

NATIVE AMERICAN HERITAGE COMMISSION

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December 4, 2019

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

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

Dear President Napolitano:

The Native American Heritage Commission (Commission) appreciates the opportunity to comment on the University of California's (UC) Native American Cultural Affiliation and Repatriation Draft Policy (Draft Policy), as required under Public Resources Code section 8025, subdivision (a)(2)(D)(3).

The UC's adoption of a systemwide repatriation policy is an important and long-overdue step in the right direction; however, the Commission has some concerns regarding the most recent Draft Policy provided by the UC. The Commission understands that the UC intends to make further revisions to the Draft Policy before its adoption and is hopeful that those revisions will address the concerns detailed herein.

Given that it will be impossible for the UC to address all of the Commission's concerns before the January 1, 2020 deadline for adoption, the Commission urges the UC to commit to shaping the Draft Policy, companion documents, and implementation guidance in collaboration with the Commission and California Native American tribes through July 1, 2020 to achieve compliance with the authorizing statute and current law and allow for meaningful consultation with California Native American tribes.

The Commission is committed to assisting and advising the UC throughout this process to resolve these concerns and create an effective UC repatriation policy that takes into account the unique history of California Native Americans.

BACKGROUND

The historical context surrounding the collection of Native American remains and associated cultural objects presents fundamental human rights issues for peoples indigenous to the lands that now constitute the United States. Initial collecting efforts in the state of California were directed by colonialist, supremacist, or even genocidal ideologies. The federal and state Native

American Graves Protection and Repatriation Acts (NAGPRA—25 U.S.C. sections 3001 et seq.; 43 C.F.R. part 10; Health and Safety Code, sections 8010, et seq.) were enacted as human rights legislation intended to address centuries of exploitation, displacement, and dispossession of Native American peoples. This included academic exploitation which exalted the study of sacred remains and related cultural items, including their public display in museums, over indigenous peoples' entitlement to cultural and spiritual respect for their ancestors' burials; a human right afforded to European settlers, but not Native Americans. While the two laws were intended to provide effective redress and repatriation of these remains and items on their own, the reluctance of institutions to repatriate in the decades since their passage has necessitated further efforts to ensure proper enforcement of the laws.

In California, the Legislature most recently adopted AB 2836 in response to the UC's "history of inconsistent application of federal and state repatriation laws by some campuses" of repatriation laws. (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(8).) This has included the absence of required consultation with California Native American tribes which interfered with effective repatriation. (*Id.*, subd. (a)(9).) As a result, some campuses, like UC Berkeley, have designated up to two-thirds of their remains and cultural items as culturally unidentifiable. (*Id.*, subd. (12).) The Legislature further documented the UC's existing policy's failure to comply with federal regulations (specifically 43 C.F.R. §§ 10.10 and 10.11) which require agencies to affirmatively offer to repatriate culturally unaffiliated items to non-federally recognized tribes.

AB 2836 requires the UC to adopt "clear and transparent" systemwide policies and procedures related to repatriation of Native American remains and cultural items, including for claims submission, tribal notifications, establishing cultural affiliation (including for remains and items previously determined to be culturally unaffiliated), dispute resolution, as well as all other subjects related to repatriation consistent with federal and state NAGPRAs. (Health & Saf. Code, § 8025, subd. (a)(2)(B).) All systemwide policies are required to be adopted in consultation with California tribes (as that term is defined under Government Code section 65352.4). AB 2836 also requires the UC to create systemwide and campus committees to advise the UC concerning its implementation of repatriation laws. (Health & Saf. § 8025, subd. (a)(1). The membership makeup of these committees is also governed by statute, balancing UC and tribal membership. (Health & Saf. Code, § 8026.)

After performing a thorough review of the Draft Policy, and meeting and conferring with University officials, the Commission concludes that the proposed policy conflicts with both federal and state NAGPRAs, as well as the spirit behind these laws to expedite and facilitate the repatriation of Native American remains and related cultural items. Compounding these legal concerns is the Draft Policy's lack of mandatory timeframes for achieving compliance for long-overdue repatriations. This Draft Policy comes on heels of the Governor's apology recognizing the state's history of discrimination, violence, and maltreatment of California's Native Americans. (Governor's Exec. Order No. N-15-19 (Jun. 18, 2019).)

As detailed below, the Commission finds that the UC's Draft Policy fails to incorporate state law repatriation requirements and often is in conflict with state and federal law in key areas including: the consultation process, policy structure, inventories, reevaluation of culturally

unidentifiable remains and items, handling repatriation claims and dispute resolution, repatriation process, as well as in the creation of systemwide and campus committees.

