

HUMAN REMAINS RELATED AMENDMENTS

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Kevin T. VanTassell

House Sponsor: Douglas C. Aagard

LONG TITLE

General Description:

This bill modifies the Native American Grave Protection and Repatriation Act.

Highlighted Provisions:

This bill:

- ▶ defines terms;
- ▶ provides for administrative resolution of claims for Native American remains before an action may be filed in court;
- ▶ exempts certain actions from the Administrative Procedures Act; and
- ▶ makes technical and conforming amendments.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

9-9-402, as last amended by Laws of Utah 2007, Chapter 231

9-9-403, as last amended by Laws of Utah 2007, Chapter 231

9-9-405, as last amended by Laws of Utah 1997, Chapter 35

9-9-406, as enacted by Laws of Utah 1992, Chapter 286

63-38f-415, as renumbered and amended by Laws of Utah 2005, Chapter 148

Be it enacted by the Legislature of the state of Utah:

30 Section 1. Section **9-9-402** is amended to read:

31 **9-9-402. Definitions.**

32 As used in this part:

33 (1) "Antiquities Section" means the Antiquities Section of the Division of History.

34 (2) "Burial site" means [~~any~~] a natural or prepared physical location, whether originally
35 below, on, or above the surface of the earth, into which as a part of the death rite or ceremony
36 of a culture individual human remains are deposited.

37 (3) "Cultural affiliation" means that there is a relationship of shared group identity that
38 can be reasonably traced historically or prehistorically between a present day Indian tribe and an
39 identifiable earlier group.

40 (4) "Director" means the director of the Division of Indian Affairs.

41 [~~(4)~~] (5) "Division" means the Division of Indian Affairs.

42 [~~(5)~~] (6) "Indian tribe" means [~~any~~] a tribe, band, nation, or other organized group or
43 community of Indians that is recognized as eligible for the special programs and services
44 provided by the United States to Indians because of their status as Indians.

45 [~~(6)~~] (7) "Lineal descendant" means the genealogical descendant established by oral or
46 written record.

47 [~~(7)~~] (8) "Native American" means of or relating to a tribe, people, or culture that is
48 indigenous to the United States.

49 [~~(8)~~] (9) "Native American remains" means remains that are Native American.

50 [~~(9)~~] (10) (a) "Nonfederal land" means land in the state that is not owned, controlled, or
51 held in trust by the federal government.

52 (b) "Nonfederal land" includes:

53 (i) land owned or controlled by:

54 (A) the state;

55 (B) a county, city, or town;

56 (C) an Indian tribe, if the land is not held in trust by the United States for the Indian
57 tribe or the Indian tribe's members; or

58 (D) a person other than the federal government; or
 59 (ii) school and institutional trust lands as defined in Section 53C-1-103.
 60 ~~[(H)]~~ (11) "Remains" means all or part of a physical individual and objects on or
 61 attached to the physical individual that are placed there as part of the death rite or ceremony of
 62 a culture.

63 (12) "Review committee" means the Native American Remains Review Committee
 64 created by Section 9-9-405.

65 ~~[(H)]~~ (13) (a) "State land" means ~~[any]~~ land owned by the state including the state's:
 66 (i) legislative and judicial branches;
 67 (ii) departments, divisions, agencies, boards, commissions, councils, and committees;
 68 and
 69 (iii) institutions of higher education as defined under Section 53B-3-102.

70 (b) "State land" does not include:
 71 (i) land owned by a political subdivision of the state;
 72 (ii) land owned by a school district;
 73 (iii) private land; or
 74 (iv) school and institutional trust lands as defined in Section 53C-1-103.

75 Section 2. Section **9-9-403** is amended to read:

76 **9-9-403. Ownership and disposition of Native American remains.**

77 (1) If Native American remains are discovered on nonfederal lands on or after April 30,
 78 2007, the ownership or control of the Native American remains shall be determined in the
 79 following priority:

- 80 (a) first, in the lineal descendants of the Native American;
- 81 (b) second, if the lineal descendants cannot be ascertained, in the Indian tribe that:
 82 (i) has the closest cultural affiliation with the Native American remains; and ~~[that]~~
 83 (ii) states a claim for the Native American remains; or
- 84 (c) third~~[-if cultural affiliation of the Native American remains cannot be reasonably~~
 85 ~~ascertained and the land is recognized either by a final judgment of the Indian Claims~~

86 ~~Commission or through other evidence as the exclusive or joint aboriginal land of some Indian~~
87 ~~tribe,];~~

88 (i) in the Indian tribe that is recognized as aboriginally occupying the area in which the
89 Native American remains are discovered, if:

90 (A) cultural affiliation of the Native American remains cannot be reasonably
91 ascertained;

92 (B) the land is recognized either by a final judgment of the Indian Claims Commission
93 or through other evidence as the exclusive or joint aboriginal land of some Indian tribe; and

94 (C) that tribe states a claim for the Native American remains[;]; or

95 (ii) in a different tribe if:

96 (A) it can be shown by a preponderance of the evidence that that different tribe has a
97 stronger genetic or cultural relationship with the Native American remains; and

98 (B) that different tribe states a claim for the Native American remains.

