

NATIVE AMERICAN HERITAGE COMMISSION
M E M O R A N D U M
January 10, 2017

To: Native American Heritage Commission Members

From: Terrie L. Robinson, General Counsel 

CC: Cynthia Gomez, Executive Secretary

Re: Action Item: Authorization to Propose Regulations for General Provisions, the Treatment and Disposition of Native American Human Remains, and the Most Likely Descendants Identification Process and Commence the Formal Rulemaking Process

INTRODUCTION

The Most Likely Descendants Regulations Subcommittee (MLD Subcommittee) of Vice Chairwoman Laura Miranda and Commissioner Julie Tumamait-Stenslie has reviewed the attached draft proposed regulations that would provide general provisions to implement, interpret and make specific statutes relating to the treatment and disposition of Native American human remains. The Native American Heritage Commission (NAHC) implements all or part of Health and Safety Code section 7050.5, Public Resources Code section 5097.94, subdivision (k), and Public Resources Code section 5097.98 regarding the Most Likely Descendants identification process and the treatment and disposition of Native American human remains. **The action requested of the Commission is for the Commission to authorize the Commission staff to:**

- 1) Propose the draft regulations as currently provided or as amended by the Commission in its January 20, 2017 meeting; and**
- 2) Commence the formal rulemaking process for the eventual adoption of the attached proposed regulations as currently provided or as amended by the Commission in the January 20, 2017 Commission meeting, including the drafting and publication of required rulemaking documents.**

The MLD Subcommittee did not endorse the draft proposed regulations in their entirety. Instead, the MLD Subcommittee reviewed the NAHC staff draft and public comments and offers these draft proposed regulations for consideration by the Commission. The MLD Subcommittee has asked that certain provisions be noted for purposes of greater discussion and consideration prior to proposing the regulations and beginning the formal rulemaking process

because they represent a major change in the manner in which the Commission has implemented Public Resources Code section 5097.98.

BACKGROUND AND PROCEDURE FOR ADOPTING THE MOST LIKELY DESCENDANTS REGULATIONS

I. Background

The Native American Heritage Commission (NAHC or Commission) has had a Most Likely Descendants Subcommittee (MLD Subcommittee) for many years to consider problems with the Most Likely Descendants identification process. This subcommittee began its work long before the Commission began considering adopting regulations on this issue in 2014. At the direction of the Commission, Commission staff held a series of pre-notice public hearings¹ in 2015 to take comments on the Most Likely Descendants identification process that would be considered by the MLD Subcommittee and Commission staff in drafting proposed regulations.

Since the beginning of 2016, the NAHC staff members have worked to draft proposed regulations for consideration by the MLD Subcommittee by holding staff meetings, reviewing several drafts, and sharing the staff's considerable institutional knowledge about the Most Likely Descendants (MLD) identification process, public comments, and recurring problems. Beginning in August of 2016, the MLD Subcommittee received a draft of the proposed regulations from the General Counsel and, over several months, reviewed and revised multiple drafts of the proposed regulations. The MLD Subcommittee agreed to refer these draft proposed regulations to the entire Commission for discussion and a decision as to whether to propose the regulations through the formal rulemaking process for future adoption.

If the Commission approves the draft proposed regulations as provided or as amended, Commission staff will draft the additional required rulemaking documents, including the Notice of Proposed Action, Initial Statement of Reasons, and Economic Impact Assessment/Analysis, and initiate the rulemaking process in accordance with the proposed rulemaking schedule approved by the Commission at its October 20, 2016 meeting.

¹ These pre-notice public hearings were held in Rocklin, Brooks, Temecula, Redding, Rohnert Park, Sacramento, Santa Ynez, and San Diego.

II. Procedure and Proposed Schedule for Adopting the Most Likely Descendants Regulations

If the Commission approves the draft proposed regulations at its January 20, 2017 meeting and authorizes the Commission staff to initiate the rulemaking process, the following procedural steps will take place:

- February 3, 2017: Staff submits the proposed rulemaking package, including the draft proposed regulations, to the Department of Finance for fiscal impact assessment and approval of the fiscal impact statement.
- April 3, 2017: Staff submits the Notice of Proposed Action, proposed text of the regulations, Initial Statement of Reasons, and Economic and Fiscal Impact Statement to the Office of Administrative Law (OAL) for publication in the California Regulatory Notice Register.
- April 13, 2017: OAL publishes the Notice of Proposed Action in the California Regulatory Notice Register. **This begins the formal process of adopting regulations, i.e., the “rulemaking process,” and the period for public comment and tribal consultation.**
 - **The period for public comment and tribal consultation begins.** Publication of the Notice of Proposed Action begins the period for public comment on the proposed regulations. **The Commission decided on a 74-day public comment period, more than the minimum 45-day public comment period.**
- June 26, 2017: Public comment period ends.
- July 21, 2017: Public hearing.
- August 11, 2017: Publication of substantial changes to the proposed regulations and beginning of the public comment period on those substantial changes. **The Commission decided on a 28-day public comment period, more than the minimum required 15-day public comment period.**
- September 8, 2017: Public comment period ends. Tribal consultation period ends.
- October 20, 2017: Commission decides whether to adopt regulations.
- November 10, 2017: If regulations are adopted on October 20, 2017, the rulemaking record is transmitted to the Office of Administrative Law, which has 30 days to review the record. Regulations usually take effect on a quarterly basis after approval by the Office of Administrative Law and submission to the Secretary of State.

DISCUSSION

I. Problems with the Most Likely Descendants Identification Process and the Treatment and Disposition of Native American Human Remains

NAHC Staff and the MLD Subcommittee reviewed public comments provided prior, during and after the pre-notice public hearings on the MLD process. A summary of the comments received, and the number of people or organizations who commented on the same issues, is provided. The most commonly cited problems included:

- Lack of understanding of the MLD identification process; lack of written guidelines outlining the roles and responsibilities of MLDs and a lack of a code of ethics for MLDs.
- The identification of individuals as MLDs on equal footing with Tribes;
- Confidentiality during the process of conferring with landowners regarding the treatment and disposition of Native American human remains.

Additional problems identified by staff included but were not limited to:

- Reinterment of remains by landowners who have assumed that MLDs were not or could not be identified;
- Protection of Native American burial sites and remains pending the identification of MLDs;
- Ensuring compliance by landowners with the provisions of subdivision (e) of Public Resources Code section 5097.98 when Native American remains are reinterred on the landowner's property;
- The lack of a procedure for mediating disputes between MLDs and landowners pursuant to Public Resources Code section 5097.94, subdivision (k);
- The lack of definition of crucial terms in Public Resources Code section 5097.98 such as "appropriate dignity," among others;
- Disinterment of Native American human remains previously reinterred on a landowner's property; and
- Maintaining confidential the location of Native American burials pending identification of the MLDs in order to protect the burials from vandalism.

Given that terms in Public Resources Code section 5097.98 needed to be defined, staff reviewed other statutes that the Commission implements and/or enforces and determined that definitions should be proposed for all of the statutes the Commission implements and/or enforces. In the future, Commission Staff will

provide draft proposed regulations for the Commission's consideration regarding Commission officers and meetings, the SB 18 tribal consultation list, the Sacred Lands Inventory, investigations and public hearings under Public Resources Code sections 5097.94, subdivision (g) and 5097.97, and the California Native American Graves Protection and Repatriation Act (CalNAGPRA), among others.

II. Provisions Meriting Greater Consideration

The MLD Subcommittee asked that the following provisions of the draft proposed regulations be identified for greater discussion and consideration because of the impact they could have on how the Commission has previously implemented Public Resources Code section 5097.98.

A. Chapter 3, Article 2, Section 29214: Inclusion on the Most Likely Descendants List

The MLD Subcommittee offers for the Commission's consideration naming Tribes or consortia of Tribes, and not individuals, as Most Likely Descendants and including only Tribes on the Most Likely Descendants list. The reason for offering this controversial proposal is based in the legislative history of the statute that created the MLD identification process.

The statute that created the MLD process, SB 297 (Garamendi, Chapter 1492, Statutes of 1982) was enacted following the Third District Court of Appeal's decision in *Wana the Bear v. Community Construction, Inc.*, (1982) 128 Cal.App.3d 536. In *Wana the Bear*, the Third District Court of Appeal held that ancient Native American burials were not protected as public cemeteries under the laws applicable to cemeteries. As such, a separate statute and process were necessary to protect ancient Native American human remains and associated items from destruction and theft. The legislative committee reports and versions of the SB 297 are consistent in providing that recommendations on the treatment and disposition of Native American human remains are to be made by multiple descendants rather than any one single descendant.

Attached are some of the legislative analyses of SB 297 that show the consistent reference to multiple descendants as opposed to an individual descendant for purposes of making recommendations as to the treatment and disposition of Native American human remains.

B. Chapter 3, Article 8, Section 29226: Most Likely Descendants and Authorized Representatives Code of Ethics

Section 29226 provides a Code of Ethics for Most Likely Descendants and their Authorized Representatives to follow. Subdivision (a) provides that Most Likely Descendants shall not:

have a financial interest in the treatment and disposition of the Native American human remains and/or associated items for which the Most Likely Descendants have been identified as Most Likely Descendants. Most Likely Descendants and their authorized representatives shall not serve as paid archaeological or cultural resources monitors for projects where the remains for which the Most Likely Descendants have been identified were discovered.

The intention of this provision is to preserve the integrity of the process of determining the treatment and disposition of Native American human remains. However, the unintended consequence of this provision could be that the people most knowledgeable about the tribal cultural resources at a site and best able to protect them could also be the tribe identified as the Most Likely Descendants. Under this provision, the tribe could not serve as paid archaeological or cultural resources monitors for a project for which it has been identified as the Most Likely Descendants. The MLD Subcommittee recognizes the need and desire to preserve the integrity of the process of determining the treatment and disposition of Native American human remains. However, the MLD Subcommittee raises the issue that project proponents could use this regulation as a means of avoiding paying tribal cultural resources monitors for their work if their tribe is later identified as MLDs for the project on which the monitors are working.

C. Chapter 3, Article 8, Section 29277: Commissioner Involvement in Conferrals or Mediations

Section 29227, subdivision (b), provides that a Commissioner should avoid, if possible, participating in conferrals or mediations with landowners regarding the treatment and disposition of Native American human remains and/or associated items for which the Commissioner's tribe or consortium to which the Commissioner's tribe belongs has been identified as Most Likely Descendants.

The purpose of this provision is to avoid any confusion as to whether a Commissioner is acting in his or her capacity as a Commissioner when conferring with landowners. However, the MLD Subcommittee raises for the Commission's consideration that the potential unintended consequence of this provision could be that Commissioners will have to refrain from representing their tribes in conferrals

or mediations with landowners despite the fact that their very profession involves representing their tribes in such conferrals and mediations. The Commission wants and needs to attract potential candidates with expertise in cultural resources and the laws protecting them. This limitation may cause many desirable candidates for appointment to the Commission to avoid applying for appointment because they would be precluded from representing their tribes in conferrals and mediations with landowners.

