

NATIVE AMERICAN HERITAGE COMMISSION
MEMORANDUM
January 19, 2018

To: Chairman Ramos and NAHC Commissioners

From: Terrie L. Robinson, General Counsel¹

CC: Debbie Treadway, Acting Executive Secretary

Re: Request from the United Auburn Indian Community Regarding U.C. Davis' Repatriation of Native American Human Remains and Funerary Objects from the Auburn Dam Project, Accession 32

At the October 20, 2017 Commission meeting, the United Auburn Indian Community (UAIC), a Miwok and Nisenan tribe, made five requests of the Commission under the California Native American Graves Protection and Repatriation Act (Health and Saf. Code § 8010 et seq.) with respect to U.C. Davis' collection of Native American human remains and funerary objects acquired as part of the excavations that occurred during 1966-1969 in preparation for the construction of the Auburn Dam, which was never built. The undisputed facts demonstrate that U.C. Davis did not consult with UAIC prior to making the initial determination in 1995 that the Accession 32 collection was culturally unidentifiable, even though UAIC was restored to federal recognition on September 30, 1994. Additionally, U.C. Davis clearly admits errors in its 1995 inventory process for Accession 32 and has reinitiated the inventory process and tribal consultation as of December 18, 2017 with several tribes, including UAIC, to determine cultural affiliation and complete the inventory by April 1, 2018. There may also be ownership issues since some of the materials appear to have been taken from private lands.

In order to provide the opportunity for all potentially affiliated tribes to participate in this process with respect to the Accession 32 collection and, hopefully, achieve repatriation shortly thereafter, it is my recommendation that UAIC's request be held in abeyance and the Commission abstain from exercising its jurisdiction under CalNAGPRA until all tribal consultation is completed, the NAGPRA inventory is completed as scheduled by April 1, 2018, and any ownership issues regarding Accession 32 be resolved, with the proviso that this entire matter be revisited at the

¹ This memorandum was written with the necessary assistance and analysis of Rob Wood, NAHC Associate Environmental Planner. Rob worked on NAGPRA compliance and completed NAGPRA repatriations for the California Department of Parks and Recreation prior to joining the NAHC staff.

April Commission meeting for a determination that substantial progress or completion has occurred or for consideration of legal options. However, I will send a letter to U.C. Davis Native American Graves Protection and Repatriation Act (NAGPRA) Project Manager Megon Noble seeking statutory or regulatory justification for U.C. Davis' methods of handling the collection, which UAIC has found highly objectionable. If there is no statutory or regulatory justification for U.C. Davis' handling methods, I will refer the finding to the Commission for further consideration.

Background²

From 1966-1969, U.C. Davis and the Bureau of Reclamation surveyed and excavated sites in the Auburn Dam project area in El Dorado and Placer Counties. Some of these materials that were excavated appear to have come from private lands, and they were curated by U.C. Davis as part of Accession 32 prior to the enactment of the NAGPRA in 1990.

U.C. Davis' NAGPRA committee was initiated in 1992 and reactivated many times in response to changes in the legislation.³ In 1995, U.C. Davis prepared an inventory for Accession 32 as "most likely" Nisenan but filed the inventory with National NAGPRA as culturally unidentifiable. For example, the summary of evidence for determination of affiliation for one of four burials from which remains were exhumed and included in Accession 32 states, "[I]t is most likely that these remains are affiliated with the Nisenan. However, the possibility exists that these remains may be related to a group that was displaced or assimilated sometime before AD 0. Because the Nisenan are not a federally recognized tribe, these remains are considered unaffiliated."⁴

In May of 2010, the Department of the Interior adopted regulations requiring consultation on culturally unidentifiable remains with Indian tribes and Native Hawaiian organizations whose tribal lands or aboriginal occupancy areas are in the area where the remains were removed. If cultural affiliation could still not be determined and repatriation achieved, the Indian tribe or Native Hawaiian organization could request disposition of the remains. The museum or federal agency could then publish a notice and transfer control to the tribe without first being required to appear before the Review Committee to seek a recommendation for disposition approval from the Secretary of the Interior. (Federal Register, Vol. 75, No. 49, March 15, 2010, 43 CFR Part 10).