ANALYSIS

I. INADEQUATE CONSULTATION DURING THE ADOPTION PROCESS, AS WELL AS INCORPORATED INTO IN THE POLICY ITSELF

AB 2836 was enacted to combat the UC's "history of inconsistent application of federal and state repatriation laws by some campuses within the University of California system." (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(8).) The Legislature documented the "absence of required consultation with California Native American tribes with respect to repatriation" in the existing UC repatriation policy. (*Id.* subd. (a)(9).) Fundamental to creating a new repatriation policy is the need for meaningful consultation with California's tribes which have endured decades of frustration in the failure of the UC to repatriate remains and cultural items.

The Legislature specifically required that the UC "[d]evelop all policies and procedures" "in consultation with California Native American tribes on the contact list maintained by [the Commission]." (Health & Saf. Code, § 8025, subd. (a)(3).) California law defines "consultation" to mean "the meaningful and timely process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement." (Gov. Code, § 65352.4.) Consultation "shall be conducted in a way that is mutually respectful of each party's sovereignty." (*Ibid.*)

A. Inadequate Consultations During the Drafting of the Policy

On August 29, 2019, the UC completed its draft repatriation policy. The draft document is lengthy (almost 40 pages) and contains an intricate (and at times confusing) policy. During the policy's drafting, the UC did not perform publicly noticed outreach or seek consultation with California tribes as required, in order to consider their views and obtain their agreement. When it did seek comment, tribal written comments were due November 15, 2019. During the Commission's November 13 and 14, 2019 meet and confer convened at the Commission's request, UC administrators stated that the last day that it could effectively consider these comments was December 11, 2019, for inclusion on the UC Academic Senate's December 11 agenda. This means that the UC provided a little less than a month to consider written tribal comments with no publicly noticed plans for tribal consultations during this brief period. The UC process also failed to include a reply step concerning the comments it received, a necessary component to show the UC actually considered the comments. This drafting process was not conducted in a manner consistent with California law requiring meaningful consultation with California tribes who are most affected by this policy.

B. The Policy Fails to Provide Guidance Concerning the Term "Consultation" which Forms the Cornerstone of Any Effective Repatriation Process and Violates State Law

As previously noted, the cornerstone of any effective repatriation process must be consultation necessary for reevaluating previously identified culturally unidentifiable remains and items,

assessing repatriation requests, and to make offers to transfer control required under federal regulations. Meaningful consultation is essential to the repatriation process. As previously noted, the Legislature documented the existing UC's repatriation policy's failure to include consultation with California Native American tribes resulting in their exclusion from the repatriation process. (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(9).)

The Draft Policy defines "consultation" to mean a "process conducted in accordance with 43 C.F. R. §§ 10.5, 10.8(d), or 10.11(b)." Not only does this definition fail to provide guidance in conducting consultations, it requires some degree of legal expertise to locate and interpret these federal regulations. And even then, the cited regulations fail to define the term or provide any guidance in conducting consultations. At the same time, the Draft Policy omits any reference to California law which does provide such a definition and guidance, and which is purposely included in AB 2836, the legislation mandating the UC systemwide Policy (Gov. Code, § 65352.4; Health & Saf. Code, § 8025, subd. (a)(2)(D)(3) (In developing a UC policy, the term "consultation" has the same meaning as defined in Section 65352.4.))

Later in the Draft Policy under "Procedures," it calls for "meaningful consultation," including "the timely process of seeking, discussing, and considering carefully the views presented." (Draft Policy at p. 19.) The failure to include this language in the definition of the term "consultation" is confusing. While this language is an improvement over the previous definition of the term used in the Draft Policy, it omits language from California law requiring that consultations also be conducted "in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement" and "in a way that is mutually respectful of each party's sovereignty." (Gov. Code, § 65352.4.) This is a significant oversight and deviation from California law because the Draft Policy only requires the UC to consider carefully the views presented without expressly requiring that tribal cultural values and sovereignty over their ancestors' remains and related cultural items be assessed a part of any meaningful discussion in an effort to reach agreement.

To confuse matters even more, the Draft Policy under the section entitled "Beyond Consultation by Law," mandates that each campus "that has a NAGPRA-eligible collection will have an outreach program that promotes proactive consultation with Native American and Native Hawaiian tribal representatives regarding the affiliation, repatriation, and disposition of the ancestral remains and cultural items." Use of the phrase "NAGPRA-eligible collection" suggests that consultation is confined only to federal law and that conducting consultations concerning cultural affiliation, repatriation and disposition are "beyond" what is required by law, when nothing could be further from the truth. (See 43 C.F.R. §§ 10.5(b), 10.8(d), 10.9(b), 10.11(b); Health & Saf. Code, § 8011, subd. (b).) Further, by delegating this to the campuses, the Draft Policy frustrates the Legislative purpose behind AB 2836 to create systemwide policies to avoid repetition of the UC's past history "of inconsistent application of federal and state repatriation laws. . . ." (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(9).)

