA's meaning. NAGPRA defines human remains as "Native American" if the remains are "of, or relating to, a tribe, people, or culture that is indigenous to the United States." 25 U.S.C. § 3001(9). The text of the relevant statutory clause is written in the present tense ("of, or relating to, a tribe, people, or culture *that is* indigenous"). Thus the statute unambiguously requires that human remains bear some relationship to a *presently existing* tribe, people, or culture to be considered Native American.

It is axiomatic that, in construing a statute, courts generally give words not defined in a statute their "ordinary or natural meaning." United States v. Alvarez-Sanchez, 511 U.S. 350, 357, 114 S.Ct. 1599, 128 L.Ed.2d 319 (1994); see also Williams v. Taylor, 529 U.S. 420, 431, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (holding that courts "give the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import") (internal quotation marks omitted).

In the context of NAGPRA, we conclude that Congress's use of the present tense is significant.<sup>[15]</sup> The present tense "in general represents present time." R. Pence and D. Emery, *A Grammar of Present Day English* 262 (2d ed.1963). Congress, by using the phrase "is indigenous" in the present tense, referred to presently existing tribes, peoples, or cultures. We must presume that Congress gave the phrase "is indigenous" its ordinary or natural meaning. Alvarez-Sanchez, 511 U.S. at 357, 114 S.Ct. 1599. We conclude that Congress was referring to *presently existing* Indian tribes when it referred to "a tribe, people, or culture *that is* indigenous to the United States." 25 U.S.C. § 3001(9) (emphasis added).<sup>[16]</sup>

NAGPRA also protects graves of persons not shown to be of current tribes in that it protects disjunctively remains "of, or relating to" current indigenous tribes. Thus, NAGPRA extends to all remains that relate to a tribe, people, or culture that is indigenous to the United States, see 25 U.S.C. § 3001(9) (defining human remains as Native American if they are "of, *or relating to*, a tribe, people, or culture that is indigenous to the United States") (emphasis added).

Our conclusion that NAGPRA's language requires that human remains, to be considered Native American, bear some relationship to a presently existing tribe, people, or culture accords with NAGPRA's purposes. As regards newly discovered human remains, NAGPRA was enacted with two main goals: to respect the burial traditions of modern-day American Indians and to protect the dignity of the human body after death. NAGPRA was intended to benefit modern American Indians by sparing them the indignity and resentment that would be aroused by the despoiling of their ancestors' graves and the study or the display of their ancestors' remains. See H.R.Rep. No. 101-877, U.S.Code Cong. & Admin.News at 4367, 4369 (1990) ("For many years, Indian tribes have attempted to have the remains and funerary objects of *their ancestors returned to them.*") (emphasis added).

Congress's purposes would not be served by requiring the transfer to modern American Indians of human remains that bear no relationship to them. Yet, that would be the result under the Secretary's construction of the statute, which would give Native American status to any remains found within the United States regardless of age and regardless of lack of connection to existing indigenous tribes.<sup>[17]</sup> The exhumation, study, and display of ancient human remains that are unrelated to modern American Indians was not a target of Congress's aim, nor was it precluded by NAGPRA.

NAGPRA was also intended to protect the dignity of the human body after death by ensuring that Native American graves and remains be treated with respect. See S.Rep. No. 101-473, at 6 (1990) ("The Committee believes that human remains must at all times be treated with dignity and respect."); H.R.Rep. No. 101-877, U.S.Code Cong. & Admin.News at 4367, 4372 (1990) ("Some Indian representatives testified that the spirits of *their ancestors* would not rest until they are returned to their homeland....") (emphasis added). Congress's purpose is served by requiring the return to modern-day American Indians of human remains that bear some significant relationship to them.

Despite the statute's language and legislative history, the Secretary argues that the district court's interpretation "improperly collapses" NAGPRA's first inquiry (asking *whether* human remains are Native American) into NAGPRA's second inquiry (asking *which* American Indians or Indian tribe bears the closest relationship to Native American remains). The Secretary is mistaken. Though NAGPRA's two inquiries have some commonality in that both focus on the relationship between human remains and present-day Indians, the two inquiries differ significantly. The first inquiry requires only a general finding that remains have a significant relationship to a presently existing "tribe, people, or culture," a relationship that goes beyond features common to all humanity. The second inquiry requires a more specific finding that remains are most closely affiliated to specific lineal descendants or to a specific Indian tribe. The district court's interpretation of NAGPRA preserves the statute's two distinct inquiries. Because the record shows no relationship of Kennewick Man to the Tribal Claimants, the district court was correct in holding that NAGPRA has no application.

