



NATIVE AMERICAN HERITAGE COMMISSION

June 19, 2020

Hon. Janet Napolitano
President
University of California
Office of the President
1111 Franklin St., 12th Floor
Oakland, CA 94607

Submitted via Electronic Mail

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COMMISSIONER
[Vacant]

EXECUTIVE SECRETARY
Christina Snider
Pomo

NAHC HEADQUARTERS
1550 Harbor Boulevard
Suite 100
West Sacramento,
California 95691
(916) 373-3710
(916) 373-5471 fax
nahc.ca.gov

Re: Native American Heritage Commission's Review of the University of California's Second Revised Native American Cultural Affiliation and Repatriation Draft Policy (As Required under Public Resources Code section 8025, subdivision (a)(2)(D)(3))

Dear President Napolitano:

The Native American Heritage Commission (Commission) appreciates the opportunity to comment on the University of California's (UC) Second Revised (as of April 2020) Native American Cultural Affiliation and Repatriation Draft Policy (Policy), as required under Public Resources Code section 8025, subdivision (a)(3).

The latest version of the Policy represents the most significant improvement to the Policy to date, incorporating some of the Commission's previous concerns raised in its December 4, 2019, and March 31, 2020, comment letters. While the Commission appreciates these improvements, as documented by a June 2020 audit conducted by the State Auditor, serious concerns with the Policy remain, including its compliance with state and federal law. (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).)

Significant revisions to the Policy are necessary given 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 AB 2836, as well as other federal and state repatriation laws.

EXECUTIVE SUMMARY

- **Consulting and Structural Concerns**

While the UC has made improvements to its Policy, significant overarching concerns remain regarding consultation and organization.

- **Consultations**

AB 2836 requires the UC to develop its Policy in consultation with California Native American tribes. (Health & Saf. Code, § 8025, subd. (a)(3).) California law defines "consultation" to mean "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." (Gov. Code, § 65352.4.) Consultation "shall be conducted in a way that is mutually respectful of each party's sovereignty." (*Ibid.*) Unfortunately, the UC's proposed policy continues to fall short of the legal standard.

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, . . ." (*Id.*, opening Letter to the Governor.)

On December 3, 2019, in response to the first draft, the Commission commented that the UC had failed to conduct any public consultation. When the UC did seek tribal comments, it provided itself with less than a month to consider these comments and, in the process, failed to respond to any comments, a fact documented by the State Auditor. (June 2020 Audit Report at pp. 21-23.)

On March 31, 2020, in response to the second draft, the Commission commented that the UC had provided insufficient time for tribes to review and comment on the 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 holding its public consultation at UC Berkeley, housing one of the largest Native American collections in the country. No consultations were scheduled north of Davis in spite of the Commission's offer of assistance. In response to the Commission's comment letter, the UC failed to provide a written response to a single tribal or Commission comment. (June 2020 Audit Report at p. 23.)

The UC has now drafted its third-revised Policy without providing written responses to any comments and with no plans to conduct further public consultations. Not only does this process run counter to express Legislative mandate that it comply with consultation laws, but it also fails to respect tribal sovereignty, fails to carefully consider tribal views, and makes little attempt to reach agreement.

- **Structure**

The Policy needs to better track the attached flow chart (Appendix A-1) to enable campuses to effectively follow and implement it. The Policy often fails to provide practical guidance, preferring to recite federal and state laws.

To the extent that the Policy does attempt to restate federal and state law, it does so incorrectly in key areas, including restricting consultations, implementing a bias-based test to evaluate tribal knowledge, and in failing to create systemwide policies across campuses governing locating and identifying remains, creating a uniform claims process, deaccessioning collections, updating culturally unidentifiable items (CUI), and in implementing the mandatory disposition of CUI. (Health & Saf. Code, § 8025, subds. (2)(A)-(D).) These concerns were documented by the State Auditor. (June 2020 Audit Report at pp. 21-24, 28-30.) The Policy only makes token attempts to integrate CalNAGPRA and in key aspects, rather than facilitate repatriation, and adopts an adversarial process to enable campuses to retain Native American remains and cultural items. (June 2020 Audit at pp. 20-23 ["Our review of the draft policy from April 2020 found that it would not create consistency across campuses as state law intends."].)

- **Cultural Affiliation—Biased-Based Test Discrediting Tribal Sources of Evidence**

While the Policy asserts that "tribal oral histories, documentation, and testimonies" shall be afforded no less weight by virtue of being in these categories, the Policy then asserts that evidence provided by tribes "shall be evaluated critically taking into consideration the potential bias of the sources of the evidence . . . [including] other works discrediting the sources of evidence, or the circumstances in which the evidence was produced." (Policy at p. 22.) The Policy clearly invites the critique of tribal knowledge which reflects its cultural roots by adopting a biased-based test "discrediting the sources of evidence," an inherently negative test for challenging tribal knowledge not found in federal or state law. Federal and state NAGPRA simply state that "[a] finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances, and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record." (43 C.F.R. § 101.14(d); Health & Saf. Code, § 8013, subd. (a)(3).)

Not only is this test not found in state or federal NAGPRA, it undermines the goal of facilitating repatriation. Under the Policy, campuses will be free to discredit tribal evidence necessary to establish tribal cultural affiliation, while elevating academic interests in maintaining the items as culturally unidentified. Such an outcome perpetuates the “discrimination and exploitation sanctioned by state government throughout its history” described by Governor Newsom when he created the Truth and Healing Council.¹

As documented by the State Auditor, the discrediting of Native American evidence permits campuses to “repeatedly and indefinitely require a tribe to submit additional evidence demonstrating that remains and artifacts are affiliated with it.” (June 2020 Audit at p. 9.) The State Auditor documented that this approach has permitted a “drastic variation in campus practices . . . with no guidance on how to evaluate that evidence.” (June 2020 Audit at p. 19.) This, in turn, has led to significant delays and failures to repatriate, a problem the State Auditor found particularly acute at UC Berkeley. (June 2020 Audit Report at pp. 1-2, 18-20 [“Los Angeles has repatriated nearly all of the remains and artifacts in its collection . . . while Berkeley has returned only 20 percent”.]) This may also explain UC San Diego’s conclusion in 2018 that none of its remains and cultural items could be culturally affiliated with a present-day Native American tribe. (83 Fed. Reg. 32318 (Jul. 12, 2018).

- **Previously Unreported Holdings**

The Policy requires campuses to use “proactive efforts” to locate previously unreported collections consisting of a “communication” to departments asking for an “assessment” about whether they have Native American remains and cultural items. (Policy at p. 28.) No definition of “proactive efforts” is provided, nor procedures for conducting such searches, including for ensuring that such searches even occur. These procedures must include having every department or office confirm to the repatriation coordinator that it has conducted a search using the Policy’s guidelines and report these search findings. Further, these guidelines need to include provisions for departments or offices that find remains and items outside any formal searches, immediately contact the repatriation coordinator.

This Policy failure is remarkable given the State Auditor’s findings. Specifically, the State Auditor documented 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

¹ <https://www.gov.ca.gov/2019/06/18/governor-newsom-issues-apology-to-native-americans-for-states-historical-wrongdoings-establishes-truth-and-healing-council/> (Accessed Jun 16, 2020)

inventories they completed in the 1990s to 2000, only Davis and Los Angeles could demonstrate that they informed tribes of what was missing." (*Ibid.*) Given this history, it is imperative that the Policy implements systemwide requirements for conducting thorough and comprehensive searches for Native American remains and associated items which may be located in disparate departments or offices.