CONCLUSION

Attached please find the draft proposed regulations, a summary of public comments received, legislative analyses of SB 297, and the proposed rulemaking schedule.

Attachment A
Draft Proposed Regulations

CALIFORNIA CODE OF REGULATIONS, TITLE 14, NATURAL RESOURCES

Division 17, Native American Heritage Commission

CHAPTER 1. GENERAL PROVISIONS

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CHAPTER 2 THE COMMISSION - RESERVED

CHAPTER 3 MOST LIKELY DESCENDANTS, NATIVE AMERICAN HUMAN REMAINS,
AND ASSOCIATED ITEMS

**Article 1 Procedures for Protecting Native American Human Remains
Pending Treatment and Disposition; Procedure for Identifying
Most Likely Descendants**

- § 29201 Procedure for Protecting Native American Human Remains and
Associated Items Pending Conferral with the Most Likely Descendants
- § 29202 Emergency Removal of Native American Human Remains and
Associated Items Prior to Identification of or Conferral with the Most
Likely Descendants
- § 29203 Procedure for Identification of Most Likely Descendants
- § 29204 Identification of Most Likely Descendants - Factors Considered
- § 29205 Rotation of Most Likely Descendants Identifications When More Than
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- § 29206 Joint Most Likely Descendants Identifications When Tribes of
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- § 29207 Most Likely Descendants Identifications on a Project or Site Basis;
Multiple Most Likely Descendants Identifications for a Single Project
Overlapping One or More Traditional Tribal Territories; Continuing
Identifications for Remains Reinterred or Preserved in Place on the
Landowner's Property
- § 29208 Alternate Most Likely Descendants Identifications When Most Likely
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- § 29219 Authorized Representative(s) of Most Likely Descendants
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- § 29212 Authorized Representatives of Landowners
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Article 2 Most Likely Descendants List

- § 29214 Inclusion on Most Likely Descendants List

§ 29215 Prior Identifications of Individuals as Most Likely Descendants for Remains Reinterred or Preserved in Place on a Landowner's Property; Removal of Individuals from the Most Likely Descendants List

§ 29216 Removal from Most Likely Descendants List

§ 29217 Most Likely Descendants List Registration Form; Update of Contact Information

Article 3 Most Likely Descendants' Duties

§ 29218 Report of Treatment and Disposition

Article 4 Conferral Between Most Likely Descendants and Landowners; Mediation of Disputes Between Most Likely Descendants and Landowners Pursuant to Public Resources Code Section 5097.94, Subdivision (k)

§ 29219 Conferral Between Most Likely Descendants and Landowners

§ 29220 Confidentiality of Discussions

§ 29221 Application for Mediation

§ 29222 Mediation Procedures

Article 5 Reinterment of Native American Human Remains and Associated Items on Landowner's Property

§ 29223 Reinterment of Native American Human Remains and Associated Items on Landowner's Property

Article 6 Repatriation of Native American Human Remains and Associated Grave Goods to Most Likely Descendants; Preservation in Place

§ 29224 Repatriation of Native American Human Remains to Most Likely Descendants

Article 7 Public Records Act Exemption from Disclosure of Native American Burials

§ 29225 Confidentiality of Native American Burials

**Article 8 Most Likely Descendants and Authorized Representatives Code
of Ethics; Commissioner Involvement in Conferrals or Mediations**

§ 29226 Most Likely Descendants and Authorized Representatives Code of
Ethics

§ 29227 Commissioner Involvement in Conferrals or Mediations

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Article 1 Interpretation and Purpose of Regulations

§ 29001 Purpose of Regulations

The regulations of the Native American Heritage Commission (NAHC) implement and interpret Government Code sections 65092, subdivision (b), 65351, subdivision (a)(1), 65352, 65352.3, subdivisions (a)(1) and (a)(2), 65352.4 and 65562.5; Health and Safety Code section 7050.5; 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 8010 et seq.); Division 5, Chapter 1.75 of the Public Resources Code (Public Resources Code sections 5097.9 through 5097.991); the Native American Historic Resource Protection Act, Division 5, Chapter 1.76 of the Public Resources Code (Public Resources Code sections 5097.993 and 5097.994); Sections 21073 and 21080.3.1 of the Public Resources Code; and as all of them as they may be amended from time to time. No attempt has been made to reproduce in these regulations all of the definitions, policies, and other provisions found in these Acts and statutes. Therefore, these regulations should be read together with these Acts and statutes.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 65092, 65351, 65352, 65352.3, 65352.4, 65562.5, Government Code; Sections 7050.5, 8010, 8011, 8012, 8013, 8014, 8015, 8016, 8017, 8018, 8019, 8020, 8021, 8029, 8030, Health and Safety Code; Sections 5097.9, 5097.91, 5097.92, 5097.93, 5097.94, 5097.95, 5097.96, 5097.97, 5097.98, 5097.99, 5097.991, 5097.993, 5097.994, 21073 and 21080.3.1, Public Resources Code.

§ 29002 Interpretation of Regulations

These sections are adopted severally. If one or more of these sections is deemed invalid, the remaining sections are intended to remain in effect.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 65092, 65351, 65352, 65352.3, 65352.4, 65562.5, Government Code; Sections 7050.5, 8010, 8011, 8012, 8013, 8014, 8015, 8016, 8017, 8018, 8019, 8020, 8021, 8029, 8030, Health and Safety Code; Sections 5097.9, 5097.91, 5097.92, 5097.93, 5097.94, 5097.95, 5097.96, 5097.97, 5097.98, 5097.99, 5097.991, 5097.993, 5097.994, 21073 and 21080.3.1, Public Resources Code.

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§ 29003 Explanation of References

References in these regulations to "Chapter __", "Subchapter __", "Article __,"
Section __," and Paragraph (__)," denote subdivisions of these regulations.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section
5097.94, Public Resources Code. Reference: Sections 65092, 65351, 65352,
65352.3, 65352.4, 65562.5, Government Code; Sections 7050.5, 8010, 8011, 8012,
8013, 8014, 8015, 8016, 8017, 8018, 8019, 8020, 8021, 8029, 8030, Health and
Safety Code; Sections 5097.9, 5097.91, 5097.92, 5097.93, 5097.94, 5097.95,
5097.96, 5097.97, 5097.98, 5097.99, 5097.991, 5097.993, 5097.994, 21073 and
21080.3.1, Public Resources Code.

Article 2 **Definitions**

§ 29004 Appropriate Dignity

"Appropriate dignity" means a manner or style that respects and accommodates the
cultural values, use and traditions of Most Likely Descendants in the treatment and
disposition of Native American human remains and associated items for purposes of
reinterment pursuant to Public Resources Code section 5097.98, subdivision (e).

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section
5097.94, Public Resources Code. Reference: Section 65562.5, Government Code;
Sections 5097.9, 5097.98, 5097.993, Public Resources Code.

§ 29005 Associated Items

"Associated Items" means items found with or near Native American human
remains for which it can be reasonably concluded that they were intentionally
placed or buried with Native American human remains at the time of interment or
later as part of funerary practices, death rites or ceremonies. For purposes of
Chapters 1.75 and 1.76 of the Public Resources Code, "Associated items" is
synonymous with "associated grave goods," "associated grave artifacts," "items
associated with the human remains," "Native American artifacts taken from a Native
American grave or cairn," "items associated and buried with Native American human
remains," and "items associated with Native American human burials."

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Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, 5097.99 and 5097.991, Public Resources Code.

§ 29006 Burial or Burial Site

For purposes of these regulations, "burial" or "burial site" means, except for cemeteries and graveyards protected under other existing law, a natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which human remains were intentionally deposited as a part of the funerary practices, death rites or ceremonies of Native American people. "Burial" or "burial site" is synonymous with "grave" or "cairn" for purposes of Section 5097.99 of the Public Resources Code.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, 5097.99, Public Resources Code.

§ 29007 California Native American Tribe

For purposes of Sections 65092, 65351, 65352, 65352.3, 65352.4 and 65562.5 of the Government Code, Division 5, Chapters 1.75 and 1.76 of the Public Resources Code, and Sections 21073 and 21080.3.1 of the Public Resources Code, "California Native American Tribe" means a Native American tribe located in California that is on the contact list maintained by the Native American Heritage Commission for purposes of Chapter 905 of the Statutes of 2004. For purposes of Government Code section 65352.4, "Native American tribe" is synonymous with "California Native American tribe."

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 65092, 65351, 65352, 65352.3, 65352.4, 65562.5, Government Code; Sections 5097.92, 5097.94, 21073, and 21080.3.1, Public Resources Code.

§ 29008 Chairperson

"Chairperson" means the person elected by the members of the Native American Heritage Commission to serve as chairperson of the Commission.

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Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.91 and 5097.94, Public Resources Code.

§ 29009 Cultural Affiliation

“Cultural affiliation” means a relationship of shared group identity that can be reasonably traced historically or prehistorically between a present day California Native American tribe or tribes and an identifiable earlier tribe or group that occupied a particular area. Cultural affiliation is established when the preponderance of evidence, based on geography, kinship, biology, archaeology, anthropology, linguistics, folklore, oral tradition, historical evidence, or other information or expert opinion, reasonably leads to a conclusion of shared group identity between a present day California Native American tribe or tribes and a identifiable earlier tribe or group that occupied a particular area.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 21073, 21080.3.1, Public Resources Code.

§ 29010 Culturally Appropriate Treatment

“Culturally appropriate treatment” means treatment of Native American human remains and associated items consistent with the cultural values, traditions and use of the Most Likely Descendants. “Culturally appropriate treatment” may be ascertained from a review of the site of the discovery of Native American human remains utilizing cultural and archaeological standards and information. For purposes of Chapter 1.75 of Division 5 of the Public Resources Code, “culturally appropriate treatment” is synonymous with “sensitive treatment and disposition.”

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29011 Further and Future Subsurface Disturbance

“Further and future subsurface disturbance” means any below ground disturbance within a reasonable distance of no less than six feet of Native American human remains and/or associated items reinterred pursuant to subdivision (e) of Public Resources Code section 5097.98.

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Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29012 Generally Accepted Cultural or Archaeological Standards or Practices

“Generally Accepted Cultural or Archaeological Standards or Practices” shall include, but not be limited to, the following non-invasive standards or practices:

- (a) No further excavation or disturbance of a site where Native American human remains and/or associated items are discovered except as necessary to protect the site in accordance with Section 29201.
- (b) Standards or practices commonly used by qualified archaeologists to protect archaeological sites as work has stopped from light, heat, wind, moisture, movement, erosion, friction or any physical contact, theft, and vandalism when no one is present to protect them.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29013 Landowner

“Landowner” means the owner of land on which Native American human remains are discovered, reinterred, or preserved in place.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29014 Most Likely Descendants

“Most Likely Descendants” means a California Native American tribe or consortium of California Native American tribes identified by the Executive Secretary or their staff designee to most likely be the lineal descendants of the Native American person or persons whose remains have been discovered, subsequently reinterred or preserved in place. There may be more than one tribe identified as Most Likely Descendants, and a tribe or consortium of tribes may serve as Most Likely Descendants.