² This background section relies in large part on the timeline provided by UAIC and the documents provided in support.

³ June 2, 2011 letter from Ralph J. Hexter, U.C. Davis Provost and Executive Vice Chancellor.

⁴ University of California, Davis Department of Anthropology Museum Inventory of Human Remains and Associated Funerary Objects for Accession 32, a United States Bureau of Reclamation Collection at pp. 255-256.

U.C. Davis Provost and Executive Vice Chancellor Ralph J. Hexter sent a letter on June 3, 2011 inviting participation on the U.C. Davis NAGPRA committee to which Marcos Guerrero, then Tribal Historic Preservation Officer (THPO) of UAIC, responded on behalf of UAIC and made the following recommendations:

1. Transparency with all collections records of provenience, including archaeological site records, maps, and records of consultation;
2. Access to scientific reports and findings associated with Native American human remains;
3. Develop a process to consult with Native communities prior to scientific testing of human remains;
4. Publish inventories for all collections with human remains housed at UCD;
5. Additional Tribal representation in the NAGPRA committee, or a Tribal NAGPRA committee;
6. Update national NAGPRA about any collections that have been repatriated;
7. Develop and publish UCD policies and procedures for identifying cultural items and consultation.⁵

On May 24, 2012, UAIC Chairman David Keyser wrote to Provost Hexter with additional recommendations and also wrote to the Bureau of Reclamation on May 29, 2012 requesting the re-initiation of consultation on Accession 32. On July 12, 2012, Provost Hexter responded to Chairman Keyser's May 24, 2012 letter as follows:

Dear Chairman Keyser,

Your letter of May 24, 2012 outlined a desire for quicker progress from the U.C. Davis NAGPRA Committee and provided detailed suggestions on how to move forward. During the upcoming academic year, I expect that the NAGPRA Committee will be transitioning from learning NAGPRA to preparing actual recommendations and that many of the items in your letter will be addressed.

Provost Hexter expected that many of Chairman Keyser's recommendations would be addressed in the upcoming academic year.⁶ On May 19, 2014, U.C. Davis Chancellor Linda Katehi sent a letter to UAIC Chairman Gene Whitehouse announcing the appointment of Megon Noble as U.C. Davis NAGPRA Project Manager.⁷ Draft notes from a June 10, 2014 NAGPRA meeting between UAIC and U.C. Davis reflect that the

⁵ November 7, 2011 letter from Marcos Guerrero, RPA, THPO, UAIC, to Provost Ralph J. Hexter, U.C. Davis.

⁶ July 12, 2012 Letter from Ralph J. Hexter, Provost and Executive Vice Chancellor, U.C. Davis, to Chairman David Keyser, United Auburn Indian Community.

⁷ May 19, 2014 letter from Linda Katehi, Chancellor, U.C. Davis, to Chairman Gene Whitehouse, United Auburn Indian Community.

issue of whether U.C. Davis or the Bureau of Reclamation was the responsible party for the Auburn Dam collection still had not been resolved and that legal advice was going to be sought from the Department of Interior. The Bureau of Reclamation and U.C. Davis did not reach an agreement on how to handle NAGPRA responsibilities for Accession 32 until approximately 2016, with the Bureau of Reclamation claiming responsibility for materials excavated from one of the sites involved and sharing joint responsibility with U.C. Davis for materials excavated from the three remaining involved sites.⁸ Megon Noble's March 31, 2016 letter to UAIC THPO Matthew Moore states, "Based on the prior question of control and responsibility, final NAGPRA Inventories and Notices of Inventory Completion have not yet been produced for the relevant four sites. We are inviting all tribes previously consulted and/or potentially affiliated to consult regarding the preparation of NAGPRA Inventories."⁹

