

CALIFORNIA CODE OF REGULATIONS, TITLE 14, NATURAL RESOURCES

Division 17, Native American Heritage Commission

CHAPTER 1. MEDIATION PROCEDURES

§ 29001 Purpose of Mediation

The mediation regulations of the Native American Heritage Commission (Commission) implement the California Native American Graves Protection and Repatriation Act, Division 7, Part 2, Chapter 5 of the Health and Safety Code (Health and Safety Code section 8016, subdivision (d)(8)) and Division 5, Chapter 1.75 of the Public Resources Code (Public Resources Code section 5097.94, subdivisions (k)(1) and (n)(1)(B)).

Note: Authority cited: Section 8016, Health and Safety Code; Section 5097.94, Public Resources Code. Reference Section 5097.98, Public Resources Code.

§ 29002 Mediation Defined

Mediation refers to a process whereby a neutral third person, a designated mediator, acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and nonadversarial process with the objective of helping the disputing parties reach a mutually acceptable written agreement. The role of the designated mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, exploring resolution alternatives, and issuing a decision.

Note: Authority cited: Section 8016, Health and Safety Code; Section 5097.94, Public Resources Code. Reference: Section 11420.20, Government Code; Section 1212, title 1, California Code of Regulations.

§ 29003 Construction of Regulations

(a) As used in these regulations, words in the singular shall include the plural and words in the plural shall include the singular, unless the context otherwise requires.

(b) In these regulations, whenever a time is stated within which an act is to be done, the time is computed by excluding the first day and including the last day. If the last day is any day the Commission is closed for business, that Day is also excluded.

(c) Time limits set forth in these regulations are not jurisdictional.

Note: Authority cited: Section 8016, Health and Safety Code; Section 5097.94, Public Resources Code. Reference Section 5097.98, Public Resources Code.

§ 29004 Initiating Mediation

Parties seeking mediation services must file a request for mediation with the Commission identifying the following:

- i) The names of all parties and counsel (if any) involved.
- ii) The physical addresses, electronic mail addresses, and telephone numbers of the parties or their representatives, including counsel.
- iii) A brief statement of the nature of the dispute and related documentation, and the relief requested by the parties.
- iv) If the state agency or state-funded museum is also subject to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), any party may also request the assistance of the federal Native American Graves Protection and Repatriation Review Committee in resolving the dispute. The party or parties seeking such assistance shall immediately inform the Commission of this fact prior to the initiation of any mediation under these regulations. Mediation under these regulations shall be suspended pending the completion of the federal dispute resolution process. If the parties are unable to resolve their dispute through the federal dispute resolution process, then they must inform the Commission of this fact, including providing any advisory findings and recommendations which may have resulted from the federal dispute resolution process. Upon such notification, the suspension of mediation under these regulations shall be immediately lifted and shall proceed in accordance with these regulations.

Note: Authority cited: Section 8016, Health and Safety Code; Section 5097.94, Public Resources Code. Reference Section 5097.98, Public Resources Code.

§ 29005 Pre-mediation Meeting by the Parties

Within 10-days of receiving the request for mediation, including the brief statement of the nature of the dispute and related documentation, and the relief requested by the parties, the Commission shall serve these records on all parties identified in the request with a notice informing the parties of the requirement that they meet within 30-days of service of the notice by the Commission. Upon service by the Commission, the parties shall meet within 30 days of service of these documents with the intent of settling the dispute. The parties shall notify the Commission upon completion of this meeting.

Note: Authority cited: Section 8016, Health and Safety Code; Section 5097.94, Public Resources Code.

§ 29006 Attendance by Parties and Representatives

All parties, their counsel and persons with full authority to settle the case must personally attend all mediations, unless excused by the mediator for good cause. If any consent to settle is required for any reason, the party with the consent authority must be personally present at the mediation.

Note: Authority cited: Section 8016, Health and Safety Code; Section 5097.94, Public Resources Code. Reference Section 5097.98, Public Resources Code; Rule 2.3.2, California Rules of Court; Section 1222, title 1, California Code of Regulations.

§ 29007 Good Faith Participation

All parties and their representatives shall participate in mediation proceedings in good faith with the intention to resolve all disputes.

Note: Authority cited: Section 8016, Health and Safety Code; Section 5097.94, Public Resources Code. Reference Section 5097.98, Public Resources Code; Rule 2.3.2, California Rules of Court.