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Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29015 Multiple Native American Human Remains

“Multiple Native American Human Remains” means the remains of more than one Native American human, whether an inhumation or cremation, and in any state of decomposition or skeletal completeness.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 7050.5, Health and Safety Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29016 Native American Human Remains

“Native American Human Remains” are human remains determined by a county coroner pursuant to Health and Safety Code section 7050.5 to be the remains of a Native American.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Section 7050.5, Health and Safety Code; Sections 5097.94, 5097.98, Public Resources Code.

§ 29017 Nondestructive Removal and Analysis

“Nondestructive Removal and Analysis” means the removal and analysis of Native American human remains without further damage, deterioration, or decomposition.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 290218 Parliamentarian

“Parliamentarian” means the Commissioner appointed by the Commission Chairperson to serve as Parliamentarian of the Commission and insure that parliamentary procedures are followed during Commission meetings.

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Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.91, 5097.94, Public Resources Code.

§ 29019 Project

For purposes of this Chapter, "Project" is synonymous with the definition of "project" under Public Resources Code section 21065 and also means any ground-disturbing activity that results in the inadvertent discovery of Native American human remains.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, 21065, Public Resources Code.

§ 29020 Qualified Archaeologist

"Qualified archaeologist" means an archaeologist registered with the Registry of Professional Archaeologists who has experience with an area and the tribes within that area in which he or she is practicing archaeology.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29021 Reinterment

"Reinterment" means the interment and reburial of previously disinterred human remains.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, 5097.98, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29022 Sacred Lands Inventory

"Sacred Lands Inventory" means the inventory of places maintained by the Commission pursuant to Public Resources Code section 5097.94, subdivision (a) of special religious or social significance to Native Americans and known graves and

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cemeteries of Native Americans located on private land and the inventory maintained by the Commission pursuant to Public Resources Code section 5097.96 of Native American sacred places located on public lands.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.96, Public Resources Code.

§ 29023 Secretary

“Secretary” means the Commissioner elected by the members of the Native American Heritage Commission to serve as Secretary of the Commission.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Sections 5097.91, 5097.94, Public Resources Code. Reference: Sections 5097.91, 5097.94, Public Resources Code.

§ 29024 Traditional Tribal Territory

“Traditional tribal territory” means the geographic area historically or prehistorically occupied by a California Native American tribe.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.92, 5097.94, 21080.3.1, Public Resources Code.

§ 29025 Traditionally and Culturally Affiliated

“Traditionally and culturally affiliated” means the affiliation between a present-day California Native American tribe and a geographic area the tribe affirms it occupied in when such residence can be reasonably traced, historically or prehistorically. Traditional and cultural affiliation is not solely based on the history of residence of any individual tribal member’s ancestors but on the history of residence of the tribe as a whole.

§ 29026 Vice Chairperson

“Vice Chairperson” means the Commissioner elected by the members of the Native American Heritage Commission to serve as Vice Chairperson of the Commission.

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Note: Authority cited: Sections 11152, 11342.2, Government Code; Section
5097.94, Public Resources Code. Reference: Sections 5097.91, 5097.94, Public
Resources Code

CHAPTER 2 THE COMMISSION -- RESERVED

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CHAPTER 3 MOST LIKELY DESCENDANTS, NATIVE AMERICAN HUMAN REMAINS,
AND ASSOCIATED ITEMS

Article 1 **Procedures for Protecting Native American Human Remains
Pending Treatment and Disposition; Procedure for Identifying
Most Likely Descendants**

§ 29201 Procedure for Protecting Native American Human Remains and
Associated Items Pending Conferral with Most Likely Descendants

Native American human remains and associated items that have been discovered or unearthed shall be protected *in situ* prior to conferral with the Most Likely Descendants by the landowner on whose property the remains and associated items were found, unless removal is necessary to prevent immediate damage to the remains and associated items. *In situ* preservation shall include such feasible measures to protect the remains and associated items from light, heat, wind, moisture, movement, erosion, friction or any physical contact, theft and vandalism. Removal, if necessary, shall be completed by a qualified archaeologist.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29202 Emergency Removal of Native American Human Remains and
Associated Items Prior to Identification of or Conferral with the Most
Likely Descendants

- (a) Generally speaking, Native American human remains and/or associated items are to be left in place. If *in situ* preservation poses a serious risk of immediate damage to Native American human remains and/or associated items prior to the identification of or conferral with the Most Likely Descendants, the determination whether the remains and/or associated items need to be removed immediately shall be made by a qualified archaeologist. Removal, if necessary, shall be completed by a qualified archaeologist at the landowner's expense. Circumstances necessitating removal shall be limited to unavoidable acts of nature or unintentional acts including, but not limited to, flooding, rain, fire, and subterranean movement.
- (b) In the event that removal of Native American human remains and/or associated items is required to avoid immediate damage before the Most Likely Descendants have been identified or have inspected the site where the remains

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and associated items were discovered, the remains and associated items shall be removed, stored, and preserved carefully and respectfully in containers

appropriate for the respectful storage of human remains. The type, provenience and state of the remains and associated items shall be documented by a qualified archaeologist upon removal and, if reinterred where discovered, upon reinterment. Storage and preservation of the remains and associated items shall be without any destructive testing or analysis pending conferral with the Most Likely Descendants, and on-site, if possible, with appropriate security.

- (c) In the event that removal of Native American human remains and/or associated items is necessary in order to avoid immediate damage after the Most Likely Descendants have inspected the site where the remains and associated items were discovered but before the Most Likely Descendants have made a recommendation as to treatment and disposition, the remains and associated items shall be removed and stored by a qualified archaeologist in accordance with paragraph (b) above
- (d) Disinterred Native American human remains shall always be kept with their associated items in containers appropriate for the storage of human remains in accordance with paragraph (b) above

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29203 Procedure for Identification of Most Likely Descendants

Most Likely Descendants may be identified on an individual tribal basis, a rotational basis, as joint Most Likely Descendants for the same project, or as multiple Most Likely Descendants for a single project that overlaps multiple traditional tribal territories.

(a) Identification of Most Likely Descendants

Upon receiving notification of the discovery of Native American human remains from a representative of a county coroner's office in conformance with Health and Safety Code section 7050.5, subdivision (c), the Executive Secretary or their staff designee, absent unforeseen difficulties, will attempt to identify the Most Likely Descendants for the Native American(s) whose remains have been discovered within two business days of the NAHC receiving the notification. Identified Most Likely Descendants will have two business days to accept or decline the

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identification. Most Likely Descendants identifications will be made only after a county coroner has identified discovered remains as Native American.

(b) Confidentiality of Location of Native American Burials

In order to protect the immediate vicinity of Native American human remains from damage or from disturbance by further development activity prior to conferral with the Most Likely Descendants, the landowner and the county coroner's office shall keep confidential the location of Native American human remains discovered on the landowner's property except as necessary to comply with Health and Safety Code section 7050.5. The location of Native American human remains is exempt from disclosure by the county coroner under Government Code sections 6254 (r) and 6254.10.

(c) Notice of Identification to the Most Likely Descendants and Landowner

The Executive Secretary or their staff designee will provide written notice of the Most Likely Descendants identification to the landowner within one business day of the Most Likely Descendants accepting the identification. Only the tribal chairperson, chief, president or captain of the tribe identified as Most Likely Descendants will be provided notice of the identification on behalf of the tribe unless the tribe's governing body designates in writing an alternate and/or additional recipient(s) to receive notice.

(d) Inability of the Executive Secretary or Their Staff Designee to Identify Most Likely Descendants

When the Executive Secretary or their staff designee is unable to identify Most Likely Descendants for Native American human remains, the Executive Secretary or their staff designee will provide written notice of said inability to the landowner on whose property Native American human remains were discovered. The inability of the Executive Secretary or of their staff designee to identify Most Likely Descendants shall not be presumed and acted upon pursuant to Public Resources Code section 5097.98, subdivision (e) in the absence of written notification pursuant to this subsection.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Section 7050.5, Health and Safety Code; Sections 5097.94, 5097.98, Public Resources Code.

§ 29204 Identification of Most Likely Descendants -- Factors Considered

(a) Identification of Most Likely Descendants

The identification of Most Likely Descendants by the Executive Secretary or their staff designee is an approximate determination based on weighing evidence supporting the likelihood that a California Native American tribe or tribes are the

Most Likely Descendants of the Native American or Native Americans whose remains have been discovered. Such determinations will be made with the best information on record with the Commission at the time the Executive Secretary or his or her staff designee receives notice from a representative of a county coroner's office that Native American human remains have been inadvertently discovered.

(b) Factors Considered When Identifying Most Likely Descendants

The factors considered by the Executive Secretary or their staff designee when identifying Most Likely Descendants include, but are not limited to:

- (i) The geographic area of tribal traditional and cultural affiliation, tribal territory, known former tribal reservation or tribal rancheria, and/or tribal traditional specific village locations where the remains were discovered;
- (ii) Evidence supporting the likelihood of a California Native American tribe's lineage to the indigenous inhabitants of the geographic area of cultural affiliation, traditional tribal territory, known former tribal reservation or tribal rancheria, or tribal traditional specific villages where the remains were found. Evidence that will be considered to prove a tribe's lineage shall include, but not be limited to, the following:
 - A. Evidence of a California Native American tribe's cultural affiliation with the indigenous inhabitants of the area where the remains were found. Such evidence shall be based on geography, kinship, biology, archaeology, anthropology, linguistics, folklore, oral tradition, historical evidence, or other information or expert opinion that reasonably lead to such a conclusion.
 - B. Genealogies, ethnographic studies, anthropological or historical studies, or other credible evidence tracing a California Native American tribe's genealogical lineage to the indigenous ancestors who occupied the traditional tribal territory, known tribal reservation or tribal rancheria, or traditional tribal village site where the remains were discovered;
 - C. The historical or prehistorical time period during the indigenous ancestors to whom a California Native American tribe's cultural affiliation or genealogical lineage can be traced occupied the area where the remains were discovered;

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- D. Tribal territory and cultural affiliation maps provided by California Native American tribes, ethnographers, anthropologists, qualified archaeologists, universities, colleges, academics with expertise in California Native American studies, professional cartographers, or other credible sources;
- E. Primary sources of authority on California Native American tribes' geographic areas of traditional and cultural affiliation, including, but not limited to, Robert F. Heizer, *The Handbook of North American Indians*, Volume 8 (Smithsonian Institution, 1978).