The result is a glaring flaw in the Draft Policy violating California law and affecting the entire repatriation process. Despite its central importance, the policy expressly fails to recognize tribal cultural values and sovereignty during consultation concerning the tribes' own ancestors' remains and cultural items, thereby perpetuating "prejudicial policies against California Native Americans" acknowledged by the Governor in an Executive Order. (Governor's Exec. Order No. N-15-19 (Jun. 18, 2019); (Health & Saf. Code, § 8025, subd. (a)(2)(D)(3).)

C. The Draft Policy Fails to Incorporate State Law Confidentiality During Consultations Potentially Undermining the Entire Process

The policy also fails to define “confidential information” to expressly include records of Native American graves, cemeteries, and sacred places as required under state law. (Gov. Code, § 6254, subd. (r).) Rather, the Draft Policy only includes “personal identifiable information or information that if disclosed could cause irreparable harm to the affected party” and which must be marked as confidential within 15 days of its oral disclosure. (Draft Policy at p. 3.)

Not only does the policy not require preserving state law confidentiality during consultations involving the location of sacred places, it places the burden on the tribes to show that its disclosure “could cause irreparable harm” and requires the tribes to actually mark such records as confidential. Concomitantly, it imposes this burden on tribes without requiring the UC to inform tribes about this policy before any consultations, which are at the heart of any effective repatriation process. Nothing could undermine the consultation process more than the UC’s failure to maintain confidences during this process. Sadly, the Draft Policy reflects a failure to treat the tribes “in a manner that is cognizant of all parties’ cultural values,” and “in a way that is mutually respectful of each party’s sovereignty” both of which are required to be part of the consultation process, but were omitted from the Draft Policy. (Health & Saf. Code, § 8025, subd. (a)(2)(D)(3); Gov. Code, § 65352.4.)

II. THE DRAFT POLICY LACKS A COHERENT STRUCTURE AND DELEGATES THE MOST CRITICAL ELEMENTS OF UC REPATRIATION TO ITS CAMPUSES IN A MANNER CONTRARY TO STATE LAW

A. The Draft Policy Lacks a Coherent Framework and Fails to Provide Meaningful Guidelines to the Campuses

Ideally, an effective systemwide policy, as required under AB 2836, should be succinct, include standards, baselines and lay out the goals and process with citations to both federal and California NAGPRA. A separate guidance document should also be included which lays out and explains the process as it would apply to most campuses, including easy to use flow charts and diagrams. This is the approach that federal agencies take to enforce NAGPRA.¹ This approach also better accommodates changes in federal and state law which may be explained in the guidance document.

The Draft Policy includes terms that are inconsistently and inaccurately defined. For instance, the term “consultation” (as mentioned above) is defined in one section entitled “Definitions,” but this definition differs from the one later used to describe “consultation” and neither definition completely incorporates the complete definition of “consultation” used under state law. (Health & Saf. Code, § 8025, subd. (a)(2)(D)(3); Gov. Code, § Gov. Code, § 65352.4.)

In another example, the process for handling multiple claims for repatriation for the same items is not incorporated into the repatriation and claims process, but rather is discussed under

¹ An excellent example of such a guidance policy comes from the National Park Service which explains and lays out the policy in a manner in which administrators may better apply it. A copy is attached as Exhibit A and was provided by the Commission to the UC at the November 13 and 14 Meet and Confer.

“Appeals.” (Draft Policy at p. 31.) As to appeals, no mechanism is created for tribes to raise concerns during the inventory and reevaluation processes, which are also not addressed or discussed in the appeals process, which limits appeals to disagreements over cultural affiliation or repatriation/disposition. (Draft Policy at pp. 20-24 and 31.)

In still another example, the Draft Policy fails to require consultation with California tribes as defined under state law, including non-federally recognized tribes, in establishing state cultural affiliation. (Draft Policy at pp. 19 and 24.) However, later in the policy concerning the claims process, it states that the “UC will make *every effort* to engage with non-federally recognized Native American tribes in the cultural affiliation process” without any guidance as to what “every effort” entails. (Draft Policy at p. 27, italics added.)

Coupled with its structural concerns, the Draft Policy fails to incorporate policies and procedures that have already been proven to be effective at other campuses. For example, UCLA has one of the more effective repatriation programs, which has resulted in the repatriation of the vast majority of its collections, while UC Berkeley still retains much of its collection.

B. The Draft Policy Creates a Bureaucratic Structure with Inadequate Accountability

An additional concern to the Draft Policy’s structure and organization is its creation of an additional layer of bureaucracy consisting of a campus repatriation official, campus committee, campus point of contact, chancellor, chancellor’s designee, liaison, president, president’s designee, and systemwide committee without a flow chart showing each person’s or entity’s role during the process, with the lowest-ranking officials charged with assisting the tribes (the liaison), who then reports to the campus repatriation official, neither of whom are responsible for ensuring compliance with the Draft Policy. (Draft Policy at pp. 10-11.) To compound the confusion, in one section of the Draft Policy the Chancellor “is responsible for oversight and compliance” with the policy, but later in the Draft Policy it states that the campus and systemwide committees are responsible “to provide oversight and compliance with this Policy, . . .” (Draft Policy at pp. 10, 16, and 30.) To be effective, there needs to be an official with authority and oversight over the entire process who reports directly to the Chancellor and can work directly with the tribes to avoid confusion and to ensure compliance.

