

NATIVE AMERICAN HERITAGE COMMISSION

June 3, 2021

Hon. Michael V. Drake
President
University of California
Office of the President
1111 Franklin St., 12th Floor
Oakland, CA 94607

Submitted via Electronic and USPS Mail

Re: Native American Heritage Commission's Review of the University of California's Final Draft Native American Cultural Affiliation and Repatriation Policy (mandated by Health and Safety Code section 8025, subdivision (a)(4)).

Dear President Drake:

The Native American Heritage Commission (Commission or NAHC) appreciates the opportunity to comment on the University of California's (UC) March 2021 Draft Repatriation Policy (Policy), as required under Health and Safety Code section 8025, subdivision (a)(4). The latest version incorporates some of the suggestions that the Commission had made as to prior drafts, but significant challenges remain.

UC HISTORY OF EXPLOITATION

The Commission's views on the inadequacies of the Policy are best understood in the context of UC's exploitation, which has precipitated the crisis that gave rise to the need for the Policy. California's Native American tribes have had a long and difficult road fighting for repatriation of their ancestors' remains and cultural items from the UC. The UC's legacy in Native American remains and cultural items is rooted in archaeology and anthropology. Most prominently, UC Berkeley Prof. Alfred Kroeber, a renowned and controversial anthropologist, began his career collecting Native American remains and cultural items with the assistance of Phoebe Hearst, a major UC benefactor for whom the Phoebe Hearst Museum at UC Berkeley is named.¹ Prof. Kroeber will forever be linked to "Ishi," a Native American who was one of the last of his tribe to escape slaughter only to be exhibited for display by the UC.² In addition to "Ishi," Prof. Kroeber was instrumental in looting Native American graves, most notably in Humboldt County at a site where 55 Native Americans were massacred by local ranchers.³

¹ Brittani Orona and Vanessa Esquivido, *Continued Disembodiment: NAGPRA, CALNAGPRA, and Recognition* (2020) Vol. 1, No. 42 Humboldt Journal of Social Relations, at p. 50, at <https://digitalcommons.humboldt.edu/cgi/viewcontent.cgi?article=1132&context=hjsr>.

² *Ibid.*; Tony Platt, *UC and Native Americans: Unsettled remains* (June 18, 2013) Los Angeles Times, at <https://www.latimes.com/opinion/la-xpm-2013-jun-18-la-oe-platt-native-american-indian-remains-20130618-story.html>.

³ Tony Platt, *Grave Matters* (June 18, 2009) North Coast Journal, at <https://www.northcoastjournal.com/humboldt/grave-matters/Content?oid=2129764>.



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In the 1940's, UC Prof. Edward Gifford followed up on Prof. Kroeber's work by testing Native American skulls to validate his eugenic theories.⁴ Prof. Gifford used the UC's trove of remains to document racial differences, "as indicated by the length and breadth of Indian heads, noses, and ears; the degree of slope in foreheads; the axis of nostrils; and whether or not 'the fleshy lower margin of the septum is exposed.'"⁵ From 1947-49, noted anthropologist Prof. Robert Heizer carried out "intensive excavations" of Humboldt gravesites, viewing it as "an important component of his mission to train young archaeologists."⁶ By 1948, Berkeley boasted to Life magazine that its Native American collection included "more than 10,000 Indian skeletons, many of them complete," a collection so vast that much of it was stored in the cavernous, dank basement of the Hearst gym.⁷

But this legacy is by no means confined to the past. In 2018, the legislature documented that since NAGPRA's enactment in 1990 and CalNAGPRA's in 2001, the UC has thwarted compliance through the inconsistent application of these laws across campuses, a history of inadequate consultations, a disregard of traditional tribal knowledge (one of the most common means tribes have to establish cultural affiliation), and through a lack of transparency in its processes.⁸

A State Auditor's June 2020 Audit Report found "that the university's inadequate policies and oversight have resulted in inconsistent practices for returning Native American remains and artifacts," and that through sloppy accounting (including campuses lacking "controls for keeping track of what they had loaned") campuses had lost remains and items.⁹

More recently, in November of 2020, a whistleblower documented that in 2009 a UC anthropologist had pulled numerous remains from a site in Mariposa and waited seven years to notify the relevant federal agency of this fact.¹⁰ A Bureau of Land Management archaeologist confirmed that during a meeting in 2018, the professor admitted that he had some of them in his personal possession, leaving the archaeologist to wonder: "Are these things in his garage and how many does he have?"¹¹ This concern was echoed by the State Auditor who concluded that because of "poor recordkeeping," "remains could be lost in a closet, attic, or desk drawer of a researcher."¹² In fact, as recently as 2008, the UC Berkeley Hearst Museum acknowledged discrepancies in its inventory due to poor recordkeeping, as well as its prior policy to "freely trade in crania."¹³

While UC Berkeley's anthropology department chair Charles Hirschkind recently acknowledged "a long history of violence toward Native Americans in which UC Berkeley and the anthropology department are implicated,"¹⁴ thirty years after the enactment of NAGPRA requiring the repatriation of Native American remains and cultural items, UC Berkeley continues to house one of the largest collections of remains and cultural items in the country, having only repatriated approximately 20% of its vast collection.¹⁵ This prompted Prof. Hirschkind to comment that "UC Berkeley has too long continued to use the most conservative interpretation possible under these laws, discounting traditional tribal knowledge on cultural affiliation and committing yet another act of injustice to Native American peoples who have sought repatriation."¹⁶

⁴ Platt, *supra*, note 2.

⁵ Platt, *supra*, note 3.

⁶ Platt, *supra*, note 3 (To his credit, Prof. Heizer later apologized for archaeologists failing to listen to Native American protests about his conduct and for treating "Indians not as people, but as objects for study," but neglected to mention himself, nor did he undertake efforts to repatriate.)

⁷ Platt, *supra*, note 3.

⁸ Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subs. (a)(7)-(12).

⁹ 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, at p. 28 (hereinafter June 2020 Audit Report).

¹⁰ Tay Wiles, *A whistleblower speaks out over excavation of Native sites* (Nov. 12, 2020) High Country News.

¹¹ *Id.*

¹² June 2020 Audit Report, *supra*, note 8, at pp. 29-30.

¹³ Platt, *supra*, note 3.

¹⁴ Charles Hirschkind, *Letter From the Chair* (Sept. 8, 2020), at <https://anthropology.berkeley.edu/news/letter-chair>

¹⁵ June 2020 Audit Report, *supra*, note 8, at p. III (June 11, 2020, letter from the State Auditor to the Governor).

¹⁶ Charles Hirschkind, *supra*, note 14.

EXECUTIVE SUMMARY

The Commission has submitted four-previous comment letters, engaged in numerous meetings and calls with the UC in an attempt to arrive at an effective policy. This policy remains inadequate and does not even meet the bare minimum of compliance with auditor comments, state law, including AB 2836 and CalNAGPRA, and does not fully commit to repatriation through funding commitments or goal timelines for accomplishing repatriation. It's been 30 years since NAGPRA was instituted and tribes are still struggling to recover their ancestors and cultural items from the UC.

