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May 23, 2008

PROVOST AND EXECUTIVE VICE PRESIDENT RORY HUME
Office of the President
University of California
1111 Franklin Street

SUBJECT: Repatriation Request to UC San Diego

Dear Rory:

I am writing to address several administrative concerns that have come to my attention in conjunction with a repatriation request that was submitted in 2006 by the group of federally recognized Native American tribes in San Diego that is known as the Kumeyaay Cultural Repatriation Committee (KCRC). In accord with UC policy for implementing the Native American Grave Protection and Repatriation Act (NAGPRA), an academic assessment of the "cultural affiliation" of human remains unearthed in 1976 by students from California State University, Northridge, who were engaged in an archaeological field research project on the University House site at UC San Diego, was recently completed and conveyed to Vice President for Research and Graduate Studies Beckwith on May 23, 2008. This report concluded that these remains are "culturally unidentifiable," and my understanding is that the issue will now be reviewed by the UC Advisory Group on Cultural Affiliation and Repatriation of Human Remains and Cultural Items. It is important to note that a minority report prepared by a dissenting member of this UC San Diego academic work group instead strongly favored repatriation.

In many respects, the conflicts and difficulties associated with this repatriation request would have been obviated had these remains been unearthed in 2008 (or even 1989) rather than 1976. Since 1989, activities which entail physical changes to the UC San Diego campus environment have been governed by procedures that ensure compliance with the California Environmental Quality Act. Specific procedures, detailed in the UC San Diego Long Range Development Plan Environmental Impact Report (LRDP EIR), apply to projects which may entail potential impacts to archaeological resources. In those cases, consistent with public law, UC San Diego elicits the involvement of Native American monitors who provide advice should archaeological resources be affected during project activities. Also, in cases where human remains are uncovered, the procedures call for the University to contact the local Coroner and the Most Likely Descendant (MLD) previously defined by the California Native American Heritage Commission. Those procedures have been followed in a linear fashion on several occasions in recent years at UC San Diego, including after the discovery of a bone at the University House site in January, 2006. (In that case, I was invited to join the Native American ceremony that led to the reburial on-site of that human remain.) The Kumeyaay have been recognized as the MLD for most of San Diego County in which the University resides. The California Native American Heritage committee, a State agency, has provided positive support and mediation in our efforts to communicate and interact with the KCRC, and we are grateful for their leadership and direction.

Clearly, if the human remains that are at the heart of the current repatriation request had been discovered after 1989, the procedures of the LRDP EIR would have been followed and the determination of reburial, essentially an act of repatriation, would have been made by the MLD. However, because these remains were unearthed prior to 1989, those procedures were not yet in effect.

It is also important to note that key elected officials in San Diego, including Senator Denise Ducheneay (Chair of the Senate Committee on Budget and Fiscal Reviews and Chair of the Joint Legislative Budget Committee), among others, have petitioned the University to give full and appropriate consideration to the merits of the repatriation request that have been articulated by the Native American community. The concerns that they have expressed are quite similar to those that were provided by Senator Dean Florez in his February 27, 2008 letter to Chancellor Birgeneau, regarding the reorganization of the NAGPRA unit at UC Berkeley.

Further, the remains in question have already been subject to extensive scientific analyses since 1976; many of these studies are referenced in the report of the UC San Diego Work Group, and include a multi-decade research project by the Smithsonian Institution that was led by one of the world's foremost forensic anthropologists. Unfortunately, with respect to the scientific methods that have been applied, the Native American community in San Diego believes that the manner in which these remains have been handled as research samples has been "disrespectful"; and, that perception provides significant impetus for the current repatriation request. During an initial consultation with the KCRC, I was advised that UC San Diego did not have any Faculty actively studying Native American remains and the one faculty member at UC San Diego that was studying human remains focused solely on those from the Middle East. The Native American community is "gravely concerned that the University maintains remains for which it has neither active research nor faculty member studying them."

To further support the need to repatriate, I note that upon receipt of the remains from the Smithsonian, the University had to contract with the San Diego Museum of Man and subsequently with the San Diego Anthropological Society, as we had no facilities available at the University or qualified staff to receive them. We pay for that service and will continue to do so until repatriation occurs.

