



Native American Graves Protection and Repatriation Act

The University of California Is Not Adequately
Overseeing Its Return of Native American
Remains and Artifacts

June 2020

REPORT 2019-047





CALIFORNIA STATE AUDITOR

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June 11, 2020

2019-047

The Governor of California
President pro Tempore of the Senate
Speaker of the Assembly
State Capitol
Sacramento, California 95814

Dear Governor and Legislative Leaders:

As required by Health and Safety Code section 8028, my office conducted an audit of the University of California's (university) compliance with the federal Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) and its 2001 California counterpart, CalNAGPRA. These acts establish requirements for the repatriation, or return, of Native American human remains and cultural objects (remains and artifacts) to tribes by government agencies and museums—which include the university's campuses—that maintain collections of remains and artifacts. This report concludes that the university's inadequate policies and oversight have resulted in inconsistent practices for returning Native American remains and artifacts among the university campuses we reviewed at Berkeley, Davis, and Los Angeles.

Different approaches employed at the campuses have likely contributed to the fact that Los Angeles has repatriated nearly all of the remains and artifacts from its collection, while Berkeley has returned only about 20 percent. The university's Office of the President (Office of the President) allowed these inconsistencies to persist by failing to provide adequate guidance to the campuses and oversight of their practices and decision-making. In fact, a 2018 amendment to CalNAGPRA required the university to create a policy for repatriation and establish systemwide and campus committees to review repatriation activity. However, the university failed to adequately incorporate tribal perspectives during the policy's initial development, and the Office of the President had to extend its timeline to finalize the policy to obtain these perspectives. Nevertheless, the draft policy we reviewed does not create the consistency across the campuses required by CalNAGPRA.

We also found that the campus and systemwide committees do not have the tribal representation that state law requires to ensure balance between university and tribal representatives. According to the campuses and the Office of the President, they have not revised their committees' membership to comply with state law because they are waiting for finalization of the university's policy. However, until campuses and the Office of the President revise the membership of the committees, the university will fail to comply with CalNAGPRA.

Finally, the intent of CalNAGPRA was to allow more California tribes to pursue repatriation, but a 2015 change in federal regulations has sharply reduced the number of California tribes permitted to make repatriation claims. As a result, in order to fulfill CalNAGPRA's original intent, the Legislature will have to amend requirements for tribes to qualify to make repatriation claims.

Respectfully submitted,

A handwritten signature in black ink that reads "Elaine M. Howle". The signature is written in a cursive, flowing style.

ELAINE M. HOWLE, CPA
California State Auditor

Selected Abbreviations Used in This Report

Berkeley	University of California, Berkeley
Davis	University of California, Davis
Los Angeles	University of California, Los Angeles
CalNAGPRA	California Native American Graves Protection and Repatriation Act
NAGPRA	Native American Graves Protection and Repatriation Act
NAHC	Native American Heritage Commission
remains and artifacts	Native American human remains and cultural objects

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Summary

Results in Brief

The federal Native American Graves Protection and Repatriation Act (NAGPRA), passed in 1990, and its California counterpart (CalNAGPRA), enacted in 2001, establish requirements for the protection of Native American graves and the treatment and return of Native American human remains and cultural objects (remains and artifacts) from the collections of government agencies and museums (agencies). In California, the University of California (university) maintains a significant collection of hundreds of thousands of remains and artifacts. NAGPRA prescribes a process for entities with such collections, including the university's various campuses, to *repatriate*, or return, these remains and artifacts to tribes that have a traceable relationship to them. Once agencies return remains, some tribes may choose to rebury them because those tribes believe that the spirit of their ancestors cannot rest until they are properly buried.

Federal law allows only those tribes that the U.S. Department of the Interior officially recognizes to use NAGPRA's repatriation process. However, many California tribes lost their federal recognition during the mid-20th century as part of the federal government's efforts to integrate Native Americans into American society. To address this issue, the Legislature passed CalNAGPRA to encourage and increase repatriation of Native American remains and artifacts to California tribes, in part by expanding the number of California-based tribes that can submit repatriation claims. The Legislature amended CalNAGPRA in 2018 to add specific requirements for the university, which include implementing a systemwide policy regarding the appropriate treatment and repatriation of Native American remains and artifacts consistent with NAGPRA and CalNAGPRA.

We reviewed the university's campuses at Berkeley, Davis, and Los Angeles—and found that each campus takes a different approach when making key decisions related to NAGPRA. For example, an important component of the repatriation process is identifying the tribe or tribes with a traceable relationship to the remains and artifacts, a process known as *affiliation*. Campuses often work with a tribe to review evidence related to the tribe's affiliation with remains or an artifact, but they have different approaches both to their interactions with tribes and to the level of evidence they require to decide whether remains or artifacts belong to a particular tribe or tribes. For example, unlike the other two campuses, Berkeley regularly required tribes to submit additional evidence for affiliation beyond what the tribe provided in its claim, which can extend the time before it returns the remains and artifacts.

Audit Highlights . . .

Our audit of the University of California's (university) compliance with state and federal laws protecting Native American human remains and cultural objects (remains and artifacts) highlighted the following:

- » *The university's inadequate policies and oversight have resulted in different approaches to making key decisions at the three campuses we reviewed.*
 - *One campus regularly requested more evidence from tribes in order to decide whether remains or artifacts belong to a particular tribe or tribes.*
 - *For remains and artifacts found in an area with overlapping tribal territories, one campus requires written support from all consulted tribes from these territories to agree to the return of the items to the requesting tribe, while the other campus only requires a good faith effort to obtain support.*
- » *Some campuses have returned larger proportions of remains and artifacts in their collections to tribes due to inconsistent approaches—one campus has returned nearly all of the remains and artifacts in its collection while another has returned about 20 percent.*
- » *The university has not finalized a systemwide NAGPRA policy, and its draft policy does not ensure consistency across campuses or include a standardized process for reviewing evidence of affiliation.*
- » *Campus and systemwide NAGPRA committees do not have the tribal representation that state law requires to ensure balance between university and tribal representation.*

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» *The Legislature intended with CalNAGPRA to allow more tribes to pursue repatriation, but a 2015 change in federal regulations dramatically decreased the number of California tribes permitted to seek the repatriation of remains and artifacts.*

We found similar inconsistencies in the campuses' approaches when we looked at instances when the campuses have concluded that it was not possible to affiliate remains or artifacts to specific tribes because the available evidence was insufficient to support a traceable connection. Because more than one tribe might have lived in the same area at different times, campuses cannot always use a geographic location to affiliate remains or an artifact to a specific tribe. In these cases, a tribe may file a claim through a process called *disposition*. In this process, a campus must consult with the tribes from whose land the remains or artifacts were removed, which may include multiple tribes because of overlapping territories, and attempt to reach agreement among all parties on the proposed disposition. Berkeley believes it must receive written support from all consulted tribes on the proposed disposition before it returns the remains or artifacts to the requesting tribe—a process that can take more than a year. In contrast, Davis only requires that it make a good faith effort to obtain support, which it does not require to be in writing, from the other tribes before it returns the remains or artifacts to the tribe that filed the disposition claim.

These differences in approach have likely contributed to the fact that some campuses have returned larger proportions of the Native American remains and artifacts in their collections to tribes. Specifically, Los Angeles has repatriated nearly all of the remains and artifacts in its collection that are subject to NAGPRA, while Berkeley has returned only about 20 percent. These variations underscore the need for the university to develop a uniform NAGPRA policy that ensures consistency across its campuses, as CalNAGPRA requires. Although the university's Office of the President (Office of the President) is currently drafting a systemwide policy, the draft policy does not create consistency across the campuses as state law intends. For example, it does not provide methods to standardize affiliation decisions within and between campuses, such as a standardized process for reviewing evidence of affiliation. The draft policy also does not facilitate oversight of campus decisions by, for example, requiring campuses to regularly and consistently report information about their repatriation activities to the Office of the President's NAGPRA committee (systemwide committee) responsible for NAGPRA-related issues. In addition, the Office of the President did not implement the policy by January 1, 2020, as CalNAGPRA required. Instead, the Office of the President decided to delay finalizing the policy until July 2020 so that it could obtain more input from tribes and stakeholders.

Along with the systemwide committee, another important source of oversight for campuses that have remains and artifacts are their campus-level NAGPRA committees. These committees, composed of members from the university and from tribes, are responsible for reviewing campuses' repatriation decisions. In 2018 and 2019, the

Legislature amended CalNAGPRA to ensure that tribal members have representation equal to the number of university members on the campus and systemwide committees. However, the campus and systemwide committees do not currently meet CalNAGPRA's requirements for tribal representation. The campuses and the Office of the President explained they have not ensured that the membership of their committees complies with state law because they are waiting for the issuance of the university's systemwide policy, which they assert will provide exceptions to enable them to select the most qualified committee members. We find this explanation unreasonable given that state law already adequately specifies the committees' required membership and provides for exceptions. Until the campuses and the Office of the President revise their committee memberships, they cannot ensure that they are involving all needed stakeholders in repatriation decisions and hearing sufficient tribal perspectives before making these decisions.

CalNAGPRA also established a process for tribes in California that are not federally recognized to pursue repatriation, but its current definition of a California tribe will not significantly expand the number of tribes that can pursue repatriation. Although the federal government already recognizes more than 100 tribes in California, CalNAGPRA established a process that would enable the State to officially recognize dozens of additional tribes. Specifically, CalNAGPRA requires the Native American Heritage Commission (NAHC)—a state entity that manages Native American cultural resources in California—to publish a list of California tribes that are eligible to participate in CalNAGPRA's repatriation process. Under CalNAGPRA, a key criterion for inclusion on the list is for a tribe to be petitioning for federal recognition. According to the NAHC, because the U.S. Department of the Interior changed its regulations for tribes that were petitioning for federal recognition in 2015, the number of tribes in California formally seeking recognition decreased dramatically, from 81 tribes in 2013 to just four tribes in 2020. This significant reduction does not meet the Legislature's intent for CalNAGPRA to provide a means for California tribes that are not federally recognized to seek the repatriation of remains and artifacts.

Moreover, although CalNAGPRA has required the NAHC to publish the list of tribes since 2015, the NAHC has not done so. When we asked the NAHC about the significant delay, it could not explain why it had not promptly published the list as state law required, but it indicated it has taken steps to do so more recently. Specifically, during the summer of 2019, the NAHC began internal discussions about its process for including tribes on the list, and the executive secretary noted that if the NAHC were to publish the list, it would contain only four tribes. Several tribes raised similar concerns to the NAHC. The NAHC is currently monitoring efforts

to amend state law to expand the number of tribes that can make repatriation claims. If this legislation is not successful, the NAHC plans to publish the list after the legislative session concludes in August 2020. Without this list, even those four additional tribes are not able to use the State's repatriation process to obtain remains and artifacts that belong to them.

Selected Recommendations

Legislature

To allow more California tribes to pursue repatriation of remains and artifacts that may belong to them, and consistent with the intent of CalNAGPRA, the Legislature should amend state law to allow more tribes to be eligible for inclusion on the NAHC's list of recognized tribes.

University

To increase oversight and ensure that campuses consistently review claims, the Office of the President should require campuses to provide reports about all current claims for affiliation, repatriation, and disposition, as well as any associated decisions, to the systemwide committee for biannual review no later than January 2021.

To ensure that the affiliation, repatriation, and disposition processes are timely and consistent across all campuses as the Legislature intended, the Office of the President should publish its final systemwide NAGPRA policy no later than August 2020.

To ensure that tribal perspectives are appropriately represented in repatriation decisions, the Office of the President should ensure that membership of campus and systemwide committees complies with state law by including appropriate tribal representation no later than November 2020.

NAHC

To ensure that more tribes can make repatriation claims, the NAHC should publish the list of recognized California tribes no later than September 2020.

Agency Comments

The university agreed with our recommendations and indicated that it would implement them to improve its policies and practices. The NAHC raised numerous questions and concerns about the redacted draft report we provided to it for its response. In particular, the NAHC expressed concern about the redacted draft report not including any discussion of the university's compliance with NAGPRA and CalNAGPRA, as well as concerns about implementing the one recommendation we made to it.

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Introduction

Background

The U.S. Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA) in 1990 to protect Native American gravesites and to create a process for government agencies and museums (agencies) to manage and return certain Native American human remains and cultural objects (remains and artifacts) to the tribes that have ancestral, cultural, or geographic links to them. When enacting NAGPRA, Congress acknowledged that those remains and artifacts removed from federal or tribal lands belong to Native American tribes. The text box describes the types of remains and artifacts that NAGPRA covers, as well as related key terms. NAGPRA applies to tribes that are recognized by the U.S. Department of the Interior, the entity responsible for recognizing tribes that are eligible to receive services provided by the federal government.¹

During the 1990s, NAGPRA required each agency that controlled Native American remains, funerary objects, or cultural objects to have compiled an inventory of specified items by certain dates. To complete this inventory, an agency had to consult with each tribe that had a possible cultural or geographical link to the remains or artifacts to share and obtain information. The agency then evaluated the information from this consultation along with all other evidence, including biological, archeological, anthropological, geographic, kinship, linguistic, folklore, and historical evidence. Based on this evaluation, the agency determined whether it could reasonably trace a relationship between the remains or artifacts within its possession and a specific tribe, a process known as *affiliation*. After completing its inventory, each agency had to send information from the inventory to tribes for which it had established affiliation. Subsequently, the tribes could decide whether to submit claims for the return of the remains and artifacts with which they were affiliated.²

Summary of Key NAGPRA Terms

Types of remains and artifacts subject to NAGPRA:

- **Remains**—Physical remains, including bones, of people of Native American ancestry.
- **Funerary objects**—Objects such as stones and beads placed with or near remains as part of a death rite or ceremony.
- **Cultural objects**—Objects such as prayer sticks or wolves' skins that have ongoing ceremonial importance to a tribe.

