

**NATIVE AMERICAN HERITAGE COMMISSION**

November 13, 2020

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***Submitted via Electronic Mail***

Re: Native American Heritage Commission's Review of the University of California's Interim Native American Cultural Affiliation and Repatriation Policy (Mandated by Public Resources Code section 8025, subdivision (a)(2)(D)(3).

Dear President Drake:

The Native American Heritage Commission (Commission) appreciates the opportunity to comment on the University of California's Interim Repatriation Policy (UC Interim Policy), as required under Public Resources Code section 8025, subdivision (a)(3), now representing its fourth such draft policy.

The UC Interim Policy is, by far, the most significant improvement in its serial draft policies, incorporating many of the Commission's previous concerns raised in its December 4, 2019, March 31, and June 19, 2020, comment-review letters. While an improvement over its predecessors, significant challenges remain, including incorporating recent statutory changes enacted by the California Legislature through Assembly Bill 275 (AB 275), as well as addressing concerns raised by the State Auditor documenting a lack of compliance with state and federal repatriation laws. (California State Auditor, *Native American Graves Protection and Repatriation Act: The University of California is not Adequately Overseeing its Return of Native American Remains and Artifacts* (June 2020) Report No. 2019-047 (June 2020 Audit Report).)

Existing law, through AB 2836, requires the UC to engage in tribal consultations in adopting its policy, something that is not only required under state law, but is essential in adopting an effective repatriation policy. (Health & Saf. Code § 8025, subd. (3).) Despite three-previous attempts by the Commission to address the UC's failure to comply with its consultation obligations, a concern substantiated in the June 2020 Audit

Report, remarkably the UC is now proposing to adopt its fourth (and final) version of a repatriation policy without conducting adequate consultations. For instance, the UC did not hold any public consultation sessions regarding its interim policy and has set a November 15, 2020 deadline for tribes to submit comments on a policy to be adopted by the end of the year. This fails to provide time for one-on-one tribal consultations necessary to reach agreement with tribes over their concerns with the policy as required by state law. (See Gov. Code, § 65352.4) An extension of the UC's deadline to conduct genuine consultations is warranted because many tribes lack full staffing during the ongoing pandemic, a concern expressly recognized under state law in other consultation contexts. (Governor's Exec. Order No. N-54-20 (Apr. 22, 2020).) Because of its importance, the Commission would support an appropriate extension of time for the UC to adopt a final policy provided that it demonstrate that it will truly engage in meaningful consultation, as defined under state law, something it has yet to do.

Tribal consultation is a key component, if not the most important step in the adoption of a final policy. First, it provides for the inclusion of the Native American community's voice, the very community to which this policy is meant to serve and provide justice. Second, consultation law clearly states that the parties, where feasible, shall seek agreement (Gov. Code, § 65352.4). This leads to a third important reason for adequate consultation, which is to arrive at a final policy that *all stakeholders* can confirm contains a fair, understandable, transparent process which is also reliable and most importantly, in compliance with the law from a tribal perspective. The UC's failure to include this perspective has been amply evidenced through the UC Regents' September 26, 2018, hearing on repatriation<sup>1</sup>, the enactment of Legislation<sup>2</sup>, a State Audit<sup>3</sup>, as well as through Commission oversight and advice. An effective repatriation policy can only be accomplished through meaningful consultation with those affected communities. Even after its adoption, the UC will still need to conduct periodic consultations, at least over the implementation of its first two-years, concerning the policy's efficacy necessary to make alterations addressing tribal concerns and frustrations that impede repatriation. In a very real way, the policy needs to be a living document with its primary purpose to facilitate long-overdue repatriations.

In conjunction with consultation, AB 2836 also requires the UC to adopt systemwide policies in consultation with tribes for the identification of Native American remains and cultural items. (Health & Saf. Code, § 8025, subd. (2)(D).) A necessary component in complying with this requirement is determining whether the UC has legal possession and control sufficient to treat the objects as part of its collection. (43 C.F.R. § 10.2(3)(ii); Health & Saf. Code, § 8012, subd. (e), under existing law, and Health & Saf. Code § 8012, subds. (f) and (j), as amended by AB 275.) More recently, UC campuses, including Berkeley, UCLA, and Davis, stated that they have identified a large number of remains and related items provided by other agencies to the UC where they may have

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<sup>1</sup> <https://regents.universityofcalifornia.edu/regmeet/sept18/a3.pdf>

<sup>2</sup> Assem. Bill No. 2836 (2017-2018 Reg. Sess.); Assem. Bill No. 275 (2019-2020 Reg. Sess.).