Undoubtedly, a rejection of this repatriation request will be viewed by many as a clear example of "cultural insensitivity and a failure to respect the ethical, moral, rights and beliefs of the Native American people designated the MLD in the region."(KCRC Chair Banegas) There are no competing requests for repatriation, and the KCRC is the legally recognized MLD in San Diego, as confirmed by the State of California Native American Heritage Commission.

I had the opportunity to attend the recent discussion of the Regents related to the lack of diversity in the University, and it was clear that the emotion in the room was palpable. Currently, Native Americans comprise less than 1% of the students at UC San Diego with not one Kumeyaay student represented in those meager numbers. The Regents have identified actions required of each Chancellor to address diversity initiatives that include recruitment, retention, outreach and overall improvement of the pipeline to access a UC education. One strategic and meaningful step forward would be to address the spirit of the law and required actions contained within NAGPRA for remains found today as well as for those found prior to 1989. This action would have a profound effect on bridging the gap that is clearly evident between the Native American Community and the University of California. Repatriation would also assist

PROVOST AND EXECUTIVE VICE PRESIDENT RORY HUME

May 23, 2008

Page 3

in “celebrating those that came before us while also providing a peaceful respectful burial without future disturbance.” (Carmen Lucas KCRC site monitor) This plea is an essential principle of the Kumeyaay culture and one that has been repeated during several meetings with the KCRC. “Please provide a respectful burial for these souls.”

The Kumeyaay are asking for the return of remains that the University does not appear ready to study. They are the only recognized tribe to place such a claim, and the NAGPRA policy clearly allows and promotes the opportunity to mediate when agreement cannot be reached. In this case we should expedite that process and repatriate as we would anything found today.

Exhaustive scientific work has been completed on these remains over the past three decades. In view of the thorough research already completed, and consistent with both the intent of the law and the principles of UC’s implementing policy, I believe that the wisest, most appropriate, and most respectful action to take at this point would be to repatriate. Doing so would achieve an outcome that is consistent with NAGPRA. Moreover, it would balance the scientific benefit that has already been achieved with the value of recognizing the sincere and profoundly held cultural views that have been expressed by the representatives of the Kumeyaay Nation in San Diego.

The remains have never been studied by UC San Diego Faculty other than in connection with this repatriation process. Chain of Custody of the remains is also questionable, as they were held by the Smithsonian for many years without any UC oversight. In some respects, their arrival in San Diego in the spring of 2008 represents UC San Diego’s first receipt of the collection. Based on the date of the inventory provided by the review, the remains represent a new collection to the University that is subject to NAGPRA which requires an expeditious return to the MLD.

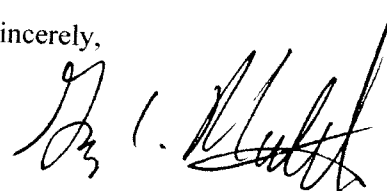
Policies, procedures and laws are developed to provide guidance and direction. In this instance the spirit of the law dictates that the remains be repatriated just as clearly as the law requires anything found post-1989 to be expeditiously repatriated to the MLD. In this instance the KCRC is the legally recognized MLD - the only claimant in this action - and their stated goal is to re-bury those they believe to be their ancestors. It is their cultural belief that “these remains are their ancestors who deserve a respectful burial.”(Native American Heritage Commission hearing) The Native American community strongly believes in developing relationships through respectful dialogue leading towards trust and inclusion through community interaction, communication, and cultural understanding. I therefore implore you to provide positive consideration to this request and the many benefits it provides.

In addition, I request that the concerns expressed in this letter and the attached amplification (which addresses relationships with the Native American community in San Diego, germane determinations made by the California Native American Heritage Commission, and complex legal, political, and cultural disputes that have arisen in conjunction with NAGPRA) be taken into consideration before making a final determination regarding the subject repatriation request.

PROVOST AND EXECUTIVE VICE PRESIDENT RORY HUME
May 23, 2008
Page 4

Thank you for your consideration of this information. Please let me know if you would like to discuss any aspect.

Sincerely,

A handwritten signature in black ink, appearing to read "G. C. Matthews". The signature is fluid and cursive, with a prominent vertical stroke at the end.