Types of actions in the repatriation process:

- **Affiliation**—Identifying remains or artifacts as belonging to a federally recognized tribe or tribes.
- **Repatriation**—Returning remains or artifacts to the affiliated tribe.
- **Disposition**—Returning remains or artifacts to a tribe claiming ownership when the agency holding them could not affiliate them to a tribe.

Source: Federal regulations.

¹ NAGPRA also applies to Native Hawaiian organizations; however, our report focuses on Native American tribes.

² NAGPRA applies technical terms to different categories of Native American items and processes for their identification and return. For example, federal regulations define "culturally unidentified items" as those that have not been affiliated to a tribe. We refer to these remains and artifacts as "not affiliated." To communicate our findings succinctly, this report consolidates many of these terms.

Each agency also had to report its inventory to the national NAGPRA program (national program), which is administered by the National Park Service, a bureau of the U.S. Department of the Interior. The national program is responsible for performing various activities, including drafting regulations to implement NAGPRA, administering grants to museums and tribes for fulfilling NAGPRA, assisting excavations that discover remains or artifacts on federal or tribal land, and maintaining a database of all items agencies reported to it that are subject to NAGPRA. Further, it supports the national NAGPRA Review Committee (national committee), which monitors and reviews the implementation of NAGPRA across the nation. For example, the national committee is to monitor the inventory and identification process, consult on the development of the program's regulations, and facilitate the resolution of disputes between agencies and tribes.

Since 1982 state law has required that a Native American's most likely descendant be contacted whenever Native American remains are discovered, so that the descendant may recommend appropriate treatment of the remains and related artifacts. In addition, since 2015 state and local public agencies that have principal responsibility over specified construction projects subject to the California Environmental Quality Act must follow certain requirements when they discover Native American remains and artifacts. Specifically, they are required to avoid damaging tribal cultural resources when feasible and to consult with Native American tribes located in the area of a project about measures to preserve or mitigate impacts on such resources. Therefore, agencies in California are no longer expanding their collections of remains and artifacts covered by NAGPRA through archaeological activities.

Tribes Reclaim Their Ancestors' Remains and Artifacts Through Repatriation and Disposition

NAGPRA requires agencies in possession of Native American remains and artifacts to respond to tribes' claims to have those remains and artifacts repatriated to them. These agencies include campuses in the University of California (university) system, which generally maintain their NAGPRA collections through on-campus museums that are not open to the public. At the three campuses we reviewed—Berkeley, Davis, and Los Angeles—a designated campus NAGPRA official oversees NAGPRA implementation. Each campus has also established a NAGPRA committee to review repatriation claims in coordination with the campus NAGPRA official. In turn, the university's Office of the President (Office of the President) manages NAGPRA activity across all of its campuses with the help of the Office of the President's NAGPRA committee (systemwide committee) made up of representatives from campuses subject to NAGPRA and one tribal representative.

Federally recognized tribes can submit repatriation claims to campuses for the return of their ancestors' remains and artifacts. The text box summarizes the major requirements for remains and artifacts to be eligible for repatriation. After a campus affiliated remains or artifacts with a tribe or tribes during the preparation of its initial inventory in the 1990s, the campus was required to notify tribes and publish a notice in the *Federal Register* about the affiliated remains and artifacts. At that time, other tribes had 30 days to contest the campus's affiliation determination. If a tribe did not contest the affiliation within 30 days, the campus was required to return the remains or artifacts after receiving the tribe's repatriation claim. Several of the claims we reviewed were for such remains or artifacts.

Major Requirements for Repatriation Eligibility

To be eligible for repatriation under NAGPRA, remains or artifacts claimed by a tribe must meet the following requirements:

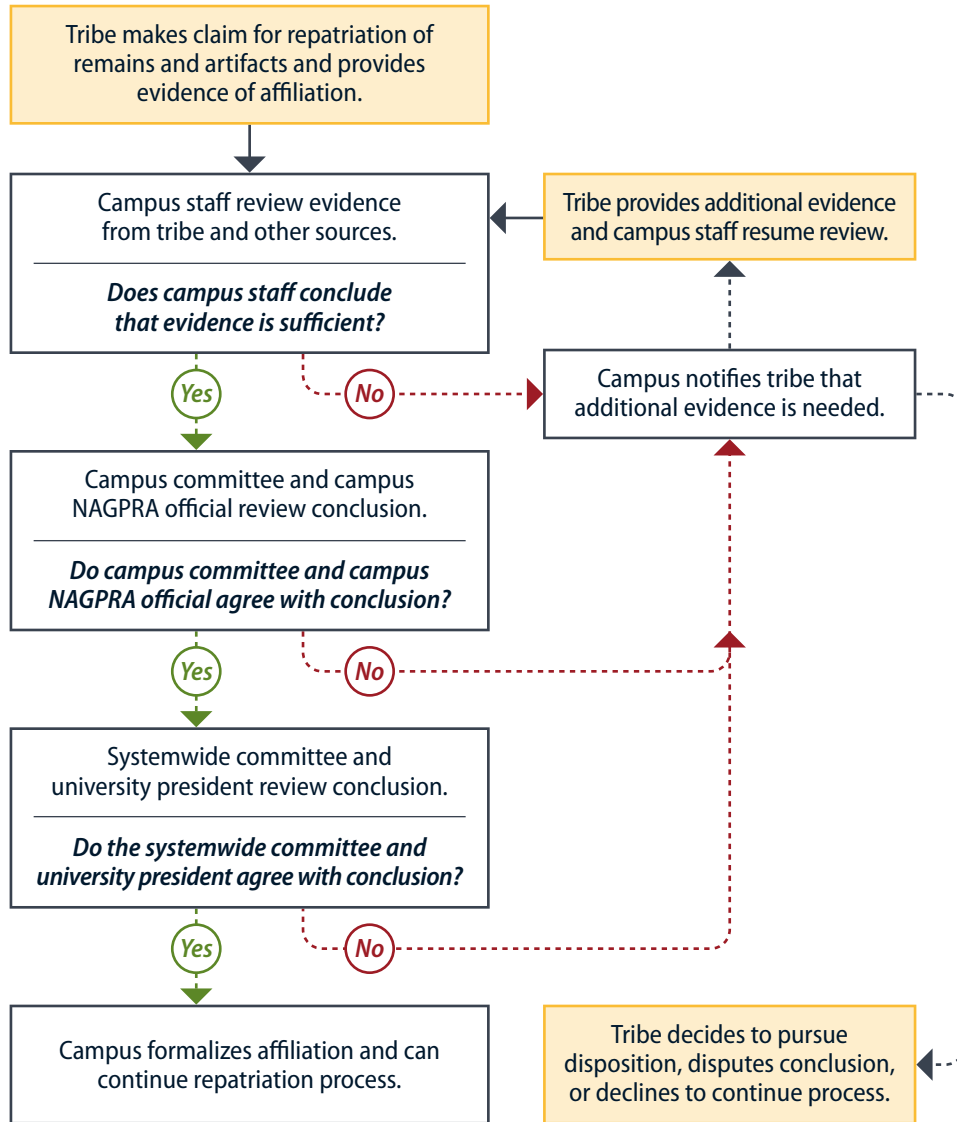
- Be under the legal control of the agency that has the remains or artifacts.
- Was not obtained from a person authorized by a tribe to voluntarily give or sell the remains or artifacts.
- If human remains, be proven to be Native American. Artifacts must have a proven cultural affiliation.

Source: Federal regulations.

However, in many instances, campuses did not affiliate remains or artifacts with a tribe during their initial inventories. Tribes can request consultations with these campuses to learn about their collections and determine whether they want to make repatriation claims by requesting affiliation to specific remains and artifacts. Federal law requires a campus to base its determination of affiliation with a tribe on a preponderance of the evidence, meaning that the remains and artifacts are more likely than not affiliated with the noted tribe. NAGPRA requires a campus to use various types of evidence to support these determinations, including oral history, geography, and anthropological evidence.

However, the affiliation process can be lengthy. As Figure 1 shows, a campus can repeatedly and indefinitely require a tribe to submit additional evidence demonstrating that remains and artifacts are affiliated with it, a concern we describe further in the Audit Results. Further, to ensure that it receives all relevant information, the campus must contact and consult with other tribes that may have a relationship to the remains and artifacts in question. This consultation allows the other tribes to decide whether they believe the remains and artifacts are affiliated with them and, if so, to provide evidence of their historical relationship and to submit a claim for repatriation. If the campus determines that a preponderance of evidence supports affiliation to a tribe and the campus committee agrees, the campus sends the claim to the systemwide committee for its review. The systemwide committee provides a recommendation to the university president. If the university president (or his or her designee) approves the affiliation, the campus has to post in the *Federal Register* a notice about its affiliation determination and wait 30 days before returning the remains or artifacts, unless another tribe makes a claim.

Figure 1
Campus's Processes for Determining Whether Remains and Artifacts Are Affiliated With a Tribe Can Be Lengthy



Source: Federal regulations, Office of the President's 2001 policy, campus documents, and interviews with campus officials.

In some instances, campuses have been unable to clearly identify to which tribe remains or artifacts belong. In these cases, tribes seeking possession of the remains or artifacts must submit a claim through *disposition*. As Figure 2 shows, the university's process for returning remains and artifacts through disposition differs somewhat from its process for repatriation. For example, because more than one tribe may have claimed the same territory over time, the disposition process includes a step for the campus to communicate with each tribe from whose land the remains or artifacts were removed and then to attempt to develop a disposition that is agreeable to all of these tribes. In addition, a tribe can contest a proposed disposition to another tribe after a campus publishes a notice in the *Federal Register* if the tribe believes that the items belong to it. The campus and the tribes are expected to resolve any disputes through informal negotiations. If no other tribes submit a claim within 30 days of a notice, the campus typically transfers the remains and artifacts to the requesting tribe. When campuses return remains and artifacts either through repatriation or disposition, tribes may choose to rebury the remains because some tribes believe that their ancestors' spiritual journeys have been disrupted by their exhumation and that reinternment allows them to rest.

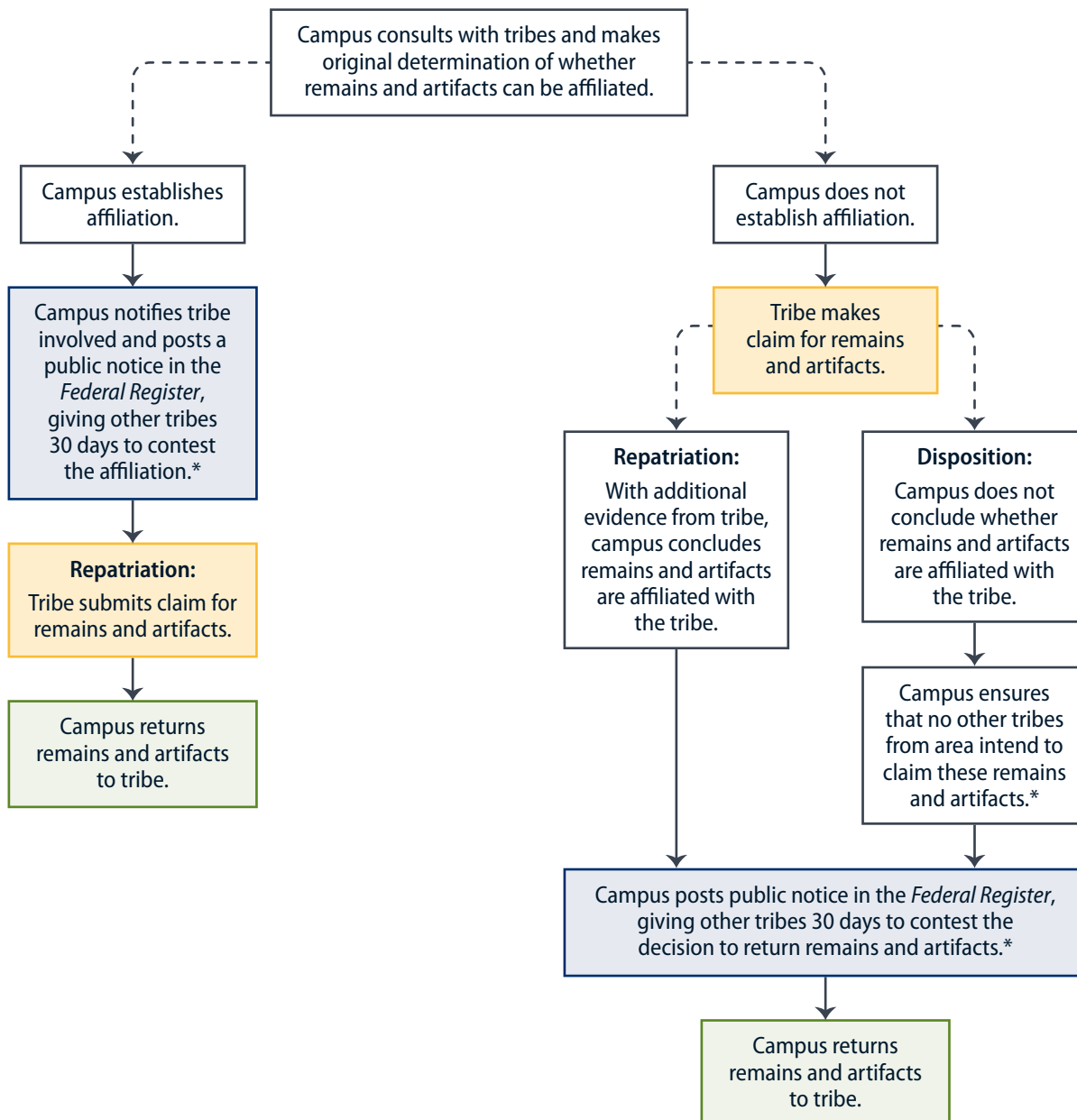
Tribes Can Dispute Campus Decisions on Affiliation, Repatriation, and Disposition

Tribes that disagree with campus decisions have various options for dispute. Specific decisions a campus makes may be grounds for dispute, such as determinations of affiliation or of the eligibility of remains and artifacts for repatriation. Tribes can bring such disputes to the national committee, which may provide advice to both parties on how to resolve the dispute. Tribes may also dispute decisions through the systemwide committee, or they may simultaneously pursue disputes both with the national and systemwide committees. In addition to disputes, tribes may also bring complaints about a campus's compliance with NAGPRA to the national program. The national program may then investigate that campus. Thus far, only one repatriation decision by a campus has been disputed by a tribe. That tribe also brought the dispute to the national committee.

