

AMENDED IN ASSEMBLY APRIL 19, 2013

AMENDED IN ASSEMBLY APRIL 8, 2013

AMENDED IN ASSEMBLY MARCH 19, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 52

**Introduced by Assembly Member Gatto
(Principal coauthor: Assembly Member Alejo)**

December 21, 2012

An act to amend Section 21083 of, and to add Sections 21073, 21074, 21083.09, 21084.2, 21084.3, and 21097 to, the Public Resources Code, relating to Native Americans.

LEGISLATIVE COUNSEL'S DIGEST

AB 52, as amended, Gatto. Native Americans: California Environmental Quality Act.

Existing law, the Native American Historic Resource Protection Act, establishes a misdemeanor for unlawfully and maliciously excavating upon, removing, destroying, injuring, or defacing a Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources.

The California Environmental Quality Act, referred to as CEQA, requires a lead agency, as defined, to prepare, or cause to be prepared, and certify the completion of, an environmental impact report 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. CEQA also requires a lead agency to prepare a mitigated negative declaration for a project that may have a significant effect on the environment if revisions in the

project would avoid or mitigate that effect and there is no substantial evidence that the project, as revised, would have a significant effect on the environment. CEQA requires the lead agency to provide a responsible agency with specified notice and opportunities to comment on a proposed project. CEQA requires the Office of Planning and Research to prepare and develop, and the Secretary of the Natural Resources Agency to certify and adopt, guidelines for the implementation of CEQA that include, among other things, criteria for public agencies to following in determining whether or not a proposed project may have a significant effect on the environment.

The bill would specify that a project having a potential to cause a substantial adverse change in the significance of a tribal resource, as defined, to be a project that may have a significant effect on the environment. The bill would require a lead agency to make best efforts to avoid, preserve, and protect specified Native American resources. The bill would require the lead agency to undertake specified actions if a project may adversely affect tribal cultural resources, or a tribal reservation or rancheria. The bill would require the office to revise the guidelines to include criteria for determining whether a proposed project has a significant effect on the environment to include effects on tribal cultural resources, including sacred places, or a tribal reservation or rancheria community. The bill would require the office to prepare and develop, and the secretary to certify and adopt, revisions to the guidelines relating to the identification and treatment of tribal cultural resources. By requiring the lead agency to consider these effects relative to Native Americans, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

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

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

1 (a) California had the largest aboriginal population in North
2 America before contact with non-Native Americans. Yet, California
3 Native American tribes suffered the greatest losses from
4 termination, removal, and assimilation policies, including the loss
5 of a majority of their lands and tribal cultural resources, including
6 sacred places. This devastation debilitated tribal religious practices
7 and cultural identity, and threatened the survival of California
8 Native Americans.

9 (b) Spiritual integrity, community identity, political sovereignty,
10 and governance processes are intertwined in the lifeways and
11 identity of the California Native American tribes.

12 (c) California Native American tribes possess original natural
13 rights, from time immemorial, recognized in over 200 years of
14 federal jurisprudence, the Federal Constitution, federal and state
15 laws and administrative policies, and state actions, including,
16 tribal-state agreements.

17 (d) Included in these original natural rights is the right of tribal
18 governments to enact their own laws and be governed by them
19 and to engage in their own cultural and spiritual practices. It is a
20 fundamental obligation of each generation of California Native
21 Americans to cherish and protect these rights for their children
22 and for generations to come.

23 (e) California Native Americans have used, and continue to use,
24 natural settings in the conduct of spiritual practices, religious
25 observances, ceremonies, and cultural uses and beliefs that are
26 essential elements in tribal communities. Tribes consider these
27 sacred and cultural places, used by generations, as vital to their
28 existence, well-being, and identity.

29 (f) In addition to the lingering effects of historic termination,
30 removal, and assimilation policies, the continued loss of tribal
31 cultural resources, including sacred places and tribal lands in the
32 past 200 years has caused further debilitating impacts on the
33 religious practices, cultural traditions, tribal identity, and
34 self-governance rights of California Native American tribes.

35 (g) To uphold California Native American tribes' original natural
36 rights with regard to religious practices, cultural traditions, tribal
37 identity, and self-governance, it is essential that the natural setting
38 and essential integrity of these tribal cultural resources be protected
39 and the sacred places be preserved.

1 (h) Traditional tribal lands were diminished to reservations and
2 rancherias that exist today in California with local governments,
3 state lands, federal lands, and privately owned lands located
4 adjacent to, and in the vicinity of, tribal government reservations
5 and rancherias. The land use decisions concerning lands adjacent
6 to, and in the vicinity of, California Native American reservations
7 and rancherias affect those tribal communities in terms of
8 environmental impacts and tribal self-governance rights.

