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OPINION	:	No. 07-103
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of	:	November 6, 2007
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THE NATIVE AMERICAN HERITAGE COMMISSION has requested an opinion on the following question:

To what extent, if any, may the Native American Heritage Commission delegate its powers and duties to its executive secretary, including the authority to hold hearings, make findings, and ask the Attorney General to bring an action to prevent severe and irreparable damage to a Native American sanctified cemetery or to prevent the taking of artifacts from a Native American grave?

CONCLUSION

The Native American Heritage Commission may delegate to its executive secretary those powers and duties that do not require the exercise of the special judgment and discretion conferred upon the commission by statute. Such delegable powers include the authority to investigate claims of damage or threatened damage to a Native American sanctified cemetery or of removal or threatened removal of artifacts from a Native American grave; to prepare preliminary reports, hold hearings, and make recommended findings subject to the commission's review and approval; and to recommend that the commission bring an action, through the Attorney General, to prevent such damage or such removal.

ANALYSIS

The Native American Heritage Commission (Pub. Resources Code, §§ 5097.9-5097.994; "Commission")¹ is charged by the Legislature with identifying and cataloguing places of cultural significance to Native Americans and with protecting the integrity and sanctity of Native American burial sites, skeletal remains, and grave artifacts found on public and private property. (See *Native American Heritage Com. v. Board of Trustees* (1996) 51 Cal.App.4th 675, 681-682; *People v. Van Horn* (1990) 218 Cal.App.3d 1378, 1392-1394; 71 Ops.Cal.Atty.Gen. 121, 121-123 (1988).)

The Commission is comprised of nine members, a majority of whom must be from California Native American tribes and be nominated by tribes or other Native American organizations. (§ 5097.92; see *People v. Van Horn, supra*, 218 Cal.App.3d at p. 1395.) Commission members are appointed by the Governor with the advice and consent of the Senate. (§ 5097.91.) The Commission has an "executive secretary," who is also appointed by the Governor. (§ 5097.92.)

The question presented for resolution concerns whether the Commission may delegate to its executive secretary the powers and prerogatives conferred by statute upon the Commission. More particularly, we are asked whether such a delegation may include the following specific powers: (1) the authority to hold hearings and make findings concerning the effects of proposed actions by public agencies; and (2) the authority to ask the Attorney General to bring an action to prevent severe and irreparable damage to historical, cultural, or sacred Native American sites or to prevent the taking of artifacts from Native American graves. We conclude that the Commission may delegate to its executive secretary matters that do not require an exercise of the special discretion and judgment conferred upon the

1. All further references to the Public Resources Code are by section number only.

Commission. The Commission may not delegate its authority to make final findings about the extent to which Native American sacred sites, remains, and artifacts are threatened, or its power to determine appropriate mitigation measures, or its discretion to choose whether and when the Attorney General should be asked to file an action on the Commission's behalf.

Section 5097.94 states the general powers of the Commission:

The commission shall have the following powers and duties:

(a) To identify and catalog places of special religious or social significance to Native Americans, and known graves and cemeteries of Native Americans on private lands. The identification and cataloguing of known graves and cemeteries shall be completed on or before January 1, 1984. The commission shall notify landowners on whose property such graves and cemeteries are determined to exist, and shall identify the Native American group most likely descended from those Native Americans who may be interred on the property.

(b) To make recommendations relative to Native American sacred places that are located on private lands, are inaccessible to Native Americans, and have cultural significance to Native Americans for acquisition by the state or other public agencies for the purpose of facilitating or assuring access thereto by Native Americans.

(c) To make recommendations to the Legislature relative to procedures which will voluntarily encourage private property owners to preserve and protect sacred places in a natural state and to allow appropriate access to Native American religionists for ceremonial or spiritual activities.

(d) To appoint necessary clerical staff.

(e) To accept grants or donations, real or in kind, to carry out the purposes of this chapter.

(f) To make recommendations to the Director of Parks and Recreation and the California Arts Council relative to the California State Indian Museum and other Indian matters touched upon by department programs.