The Secretary finally argues that, under *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), we must defer to the Secretary's interpretation of "Native American." The Secretary by regulation has defined "Native American" to mean "of, or relating to, a tribe, people, or culture indigenous to the United States." 43 C.F.R. § 10.2(d). The Secretary's regulation, enacted through notice and comment rulemaking, defines Native American exactly as NAGPRA defines it, with one critical exception: the regulation omits the present-tense phrase "that is." Compare 25 U.S.C. § 3001(9) ("*a culture that is indigenous* to the United States") (emphasis added) with 43 C.F.R. § 10.2(d) ("*a culture indigenous* to the United States") (emphasis added). We hold, for the reasons discussed above, that NAGPRA's requirement that Native American remains bear some relationship to a *presently existing* tribe, people, or culture is unambiguous, and that the Secretary's contrary interpretation therefore is not owed *Chevron* deference. See *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.");<sup>[18]</sup> see also *Wilderness Soc'y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051, 1061 (9th Cir.2003) (en banc) ("If, under these canons, or other traditional means of determining Congress's intentions, we are able to determine that Congress spoke clearly ..., then we may not defer to the [agency's] contrary interpretation."). Moreover, the Secretary's regulation conflicts with NAGPRA's plain language and so is invalid for that reason. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 481, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (holding that *Chevron* deference is due only to a "*reasonable* interpretation made by the administrator of an agency") (emphasis added) (internal quotation marks omitted); *Pub. Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989) ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself."). Finally, the common maxim of statutory construction that we must give effect, if possible, to every word Congress used is fatal to the Secretary's attempt to amend NAGPRA by removing the phrase "that is." See *Bennett*, 520 U.S. at 173, 117 S.Ct. 1154 ("It is the 'cardinal principle of statutory construction' [that courts must] give effect, if possible, to every clause and word of a statute...."). We hold that, notwithstanding 43 C.F.R. § 10.2(d), NAGPRA requires that human remains bear a significant relationship to a *presently existing* tribe, people, or culture to be considered Native American. The district court did not err in reaching that conclusion.

The requirement that we must give effect, if possible, to every word Congress used supports our holding that human remains must be related to a currently existing tribe to come within NAGPRA's protection. Under the Secretary's view of NAGPRA, all graves and remains of persons, predating European settlers, that are found in the United States would be "Native American," in the sense that they presumptively would be viewed as remains of a deceased from a tribe "indigenous" to the United States, even if the tribe had ceased to exist thousands of years before the remains were found, and even if there was no showing of any relationship of the remains to some existing tribe indigenous to the United States. Such an extreme interpretation, as was urged by the Secretary here, see *supra* note 17, would render superfluous NAGPRA's alternative "relating to" method for establishing remains as "Native American" (i.e., if remains are "of, or relating to, a tribe that is indigenous to the United States"). If accepted, the Secretary's interpretation would mean that the finding of any remains in the United States *in and of itself* would automatically render these remains

"Native American." This interpretation would leave no meaning for the "relating to" clause, unless we were to interpret the clause to cover remains found outside the United States. But we cannot conclude that Congress intended an absurd result, for Congress could not be considered to have jurisdiction over disposition of human remains found in some other country. By reading NAGPRA's definition of "Native American" literally, meaning is given to each of its terms. Some remains may be covered because they are remains of a tribe, people, or culture that is indigenous, while other remains may be covered because they are "related to" a currently existing indigenous tribe, people, or culture.

Our analysis is strengthened by contrasting the statutory definition of the adjective "Native American" to the statutory definition of the noun "Native Hawaiian." Under § 3001(9), " 'Native American' means of, or relating to, a tribe, people or culture that is indigenous *to the United States*." (Emphasis added). Under § 3001(10), " 'Native Hawaiian' means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty *in the area that now constitutes the State of Hawaii*." (Emphasis added).

