

NATIVE AMERICAN HERITAGE COMMISSION

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January 8, 2025

Hon. Mildred Garcia
Chancellor
California State University
Office of the Chancellor

Submitted via Electronic and USPS Mail

Re: Review of California State University Working Draft Policy for Tribal Consultation Purposes – Systemwide NAGPRA Policy

Dear Chancellor Garcia,

The Native American Heritage Commission (Commission) appreciates the opportunity to comment on the California State University (CSU) July 2024 Working Draft Policy for Tribal Consultation Purposes (Policy), as required under the California Health and Safety Code.¹ The Commission understands that this draft version is a starting point and urges the CSU to integrate the substantive comments received from both California Native American Tribes and the Commission during this and any subsequent tribal consultation period. The continued transparent dialogue between CSU and Commission leadership has positively impacted the development of this policy. However, there is still significant work to be done, for this reason, the Commission urges the CSU to continue to uphold its duty to conduct in good faith meaningful tribal consultation by considering, at a minimum, two additional tribal consultation periods of no less than 90 days.

I. STATE AUDITOR FINDINGS

On June 29, 2023, the California State Auditor (Auditor) published an audit of the CSU's compliance with both the Native American Graves Protection and Repatriation Act (NAGPRA) and the California Native American Graves Protection and Repatriation Act (CalNAGPRA).² The Auditor surveyed all 23 CSU campuses, including on-site reviews at Chico State University, Sacramento State University, San Diego State University, and San Jose State University. The audit concluded "that although the CSU's Office of the Chancellor (Chancellor's Office) has taken some limited steps recently to support the campuses' repatriation efforts, it must take additional action to ensure that campuses

¹ Health and Safety Code, section 8028.7, subdivision (a)(3).

² State Auditor Report, 2022-107, June 29, 2023;

<https://information.auditor.ca.gov/reports/202207/index.html#section3>.



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prioritize complying with NAGPRA and CalNAGPRA.”³ The Auditor credits the failings of the CSU Campuses in part because they “lack the policies, funding, and staffing necessary to follow the law and repatriate their collections.”⁴ The audit report made clear that the Chancellor’s Office’s lack of guidance in the form of a systemwide policy contributed greatly to campuses’ failure to comply with NAGPRA and CalNAGPRA.

II. ASSEMBLY BILL 389

On October 10, 2023, Governor Newsom signed Assembly Bill Number 389 to “require the California State University to comply with various requirements regarding the handling, maintenance, and repatriation of Native American human remains and cultural items under the California Native American Graves Protection and Repatriation Act of 2001, including adopting and implementing systemwide policies that, among other things, prohibit the use of any Native American human remains or cultural items for purposes of teaching or research at the California State University while in the possession of a California State University campus or museum.”⁵ All policies and procedures developed under the law are to be done in consultation with California Indian Tribes⁶ and submitted to the NAHC for review and comment.⁷ Additionally, AB 389 is clear that the finalization of a systemwide policy is merely the starting point for addressing the past harms created by the CSU’s collection of Native American human remains and cultural items and that the CSU is required to ensure that each campus implements the adopted policies and procedures.⁸

Additionally, AB 389 required the CSU to establish and maintain systemwide and campus-level committees that review and advise the university on matters related to the university’s implementation of legal requirements to increase repatriation outcomes or dispositions of Native American human remains and cultural items to California Indian Tribes.⁹

III. NAHC COMMENTS ON THE CSU DRAFT SYSTEMWIDE POLICY

Format and Structure

The format and structure of the policy need reorganization to highlight and prioritize guiding principles. This Policy should first make clear the CSU’s commitment to acknowledging past harms. The Policy should then establish guiding principles to ensure these past harms are not perpetuated moving forward. Additionally, the Policy could be improved by ensuring the subdivision of sections is consistent and includes a table of contents. Lastly, a commitment should be made by the CSU to develop a systemwide consultation policy in consultation with Tribes. While this Policy is undergoing tribal consultation, Tribes had little to no say on how the CSU conducts consultation on this or any subsequent policy impacting tribes.