These factors are not listed in order of consideration or merit.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29205 Rotation of Most Likely Descendants Identifications When More Than One Tribe of the Same Cultural Affiliation Shares Traditional Tribal Territories or When Traditional Tribal Territories Overlap; Tribal Consortia

- (a) When more than one California Native American tribe of the same cultural affiliation can trace their lineage to indigenous ancestors who occupied the same or overlapping traditional tribal territory where Native American human remains are discovered, the identification of Most Likely Descendants may be rotated among the tribes using a rotation list created by the Executive Secretary or their staff designee for that purpose. Tribes can be added or removed from the rotation list at the discretion of the Executive Secretary or their staff designee if subsequent evidence as provided for in section 29204, subparagraph (ii) supports the addition or removal of a tribe from the rotation list.
- (b) When two or more California Native American tribes of the same cultural affiliation have formed a consortium for the purpose of making recommendations regarding the treatment and disposition of Native American human remains discovered in the traditional tribal territory of any of the tribes in the consortium, the tribal consortium will be identified as Most Likely Descendants on the same basis as individual tribes as if the tribal consortium members were one tribe and their individual traditional tribal territories were one traditional tribal territory. Tribal consortia shall provide the NAHC notice of the formation of, or dissolution of, a tribal consortium and a list of the consortium member tribes. Each tribe in the

consortium shall meet the requirements of subdivision (b) of section 29215.
A Notice of Formation of Tribal Consortium and sample notice of
authorization form is provided in Appendix A of these regulations.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section
5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public
Resources Code.

§ 29206 Joint Most Likely Descendants Identifications When Tribes of
Different Cultural Affiliations Have Overlapping Tribal Territories

When more than one California Native American tribe with different cultural
affiliations could be identified as Most Likely Descendants for the remains of the
same Native American or Native Americans discovered in overlapping tribal
territories, they may be provided the option to serve as Joint Most Likely
Descendants. If a tribe declines to serve as Most Likely Descendants, the tribe or
tribes that do not decline to serve may serve as the Most Likely Descendants.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section
5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public
Resources Code.

§ 29207 Most Likely Descendants Identifications on a Project or Site Basis;
Multiple Most Likely Descendants Identifications for a Single Project
Overlapping One or More Traditional Tribal Territories; Continuing
Identifications for Remains Reinterred or Preserved in Place on the
Landowner's Property

- (a) Most Likely Descendants are identified as such for Native American human
remains discovered in the geographic area of a single project for which the
project proponent, person or entity causing the ground-disturbing activity
remains the same. If the remains are reinterred on the landowner's property
within the geographic area of a single project, the Most Likely Descendants
remain so identified until the tribe or tribal consortium identified as Most Likely
Descendant ceases to exist or declines to serve pursuant to Section 29211.
- (b) If Native American human remains are discovered in the same location at a later
date by virtue of a different project, different Most Likely Descendants may be
identified.
- (c) For multiple discoveries of Native American human remains in the geographic
area of a single project that overlaps adjacent traditional tribal territories for

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different tribes, Most Likely Descendants will be identified for each traditional tribal territory within the project area or discovery site.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29208 Alternate Most Likely Descendants Identifications When Most Likely Descendants Cannot or Will Not Serve

When Most Likely Descendants cannot serve, decline to serve, or fail to timely accept the identification, the Executive Secretary or their staff designee may identify an alternate Most Likely Descendant in accordance with the procedures in Sections 29203, 29204, 29205 and 29206.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29209 Authorized Representative(s) of Most Likely Descendants

The Most Likely Descendants identified for Native American human remains may authorize a representative or representatives to discuss and confer with the landowner or the landowner's authorized representative(s). The Most Likely Descendants' authorized representative(s) shall provide proof of their authorization to the landowner and to the Commission. Authorized representatives of Most Likely Descendants who have been so authorized on the tribe's or consortium's current Most Likely Descendants registration form pursuant to Section 29217 shall provide written proof of authorization to the landowner or his or her authorized representative. The Most Likely Descendants' authorized representative(s) shall be considered an agent of the Most Likely Descendants for purposes of Public Resources Code section 5097.98. The Most Likely Descendants registration form and sample notice of authorization is provided in Appendix B of these regulations.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29210 Replacement of Most Likely Descendants' Authorized
Representative(s) Before Treatment and Disposition of Remains

(a) Requirements for Replacing Most Likely Descendants' Authorized
Representative(s) Before Treatment and Disposition of Remains.

Most Likely Descendants' authorized representative(s) may be replaced before the treatment and disposition of the Native American human remains for which the Most Likely Descendants have been identified has occurred. Replacement of the Most Likely Descendant's authorized representative(s) may occur for the following reasons:

- i. The Most Likely Descendants' authorized representative(s) violated local, state, or federal law in carrying out his, her or their duties as authorized representative(s) of the Most Likely Descendants;
- ii. The Most Likely Descendants' authorized representative(s) violated the Most Likely Descendants and Authorized Representative(s) Code of Ethics.

Once replaced, the authorized representative(s) shall not represent the Most Likely Descendants in the future without the consent of the Executive Secretary or their staff designee.

(b) Time Period and Procedure for the Most Likely Descendants to Provide a
Replacement Authorized Representative or Representatives.

The Executive Secretary or their staff designee, will seek a replacement for a Most Likely Descendants' authorized representative(s) from the Most Likely Descendants when required within 1 business day from when the Executive Secretary or their staff designee became aware of the occurrence of conditions necessitating the replacement. The Executive Secretary or their staff designee, will contact the Most Likely Descendants within one business day to ask the Most Likely Descendants to identify a replacement authorized representative or representatives in the event that a replacement is necessitated pursuant to subsection (a) above.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

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§ 29211 Death or Nonexistence of Most Likely Descendants After Reinterment
or Preservation in Place of Native American Remains on the
Landowner's Property

In the event of the death of an individual identified as Most Likely Descendant for Native American human remains reinterred or preserved in place on the landowner's property prior to the adoption of these regulations, or the nonexistence of a tribe identified as Most Likely Descendants for Native American human remains that have been reinterred or preserved in place on the landowner's property, Most Likely Descendants shall be identified should the remains for which an individual Most Likely Descendant or Most Likely Descendants were previously identified be inadvertently disturbed.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29212 Authorized Representatives of Landowners

Authorized representatives of landowners shall provide written proof of their authorization to represent the landowner to the Most Likely Descendants identified for the Native American human remains on the landowner's property and to the Commission. The landowner's authorized representative shall be considered an agent of the landowner for purposes of Public Resources Code section 5097.98. A sample authorization form is provided in Appendix C of these regulations.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29213 Notification of Most Likely Descendants Identifications

Any member of the public may request to be notified of the identification of Most Likely Descendants for a project.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

Article 2 Most Likely Descendants List

§ 29214 Inclusion on Most Likely Descendants List

(a) Registration; Approval by the Executive Secretary.

In order to be identified as Most Likely Descendants, a California Native American tribe or consortium of California Native American tribes must be on the Most Likely Descendants List maintained by the Commission. A California Native American tribe or consortia of tribes must register to be included on the Most Likely Descendants List. Registrations must be in writing, using the Most Likely Descendants Registration Form, and must include the name, address, phone number and email address for the tribe's chairperson, chief, president or captain, or for a consortium's contact person and authorized representative(s). Information substantiating that a tribe or consortium of tribes meets the criteria for inclusion on the Most Likely Descendants list must be included with the registration form. The Executive Secretary or their staff designee must approve in writing a tribe's or tribal consortium's inclusion on the list. Tribes or consortia of tribes that have met the current criteria for inclusion on the Most Likely Descendants List prior to the adoption of these regulations will not be required to provide information substantiating that they meet the criteria for inclusion.

(b) Criteria for Inclusion on Most Likely Descendants List

After the adoption of these regulations, only California Native American tribes or a consortium of California Native American tribes may be included on the Most Likely Descendants List. Tribes or each tribe in a consortium of tribes must meet the following criteria to be included on the list:

(i) California Native American Tribe

A California Native American tribe that is one of the following may be included on the Most Likely Descendants List:

- (A) A Federally recognized tribe with all or part of its sovereign tribal territory within the State of California; or
- (B) A non-federally recognized California Native American tribe that is on the list maintained by the NAHC for purposes of Chapter 905 of Statutes of 2004 (SB 18).

Each tribe in a consortium of tribes requesting inclusion must demonstrate that they meet one of these criteria in order for the consortium to be included on the list as a consortium.

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Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29215 Prior Identifications of Individuals as Most Likely Descendants for Remains Reinterred or Preserved in Place on a Landowner's Property; Removal of Individuals from the Most Likely Descendants List

An individual identified as a Most Likely Descendant for Native American human remains that were subsequently reinterred or preserved in place on a landowner's property prior to the adoption of these regulations shall remain the Most Likely Descendant only for those remains until the individual is deceased or declines to serve, but the individual shall not be included on the Most Likely Descendants list. Individuals will not be eligible for future Most Likely Descendants identifications after the adoption of these regulations and shall be removed from the Most Likely Descendants list.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29216 Removal from Most Likely Descendants List

The Executive Secretary or their staff designee may remove a California Native American tribe or consortium of California Native American tribes from the Most Likely Descendant list for either or both of the following reasons:

- (i) The tribe or consortium requested removal;
- (ii) The tribe or consortium does not meet the criteria for inclusion on the list.

The Executive Secretary or their staff designee shall provide written notice to a tribe or consortium of tribes of the Commission's intention to remove the tribe or consortium from the list. A tribe or consortium of tribes will have 30 business days from receipt of the written notice to request to be kept on the list or to provide in writing evidence showing that one of the criteria for inclusion on the list has been met. Failure to timely request to be kept on the list or to provide written evidence showing that one of the criteria for inclusion on the list has been met may result in removal from the list until such time as the tribe or consortium requests inclusion and demonstrates that one of the criteria for inclusion has been met.

§ 29217 Most Likely Descendants List Registration Form; Update of Contact Information

California Native American tribes or consortia of California Native American tribes must annually update the contact information for their chairperson, chief, president or captain, and for their contact person(s) and authorized representative(s).

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

Article 3 Most Likely Descendants' Duties

§ 29218 Report of Treatment and Disposition

The Most Likely Descendants shall file a report with the Executive Secretary within 60 days of the treatment and disposition of the Native American human remains for which they have been identified as Most Likely Descendants. This report shall include:

- (a) The date when the treatment and disposition of the Native American human remains occurred;
- (b) Whether the Native American human remains were reinterred or preserved in place on the landowner's property;
- (c) If the Native American human remains were reinterred on the landowner's property, when and how the landowner complied with subdivision (e) of Public Resources Code section 5097.98; and
- (d) Any non-confidential correspondence or agreements between the landowner and the Most Likely Descendants regarding the treatment and disposition of the Native American human remains.

