

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.

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