

**Date:** October 10, 2019

**To:** Christina Snider, Executive Secretary

**From:** John Appelbaum, Deputy Attorney General

**Re:** Preliminary Analysis on the UC Draft Native American Cultural Affiliation and Repatriation Policy

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Below are the Attorney General’s preliminary and brief comments to the UC’s proposed Native American Cultural Affiliation and Repatriation Policy. Overall, the policy is skewed in favor of federal NAGPRA and UC academic concerns. It omits key sections of the CalNAGPRA that were intended to support repatriation and make it more accessible for tribes. The Policy does not take into account the statutory role of the NAHC.

UC Policy Section	Comment
<p><b>§ II Def. ¶ 2 p. 2</b></p> <p>Associated funerary objects: Those funerary objects for which the human remains with which they were placed intentionally are also in the possession or control of a museum or Federal agency. Associated funerary objects also means those funerary objects that were made exclusively for burial purposes or to contain human remains. 43 C.F.R. § 10.2(d)(2)(i).</p>	<p>CalNAGPRA: § 8013(a) uses a more flexible definition as objects that are either clearly identifiable as to state cultural affiliation and those not clearly identifiable by cultural affiliation, but given “the totality of the circumstances surrounding their acquisition are determined by reasonable belief to be human remains and associated funerary objects with a state cultural affiliation with one or more California Indian tribes.” CalNAGPRA applies to state agencies and museums receiving state funding, while the Federal Regulations only apply to Federal agencies and museums receiving federal funding.</p> <p>§ 8013(a)(3) requires consultation “with California Indian tribes believed by the agency or museum to be affiliated with the items, during the compilation of the inventory as part of the determination of affiliation.”</p> <p><i>Analysis:</i> This is critical because it requires examining the totality of the circumstances and identifies a standard for making this determination. Further, it includes “any agency” eliminating disputes over whether</p>

	<p>objects held by a state agency in something other than a “museum” would still be covered. Further, California tribes should be consulted in making this determination, something omitted in UC’s policy.</p>
<p><b>§ II Def: ¶ 4: California Indian Tribe: p. 3</b></p> <p>Under CalNAGPRA (California Health &amp; Safety Code, Section 8012(j)), a California Indian Tribe is a federally recognized Tribe (as defined below) located in California; or a non-federally recognized Tribe located in California for which the following applies: It is not recognized by the federal government, but is indigenous to the territory that is now known as the State of California, and both of the following apply:  It is listed in the Bureau of Indian Affairs Branch of Acknowledgement and Research petitioner list pursuant to Section 82.1 of Title 25 of the Federal Code of Regulations.  It is determined by the California Native American Heritage Commission (NAHC) to be a tribe that is eligible to participate in the repatriation process set forth in CalNAGPRA. CalNAGPRA requires the NAHC to publish a document that lists the California tribes meeting these criteria, as well as authorized representatives to act on behalf of the tribe in the consultations required under paragraph (3) of subdivision (a) of Health &amp; Safety Code Section 8013 and in matters pertaining to repatriation under CalNAGPRA. CalNAGPRA specifies that criteria that shall guide the NAHC in making the determination of eligibility shall include, but not be limited to, the following:  i) A continuous identity as an autonomous and separate tribal government.  ii) Holding itself out as a tribe.</p>	<p><i>Analysis:</i> This definition comes directly from § 8012(j). While an agency may adopt regulations to fill in the details of a statutory scheme, it may not alter or exceed this authority. <i>Association of California Ins. Cos. v. Poizner</i> (2009) 180 Cal.App.4th 1029, 1047; <i>Nortel Networks Inc. v. Board of Equalization</i> (2011) 191 Cal.App.4th 1259, 1276 (“An administrative agency may not promulgate a regulation that is “inconsistent with the governing statute,” or that alters, amends, enlarges, or impairs the scope of the statute.”) In this case, UC properly used CalNAGPRA’s definition.</p> <p>Note: The Commission is aware of this definition is not in line with current federal law and policy and is outdated. There are legal questions surrounding the manner in which the Commission complies with its obligations related to this definition that need to be clarified.</p>

<p>iii) The tribe as a whole has demonstrated aboriginal ties to the territory now known as the State of California and its members can demonstrate lineal descent from the identifiable earlier groups that inhabited a particular tribal territory.</p> <p>iv) Recognition by the Indian community and non-Indian entities as a tribe.</p> <p>v) Demonstrated</p>	
<p><b>§II ¶ 6: Confidential Information p. 3</b>  Confidential Information: Information meeting the following conditions: (1) Containing personal identifiable information protected by privacy laws or information that if disclosed could cause irreparable harm to the affected party, and (2) Presented and marked as “confidential” by either party in writing, or if orally disclosed, information reduced to writing and marked as confidential by the disclosing party within fifteen (15) days of oral disclosure.</p>	<p>This definition of confidentiality is wholly inadequate. At a minimum, it should include matters already confidential under California law, including “records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency.” Gov. Code, § 6254. This includes “any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine.” Pub. Res. Code, § 5097.9.</p> <p>This policy should also include consultations where information is provided with the expectation that it will be kept confidential. Evid. Code, § 1040(b). Further, all Committee members should be informed of their obligation to maintain this confidentiality and should be dismissed for material breaches.</p>
<p><b>§ II ¶7: Consultation: p. 4</b></p> <p>A process conducted in accordance with 43 C.F.R. §§ 10.5, 10.8(d), 10.9(b), or 10.11(b).</p>	<p>This policy should elaborate on what federal regulations require in this regard. § 10.5 requires consultation for remains and objects “on Federal lands.” Federal officials must consult with “known lineal descendants and Indian tribe officials” where the discovery was made that “are likely to be, culturally affiliated” with the remains or objects. The other federal regs cited require consultation but fails to define it.</p> <p>Cal NAGPRA does not specifically define the</p>

term “consultation,” but SB 18 does provide a meaningful definition: “‘consultation’ means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties’ cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party’s sovereignty. Consultation shall also recognize the tribes’ potential needs for confidentiality with respect to places that have traditional tribal cultural significance.” This is also the definition embraced under B 52 for CEQA. Pub. Res. Code, § 21080.3.1.

§ 8012(d) uses the term “state cultural affiliation” which means “a relationship of shared group identity that can reasonably be traced historically or prehistorically” “when the preponderance of the evidence, based on geography, kinship, biology, archaeology, linguistics, folklore, oral tradition, historical evidence, or other information or expert opinion, reasonably leads to such a conclusion.”

There are concerns with the “preponderance of the evidence” standard. Some have pointed out there is a gap or over reach between the federal statute and the federal regulations. At a minimum, it should be clearly stated that this is not intended this standard be met with scientific certainty and should not be a bar or prohibition to repatriation. This step also needs to include tribal consultation as it is where many of the break downs exist in terms of repatriation “denials” or “justified” inaction for not meeting a standard that has been largely driven by scientific certainty principles and incorrectly put burdens on tribes.

