

NATIVE AMERICAN HERITAGE COMMISSION

APRIL 4, 2024

Draft CalNAGPRA Dispute Resolution/Mediation Regulations Summary of Comments Received

On January 24, 2024, the Native American Heritage Commission (NAHC) released draft CalNAGPRA dispute resolution/mediation regulations for a 60-day tribal comment and consultation period. Previously, the Commission began initial tribal consultation on the development of these draft regulations in August 2021, conducting a listening session and soliciting written feedback. Based on input received from tribes, draft regulations were created. On February 7, 2022, the Commission released the draft regulations and initiated a 45-day tribal consultation period after which time the draft regulations were revised to reflect tribal input, resulting in the current version of these draft regulations.

During the recent tribal comment and consultation period the NAHC conducted two virtual listening sessions and engaged in individual consultation with one tribe. Comments received during these various listening sessions and consultations as well as written comments provided by six tribes were compiled and summarized in the following document.

As reflected in the summary of comments, tribes questioned whether the NAHC has the authority to promulgate these regulations or whether it is limited to developing mediation procedures. Additionally, concerns were raised about the draft regulations' failure to make the relationship between federal and CalNAGPRA explicit and to harmonize any conflict as it relates to mediation. Commenters also expressed concerns about the qualifications and role of mediators and advocated for mediation procedures to reflect restorative justice principles. Lastly, requests were made to either further explain or simplify the adjudicatory process or to remove it and develop separate draft regulations for that process.



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General

- Time must be spent parsing out when the Regulations should use the term Commission and Commission Departments (Advisory, Enforcement or Adjudicatory). Refinement and precision will be of tantamount importance here as the NAHC as an agency has potentially conflicting roles with regard to repatriation matters. This must be addressed before a competent and fair set of regulations can be promulgated.
- The draft regulations have four types of notices (Dispute, Required Meeting, Inability to Settle Dispute, and Intent to Designate Precedent). It would be helpful and create transparency if these notices were listed on the NAHC agendas and on the NAHC website, since they are not otherwise public. Such a public listing might also encourage museums to resolve issues prior to mediation, since there would be public record that mediation was occurring.
- It would be helpful for NAHC to develop a bank of forms to be used in the dispute resolution/mediation process.
- It is unclear if the NAHC will track disputes and mediation outcomes and report out on general trends, process improvements, etc.
- This process does not do justice for non-federally recognized tribes. No mediation nor restorative justice criterion's will help bring our ancestors home for repatriation because NAGPRA will take precedent over the state law. We do not have a voice in this matter and it's terrible and offensive.
- The email announcing the listening session did not explain the purpose of the meeting, which is required under state law.

Section 29001 – Purpose of the Dispute Resolution/Mediation Process

- CalNAGPRA was intended to serve as a complement to federal NAGPRA and flesh out the required processes for state institutions and requesting parties. It also provided a state-law based repatriation framework for instances where federal NAGPRA would not apply. CalNAGPRA does not, however, supersede or override federal NAGPRA. Where federal NAGPRA applies, it preempts state law to the extent a conflict may arise. Accordingly, the proposed regulations should be explicit that federal NAGPRA, where applicable, is *controlling*. This should be added to Chapter 1, such as by adding language to proposed Sec. 29001 concerning the purpose of the regulations.
- The proposed Regulations should be explicit that federal NAGPRA, where applicable, is *controlling*. This should be added to Chapter 1, such as by adding language to proposed Sec. 29001 concerning the purpose of the regulations. These legal realities concerning the interplay between NAGPRA and CalNAGPRA must be addressed throughout these Regulations as they go to the actual disputes and parties to the disputes that may be submitted to the NAHC and mediated under these Regulations.
- The mediation “regulations” are being proposed by the NAHC in order to comply with California Health & Safety Code §8016(d)(8). Section 8016(d)(8) provides: “No later than June 30, 2021, the commission shall 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.” (emphasis added). CalNAGPRA requires mediation procedures. The NAHC is proposing mediation “regulations.” NAHC should carefully determine it has authority for issuing regulations, rather than procedures, so that the agency and consulting tribes do not expend limited time and resources on pursuing regulations only to find out later in the process that regulations have not been properly authorized under state law. Should the NAHC determine, after conducting due diligence to ensure it is not developing an underground regulation, which are void in California, that mediation procedures will be adopted, we recommend the NAHC re-engage in meaningful tribal consultation on the issuance of procedures instead. To be sure, clarity on what is required is needed. The NAHC must be transparent, engage with the tribes in a timely manner, with the ultimate goal of resolving disputes in a manner that enhances and expedites timely repatriation.

- It is the Tribe’s understanding that these Regulations proffered by the NAHC are to comply with Cal. H&S Code § 8016(d)(8), which states: No later than June 30, 2021, the commission shall *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. The Statute specifically calls for “mediation procedures,” and not Regulations. The Tribe understands that the State may aim for or be required to implement regulations for CalNAGPRA in general, but that is more extensive than the statutory section the NAHC is aiming to fulfill with this Regulation.
- The NAHC should consider making a stronger statement that these regulations apply only to CalNAGPRA disputes and not to any other mediation process the NAHC may statutorily be involved in.