- **Repatriation**

- **Non-federally Recognized Tribes**

The Policy states that repatriation to non-federally recognized tribes "may only take place after receiving a recommendation from the Secretary of the Interior or authorized representative." (Policy at p. 26.) The statement is misleading because repatriation to non-federally recognized tribes without the Secretary's recommendation may still occur under NAGPRA through their affiliation with federally recognized tribes, something the Policy recognizes in other places. (Policy at p. 24.) Where non-federally recognized tribes are discussed, the Policy only states that at the request of such a tribe, a UC repatriation coordinator may assist in finding a federally recognized tribe to act as a sponsor." (Policy at p. 24.) But many of these tribes lack the legal resources to understand the need to seek a federally recognized sponsor or to seek such assistance. This is a critical oversight because the Policy requires compliance with CalNAGPRA, including assessing state cultural affiliation, which involves repatriation to non-federally recognized tribes. In a very real way, the Policy is potentially setting these tribes up for failure. The concern over non-federally recognized tribes is magnified by the fact that the State Auditor documented the UC's history in failing to comply with federal laws governing the disposition of remains and items which is the only process under NAGPRA which permits non-federally recognized tribes to participate in repatriation. (June 2020 Audit Report at p. 19.)

- **Integrating CalNAGPRA**

CalNAGPRA is intended to be applied in conjunction with NAGPRA. (Health and Saf. Code, § 8011, subd. (c).) Under CalNAGPRA, any tribe claiming state cultural affiliation must file a claim with the Commission under CalNAGPRA. (Health & Saf. Code, § 8014, subd. (a).) This requirement is mandatory and triggers other obligations under CalNAGPRA, but is not explained in the Policy. In regards to CalNAGPRA, the State Auditor found that "[o]f further concern is that the Office of the President did not update the sytemwide policy in 2002 when CalNAGPRA became effective, . . ." (June 2020 Audit Report at p. 19.) The failure to properly integrate CalNAGPRA into the Policy is an ongoing one.

Under CalNAGPRA, where there are multiple requests, the parties must submit documentation concerning the dispute to the Commission and 30 days thereafter must meet to settle this dispute. (Health & Saf. Code, § 8016, subd. (d).) If the parties are unable to resolve the matter, then the matter must proceed to Commission mediation, culminating in a Commission resolution as a final CalNAGPRA remedy. (Health & Saf. Code, § 8016, subds. (d), (e), and (j).)

- **Culturally Unidentified Items**

As part of the re-evaluation of CUI, the Policy fails to require consultation with tribes having state cultural affiliation, nor does it explain that where no claims are made based upon the re-evaluation of CUI, campuses must still affirmatively offer to transfer control to tribes (Policy at pp. 36-37) (43 C.F.R. § 10.11(c)(1).) Finally, as mentioned above, the Policy does not adequately explain that as part of the re-evaluation process, campuses should assist tribes with state cultural affiliation needing to associate with federally recognized tribes to obtain repatriation.

- **Research and Testing**

Research and testing on sacred Native American remains and cultural items is one of the most fundamental human rights violations related to the exploitation of Native Americans. Testing and research are not part of repatriation/disposition under federal or state NAGPRA and should not be in the UC Policy, nor should research and testing be allowed by the UC on its NAGPRA/CalNAGPRA collections.²

The flaws in the Policy regarding testing illustrate the reason it should not be part of repatriation. It would permit research and testing without obtaining approval from state culturally affiliated tribes. (Policy at p. 33.) In so doing, the Policy not only fails to incorporate CalNAGPRA, it creates a loophole that will allow for destructive testing of CUI, where federally recognized tribes may have little interest or no affiliation with the remains and items. It would also permit testing prior to repatriation/disposition such that the tribes which may ultimately obtain the remains never consented to the testing.

Finally, in light of the history of misuse and exploitation of CUI, it is disappointing that the Policy fails to adequately protect tribes by requiring that written agreements include a clear and easily understood explanation of the type, nature, and extent of testing being permitted; the potential impacts of this testing on the remains and any associated items; the duration of such testing; and the tribes' rights to revoke such authority or to terminate the agreement.

² If Tribes, voluntarily, once final repatriation/disposition has occurred, wish to engage any of the campuses on such issues that would be of a matter separate apart from this repatriation policy.

- **Failure to Adopt Systemwide Policies**

The Commission has repeatedly explained that AB 2836 requires the UC adopt systemwide policies applying across all campuses for the following areas:

1. Culturally appropriate treatment of remains and cultural items, including testing;
2. Claims process for repatriation, including tribal notifications;
3. Deaccessioning collections;
4. Identification and disposition of culturally unidentifiable remains, including updates of existing CUI inventories to determine if cultural affiliation can be determined.

(Health & Saf. Code, § 8025, subds. (2)(A)-(D).) Despite these efforts, the State Auditor concluded that “[o]ur review of the draft policy from April 2020 found that it would not create consistency across campuses as state law intends.” (June 2020 Audit Report at p. 23.) The Policy delegates responsibility to each campus to develop policies with little or no guidance, or deadlines for adopting and implementing them.

Moreover, the Policy fails to require the adoption of any policies concerning deaccessioning (Policy at p. 29), despite Legislative findings that such policies are needed because of the UC’s “history of inconsistent application of federal and state repatriation laws by some campuses,” along with “the absence of required consultation with California Native American tribes” under federal and state law. (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subds. (a)(8) and (9).)

- **Conflicts of Interest**

The Policy only requires officials to consider recusal “if they believe they cannot perform their duties objectively.” (Policy at p. 12.) This subjective assessment applies to all “financial, professional, or personal” conflicts of interest. (Policy at p. 3.) Under this circumstance, officials may either recuse themselves or disclose the conflict to the President who may allow their continued participation in the matter. (Policy at p. 12.) But state law is clear that an official with a disqualifying conflict of interest “may not make, participate in making, or use his or her position to influence a governmental decision.” (*Finnegan v. Schrader* (2001) 91 Cal.App.4th 572, 581, fn. 7, as modified (Aug. 10, 2001)).³ Adherence to ethical laws is essential in preserving tribes’ right to fair and unbiased hearings. (*Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81,

³ See <http://www.fppc.ca.gov/learn/conflicts-of-interest-rules.html>

90.) The Commission is deeply troubled by the Policy's failure to adhere to ethical laws concerning Native American repatriation, especially in light of Legislative findings concerning the UC's past compliance with repatriation laws, including the absence of required Native American consultations which "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 (Legislative Findings), subd. (a)(9).).

As detailed below, the Commission finds that the UC's Draft Policy fails to incorporate state law repatriation requirements and often is in conflict with state and federal law in key areas including: policy structure, inventories, reevaluation of culturally unidentifiable remains and items, handling repatriation claims and dispute resolution, repatriation process, conflicts of interests, as well as in the creation of systemwide and campus committees. Many of these findings are documented problems identified by the State Auditor.