C. The Scope of the Policy is Unclear

The Draft Policy states that it applies “to all UC locations. Each UC location shall establish policies and/or procedures consistent with this Policy, and its local scope and circumstances.” (Draft Policy at p. 9.) Federal and State NAGPRA require repatriation of remains and cultural items in the possession or control of an agency, which can include items located off campus, including items sent to third parties. (43 C.F.R. §§ 10.2 (3)(i), 10.10, 10.11; Health & Saf. Code, §§ 8012, subd. (a), 8015; 8025.) The Draft Policy should clarify this fact and emphasize that the repatriation obligation applies to all departments regardless of whether the remains and cultural items are housed in a museum.

While the Draft Policy states the UC’s intent to comply with both federal and state repatriation laws, only federal law procedure and citations are utilized throughout the policy, as discussed more fully below. The policy fails to address the need to include California Native American tribes during consultation, or to consider state cultural affiliation during the inventory,

reevaluation, claims, or repatriation processes, including failing to include CalNAGPRA claims and dispute resolution procedures, all as required under state law. If the UC is committed to complying with state law, then CalNAGPRA must be integrated into each step of the policy.

Moreover, the Draft Policy requires each campus to: 1) “Devise a plan to review existing materials that may potentially contain Native American or Native Hawaiian human remains or cultural items, . . .”; 2) “Require non-museum academic units to review materials that may potentially contain Native American or Native Hawaiian human remains or cultural items, . . .”; and 3) “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.” (Draft Policy at p. 23.) The Draft Policy delegates these critical functions to each campus in spite of the Legislature’s intent that it adopt “clear and transparent policies and procedures on the systemwide requirements” for repatriation, documenting the UC’s history of inconsistent application of repatriation laws across its campuses. (Health & Saf. Code, § 8025, subds. (2)(B), (C), (D); Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(8).)

In addition, the Policy fails to include requirements, standards, structure, goals, or timelines for accomplishing these benchmarks. The UC has the unique ability to self-regulate, largely free from outside influence. This can be a source of frustration for tribes seeking meaningful systemwide change, as there are few avenues for tribes to ensure the efficacy their attempts to shift policy from the outside. Recognizing this, the UC should view this as an opportunity to demonstrate a real commitment to carrying out the stated policy of repatriation in good faith. For this Policy to be meaningful, a campus’s failure to meet any benchmark must be accompanied by substantial consequences from the UC Office of the President, including withholding university funding for related programs.

III. THE REEVALUATION OF CULTURALLY UNIDENTIFIABLE REMAINS AND ITEMS FAILS TO COMPLY WITH FEDERAL AND STATE LAW ON REPATRIATION

The Legislature has already documented that the existing UC repatriation Draft Policy fails to comply with federal law, specifically Sections 10.10 and 10.11 of the Code of Federal Regulations (43 C.F.R. §§ 10.10 and 10.11 [Sections 10.10 and 10.11.]). (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(12).) The Legislature found that the UC has classified large portions of its remains and cultural items as “culturally unidentifiable” in violation of federal law. (*Ibid.*) The Legislature found that the UC’s existing policy failed to “equally consider the cultural and religious concerns of tribes . . . and instead is partial to perceived educational and research potential that these human remains and cultural items may have for academia and science.” (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(11).) The reevaluation and repatriation of remains and items previously identified as culturally unidentified is a core requirement for the UC policy. (Health & Saf. Code, § 8025, subd. (a)(2)(D).)

A. No Framework or Guidance is Provided in the Draft Policy for Campus Reevaluations of Culturally Unidentifiable Remains and Items, Including Time Frames for Completing the Process

Despite the Legislature documenting the existing UC policy's failures concerning culturally unidentifiable remains and items, the Draft Policy delegates this responsibility to each campus while failing to provide baseline standards or a minimal framework for campuses to reevaluate their previous inventory and cultural affiliation determinations. The policy requires each campus to:

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

(Policy at p. 23.) The Draft Policy is contrary to state law which requires the UC to adopt "systemwide" policies governing this reevaluation process. (Health & Saf. Code, § 8025, subd. (a)(2)(D).) No substantive guidance or framework is provided for campuses to follow and even the term "proactively review" is left undefined; one campus's interpretation to "proactively review previous determinations" can be vastly different from another's. Given that many inventories and summaries are well over 20 years old, and many were performed with inadequate consultation, systemwide policies are necessary for mandating reevaluations under specific circumstances across the UC, particularly for older collections.

While the Draft Policy neglects to create a framework for reevaluations, it also does not obligate campuses to initiate consultations, including with California Native American tribes, related to culturally unidentifiable items, which would be an integral part of such reevaluations. (See 43 C.F.R. § 10.11(b)(1); Draft Policy at pp. 23-25.) This is a significant omission because meaningful consultations are essential for effective repatriation of these very items.