(g) To bring an action to prevent severe and irreparable damage to, or assure appropriate access for Native Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, pursuant to Section 5097.97. If the court finds that severe and irreparable damage will occur or that appropriate access will be denied, and appropriate mitigation measures are not available, it shall issue an injunction, unless it finds, on clear and convincing evidence, that the public interest and necessity require otherwise. 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 shall be authorized to employ other counsel. In any action to enforce the provisions of this subdivision the commission shall introduce evidence showing that such cemetery, place, site, or shrine has been historically regarded as a sacred or sanctified place by Native American people and represents a place of unique historical and cultural significance to an Indian tribe or community.

(h) To request and utilize the advice and service of all federal, state, local, and regional agencies.

(i) To assist Native Americans in obtaining appropriate access to sacred places that are located on public lands for ceremonial or spiritual activities.

(j) To assist state agencies in any negotiations with agencies of the federal government for the protection of Native American sacred places that are located on federal lands.

(k) To mediate, upon application of either of the parties, disputes arising between landowners and known descendents relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials.

The agreements shall provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction and provide for sensitive treatment and disposition of Native American burials, skeletal remains, and associated grave goods consistent with the planned use of, or the approved project on, the land.

(l) To assist interested landowners in developing agreements with appropriate Native American groups for treating or disposing, with appropriate

dignity, of the human remains and any items associated with Native American burials.

In addition, section 5097.97 provides:

In the event that any Native American organization, tribe, group, or individual advises the commission that a proposed action by a public agency may cause severe or irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, or may bar appropriate access thereto by Native Americans, the commission shall conduct an investigation as to the effect of the proposed action. Where the commission finds, after a public hearing, that the proposed action would result in such damage or interference, the commission may recommend mitigation measures for consideration by the public agency proposing to take such action. If the public agency fails to accept the mitigation measures, and if the commission finds that the proposed action would do severe and irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, the commission may ask the Attorney General to take appropriate legal action pursuant to subdivision (g) of Section 5097.94.

Section 5097.994 establishes civil penalties for the unlawful excavation, destruction, removal, or defacement of historical, cultural, or sacred Native American sites on private land, and provides that “[a] civil action may be brought pursuant to this section by the district attorney, the city attorney, or the Attorney General, or by the Attorney General upon a complaint by the Native American Heritage Commission.” (§ 5097.994, subd. (d).)

Accordingly, the Commission’s powers and duties include: (1) identifying and cataloguing places of special religious or social significance to California Native Americans; (2) helping Native Americans make known their concerns regarding the treatment of Indian graves and cemeteries; (3) identifying Native American burial sites on private property and, upon the discovery of remains, notifying the most likely descendants so they might recommend treatment and disposition of the remains and of the grave goods; (4) mediating disputes between landowners and Native Americans that may arise in such private property contexts; (5) assisting landowners and Native American Groups in developing agreements regarding the disposition of graves and artifacts; (6) making recommendations for the purchase by the state or public agencies of sacred sites on private lands to facilitate access thereto by Native Americans; (7) ensuring and protecting access by Native Americans to sacred sites on public property; (8) assisting state agencies in negotiations with the federal

government for the protection of sacred places on federal lands; (9) requesting and applying the advice and services of federal, state, regional, and local agencies; and (10) working with the Department of Parks and Recreation, the California Arts Council, and other governmental agencies on Indian matters.

In contrast, the statutory scheme does not assign any specific duties, powers, responsibilities, or functions to the Commission's executive secretary; neither do the statutes require that the executive secretary be a tribe member or tribal leader, or that he or she be nominated by tribes or other Native American organizations. The statutes are silent about which of the Commission's responsibilities, if any, may be delegated to the executive secretary by the Commission, and under what circumstances. (Cf., e.g., Gov. Code, § 17530 [duties of executive director of Commission on State Mandates]; Gov. Code, § 18654 [State Personnel Board's delegation of powers to executive officer]; Gov. Code, § 20099 [delegation by Board of Administration of the Public Employees' Retirement System to executive officer]; Gov. Code, § 22208 [delegation by Retirement Board of the State Teachers' Retirement System to executive officer]; Gov. Code, § 83108 [Fair Political Practices Commission's delegation to executive director]; Ed. Code, § 71090 [delegation by Board of Governors of California Community Colleges to Chancellor]; Wat. Code, § 13223 [delegation by regional water quality control boards to respective executive officers].)