ANALYSIS

I. DEFINITIONS

- Confidentiality: The definition of confidentiality and related discussion under subdivision (V)(B)(2) on page 20 represents a substantial improvement over the last draft. While an improvement, it only covers information submitted by a tribe. Given the protections afforded this information by the California Public Records Act, we urge the Policy to go farther to affirmatively protect from disclosure all records related to Native American graves, cemeteries, and sacred places, as provided for under Government Code section 6254, subdivision (r). Further, the Commission continues to recommend adopting language similar to AB 52 governing the California Environmental Quality Act, which expressly provides that all information, including, but not limited to, the location, description, and use of tribal cultural resources submitted by a tribe shall not be disclosed to any other public agency or the public consistent with section 6254, subdivision (r). (See Pub. Resources Code, 21082.3, subd. (c)(1)).
- Conflicts of Interest: While this definition represents a vast improvement from prior versions, it needs to clarify that it applies to individuals reviewing matters where they were personally involved in the underlying process, including claims, dispositions, disputes, and repatriations to preserve a fair hearing before unbiased decision makers. (See *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1171, as modified on denial of reh'g (Sept. 11, 1996) ["[T]he common law doctrine against conflicts of interest . . . prohibits public officials from placing themselves in a position where their private, personal interests may

conflict with their official duties.”].) Unfortunately, the Policy only requires officials to consider recusal “if they believe they cannot perform their duties objectively.” (Policy at p. 12.) Under this circumstance, officials may either recuse themselves or disclose the conflict to the President who may allow their continued participation in the matter. (Policy at p. 12.) But state law is clear, “[a]n official with a disqualifying conflict of interest may not make, participate in making, or use his or her position to influence a governmental decision.”⁴ (*Finnegan, supra*, 91 Cal.App.4th at p. 581, fn. 7.) (See discussion below under Systemwide Committee—Conflicts of Interest.)

- **Possession and Control:** The policy states: “UC Locations with Possession or Control of Native American Human Remains and Cultural Items are required to consult and update their inventories and summaries as required by CalNAGPRA when the list of California Indian Tribes is published by the California state Native American Heritage Commission (NAHC) as contemplated by § 8012(j).” (Policy at p. 7.) But the terms “Possession or Control” are not defined in the Policy. Further, as discussed below, CalNAGPRA requires implementing policies for updating inventories and summaries independent of the Commission’s tribal list. (Health & Saf. Code, § 8025.) Nothing prevents a campus from consulting with federally and non-federally recognized tribes to fulfill its obligations until the Commission publishes its tribal list.

II. POLICY TEXT

A. CalNAGPRA Compliance

The Policy provides that “UC campuses with Possession or Control of Native American Human Remains and Cultural Items are required to consult and update their inventories and summaries as required by CalNAGPRA when the list of California Indian Tribes is published by the California Native American Heritage Commission (NAHC) as contemplated by § 8012(j).” (Policy at p. 7.) This misstates the law. CalNAGPRA specifically requires the UC to adopt and implement systemwide policies governing claims, deaccessioning, identifying and repatriating existing CUI, updating inventories, and updating appeals and dispute resolution processes by January 1, 2020. (Health & Safety Code, § 8025, subds. (a)(1)-(7).) The Policy’s language states that campuses may delay consulting and updating inventories until the Commission publishes its list of tribes, but CalNAGPRA clearly requires that this updating occur independently of publication of the tribal list. Campuses can consult with federally and non-federally recognized tribes (as provided for under the Policy) until the Commission publishes its tribal list.

⁴ <http://www.fppc.ca.gov/learn/conflicts-of-interest-rules.html>

B. Policy Revisions

The Policy permits its revision under the following circumstances: "1) when there are changes to NAGPRA and CalNAGPRA that would affect this Policy, 2) when internal or external auditors or the Systemwide Committee recommend changes to this Policy, 3) as deemed appropriate by the President, and 4) at least every five (5) years." (Policy at p. 7.) The requirement before doing so is for the President to provide an advance copy to the systemwide committee and the Commission for comment. The Commission strongly recommends that the systemwide committee, the Commission, as well as the tribes (the true stakeholders), be given at least 45-days notice of any proposed Policy changes for review and be provided consultation (as defined under the Policy).

III. PROCEDURES (Policy § V)

A. Failure to Properly Constitute Committees

The State Auditor concluded that the "University is not adequately complying with state law that requires the systemwide committee and the campus committees to have certain tribal representation." (June 2020 Audit Report at p. 24.) The audit report explained that the Legislature intended to balance these committees with tribal representatives because "the committees on some campuses had historically been composed nearly completely of members with certain research interests, which excluded tribal voices and views from scholars in fields such as Native American studies." (*Ibid.*) The State Auditor found that despite AB 2836's express requirements concerning the composition of these committees, that "the campus committees and the systemwide committee do not have the required members from California tribes." (*Id.* at p. 26.) "Until the three campuses and the Office of the President revise the membership of their committees, they cannot ensure that they are sufficiently involving all appropriate stakeholders in repatriation decisions and incorporating sufficient California tribal perspectives." (*Ibid.*)

Involving stakeholders, whether through consultations or through the composition of its committees, has been a pervasive problem for the UC which has resulted in a skewed Policy which, as noted by the State Auditor, fails to comply with state law.

B. Oversight Authority

As the State Auditor noted, the Policy permits the systemwide committee to assess campus reports of their repatriation activities, but does not expressly require such reports, nor does it specify the contents of such reports which could provide important feedback about the process across the UC system. (June 2020 Audit Report at p. 23; Policy at p. 11.) As the State Auditor explained that this is a major omission:

The draft policy gives the systemwide committee the discretion to request reports from campuses to conduct oversight. These reports could include information such as the amount of time a campus took to process a claim, a summary of the evidence the campus used for a claim, or the campus's consultation history with a tribe. The committee could then make recommendations for revisions to the systemwide policy to the Office of the President. However, we do not believe these reports will provide adequate oversight because the policy does not require campuses to submit regular reports on activities such as affiliation, repatriation, and disposition decisions.

(*Ibid.*) And illustrating the need for systemwide policies across its campuses as required by AB 2836, the State Auditor concluded that “[f]urther, any reports the systemwide committee may request may not facilitate oversight due to inconsistent reporting practices by campuses.” (June 2020 Audit Report at p. 23.) The State Auditor found that “the lack of consistent information from campuses and limited reporting requirements will impede the systemwide committee’s ability to identify differences in how the campuses implement NAGPRA and recommend revisions to university policy that will create the consistency the Legislature intended.” (*Id.* at p. 24.)

Armed with these findings, the Commission believes that the UC must standardize its repatriation reporting requirements across its campuses, provide routine and regular reporting periods to the systemwide committee, as well as provide the systemwide committee with the authority to require compliance with these requirements necessary identify variations in campus implementation of the Policy and to make proposed Policy recommendations.

C. Concerns Over the Systemwide Committee’s Operations

- *Conflicts of Interest:* The Policy only requires Systemwide Committee members to consider recusing themselves “if they believe they cannot perform their duties objectively.” (Policy at p. 12.) This subjective assessment applies to all “financial, professional, or personal” conflicts of interest. (Policy at p. 3.) The Policy permits tribes to raise conflicts of interest which are considered by the President. (Policy at p. 12.) Where officials believe they cannot objectively perform their duties, or a tribe raises a conflict of interest, officials may either recuse themselves or disclose the conflict to the President who may allow their continued participation in the matter. (Policy at p. 12.) But state law is clear, “[a]n official with a disqualifying conflict of interest may not make, participate in making, or use his

or her position to influence a governmental decision." ⁵ (*Finnegan, supra*, 91 Cal.App.4th at p. 581, fn. 7.) A member with a conflict of interest (regardless of their subjective beliefs about their ability to perform their duties objectively) should not even be participating in the discussions or deliberations (much less voting) because this may impermissibly influence the other members. "[T]he common law doctrine against conflicts of interest . . . prohibits public officials from placing themselves in a position where their private, personal interests may conflict with their official duties." (*Clark, supra*, 48 Cal.App.4th at p. 1171.)

