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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

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### Museum Defined

- (NAGPRA, 25 U.S.C. § 3001(8); Health & Saf. Code, § 8012, subs. (a) & (i))
- **Museum (federal NAGPRA):** is any state or federal agency that receives federal funds\*
- **Museum (CalNAGPRA):** is any agency, museum, person, or entity, including higher education, that receives state funds or are part of a larger entity that receives state funds.
- **Agency (CalNAGPRA):** is a division, department, bureau, commission, board, council, city, county, city and county, district, or other political subdivision of the state.
- \*The Smithsonian Institution has a separate law regarding repatriation: National Museum of the American Indian Act (NMAIA)

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### 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

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### U.C. NAGPRA Committee

- (Health & Saf. Code, § 8026)
- Requires UC Regents to establish a systemwide Native American Graves Protection and Repatriation Implementation Committee (NAGPRA Committee) and one at each campus.
- Purpose to oversee all repatriation claims, disputes and violations of law.
- All NAGPRA Claims and Disputes go to the campus NAGPRA Committee for determination

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## Disputes and Mediation

The process for resolving disagreements in the repatriation claim process

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## Mediation to Resolve Disputes

- The Dispute resolution process in CalNAGPRA focuses on mediation of disputes
- Mediation is a process using a neutral third party to help the disputing parties reach a resolution
- Mediation is non-binding but the record of the mediation, including mediator's recommendations, reports or decisions, is used when appealing to another party or court

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## Mediation Procedures

- (Health & Saf. Code, § 8016, subd. (d)(8); Pub. Resources Code, § 5097.94, subds. (n)(1)(B))
- The NAHC will develop and adopt mediation procedures including:
  - Standards for experience and qualification of mediators
  - Establish mediation procedures for submission of documents and serving documents on other parties
  - Potentially utilizing restorative justice practices
  - What county superior court appeals will be filed in

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## Types of Disputes

- (Health & Saf. Code, § 8016, subd. (d))
- Multiple repatriation claims
- Museum objection to a claim
- Contents of an inventory or summary
- The repatriation process

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## Multiple Repatriation Claims

- (Health & Saf. Code, § 8016, subds. (b) & (d))
- If there are claims by more than one tribe or person for the same human remains or cultural items the claim the dispute must be resolved before the repatriation can be completed.
- The museum will keep physical possession until the dispute is resolved
- The dispute process will be covered more fully in Unit 8

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## Museum Objections o Repatriation

- (Health & Saf. Code, § 8016, subd. (c))
- The museum has 30 days after the claim is made to object to the request for repatriation based on a good faith belief that either:
  - The human remains and cultural items are not affiliated with the tribe or person making the claim (and therefore are affiliated with another tribe), or
  - The human remains or cultural items are not subject to repatriation

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## Inventory & Summary Disputes

- (Health & Saf. Code, § 8013, subd. (j) (1)-(2))
- At the end of the 30 day review period for a preliminary inventory or summary, the NAHC notes tribal concurrence, disagreement or non-response
- If a consulting tribe disagrees with the preliminary document, the museum can make revisions or the NAHC can offer to initiate the dispute resolution process.

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## Other Repatriation Process Disputes

- (Health & Saf. Code, § 8016, subd. (d))
- A party can dispute that the repatriating process was executed properly, examples include
  - Inadequate Tribal Consultation
  - Inaccurate cultural affiliation determination
  - Failure to provide proper notification of a claim or a repatriation
  - Failure to provide additional documents if requested

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## U.C. NAGPRA Committee

- (Health & Saf. Code, § 8026, subd. (b)(4))
- Claims for violations of the U.C. NAGPRA systemwide policies should be made to the Campus NAGPRA Committee
- If the tribe disagrees with the Campus NAGPRA Committee Decision, then it can request mediation through the NAHC process

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## NAHC Mediation Process Summary

- (Health & Saf. Code, § 8016, subd. (d))
1. The disputing parties submit documentation describing the nature of the dispute to the NAHC (process will be in the NAHC Mediation Procedures)
  2. The Parties meet within 30 days to attempt to resolve the dispute
  3. If parties can not resolve the dispute, the NAHC or a certified mediator shall mediate the dispute
  4. Each party shall submit complaints and supporting evidence to the NAHC or mediator and the other party

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## NAHC Mediation Process Summary

- (Health & Saf. Code, § 8016, subd. (d))
5. Each party will have 20 days to respond to the complaint
  6. All responses are submitted to the NAHC or mediator and the other party
  7. Within 20 days of the mailing of all responses the NAHC or mediator shall hold a mediation session
  8. If the parties can not reach a resolution the mediator shall issue a decision within 7 days of the mediation session

