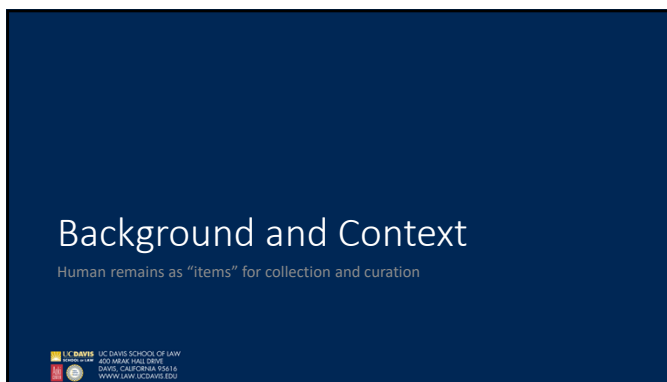




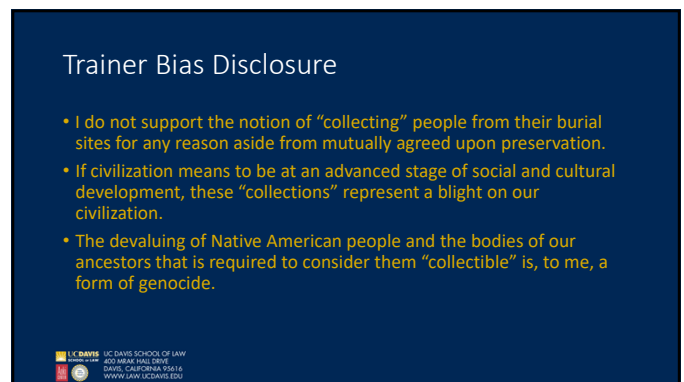
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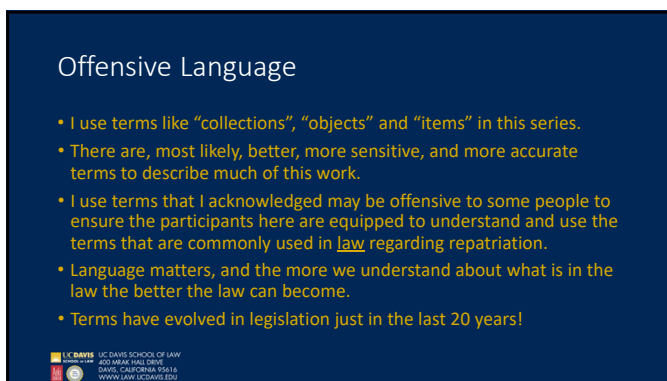
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5



6

## From Burials to “Collections”

- The government encouraged excavations and looting graves of Native Americans at first in the name of science and historic preservation.
- It gained public acceptance.
- Monetary and trade markets evolved, and private individuals and public and private institutions gained pride for amassing “collections”.
- Sales, trades and loans spread burial contents around the country and around the world.
- We aren’t the only ones...international indigenous people acknowledgment.

7

## Genocidal Myths Justify Collecting

- Race Science: now debunked pseudoscience hypothesis that races exist on a hierarchy with the white race being superior.
- Popularly includes Phrenology, the study of skull size to determine intelligence.
- Historic Preservation: The vanishing Indian myth
- Myth that all Native Americans would be extinct and as much “data” as possible needed to be collected to preserve their “historical existence”
- Invisible minority: Reducing burials to sellable property is an act of genocide

8

## Mismanagement of Collections – UC Example

- Before the implementation of NAGPRA in 1990, UC campuses lacked adequate controls and oversight related to access to their museum collections of Native American remains and artifacts.
- From the 1950s through the 1980s the honor system was used for students and professors who wanted to borrow from campus museums for research.
- Information from the California State Auditor Report June 2020

9

## Lost and Stolen Items – UC Example

- Individuals did not always return what they borrowed to the collection and in some cases faculty and graduate students took remains or artifacts with them after leaving the university.
- There are also noted instances of loaning remains or artifacts to institutions nationally and overseas in the 1920s through the 1960s, but not always maintain records of these transfers.
- Information from the California State Auditor Report June 2020