99 (2) Subject to Subsection (7), Native American remains discovered on nonfederal lands
100 that are not claimed under Subsection (1) shall be disposed of in accordance with rules made by
101 the division:

102 (a) consistent with Chapter 8, Part 3, Antiquities[;]; and

103 (b) in consultation with Native American groups, representatives of repositories, and
104 the review committee established under Section 9-9-405.

105 (3) The intentional removal or excavation of Native American remains from state lands
106 may be permitted only if:

107 (a) the Native American remains are excavated or removed pursuant to a permit issued
108 under Section 9-8-305;

109 (b) the Native American remains are excavated or removed after consultation with and
110 written consent of the owner of the state land; and

111 (c) the ownership or right of control of the disposition of the Native American remains
112 is determined as provided in Subsections (1) and (2).

113 (4) (a) ~~[Any]~~ A person who knows or has reason to know that the person has

114 discovered Native American remains on state lands after March 17, 1992 shall notify, in writing,
115 the appropriate state agency having primary management authority over the lands as provided in
116 Chapter 8, Part 3, Antiquities.

117 (b) If the discovery occurs in connection with construction, mining, logging,
118 agriculture, or a related activity, the person shall:

119 (i) cease the activity in the area of the discovery[;];

120 (ii) make a reasonable effort to protect the Native American remains discovered before
121 resuming the activity[;]; and

122 (iii) provide notice of discovery to the appropriate state agency under Subsection (4)(a).

123 (c) Following notification under Subsections (4)(a) and (b) and upon certification by the
124 head of the appropriate state agency that notification [~~has been~~] is received, the activity may
125 resume after compliance with Section 76-9-704.

126 (5) (a) Scientific study of Native American remains may be carried out only with
127 approval of the owner of the Native American remains as established in Subsections (1) and (2).

128 (b) (i) If ownership is unknown, [~~prior study shall be~~] study before identifying
129 ownership is restricted to those sufficient to identify ownership. [~~This study~~]

130 (ii) Study to identify ownership shall be approved only in accordance with rules made
131 by the division in consultation with the review committee [~~established under Section 9-9-405~~].

132 (c) The Native American remains may not be retained longer than 90 days after the date
133 of establishing ownership.

134 (6) (a) Ownership of Native American remains shall be determined in accordance with
135 this Subsection (6) if:

136 [~~(6) If~~] (i) there are multiple claims of ownership under Subsection (1) of [~~any~~] Native
137 American remains; and

138 (ii) the division cannot clearly determine which [~~party making a claim~~] claimant is the
139 most appropriate claimant[;].

140 (b) If the conditions of Subsection (6)(a) are met, the appropriate state agency having
141 primary authority over the lands as provided in Chapter 8, Part 3, Antiquities, may retain the

142 remains until ~~[the parties that make a claim]~~:

143 (i) the multiple claimants for the Native American remains enter into an agreement
144 concerning the disposition of the Native American remains ~~[or]~~:

145 (ii) the dispute is ~~[otherwise]~~ resolved through an administrative process:

146 (A) established by rules made by the division in accordance with Title 63, Chapter 46a,
147 Utah Administrative Rulemaking Act; and

148 (B) that is exempt from Title 63, Chapter 46b, Administrative Procedures Act; or

149 (iii) after the administrative process described in Subsection (6)(b)(ii) is complete, the
150 dispute is resolved by a court of competent jurisdiction.

151 (7) The division may not make rules that impose any requirement on a person who
152 discovers Native American remains or owns or controls nonfederal land that is not state land on
153 which Native American remains are discovered that is not expressly provided for in Section
154 9-8-309.

155 (8) For purposes of this part, if Native American remains are discovered on nonfederal
156 land that is not state land, the Antiquities Section ~~[shall be]~~ is considered the state agency
157 having primary authority over the nonfederal land.

158 (9) This part does not modify any property rights of a person that owns or controls
159 nonfederal land except as to the ownership of Native American remains.

160 Section 3. Section **9-9-405** is amended to read:

161 **9-9-405. Review committee.**

162 (1) There is created a Native American Remains Review Committee.