Gary C. Matthews
Vice Chancellor

Attachment

cc: S. Beckwith
A. Ellis
M. Fox



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May 23, 2008 - Attachment

Additional Information Pertaining to the 2006 Repatriation Request Submitted to the University of California by the Kumeyaay Cultural Repatriation Committee

Background

The repatriation request from KCRC pertains to burials that were unearthed in 1976 as part of the activities of an undergraduate class that was engaged in an archaeological field research project on the University House site at UC San Diego. These students from California State University, Northridge were led by a professor (Gail E. Kennedy) who subsequently became a faculty member at UCLA and who was in possession of the remains when the federal Native American Grave Protection and Repatriation Act (NAGPRA) went into effect 1989. The UC Office of the General Counsel determined that it would be most appropriate for this repatriation request to be evaluated by faculty at UC San Diego, since the remains had been unearthed at this campus, even though they were in the possession of UCLA at the time that NAGPRA went into effect. (The remains had never been possessed by UC San Diego until 2008.) The remainder of this attachment addresses concerns that are applicable to both the subject repatriation request and the procedures being implemented through the governing UC policy.

UC San Diego's Relationship with Native American Tribes in San Diego

Beginning in January, 2007, Vice Chancellor for Resource Management and Planning, Gary C. Matthews, participated in several meetings with the leadership of the Native American community in San Diego, both at tribal locations and on campus. These meetings have been held to strengthen University relationships with the Native American community in San Diego, and to elicit the participation of "monitors" during geotechnical testing or construction of a capital project that has been scheduled to improve the deficient University House; these monitors provide advice in case archaeological resources are discovered during project field work. Invariably, during these meetings, the leadership of the Native American community expressed extreme frustration and disappointment about the way in which UC has been administering the NAGPRA policy. During these meetings, deep shock was expressed regarding the process and outcome of a repatriation request that was submitted to UCLA several years ago regarding other remains that had been unearthed just south of the canyon adjacent to the UC San Diego University House site. In that case, despite a positive recommendation from the UCLA campus committee in 2001 to repatriate those remains, the UC Advisory Group overruled that campus position and recommended against repatriation. The firmly held belief of the leadership of the San Diego Native American community is that UC's repatriation process is being excessively driven by academic research considerations, and that insufficient weight is being given to other legitimate factors identified in the

NAGPRA law, including geography, oral tradition, and folklore. The view that UC is being insensitive is deeply felt by the local Native American community and others in San Diego, and is impairing the ability of this campus to sustain and advance a wide range of important outreach, instructional, and health service programs.

The View of the California Native American Heritage Commission (NAHC)

During this same 18-month time frame, Vice Chancellor Matthews engaged in several meetings and discussions with the Executive Director, General Counsel, and staff of the NAHC. The mission of NAHC is:

“... to provide protection to Native American burials, provide a procedure for the notification of most likely descendants regarding the discovery of Native American human remains, and prevent severe and irreparable damage to sacred shrines, ceremonial sites, sanctified cemeteries and places? of worship on public property.....”

These interactions with the NAHC have pertained both to the subject repatriation request and to matters associated with the proposed University House project. It is important to note that on March 12, 2008, the NAHC found the University House site to be a "sanctified cemetery." This determination was based on the fact that more than two dozen remains have been unearthed at this location over a period of six decades; the NAHC also reached this conclusion based on the testimony of individuals from the San Diego Native American community about the sacred nature of this burial ground. It is important to note that the NAHC determination that the University House site is a sacred cemetery was not included in the information sent recently by the UC San Diego Work Group.

In addition, the NAHC designated the Spokesperson of the Kumeyaay Cultural Repatriation Committee to be the Most Likely Descendant with whom the University should consult regarding geotechnical testing or construction activities that may be undertaken in conjunction with the proposed University House project. As the cognizant State body under California Public Resources Code 5097.9, the NAHC has concluded that significant ties exist between the San Diego Native American community and the University House site, the location of the subject repatriation request. Note that while the report conveyed to Vice President for Research and Graduate Studies Beckwith concluded that, “there is not a significant preponderance of evidence to support an affirmation of cultural identification or affiliation with any modern group,” the report did not address the NAHC conclusions concerning the “sacred cemetery” and “Most Likely Descendant” determinations.