The "United States" is a political entity that dates back to 1789. *Owings v. Speed*, 18 U.S. (5 Wheat.) 420, 423, 5 L.Ed. 124 (1820). This term supports that Congress's use of the present tense ("that *is* indigenous") referred to tribes, peoples, and cultures that exist in modern times, not to those that may have existed thousands of years ago but who do not exist now. By contrast, when Congress chose to harken back to earlier times, it described a geographic location ("the area that now constitutes the State of Hawaii") rather than a political entity ("the United States").

Our conclusion that NAGPRA requires human remains to bear some relationship to a presently existing tribe, people, or culture to be considered "Native American" is also reinforced by how NAGPRA defines "sacred objects." NAGPRA defines "sacred objects" as "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions *by their present day adherents*." 25 U.S.C. § 3001(3)(C) (emphasis added). A literal reading of this definition reveals that any artifact to be deemed a "sacred object" must be connected to the practice of an American Indian religion by *present-day* peoples. This reading is consistent with our reading of "Native American"; that is, just as there must be a relationship between an artifact and a presently existing peoples for the artifact to be a "sacred object" under NAGPRA, there must be a relationship between a set of remains and a presently existing tribe, people, or culture for those remains to be "Native American" under NAGPRA.

Although NAGPRA does not specify precisely what *kind* of a relationship or precisely *how strong* a relationship ancient human remains must bear to modern Indian groups to qualify as Native American, NAGPRA's legislative history provides some guidance on what type of relationship may suffice. The House Committee on Interior and Insular Affairs emphasized in its report on NAGPRA that the statute was being enacted with modern-day American Indians' identifiable *ancestors* in mind. See, e.g., H.R.Rep. No. 101-877, U.S.Code Cong. & Admin.News at 4367, 4372 (1990) ("Indian representatives testified that the spirits of *their ancestors* would not rest until they are returned to their homeland ...." (emphasis added)); *id.* at 4369 ("For many years, Indian tribes have attempted to have the remains and funerary objects of *their ancestors* returned to them." (emphasis added)). Human remains that are 8340 to 9200 years old and that bear only incidental genetic resemblance to modern-day American Indians, along with incidental genetic resemblance to other peoples, cannot be said to be the Indians' "ancestors" within Congress's meaning. Congress enacted NAGPRA to give American Indians control over the remains of their genetic and cultural forbearers, not over the remains of people bearing no special and significant genetic or cultural relationship to some presently existing indigenous tribe, people, or culture.

The age of Kennewick Man's remains, given the limited studies to date, makes it almost impossible to establish *any* relationship between the remains and presently existing American Indians. At least no significant relationship has yet been shown. We cannot give credence to an interpretation of NAGPRA advanced by the government and the Tribal Claimants that would apply its provisions to remains that have at most a tenuous, unknown, and unproven connection, asserted solely because of the geographical location of the find.

## IV

Finally, we address the Secretary's determination that Kennewick Man's remains are Native American, as defined by NAGPRA. We must set aside the Secretary's decision if it was "arbitrary" or "capricious" because the decision was based on inadequate factual support. See 5 U.S.C. § 706(2)(A). We review the full agency record to determine whether substantial evidence<sup>[19]</sup> supports the agency's decision that Kennewick Man is "Native American" within NAGPRA's meaning. Here, after reviewing the record, we conclude that the record does not contain substantial evidence that Kennewick Man's remains are Native American within NAGPRA's meaning.<sup>[20]</sup>

The administrative record contains no evidence — let alone substantial evidence — that Kennewick Man's remains are connected by some special or significant genetic or cultural relationship to any presently existing indigenous tribe, people, or culture. An examination of the record demonstrates the absence of evidence that Kennewick Man and modern tribes share significant genetic or cultural features.<sup>[21]</sup>

No cognizable link exists between Kennewick Man and modern Columbia Plateau Indians. When Kennewick Man's remains were discovered, local coroners initially believed the remains were those of a European, not a Native American, because of their appearance. Later testing by scientists demonstrated that the cranial measurements and features of Kennewick Man most closely resemble those of Polynesians and southern Asians, and that Kennewick Man's measurements and features differ significantly from those of any modern Indian group living in North America.<sup>[22]</sup>