UAIC requested consultation by a letter dated October 21, 2016, stating that it had reviewed Notices of Inventory Completion and collections documentation for Miwok and Maidu (Nisenan) collections prepared by the U.C. Davis and believed that many objects that should have been identified as associated funerary objects were not identified in the inventories and that many sacred objects, objects of cultural patrimony, and unidentified funerary objects had yet to be identified.¹⁰ Ms. Noble responded on December 8, 2016, stating that ownership and control of the Accession 32 collection was still under discussion with the Bureau of Reclamation and NAGPRA inventories for Accession 32 had not yet been completed. Ms. Noble went on to state:

We look forward to working with UAIC and other potentially affiliated tribes on the preparation of the relevant inventories.

We agree with UAIC's assessment that these inventories created for the 1995 NAGPRA deadline may be incomplete or inaccurate and are actively working to address this. It is possible that objects that may meet the definition of funerary objects under NAGPRA were omitted.

Additionally, new information obtained through tribal consultation and/or scientific study should be considered as to the designation of funerary objects as well as

⁸ University of California, Davis United Auburn Indian Community Outreach Week Meeting Notes, March 10, 2016 at p. 3; March 31, 2016 letter from Megon Noble, U.C. Davis NAGPRA Project Manager, to Matthew Moore, Tribal Historic Preservation Officer, United Auburn Indian Community.

⁹ March 31, 2016 letter from Megon Noble, U.C. Davis NAGPRA Project Manager, to Matthew Moore, Tribal Historic Preservation Officer, United Auburn Indian Community.

¹⁰ October 21, 2016 letter from Chairman Gene Whitehouse, United Auburn Indian Community, to Megon Noble, NAGPRA Project Manager, U.C. Davis.

previous cultural affiliation determination. UC Davis fully acknowledges the need for re-evaluating previous decisions and including consultation in this process We welcome input on the specific inventories and consultation with UAIC and other Miwok and Nisenan groups.¹¹

There were also loans of Auburn Dam materials, although Accession 32 materials were not among them. UAIC requested to be notified in advance of any future loans.

From January 4, 2017 onward, U.C. Davis, the Bureau of Reclamation, and UAIC consulted on many issues, including the handling of Accession 32 materials, the separation of faunal material, and unresolved ownership issues between the Bureau of Reclamation and U.C. Davis regarding Accession 32. It still is not clear from the record provided that the ownership issue regarding Accession 32 has been resolved. During this time, it came to UAIC's attention that San Francisco State University (SFSU) also worked with U.C. Davis on to prepare reports for Accession 32. SFSU accepted all of UAIC's identifications of cultural items and repatriated its collection to UAIC.

On October 26, 2017, subsequent to UAIC's request for the Commission's engagement in this matter under CalNAGPRA, U.C. Davis informed Buena Vista Rancheria of Me-Wuk Indians (Buena Vista), Ione Band of Miwok Indians (Ione), Jackson Rancheria (Jackson), and UAIC about the next steps in processing to amend the Accession 32 NAGPRA inventories. U.C. Davis and the Bureau of Reclamation's Anticipated Schedule was stated as follows:

1. Review fauna and confirm human remains documentation: November 13 – 22
2. Submit draft amended Inventory to consulting tribes: December 15
3. Continue consultation regarding cultural affiliation and associated funerary objects: December 15 – January 30, 2018
4. Bureau of Reclamation Review: February 1-9, 2018
5. U.C. Davis Campus Revise and Review: February 1-28, 2018
6. U.C. Systemwide Review: March 1-30, 2018
7. Submit amended NAGPRA Inventory to National NAGPRA: April 1, 2018.¹²

A draft amended NAGPRA Inventory of Human Remains and Associated Funerary Objections for Accession 32 was prepared on December 18, 2017. It reflects that the following tribes were invited to consult:

¹¹ December 8, 2016 letter from Megon Noble, NAGPRA Project Manager, U.C. Davis, to Chairman Gene Whitehouse, United Auburn Indian Community.