10

## What is NAGPRA and CalNAGPRA?

- The federal Native American Graves Protection and Repatriation Act (NAGPRA), was enacted in 1990, and its California counterpart (CalNAGPRA), was enacted in 2001.
- These laws establish requirements for the protection of Native American graves and the treatment and return of Native American human remains and cultural items from the collections of government agencies and museums.
- NAGPRA and CalNAGPRA prescribe a process for entities with these collections to repatriate, or return, these remains and cultural items to tribes that have a traceable relationship to them.

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## Smithsonian Institution – Washington D.C.

- The Smithsonian Institution collections are large and diverse
- Focusing on collections in California today but be aware that California tribes have been/are represented in these collections
- The Smithsonian Institution collections are covered by a separate law
- National Museum of the American Indian Act (NMAIA), 20 U.S.C. §80q (Public Law 101–185), as amended by the NMAIA Amendment of 1996 (Public Law 104–278).
- Website with process and guides for repatriation: <https://americanindian.si.edu/explore/repatriation>

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## Repatriation Defined

- Commonly: to restore or return someone or something to its country of origin
- In the context of human remains and cultural items in collections: to return the human remains or cultural items to lineal descendant or California Indian tribe affiliated with the state aboriginal territory where the remains were removed from.

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## What is subject to repatriation?

- Human Remains: Physical remains, including bones, of people of Native American ancestry.
- Cultural items:
  - Funerary object: Objects placed with or near remains as part of a death rite or ceremony.
  - Sacred object: Objects used for ceremonial purposes.
  - Objects of cultural patrimony: Objects that have ongoing historical, traditional or cultural importance to a tribe.

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## Repatriation Process Key Actions

- Affiliation: Identifying remains or artifacts as belonging to a tribe or tribes.
- Repatriation: Returning legal control or ownership of remains or artifacts to the affiliated tribe.
- Disposition: Generally, returning possession or physical custody of remains or artifacts to a tribe claiming ownership, or another mutually agreed upon course of action. \*
- \* Tribes may not have the resources or the desire to take physical possession of burial contents and may wish to negotiate another disposition

15

## Ownership and Control of Burial Items

- Under current law...
- Relatives and tribes "own" Native American burial items
- This applies to all Native American burial items ever excavated
- This applies to all lands in the United States
- Therefore, (again), if you have it, or you find it, you need to report it and give it back to the individual or group it belongs to, unless an agreement is made otherwise.
- Keeping Native American burial items, you do not own, is theft, a violation of Federal and California policy, and a crime.

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## Right of Possession – National Standard

- (NAGPRA, 25 U.S.C. § 3001(13))
- Possession is the physical custody
- "Right of possession" means possession obtained with the voluntary consent of an individual or group that had authority of alienation.
- Applies to all burial items, from any time, found anywhere.
- Meaning, descendants and tribes have the "right of possession" unless they voluntarily consent to "alienate", relinquish or give away that right to another entity.

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## Possession, Control, Ownership – CA Codes

- (Health and Saf. Code, § 8012, subds. (f) and (j)).
- Possession (from the perspective of a museum) means having physical custody of Native American human remains and cultural items.
- Control means having legal control of the items regardless of physical custody of the items.
- One museum may have "control" of an item but another museum may have "possession" of that item if it was borrowed or loaned.

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## Federal Repatriation Policy

- (NAGPRA, 25 U.S.C. § 3005)
- Subsection (a): The language throughout this section states that museums receiving repatriation requests for remains and cultural items “shall expeditiously return” such remains and cultural items.
- Subsection (c): This subsection makes it clear that there is a presumption that evidence submitted by relatives and tribes showing the museum does not have the right of possession proves this claim and shifts the burden to the Museum to show they have the right of possession.