Although UC has acknowledged its history of Native American exploitation, the true commitment to this acknowledgement is not reflected in the Policy. Many of the Policy's flaws leave tribes in a similar relationship with the UC as they were in the '40s and '50s. This is unacceptable.

The Policy is flawed in a number of respects. A pervasive issue that the Policy fails to adequately address is the need to devote adequate resources and staffing to expedite long-overdue repatriation. The Policy fails to allocate funding from the UC to the campuses for this purpose, and it provides no standard that campuses must follow for assessing the adequacy of resources they devote to the commitment of repatriation. Nor does the Policy provide any incentive to campuses to allocate adequate resources for this purpose. The result will be a perpetuation of existing disparities in repatriation between campuses.

A continuing concern previously raised by the Commission, is the Policy's length and organization.¹⁷ The Commission recommends a succinct Policy outlining the repatriation process with guidance and best practices, as well as links to the actual laws referenced, rather than lengthy verbatim statutory quotes that are often not clear or correct in terms of their interpretation of the law. Organization continues to be a significant concern. For instance, as discussed below, many of CalNAGPRA's preliminary inventory requirements including the inclusion of all Native American ethnographic or archaeological objects into preliminary summaries and inventories is not discussed in conjunction with preliminary inventories, but under consultations where the requirement is relegated to a suggestion.¹⁸

As to AB 2836 compliance, concerns persist as to the integration of tribal traditional knowledge, the identification of Native American remains and cultural items, including the integration of CalNAGPRA's preliminary inventory process, the need to conduct adequate searches, the determination of possession and control, the continuation of research and testing, the repatriation committees' roles and responsibilities, and deaccessioning, all as discussed in more detail in the analysis below. Compounding prior concerns, the Policy creates two-distinct processes for creating and finalizing inventories and summaries without explanation. Sadly, the Commission previously raised almost all of these issues in its four-prior comment letters, but the UC chose not to address them or to consult with the Commission in an effort to reach an appropriate resolution.

As to AB 275, pervasive problems remain concerning the inability to effectively integrate the California Native American Graves Protection and Repatriation Act (CalNAGPRA) into the Policy. AB 275 marks a dramatic departure from prior state law, as well as federal NAGPRA, by empowering California Native American tribes to identify remains and cultural items, determine cultural affiliation, review and finalize inventories and summaries, file claims, and resolve disputes. In many instances, the Policy either fails to adhere to CalNAGPRA or contains conflicting provisions without explanation. For instance the Policy creates conflicting processes allowing the UC to make final determinations concerning cultural affiliation under one process, usurping the tribes' right under AB 275 to make this determination. Similarly, the Policy creates two claims processes, one for NAGPRA and one for CalNAGPRA, expressly making CalNAGPRA optional for tribes. Nothing in AB 275 suggests the legislature intended to make its process optional for the UC. In fact, AB 275 contemplates both processes occurring simultaneously, something the Policy fails to do.

As to dispute resolution, the Policy creates two dispute resolution processes, one of which conflicts with AB 275, again without explanation. Under one process, a tribe can appeal to the campus committee and chancellor for resolution and under the other process, the tribe has the option of having the Commission resolve the dispute through AB 275. But make no mistake, the legislature did not make CalNAGPRA's dispute resolution process optional.

The prevalence of language either failing to implement AB 2836, violating AB 275, or creating internal conflicts within the Policy without explanation or guidance will result in confusion, Policy and/or legal noncompliance, all unacceptable outcomes. For the reasons explained more fully below in the analysis, the Commission strongly

¹⁷ See Policy at pp. 29-30. The Policy is 49 single-spaced pages whose organization is difficult to follow.

¹⁸ See Health & Saf. Code, § 8013, subd. (c)(1) and Policy at pp. 26-27.

opposes implementation of the UC's latest Policy. After the UC has had sufficient time to review this response, the Commission recommends creating a consultation schedule. The Commission recommends beginning consultations in June and twice a month after that until the issues raised here are resolved.

ANALYSIS

I. THE POLICY FAILS TO ADDRESS ADEQUATE STAFFING AND RESOURCES

Adequate funding to expedite repatriation to redress the UC's history of exploitation, as well as to address past efforts to thwart repatriation, must be the bedrock foundation for any effective repatriation policy. To address systemwide disparities, the Policy needs to provide minimum repatriation funding and staffing levels dependent upon the size and scope of the collection, excluding curation, and other museum-related staff, who do not directly participate in repatriation. Funding must be transparent and devoted to repatriation. This fosters repatriation, as well as uniformity in repatriation across campuses.¹⁹

The Policy states that campuses will estimate their costs under the Policy in preparing "a detailed budget."²⁰ The President/designee "is responsible for allocating sufficient resources to fulfill the obligations of the President's office and Systemwide Committee, as described under this policy" and the Chancellor/designee "is responsible for allocating sufficient resources to fulfill the obligations of the campus and Campus Committee, as described under this policy."²¹ The term "sufficient resources" is not defined.

Absent from the Policy is a commitment from the UC to provide funding to the campuses for this purpose, as well as any formula or standard requiring campuses to devote sufficient resources to expedite long-overdue repatriation. This omission is serious. For instance, the Phoebe Hearst Museum of Anthropology at UC Berkeley, which "contains one of the largest collections of Native American human remains and cultural items within the United States,"²² with nearly 500,000 Native American remains and cultural items,²³ has one NAGPRA liaison, while UC Davis, which has a collection approximately one-tenth the size, has three staff devoted to repatriation.²⁴ The lack of commitment and resources across campuses has led to widely divergent results. For instance, UCLA, which has devoted significant resources, including providing tribal assistance, has repatriated nearly 96% of its Native American collection, while UC Berkeley has repatriated barely 20% of its collection.²⁵ One of AB 2836's primary purposes is to ensure uniformity across campuses, to avoid these kinds of disparities.²⁶

The Policy allows for campuses to "benchmark against institutions with similarly sized collections to estimate the costs."²⁷ The Policy's inclusion of language permitting campuses to benchmark funding against unspecified institutions does not resolve the concern. Other institutions, including other universities, have their own particular funding challenges unrelated to effective repatriation which would make such benchmarks inappropriate to address the UC's unique concerns. If other institutions are used as benchmarks, the Policy should provide guidance in identifying those institutions that have been successful in repatriation, as well as appropriating funds needed for CalNAGPRA compliance.

¹⁹ These factors can include any of the following: the size of collections, addressing past bureaucratic and other administrative concerns which hindered prior repatriation efforts, tribal outreach efforts, difficulties in ascertaining the origin of items, logistics associated with searches, storage, CalNAGPRA consultations necessary for identification of items and cultural affiliation, reinventorying culturally unidentifiable items (CUI), drafting preliminary inventories and summaries, assisting tribes with disputes, assisting non-federally recognized tribes with additional related NAGPRA requirements, participating in CalNAGPRA with the Commission when posting summaries and inventories, claims, and disputes, navigating the UC's committees and appeals processes, and assisting tribes with actual repatriation.