Section I. Purpose and Scope

Section I should include an acknowledgment of the past harms perpetrated by the CSU and a commitment to redress those harms moving forward. Therefore, “*Acknowledgement of Past Harms and Guiding Principles*” should be incorporated into Section I.

The casual mention of supplemental policies in Section I is inappropriate. This Policy needs to be clear that it is the default and controlling repatriation policy for all CSU campuses. This Policy should emphasize that supplemental campus policies are only the result of extremely unique circumstances at an individual campus, furthermore, any supplemental policy should be incorporated as an addendum to this Systemwide Policy and shall be subject to the NAHC’s review and approved by the Systemwide Committee.

³ *Id.*

⁴ *Id.*

⁵ Assembly Bill No. 389, 2022-2023 Reg. Session, as approved October 10, 2023.

⁶ *Health and Saf. Code, 8028.7 a (3).*

⁷ *Health and Saf. Code 8028.7 (a) (4).*

⁸ Assembly Bill No. 389, 2022-2023 Reg. Session, as approved October 10, 2023.

⁹ *Id.*

Section II. Background

This section of the Policy needs to establish a clear understanding of both Federal and State repatriation law as applied to the CSU. This section should discuss the impact of the new NAGPRA Regulations on repatriation timelines, procedures, and the legal rights of Non-Federally Recognized versus Federally Recognized Tribes. This should include a clear statement that the California State University receives federal funds and must conduct repatriation under NAGPRA, with CalNAGPRA limited in scope to providing Tribes with notice of inventories and summaries and tracking repatriation progress through the NAHC database. Moreover, this policy should clearly explain the revisions to the new NAGPRA regulations that remove Non-Federally Recognized tribes from the federal process. This document also references disposition in various sections. The CSU should conduct due diligence to determine if including disposition under Federal NAGPRA in this Policy is even appropriate. This Policy should provide clear guidance on the legal requirements of fulfilling repatriation under Federal and State law including references to federal guidelines on duty of care and culturally unidentifiable items.

Section IV. Note on Definitions

This section needs to define and identify the state and federal “government bodies” relevant to repatriation, including the NAHC, NAGPRA, and Department of Interior. Additionally, this section needs to identify conflicting definitions in regulations and clearly define the rights of Federally and Non-Federally Recognized Tribes under Federal and State law.

Section V. Compliance Oversight

A. System

Chancellor’s Office

This section needs to expand the definition of the Chancellor’s Office to include the newly formed Office of Tribal Relations. This definition also needs more clarity on the role and responsibility of the “project manager” and “designated administrator”.

Systemwide NAGPRA Implementation and Oversight Committee

This section could be improved by clearly defining the influence of the Systemwide Repatriation and Oversight Committee (Systemwide Committee) on a Campus Repatriation and Oversight Committee (Campus Committee). Specifically, while the Policy states that the Systemwide Committee “shall provide support and counsel for the individual campus NAGPRA committees...” as well as “provide support to resolve disputes and appeals brought by Tribes when disagreements arise regarding a campus’ identification, repatriation, or disposition decision for human remains or cultural items” the Policy does not provide any clear detail on what this process would be or the clear authority of the Systemwide Committee over a Campus Committee. The Policy does not address the authority or process the Systemwide Committee would have in the event it disagreed with a Campus Committee’s actions. As such, there needs to be clarification of the Systemwide Committees’ authority when they disagree with a Campus Committee’s repatriation plan. Additionally, the Policy should make clear that neither Systemwide nor Campus Committee members are subject to term limits and that priority for filling these positions should be to those with NAGPRA and CalNAGPRA experience.

Reporting

The NAHC is in full support of regular and diligent monitoring and reporting of campus repatriation progress and outcomes. However, this section is lacking a clear understanding of what “regular” would be. This section needs to specifically define the frequency of reporting in either monthly or bi-monthly segments.

