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## FISCAL IMPACT REPORT

SPONSOR: Tsosie DATE TYPED: 02/21/03 HB \_\_\_\_\_

SHORT TITLE: Repatriation Act SB 673

ANALYST: Weber

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY03	FY04	FY03	FY04		
			Significant – See Narrative	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

Responses Received From

Attorney General  
Office of Indian Affairs  
Office of Cultural Affairs

### SUMMARY

Synopsis of Bill

Senate Bill 673 (SB 673) proposes to create a state Repatriation Act similar to the federal Native American Protection and Repatriation Act, 25 U.S.C. 3001, PL 101-601(Nov. 16, 1990). The state law would provide for the disposition and/or repatriation of Indian tribal human remains and funerary objects for tribes located within and around New Mexico. SB 673 also proposes to amend the Open Meetings Act to make certain discussions concerning repatriation exempt from the open meeting requirement of the Open Meetings Act, Section 10-15-1 *et seq.* NMSA 1978.

Significant Issues

Each of the three responding agencies offered extensive and often overlapping analysis of SB 673. The following is principally from the Office of Indian Affairs response.

The Repatriation Act states that an agency that has control over human remains, sacred objects, funerary objects or objects of cultural patrimony will complete an inventory within six months.

The Native American Graves and Repatriation Act (NAGPRA) was passed in Nov. 1990, and there was provision for grants for museums to hire staff to assist them in completing draft inventories, and well as the procedures for inventories and notification to the Tribes. The grant funding ended in 1995. However, all institutions that receive Federal money had to comply with NAGPRA. The Museum of Indian Art and Culture completed their draft inventory which has been sent out and received by the Tribes. To complete an inventory that is correct and complete, there must be more time allowed and funds must be allocated to hire additional full time staff specifically for this project. Printing of the inventory will be voluminous and as written in this legislation, would also be distributed by the New Mexico Commission on Indian Affairs. Printing of these inventories will be costly, and funding for printing is not mentioned in this legislation.

Federal law supercedes State law, and NAGPRA would supercede the Repatriation Act. NAGPRA is the greatest human rights law ever written, and gave Tribes control over their ancestral remains, affiliated and unaffiliated burial objects, sacred objects and objects of cultural patrimony. NAGPRA also recognizes that oral history, aboriginal lands, folklore, and ceremonies in providing the burden of proof of cultural affiliation. There is a NAGPRA Advisory Committee that handles disputes, and as well as NAGPRA provisions for inventories and reporting. Consultations with tribes are not mentioned, nor are meetings between tribal entities to settle a dispute.

The Executive Director of the Office of Indian Affairs and the State Historic Preservation Officer are assigned the task of determining the cultural affiliation or direct kinship relationship with a tribe, or if the case should be taken before the Repatriation Commission. This task is very specific in nature and requires incredible expertise. When there is discovery, currently the State Historic Preservation Division contacts tribes that may be affiliated or related by direct kinship, and then forwards a letter to the Office of Indian Affairs. The OIA then contacts all 22 tribes, forwarding a copy of the letter from HPD which states the exact location of the site and with specifics. The Tribes then would contact HPD directly if they wished to make a claim. This way it is more inclusive and less subjective. The Hopi and Plains Tribes also may have claims.

The Repatriation Act also establishes a nine member Repatriation Commission, who would be appointed by the Governor for two years. There isn't an appropriation attached to the legislation to provide for the Repatriation Commission.

In Section 6, (C) it states that each language group spoken by the tribes in New Mexico would be represented. However, it does not mention Tiwa, Tewa, or the Keres language. Representatives from Hopi, the Tohono O'odham, as well as representatives from Plains Tribes have cultural affiliation to New Mexico should be represented on this Commission. A complete list of those language groups or tribes that are designated members of the panel should be listed. A good model for the Commission would be the Native American Advisory Panel of the Museum of Indian Art and Culture.

Legislation needs to be drafted that addresses inadvertent discovery on private lands, and that has "teeth"—strong penalties for those who desecrate graves and sell the remains and associated and unassociated funerary objects. Private landowners can receive permits from a city or town, and build without impunity or without prior archaeological excavation, if a landowner knows how to circumvent the State. A State Repatriation Law could offer punitive alternatives.

Another issue that is not addressed in Senate Bill 673 is there are no Indian members of the Historic Preservation Department's committee that issues archaeological permits. There could be legislation drafted that mandates two members be Native American

A State Repatriation Act could compliment NAGPRA and cover the issues that are not addressed in NAGPRA. Punitive measures that are extensive and strict would be a deterrent to grave robbers, pot hunters, exploitive gallery owners, and private owners who desecrate and exploit burial sites on their land.