The Draft Policy does not address the need to expedite repatriation given that the obligation to repatriate under federal NAGPRA has existed since 1990 and under CalNAGPRA since 2001. No timeframes or goals are set for campuses to complete the process, with guidance provided for establishing these deadlines, incorporating factors such as the size and scope of collections. And given the UC's history of noncompliance as documented by the Legislature, the Draft Policy needs to set the outside time parameters for even larger collections to meet along with substantial consequences for their non-compliance.

As currently drafted, the Draft Policy will result in fragmented and Balkanized processes across campuses, often in conflict state and federal law, with campuses pursuing varied reevaluation plans, some less vigorously than others.

B. No Framework or Guidance is Provided in the Draft Policy for Locating Remains and Cultural Items Outside of its Museums

The UC is a vast academic and research institution with ten campuses, more than 238,000 students and 190,000 faculty. Both federal and state law require repatriation of remains and cultural items in possession or control of a state agency (or a state agency receiving federal

funding) regardless of whether these remains and items are contained within a museum. (43 C.F.R. §§ 10.2 (3)(i), 10.10, 10.11; Health & Saf. Code, §§ 8012, subd. (a), 8015; 8025.)

As part of its reevaluation, the UC will need to create a process to identify remains and cultural items located outside of its museums, for instance in its various academic departments, located on and off campus. Here again, no guidance or framework is provided for campuses to follow. The Draft Policy requires each campus to create a policy to:

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

(Draft Policy at p. 23.) Contrary to state law, no systemwide framework or guidance is provided for conducting this search and no timeframes are created for completing such a process. (Health & Saf. Code, § 8025, subd. (a)(2)(D.)) Like its policy for reviewing items previously identified as culturally unidentified, the Draft Policy will result in a fragmented patchwork of campus plans, with campuses pursuing varied searches, some more vigorously than others, with nothing preventing a campus from poorly staffing the effort and otherwise delaying the process.

C. The Draft Policy's Updates of Inventories and Summaries Fails to Comply with State law

Under its inventory process, the Draft Policy only requires compliance with federal NAGPRA, including in consulting with tribes. (Draft Policy at p. 21.) Further, inventory summaries are only required for a campus "that has a NAGPRA-eligible collection. . . .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." (Draft Policy at p. 22.) State law includes "state cultural affiliation" including California Native American tribes' cultural affiliation to remains and cultural items, which is broader in scope than federal NAGPRA (which is generally confined to federally recognized tribes). (Health & Saf. Code, §§ 8012, subds. (f), (j), 8013, subds. (a)(2), (3), (c).)

The Draft Policy requires that inventories be "made available to federal agencies, lineal descendants, and Native American Tribes, and Native Hawaiian organizations, as required by law" without specifying what this entails and without incorporating state law which requires submission to the Commission for publication on its website. (Health & Saf. Code, § 8013, subd. (e).)

As to the creation and reevaluation of inventories, the Draft Policy requires that any inventory reevaluations that result in a revision to campus inventories be reviewed by the Campus Committee and approved by the Chancellor. (Draft Policy at p. 24.) Under state law, within 90 days of completing an inventory and summary, the UC must provide a copy to the Commission for publication on its website, which also includes any updated inventories or summaries. (Health & Saf. Code, § 8013, subds. (e) and (i).)

In conjunction with reevaluations and updates, the Draft Policy needs to incorporate language ensuring reasonable access to all remains and cultural items as part of these processes, including for California Indian tribes as defined under state law. (Draft Policy at pp. 21-24.) The Draft Policy fails to provide guidance in determining reasonable access, including any presumptions

facilitating tribal access. Further, the Draft Policy should provide a procedure for tribes challenging the inventory and reevaluation processes, including expressly permitting appeals of such challenges.

The Draft Policy fails to incorporate state law concerning the creation and reevaluation of inventories, including in establishing California tribal cultural affiliation. This is not only vital under state law, but is also an important factor in repatriating items to non-federally recognized tribes under federal law. (See 42 C.F.R. § 10.11(c)(2)(ii)(A).)

D. The Policies Concerning Culturally Unaffiliated Remains and Cultural Items Fails to Comply with Federal and State Law

1. The Draft Policy Fails to Include State Cultural Affiliation

The Draft Policy limits evaluation of cultural affiliation to federal NAGPRA. (Draft Policy at p. 24.)² As previously discussed concerning the Draft Policy’s framework, under the claims process the UC asserts that it “will make every effort to engage with non-federally recognized Native American tribes in the cultural affiliation process” consistent with federal law, without specifying what these efforts will entail or even requiring consideration of state cultural affiliation as required under state law. (Draft Policy at p. 27; (Health & Saf. Code, §§ 8012, subd. (f)); 8013, subd. (a)(3).)

