



NATIVE AMERICAN HERITAGE COMMISSION

March 31, 2020

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

Submitted via Electronic Mail

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

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

Dear President Napolitano:

The Native American Heritage Commission (Commission) appreciates the opportunity to comment on the University of California's (UC) First Revised (as of January 2020) Native American Cultural Affiliation and Repatriation Draft Policy (Policy), as required under Public Resources Code section 8025, subdivision (a)(2)(D)(3).

The UC's revision of its initial draft Policy (issued in August of 2019) is an improvement. We recognize and appreciate that it addresses some of the prior concerns raised by the Commission on December 4, 2019. However, after thoroughly reviewing this latest Policy, the Commission continues to have concerns that we must bring to your attention. The Commission understands that the UC intends to issue at least two more drafts before it finalizes the Policy and is hopeful that the next draft will address the concerns raised herein. The Commission remains committed to assisting and advising the UC through this process in an effort to achieve compliance with AB 2836, as well as related state and federal repatriation laws.

OVERARCHING CONCERNS

The Commission finds that this latest draft Policy, like the initial draft, conflicts with, or fails to adequately incorporate, both federal and state

Native American Graves Protection and Repatriation Acts (NAGPRA), which are intended to expedite and facilitate the repatriation of Native American remains and related cultural items.

- *Policy Structure*

As the Commission previously commented, an effective systemwide policy, as required under AB 2836, should be succinct, include standards, baselines, and clearly lay out the goals and processes, with ample citations to both federal and California NAGPRA. As discussed at our March 3, 2020 meeting, the policy should track the related flow chart to enable campuses to effectively follow and implement it. The Policy should serve as a guidance document on carrying out the law, rather than as a recitation of federal and state laws. This is the approach that federal agencies have taken to enforce NAGPRA. To the extent that the Policy does attempt to restate the law, in many places it does so incorrectly, as explained more fully below under the Detailed Analysis portion of this letter. The Policy also contains conflicting and overlapping language, with no cross references to other sections of the Policy. For example, the Policy discusses federal and state cultural affiliation with no cross-references to consultation, inventory, summaries, and repatriations/disposition, all of which touch upon this issue. This concern is particularly acute for state cultural affiliation where the Policy does not explain how it is to be used in conjunction with federal cultural affiliation, as well as during repatriation/disposition, nor explain the process and best practices, in clear, non-technical language.

- *Consultation*

Another overarching concern has been the UC's apparent reluctance to engage in meaningful consultation as required under AB 2836. (Health & Saf. Code, § 8025, subd. (a)(3).) The Commission's December 4, 2019 advice letter raised serious concerns about the UC's compliance with AB 2836's requirement for consultation with California Native American tribes. Specifically, the Legislature 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.*)

The Commission appreciates that the UC made significant strides to improve consultations by scheduling four public work sessions at its campuses, scheduled for the end of January and February. In conjunction with the public sessions, the UC also

agreed to 15-minute consultations with requesting tribes. The UC also informed the Commission that it would conduct additional individualized consultations telephonically, as well as at its Oakland offices upon tribal request.

On January 23, the UC provided notice to tribes, with a link to its latest Policy for work sessions scheduled to begin January 31, at UC Berkeley and February 7, at UC Riverside. Asking tribes to review an intricate and lengthy policy (40 pages), in conjunction with detailed federal and state repatriation laws, on such short notice, is not conducive to meaningful consultations, nor is it respectful of each party's sovereignty.

A related issue with these working sessions is that tribes raised their concerns with the Policy, but had little dialog and discussion from the UC to resolve these concerns in an attempt to reach agreement. In other instances, the UC claimed the Policy addressed concerns without completely understanding the issues and/or it failed to make additional follow-up inquiries to better understand the nuances of the concerns. Nor did the UC respond to past Commission or tribal comments as part of its latest consultation process. The Commission, as well as many tribes, recognizes that the UC's latest draft fails to incorporate these comments, without explanation.

Furthermore, no work sessions were scheduled north of the Bay Area, notwithstanding the many tribes located in Humboldt and Siskiyou counties. This is a significant oversight because many tribal members lack the resources to commute to Berkeley or Davis to attend day-long consultations, especially on short notice.

Finally, the UC has not committed to any public work sessions beyond this initial revised draft of the policy. Considering the short notice provided for the first two work sessions, and the burden placed on tribes to travel long distances on short notice, many tribes will likely wait until the final draft before making comments. The Commission recommends that additional work sessions and consultations be scheduled after the completion of the final third draft and that the UC accommodate tribal requests for individual consultations at mutually preferable locations, including on tribal lands.

EXECUTIVE SUMMARY

In addition to the Commission's overarching concerns regarding the UC's consultation process and Policy's structure, the Commission has identified major areas where the Policy fails to adhere to state and federal law, as summarized below:

- *Re-inventorying to Locate Remains and Related Cultural Items*

While the Policy acknowledges that previously unreported items "may be found in disparate academic units of the UC," it omits any requirement that campuses

systematically search museums and departments for unreported items, something expressly required under state law. (Health & Saf. Code, § 8025 subds. (a)(2)(A) and (D).) Even the prior version of the Policy issued in August of 2019 acknowledged this concern by requiring campuses to create plans to search museums and departments for remains and cultural items. (Aug. 2019 Policy at p. 23.) As the Commission previously commented on this issue in the prior draft Policy, the Policy should provide detailed guidance for conducting these reviews, as well as timeframes to the campuses for accomplishing this.

- *Inadequate Claims Process: Improper Delegation to Campuses with No Timeframe for Compliance*

The Policy delegates to each campus responsibility for establishing “a clear and transparent process for Native American Tribes or Native Hawaiian Organizations to submit a request for Repatriation or Disposition in accordance with federal and state law and this Policy.” (Policy at p. 28.) This violates AB 2836, which requires the UC to adopt systemwide policies governing claims. AB 2836’s mandate for a systemwide policy is aimed, in large part, at avoiding the problems that arose in the past as a result of the UC’s inconsistent application of repatriation laws across the various campuses. (Health & Saf. Code, § 8025, subd. (a)(2)(B) and (D); Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subd. (a)(8).) The Policy’s continued failure to provide systemwide guidance and to set deadlines for campuses to initiate their claims’ processes remains a significant concern.

- *The Claims Process for Culturally Unidentified Items Violates State and Federal Law*

The Policy requires tribes to file claims for CUI, which, in turn, trigger consultations. (Policy at p. 30.) If no claim is filed, a campus could retain items indefinitely before deciding to initiate consultations. (*Ibid.*) This procedure violates federal law, which clearly states the UC “must offer to transfer control” of these remains and items to a descending priority list of tribes. (43 C.F.R. § 10.11(c)(1)-(2).) Nothing in the Policy, however, requires the UC to notify tribes about the existence of any remaining CUI after its re-inventory process and to inform them about the necessity of filing a claim to initiate consultations on every single remain and item. As a result, the Policy discourages the mandatory disposition of CUI; a result the Legislature sought to avoid when it enacted AB 2836. (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subd. (a)(12).)