²⁰ Policy at p. 48.

²¹ *Id.* at pp. 11-12.

²² Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subd. (a)(3).

²³ June 2020 Audit Report, *supra*, note 8, at p. 20.

²⁴ Sage Alexander, *Grave robbing at UC Berkeley: A history of failed repatriation* (Dec. 5, 2020), The Daily Californian, at <https://www.dailycal.org/2020/12/05/grave-robbing-at-uc-berkeley-a-history-of-failed-repatriation/>.

²⁵ *Id.*

²⁶ Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subd. (a)(8) ("There is a history of inconsistent application of federal and state repatriation laws by some campuses within the University of California system.")

²⁷ Policy at p. 48.

Lastly, funding should adequately address many tribes' need for resource assistance. For example, some tribes lack financial resources to travel long distances, including costs incurred for airfare, lodging, and food. This is particularly a concern at campuses with the largest collections, including UCLA, UC Berkeley, UC San Diego, and UC Davis. These tribes should not be shut out from the process to recover their ancestors simply because they are unable to afford the cost. The Policy provides that campuses may provide "travel support through grants or allocation of funding," and that campuses may include in their budgets funds for "travel."²⁸ The Policy needs to mandate that these costs be covered, as well as be included in campuses' budgets.

II. THE UC POLICY CONTINUES TO FAIL TO COMPLY WITH AB 2836

A. Identification of Cultural Items in Original Inventories Where the UC Failed to Adequately Incorporate Traditional Tribal Knowledge

AB 2836 requires the UC to adopt a systemwide policy "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."²⁹ Like AB 2836's other UC requirements, this must be accomplished through consultation.³⁰

Rather than adopt a systemwide policy across all campuses, the Policy requires each campus to adopt its own reevaluation policy.³¹ The State Auditor documented that variations in campus policies had contributed to inconsistent repatriation efforts, underscoring "the need for the university to develop a uniform NAGPRA policy that ensures consistency across its campuses, as CalNAGPRA requires."³² AB 2836's requirement for a systemwide policy is crucial as campuses reported that through historically inadequate consultations, as well as the discounting of tribal knowledge, prior inventories identified by campuses as CUI may not be accurate.³³ While the Policy mentions tribal traditional knowledge in defining the standard of review, it does not explain its importance in performing reevaluations under the Policy, impacting prior CUI determinations.³⁴ A fundamental tenant of reevaluations includes applying tribal traditional knowledge to reassess prior CUI determinations, something not mentioned in the Policy. Of all the omissions this may be the most detrimental to tribes, as well as the relationship between the UC and tribes, as it clearly shows the UC does not completely accept tribal knowledge and expertise in assessing tribes own heritage, basic tribal human rights, or the sovereignty and self-determination of tribes.

Not only is there no systemwide policy governing reevaluations, but the Policy provides no required timeframes for doing so.³⁵ While the Policy requires campuses to "proactively review and update previous determinations," it lacks even recommended timelines for doing so, previously included in the prior Interim Policy.³⁶ And the terms "proactively review" are not defined. Campuses' interpretation of these terms may (and will) vary widely, defeating the purpose behind having systemwide policies to avoid the UC's "history of inconsistent application of federal and state repatriation laws by some campuses"³⁷

In addition to lacking meaningful completion times, the Policy is silent as to the documentation campuses need to provide concerning their progress, including the consultations held and anticipated completion dates for categories within a collection, like a particular accession. These should be made public so that the tribes can assess their accuracy and progress. Because of historical UC failures to adequately consult and to consider traditional tribal knowledge, transparency in this process across campuses is not only required under AB 2836, but essential for building trust.

²⁸ Policy at pp. 22 and 48.

²⁹ Health & Saf. Code, § 8025, subd. (a)(2)(D).

³⁰ *Id.*, subd. (a)(3).

³¹ Policy at p. 47.

³² June 2020 Audit Report, *supra*, note 8, at p. 2.

³³ During a November 9, 2020, conference call, campuses expressed concern about the accuracy of prior published CUI determinations, particularly UC Berkeley.

³⁴ Health & Saf. Code, § 8012, subd. (k).

³⁵ Policy at p. 47.

³⁶ Compare Policy at pp. 47-48 and Interim Policy at p. 41, App. C. As the Commission previously commented, even the recommended timeframes previously used by the UC were problematic because they recommended dates for certain tasks, but provided no recommendations as to when campuses should complete reviewing 10%, 20%, 30%, or up to 100% of their collections.

³⁷ Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(8).

B. Identification of Remains and Cultural Items

AB 2836 further requires the UC to adopt systemwide policies “for the identification and disposition of culturally unidentifiable human remains and cultural items as required by the federal Native American Graves Protection and Repatriation Regulations.”³⁸

1. The Policy Fails to Properly Identify all Native American Archaeological Objects Necessary for Tribal Identification of Sacred Items

Under the Policy, repatriation coordinators will send a communication (presumably an email) “providing the definitions of Human Remains and Cultural Items under NAGPRA and CalNAGPRA and instructions on what to look for so that deans, department chairs, and unit heads can make an informed initial assessment about whether their departments/units potentially hold Human Remains or Cultural Items.”³⁹

As an initial matter, this process violates AB 275 which recognizes that “[b]ecause it may not be clear whether Native American objects are cultural items, all museum collections of Native American ethnographic or archaeological objects shall be included in the preliminary summary.”⁴⁰ Thus, under AB 275, the items that should be incorporated into a search goes far beyond human remains and cultural items as set forth in the Policy.

2. The Policy Does Not Define the Specific Requirements for an Adequate Search

In conjunction with the Policy’s failure to require the inclusion of “Native American ethnographic or archaeological objects” in searches, despite repeated concerns raised by the Commission, the Policy still fails to set out any parameters for what would constitute an adequate search by campus staff.⁴¹ As mentioned above, under the Policy, repatriation coordinators will send a communication (presumably an email) “providing the definitions of Human Remains and Cultural Items under NAGPRA and CalNAGPRA and instructions on what to look for so that deans, department chairs, and unit heads can make an informed initial assessment about whether their departments/units potentially hold Human Remains or Cultural Items.”⁴²

The term “informed initial assessment” is not defined, and while the Policy requires these department heads to “confirm that they have conducted the search,” it fails to define what constitutes an adequate “search.” For example, it is unclear whether the department head is required to make inquiries with his/her staff and/or former department staff, conduct physical inspections, review inventories or other documents, or undertake any other search methods.

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.⁴³ According to the State Auditor, “only Berkeley could tell us how many items were missing from its NAGPRA collection.”⁴⁴ 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.”⁴⁵ “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.”⁴⁶

The inadequacy of the Policy on searches is further illustrated by a recent incident at UC Riverside. In a January 2021 report, UC Riverside found that remains and associated items which had been sent out from the Department of Anthropology to the Radiocarbon Laboratory for radiological testing sometime “in the latter half of the 20th century” had, upon a former Department head’s specific request after his retirement in 2002, been relocated from the Laboratory to a library’s archives, rather than identified for potential repatriation.⁴⁷ The incident is troubling because

³⁸ Health & Saf. Code, § 8025, subd. (a)(2)(D).