§ 29008 Designation of Mediator

Within 30 days after receiving parties' request for mediation, the Commission will inform the parties of the designation of the mediator along with his/her qualifications and experience in conjunction with the legal issues and nature of the dispute. Mediators shall have mediation training. Upon designation, mediators shall disclose their qualifications and experience to the parties.

- a) Mediators are disqualified from serving on any of the grounds listed in this section and parties have ten days after designation to seek disqualification on the following grounds:
 - i) The mediator has personal knowledge of disputed evidentiary facts involved in the dispute;
 - ii) The mediator is a person within the third degree of relationship to a party, or to a person who provided professional advice to the parties.
 - iii) The mediator is affiliated with a Native American tribe which is a party to the dispute.
 - iv) The mediator, or their spouse or minor children, has a financial interest in the dispute or with a party.
 - v) The mediator is in discussions, or has a current arrangement, concerning prospective or existing employment or other compensated service with a party or related to the specific matter in the dispute. "In discussions" means that the mediator solicited or otherwise indicated an interest in accepting or negotiating possible employment or providing services.
- b) Mediators may recuse themselves from proceedings based upon the following:
 - i) The mediator believes his or her recusal would further the interests of justice.
 - ii) The mediator believes there is substantial doubt as to his or her capacity to be impartial.
- c) In the event that a mediator is disqualified or recuses themselves, within 10-days thereafter the Commission shall designate another mediator consistent with this section.

Note: Authority cited: Section 8016, Health and Safety Code; Section 5097.94, Public Resources Code. Reference Section 5097.98, Public Resources Code; Section 170.1, Code of Civil Procedure.

§ 29009 Alternative Mediator Designation

As an alternative to the Commission's designation of a mediator, the parties may agree on their own appointment of a mediator to assist them in resolving disputes. Compensation of a mediator appointed by the parties, as well as associated costs, shall be the responsibility of the parties to the mediation. An agreement regarding compensation and costs shall be reached between the mediator and the parties before the mediation is commenced and shall be memorialized in writing. The parties must provide this agreement to the Commission.

Authority cited: Section 8016, Health and Safety Code; Section 5097.94, Public Resources Code. Reference: Section 11420.20, Government Code; Section 1218, title 1, California Code of Regulations.

§ 29010 Service of Papers

All papers filed or submitted to the mediator and the Commission must be accompanied by a proof of service of all other parties or their designated representatives to the mediation proceeding demonstrating any of the following: personal service, service via facsimile, or service by electronic mail that complies with the following:

(a) Proof of Service of papers shall be a Declaration stating the title of the paper Served or filed, the name and address of the person making the Service, and that he or she is over the age of 18 years and not a party to the matter.

(b) Service may be made by leaving the paper at the residence or business of the person named to be Served, with a person not less than 18 years of age. Where Service is made in this manner, the proof of Service shall also state the date and place of delivery and the name of the person to whom the papers were handed. Where the person making the Service is unable to obtain the name of the person to whom the papers were handed, the person making the Service may substitute a physical description for the name.

(c) Where Service is by facsimile or electronic mail, the proof of Service shall state the method of Service upon each party, the date and time sent and the electronic mail address or facsimile number to which the document was sent.

Note: Authority cited: Section 8016, Health and Safety Code; Section 5097.94, Public Resources Code. Reference Section 5097.98, Public Resources Code; Section 1008, Title 1, California Code of Regulations.

§ 29011 Confidentiality

All communications and records made or used during mediations under these regulations are protected as follows:

(a) Anything said, any admission made, and any document prepared in the course of, or pursuant to, mediation under these regulations is a confidential communication, and a party to the mediation has a privilege to refuse to disclose and to prevent another from disclosing the communication, whether in an adjudicative proceeding, civil action, or other proceeding. This subdivision does not limit the admissibility of evidence if all parties to the proceedings consent.

(b) No reference to these mediation proceedings, a decision of the designated mediator or Commission that is rejected by a party's request for a de novo adjudicative proceeding, the evidence produced, or any other aspect of the arbitration may be made in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

(c) No mediator, commissioner, or commission employee is competent to testify in a subsequent administrative or civil proceeding as to any statement, conduct, decision, or order occurring at, or in conjunction with, a mediation.

(d) Evidence otherwise admissible outside of mediation under these regulations is not inadmissible or protected from disclosure solely by reason of its introduction or use in mediation under these regulations.