9 (i) The California Environmental Quality Act does not readily
10 or directly solicit, include, or accommodate California Native
11 American tribes' concerns and issues, which has resulted in
12 significant environmental impacts to tribal cultural resources,
13 including sacred places and tribal government reservations and
14 rancherias, leaving them unanalyzed and unmitigated. The result
15 has been significant and unmitigated cumulative impacts to those
16 resources and California Native American reservations and
17 rancherias to the detriment of those communities and California's
18 environment.

19 (j) California Native American tribes are experts concerning
20 their culturally affiliated resources, tribal history, and practices
21 concerning those resources. Tribal knowledge about the land and
22 the resources should be included in environmental assessments
23 pursuant to state environmental laws for projects that have a
24 potentially significant impact or effect on those resources.

25 (k) State environmental law should not only take into account
26 the scientific or archaeological value of cultural resources, but also
27 the tribal cultural values, tribal interpretations, and culturally
28 appropriate treatment when decisions are made concerning whether
29 or how to approve a project that may significantly impact or effect
30 those places and resources.

31 SEC. 2. Section 21073 is added to the Public Resources Code,
32 to read:

33 21073. "Native American tribe" means a federally recognized
34 Indian tribe located in California.

35 SEC. 3. Section 21074 is added to the Public Resources Code,
36 to read:

37 21074. (a) "Tribal cultural resource" means a resource that is
38 any of the following:

39 (1) A resource listed in, or determined to be eligible for listing
40 in, the California Register of Historical Resources, a local register

1 of historical resources, as defined in subdivision (k) of Section
2 5020.1, or a tribal register of historic resources.

3 (2) A resource deemed to be significant pursuant to subdivision
4 (g) of Section 5024.1.

5 (3) A resource deemed by the lead agency to be a tribal cultural
6 resource.

7 (b) Tribal cultural resources include, but are not limited to, sites,
8 features, places, or objects with cultural value to descendant
9 communities, traditional culture properties, or tribal cultural
10 landscapes consistent with the guidance of the federal National
11 Park Services' Advisory Council on Historic Preservation.

12 (c) A tribal cultural resource may also be a historic resource or
13 a unique archaeological resource.

14 (d) A tribal cultural resource does not include a resource
15 demonstrated by clear and convincing evidence to be historically
16 or culturally not significant.

17 SEC. 4. Section 21083 of the Public Resources Code is
18 amended to read:

19 21083. (a) The Office of Planning and Research shall prepare
20 and develop proposed guidelines for the implementation of this
21 division by public agencies. The guidelines shall include objectives
22 and criteria for the orderly evaluation of projects and the
23 preparation of environmental impact reports and negative
24 declarations in a manner consistent with this division.

25 (b) The guidelines shall specifically include criteria for public
26 agencies to follow in determining whether or not a proposed project
27 may have a "significant effect on the environment." The criteria
28 shall require a finding that a project may have a "significant effect
29 on the environment" if one or more of the following conditions
30 exist:

31 (1) A proposed project has the potential to degrade the quality
32 of the environment, curtail the range of the environment, or to
33 achieve short-term, to the disadvantage of long-term, environmental
34 goals.

35 (2) The possible effects of a project are individually limited but
36 cumulatively considerable. As used in this paragraph,
37 "cumulatively considerable" means that the incremental effects of
38 an individual project are considerable when viewed in connection
39 with the effects of past projects, the effects of other current projects,
40 and the effects of probable future projects.

1 (3) The environmental effects of a project will cause substantial
2 adverse effects on human beings, either directly or indirectly.

3 (4) A proposed project may have a significant effect on a tribal
4 cultural resource, including a sacred place, or a tribal reservation
5 or rancheria community.

6 (c) The guidelines shall include procedures for determining the
7 lead agency pursuant to Section 21165.

8 (d) The guidelines shall include criteria for public agencies to
9 use in determining when a proposed project is of sufficient
10 statewide, regional, or areawide environmental significance that
11 a draft environmental impact report, a proposed negative
12 declaration, or a proposed mitigated negative declaration shall be
13 submitted to appropriate state agencies, through the State
14 Clearinghouse, for review and comment prior to completion of the
15 environmental impact report, negative declaration, or mitigated
16 negative declaration.

17 (e) The Office of Planning and Research shall develop and
18 prepare the proposed guidelines as soon as possible and shall
19 transmit them immediately to the Secretary of the Natural
20 Resources Agency. The Secretary of the Natural Resources Agency
21 shall certify and adopt the guidelines pursuant to Chapter 3.5
22 (commencing with Section 11340) of Part 1 of Division 3 of Title
23 2 of the Government Code, which shall become effective upon the
24 filing of the adopted guidelines. However, the guidelines shall not
25 be adopted without compliance with Sections 11346.4, 11346.5,
26 and 11346.8 of the Government Code.