19

## California Repatriation Policy

- (Pub. Resources Code, § 5097.991)
- Enacted in 1991 by AB 12
- Added a section to the CA Public Resources Code (§ 5097.991)
- “It is the policy of the state that Native American remains and associated grave artifacts shall be repatriated.”
- This policy statement remains in the law today, unamended

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## Barriers to Repatriation

Competing interests between museums and tribes

21

## Competing Interests

- There are, in some instances competing interests regarding repatriation.
- Museums want to retain their collections.
- Tribes want their ancestors and cultural items repatriated.
- Historically museums have had an unfair advantage in that they have access to their entire collection and get to make determinations and classifications about the collection contents resulting in some contents being excluded from the repatriation process.

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## Barriers to Repatriation – Affiliation

- The interpretation of evidence standards required to prove cultural affiliation have been a longstanding barrier to repatriation.
- The time and resources that are required to demonstrate what is needed for a successful claim is not available to all relatives and tribes seeking repatriation.
- As an example: some “museums” have required evidence linking each human bone to a specific grave that was part of a specific excavation.
- For some museums, it has not been enough to show that the remains in question are Native American and were excavated within a tribe’s known and undisputed aboriginal or traditional territory.

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## Bonnichsen v. U.S. (Kennewick Man Case)

- Ninth Circuit Court of Appeals case from 2004
- Court considered who should have “custody” of 9,000 year-old human remains
- Scientists wanted the right to study the remains and argued they were not tied to a Native American group
- Local tribes wanted to rebury what they believed to be their ancestor
- Court found the tribes could not prove the remains were part of a contemporary Native American tribe.

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## Barriers to Repatriation – Classification of Objects

- Only certain objects are considered “cultural items” subject to repatriation.
- It is possible some museums have intentionally or unintentionally classified items on their own determinations, to be not cultural items when actually, according to the tribe, they are cultural items and should be repatriated.
- If these items do not show up in the inventory or summary of a collection, a tribe would never even know to question these determinations.

25

## Major Changes in CalNAGPRA

California State Audit Report and AB 275 Updates

26

## CalNAGPRA

- Enacted in 2001 by AB 978
- Added Sections to the CA Health and Safety Code (§ 8010-8021, 8024-8030)
- California Native American Graves Protection and Repatriation act of 2001 (Cal NAGPRA)
- Created the Repatriation Oversight Committee (§ 8025)

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## U.C. Repatriation Mandates Added

- CalNAGPRA amended by AB 2836 in 2018
- Amended a section of the CA Health and Safety Code (§ 8014) and added several sections to the CA Health and Safety Code (§ 8025 – 8028.5)
- Amended a section of the Public Resources Code (§ 5097.94)
- Requires the University of California (UC) system to adopt a systemwide and campus wide policy and process for repatriation of cultural resources.
- Focuses on items labeled as culturally unidentifiable and requires increased tribal consultation

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## Strengthening Repatriation for Tribes (Again)

- CalNAGPRA amended by AB 275 in 2020
- Added a section to the CA Government Code (§ 8318)
- Repealed and added sections to the CA Health and Safety Code (§§ 8011 – 8017, 8025, 8026)
- Redefines “State Agency” in the Government Code to specifically include the University of California and requires state agency liaisons for consultation with tribes
- Modifies almost all sections of Cal NAGPRA to improve repatriation process for tribes
- Targets the UC Regents for repatriation reform systemwide

29

## California State Auditor Report June 2020

- Title: Native American Graves Protection and Repatriation Act: The University of California Is Not Adequately Overseeing Its Return of Native American Remains and Artifacts
- <https://www.auditor.ca.gov/reports/2019-047/auditresults.html>
- Reviewed practices and inventory status at three campuses:
  - University of California Berkeley (UC Berkeley)
  - University of California (UC Davis), and
  - University of California Los Angeles (UCLA)

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## Summary of Audit – Inconsistent Approaches

- The Office of the President has provided minimal guidance for implementing NAGPRA and CalNAGPRA, which has allowed inconsistencies to persist in the approaches the campuses use when determining whether to return remains and artifacts.
- The campuses have two processes for returning remains and artifacts to tribes:
  - repatriation, which a campus uses when it is able to affiliate remains or artifacts to a specific federally recognized tribe, and
  - disposition, which a campus uses when it is unable to affiliate remains or artifacts with a specific federally recognized tribe.