Under state law, the California Native American Heritage Commission (NAHC), a state entity that manages Native American cultural resources in California, also has the authority to mediate disputes over repatriation claims. However, no tribes have used the NAHC to mediate a dispute under NAGPRA's California counterpart, CalNAGPRA, which we describe in the following section.

Figure 2

The University's Decision to Use Repatriation or Disposition Is Dependent on Whether It Has Determined Tribal Affiliation for Remains and Artifacts



Source: Federal regulations and the Office of the President's policy.

Note: Boxes of the same color indicate a similar step.

* If other tribes claim the remains and artifacts or contest the affiliation, the campus will retain the remains and artifacts until the campus and involved tribes agree on the appropriate recipient or the dispute is otherwise resolved.

CalNAGPRA Creates Additional Opportunities for Tribes to Obtain Remains and Artifacts and Increases Oversight of Campuses

CalNAGPRA covers California tribes, including both federally recognized tribes in California and those California tribes that are not recognized by the U.S. Department of the Interior. Many California tribes are not currently federally recognized in part because the federal government cancelled its recognition of many of them beginning in the 1940s during its efforts to integrate Native Americans into American society. Specifically, according to a publication on the National Park Service's website, the government decided after World War II to forcibly assimilate Native Americans into mainstream society by terminating the federal recognition of tribes and the federal government's accompanying obligations to them, and by relocating Native Americans from rural reservation communities to urban areas. Enacted in 2001, the intent of CalNAGPRA is to provide a mechanism for California tribes that do not have federal recognition to submit repatriation claims to state agencies, including university campuses. CalNAGPRA describes the process tribes must use to initiate a repatriation claim under state law and to resolve any subsequent disputes through the NAHC. However, tribes have generally not used these parts of the law because the NAHC and the university have not fully implemented them, as we describe in the Audit Results.

The Legislature amended CalNAGPRA in 2018 in response to allegations from stakeholders, including tribes, that the university had a poor record of completed repatriations and that participation by tribes in the repatriation process had been limited. According to the amendment's author, these allegations focused primarily on Berkeley's lack of significant repatriations from its NAGPRA collection over the 20 years since it completed its inventory of Native American remains and artifacts. The 2018 amendment required the Board of Regents of the University of California (Board of Regents), or its designee, to implement a systemwide policy by January 2020 regarding the appropriate treatment and repatriation of Native American remains and artifacts consistent with NAGPRA and CalNAGPRA. The university's Office of the President is currently drafting a systemwide policy on behalf of the Board of Regents.

The amendment also required that the Board of Regents, or its designee, establish the systemwide committee and that each campus subject to NAGPRA establish a campus committee. Each of the university campuses in the text box needed to have a campus committee beginning

University Campuses With NAGPRA Collections

- Berkeley
- Davis
- Los Angeles
- Riverside
- San Diego*
- Santa Barbara
- Santa Cruz

Source: National Park Service.

* San Diego told us that although the National Park Service indicates it has a NAGPRA collection, it no longer has any remains or artifacts subject to NAGPRA.

in January 2019. Although the campuses were not required to have committees before the amendment, the three campuses we reviewed and the Office of the President maintained committees before 2018 to review NAGPRA claims. According to the amendment, each committee must have adequate representation from California tribes. Each campus committee must have three California tribal representatives; however, if no representatives from a California tribe are available, a campus can appoint members from tribes located outside the State. The campus committees must also have three members from the university with backgrounds in related fields of study, such as archeology, anthropology, or history, with a focus on California. The systemwide committee has similar requirements, and in addition, it must have a nonvoting member from each campus subject to NAGPRA. Finally, the Office of the President and each campus must appoint committee members based on nominations from the NAHC.

Audit Results

Campuses Are Inconsistent in Their Processes for Returning Human Remains and Artifacts to Tribes

The Office of the President has provided campuses with 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.³ As we discuss in the Introduction, the campuses have two processes for returning remains and artifacts to tribes: repatriation, which a campus uses when it is able to affiliate—or connect—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. 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 we visited—Berkeley, Davis, and Los Angeles—used varying approaches when evaluating available evidence to determine whether remains or artifacts are affiliated. The three campuses also have different interpretations of the level of necessary consultation with tribes before completing dispositions. Moreover, campus committees that are responsible for approving the campuses' repatriation and disposition decisions have exercised only limited oversight of these decisions. The inconsistencies we identified across the campuses were often a result of the overly broad discretion they are allowed by the Office of the President and indicate a need for greater systemwide guidance.

Campuses Use Different Standards for Affiliation Determinations and Disposition Consultations

We reviewed a selection of claims that the three campuses received from tribes from 2010 through 2019, including nine repatriation claims at Berkeley, five at Davis, and five at Los Angeles. We reviewed about half of the total claims that Berkeley, Davis, and Los Angeles received during this period. Some of the repatriation claims were also affiliation claims, and we found that Berkeley was the only campus to request additional documentation and evidence beyond what the tribes provided in support of their affiliation claims. Berkeley's approach extended the time needed to return remains and artifacts. The Office of the President stated that although there may be legitimate reasons for differences in the amount of evidence

³ Our review focused primarily on the repatriation and disposition processes established by federal regulations rather than by CalNAGPRA, as CalNAGPRA was intended to supplement NAGPRA.

Because of different standards when assessing evidence of affiliation, a tribe may have greater success with an affiliation claim depending on the campus in possession of the remains and artifacts.

campuses request from tribes, the different approaches campuses take could be an indicator of a campus's reluctance to assist and partner with tribes to promote repatriation. Out of five affiliation claims we reviewed at Berkeley, it requested additional evidence for four. For example, for one claim, its insistence that the tribe provide additional evidence—and the time the tribe took to provide that evidence—added 18 months to the affiliation decision. Initially, the tribe contested the need for more evidence, asserting that Berkeley had not given the tribe's oral history and traditions the same weight as scientific evidence, but the tribe continued to work with the campus and provided additional evidence.

Campuses use different standards when assessing evidence of affiliation. Of the five affiliation claims we reviewed, Berkeley eventually approved two, relying on at least two types of evidence for each claim. Similarly, Los Angeles relied on multiple kinds of evidence in its one affiliation claim we reviewed. In contrast, Davis generally relied on fewer types of evidence to make its decisions about affiliation. For instance, in two of the three affiliation claims we reviewed at Davis, it based its decisions on geographic evidence only—that is, the location where the remains or artifacts were discovered. Berkeley stated that it does not believe geographic evidence alone is generally sufficient because more than one tribe might have lived in the same territory over time. Because of these campus differences, a tribe may have greater success with an affiliation claim depending on the campus in possession of the remains and artifacts.

We also found that the three campuses have different practices for processing disposition claims. We reviewed disposition claims that the three campuses received from 2010 through 2019, including one at Berkeley, three at Davis, and two at Los Angeles. Tribes may pursue a disposition claim for remains and certain artifacts that a campus has not been able to affiliate with a specific tribe. After receiving a disposition claim, a campus is required to consult with all tribes from whose lands the remains or artifacts were removed, which may include multiple tribes because of overlapping tribal territories. The intent of these consultations is to reach agreement among the tribes on a proposed disposition. However, campuses have used different practices to consult with these tribes, and the time they took to process disposition claims varied widely.

The disposition practices that Davis and Los Angeles used recognize that not all tribes will formally respond to their requests for agreement on proposed dispositions. For one of Davis's disposition claims, it sent letters to the other tribes from whose lands the remains were removed, informing them of the disposition claim and requesting their permission to transfer the remains and artifacts to the tribe that submitted the claim. The campus began

following up about two months later with phone calls to tribes that had not responded and continued to make these calls over a period of several months. After a majority of the tribes expressed written or verbal support for transferring the remains and artifacts to the tribe that submitted the disposition claim, Davis continued the disposition process by publishing a notice in the *Federal Register*. Los Angeles corresponded informally—and did not maintain documentation of that correspondence—with the other tribes associated with the lands where the remains and artifacts were found to obtain their support for its two disposition claims. Thus, we were unable to determine how many tribes it consulted with or the amount of time it provided those tribes to respond.

Conversely, for the one disposition claim we reviewed from Berkeley, the campus required all the tribes whose lands include the area where the claimed remains were found to respond in writing before it would proceed with returning the remains. According to Berkeley, if it did not have support for the disposition from other tribes with a historical connection to the land in question, one of those tribes could hold the campus legally accountable for returning the remains or artifacts to the tribe that submitted the disposition claim. Berkeley confirmed that no tribe had ever done so but noted that the campus might not have been subject to such a claim precisely because it follows these practices. We find Berkeley's approach to be overly cautious, as federal law does not require it to obtain agreement from all consulted tribes before returning remains or artifacts.

Additionally, Berkeley did not follow up with tribes after sending the initial letter requesting consultation. After sending out those letters, the campus did not conduct further work on the claim for 17 months. In fact, the campus contacted the tribes again only after the tribe claiming disposition asked for an update on the process, which restarted Berkeley's work on the claim. According to Berkeley, it did not initiate follow-up because it is not the campus's place to pressure tribes to respond to a timeline that it sets. It took another 20 months for the campus to obtain responses from all remaining tribes, leading to the eventual return of the remains to the tribe that submitted the disposition claim. Berkeley's practice of ensuring that it receives a written response from every tribe about its support for disposition claims and its failure to follow up when tribes do not respond, unnecessarily extends the time it takes for returns.

Federal law does not require campuses to obtain agreement from all consulted tribes before returning remains or artifacts.

Campus Committees Exercise Minimal Oversight of Campus Decisions

Two of the three campus committees do not review pending repatriation and disposition claims that their campuses are processing, limiting their ability to provide advice and direction. All three campuses we reviewed have campus-level committees that

Although each of the three campuses stated that their museum staff communicate with their committees, two do not have a formal mechanism for doing so.

advise on NAGPRA implementation. However, although each of the three campuses stated that their museum staff communicate with their committees, two do not have a formal mechanism for doing so. Specifically, Davis presents ongoing claim information to the entire committee during documented meetings. In contrast, Los Angeles stated that it is in frequent, informal contact with the committee chair, and Berkeley noted that it too informally communicates with the committee chair to determine whether it has enough evidence to present a claim to the campus committee.

Berkeley's and Los Angeles's practice of using informal communication does not allow their committees to provide advice about pending claims. For example, as we describe previously, Berkeley allowed a claim to remain pending for 17 months until the requesting tribe asked for an update on the status of its claim. Because Berkeley's practice is to informally communicate with its committee about pending claims, it could not demonstrate whether the campus committee was aware of this delay. If the campus committee had been formally reviewing the status of pending claims, it could have instructed the campus to follow up with those tribes, and the tribe that made the request might not have had to wait as long for the return of the claimed remains.

Additionally, several tribes have complained that Berkeley's process lacks transparency and timeliness. For example, one tribe explained to Berkeley that it had complained to the national committee in part because the tribe had not received any information from the campus about when its claim might progress to the campus committee, even though the tribe had made the claim more than two years earlier. Without occasional, formal review of pending claims, including those stalled in the repatriation or disposition process, the campus committee cannot hold the campus accountable for how it is managing claims and ensure that any delays tribes experience in pursuing the return of remains and artifacts are reasonable.

Further, Berkeley explained that when a tribe tries to support its affiliation to remains and artifacts, the campus and the committee chair determine when there is sufficient evidence for the committee to review the tribe's claim. Berkeley's practice deprives the other committee members of a voice in determining when there is sufficient evidence, as well as awareness of instances when tribes and the committee chair disagree about the sufficiency of evidence. As a result, the committee generally makes formal decisions only on claims with sufficient evidence for approval, and the campus rarely formally denies claims that lack sufficient evidence.