³⁹ Policy at p. 36.

⁴⁰ Health & Saf. Code, § 8013, subd. (c)(1).

⁴¹ Policy at p. 36.

⁴² *Id.* at p. 36.

⁴³ June 2020 Audit Report, *supra*, note 8, at p. 28.

⁴⁴ *Id.* at p. 29.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ Steven Mandeville-Gamble and Dr. M. C. Hall, *Biannual Report of Activities Carried Out Under*

UC Riverside elected to follow a retiring department head's request to place the remains in a remote location where they would not likely be found, rather than follow existing NAGPRA law requiring their repatriation to tribes.⁴⁸ It was not until some 18-years later that UC Riverside publicly reported the incident and even then the report is ambiguous as to dates, referring to "the latter half of the 20th Century" as to the date of the remains' testing, while the library transfer occurred sometime "[a]fter [the former Department head's] retirement and closure of the UCR Radiocarbon Laboratory" without actually identifying the date of either. It seems untenable that there would not be some record documenting when the remains were tested, as well as a record of their library transfer. If not, then this is yet another example of sloppy recordkeeping as previously documented by the State Auditor.

While troubling, the incident underscores the historical failures in complying with repatriation laws, which is reflected in the Policy's indifference concerning the importance of conducting meaningful searches. First, if a repatriation coordinator were to send an email to department heads (as specified in the Policy), a department head may not even be aware of the existence of the transfer which, in the case of UC Riverside, occurred well over 18-years ago. Absent someone coming forward, a repatriation coordinator would have no reason to suspect that human remains would be stored in the library, or even some other remote location. The Policy, under this circumstance, would not necessarily reveal the existence of these remains. The incident underscores the importance of conducting appropriate investigations and thorough searches, something the Policy fails to require.

Rigorous search protocols are necessary because of poor recordkeeping in the past. The Commission recommends that searches be defined and that best practices for such searches be provided.⁴⁹

UC Native American Cultural Affiliation and Repatriation Policy (Jan. 2021), p. 4. While the report states that the transfer occurred "after his retirement," without identifying a specific date, the Commission was able to determine that he retired from UC Riverside in 2002. (*Ervin Taylor, AT Co-founder and Respected Scientist, Passes to His Rest* (May 9, 2019) Adventist Today.Org., <https://atoday.org/ervin-taylor-at-co-founder-and-univ-of-calif-scientist-passes-to-his-rest/>.)

⁴⁸ At the time of the Professor's retirement, NAGPRA had been in effect since 1990. See 104 Stat. 3048, Pub. L. 101-601 (Nov. 16, 1990).

⁴⁹ Protocols may include any of the following:

- Repatriation coordinator search requests should be targeted not only to department heads, but to supervisory staff involved with libraries, storage facilities, research laboratories, and disparate locations. The request should include information about the requirements for conducting searches, including providing required checklists and forms documenting the searches. There should be best practices provided using examples such as UC Riverside to explain that remains or Native American items may be located in unexpected locations, including libraries, storage rooms, and peoples' homes.
- Search requests need to include not only all remains, but all Native American ethnographic or archaeological objects and provide examples of these. The guidance should explain that bone fragments, ashes, and broken Native American objects, shards, baskets, or pieces of objects should be included. When in doubt, departments should be instructed to identify the items.
- Guidance in performing searches must be provided, including: the need to assemble teams for visual inspections of all rooms, storage areas, including off-site storage facilities. As the UC Riverside example demonstrates, remains may be found in unexpected places unassociated with remains or Native American artifacts such that all departments and units need to conduct searches.
- Department heads need to be required to make inquiries of all staff to determine if they are aware of any remains or Native American ethnographic or archaeological items either at the university, located off-site, or in their homes.
- Required timelines for conducting these searches must be provided, with department heads having to justify to the chancellor any failures to comply with timelines. The requests should be viewed as important priorities with consequences for failures to comply.
- With department head assistance, repatriation coordinators need to conduct independent searches of departments more likely to have Native American ethnographic or archaeological objects, including anthropology, archaeology, Native American studies, museums, curation, ethnic studies, radio-carbon testing and other units related to the testing or study of historical remains.
- Repatriation coordinators need to monitor compliance with search protocols and maintain copies of all checklists and forms documenting searches. Repatriation coordinators should report search statuses to chancellors who must assist them in gaining compliance.
- Tribal Knowledge and expertise should be used to identify ethnographic and archeological items, particularly to determine whether they include cultural items.

3. The Policy Fails to Integrate CalNAGPRA into Its Process for Identifying Remains

In discussing preliminary inventories, the Policy requires repatriation coordinators to “prepare a preliminary and final Summary for review by the Campus Committee to determine whether the requested items meet the NAGPRA/CalNAGPRA definitions of Unassociated Funerary Objects, Sacred Objects, or Objects of Cultural Patrimony (and whether any Tribes are Culturally Affiliated or State Culturally Affiliated).”⁵⁰ Similarly, the Policy requires repatriation coordinators to do the same for inventories.⁵¹

The Policy does not address the need to include all Native American ethnographic or archaeological objects into preliminary summaries and inventories.⁵² Rather, in conjunction with consultations, the Policy states that: “[i]n general, any non-contemporary Native American ethnographic object or artifact may be a Cultural Item, and campuses should consult with potentially Culturally Affiliated/State Culturally Affiliated Tribes regarding any collections that contain such Native American objects.”⁵³ But this differs from AB 275 which requires that “all museum collections of Native American ethnographic or archaeological objects shall be included in the preliminary summary.”⁵⁴ This distinction is important because under the Policy, campuses may potentially exclude “non-contemporary Native American ethnographic object[s] or artifact[s]” from preliminary inventories based upon their initial assessments. This underscores the importance of consulting with tribes at the time the UC is identifying these items, as well as later in determining whether they are cultural items subject to repatriation. .⁵⁵

Further, as part of consultations, the Policy provides that consultation “**may** include . . . [c]ollecting identifications of Cultural Items made by Tribal Representatives, which the campus must record in accordance with CalNAGPRA § 8013(b)(1)(c)(iii).”⁵⁶ Contrary to AB 275, the Policy appears to make a voluntary component of consultation by using the term “may,” as well as failing to integrate the requirement of tribal knowledge and expertise into the preliminary summary and inventory process, violating both the spirit and letter of the law.