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## Summary of Audit – Evidence

- If a tribe submits an affiliation claim for remains or artifacts, university policy requires that the campus work with that tribe when evaluating evidence to determine affiliation.
- However, the three campuses visited used varying approaches when evaluating available evidence to determine whether remains or artifacts are affiliated.

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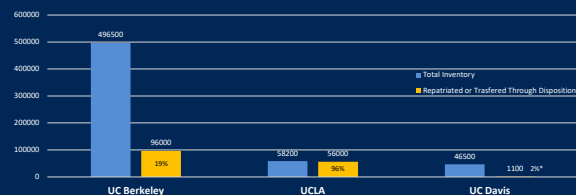
## Summary of Audit – Consultation & Oversight

- The three campuses also have different interpretations of the level of necessary consultation with tribes before completing dispositions.
- Campus committees that are responsible for approving the campuses' repatriation and disposition decisions have exercised only limited oversight of these decisions.

33

## UC Campuses Audit Results\*

Source: Analysis of campuses' inventory data as of December 2019



\* At the time of the audit UC Davis was processing a 2020 claim for one archeological site containing roughly 40,500 items. Once this claim is completed, UC Davis will have repatriated approximately 89% of its NAGPRA inventory.

34

## AB 275 – Cal NAGPRA Update: Big Message

- This bill was a message to all institutions with "collections" – No more excuses, it is time to comply with law and policy and repatriate.
- Bill was introduced in 2019 but was amended significantly 2 weeks after the audit was published.
- Much of what is in AB 275 reflects recommendations made in the California State Auditor Report June 2020.
- Let us review some of the most significant changes to CalNAGPRA
- Note: All of the AB 275 changes are reflected throughout this training series and the codes cited are up to date as of the date of this training.

35

## Definitions Updates Generally

- (Health & Saf. Code, § 8012)
- NAGPRA Definitions still apply unless a term is specifically defined in Section 8012.
- All definitions were re-ordered to be in alphabetical order, you may need to update your notes of what letter (ie: (c)) a term is now
- The definitions reviewed here are the ones with a significant change
- Otherwise, definitions will be reviewed as they are relevant to a process being discussed in the unit

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## Definitions – Tribes & Consultation

- (Health & Saf. Code, § 8012)
- (c) “California Indian Tribe” this was clarified and simplified:
  - Federally Recognized Tribes, and
  - California Tribes on the NAHC list (see Gov. Code, § 65352.3, and Health & Saf. Code § 8013)
- (e) “Consultation” is new to CalNAGPRA, it matches language in Government Code Section 65352.4 now

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## Definitions – Cultural Items and Museums

- (Health & Saf. Code, § 8012)
- (g) “Cultural items” clarifies that these items are subject to the definition of “reasonable”, which is new and explicitly states that an item is not precluded from being a cultural item solely because of age
- (i) “Museum” was clarified as to the definition of “state funds” which is what qualifies anyone or thing as a “museum” for CalNAGPRA

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## Definitions – Evidence Standards

- (Health & Saf. Code, § 8012)
- (k) “Preponderance of the evidence” the term “tribal traditional knowledge” was added to be enough to meet this standard,
  - This was once critical as the preponderance of the evidence standard was used in determining “state cultural affiliation”,
  - After AB 275, the preponderance of the evidence standard was removed and is not used anywhere else in CalNAGPRA, except in this definition.
- (l) “Reasonable” is a new term and is still used in the “state cultural affiliation” definition

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## Definitions – Affiliation

- (Health & Saf. Code, § 8012, subd. (n))
- “State cultural affiliation” ... often used as a barrier to granting repatriation claims, this language was REVISED with a purpose
- The list of relevant evidence is unchanged except “tribal traditional knowledge” has been added, and
- The standard is now to establish cultural affiliation with one or more of the types of evidence on the list
- Pre-AB 275, needed to show cultural affiliation based on a “preponderance of the evidence” incorporating ALL the possible evidence submitted on the list and in practice tribal traditional knowledge was often discredited as not “expert opinion”

40

## “State cultural affiliation” – Before and After

### Before AB 275 (OLD)

“State cultural affiliation” means that there is a relationship of shared group identity that can reasonably be traced historically or prehistorically between members of a present-day California Indian tribe, as defined in subdivision (i), and an identifiable earlier tribe or group.