<sup>3</sup> California State Auditor, *Native American Graves Protection and Repatriation Act: The University of California is not Adequately Overseeing its Return of Native American Remains and Artifacts* (June 2020) Report No. 2019-047.

possession, but the issue is unclear. The UC Interim Policy fails to provide basic components of a systemwide process for inventorying and making the necessary determinations regarding possession and control. For example, as part of any final policy for remains and items where the UC determines it lacks legal possession and control, tribes need to be provided with this inventory and corresponding analysis, as well as identification of the agencies which provided them to the UC sufficient to enable tribes to bring claims before these agencies. Absent such a process, these remains and items could indefinitely evade repatriation, defeating the purpose behind state and federal repatriation laws.

Ultimately, significant revisions remain necessary to address the State Auditor's June 2020 conclusion "that the university's inadequate policies and oversight have resulted in inconsistent practices for returning Native American remains and artifacts," as well as her finding that through sloppy accounting (including campuses lacking "controls for keeping track of what they had loaned") that campuses had lost remains and items. (June 2020 Audit Report at p. 28.) The Commission is resolute in its commitment to assist and advise the UC to achieve compliance with existing law (Assembly Bill 2836 [AB 2836]), as well as newly enacted AB 275, and existing federal repatriation law. This assistance will continue to include providing written comments and participation in meetings to discuss UC questions and concerns, including the detailed analysis provided below.

## **ANALYSIS**

### **I. ONGOING NON-COMPLIANCE WITH AB 2836 PREVIOUSLY RAISED BY THE COMMISSION**

This is now the fourth time the Commission has raised the UC's non-compliance with AB 2836 requiring that it adopt systemwide policies across all campuses, in consultation with California tribes (as that term is defined by Government Code section 65352.4).

#### **A. Inadequate Consultation**

AB 2836 requires the UC to adopt systemwide policies for four categories: 1) the respectful and culturally appropriate treatment of remains and cultural items; 2) procedures for submitting claims; 3) deaccessioning; 4) identification of culturally unidentifiable remains and cultural items (CUI), including updates to existing CUI determinations "to identify cultural items that may not have been identified in the original inventories or summaries because traditional tribal knowledge was not incorporated into the identification process." (Health & Saf. Code § 8025, subd. (3).)

These systemwide policies are required to be adopted in consultation with California Native American tribes. (Health & Saf. Code, § 8025, subd. (3).) Consultation is defined as "the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each

party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance." (Gov. Code, § 65352.4)

In June of 2020, the California State Auditor completed her review of the UC's compliance with repatriation laws. As to consultations, the State Auditor found that "the university failed to adequately incorporate tribal perspectives during the policy's initial development, . ." (California State Auditor, *Native American Graves Protection and Repatriation Act: The University of California is not Adequately Overseeing its Return of Native American Remains and Artifacts* (June 2020) Report No. 2019-047, Opening Statement (June 2020 Audit Report).)

To date, the UC has never sought to conduct in-person consultations at locations other than at its campuses and has made no effort to assist tribes (many of whom lack significant resources) in their travel to UC sites. This occurred in spite of Commission offers to assist in finding alternative low, or no, cost consultation sites. Further, limited efforts were made for individual tribal consultations necessary to reach any form of agreement, as required by the definition of Consultation. These efforts are not respectful of tribal sovereignty and are contrary to the statutory language and legislative intent of AB 275.

Not only were locations limited for UC convenience, but the UC did not provide tribes with adequate time to review a long and complex repatriation policy prior to conducting consultations. (June 2020 Audit Report at p. 21.) For instance, tribes were provided with just eight days to review and comment upon the policy (a lengthy and complex document) prior to the UC holding its public-tribal consultation at UC Berkeley, housing one of the largest Native American collections in the country.

As to the UC's Interim Policy, the Commission is unaware of any plans for the UC to conduct consultations with tribes, including virtually.<sup>4</sup> Tribes are being provided until November 15, 2020, to submit comments for a policy to be finalized on December 31, 2020.<sup>5</sup> Like its predecessors, this process fails to comport with state law because it is not "a meaningful and timely process of seeking, discussing, and considering carefully the views" of tribes to reach agreement and is not respectful of tribal sovereignty. (Gov. Code, § 65352.4) The Commission finds this remarkable given that the UC received written feedback from the Commission three-previous times, and the State Auditor made similar findings documenting the concern. The need for genuine consultation is real, but the UC has treated it as an inconvenient procedural impediment. The Commission emphasizes that no final UC repatriation policy should be adopted until the

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<sup>4</sup> The UC's website informs tribes that they have until November 15, 2020, to submit comments, but does not provide for meaningful consultations beyond just receiving comments. See <https://www.ucop.edu/research-policy-analysis-coordination/policies-guidance/curation-and-repatriation/index.html>

<sup>5</sup> <https://www.ucop.edu/research-policy-analysis-coordination/policies-guidance/curation-and-repatriation/index.html>

UC complies with its obligation to engage in meaningful consultation as required under state law. (Health & Saf. Code § 8025, subd. (3).)