- *Chair*: AB 2836 does not provide for the position of chair on a committee, and if such a position is created, that person should need to be approved by the President if the majority of Committee members voted for the person. Presidential approval potentially skews the Committee for a person favorable to the President, contrary to AB 2826's intent to maintain balance and neutrality of these Committees.
- *Subject Matter Experts*: The Policy allows the Committee to create "a pool of internal or external subject matter experts for campuses needing additional expertise to assist in the implementation of effective programs and/or review specific cases." (Policy at p. 13.) Nothing in AB 2836, or federal/CalNAGPRA permits the use of external experts appointed by the agency, itself, which may be used to potentially dispute tribal claims. Unfortunately, the term "expert" almost always means someone with an academic background, typically in anthropology, archeology, sociology, or history, rather than tribal knowledge and culture. To avoid bias against tribal knowledge, the use of outside experts should be confined to resolving multiple claims and disputes between tribes over remains/items.

A further concern previously raised by the Commission is that Committees reviewing complaints and appeals should not be engaging in *ex parte* consultations with external subject matter experts where tribes are denied the opportunity to hear and respond to these communications. (See, e.g. Gov. Code, § 11430.10; *Nightlife Partners, supra*, 108 Cal.App.4th at p. 90 (Due process requires "the absence of even a probability of outside influence . . .").) This is particularly important because tribes are entitled to hear and respond to all expert opinions which may influence repatriation.

- *Frequency of Meetings*: The systemwide committee should be convened any time complaints and appeals are brought which may not coincide with its triannual meetings to avoid unnecessary repatriation delays.

⁵ <http://www.fppc.ca.gov/learn/conflicts-of-interest-rules.html>

- *Audits*: The Policy permits the systemwide committee to conduct audits “as necessary,” without defining this term. (Policy at p. 3.) Because of the history concerning repatriation as documented by the Legislature and the State Auditor, as well as the initiation of new policies to address this history, audits need to be mandatory, especially during the Policy’s rollout.

D. Concerns over the Campus Committee’s Operations

- The Repatriation Coordinator reports directly to the Chancellor, and is required to “have an in-depth understanding and experience with: (a) Consultation practices and processes, building positive working relationships with Native American Tribes and/or Native Hawaiian Organizations; and (b) NAGPRA and CalNAGPRA.” (Policy at p. 9.) This person “is responsible for coordinating with staff at campus museums and all other departments bearing compliance responsibilities with this Policy,” yet the tribes are required to work with a “Repatriation Point of Contact” who does not report directly to the Chancellor and is not responsible for UC compliance with the Policy. The tribes should be working directly with the Repatriation Coordinator so this person understands tribal concerns and can work with the UC departments and chancellor to address them.
- *Conflicts of Interest*: See Systemwide Committee Comments above regarding conflicts.
- *Chair*: See Systemwide Committee Comments above regarding the appointment of Chairs.
- *Tribal Presence*: The first sentence contains a typo in the use of the word “deliberating.” Because tribal presence is essential to the process, campuses must do more than “invite” affected tribes to their deliberations. Campuses should strive to include tribes in the process, including scheduling mutually agreeable dates for such consultations, consistent with the consultation policy. This should not be constructed as an adversarial process that is contrary to the fundamental goal of repatriation. (Policy at p. 16.)
- *Duties*: This committee is required to review all decisions regarding the identification of cultural items, requests for cultural affiliation, and repatriation/disposition requests, regardless of whether a dispute exists. (Policy at p. 14.) This provides an unnecessary layer of review that will slow the repatriation process. The Committee should only conduct reviews where tribes dispute such decisions.

- *Meeting Frequency:* The Policy states that: For campuses having Possession or Control of Human Remains, where the number of individuals or sets of Human Remains exceeds 100, the Campus Committee shall meet no less frequently than three (3) times per academic year. (Policy at p. 16.) The Policy does not identify which campuses this would apply to, making impossible for tribes to ascertain which campuses are subject to this requirement. Further, because this Committee is charged with reviewing all decisions regarding the identification of cultural items, requests for cultural affiliation, and repatriation/disposition requests, a triannual process will needlessly delay repatriation; a problem magnified at campuses where the Committee only meets twice a year.
- *Subject matter experts:* See comments above regarding subject matter experts.
- *Audits:* The Policy permits this Committee to conduct audits "as necessary." (Policy at p. 14.) See systemwide committee audit comments above.

E. Consultation

The consultation language is a vast improvement over the prior draft Policy and embraces its meaning and purpose. However, some concerns remain:

- The Policy provides that "[t]he Repatriation Coordinator should initiate Consultation as required by this Policy, as early as possible when new information or Human Remains or potential NAGPRA/CalNAGPRA-eligible Human Remains or Cultural Items are identified." (Policy at p. 18.) The Policy needs to expressly require consultations for re-inventorying existing culturally unidentified and previously unclaimed items, as well as for initiating the inventory process.
- The Policy provides that "[a]n initial letter or email with sufficient information should be provided to Tribal Representatives to determine if they have an interest in participating in the Consultation process." (Policy at p. 18.) Some tribes have limited resources or may have appointed new or different representatives, such that a single email or letter may be insufficient notification. The State Auditor documented this concern finding that "Berkeley did not follow up with tribes after sending the initial letter requesting consultation" which resulted in substantial delays. (June 2020 Audit Report at p. 17.) The Policy should provide that if no response is received, that additional notifications using alternative means, such as U.S. mail and telephone, will be utilized.
- The Policy provides that "[t]he campus Repatriation Coordinator should work with the Consulting Tribes to provide any needed documentation related to collections and Human Remains prior to Consultation meetings. Documentation may include catalogs, reports, summary of NAGPRA related information, and

notices." (Policy at pp.18-19.) Documentation should be expanded to include maps, tribal histories, linguistics, recordings, and folklore consistent with the Policy.

F. Cultural Affiliation: Biased-Based Test to Discredit Tribal Knowledge

After expressly stating that campuses must "consider tribal oral histories, documentation, and testimonies [which] shall not be afforded less evidentiary weight than other relevant categories of evidence on account of being in those categories," the Policy then states, "All evidence, including academic evidence, shall be evaluated critically taking into consideration the potential bias of the sources of the evidence, including academic authors, the credibility of certain evidence in light of contrasting evidence, such as tribal oral histories, other works discrediting the sources of evidence, or the circumstances in which the evidence was produced." (Policy at p. 22.) This process specifically encourages the critique of tribal knowledge (singling out "tribal oral histories") which inherently reflects its cultural roots, as biased, or "produced" solely for the purpose of repatriation while encouraging reliance on "other works discrediting" this evidence. This negative biased-based test could be used by some campuses to unfairly discredit tribal knowledge despite the precatory language giving it equal weight, a concern validated by the State Auditor. The discrediting of Native American evidence permits campuses to "repeatedly and indefinitely require a tribe to submit additional evidence demonstrating that remains and artifacts are affiliated with it." (June 2020 Audit at p. 9.) The State Auditor documented that this approach has permitted a "drastic variation in campus practices . . . with no guidance on how to evaluate that evidence." (June 2020 Audit at p. 19.) This, in turn, has led to significant delays and failures to repatriate, a problem the State Auditor found particularly acute at UC Berkeley. (June 2020 Audit Report at pp. 1-2, 18-20.)

Significantly, this biased-based test creates a standard not found elsewhere in state or federal NAGPRA, permitting the potential disregard of otherwise undisputed tribal knowledge. Federal NAGPRA simply states that "[a] finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances, and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record." (43 C.F.R. § 101.14(d).) Similarly, state law also looks at the "totality of the circumstances." (Health & Saf. Code, § 8013, subd. (a)(3).) The bias-based test could be used to discredit forms of tribal knowledge, which is a real concern given the UC's long history of failing to "equally consider the cultural and religious concerns of tribes with respect to repatriating human remains and cultural items to their tribal communities" favoring "the perceived educational and research potential that these human remains and cultural items may have for academia and science." (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subd. (a)(11).)