- *The Process (or lack thereof) for Reviewing Existing CUI Determinations Fails to Comply with State Law*

The Policy requires campuses to develop plans for reviewing existing CUI determinations within six months after the Chancellor's appointment of a Campus Committee, but no later than January 1, 2021. (Policy at p. 39.) But there is no guidance explaining the required elements for these plans and no deadlines are required for completing reviews under the plans. This enables campuses to potentially avoid reviews through delay, and will result in inconsistent CUI review policies across the UC system. Both outcomes contravene the spirit, intent, and language in AB 2836. (Health & Saf. Code, § 8025, subd. (a)(1)(D); (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subds. (a)(9) and (12).)

- *The Process for Repatriating Unclaimed Items to Culturally Affiliated Tribes Fails to Adhere to State Law*

The Policy provides that, for culturally affiliated items where no claim was filed, that campuses must develop plans to notify "tribal officials," to "invite Repatriation requests (e.g., of no less than every year), with instructions on how to submit such requests." (Policy at p. 39.) Consistent with its other campus delegations, no deadline is set for when campuses must actually begin these notifications and the term "notify" is not defined, including a requirement that campuses inform tribes of the specific items for which the UC has determined their cultural affiliation. This will result in inconsistent systemwide policies with varying degrees of implementation in violation AB 2836. (Health & Saf. Code, § 8025, subd. (a)(2)(B).)

- *The Process for Allowing Research and Testing is Flawed*

Research and testing on sacred Native American remains and cultural items is one of the most fundamental human rights violations related to the exploitation of Native American remains and cultural items. First and foremost, California Native American tribes and not the University should drive all practices, policies and requests regarding testing. If it is the will of tribes to allow any testing, no testing should be allowed under this Policy unless all state and federally culturally affiliated tribes expressly agree in writing, specifically describing the extent and duration of permissible testing, and with no related appeals and complaints are still pending. In instances where only non-federally recognized tribes are culturally affiliated, then permission must also be obtained from federally recognized tribes that are recognized as aboriginal to the area from which the remains were removed, consistent with federal law. Second, the Policy is fatally flawed because it would permit testing prior to repatriation/disposition in instances where the tribe allegedly granting the request may not be the tribe that will ultimately be granted repatriation/disposition rights.

- *Conflicts of Interest are Not Properly Defined*

The Policy limits a conflict of interest to financial and personal conflicts, without defining what constitutes a “financial” or “personal” conflict. Absent a definition of what a personal conflict entails, UC officials involved in the repatriation/disposition processes within their departments could also serve on Campus and Systemwide Committees reviewing appeals and complaints arising out of their own decisions. (*Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90 (Due process requires “a fair hearing before a neutral or unbiased decision-maker.”)) In fact, under the Policy, the President’s and Chancellor’s designees may serve on committees which make recommendations concerning appeals and complaints to these very same individuals.

- *Confidential Information*

The definition is limited to records related to consultations, and it does not include all records related to Native American graves, cemeteries, and sacred places as provided for under Government Code section 6254, subdivision (r). Maintaining confidentiality is essential to any effective repatriation process and in building tribal trust. The Commission recommends that language similar to AB 52 be used requiring that any information, including the location, description, and cultural resources shall not be disclosed to the public consistent with existing Public Records Act exceptions. (See Pub. Resources Code, § 21082.3, subd. (c)(1).)

- *Use of Audits*

Because of the UC’s “history of inconsistent” compliance with repatriation laws documented by the Legislature, the Commission also recommends that the Policy incorporate greater accountability by requiring periodic audits with corresponding timelines for addressing any concerns identified by the audit. (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subds. (8) and (9).)

This summary represents just some of the most significant concerns raised by the current draft Policy, but the Policy also raises other important concerns explained in more detail below.

DETAILED ANALYSIS

DEFINITIONS

A prominent concern in the Policy’s definitional section is its attempt to restate legal definitions that already exist under the law, while the Policy fails to provide guidance in their practical application and meaning. The best example of this is the Policy’s use of

the legal terms “museum or Federal agency” throughout its definitions. (See Associated Funerary Objects; Funerary Objects; Inventory; Notice of Intent to Repatriate; Notice of Inventory Completion.) The Policy does so despite the fact that the terms are not otherwise defined under the Policy, which is confusing and may result in some staff erroneously concluding that their UC program is neither. Since the Policy already applies to the entire UC, it would be more appropriate, and useful, to clarify that it covers the entire UC, including associated items found anywhere within the UC system, no matter where they are housed, including but not limited to museums, collections, academic departments, clinics, and research programs.

- Associated Funerary Objects: The Policy defines funerary objects to mean items “that were made exclusively for burial purposes or to contain human remains.” (Policy at p. 3) But federal NAGPRA does not require that the items be made exclusively for burial purposes, only that the items were placed intentionally with the remains. (43 C.F.R. § 10.2(d)(2) and (3).) This is a significant difference because campuses may misclassify associated funerary objects believing that such items must be made exclusively for burial purposes.
- Burial Site: The proposed Policy provides the two federal and state legal definitions of burial site without explanation. The Policy should use CalNAGPRA’s definition, but note that under federal law, a burial site must also have been part of a death rite or ceremony of a culture and specifically includes rock cairns and pyres.
- California Indian Tribe: Rather than provide legal verbiage, the Policy should simply state that a tribe under federal law is defined as one that is federally recognized, which is listed by the BIA and provide the link to the list. The Policy should explain that CalNAGPRA incorporates these tribes located in California, as well as California tribes identified by the Commission under criteria set forth by state law. There is no reason to set out the detailed legal criteria for Policy purposes because the campuses will not be making this determination.
- Confidential Information: This is a vast improvement over the UC’s prior definition of this term, but it needs to be expanded to include not only records related to consultations (Pub. Resources Code, § 6254.10) but also all records related to Native American graves, cemeteries, and sacred places as provided for under Government Code section 6254, subdivision (r). Further the Commission recommends adopting language similar to AB 52 governing the California Environmental Quality Act, which provides that all information, including, but not limited to, the location, description, and use of tribal cultural resources submitted by a tribe shall not be disclosed to any other public agency or the public consistent with section 6254, subdivision (r). (See Pub. Resources Code, 21082.3, subd. (c)(1).) This is an important tribal issue because many sacred places are subject

to looting, vandalism, and desecration, and tribes need to be assured that the UC will maintain their confidences.