## **B. Systemwide Policies for Identifying and Updating Inventories**

AB 2836 requires the UC to adopt “systemwide” UC policies “for the identification and disposition of culturally unidentifiable human remains and cultural items . . . .” (Health & Saf. Code, § 8025, subd. (2)(D).) The Interim Policy has no express procedures for campuses to conduct searches to identify remains and cultural items. Rather, Repatriation Coordinators will send a communication (presumably an email) asking department heads “to make an informed initial assessment about whether their departments potentially hold Human Remains or Cultural Items.” (UC Interim Policy at p. 30.) These individuals will then confirm that they conducted some sort of “search.” (UC Interim Policy at p. 30.) The terms “informed initial assessment” and “search” are not in any way defined, leaving it up to each department to conduct its version of a search with no deadlines for completing “searches,” whatever this entails.

This is a glaring omission given the State Auditor’s findings that through sloppy accounting, including campuses lacking “controls for keeping track of what they had loaned,” that they had lost remains and items. (June 2020 Audit Report at p. 28.) According to the State Auditor, “only Berkeley could tell us how many items were missing from its NAGPRA collection.” (Id. at p. 29.) While “all three campuses identified missing remains and artifacts during the initial inventories they completed in the 1990s to 2000, only Davis and Los Angeles could demonstrate that they informed tribes of what was missing.” (Ibid.) “When we inquired about some of the missing remains and artifacts at each campus, the campuses generally could provide little information about how they went missing because of poor recordkeeping.” (Ibid.)

Not only does state law require systemwide policies for identifying CUI, but federal NAGPRA requires that inventories include remains in “possession or control” of the agency. (43 C.F.R. § 10.9(a).) Possession means “having physical custody” of remains and related items, which extends beyond just museums, but to any UC department, professor, researcher, or student having physical custody over Native American remains and cultural items. (43 C.F.R. § 10.2(3)(i).) To be sure, leaving it to administrators with no experience or incentive to locate items without specifying the effort which must go into a search, nor deadlines for doing so, is not sufficient to locate remains which went missing because of poor recordkeeping or otherwise.

In conjunction with locating remains and cultural items, AB 2836’s requirement that the UC adopt systemwide policies for identifying Native American remains and cultural items necessarily entails determining if the UC has legal possession and control under state and federal law. Federal law defines the term “control” to mean “having a legal interest in human remains, funerary objects, sacred objects, or objects of cultural patrimony sufficient to lawfully permit the museum or Federal agency to treat the objects as part of its collection . . . .” (43 C.F.R. § 10.2(3)(ii).) Similar to federal law, AB 275 uses CalNAGPRA’s existing definition of “control” to mean “having ownership of Native American human remains and cultural items sufficient to lawfully permit an agency or

museum 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 agency or museum.” (Health & Saf. Code, § 8012, subd. (f), as amended.)<sup>6</sup> AB 275 defines “possession” to mean “having physical custody of Native American human remains and cultural items with a sufficient legal interest to lawfully treat the human remains and cultural items as part of a collection.” (Health & Saf. Code, § 8012, subd. (j), as amended.)

Unlike its predecessor draft policies, the UC Interim Policy omits any definition for the term “possession” or “control.” (UC Interim Policy at p. 4.) At a November 9, 2020 meeting between the UC and Commission, UC campuses, including Berkeley, UCLA, and Davis stated that they have identified a large number of remains and related items obtained from other agencies, some of which may be lawfully treated as part of a UC collection. The campuses expressed concern because possession and control may exist by virtue of curation agreements or, in some instances, because the other agencies consider them to be under the UC’s possession and control. In still other instances identified by the campuses, other agencies, often federal ones, have “flipped-flopped” on whether the UC has possession and control.

The UC Interim Policy fails to include any procedures for inventorying items received from other agencies and in making determinations concerning possession. These remains and related items need to be inventoried and a determination made as to whether the UC has a sufficient legal interest to treat them as part of its collections. For remains and items where the UC determines it lacks state and/or federal legal possession and control, tribes need to be provided with this inventory, the pertinent analysis, as well as identification of the agencies which provided them to the UC, sufficient to enable the tribes to bring claims before these agencies. Without such a process, these remains and items could evade repatriation, perhaps indefinitely, violating AB 2836 and defeating the purpose behind state and federal repatriation laws.

### **C. Systemwide Policies for Deaccessioning**

Under existing law, UC must “[a]dopt or amend, in consultation with California Indian tribes, systemwide University of California museum collection management policies to explicitly provide for the deaccession of collections containing Native American human remains and cultural items to effect the timely and respectful return of those items pursuant to valid claims submitted by a California Indian tribe.” (Health & Saf. Code, § 8025, subd. (a)(2)(C).)

