



NATIVE AMERICAN HERITAGE COMMISSION

February 7, 2022

REQUEST FOR TRIBAL CONSULTATION

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NAHC HEADQUARTERS
1550 Harbor Boulevard
Suite 100
West Sacramento,
California 95691
(916) 373-3710
nahc@nahc.ca.gov
NAHC.ca.gov

To: California Native American tribes

Re: **Native American Heritage Commission Mediation Regulations**

Deadline: March 25, 2022

Contact: Vanessa Racehorse; CalNAGPRA@nahc.ca.gov

The Native American Heritage Commission ("Commission") seeks input from California Native American tribes on the development of mediation regulations that implement the California Native American Graves Protection and Repatriation Act (CalNAGPRA). CalNAGPRA requires the Commission to "develop and adopt mediation procedures that will recognize the need for mediators with qualifications and experience appropriate to a dispute's circumstances. Dispute procedures may incorporate aspects of restorative justice practices." Health and Safety Code section 8016, subdivision (d)(8).

The required mediation procedures must follow the Administrative Procedure Act's formal rulemaking procedures, requiring the Commission to adopt regulations. See Cal. Gov. Code § 11340.5(a).

The Commission currently seeks tribal input on the drafting of the proposed mediation regulations, so that tribal input may be considered prior to releasing a draft for a public comment period.

Tribal input is critical to ensure that the Commission meaningfully considers the unique circumstances of each California Native American tribe in planning, drafting, and implementing these regulations. To review a draft for tribes' consideration during the tribal consultation process, please see **Attachment 1**.

The Commission anticipates that the tribal consultation process will continue **through March 25, 2022**, but this timeline may be extended to facilitate further tribal consultation. Additionally, the tribal consultation process will include virtual listening sessions. The listening sessions are

intended to be public forums where tribes and the Commission can collaborate openly and share ideas. These listening sessions will not take the place of government-to-government consultation, if requested.

The Commission is hosting a **virtual listening session** via Zoom on **February 24, 2022**, from **1:00-2:30pm**. Please register [here](#).

To assist you in developing recommendations responsive to this request for consultation, below is a (non-exclusive) list of questions:

1. Should the mediation regulations apply to all potential disputes mediated by the Commission or should they only apply to disputes under CalNAGPRA?
2. What restorative justice practices and values should be made applicable to dispute resolution under the mediation regulations?
3. Should there be an opportunity for the parties to agree on their own appointment of a certified mediator, at their own cost, as an alternative to the Commission's designation of a mediator?
4. Are there any existing mediation practices, procedures, or models that you recommend the Commission incorporate into the regulations?

Consultation submissions should be sent via email to Vanessa Racehorse, at CalNAGPRA@nahc.ca.gov, with the subject line "**NAHC Mediation Regulations: [Tribe Name] Tribal Consultation Response**" or via mail to:

Native American Heritage Commission
Attn: Vanessa Racehorse
1550 Harbor Boulevard, Suite 100
West Sacramento, CA 95691

The Commission can also facilitate web-based or conference call tribal consultations should your Tribe seek to engage in direct consultation in addition to submitting written comments. If your Tribe would like to engage in this type of consultation, please contact Vanessa Racehorse at CalNAGPRA@nahc.ca.gov or via phone at (916)373-3710, to set up a web-based or conference call consultation.

Thank you for your patience during this time and please do not hesitate to contact us with any follow up questions or concerns.

Respectfully,

Debbie Treadway

Debbie Pilas-Treadway
Deputy Executive Secretary

CALIFORNIA CODE OF REGULATIONS, TITLE 14, NATURAL RESOURCES

Division 17, Native American Heritage Commission

CHAPTER 1. DISPUTE RESOLUTION/MEDIATION PROCEDURES

§ 29001 Purpose of the Dispute Resolution/Mediation Process

These dispute resolution/mediation regulations of the Native American Heritage Commission (Commission) implement the California Native American Graves Protection and Repatriation Act, Division 7, Part 2, Chapter 5 of the Health and Safety Code (Health and Safety Code section 8016), and Division 5, Chapter 1.75 of the Public Resources Code (Public Resources Code sections 5097.94 and 5097.98).

