

M e m o r a n d u m

To : Christina Snider
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Subject : Background on Most Likely Descendant Draft Regulations

I. INTRODUCTION

When Native American remains are found on private property, the Commission is required to immediately notify the persons most likely to be descended (MLD) from the deceased Native American. The Commission has, since its very early days, had a process in place to fulfill this statutory duty. However, this process has never been promulgated as a formal rule, and certain aspects of the process have proven to require refinement. Since 2014, the Commission has had a subcommittee considering the existing MLD process, as well as regulations to formalize the process. This memorandum examines the history of this process and its current status.

II. BACKGROUND ON THE CURRENT PROCESS

Under the Public Resources Code, when Native American remains are discovered on private lands, the Commission must immediately notify “those persons it believes to be most likely descended from the deceased Native American” for consultation purposes so that the remains may be reinterred with appropriate dignity. (Pub. Res. Code, § 5097.98, subd. (a).)

In July 1978, the Commission created a California Native American directory of individuals, tribes, and organizations to be consulted for assistance in identifying cultural resources and for use in identifying MLDs. Tribes provided contact information as well as the territory with which they were affiliated. In maintaining the MLD list, the Commission periodically requested listed parties to update their information and report on their activities.

In 2016 and 2018, in conjunction with other statutes requiring the Commission to maintain a contact list for consultation purposes, the Commission updated its criteria for eligibility for inclusion of non-federally recognized tribes on the list. The criteria require documentation that an applicant tribe show that it: 1) descended from a historical California tribe; and 2) currently operates as a tribal governmental body that carries out general governmental functions for its members.

III. HISTORY OF PROPOSED MLD REGULATIONS

In October 2014, the Commission directed staff to hold public hearings and consultations to assist it in crafting MLD regulations.¹ The Commission held ten such public hearings taking both written and verbal comments from interested tribes and members of the public.² The comments were gathered and analyzed by the General Counsel, staff, and a Commission subcommittee.

In 2016, based, in part, upon the input received, the General Counsel and staff initiated draft MLD regulations for subcommittee review.³ In a January 10, 2017 memorandum to the Commission, the General Counsel listed the most common problems with the MLD process identified by the public; these included a lack of understanding of the MLD identification process and a lack of written guidelines outlining the roles and responsibilities of MLDs.⁴

On January 20, 2017, the subcommittee referred the draft MLD regulations to the Commission for consideration at its public meeting.⁵ The subcommittee did not endorse the draft proposed regulations in their entirety, but sought Commission input on certain key provisions. At that meeting, the Commission requested that staff publish the draft regulations on the Commission's website to allow the public to comment on them.

Over two years later, the draft MLD regulations had not been finalized. On October 18, 2019, the Executive Secretary recommended that given this passage of time, the Commission seek more current comments and consider amending the draft regulations accordingly.⁶ The Commission voted in favor of this recommendation. On January 17, 2020, the Chief Deputy Executive Secretary reported that staff, with the assistance of the Attorney General's office, were addressing comments and legal concerns.⁷ Based on comments and legal concerns, staff has worked with a subcommittee to revise the proposed regulations. The proposed revised regulations are pending subcommittee review for eventual resubmission to the Commission.

IV. PROCESS MOVING FORWARD

After the subcommittee proposes another draft of the MLD regulations for Commission review/approval, the draft will need be reviewed by the Attorney General's office to identify potential legal concerns. After this review, the proposed regulations will need to be submitted to the California Natural Resources Agency (CNRA) for its review and approval before re-submission to the Commission. The Commission can then send the proposed regulations back to

¹ Jan. 20, 2017 minutes, Ex. 1.

² *Ibid.* Hearings were held in Rocklin, Brooks, Temecula, Redding, Rohnert Park, Sacramento, Santa Ynez, and San Diego.

³ Jan. 10, 2017 Memo from Chief Counsel Robinson to Executive Secretary Gomez, Ex. 2.

⁴ *Ibid.*

⁵ Jan. 20, 2017 draft MLD regulations attached to Jan. 10, 2017 Memo, Ex. 2.

⁶ Oct. 18, 2019 Minutes, Ex. 3.

⁷ January 17, 2020 Minutes.

the subcommittee with suggested changes and/or seek additional public input, or accept the proposed draft and/or make proposed changes to the draft regulations at a public meeting. Any changes would be subject to additional Attorney General review and CNRA approval. After the proposed regulations have been reviewed, finalized, and approved by the Commission, the Commission must authorize their submission to the Office of Administrative Law (OAL) under the formal regulatory enactment process (Gov. Code, § 11346, et seq.) This process requires, among other things, a Notice of Proposed Action containing the proposed regulations, including the statutes authorizing their adoption and an initial statement of reasons explaining their need and purpose. After publication of the proposed regulations in California's Regulatory Notice Register, posting on OAL and Commission websites, and mailing to interested parties, the Commission is required to consider and respond to comments in a final statement of reasons along with proposing the final version of the regulation. This process must be completed within a year of its initiation. (Gov. Code, § 111346.4, subd. (b).)