- Conflict of Interest: The proposed definition limits a conflict of interest under the Policy to financial and personal ones, without stating what constitutes a “personal” conflict. To be meaningful, a conflict must be better defined to avoid having individuals reviewing decisions in which they personally participated (including claims, dispositions, disputes, and repatriations) which may involve that person’s specific academic department, museum, or affiliated tribe, including where they receive compensation as a contractor. The goal should be to avoid having individuals with a vested personal stake in an outcome from participating in the review or complaint process. (*Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90 (“Due process, however, always requires a relatively level playing field, the ‘constitutional floor’ of a ‘fair trial in a fair tribunal’ in other words, a fair hearing before a neutral or unbiased decision-maker.”))
- Consultation: Insert a sentence at the end which states “See Consultation section for details and best practices.”
- Control: The definition is overly legalistic making it difficult to understand. It could be more simply stated to be a legal interest (including ownership) in remains and associated funerary objects that are treated as belonging to a museum, department, or program, including items on loan to a third party.
- Cultural Affiliation: The definition uses the term “Indian Tribe” without defining this term (although the term “tribe” is defined) and it only cites to federal law, which incorrectly suggests that it only applies to federally recognized tribes under federal NAGPRA. The definition should include a citation to Health and Safety Code section 8012, subdivision (f). Further, the later definition of “tribe” should be changed to “Indian Tribe” and its definition should specify that it includes federally recognized, as well as, other California Indian tribes as identified under state law.
- Cultural Items: This definition is overly legalistic. There is no reason to specify that CalNAGPRA means only those items originated in California because CalNAGPRA only applies to California Indian Tribes having a cultural affiliation with the cultural items.
- Disposition: The definition is confusing when it states: “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 Human Remains and Cultural Items).” CalNAGPRA does not make this distinction and it is not necessary for the Policy to distinguish between the two. To the extent that the UC feels it must distinguish

between them, it would be clearer to state that where the term “disposition” is used instead of “repatriation,” it is referring to the disposition process for culturally unidentifiable remains and associated items under federal NAGPRA (43 C.F.R. § 10.11(c)).

- Funerary objects: CalNAGPRA incorporates the term as part of “cultural items.” Please add a citation to Health & Saf. Code, § 8012, subd. (d).
- NAGPRA-eligible Human Remains/Cultural Items and NAGPRA-eligible Collection: The Policy inconsistently refers to “NAGPRA-eligible collections,” and “each campus with the Possession or Control of Native American or Native Hawaiian Human Remains and Associated Funerary Objects.” (See Policy at pp. 13 and 23.) While the definition does include CalNAGPRA, it is confusing to use only a federal law reference to refer to both state and federal law. Further, the term presupposes that it only applies to collections which have already been determined to be “NAGPRA-eligible.” Much of the Policy applies to collections and items that are “potentially” NAGPRA-eligible, so use of this term forecloses items that actually must be captured by the policy so they may be identified and repatriated if they fall under NAGPRA. The Policy should eliminate this confusing reference and just refer to Human Remains and Cultural Items, which are already defined. The term “collection” should be used when providing examples of the different divisions and departments which may have remains and associated items required to comply, including but not limited to any museums, collections, departments, clinics, and research programs. (See 43 C.F.R. § 10.2(1) and (3).)
- Native American: Please include citations to state law, which incorporates federal law. (Health & Saf. Code, § 8012, subd. (j).)
- Notice of Inventory Completion: While the Commission appreciates the citation to CalNAGPRA, the definition only incorporates federal requirements. It should specify that within 90-days of completion, all campuses shall provide copies of the inventory and summary to the Commission for publication on the Commission’s Web site for 30 days, as well as making these available to all tribes.

PROCEDURES

The Policy spends an inordinate amount of space to the composition of the Systemwide and Campus Committees. For example, much of this is already defined in law and actually may change, so citations to law is the preferable manner in which to reference this. Please eliminate it or place in guidance documents.

Systemwide Committee

Composition

AB 2836 sets out the requirements for the Systemwide Committee, which does not include the President/designee as non-voting members. (Policy at p. 15.) The inclusion of the President/designee in this Committee is problematic because the Committee makes recommendations to the President regarding policy revisions, guidance and best practices, corrective-action audits, and tribal appeals. It would undermine the integrity of the process if the President/designee participated in these very decisions, even in a non-voting capacity.

Procedures

Conflicts of Interest

As discussed above, the Policy should set out what constitutes a conflict of interest. (Policy at p. 16.) By leaving this decision to each campus, there is a substantial risk that inconsistent campus policies will develop. Under the Policy, Systemwide and Campus-wide Committees, as well as Chancellors/designees, are required to make decisions regarding cultural affiliation, repatriation/disposition, claims, appeals, and disputes. A conflict of interest arises anytime they review matters involving their specific academic department, museum, or affiliated tribe, including when they receive compensation as a contractor. The goal should be to avoid having individuals with a vested personal stake in an outcome from participating in the review process. For instance, under the policy, a museum's director may participate in decisions concerning approvals and appeals, which could include approvals and appeals arising from his or her own decisions. (*Nightlife Partners, supra*, 108 Cal.App.4th at p. 90 ("Due process, however, always requires a relatively level playing field, the 'constitutional floor' of a 'fair trial in a fair tribunal' in other words, a fair hearing before a neutral or unbiased decision-maker."))

Chair

While the Commission appreciates the change permitting the Chair to be chosen from any of the Committee members, under the Policy, the nominee must be approved by the President/designee. (Policy at p. 16.) This would permit Committee members (particularly those that work within the UC) to lobby the President and skews the process in favor of UC nominees. Nothing in AB 2836 authorizes or provides such authority to the President. Rather, the composition of the Committee was carefully determined by the Legislature and, accordingly, this requirement should be stricken from the policy.

Campus Committee

Composition

Reference to NAGPRA-Eligible Collection

The policy again refers to "NAGPRA-eligible collection" which is potentially confusing because the definition is broader than just NAGPRA or just "collections." (Policy at p. 17; See definitional comments on this term.)

Chancellor/Designee

Like Systemwide Committees, AB 2836 sets out the requirements for the Campus Committee, which does not include the Chancellor/designee as non-voting members. (Policy at p. 19.) The Commission appreciates the potential interest by the Chancellor, but including the Chancellor may unfairly skew the Committee's decision-making. The Committee makes recommendations to the Chancellor regarding implementation, claims, disputes, and tribal access. It would not be appropriate for the Chancellor/designee to also participate in these decisions, even as non-voting members. (See Comment re: President/Designee above.)

Procedures

Conflicts of Interest

The Policy needs a comprehensive conflict of interest policy. (Policy at p. 20.) Like the Systemwide Committee, by leaving this decision to each campus, there is a significant risk of inconsistent campus policies. (See prior Comment on Conflicts of Interest for the Systemwide Committee and under Definitions.)