Scant or no evidence of cultural similarities between Kennewick Man and modern Indians exists. One of the Secretary's experts, Dr. Kenneth Ames, reported that "the empirical gaps in the record preclude establishing cultural continuities or discontinuities, particularly before about 5000 B.C." Dr. Ames noted that, although there was overwhelming evidence that many aspects of the "Plateau Pattern" were present between 1000 B.C. and A.D. 1, "the empirical record precludes establishing cultural continuities or discontinuities across increasingly remote periods." He noted that the available evidence is insufficient either to prove or disprove cultural or group continuity dating back earlier than 5000 B.C., which is the case with regard to the Kennewick Man's remains, and that there is evidence that substantial changes occurred in settlement, housing, diet, trade, subsistence patterns, technology, projectile point styles, raw materials, and mortuary rituals at various times between the estimated date when Kennewick Man lived and the beginning of the "Plateau Culture" some 2000 to 3000 years ago.

Dr. Ames' conclusions about the impossibility of establishing cultural continuity between Kennewick Man and modern Indians is confirmed by other evidence that the Secretary credited. For example, the Secretary acknowledges that the record shows that there were no villages or permanent settlements in the Columbia Plateau region 9000 years ago and that human populations then were small and nomadic, traveling long distances in search of food and raw materials. The Secretary's experts determined, and the Secretary acknowledged, that it was not until 2000 to 3000 years ago that populations began to settle into the villages and bands that may have been the antecedents of modern Indian tribes something like those encountered by European settlers and colonists. As the Secretary summarized, "[c]ultural discontinuities are suggested by evidence that the cultural group existing XXXX-XXXX years ago was likely small in size and highly mobile while the Plateau culture consisted of [f] larger, more sedentary groups."

The Secretary also acknowledges that "there is very little evidence of burial patterns during the XXXX-XXXX period and significant temporal gaps exist in the mortuary record for other periods." So, even if we assume that Kennewick Man was part of a stable social group living in the area, it still would be impossible to say whether his group's burial practices were related to modern tribes' burial practices. The Secretary also noted that "the linguistic analysis was unable to provide reliable evidence for the XXXX-XXXX period."

The Secretary's only evidence, perhaps, of a possible cultural relationship between Kennewick Man and modern-day

American Indians comes in the form of oral histories. One of the Secretary's experts, Dr. Daniel Boxberger, concluded that modern day Plateau tribes' oral histories — some of which can be interpreted to refer to ancient floods, volcanic eruptions, and the like — are "highly suggestive of long-term establishment of the present-day tribes." Stated another way, Dr. Boxberger noted that oral traditions showed no necessary tale of a superseding migration with newer peoples displacing older ones. But evidence in the record demonstrates that oral histories change relatively quickly, that oral histories may be based on later observation of geological features and deduction (rather than on the first teller's witnessing ancient events), and that these oral histories might be from a culture or group other than the one to which Kennewick Man belonged. The oral traditions relied upon by the Secretary's expert, Dr. Boxberger, entail some published accounts of Native American folk narratives from the Columbia Plateau region, and statements from individual tribal members. But we conclude that these accounts are just not specific enough or reliable enough or relevant enough to show a significant relationship of the Tribal Claimants with Kennewick Man. Because oral accounts have been inevitably changed in context of transmission, because the traditions include myths that cannot be considered as if factual histories, because the value of such accounts is limited by concerns of authenticity, reliability, and accuracy, and because the record as a whole does not show where historical fact ends and mythic tale begins, we do not think that the oral traditions of interest to Dr. Boxberger were adequate to show the required significant relationship of the Kennewick Man's remains to the Tribal Claimants.<sup>[23]</sup> As the district court observed, 8340 to 9200 years between the life of Kennewick Man and the present is too long a time to bridge merely with evidence of oral traditions.