Most Likely Descendants not in compliance with this section will not be identified as Most Likely Descendants for additional discoveries of Native American human remains until their compliance is achieved.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

**Article 4 Conferral Between Most Likely Descendants and Landowners;
Mediation of Disputes Between Most Likely Descendants and
Landowners Pursuant to Public Resources Code section 5097.94,
Subdivision (k)**

§ 29219 Conferral Between Most Likely Descendants and Landowners

Conferral between the Most Likely Descendants and the landowner should begin as soon as the Most Likely Descendants are identified. If the parties cannot reach an agreement as to the treatment and disposition of the Native American human remains and associated items within 48 hours of beginning conferral and they do not mutually agree to extend discussions, either party may apply for mediation by Commission staff. Only the landowner, the Most Likely Descendants, or their authorized representatives shall confer pursuant to Public Resources Code section 5097.94, subdivision (k).

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29220 Confidentiality of Discussions

The Most Likely Descendants and the landowner, or their authorized representatives, shall recognize each party's need for confidentiality of information provided to each other when conferring on the treatment and disposition of Native American human remains and associated items.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29221 Application for Mediation

Upon application of either the Most Likely Descendants or the landowner, the Commission shall mediate a dispute between the Most Likely Descendants identified for Native American human remains on a landowner's property and the landowner regarding the treatment and disposition of the remains. The application for mediation must be in writing, be transmitted by fax or email to the Commission, and shall state the following:

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- (i) The party requesting the mediation;
- (ii) The issues in dispute (E.g., proposed location of reinterment, method of treatment and disposition, whether an item is associated with a Native American burial); and
- (iii) The position of the applicant on each issue.

Commission staff will transmit the application to the non-requesting party upon receipt and contact the parties within one business day of receiving the application to schedule a mediation session at a time agreeable to both parties. The sample Application for Mediation can be found in Appendix D of these regulations. No party will be required to participate in mediation.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

§ 29222 Mediation Procedures

(a) Parties to Mediation

Mediation sessions will be conducted by Commission staff or designated consultants who are trained in mediation. Only Most Likely Descendants, the landowners, and/or their authorized representatives may participate. Authorized

representatives must provide Commission staff proof of authorization in writing. If an authorized representative participates on behalf of a party, that party will be bound by the representations and positions of its authorized representative.

(b) Conduct of Mediation Sessions

Mediation sessions may be conducted telephonically, in person, or by video conferencing. The Commission staff member assigned to the mediation will, in the course of the mediation:

- (i) Determine the issues in dispute;
- (ii) Determine the positions of each party on each issue in dispute;
- (iii) Inform the parties of their legal obligations in the event that an agreement is not reached or if the landowner rejects the recommendations of the Most Likely Descendants; and
- (iv) Attempt to bring the parties to an agreement using standard mediation practices.

Mediation sessions may continue as long as mutually agreed upon by the parties or by their authorized representatives. If an agreement is reached, the parties or their authorized representatives shall memorialize the agreement in writing and provide it to the Commission excluding the terms that are confidential. Commission staff shall not coerce or threaten any party in order to secure agreement between the parties.

(c) Conclusion of Mediation

The mediation shall be considered concluded when one of the following has occurred:

- (i) The parties or, in the absence of a party, that party's authorized representative or representatives, have reached an agreement and have memorialized it in writing;
- (ii) Any party or, in the absence of a party, that party's authorized representative or representatives refuse to continue the mediation; or
- (iii) The landowner or his or her authorized representative or representatives continue to reject the recommendations of the Most Likely Descendants or their authorized representative or representatives.

The Commission staff person assigned to the mediation shall memorialize in writing the reasons why agreement was not possible and provide copies of the writing to the parties. A copy shall be kept in the Commission's files.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

Article 5 Reinterment of Native American Remains and Associated Items on Landowner's Property

§ 29223 Reinterment of Native American Remains and Associated Items on Landowner's Property

- (a) When the landowner or his or her authorized representative reinters Native American human remains and/or their associated items pursuant to subdivision (e) of Public Resources Code section 5097.98, the remains and associated items shall be reinterred by a qualified archaeologist at the expense of the landowner. A qualified archaeologist shall document the state and nature of the remains that are reinterred.

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- (b) If the landowner reinters Native American human remains on its property pursuant to subdivision (e) of Public Resources Code section 5097.98, the landowner shall provide proof of compliance with Section 5097.98, subdivision (e) to the Commission within 30 days of the reinterment. The period for providing proof of compliance may be extended up to 180 days from the date of reinterment by the Executive Secretary or their staff designee for good cause shown by the landowner, the Most Likely Descendants, or both. The decision by the Executive Secretary or their staff designee extending the time period for providing proof of compliance shall be provided in writing to both parties.
- (c) In the event that there is or has been subsurface ground disturbance within six feet of the reinterred remains and/or associated items, the landowner shall contact the Commission. The Commission will notify the Most Likely Descendants, who shall have the right to inspect the site at a time mutually agreed upon by the landowner and the Most Likely Descendants to determine if the remains and/or associated items have been damaged. If the remains and/or associated items have been damaged or are at risk of being damaged by subsurface ground disturbance, the Most Likely Descendants shall inform the Commission, which may take legal action to ensure the landowner's compliance with subdivision (e) of Public Resources Code section 5097.98.
- (d) Intentional subsurface disturbance of Native American remains that have been reinterred on a landowner's property pursuant to subdivision (e) of Public Resources Code section 5097.98 does not constitute an accidental or inadvertent discovery or recognition of those remains for purposes of Public Resources Code sections 5097.98. The intentional subsurface disturbance of remains reinterred pursuant to Public Resources Code section 5097.98, subdivision (e) by the landowner, its agents and assigns, the landowner's authorized representatives, or anyone with the landowner's permission shall be considered a violation of that section.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code; California Code of Regulations, Title 14, Section 15064.5.

**Article 6 Repatriation of Native American Remains and Associated Items
to Most Likely Descendants; Preservation in Place**

§ 29224 Repatriation of Native American Remains to Most Likely Descendants

Native American human remains and associated items may be repatriated to the Most Likely Descendants pursuant to Public Resources Code section 5097.98, subdivision (b)(1)(C) and section 5097.991. The landowner shall not possess the Native American remains and/or associated items found on his or her property except as otherwise provided by law or in accordance with an agreement reached pursuant to subdivisions (k)(1) and (l) of Public Resources Code section 5097.94 or pursuant to Public Resources Code section 5097.98.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, 5097.991, Public Resources Code.

**Article 7 Public Records Act Exemption from Disclosure of Native
American Burials**

§ 29225 Confidentiality of Native American Burials

Records of Native American graves, cemeteries and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Commission, another state agency, or a local agency are exempt from disclosure to the public pursuant to subdivision (r) of Government Code section 6254. In order to protect a site where Native American human remains have been discovered, county coroners and lead agencies under the California Environmental Quality Act, Public Resources Code section 21000 et seq., shall not disclose the location of such sites except as necessary to comply with Health and Safety Code section 7050.5.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Section 7050.5, Health and Safety Code; Sections 5097.94, 5097.98, Public Resources Code.

**Article 8 Most Likely Descendants and Authorized Representatives Code
of Ethics; Commissioner Involvement in Conferrals or Mediations**

§ 29226 Most Likely Descendants and Authorized Representatives Code of
Ethics

Most Likely Descendants and their authorized representatives shall abide by the following Code of Ethics when serving in the capacity of Most Likely Descendants or representing the Most Likely Descendants. Most Likely Descendants and their authorized representatives shall not:

- (a) Have a financial interest in the treatment and disposition of the Native American human remains and/or associated items for which the Most Likely Descendants have been identified as Most Likely Descendants. Most Likely Descendants and their authorized representatives shall not serve as paid archaeological or cultural resources monitors for projects where the remains for which the Most Likely Descendants have been identified were discovered;
- (b) Use their identification as Most Likely Descendants or authorized representatives for the financial gain of others;
- (c) Represent themselves as Most Likely Descendants or authorized representatives of Most Likely Descendants for projects where Native American human remains or associated items have yet to be discovered;
- (d) Sell, possess, transfer or convey Native American human remains or associated items for which they have been identified as Most Likely Descendants, except as provided by law;
- (e) Disclose the location of Native American human remains or associated items that have been reinterred on a landowner's property pursuant to subdivision (e) of Public Resources Code section 5097.98 or preserved in place pursuant to subdivision (b)(1)(B) of Public Resources Code section 5097.98 except as necessary to protect the location or as required by law;
- (f) Represent themselves as professional Most Likely Descendants, a professional authorized representative, or professional authorized representatives of Most Likely Descendants; and
- (g) Charge the landowner, whether by payment or in kind, for serving as the Most Likely Descendants or as the Most Like Descendants' authorized representative or representatives.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

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§ 29227 Commissioner Involvement in Conferrals or Mediations

- (a) A Commissioner shall not use his or her position as a Commissioner to exert undue influence or achieve an unfair advantage in conferrals or mediations with landowners regarding the treatment and disposition of Native American human remains and/or associated items for which a Commissioner's tribe or consortium to which the Commissioner's tribe belongs has been identified as Most Likely Descendants.
- (b) A Commissioner should avoid, if possible, participating in conferrals or mediations with landowners regarding the treatment and disposition of Native American human remains and/or associated items for which the Commissioner's tribe or consortium to which the Commissioner's tribe belongs has been identified as Most Likely Descendants.
- (c) A Commissioner shall recuse himself or herself from any Commission consideration of legal action against a landowner to seek compliance with Public Resources Code section 5097.98 regarding Native American human remains and/or associated items for which the Commissioner's tribe or consortium of tribes to which the Commissioner's tribe belongs has been identified as Most Likely Descendants.

Note: Authority cited: Sections 11152, 11342.2, Government Code; Section 5097.94, Public Resources Code. Reference: Sections 5097.94, 5097.98, Public Resources Code.

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Appendix A

Native American Heritage Commission
Notice of Formation of Tribal Consortium for Most Likely Descendants
Identifications
(Public Resources Code Section 5097.98; California Code of Regulations, Title 14,
Section 29205, subdivision (b))

Name of Tribal Consortium _____

Date Tribal Consortium Was Formed: _____

Mailing Address : _____

Contact Person (Person Authorized by the Tribal Consortium to Receive Notice That
The Tribal Consortium Has Been Identified as Most Likely Descendants and to
Accept Identification):

Telephone Number(s) and Email Address For Contact
Person: _____

Additional Contact Person, If Any: _____

Telephone Number(s) and Email Address for Additional Contact
Person: _____

Authorized Representative(s) for Tribal Consortium (Person or Persons Authorized
by the Tribal Consortium to Confer with Landowners Regarding the Treatment and
Disposition of Native American human
remains): _____

Telephone Number(s) and Email Address for Authorized Representative(s) _____

Name of Each Tribe in the Tribal Consortium (Add Additional Pages If Necessary):

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Combined Area of Traditional Territories or Area of Traditional and Cultural Affiliation for Tribal Consortium (Please identify, either individually or combined, the Tribes' traditional territory or areas of traditional and cultural affiliation for each Tribe in the Tribal Consortium as specifically as possible):

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PLEASE PROVIDE SUPPORTING DOCUMENTATION DEMONSTRATING THE FOLLOWING:

1. Each Tribe in the Tribal Consortium meets the criteria to be included on the Most Likely Descendants List. The criteria to be included on the Most Likely Descendants List are as follows (California Code of Regulations, Title 14, Section 29214):

- (ii) California Native American Tribe

A California Native American tribe that is one of the following may be included on the Most Likely Descendants List:

- (C) A Federally recognized tribe with all or part of its sovereign tribal territory within the State of California; or

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(D) A non-federally recognized California Native American tribe that is on the list maintained by the NAHC for purposes of Chapter 905 of Statutes of 2004 (SB 18).