The UC defines deaccessioning as the return of items not covered under federal or state NAGPRA. (UC Interim Policy at p. 31.) Rather than adopt a systemwide policy across campuses in consultation with tribes, the UC Interim Policy unilaterally provides that “[C]ampuses may voluntarily Deaccession items to the requesting Tribe, in

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<sup>6</sup> Prior to AB 275’s enactment, the same definition of the term “control” was codified at Health and Safety Code section 8012, subdivision (e).

accordance with campus practices and as allowable by law.” (UC Interim Policy at p. 31.) This is the *fourth instance* in written comments where the Commission has had to inform the UC that allowing each campus to devise its own policies is *not* a “systemwide” UC policy as required under AB 2836. Simply stated, the terms “may voluntarily deaccession items” does not meet the legal mandate for “explicit provisions” for the deaccession of collections. AB 2836’s mandate for a systemwide policy is aimed, in large part, at avoiding the problems that arose in the past as a result of the UC’s inconsistent application of repatriation laws across the various campuses. (Health & Saf. Code, § 8025, subd. (a)(2)(B) and (D); Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subd. (a)(8).) The UC deaccessioning policy needs to be consistent across campuses and provide clear guidance fostering repatriation to tribes.

## **II. REVISION OF THE UC INTERIM POLICY NECESSARY TO COMPLY WITH AB 275**

On September 25, 2020, California adopted AB 275 profoundly impacting repatriation under state law. The UC is required to substantially revise its Interim Policy in critical areas, including the following:

### **A. Definitions**

#### **1. California Indian tribe**

AB 275 defines a “California Indian tribe” to mean a tribe located in California to which either 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.) or (2) It is not recognized by the federal government, but is a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for the purposes of consultation pursuant to Section 65352.3 of the Government Code. (Health & Saf. Code, § 8012, subds. (c), (1), (2), as amended.) In its definition, the UC Interim Policy contains a conclusory reference to a soon to be outdated statutory reference. (UC Interim Policy at p. 3.)

The change in the definition is significant because the Legislature intended to address concerns in the existing law which limited repatriation to federally recognized tribes and tribes with petitions pending for federal recognition. But this existing law referred to petitions pending with the Bureau of Indian Affairs Branch of Acknowledgement (which no longer exists), using a list maintained under Title 25 of the Code of Federal Regulations, section 82.1 (which was repealed). By utilizing the contact list maintained by the Commission, also used for California Environmental Quality Act purposes, the Legislature significantly broadened the list of California tribes eligible to participate in repatriation, including non-federally recognized tribes.

#### **2. Confidential Information as Part of Consultation**

AB 275 provides that consultation “shall recognize the tribes’ potential need for confidentiality with respect to tribal traditional knowledge and all tribal information shared during the consultation.” In conjunction with AB 275, the Public Records Act

(PRA) exempts from public disclosure records related to “sacred places,” and “Native American objects,” as well as “records that the agency obtains through a consultation process. . . .” (Health & Saf. Code, § 8012, subd. (e), as amended; Gov. Code, §§ 6254, subd. (r), 6252.10.)

While AB 275 references the need to maintain the confidentiality of tribal traditional knowledge, and tribal “information shared” during consultations, dovetailing existing PRA exemptions from public disclosure for records related to sacred “objects,” and records obtained through consultation, the UC Interim Policy generally extends confidentiality only to records related to “places that have traditional tribal cultural significance,” without defining this phrase, as well as information identified by the consulting tribe as confidential. (UC Interim Policy at p. 3.)

The UC Interim Policy needs to broaden its definition of the records deemed confidential to include information about traditional tribal knowledge, as well as all information shared during consultations. Further, the burden should not be on the tribes to identify all of the records the UC should keep confidential. Maintaining confidentiality strikes at the heart of effective consultations and maintaining trust, including respecting tribal sovereignty.

### **3. Departments: Application to all UC Departments, Research Institutions, and Professors/Researchers in Possession of Native American Remains and Cultural Items**

AB 275 defines “museum,” in part, as “an agency, museum, person, or entity, including a higher educational institution, that receives state funds.” (Health & Saf. Code, § 8012, subd. (i), as amended.) Absent from the Interim Policy is an initial statement that it applies to all departments, research institutions, offices, and employees/professors/researchers/students in possession of Native American remains and cultural items, as well as established collections and museums. (UC Interim Policy at p. 4.) Clearly identifying and advertising the repatriation policy’s reach is critical because the State Auditor documented the UC’s past history of poor record keeping resulting in missing items. (June 2020 Audit Report at p. 30.) Individuals and departments may not even realize that they too are subject to the policy, unless the policy is clear and implemented across all departments, employees, and research institutions.