The Repatriation Act could also provide for a State Cemetery for Native American Ancestors for human remains that have no cultural affiliation or whose tribes do not want them back. This is an important issue because there are tribes who will not receive remains back or sacred objects when they have been disturbed and excavated, thus tainted. The tribe leaves the human remains or objects in the hands and responsibility of those that disturbed them. Some tribes believe that once a ceremony is completed, their duty is complete. Many tribes have no ceremonies for reburial when remains have been disturbed.

A very important point of this legislation is that any human remains or sacred objects that are in the custody of an institution should be treated with dignity and respect with allowances for traditional care of the objects (Section 5, #D).

This is a very important step in creating legislation that deals with the processes of repatriation and a great attempt to get most of the human remains and associated sacred objects and objects of cultural patrimony back to their tribes. NAGPRA is the vehicle for this. However, stipulations can be made and processes directed for advertent/inadvertent discovery on private and State lands, and longer periods of contact other than the 30 day which is currently in effect, for tribes to respond to notification from the Historic Preservation Division and the Office of Indian Affairs.

The Office of Attorney General offers a concern relating to the section related to the Open Meetings Act. SB 673 proposes to amend the Open Meetings Act to permit the discussions of the proposed Repatriation Committee to be closed to the public. Under the enumerated exemptions of the Open Meetings Act, the discussions of the proposed Repatriation Commission do not clearly fall within any exemption. It would be inconsistent with the intent of the Open Meetings Act to permit the discussions of the Repatriation Commission to be closed. It is unclear whether the decision making process by the Repatriation Commission is an adjudicatory-type hearing or general discussion. It does not further due process and fairness if the deliberations of the Repatriation Commission are closed when an agency's legal rights may be at issue, or if an agency objects to a repatriation request.

### **FISCAL IMPLICATIONS**

Legislative appropriations may have to be made to fund the additional duties of the Office of Indian Affairs and its executive director, the State Historic Preservation Officer and the newly formed Repatriation Commission.

The Office of the Attorney General will also assume a new client agency in the newly created Repatriation Commission. The annual fiscal implications for the AGO will be \$75,000 salary plus 33% benefits.

## TECHNICAL ISSUES

The Office of Cultural Affairs sites a variety of clarifications.

Generally: definitions of essential terms and concepts (“reasonably traced,” “strong evidence,” and even “tribe”) are more ambiguous than in the analogous federal legislation, NAGPRA. These need to be tightened to improve implementation. Care must be taken to distinguish rights and protections of burials that are not Native American, including other non-European descendants. Another potentially difficult technical issue is that the most relevant consultants (descendants) of individual burials may not be New Mexico tribes (Ute, Southern Ute, Plains groups, Hopi, etc.).

### Specifically:

- Section 2.B. “cultural affinity” is defined to include “a link that can be established through common use of a geographic site.” This provision is not included in NAGPRA and appears to be so broad as to include private land.
- Section 2.D. “funerary object” is defined to include “interment...identified to be related to specific remains or a specific site.” This provision is not included in NAGPRA and appears overly broad; substitution of “and” for “or” would be less vague.
- Section 2.H. The definition of “remains” substantially overlaps with the existing definition of “human burial” found at 18-6-11.2.B(2). It seems reasonable to cite the existing statutory definition for comparability.
- Section 2.G. “object of tribal patrimony” is defined to address inalienable property only. NAGPRA provides for property legally owned (alienable) by an individual and it appears this provision should be included in the definition for comparability.
- Section 2.I. NAGPRA defines “sacred object” as a “specific ceremonial object” with continuing language. The proposed definition of “object” is vague.
- Section 2.K “tribe” as defined excludes tribes in neighboring states that have traditional use areas as well as a historic presence in New Mexico. The proposed definition should delete the words after “pueblo.”
- Section 3.B(1) – the “New Mexico *commission* on Indian affairs” is not defined.
- Section 3.D. Providing the inventory to “any person who requests a copy of the inventory” appears inappropriate and insensitive. In addition, any item brought to the courts in the future that is not on such a list could be used by the defense attorney as evidence that the item(s) in question are not cultural patrimony.
- Section 7.H(11) will probably require a formal argument to exempt the meetings of the Repatriation Commission from the Open Meetings Act.