

MEETING SUMMARY & REPORT
University of California Systemwide Advisory Group on
Cultural Affiliation and Repatriation of Human Remains and Cultural Items

Meeting Date: March 2, 2011 – Oakland, CA

Attendees:

Advisory Group members: Richard Buxbaum, Professor of Law, (UC Berkeley); Valentin Lopez (Amah Mutsun); Robert Bettinger, Chair/Professor of Anthropology (UC Davis); Pat Sekaquaptewa (Hopi); Carole Goldberg, Professor of Law (UCLA); Scott Fedick, Professor of Anthropology (UC Riverside); Lynn Gamble, Professor of Anthropology, (UCSB); Judith Habicht Mauche, Professor of Anthropology (UCSC); Margaret Schoeninger Professor of Anthropology (UCSD)

Other campus attendees: Anthony Garcia, NAGPRA Coordinator (UC Berkeley)

UCOP staff: Jeff Hall, Director, Research Policy Development; Ellen Auriti, University Counsel

Absent Advisory Group members: None

1. Welcome and Introductions

All Advisory Group members were present and re-introduced themselves. Hall described his new role as the UCOP Office of Research's policy contact for the Advisory Group and former Office of Research NAGPRA contact Ellen Auriti's new role in the Office of General Counsel. Hall and Auriti announced they would co-facilitate this meeting. Auriti briefly reminded the Advisory Group of its role – to advise the UC Office of the President regarding campus implementation of and compliance with NAGPRA, review campus decisions regarding potential cultural affiliation and repatriation of Native American or Native Hawaiian remains and cultural items, report its findings and recommendations to the President or designee, and to assist in the resolution of disputes that may arise in connection with this policy. In addition, Advisory Group members may be the conduit for bringing additional input on significant policy matters to the Office of the President. Under the UC Policy, campuses are encouraged to solicit input on significant policy matters, as appropriate, from members of Native American and Native Hawaiian groups and from additional University faculty members drawn from a variety of disciplines in which the study, treatment, curation and repatriation of human remains is relevant. Campuses are encouraged to forward input received from such consultations to the Office of the President via their Advisory Group representative.

Hall informed the group that the purpose of the meeting was to review the UCSD Notice of Inventory Completion and related issues, and that this in-person meeting was convened at the request of the UCSD Advisory Group representative, Professor Schoeninger. (Prior to the meeting, written comments were submitted by all but one Advisory Group members, with 4 supporting the proposed submission to federal officials of UCSD's Draft Notice of Inventory Completion, 1 opposed, 3 undecided, and a majority agreed that the Group's consideration of the issues would benefit from an in-person discussion.) Auriti noted that the discussion should consider the new NAGPRA regulations pertaining to the disposition of unaffiliated remains, given that the inventory previously submitted to federal officials by UCSD after review by the Advisory Group had identified the remains in question as culturally unidentifiable.

2. The circumstances of the UCSD case (CA-SDI-4669 Remains)

(The attached documents were referenced in the course of the discussion of this agenda item: 5.11.10 letter from Chancellor Fox to President Yudof; 6.4.10 letter from Yudof to Fox; 10.21.10 letter from Vice Chancellor Matthews to (KCRC representatives and tribal members); 11.22.10 Draft Notice of Inventory Completion; 12.2.10 Fox letter to Vice President Beckwith)

Professor Schoeninger described the circumstances of the UCSD case, her role as the UCSD representative to the Advisory Group, and UCSD Vice Chancellor Gary Matthews's role as the designated campus liaison to the local native communities, including the Kumeyaay Cultural Repatriation Committee (KCRC). Schoeninger summarized the content of the 2010 correspondence between UCSD Chancellor Fox and President Yudof and

between Vice Chancellor Matthews and the KCRC regarding the remains that are the subject of the UCSD Draft Notice of Inventory Completion.