Because the legislative scheme assigns no specific duties to the executive secretary and is silent about the extent to which the Commission's powers may be delegated, we turn to general principles governing the delegation of authority to state and local public agencies. It is well established that, in the absence of express statutory authorization, powers and authority conferred upon a public agency cannot be surrendered or delegated to a subordinate if they involve the exercise of judgment or discretion in the agency's areas of special expertise; rather, such powers are said to be in the nature of a public trust, placed exclusively in the hands of the specified public agency. (See, e.g., *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 24-25; *California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal.3d 139, 144; *American Federation of Teachers v. Board of Education* (1980) 107 Cal.App.3d 829, 834; 64 Ops.Cal.Atty.Gen. 47, 51 (1981); 63 Ops.Cal.Atty.Gen. 240, 243 (1980).)

It is likewise well established, however, that boards and commissions may delegate to their executive officers a wide variety of powers and responsibilities that may be characterized as "routine" or "preliminary" or "ministerial in nature" and that do not require application of the board's or commission's special expertise. This distinction was made by the Supreme Court in *California Sch. Employees Assn. v. Personnel Commission*, *supra*, 3 Cal.3d 139:

As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization. [Citations.] Under normal circumstances and absent statutory provisions to the contrary the dismissal of employees involves the exercise of judgment or discretion. [Citations.]

On the other hand, public agencies may delegate the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action. [Citations.] Moreover, an agency's subsequent approval or ratification of an act delegated to a subordinate validates the act, which becomes the act of the agency itself. [Citations.]

(*Id.* at pp. 144-145.) These principles regarding the delegation of authority by a board or a commission have been applied in a variety of different contexts. (See, e.g., *Bagley v. City of Manhattan Beach*, *supra*, 18 Cal.3d at pp. 24-25; *American Federation of Teachers v. Board of Education*, *supra*, 107 Cal.App.3d at p. 834; *Ellerbroek v. Saddleback Valley Unified School Dist.* (1981) 125 Cal.App.3d 348, 374; *Schechter v. County of Los Angeles* (1968) 258 Cal.App.2d 391, 396-398; 62 Ops.Cal.Atty.Gen. 479, 482 (1979).)

As noted above, the Legislature has in many instances specifically provided for a broad delegation of powers from a board or commission to its executive officer. These statutes may also establish a presumption that any authority held by a board that *may* lawfully be delegated *has been* delegated to its executive officer. (See, e.g., Gov. Code, § 18654; see also 72 Ops.Cal.Atty.Gen. 58, 59-62 (1989).)

The extent to which a public agency's authority may lawfully be delegated to an executive officer depends not only upon the agency's enabling statute, but also upon whether and to what degree the agency has first provided clear guidelines within which subordinates may apply, administer, or enforce the authority granted. That is to say, if a board or commission has exercised its judgment in defining standards and establishing protocols for the treatment of a matter within its jurisdiction, it may then delegate the application or enforcement of those defined standards in specified situations. (See *Sacramento Chamber of Commerce v. Stephens* (1931) 212 Cal. 607, 610; *American Federation of Teachers v. Board of Education*, *supra*, 107 Cal.App.3d at pp. 834-835; cf. *Kugler v. Yocum* (1968) 69 Cal.2d 371, 375-376 ["legislative power may properly be delegated if channeled by a sufficient standard"].)