2. The Tribal Consortium has authorized the Contact Person(s) and Authorized Representative(s) to serve in those capacities.

On behalf of the (Name of Tribal Consortium) _____, I affirm that this form and supporting documentation are true and correct to the best of my knowledge and that I am authorized to submit them on behalf of the Tribal Consortium.

Name (Printed) _____

Title: _____

Date: _____

Signature: _____

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Sample Form
Notice of Authorization
Authorized Representative(s) of Tribe or Tribal Consortium for
Conferral with Landowners for the Treatment and Disposition of Native American
Human Remains
(Public Resources Code section 5097.98; California Code of Regulations, Title 14,
Sections 29205, subdivision (b), 29209)

On (date) _____, the [Tribal Government of the (Name
of Tribe) _____] or [(Name of Tribal
Consortium) _____] authorized the following person(s)
to represent and act as (an) agent(s) on the behalf of the Tribe/Tribal Consortium as
Most Likely Descendants to confer with landowners regarding the treatment and
disposition of Native American human remains pursuant to Public Resources Code
section 5097.98:

Name(s) of Authorized Representative (s) and Title(s):

I affirm that the above-stated information is true and correct to the best of my
knowledge and I am authorized by the Tribal Government/Tribal Consortium to
represent it as such.

Name (Printed): _____

Title: _____

Signature: _____

Date: _____

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Appendix B

Native American Heritage Commission
Most Likely Descendants List
Registration Form
(Public Resources Code section 5097.98; California Code of Regulations, Title 14,
Sections 29209, 29214, 29217)

Name of Tribe: _____

Mailing Address: _____

Contact Person (Person Authorized by the Tribe to Receive Notice that Tribe has
been identified as Most Likely
Descendants): _____

Telephone Number(s) and Email Address for Contact Person: _____

Additional Contact Person: _____

Telephone Number(s) and Email Address for Additional Contact Person: _____

Authorized Representative(s) for the Tribe (Person or Persons Authorized by the
Tribe to Confer with Landowners Regarding the Treatment and Disposition of
Native American Human Remains):

Telephone Number(s) and Email Address for Authorized Representative(s) _____

Tribe's Traditional Territory or Area of Traditional and Cultural Affiliation (Please
identify as specifically as
possible): _____

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PLEASE PROVIDE SUPPORTING DOCUMENTATION DEMONSTRATING THE
FOLLOWING:

1. The Tribe meets the criteria to be included on the Most Likely Descendants List. The criteria to be included on the Most Likely Descendants List are as follows (California Code of Regulations, Title 14, Section 29214):
2.
 - (iii) California Native American Tribe

A California Native American tribe that is one of the following may be included on the Most Likely Descendants List:

- (E) A Federally recognized tribe with all or part of its sovereign tribal territory within the State of California; or
- (F) A non-federally recognized California Native American tribe that is on the list maintained by the NAHC for purposes of Chapter 905 of Statutes of 2004 (SB 18).

2. The Tribe has authorized the Contact Person(s) and Authorized Representative(s) to serve in those capacities.

On behalf of the (Name of Tribe) _____, I affirm that this form and supporting documentation are true and correct to the best of my knowledge and that I am authorized to submit them on behalf of the Tribe.

Name (Printed) _____

Title: _____

Date: _____

Signature: _____

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Notice of Authorization
Authorized Representative(s) of Tribe or Tribal Consortium for
Conferral with Landowners for the Treatment and Disposition of Native American
Human Remains
(Public Resources Code section 5097.98; California Code of Regulations, Title 14,
Sections 29205, subdivision (b), 29209)

On (date) _____, the [Tribal Government of the (Name
of Tribe) _____] or [(Name of Tribal
Consortium) _____] authorized the following person(s)
to represent and act as (an) agent(s) on the behalf of the Tribe as Most Likely
Descendants to confer with landowners regarding the treatment and disposition of
Native American ancestral remains pursuant to Public Resources Code section
5097.98:

Name(s) of Authorized Representative (s) and Title(s):

I affirm that the above-stated information is true and correct to the best of my
knowledge and I am authorized by the Tribal Government/Tribal Consortium to
represent it as such.

Name (Printed): _____
Title: _____

Signature: _____

Date: _____

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Appendix C

Native American Heritage Commission
Sample Form
Notice of Authorization
Authorized Representative(s) of Landowner(s) for
Conferral with Most Likely Descendants for the Treatment and Disposition of Native
American Human Remains
(Public Resources Code section 5097.98; California Code of Regulations, Title 14,
Section 29212)

On (date) _____, the (Name of
Landowner) _____] authorized the following person(s)
to represent and act as (an) agent(s) on the behalf of the landowner to confer with
Most Likely Descendants regarding the treatment and disposition of Native
American ancestral remains discovered on the landowner's property pursuant to
Public Resources Code section 5097.98:

Name(s) of Authorized Representative (s) and Title(s):

I affirm that the above-stated information is true and correct to the best of my
knowledge and I am authorized by the Landowner(s) to represent it as such.

Name (Printed): _____

Title: _____

Signature: _____

Date: _____

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Appendix D

Native American Heritage Commission
Application for Mediation Between Most Likely Descendants and Landowner(s)
(Public Resources Code sections 5097.94, subdivision (k), 5097.98, subdivision (e);
California Code of Regulations, Title 14, Sections 29221, 29222)

An application for mediation between Most Likely Descendants and Landowners pursuant to Public Resources Code sections 5097.94, subdivision (k) and 5097.98, subdivision (e) MUST BE IN WRITING and transmitted by fax or email to the Native American Heritage Commission at:

Native American Heritage Commission
Fax: (916) 373-5471
Email: nahc@nahc.ca.gov

Commission staff will transmit the application to the non-requesting party upon receipt and contact the parties within one business day of receiving the application to schedule a mediation session at a time agreeable to both parties.

Name of Party Requesting Mediation (Applicant): _____

Date: _____

Telephone number: _____

Email: _____

Fax: _____

Mediation is requested by or on behalf of: Most Likely Descendants _____
Landowner _____

1. Please describe the issues in dispute between the Most Likely Descendants and the Landowner regarding the treatment and disposition of the Native American human remains involved. (For example, proposed location of reinterment; method of treatment and disposition; whether an item is associated with a Native American burial):

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2. Please describe the Applicant's position on each of the issues stated above:

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I affirm that I am authorized to request mediation on behalf of the party listed above:

Name (Printed): _____

Title: _____

Phone number: _____

Email: _____

Signature: _____

Mediation Procedures
(Public Resources Code section 5097.94, subdivision (k), 5097.98, subdivision (e);
California Code of Regulations, Title 14, Section 29222)

§ 29222 Mediation Procedures

(d) Parties to Mediation

Mediation sessions will be conducted by Commission staff or designated consultants who are trained in mediation. Only Most Likely Descendants, the landowners, and/or their authorized representatives may participate. Authorized representatives must provide Commission staff proof of authorization in writing. If an authorized representative participates on behalf of a party, that party will be bound by the representations and positions of its authorized representative.

(e) Conduct of Mediation Sessions

Mediation sessions may be conducted telephonically, in person, or by video conferencing. The Commission staff member assigned to the mediation will, in the course of the mediation:

- (iii) Determine the issues in dispute;
- (iv) Determine the positions of each party on each issue in dispute;
- (iii) Inform the parties of their legal obligations in the event that an agreement is not reached or if the landowner rejects the recommendations of the Most Likely Descendants; and
- (iv) Attempt to bring the parties to an agreement using standard mediation practices.

Mediation sessions may continue as long as mutually agreed upon by the parties or by their authorized representatives. If an agreement is reached, the parties or their authorized representatives shall memorialize the agreement in writing and provide it to the Commission excluding the terms that are confidential. Commission staff shall not coerce or threaten any party in order to secure agreement between the parties.

(f) Conclusion of Mediation

The mediation shall be considered concluded when one of the following has occurred:

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- (iv) The parties or, in the absence of a party, that party's authorized representative or representatives, have reached an agreement and have memorialized it in writing;
- (v) Any party or, in the absence of a party, that party's authorized representative or representatives refuse to continue the mediation; or
- (vi) The landowner or his or her authorized representative or representatives continue to reject the recommendations of the Most Likely Descendants or their authorized representative or representatives.

The Commission staff person assigned to the mediation shall memorialize in writing the reasons why agreement was not possible and provide copies of the writing to the parties. A copy shall be kept in the Commission's files.

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Attachment B
Summary of Public Comments

List by Frequency of Comments on the Most Likely Descendant Process and
Summary of Comments (As Needed)

	Comment	Number of Responses	Summary
1	MLD Designation Process/Guidelines/Directions	35	This represents the largest category of comments. These comments indicate that there is a general lack of understanding of the MLD designation process, including the role of the Commission itself. There are no written guidelines outlining MLD roles and responsibilities and no written code of ethics for MLDs.
2	The current process elevates individuals over tribes. These individuals often do not share information regarding discoveries with the culturally affiliated community.	22	Concerns with individuals having the same rights as MLDs as tribes have represented the second largest number of comments received. There is no requirement for MLDs to involve other culturally affiliated tribes or individual Native Americans in formulating recommendations to landowners for the treatment and disposition of Native human remains and any associated grave items, or to involve them in reburial ceremonies that may occur subsequent to the acceptance by landowners of the MLD recommendations. There is also no requirement to submit a written report to the NAHC after the landowner, or landowner's authorized representative, and the MLD have agreed to the disposition and treatment of the Native American human remains and any associated grave items.
3	Confidentiality is a major issue. Tribes do not trust that the information given during conferral (or during any step in the process) will remain confidential. Lead agencies often bring too many people to consultations that aren't necessary. Commenters would like some direction on who must actually be present during the process and how to	14	

	remove extraneous people from the meetings.		
4	NAHC procedures for determining MLDs rely too much on anthropological, scientific, and historical information provided by non-Indians, and not enough on traditional information provided by the indigenous Native American community. Most Native American history is passed down orally. <u>The NAHC must give the same or greater weight to the history (oral or written) provided by the tribes as to scientific (DNA) data and mission records, which are known to be inaccurate.</u>	12	
5	Public Hearings should not satisfy the requirement for consultation. A private consultation with each affected tribe should be required.	12	
6	The NAHC Most Likely Descendant Subcommittee should reach out to tribes.	5	
7	The NAHC should update its list annually and ask for comments on the MLD process.	5	
8	It is difficult, financially, for tribes to attend NAHC public meetings.	4	
9	The NAHC violates tribal or family sovereignty in determining a MLD.	4	These comments suggest that the NAHC undermines the wishes of lineal descendants and tribes when it designates MLDs without consultation.
10	The term MLD should be eliminated completely. People are just interested in being a MLD for the financial benefit. No one should be profiting off of this process.	4	
11	The NAHC should use the SB 18 List to select MLDs.	4	
12	When remains are found, contact the nearest federally recognized tribe.	4	
13	When remains are found contact all federally recognized tribes in a shared territory.	3	
14	Landowners can refuse the recommendation of the MLD and mediation and rebury remains and grave	3	

	goods without MLD participation.		
15	Concerns regarding archaeologists picking the same tribe or individual to work with to the exclusion of others.	2	
16	How do we protect information on the MLD list? It should all be confidential.	3	
17	Why are changes to the statute are needed and why a MLD Sub-Committee is needed?	1	
18	Incidence of one family attempting to circumvent the statute and creating an issue of control over reburial of remains.	1	

Attachment C
Legislative Analyses of SB 297 (Garamendi, Chapter 1492, Statutes of 1982)

FILE COPY

SB 297

Legislative Analyst
August 10, 1982

ANALYSIS OF SENATE BILL NO. 297 (Garamendi)
As Amended in Assembly August 9, 1982
1981-82 Session

SB 297 (Am. 8/9/82)

Fiscal Effect:

Cost: State: No additional costs.