Section 29002 - Construction of Regulations

- (d) The regulations should clarify what this means.

Section 29003 – Confidentiality

- The regulations should prohibit social media posting.
- (a) If discussions during mediation, including documents submitted are confidential, would that prohibit the party that supplied the information from providing the same information in a different part in that later administrative law process or later processes?

Section 29004 – Commission Notification to Parties to Dispute

- (a) This is an example of an issue throughout the draft regulations, uncertainty about whether Commission staff or Commissioners are to carry out certain actions. It should be made clear whether a staff member or the Commission as a whole will provide notice of the dispute.

Section 29006 – Federal Dispute Resolution

- (a) Is the purpose of this subsection primarily intended to be a notice provision, i.e. to inform the NAHC if disputing parties are pursuing the federal NAGPRA Review Committee dispute resolution process? And, if so, why does this provision appear to *require* disputing parties to submit to the NAHC mediation process *even if* they elected to pursue a federal dispute resolution process (which could be via the Office

of Hearings & Appeals, NAGPRA Review Committee, arbitration or a federal court)? If disputing parties mutually agree to utilize the federal NAGPRA Review Committee process, or other federal process, then the NAHC should not require those parties to also submit to the NAHC mediation process. (2 tribes)

- (a) The words “immediately after” should include a time certain for notice to the NAHC. This should be clarified to strike “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” and replaced with “or ‘within seven (7) days of’ requesting assistance from the Native American Graves Protection and Repatriation Review Committee if such request is made after the initial submission to the Commission.”
- (b) As currently drafted, this subsection would give the NAHC discretion to continue hearing a dispute even if the same dispute is being heard through a federal dispute resolution process. We are concerned that pursuing both the state and federal dispute resolution tracks simultaneously will lead to confusion and inconsistent outcomes. The section must make *clear* that 1) the NAHC cannot issue a decision that is contrary to a federal NAGPRA decision, and 2) in the event NAHC issues a decision prior to the issuance of a federal NAGPRA decision, and the two decisions conflict in some manner, then the federal decision controls. (2 tribes)
- (b) This should be revised to strike NAHC’s discretion to suspend and replace it with mandatory suspension and deference to the federal process. Deference to the federal process would not only avoid the necessity of further clarification to the Regulations which would necessitate inclusion of criteria for the exercise of the NAHC’s discretion to suspend but may also moot the CalNAGPRA dispute resolution process altogether.
- (b) This is concerning because a party could use the federal process, which is very slow, to delay repatriation. The Commission should consider adding a requirement that both parties are notified and have the opportunity to weigh in on whether the CalNAGPRA dispute resolution process will be stayed.

Section 29007 – Required Meeting of the Parties

- (a) This is another example of uncertainty about whether Commission staff or Commissioners are to carry out certain actions. It should be made clear whether a staff member or the Commission as a whole will serve the parties with the required documents and notice.
- (b) A time certain should be added to this section, e.g., “[t]he parties shall notify the Commission within seven (7) days upon completion of this meeting”

Section 29010 – Designation of Mediator; Disqualification

- (b) it is a well-established tenant of administrative adjudication that the same teams that perform investigations and fact-gathering cannot assist with adjudication of a matter. At this time the Tribe does not understand how the NAHC itself, meaning staff or individual Commissioners can ever mediate a conflict themselves without running into conflict and due process issues. It seems both from §8016(d)(8) itself and the daily activities of the NAHC that its role is simply to provide mediators and serve as a clearinghouse for records. These concepts need to be understood, legally clarified, and then upheld in

the Regulation language itself. This language proffered arguably expands beyond legally permissible bounds and/or does not separate duties and roles to meet legal requirements on due process and administrative rules and best practices.

- (b) should define what constitutes a “certified mediator.” This section should further require that a Commission staff member selected as a mediator also be certified. Moreover, while this section refers to a list of mediators with whom the NAHC has contracted, it does not explicitly require the NAHC to keep any mediators under contract. This requirement should be added.
- (b) Like the qualifications as outlined in the 2021 University of California Policy (UC Policy) pursuant to CalNAGPRA (§ 8026(d)(2)), for the All Systemwide Committee members, any mediator must “have demonstrated, through their professional experience, the ability to work in collaboration with Native American tribes successfully on issues related to repatriation or museum collection management.” In addition, CalNAGPRA recognized the need for mediators to have “qualifications and experience appropriate to the circumstances of these disputes” which must explicitly comply with the requirements of CalNAGPRA and also align with the UC Policy and future CSU policies. The regulations, specifically proposed Sec. 29010, should mirror the language from these authorities. Deviations from the law and the UC Policy will create confusion, delays and ultimately frustrate the policies and hopes of CalNAGPRA.
- (b) should clarify that a “certified mediator” means a person with training and experience that is routinely required to serve on California state court panels to receive referrals for court-ordered mediation. We recognize that California has no statewide system for qualifying or licensing mediators, however, the state court certification standards applicable to “certified mediators” should be applicable to any NAHC staff designated by the NAHC as mediators.
- (b)(2) “o” should be “or”
- (c)(3) Potential mediators are disqualified if they or “their spouse or minor children, is employed by, a member of, or *otherwise affiliated* with a party.” (Emphasis added.) The phrase “otherwise affiliated” is unduly vague and could be broadly construed to disqualify any mediator who has a professional or personal relationship with an individual employed by a party. Given that the California tribal cultural resource world is small and THPOs, for example, have a statewide network, we recommend either deleting “otherwise affiliated” or caveating it with additional language requiring that “such affiliation would make the mediator unable to fairly and impartially facilitate resolution of the parties’ dispute.”
- (e) Sometimes you don't find out that there’s an issue until later in the process, and so there might be a need to request a disqualification after -- later than 10 days after that designation. So, it would be helpful to add a clause saying, “Or within 10 days of finding out information relevant to those disqualifications.”
- (e) should allow tribal parties one (1) chance to request disqualification of a mediator without needing to specify the grounds. There may be situations where a tribe does not want to disclose sensitive information pertaining to why the mediator is being disqualified, so allowing one “free pass” helps protect tribally sensitive information without creating the potential for abuse.
- (e) The Regulations should allow disqualification “for cause” at any time before the conclusion of the mediation.