Examples of permissible delegations include most personnel decisions, supervision of the agency's staff, and general day-to-day administration of the agency's

operations. (See, e.g., *Wilson v. San Francisco Mun. Ry.* (1973) 29 Cal.App.3d 870, 873; 63 Ops.Cal.Atty.Gen., *surpa*, at pp. 244-245; but see *California Sch. Employees Assn. v. Personnel Commission*, *supra*, 3 Cal.3d at p. 144 [public agency's dismissal of permanent employees normally involves exercise of judgment or discretion]; *Civil Service Assn. v. Redevelopment Agency* (1985) 166 Cal.App.3d 1222, 1225-1226 [same].)

On the other hand, matters that call for an exercise of the board's or commission's special discretion or judgment may not lawfully be delegated to an executive officer or other body because such authority is exclusively reserved, as a public trust, for the public agency to which that authority has been conferred by law. If this were not so, the board or commission would itself have little purpose. (See, e.g., *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 235 [legislative functions such as the power to levy taxes and adopt budgets "may not be delegated to an executive officer, leaving no discretion in the governing board"].)

In our view, Commission functions such as (1) determining whether sacred Native American sites, remains, or artifacts are suffering or are threatened with severe damage; (2) determining appropriate mitigation measures; and (3) deciding whether and when to bring a legal action are not "routine," "preliminary," or "ministerial in nature," but rather call for exercise of the Commission's special judgment and discretion. (Compare, e.g., *Bagley v. City of Manhattan Beach*, *supra*, 18 Cal.3d at pp. 24-25 [city council's power to determine salaries]; *California Sch. Employees Assn. v. Personnel Commission*, *supra*, 3 Cal.3d at p. 144 [school district board's authority to dismiss district employees]; *Sacramento Chamber of Commerce v. Stephens*, *supra*, 212 Cal. at p. 610 [city council's power to appropriate city funds]; *Webster v. Board of Education* (1903) 140 Cal. 331, 332 [school superintendent's authority to sit as *ex officio* member of board of education]; *American Federation of Teachers v. Board of Education*, *supra*, 107 Cal.App.3d at p. 834 [board's authority to accept employee's resignation]; *Myers v. City Council of City of Pismo Beach* (1966) 241 Cal.App.2d 237, 241-242 [city council's power to levy taxes]; *City of Redwood City v. Moore* (1965) 231 Cal.App.2d 563, 576 [city council's authority to issue bonds]; *Mitchell v. Walker* (1956) 140 Cal.App.2d 239, 243-244 [city council's power to fix compensation for city officials and employees].)

Hence, we believe that the final administrative decisions as to each of these matters must be made by the Commission, in keeping with the public trust conferred upon it, and may not be delegated to any other body or other officer. (See *Bagley v. City of Manhattan Beach*, *supra*, 18 Cal.3d at pp. 24-25; *California Sch. Employees Assn. v. Personnel Commission*, *supra*, 3 Cal.3d at p. 144; *American Federation of Teachers v. Board of Education*, *supra*, 107 Cal.App.3d at p. 834; 64 Ops.Cal.Atty.Gen., *supra*, at p. 51; see also *Hampson v. Superior Court* (1977) 67 Cal.App.3d 472, 484 [regional water board may

authorize executive officer to make initial determinations, but may not relinquish its right and duty to review and, where appropriate, to overrule such preliminary determinations].)

Still, we believe that the Commission may delegate to its executive secretary, or to other representatives, the responsibility for taking preliminary steps associated with these decisions, such as investigating claims, conducting evidentiary hearings, making preliminary evaluations of evidence, preparing reports and recommendations that may include recommended findings and decisions, and establishing and maintaining contacts with Native American groups, interested parties, law enforcement agencies, and other public agencies. (Cf. Gov. Code, § 19582 [State Personnel Board may authorize representative, such as administrative law judge, to hold hearing and prepare proposed decision, but only board “shall render the decision that in its judgment is just and proper”]; *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 593 [in adjudication of disciplinary actions, administrative law judge “has no authority to issue decisions or take other action” on State Personnel Board’s behalf, but may only render proposed decisions for board’s consideration]; *Klevesahl v. Byington*, (1934) 1 Cal.App.2d 671, 676 [civil service commission may delegate tasks of investigating facts and preparing reports, but may not delegate its authority to determine moral character of applicants].) As the court observed in *Schechter v. County of Los Angeles*, *supra*, 258 Cal.App.2d 391:

