

Date of Hearing: April 23, 2019

ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND
INTERNET MEDIA

Kansen Chu, Chair

AB 275 (Ramos) – As Amended April 22, 2019

SUBJECT: Native American cultural preservation.

SUMMARY: This bill would make various changes to laws relating to California Native American tribes, including: requiring all state agencies, as defined, to establish a tribal liaison for specified purposes; defining tribal traditional knowledge and assigning relative weight of its application under Cal NAGPRA, as specified; clarify circumstances when the Attorney General's Office may be conflicted out of representing the Native American Heritage Commission, and; altering the CEQA consultation process between lead agencies and California Native American Tribes, to require the lead agency to commence consultation with the tribes, as provided.

Specifically, **this bill:**

- 1) Requires every state agency, as defined, and requests 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.

Further requests the Regents of the University of California, and requires every other state agency with 30 or more employees or one or more contracts or grants for the procurement of any property or services with or from a California Native American tribe on the tribal contact list, to designate one or more liaisons with the sole responsibility of fulfilling this purpose.

- 2) Defines "Tribal traditional knowledge" under the California Native American Graves Protection and Repatriation Act of 2001 (Cal NAGPRA) to mean "knowledge systems embedded and often safeguarded in the traditional culture of California Native American tribes, including, but not limited to, knowledge about traditional ceremonial practices, lifeways, climate, and subsistence."
- 3) Provides that when consulting with tribes pursuant to Cal NAGPRA, the agency or museum shall consider tribal traditional knowledge, as defined, with comparable or greater weight than other nontribal sources of information.
- 4) In determining whether an item is an "associated funerary object," under Cal NAGPRA, the bill would require that the agency or museum consider tribal traditional knowledge with comparable or greater weight than other nontribal sources of information.
- 5) Requires the Attorney General to represent the commission and the state in litigation concerning affairs of the commission, unless:

- a) the Attorney General has determined to represent the agency against whom the commission's action is directed and has determined there exists a conflict that would impair its ability to zealously advocate on behalf of the commission, or;
 - b) the commission reasonably believes that the Attorney General cannot, in good faith, represent the interests of the commission, in which case the commission shall be authorized to employ other counsel.
- 6) Authorizes the Native American Heritage Commission (Commission) to provide each lead agency, as defined, with a project within the geographic area with which a California Native American tribe is traditionally and culturally affiliated, the contact information of those tribes, and information on how the lead agency may initiate consultation with the tribe pursuant to CEQA.
 - 7) Revises the CEQA tribal consultation provisions, to allow a lead agency to begin consultation with a California Native American tribe as specified, rather than the tribe contacting the lead agency, as provided.

EXISTING LAW:

- 1) Provides that 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 Indian tribes, as specified.

As to those human remains and associated funerary objects that are not clearly identifiable as to cultural affiliation with California Indian tribes, Cal NAGPRA requires the agency or museum to consult with the California Indian tribes believed to be affiliated with the items, or that may be affiliated, during the compilation of the inventory, as provided.

- 2) Establishes the Native American Heritage Commission and vests the Commission with specified powers and duties.
- 3) Mandates the Commission to publish a document that lists the California Indian tribes meeting the criteria for a California Indian tribe, as defined, as well as authorized representatives to act on behalf of the tribe for various consultations and in matters pertaining to repatriation (tribal contact list).
- 4) Requires 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 is authorized to employ other counsel.
- 5) The California Environmental Quality Act (CEQA) requires a lead agency, as defined, to prepare an environmental impact report (EIR) on a project that it proposes to carry out or approve that may have a significant effect on the environment or to adopt a negative declaration if it finds that the project will not have that effect.

- 6) Prior to the release of a negative declaration, mitigated negative declaration, or an EIR for a project, CEQA requires the lead agency to begin consultation with a California Native American tribe that is traditionally and culturally affiliated with the geographic area of the proposed project, if the tribe requested in writing to be informed by the lead agency through formal notification, as specified.
- 7) Authorizes the Commission to provide each California Native American tribe with a list of all public agencies that may be a lead agency within the geographical 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 CEQA.

FISCAL EFFECT: Unknown. This measure has been keyed fiscal by the Legislative Council.