She noted that she was not involved in either the campus administrative leadership meeting with Kumeyaay representatives or with the subsequent preparation/review of a 2010 letter generated by UCSD that included a list of items subject to disposition to the Kumeyaay. Schoeninger reported that during this same general time period, key academic and research positions at the campus involved in NAGPRA decision-making were vacant or in transition. In her view, this limited the opportunities for review of what she described as significant divergences between the 2008 report she and the campus NAGPRA Committee prepared regarding the CA-SDI-4669 remains and cultural materials (which report served as the basis for the NAGPRA inventory that UCSD submitted to federal officials) and the 11.22.10 draft Notice of Inventory Completion generated by the office of the campus liaison and sent to the local native communities and to UCOP. Specifically, she noted that the 2008 report reported no cultural materials found at the UCSD site where the remains were discovered, but the 2010 reported 25 funerary objects were co-located with the remains; the reports differed in their descriptions of the conditions in which the remains were found; and the 2008 report was silent on whether the remains were Native American. (Although the 2010 report refers to the remains and items as Native American, this characterization is disputed by some members of the Advisory Group, as noted in sections 3 and 5.D., below). On this last point, Schoeninger conveyed that she was asked only the narrow question of whether the remains were Kumeyaay, and did not attempt to make a determination of whether they were Native American. She reported that in 2009, a subsequent analysis by San Diego State University Professor Mayes referred to the remains as "Indian", based on dental evidence.

Schoeninger reported that in 2009, Vice Chancellor Matthews' correspondence requested that the federal NAGPRA Review Committee approve disposition of the culturally unidentified remains and associated materials to the KCRC, citing the estimated age of the materials (8,700-9,600 years old) and the Kumeyaay's belief that they had lived in the area "since the beginning". She noted that no other tribes were consulted with regard to the disposition of the remains and items. This request was subsequently withdrawn in part because the tribe took the position that the remains are culturally affiliated with the tribe and therefore did not want to proceed under the CUI procedure in effect at the time.

Schoeninger asked the Advisory Group to consider whether UCSD should consult other tribes (specifically, the Chumash) before the submitting the Draft Inventory of Completion.

3. Discussion of applicable law and regulations

Auriti provided a brief overview of the NAGPRA regulation on disposition of culturally unidentifiable (CUI) Native American human remains, which took effect in May, 2010 (43 CFR Section 10.11). She noted that the regulation applies to human remains that are determined to be Native American but for which no lineal descendant or culturally affiliated Indian tribe or Native Hawaiian organization has been identified (i.e., remains classified as "culturally unidentifiable"). With respect to consultation, the regulation requires that within 90 days of receiving a request from an Indian Tribe or Native Hawaiian organization for transfer of control of CUI remains and Associated Funerary Objects (AFOs), or, if no request is received, before any offer to transfer control over such objects (i.e., before publication of a Federal Register notice), a museum must consult with officials and traditional religious leaders of all Indian Tribes and Native Hawaiian Organizations:

- from whose tribal lands, at the time of removal, the remains and AFOs were removed; and
- from whose aboriginal lands the remains and AFOs were removed.

Auriti noted that with respect to "disposition" (a term of art used for transfer of control of CUI remains), a museum that cannot prove right of possession must offer to transfer CUI remains to Indian Tribes from whose

tribal lands (at the time of excavation) the remains were removed, or, if none, to Indian Tribes recognized as **aboriginal** to the area from which the remains were removed. If none of the Indian Tribes entitled to mandatory disposition agree to accept control of CUI remains, a museum **may** transfer control to other federally recognized tribes (without getting permission from the Secretary of Interior). A museum **may** also choose to transfer control to a non-federally recognized group or to reinter the remains, but would need the Secretary of Interior's permission before doing so. A museum **may** (recommended but not required by the regulation) transfer control of AFOs associated with CUI remains if state or other law does not preclude it.