In addition to its use of an improper standard to assess tribal evidence, the State Auditor determined that the Policy fails “to create a standardized process” for evaluating tribal documentation including standards in assessing its adequacy and forwarding this documentation to campus committees during the process. (June 2020 Audit Report at p. 23.)

G. Requests for Repatriation

1. Creating an Adequate Process for State Cultural Affiliation under NAGPRA

As the State Auditor explained, CalNAGPRA is intended “to provide a mechanism for tribes that are not federally recognized to pursue repatriation of remains and artifacts.” (June 2020 Audit Report at p. 30.) The Policy states that: “At the request of the non-Federally Recognized Tribe, the Repatriation Coordinator may assist in identifying a Federally Recognized Tribe who may potentially serve as a partner/sponsor.” (Policy at p. 24.) Many non-federally recognized tribes are small and may lack the legal resources to understand the need under NAGPRA to associate with a federally recognized tribe or to fully appreciate their rights under the Policy. These tribal associations are critical because the Policy requires compliance with CalNAGPRA, including assessing state cultural affiliation, which involves repatriation to non-federally recognized tribes. In a very real way, the Policy is potentially setting these tribes up for failure by assessing their state cultural affiliation, but failing to create an adequate process for these tribes to successfully complete repatriation.

To be meaningful, the Policy needs to provide guidance concerning the need for non-federally recognized tribes to affiliate with federally recognized tribes under NAGPRA and to require that Repatriation Coordinators reach out to these tribes to facilitate repatriation/disposition with a federally recognized tribe; a process which is currently being done at some UC campuses, including UCLA.

2. Integrating CalNAGPRA

The State Auditor documented the UC's history of noncompliance with CalNAGPRA, both after its passage, as well as after its amendments in 2018 and 2019 to address UC concerns. (June 2020 Audit Report at pp. 19, 24.) Although the Policy states that the “UC is committed to complying with CalNAGPRA,”⁶ it nonetheless fails to sufficiently integrate CALNAGPRA or offer meaningful guidance on how the UC system can comply with it. (Policy at p. 23.) The Policy states that “California Indian Tribes may file Requests under CalNAGPRA for return of Human Remains and Cultural items with which they have State Cultural Affiliation.” (Policy at p. 23.) But CalNAGPRA is intended to be

⁶ Policy at p. 7.

applied in conjunction with NAGPRA. (Health and Saf. Code, §§ 8011, subd. (c).) Under CalNAGPRA, any tribe claiming state cultural affiliation must file a claim with the Commission under CalNAGPRA. (Health & Saf. Code, § 8014, subd. (a).) This step is mandatory and triggers other obligations under CalNAGPRA.

The Policy completely omits any reference to the following CalNAGPRA procedures, all of which are intended to run concurrently with NAGPRA:

- Under CalNAGPRA, within 90 days of completing inventories and summaries, the UC must provide a copy to the Commission for 30-day publication on its website. (Health & Saf. Code, § 8013, subd. (e).)
- Tribes claiming state cultural affiliation must do the following: 1) file a written request with the Commission and the UC; and 2) provide evidence of cultural affiliation, unless cultural affiliation is already established by the UC as published in the Federal Register in compliance with NAGPRA. (Health & Saf. Code, § 8014, subds. (a) and (b).)
- Upon receiving a written request, the Commission must forward a copy to the UC, as well as provide 30-day publication of the request on its website, provided that the following have been established:
 - The UC has possession or control over the Native American remains and associated items;
 - State cultural affiliation has been established;
 - The UC does not otherwise present evidence showing its entitlement to the remains;
 - No other exceptions under the Federal Regulations (43.C.F.R. § 10.10(c)) apply;
 - All other applicable NAGPRA requirements have been met.

(Health & Saf. Code, §§ 8015, subd. (a), 8016, subd. (b).)

H. Disposition of Culturally Unidentifiable Remains: Non-Federally Recognized Tribes

In regards to CUI, the Policy states:

In accordance with NAGPRA § 10.11(c), a campus that has completed Consultation pursuant to § 10.11(b) must offer to

transfer Control of the Culturally Unidentifiable Human Remains (and, per this Policy, Associated Funerary Objects) in the following priority order:

- a. The Federally Recognized Tribe or Native Hawaiian Organization from whose tribal land, at the time of the removal, the Human Remains and Associated Funerary Objects were removed.
- b. The Federally Recognized Tribe or Tribes that are recognized as aboriginal to the area from which the Human Remains and Associated Funerary Objects were removed. Aboriginal land may be recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims, or by a treaty, Act of Congress, or Executive Order. (Policy at p. 26.)

The Policy goes on to state: "Under NAGPRA, Disposition to a non-Federally Recognized Tribe may only take place after receiving a recommendation from the Secretary of the Interior or authorized representative." (Policy at p. 26, emphasis added.) The Policy makes this statement despite contrary, prior language in the Policy stating that non-federally recognized tribes may affiliate with federally recognized tribes to obtain repatriation. (Policy at p. 24.)

Even here, the Policy's language concerning non-federally recognized tribes is problematic. The Policy states that "a non-Federally Recognized Tribe may partner with a Federally Recognized Tribe, or request a Federally Recognized Tribe sponsor their Request. At the request of the non-Federally Recognized Tribe, the Repatriation Coordinator may assist with the process." (Policy at p. 24.) As previously mentioned, many non-federally recognized tribes lack the legal resources and access to counsel to understand the need to associate with a federally recognized tribe under NAGPRA and may not understand their right to request UC assistance in that process. Repatriation Coordinators should explain to these tribes the need to associate with federally recognized ones, as well as encourage federally recognized tribes to affiliate with, or sponsor, non-federally recognized tribes to facilitate repatriation of CUI under CalNAGPRA. This process needs to be incorporated into the Policy's discussion of CUI in relationship to Section 10.11(c). Further, it would be helpful if the Policy's accompanying guidance documents provided examples of such requests for Repatriation Coordinators to use in such instances.

In addition to the need to assist non-federally recognized tribes, the Policy then needs to explain that the requirement to obtain the recommendation of the Secretary under

Section 10.11(c) only applies where no federally recognized tribes are willing to accept the items, including by affiliating with non-federally recognized tribes, which should be an exceptionally rare occurrence.

I. Multiple Claims

The Policy states that the “UC may receive multiple Requests for transfer from different Tribes each with a valid claim for Repatriation/Disposition. If each Tribe has a legally valid claim, and if the law does not specify an order of precedence that gives one Tribe priority over another, UC shall retain the Human Remains or Cultural Items until the requesting parties reach agreement on proper Disposition or until the dispute is resolved.” (Policy at p. 27.)

At the outset, the Policy provides no guidance to campuses in facilitating tribal disputes, including handling state cultural affiliation claims. Second, the Policy does not define what a “legally valid claim” means. The Policy needs to explain the elements constituting legally valid claims, preferably with cross-references to the Policy where each element is determined under the Policy. As for dispute resolution, the Policy simply states that for claims under CalNAGPRA the parties may seek mediation through the Commission.⁷ But this does not accurately reflect CalNAGPRA’s process, nor does it provide adequate guidance.