As to the types of evidence that may be considered to establish cultural affiliation, the Draft Policy again limits such evidence under “federal statute and regulations.” (Draft Policy at p. 25.) It does so despite the fact that state law requires consideration of “state cultural affiliation” by California Indian tribes. (Health & Saf. Code, §§ 8012, subd. (f)); 8013, subd. (a)(3).) Not only is this required for compliance with California law, but it may be considered as part of the disposition of culturally unidentified remains under federal NAGPRA as well. (43 C.F.R. § 10.11(c)(2)(ii)(A) and (B).)

2. The Draft Policy Fails to Provide Adequate Guidance in Identifying and Evaluating Evidence of Cultural Affiliation

As to the types of evidence that may be considered to establish cultural affiliation, the Draft Policy lists: “geographical, kinship, biological, archaeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.” (Draft Policy at p. 25.) But it fails to provide guidance that any one of these alone may be sufficient to identify remains and associated funerary objects and related cultural affiliation.

The Draft Policy goes even further by providing that: “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.” (Draft Policy at p. 25.) But nothing in federal or state law requires that tribal perspectives (which is not defined) can only be given equal weight as to other forms of evidence. (43 C.F.R. §§ 10.2(e)(1) 10.14(d); Health & Saf. Code, § 8013, subd. (a)(3).) Rather, “[a] finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence” (43 C.F.R. §

² The Draft Policy states: “Under federal NAGPRA, all of the following requirements must be met to determine cultural affiliation between a present-day federally recognized Native American tribe”

10.14(d); Health & Saf. Code, § 8013, subd. (a)(3).) There may be instances where, based upon the totality of the circumstances, “tribal perspectives,” or rather “tribal knowledges,” including oral tradition, outweigh other forms of proffered evidence.

Further, the Draft Policy contains no guidance explaining that cultural affiliation is based upon a preponderance of the evidence which “should not be precluded solely because of some gaps in the record.” (43 C.F.R. § 10.14(d).) This is a serious omission because historical gaps are inevitable when evaluating tribal knowledge, some of which may contain oral histories, and some of which was systemically and intentionally suppressed throughout the state’s history and dealings with California Native Americans. Recently, the UC has rejected tribal claims as being “incomplete” relying upon “some gaps in the record.” The Draft Policy need to be clear that these “gaps” are insufficient, by themselves, to justify denying claims, particularly when repatriation is otherwise required under federal NAGPRA absent any claims (as discussed in subsection three below). (43 C.F.R. § 10.11(c)(1) and (2).)

Beyond cultural affiliation, the Draft Policy omits any discussion of the evidence to be evaluated to determine whether items are “cultural items” as defined under the Draft Policy, including associated/unassociated funerary objects, sacred objects and objects of cultural patrimony. (43 C.F.R. § 10.2((d)(2),(i),(ii),(3),(4).) This also requires evaluating similar evidence of “geographical, kinship, biological, archaeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion” raising similar evidentiary concerns. This initial determination is critical since items may be improperly omitted from inventories because a campus made the determination that they did not qualify as cultural items as defined under the Draft Policy. (Draft Policy at p. 4.) The identification of “cultural items” under the Draft Policy must be incorporated into the repatriation process replete with tribal consultations and an evidentiary evaluation to avoid improper omissions.

3. The Draft Policy Fails to Comply with Federal Law by Requiring Campuses to Offer to Transfer Control of Culturally Unidentifiable Items

The Draft Policy requires tribes to make requests for culturally unidentifiable remains and cultural items before the UC will consider repatriating these. (Draft Policy at pp. 27-28.) No provision in the Draft Policy exists for repatriation outside the claims and request process for culturally unidentifiable remains and cultural items. (*Ibid.*) But where no requests are made, Federal NAGPRA actually requires agencies “to offer to transfer control” of these items and remains subject to a descending priority list of tribes based upon the location of where the items and remains were found, or to other tribes willing to accept the remains, including to non-federally recognized tribes. (43 C.F.R. § 10.11(c)(1) and (2).)

In an odd twist on federal law, the Draft Policy states that “[i]n the event of multiple requests” a campus “must transfer control” of these items and remains to a “federally recognized tribe located on the land where the objects were removed” or “to tribes located on aboriginal lands subject to a final judgment of the Indian Claims Commission or the U.S. Court of Claims.” (Draft Policy at p. 28.)

First, federal law does not require that any requests be made before such a transfer must occur. (43 C.F.R. § 10.11(c)(1) and (2), (ii).) Second, as to aboriginal lands, federal law only states that

a final judgment of the Indian Claims Commission or the U.S. Court of Claims is just one method for establishing this fact. (43 C.F.R. § (c)(1)(ii).)

Under the Draft Policy, in instances where multiple requests are not made and these two conditions are not met, “the campus may transfer control” to a federally recognized tribe “that has submitted a request or a non-federally recognized tribe.” (*Ibid.*) But nothing in federal law permits such a process. As mentioned, federal law does not require the need for any requests and has a descending order for such mandatory transfers. (43 C.F.R. § (c)(1)(i)(ii) and (2)(i)(ii)(A)(B).)