Auriti conveyed that disposition of culturally unidentified remains cannot take place until 30 days after notice is published in the Federal Register. She noted that the NAGPRA CUI regulation would apply to the UCSD remains (and UCSD would be required to offer to transfer control of the remains to the requesting tribe):

- IF the remains are determined to be Native American;
- IF they are determined to be CUI; and
- IF the remains are determined to have been removed from either tribal land or land determined to have been aboriginal land of the requesting tribe

She noted that with respect to the UCSD remains, the UCSD campus previously submitted (after Advisory Group review) a NAGPRA inventory to federal officials, stating that the remains are culturally unidentifiable. She noted that under the regulations, "culturally unidentifiable" is a category applied to certain Native American remains for which institutions are required to submit a NAGPRA inventory. She noted that submission of the previous UCSD inventory would seem to indicate that a determination had been made that the remains in question are Native American remains determined to be CUI, but also noted that several Advisory Group members have raised a question about whether the remains were appropriately determined to be Native American. She suggested that be part of the group's discussion.

4. Discussion and written comments -- Advisory Group Members

The Advisory Group discussion focused first on whether UCSD's consultation with tribes complied with the consultation provision of the regulations. Members raised a concern that no tribes other than the Kumeyaay have been consulted with regard to the disposition of the remains, since there may be other tribes that could be considered to have aboriginally occupied the land from which the remains are removed, and since the regulation requires consultation with those tribes from whose aboriginal lands the remains were removed. One member noted that the 2008 UCSD inventory identified the remains as having come from Kumeyaay aboriginal territory, and did not mention any other groups who could claim the site as their aboriginal territory. However, if there are such groups, then it is far more likely that the remains are "Native American" within the meaning of NAGPRA.

They also suggested that the campus review the addressee/recipients of the (10.21.10) letter from VC Matthews to the Kumeyaay Cultural Repatriation Committee to analyze whether consultation with the Kumeyaay included Indian tribal officials and traditional religious leaders as required by the regulation.

Some group members observed that with modern DNA analysis, it is conceivable that the remains could be culturally affiliated with a tribe. However, it was observed that the Advisory Group had previously considered the proposed affiliation of the remains and concluded that because of their age (which pre-dates the Kumeyaay's known presence in the area) and because of the lack of additional information, it would be very difficult to affiliate them with any particular modern-day tribe. It was also noted, however, that cultural affiliation is no longer the relevant question in regard to these remains and objects.

The majority of members recommended that UCSD should not forward the Draft Notice of Inventory Completion to federal officials without further consultation with other tribes. In addition, some members noted that the unique qualities of these remains (including their age and the fact that they are relatively intact) imbue them with a high research value such that they can contribute to knowledge of value to all humanity – an interest that goes beyond that of the Kumeyaay. Others felt this issue was raised in the course of the preparation and review of the original report, that the delay that would result from further consultation was not desirable, that DNA testing of the remains was abhorrent to many Native Americans, and that even with additional consultation, other tribes would very likely defer to the modern day territorial responsibilities and prerogatives of the Kumeyaay. Furthermore, there is a distinct research interest within the University of California in supporting the goals of NAGPRA, given that many faculty members who conduct research with Native nations must comply with IRB requirements and secure permission from those nations before carrying out their work. Inconsistency and pointless delay by UC in the administration of NAGPRA would undermine those research interests.

The Advisory Group discussed an alternate, mediated resolution to negotiate an agreement that would allow a time-limited, tribe-supervised research use of the remains, after which the remains would go to the tribe for re-burial.

The group discussed whether the remains were “Native American” as defined by NAGPRA and case law (*Bonnichsen v. U.S.*, also known as, “the Kennewick man case. Several members of the Group agreed that in the earlier Notice of Inventory involving these remains, that UCSD and the Advisory Group had implicitly concluded that the remains were Native American (by filing a Notice at all and going through the process of denying cultural affiliation) and expressly stating both that the land was aboriginal land of the Kumeyaay (not mentioning any other group), and that “Native Americans have lived in the San Diego region since the early Holocene or terminal Pleistocene (approximately 10,000 years ago) There was discussion about whether the items other than the remains that were characterized as funerary objects in the draft notice of inventory completion were in fact funerary objects or unassociated, random items found nearby the remains. At the time of the excavation, and in the Inventory that UCSD submitted to federal officials, these items (e.g., shells, charcoal) were not characterized as funerary objects, but were so characterized in the new Draft Notice of Inventory Completion that is the subject of the current review.