Chair

While the Commission appreciates the change permitting the Chair to be chosen from any of the members, the Policy requires that the nominee be approved by the Chancellor/designee. (Policy at p. 20.) This allows Committee members (particularly those that work within the UC) to lobby the Chancellor and skews the process in favor of UC nominees. Nothing in AB 2836 authorizes or provides such authority to the Chancellor. To the contrary, the Legislature carefully delineated the Committee's composition and structure. This requirement should be stricken from the policy.

Consultation

As to consultation, at the March 3, 2020 meeting, the UC provided an update guidance document to provide best practices for effective consultation. That document should be an integral part of the Policy as the backbone for repatriation. If the UC does decide to use it as a guidance or best practices supplement, then it should be the very first one.

“NAGPRA-Eligible Collection”

As previously explained, use of the term “NAGPRA-eligible Collection” is potentially confusing because the definition is broader than just NAGPRA or “collections.” (Policy at p. 21; See Comments to use of the term under Definitions.)

Collaboration

The Policy requires campuses “to work collaboratively with Tribal Representatives to facilitate the Cultural Affiliation and State Cultural Affiliation of Native American or Native Hawaiian ancestral Human Remains and Cultural Items, and provide Tribal Representatives reasonable opportunity to present information regarding Cultural Affiliation or State Cultural Affiliation orally or in writing.” The Policy, however, does not, address three significant sources of friction between the tribes and the UC: 1) complete and full access to remains and cultural items during the inventory process; 2) adequate notice necessary to participate in the inventory process while the inventory is being assembled and culturally identified; and 3) adequate notice to participate in the claims repatriation or disposition process.

Confidentiality Waivers

As discussed above under the definition of Confidentiality, maintaining confidentiality is integral to effective consultation and in building trust with the tribes. Responsibility for maintaining confidentiality falls on the UC which has the legal obligation to repatriate. If unique circumstances arise where the UC is somehow precluded from maintaining specific confidential information, then the UC must provide the basis for this concern to the tribes in advance of any related consultations in an effort to reach agreement concerning any proposed disclosure. (Policy at p. 22.) Tribes need to know that the UC will maintain and respect confidentiality and that any proposed exceptions will be carefully explained and agreed to in advance of any disclosures.

In relation to exceptions, the Policy fails to provide guidance concerning the circumstances under which a waiver of confidentiality should be sought. Moreover, nothing in the Policy precludes a campus from including it as standard contract

language or from requiring waivers as a condition for tribal participation in the repatriation process. These waivers should only be requested by the UC when absolutely necessary to comply with its statutory obligations and no tribe should be compelled to execute a waiver as a condition to participating in the Policy's process. When confidentiality is waived by a tribe, the waiver should be in writing so that all parties understand the nature, scope, and duration of the waiver.

Inventories and Summaries

The policy would only require campuses to update existing inventories under the following circumstances:

1. Previously unreported holdings or collections are located that may include remains or cultural items;
2. Remains and cultural items are likely to be culturally affiliated with a newly federally recognized tribe;
3. New information about cultural affiliation is obtained which provides a basis for revising a prior determination; and
4. An update "is otherwise required" under federal or state law.

(Policy at pp. 22-23.)

The enumerated list omits reference to the need to update existing inventories as part of the requirement to update existing CUI inventories to ascertain whether cultural affiliation can now be determined. (Health & Saf. Code, § 8025, subd. (a)(2)(D).) But in a separate note below the list it states:

Note that 'new information' includes information obtained during Consultations conducted pursuant to Federal NAGPRA and CalNAGPRA, and in the course of campus review of their existing inventories and summaries that list Human Remains and Cultural Items as Culturally Unidentifiable, pursuant to Section VI of this Policy.

In order to avoid confusion, the Policy should expressly include the note as a fifth circumstance necessitating an inventory update.

In addition, all faunal collections within UC control are in need of re-review to identify potential Native American human remains. When UCLA re-reviewed its collections, the amount of identified Native American human remains that had previously been missed

was remarkably high. This needs to be incorporated in the circumstances requiring an update to inventories.

Adding to this confusion is the fact that the Policy requires campuses to update inventories and summaries under CalNAGPRA, which includes adding State Cultural Affiliation. (Policy at pp. 23-24.)¹ Yet, this is not expressly identified as one of the circumstances warranting the updating of existing inventories. (Policy at pp. 22-23.) This creates internal inconsistencies within the Policy which hinders compliance.

The Policy also requires inventory updates as “otherwise required” under federal and state law. (Policy at p. 23.) This language fails to provide any assistance or guidance to the reader. To be effective, the Policy needs to set out in clear, simple language all the circumstances where campuses must update their inventories, including for State Cultural Affiliation.

As discussed at our March 3, 2020 meeting, we also recommend that notice of summaries be provided to the Commission so that this information may be published on the Commission’s Web site.

Finally, the need to update inventories is related to the Policy’s requirements that campuses implement plans for reviewing existing CUI, culturally affiliated, but unclaimed items, and outreach, yet organizationally they are found in completely different places within the Policy with no cross-references. (See “Inventories and Summaries” at pp. 22-23 and “All Such Agreements Shall Be Reported to the Campus Committee and the Systemwide Committee Repatriation Implementation Plan” at pp. 39-40.)

Inventory Process (Human Remains and Associated Funerary Objects)

The Policy Needs to Include the CalNAGPRA Process

Under the inventory process, the Policy only requires campuses to “make available” inventories and inventory supplements to the Commission and to tribes. (Policy at pp. 23-24.) But CalNAGPRA requires campuses to affirmatively provide a copy of inventories and summaries to the Commission within 90-days of completion which must be posted on the Commission’s Web site for 30-days. (Health & Saf. Code, § 8013, subd. (e).) These state law requirements are not included in the Policy. Additionally, the Policy fails to

¹ “Campus inventories must include a summary of the evidence, including evidence obtained through tribal Consultation, used to determine whether the objects are Associated Funerary Objects and the Cultural Affiliation / State Cultural Affiliation of the Human Remains based on the preponderance of the evidence.” (Policy at p. 24.)

require providing tribes with the inventories within six months of completion as required under Federal law. (43 C.F.R. § 10.9(e)(1).)

Consultation During Inventory Fails to Incorporate CalNAGPRA

The inventory process only incorporates federal NAGPRA consultation. (Policy at p. 23.) Only after the inventory process, does the Policy require CalNAGPRA consultation (Policy at p. 24.) Consultation with California tribes during inventory is critical because these tribes have an understanding of their unique cultural heritages, ceremonies, and rituals. (Health & Saf. Code, § 8013, subd. (a).) This understanding is necessary for determining whether objects found near the remains constitute associated Cultural Items as required under the Policy. (Policy at p. 23)² Further, the Policy uses the term “materials” when referring to associated items, which is confusing because the term is not defined, while “cultural items” is defined. (Policy at p. 23.)