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

§ 29002 Construction of Regulations

- (a) As used in these regulations, words in the singular shall include the plural and words in the plural shall include the singular, unless the context otherwise requires.
- (b) In these regulations, whenever a time is stated within which an act is to be done, the time is computed by excluding the first day and including the last day. If the last day is any day the Commission is closed for business, that day is also excluded.
- (c) In these regulations, any time within which an act is to be done refers to calendar days, unless otherwise specified.
- (d) Time limits set forth in these regulations are not jurisdictional.

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

§ 29003 Confidentiality

Confidentiality in any mediation/dispute resolution under these regulations shall be governed by Government Code section 11420.30, and Evidence Code sections 703.5, 1152.5, and 1152.6. Accordingly, all communications and records made or used in the course of the mediation/dispute resolution proceedings described herein are protected as follows:

- (a) Anything said, any admission made, and any document prepared in the course of, or pursuant to, mediation/dispute resolution under these regulations is a confidential communication, and a party to the mediation/dispute resolution has a privilege to refuse to disclose and to prevent another from disclosing the communication, whether in an adjudicative

proceeding, civil action, or other proceeding. This subdivision does not limit the admissibility of evidence if all parties to the mediation proceedings consent.

(b) Except as provided for in section 29014, no reference to the mediation/dispute resolution proceedings, including the mediator's written decision, may be made in the context of (1) the Final Commission Determination provided for in section 29014, (2) any other administrative adjudicative proceeding or (3) any civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

(c) No mediator, Commissioner, or Commission employee is competent to testify at (1) the Final Commission Determination provided for in section 29014, (2) any other administrative adjudicative proceeding or (3) any civil action as to any statement, conduct, decision, or order occurring at, or in conjunction with, a mediation/dispute resolution.

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

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

§ 29004 Service of Papers

(a) Mediation: All papers and documents submitted for mediation, other than for final Commission determinations under subdivision (b), should be provided to the mediator with copies to all parties as specified in the briefing schedule under section 29013 of these regulations. Parties should provide electronic copies whenever possible. The designated mediator may also exercise discretion in providing additional procedures for the service of papers and documents as appropriate, including allowing a party to submit records and other evidence to the mediator without service to the other parties where the party has stated a justification for doing so.

(b) Final Commission Determinations: For Final Commission Determinations under section 29014, including administrative hearings and related Commission review, all papers filed or submitted to the hearing officer or the Commission must be accompanied by a proof of service of all other parties, or their designated representatives to the proceeding, demonstrating any of the following: personal service, service via facsimile, or service by electronic mail that complies with the following:

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

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

obtain the name of the person to whom the papers were handed, the person making the service may substitute a physical description for the name.

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

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

§ 29005 Commission Notification to Parties to Dispute

If the Commission receives multiple written requests for repatriation of the same item pursuant to section 8014 of the Health and Safety Code, written notification that there is a dispute between a requesting party and an agency or museum, written notification of a dispute as to the contents of an inventory or summary, or written notice of any other dispute in relation to the repatriation process described in section 8016 of the Health and Safety Code, within 14 days the Commission will provide the involved parties with notice of the dispute.

Any affected party may contact the Commission in writing to notify it that a dispute has arisen in relation to the repatriation process.

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

§ 29006 Submission of Documentation by Disputing Parties

Upon receipt of notification from the Commission that a dispute exists in relation to the repatriation process, each party to the dispute shall within 30 days submit the following information to the Commission:

- (i) The names of all parties involved in the dispute and their counsel (if any).
- (ii) The physical addresses, electronic mail addresses, and telephone numbers of the parties or their representatives, including counsel.
- (iii) A brief statement of the nature of the dispute and related documentation, and the relief requested by the parties.