*Analysis:* Federal law only applies to federal lands and only requires consultation with known lineal descendants, while California

	<p>law applies to state lands and requires consultations with tribes reasonably traced to an area. This can be a significant distinction. Federal law also does not define how consultations should be conducted. While CalNAGPRA does not provide a specific definition either, an agency may fill in the details of a statute so long as it does not alter or exceed this authority. <i>Association of California Ins. Cos. v. Poizner</i> (2009) 180 Cal.App.4th 1029, 1047; <i>Nortel Networks Inc. v. Board of Equalization</i> (2011) 191 Cal.App.4th 1259, 1276. Here, given the UC's past-track record, its policy should define the process.</p>
<p><b>§ II ¶12: Culturally unidentifiable:</b> p. 3 Human remains and cultural items for which no lineal descendant or culturally affiliated present-day federally recognized tribe can be determined.</p>	<p>§ 8012(j).does go beyond just federally recognized tribes. CalNAGPRA does not otherwise define this term, but § 8013(a)(3) provides that if a California tribe cannot be identified, “then tribes that may be affiliated with the items shall be consulted during the compilation of the inventory.”</p> <p>§ 8013(b) requires a written summary of all unassociated objects.</p> <p>Later in its policy, it requires that objects be classified as “unidentifiable” as part of the inventory process. ¶ C(1) After the inventory process, it will “devise a plan” for these items “in consultation with tribal representatives, re-evaluating originally considered evidence, as well as any newly available evidence or information.” ¶ C(3)</p> <p>The tribal consultation process should also be clearly spelled out here.</p> <p><i>Analysis:</i> The regulation should use CalNAGPRA’s definition of a tribe and CalNAGPRA requires that tribes that may be affiliated be consulted during the inventory process, not after. Further, the regs only require consultation with “tribes,” while</p>

	<p>CalNAGPRA more appropriately requires consultation with tribes that “may” be affiliated which is the more relevant consultation group.</p>
<p><b>¶§ II 14 Disposition: p. 4</b></p> <p>Disposition: Generally, transfer of control of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony by a museum or Federal agency; specifically, as used in this Policy, transfer of culturally unidentifiable human remains, with or without associated funerary objects (as distinguished from “repatriation,” which applies only to transfer of culturally affiliated remains and cultural items). 43 C.F.R. § 10.2(g)(5).</p>	<p>CalNAGPRA does not distinguish between deposition and repatriation.</p>
<p><b>¶§ II 16 Funerary objects p. 5.</b></p> <p>Funerary objects: Items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains. Funerary objects must be identified by a preponderance of the evidence as having been removed from a specific burial site of an individual affiliated with a particular Indian tribe or Native Hawaiian organization or as being related to specific individuals or families or to known human remains. 43 C.F.R. § 10.2(d)(2).</p>	<p>CalNAGPRA: § 8013(a) uses a more flexible definition as objects that are either clearly identifiable as to state cultural affiliation and those not clearly identifiable by cultural affiliation, but given “the totality of the circumstances surrounding their acquisition are determined by reasonable belief to be human remains and associated funerary objects with a state cultural affiliation with one or more California Indian tribes.”</p> <p>As discussed above, CalNAGPRA uses a broader definition of tribe that under the Federal Reuglaitons.</p> <p>§ 8013(a)(3) requires consultation “with California Indian tribes believed by the agency or museum to be affiliated with the items, during the compilation of the inventory as part of the determination of affiliation.”</p> <p><i>Analysis:</i> The policy follows federal law which requires that the objects be placed intentionally to qualify as funerary objects, while CalNAGPRA looks to the totality of the circumstances that the items are funerary</p>

	<p>objects. In most cases, this may be a minor distinction, but there could be instances where intentionality is missing, although the objects are adjacent to remains.</p> <p>Further, California tribes should be consulted in making this determination, something omitted in UC's policy.</p>
<p><b>§ II ¶ 19 Lineal Descendant p. 5</b></p> <p>Lineal Descendant: An individual tracing his or her ancestry directly and without interruption by means of the traditional kinship system of the appropriate Indian tribe or Native Hawaiian organization or by the common law system of descentance [sic] to a known Native American individual whose remains, funerary objects, or sacred objects are being claimed under NAGPRA. 43 C.F.R. § 10.2(b)(1).</p>	<p>CalNAGPRA does not define this term because inventories and the repatriation process rely upon tribal state cultural affiliation. § 8012(f); 8013(a); and 8014.</p> <p><i>Analysis:</i> Consistent with federal law, the policy allows repatriation by lineal descentance, as well as tribes. ¶ 28-29 The policy also includes consultation with lineal descendants and tribal representatives. ¶ B(4). Federal law and the policy in this instance are actually slightly broader in extending consultation and repatriation beyond just tribes, but the policy should include the term California Indian tribe.</p>
<p><b>§II ¶ 24 Notice of Inventory Completion p. 6</b></p> <p>Notice of Inventory Completion: A Notice of Inventory Completion is published in the Federal Register when a museum or Federal agency has made a determination of cultural affiliation, or a determination of the lack of a reasonable basis for determining cultural affiliation for Native American human remains and associated funerary objects in its possession or control. Such notification is required pursuant to 43 C.F.R. § 10.9(e) and 43 C.F.R. § 10.13. The National NAGPRA program is responsible for publishing Notices of Inventory Completion on behalf of museums and Federal agencies. 43 C.F.R. § 10.9(e)(7).</p>	<p>CalNAGPRA requires that: "Within 90 days of completing the inventory and summary specified in subdivisions (a) and (b), the agency or museum shall provide a copy of the inventory and summary to the commission. The commission shall, in turn, publish notices of completion of summaries and inventories on its Web site for 30 days, and make the inventory and summary available to any requesting tribe or state affiliated tribe." § 8013(e).</p> <p><i>Analysis:</i> The policy fails to comply CalNAGPRA by relying entirely on the Federal Register for notice. This is important because CalNAGPRA contemplates notice on the NAHC's website and to make copies available upon request, which would reach</p>

	<p>more tribes, unless tribes routinely check the FR which may not be all that likely.</p>
<p><b>§II ¶ 28 Repatriation p. 7</b></p> <p>Repatriation: The transfer of legal interest (usually accompanied by physical transfer) in Native American or Native Hawaiian human remains and cultural items to lineal descendants, culturally affiliated federally recognized Indian tribes and Native Hawaiian organizations. 25 U.S.C. § 3005; 43 C.F.R. § 10.2(g)(5)(ii).</p>	<p>The definition should also include state cultural affiliation and as mentioned above CalNAGPRA is not just limited to federally recognized tribes.</p>
<p><b>§II ¶ 33 Summary p. 7</b></p> <p>Summary: The written description of collections that may contain unassociated funerary objects, sacred objects, or objects of cultural patrimony required by NAGPRA. 43 C.F.R. § 10.2(g)(1). The summary serves in lieu of an object-by-object inventory of these collections, although, if an inventory is available, it may be substituted. The summary must include: an estimate of the number of objects in the collection or portion of the collection; a description of the kinds of objects included; reference to the means, date(s), and location(s) in which the collection or portion of the collection was acquired, where readily ascertainable; and information relevant to identifying lineal descendants, if available, and cultural affiliation. 43 C.F.R. § 10.8(b).</p>	<p>CalNAGPRA requires the summary to describe the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition, and state cultural affiliation, where readily ascertainable. § 8013(b). Further, CalNAGPRA provides that to the extent it requires an inventory and summary which includes items not required to be included under federal NAGPRA, the agency must supplement its inventory and summary to include those items. § 8013(c).</p> <p><i>Analysis:</i> The policy omits the term state cultural affiliation and the requirement that the summary include items not required to be included for federal NAGPRA purposes.</p>
<p><b>§II ¶ 37 Unassociated funerary objects p.8</b></p> <p>Unassociated funerary objects: Those funerary objects for which the human remains with which they were placed intentionally are not in the possession or control of a museum or Federal agency. Objects that were displayed with individual human remains as part of a death rite or ceremony of a culture and subsequently</p>	<p>§ 8013(a)(3) provides that if a California tribe cannot be identified, “then tribes that may be affiliated with the items shall be consulted during the compilation of the inventory.”</p> <p>§ 8013(b) requires a written summary of all unassociated objects.</p> <p>§ 8013(a)(3) requires an examination of the totality of the circumstances based upon reasonable belief to determine association</p>