Tribal Access During Inventory

While the Policy calls for consultation (at least under federal NAGPRA), no provision is made for tribal access during the inventory process. (Policy at pp. 23-24.) Under the Policy, access is only provided “for the purposes of Consultation toward Repatriation or Disposition and cultural or spiritual care.” (Policy at pp. 35-36.) Access should be provided throughout the entire process, from inventory, cultural affiliation, summary, claims, appeals, to repatriation/disposition. Further, the Policy requires “reasonable access,” but offers no guidance as to what factors should be considered in providing that access. Because of state and federal NAGPRA’s emphasis on repatriation/disposition, the Policy should state that access will be liberally granted. Other factors to be considered should include consideration of any of the following: 1) the size and scope of the campus’s collection; 2) tribal availability; 3) the distance of the tribe(s) from the collection and difficulty in getting to the collection; and 4) the difficulty in accessing the location where remains and items are stored. This is exceptionally important, particularly given the UC’s repatriation history as documented by the Legislature, as well as the potential reluctance of campuses with larger collections to engage in the process.

Compounding this concern is the fact that the Policy later imposes confusing restrictions on access by requiring Tribal Representatives to “present evidence indicating approval by their tribal chair to access such ancestral Human Remains and Cultural Items.” (Policy at p. 36.) The Policy fails to define the term “tribal chair,” but throughout the

² For example, the Policy, citing CalNAGPRA, requires campuses to consider “geographical, kinship, biological, archaeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information,” to determine whether items are Cultural Items, most of which can only be obtained during consultation with tribes during inventory consultations.

Policy, "Tribal Representatives" are permitted to otherwise participate in the process. While the Commission understands the need for proper tribal authorization, how that authorization is granted depends on each individual tribe—the elected tribal chairperson (or other leader) is not always able, or required, to grant that authorization pursuant to tribal law, customs, or traditions. Given that the authorization process will depend on each tribe, the requirement that Tribal Representatives first present evidence of tribal chair authorization is arbitrary and possibly overly restrictive.

An additional barrier to access is the Policy's requirement that access requests "should be made with sufficient advance notice to allow for adequate preparation and staffing." (Policy at p. 36.) It is unreasonable to assume that a tribe would understand what notice is sufficient to accommodate any particular campus's need for "adequate preparation and staffing." In order to accommodate access and institutional needs, the Policy must specify a reasonable notice period, such as two weeks, but with an emphasis on accommodating tribal needs.

Associated Items Improperly Limited

Under the Policy, "campuses must request that Tribes provide certain information, including, as appropriate, information regarding the kinds of objects the Tribe reasonably believes to have been made exclusively for burial purposes or to contain Human Remains of their ancestors." (Policy at p. 24.) But, as discussed regarding the definition of associated funerary objects, a funerary object may include any object used as part of a death rite or ceremony reasonably believed to have been placed intentionally with the remains. (43 C.F.R. § 10.2(d)(2); Health & Saf. Code, § 8012, subd. (d).) The object need not have been made exclusively for burial purposes, but can include items associated with a tribe's culture and rituals or with the individuals themselves.

Deficiencies in the Summary Process

Process Omitted

Further, the Policy refers to "collections" which suggests that it only applies to remains and associated items that are part of a museum collection or something similar. There is no reason not to eliminate the pervasive use of the terms "NAGPRA-Eligible Collection" and "collection" in favor of Native American remains and cultural items. (See first bulleted comment to Definitions.)

The Policy states: "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." (Policy at p. 25.) But under Federal law, it is not just an invitation to consult, but consultation is required. (43 C.F.R. § 10.8(d)(1).) Further, this consultation must be initiated before the completion of the summary process via letter and personal dialogue with the tribe. (43 C.F.R. § 10.8(d)(2).) The consultation process should also comply with state law which exceeds the federal requirements. (See Gov. Code, § 65352.4)

State and Federal Cultural Affiliation

The organization of the Policy is confusing because it discusses the process for completion of inventories and summaries before it discusses the procedures for determining state and federal cultural affiliation (which must be assessed during inventory and summary completion [see 43 C.F.R. §§ 10.8 and 10.9]). (See Policy at pp. 23-25 and 27.) To be meaningful, the process for determining cultural affiliation needs to be incorporated into the inventory and summary processes as part of consultations, which is the time at which the campus will be obtaining and assessing information obtained from the tribes before it completes the processes.³

The Commission appreciates that tribal histories, documentation, and testimonies will not be afforded less evidentiary weight than other evidentiary categories, but the Policy omits language from NAGPRA stating that a finding of cultural affiliation "should not be precluded solely because of some gaps in the record." (43 C.F.R., § 10.14(d).) As mentioned during National NAGPRA's March 4 presentation at UC Berkeley, this language is important because tribes should not be denied cultural affiliation because of "gaps" which are a part of any linguistic, folklore, or oral tradition which, in many instances, are the primary ways tribes passed on their histories and traditions.

Claims and NIR Process Inappropriately Placed Under "Inventories and Summaries" and Not Explained

Under the heading "Inventories and Summaries" and the subheading "Summary Process," the Policy discusses that claims for unassociated funerary objects and Notices of Intent to Repatriate (NIRs) must be reviewed by the Campus Committee and approved by the Chancellor. (Policy at p. 25.) The subdivision only discusses the process for creating summaries (consistent with the subheading) and fails to describe the process for submitting and evaluating claims for associated or unassociated items.

³ For instance on p. 24, the Policy states: "Consistent with CalNAGPRA, if after Consultation with California Indian Tribes, State Cultural Affiliation is established with a non-federally recognized California Indian Tribe, the campus shall include that information in the Inventory or Inventory supplement that it prepares pursuant to CalNAGPRA § 8013." No reference is made here that later in the Policy, at p. 27, a procedure exists for determining State Cultural Affiliation.

Moreover, it fails to describe the NIR process and how it is part of the summary process, if at all. Compounding the confusion, the Policy later states, under the heading “Repatriation and Disposition,” that each campus “shall establish a clear and transparent process for Native American Tribes or Native Hawaiian Organizations to submit a request for Repatriation or Disposition in accordance with federal and state law and this Policy.” (Policy at p. 28.)

The Policy needs a separate primary heading (denoted with its own Roman numeral) to discuss the procedures for repatriation and disposition, including the claims process and issuances of NIRs. The Commission is also concerned that by delegating to each campus the responsibility for creating claims policies with no deadline for doing so will lead to delays and inconsistent processes across campuses, something AB 2836 sought to eliminate. (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1, subd. (a)(8) (“There is a history of inconsistent application of federal and state repatriation laws by some campuses within the University of California system.”).) The Policy needs to provide a claims process consistent across all campuses.