### **4. Control and Possession**

AB 275 defines “control” to mean “having ownership of Native American human remains and cultural items sufficient to lawfully permit an agency or museum 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 agency or museum.” (Health & Saf. Code, § 8012, subd. (f), as amended.) It defines “possession” to mean “having physical custody of Native American human remains and cultural items with a sufficient legal interest to lawfully treat the human remains and cultural items as part of a collection.” (Health & Saf. Code, § 8012, subd. (j).) The UC Interim Policy omits any definition for these terms. (UC Interim Policy at p. 4.) As discussed

above, having these definitions is vital for two reasons: First, the policy applies to all departments, research institutions, offices, as well as employees/professors/researchers/students in “possession” of Native American remains and cultural items, such that the UC is legally responsible to ensure all its departments and offices are in compliance and must take steps to clearly communicate the legal requirements throughout its potentially affected system with specific actions to be taken. Second, the UC Interim Policy lacks any procedures for inventorying and making determinations concerning possession and control. (See discussion, *supra*, Subdivision (l)(B).) UC campuses, including Berkeley, UCLA, and Davis, stated that they have identified a large number of such remains and related items. Under AB 2836, these remains and related items must be inventoried and a determination made as to whether the UC has a sufficient legal interest to treat them as part of its collections. If the UC determines it lacks legal possession and control, tribes need to be provided with this inventory, along with the UCs written determination, and related analysis, which should include identification of the agencies/museums which provided them to the UC to enable these tribes to bring claims before the appropriate agency. Lastly, having a process to determine whether UC has control or right of possession for each collection will be a necessary step in its compliance with Health & Saf. Code, § 8016(a)(3), as amended, wherein an item shall be repatriated when the UC is unable to present evidence that would support a finding it has a right of possession to the items. This is a crucial component in expediting repatriation.

## **5. Preponderance of the Evidence**

AB 275 provides that tribal traditional knowledge satisfies the “preponderance of the evidence” standard. AB 275 states, “Tribal traditional knowledge alone may be sufficient to meet this standard. If there is conflicting evidence, tribal traditional knowledge shall be provided deference.” (Health & Saf. Code, § 8012, subd. (k), as amended.) The UC Interim Policy has no definition for this term, nor does it embrace deference to tribal traditional knowledge. (UC Interim Policy at p. 4.) This is critical because tribes have raised concerns in the past that the UC has denied repatriation, finding that tribal traditional knowledge lacks sufficient evidentiary basis.

### **B. Preliminary Inventories and Related Updates**

#### **1. Creation of Preliminary Inventories and Related Updates**

By January 1, 2022, the UC must update inventories and preliminary inventories based upon state cultural affiliation, including the cultural affiliation of California non-federally recognized tribes. (Health & Saf. Code, § 8013, subds. (b)(1), (C)(i), as amended.) Prior to conducting any inventorying work, the UC must consult with affiliated California Indian tribes. (Health & Saf. Code, § 8013, subd. (b)(B), as amended.) The UC Interim Policy does not require a preliminary inventory process, nor does it contain any requirements for consultation prior to conducting inventorying.

This is a significant change because California Native American tribes are now entitled to participate in the inventory process. Under the UC Interim Policy, tribes may not even

be aware that items were initially excluded from the process. The Legislature documented that the UC's "absence of required consultation with California Native American tribes with respect to repatriation has resulted in some University of California campuses excluding or limiting the participation of stakeholders who could bring valuable knowledge to the repatriation process." (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(9).) AB 275 enables tribes to identify items as culturally related items subject to inventory and repatriation under circumstances where the UC previously may have had no way to have known this fact..

## **2. Preliminary Inventory Publication and Consultation**

Under AB 275, within 90 days of completing preliminary inventories and summaries which include state cultural affiliation, state agencies/museums must provide copies to the Commission. (Health & Saf. Code, § 8013, subd. (d), as amended.) The Commission must publish notices of completion on its website for 30 days, as well as make them available to any requesting potentially culturally affiliated California Indian tribe. (*Ibid.*) After providing the preliminary inventory and summary to the Commission, the state agency/museum must consult with California Indian tribes that may be culturally affiliated. The Commission may assist in identifying California Indian tribes for consultation, but the obligation to contact and consult resides with the state agency/museum. (Health & Saf. Code, § 8013, subd. (j)), as amended.)

AB 275's requirement that the Commission post preliminary inventories is significant because the UC may be unaware of potentially affiliated California Indian tribes (particularly non-federally recognized tribes) resulting from its past documented history of failing to consult with California tribes. Posting on the Commission's website may also assist in ascertaining cultural affiliation for previously missing items, including items missing through poor recordkeeping. (June 2020 Audit Report at p. 28.)