The failings of the Draft Policy in this regard are significant because in some instances tribes, for various reasons, may not make claims. Federal law nonetheless creates a required procedure for their mandatory repatriation or return, while the Draft Policy fails to do so—even adding an additional barrier by requiring multiple requests before it requires such repatriations. Unfortunately, the Draft Policy does so in spite of the fact that the Legislature documented that existing policy fails to comply with this very federal regulation (43 C.F.R. § 10.11). (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(12).)

IV. THE DRAFT POLICY FAILS TO INCORPORATE STATE LAW FOR ASSESSING REPATRIATION CLAIMS AND DISPUTE RESOLUTION

A. The Draft Policy’s Repatriation Claims Process Fails to Incorporate State Law

The Draft Policy’s repatriation claims process solely relies upon federal NAGPRA. (Draft Policy at pp. 26-28.) Under the Draft Policy, only tribes meeting the criteria for federal cultural affiliation may submit claims for repatriation. (Draft Policy at p. 26.) As the Draft Policy notes, “NAGPRA does not give standing to non-federally recognized Native American tribes.” (Draft Policy at p. 27.) Instead, the Draft Policy relegates non-federally recognized tribes to submitting a request for culturally unidentified remains and items under Section 10.11, subdivision (c), even though, as discussed above, under this federal process the UC must be the one to “offer to transfer control” to the non-federally recognized tribe.

Not only does state law permit non-federally recognized tribes to make claims for repatriation, but all claims (including from federally recognized tribes) must go to the Commission for publication on its Web site for 30 days. (Health & Saf. Code, §§ 8014 and 8015, subd. (a).) Nothing in federal NAGPRA precludes the UC from also initiating the state repatriation process in addition to the federal process. (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 936 (Preemption occurs “when simultaneous compliance with both state and federal directives is impossible.”)) In fact, the Legislature specifically intended that the UC policy “meet the intent of both federal and state law regarding the repatriation of human remains and cultural items in consultation with California Native American tribes.” (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(10).) While the UC Draft Policy asserts that it will comply with both NAGPRA and CalNAGPRA, it fails to incorporate the CalNAGPRA process throughout the Draft Policy, including the claims process. (Draft Policy at p. 9.)

By circumventing the Commission, as well as California's non-federally recognized tribes, the Draft Policy perpetuates historical discrimination against California's tribes, defeating one of the Legislature's purposes in enacting CalNAGPRA. (Health & Saf. Code, § 8011, subd. (f) (CalNAPRA intended to: "Provide a mechanism whereby California tribes that are not federally recognized may file claims with agencies and museums for repatriation of human remains and cultural items.").)

B. The Draft Policy's Claims Review Process Fails to Incorporate State Law

Under the Draft Policy, claimants must submit written requests for repatriation and the UC will send a written status update within 60 days. (Draft Policy at p. 29.) After a claim is "accepted" by a campus, the campus committee will engage in consultation under federal NAGPRA. (*Ibid.*) The campus committee makes a recommendation to the Chancellor or his/her designee who then must approve the request. (*Ibid.*)

But under CalNAGPRA, after the Commission has published the request for 30 days, if there are no other requests or unresolved objections, then the item may be repatriated. (Health & Saf. Code, § 8015, subd. (a).) Nothing precludes the UC from complying with both state and federal law, until compliance with both becomes impossible. (*Viva!*, *supra*, 41 Cal.4th at p. 936.) Only to the extent that the two statutes ultimately yield different outcomes would compliance with both become impossible. Not only is compliance with both statutory schemes required under state law, compliance with both substantially facilitates repatriation to a tribe most culturally affiliated with the remains and items fulfilling the purposes of both statutes.

C. The Draft Policy's Dispute Resolution Process Fails to Comply with State Law

Under the Draft Policy, the UC will evaluate multiple claims to determine if the claimant "has a valid request for repatriation/disposition under NAGPRA." (Draft Policy at p. 32.) "If UC is unable to determine which requesting party is the most appropriate, UC shall continue to provide stewardship of the human remains of Native American or Native Hawaiian ancestors or cultural items until the requesting parties reach agreement on proper disposition or until the dispute is resolved by mediation, a court of competent jurisdiction, or other appropriate means."

Under federal law, where multiple requests are made, an agency "must determine by a preponderance of the evidence which competing requesting party is the most appropriate claimant." (43 C.F.R. § 10.10(c)(2).) Presumably, the UC would apply this standard, but the Draft Policy is unclear on this. If the agency is unable to determine which party is the most appropriate claimant, it "may retain the cultural items in question until the competing parties agree upon the appropriate recipient or the dispute is otherwise resolved pursuant to these regulations or by a court of competent jurisdiction." (*Ibid.*) Neither state nor federal law recognizes the right of an agency "to provide stewardship" of remains and cultural items, which is a right not defined under the Draft Policy.