Mandated local program. Potential minor costs. Reimbursement disclaimed.

Revenue: None.

Analysis:

This bill clarifies the authority of the Native American Heritage Commission and makes other minor related changes. Specifically, it:

- Empowers the commission through January 1, 1984 to identify and catalog specified Native American graves and cemeteries. Under existing law, the commission is empowered to identify and catalog "places of special religious or social significance to Native Americans."
- Authorizes the commission to resolve disputes and develop agreements, as specified relating to the disposition of Native American burial remains.
- Requires county coroners, under specified circumstances, to contact the commission upon the discovery of Native American human remains. The commission would be required to notify the most likely descendants of the deceased.

SB 297--contd

- Effective January 1, 1984, makes it unlawful for any person, as specified, to obtain or possess Native American artifacts or human remains which have been taken from a cairn or grave. The bill also makes it a misdemeanor to willfully remove any human remains from other than a dedicated cemetery, with specified exceptions.
- Exempts from the Public Records Act the commission's records of Native American graves, cemeteries and sacred sites.

The Native American Heritage Commission indicates that it can absorb any workload resulting from this bill within existing resources.

Mandated local program. Local government could incur minor costs to notify the commission upon discovery of Native American burial remains and otherwise enforce the provisions of the bill. The bill contains a "crimes and infractions" disclaimer.

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AUGUST 10, 1982

SENATE BILL 297 (GARAMENDI)

(AS AMENDED AUGUST 9, 1982)

SUMMARY:

PROVIDES PROCEDURE TO BE FOLLOWED WHEN REMAINS OF NATIVE AMERICANS ARE DISCOVERED; IMPOSES MISDEMEANOR PENALTIES FOR THE MUTILATION, DISINTERMENT, OR DISTURBANCE OR REMOVAL OF HUMAN REMAINS WITHOUT LEGAL AUTHORITY; REQUIRES THE NATIVE AMERICAN HERITAGE COMMISSION TO IDENTIFY AND CATALOG KNOWN GRAVES AND CEMETERIES OF NATIVE AMERICANS; EXEMPTS THE COMMISSION'S RECORDS RELATIVE TO LOCATION OF GRAVES AND CEMETERIES FROM DISCLOSURE UNDER THE PUBLIC RECORDS ACT; MAKES OTHER CHANGES RELATIVE TO PROTECTION OF NATIVE AMERICAN BURIAL SITES.

DIGEST:

CURRENT LAW PROHIBITS A PUBLIC AGENCY OR PRIVATE PARTY FROM CAUSING SEVERE OR IRREPARABLE DAMAGE TO ANY NATIVE AMERICAN SANCTIFIED CEMETERY LOCATED ON PUBLIC PROPERTY, EXCEPT UPON A SHOWING THAT THE PUBLIC INTEREST AND NECESSITY SO REQUIRE. IN THE CASE OF PUBLIC PROPERTY OF CITIES AND COUNTIES, HOWEVER, SUCH PROHIBITION APPLIES ONLY TO PARKLANDS IN EXCESS OF 100 ACRES. IN ADDITION, CURRENT LAW SPECIFIES THAT ANY PERSON WHO MUTILATES, DISINTERS, OR REMOVES FROM THE PLACE OF INTERMENT (I.E., FROM A CEMETERY OR OTHER DEDICATED PLACE OF BURIAL) ANY HUMAN REMAINS WITHOUT LEGAL AUTHORITY IS GUILTY OF A FELONY. CURRENT LAW ADDITIONALLY REQUIRES COUNTY CORONERS, WHENEVER A BODY IS DISCOVERED, TO DETERMINE WHETHER CIRCUMSTANCES WARRANT AN INVESTIGATION OF THE CAUSE OF DEATH.

WHILE A NATIVE AMERICAN BURIAL SITE CURRENTLY MAY BE PROTECTED FROM DESTRUCTION OR REMOVAL IN THOSE INSTANCES WHERE THE SITE IS LOCATED ON PUBLIC PROPERTY OR WHERE THE BURIAL GROUND IS DETERMINED BY THE COURTS TO CONSTITUTE A CEMETERY OR OTHER DEDICATED PLACE OF BURIAL, THERE IS GENERALLY NO PROTECTION FOR THOSE NATIVE AMERICAN BURIAL SITES LOCATED ON PRIVATE PROPERTY.

AUGUST 10, 1982

SB 297 WOULD ENACT THE FOLLOWING PROVISIONS RELATIVE TO THE IDENTIFICATION AND CATALOGING OF NATIVE AMERICAN BURIAL SITES AND PROCEDURES WHICH MUST BE FOLLOWED IN THE EVENT OF DISCOVERY OF NATIVE AMERICAN REMAINS:

LEGISLATIVE FINDINGS AND PURPOSE

SB 297 WOULD MAKE THE FOLLOWING LEGISLATIVE FINDINGS:

1. THAT NATIVE AMERICAN BURIAL SITES AND SKELETAL REMAINS ARE SUBJECT TO VANDALISM AND INADVERTENT DESTRUCTION AT AN INCREASING RATE.
2. THAT STATE LAWS DO NOT PROVIDE FOR THE PROTECTION OF THE REMAINS AND BURIAL SITES.
3. THAT THERE IS CURRENTLY NO MEANS FOR NATIVE AMERICAN DESCENDENTS TO EXPRESS THEIR CONCERNS REGARDING THE TREATMENT AND DISPOSITION OF NATIVE AMERICAN BURIALS.

SB 297 WOULD SPECIFY THAT THE PURPOSE OF THE BILL IS TO:

1. PROVIDE PROTECTION TO NATIVE AMERICAN BURIALS AND SKELETAL REMAINS FROM VANDALISM AND INADVERTENT DESTRUCTION.
2. PROVIDE A MEANS FOR NATIVE AMERICAN DESCENDENTS TO MAKE THEIR CONCERNS KNOWN REGARDING THE NEED FOR SENSITIVE TREATMENT AND DISPOSITION OF NATIVE AMERICAN BURIALS, SKELETAL REMAINS AND ITEMS BURIED WITH NATIVE AMERICAN REMAINS.

PROCEDURE TO FOLLOW UPON DISCOVERY OF REMAINS

1. SB 297 WOULD PROHIBIT FURTHER EXCAVATION OR DISTURBANCE OF A SITE IN THE EVENT OF DISCOVERY OF ANY HUMAN REMAINS IN A LOCATION OTHER THAN A DEDICATED CEMETERY UNTIL THE COUNTY CORONER HAS DETERMINED THAT HE OR SHE IS NOT REQUIRED BY LAW TO INVESTIGATE THE CIRCUMSTANCES

AUGUST 10, 1982

OF THE DEATH AND UNTIL RECOMMENDATIONS CONCERNING THE TREATMENT AND DISPOSITION OF THE REMAINS HAVE BEEN MADE AS PRESCRIBED IN THE BILL. THE CORONER WOULD BE REQUIRED TO MAKE HIS OR HER DETERMINATION WITHIN TWO WORKING DAYS FROM THE TIME THE CORONER IS NOTIFIED OF THE DISCOVERY OF THE REMAINS.

2. IF THE CORONER DETERMINES THAT THE REMAINS ARE NOT SUBJECT TO HIS OR HER AUTHORITY AND RECOGNIZES THE REMAINS TO BE THOSE OF NATIVE AMERICANS, OR HAS REASON TO BELIEVE THAT THEY ARE THOSE OF NATIVE AMERICANS, THE CORONER WOULD BE REQUIRED TO CONTACT THE NATIVE AMERICAN HERITAGE COMMISSION WITHIN 24 HOURS.
3. UPON RECEIPT OF NOTIFICATION OF DISCOVERY OF THE REMAINS, THE COMMISSION WOULD BE REQUIRED TO IMMEDIATELY NOTIFY THE PERSONS MOST LIKELY TO BE THE DESCENDENTS OF THE DECEASED NATIVE AMERICANS.
4. THE DESCENDENTS, WITH THE PERMISSION OF THE PROPERTY OWNER, WOULD BE ALLOWED TO INSPECT THE SITE AND RECOMMEND A MEANS FOR TREATING OR DISPOSING OF THE HUMAN REMAINS AND ANY ASSOCIATED GRAVE GOODS. THE RECOMMENDATION MAY INCLUDE THE SCIENTIFIC REMOVAL AND NONDESTRUCTIVE ANALYSIS OF THE REMAINS AND GRAVE GOODS. ANY SUCH INSPECTION AND RECOMMENDATION WOULD BE REQUIRED TO BE COMPLETED WITHIN 24 HOURS AFTER THE DESCENDENTS RECEIVE NOTIFICATION BY THE COMMISSION.
5. IF THE COMMISSION CANNOT IDENTIFY A DESCENDENT, OR THE IDENTIFIED DESCENDENT FAILS TO MAKE A RECOMMENDATION, OR THE LANDOWNER AND THE DESCENDENTS ARE UNABLE TO REACH AN AGREEMENT WITH REGARD TO TREATING AND DISPOSING OF THE HUMAN REMAINS, THE LANDOWNER WOULD BE REQUIRED TO REINTER THE REMAINS AND GRAVE GOODS WITH APPROPRIATE DIGNITY ON

AUGUST 10, 1982

PENALTIES; PROHIBITION AGAINST POSSESSION OF REMAINS

1. SB 297 WOULD PROVIDE THAT ANY PERSON WHO KNOWINGLY MUTILATES OR DISINTERS, WANTONLY DISTURBS, OR WILLFULLY REMOVES ANY HUMAN REMAINS IN OR FROM ANY LOCATION OTHER THAN A DEDICATED CEMETERY WITHOUT LEGAL AUTHORITY WOULD BE GUILTY OF A MISDEMEANOR. IN ADDITION, SB 297 WOULD SPECIFICALLY EXEMPT FROM SUCH PROHIBITION ANY PERSON WHO IS FOLLOWING THE PROCEDURES SPECIFIED IN THE BILL FOR TREATMENT AND DISPOSITION OF NATIVE AMERICAN BURIALS.
2. SB 297 WOULD PROHIBIT A PERSON FROM OBTAINING OR POSSESSING NATIVE AMERICAN ARTIFACTS OR HUMAN REMAINS WHICH ARE TAKEN FROM A NATIVE AMERICAN CAIRN OR GRAVE AFTER JANUARY 1, 1984, EXCEPT IN ACCORDANCE WITH THE PROVISIONS OF THE BILL, OR AS OTHERWISE AUTHORIZED BY LAW.