Berkeley indicated that an outright denial of a tribe's claim might damage the campus's relationship with that tribe and that either the campus or tribe could identify additional evidence in

the future that would support the affiliation claim. However, in one of the five affiliation claims we reviewed from Berkeley, the tribe requested a written decision from the campus committee after the campus and committee chair informed it that the tribe's evidence was insufficient. The tribe then received the written decision. In response, the tribe asserted that the campus had not fairly considered the evidence it had submitted. In this instance, the campus committee agreed with the campus and committee chair's conclusion that there was not sufficient evidence to support the affiliation. However, there is no guarantee that the committee will always agree with the campus's decisions or that tribes are even aware that they may request a formal review of their claim by the committee, instead of having to continue to work with the campus to provide additional evidence. Further, if the campus and the committee chair determine the evidence is not sufficient, the campus does not have a formal process for the committee to review the quality or quantity of the existing evidence or periodically assess pending claims. As a result, the committee lacks assurance as to whether the campus is fairly evaluating the evidence.

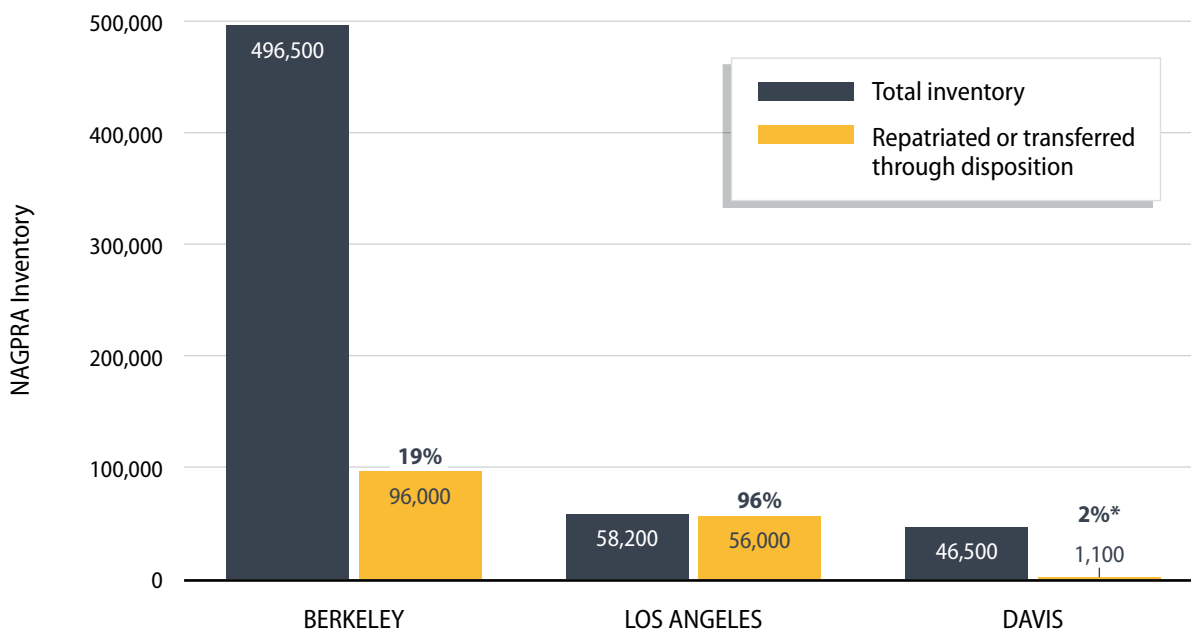
University Policy Allows Drastic Variation in Campus Practices

The Office of the President has provided campuses with little guidance on how to implement the requirements of NAGPRA and CalNAGPRA, a shortcoming that has led to campuses taking very different approaches when determining whether to return remains and artifacts to tribes. The Office of the President issued its current systemwide NAGPRA policy in 2001, and that policy provides minimal guidance beyond describing the federal regulations the campuses must follow for repatriations and affiliations. For example, the 2001 policy lists acceptable types of evidence but gives no guidance on how to evaluate that evidence. Of further concern is that the Office of the President did not update the systemwide policy in 2002 when CalNAGPRA became effective, nor did it update it when the federal government amended federal regulations to create the disposition process in 2010, which allows tribes to file claims for remains and artifacts that campuses are unable to affiliate with a specific tribe. According to the Office of the President, the fact that it did not update the policy was not the result of a decision; rather, it preferred to wait until significant changes were necessary before going through the lengthy policy review process. It further stated that campuses and the systemwide committee were kept informed of changes to NAGPRA requirements and were aware that they needed to comply with current law. However, we disagree with this approach given that the addition of the disposition process significantly expanded the potential for returns and the disposition process has different requirements than repatriations do.

The 2001 systemwide policy lists acceptable types of evidence but gives no guidance to campuses on how to evaluate that evidence.

The minimal guidance from the Office of the President permits considerable differences in NAGPRA implementation between campuses, likely affecting the number of remains and artifacts that campuses have returned to tribes. As Figure 3 shows, the three campuses we reviewed have each returned different percentages of their NAGPRA collections. Further, as several previous examples demonstrate, the campuses' varying practices have resulted in delays, sometimes lasting years, for returns. The Legislature recognized a history of inconsistency between campuses and amended CalNAGPRA in 2018 to create additional requirements for the university, including a requirement for a more comprehensive systemwide policy. The amended CalNAGPRA requires the university to create consistency in specific aspects of NAGPRA implementation. As we describe in the next section, the Office of the President is now revising its systemwide policy to meet the amended requirements of CalNAGPRA. Those revisions will address some of the inconsistencies we observed across campuses, such as establishing procedures for communicating and following up with tribes during dispositions and encouraging campuses to provide regular reports to their campus committees about pending claims.

Figure 3
Berkeley and Davis Have Returned Only a Small Portion of Their NAGPRA Inventories



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

* Although Davis has repatriated just 2 percent of its NAGPRA inventory, this is in part because of one archeological site containing roughly 40,500 items for which the affiliated tribe submitted a claim in January 2020. The university notes that it fully supports this claim, and that when it transfers the remains and artifacts to the tribe, Davis will have repatriated approximately 89 percent of its NAGPRA inventory.

The University's Draft of Its NAGPRA Policy Fails to Standardize Campus Procedures as the Legislature Intended

In its 2018 amendment of CalNAGPRA, the Legislature required the university to develop clear and transparent systemwide policies regarding the implementation of NAGPRA by January 1, 2020. CalNAGPRA required the university, in developing those policies, to consult with California tribes that appear on a contact list of California tribes that the NAHC maintains. CalNAGPRA also required the university to submit a draft policy to the NAHC for its review and comment by July 1, 2019. The Office of the President created a work group in October 2018 to develop the policy. Figure 4 illustrates a timeline of the university's development of the draft policy, including its consultation with the NAHC and tribes. The Office of the President notified the NAHC in late June 2019 that the draft would not be ready for review as required, and as the timeline shows, the Office of the President missed the statutory deadline. Although the Office of the President provided the NAHC with a confidential draft of its policy in early July 2019, the NAHC stated that its commissioners could not discuss the policy during their meetings until the university publicly released the draft policy in August 2019. The Office of the President distributed a draft policy to its campuses, the NAHC, and tribes in California in late August 2019, and it invited these stakeholders to submit comments. It stated that its intention was to incorporate this feedback by December 15, 2019 into its final policy, which it would issue by December 31, 2019.

For several months after the Office of the President distributed the draft policy, the NAHC and the Office of the President intermittently communicated about the NAHC's concerns with the policy. For example, in October 2019, the NAHC informed the Office of the President that it would be unable to submit comments on the policy by the Office of the President's deadline of November 15, 2019, because of the policy's length and complexity. Then, in a December 2019 letter to the Office of the President, the NAHC asserted that the university had not performed the required level of outreach or sought meaningful consultation with California tribes in a manner consistent with CalNAGPRA. The NAHC also stated that when the Office of the President provided the draft to tribes for comment, it did not allow adequate time to consider or respond to their feedback. The NAHC urged the Office of the President to delay implementation to July 1, 2020, so that it could reshape the draft policy in collaboration with the NAHC and with California tribes in a way that would ensure that the Office of the President was conducting meaningful consultation and addressing these entities' concerns. As Figure 4 shows, the Office of the President agreed to miss the January 1, 2020, statutory deadline and push back the implementation of the final policy, which it now expects to implement by July 31, 2020.

In a December 2019 letter to the Office of the President, the NAHC asserted that the university had not performed the required level of outreach or sought meaningful consultation with California tribes regarding its NAGPRA policy.

Figure 4
The University Failed to Meet Statutory Deadlines for Its NAGPRA Policy



Source: State law and documentation and information provided by the Office of the President.

In its efforts to address the NAHC's concerns, the Office of the President has conducted additional outreach to tribes. It scheduled and conducted four half-day open forums around the State to engage with any tribes that chose to participate. On the same days as the forums, the Office of the President dedicated time for one-on-one meetings with tribal leaders from California. The Office of the President stated that since January 2020, it has also met with and obtained feedback from the NAHC. The Office of the President stated that it intends to be as responsive as possible to feedback from the NAHC and the tribal forums. In April 2020, the Office of the President distributed a new draft to stakeholders for final comments. When we asked the NAHC about the Office of the President's additional outreach in 2020, it stated that although

the Office of the President had made efforts to increase tribal outreach, that outreach did not reflect meaningful consultation with tribes. Specifically, it had expected the university to formally respond to the written feedback tribes provided. Further, the NAHC indicated that it had asked to participate in the Office of the President's work group in making policy revisions, but the Office of the President denied this request. The Office of the President stated that the NAHC's executive secretary had the opportunity to vote on the selection of members for the work group.

Our review of the draft policy from April 2020 found that it would not create consistency across campuses as state law intends. When it amended CalNAGPRA, the Legislature recognized the campuses' history of inconsistently applying NAGPRA and CalNAGPRA, and it required the university to adopt systemwide policies regarding the treatment of Native American remains and artifacts. For example, state law requires those policies to include systemwide requirements for demonstrating that remains and artifacts are affiliated with a tribe. As we discuss in the previous section, the basis for affiliation determinations currently varies from campus to campus. The draft policy's section covering affiliation builds on the federal requirements and the Office of the President's previous guidance by instructing campuses to review evidence for credibility and the possibility of affiliating remains and artifacts to more than one tribe. Although the policy addresses the grounds on which a campus may make an affiliation decision, it does not create a standardized process for doing so. For example, the policy could include documentation standards for campuses to follow when evaluating evidence they receive from tribes and require campuses to forward documentation to their campus committees when they are reviewing claims.

Additionally, the draft policy does not create sufficient oversight of the campuses' affiliation and repatriation activities, including oversight by the systemwide committee. The draft policy gives the systemwide committee the discretion to request reports from campuses to conduct oversight. These reports could include information such as the amount of time a campus took to process a claim, a summary of the evidence the campus used for a claim, or the campus's consultation history with a tribe. The committee could then make recommendations for revisions to the systemwide policy to the Office of the President. However, we do not believe these reports will provide adequate oversight because the policy does not require campuses to submit regular reports on activities such as affiliation, repatriation, and disposition decisions. Further, any reports the systemwide committee may request may not facilitate oversight due to inconsistent reporting practices by campuses. The draft policy requires the systemwide committee to make recommendations for consistency in the level of information

The draft policy does not create sufficient oversight of the campuses' affiliation and repatriation activities, including oversight by the systemwide committee.