Cultural affiliation is established when the preponderance of the evidence, based on geography, kinship, biology, archaeology, linguistics, folklore, oral tradition, historical evidence, or other information or expert opinion, reasonably leads to such a conclusion.

### After AB 275 (NEW)

“State cultural affiliation” means that there is a reasonable relationship of shared group identity that can reasonably be traced historically or precontact between members of a present-day California Indian tribe and an identifiable earlier tribe or group.

Cultural affiliation shall be established based on one or more of the following: (1) Geography, (2) Kinship, (3) Biology, (4) Archaeology, (5) Linguistics, (6) Folklore, (7) Oral tradition, (8) Historical evidence, (9) Tribal traditional knowledge, (10) Other information or expert opinion that reasonably leads to that conclusion.

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## Definitions – Inventory and Summary

- (Health & Saf. Code, § 8012, subds. (h) & (o))
- “Inventory” and “Summary” were both updated to require a new inventory and summary and clarify that any inventories or summaries prepared for NAGPRA could be included but not a substitute for CalNAGPRA-required inventories and summaries.

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## New Inventory and Summary - Requirements

- (Health & Saf. Code, § 8013, subds. (b) & (c))
- Inventory lists must now include human remains and cultural items not clearly culturally affiliated but determined by reasonable belief to have been removed from one or more tribes' aboriginal territory.
- Summary now must include ALL museum collections of Native American ethnographic or archaeological objects, "Because it may not be clear whether Native American objects are cultural items"

43

## NAHC California Indian Tribe List

- (Health & Saf. Code, § 8013, subd. (a))
- This is new language clarifying the NAHC "list" that is used for repatriation consultation and notice purposes.
- The list should include all California tribes and their respective aboriginal territories.
- On December 31, 2020, the NAHC notified, in writing, all agencies, museums, and California tribes that the NAHC maintains the list
- The list is for repatriation only, meaning it is not "state recognition" of non-federally recognized tribes for other purposes.

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## Claims/Requests and Repatriation

- Claims/Request Process: A section was added for lineal descendants to make claims. (Health & Saf. Code, § 8014, subds. (a))
- Repatriation Presumption: The new language is clear that there is a presumption that repatriation requests shall be granted (Health & Saf. Code, § 8016, subds. (a) – (b))

45

## Disputes and Mediation

- Disputes: Adds some clarifying language for the process for mediation of disputes. (Health & Saf. Code, § 8016, subd. (d))
- Mediation procedures: New language requires the NAHC to adopt mediation procedures. (Health & Saf. Code, § 8016, subd. (d) (8))

46

## Repatriation Oversight Commission - Deleted

- Article 3, Health and Safety Code sections 8024 – 8028.5 was previously about the Repatriation Oversight Commission (ROC)
- The ROC duties are now with the NAHC so this language was all deleted and replaced with new Article 3 heading and language
- "Article 3. Conditions on the Use of State Funds for the Handling of Maintenance of Native American Human Remains and Cultural Items [8024 – 8028.5]"
- These sections of the Health and Safety Code now describe all the repatriation requirements the U.C. Regents must follow in order to use state funds for the maintenance of collections containing human remains and cultural items

47

## UC Regents Repatriation Requirements

- Health and Safety Code Section 8028 was implemented in 2019 and required an Audit of the UC System's Compliance with NAGPRA and CalNAGPRA
- The audit report, as previously discussed, showed inconsistency with processing repatriation claims and requests
- AB 275 dedicated this section of CalNAGPRA to the UC Regents and the use of state funds
- This is a targeted legislative message that repatriation delays will no longer be tolerated by some of the holders of the largest collections