<p>returned or distributed according to traditional custom to living descendants or other individuals are not considered unassociated funerary objects. 43 C.F.R. § 10.2(d)(2)(ii).</p>	<p>which does not turn on whether a museum or federal agency are not in possession of the human remains where they were placed intentionally.</p> <p>Note: The UC policy is limited to Federal agency or museum, but to be consistent with CalNAGPRA should apply to all state agencies and museums receiving state funding.</p> <p><i>Analysis:</i> This is critical because under the policy, the UC may find funerary objects unassociated where it does not have the remains with which the objects were intentionally placed. But CalNAGPRA doesn't use this standard and can lead to a different result.</p>
<p><b>§ V ¶ 1(c) Consultation with state and federal entities and agencies.</b>pp. 11-12</p> <p>Consultation with state and federal entities and agencies.University of California Policy on Native American Cultural Affiliation and Repatriation If no members of a California Indian tribe (as defined in CalNAGPRA Section 8012(j)) meeting the qualifications above are available, members of other tribes, including tribes outside of California may serve.</p>	<p>While CalNAGPRA uses a narrow definition of “tribe” under § 8012(j), if no tribal members are available meeting CalNAGPRA’s definition, then the policy should defer to the NAHC which, under SB 18, already maintains a list of culturally affiliated tribes by geographic area, many of which are not federally recognized, nor have applications pending. Pub. Res. Code, § 21080.3.1. Further, only if no California tribes can be ascertained by the NAHC should outside tribes serve.</p>
<p><b>§V, ¶ A(2):Systemwide Committee Composition p. 12</b></p> <p>One (1) elder, spiritual leader, tribal leader, or tribal member (who has been designated as such by the governing body of the individual’s tribe) from a California Indian tribe under CalNAGPRA Section 8012(j)(2), having a minimum of five years’ prior experience in any of the following: Repatriation of human remains and cultural items pursuant to the federal Native American Graves Protection and</p>	<p>The policy requires that in order for tribal members to qualify they must have 5 years experience under federal NAGPRA. There is no reason for discounting experience under CalNAGPRA and the 5-year rule is arbitrary and may be difficult for tribal members to meet. The policy should include ALL experience in repatriation and there should be no time-limit test. There may not be qualified members who meet all of these criteria (which may be the UC’s intent). Note: As discussed more fully below, <u>no</u> repatriation experience is similarly required of the other UC members</p>

<p>Repatriation Act (25 U.S.C. Sec. 3001 et seq.).</p> <p>Cultural resources protection under tribal, state, and federal law.</p> <p>Consultation with state and federal entities and agencies.</p> <p>If an elder, spiritual leader, tribal leader, or tribal member from a tribe as described in this section 2) is not available, a member from a federally recognized California Indian tribe as described in section 1) above may meet this requirement. In addition, if no members of a California Indian tribe (as defined in CalNAGPRA Section 8012(j)) meeting the qualifications above are available, members of other tribes outside of California may serve</p>	<p>on the Committee.</p> <p>Further, if no qualified CalNAGPRA tribal members are available then the NAHC should be contacted about selecting a member rather than selecting allowing the UC to select out-of-state members.</p>
<p><b>§V, ¶ A(3): Systemwide Committee Composition p. 12</b></p> <p>Four (4) members from UC. Not fewer than two of these members shall be affiliated with an American Indian or Native American Studies program and each of these members shall meet the following requirements:</p> <p>Have a graduate degree in either Anthropology, Archaeology, Environmental Studies, Ethnic Studies, History, Law, Native American Studies, or Sociology, with a focus in California.</p> <p>Have a minimum of five years' experience working in their field.</p> <p>Preference shall be given to Academic Senate members who have demonstrated, through their professional experience, the ability to work in collaboration with Native American tribes successfully on issues related to repatriation or museum collection management. In the event that actively employed candidates from UC are not available or do not meet the criteria above, UC positions may be represented by persons retired from UC who meet the above criteria</p>	<p>The systemwide committee is divided equally between Native American members and UC academics. But this is a repatriation committee, not one designed to equally weigh academic preferences. Certainly, having 1 or 2 academics may be helpful in considering academic preferences, but here they can effectively dead lock the committee. Further, these academics are not required to have any experience in repatriation that the UC is attempting to require of Native Americans. A true double standard inuring to the UC's benefit.</p>
<p><b>§V, ¶ A(3): Systemwide Committee Composition p. 13</b></p>	<p>In addition to the 4 to 4 split on the systemwide committee between Native Americans and academics (with no</p>

<p>In addition to the voting members, there shall be one (1) non-voting member from each UC campus that has a NAGPRA-eligible collection. Each of these non-voting members shall meet the requirements of 3)a) and 3)b) above, unless an exception has been approved by the President or the President's designee as described above. Also, the President or President's designee may serve as an ex-officio non-voting member.</p>	<p>repatriation experience), this allows the UC to skew the Committee definitively towards the academics by allowing 2 additional non-voting academics to be added to it, also with no repatriation experience. This clearly places academic concerns above Native American repatriation concerns, something that is already an existing concern with the UC.</p>
<p><b>§V ¶ (c) Systemwide Committee Chair. P. 14</b></p> <p>The Systemwide Committee shall nominate a Chair from amongst the four UC members, who, upon approval of the President or President's designee, shall serve for two (2) consecutive years. The Systemwide Committee may renew a chairperson upon approval of the President or President's designee. The duties and responsibilities of the Chair include</p>	<p>Under the policy, the chair of the systemwide committee must be from the UC and is not required to have any experience in repatriation, unlike his/her Native American counterparts. A persistent double standard and it potentially places academic concerns above Native American ones.</p>
<p><b>§V(c) Conflicts of Interest p. 14</b></p> <p>Conflicts of Interest. If the Systemwide Committee is considering a case involving the tribe of a Systemwide Committee member, a substitution may be made for the Systemwide Committee member with the conflict; the substitute may be selected from the UC non-voting campus representatives, or from a campus committee. The balance in the composition of the Systemwide Committee membership considering the case will nonetheless be maintained in accordance with the Composition section (Section a above). Chair. The Systemwide Committee shall nominate</p>	<p>This is problematic because the policy allows the UC to pick alternates from its own non-voting members (who are UC academics) or Campus Committee who may have no interest in the geographic repatriation concerns.</p>
<p><b>§V¶ 2 Campus Committees p. 15</b></p> <p>For each UC campus that has a NAGPRA-eligible collection, the Chancellor or Chancellor's designee shall establish a Campus Native American Repatriation Implementation and Oversight Committee (hereinafter called the "Campus</p>	<p>This raises similar concerns already discussed above concerning the composition of systemwide committees, plus under this section the Committee is limited to federally recognized tribes, while CalNAGPRA is slightly broader in the tribes included under it. § 8012(j).</p>

<p>Committee”). Campus shall solicit nominations for the membership required under subsections 1) and 2) below from the NAHC. The voting membership of the Campus Committee shall be as follows: Two (2) elders, spiritual leaders, tribal leaders, or tribal members (who have been designated as such by the governing body of the individual’s tribe) from a federally recognized California Indian tribe, having a minimum of five years’ prior experience in any of the following:</p> <p>Repatriation of human remains and cultural items pursuant to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).</p> <p>Cultural resources protection under tribal, state, and federal law.</p> <p>Consultation with state and federal entities and agencies.</p> <p>If no members of a California Indian tribe meeting the qualifications above are available, members of other tribes, including tribes outside of California may serve.</p>	
<p><b>§V¶ 2 Campus Committees p. 15</b></p> <p>One (1) elder, spiritual leader, tribal leader, or tribal member (who has been designated as such by the governing body of the individual’s tribe) from a California Indian tribe under CalNAGPRA Section 8012(j)(2), having a minimum of five years’ prior experience in any of the following:</p> <p>Repatriation of human remains and cultural items pursuant to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).</p> <p>Cultural resources protection under tribal, state, and federal law.</p>	<p>This is strange because it allows 1 tribal member under CalNAGPRA, which in almost all situations will be from a federally recognized tribe, unless that tribe has a petition pending to become federally recognized. And no reason is given for having only 1 member be compliant with CalNAGPRA, rather than 2. It just makes more sense to have all 3 members be CalNAGPRA compliant because of the significant overlap with federal law anyway.</p> <p>See my prior comments about the composition requirements discussed in conjunction with the systemwide committee which also apply here.</p>