5. Advisory Group’s Recommendations

The Advisory Group’s discussion of the issues presented by the disposition of the CA-SDI-4669 remains and cultural items was fractured, with no clear majority/minority positions emerging, except on the issues of additional consultation and re-analysis of the funerary objects listed in the Draft Inventory. The discussion focused mostly on the issue of consultation and not on the issue of ultimate disposition.

A. Additional Consultation

The majority of the Advisory Group recommended that in order to meet the consultation requirements of the NAGPRA regulations, UCSD should consult more broadly than it already has regarding the disposition of the culturally unaffiliated CA-SDI-4669 remains. They recommended that UCSD consult with other tribes in the region, (specifically, the Chumash, Takic-speakers, and others as may have aboriginally occupied the land from which the remains were removed). It was, however, noted that the campus should be sensitive to the possibility that the requesting Tribe might not look favorably on the campus undertaking additional consultation regarding remains that the Tribe believes are “theirs” (and which will take additional time)

Some members expressed the opinion that UCSD's additional consultation should include consultation with non-federally recognized tribes, even though federal NAGPRA regulations require only consultation with federally-recognized tribes. Others noted that while such broad consultation may be ideal, it could undesirably delay the process. Still others expressed concern that inserting an additional consultation requirement would suggest reluctance on the part of the UC to comply with NAGPRA in an expeditious fashion. It was also recommended that UCSD confirm that its consultation with the KCRC included consultation with the appropriate individuals (tribal officials and traditional religious leaders). Others noted that the KCRC is a longstanding and legitimate representative of the Kumeyaay in repatriation matters, and it would be disrespectful to question its authority.

At least one Advisory Group member observed that even without additional consultation, other tribes will have notice and opportunity to file a competing claim if they have an interest in the remains and cultural materials. That is because repatriation cannot take place until 30 days after a Notice is published in the Federal Register. While this doesn't constitute "consultation" under the regulations, it was viewed by some as a potentially adequate accommodation, given the lack of information and uncertainty of whether other peoples aboriginally occupied the UCSD site, and whether any present-day tribes who are ancestors of the original aboriginal peoples still exist.

B. Applicability of the Mandatory Disposition Rule Under the CUI Regulation

The group acknowledged that IF the remains are considered Native American, then given the conditions documented by UCSD, including the ancestral connection of the Kumeyaay to the territory where the remains and objects were found and the agreement by other Kumeyaay tribes to designate La Posta as the recipient, the Kumeyaay are an appropriate claimant under the mandatory disposition section of the CUI regulation. Thus, assuming there are no competing claims (which could be discovered during the recommended additional consultation), federal regulations now require disposition of the "culturally unidentifiable" human remains to the Kumeyaay, and permit similar disposition of any associated funerary objects.

C. Re-Analysis of Items Characterized as Funerary Objects

Serious concern was expressed by Advisory Group members – including UCSD's own Advisory Group member – that there was no reported factual/analytical basis for characterizing the materials (e.g., shells, charcoal) listed on the Draft notice of Inventory Completion as funerary objects. Questions were raised about whether the campus process for making this determination included expert analysis. Advisory Group members – including UCSD's own representative -- recommended that the campus re-analyze whether those items are, in fact, funerary objects, and if not, to revise their Draft Notice accordingly. Several members noted the policy decision of the University of Michigan to dispose of associated human remains under the new NAGPRA regulations, even though such disposition is only permitted, not required. If the listed materials are found to be funerary objects, then these members advocated a similar policy for UC.

