



**NATIVE AMERICAN HERITAGE COMMISSION
MEMORANDUM**

October 16, 2023

To: Commissioners and the Public
From: Mario Pallari, Staff Counsel
Re: NAHC Mediation Framework

MEDIATION FRAMEWORK

The Native American Heritage Commission (Commission) is authorized by Public Resources Code, Section 5097.98 to determine the Most Likely Descendent of human remains for cultural resources protection. Commission staff interact with a multitude of Tribal representatives throughout California. Section 5097.98, subdivision (k), provides the Commission with the authority “[t]o mediate, upon application of either of the parties, disputes arising between landowners and known descendants relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials.”

The statute does not provide a procedure for this mediation. The following presents, as a best practice, standard steps (with associated, brief annotated descriptions) of how an interest-based mediation is commonly conducted with two or more parties. In this context, NAHC leadership and Dave Ceppos, the Director and Managing Senior Mediator of the Consensus and Collaboration Program (CCP), of California State University Sacramento, are working with the Commission to prepare a standard, “Mediation Framework” (Framework) to describe common steps to conduct a successful mediation. The Commission is prepared to facilitate any mediation under Section 5097.98, subdivision (k) by utilizing the expertise of the CCP mediators.

STEP 1 - REVIEW BACKGROUND INFORMATION TO INFORM MEDIATION FEASIBILITY

A request for mediation and conducting a mediation are separate conditions. Not all mediations are feasible and not all requests for mediation should be or can be honored. If

a specific party amongst two or more parties (in a potential mediation) has a significant influence disparity or some similar dynamic they can employ, it likely means that a mediation is not advisable as the process will potentially be disingenuous since the more “influential” party is likely to achieve disproportionately beneficial outcomes. This would likely result in the detriment to one or more of the other parties.

Therefore, it is a necessary initial step of a mediation is for the mediator to review pertinent information to fully understand the factors at hand. These factors could include the potential parties to be involved, the background of the conflict, the parties associated with the conflict, and similar contextual information. The mediator will analyze this information as well as any documents, correspondence, or relevant law to make an initial determination of feasibility. Only after the review of this pertinent information will the mediator initiate steps to conduct interviews with the participants.

STEP 2 - DEVELOP INTERVIEW QUESTIONS TO ADDRESS WITH POTENTIAL MEDIATION PARTICIPANTS

Interviews of potential participants is a critical pre-requisite to conducting a successful mediation. These interviews enable the mediator to formulate diagnostic and predictive insights, which, in concert with Step 1, inform mediation feasibility and practicality. The mediator will rely on their analysis of documents, correspondence, contextual information, and relevant law to develop a set of unique interview questions for the potential participants. These questions are designed to be a toolset for the mediator to fully understand all parties' needs, interests, and constraints. These questions can provide a mediator with an understanding of power dynamics and challenges to a mutually agreeable solution in a contained environment before creating a mediation space where parties are able to interact with each other.

STEP 3 – ASSESSMENT- CONDUCT INTERVIEWS WITH POTENTIAL MEDIATION PARTICIPANTS

After formulating a set of tailored questions to appropriately inform the mediator, the mediator will conduct interviews of the potential parties. This process is oftentimes called an “Assessment”. The experienced mediators at CCP vary the content and style of their assessments in response to the relevant variables of the matter. For example, sometimes it is best to interview each participant individually, even if they represent the same Tribe, organization, family, etc. Such individual interviews allow each participant to speak most candidly with the mediator, answer the standard questions, and do so in a manner that allows the interviewee the highest level of independence to be open and honest. At other times, it is most advantageous for interviewees from a similar Tribe, organization, or family to be interviewed together such that they can address questions communally and arrive at a unified response as to what their needs are and how they will approach a mediation process. Similarly, in multi-party situations there is sometimes merit for similar types of interviewees to be interviewed in a small group setting to assess their

commonalities and differences going into a potential mediation. A mediator's choice to utilize a specific interview method is determined in part by their initial review of the documents.

In all cases, the purpose of the Assessment is for the mediator, and the potential participants to identify their "interests" and "positions". In brief, Interests translate to "needs" and "motivators". These are the fundamental, underlying conditions that a mediation participant must achieve. Positions are defined as "wants". These are commonly misunderstood to be needs and often require some level of clarifying discussion between interviewees and the mediator to parse out what is in fact, a fundamental need / interest, and what is in fact, a "want" or "desire". This is a fundamentally important step that is further described below.