163 (2) (a) The review committee shall be composed of seven members as follows:

164 (i) four shall be appointed by the ~~[division]~~ director from nominations submitted by
165 Indian tribes; and

166 (ii) three shall be appointed by the ~~[division]~~ director from nominations submitted by
167 representatives of repositories.

168 (b) Except as required by Subsection (2)(c), as terms of current committee members
169 expire, the ~~[division]~~ director shall appoint each new member or reappointed member to a

170 four-year term.

171 (c) Notwithstanding the requirements of Subsection (2)(b), the ~~[division]~~ director shall,
172 at the time of appointment or reappointment, adjust the length of terms to ensure that the terms
173 of committee members are staggered so that approximately half of the review committee is
174 appointed every two years.

175 (d) When a vacancy occurs in the membership for any reason, the ~~[replacement shall be~~
176 ~~appointed]~~ director shall appoint a replacement for the unexpired term.

177 (e) (i) A member ~~[shall]~~ may not receive ~~[no]~~ compensation or benefits for the member's
178 services, but may receive per diem and expenses incurred in the performance of the member's
179 official duties at the rates established by the Division of Finance under Sections 63A-3-106 and
180 63A-3-107.

181 (ii) A member may decline to receive per diem and expenses for the member's service.

182 (f) The review committee shall designate one of its members as chair.

183 (3) The review committee shall:

184 (a) monitor the identification process conducted under Section 9-9-403 to ensure a fair
185 and objective consideration and assessment of all available relevant information and evidence;

186 (b) review~~[- upon the request of any affected party, any]~~ a finding relating to the
187 following, subject to the rules made by the division under Subsection 9-9-403(6):

188 (i) the identity or cultural affiliation of Native American remains; or

189 (ii) the return of ~~[these]~~ Native American remains;

190 (c) facilitate the resolution of ~~[any disputes]~~ a dispute among Indian tribes or lineal
191 descendants and state agencies relating to the return of Native American remains, including
192 convening the parties to the dispute if ~~[deemed]~~ considered desirable;

193 (d) consult with Indian tribes on matters within the scope of the work of the review
194 committee affecting these tribes;

195 (e) consult with the division in the development of rules to carry out this part;

196 (f) perform other related functions as the division may assign to the review committee;
197 and

198 (g) make recommendations, if appropriate, regarding [~~future~~] care of Native American
199 remains that are to be repatriated.

200 (4) [~~Any records and findings~~] A record or finding made by the review committee
201 relating to the identity of or cultural affiliation of [~~any~~] Native American remains and the return
202 of [~~any~~] Native American remains may be admissible in any action brought under this part.

203 (5) The appropriate state agency having primary authority over the lands as provided in
204 Chapter 8, Part 3, Antiquities, shall ensure that the review committee [~~have~~] has reasonable
205 access to:

206 (a) Native American remains under review; and [~~to~~]

207 (b) associated scientific and historical documents.

208 (6) The division shall provide reasonable administrative and staff support necessary for
209 the deliberations of the review committee.

210 (7) The review committee shall submit an annual report to the Native American
211 Legislative Liaison Committee, created in Section 36-22-1, on the progress made, and any
212 barriers encountered, in implementing this section during the previous year.

213 Section 4. Section **9-9-406** is amended to read:

214 **9-9-406. Savings provision.**

215 Nothing in this part may be construed to:

216 (1) limit the authority of [~~any~~] a state agency to:

217 (a) return or repatriate Native American remains to Indian tribes or individuals; or

218 (b) enter into [~~any other~~] another agreement with the consent of the lineal descendant
219 or culturally affiliated tribe as to the disposition or control over Native American remains;

220 (2) delay actions on repatriation requests that are pending on [~~the effective date of this~~
221 part] March 17, 1992;

222 (3) deny or otherwise affect access to any court, except as provided in Subsection
223 9-9-403(6);

224 (4) limit any procedural or substantive rights [~~which~~] that may otherwise be secured to
225 individuals or Indian tribes; or

226 (5) limit the application of any state or federal law pertaining to theft or stolen property.

227 Section 5. Section **63-38f-415** is amended to read:

228 **63-38f-415. Indian tribes -- Application.**

229 (1) For purposes of this section:

230 (a) "Indian reservation" is as defined in Section 9-9-210.

231 (b) "Indian tribe" is as defined in Subsection 9-9-402~~(4)~~(6).

232 (c) "Tribal applicant" means the governing authority of a tribe that meets the
233 requirements for designation as an enterprise zone under Subsection ~~(3)~~(2).

234 (2) Indian tribes may apply for designation of an area within an Indian reservation as an
235 enterprise zone.

236 (3) The tribal applicant shall follow the application procedure for a municipal applicant
237 in this part except for the population requirement in Subsections 63-38f-404(2)(a) and (b).