Unreported Holdings

The Policy acknowledges that previously unreported items “may be found in disparate academic units of the UC, e.g., inadvertently included among fauna or other materials.” (Policy at p. 26.) But no procedure is set out requiring campuses to conduct systemic searches of all departments, museums, collections, clinics, and research programs, including “disparate academic units.” (Health & Saf. Code, § 8025 subds. (a)(2)(A) and (D) (UC must adopt systemwide policies for “cultural items while in possession of a University of California campus” and for the “identification” of remains and cultural items.)) All the Policy requires is that each campus “communicate with all relevant faculty, researchers, and staff to raise awareness about the requirements of this Policy and related laws and regulations.” (Policy at p. 26.) The Policy does not explain how each campus can communicate with “all relevant staff” when the repatriation staff required to implement the Policy do not necessarily understand which departments, clinics and research programs may actually have remains and cultural items. And nothing in the Policy expressly requires existing museums and collections to conduct additional searches to locate previously unreported items.

Even the prior Policy issued by the UC in August of 2019 acknowledged this concern by requiring that each campus: 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.” (Aug. 2019 Policy at p. 23.) As the Commission previously commented on this prior Policy, the Policy should provide clear guidance and timeframes to the campuses

for accomplishing this. Not only does this current Policy not address this concern, it eliminates the requirement altogether. This is inconsistent with state and federal law which requires repatriation by all agencies receiving state and/or federal funding having possession and custody of Native American remains and cultural items. (25 U.S.C. § 3001, et seq.; 43 C.F.R. §§ 10.2(3),(i); Health & Saf. Code §§ 8012, subds. (e), (g), 8013, subd. (a), 8025, subds. (a)(2)(A) and (D).

REPATRIATION AND DISPOSITION

Inadequate Claims Process: Improper Delegation to Campuses with No Timeframe for Compliance

The Policy delegates to each campus responsibility for establishing “a clear and transparent process for Native American Tribes or Native Hawaiian Organizations to submit a request for Repatriation or Disposition in accordance with federal and state law and this Policy.” (Policy at p. 28.) This violates AB 2836, which requires the UC to “[a]dopt and implement clear and transparent policies and procedures on the systemwide requirements for submitting claims for the repatriation of Native American remains and cultural items, . . . deemed culturally affiliated but that are not subject to a current repatriation claim, . . .” (Health & Saf. Code, § 8025, subd. (a)(2)(B), emphasis added.) The purpose of this language was to address “a 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 (Legislative Findings), subd. (a)(8).) Delegating responsibility to each campus to develop its own claims process with no timeframes or guidance for doing so not only violates AB 2836, but also will result in inconsistent claims policies across campuses and potential delay by other campuses who may be reluctant to comply. The claims process should be uniform across campuses with clear guidance for implementation.

Inadequate Incorporation of the State Law Claims Process for Federally Culturally Unidentifiable Remains and Cultural Items

The Policy states that “UC campuses must comply with all requirements of CalNAGPRA including those pertaining to claims for State Cultural Affiliation, as well as the requirements of Federal NAGPRA.” (Policy at pp. 29-30.) The Policy needs to better explain that State Cultural Affiliation can be used for repatriation/disposition if a federally recognized tribe sponsors the request, and if no such sponsorship can be arranged, the non-federally recognized tribe may still obtain the remains and items through CUI disposition upon National NAGPRA’s approval. The Policy should explain that this approval process can be time consuming and that tribes should be encouraged to work out other arrangements, if possible, to avoid this delay. (43 C.F.R. § 10.11(c)(2)(ii)(A).)

In conjunction with state cultural affiliation, the Policy should provide guidance to encourage repatriation to non-federally recognized tribes consistent with both NAGPRA and CalNAGRPA. As mentioned at the March 4, 2020 National NAGPRA presentation at UC Berkeley, this can be encouraged through the use of sponsorships or joint requests made by federally and non-federally recognized tribes.

Conspicuously absent from the Policy is any description of the CalNAGPRA claims process, including for filing claims with the Commission, publication on the Commission's Web site, applicable time frames for repatriation, and the dispute process for resolving multiple repatriation claims. (Health & Saf. Code, §§ 8014-8016) The Policy follows only federal law procedure permitting each campus to review disposition requests by non-federally recognized tribes subject to Campus Committee and Chancellor review. (Policy at p. 31.) Nothing precludes compliance with both statutes, unless a direct conflict arises.

The Disposition Process Fails to Comply with Federal Law and Will Cause Unnecessary Delay and/or Failure to Affirmatively Offer to Transfer Control

The Policy provides that the UC will initiate consultation for the disposition of culturally unidentified remains and items: 1) Within 90 days of receiving a tribal request; or, 2) If no request is received before any offer is made prior to transfer control of the remains and items. (Policy at p. 30.) This is inconsistent with the Federal Regulations which do not contemplate a claims process for CUI. Rather, federal law requires that the UC "must offer to transfer control" of these remains and items to a descending priority list of tribes. (43 C.F.R. § 10.11(c)(1)-(2).) Under the Policy, if no request is made, then the disposition process can be delayed indefinitely. No time limit is set for the UC to make the offers required under Section 10.11 absent a tribal request. Moreover, nothing in the Policy requires the UC to notify tribes about the existence of any remaining culturally unidentified items and to inform them about the necessity of filing a request or claim to initiate consultations on every single remain and item. As a result, in some instances, culturally unidentified items in major collections may never occur or may occur in an extremely delayed or haphazard fashion. This is precisely the result the Legislature sought to avoid when it enacted AB 2836.

Under the Policy, within 90 days of receiving a claim, the UC must initiate consultations, but no deadline is set in the Policy for when these consultations must actually occur or be completed. (Policy at pp. 30-31.)

Finally, no deadline is set for determining disposition, which must also be reviewed by the Campus Committee and the Chancellor/designee. (Policy at pp. 31-32.) Under the

Policy, campus initiative for the timely disposition of remains and items will vary, a result the Legislature sought to avoid when it enacted AB 2836.

Care for Remains and Cultural Items

The Policy states that remains and cultural items will be preserved in accordance with 36 C.F.R. § 79.9(b)(3), unless an exception is brought before the Campus Committee, presumably by a campus seeking to be relieved of some or all of its obligations. (Policy at p. 35.) This raises four major concerns. First, the Policy does not set out Section 79.9's seven requirements for protecting these items. Staff should not be expected to ascertain these requirements from outside sources, when the requirements can be laid out in the Policy. Second, the Federal Regulations do not provide for the unbridled exception created by the Policy. Third, no standard is provided for evaluating exceptions to compliance with this Federal Regulation. And fourth, no notice is required to state and federally culturally affiliated tribes at the time such a request is made or after it is granted. (Policy at p. 35.)