27 (f) The Office of Planning and Research shall, at least once
28 every two years, review the guidelines adopted pursuant to this
29 section and shall recommend proposed changes or amendments
30 to the Secretary of the Natural Resources Agency. The Secretary
31 of the Natural Resources Agency shall certify and adopt guidelines,
32 and any amendments to the guidelines, at least once every two
33 years, pursuant to Chapter 3.5 (commencing with Section 11340)
34 of Part 1 of Division 3 of Title 2 of the Government Code, which
35 shall become effective upon the filing of the adopted guidelines
36 and any amendments to the guidelines. However, guidelines may
37 not be adopted or amended without compliance with Sections
38 11346.4, 11346.5, and 11346.8 of the Government Code.

39 SEC. 5. Section 21083.09 is added to the Public Resources
40 Code, to read:

1 21083.09. On or before January 1, 2015, the Office of Planning
 2 and Research shall prepare and develop, and the Secretary of the
 3 Natural Resources Agency shall certify and adopt, revisions to the
 4 guidelines that do all of the following:

5 (a) Provide guidance on the implementation of Sections 21084.2
 6 and 21084.3.

7 (b) Provide advice developed in consultation with the Native
 8 American Heritage Commission, Native American tribes, related
 9 to tribal cultural resources, including sacred places, for all of the
 10 following:

11 (1) The preservation and protection of, or culturally appropriate
 12 mitigation to impacts to, tribal cultural resources.

13 (2) Procedures for the protection of the confidentiality of
 14 information concerning the specific identity, location, character,
 15 and use of tribal cultural resources.

16 (3) Procedures to facilitate the voluntary participation of
 17 landowners to preserve and protect the specific identity, location,
 18 character, and use of tribal cultural resources.

19 (4) Procedures to facilitate the identification of, and culturally
 20 appropriate treatment of, tribal cultural resources.

21 (c) Revising Appendix G of Chapter 3 (commencing with
 22 Section 15000) of Division 6 of Title 14 of the California Code of
 23 Regulations to ~~separate~~ *do both of the following:*

24 (1) *Separate* the consideration of paleontological resources
 25 from cultural resources and ~~updating~~ *update* the relevant sample
 26 questions.

27 (2) *Add consideration of tribal cultural resources, including*
 28 *sacred places, with relevant sample questions.*

29 SEC. 6. Section 21084.2 is added to the Public Resources Code,
 30 to read:

31 21084.2. (a) A project may have a significant effect on the
 32 environment if the project has the potential of causing a substantial
 33 adverse change in the significance of a tribal cultural resource.

34 (b) Because Native American tribes may have expertise in
 35 identifying, interpreting, and determining significance of tribal
 36 cultural resources and whether an impact of a proposed project to
 37 a tribal cultural resource is significant, the lead agency shall consult
 38 with the relevant Native American tribes in making a determination
 39 pursuant to subdivision (a).

1 SEC. 7. Section 21084.3 is added to the Public Resources Code,
2 to read:

3 21084.3. If the lead agency determines that a project will have
4 a significant effect on places, features, and objects described in
5 Section 5097.9 or 5097.995 and listed in the California Native
6 American Heritage Commission Sacred Lands File pursuant to
7 Section 5097.993 or 5097.994, the lead agency shall make its best
8 effort to ensure that these resources be avoided, preserved, and
9 protected in place or left in an undisturbed state.

10 SEC. 8. Section 21097 is added to the Public Resources Code,
11 to read:

12 21097. (a) If a Native American tribe notifies a lead agency
13 prior to the commencement of the public review period established
14 by Section 21091, or if the lead agency determines pursuant to
15 Section 21084.3, that a project may adversely affect a tribal cultural
16 resource, including a sacred place, or a tribal reservation or
17 rancheria and that the tribe wishes to consult to resolve the
18 potentially adverse impacts, the lead agency shall engage in early
19 consultation with the affected tribe before or during the
20 environmental review process. The lead agency shall provide to
21 the affected tribe copies of any environmental document and its
22 technical reports. The affected tribe may request the Native
23 American Heritage Commission, the State Office of Historic
24 Preservation, and other relevant agencies or entities to participate
25 in the consultation process and to seek mutually agreeable methods
26 of avoiding or otherwise resolving the potential adverse effects.
27 As part of the consultation process, the parties may propose
28 mitigation measures capable of avoiding or substantially lessening
29 potential impacts to a tribal cultural resource, including a sacred
30 place, or a tribal reservation or rancheria. Any binding agreement
31 reached in this consultation shall be incorporated as mitigation
32 measures in the final environmental document.

33 (b) If no agreement is reached pursuant to subdivision (a), or if
34 an affected tribe identifies significant effects on a tribal cultural
35 resource, including a sacred place, or the affected tribe's reservation
36 or rancheria during the public comment period, the environmental
37 document shall include both of the following analyses:

38 (1) Whether the proposed project has a significant impact on
39 an identified tribal cultural resource, including a sacred place, or
40 a tribal reservation or rancheria.