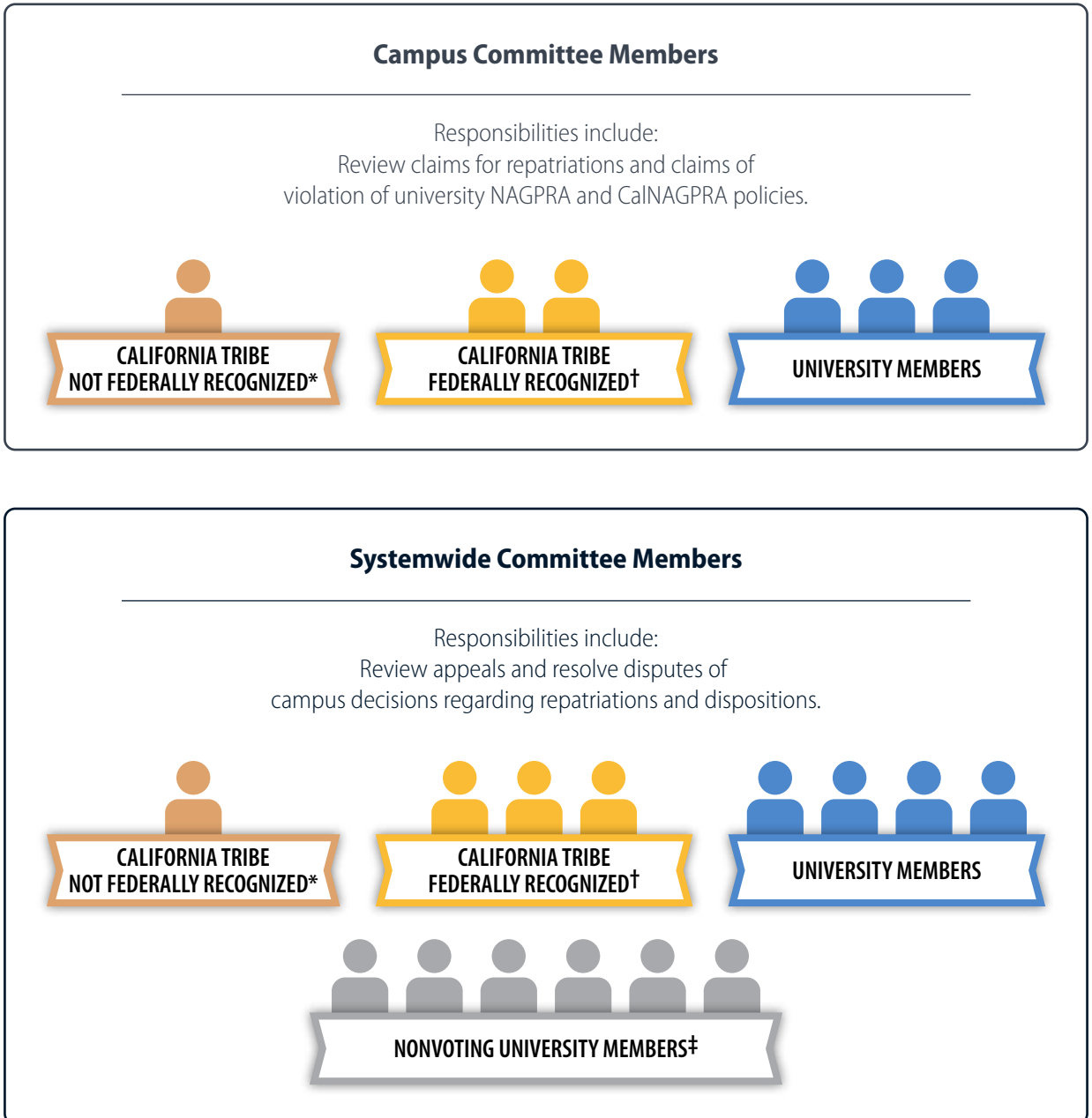
campuses include in their reports. However, until it does so, the lack of consistent information from campuses and limited reporting requirements will impede the systemwide committee's ability to identify differences in how the campuses implement NAGPRA and recommend revisions to university policy that will create the consistency the Legislature intended.

The Membership of the Systemwide and Campus Committees Does Not Comply With State Law

The university is not adequately complying with state law that requires the systemwide committee and the campus committees to have certain tribal representation. In its 2018 amendment to CalNAGPRA, the Legislature required the university to create the systemwide and campus committees, although the three campuses we reviewed and the Office of the President maintained committees before 2018 to review NAGPRA claims. The Legislature further amended CalNAGPRA in 2019 to add an additional tribal representative to the systemwide committee. According to the author of the 2018 amendment, the committees on some campuses had historically been composed nearly completely of members with certain research interests, which excluded tribal voices and views from scholars in fields such as Native American studies. Each of the campuses had formed their committees under the Office of the President's 2001 policy, which did not specify tribal membership requirements or the size of the committees, leading the campuses to have varying numbers of members and varying degrees of representation on their committees. The 2018 and 2019 legislative amendments to CalNAGPRA require the committees to have equal representation between university members and members of California tribes, which helps ensure that tribes have equal input on repatriation decisions.

State law now requires that each campus committee have three university members and three tribal members, as Figure 5 shows. Two of the tribal members should be from federally recognized California tribes and one from a California tribe that is not federally recognized. If no qualifying members of a California tribe are available, the law allows the university to appoint members from tribes outside California. However, considering the large number of California tribes, it is unlikely that no qualifying members would be available. The systemwide committee has similar membership requirements but also includes a nonvoting member from each campus that is subject to NAGPRA.

Figure 5
CalNAGPRA Establishes Required Campus and Systemwide Committee Membership



Source: State law.

* If no qualifying members of California tribes that are not federally recognized are available to serve, state law permits members from federally recognized California tribes to serve.

† If no qualifying members of California tribes are available to serve, state law permits members of other tribes from outside of California to serve.

‡ State law requires the systemwide committee to have one nonvoting member from each campus subject to NAGPRA.

The NAHC stated that members from a California tribe would have been available to serve on campus committees; however, the campuses did not request the NAHC to nominate California tribal members.

Despite these requirements, the campus committees and the systemwide committee do not have the required members from California tribes. The committees have some tribal members, as Table 1 shows. However, although Berkeley's committee has six tribal members, none of these members are associated with a California tribe. Similarly, Davis has three tribal members, but only two are associated with a California tribe. Los Angeles's committee has six tribal members, including one member from a California tribe that is not federally recognized. However, it only has one of the two required members of federally recognized California tribes. The remaining three tribal members are from tribes outside of California. Finally, the systemwide committee has two tribal members, but only one is associated with a California tribe. Although state law allows members from tribes outside of California to serve on committees, it only does so when no members from California tribes are available to serve. The NAHC stated that members from a California tribe would have been available to serve on campus committees; however, as we describe later in this section, the campuses did not request the NAHC to nominate California tribal members.

Further, the campus committees and the systemwide committee currently have more voting members from the university than tribal members. For example, Berkeley has 11 members on its committee, each of whom is a member of the university but only six of whom are also members of tribes. Further, the systemwide committee has seven members, six of whom are members of the university, but it only has two members from tribes. As a result, university member votes often significantly outnumber tribal member votes on the repatriation decisions that the campus and systemwide committees make. Until the three campuses and the Office of the President revise the membership of their committees, they cannot ensure that they are sufficiently involving all appropriate stakeholders in repatriation decisions and incorporating sufficient California tribal perspectives.

According to the campuses and the Office of the President, they have not reformed their committees to comply with state law because they are waiting for the university's final NAGPRA policy, which will include updated information about committee membership. The campuses noted that it might be difficult to find members who meet the requirements in state law, such as members with graduate degrees in specific fields. State law also requires the university members to have a minimum of five years' experience working in their field of study, and it gives preference to members who have demonstrated, through their professional experience, the ability to work in collaboration with Native American tribes successfully on issues related to repatriation or museum collection management. In contrast, the campuses and the

Office of the President expect the new policy to allow flexibility in selecting committee members as long as the exceptions promote repatriation. Specifically, the Office of the President stated that the policy will provide a path for exceptions that will address situations in which the rigidity of CalNAGPRA could hamper selection of the most qualified members. However, we find this explanation for delay unreasonable given that state law adequately specifies the required committee membership and even balance between university and tribal members, and permits flexibility to select retired university members if no members of the university meet the criteria in state law.

Table 1
The Campus and Systemwide Committees Lack the Required California Tribal Representation

	NAGPRA COMMITTEE			
	BERKELEY	DAVIS	LOS ANGELES	SYSTEMWIDE
Total committee members	11	14	9	7
University members without tribal affiliation	5	11	3	5
University members with tribal affiliation*	6	1	4	1
Tribal members not affiliated with the university*	0	2	2	1
<i>Total tribal members*</i>	6	3	6	2
Does the committee have equal representation between university and tribal members?	No	No	No	No
Members from a federally recognized California tribe†	0 of 2	1 of 2	1 of 2	0 of 3
Does the committee have the required number of members from a federally recognized California tribe?‡	No	No	No	No
Members from a California tribe not federally recognized	0 of 1	1 of 1	1 of 1	1 of 1
Does the committee have the one required member from a California tribe not federally recognized? ‡§	No	Yes	Yes	Yes

Source: Analysis of documents about committee members and interviews with staff from Berkeley, Davis, Los Angeles, and the Office of the President.

Note: We did not include nonvoting committee members in our review.

* The total number of tribal members on the committees includes members from tribes outside of California.

† State law requires the campus committees to have two members from federally recognized California tribes and the systemwide committee to have three.

‡ If no qualifying members of California tribes are available to serve, state law permits members from tribes outside of California to serve.

§ If no qualifying members of California tribes that are not federally recognized are available to serve, state law permits members from federally recognized California tribes to serve.

Finally, state law requires campuses and the Office of the President to appoint all committee members upon nomination by the NAHC, and the NAHC recently developed a process for nominating members of these committees. According to the NAHC, it has not nominated any members because the campuses and the Office of the President have not taken action to form these committees, and therefore have not yet requested nominations from the NAHC. If the university had made such requests, the NAHC stated it had established a general process for identifying and appointing representatives from California tribes for various boards, commissions, and advisory bodies, but did not have a process for identifying and nominating NAGPRA committee members. In response to our inquiry, the NAHC developed a process for nominating committee members in April 2020 so that it can make nominations when the university requests them.

Campuses Lost Some Remains and Artifacts Because They Poorly Managed Their Collections in the Past

Before the implementation of NAGPRA in 1990, the campuses lacked adequate controls and oversight related to access to their museum collections of Native American remains and artifacts. As a result, each of the three campuses we reviewed had missing NAGPRA remains and artifacts. For example, from the 1950s through the 1980s, Los Angeles used a sign-out sheet and honor system for students and professors who wanted to borrow from its museum for research, but those individuals did not always return what they borrowed to the collection. Berkeley and Davis cited the same problems, where unrestricted access to inventory led to stolen and misplaced remains and artifacts. For example, in some cases at Davis, faculty and graduate students accessing a collection for research took remains or artifacts with them after leaving the university.

The campuses each indicated that they lacked controls for keeping track of the remains and artifacts they had loaned.

Additionally, the campuses each indicated that they lacked controls for keeping track of what they had loaned. For example, Berkeley noted instances of loaning remains or artifacts to institutions overseas or exchanging them with other museums in the 1920s through the 1960s, but it did not always maintain records of these transfers. Davis explained that before the 1980s, it did not have a process for tracking loaned remains or artifacts, so some loans may not have been documented and the remains or artifacts were never returned. The inadequate recordkeeping of loans and exchanges resulted in losses that the campuses did not discover until NAGPRA required them to take inventory of their collections in the 1990s.

By the 1990s, each of the three campuses we visited had begun establishing processes to protect its Native American remains and artifacts from being lost or stolen. According to standards issued by the American Alliance of Museums, museums are expected to implement appropriate measures to ensure the safety and security of their collections. During our review, we observed that each of the campuses now has strict physical controls for accessing its NAGPRA collections. For example, each campus stores NAGPRA remains and artifacts in locked rooms with access limited to authorized staff. Additionally, Berkeley and Davis established processes for tracking loaned remains and artifacts and ensuring that borrowers return what they borrow. Los Angeles established a process for requesting a research visit to its museum to view remains or artifacts but stated that it does not loan from its NAGPRA-related collection. Because we found that each campus's current processes for protecting its NAGPRA collections appear adequate, it is likely that the losses to the collections occurred decades ago, when the campuses lacked adequate safeguards.

Although the three campuses have maintained records of their missing remains and artifacts, only Berkeley could tell us how many items were missing from its NAGPRA collection. Each of the three campuses track NAGPRA remains and artifacts electronically, but only Berkeley centrally tracks whether something is missing. According to documentation that Berkeley provided to us, the campus has identified nearly 180 missing or lost remains or artifacts. At Los Angeles and Davis, the campuses maintain records of missing remains and artifacts in individual files, but because neither campus centrally tracks this information, they could not tell us the total number of items missing. When we inquired about some of the missing remains and artifacts at each campus, the campuses generally could provide little information about how they went missing because of poor recordkeeping.

Although all three campuses identified missing remains and artifacts during the initial inventories they completed in the 1990s to 2000, only Davis and Los Angeles could demonstrate that they informed tribes of what was missing. After Congress enacted NAGPRA in 1990, it required each campus to compile a list describing its remains and artifacts subject to NAGPRA and provide that list to tribes that were or might be affiliated. Both Davis and Los Angeles identified missing remains and artifacts on the NAGPRA inventories that they sent to tribes. However, Berkeley does not know what information it provided to tribes during that initial inventory process. Although it indicated that it might have informed the tribes of missing remains or artifacts, it has no documentation to demonstrate it did so.

Although all three campuses identified missing remains and artifacts during the initial inventories they completed in the 1990s to 2000, only Davis and Los Angeles could demonstrate that they informed tribes of what was missing.

When tribes are not notified of missing remains and artifacts, they may invest time in initiating repatriation claims for items that a campus cannot return, which may upset tribal communities. In fact, during Berkeley's review of a tribe's November 2016 request for the repatriation of certain remains, the campus noted that the remains of a child in its collection that was included in the requested remains had been missing for more than 20 years. According to a letter from that tribe to the campus, the fact that the remains were missing was deeply distressing for its community because not only was the grave of the child violated, but the child's remains could be lost in a closet, attic, or desk drawer of a researcher. As this situation illustrates, when Berkeley notifies tribes of missing remains and artifacts only after the initiation of a repatriation claim, it further deteriorates the important relationships between the campus and tribal communities. These are relationships that Berkeley has told us it seeks to maintain.

The NAHC Has Not Published a List of Tribes That California Recognizes

CalNAGPRA requires the NAHC to create a list of California tribes that will, when completed, allow more tribes to submit repatriation claims. When the Legislature passed CalNAGPRA, it intended the legislation to provide a mechanism for tribes that are not federally recognized to pursue repatriation of remains and artifacts. This mechanism requires the creation of a list of tribes not federally recognized that are eligible to participate in the CalNAGPRA process. Although more than 100 federally recognized tribes in California can pursue repatriation through NAGPRA and CalNAGPRA, dozens of tribes in California do not have this recognition and cannot currently pursue repatriation. Once the NAHC completes a list of tribes that meet the Legislature's criteria for a California tribe, the tribes on that list will have the same ability as federally recognized California tribes to submit repatriation claims to agencies, such as campuses, that possess remains and artifacts eligible under CalNAGPRA. However, until the NAHC completes this list, some California tribes that might otherwise be eligible to submit claims for repatriation under CalNAGPRA cannot do so.