## **3. Preliminary Inventory Disagreements**

Under AB 275, if a tribe disagrees with the contents of a preliminary inventory, the agency must either revise the preliminary inventory to correct the disputed information or the Commission shall offer to initiate dispute resolution through its mediation process. (Health & Saf. Code, § 8013, subd. (j)(1), as amended.) Further, a preliminary inventory may not become final until all disputes are resolved, including over inventory contents, which are required to undergo Commission mediation. (Health & Saf. Code, §§ 8013, subds. (j)(1) and (2), 8016, subd. (d), as amended.)

The UC Interim Policy does not specifically address disagreements over the contents of inventories, preliminary or otherwise. After the UC finalizes an inventory, a tribe could file a complaint or appeal, after-the-fact, but unlike AB 275, the burden would fall on the tribe to establish a mistake and it would be reviewed internally by the UC chancellor. (UC Interim Policy at p. 33.)

AB 275 represents a significant departure from the UC's approach. The UC must now ensure there are no disputes over inventory contents before an inventory may become

final. The tribes must resolve their differences, rather than have the UC make its own determination for them. In a real sense, AB 275 is far more cognizant of tribal sovereignty than the UC Interim Policy.

### **C. Determining Cultural Affiliation**

#### **1. AB 275 Deference to Tribal Knowledge**

In assessing state cultural affiliation under the preponderance of the evidence standard (i.e. that something is more likely than not), AB 275 provides that tribal traditional knowledge alone may be sufficient to meet the standard, but if there is conflicting evidence, tribal traditional knowledge shall be provided deference. (Health & Saf. Code, § 8012, subd. (k), as amended.) AB 275 expressly provides that: "Tribal traditional knowledge shall be used to establish state cultural affiliation and identify associated funerary objects." (Health & Saf. Code, § 8013, subd. (b)(1)(C)(ii), as amended.)

While UC Interim Policy considers tribal knowledge as one factor to be evaluated under the totality of the circumstances in determining state cultural affiliation, it does not identify it as the primary factor to be used to establish cultural affiliation, nor does it provide deference to it where conflicting evidence exists. (UC Interim Policy at pp. 4, 23-24.)

Nothing is more fundamental to cultural affiliation than tribal knowledge. This is crucial because the UC has historically placed emphasis on academic experts in history, anthropology, archeology, and genealogy, in concluding that historical or genealogical gaps were sufficient to deny tribal affiliation. Addressing this concern, the Legislature recognized "that California Indian tribes have expertise with regard to their tribal history and practices that concern the Native American human remains, cultural items, and tribal cultural resources" which "includes treating tribal traditional knowledge as the authority with respect to determining cultural affiliation and the identification of cultural items . . . ." (Assem. Bill No. 275 (2019-2020 Reg. Sess.) § 1, subd. (k)(5).) The Legislature further found this approach to be consistent with federal NAGPRA's canons of interpretation that federal laws "be interpreted as the Indians would have understood them, be construed liberally in favor of the Indians," and that any "ambiguities in the law in favor of the Indians, . . ." (Health & Saf. Code, § 8011, subd. (b), as amended.) As explained here, the Interim Policy must be brought into compliance with this crucial key component of AB 275.

#### **2. Disagreements over Cultural Affiliation**

AB 275 permits tribes to dispute cultural affiliation and a preliminary inventory may not become final until the dispute is resolved. (Health & Saf. Code, § 8013, subds. (j)(1) and (2), as amended.) Further, an inventory may only be changed to final by the Commission if all responding tribes concur. (Health & Saf. Code, § 8013, subd. (j)(2), as amended.) Disputes are handled through the Commission's mediation process. (Health & Saf. Code, § 8016, as amended.)

Under the UC Interim Policy, the UC campus determines if an inventory is final, including determining cultural affiliation, and the burden is on the tribes to file an appeal. (UC Interim Policy at pp. 23-24, 33.)

AB 275 represents a significant departure from the UC Interim Policy. By contrast under AB 275, the tribes are the ones who determine if an inventory is final, including determining cultural affiliation. Under AB 275, the tribes must concur with the inventory or summary. If tribes disagree it must be corrected and any differences resolved, including inter-tribal differences, before the cultural affiliation becomes final. Of key importance, tribes do not have the burden of appealing a campus determination through the UC's appellate process.

#### **D. Final Inventories**

As discussed above, under AB 275 an inventory is only final after its posting on the Commission's website for 30-days and all responding tribes listed in the inventory concur with the information in it. (Health & Saf. Code, § 8013, subds. (j)(1) and (2), as amended.) Any disputes between tribes over a final inventory are resolved through the Commission's dispute mediation process. (Health & Saf. Code, § 8016, subd. (d), as amended.)