Campus Repatriation Plans

This section could be improved by specifying the need for campus repatriation plans to be transparent, public, and regularly reviewed by campus leadership. This portion of the Policy should also include a discussion of the annual reports as required by Assembly Bill 389¹⁰ and a checkpoint for how often reports are due. These Campus Repatriation Plans should also be done in consultation with Tribes.

B. Campus

Campus NAGPRA Coordinator

The NAHC is in support of this language, particularly the requirement that repatriation coordinators be in an administrative position with direct access to their campus president. However, the Policy should provide more clarity in the last sentence as to who is the “administrative authority”.

Campus NAGPRA Implementation Committee (“NAGPRA Committee”)

The Campus NAGPRA Implementation Committee should be referred to consistently as the “Campus Committee” or “Campus NAGPRA Committee” throughout the Policy. Campus committees should not wait to be fully formed to begin meetings, the skills and knowledge of the committee should be utilized even if not fully staffed. All past campus committees that were developed outside of the process set forth in AB 389¹¹ should no longer meet or influence repatriation decisions.

Funding

The NAHC is in full support of travel, repatriation, and reburial costs being accounted for and provided to tribal representatives participating in consultation. The NAHC supports tribal representatives being reasonably compensated for their time and cultural knowledge throughout the repatriation process. The process for reimbursement should be timely and efficient ensuring tribal representatives are financially empowered to participate in repatriation. Further details and estimates should be provided to clarify the specific funding needs of repatriation.

Section VI. Compliance

A. Consultation

Tribal consultation is the cornerstone of repatriation. As such, this section needs further development and clarification to adequately address this very important component of the repatriation process. For example, further detail should be provided on how often a consultation notice is generated and how often this notice is sent to THPO’s, NAGPRA staff, and Tribal Chairs. The NAHC supports consultation addressing all concerns that potentially culturally affiliated Tribes may have, including appropriate treatment, minimizing handling, and respectful protocols. In providing information to Tribes, campus repatriation coordinators should only provide information that they have available and should not handle or disturb collections.

Timeline

The NAHC is in support of prioritizing timely and expedient repatriation in all instances unless a culturally affiliated tribe has requested extensions of the timeline and supports procedures that avoid delay or obstacles to repatriation if these procedures are discussed and consented to in tribal consultation. Consultation should be done early and often, utilizing multiple forms of outreach to secure consultation must occur unless one single method is successful. It is noted that the CSU has the responsibility and obligation to initiate and engage in meaningful consultation. Lastly, the NAHC supports the CSU in addressing the financial burdens Tribes face throughout the repatriation process. However, the Policy should clarify that specific allocations will

¹⁰ Assembly Bill No. 389, 2022-2023 Reg. Session, as approved October 10, 2023.

¹¹ *Id.*

be made in the Systemwide budget for addressing the financial burdens of repatriation on Tribes, generalized funding that includes repatriation staff salaries is not sufficient.

Identifying and Reporting Conflicts with Campus Staff

This section needs more procedure and detail. Tribes should be able to refer to this section and feel equipped with a step-by-step guide to address their conflicts with campus staff. This section of the Policy should also provide all Campus Committees with clear guidelines to address conflicts with campus staff that are reported to them. Additionally, this section of the Policy should address clear consequences for ethical, professional, or legal violations made by CSU campus staff during the repatriation process.

Request for assistance of another CSU campus

The NAHC is generally in support of allowing Tribes to request assistance from CSU campuses that have proven themselves to be proficient, respectful, worthy of trust, and effective in repatriation. However, this section requires additional details on the procedure for making such a request, empowering California Native American tribes to initiate this process.