Under CalNAGPRA, where there are multiple requests for the same items or disputes, the parties must submit documentation concerning the dispute to the Commission and 30 days thereafter must meet to settle this dispute. (Health & Saf. Code, § 8016, subd. (d).) If the parties are unable to resolve the matter, then the matter must proceed to Commission mediation (which is mandatory), culminating in a Commission resolution as a final CalNAGPRA remedy. (Health & Saf. Code, § 8016, subds. (d), (e), and (j).)

J. Previously Unreported Holdings

The State Auditor documented 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.*) In a tragic

⁷ The Policy states: For assistance in resolving a dispute, the parties may choose mediation by a third party mutually agreeable to the Tribes with conflicting claims, or other appropriate means. Tribal Representatives may also file a request with the Federal Advisory Review Committee per NAGPRA § 10.17, or for Requests that fall under CalNAGPRA, with the NAHC, per CalNAGPRA § 8016. (Policy at p. 27.)

example, the remains of a child from the Berkeley campus have been missing for more than 20 years. (*Id.* at p. 30.) “[T]he child’s remains could be lost in a closet, attic, or desk drawer of a researcher.” (*Ibid.*)

As to previously unreported collections, the Policy requires “proactive efforts” by each campus. (Policy at p. 27.) As part of this effort, the Policy acknowledges that the “UC may locate previously unreported Human Remains and/or Cultural Items. These may be found in disparate academic units of the UC or inadvertently included among fauna or other materials.” (Policy at p. 27.) Not only may these items be found “in disparate academic units,” but the State Auditor documented that “in some cases at Davis, faculty and graduate students accessing a collection for research took remains or artifacts with them after leaving the university.” (June 2020 Audit Report at p. 28.) These remains “could be lost in a closet, attic, or desk drawer of a researcher.” (*Id.* at p. 30.)

“Proactive efforts” require Repatriation Coordinators to “review” whether the campus may have previously unreported items. (Policy at p. 28.) This proactive “review” consists of the Coordinator simply sending letters to all deans or chairs “providing necessary information so that they can make an informed initial assessment about whether their departments potentially hold NAGPRA/CalNAGPRA-eligible items.” (Policy at p. 28.)

Given the history of lost remains and sloppy record keeping, this is completely inadequate. First, the term “necessary information” is not defined. Second, as the Commission has raised in its prior comments, the Policy fails to require systematic searches for items. Deans and chairs appear to be under no obligation to conduct such searches under the Policy and may not even respond to such letters, despite AB 2836’s requirement that the UC to adopt systemwide policies for “cultural items while in possession of a University of California campus” and for the “identification” of remains and cultural items. (Health & Saf. Code, § 8025 subds. (a)(2)(A) and (D).) Third, the Policy provides no guidance for conducting the searches. Sending letters should be just the first step in any policy to locate and identify remains and associated items, not the entirety of the process. More comprehensive and mandatory search protocol is not only required by law, but is critical given the State Auditor’s findings. Fourth, given the UC’s history of sloppy record keeping, and the reality that professors and students took remains, any search must include outreach to these individuals requiring that they return these remains and items. Fifth, search procedures must include having every department or office affirmatively confirm to the repatriation coordinator that it has conducted a search using the Policy’s guidelines and report its search findings. And sixth, these guidelines need to include provisions for departments or offices that find remains and items outside any formal searches, to immediately contact the repatriation coordinator.

K. Identifying Newly Discovered Native American Remains

Under the subheading "Protecting Items Potentially Subject to NAGPRA or CalNAGPRA," the Policy includes a discussion on the process for identifying newly identified remains potentially subject to the Policy. (Policy at p. 28.) A Repatriation Coordinator would have no way to know that such a discussion would be encompassed under this heading. A separate and appropriate heading for identifying newly discovered remains should be added.

As to the identification policy itself, the Policy requires a "campus" to determine "whether NAGPRA or CalNAGPRA applies," and to "seek tribal expertise" in doing so. (Policy at p. 28.) The failure to identify a person with responsibility for making this determination will lead to confusion and non-compliance. Equally problematic is the Policy's failure to provide guidance in making such determinations, even failing to define what it means to "seek tribal expertise." We suggest first determining the remains' origins to narrow down the list of tribes with potential cultural affiliation.

L. Receipt of New Native American Remains

While the Policy claims that it precludes the acceptance of new "NAGPRA/CalNAGPRA-eligible Human Remains," it nonetheless allows the acceptance of new remains where the donor has a "right of possession," which is not defined in the Policy. (Policy at p. 29.) While not defined under the Policy, the term is defined under NAGPRA to mean the voluntary acquisition from a donor who has "authority of alienation." (43 C.F.R. § 10.10(a)(2).) "Authority of alienation" means that the donor obtained the remains "with the voluntary consent of an individual or group with authority to alienate" them. (*Ibid.*) Because of the need to ensure the legitimacy of these transactions, the Policy should provide guidance to campuses in ensuring that third-party donors provide sufficient evidence concerning their right of possession and that such acquisitions be properly recorded in written agreements subject to tribal inspection. And because of the potential confusion between those remains and associated items subject to such agreements (as opposed to those subject to California and federal NAGPRA), these remains and associated items must be clearly identified and marked as such, as well as subject to tribal inspections.

As to UC staff with "private collections," the State Auditor documented faculty and graduate students accessed collections for research, taking "remains or artifacts with them after leaving the university," such that "remains could be lost in a closet, attic, or desk drawer of a researcher." (June 2020 Audit Report at pp. 28, 30.) Given these findings, UC staff with private collections must demonstrate a right of possession under NAGPRA or be required to return the remains and associated items over to the Repatriation Coordinator for repatriation. (Policy at p. 29.)

M. Oversight

When discussing chancellors' and the President's oversight authority, the Policy states for the first time that they may initiate audits to assess compliance and performance, in addition to the systemwide and campus committees. (Policy at p. 30.) This oversight authority should be discussed in conjunction with the President's and chancellors' other oversight responsibilities under the Policy under "Roles/ Responsibilities," section IV, subdivision (B)(1). Similar to the Commission's comments regarding committees' audits, because of the UC's past history concerning repatriation as documented by the Legislature, such audits should initially be mandatory to ensure compliance, with subsequent periodic audits occurring thereafter.

N. Complaints and Appeals

1. Complaint Process

The Policy only addresses complaints regarding "the consultation processes or access," but complaints may arise in many other contexts, including conflicts of interest, *ex parte* contacts with outsider experts, missed deadlines, inadequate notice, inadequate campus searches and identifications, improper inventory processes, etc. (Policy at p. 30.) Tribes should be entitled to file complaints about any aspect of the Policy. Because the goal is to repatriate as expeditiously as possible, the UC ought to be able to review and respond within 30-days of receiving a complaint. For complaints involving the chancellor/designee, tribes should also be able to address these to the President/designee.

While the Policy allows tribes dissatisfied with their responses to bring their complaints to the campus and systemwide committees and the President, it does not expressly provide authority to alter a prior response, which can include reversing and where appropriate remanding the matter for further consideration.

2. Appeals Concerning Cultural Affiliation and Repatriation/Disposition

While the Policy would give the UC 45 days to respond to complaints, tribes would only be given 30 days to appeal determinations related to inventories, cultural affiliation, and repatriation/disposition. (Policy at pp. 30-31.) Many tribes lack the resources to review lengthy records to determine whether a sufficient evidentiary basis existed to justify UC determinations, or whether the UC complied with its policies and/or federal and state law, all within 30 days. The Commission recommends providing tribes with 60 days to appeal determinations, with extensions of time permitted upon a showing of good cause.