Under state law, the disputing parties must submit the dispute to the Commission for mediation. (Health & Saf. Code, § 8016, subds. (a), (d).) If the parties are unable to resolve the dispute through mediation, then the Commission must resolve it. (Health & Saf. Code, § 8016, subd. (j).) Nothing in federal law precludes the UC from requiring the parties to mediate their dispute before the Commission, consistent with NAGPRA's language encouraging the parties to resolve

their disputes and in relying upon any Commission determinations during this process. The failure to incorporate the state dispute resolution process is significant because it facilitates repatriation, including to California's non-federally recognized tribes, and permits the Commission to exercise its expertise to assist in the process.

V. OTHER CONCERNS UNDERMINING THE DRAFT POLICY

A. The Draft Policy Fails to Incorporate State Law Definitions

As noted previously, while the Draft Policy states that the UC will comply with both federal and CalNAGPRA (Draft Policy at p. 9), it fails to incorporate state law throughout, including in its definitions. Even though CalNAGPRA contains definitions of many key terms, including "Museum," "California Indian tribe," and "State cultural affiliation," which differ from, or are not defined under, federal NAGPRA, the Draft Policy only incorporates federal law definitions. (Draft Policy at pp. 2-8.)

The Draft Policy's failure to include state law definitions is significant because they extend repatriation to include California non-federally recognized tribes and their cultural affiliation to remains and cultural items. As discussed above, this also results in the Draft Policy's failure to incorporate the Commission into the Draft Policy's cultural affiliation, claims, and disposition processes. The Commission is the agency tasked with preventing severe and irreparable damage to Native American cemeteries and sacred sites, including responsibility under CalNAGPRA for facilitating the repatriation process. (Pub. Res. Code, § 5097.94, subd. (g); Health & Saf. Code, §§ 8013-8020.)

B. The Draft Policy Skews the Systemwide and Campus Committees Towards Academic Members Without Legal Authority for Doing So

Consistent with state law, the Draft Policy creates both systemwide and campus committees. (Draft Policy at pp. 11-18.) The composition of these committees is provided for under state law. (Health & Saf. Code, § 8026, subds. (a)(2) and (b)(2).) The Draft Policy augments this by creating a chair position which must be chosen "from amongst the four UC members." (Draft Policy at pp. 14 and 18.) But none of the UC members is required to have repatriation experience, unlike the Native American members, and no legal authority exists for imposing this requirement. (Policy at pp. 11-12 and 15-16; Health & Saf. Code, § 8026, subds. (a)(2) and (b)(2).) Because the law does not authorize the imposition of such skewed qualifications for the chair position, the policy must allow the committees to select their own chairs.

The Draft Policy also allows the Chancellor or designee to serve as a non-voting member of the Campus Committee. (Policy at p. 16.) This position also is not authorized under state law which clearly intended to maintain a balance between academics and Native American members and it creates a conflict of interest, as the Campus Committee is responsible for making recommendations to the Chancellor or designee, including for evaluating appeals. (Draft Policy at pp. 16 and 31.)

The Draft Policy allows the systemwide committee to retain subject matter experts, including the UC's General Counsel, to assist it in carrying out its duties. (Draft Policy at p. 15.) But the Draft

Policy fails to provide a process for assessing need, or for the retention of such experts, including whether the committee should vote on such matters.

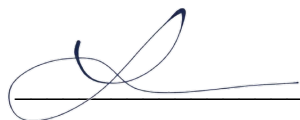
The Draft Policy also implements its own conflict policy for these committees. (Draft Policy at pp. 14 and 18.) While it requires the UC to maintain the balance in the composition of the committees when appointing substitute members to serve in place of the conflicted member, it fails to explain the process for doing so and does not expressly give preference to California tribes in making these selections involving the Native American members.

Even more striking, the Draft Policy fails to define a conflict of interest. A specific definition is necessary here because conflicts may arise where the repatriation involves the specific member's academic department, museum, or tribe.

CONCLUSION

As currently drafted, the Draft Policy will result in fragmented and Balkanized processes across campuses, often in conflict state and federal law, with campuses pursuing varied reevaluation plans, some more vigorously than others. The Draft Policy may actually cause harm by codifying policies and procedures that conflict with state and federal law in critical areas including in its consultation process, policy structure and campus delegations, inventory process, the reevaluation of culturally unidentifiable remains and items, the processing of repatriation claims and dispute resolution, the repatriation process, as well as in the creation of systemwide and campus committees. Moving forward, the Commission remains committed to assisting the UC in resolving these concerns and in creating an effective UC repatriation policy, and urges the UC to commit to continue shaping the Draft Policy, companion documents, and implementation guidance in collaboration with the Commission and California Native American tribes through July 1, 2020.

Sincerely,

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

Laura Miranda

Chairperson