At the conclusion of the Assessment, in concert with Step 1, the mediator will make a recommendation as to whether a mediation should proceed.

STEP 4 - PREPARE GUIDELINES FOR MEDIATION PROCESS AND REVIEW WITH POTENTIAL MEDIATION PARTICIPANTS

All mediations must have a standard set of guidelines or "rules of engagement" as to how the mediation process will be carried out and how the parties will participate. Absent such mutual agreement guidelines, the parties and mediator run a significant risk of having different expectations on a range of factors such as decision-making methods, timelines, anticipated levels of effort and participation, ceremonies, behavior, external communications, etc. Therefore, under this step, the mediator will prepare, discuss, and finalize said guidelines. Guidelines can include but are not limited to time restraints, language restraints, space utilization, layout of seating, venue of the mediation, and who will be representing the parties.

STEP 5 - CONVENE AND CONDUCT MEDIATION

- **STEP 5.1 – DEFINE INTERESTS AND POSITIONS**

As previously noted in Step 3, a fundamental step in a mediation is for the parties to analyze and define their Interests and Positions. In Step 5.1, the mediator works with the parties to finalize these decisions and to ensure the parties are fully prepared to speak about / present these interests so that all parties in the conflict are fully informed as to what all other parties need as an outcome(s). Defining these interests does not obligate any party to agree with another party's interest. However, this step allows for each party to understand the core principles of a multi-interest negotiation. Each party is expected to commit their best efforts to achieve their interests and the interests of the other parties as well.

During this step, each party is also encouraged by the mediator to define their “Best Alternative to a Negotiated Agreement” or “BATNA”. In short, a BATNA is the most optimistic but realistic outcome for a party if they choose to leave or stop their participation in the mediation process. Essentially, parties are asked to consider and know for themselves at the start of the mediation process when the process would no longer serve their interests and the outcomes of that decision. This is a foundational piece of information for each party to know about themselves, and for the mediator to confidentially know so they can help steer outcomes away from any parties BATNA.

STEP 5.2 - ADDRESS THE CONFLICT

It is at this step that the parties disclose to each other their interests, so each party is fully informed. At this stage, the mediator works with the parties, sometimes in plenary, sometimes in individual caucuses to discuss potential solutions and how said solutions can best achieve the multiple interests of the collected parties.

STEP 5.3 – DETERMINE OPTIONS FOR MUTUAL GAIN

The mediator works with the parties to analyze potential solutions initiated in Step 5.2 with the specific focus of determining the ideas that achieve the most optimal outcomes for each party. This type of outcome is commonly referred to as “mutual gains” and means that ideally, a solution, or set of solutions, is identified by all parties that would achieve as many interests as possible for each party. Determination of a mutual gain empowers all parties to mutually achieve interests, rather than positive outcomes being achieved by only a single party or minority of parties.

STEP 6 – FINALIZE AND MEMORIALIZE AGREEMENTS

If Step 5.3 ends favorably for all parties and no party has decided they have reached their BATNA and must leave the mediation process, Step 6 is when the mediator writes the presumed final, mediation outcomes and all parties confirm their initial acceptance and/or support for said outcomes. Once this is done in a non-binding format (sometimes called a “straw poll”), the mediator, using the guidelines defined in Step 4, will produce for the parties, a final mediation document and will have all parties expressed their formal level of acceptance or approval for the outcomes. If no changes have taken place between the initial straw poll, and this final vote, the outcome should be a memorialized set of mutual agreements that each party commits to uphold.

CONCLUSION

As previously discussed, the (Commission) is authorized by Public Resources Code, Section 5097.98 subdivision (k), “[t]o mediate, upon application of either of the parties, disputes arising between landowners and known descendants relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials.”

The statute, however, does not provide procedural or logistical guidelines for such mediations. The above procedure is provided as a best practice that presents standard steps (with associated, brief annotated descriptions) of how an interest-based mediation is commonly conducted with two or more parties. If parties choose to participate in mediation, additional documentation and guidance will be provided by the Commission in collaboration with the CCP.

In contrast, if parties decline to participate in the mediation process utilizing the NAHC and/or the CCP, they may pursue outside mediation at their own expense. In all cases, the NAHC would like to be updated with mediation summary outcomes to ensure that all parties have mutually agreed to mediation outcome terms and that the treatment and disposition of Native American burials are treated with appropriate dignity.