In conjunction with requirements for tribal identifications, under AB 275, an inventory or summary may not become final until “all responding California Indian tribes listed in the inventory or summary concur with the information in the inventory or summary.”⁵⁷ Consequently, if a responding tribe disagrees with the identification of items in an inventory or summary, the inventory/summary cannot become final. But this requirement is not integrated into the Policy’s provisions about inventories and summaries.⁵⁸ After setting out the process for finalizing inventories and summaries,⁵⁹ the Policy later provides, under the heading “Additional CalNAGPRA Specific Processes,” verbatim passages from AB 275 (specifically Health and Safety Code section 8013, subdivision (j)), including the requirement for tribal concurrence before an inventory or summary becomes final, without explaining or integrating it into its process for repatriation coordinator and campus committee finalization.⁶⁰ This leaves two distinct processes to finalize inventories with no effort to reconcile them, leading to confusion and fostering potential conflict between them.

4. Department Heads Are Unqualified and Ill-Equipped to Determine If They Have Potential Remains and Items Subject to the Policy

Not only does the Policy not contain any parameters on the required search, the Policy places the responsibility on department heads to “report whether their departments or units hold Human Remains and Cultural Items under UC’s Possession or Control as well as the current location of such items.”⁶¹ This requires the department heads to determine

⁵⁰ Policy at pp. 27-28.

⁵¹ *Id.* at p. 27.

⁵² Policy at pp. 26-27.

⁵³ Policy at p. 27.

⁵⁴ Health & Saf. Code, § 8013, subd. (c)(1).

⁵⁵ The UC’s flowchart reflects the omission of this step. See <https://www.ucop.edu/research-policy-analysis-coordination/policies-guidance/curation-and-repatriation/rev-policy-no3---appendix-a-1-repatriation-flowchart-narrative-04-24-2020.pdf>.

⁵⁶ Policy at pp. 23-24 (emphasis added).

⁵⁷ Health & Saf. Code, § 8013, subd. (j)(2).

⁵⁸ Policy at pp. 26-28.

⁵⁹ *Id.* at p. 27.

⁶⁰ *Id.* at pp. 29-30.

⁶¹ *Id.* at p. 36. Under the Policy, the term “Human Remains” refers to “the body of a person of Native American ancestry,” and the term “Cultural Items” is defined as associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony. *Id.* at pp. 5 and 6.

whether their remains and associated items are subject to repatriation under the Policy, something virtually none of them are qualified to do, and cannot adequately do without access to tribal consultations and traditional tribal knowledge.⁶² The Policy goes on to state that the repatriation coordinator/point of contact “will review the items in all departments historically engaged in studies with Human Remains or Cultural Items (e.g., archaeology, anthropology, biology, geology, oceanography, physical sciences, dentistry, etc.) and all departments identified by deans, department chairs, or unit heads as potentially holding Human Remains or Cultural Items.” But the Policy does not define what “items” the Repatriation Coordinator is supposed to be reviewing, other than the “items” identified by the department heads as potentially subject to the Policy. This creates a gaping loophole where department heads only have to report “items” they determine are potentially subject to the Policy, almost certainly without sufficient training, expertise, or access to tribal consultations necessary for doing so. In some instances, these department heads may lack cultural sensitivity in making these determinations, and in other instances may even object to repatriation.⁶³

This problem can be alleviated by adhering to AB 275 in broadening searches to include all potential Native American ethnographic or archaeological objects and by providing best practices, including examples of such objects, explaining that bone fragments, ashes, pottery and basket pieces or shards should be included and by emphasizing that when in doubt, items should be included and/or repatriation coordinators consulted.

5. The Policy Fails to Specify Timelines for Completing Searches

In addition to improperly requiring likely unqualified department heads to identify Native American remains and associated items without appropriate tribal input, the Policy requires each campus chancellor to “set appropriate reporting timelines” in response to a repatriation coordinator’s email asking for Departments’ reviews.⁶⁴ The terms “appropriate reporting timelines” are not defined; thus, searches at UC campuses may be completed at substantially different intervals with no guidance in setting any particular completion date across campuses. This is precisely the type of inconsistency across UC campuses the Legislature sought to avoid when it enacted AB 2836.⁶⁵

C. Determining Possession and Control

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 whether the UC has legal possession and control under state and federal law. While the Policy is clear that it only applies to remains and items under its possession and control (including for inventorying), it fails in three regards: First, it offers no practical guidance in making these determinations, which can often be complex, especially where the UC operated in conjunction with other agencies.⁶⁶ Second, the Policy fails to state that all items within its possession should be inventoried, regardless of legal control. And third, if the UC subsequently determines that it lacks legal control, that any related transfers will be done in an open and transparent process.

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”⁶⁷ 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.”⁶⁸ 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.”⁶⁹

As raised in the Commission’s prior comment letter, 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

⁶² *Ibid.*

⁶³ One need only look to the UC professors who recently brought suit to block repatriation under NAGPRA so they could study the remains. See *White v. University of California* (9th Cir. 2014) 765 F.3d 1010, 1016.

⁶⁴ Policy at p. 36.

⁶⁵ Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(8).

⁶⁶ Policy at p. 6.

⁶⁷ 43 C.F.R. § 10.2(3)(ii).

⁶⁸ Health & Saf. Code, § 8012, subd. (f).

⁶⁹ *Id.*, subd. (j).

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 (particularly the Bureau of Land Management), have "flip-flopped" on whether the UC has possession and control. At this meeting, the repatriation coordinators thought it would be helpful if the Policy made clear that all items within the UC's possession would be inventoried and that all items determined to be outside of its control would be returned to the appropriate agencies in a transparent process allowing tribes to track these items and to pursue repatriation with these other agencies.

Despite this input from its staff with the most expertise in repatriation, the Policy fails to include any meaningful guidance or procedures for inventorying all items received from other agencies and in making determinations concerning possession and control. In fact, the Policy's vague language that "generally, . . . [items] on loan from another individual, museum, or federal agency" would not be considered in the possession of UC actually undermines this recommendation without explanation.⁷⁰ Sadly, this will lead to instances where repatriation coordinators lack the ability to determine possession and control, or the UC maintains possession of items determined to be within other agencies' control with no related inventory, or items are returned to other agencies determined to have control, all of which will likely occur under the Policy without tribal input or understanding that it is occurring. This outcome stymies repatriation and promotes distrust. More significantly, it rekindles the UC's history of exploitative practices which include opaque and inconsistent processes, combined with inadequate consultations and the disregard of tribal traditional knowledge. Without a transparent process, these remains and items could evade repatriation, perhaps indefinitely, violating AB 2836 and defeating the purpose behind state and federal repatriation laws.

D. Research and Testing/Loans

Research and testing on sacred Native American remains and cultural items constitute violations of fundamental human rights, particularly in light of the UC's historic exploitation of Native American remains and cultural items. The Policy marks a major improvement from prior policies discussing testing by requiring prior written authorization from state and federally culturally affiliated tribes.⁷¹ While an improvement, the Policy would still permit research and testing on items subject to reevaluation under AB 2836, as well as preliminary inventory under CalNAGPRA, to determine state and federal cultural affiliation, including items previously identified as CUI.⁷² As to items previously identified as CUI, the Policy only requires written permission from federally recognized tribes under NAGPRA with an aboriginal interest.⁷³ The Policy ignores the reality that many prior UC CUI-determinations were erroneous, the consequence of inadequate consultation efforts, as well as the discounting of traditional tribal knowledge, thereby evading repatriation over the decades.⁷⁴ In order to address this reality in conjunction with the UC's history of Native American exploitation, absolutely no research and testing should be allowed for remains and items subject to re-inventorying and preliminary inventory.