<p>Consultation with state and federal entities and agencies. If an elder, spiritual leader, tribal leader, or tribal member from a tribe as described in this section 2) is not available, a member from a federally recognized California Indian tribe as described in section 1) above may meet this requirement. In addition, if no members of a California Indian tribe meeting the qualifications above are available, members of other tribes, including tribes outside of California may serve.</p>	
<p><b>§V¶ 2 Campus Committees p. 16</b></p> <p>Three (3) members from UC. No fewer than one of these members shall be affiliated with an American Indian or Native American Studies program and each of these members shall meet the following requirements:</p> <p>Have a graduate degree in either Anthropology, Archaeology, Environmental Studies, Ethnic Studies, History, Law, Native American Studies, or Sociology, with a focus in California.</p> <p>Have a minimum of five years' experience working in their field.</p> <p>Preference shall be given to Academic Senate members who have demonstrated, through their professional experience, the ability to work in collaboration with Native American tribes successfully on issues related to repatriation or museum collection management. In the event that candidates from UC are not available or do not meet the criteria above, UC positions may be represented by persons retired from UC who meet the above criteria</p>	<p>See my prior comments re: systemwide committee. Of note, the requirements for the Native American members for this subordinate committee are considerably stricter than for the UC members who have no requirement for repatriation experience. If the UC is adopting less stringent requirements for its affiliated members, then Native Americans should also get the benefit of less stringent requirements, which could include using members from California non-federally recognized tribes (like SB 18) and eliminating the experience requirements. The real potential exists that the NA slots will not be filled because of the stringent requirements giving the UC discretion to appoint non-California tribal members. This could really skew the committee.</p>
<p><b>§V¶ 2 Campus Committees (c) Conflicts of Interest p. 18</b></p> <p>Conflicts of Interest. If the Campus Committee is considering a case involving the tribe of a Campus Committee member, a substitution may be made for the Campus Committee member with the conflict; the substitute may be selected from a pool of</p>	<p>This is problematic because the policy allows the UC to pick alternates from other campuses and from tribal members who may have no interest in the geographic repatriation concerns. And these alternates may have no experience in repatriation. To the extent that a conflict arises with a Native American member, then the NAHC is in a better</p>

<p>alternates or from another campus' corresponding Committee. The balance in the composition of the Campus Committee membership considering the case will nonetheless be maintained in accordance with the Composition section (Section A.2.a above).</p>	<p>position to choose the alternate.</p>
<p><b>§V¶ 2 Campus Committees (c) Chair p. 18</b></p> <p>The Campus Committee shall nominate a rotating Chair from amongst the three UC members, who, upon approval by the Chancellor or Chancellor's designee, shall serve for two (2) consecutive years. The Campus Committee may renew a chairperson, upon approval by the Chancellor or Chancellor's designee.</p>	<p>Here again, no consideration is given to permitting a NA chair and the chair is not required to have any experience in repatriation.</p>
<p><b>§V (B)(1) Procedures: General Compliance Consultation p. 19</b></p> <p>Consultation is a critical element of compliance with this Policy and is required by NAGPRA and CalNAGPRA at various stages of the inventory, summary, repatriation and disposition processes. Each campus that has a NAGPRA-eligible collection shall engage in meaningful consultation with tribal representatives. Mutual respect and understanding of concerns is critical to successful consultations. Meaningful consultation shall include the timely process of seeking, discussing, and considering carefully the views presented.</p>	<p>As mentioned above, the term "consultation" is left undefined. While CalNAGPRA does not specifically define the term "consultation," SB 18 does provide a meaningful definition: "'consultation' means the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement. Consultation between government agencies and Native American tribes shall be conducted in a way that is mutually respectful of each party's sovereignty. Consultation shall also recognize the tribes' potential needs for confidentiality with respect to places that have traditional tribal cultural significance." As noted above, this is also the definition embraced under AB 52 for CEQA. Pub. Res Code, § 21080.3.1.</p>
<p><b>§V (B)(1) Procedures: General Compliance: Confidentiality pp. 19-20</b></p> <p>UC is committed to upholding the confidentiality of Native American tribes and Native Hawaiian organizations with regard to confidential information shared or</p>	<p>As noted above re: the definition of confidentiality should incorporate state law. Further, all committee members should be informed of their confidentiality obligations and agree to them. And Committee members should be subject to dismissal for material</p>

<p>learned in the implementation or undertaking of this Policy, subject to mandatory disclosure requirements which may be set by state or federal law. When requested by a tribe or organization, all “confidential information” (as defined in Section II. Definitions) provided to the campus shall only be made available to those with a need to know for compliance with this Policy, and shall not be further re-disclosed unless otherwise required by law.</p>	<p>breaches.</p>
<p><b>C. INVENTORIES AND SUMMARIES p. 20</b></p> <p>If a campus that has not completed an inventory or summary becomes aware of the existence of such human remains or cultural items in its stewardship, it must complete its inventories and summaries</p>	<p>Note: The policy ought to state that the campus will expeditiously complete its inventory consistent with existing law.</p>
<p><b>C. INVENTORIES AND SUMMARIES pp. 20-21</b></p> <p>Campuses with existing inventories and summaries must update these when:</p> <p>They locate previously unreported holdings or collections that may include the human remains of Native American or Native Hawaiian ancestors or cultural items;</p> <p>They have stewardship of human remains or cultural items that are or are likely to be culturally affiliated with a newly federally recognized tribe;</p> <p>They obtain new information that provides the basis for revising a decision about the cultural affiliation or about the number of cultural items listed in a previously submitted Notice of Intent to Repatriate or Notice of Inventory Completion; or An update is otherwise required pursuant to NAGPRA, 43 C.F.R. § 10.13,<sup>8</sup> or other applicable law.</p>	<p>§ 8013(i) provides that such updates must be provided to the NAHC and it provides that such updates shall not “be construed to mean that a museum or agency may delay repatriation of items in the initial inventory until the updating of all inventories and summaries is completed.”</p>
<p><b>C. INVENTORIES AND SUMMARIES Inventory Process (Human Remains and Associated Funerary Objects) p. 21</b></p> <p>In accordance with NAGPRA § 10.9,</p>	<p>This may be a technicality, but under CalNAGPRA agencies should consult with California tribes reasonably believed to be culturally affiliated with an item or remains and if it can’t make this determination then it</p>