When an act or duty is discretionary the information and data needed for the exercise thereof . . . need not be personally gathered. “. . . the rule that requires an executive officer to exercise his own judgment and discretion in making an order of such nature does not preclude him from utilizing, as a matter of practical administrative procedure, the aid of subordinates directed by him to investigate and report the facts and their recommendation in relation to the advisability of the order, and also to draft it in the first instance. [Citations.] It suffices that the judgment and discretion finally exercised and the orders finally made by the superintendent were actually his own; and that there then attaches thereto the presumption of regularity in order to effectuate the intent manifested thereby.” [Citations.]

(*Id.* at pp. 397-398.) In addition, the Commission may delegate the handling of routine personnel matters and the oversight of the day-to-day operations of the Commission and its staff.

A contrary conclusion -- that the executive secretary may perform all of the functions and make all of the determinations charged by statute to the Commission -- would not only render the Commission virtually superfluous, including the requirement that a majority of its membership be Native Americans (§ 5097.92; *People v. Van Horn*, *supra*, 218

Cal.App.3d at p. 1395), but it would also effectively negate two significant policies and principles that govern the conduct of state boards and commissions -- namely, quorum rules and “open-meeting” requirements.

The quorum rule for convening meetings is intended to ensure that a board’s or commission’s determinations reflect the considered judgment of at least a significant and representative number of the board’s or commission’s members. The body may not conduct official business when fewer than a prescribed number of its members are in attendance. (See Civ. Code, § 12; Code Civ. Proc., § 15; *People v. Harrington* (1883) 63 Cal. 257, 259-260; *Jacobs v. Board of Sup’rs of City and County of San Francisco* (1893) 100 Cal. 121, 132; *Ursino v. Superior Court* (1974) 39 Cal.App.3d 611, 620; *Ford v. Civil Service Commission* (1958) 161 Cal.App.2d 692, 697; 66 Ops.Cal.Atty.Gen. 336, (1983); 63 Ops.Cal.Atty.Gen., *supra*, at p. 245; 61 Ops.Cal.Atty.Gen. 243, 252-253 (1978); 58 Ops.Cal.Atty.Gen. 706, 706-707 (1975).)

Open-meeting requirements serve a different purpose: they are intended to ensure that governmental deliberations and decision making are accessible to public scrutiny and have the benefit of public participation and comment. (See Gov. Code, §§ 11120-11132; 86 Ops.Cal.Atty.Gen. 210, 212 (2003); 85 Ops.Cal.Atty.Gen. 145, 147 (2002).) As we observed in 75 Ops.Cal.Atty.Gen. 263, 266 (1992), there is an implicit presumption underlying such open-meeting laws “that statutorily created bodies will act at meetings.” This premise applies even when the enabling statutes do not expressly call for regular meetings of the board or commission in question. (*Ibid.*)

Here, because the Legislature has created a nine-member Commission and has specified that a majority of its members be Native Americans, we must presume that the Commission must act as a body, not as a single-person entity, in discharging its specially designated statutory functions. (See also *In re Retirement Cases* (2003) 110 Cal.App.4th 426, 471 [if administrative body has statutory discretion to act, courts may not usurp that discretion or compel its exercise in particular manner]; cf. *People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132, 1150-1155 [prosecutor’s action does not usurp commission’s discretion where statutory scheme specifically confers shared enforcement authority upon commission and public prosecutors].) A quorum must be present for the Commission to take official action, and the Commission’s meetings must be open to the public.

We conclude that the Commission may delegate to its executive secretary those powers and duties that do not require the exercise of the special judgment and discretion conferred upon the Commission by statute. Such delegable powers include the authority to investigate claims of damage or threatened damage to a Native American sanctified cemetery or of removal or threatened removal of artifacts from a Native American grave; to prepare

preliminary reports, hold hearings, and make recommended findings subject to the Commission's review and approval; and to recommend that the Commission bring an action, through the Attorney General, to prevent such damage or such removal.