Under the UC Interim Policy, the UC campus determines if an inventory is final and the burden is on the tribes to file an appeal. (UC Interim Policy at pp. 23-24, 33.) As mentioned above, AB 275 reflects a significant shift in the state repatriation process. Posting on the Commission's website is essential to ensure that all California Indian tribes with potential cultural affiliation are aware of the UC inventories. Unlike the current UC Interim Policy, the Commission plays an important role in designating the inventories as final, including the ability to revert an inventory from final back to preliminary based upon tribal disagreements. (Health & Saf. Code, § 8013, subd. (j)(3), as amended.) Under AB 275, an inventory is only final after tribal concurrence, fostering consultations, dispute resolution while recognizing tribal sovereignty in the process.

#### **E. Claims Process**

AB 275 creates a new claims process. Tribes must file claims with both the Commission and the UC. (Health & Saf. Code, § 8014, subds. (b)(1)-(2), (A) and (B), as amended.) It creates two standards for assessing claims, one for lineal descendants and one for California Indian tribes.

- Lineal descendants must trace ancestry "directly and without interruption by means of the traditional kinship or village system of the appropriate California Indian tribe, or by the common law system of descendancy to a known individual whose human remains or cultural items are being claimed." (Health & Saf. Code, § 8014, subds. (a)(1) and (2), as amended.)
- California Indian tribes must demonstrate one or both of the following:

- o Shared Group Identity: Demonstrate a shared group identity that can reasonably be traced historically with an earlier identifiable group from which the remains/cultural items originated. This is conclusively proven by a published finding in the Federal Register under NAGPRA; and/or
- o State Aboriginal Territory: Demonstrate that the remains or cultural items were removed from the state aboriginal territory of the claiming tribe. (Health & Saf. Code, § 8014, subds. (b)(1)-(2), (A) and (B), as amended.)

After a claim has been filed, the Commission publishes the request on its website. (Health & Saf. Code, § 8015, subd (a), as amended.) Within 30-day after receiving the Commission's notice, the UC may object to the proposed repatriation because it believes the items are not culturally related to the requesting tribe, were not removed from its state aboriginal territory, or are not subject to repatriation under CalNAGPRA. (Health & Saf. Code, § 8016, subd. (c), as amended.)

By contrast, the UC Interim Policy has two requirements for filing claims under CalNAGPRA:

1. "File a written Request with the NAHC and the UC; and
2. Provide evidence of State Cultural Affiliation, unless Cultural Affiliation is already established by UC as published in the Federal Register in compliance with NAGPRA." (UC Interim Policy at p. 26.)

While providing evidence of state cultural affiliation embraces one of AB 275's elements, it does not necessarily capture the alternative element of state aboriginal territory.

The UC Interim Policy does not provide for UC objections to the claim. In some instances this may be important for a fair and transparent process for all involved. The UC may have legitimate concerns about cultural affiliation or aboriginal interests justifying further exploration through the mediation process. Alternatively, the UC may have concerns about federal NAGPRA's impact on the state claim which needs to be shared with the parties and the Commission.

In a laudable effort, as for non-federally recognized tribes, the UC Interim Policy makes an effort to assist them with the federal NAGPRA process. (UC Interim Policy at p. 27.) To be effective, as soon as a non-federally recognized tribe files a state claim, there needs to be a process to simultaneously assist it in finding a federally recognized tribe to affiliate with for the NAGPRA process, or, if no such federally recognized tribe is available to assist, to file a claim for federal disposition as provided for under the Federal Regulations. (43 C.F.R. § 10.11(c)(ii).) Assistance in this instance is critical because many California tribes lack resources to pursue both state and federal remedies. The interplay between federal and state law can be complex, but the UC's goal should remain to foster repatriation to the fullest extent possible under these laws.

In addition to differences in the claims process, AB 275 provides a dispute resolution process (discussed below) for competing claims. (Health & Saf. Code, § 8016, subd. (d).) The UC Interim Policy states that “[t]ribal Representatives may also seek resolution with the Federal Advisory Review Committee per NAGPRA (43 C.F.R. § 10.17), or for Requests that fall under CalNAGPRA, with the NAHC, per CalNAGPRA § 8016.” By contrast, AB 275 makes the dispute resolution process mandatory. (Health & Saf. Code, § 8016, subd. (d)(1), as amended.)

## **F. Agreements**

AB 275 permits parties to coordinate concerning repatriation and to reach agreement concerning repatriation, including with the UC. The Commission “shall receive” copies of repatriation agreements and “shall have the power to enforcement these agreements.” (Health & Saf. Code, § 8015, subd. (b), as amended.) Under the UC’s Interim Policy, it will “repatriate or complete a Disposition to the Tribe(s) specified in such an agreement, arrangement or decree, provided that the Tribe(s) have been determined by the UC to be entitled to Repatriation or Disposition under this policy. (UC Interim Policy at p. 29.)