There should also be a requirement that a campus that denies a request for assistance must provide written reasoning for their denial to the requesting Tribe, the involved Campus Committees, and the Systemwide Committee. It should be noted in the Policy that while requests may be submitted to the Chancellor's Office and the Systemwide Committee for review and approval, this is not a requirement and the requested campus may provide assistance without approval from either the Chancellor's Office, its Campus Committee, or the controlling campus' Oversight Committee. This decision should be made in consultation with the requesting Tribe and the requested campus' repatriation coordinator.

Confidentiality

As a best practice, throughout consultation repatriation staff should inquire about a Tribe's need for confidentiality with respect to tribal traditional knowledge and any other tribal information shared. This section should be bolstered with the requirement of non-disclosure agreements for campus staff that have access to curation spaces or consultation information. This section should also contain a clear prohibition on the use of social media by campus staff to publish information that may be acquired during consultation or repatriation. Confidentiality should also include the receipt of a signed document on which the consulting Tribe(s) can identify who from their Tribe is authorized to waive confidentiality if there is an opportunity for waiver at all.

Stewardship

The NAHC is generally in support of this language, however, it lacks a clear statement of ramifications for violation of this requirement. This section should provide a clearer understanding of the repercussions campus staff face for violating this Policy specifically sections related to stewardship, duty of care, CalNAGPRA, or NAGPRA compliance. The title of this section should be modified, a proposed title is "Respect, Treatment, and Tribal Preference on Care".

Campus Assessments and Surveys

The NAHC supports the thorough and routine reporting and surveying of all campuses. This Policy is not clear on the repercussions campus staff will face if they attempt to obstruct or submit fraudulent information connected to a campus assessment and survey.

Documentation and Reconciliation

The NAHC is in support of the full documentation and prompt reunification of collections subject to affiliated Tribes' prior and informed consent. Campuses should be required to reach out to retired professors or their descendants to ensure that all collections are reported, documented, and repatriated.

Updates to Inventories and Summaries

The NAHC supports the inclusion of Tribal traditional knowledge in any updates to inventories and summaries. The procedure for reporting overlooked or hidden human remains, or cultural items should be a systemwide resource that is uniform for every campus, on each campus' NAGPRA website, and available on the systemwide NAGPRA website. This Systemwide Policy needs to address the ongoing creation of new NAGPRA collections as a result of field schools and CEQA projects on CSU land. Furthermore, this Policy needs to address scenarios where outside consultants or archaeologists contracted by the CSU may have taken or kept Native American human remains or cultural items they came into contact with as a result of their work for the CSU. Each one of these activities has the potential to create additional NAGPRA collections.

Stewardship

Stewardship agreements should be a uniform resource that are provided to all campuses from a central systemwide level. Tribes should not have to acquaint themselves with different stewardship agreements for each campus. The title of this section in the Systemwide Policy should be altered to clarify this is a tribal request for stewardship of collections after repatriation has occurred.

C. Cultural Affiliation, Disposition and Repatriation

The NAHC is in support of giving deference to Tribal Traditional Knowledge in determining cultural affiliation. The NAHC also supports flexibility in determining cultural affiliation so as to not hinder or delay repatriation, however, there needs to be a clear definition of what in this context is “timely.”

Repatriation and Disposition

The language of this section should be changed to state “As a best practice, campuses should update the notes section of the associated CalNAGPRA inventory or summary with the Federal Register number and provide notice via email to the NAHC of any Federal Register posting.”

Transfer and Reburial Preparation

The NAHC supports this language, requiring annual reporting of repatriation outcomes.

Repatriation Metrics and Completion

The NAHC is in support of the goals outlined in this section. However, if a campus fails to meet these objectives the campus should be required to report the shortcomings to both the CSU Campus and Systemwide Committees.

The Commission offers these substantive comments to ensure respectful and expedient repatriation of Native American human remains and cultural items held by the CSU. Continued collaboration and tribal consultation are integral in ensuring a robust and successful Systemwide Policy.

Sincerely,

REGINALD PAGALING

Reginald Pagaling, Chairman
Native American Heritage Commission