COMMENTS:

- 1) *Author and supporters statement of need for legislation.* According to the Author, California is home to nearly one-fifth of all federally recognized tribes. According to the 2010 census, 723,000 Native Americans reside in California, more than any other state.

The Native American Heritage Commission (NAHC), created in 1976, has a mission to ‘protect Native American sanctified cemeteries, places of worship, religious or ceremonial sites, or sacred shrines on public property, and to ensure the respectful treatment and disposition of ancient Native American human remains and associated grave goods, all to the fullest extent of the law.’ In January 2018, the California Heritage Commission published its Five-Year Strategic Plan which identified several strengths and weaknesses of the Commission. Among the weaknesses, it was found that there continues to be a significant “lack of tribal and stakeholder knowledge of Commission’s laws” as well as confusion with respect to the protection of Native American remains and associated funerary artifacts.”

In response to the findings outlined in the NAHC Five-Year Strategic Plan, AB 275 establishes the following:

- Requests the University of California, and requires state agencies with 30 or more employees, to designate one or more liaisons for the purpose to engage with Native American tribes on a list that is maintained by the Native American Heritage Commission.
- Updates current law with respect to the possession of California Native American human remains and associated funerary objects for repatriation to require for agencies and museums to consider ‘tribal traditional knowledge’ as defined with comparable or greater weight than other nontribal sources of information.

The author concludes by saying, “This bill is vital to preserve tribal culture and ensure Native American tribes have the opportunities to pay honor and respect to our ancestors and elders, including those who have come before and to the tribal members that continue to create pathways for future generations.”

- 2) *Author's amendments to be taken in committee.* The author will be amending this measure to address an issue created by recent amendments which struck the CEQA language from the bill yet left related language under the duties of the NAHC in PRC Section 5097.94.(m), and a redundancy in application of the section Gov Code sections 8318 (b) and (c).

Specifically, the amendments will strike proposed Government Code 8318 subsection (c) on page 4, lines 15-22, and; proposed changes to Public Resources Code Section 5097.94 sub (m) on page 12, lines 22-30.

3) *Background:*

- a) *The Native American Heritage Commission.* According to their website, the California Native American Heritage Commission (NAHC or Commission), was created in statute in 1976 (Chapter 1332, Statutes of 1976), and is a nine-member body whose members are appointed by the Governor. The NAHC identifies, catalogs, and protects Native American cultural resources -- ancient places of special religious or social significance to Native Americans and known ancient graves and cemeteries of Native Americans on private and public lands in California. The NAHC is also charged with ensuring California Native American tribes' accessibility to ancient Native American cultural resources on public lands, overseeing the treatment and disposition of inadvertently discovered Native American human remains and burial items, and administering the California Native American Graves Protection and Repatriation Act (CalNAGPRA), among many other powers and duties.

Under state law, as state trustee, it is the role and responsibility of the Commission to protect tribal cultural resources through fostering cooperative working relationships between California Native American tribes, state and local agencies, private landowners, developers, environmental consultants, and museums.

- b) *Cal NAGPRA - State repatriation law.* Existing state law, created by AB 978 (Steinburg), requires creation of a ten-member appointed Repatriation Commission with authority to order repatriation, to mediate disputes, to subpoena, and to impose civil penalties for violations. The bill required any agency or museum that has possession or control over collections of California Native American human remains and associated funerary object to complete inventories and specified timelines and methods for their repatriation. However, this Act was never fully implemented and the commission was not established. Instead, according to their website, the California Native American Heritage Commission has taken over the work of the Native American Repatriation Commission established by AB 978, and now works with museums, community colleges, state universities, private universities, and the University of California campuses on issues including issues related to the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) and CalNAGPRA (SB 978).
- c) *The University of California Policy and Procedures on Curation and Repatriation of Human Remains and Cultural Items.* UC states in its policy summary the balance of interests that the University strives to achieve with regard to repatriation and maintenance of human remains and cultural items:

"It is the policy of the University of California to assure that the respectful and dignified treatment of human remains and the consideration of living

descendants of those deceased. The University recognizes that individuals and communities have cultural and religious concerns that must be considered in determining the treatment and disposition of human remains in its collections. At the same time, the University's collections of human remains and Cultural Items serve valuable educational and research purposes important to the enhancement of knowledge in various disciplines. The University maintains these collections as a public trust and is responsible for preserving them according to the highest standards while fulfilling its mission to provide education and understanding about the past and present through continued teaching, research and public service."