<p>campuses shall consult with lineal descendants (if known) and with tribal representatives and traditional religious leaders of Native American tribes or Native Hawaiian organizations: a) from whose tribal lands the human remains and associated funerary objects originated; b) that are, or are likely to be, culturally affiliated with human remains and associated funerary objects; and c) from whose aboriginal lands the human remains and associated funerary objects originated, and draw on the best available expertise to determine associated funerary objects and the cultural affiliation of the human remains based on the preponderance of the evidence.</p>	<p>should consult with tribes that “may be affiliated with the items . . . .” § 8013(a)(3).</p> <p>Cultural affiliation is determined by a preponderance of the evidence “based on geography, kinship, biology, archaeology, linguistics, folklore, oral tradition, historical evidence, or other information or expert opinion, reasonably leads to such a conclusion.” § 8012(f).</p> <p>It would be preferable that the policy track this language rather than use terms like “likely” with no reference to the factors to be considered in making the determination.</p>
<p><b>C. INVENTORIES AND SUMMARIES Inventory Process p. 21</b></p> <p>If after consultation with tribal representatives, a campus is unable to determine the cultural affiliation of any human remains and associated funerary objects, then the campus will classify them as culturally unidentifiable in its NAGPRA inventory.</p>	<p>As previously mentioned, § 8013(b) requires an agency provide a written summary of unassociated items based upon available information including “the scope of the collection, kinds of objects included, reference to geographical location, means and period of acquisition, and state cultural affiliation, where readily ascertainable.” Within 90 days of completion, it must provide this inventory and summary to the NAHC which publishes notice. § 8013(e).</p> <p>An agency may use its NAGPRA inventory and summary instead “if appropriate.” § 8013(f).</p>
<p><b>C. INVENTORIES AND SUMMARIES Inventory Process p. 21</b></p> <p>Campus Inventories and Notices of Inventory Completion (NICs) shall be reviewed by the Campus Committee upon completion and must be approved by the Chancellor or Chancellor’s designee prior to being finalized for submission. Upon approval by the Chancellor or designee, the campus will make them available to federal agencies, lineal descendants, and Native American Tribes and Native Hawaiian organizations, as required by law. The</p>	<p>Under § 8013(e) within 90 days of completing an inventory and summary “the agency or museum shall provide a copy of the inventory and summary to the commission. The Commission shall, in turn, publish notices of completion of summaries and inventories on its Web site for 30 days, and make the inventory and summary available to any requesting tribe or state affiliated tribe.”</p> <p>An agency may use its NAGPRA inventory and summary instead “if appropriate.” §</p>



<p>campus shall provide an annual report of all Notices of Inventory Completion made pursuant to this section to the Systemwide Committee and the UC President or President’s designee.</p>	<p>8013(f). The policy completely ignores this requirement.</p>
<p><b>C. INVENTORIES AND SUMMARIES Summary Process p. 22</b></p> <p>In accordance with NAGPRA and all other applicable laws and policies, each campus that has a NAGPRA-eligible collection shall complete a written summary of Native American and Native Hawaiian collections for the purpose of providing information about the collections to Native American tribes and Native Hawaiian organizations that may wish to request repatriation of unassociated funerary objects, sacred objects, or objects of cultural patrimony. The summary is an invitation to consult on the identification of unassociated funerary objects, sacred objects and objects of cultural patrimony, and provides a basis for Native American Tribes and Native Hawaiian organizations to request repatriation of these items after additional consultation between them and the campus.</p>	<p>This is written in a manner to circumvent CalNAGPRA by only applying to “each campus that has a NAGPRA-eligible collection.” This is significant because NAGPRA only applies to items found on federal land, or held by federal agencies and museums that receive federal funding. 28 U.S.C § 3001(4)(5) and (8). CalNAGPRA applies to state agencies and museums receiving state funding. § 8012(a) and (i).</p> <p>Under § 8013(e) within 90 days of completing an inventory and summary “the agency or museum shall provide a copy of the inventory and summary to the commission. The commission shall, in turn, publish notices of completion of summaries and inventories on its Web site for 30 days, and make the inventory and summary available to any requesting tribe or state affiliated tribe.”</p> <p>An agency may use its NAGPRA inventory and summary instead “if appropriate.” § 8013(f).</p> <p>The policy completely ignores this requirement.</p>
<p><b>C. INVENTORIES AND SUMMARIES Summary Process p. 22</b></p> <p>Claims for unassociated funerary objects, sacred objects, or objects of cultural patrimony and Notices of Intent to Repatriate (NIRs) shall be reviewed by the Campus Committee and must be approved by the Chancellor or Chancellor’s designee prior to being finalized for submission. Upon approval by the Chancellor or Chancellor’s designee, the campus shall make the NIRs available to federal</p>	<p>Under § 8013(e) within 90 days of completing an inventory and summary “the agency or museum shall provide a copy of the inventory and summary to the commission. The commission shall, in turn, publish notices of completion of summaries and inventories on its Web site for 30 days, and make the inventory and summary available to any requesting tribe or state affiliated tribe.”</p> <p>An agency may use its NAGPRA inventory and summary instead “if appropriate.” §</p>

<p>agencies, lineal descendants, and Native American Tribes and Native Hawaiian organizations, as required by law. The campus shall provide an annual report of all Summaries and NIRs made pursuant to this section to the Systemwide Committee and the President or President's designee</p>	<p>8013(f).</p> <p>The policy completely ignores this requirement.</p> <p>Further, § 8014 “A tribe claiming state cultural affiliation and requesting the return of human remains and cultural items listed in the inventory or summary of an agency or museum or that requests the return of human remains and cultural items that are not listed in the inventory but are believed to be in the possession or control of the agency or museum in the state shall do both of the following:</p> <p>(a) File a written request for the human remains and cultural items with the commission and the agency or museum believed to have possession or control.</p> <p>(b) Provide evidence that would establish that items claimed are cultural items and are culturally affiliated with the California Indian tribe making the claim. Evidence of cultural affiliation need not be provided in cases where cultural affiliation is reasonably established by the inventory or summary.”</p> <p>The policy ignores this procedure.</p>
<p><b>C. INVENTORIES AND SUMMARIES</b>  <b>Reevaluations and Previously Unreported Holdings pp. 22-23</b>  Compliance with NAGPRA, CalNAGPRA, and this Policy is a UC-wide responsibility. Proactive efforts are required across UC to ensure that all human remains and cultural items of Native Americans and Native Hawaiians are reported and provided appropriate treatment while in the UC's care. Each campus will communicate with all relevant faculty, researchers, and staff to raise awareness about the requirements of this Policy and related laws and regulations, and to provide a method of reporting to the Liaison or Campus Point of Contact potential NAGPRA-covered human</p>	<p>This is written in a manner to circumvent CalNAGPRA by only applying to “potential NAGPRA-covered human remains or cultural items.” This is significant because NAGPRA only applies to items found on federal land, federal agencies and to museums that receive federal funding. 28 U.S.C § 3001(4)(5) and (8). CalNAGPRA applies to state agencies and museums receiving state funding. § 8012(a) and (i). This change in scope can be very significant.</p>

remains or cultural items	
<p><b>C. INVENTORIES AND SUMMARIES Reevaluations and Previously Unreported Holdings p. 23</b></p> <p>Even after submission of inventories and summaries to federal or state officials and to tribes, UC may locate previously unreported Native American or Native Hawaiian human remains and/or cultural items. These may be found in disparate academic units of the UC, e.g., inadvertently included among fauna or other materials. In addition, consultations with tribal representatives or others may yield new information, or changes in law or the addition of new federally recognized tribes under NAGPRA or California Indian tribes under CalNAGPRA may necessitate re-evaluations.</p> <p>As part of the campus strategic repatriation plan, to update their reported inventories and summaries, campuses shall: Devise a plan to review existing materials that may potentially contain Native American or Native Hawaiian human remains or cultural items, and report any previously unreported findings to the Liaison or Campus Point of Contact. Campuses should engage the expertise of an osteologist, an anthropologist, or similar expert to assist in this review.</p> <p>Require non-museum academic units to review materials that may potentially contain Native American or Native Hawaiian human remains or cultural items, and report any previously unreported findings to the Liaison or Campus Point of Contact.</p> <p>Devise a plan to proactively review previous determinations of culturally unidentifiable human remains in consultation with tribal representatives, re-evaluating originally considered evidence, as well as any newly available evidence or information.</p>	<p>Since 2002, CalNAGPRA applies to state agencies and museums receiving state funding. § 8012(a) and (i). The time for locating items “found in disparate academic units” is so very long overdue and legally should have been performed over a decade ago. The time for devising a plan to do this is over. The policy should articulate the efforts that will immediately be undertaken to assemble this inventory. The policy should be consistent with its other policies to identify and inventory applicable items.</p> <p>Requiring “non-museum academic units to review materials” that may contain NA remains and cultural items is wholly inappropriate where the chosen academics are not required to have experience in identifying NA remains and items and may have no experience in repatriation. Properly constituted systemwide and campus committees should do this or experts chosen by these committees.</p>