The NAHC's responsibilities under CalNAGPRA are fairly recent. The Legislature established the NAHC in 1976 to manage Native American cultural resources in the State, and it was not initially involved in NAGPRA or CalNAGPRA. When CalNAGPRA was passed in 2001, the law created a new separate oversight entity, the Repatriation Oversight Commission, and tasked it with creating the list of California tribes not federally recognized that would be eligible to request repatriation under CalNAGPRA. However, for reasons we were not able to discern, the Legislature never

funded the Repatriation Oversight Commission. As a result, the Repatriation Oversight Commission was briefly formed, only meeting two times in 2004, and the creation of the list of California tribes went unaddressed. In 2015 the Legislature abolished the Repatriation Oversight Commission and reassigned its responsibilities, including the creation of the list of California tribes, to the NAHC.

Since the enactment of CalNAGPRA, the number of tribes eligible for inclusion on the list has dwindled rather than increased. One criterion for placement on the list does not provide the NAHC any discretion. Specifically, CalNAGPRA limits eligibility for the list to only those California-based tribes that are in the process of obtaining federal recognition by petitioning the U.S. Department of the Interior. In 2015 the U.S. Department of the Interior changed its regulations that govern the process tribes must follow when petitioning for federal recognition. These changes established a phased review process intended to streamline the review. According to the NAHC, after the regulations were changed, tribes may have withdrawn their petitions or been removed from the petitioning process. In 2013—two years before the U.S. Department of the Interior amended its regulations as described above—81 California tribes were in the process of petitioning for federal recognition. However, as of March 2020, just four California tribes were actively petitioning for federal recognition. According to the U.S. Department of the Interior’s website, of the 77 tribes that are no longer petitioning for federal recognition, none received recognition and only one was formally denied recognition, supporting the NAHC’s contention that tribes may have withdrawn from the process.

The decrease in the number of California tribes petitioning for federal recognition in turn reduced the number of tribes that are eligible for inclusion on the NAHC’s list of California tribes. Because only four tribes are currently eligible for inclusion on the list the NAHC must create, that list will not significantly expand the number of tribes that are eligible to make repatriation claims. The limited expansion of tribes that can pursue repatriation reduces the impact the Legislature intended CalNAGPRA to have, which was to provide a means for both California tribes that are federally recognized and those not federally recognized to submit repatriation claims for the return of remains and artifacts that may belong to them.

Further, we found that the NAHC has not taken the actions necessary to establish the list of tribes that California recognizes. The current executive secretary of the NAHC, who started in February 2018, explained that in April 2018, she initiated a competitive bidding process to engage a consultant to develop a CalNAGPRA implementation plan. The consultant was expected

We found that the NAHC has not taken the actions necessary to establish the list of tribes that California recognizes.

to develop regulations and internal procedures for implementing CalNAGPRA, which would address developing the list of tribes, receiving repatriation claims, and mediating disputes. However, the bidding process was initially unsuccessful, and the NAHC did not contract with a consultant until June 2019.

The executive secretary further stated that around this time, the NAHC began to move forward on publishing the list of tribes that California recognizes; however, the NAHC has concerns—which tribes have also expressed—about the current definition of a California tribe in state law. As we describe above, this definition will limit the NAHC to adding only four tribes to the list, excluding many tribes that are not federally recognized from making repatriation claims. As a result, the NAHC held a public hearing in October 2019 to better understand the issues related to the definition and called for written feedback from tribes. More recently, the NAHC became aware that tribes close to the issue were working with the Legislature to propose a solution that would expand the definition of a California tribe in CalNAGPRA to allow it to officially recognize a greater number of tribes. If these efforts are not successful, the executive secretary noted that the NAHC would move forward with publishing the list after the legislative session ends in August 2020.

Recommendations

Legislature

To allow more California tribes to pursue repatriation of remains and artifacts that may belong to them, and consistent with the intent of CalNAGPRA, the Legislature should amend state law to allow more tribes to be eligible for inclusion on the NAHC's list of recognized tribes.

University

To ensure that the affiliation, repatriation, and disposition processes are timely and consistent across all campuses as the Legislature intended, the Office of the President should publish its final systemwide NAGPRA policy no later than August 2020.

To increase oversight and ensure that campuses consistently review claims, the Office of the President should require campuses to provide reports about all current claims for affiliation, repatriation, and disposition, as well as any associated decisions, to the systemwide committee for biannual review no later than January 2021.

To ensure that tribal perspectives are appropriately represented in repatriation decisions, the Office of the President should ensure that membership of campus and systemwide committees complies with state law by including appropriate tribal representation no later than November 2020.

To increase the transparency of the campuses' NAGPRA collections, the Office of the President should determine whether its campuses have informed tribes about all known missing remains and artifacts no later than August 2020, and if campuses have not done so, determine an appropriate method of communicating with tribes about missing remains and artifacts.

NAHC

To ensure that more tribes can make repatriation claims, the NAHC should publish the list of recognized California tribes no later than September 2020.

We conducted this performance audit under the authority vested in the California State Auditor by Government Code 8543 et seq. and in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Respectfully submitted,



ELAINE M. HOWLE, CPA
California State Auditor

June 11, 2020

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Appendix

Scope and Methodology

Section 8028 of the Health and Safety Code requires the California State Auditor (State Auditor) to commence audits of the university's compliance with NAGPRA and CalNAGPRA in 2019 and 2021, and to report the results of the audit to the Legislature. This is the first of two reports that the State Auditor plans to release.

To obtain an understanding of the requirements of NAGPRA and CalNAGPRA, we reviewed relevant state and federal laws and regulations. Using factors such as the size of their NAGPRA collections and their locations across the State, we selected three campuses and the Office of the President to review, and we performed audit work related to their adherence to the requirements in NAGPRA and CalNAGPRA. We visited the following three campuses:

- Berkeley
- Davis
- Los Angeles

To determine whether these campuses followed the requirements in NAGPRA, we reviewed 28 of the approximately 55 claims that the three campuses received from tribes from January 2010 through August 2019. Specifically, we reviewed 19 completed repatriations and six completed disposition claims, including denied claims, to ensure that they followed federal regulations that govern the repatriation and disposition processes. Additionally, we reviewed three pending claims to ensure that we identified the reasons their statuses were pending as opposed to denied. To verify information about campuses' NAGPRA collections, including remains and artifacts that campuses reported as repatriated or missing, we reviewed the accuracy and completeness of their data concerning the collections, which we discuss in more detail in the assessment of data reliability below.

To identify whether the Office of the President complied with state law related to adopting and implementing systemwide policy, we reviewed both its process for drafting the policy as well as the draft text of the policy. Specifically, we reviewed documentation and meeting summaries, and we interviewed officials to identify the timeline and process the Office of the President is using. We compared the text of the first draft systemwide policy to the specific requirements in state law and assessed whether the policy addressed any of the concerns we identified in our review of the

three campuses' approaches to implementing NAGPRA. We also reviewed the most recent draft of the systemwide policy as of April 2020 to determine whether the policy addressed any of our concerns, and we updated our conclusions appropriately.

To evaluate whether the campuses and the Office of the President are complying with CalNAGPRA requirements related to the membership of their committees, we interviewed their staff and reviewed documentation related to committee members. For the systemwide and campus committees, we reviewed the academic background and biographies of university members and had the campuses and the Office of the President confirm the tribal associations of tribal members.

To ensure that the NAHC was fulfilling its statutory responsibilities, we identified state laws related to its responsibilities, interviewed staff, and reviewed supporting documentation where available. Although CalNAGPRA establishes several roles for the NAHC, including mediating disputes and publishing a list of California tribes that have not received federal recognition, our review focused on initial steps that the NAHC must take to implement CalNAGPRA. We also interviewed NAHC staff and reviewed its processes for soliciting nominations for tribal members to serve on campus and systemwide committees.

Assessment of Data Reliability

The U.S. Government Accountability Office, whose standards we are statutorily required to follow, requires us to assess the sufficiency and appropriateness of computer-processed information that we use to support findings, conclusions, and recommendations. In performing this audit, we relied on data provided by the campuses we reviewed to understand the campuses' NAGPRA collections. To evaluate these data, we performed electronic testing of the data and tested the accuracy and completeness of the data.⁴ We found that Davis's and Los Angeles's data related to their NAGPRA collections were sufficiently reliable for the purposes of our audit.

However, during our review, we identified errors in the accuracy of Berkeley's NAGPRA collection data. Specifically, of the 24 sets of remains and artifacts that we reviewed, Berkeley's data had six errors in the number of remains and artifacts in those sets. As a result, we determined that the NAGPRA collections data that

⁴ In order to be respectful of tribal concerns about disturbance of their ancestors, we did not view remains or artifacts as part of these activities. Instead, we verified storage and location information and compared data to physical museum records.

Berkeley provided to us are not sufficiently reliable for the purposes of our audit. Nevertheless, because these data represent the only source for this information, we present a breakdown in the Audit Results of the size of campus NAGPRA collections; the number of missing remains and artifacts, where available; and the percentage of remains and artifacts that Berkeley has repatriated to tribes. To provide additional assurance on the percentage of items that Berkeley had repatriated, we compared the data to repatriations we tested at the campus and ensured that the data were accurate. Although the problems we identified with the data may affect the precision of some of the numbers we present, there is sufficient evidence in total to support our findings, conclusions, and recommendations.

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May 21, 2020

Ms. Elaine M. Howle
California State Auditor
621 Capitol Mall, Suite 1200
Sacramento, California 95814

Dear State Auditor Howle:

Thank you for the opportunity to review and respond to the draft audit report, *Native American Graves Protection and Repatriation Act: The University of California Is Not Adequately Overseeing the Return of Native American Remains and Artifacts*. Your recommendations will better enable the University to ensure consistent implementation of federal and State law, and even the University's own policies. Below are the University's responses to the specific recommendations in the report directed to the University of California Office of the President.

- 1. To ensure that the affiliation, repatriation, and disposition processes are timely and consistent across all campuses as the Legislature intended, the Office of the President should publish its final systemwide repatriation policy no later than August 2020.**

We agree with this recommendation. Though variances across campuses do not necessarily mean non-compliance with the law, we do plan to enact policy that promotes consistency in achieving the goal of repatriation throughout the University. The University expects to issue the final policy no later than August 2020.

- 2. To increase oversight and ensure that campuses consistently review claims, the Office of the President should require campuses to provide reports about all current claims for affiliation, repatriation, and disposition, as well as any associated decisions, to the systemwide committee for biannual review no later than January 2021.**

We agree with this recommendation and will include this requirement in the new policy, with the first report due to the President and systemwide committee no later than January 2021.

- 3. To ensure that tribal perspectives are appropriately represented in repatriation decisions, the Office of the President should ensure that**

Ms. Elaine M. Howle
May 21, 2020
Page 2

membership of campus and systemwide committees complies with State law by including appropriate tribal representation no later than November 2020.

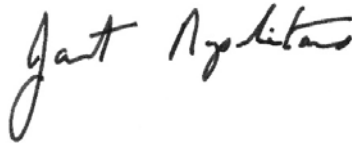
We agree with this recommendation, and acknowledge the importance of ensuring tribal perspectives are appropriately represented in repatriation decisions. We will appoint reconstituted committees no later than November 2020.

- 4. To increase the transparency of the campuses' NAGPRA collections, the Office of the President should determine whether campuses have informed tribes about all known missing remains and artifacts no later than August 2020, and if campuses have not done so, determine an appropriate method of communicating with tribes about missing remains and artifacts.**

We agree with this recommendation and will determine whether campuses have informed tribes about all human remains and artifacts known to be missing from campus held NAGPRA collections no later than August 2020. If campuses have not done so, we will determine an appropriate method of communicating with tribes about missing remains and artifacts.

The University understands the need for a stronger policy to better effectuate repatriation of Native American human remains and cultural items, and to improve our relationships with Native American communities. The University has been working hard over the last two years to make improvements in this area, and we anticipate that the recommendations and observations in your report will contribute further to helping us achieve these goals. We appreciate your team's professionalism and cooperation during the audit process, and the time taken to identify improvements.

Yours very truly,



Janet Napolitano
President

cc: Executive Vice President and Provost Michael Brown
Senior Vice President and Chief Compliance and Audit Officer Alexander Bustamante
Chief of Staff to the President and Chief Policy Advisor to the President Jenny Kao



STATE OF CALIFORNIA

Gavin Newsom, Governor

NATIVE AMERICAN HERITAGE COMMISSION

May 21, 2020

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California State Auditor
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Sacramento, CA 95814

VICE CHAIRPERSON
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Via Electronic Mail

SECRETARY
Merri Lopez-Keifer
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Dear Ms. Howle:

PARLIAMENTARIAN
Russell Attebery
Karuk

The Native American Heritage Commission (Commission) appreciates the opportunity to respond to the draft audit report regarding the University of California's (UC) compliance with repatriation laws as required under AB 2836 (Report 2019-047.)