Considered as a whole, the administrative record might permit the Secretary to conclude reasonably that the Tribal Claimants' ancestors have lived in the region for a very long time. However, because Kennewick Man's remains are so old and the information about his era is so limited, the record does not permit the Secretary to conclude reasonably that Kennewick Man shares special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures. We thus hold that Kennewick Man's remains are not Native American human remains within the meaning of NAGPRA and that NAGPRA does not apply to them. Studies of the Kennewick Man's remains by Plaintiffs-scientists may proceed pursuant to ARPA.<sup>[24]</sup>

We remand to the district court for further proceedings consistent with this opinion.

AFFIRMED.

[\*] The Honorable Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

[1] Plaintiffs are experts in their respective fields. Plaintiff Bonnichsen is Director of the Center for the Study of the First Americans at Oregon State University. Plaintiff Brace is Curator of Biological Anthropology at the University of Michigan Museum of Anthropology. Plaintiffs Gill, Haynes, Jantz, and Steele are anthropology professors. Plaintiff Owsley is division head for physical anthropology at the Smithsonian Institution's National Museum of Natural History. Plaintiff Stanford is Director of the Smithsonian's Paleo Indian Program.

[2] The Tribal Claimants — present in this appeal as intervenors — are the Confederated Tribes & Bands of the Yakama Indian Nation, the Nez Perce Tribe of Idaho, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes of the Colville Reservation.

[3] We use the term "American Indian" because the definition of "Native American," as used in Native American Graves Protection and Repatriation Act, is a disputed issue in this appeal.

[4] The district court has issued three published opinions in this case. See *Bonnichsen v. United States*, 969 F.Supp. 614 (D.Or.1997) (denying Defendants' motion to dismiss based on failure to state a claim and ripeness grounds) (*Bonnichsen I*); *Bonnichsen v. United States*, 969 F.Supp. 628 (D.Or.1997) (*Bonnichsen II*) (denying Defendants' motion for summary judgment and vacating the government's disposition of the Kennewick Man's remains); *Bonnichsen v. United States*, 217 F.Supp.2d 1116 (D.Or.2002) (*Bonnichsen III*) (again vacating the government's disposition of the Kennewick Man's remains).

[5] Our rendition of the facts is adapted from the district court's third published opinion in this case. See *Bonnichsen v. United*

States, 217 F.Supp.2d 1116 (D.Or.2002). No party on appeal disputes the district court's findings of fact, which are supported by the administrative record.

[6] Human skeletons this old are rare in the Western Hemisphere, and most found have consisted of only fragmented remains. The record indicates that less than twelve securely dated human crania older than 8000 years have been found in the United States. By contrast, about 90 percent of this skeleton was recovered in good condition. Dr. Chatters testified in an affidavit: "The Kennewick Man skeleton is virtually intact. It lacks only the sternum and a few small nondiagnostic bones of the hands and the feet. Although some of the ribs and other long bones are fragmented, they can be reconstructed. The skull and the lower jaw are complete and are not deformed. The bones of the skeleton are extremely well preserved, with only minor surface mineralization and little if any evidence of decay."

[7] The Smithsonian Institution in Washington, D.C., is the world's largest museum complex, with fourteen museums in the District of Columbia and over 90 affiliate museums. The National Museum of Natural History, part of the Smithsonian Institution, was established in 1910 and "is home to about 185 professional natural history scientists, the largest group of scientists dedicated to the study of the natural and cultural history in the world." National Museum of Natural History Research & Collections Home Page, <http://www.mnh.si.edu/rc/>.

[8] For example, the Tribal Claimants urged that "[w]hen a body goes into the ground, it is meant to stay there until the end of time. When remains are disturbed and remain above the ground, their spirits are at unrest.... To put these spirits at ease, the remains must be returned to the ground as soon as possible." Bonnichsen III, 217 F.Supp.2d at 1121 (quoting Joint Tribal Amici Memorandum (1997) at 4-5). We note that the Ethnic Minority Council of America, in its amicus brief, urges that: "Potential descendants [of Kennewick Man] may not be members of the Joint Tribal Claimants or believe in the expressed 'Indian' religious interpretations made by the political leaders of the tribes." Further, as suggested by amicus Ohio Archaeological Council, in the absence of a conclusive determination of cultural affiliation, the Tribal Claimants cannot establish that permitting Plaintiffs-scientists to study the Kennewick Man's remains offends their religious views or customs.