If an involved state agency or state-funded museum is also subject to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), and it cannot determine the most appropriate requestor, then the parties must submit their dispute under this section, otherwise consistent with federal law. Parties that have requested the assistance of the federal Native American Graves Protection and Repatriation Review Committee in resolving the dispute shall inform the Commission of this fact concurrent with the submission of the above

information, or immediately after requesting assistance from the Native American Graves Protection and Repatriation Review Committee if such request is made after the initial submission to the Commission. Any party may also request that the Commission suspend dispute resolution under these regulations pending the completion of the federal dispute resolution process. Suspension of dispute resolution under these regulations shall be at the Commission's discretion. If the parties are unable to resolve their dispute through the federal dispute resolution process, then they must inform the Commission of this fact, including providing any advisory findings and recommendations which may have resulted from the federal dispute resolution process. Upon such notification, any suspension of dispute resolution under these regulations shall be immediately lifted and the matter shall proceed in accordance with these regulations.

Note: Authority cited: Authority cited: Health and Safety Code section 8016; Public Resources Code sections 5097.94 and 5097.98. Reference: Health and Safety Code section 8016; Public Resources Code sections 5097.94 and 5097.98; 43 C.F.R. section 10.10.

§ 29007 Required Meeting of the Parties

Within 10 days of receiving from each party the submission described in section 29004, including the brief statement of the nature of the dispute and related documentation, and the relief requested by the parties, the Commission shall serve upon all parties identified therein (1) a copy of each submission and (2) a notice informing the parties of the requirement that they meet within 30 days of the date of the Commission's mailing of the documentation.

The parties shall notify the Commission upon completion of this meeting, indicating whether the parties were able to settle all or any part of the dispute. If the parties were unable to settle the dispute, at this time they may also provide the Commission with the names of and contact information for any qualified mediators who are mutually agreeable to the parties.

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

§ 29008 Commencement of Mediation

If the Commission receives notice that the parties were unable to settle their dispute, the Commission shall, within 30 days, inform the parties of the designation of the mediator along with the mediator's qualifications and experience relevant to the dispute.

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

§ 29009 Mediation Defined

Mediation refers to a process whereby a neutral third person, a designated mediator, acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually

acceptable written agreement. The role of the designated mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, exploring resolution alternatives, and issuing a decision.

In conducting mediation sessions and issuing any written decision, the mediator shall consider and encourage the parties to consider restorative justice practices and values applicable to the dispute, including addressing any of the following:

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

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

§ 29010 Designation of Mediator; Disqualification

The Commission shall designate a mediator with training and experience adequate to mediate the parties' dispute. If the parties have provided the Commission with the names of mediators mutually agreeable to the parties, the Commission shall designate a mediator chosen by the parties so long as the Commission determines that the mediator is sufficiently qualified. In instances where the Commission designates a mediator chosen by the parties, the parties must bear any costs associated with using this mediator.

- (a) Mediators are disqualified from serving on any of the grounds listed in this section:

- (1) The mediator has personal knowledge of disputed evidentiary facts involved in the dispute;
- (2) The mediator is a person within the third degree of relationship to a party, or to a person who provided professional advice to a party;
- (3) The mediator is affiliated with a Native American tribe which is a party to the dispute;
- (4) The mediator, or their spouse or minor children, has a financial interest in the dispute or with a party;
- (5) The mediator is in discussions, or has a current arrangement, concerning prospective or existing employment or other compensated service with a party or related to the specific matter in the dispute. "In discussions" means that the mediator solicited or otherwise indicated an interest in accepting or negotiating possible employment or providing services; or
- (6) The mediator believes, for any other reason, that they are unable to fairly and impartially facilitate resolution of the parties' dispute.

(b) Prior to designation of a mediator, the Commission shall confirm with a prospective mediator that:

- (1) The mediator agrees to be bound by the confidentiality provisions described in section 29003; and
- (2) Upon having reviewed the names of the parties and the nature of the dispute, the mediator is not subject to disqualification.

(c) If any party believes that a mediator designated by the Commission should be disqualified, the party must notify the Commission of the grounds for disqualification within 10 days of being notified of the mediator's designation. Within 10 days of receiving the notification of the grounds for disqualification, the Commission shall either designate another mediator consistent with this section or notify the parties that it has determined that the previously selected mediator is not disqualified.

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

§ 29012 Attendance by Parties and Representatives

Each party, or an officer or member of the party with authority to bind the party in a settlement, shall attend each mediation session. Parties are permitted to be accompanied by counsel.