As to loaning remains and items, the Policy similarly permits loans for items subject to reevaluation under AB 2836, as well as preliminary inventory under CalNAGPRA, including items previously identified as CUI.⁷⁵ Similar to research and testing, this ignores the UC's history of exploitation and inadequate consultations, but also creates a potential loophole for items subject to reevaluation and preliminary inventorying to be shipped off-campus. To avoid this potential outcome, no loans should be permitted to other institutions for items subject to preliminary inventorying and re-inventorying under AB 2836.

⁷⁰ Policy at p. 6.

⁷¹ Policy at pp. 43-44.

⁷² Policy at p. 43.

⁷³ *Id.* at p. 44.

⁷⁴ See Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(9) ("The 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.") The UC's use of the CUI classification "provides a basis for denying repatriation of these human remains, in violation of applicable federal regulations." *Id.* at subd. (a)(12).

⁷⁵ Policy at p. 45.

E. UC Committees

1. UC Committees' Required Duties, Including Audits

In connection with adopting systemwide policies, AB 2836 requires the UC to establish systemwide oversight and campus repatriation committees tasked with implementing the required systemwide repatriation policies.⁷⁶ The Policy gives discretion to these committees as to the duties they “may” perform, with no requirement, nor deadlines, for completing any specified duty.⁷⁷ Similar to concerns raised about other policies, this will lead to inconsistent application of committees and functions across campuses, something the Legislature sought to avoid when it imposed this requirement.⁷⁸

One of the most significant duties these committees have is to audit compliance with the Policy, which should include the pace of progress. Yet even here, under the Policy, the systemwide committee may only “make recommendations” to the President concerning the need for campus audits and campus committees “may” conduct audits “as necessary.”⁷⁹ Concomitantly, the President and chancellors have discretion to act on audit requests and “may” initiate compliance audits to evaluate Policy compliance “and/or reviews to benchmark the campus’ performance or assess the need for improvements.”⁸⁰

The President and chancellors will likely be reluctant to conduct audits which may be critical of their institutions’ repatriation efforts and risk backlash from campuses potentially subject to such audits. To the extent that such audits even occur, pressure will exist to soften criticisms, such that they are unlikely to reach the level of scrutiny and objectiveness that was achieved in the State Auditor’s audit. Given these realities, the Policy must require audits for campuses with larger collections and these audits must be conducted by neutral third parties with expertise in repatriation.

2. The Policy Impermissibly Allows Campus Committees to Determine State Cultural Affiliation

As discussed above concerning the Policy’s failure to integrate AB 275 into its identification process for inventories and summaries, under AB 275, tribes review inventories and summaries to determine cultural affiliation, and these do not become final until “all responding California Indian tribes listed in the inventory or summary concur with the information in the inventory or summary.”⁸¹ If tribes and/or agencies are unable to reach such agreement, they are required to pursue mediation through CalNAGPRA.⁸² Like other CalNAGPRA provisions, compliance with this process is required and not optional. This constitutes a fundamental shift from the federal NAGPRA approach to allow the agency rather than tribes to make final inventory and cultural affiliation determinations.

As explained above, despite AB 275’s shift toward accepting tribal sovereignty in the repatriation process, the Policy requires the Repatriation Coordinator to “prepare a preliminary and final inventory for review by the Campus Committee to determine whether items meet the NAGPRA/CalNAGPRA definitions of Human Remains and Associated Funerary Objects (and whether any Tribes are Culturally Affiliated and/or State Culturally Affiliated).”⁸³ The Chancellor/designee then makes final determinations subject to an appeals process.⁸⁴ By having the UC make final determinations about cultural affiliation without recognizing the veto power of California Indian tribes, the Policy violates AB 275 by usurping tribal sovereignty and final decision-making during the repatriation process.

Creating confusion, after describing the process for final campus determinations, the Policy later quotes lengthy passages from AB 275’s process, including requiring tribal concurrence before an inventory becomes final, including incorporating cultural affiliation designations.⁸⁵ The two processes are not reconciled under the Policy, leaving two distinct avenues for finalizing inventories without explanation; such a result is untenable.

⁷⁶ Health & Saf. Code, §§ 8025, subd. (2)(D)(6) and 8026, subds. (a) and (b).

⁷⁷ Policy at pp. 14, 17-18.

⁷⁸ Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(8).

⁷⁹ Policy at pp. 14, 17.

⁸⁰ *Id.* at p. 38.

⁸¹ Health & Saf. Code, § 8013, subd. (j)(2).

⁸² *Id.*, § 8016, subds. (d)(1)-(7).

⁸³ Policy at p. 27; see also *id.* at p. 17 (giving campus committees authority to “make determinations” concerning state cultural affiliation).

⁸⁴ *Id.* at pp. 11, 39.

⁸⁵ *Id.* at pp. 29-30.

To be clear, this is not a situation where the UC is unable to comply with both federal and state laws. Nothing prevents the UC from using AB 275's process and then utilizing these results for adoption under NAGPRA. To the extent that AB 275 permits non-federally recognized tribes to participate (which is not a part of federal NAGPRA), the Policy already contemplates this reality by encouraging these tribes to partner with federally recognized tribes under NAGPRA and, if necessary, to use NAGPRA's disposition process.⁸⁶

3. Committees' Composition

The Policy gives the President and chancellors the ability to replace members of the Systemwide and Campus committees who have conflicts of interest as long as the "balance between tribal and UC membership" on the committees is maintained.⁸⁷ Nothing in AB 2836 gives the UC authority to take such actions; indeed, this provision contravenes the statute's requirement that all of the members of both committees be appointed "upon nomination by the [C]ommission."⁸⁸ While the Commission has no objection to the UC recommending replacement members to the Commission, their appointments must be subject to Commission nomination as required by statute.

In addition to lacking authority to unilaterally replace Committee members, the UC lacks authority to create exceptions in creating such committees. The Policy allows a campus which "does not otherwise anticipate needing a full committee" to rely upon another campus's committee.⁸⁹ The Commission understands that certain campuses may not have remains and cultural items subject to repatriation, or may have very few. Under this circumstance, the Policy must set out criteria for this determination to avoid substantial noncompliance with this requirement.

Finally, the Policy creates a "chair" position to serve two years upon committee nomination and President or chancellor approval.⁹⁰ Yet again, AB 2836 provides no authority for the creation of this position. While the Commission has no objection in principle to having a chair to facilitate meetings, it does object to the requirement of President/chancellor approval. This gives the UC the ability to veto candidates it finds objectionable (which could include Native American members and other advocates) regardless of the committee's nomination decision. This violates AB 2836's fundamental principle in maintaining balance on these committees between California Native American tribes and UC representatives, particularly where the President and chancellors likely lack the qualifications or experience to determine who would be best suited for the role of chair.