[9] The parties agreed that the magistrate judge's determinations would be final and not subject to review by the district court. We refer to the opinions of the magistrate judge as that of the district court.

[10] The Corps buried the discovery site of the remains under approximately two million pounds of rubble and dirt, topped with 3700 willow, dogwood, and cottonwood plants. The lengthy administrative record that Defendants filed with the district court documents only a portion of the process by which the decision to bury the site was made. Nevertheless, that record suggested to the district court that the Corps' primary objective in covering the site was to prevent additional remains or artifacts from being discovered, not to "preserve" the site's archaeological value or to remedy a severe erosion control problem as Defendants represented. Bonnichsen III, 217 F.Supp.2d at 1125. Burial of the discovery site hindered efforts to verify the age of Kennewick Man's remains, and effectively ended efforts to determine whether other artifacts are present at the site which might shed light on the relationship between the remains and contemporary American Indians. *Id.* at 1126.

[11] The district court also held that even if NAGPRA applied: (1) the remains were not "culturally affiliated" with the Tribal Claimants; (2) only an individual Indian tribe — not a coalition of Indian tribes — could be a proper claimant under NAGPRA; and (3) the Tribal Claimants' alleged "aboriginal occupation" of the discovery site was not a proper reason to give the Tribal Claimants the remains. Bonnichsen III, 217 F.Supp.2d at 1158. Because we conclude *infra* that NAGPRA does not apply to Kennewick Man's remains, we do not need to reach and we do not review these additional holdings of the district court.

[12] An additional appellant, Joseph P. Siofele, argues that Kennewick Man's remains are Polynesian, that Siofele is Kennewick Man's descendant, and that Kennewick Man's remains properly belong to him. Siofele appeals *pro se* from the district court's denial of his untimely motion to intervene. We resolve Siofele's appeal in a separate disposition.

[13] The Tribal Claimants rely on an out-of-circuit district court decision, Idrogo v. United States Army, 18 F.Supp.2d 25 (D.D.C.1998), for the proposition that non-Indian plaintiffs lack standing to bring lawsuits alleging violations of NAGPRA because they are not within the statute's zone of interests. But *Idrogo* does not stand for this broad proposition and is not persuasive to us in support of the claimed restriction. Rather, *Idrogo* merely held that a particular plaintiff bearing no relation to the Apache warrior Geronimo could not sue for the "return" of Geronimo's remains because that plaintiff did not satisfy the constitutional injury-in-fact requirement. *Id.* at 27. In *Idrogo*, neither the prudential standing requirements nor the zone-of-interests test was at issue. And unlike Plaintiffs here, the *Idrogo* plaintiff had not alleged any interest in studying the remains.

[14] Even if NAGPRA did not confer jurisdiction over Plaintiffs' claims, the APA's "generous review provisions" would confer jurisdiction. See Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 400 n. 16, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987). The APA provides a right to judicial review of all "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. The interests Plaintiffs seek to protect are "arguably within the zone of interests to be protected or regulated" by NAGPRA § 3002(a). See Bennett, 520 U.S. at 175, 117 S.Ct. 1154 (holding that under an APA claim one looks to substantive statutes to determine whether zone-of-interests test is met). NAGPRA § 3002(a) was not intended merely to benefit American Indians, but rather to strike a balance between the needs of scientists, educators, and historians on the one hand, and American Indians on the other. Plaintiffs' claim that they are victims of a mistaken over-enforcement of § 3002(a) is within the provision's zone of interests.

[15] The Supreme Court has found Congress's use of the present tense to be significant when interpreting Congress's intentions. Gwaltney of Smithfield Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 59, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987) (holding that Congress's use of the present tense in 33 U.S.C. § 1365 meant that citizens could not maintain a suit for past violations of the Clean Water Act) (superceded in irrelevant part by statute). Federal appellate courts have made similar observations. Medberry v. Butler, 185 F.3d 1189, 1193 (11th Cir.1999) ("Congress' use of the present tense in [28 U.S.C.] § 1915(g) confirms that a prisoner's allegation that he faced imminent danger sometime in the past is an insufficient basis to allow him to proceed *in forma pauperis* pursuant to the imminent danger exception to the statute"); Malik v. McGinnis, 293 F.3d 559, 562 (2d Cir.2002) (same); Abdul-Akbar v. McKelvie, 239 F.3d 307, 313 (3d Cir.2001) (same).