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

§ 29013 Briefing and Mediation Schedule

(a) *Opening Statement (complaint)*: Within 20 days of the Commission's designation of a mediator, each party to the dispute shall submit a brief to the mediator identifying each issue or item in dispute, the facts supporting their positions, and the legal bases supporting their positions. The brief should be accompanied by any evidence demonstrating the truth of the facts therein. As appropriate, the mediator has discretion to implement reasonable policies and practices for mediation, including, without limitation, creating submission procedures, requesting exhibit indexes, imposing page limits, separating the parties during the process, and requesting additional evidence or briefing from the parties.

(b) *Responses*: Each party to the dispute is permitted, but not required, to submit a second brief responding to the opening statements and evidence of the other party or parties. Any such responses shall be filed with the mediator and submitted to the opposing party or parties within 20 days of the date of service of the last-submitted opening statement. As appropriate, the mediator may request that accompanying evidence be lodged separately, with each exhibit marked as part of an index.

(c) *Mediation Sessions*: Within 7 days of having received responses from all parties, or 27 days after having received opening statements, whichever is later, the mediator shall contact the parties to schedule an initial mediation session. The mediation session shall be scheduled to occur within 20 days of the submission of the last-submitted response brief, or 40 days from the submission of the last-submitted opening statement, whichever is earlier. If the parties are unable to agree upon a date, the designated mediator will provide the parties with a mediation date within this time frame. Mediation sessions may be continued as determined necessary by the mediator.

(d) *Mediator Decision*: If the parties are unable to fully resolve their dispute through the mediation process, then, within 7 days of the last mediation session, the mediator shall render a written decision as to all issues that remain unresolved. The decision shall identify the issues and/or items in dispute, the parties' positions concerning each issue and/or item in dispute, the evidence supporting the parties' positions, and the applicable law, and it shall provide an assessment of the facts in dispute and the application of law to those facts, including the application of the restorative justice principles specified in section 29009.

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

§ 29014 Final Commission Determination

(a) Within 30 days of receiving the mediator's decision, the parties must notify the Commission whether they are unable to resolve their dispute through mediation. The parties shall not transmit a copy of the mediator's decision to the Commission.

(b) Upon the parties' notification that after the mediator's decision they are unable to resolve their dispute through mediation, the Commission will designate a hearing officer subject to the same disqualification provisions for mediators set out in section 29010. Alternately, the Commission may refer the matter to the California Office of Administrative Hearings for hearing and determination by an administrative law judge.

(c) Hearings will be conducted consistent with Chapter 5 of the California Administrative Procedure Act, sections 11500, et seq. of the Government Code. Such hearings will be closed to the public, and, to the extent permitted by law, evidence shall not otherwise be made public to protect records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Commission, and/or another state or local agency. Such evidence includes information related to the location, description, and use of tribal cultural resources as described under section 21082.3 of the Public Resources Code, as well as records that relate to archaeological site information and reports in the possession of the Commission or other state agencies obtained during a consultation process between a California Native American tribe and the state or local agency consistent with section 6254.10 of the Government Code.

(d) The hearing officer's proposed decision will consider the facts as presented by the parties; the applicable law; tribal traditional knowledge, oral histories, documentation, and testimonies relative to other relevant categories of evidence as provided in Health and Safety Code section 8016(d)(6); restorative justice principles described in section 29009; and the proposed resolution and remedies. The hearing officer will not consider the decision of the mediator; nor will any party share with the hearing officer the decision of the mediator or any part of the record produced at mediation.

(e) Upon receipt of the hearing officer's proposed decision, the Commission will calendar a closed session review at the next regularly scheduled Commission meeting, unless a special meeting is otherwise noticed for the matter, consistent with section 11517 of the Government Code. Commissioners and/or employees who have served as or assisted designated mediators in the matter under consideration or in another matter involving any of the same parties may not participate in such reviews. The Commission may take the following actions concerning the proposed decision:

- (1) Adopt the proposed decision in its entirety.
- (2) Reduce or otherwise mitigate the proposed remedy and adopt the balance of the proposed decision.