<p><b>C. INVENTORIES AND SUMMARIES Reevaluations and Previously Unreported Holdings p. 24</b></p> <p>Reevaluations that result in a revision to campus inventories shall be reviewed by the Campus Committee upon completion and approved by the Chancellor or Chancellor’s designee prior to being finalized for submission. Upon approval, the campus will make the inventory available to federal agencies, lineal descendants, and Native American Tribes and Native Hawaiian Organizations, as required by law. The campus shall report to the Systemwide Committee and the President or President’s designee all Notices of Inventory Completion made pursuant to this section.</p>	<p>§ 8013(i) requires that after updating inventories and summaries, the agency “shall provide a copy of its updated inventories and summaries to the commission. Nothing in this section shall be construed to mean that a museum or agency may delay repatriation of items in the initial inventory until the updating of all inventories and summaries is completed.”</p> <p>The policy omits this procedure.</p>
<p><b>D. CULTURAL AFFILIATION p. 24</b></p> <p>Under federal NAGPRA, all of the following requirements must be met to determine cultural affiliation between a present-day federally recognized Native American tribe or Native Hawaiian organization and human remains, funerary objects, sacred objects, or objects of cultural patrimony of an identifiable earlier group: Existence of an identifiable present-day Native American tribe or Native Hawaiian organization with standing under NAGPRA;</p>	<p>The policy completely ignores CalNAGPRA state cultural affiliation and should apply to both CalNAGPRA and NAGPRA to also incorporate California tribes as defined under CalNAGPRA.</p>
<p><b>D. CULTURAL AFFILIATION: Types of Evidence p. 25</b></p> <p>As provided in the federal statute and regulations, evidence of cultural affiliation between a Native American tribe or Native Hawaiian organization and human remains, funerary objects, sacred objects, or objects of cultural patrimony must be established using the following types of evidence: geographical, kinship, biological, archaeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.</p>	<p>The evidence should include CalNAGPRA as well as the preponderance standard and reasonable belief used to evaluate the evidence under §§ 8012(f) and 8013(a)(3). This also includes “the totality of circumstances surrounding their acquisition and characteristics are determined by a reasonable belief to be human remains and associated funerary objects with a state cultural affiliation with one or more California Indian tribes.” § 8013(a)(3).</p> <p>There are concerns with the “preponderance</p>

<p>When considering the totality of evidence, the perspectives of tribal representatives shall be considered with equal weight as other lines of evidence in accordance with state and federal law for the purposes of determining cultural affiliation</p>	<p>of the evidence” standard. Some have pointed out there is a gap or over reach between the federal statute and the federal regulations as well. Besides the CalNAGPRA piece, at a minimum, it should be clearly stated that it is not intended this standard be met with scientific certainty and should not be a bar or prohibition to repatriation. This step also needs to include tribal consultation as it is where many of the break downs exist in terms of repatriation “denials” or “justified” inaction for not meeting a standard that has been largely driven by scientific certainty principles and incorrectly put burdens on tribes.</p>
<p><b>D. CULTURAL AFFILIATION: Evidentiary Standard and Burden of Proof p. 26</b></p> <p>Burden of Proof: The claimant bears the burden of proof with respect to a repatriation request. To meet this burden, the available evidence must be sufficient to establish a reasonable basis for believing the materials in question are Native American remains or cultural items eligible for repatriation under NAGPRA and that the claimant is culturally affiliated with the human remains or cultural items.</p>	<p>§ 8014 requires a state culturally affiliated tribe to file a written request and provide evidence that the remains and items are culturally affiliated with that tribe, but it need not do so where cultural affiliation “is reasonably established by the inventory.” Under § 8015 the request goes to the NAHC and (after 30-day publication on its website) if within 90 days there are no other requests for the items or unresolved objections, the agency must repatriate. §8016 sets out the process for disputes.</p> <p><i>Analysis:</i> This is a critical distinction because CalNAGPRA creates a presumption in favor of repatriation absent a dispute or objection. Furthermore, federal NAGPRA requires the agency to initially determine by a preponderance if the items are subject to repatriation and cultural affiliation and only puts the preponderance burden on the tribe where cultural affiliation has not been established under the inventory process, or where the tribe claims the agency failed to list items. 25 U.S.C. § 3005(a)(1) and (4).</p>
<p><b>E. REPATRIATION AND DISPOSITION p. 26</b></p> <p>Each campus that has a NAGPRA-eligible collection shall establish a clear and transparent process for Native American</p>	<p>The policy only covers “ a NAGPRA-eligible collection,” which by federal definition only includes federal agencies and museums receiving federal funding. Difficult to believe</p>

<p>tribes or Native Hawaiian organizations to submit a request for repatriation or disposition in accordance with federal and state law and this Policy.</p>	<p>this was an oversight.</p>
<p><b>E. REPATRIATION AND DISPOSITION Claims for Cultural Affiliation and Requests for Repatriation by Federally Recognized Tribes or Native Hawaiian organizations p. 26</b></p> <p>A federally recognized Native American tribe or Native Hawaiian organization may submit a claim to establish cultural affiliation with human remains or cultural items.</p>	<p>This expressly excludes the broader definition of California Indian Tribe under § 8013(j).</p>
<p><b>E. REPATRIATION AND DISPOSITION Claims for Cultural Affiliation and Requests for Repatriation by Federally Recognized Tribes or Native Hawaiian organizations p. 26</b></p> <p>Each campus that has a NAGPRA-eligible collection shall establish a list of minimum necessary information that should be included in a claim to start a review by the Campus Committee.</p>	<p>The policy only covers campuses with a “NAGPRA-eligible collection” which only covers federal agencies and museums receiving federal funding. 25 U.S.C. § 3001(4) and (8) and 25 U.S.C. § 3003(a).</p> <p><i>Analysis:</i> This is a persistent problem with the policy.</p>
<p><b>E. REPATRIATION AND DISPOSITION Claims for Cultural Affiliation and Requests for Repatriation by Federally Recognized Tribes or Native Hawaiian organizations p. 26</b></p> <p>Once all the criteria for cultural affiliation described above and set out in federal NAGPRA § 10.10 are met, within ninety (90) days of receipt of a written request for repatriation from a Native American tribe or Native Hawaiian organization, UC must expeditiously repatriate human remains and associated funerary objects, unassociated funerary objects, sacred objects, or objects of cultural patrimony; however, repatriation may not occur until at least thirty (30) days after publication of the Notice of Intent to Repatriate in the Federal Register</p>	<p>This completely ignores the CalNAGPRA process requiring that the request be sent to the NAHC which must be published on its website for 30 days which must occur within the 90-day period specified under NAGPRA. § 8015(a).</p>