¹² October 26, 2017 Letter from Megon Noble, NAGPRA Project Manager, U.C. Davis, to Mike DeSpain, Buena Vista Rancheria of Me-Wuk Indians; Randy Yonemura, Ione Band of Miwok Indians; Rollie Fillmore, Jackson Rancheria; and Matthew Moore, Tribal Historic Preservation Officer, United Auburn Indian Community.

Berry Creek Rancheria of Maidu Indians of California (1995)
Buena Vista Rancheria of Me-Wuk Indians (2017)
Enterprise Rancheria of Maidu Indians of California (1995)
Greenville Rancheria (1995)
Ione Band of Miwok Indians (2017)
Jackson Rancheria (2017)
Mooretown Rancheria of Maidu Indians of California (1995)
Shingle Springs Band of Miwok Indians (2016)
Susanville Indian Rancheria (1995)
United Auburn Indian Community (2014) (UAIC contacted the Bureau of Reclamation to inquire about the NAGPRA status of Accession 32 in 2012)
Wilton Rancheria (2016)

The tribes engaged in consultation include Buena Vista, Ione, Jackson, Shingle Springs, and UAIC.

UAIC's Request, Staff Recommendation, and Conclusion

UAIC made five requests of the Commission:

1. Determine that there is a dispute under CalNAGPRA, Health and Safety Code section 8016(a).
2. Issue a notice to U.C. Davis requiring them to repatriate the Auburn Dam collection within 30 days unless they submit evidence that the collection is not culturally affiliated with UAIC or not subject to repatriation under CalNAGPRA as required by Health and Safety Code section 8016(c).
3. Issue guidance to U.C. Davis explaining that CalNAGPRA is in effect and must be considered, that the state policy is to repatriate, that state case law holds that tribes are the experts at identifying burials and grave goods – not archaeologists, and that museum practices should not be used to delay repatriation.
4. Issue guidance to U.C. Davis clarifying that UAIC's evidence regarding cultural affiliation must be accepted under CalNAGPRA unless there is actual contradictory evidence in their possession and requesting that U.C. Davis provide the Commission and UAIC with all such contradictory evidence.
5. Issue guidance to U.C. Davis clarifying that museums have no authority to supersede tribal determinations that something is a funerary object or cultural item under CalNAGPRA unless there is contradictory evidence in their possession and requesting that U.C. Davis provide the Commission and UAIC with all such contradictory evidence. Or, alternatively, explain to UAIC how to properly bring this ongoing dispute to the Commission's attention and access the dispute resolution process under CalNAGPRA.

It what can only be described as a twisted and sad irony for UAIC resulting from U.C. Davis' and the Bureau of Reclamation's ignorance of NAGPRA, failure to consult with UAIC before deciding that Accession 32 was culturally unidentifiable, sloth in resolving their NAGPRA responsibility and ownership issues, and delay in appointing a NAGPRA Project Manager to keep the process moving forward, UAIC's requests are premature at this time. Given where U.C. Davis and the Bureau of Reclamation finally are in the process of amending the NAGPRA inventory for Accession 32, the fact that they are, for the moment, on schedule with their process, and that there is currently ongoing tribal consultation with other potentially affiliated tribes – Buena Vista, Jackson, Ione, and Shingle Springs -- regarding the draft NAGPRA Inventory for Accession 32 and the determination of cultural affiliation, the initiation of a separate CalNAGPRA proceeding might stifle tribal consultation and a robust cultural affiliation determination process allowing the other consulting tribes to support any claim they have as to cultural affiliation.

Out of respect for the NAGPRA tribal consultation process and the opportunity for the other consulting tribes to fully participate in the NAGPRA process with respect to Accession 32, I reluctantly recommend that the Commission revisit this matter at its April 1, 2018 meeting to ensure that U.C. Davis and the Bureau of Reclamation remain on schedule with the NAGPRA process for Accession 32 or to consider legal options to expedite repatriation to the appropriate culturally affiliated tribes