POWERS AND DUTIES OF NATIVE AMERICAN HERITAGE COMMISSION

CURRENT LAW SPECIFIES THE POWERS AND DUTIES OF THE NATIVE AMERICAN HERITAGE COMMISSION, INCLUDING IDENTIFYING AND CATALOGING PLACES OF RELIGIOUS OR SOCIAL SIGNIFICANCE TO NATIVE AMERICANS AND MAKING RECOMMENDATIONS RELATIVE TO NATIVE AMERICAN SACRED PLACES LOCATED ON PRIVATE LANDS.

SB 297 WOULD ADDITIONALLY SPECIFY THE FOLLOWING POWERS AND DUTIES OF THE COMMISSION:

1. WOULD REQUIRE THE COMMISSION, BY JANUARY, 1984, TO IDENTIFY AND CATALOG KNOWN GRAVES AND CEMETERIES OF NATIVE AMERICANS ON PRIVATE LANDS.
2. WOULD REQUIRE THE COMMISSION TO NOTIFY LANDOWNERS ON WHOSE PROPERTY SUCH GRAVES AND CEMETERIES EXIST AND TO IDENTIFY THE NATIVE AMERICAN GROUP MOST LIKELY DESCENDED FROM THE NATIVE AMERICANS INTERRED ON THE PROPERTY.
3. WOULD AUTHORIZE THE COMMISSION, UPON APPLICATION OF EITHER THE LANDOWNERS OR DESCENDENTS, TO MEDIATE DISPUTES RELATING TO THE TREATMENT AND DISPOSITION OF NATIVE AMERICAN BURIALS, RELATED REMAINS AND ITEMS ASSOCIATED WITH THE REMAINS.

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4. WOULD AUTHORIZE THE COMMISSION TO ASSIST INTERESTED LANDOWNERS IN DEVELOPING AGREEMENTS WITH NATIVE AMERICANS FOR TREATING AND DISPOSING OF THE HUMAN REMAINS AND GRAVE GOODS.

EXEMPTION FROM ENVIRONMENTAL QUALITY ACT AND COASTAL ACT

SB 297 WOULD EXEMPT THOSE PROVISIONS OF THE BILL RELATIVE TO DISCOVERY AND DISPOSITION OF NATIVE AMERICAN BURIALS FROM THE PROVISIONS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT AND THE CALIFORNIA COASTAL ACT.

COMMENTS:

1. ACCORDING TO THE PROPONENTS OF SB 297, NATIVE AMERICAN BURIAL SITES ARE OCCASIONALLY DISCOVERED ON PRIVATE PROPERTY EITHER AT THE TIME OF DEVELOPMENT OF THE PROPERTY, DURING ARCHAEOLOGICAL STUDIES, OR THROUGH INADVERTENT DISCOVERY. IT IS ARGUED THAT THERE IS NOT ONLY A NEED TO PROTECT THE BURIAL SITES, BUT ALSO TO PROVIDE A PROCEDURE WHEREBY DESCENDENTS OF THE DECEASED NATIVE AMERICANS WILL HAVE THE OPPORTUNITY TO RECOMMEND TO THE PRIVATE PROPERTY OWNERS A RESPECTABLE MEANS FOR TREATING AND DISPOSING OF THE REMAINS.
2. WHILE CURRENTLY THERE ARE LAWS TO PROTECT NATIVE AMERICAN BURIAL SITES LOCATED ON PUBLIC PROPERTY, THERE IS CURRENTLY NO PROTECTION AFFORDED SITES WHICH ARE LOCATED ON PRIVATE PROPERTY, UNLESS THE SITE IS DETERMINED BY THE COURTS TO BE PROTECTED PURSUANT TO PROVISIONS OF LAW GOVERNING PROTECTION OF CEMETERIES OR OTHER DEDICATED PLACES OF BURIAL. HOWEVER, THERE HAS BEEN LITTLE SUCCESS IN ACHIEVING PROTECTION OF SUCH SITES THROUGH THE COURTS. FOR EXAMPLE, IN A RECENT COURT DECISION, THE THIRD DISTRICT COURT OF APPEAL HELD THAT A BURIAL SITE CONTAINING THE REMAINS OF MORE THAN 200 MIWOK INDIANS, WHICH WAS UNEARTHED DURING THE DEVELOPMENT OF A RESIDENTIAL HOUSING TRACT IN THE CITY OF STOCKTON, HAD NOT ACHIEVED PROTECTABLE STATUS AS A PUBLIC CEMETERY (VIA THE BEAR VALLEY COMMUNITY CONSTRUCTION, INC. 1982 CAL App. 4th 300, FEBRUARY 9, 1982).

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3. SB 297 WOULD PROVIDE A PROCEDURE WHICH MUST BE FOLLOWED UPON DISCOVERY OF HUMAN REMAINS DURING EXCAVATION OF PRIVATE PROPERTY. THE PROPERTY OWNER WOULD BE REQUIRED TO TEMPORARILY CEASE FURTHER EXCAVATION UNTIL THE COUNTY CORONER IS NOTIFIED AND RECOMMENDATIONS REGARDING DISPOSITION OF THE REMAINS ARE MADE. IF THE CORONER DETERMINES THAT THE REMAINS ARE THOSE OF NATIVE AMERICANS, THE DESCENDENTS, UPON NOTIFICATION BY THE NATIVE AMERICAN HERITAGE COMMISSION, WOULD HAVE 24 HOURS TO INSPECT THE SITE AND RECOMMEND TO THE PROPERTY OWNER A MEANS FOR TREATING AND DISPOSING OF THE REMAINS.

IN THE EVENT THE COMMISSION IS UNABLE TO IDENTIFY A DESCENDENT, OR THE IDENTIFIED DESCENDENTS FAIL TO MAKE A RECOMMENDATION, OR THE LANDOWNER AND THE DESCENDENTS ARE UNABLE TO REACH AN AGREEMENT WITH REGARD TO TREATING AND DISPOSING OF THE REMAINS, THE LANDOWNER WOULD BE REQUIRED TO REINTER THE REMAINS AND GRAVE GOODS WITH APPROPRIATE DIGNITY ON THE PROPERTY IN A LOCATION NOT SUBJECT TO FURTHER SUBSURFACE DISTURBANCE.

4. SB 297 WOULD IMPOSE A MISDEMEANOR PENALTY FOR MUTILATION, DISINTERMENT, DISTURBANCE, OR REMOVAL OF HUMAN REMAINS WITHOUT LEGAL AUTHORITY. IN ADDITION, THE BILL WOULD PROHIBIT A PERSON FROM OBTAINING OR POSSESSING ANY NATIVE AMERICAN ARTIFACTS OR HUMAN REMAINS TAKEN FROM A NATIVE AMERICAN CAIRN OR GRAVE AFTER JANUARY 1, 1984, EXCEPT IN ACCORDANCE WITH THE PROVISIONS OF THE BILL OR AS OTHERWISE AUTHORIZED BY LAW. HOWEVER, SB 297 DOES NOT SPECIFY THE PENALTY FOR OBTAINING OR POSSESSING THE ARTIFACTS OR HUMAN REMAINS. THE COMMITTEE MAY WISH TO CONSIDER, THEREFORE, WHETHER THE BILL SHOULD BE AMENDED TO SPECIFY THE PENALTY FOR OBTAINING AND POSSESSING ARTIFACTS OR HUMAN REMAINS FROM A NATIVE AMERICAN CAIRN OR GRAVE.

Attachment D
Proposed Rulemaking Schedule

Native American Heritage Commission
Proposed Rulemaking Schedule
Most Likely Descendant Regulations
California Public Resources Code Section 5097.94, subdivisions (k) and (l), and
Section 5097.98

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| November 18, 2016 | The MLD Subcommittee provides comments to the General Counsel. |
| December 2, 2016 | The General Counsel provides the MLD Subcommittee a second draft of the MLD regulations based on the comments received. |
| December 16, 2016 | The MLD Subcommittee provides comments to the General Counsel. |
| December 23, 2016 | The General Counsel provides the MLD Subcommittee a third draft based on the comments received. |
| January 6, 2017 | The MLD Subcommittee confers telephonically with the General Counsel to determine whether the third draft is ready for NAHC Commission consideration; if so, draft MLD regulations are included in the agenda packet for the January 2017 Commission meeting for Commission consideration. |
| January 20, 2017 | The Commission reviews the draft MLD regulations and votes to propose the regulations, propose the regulations with amendments, or refer the regulations back to the NAHC MLD Subcommittee for revision. If the Commission votes to propose the draft regulations, staff begins the formal rulemaking process. |
| February 3, 2016 | Submission of the proposed rulemaking package to the Department of Finance for fiscal impact assessment and approval of fiscal impact statement. (This process usually takes 30 days but may require more time if submitted during the state's budget preparations.) |

April 3, 2017	Submission of Notice of Proposed Regulatory Action, Proposed Text, Initial Statement of Reasons, and Economic and Fiscal Impact Statement to Office of Administrative Law for publication in the California Regulatory Notice Register.
April 13, 2017	<p>Publication of Notice of Proposed Regulatory Action in the California Regulatory Notice Register. Formal rulemaking process begins and must be completed within one year.</p> <p>Comment period begins 4/13/17 and ends 6/26/17. (Note: Minimum required comment period is 45 days; proposed comment period is 74 days)</p> <p>Tribal consultation period for proposed regulations begins.</p>
June 26, 2017	Comment period ends.
July 21, 2017	Public hearing.
August 11, 2017	<p>Publication of substantial changes and beginning of new comment period.</p> <p>Comment period begins 8/11/17 and ends 9/8/17. (Note: Minimum required comment period is 15 days; proposed comment period is 28 days).</p>
September 8, 2017	<p>New comment period ends.</p> <p>Tribal consultation for proposed regulations ends.</p>
October 20, 2017	Commission decides whether to adopt regulations.
November 10, 2017	If regulations are adopted on October 20, 2017, rulemaking record is transmitted to the Office of Administrative Law, which has 30 days to review. Regulations usually take effect on a quarterly basis after approval by the Office of Administrative Law and submission to the Secretary of State.