D. Determination re: Whether the Remains are "Native American"

Advisory Group members agreed there was at least an implicit assumption or determination in UCSD's previously-submitted inventory that the remains in question are Native American. However, some members voiced strong concern that there had not been adequate review/analysis of this matter, possibly because (1) at the time the inventory was prepared and reviewed, the main question being asked was whether the remains could be culturally affiliated with the Kumeyaay, not whether the remains were Native American, and (2) because the analysis was done prior to enactment of the current regulations, i.e., at a time when there was no specific legal disposition required for CUI Native American remains.

These members totally opposed the idea that UCSD should proceed as though the remains are Native American, even though they might not be, on the grounds that the previously submitted inventory treated the remains as being Native American. They argued that the previous UCSD submission did not tacitly accept that the La Jolla remains were Native American, rather UCSD was required by (NAGPRA) law to comply with a NPS procedure that made that assumption (the remains were Native American) for them.

Some members pointed out that the *Bonnichsen (Kennewick Man)* case had been law for several years as of the time the 2008 UCSD inventory, and members of the committee had every opportunity to raise the question whether the remains were Native American at all at that time. Furthermore, using the existence of the new regulations as reason to question, for the first time, whether the remains are Native American may suggest resistance by UC to NAGPRA's mandates. With regard to whether the CA-SDI-4669 remains are Native American within the meaning of NAGPRA, so that NAGPRA applies to the disposition of the remains, the Advisory Group was fairly evenly divided in its views – about a third of the group assessed that the remains are not Native American and exempt from NAGPRA, another third thought the remains are Native American and subject to NAGPRA, and about a third of the group did not express any opinion either way.

Those who expressed the opinion that the remains are not Native American under NAGPRA noted the similarity of the UCSD matter to the matter reviewed in the 9th Circuit “Kennewick” decision (*Bonnichsen v. United States*). That is, they felt that because the CA-SDI-4669 remains are so old and the information about their era is so limited, the record does not permit the Advisory Group to conclude reasonably that the CA-SDI-4669 remains share special and significant genetic or cultural features with presently existing indigenous tribes, people, or cultures. These Advisory Group members pointed out that given the particular significance of these remains, and given possible precedent (i.e., this would be one of the first significant applications of the new CUI regulation), there may be merit in re-visiting the issue of whether the remains are Native American under the law. Other members were concerned about raising the issue for the first time simply because of changes in the legal consequences. One suggested approach for addressing the uncertainty surrounding the matter of whether the remains are “Native American” was to insert language into UCSD's new Notice of Inventory Completion acknowledging that given the age of the remains, there is some uncertainty on the matter of whether they meet the legal definition of “Native American,” but that the campus has decided to proceed under the presumption that they are, given that the campus already circulated a previous NAGPRA inventory listing these remains, given that the campus wishes to make a disposition, and given that doing so will ensure that there is adequate notice to the public and to potentially interested tribes that a disposition is going to be made. This approach would avoid having to re-open an issue that already was dealt with in the previous inventory, but would partially address concerns expressed by experts about the scientific uncertainty that the remains are “Native American,” and avoid taking a definitive possibly precedent-setting position in a high profile matter.

E. Research Value.

Several of the members recognized that the UCSD remains had exceptionally high research value. They observed that there are very few remains in the western Hemisphere that are as old or found in such an undisturbed condition. Further, very recent technological advances would facilitate study of the remains in a way not previously possible and could reveal knowledge of great benefit to humanity generally. Other members pointed out that disposing of the remains to the Kumeyaay would also have great research value, because the demonstration of respect for Native cultures would facilitate cooperative and collaborative research between scholars and Native communities on matters such as health, history, and

criminal justice

F. Possible Mediated Process.

Some Advisory Group members suggested that resolution of consultation and disposition issues be attempted through mediation among the KCRC, other potential tribal claimants, UCSD administration and UCSD Senate representatives. Some Advisory Group members expressed reservations about the expediency of the new NAGPRA regulation in fulfilling the goals of either the archaeological or Native American communities in regards to culturally unidentifiable materials.