Toward these competing goals, the University created a Policy and Procedures (Policy) and a University Advisory Group on Cultural Affiliation and Repatriation of Human Remains and Cultural Items (Advisory Group), for handling their requirements relative to Native American human remains and cultural items under state and federal law, which "shall be composed of one University faculty member delegated principal responsibility for compliance with this policy from each of those campuses that house collections covered by NAGPRA, and two Native American members to be selected by the President or designee from among nominees submitted by each campus. The Vice Provost for Research (or designee) will be the UC Office of the President liaison to the Advisory Group."

According to the Policy, 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 Policy contains procedures for implementation, including a required review of Inventories of Native American and Native Hawaiian human remains and associated objects as follows: "In accordance with NAGPRA, each campus with Native American or Native Hawaiian human remains and associated funerary objects shall complete inventories of all such remains and associated funerary objects in its collections by reviewing existing documentation. Campus inventories shall draw on the best available academic expertise and involve consultation with tribal authorities representing Native American and Native Hawaiian groups. The inventories shall include descriptions of human remains and associated funerary objects and shall, to the extent possible, identify the geographical and cultural affiliation of those human remains and associated Cultural Items, as required by NAGPRA. ...

"Upon request by lineal descendants or appropriate tribal authorities, the campus shall provide additional available documentation to supplement the information provided in the campus inventories. Existing information is sufficient to fulfill this requirement; no additional scientific studies need be undertaken to provide such information."

The Policy also requires each campus to complete "a written summary of Native American and Native Hawaiian unassociated funerary objects, sacred objects, and objects of cultural patrimony held in its collections, and declares that these summaries provide a

basis for further consultations with Native American and Native Hawaiian tribal authorities to determine cultural affiliation. Final campus summaries shall be submitted to federal agencies, lineal descendants, Native American tribes and Native Hawaiian organizations, as required by law."

In addition, the Policy states that, "Upon request by lineal descendants or appropriate tribal authorities, the campus shall provide access to records, catalogues, relevant studies, or other pertinent data for the purpose of determining the geographic origin, cultural affiliation and basic facts surrounding the acquisition and accession of objects covered in the summary."

The Policy claims, "to the extent possible, campus inventories and summaries shall identify the Cultural Affiliation of human remains, funerary objects, sacred objects, and objects of cultural patrimony, as defined by federal law." And states that "Under NAGPRA, all of the following requirements must be met to determine cultural affiliation between a present-day Indian tribe or Native Hawaiian organization and human remains, funerary objects, sacred objects, or objects of cultural patrimony of an earlier group:

- i) Existence of an identifiable present-day Indian tribe or Native Hawaiian organization with standing under NAGPRA;
- ii) Existence of an identifiable earlier group; and
- iii) Existence of a shared group identity that can be reasonably traced between the present-day Indian tribe or Native Hawaiian organization and the earlier group. Evidence to support this requirement must establish that a present-day Indian tribe or Native Hawaiian organization has been identified from prehistoric or historic times to the present as descending from the earlier group."

The Policy allows Tribal authorities "reasonable access to examine items in the University's collections in order to evaluate the cultural affiliation of items listed in the inventory as culturally unidentifiable. They shall also be given reasonable opportunity, upon request, to present their views orally or in writing to campus officials responsible for NAGPRA implementation regarding the identification of any such human remains, funerary objects, sacred objects, or objects of cultural patrimony. The perspectives of such tribal authorities shall be considered in determining cultural affiliation."

The Policy states that review of repatriation requests shall reflect consideration of academic expertise and Native American or Native Hawaiian viewpoints, and shall provide consultation with requesting individuals or tribes, as required by NAGPRA, and provides upon the written request of a lineal descendant, Indian tribe or Native Hawaiian organization, or California-recognized Indian tribe, the University will expeditiously repatriate human remains, funerary objects, sacred objects, and objects of cultural patrimony if lineal descent has been established or if cultural affiliation between the requesting tribe or organization and the requested remains or Cultural Items has been established in accordance with federal law and if all other requirements for repatriation of such human remains or Cultural Items as set forth in federal law are met, and provides for repatriation to a non-federally-recognized California-recognized tribe under specified circumstances and for resolution of repatriation disputes.