- (3) Make technical or other minor changes in the proposed decision and adopt it as the decision.
 - (4) Reject the proposed decision and refer the matter back to the hearing officer or entity which conducted the hearing.
 - (5) Reject the proposed decision and decide the matter on the record, including the hearing transcript.
- (f) In the event that the Commission rejects a proposed decision and elects to decide the matter on the record, the following procedure shall be followed:
- (1) The Commission shall provide the parties with written notification that it has rejected the proposed decision and will decide the matter itself on the record.
 - (2) The Commission will provide a copy of the record, including the hearing transcript, to the parties unless the parties stipulate that the Commission may hear the matter without the transcript.
 - (3) The complaining parties shall file their opening briefs within 20 days after the Commission has transmitted the record to the parties.
 - (4) The responding parties shall file their responding briefs within 20 days after service of any opening briefs.
 - (5) The complaining parties may file reply briefs within 15 days after service of any responding briefs.
 - (6) Service of all papers and records shall be served in compliance with section 29004, subdivision (b).
 - (7) All briefs shall comply with the following formatting:
 - (A) Opening and responding briefs shall be no longer than 30 pages, excluding indexes and exhibits. Reply briefs shall be no longer than 15 pages. Parties may seek leave to file briefs in excess of these page limits from the Commission, and such requests shall be granted upon a showing of good cause.
 - (B) The lines of text must be unnumbered and at least one-and-a-half spaced. Headings and footnotes may be single spaced. Quotations may be block indented and single spaced. "Single spaced" means six lines to a vertical inch.
 - (C) The font size, including footnotes, must not be smaller than 13-point.
 - (D) The margins must be at least 1 1/2 inches on the left and right and 1 inch on the top and bottom.

(E) The pages must be consecutively numbered. The page numbering must begin with the cover page as page 1 and use only Arabic numerals (e.g., 1, 2, 3). The page number may be suppressed and need not appear on the cover page.

(8) Parties may request an oral hearing no later than two business days after completion of the written briefing. The Commission shall schedule a hearing in closed session within 14 days of such request. Each party will be given 30 minutes to present their arguments. The parties shall confine their arguments to the record, unless they can demonstrate new or different facts, circumstances or law that could not otherwise have reasonably been presented before the hearing officer. If additional oral evidence is introduced at this hearing, no Commissioner may vote on the matter unless the Commissioner has heard the additional evidence.

(9) The Commission shall issue its final decision within 100 days after rejection of the hearing officer's proposed decision. If the Commission has ordered a transcript of the hearing, the Commission shall issue its final decision within 100 days after receipt of the transcript. If the Commission finds that a further delay is required by special circumstances, it shall issue an order delaying the decision for up to 30 days.

(g) The parties shall retain the option to come to an agreement resolving all or part of their dispute, including after notifying the Commission that they were unable to resolve their dispute through mediation. The parties must promptly provide the Commission with a written copy of any agreement resolving any part of a dispute pending before the Commission. The Commission shall have the power to enforce any settlement agreement.

Note: Authority cited: Health and Safety Code sections 8015 and 8016; Public Resources Code sections 5097.94 and 5097.98. Reference: Health and Safety Code sections 8015 and 8016; Public Resources Code sections 5097.94 and 5097.98; Government Code sections 11500, et seq.

§ 29015 Precedent Decisions

(a) The Commission may designate, as a precedent decision, any decision or part of any decision that contains a significant legal or policy determination of general application that is likely to recur. The Commission may also designate as a precedent decision any precedent decision issued by another California state government agency.

(b) Once the Commission designates a decision or part of a decision as precedent, the Commission may rely on it or that part of it as precedent and the parties may cite to such decision in their argument to the Commission and courts.

(c) The Commission may reverse in whole or in part the prior designation of a decision as a precedent decision.

(d) Notice of intent to designate or withdraw designation of a precedent decision shall be given with the notice of a Commission meeting. Interested persons may submit written comments for or against the proposed action. The Commission may decide the issue at that meeting or put the matter over to a subsequent meeting.

Note: Authority cited: Health and Safety Code sections 8015 and 8016; Public Resources Code sections 5097.94 and 5097.98. Reference: Health and Safety Code sections 8015 and 8016; Public Resources Code sections 5097.94 and 5097.98; Government Code section 11425.60.

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