O. Treatment

1. Storage

As to the treatment of remains, the Policy requires adherence to 36 C.F.R. § 79.9(b)(3), without describing its seven requirements. (Policy at pp. 32-33.) Guidance should be provided on complying with these requirements.

2. Research and Exhibition

The Policy would permit research, testing, and exhibition where the campus obtains written permission from culturally affiliated tribes and any associated non-federally recognized tribes. (Policy at p. 33.) If the remains and associated items are culturally unidentified (at least under federal NAGPRA), then it would only require approval from federally recognized tribes upon whose aboriginal lands the remains and items were found. Research and testing are not part of state or federal repatriation, which focus exclusively on the return remains and items over to their rightful owners. After final repatriation/disposition of remains and items, the UC may create a separate policy for obtaining voluntary tribal consent to test, but academic research and testing are not part of a repatriation process.

While the Commission is opposed to any research and testing as part of any repatriation Policy, there are serious problems raised by this Policy, including:

- The process under the Policy of encouraging non-federally recognized tribes to associate with federally recognized tribes may take time, and the Policy would permit testing before the association process has been completed.
- The Policy does not require approval from state culturally affiliated tribes for federal CUI who have an interest in the remains under state cultural affiliation and potentially under federal law, particularly if they are able to associate with federally recognized tribes, or, if necessary, may obtains the remains subject to the Secretary's approval.
- Permission is not required from the tribal representative, as it is in other parts of the Policy.
- In order to prevent potential tribal exploitation, the Policy should specify that any "written authorization" include a clear and easily understood explanation of the type, nature, and extent of testing being permitted, the potential impacts of this testing on the remains and any associated items, the duration of such testing, as well as the tribes' rights to revoke such authority or to terminate the agreement.

3. Loans

a. Loans to the UC

The Policy would permit the UC to receive loaned remains under four circumstances: 1) A culturally affiliated tribe requests testing and analysis; 2) Another institution requests examination to fulfill its federal or California NAPGRA duties, but if culturally affiliated tribes have not authorized testing, then "the campus may only use minimally invasive procedures and shall not use destructive analysis (such as radio carbon dating, DNA analysis, stable isotope analysis, histological sampling)"; 3) "A request from an agency that recently discovered Human Remains that is unable to provide immediate and appropriate care"; 4) "Other research or care approved by or performed in Consultation with the Culturally Affiliated Tribe." (Policy at p. 35.) The Policy presents troubling legal concerns, including:

- Campuses may perform testing without ensuring that all state and federally culturally affiliated tribes have consented to the testing. It would allow just one culturally affiliated tribe to permit this testing even where other culturally affiliated tribes may object.
- It would allow forms of testing and analysis from other institutions even where state and federally culturally affiliated tribes have not authorized any testing or analysis. It does not define the term "destructive analysis" and fails to require consultation with all state and federally culturally affiliated tribes before any testing or analysis occurs. This is particularly important because tribes may have different customs and beliefs over what may be considered "destructive" to remains than do academics.
- All research and care should only occur in consultation with, and approval from, all state and federally culturally affiliated tribes, including non-federally recognized tribes as appropriate.

b. Loans from the UC

Unfortunately, the State Auditor found that loans have been problematic. "[T]he campuses each indicated that they lacked controls for keeping track of what they had loaned." (June 2020 Audit Report at p. 28.) "The inadequate recordkeeping of loans and exchanges resulted in losses that the campuses did not discover until NAGPRA required them to take inventory of their collections in the 1990s." (*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." (*Id.* at p. 29.)

The Policy would allow short-term loans to external institutions if initiated by culturally affiliated tribes or “in furtherance of Repatriation or Disposition, for periods not to exceed two years.” (Policy at p. 35.) The term “in furtherance of” Repatriation or Disposition” is not defined, nor who makes this determination. Thus, under the Policy a campus could loan remains under circumstances where all state and federally culturally affiliated tribes have not agreed to such a loan which should never occur. Further given the UC’s loan history, loans should be discouraged and only available if requested by a tribe after a final repatriation/disposition decision has been made.

IV. REPATRIATION IMPLEMENTATION PLAN

The Commission has repeatedly explained that AB 2836 requires the UC adopt systemwide policies applying across all campuses for the following areas:

1. Culturally appropriate treatment of remains and cultural items, including testing;
2. Claims process for repatriation, including tribal notifications;
3. Deaccessioning collections;
4. Identification and disposition of culturally unidentifiable remains, including updates of existing CUI inventories to determine if cultural affiliation can be determined.

(Health & Saf. Code, § 8025, subds. (2)(A)-(D).)

The Legislature documented the need for a systemwide policy in these areas because of the UC’s “history of inconsistent application of federal and state repatriation laws by some campuses,” along with “the absence of required consultation with California Native American tribes” under federal and state law. (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subds. (a)(8) and (9).)

Despite these Legislative findings and the Commission’s prior comments, the State Auditor concluded that: “Our review of the draft policy from April 2020 found that it would not create consistency across campuses as state law intends.” (June 2020 Audit Report at p. 23.)

A. Culturally Appropriate Treatment and Testing

AB 2836 requires the UC to “[a]dopt and implement systemwide policies regarding the culturally appropriate treatment of Native American human remains and cultural items,” as well as testing. (Health & Saf. Code, § 8025, subd. (a)(2)(A).) The Policy provides that campuses “must adopt procedures consistent with this section, to ensure respectful treatment of such Human Remains and Cultural Items and compliance with

all applicable laws and regulations." (Policy at p. 32.) And "[e]ach campus with a NAGPRA/CalNAGPRA-eligible collection must post on their website how to make traditional care requests." (Policy at p. 32.)

First, the Policy fails to create systemwide policies governing culturally appropriate treatment, abdicating this responsibility to each campus in contravention of AB 2836. This will result in the application of inconsistent policies across campuses, something the Legislature sought to avoid. Second, the policy needs to set out procedures for campuses to follow, for instance, requiring campuses to promptly seek consultations with state/federal culturally affiliated tribes. Third, it is not enough that campuses post on their websites how to make requests for culturally appropriate treatment. There must be a systemwide process, with prompt deadlines, for responding to such requests.

As to testing, see comments above under "Treatment—Research and Exhibition."

B. Proactive Review of CUI Determinations

The Policy requires each campus to "describe the process to be undertaken to proactively" inform tribes about CUI for consultation and to "[r]eview and update previous determinations of Culturally Unidentifiable Human Remains or Associated Funerary Objects." (Policy at p. 36.) The State Auditor found that "[a]lthough the policy addresses the grounds on which a campus may make an affiliation decision, it does not create a standardized process for doing so." (June 2020 Audit Report at p. 23.)

No definition of "proactively" is provided, nor is there any guidance concerning the processes which should be undertaken to perform these reviews. There are no timetables or deadlines for initiating and completing such reviews, and the sample timeline provided for full repatriation of all remains and items is not sufficient. (Policy at p. 38.)

Moreover, despite AB 2836's express requirement for a systemwide policy governing these reviews, the Legislative findings explaining the need for systemwide review policies, and two-prior Commission comment letters explaining the legal requirements for systemwide policies, the Policy continues to delegate to each campus responsibility to develop its own policies for these reviews. This perpetuates the existing history of inconsistent application of repatriation laws across UC campuses, permitting some campuses to indefinitely delay the creation and implementation of review policies; a violation of law and an unacceptable outcome.