F. Deaccessioning

AB 2836 requires the UC to adopt "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."⁹¹

Deaccessioning is an important component of the repatriation process, because "cultural items" under federal and state NAGPRA include "sacred objects" consisting of "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents."⁹² This extends beyond associated and unassociated funerary objects, and includes items which may only be identified by providing tribal access to complete Native American collections through a consultation process. After such a process, items may not necessarily qualify as "sacred," but may, nonetheless, be important to a tribe's history.

In response to AB 2836's requirement, the Policy allows each campus to develop its own policy as to such items, explaining that "campuses should consider the Tribe's relationship to such items, whether the items are related to other items subject to NAGPRA/CalNAGPRA, campus deaccessioning practices, and applicable laws."⁹³ But this does not constitute a "systemwide" policy ensuring uniformity across campuses. Recognizing the UC's acknowledged

⁸⁶ *Id.* at p. 33-34.

⁸⁷ *Id.* at pp. 15, 19.

⁸⁸ Health & Saf. Code, § 8026, subs. (a)(3) and (b)(3).

⁸⁹ Policy at p. 17.

⁹⁰ *Id.* at pp. 16, 19.

⁹¹ Health & Saf. Code, § 8025, subd. (a)(2)(C).

⁹² *Id.*, § 8012, subd. (g); 25 U.S.C. § 3001(3)(C).

⁹³ Policy at p. 38.

“long history of violence toward Native Americans,”⁹⁴ the Policy should include a uniform requirement and process for all campuses regarding deaccessioning of these types of items.

III. CALNAGPRA'S APPLICATION TO THE POLICY

The Policy contains persistent failures to effectively integrate AB 275 into the repatriation process. This includes the following: 1) the failure to integrate AB 275's preliminary inventory process for identifying cultural items, as discussed above concerning the Committees' roles; 2) the creation of conflicting processes for determining cultural affiliation; 3) the creation of competing processes for filing claims; 4) the failure to integrate AB 275's provisions concerning tribal agreements; and 5) the creation of competing processes for dispute resolution. Finally, the Policy should contain prominent language that it applies to all UC departments (including libraries), divisions, laboratories, offices, facilities (on and off-site), with easy-to-understand definitions of Native American ethnographic or archaeological objects with examples.

A. Failure to Properly Integrate CalNAGPRA

An ongoing concern previously raised by the Commission is the Policy's failure to properly integrate and implement CalNAGPRA. For instance, while the UC and tribes are required to adhere to CalNAGPRA's process for repatriation, the Policy states: “California Indian tribes may avail themselves of their rights under either NAGPRA or CalNAGPRA, or both, as they wish.”⁹⁵ However, nothing in CalNAGPRA's language makes its process voluntary if tribes only seek repatriation under federal NAGPRA. And a number of relevant additional requirements and protections attach under CalNAGPRA which may impact the rights and interests of other California tribes:

- An agency “shall provide a written preliminary summary” of items and “shall engage in consultation with California Indian tribes” to complete these summaries.⁹⁶
- After completing a preliminary inventory and summary an agency “shall consult with California Indian tribes that may be culturally affiliated with the human remains and cultural items.”⁹⁷
- Tribes retain the right to disagree with the contents of a preliminary inventory or summary and an agency “shall either revise the preliminary inventory or summary to correct the disputed information or the commission shall offer to initiate dispute resolution as described in Section 8016.”⁹⁸
- A tribe claiming state cultural affiliation “shall . . . [f]ile a claim for the human remains and cultural items with the commission and with the agency or museum believed to have possession or control.”⁹⁹
- “If there are no other requests for items, the agency or museum shall repatriate the requested human remains or cultural items to the requesting California Indian tribe or group”¹⁰⁰

CalNAGPRA provides no exceptions for tribes seeking repatriation under NAGPRA and tribes that fail to participate in CalNAGPRA do so at their peril. And nothing exempts the UC from complying with CalNAGPRA simply because it is also subject to federal NAGPRA. The Policy's language indicating otherwise must be amended.

B. Failure to Integrate CalNAGPRA in the Cultural Affiliation Process

As explained above regarding the campus committees' roles, the Policy fails to integrate AB 275 into identification and cultural affiliation necessary for finalizing inventories by creating two distinct processes for finalizing preliminary inventories and summaries: one controlled by the UC and another one requiring tribal concurrence.

As part of this failure, the Policy makes no attempt to integrate CalNAGPRA state cultural affiliation into its federal NAGPRA process. For instance, the Policy provides the following NAGPRA deadline:

[W]hen all the criteria for Cultural Affiliation and Repatriation set forth in NAGPRA (43 C.F.R. § 10.10) are met, and at least thirty (30) days have passed since the publication of any required notices in the Federal Register, UC must work with the requesting Tribe to expeditiously repatriate Human Remains and Cultural Items within

⁹⁴ Charles Hirschkind, *supra*, note 13.

⁹⁵ Policy at p. 10.

⁹⁶ Health & Saf. Code, § 8013, subds. (c)(1) and (2).

⁹⁷ *Id.*, subd. (j).

⁹⁸ *Id.*, subd. (j)(1).

⁹⁹ *Id.*, § 8014, subd. (b)(1).

¹⁰⁰ *Id.*, § 8016, subd. (b).

ninety (90) days of receipt of a written Request for Repatriation from the Culturally Affiliated Federally Recognized tribe.¹⁰¹

The Policy fails to integrate CalNAGPRA into this process. The Policy should include a provision requiring UC to delay publication of the notice in the Federal Register, particularly for CUI, until state cultural affiliation has been determined, something AB 275 contemplated by making CalNAGPRA repatriation requests contingent upon eventual completion of the NAGPRA process.¹⁰² Not only does this avoid needless conflict between the statutes, but it permits campuses to assess state cultural affiliation and to assist non-federally recognized tribes in finding suitable federally recognized tribes to sponsor their requests under federal NAGPRA, something encouraged under the Policy.¹⁰³

C. Failure to Integrate CalNAGPRA into the Claims Process

Under the heading "Requests for Repatriation and Disposition," the Policy sets out two sets of processes, one for requests made under federal NAGPRA and one for requests made under CalNAGPRA.¹⁰⁴ However, nothing in AB 275 makes the claims process optional. California Indian tribes "shall . . . [f]ile a claim for the human remains and cultural items with the [C]ommission and with the agency or museum believed to have possession or control."¹⁰⁵ The Legislature specifically contemplated that tribes might also be required to file NAGPRA claims by precluding repatriation under its provisions until completion of the federal process, including a federal notice of intent to repatriate.¹⁰⁶