1 (2) Whether the alternatives or mitigation measures proposed
2 by the parties pursuant to subdivision (a) or during the public
3 comment period avoid or substantially lessen the impact to the
4 identified cultural resource, including a sacred place, or a tribal
5 reservation or rancheria.

6 (c) (1) Any information, including, but not limited to, the
7 location, nature, and use of the place, feature, site, or object that
8 is submitted by an affected tribe regarding a tribal cultural resource,
9 including a sacred place, may not be included in the environmental
10 impact report or otherwise disclosed by the lead agency or any
11 other public agency to the public without the prior consent of the
12 tribe that provided the information. The submitted information
13 shall be published in a confidential appendix to the environmental
14 document. This subdivision is not intended, and may not be
15 construed, to prohibit the confidential exchange of the submitted
16 information between public agencies that have lawful jurisdiction
17 over the preparation of the environmental document.

18 (2) *This subdivision does not affect or alter the application of*
19 *subdivision (r) of Section 6254 of the Government Code.*

20 (d) The lead agency and any responsible agency for the proposed
21 project may issue a permit for a project with a significant impact
22 on an identified tribal cultural resource, including a sacred place,
23 or a tribal reservation or rancheria only if one of the following
24 occurs:

25 (1) Mitigation measures agreed to pursuant to subdivision (a)
26 have been incorporated into the final environmental document.

27 (2) The affected tribe accepts the mitigation measures proposed
28 in the draft or final environmental document.

29 (3) The affected tribe has received notice of, and has failed to
30 comment on, the proposed mitigation measures during the comment
31 period established in Section 21091 and any public hearing required
32 by or held pursuant to this division.

33 (4) The lead agency determines that there is no legal or feasible
34 way to accomplish the projects purpose without causing a
35 significant effect upon the sacred place, that all feasible mitigation
36 or avoidance measures have been incorporated, and that there is
37 an overriding environmental, public health, or safety reason based
38 on substantial evidence presented by the lead agency that the
39 project should be approved. These findings may be made only
40 after the lead agency provides 30 days' notice of hearing to the

1 affected tribe and an opportunity for the affected tribe to review
2 and comment on the proposed finding.

3 (e) If an agreement is not reached pursuant to subdivision (a)
4 and if it can be demonstrated that a project will cause significant
5 effect to a tribal cultural resource, including a sacred place, or a
6 tribal reservation or rancheria, the lead agency may require all
7 reasonable efforts to be made to treat the tribal cultural resource,
8 including a sacred place, or a tribal reservation or rancheria in a
9 culturally sensitive manner. Examples of culturally sensitive
10 treatment include, but are not limited to, the following:

11 (1) Planning construction to avoid those resources or places.

12 (2) Deeding resources or places into permanent conservation
13 easements.

14 (3) Planning parks, greenspace, or other open space to
15 incorporate those resources or places.

16 (4) Adopting culturally appropriate mitigation measures that
17 take into account the tribal value and meaning of the resource or
18 place.

19 (f) In determining the presence of tribal cultural resources,
20 including sacred places, or a tribal reservation or rancheria
21 community, the lead agency shall use the most current and
22 up-to-date technology, research, and resources including, but not
23 limited to, tribal, local, state, and national registers, the Native
24 American Heritage Commission Sacred Lands File, mapping and
25 Geographic Information System data, current cultural resources
26 reports, foot surveys, ethnographic assessment, noninvasive study
27 techniques, and information submitted by an affected tribe. The
28 lead agency shall make all reasonable efforts and complete the
29 research and identification efforts prior to the release of the draft
30 environmental document and, in any case, no later than the
31 finalization of the environmental document.

32 (g) This section is not intended, and may not be construed, to
33 do either of the following:

34 (1) Prohibit any person or entity from seeking any damages or
35 injunction authorized by law.

36 (2) Limit consultation between the state and tribal governments,
37 existing confidentiality provisions, or the protection of religious
38 exercise to the fullest extent permitted under state and federal law.

39 *SEC. 9. This act does not alter or expand the applicability of*
40 *the California Environmental Quality Act (Division 13*

1 *(commencing with Section 21000) of the Public Resources Code*
2 *for projects occurring on Native American tribal reservations or*
3 *rancherias.*

4 ~~SEC. 9.~~

5 *SEC. 10.* No reimbursement is required by this act pursuant to
6 Section 6 of Article XIII B of the California Constitution because
7 a local agency or school district has the authority to levy service
8 charges, fees, or assessments sufficient to pay for the program or
9 level of service mandated by this act, within the meaning of Section
10 17556 of the Government Code.

O