[16] The Secretary argues that "[i]n common parlance, the words 'is' and 'was' are appropriately used interchangeably when referring to tribes, peoples and cultures that existed in the past but are being spoken of in the present." Gov't Opening Brief at 31. The Secretary offers no support for this assertion, and we decline to accept it as an accurate description of the intent of Congress in this case as we interpret NAGPRA. Our holding is limited to a determination that Congress was referring to *presently existing* Indian tribes when it referred to "a tribe, people, or culture *that is* indigenous to the United States." We do not foreclose the possibility that, in any other statute, Congress's use of the present tense, in the context of a different statute, with different statutory language, structure, and purposes, could implicate a time period other than the present.

[17] At oral argument, the government urged that its interpretation of remains as Native American when found within the United States would apply even to remains as old as 100,000 or 150,000 years, close to the dawn of *homo sapiens*. Indeed, the government at oral argument even said that if remains of a mythical first man and woman, an "Adam and Eve," were found in the United States, those remains would be "Native American" under the government's interpretation of NAGPRA. Thus the government's unrestricted interpretation based solely on geography, calling any ancient remains found in the United States "Native American" if they predate the arrival of Europeans has no principle of limitation beyond geography. This does not appear to us to be what Congress had in mind. Nor does the legislative history support NAGPRA coverage of bones of such great antiquity.

[18] Because this aspect of NAGPRA is unambiguous, we need not resort to the "Indian canon of construction," under which "doubtful expressions" in legislation passed for the benefit of Indian tribes are resolved in favor of the Indians. See South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 506, 106 S.Ct. 2039, 90 L.Ed.2d 490 (1986).

[19] See Wileman Bros. & Elliott, Inc. v. Espy, 58 F.3d 1367, 1374-75 (9th Cir.1995) ("When the arbitrary and capricious standard is performing that function of assuring factual support, there is no substantive difference between what it requires and what would be required by the substantial evidence test.") (internal quotation marks omitted), rev'd on other grounds, 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). We consider the record as a whole, weighing both the evidence that supports and the evidence that detracts from the Secretary's decision. See Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir.2001).

[20] In so holding, we necessarily determine that no reasonable person could conclude on this record that Kennewick Man is "Native American" under NAGPRA. See Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366-67, 118 S.Ct. 818, 139 L.Ed.2d 797 (1998) (holding that under the substantial evidence standard the reviewing court "must decide whether on this record it would have been possible for a reasonable jury to reach the [agency's] conclusion").

[21] As pointed out by *amici* Texas Historical Commission, under the framework proposed by the government and the Tribal Claimants, as soon as any remains are determined to be pre-Columbian, *any* study or testing of such remains would have to stop. This blanket prohibition could result in improper disposition of remains to parties wholly unrelated to the remains.

[22] In a letter announcing his final decision that Kennewick Man is Native American, the Secretary acknowledged this



discontinuity:

[T]hat the morphological characteristics of the remains differ from modern day Indian tribes may indicate a cultural discontinuity between the two groups, or may indicate that the cultural group associated with the Kennewick Man may have subsequently intermixed with other groups migrating into or through the region, leading to changes in the morphological characteristics of the group.

[23] We find of considerable help the explanations of the uses and limits on oral narratives as explained and documented with scholarly authority by *amicus curiae* Dr. Andrei Simic, Professor of Anthropology at the University of Southern California, in Los Angeles since 1971 who has specialized in study of the role of folklore and oral tradition in developing cultural identity of ethnic groups, and Dr. Harry Glynn Custred, Jr., Professor of Anthropology at California State University in Hayward since 1971, who teaches anthropology, linguistics, and folklore and who has written on the subject of oral traditions.

[24] As pointed out by *amici* Texas Historical Commission, Plaintiffs-scientists plan to engage in the following general types of testing: (1) morphometric cranial and post-cranial measurements comparing the Kennewick Man's remains with other populations; (2) dental characteristic studies; (3) DNA studies; and (4) diet analysis.

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