COMMISSIONER
Marshall McKay
Wintun

I. THE AUDIT DOES NOT EVALUATE THE UC'S ASSESSMENT OF CULTURALLY UNIDENTIFIED REMAINS

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COMMISSIONER
William Mungary
Paiute/White Mountain Apache

AB 2836 requires the State Auditor to conduct an audit "regarding the University of California's compliance with the federal Native American Graves Protection Repatriation Act (25 U.S.C. Sec. 3001 et seq.) and this chapter." (Health & Saf. Code, § 8028.) The Commission is particularly concerned about the UC's extensive collection of culturally unidentified items (CUI). The Legislature found that at UC Berkeley, home to one of the nation's largest Native American collections, two-thirds of its collection had been designated as culturally unidentified. Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subd. (a)(12). The Legislature documented concerns about the UC's past compliance with repatriation laws, including the absence of required Native American consultations which "has resulted in some University of California campuses excluding or limiting the participation of stakeholders who could bring valuable knowledge to the repatriation process." (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subd. (a)(9).)

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COMMISSIONER
Julie Tumamait-Stensie
Chumash

COMMISSIONER
[Vacant]

COMMISSIONER
[Vacant]

EXECUTIVE SECRETARY
Christina Snider
Pomo

Nothing in the audit addresses the UC's existing and past compliance with CalNAGPRA and federal NAGPRA when it relied so heavily on the designation of CUI in retaining its collections, including whether it had conducted adequate consultations necessary to determine cultural affiliation under federal and state law. (Health & Saf. Code, §§ 8012, subd. (f), 8013, subd. (a)(2); 43 C.F.R. § 10.11(b), (4), (5), (6).)

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* California State Auditor's comments begin on page 51.

- In conjunction with CUI, federal NAGPRA requires the UC to affirmatively offer to transfer control of remains to tribes under a descending priority list. (43 C.F.R. § 10.11(c)(1).) The
- ③ Legislature documented that the UC's current repatriation policy fails to comply with this law. (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subd. (a)(9).)
- ① Here again, nothing in the audit addresses UC's existing and past compliance with section 10.11 in offering to repatriate items under its disposition process.

II. INACCURACIES AND OMISSIONS

A. NAGPRA

- The draft report states that a national NAGPRA committee “monitors and reviews the implementation of NAGPRA across the nation. For example, the national committee monitors the inventory and identification process, consults on the development of the program's regulations, and facilitates the resolution of disputes between agencies and tribes.” (Draft report at pp. 4-5.) No citation is provided for this statement and it is not
- ④ ⑤ completely accurate. While the National Review Committee may monitor the performance of agencies and museums, as well as assist in resolving disputes, it does not have a comprehensive program to do so in all cases. (43 C.F.R. § 10.16(a).) The
- ⑥ draft report fails to provide examples where this committee has actually monitored UC compliance with NAGPRA to ensure its compliance. In the vast majority of cases, agencies implement and oversee their own compliance with NAGPRA which the Legislature has documented has been a systematic problem for the UC. It would be a misimpression to suggest that this committee will be overseeing the UC's latest efforts to comply with NAGPRA.

B. Reliance on Inapposite Statutes

- ⑦ The draft report cites to pre-NAGPRA state statutes governing the discovery of remains and items on private property, as well as to AB 52 governing the assessment of tribal resources in conjunction with environmental review under the California Environmental Quality Act (CEQA). (Draft report at p. 5.) These statutes have no relevance to
- ④ repatriation under federal and state NAGPRA and their discussion is unnecessary and confusing.

C. Archeological Activities

- ④ ⑤ ⑧ The draft audit states that “agencies in California are no longer expanding their collections of remains and artifacts covered by NAGPRA through archaeological activities.” (Draft report at p. 5.) No factual support is provided for this proposition and concerns still persist that agencies (particularly universities) may still be performing archeological activities which may include retaining Native American items, including remains and related cultural items. The Commission does not see a need to include this statement for purposes of the audit.

D. Misstatements and Misleading Statements About the Repatriation Process

1. Inadequate Description of the Repatriation Process Misses Critical Concerns Raised by the Legislature

The draft report states in its heading and text that tribes simply reclaim remains and items through repatriation and disposition. (Draft report at p. 5.) It claims that the UC responds “to tribes’ claims to have remains and artifacts repatriated to them.” This is followed by another summary offset from the main text showing only three requirements that a tribe must meet to obtain repatriation. (Draft report at p. 6.)

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But this overly simplified summary completely ignores the problems identified by the Legislature that plague this process, namely inadequate consultation necessary to facilitate cultural affiliation leading to the improper designation of items as culturally unidentified. (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subd. (a)(9) and (12).) This prompted the Legislature to require systemwide policies governing claims, inventory, deaccession, and the identification and reassessment of CUI. (Health & Saf. Code § 8025.)

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Further, this summary claims that “[h]uman remains must be proven by the agency to be Native American. Artifacts must have a proven cultural affiliation.” (Draft report at p. 6.) This shows a misunderstanding of the process. Agencies are not required to prove that their remains are Native American. Rather, each agency in possession or control of Native American remains and related items must inventory these items through consultation in an effort to determine cultural affiliation. (43 C.F.R. § 10.9(a) and (b).) A proper understanding of the process is necessary to conduct an appropriate audit. The problem identified by the Legislature was not a failure by the UC to prove its remains are Native American, but rather problems associated with properly identifying, inventorying, consulting, and determining cultural affiliation associated with the repatriation process. (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subd. (a)(8)-(12).)

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In a related misunderstanding of NAGPRA, the draft report states that it is the tribes that may request consultation and may submit claims, which if successful, may lead to repatriation. (Draft report at p. 6.) But under NAGPRA, it is the UC which must notify tribes about its collections, including initiating consultations as part of its inventory process in order to determine cultural affiliation. (43 C.F.R. § 10.9.) Tribes may submit requests for repatriation after this process has been completed and cultural affiliation has been assessed. (43 C.F.R. § 10.10.) An agency under this circumstance must expeditiously repatriate items, but it is not deigned to be an adversarial process where tribes have the burden to successfully repatriate items.

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Other statements miss concerns related to repatriation. The draft report states that, “Once an agency determines that certain remains are eligible for repatriation, it must try to identify the tribe or tribes affiliated with them.” (Draft report at p. 7.) This simplification misses the essential concerns raised by the Legislature related to prior UC

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- ⑪ efforts related to identifying tribes culturally affiliated with the items. (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subd. (a)(8)-(12).) The UC must do more than just try to identify tribes affiliated with remains and items, it must properly inventory and consult with tribes in an effort to determine cultural affiliation. (43 C.F.R. §§ 10.5, 10.8, and 10.9.)

2. The Effect of Publishing the List of Tribes Eligible to Participate in State Repatriation

- ⑫ The draft audit states: "However, until the NAHC completes this list, some California tribes that might otherwise be eligible to submit a claim for repatriation under CalNAGPRA cannot do so." (Draft report at p. 14.) This statement is legally questionable. The UC is required to comply with federal NAGPRA which only allows repatriation to federally recognized tribes. Any list generated by the Commission containing non-federally recognized tribes would not be entitled to submit repatriation claims under the UC's current repatriation policy regardless of their inclusion on a Commission list.
- ⑬ Further, under the federal disposition process for CUI, federally recognized tribes are given priority of non-federally recognized tribes for items, such that a tribe on the Commission's list with state cultural affiliation may still be unable to participate in repatriation/disposition. (43 C.F.R. § 10.11(c).)
- ⑬ Finally, the federal disposition process for CUI requires the agency to obtain formal National Park Service Approval before repatriating remains to non-federally recognized tribes, unless that tribe has associated with a federally recognized tribe providing it with standing to make a claim. (43 C.F.R. § 10.11(c) Under this circumstance, a tribe on the Commission's list with state cultural affiliation could be denied disposition by the Park Service.

E. Identifying the Wrong Issues Associated with Repatriation

1. Disposition Plans and Tribal Disputes

- ①⑥ The draft report's focus is misplaced. It describes the disposition process under NAGPRA for CUI, highlighting that as part of this process that tribal disputes may arise contesting disposition plans. (Draft report at p. 7.) But the concerns raised by the Legislature in enacting AB 2836 and in requiring audits had nothing to do with problems with disposition plans and tribal disputes. The problems identified by the Legislature involved prior failures related to inventory, consultation, and cultural affiliation processes. (Assem. Bill No. 2836 (2017-2018 Reg. Sess.) § 1 (Legislative Findings), subd. (a)(8)-(12).) These problems are the ones that have precluded effective repatriation, rather than faulty disposition plans or tribal disputes.

2. Evidence Required to Support Cultural Affiliation

The draft report states that NAGPRA allows campuses to use various types of evidence to support determinations. (Draft report at p. 8.) But the draft report fails to address that some campuses fail to accord tribal knowledge equal consideration as other forms of evidence, including using gaps in this evidence as a basis for denying cultural affiliation. (43 C.F.R. § 10.14(d) and(e).)

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3. Dispute Resolution

The draft report states that tribes disagreeing with campus decisions “have various options for dispute.” (Draft report at p. 8.) But the draft report does not assess whether these avenues are fair and effective. Because the UC has had no policies governing confidentiality for information provided by tribes as part of dispute resolution (something addressed under the Public Records Act—Gov. Code, §§ 6254, subd. (r), 6254.10), some tribes may be reluctant to pursue such disputes. Thus, the draft audit report concludes, without evidentiary citation, that only one repatriation decision has been disputed by a tribe, without assessing tribal concerns about the process that may have stifled tribes bringing such disputes.

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The draft audit report suggests that under state law, tribes may also request the Commission mediate disputes. (Draft report at p. 8.) While making this statement, the draft report does not mention that the UC has consistently taken the position that CalNAGPRA does not currently apply until the Commission issues a tribal list under Health and Safety Code section 8012, subdivision (j), thus it has never made the option of Commission mediations available to tribes. The draft report also omits mention that the option for Commission mediation under CalNAGPRA only came into existence in 2015, when the Legislature gave the Commission authority under this statute. Prior to 2015, this avenue was not generally available to tribes.

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4. Assessing Legislative History and Findings

While the proposed report explains federal and state NAGPRA, it omits discussion of AB 2836's Legislative findings, the statute which authorized the audit. These Legislative findings identify the areas the Legislature was most concerned about when it enacted the law, which specifically include identification, inventory, consultation, and cultural affiliation. This omission is significant because these are the areas that the audit should be scrutinizing.

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F. CalNAGPRA's Impacts

The draft report asserts that “CalNAGPRA creates additional opportunities for tribes to obtain remains and artifacts and increases oversight of campuses.” (Draft report at p. 8.) As previously noted, the UC has consistently claimed that CalNAGPRA does not apply until the Commission publishes a list of non-federally tribes eligible to participate in the repatriation process, however, as explained more fully below under subdivision

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- (H), publishing the list has been hampered by CalNAGPRA's citation to a federal entity that no longer exists and to outdated federal law, as well as major changes in federal law which eliminated the vast majority of non-federally recognized tribes that could be placed on such a list, a fact later mentioned by the draft report. As a result, the UC has never complied with CalNAGPRA and this statute has never been made available to tribes by the UC as an avenue for repatriation.
- ⑬ This portion of the draft report does not discuss the related impact of the Legislature's failure to fund the Repatriation Oversight Commission. Specifically, as later mentioned in the report, prior to the Commission assuming its CalNAGPRA responsibilities as required by statute in 2015, CalNAGPRA created the Repatriation Oversight Commission which was required to create the list of non-federally recognized tribes eligible to participate in the process, however, the Legislature never funded this entity. Because of this, no mechanism existed for creating the tribal list and CalNAGPRA has never created the opportunities for tribes to obtain repatriation as suggested by the draft report.
- ③ This portion of the draft report does not discuss the related impact of the Legislature's failure to fund the Repatriation Oversight Commission. Specifically, as later mentioned in the report, prior to the Commission assuming its CalNAGPRA responsibilities as required by statute in 2015, CalNAGPRA created the Repatriation Oversight Commission which was required to create the list of non-federally recognized tribes eligible to participate in the process, however, the Legislature never funded this entity. Because of this, no mechanism existed for creating the tribal list and CalNAGPRA has never created the opportunities for tribes to obtain repatriation as suggested by the draft report.
- ③ In relationship to the purported opportunities CalNAGPRA provides to California tribes, the draft audit fails to examine the need for CalNAGPRA in the first place. The audit should consider NAGPRA hearings conducted in the 1990's, as well as hearings and testimony related to the enactment of CalNAGPRA in 2001, describing the difficulties and concerns associated with NAGPRA by California tribes necessitating its enactment. In this sense, the draft audit does not adequately address tribal concerns before discussing the potential opportunities provided by CalNAGPRA.

G. Reasons for Tribes Lacking Federal Recognition

- ③ ⑥ The explanation concerning lack of federal recognition for certain California tribes is incomplete affecting the legal analysis. (Draft report at pp. 9 and 15.) While it is accurate that some tribes in California are not federally recognized because their tribal government's political status was terminated by the federal government through the Termination Act, other tribes in California have non-federally recognized status due to California's and the federal government's genocidal and discriminatory practices, policies and laws, but this is never mentioned. These tribes are often precluded from even petitioning for federal recognition. A more in-depth examination of this history is available in the Executive Summary and Historical Overview Report contained in the *Advisory Council on California Indian Policy Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416*, published in September, 1997.
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As the draft report notes, CalNAGPRA is intended to provide a mechanism for those California tribes who do not have federal recognition to submit repatriation claims to California state agencies, but this intent has been undermined by language limiting repatriation to non-federally recognized tribes with pending petitions for federal recognition, something tribes subject to genocidal and discriminatory practices are often precluded from even seeking.