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## Dispute Resolution Standards

- (Health & Saf. Code, § 8016, subd. (d)(6))
- More weight shall be given to tribal traditional knowledge, oral histories, documentation, and testimonies over other relevant categories of evidence

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## NAHC Final Administrative Remedy

- (Health & Saf. Code, § 8016, subd. (d)(7))
- If the parties are unable to resolve a dispute through mediation the NAHC shall issue a determination
- The determination shall be considered a final administrative remedy or final administrative decision

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## Closed Mediation Sessions

- (Health & Saf. Code, § 8020)
- The NAHC may close part of a mediation to the public if it is required to protect the location of a burial site or other tribal cultural resources

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## Appeals

Challenges to official decisions in the repatriation process

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## Appeal of NAHC Decision

- (Health & Saf. Code, § 8016, subd. (d)(7))
- The NAHC determination can be reviewed by a Superior Court of California
- This will be treated as an administrative review of the record of the mediation proceedings and previous decisions
- Petitions for review must be filed within 30 days of the NAHC decision

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## Automatic Stay

- (Health & Saf. Code, § 8021))
- Filing an appeal automatically stays an order of the NACH or mediator
- That means that the order can not be acted on until the conclusion of the appeal or by an order from the court

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## Dispositions and Transfers

Agreements and alternatives to physical transfer

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## Repatriation Agreements

- (Health & Saf. Code, § 8015, subd. (b))
- At the end of a repatriation process, sometimes after a mediation, if there is an agreement to repatriate the items claimed, the parties must agree to the terms of the repatriation
- A copy of this agreement should be sent to the NAHC for their records
- The terms of all Repatriation Agreements are enforceable by the NAHC

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## Repatriation Agreements Terms

- The items included in the repatriation should be listed and recorded
- The terms for physical possession should be addressed and when and how transfer will happen
- If a tribe or person does not want to take physical possession at the time of legal transfer of custody a disposition plan should be including in the Repatriation Agreement

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## Transfer of custody without taking physical possession

- The “right of possession” is not the same as physical possession
- For various reasons a tribe may want to reclaim legal custody (right of possession) and ownership of human remains or cultural items but may not want transfer physical possession
- There are options the tribe and the museum can consider as part of the Repatriation Agreement and disposition plan
- A tribe’s reasons for this do not need to be disclosed in order to discuss alternatives to physical transfer
- Be aware, it may not be possible to return these remains and burial items to where they were taken from

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## Disposition and Transfer Alternatives

1. The Tribe loans the human remains or cultural items back to the museum for a certain period of time with specific curation requirements
2. The Tribe requests assistance with reburial of the human remains or cultural items on non-tribal land
3. The Tribe requests transfer to another museum or agency with the intent of uniting a larger collection of human remains or cultural items that were at one time buried together but has been distributed among many agencies
4. The tribe wants the items destroyed according to specific requirements

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## Relinquishment of Control

- (Health & Saf. Code, § 8019; NAGPRA, 25 U.S.C. § 3002 (e))
- Any tribe can under CalNAGPRA or NAGPRA relinquish control over any human remains or control or title to any cultural item
- Trainor recommends this is done in writing and recorded with the museum and the NAHC

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## Penalties and Enforcement

For failing to comply with CalNAGPRA and NAGPRA

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## Good Faith

- (Health & Saf. Code, § 8018; NAGPRA, 25 U.S.C. § 3002 (f))
- Any museum or agency that repatriates human remains or cultural items in good faith is not liable for claims by an aggrieved party.

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## Civil Penalty – Federal

- (NAGPRA, 25 U.S.C. § 3007)
- The Secretary of the interior can assess a civil penalty (money damages) for failure to comply with NAGPRA provisions
- Each violation is considered a separate offense
- For more details see the federal NAGPRA Regulations (43 CFR, § 10.12)

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## Civil Penalty – NAHC

- (Health & Saf. Code, § 8029)
- NAHC will conduct open/public hearings on alleged violations of CalNAGPRA
- Failure to comply with CalNAGPRA provisions, including inventory and summary requirements, claims requirements and repatriation requirements can result in a penalty of up to \$20,000 (maximum) for each violation

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## Repatriation Agreements - Enforcement

- (Health & Saf. Code, § 8015, subd. (b))
- The terms of all Repatriation Agreements are enforceable by the NAHC

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