A federal notice of intent to repatriate published in the Federal Register extends CalNAGPRA's deadline to repatriate to "30 days following the completion of the federal notice period."¹⁰⁷ This dovetails with federal NAGPRA, which provides that "repatriation may not occur until at least thirty (30) days after publication of the notice of inventory completion in the Federal Register . . ."¹⁰⁸ A tribe must complete both processes, in which both statutes have a 90-day repatriation deadline and CalNAGPRA accommodates the possibility that publication of the federal notice of intent to repatriate may extend this deadline. Final repatriation under CalNAGPRA is contingent upon completion of the federal process.¹⁰⁹ This process is important for non-federally recognized tribes which are unable to participate in formal federal repatriation and under the Policy can affiliate with federally recognized tribes or seek federal disposition; this affiliation process can be time-consuming, so the possible extension can be critical for these tribes to exercise their rights.¹¹⁰

D. Agreements

As previously mentioned, CalNAGPRA reflects a fundamental shift towards empowering tribes in making repatriation determinations. Part of this shift includes encouraging tribes to coordinate and to reach agreement on repatriation requests.¹¹¹ The Policy needs language encouraging tribes to resolve differences between themselves and requiring written agreements. These agreements must be provided to the Commission, which has the power to enforce them. Nothing in the Policy expressly empowers tribes to make repatriation decisions on their own, nor does it provide that repatriation agreements should be filed with the Commission for future enforcement. These provisions should be added to the Policy.

E. Dispute Resolution

The Policy's dispute resolution process fails to integrate AB 275 in a meaningful way. The Policy provides tribes with the right to appeal "UC decisions" on state and federal cultural affiliation, cultural item identification, inventories, and

¹⁰¹ *Id.* at p. 31.

¹⁰² Health & Saf. Code, § 8016, subd. (a)(5).

¹⁰³ Policy at p. 33.

¹⁰⁴ *Id.* at pp. 30-33.

¹⁰⁵ Health & Saf. Code, § 8014, subd. (b)(1).

¹⁰⁶ *Id.*, § 8016, subd. (a)(5).

¹⁰⁷ Health & Saf. Code, § 8016, subd. (b).

¹⁰⁸ 43 C.F.R. § 10.10(b)(2).

¹⁰⁹ Health & Saf. Code, § 8016, subd. (a)(5).

¹¹⁰ Policy at p. 33.

¹¹¹ Health & Saf. Code, § 8015, subd. (b).

summaries to the chancellors or president.¹¹² Timelines and processes for handling these appeals are provided in detail.¹¹³

Under the separate heading titled "Additional Tribal Rights Under the Complaints and Appeal Processes," the Policy states that: "Tribal Representatives from California Indian tribes may file a request with the NAHC for assistance in resolving a dispute under the process outlined in CalNAGPRA § 8016. To the extent that there is no direct conflict between the federal process referenced above and the CalNAGPRA process referenced herein, UC will participate in the NAHC dispute resolution/mediation process."¹¹⁴ Nothing in the Policy reconciles this process with its administrative appellate procedures to resolve disputes.

However, AB 275's dispute resolution process is not optional. Under AB 275, if a dispute arises between the parties or the state agency, "the Commission **shall** notify the affected parties of this fact" and the dispute "**shall** be determined in accordance" with CalNAGPRA.¹¹⁵ The disputing parties "shall meet" within 30 days to resolve the dispute. If the parties are unable to resolve the dispute, then the Commission "shall hold a mediation session."¹¹⁶ The parties "shall come to a resolution or the mediator shall render a written decision within 7 days of the mediation session."¹¹⁷ "If the parties are unable to resolve a dispute through mediation, the dispute shall be resolved by the commission."¹¹⁸ The Commission's determination is a final administrative remedy, and parties may file legal actions in Superior Court challenging the Commission's decision.¹¹⁹

Unlike CalNAGPRA, federal NAGPRA's dispute-resolution process is completely voluntary;¹²⁰ thus, if the two processes are properly integrated, there is nothing precluding the UC's compliance with state law in participating in required mediations.

F. Clarifying the Policy's Application

Buried in the Policy is a definition of "museum," which contains the first explanation that the repatriation Policy applies to the entire UC system.¹²¹ A reader, such as a department head, would not necessarily know that it applied to their department unless they took the time to read the definition of "museum," "cultural items," and "human remains."¹²² But as the Policy notes, the UC is comprised of "disparate academic units,"¹²³ the vast majority of which have no experience in identifying Native American remains and cultural items. The Policy should include an introductory section explaining that it applies to all UC departments (including libraries), divisions, laboratories, offices, facilities (on and off-site), with easy-to-understand definitions of Native American remains and cultural items. The Policy should emphasize that if a department is unsure whether something falls under the Policy, they must contact the Repatriation Coordinator for guidance.

The importance of this cannot be overstated. For instance, on April 8, 2021, UC Riverside's Radiocarbon Laboratory reached out to the Commission because it did not know whether cremated bones given to the university over 30 years ago would be subject to the Policy or whether they could just return them to the landowner (assuming they can still be found).¹²⁴ An effective Policy would leave no ambiguity as to the process UC Riverside must follow in repatriating these remains, including the fact that cremated remains qualify as human remains under the Policy.

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

¹¹² Policy at p. 39.

¹¹³ *Id.* at p. 40.

¹¹⁴ *Id.* at p. 40.

¹¹⁵ Health & Saf. Code, § 8016, subd. (d) (emphasis added).

¹¹⁶ *Id.*, subd. (d)(2).

¹¹⁷ *Id.*, subd. (d)(4).

¹¹⁸ *Id.*, subd. (d)(7).

¹¹⁹ *Ibid.*

¹²⁰ 43 C.F.R. § 10.17(a).

¹²¹ *Id.* at p. 6.

¹²² *Id.* at pp. 4, 6.

¹²³ *Id.* at p. 36.

¹²⁴ Apr. 8, 2021, email from Steven Mandeville-Gamble (UC Riverside) to Emily Archer (NAHC).

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 UC conducting effective repatriation than consultation with Indian tribes when it adopts its policy, a requirement imposed on the UC by AB 2836. Despite repeated Commission comments and now a State Auditor's Report, the UC has never adequately engaged in consultation as defined by state law after issuing five different revisions, including its proposed adoption of a final policy.

As currently drafted, the Policy's failure to properly integrate CalNAGPRA into its process, as well as conflicting language concerning the process to be followed, will continue to result in fragmented and inconsistent processes across campuses, often in conflict with state and federal law, an outcome the Legislature expressly sought to avoid when it enacted AB 2836.

Finally, any final repatriation policy must fully incorporate and embrace AB 275, permitting tribes with state cultural affiliation to fully participate in repatriation. The policy will need to be overhauled to address AB 275's processes, including for preliminary and final inventories, claims, and dispute resolution.

The Commission is dedicated to providing advice and assistance to the UC to create a meaningful repatriation policy, one that is long overdue to California's Native American tribes. To this end, the Commission requests additional consultations be scheduled to address the concerns raised by the Commission. Thank you for your consideration of our views.

Sincerely,

A handwritten signature in black ink, appearing to read 'Laura Miranda', with a stylized flourish at the end.

Laura Miranda
Chair, Native American Heritage Commission