H. Publishing a CalNAGPRA Tribal List

One impediment in publishing a tribal list under CalNAGPRA is the fact that in order to qualify a tribe must have a petition pending on a list maintained by a branch of the Bureau of Indian Affairs that no longer exists and under a federal regulation (25 C.F.R. § 82.1) which also no longer exists. (Health & Saf. Code, § 8012, subd. (j)(2)(A).) Issues related to federal recognition are of tremendous concern and interest in the tribal community such that any potential legal ambiguities in publishing a CalNAGPRA tribal list would be subject to legal challenge. No definitive legal answer exists concerning this issue. This concern in publishing a tribal list is not discussed in the draft report. ⑰

A further hurdle to publishing a list is the fact that the petitioner list maintained by predecessor entity to the current Office of Federal Acknowledgement (OFA), the Branch of Acknowledgement and Research, maintained the list based upon tribes with pending petitions, while OFA only maintains a list of tribes with petitions under active review, which does not include all tribes with pending petitions, which may not be under active review by OFA. This is an additional concern to publishing a tribal list under CalNAGPRA not addressed in the draft report.

Further the draft report states that, "According to the NAHC, tribes may have withdrawn their petition or been removed from the list after the regulations were changed, resulting in a decrease in the number of tribes petitioning for federal recognition, and therefore the number of tribes that are eligible for inclusion on the NAHC's list of California tribes." (Draft report at p. 15.) While this may be true, many other reasons may also exist for tribes being taken off the petitioners' list. These are not the only reasons tribes may have been removed from the list and the OFA and the affected tribes would have better information as to these reasons. But other potential reasons for being removed from OFA's petitioners' list should be identified. ④

I. Inventory

The proposed audit report discusses that the UC has remains and cultural items without any sort of estimate as to the number of items it currently has, especially compared to 1990, when federal NAGPRA was enacted. This is critical in establishing a meaningful baseline to assess UC compliance with federal and state NAGPRA under AB 2836. (Health & Saf. Code, § 8028.) An assessment of the UC's past repatriation efforts under federal NAGPRA prior to AB 2836's enactment is necessary to assess compliance, as well as, to gage the effect of UC's efforts under this statute. ① ⑱

J. Ambiguous Statements and Findings

1. Consultation

The draft report states that as part of consultation, the Commission expected "the university to formally respond to all of the written feedback tribes provided." (Draft report at p. 12.) This is not a Commission expectation. AB 2836 requires the UC to ⑰
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develop its Policy in consultation with California Native American tribes. (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.*)

- ①⑨ Failing to respond to tribal comments is not a meaningful process carefully considering tribal views in an effort to reach agreement; however, our concerns about the process utilized by the UC to receive input extend beyond its failure to respond to comments. The entire process of tribal engagement was done at the preference, convenience, and direction of the UC, with little regard for the individual preferences and needs of the tribal governments, communities, and individuals it was legally required to consult with. A process that fails to take into account the nuances, preferences, and individual differences of the diverse parties it seeks to obtain input from is inherently flawed and is unlikely to ensure meaningful engagement from the consulting parties.

2. Working Group

- ④ The draft report states that "the NAHC indicated that it had asked to join the Office of the President in making policy revisions." (Draft report at p. 12.) The Commission believes that this is referring to the fact that the Commission offered to participate on the UC's repatriation policy working group to offer its expertise, but that the UC never accepted this offer, and in fact unequivocally rejected the Commission's offer. If this is the set of facts the report is referring to, the draft report should state this fact, rather than using confusing language to suggest that the Commission somehow sought "to join the Office of the President in making policy revisions."
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K. Existing UC Committees

- ①③ The draft report suggests that the UC may have created some sort of systemwide committee itself, without obtaining nominees from the Commission before doing so.
- ④ (Draft report at p. 13.) To be clear, if this occurred, the audit should reference the fact that the UC did not inform the Commission it was doing so and did not seek nominees at that time. As to any existing UC systemwide committees, UCLA's repatriation coordinator, Wendy Teeter, and Carole Goldberg at UCLA, informed the Commission that existing UC systemwide committees often hinder repatriation efforts at UCLA by scrutinizing and delaying proposed repatriations to tribes. They informed the Commission that removal of this barrier by AB 2836 would improve the repatriation process. This fact is not referenced in the draft audit.

III. RECOMMENDATIONS

- ①②① The draft report states that: "To ensure that more tribes can make repatriation claims, the NAHC should publish the list of recognized California tribes no later than September 2020." (Draft report at p. 16.) Due to the legal concerns identified above in publishing
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such a list, as well as the other concerns identified in the draft report, the Commission requests that this recommendation be altered to recommend Legislative amendments to CalNAGPRA as a condition precedent to publishing any tribal lists. Further, the time for making these Legislative amendments, as well as publishing any lists, needs to factor in COVID-19 restrictions potentially limiting or delaying Legislative amendments, which would also impact the timing of any tribal-list publication by the Commission.

Sincerely,



Christina E. Snider
Executive Secretary

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Comments

CALIFORNIA STATE AUDITOR'S COMMENTS ON THE RESPONSE FROM THE NATIVE AMERICAN HERITAGE COMMISSION

To provide clarity and perspective, we are commenting on the NAHC's response to our audit. The numbers below correspond to the numbers we have placed in the margin of the NAHC's response.

The NAHC is incorrect, the audit does evaluate the university's compliance with repatriation laws. However, as we repeatedly communicated to the NAHC, state law requires our office to adhere to confidentiality requirements that prohibit us from sharing text related to other entities, such as the university, with the NAHC before we publish the audit report. Therefore, as required by law, the redacted draft report we provided to the NAHC included those portions of the report that were relevant to it, but did not include any of our findings related to the university's noncompliance with NAGPRA and CalNAGPRA.

①

Throughout its response, the NAHC refers to the remains and artifacts that have not been affiliated with a tribe as "culturally unidentified items," a technical term in NAGPRA. However, as indicated in the footnote on page 7, we use language in our report to reduce the number of technical terms associated with NAGPRA so that we do not overburden our readers. We have modified this footnote to indicate that we refer to "culturally unidentified items" as remains and artifacts that are not affiliated.

②

The State Auditor has broad authority to determine what matters to examine within the scope of the audit required by CalNAGPRA. As described in the Appendix beginning on page 35, we focused our review on the university's activities from January 2010 through August 2019 in specific areas, including its compliance with NAGPRA in responding to repatriation and disposition claims. Further, state law does not specifically direct us to determine whether the university conducted adequate consultations when its campuses determined the affiliation of remains and artifacts in their collections, which federal regulations required campuses to do in the 1990s. However, on pages 15 through 17 of our report, we do draw conclusions regarding how the campuses conducted consultations with tribes during our review period.

③

We provided the NAHC with a redacted draft report that contained only those portions relevant to it. Therefore, the page numbers that the NAHC cites in its response do not correspond to the page numbers in our final report.

④

- ⑤ We conducted this audit according to generally accepted government auditing standards and the California State Auditor's thorough quality control process. In following audit standards, we are required to obtain sufficient and appropriate audit evidence to support our conclusions. Those standards do not require us to include specific citations to law in our reports. As is our standard practice, we engaged in extensive research and analysis for this audit to ensure that we present a thorough and accurate representation of the facts. Our report text is accurate as stated in describing the roles and responsibilities of the national committee on pages 8 and 11. Moreover, the national committee is a federal entity and is not subject to our audit authority. Finally, contrary to the NAHC's assertion, nowhere in our report do we indicate that the national committee will be overseeing the university's compliance with NAGPRA requirements.
- ⑥ Many of the NAHC's comments relate to text in the Introduction. It appears that the NAHC expected this section of our report to contain audit findings. It does not; we include background information in the report's Introduction to provide readers with the ideas, terms, and context that will help them understand our Audit Results. All of our audit findings are in the Audit Results that begin on page 15.
- ⑦ We disagree with the NAHC's statement that "these statutes have no relevance to repatriation under federal and state NAGPRA and their discussion is unnecessary and confusing." Specifically, we include this discussion on page 8 to inform readers about legal requirements contained in the California Environmental Quality Act that have helped to limit the expansion of campus NAGPRA collections.
- ⑧ During the course of our review, we did not identify any evidence that campuses are still performing archaeological activities and expanding their collections of Native American remains and artifacts. Moreover, the NAHC never shared with us a concern about this issue or any evidence supporting such a concern during our audit. Similarly, in its response, the NAHC provided no support for its assertion that there is a persistent concern about this issue. Therefore, we stand by our conclusion that agencies in California are no longer expanding their collections of Native American remains and artifacts through archaeological activity.
- ⑨ In response to the NAHC's comment, we have adjusted the heading for this text box on page 9 to clarify that the listing includes the major requirements for repatriation eligibility. However, our report does not state that a tribe must only meet these three requirements to obtain repatriation.

We edited the text box associated with this text on page 9 to address the NAHC's concern. Specifically, we removed the reference to agencies proving remains are Native American because federal regulations do not place the burden of proving that remains are Native American exclusively on an agency or tribe.

⑩

The NAHC conflates the reporting of inventories that NAGPRA required campuses to perform in the 1990s with the requirements that campuses must follow when they receive repatriation requests for items in their inventories. The NAHC is correct that the inventory and consultation processes it describes in its response were required. However, as we state on page 7, they occurred in the 1990s, which is outside of the scope of this audit.

⑪

We disagree with NAHC's assertion that our statement that until the NAHC completes the list, some California tribes that might otherwise be eligible to submit a claim cannot do so is "legally questionable." To the contrary, as we note on page 30, CalNAGPRA requires the NAHC to create the list of California tribes, which then allows those tribes to pursue repatriation. Therefore, we stand by our conclusion that without the list, certain tribes in California cannot submit a claim for repatriation under CalNAGPRA.

⑫

The NAHC is correct that non-federally recognized tribes have limited opportunity to receive remains and artifacts under NAGPRA through the disposition process. As we state on page 13, CalNAGPRA is intended to allow such tribes to receive remains and artifacts through CalNAGPRA's repatriation process. However, a major obstacle to implementing CalNAGPRA has been the NAHC's inaction on creating a list of tribes who qualify to do so.

⑬

In the course of our review, we did not identify any instances in which campuses' failed to accord tribal knowledge equal consideration with other evidence, as the NAHC alleges. However, we did identify discrepancies in the amount of evidence campuses request tribes to provide, as we describe on pages 15 and 16.

⑭

As we explain on pages 11 and 13, under CalNAGPRA, federally recognized tribes can pursue repatriation through CalNAGPRA, including engaging in mediation with the NAHC when they have a dispute with a campus. However, as noted on page 11, no tribes have pursued mediation with the NAHC under CalNAGPRA. Similarly, once the NAHC completes the list, some tribes that are not federally recognized will be able to pursue repatriation and mediation through CalNAGPRA.

⑮

As the NAHC recognizes in its response, we include a discussion of the Repatriation Oversight Commission and the reassignment of its responsibilities to the NAHC in 2015 on pages 30 through 31.

⑯

However, the NAHC's contention that no mechanism existed for creating the list of California tribes is wrong because the NAHC immediately became responsible in 2015 for creating the list once the Legislature abolished the Repatriation Oversight Commission. The NAHC's statement that CalNAGPRA has not created opportunities for tribes to obtain repatriation obscures the NAHC's inaction on creating the list of California tribes. Thus, we stand by our conclusion that the NAHC could have expanded the number of tribes that could pursue repatriation had it fulfilled its responsibility to create the list of California tribes under CalNAGPRA.

- ⑰ We acknowledge on page 31 that changes in federal regulations may limit the NAHC's ability to recognize more tribes who can pursue repatriation because of certain requirements in CalNAGPRA. Therefore, as shown on page 32, we made a recommendation to the Legislature that it amend state law to address this issue.
- ⑱ The NAHC did not see the figure in the report displaying this information because it was redacted for confidentiality purposes. We present this information in Figure 3 on page 20. Further, our analysis covers the period from January 2010 through August 2019, covering the period both before and after Assembly Bill 2836 was passed in 2018.
- ⑲ We believe that our report appropriately presents the NAHC's concerns with the university's consultation process when developing the policy, although at a different level of detail than the NAHC included in its response. Specifically, we indicate on pages 21 through 23 that the NAHC was dissatisfied with the university's efforts to consult with tribes to obtain their feedback on its draft policy. Moreover, the NAHC explicitly informed us during the audit that it expected the university to respond in writing to the comments it received from tribes and the NAHC.
- ⑳ Although we believe our text related to the NAHC's request to be involved in making revisions to the university's draft policy is clear, we made minor revisions on page 23 to address the NAHC's concerns.
- ㉑ We have included a recommendation for the Legislature to consider amending CalNAGPRA to address the current problems that we discuss in our Audit Results. The NAHC did not see this recommendation because it was redacted for confidentiality purposes. However, regardless of whether the Legislature implements this recommendation, the NAHC is still legally responsible for creating and publishing the list of California tribes under CalNAGPRA. The NAHC's continued delay in fulfilling its responsibilities is preventing California Native American tribes from being able to make repatriation requests. Therefore, we firmly emphasize the importance of the NAHC implementing our recommendation to publish the list of California tribes.