Appeals and Complaints

The Appeals Process Fails to Adequately Incorporate the State Law Process for Appeals

The policy follows federal law in providing for appeals and tribal disputes over items. (Policy at pp. 33-34.) But tribes may also utilize CalNAGPRA's process to the extent that no direct conflict between the two processes occurs. (43 C.F.R. § 10.11(c)(2)(ii); Health & Saf. Code, §§ 8015 and 8016.) The Policy needs to explain the CalNAGPRA claims process for posting claims on the Commission's Web site for 30 days, along with the 90-day period for repatriation. (Health & Saf. Code, § 8015, subd. (a).) This deadline is generally consistent with federal NAGPRA. 43 C.F.R. § 10.10(a)(3.)

No Deadlines or Timelines Set

The Policy allows for appeals and complaints but does not set deadlines for filing and completion for these. (Policy at pp. 33-34.) This is significant because (at a minimum) appeals need to be initiated and completed prior to the repatriation/disposition, something the Policy does not address. The Policy should also require the UC to provide notice to the tribes about their appeal rights and applicable deadlines at each stage of the decision-making process. Further, deadlines need to be set for the Systemwide Committee's and chancellor's determinations.

Written Decision

The Policy does not expressly require a written decision by the Systemwide Committee or the President/designee setting forth the factual and legal basis for their decisions. (Policy at pp. 33-34)(See, e.g. Gov. Code, § 11425.50.) A written decision is essential for maintaining fundamental fairness and integrity of the process. (*Johnson v. Housing Authority of City of Oakland* (2019) 38 Cal.App.5th 603, 615, review denied (Oct. 23, 2019).)

Extra-record Evidence

The Policy gives the President/designee the ability to consult with the Systemwide and Campus Committees outside the parties' presence, and does not provide tribes with any opportunity to respond or participate in these communications. (Policy at p. 33) (See, e.g. Gov. Code, § 11430.10; *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90 (Due process requires "the absence of even a probability of outside influence . . .").) This deprives the tribes of the ability to know the nature of such consultations, which may materially affect the President/designee's decision-making process, including the ability to respond to these communications.

Multiple Claims

The Policy does not explain that federally recognized tribes may agree to mediation and dispute resolution by the Commission as provided for under CalNAGPRA. (Policy at p. 34.) (Health & Saf. Code. § 8016, subd. (c).) The Policy also does not explain the CalNAGPRA resolution process that could apply to CUI in the event of disposition subject to Section 10.11. (Policy at p. 34.)

Access

As mentioned above, the Policy requires "reasonable access" without laying out the factors campuses should consider in determining this access, with a presumption favoring liberal access to foster repatriation. (Policy at pp. 35-36.) (See prior Access comments provided above under Inventories.)

Complaints

The Policy permits tribes to submit complaints about access or consultations to the Chancellor/designee only "in advance of any decision or recommendation regarding cultural affiliation, repatriation, or disposition." (Policy at p. 34.) Tribes should be able to raise complaints about access and consultations at any time they occur. The Policy should set a standard for reviewing such complaints, favoring liberal access consistent

with NAGPRA's purpose facilitating repatriation/disposition. Further, timelines need to be created for evaluating complaints to prevent unnecessary delay in the process.

Research and Testing

Nothing touches more fundamentally to tribal sovereignty and respect than invasive testing and research on remains and associated items. The UC should not seek to test unrelated to repatriation and any such requests should only be made by the tribes. No testing should be permitted under the Policy unless all state and federally culturally affiliated tribes expressly consent in writing as to the extent and duration of any permissible testing where no complaints or appeals are pending. In instances where only non-federally recognized tribes are culturally affiliated, then permission must also be obtained from federally recognized tribes that are recognized as aboriginal to the area from which the remains were removed, consistent with federal law.

Ironically, the concerns raised by testing are exemplified by the issues raised by the proposed testing exceptions themselves.

- *Non-Federally Recognized Status*

One circumstance where testing would be allowed by a tribe is where the remains and items are "Culturally Unidentifiable only due to the tribe's status as non-federally recognized" and the non-federally recognized tribe is "known to have a relationship of shared group identity with the particular Human Remains and Associated Funerary Objects." (Policy at p. 36.) The term "Culturally Unidentified" is defined by the Policy as only applying to federal NAGPRA. (See Definitions at p. 5.) This creates a standard impossible for tribes to meet because, under federal NAGPRA, only federally recognized tribes are eligible to participate in the cultural affiliation process. Consequently, a non-federally recognized tribe could never establish that its cultural affiliation was denied only due to its status as non-federally recognized because it is *per se* precluded from participating in the process.

Concomitantly, if the Policy is intended to apply to non-federally recognized tribes that have established State Cultural Affiliation to the remains and items, then the Policy is still problematic. Federal Regulations require that the UC "offer to transfer control" of all culturally unidentified remains, regardless of State Cultural Affiliation. (43 C.F.R. § 10.11(c)(1).) The Federal Regulations provide a descending list of tribes to which the culturally unidentified remains and items must be offered, without regard to State Cultural Affiliation. (43 C.F.R. § 10.11(c)(1)(i)-(ii), (2)(i)(ii).) Put simply, even if a non-federally recognized tribe with State Cultural Affiliation gave written permission to the UC to perform research and testing on remains and cultural items, it would not be effective because the tribe may have no legal right to repatriation under federal

NAGPRA. In such an instance, the UC would also need the written permission of any federally recognized tribes, consistent with NAGPRA.

- *Pending Repatriation*

Another such circumstance identified in the Policy where a tribe may agree to testing is where the remains and items “are pending Repatriation or Disposition.” (Policy at p. 36.) This term is not defined, but could be read to include anytime during the repatriation/disposition process, including inventory, and during appeals and complaints.

- *After Federal Cultural Affiliation (Prior to Repatriation)*

Yet another circumstance identified in the Policy where a tribe may agree to testing is where a tribe grants permission after federal cultural affiliation has determined, regardless of state cultural affiliation (which may include non-federally recognized tribes). (Policy at p. 36.) In many instances, federally recognized tribes can agree to sponsor or enter into agreements with non-federally recognized tribes. In this instance, permission must be granted based upon state and federal cultural affiliation.

- *Federally Recognized Tribes Aboriginal Lands*

Finally, the Policy would allow the UC to obtain permission to test from tribes for culturally unidentified remains under Federal NAGPRA from all federally recognized tribes whose aboriginal lands overlap the location where the remains originate. (Policy at p. 36.) This exception is problematic because it fails to consider state cultural affiliation (which can include non-federally recognized tribes), as well as the ability of these federally recognized tribes to sponsor or enter into agreements with state culturally affiliated non-federally recognized tribes who may have closer ties to the remains.