<p><b>E. REPATRIATION AND DISPOSITION Claims for Cultural Affiliation and Requests for Repatriation by Federally Recognized Tribes or Native Hawaiian organizations p. 27</b></p> <p>A coalition of Native American tribes or Native Hawaiian organizations may jointly submit requests for repatriation. In such cases, cultural affiliation must be established for each tribe requesting repatriation via the joint request, but joint requests shall not be interpreted as competing requests.</p>	<p>Under § 8015(b) any agreements between tribes concerning repatriation must be provided to the NAHC which may enforce such agreements.</p>
<p><b>2. Claims for Cultural Affiliation by Non-federally Recognized Tribes p. 27</b></p> <p>Federal NAGPRA distinguishes federally recognized Native American tribes from non-federally recognized Native American tribes. NAGPRA does not give standing to non-federally recognized Native American tribes to claim cultural affiliation, but does provide a mechanism for making dispositions to non-federally recognized tribes under certain circumstances (see Section V.E.3 below). UC will make every effort to engage with non-federally recognized Native American tribes in the cultural affiliation process. Non-federally recognized Native American tribes may submit requests for disposition under the process described in Section V.E.3 below and outlined in NAGPRA § 10.11</p>	<p>The policy fails to acknowledge that the definition of a California Indian Tribe under CalNAGPRA is slightly broader and can, in limited circumstances, include non-federally recognized tribes that have federal petitions pending.</p>
<p><b>Requests for Disposition of Culturally Unidentifiable Human Remains and Associated Funerary Objects p. 27</b></p> <p>In accordance with § 10.11 of the federal NAGPRA regulations, UC must initiate consultation regarding the disposition of culturally unidentifiable human remains and associated funerary objects: Within 90 days of receiving a request from a Native American tribe or Native Hawaiian organization to transfer control of culturally unidentifiable human remains and</p>	<p>This omits reference to §§ 8014 and 8015's process whereby the request is sent to the NAHC and is published on the NAHC's website for 30 days. While CalNAGPRA does not preclude consultation concerning claims, it does not require it, but an agency could still comply with both statutes, but the policy should require that such requests also go to the NAHC and reference the publication requirement.</p>

<p>associated funerary objects; or If no request is received, before any offer to transfer control of culturally unidentifiable human remains and associated funerary objects.</p>	
<p><b>Requests for Disposition of Culturally Unidentifiable Human Remains and Associated Funerary Objects p. 27</b></p> <p>Federal NAGPRA § 10.11 outlines the process that a campus must follow to complete a disposition of culturally unidentifiable human remains. UC will also transfer culturally unidentifiable associated funerary objects to Native American tribes and Native Hawaiian organizations if requested. Upon receiving a request, the campus must initiate consultation with tribal representatives and traditional religious leaders of Native American tribes and Native Hawaiian organizations</p>	<p>The federal regulations only apply to federal agencies and museums receiving federal funding which is reflected in § 10.11. And the policy ignores the CalNAGPRA process for consulting tribes during the inventory process (§8013(a)(3) and (b); and §8014 (for claims) and §8015 (NAHC publication).</p>
<p>Requests for Disposition of Culturally Unidentifiable Human Remains and Associated Funerary Objects p.28</p> <p>The campus shall make a good faith effort to consult with all tribes from whose tribal lands, at the time of the removal, the human remains and associated funerary objects were removed and from whose aboriginal lands the human remains and associated funerary objects were removed (federal NAGPRA § 10.11(b)(2)).</p>	<p>No mention is made of also complying with the consultation process under CalNAGPRA outlined above.</p>
<p><b>Requests for Disposition of Culturally Unidentifiable Human Remains and Associated Funerary Objects p.28</b></p> <p>In the event of multiple requests, a campus must transfer control of the culturally unidentifiable human remains and associated funerary objects in the following priority order: 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.</p>	<p>CalNAGPRA is slightly broader than just federally recognized tribes and includes state agencies and museums receiving state funding. § 8016(b)(5) requires that all applicable federal regulations (with one exception) must be met which would include this disposition described in the policy under § 10.11(c).</p> <p>But the policy fails to also include CalNAGPRA dispute process requiring the NAHC’s involvement, including the agency’s right within 30 days to object to the</p>



<p>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</p>	<p>repatriation. § 8016(c).</p> <p><i>Analysis:</i> CalNAGPRA does require that all applicable federal regulations be met, which includes the policy's required prioritization in repatriation, but this could potentially conflict with CalNAGPRA's provisions which appear to permit an agency to object to this disposition subject to the NAHC's dispute process. One way to resolve this is to state in the policy that to the extent it does not otherwise violate NAGPRA regulations, a state agency may object to the repatriation under § 8016(c).</p>
<p><b>Requests for Disposition of Culturally Unidentifiable Human Remains and Associated Funerary Objects p. 28</b></p> <p>In a case where there is no requestor that meets the criteria of 1) or 2) above, the campus may transfer control of culturally unidentifiable human remains and associated funerary objects to (a) any other federally recognized tribe or Native Hawaiian organization that has submitted a request or (b) a non-federally recognized tribe. Under federal 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 (federal NAGPRA § 10.11(c)2(ii)).</p>	<p>CalNAGPRA does not specify what occurs if there is no requester, although if there is more than 1 request for the same item, it does state that all federal regulation requirements must be met and it specifies that the exceptions under federal regulation § 10.10(c) shall not apply. §8016(b)(4) and (5). §10.10(c) permits a Federal agency or museum receiving federal funding to retain items where it is unable to determine by a preponderance which party is the most appropriate claimant. The UC's policy does not do this.</p> <p>But, an unresolved issue remains. Under most circumstances, UC will be bound by NAGPRA and AB 2836 required it to make policies implementing federal NAGPRA regulation § 10.11. Where items are culturally unidentifiable, §10.11(c)(1) does make the priority disposition, but later in that same regulation it states that this disposition is subject to the exceptions listed under §10.10(c). See § 10.11(c)(5), which permits a federal agency or museum to retain items that are indispensable to the completion of scientific study for 90 days after completion of the study or when it cannot determine which disputing party is entitled to items.</p> <p>Under Cal NAGPRA, where there are multiple requests for repatriation for the same item, it states that none of the exceptions</p>

	<p>listed in Section 10.10(c) apply. § 8016(b)(4). There is no way to harmonize this discrepancy except to apply CalNAGPRA in those instances where NAGPRA would not otherwise apply,</p>
<p><b>Requests for Disposition of Culturally Unidentifiable Human Remains and Associated Funerary Objects p. 29</b></p> <p>A claimant or requestor must submit a request for repatriation or disposition in writing. The campus will send written responses to claimants or requestors regarding the status of all claims/requests within sixty (60) days of receiving the claim or request.</p> <p>After a claim or request is accepted by a campus, it will undergo an evaluation process by the Campus Committee. Campus review of claims or requests shall reflect consideration of Native American or Native Hawaiian viewpoints, and shall provide for consultation with requesting lineal descendants, Native American tribes, or Native Hawaiian organizations, as required by NAGPRA.</p>	<p>This process ignores CalNAGPRA’s process under § 8014 to file requests with the NAHC which, under § 8015, it publishes notice on its website for 30 days. The policy could be amended to comply with both NAGPRA and CalNAGPRA in this regard.</p>
<p><b>Deaccessioning p. 29</b></p> <p>Campuses may voluntarily deaccession items that have been determined not to be human remains or cultural items as defined by NAGPRA and CalNAGPRA, in accordance with campus policies and practices.</p>	<p>The policy really must require that before deaccessioning occurs that California Indian Tribes “that may be affiliated” be consulted with as provided for under § 8013(a)(3).</p>
<p><b>OVERSIGHT p. 30</b></p> <p>The President may initiate an internal audit to evaluate systemwide compliance with this Policy, and applicable laws and regulations, and/or reviews to benchmark UC’s performance or assess the need for improvements.</p>	<p>Given that AB 2836 requires systemwide repatriation of remaining items in the UC’s possession, as well as a reporting requirement to the Legislature and a requirement for ensuring that each campus implements the policy, an audit within the first year and periodically thereafter would be more appropriate.</p>
<p><b>H. APPEALS p.31</b></p> <p>Tribal representatives who disagree with</p>	<p>The policy’s appeals’ process ignores CalNAGPRA and NAHC authority. Under § 8014 a tribe can file a written request for</p>