48



## UC Regents Policies and Procedures

- (Health & Saf. Code, § 8025)
- Requires UC Regents to adopt and implement policies for:
  - ✓ Treatment of Native American human remains and cultural items
  - ✓ Processing Repatriation claims
  - ✓ Deaccession of collections containing Native American human remains and cultural items including "culturally unidentifiable" items
- This must all be done in consultation with tribes

49

## U.C. NAGPRA Committee

- (Health & Saf. Code, § 8026)
- Requires UC Regents to establish a systemwide NAGPRA Committee and one at each campus.
- Purpose to oversee all repatriation claims, disputes and violations of law.
- Membership must include a specific number of representatives from tribes and the U.C. system.
- Members are nominated by the NAHC and appointed by the U.C. Regents.

50

## A New Era for Repatriation Efforts

- The law makes clear that the California policy to repatriate human remains and cultural items is valid and enforceable
- All museums and agencies should be acting as partners to assist tribes and tribal people in their repatriation efforts
- Use traditional knowledge to provide evidence of cultural affiliation
- If possible, work together with neighboring tribal communities to avoid disputes or the possibility of disputes
- Hopefully, lawyers and anthropologists will no longer be needed for tribes to make a successful repatriation claim
- The next unit will cover the repatriation process in detail

51

## NAHC Duties

Repatriation Duties beyond Repatriation Oversight

52

## Powers and Duties - Repatriation

- (Pub. Resources Code, § 5097.94, subd. (n))
- To assume the powers and duties of the former Repatriation Oversight Commission (ROC) – Order repatriations, mediate disputes, issue fines
  - Note: ROC Created in 2001, never funded or functioned, decommissioned, duties transferred to NAHC by AB 2836 in 2018.
  - Covered more in next unit

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## NAHC Repatriation Oversight Duties

- (Pub. Resources Code, § 5097.94, subd. (n)(1))
- NAHC shall meet quarterly or more to perform these duties:
  - A. Order the repatriation of human remains and cultural items
  - B. Mediate disputes relating to the disposition of human remains and cultural items
  - C. Maintain a website for communication among tribes and museums and agencies
  - D. Upon request make decisions regarding financial assistance for specific repatriation activities

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## NAHC Repatriation Oversight Duties (2/3)

- (Pub. Resources Code, § 5097.94, subd. (n)(1))
- E. Recommend to the legislation the dedication of state lands for the purposes of reinterment of human remains and cultural items
- F. Prepare and submit to the legislature an annual report of repatriation activities including:
  - NAHC Activities
  - Disbursement of funds
  - Dispute resolutions

55

## NAHC Repatriation Oversight Duties (3/3)

- (Pub. Resources Code, § 5097.94, subd. (n)(1))
- G. Refer any non-compliance with federal NAGPRA to the U.S. Attorney General and the Secretary of the Interior
- H. Impose civil penalties against any museum or agency determined to have violated the act (Health & Saf. Code § 8029).
- I. Establish rules and regulations for the administration of CalNAGPRA

56

## NAHC List of Tribes

- (Health & Saf. Code, § 8013)
- Maintain a list of Federally recognized and Non-Federally Recognized Native American Tribes in California and their corresponding aboriginal territories
- This list is solely for the purpose of the repatriation of Native American tribal human remains and cultural items.

57

## Liaison to Feds and State

- (Pub. Resources Code, § 5097.94, subd. (h))
- Request and use service of all federal, state, local and regional agencies including for the purposes of carrying out the California Native American Graves Protection and Repatriation Act of 2001.

58

## UC Regents' Policies

- (Pub. Resources Code, § 5097.94, subd. (o))
- Review and provide comment and guidance on all the Regents of the University of California NAGPRA policies and procedures proposed through section 8025 of Health and Safety Code (CalNAGPRA)

59