- *At the Behest of an Affiliated Tribe*

Under the heading, “Care for Loans from Entities Other Than Native American Tribes or Native Hawaiian Organizations,” the Policy permits the UC to retain and test remains for a period not to exceed two years for “loans” when the following occurs involving:

- “A request that UC perform an analysis of the Human Remains of Native American or Native Hawaiian ancestors at the behest of an Affiliated Tribe.”
- “A request that UC perform an analysis of the Human Remains of Native American or Native Hawaiian ancestors to aid the requesting institution in

carrying out its NAGPRA or CalNAGPRA responsibilities. (Note that unless affiliated Tribes have given explicit written permission for testing, in carrying out these duties, the campus may only use minimally invasive procedures and shall not use destructive analysis, including but not limited to DNA analysis.)”

- o “Other research or care approved by or performed in Consultation with the respective Native American Tribe or Native Hawaiian Organization.”

(Policy at p. 38.)

No testing should ever be permitted unless all state and federal culturally affiliated tribes agree in writing as specified above, regardless of whether the remains come from another entity or individual. Further consultation with “respective” tribes is not defined, but must include federal and state culturally affiliated tribes and, when appropriate, federal tribes that are recognized as aboriginal to the area where the remains were found.

CAMPUS IMPLEMENTATION PLANS

Reviewing CUI Determinations

The Policy requires that campuses develop plans for reviewing CUI determinations within 6 months after the Chancellor’s appointment of a Campus Committee, but no later than January 1, 2021. (Policy at p. 39.) While the Commission supports the creation of a deadline, the Policy does not provide adequate systemwide guidance for these plans, and no timeframes for completing the process. In other words, a campus could create a plan that has no deadlines for completing its reevaluation for existing CUI collections, thwarting or delaying the effort. It also permits campuses to have different plans across the system, something that violates AB 2856 requiring systemwide CUI policies. (Health & Saf. Code, § 8025, subd. (a)(2)(D).)

The Policy’s language is ambiguous because it could be read to mean that campuses must only consider (or evaluate without decision) “changes in applicable law” or the addition of newly federally recognized tribes and non-federally recognized tribes under CalNAGPRA without actually determining if cultural affiliation can be determined as required by AB 2836. (Health & Saf. Code, § 8025, subd. (a)(2)(D).)

Furthermore, nothing requires a campus to systematically reevaluate all of its prior-existing CUI collections in an effort to establish state and federal cultural affiliation and to otherwise affirmatively offer the remains and items to tribes as required under AB 2836 and the Federal Regulations. (43 C.F.R. § 10.11(c); Health & Saf. Code, § 8025, subd. (a)(2)(D).)) It also gives priority to federally recognized tribes to request

reevaluations, without providing a mechanism for non-federally recognized tribes to associate with federally recognized tribes to also claim priority. It also provides this priority without requiring the campus to provide any notice to these tribes about its collections or information about their discovery. Campuses need to conduct systemic reevaluations consistent with the Policy for inventorying and culturally identifying pre-existing CUI collections, as well as adhere to the process for repatriation/disposition for all items where cultural affiliation may now be determined.

The Process (or lack thereof) for Repatriating Unclaimed Items to Culturally Affiliated Tribes Fails to Adhere to State Law

Federal NAGPRA requires the repatriation of culturally affiliated Native American remains and cultural items. (43 C.F.R. § 10.6(a).) Specifically, federal NAGPRA gives custody of the remains and associated items subject to a priority list between lineal descendants and federally recognized culturally affiliated tribes. Remains and items can become unclaimed if no lineal descendent or tribe submits a claim within one year of publication. (43 C.F.R. § 10.2(h)(2)(i).) For such remains and items, AB 2836 requires the UC to adopt policies “on the systemwide requirements for submitting claims” for repatriation for culturally affiliated items for which no claims were made. (Health & Saf. Code, § 8025, subd. (a)(2)(B).)

Instead, the Policy provides that for culturally affiliated items where no claim was filed, that campuses must develop plans to notify (an undefined term under the Policy) “tribal officials” (another undefined term under the Policy), to “invite Repatriation requests (e.g., of no less than every year), with instructions on how to submit such requests.” (Policy at p. 39.) The term “notify” is not defined, but any notice under the Policy should include copies of the summaries to the culturally affiliated tribes so they understand the specific remains and items where the UC has determined their cultural affiliation.

The Policy requires campuses develop plans “to invite” claims, but does not require the campus to repatriate the remains and items in a timely manner. Further, despite the fact that this Policy is required to be “systemwide,” it permits each campus to fashion its own plan leading to inconsistent systemwide plans with no guidance for creating such plans. Finally, the Policy does not provide timelines specifying when campuses must begin providing these notices under their plans.

Better Definition Needed for Outreach for Proactive Consultation

The Policy requires campuses to create “[a]n outreach program that promotes proactive Consultation with Native American Tribal Representatives regarding the Affiliation, Repatriation, and Disposition of the ancestral Human Remains and Cultural

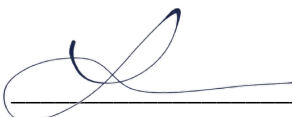
Items, including a reasonable timeline for such activities” (Policy at p. 39.) While the Commission applauds efforts to promote consultation, the Policy does not explain how this is different from the campuses existing obligation to engage in consultation. Under state and federal law, campuses already have an obligation to consult with tribes that are likely to be culturally affiliated with the remains and associated items. (43 C.F.R. § 10.5(a) and (b); Health & Saf. Code, § 8013, subd. (a).) In order to be meaningful, the Policy must explain what outreach programs promoting proactive consultation means and how this differs from campuses’ existing legal obligations to initiate consultations. As mentioned during the March 4, 2020 National NAGPRA presentation at UC Berkeley, proactive outreach can include attending inter-tribal meetings and conferences, frequent emails and calls, and public meetings.

The Policy requires regularly scheduled meetings with tribes “to discuss Repatriation/Disposition strategies” subject to “UC and tribal resources.” This provides campuses reluctant to repatriate an easy way to avoid such meetings by underfunding this effort and it puts a financial burden on tribes who were not responsible for disinterring the remains and have no concomitant obligation to repatriate. If repatriation is a UC priority, it can provide the minimal resources to provide meeting rooms or to hold meetings at tribal locations.

CONCLUSION

As currently drafted, the Policy will still result in fragmented processes across campuses, often in conflict with state and federal law, with campuses pursuing varied reevaluation plans, some more vigorously than others. The Policy continues to cause potential harm by codifying policies and procedures that conflict with state and federal law in critical areas including: consultations, confidentiality, policy structure, campus delegations, inventory process, the reevaluation of culturally unidentifiable remains and items, the claims process for previously unclaimed items, the processing of repatriation claims and dispute resolution, the repatriation/disposition processes, conflicts of interest, and the creation of systemwide and campus committees. Moving forward, the Commission remains committed to assisting the UC in resolving these concerns and in crafting an effective UC repatriation policy. The Commission appreciates the UC’s willingness to improve shaping the Policy, companion documents, and implementation guidance in collaboration with the Commission and California Native American tribes.

Sincerely,



Laura Miranda

Chairperson