<p>cultural affiliation determinations or with repatriation and disposition decisions, are encouraged to work with the Liaison for assistance in resolving disputes. Disputes remaining unresolved may be brought forth for reconsideration as follows:</p> <p>A request for reconsideration may be brought to the Campus Committee, which can support the prior determination or make a new recommendation to the campus Chancellor or Chancellor’s designee.</p> <p>After the Campus Committee upholds or makes a new recommendation as a result of 1) above, the Chancellor or Chancellor’s designee will make the decision to uphold, reverse, or modify an earlier campus determination, provided that such a decision must be based on a determination that the claim(s) meets all applicable legal and Policy requirements.</p> <p>If after such appeals to the Campus Committee the dispute remains unresolved, the claimant or requestor may appeal to the Systemwide Committee, which will make a recommendation to the President or President’s designee, whose decision shall be final.</p> <p>Tribal representatives may also file a request with the National NAGPRA Review Committee per federal NAGPRA § 10.17, for assistance in resolving a dispute; or, for claims that fall under CalNAGPRA, with the Native American Heritage Commission, per CalNAGPRA § 8016.</p>	<p>items to the NAHC. Under § 8016, a process is set out regarding repatriation disputes and a policy which fails to involve the NAHC and makes the UC President’s decision the final one violates CalNAGPRA.</p> <p>The policy is also contradictory. Federal NAGPRA entitles “any affected party” to bring a dispute to a NAGPRA Committee which may facilitate resolution and make recommendations. 25 U.S.C. § 3006(c). Further, any records or findings by this Committee is admissible in any action brought under NAGPRA. 25 U.S.C. § 3006(d) and (e). While the policy states that the President’s decision is “final,” it then states in a separate paragraph tribes may request NAGPRA Committee review or NAHC for claims under CalNAGPRA.</p> <p><i>Analysis:</i> As is apparent above, CalNAGPRA and federal NAGPRA have different dispute resolution provisions. The policy can state that the CalNAGPRA dispute process will be used NAGPRA is inapplicable. Further, the policy needs to explain when CalNAGPRA would be applicable.</p>
<p><b>Multiple Claims for Repatriation or Disposition p. 32</b></p> <p>The parties may choose mediation by a third party mutually agreeable to the disputants. For assistance in resolving a dispute, tribal representatives may also file a request with the National NAGPRA Review Committee per federal NAGPRA § 10.17, or for claims that fall under</p>	<p>As noted above, the policy needs to articulate when CalNAGPRA applies and then set out the process for multiple claims under § 8016 which goes beyond just choosing mediation. In fact, CalNAGPRA requires mediation through the NAHC for unresolved disputes. § 8016(e)-(g).</p> <p>Procedurally, it makes more sense to</p>

<p>CalNAGPRA, with the Native American Heritage Commission, per CalNAGPRA § 8016. Once the multiple requestors/claimants agree upon an arrangement, and</p>	<p>reference this before discussing the President’s authority, which the policy should make clear is only applicable when Federal NAGPRA applies.</p>
<p><b>Access to the Remains of Native American or Native Hawaiian Ancestors for Research, Instruction, Exhibition, or Other Purposes pp. 33-34</b></p> <p>UC shall not permit research, destructive analysis, classroom use, or exhibition of human remains of Native American or Native Hawaiian ancestors, except as outlined below.</p> <ol style="list-style-type: none"> <li>1) If the remains of Native American and Native Hawaiian ancestors are pending repatriation or disposition, the campus must obtain explicit written permission from the cognizant Native American tribes or Hawaiian organizations.</li> <li>2) If the remains of Native American and Native Hawaiian ancestors are culturally affiliated, the campus must obtain explicit written permission of the culturally affiliated tribes.</li> <li>3) If the remains of Native American and Native Hawaiian ancestors are culturally unidentifiable only due to the tribe’s status as non-federally recognized, the campus must obtain explicit written permission from the non-federally recognized tribe known to have a relationship of shared group identity with the particular human remains and associated funerary objects.</li> <li>4) If the remains of Native American and Native Hawaiian ancestors are culturally unidentifiable and the tribe does not fit the description in 3) above, the campus must obtain approval from all the Indian tribes whose aboriginal lands (as outlined in NAGPRA § 10.11) overlap with the location where the human remains originate. Whether internal or external to UC, all petitioners seeking access</li> </ol>	<p>This policy is very nuanced in a problematic manner. It permits research and testing on remains upon written permission, but in item no. 3 it only requires permission from non-federally recognized tribes “known to have a relationship of shared group identity with the particular human remains and associated funerary objects.” This is a much higher standard than CalNAGPRA, but there is no reason to deviate from CalNAGPRA’s preponderance standard based upon a reasonable belief that the remains are culturally affiliated with a non-federally recognized tribe. Further, it would be exceptionally rare for the UC to actually “know” there is a relationship.</p> <p>Item No. 4 is also extremely nuanced because it technically only requires permission for culturally unidentifiable remains not known to have a relationship with non-federally recognized tribes from federally recognized tribes under NAGPRA based solely upon geographic location.</p> <p>The policy shouldn’t be limited to geographic considerations, but should also consider the totality of circumstances surrounding their acquisition and characteristics to determine if they are reasonably associated with any tribe, federally or non-federally recognized as described in § 8013(a)(3). In this instance, the policy should include all non-federally recognized tribes because the UC really should obtain permission from the tribe with the greatest interest in the remains, regardless of federal recognition.</p>
<p><b>Access to the Remains of Native American or Native Hawaiian Ancestors for Research, Instruction, Exhibition, or</b></p>	<p>This is very nuanced as well because technically the policy only covers “NAGPRA-eligible human remains,” which</p>

<p><b>Other Purposes p. 34</b></p> <p>Whether internal or external to UC, all petitioners seeking access to NAGPRA-eligible human remains for research, instruction, exhibition or other purposes must provide documentation demonstrating compliance with the above requirements. The Liaison should initiate contact with the tribal representative(s) and assist in these efforts as needed.</p>	<p>would only include remains held by federal agencies or federally funded museums, potentially excluding, for example, anthropology departments which may be neither. Further, CalNAGPRA’s application vs. NAGPRA’s should be defined in the policy so administrators know when it applies and both should apply unless a conflict in the laws arise.</p>
<p><b>Access to the Remains of Native American or Native Hawaiian Ancestors for Research, Instruction, Exhibition, or Other Purposes p. 34</b></p> <p>Compliance with 1)-4) above notwithstanding, once a campus receives a claim of cultural affiliation of human remains or request for repatriation or disposition of human remains, the campus will impose a moratorium on all access for research, instruction, exhibition or other purposes unrelated to making determinations needed for compliance with NAGPRA and with this Policy, until the claim or request is resolved.</p>	<p>The policy should also include CalNAGPRA.</p>
<p><b>Access to the Remains of Native American or Native Hawaiian Ancestors for Research, Instruction, Exhibition, or Other Purposes p. 34</b></p> <p>In reviewing petitions for research, instruction, exhibition, or other purposes unrelated to making determinations needed for compliance with NAGPRA, the campus shall consider (i) evidence of tribal consultation and approvals as required above, (ii) tribal input, (iii) efforts to maintain high standards of care and respect for all human remains of Native American or Native Hawaiian ancestors, and (iv) scholarly merit.</p>	<p>The policy should make clear that this is in addition to compliance with the permission requirements and should also include CalNAGPRA.</p>
<p><b>Access to the Remains of Native American or Native Hawaiian Ancestors for Research, Instruction, Exhibition, or Other Purposes p. 35</b></p>	<p>The policy does not deal with the procedure for loaning UC remains and cultural items to other agencies or museums. A real concern exists that the UC will loan items out to avoid inventory and repatriation. The policy should</p>

<p>The campus shall semi-annually provide to the Campus Committee a summary of all access and loan agreements executed in accordance with this section, including a listing of the remains of Native American and Native Hawaiian ancestors accessed or loaned, the tribes consulted, approvals obtained, and the terms of use.</p>	<p>be clear that nothing can be loaned to other institutions until it has been determined not to be subject to repatriation under both state and federal NAGPRA.</p>