The Policy makes allowance for the teaching and research use of human remains and cultural items. It expressly provides that, "Campuses are granted the authority to make decisions about the use of Native American or Native Hawaiian human remains, associated and unassociated funerary objects, sacred objects, sacred objects, and objects of cultural patrimony in University collections for teaching and research purposes, subject to the following guidelines:

Given the importance of the study of human osteology in archaeology, paleontology, and comparative morphology, and the importance of skeletal material in training students at the lower division, upper division and graduate level, campuses normally retain the discretion to use such items in teaching. Campuses are encouraged to take into consideration the views and concerns of Native American and Native Hawaiian representatives when making decisions regarding the teaching and research use of Native American and Native Hawaiian skeletal materials.

Remains and Cultural Items covered by this policy shall normally remain accessible for research by qualified investigators, subject to approval by the curator of the relevant campus collection.

Once a repatriation request has been granted and actual repatriation is pending, the remains and Cultural Items covered by the request shall not be used in teaching or research unless expressly permitted by the tribal authority that has been granted jurisdiction over the materials, subject to exceptions provided by federal law.

In circumstances in which cultural affiliation (or cultural association) has been established and other repatriation requirements have been met but in which an affiliated (or associated) tribe has chosen not to request repatriation, an affiliated (or associated) tribe may request that the affiliated (or associated) remains or Cultural Items not be used for teaching or research. The decision of the affiliated (or associated) tribe as to whether the remains and cultural items can be used in teaching or research shall normally be accepted as final by the University, subject to exceptions provided by federal law."

Given this extensive repatriation policy and the anticipated implementation of the AB 2836 (Gloria) UC NAGPRA Committee process, this Committee wonders whether the UC should be required to designate one or more different liaisons for the purpose of educating the University on topics relevant to the state's relationship with California Native American tribes? The author may consider amending this measure to remove reference to the UC or deem them compliant with the provisions of proposed Government Code Section 8318.

- 4) *University of California's unique constitutional status.* The California Constitution establishes the University of California (UC), a public trust to be administered by the Regents of the UC and grants the Regents full powers of organization and government, subject only to such legislative control as may be necessary to insure security of its funds, compliance with the terms of its endowments, statutory requirements around competitive bidding and contracts, sales of property and the purchase of materials, goods and services. (Article IX, Section (9)(a) of the California Constitution)

5) *Prior and related legislation.*

- a) AB 1662 (Ramos) of this session, would add an additional member from a California Tribe to the systemwide Native American Graves Protection and Repatriation Act Implementation and Oversight Committee, known as the U.C. NAGPRA Committee, with specified membership. Status: That measure passed out of this committee on consent and is currently pending before the Assembly Committee on Higher Education and is set for hearing April 23, 2019.
- b) AB 2836 (Gloria), Chapter 823, statutes of 2018, requires the Regents of the University of California (UC) to establish and support a system-wide Native American Graves Protection and Repatriation Act (NAGPRA) Implementation and Oversight Committee, and for any campus subject to the federal NAGPRA to establish a campus implementation committee.
- c) AB 52 (Gatto), Chapter 532, Statutes of 2014, was the result of a collaborative process between government entities, developers and construction trades and California Native American tribes which established procedures and requirements under the California Environmental Quality Act (CEQA) for the purpose of avoiding or minimizing impacts to tribal cultural resources.
- d) AB 978 (Steinberg), Chapter 818, Statutes of 2001, enacted the California Native American Graves Protection and Repatriation Act of 2001 to establish a process for repatriating Native American human remains and cultural items that are currently in the possession of any state or local agency or any museum that receives state funds. The bill established a ten-member appointed Repatriation Commission with authority to order repatriation, to mediate disputes, to subpoena, and to impose civil penalties. The bill required any agency or museum that has possession or control over collections of California Native American human remains and associated funerary object to complete, by January 1, 2003, an inventory of all items and include specified information in the inventory that will facilitate return of the objects.

REGISTERED SUPPORT / OPPOSITION:

Support

Blue Lake Rancheria
California Nations Indian Gaming Association
California Tribal Business Alliance
Rincon San Luiseno Band of Indians
San Manuel Band of Mission Indians
Soboba Band of Luiseno Indians
Wilton Rancheria

Opposition

There is no opposition on file.

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