Note: Authority cited: Section 8016, Health and Safety Code; Section 5097.94, Public Resources Code. Reference Section 11420.30, Government Code and Sections 703.5, 1152.5, and 1152.6, Evidence Code.

§ 29012 Briefing and Mediation Schedule

a) *Complaint:* Within 20 days of the appointment, or designation by the parties, of the mediator, each party with a complaint seeking redress for claims shall submit a brief to the mediator identifying each issue and/or items in dispute, the facts supporting their claims, accompanying evidence, and the legal basis supporting their claims. As appropriate, a mediator may request that accompanying evidence be lodged separately with each exhibit marked as part of an index.

b) *Responses:* Any responses to complaints shall be filed with the mediator within 20-days of service of the complaint. Responses shall address each issue and/or item in dispute, the facts supporting the response, accompanying evidence, and the legal basis supporting the response. As appropriate, a mediator may request that accompanying evidence be lodged separately with each exhibit marked as part of an index.

c) *Mediation Sessions:* Within 5-business days of receiving any responses, or if no response is filed then within 5-business days of when any responses would have been due, the mediator shall contact the parties to arrange an initial mediation session to be conducted within 20-days of service of any responses or within 20-days of when any responses would have been

due. A mediation session will be conducted within this 20-day period. If the parties are unable to agree upon a mutually agreeable date, the designated mediator will provide the parties with a mediation date. Mediation sessions may be continued as necessary by the mediator in his/her discretion.

d) *Restorative Justice Procedures:* In conducting mediations, the mediator shall implement restorative justice practices and values to the dispute resolution, including addressing any of the following:

- 1) The harm(s) caused to the affected tribes and communities by the discovery (unearthing) and/or removal of ancestor's remains and cultural items, as well as the benefits of their return;
- 2) The harm(s) to affected tribes if remains and cultural items are left un-repatriated and/or not reinterred with culturally appropriate treatment;
- 2) The tribal traditions, customs and values necessitating the remain(s) and cultural items return, including the significance of these to the tribal community;
- 4) Deference to tribal knowledge concerning the remains or cultural items, and related history, including the significance of the location of their discovery.
- 5) Tribal customs regarding preservation in place, removal, handling and storage of remain(s) and cultural items during a dispute, as well as for their repatriation or reinterment with culturally appropriate treatment;
- 6) The effort and costs incurred by the tribe(s) in seeking repatriation or the reinterment of remains and cultural items with culturally appropriate treatment; and
- 7) Any assistance tribes will need in repatriation and/or reinterment with culturally appropriate treatment.

e) *Mediator Decision:* If the parties are unable to resolve their dispute through the mediation process, then within 7 days of the last mediation meeting, the mediator shall render a written decision. The decision shall identify the issues and/or items in dispute, the parties' positions concerning each issue and/or items in dispute, the evidence supporting their positions, the applicable law, and the mediator's application and analysis of the law to the dispute. After issuance of the written decision, the mediator shall notify and provide a copy of the decision to the Commission, along with all records and briefs submitted in conjunction with the mediation. The Commission shall maintain the confidentiality of all records and briefs it receives consistent with these regulations. The parties are encouraged to meet to resolve any remaining disputes and shall notify the Commission as soon as the matter, or any issue, is resolved.

Note: Authority cited: Section 8016, Health and Safety Code; Section 5097.94, Public Resources Code.

§ 29013 Final Commission Determination

Within 30 days of receiving the mediator's decision, the parties must notify the Commission if they still have not resolved their dispute(s), to schedule a closed-session hearing to be conducted by the Commission. Commissioners and/or employees having served as, or assisted, designated mediators may not participate in such proceedings. Each party may file a brief with the Commission within 15-days after receiving the notification of the hearing date. At the hearing, each party having submitted a complaint during mediation (the complaining party or parties) may make an opening statement. Parties having submitted responses during mediation (the responding party or parties) may then make an opposition statement. The complaining party or parties may make a final rebuttal statement addressing the opposition statement(s). The Commission may impose time limits for each statement.

The Commission will review all records submitted for mediation, the mediator's decision, the parties' briefs, as well as any statements made at the hearing. Within 30 days of the hearing, the Commission will issue a final determination on the issues raised at the hearing. The Commission's determination shall constitute a final administrative remedy.

Note: Authority cited: Section 8016, Health and Safety Code; Section 5097.94, Public Resources Code; Section 5097.94, Public Resources Code.

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