The Intent and Vagaries of NAGPRA

In many respects, the difficulties associated with the current repatriation matter are due to the overly broad and ambiguous nature of the NAGPRA code. This federal law was enacted to safeguard Native American human rights while also valuing science and education. However, the NAGPRA criteria for evaluating repatriation requests have been subject to complex legal, political, and cultural disputes because determinations regarding repatriation hinge on whether “cultural affiliation” has been established, and that concept has been subject to widely varying interpretations.

In reviewing the challenges confronting anthropologists who study ancient remains and consider matters of cultural affiliation, Professor Phillip L. Walker¹ (Department of Anthropology, UC Santa Barbara, and a member of the UC Advisory Group) wrote:

“An even more contentious issue that is still the center of a bitter legal dispute (Calvo, 2002) concerns the definition of “cultural affiliation,” a concept that currently is being interpreted in very disparate ways by different governmental agencies, museums, and tribes (Walker, 1998). In NAGPRA, cultural affiliation is defined as “a relationship of shared group identity” that can reasonably be traced between a modern tribe and an earlier group. At one extreme, some people argue that this limits tribes to claiming the remains of recent tribal members. At the other, some people believe that a relationship of shared group identity exists between all modern Native Americans and extremely ancient remains such as those of the first people to colonize the New World. Such divergent views about the applicability of NAGPRA can coexist because, by definition, cultural affiliation in NAGPRA needs to be determined based on the evaluation of a broad spectrum of very different types of evidence including “geographic, kinship, biological, archeological, linguistic, folklore, oral tradition, historic or other information or expert opinion.” Adding to the confusion is the fact that the law gives absolutely no guidance on how these different types of evidence are to be ranked or weighted in the decision-making process.”

Another perspective on the unsettled legal nature of NAGPRA is provided by Professor Susan B. Bruning² (Department of Anthropology and Dedman School of Law, Southern Methodist University):

“After almost a decade of litigation over NAGPRA's role in allocating control of Kennewick Man, the statute's role in governing the scientific study of ancient human remains has yet to be clarified. Nonetheless, the Kennewick Man controversy represents a legal watershed in American anthropology. The cacophony of legal wrangling has fueled widespread debates about NAGPRA's reach in determining cultural identity, the expansion of tribal rights to exercise control over ancient remains and objects, and the appropriate parameters of scientific inquiry into the human past when that inquiry conflicts with the beliefs and interests of present day groups. Although litigation in that case may have reached an end, NAGPRA's role in defining and enforcing the boundaries of the scientific study of ancient human remains continues to be both crucial and largely untested.”

Given the lack of clear guidance in NAGPRA regarding the rules to guide determinations of cultural affiliation, especially in cases involving ancient human remains separated by approximately 10,000 years (or 500 generations), implementation of the UC policy has regularly resulted in evaluations that have focused on the importance of measurable, empirical data. Consequently, these UC conclusions have attributed less weight to the non-empirical criteria, including oral folklore and tradition. Consequently, findings that the remains are “culturally unidentifiable,” even in cases where academic experts at the campus level have concluded that determinations of cultural affiliation were warranted (i.e., the 2001

¹ Walker, Phillip L., 2004, Caring for the Dead: Finding a Common Ground in Disputes Over Museum Collections of Human Remains. In: *Documenta Archaeobiologiae: Yearbook of the State Collection of Anthropology and Palaeoanatomy*, G. Grupe and, J. Peters (eds.), Verlag M. Leidorf Rahden/Westf

² Bruning, Susan B. 2006, Complex Legal Legacies: The Native American Graves Protection and Repatriation Act, Scientific Study, and Kennewick Man. In *American Antiquity* 71(3):501-521

UCLA report and the 2008 minority report from UC San Diego), have resulted in denials of repatriation requests. In view of the fact that both the federal law and the associated UC policy were motivated to ensure respectful treatment of human remains and to dilute the control previously accorded museums and scientists, it would be appropriate to review the procedures that are being applied by the University to implement NAGPRA to make certain that these procedures are consistent with the intent of the general principle in the UC policy, which begins with the following text:

“It is the policy of the University of California to assure the respectful and dignified treatment of human remains and the consideration of living descendants of those deceased. The University recognizes that individuals and communities have cultural and religious concerns that must be considered in determining the treatment and disposition of human remains in its collections.”