Other elements of the review process are problematic. For instance, the Policy does not require campuses to notify all tribes about existing CUI inventories for their review and it only requires consultation with tribes from whose tribal lands the objects were removed or tribes with an aboriginal interest in these same lands and California Indian tribes

(including non-federally recognized tribes) when the Commission issues a tribal list under CalNAGPRA. (Policy at p. 37.) But limiting consultations in this fashion ignores the reality that a review and update of existing CUI determinations through broader tribal consultations may yield previously unidentified state/federally culturally affiliated tribes. This reality cannot be overlooked given the Legislature's findings that an "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 (Legislative Findings), subd. (a)(9).) A broader consultation would also assist non-federally recognized tribes in establishing state cultural affiliation and to associate with federally recognized tribes, something the Policy encourages. (Policy at p. 24)

But more fundamentally, regardless of consultations, under section 10.11, subdivision (c), campuses must affirmatively offer existing CUI to tribes consistent with the Policy (Policy at pp. 25-26) which the Policy fails to make clear here. The Policy should explain that, even if consultations are unsuccessful, the items must still be repatriated through the disposition process under § V(b)(3)(D)(5). This avoids any misapprehension by the campuses that they may still retain CUI after such consultations or where no requests are made.

C. Systemwide Claims Process

AB 2836 requires the UC to "[a]dopt and implement clear and transparent policies and procedures on the systemwide requirements for submitting claims for the repatriation of human remains and cultural items . . ." (Health & Saf. Code, § 8025, subd. (a)(2)(B).) While the Policy does discuss that tribes may file requests, it does not provide any procedure for doing so and, as discussed above, fails to provide any procedure for filing claims involving state cultural affiliation. (Policy at p. 23.) The Policy requires repatriation to federally recognized tribes within 90-days of receiving a request, but fails to integrate CalNAGPRA into this process. (Policy at p. 23.) A process is needed to enable a non-federally recognized tribe making a request under CalNAGPRA to affiliate with a federal tribe as part of the overall claims procedure process.

D. Deaccessioning

AB 2836 requires the UC to "[a]dopt or amend systemwide University of California museum deaccessioning policies to explicitly provide for the deaccession of collections containing Native American human remains and cultural items to effect the timely and respectful repatriation of those items pursuant to valid claims submitted by a California Indian tribe." (Health & Saf. Code, § 8025(a)(2)(C).) Not only does the Policy fail to create systemwide deaccessioning policies, it does not even require campuses create

such policies: “If a Tribe has requested items that have been determined not to be Human Remains or Cultural Items as defined by NAGPRA and CalNAGPRA, in recognition of the principles articulated in Section III.B of this policy, campuses may voluntarily Deaccession items to the requesting Tribe, in accordance with campus practices and as allowable by law.” (Policy at p. 29.) The fact that no process is created for tribes to even submit deaccessioning requests, makes the possibility of such requests remote. This is coupled with the Policy’s failure to provide a process for evaluating these requests and to provide for “the timely and respectful repatriation of those items pursuant to valid claims submitted by a California Indian tribe.” (Health & Saf. Code, § 8025(a)(2)(C).) The Policy, in this regard, represents a complete repudiation of AB 2836.

E. Systemwide Policies on the Identification of CUI

AB 2836 requires the UC to adopt systemwide policies for “cultural items while in possession of a University of California campus” and for the “identification” of remains and cultural items. (Health & Saf. Code, § 8025 subds. (a)(2)(A) and (D).) As discussed above under the heading “Identifying Newly Discovered Native American Remains,” the Policy fails to do so.

F. Outreach to Culturally Affiliated Tribes

The Policy requires campuses to develop plans “for reaching out to Culturally Affiliated Tribes that have not yet requested” items. (Policy at p. 37.) This includes “instructions on how to submit such Requests.” (*Ibid.*) Like the Policy’s other delegations of systemwide responsibilities to its campuses, no guidance is provided describing the efforts campuses must undertake to reach out to these tribes, and no timetables are provided for completing these policies, including for initiating these contacts.

As for delegating responsibility to each campus to adopt such plans and to provide instructions on submitting requests, AB 2836 requires the UC to adopt systemwide policies across its campuses for submitting claims, including “notification to tribes of human remains and cultural items deemed culturally affiliated but that are not subject to a current repatriation claim.” (Health & Saf. Code, § 8025(a)(1)(B).) The Policy perpetuates the existing history of inconsistent application of repatriation laws across UC campuses, permitting some campuses to indefinitely delay, as well as hinder through inadequate notification procedures, the repatriation of unclaimed culturally affiliated items; a violation of law and an unacceptable outcome.

G. Outreach to Controlling Agencies

Yet again, the Policy delegates to each campus the responsibility for “a schedule for reaching out to agencies that have Control of Human Remains and Cultural Items

currently held by UC to prompt and encourage the agency's Repatriation efforts." (Policy at p. 37.) No guidance is provided for the creation of such a schedule, as well as for "reaching out to agencies."

H. Tribal Outreach

The Policy requires campuses "include an outreach program that promotes proactive Consultation with Tribal Representatives regarding the Affiliation, Repatriation, and Disposition of the Human Remains and Cultural Items, including a reasonable timeline for such activities." (Policy at pp. 37-38.) "To the extent permitted by UC and tribal resources, campuses will invite Tribes seeking Repatriation or Disposition to attend regularly scheduled meetings to discuss Repatriation/Disposition strategies." (Policy at p. 38.) No definition of "outreach" and "proactive" consultation is provided under the Policy.

But the Policy already requires campuses to initiate consultation "as early as possible" to "engage with Tribal Representatives in ongoing meaningful dialog regarding Cultural Affiliation and the identification of Cultural Items throughout the Inventory and Summary processes." (Policy at p. 17.) This includes "[f]lexible meeting agendas and schedules, with opportunity for tribal input on the agenda or schedule themselves." (Policy at p. 17.) "UC campuses should work collaboratively with each other when engaging in Consultation with Tribes that may have Human Remains or Cultural Items in collections across multiple campuses." (Policy at p. 17.)

The Policy is unclear whether such tribal outreach is in addition to the consultation requirements which dovetail its requirements. Under consultation, campuses have an existing duty to engage in proactive consultation regarding the affiliation, repatriation, and disposition, involving "meaningful dialog" that include meetings. The Policy could be interpreted as meaning that these elements of consultation are subject to each campus making its own plan and that meetings are optional depending on UC resources. The result is potential confusion among campuses over what constitutes voluntary "outreach" subject to the creation of a campus plan and what constitutes required consultation. In conjunction with this potential confusion, campuses will, undoubtedly, adopt and implement differing outreach efforts, promoting inconsistency across campuses.


CONCLUSION

As currently drafted, the Policy will result in fragmented processes across campuses, often in conflict state and federal law, with campuses pursuing varied reevaluation plans, some more vigorously than others; a fact documented by the State Auditor's June 2020 Audit Report. For tribes with state cultural affiliation, it will fail to create a

process enabling non-federally recognized tribes to successfully participate in repatriation. The Policy continues to codify policies and procedures that often conflict with state and federal law in critical areas including policy structure and campus delegations, inventory processes, the reevaluation of culturally unidentifiable remains and items, the processing of repatriation claims and dispute resolution, the repatriation process, conflicts of interest, as well as in the creation of systemwide and campus committees. As documented by the State Auditor, these concerns persist, in part, due to the UC's ongoing failure to adhere to tribal consultation requirements, including by responding to comments and meeting to resolve any concerns.

Because of its statewide importance, the Commission remains committed to assisting the UC in resolving these concerns and in creating an effective UC repatriation policy, and urges the UC to truly commit to improving the draft Policy, companion documents, and implementation guidance in improved collaboration with the Commission and California Native American tribes.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Laura Miranda', is written over a horizontal line.

Laura Miranda
Chairperson