The contrast between AB 275 and the UC Interim Policy is stark. Not only does the UC Interim Policy currently not provide for Commission enforcement, the UC determines whether the tribes are entitled to enter into such agreement based upon its prior determinations. But there may be many instances where tribes make agreements that are not reflected in the UC’s repatriation process. For instance, federally and non-federally recognized tribes may enter into agreements to have the federally recognized tribe sponsor the repatriation claim for NAGPRA purposes, or in certain circumstances, a tribe may sponsor another tribe’s repatriation claim due to a tribe’s need for assistance. Repatriation agreements may also include additional consultation, care and handling, and confidentiality terms. Under AB 275, these repatriation agreements are provided to the Commission which can make the appropriate determination over whether, and how, such agreements can be enforced.

## **G. Dispute Resolution**

Under AB 275, if a dispute arises, the Commission notifies the affected parties. The disputing parties have 30-days to meet to resolve the dispute. If the parties are unable to resolve the dispute, then the Commission will mediate the dispute. If the collection is also subject to federal NAGPRA, then the parties may seek the assistance of the Native American Graves Protection and Repatriation Review Committee in resolving the dispute. (Health & Saf. Code, § 8016, subd. (d), as amended.) The parties “shall come to a resolution or the mediator shall render a written decision within 7 days of the mediation session.” (Health & Saf. Code, § 8016, subd. (d)(4), as amended.) If a dispute cannot be resolved through mediation, the Commission shall resolve the dispute. The Commission’s determination is a final administrative remedy and parties may file legal actions in Superior Court based upon an independent review as to whether the Commission’s decision is reasonable based upon the evidence already in the record. (Health & Saf. Code, § 8016, subd. (d)(7) as amended.)

By contrast, the UC Interim Policy only provides for resolving disagreements over NAGPRA-related cultural affiliation and the identification of cultural items; a process which excludes state cultural affiliation involving non-federally recognized tribes. (UC Interim Policy at pp. 20-21.) For tribes disagreeing with UC determinations, AB 275 also requires that disputes proceed through Commission mediation (Health & Saf. Code, § 8016, subd. (d), as amended), while the UC Interim Policy requires tribes to file UC appeals which are handled internally through the Chancellor. (UC Interim Policy at p. 33.) Because the UC will no longer be making final inventory decisions, AB 275 creates a mandatory mediation process which fosters tribal agreements and respects tribal sovereignty.

## **CONCLUSION**

While the current policy represents the most significant improvement to date incorporating many of the Commission's prior comments, serious challenges remain, including incorporating recent statutory changes enacted by the California Legislature through AB 275, as well as addressing prior concerns raised by the Commission and State Auditor documenting a lack of compliance with state and federal repatriation laws.

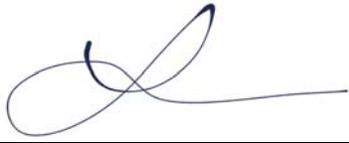
Nothing is more fundamental to effective repatriation than consultation in adopting a policy, a requirement imposed on the UC by AB 2836. Despite repeated Commission comments and now a State Audit Report, the UC has never adequately engaged in consultation as defined by state law in making its revisions, and now in proposing adoption of a final policy. Not only does this fail to accord tribes the respect and sovereignty due them under state law, it has resulted in persistent legal problems in the UC Interim Policy; an unacceptable outcome. Not only is meaningful consultation required for adoption of a final policy, but it will be necessary even after adoption to assess the policy's efficacy and to make necessary revisions to address tribal concerns.

As currently drafted, the Policy will continue to result in fragmented processes across campuses, often in conflict state and federal law, with campuses pursuing varied reevaluation, identification, and deaccessioning plans, some more vigorously than others; a fact documented by the State Auditor's June 2020 Audit Report. These ongoing concerns are coupled with the fact that the current policy fails to create a process to identify and inventory remains and items obtained from other agencies, some of which may be lawfully treated as part of a UC collection. Without such a process, these remains and items could evade repatriation, perhaps indefinitely, defeating the purpose behind state and federal repatriation laws; also an unacceptable outcome.

While existing concerns with the policy persist, any final repatriation policy must fully embrace AB 275 permitting tribes with state cultural affiliation, to fully participate in repatriation. The policy will need to be revamped to address AB 275's processes, including for preliminary and final inventories, claims, and dispute resolution. The Commission is dedicated to assisting the UC in providing advice and assistance to

create a meaningful repatriation policy, long overdue to California's Native American tribes.

Sincerely,

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a horizontal line extending to the right.

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Laura Miranda  
*Chairperson*