Section 29011 – Restorative Justice Principles

- Mediators do not render decisions, but rather, help parties reach agreement. The draft regulations should be revised to strike all references to mediator decisions.
- (b) Unfortunately, this section seems to miss the mark on the intention of §8016(d)(8). Many of the examples of restorative justice principles are basic tenants and concepts of repatriation law and policy that should automatically be part of any mediation. The mediation process *itself* should employ mediation techniques that follow restorative justice principles including creating a safe confidential space for dialogue, encouraging, and facilitating parties to employ their own problem-solving capacities, and fostering a process that allows for parties to come to an understanding and empathy of each other's grievances. It's not simply about actual tangible results, but restorative justice is equally about empowering the parties to acknowledge the actual elements of the dispute, share the experience of the dispute, and collaboratively come to a resolution that fulfills their own restoration in terms of rebuilding trust and preventing the dispute from happening again.
- (b) There should be a new subsection "The development and adoption of best practices for policies and procedures related to repatriation and the repatriation process" to assist in establishing these as reasonable components of repatriation.
- (b) The regulations should further clarify what financial restitution is available under principles of restorative justice.
- (b) Complete restoration should be included in this section, meaning the exercise of due diligence to locate all missing, in-use, stolen, or damaged, tribal ancestors and cultural items. When repatriation lists do not match what is being returned, institutions must do a thorough job of trying to discover what they have, such as checking libraries, classrooms, storage areas, etc.
- (b) Restorative justice should include the creation of pesticide histories, testing for pesticides and toxins in culturally appropriate ways without cost to a tribe, and remediation or removal of toxins where possible in consultation with the affiliated tribe.
- (b) Most museums still use information that was taken from tribal ancestors and cultural items without tribal consent. They also use this information in ways that are objectionable or offensive such as publications and presentations that interpret tribal history and culture. The regulations should require that institutional research boards or museums have a policy of listing protocol with respect to information that was taken, so that in the future it is a least against that institution's policy and ethical guidelines to publish or use that information without tribal consent of the descendant community, so that tribes have the opportunity to stop misuse of the information that was taken from their ancestors and from their belongings.
- (b)(2) "in a timely manner" needs to be added.
- (b)(3) provides that the mediator should consider, among other principles, "[t]he tribal traditions, customs, and values necessitating the return of the remains and cultural items, including the significance of these to the tribe(s) and tribal community." Our only concern is whether this information must be reduced to writing and, if so, whether it will be protected from disclosure under the Public Records Act.

The preferred approach would be for a tribal party to verbally disclose this information to the mediator so there is no risk of disclosure.

- (b)(11)(i) The proposed language is currently “museums working with tribes to *find* culturally appropriate exhibits.” (Emphasis added.) The word “find” seems odd because while exhibit can refer to singular items, it can also refer to a curated display of a collection. We recommend the regulations use the word “determine” instead.
- (b)(11)(iv) The word “commitment” should be changed to “committed”.

Section 29012 - Attendance by Parties and Representatives

- Clarification is needed whether legal counsel is permitted to both attend and speak on behalf of a party.

Section 29013 – Mediation and Briefing Schedule

- The briefing and mediation schedule are very difficult to follow. We recommend the NAHC break down the schedule into specific steps and/or provide some sort of visual or flow chart. For example, the filing timelines for Commission hearings, set out in proposed Sec. 29014(g)(vii), are easier to understand.
- (f) clearly runs afoul of restorative justice. There should be no language that provides authorization for a mediator to render a decision. This defeats the entire purpose of mediation and turns the process into arbitration. Restorative justice mediation provides the space for parties to come to an agreement themselves collaboratively.
- (f) Mediators do not render decisions, but rather, help parties reach agreement. The draft regulations should be revised to strike all references to mediator decisions.

Section 29014 - Final Commission Determination

- The Commission’s adjudication process is quite extensive and could be simplified. For example, it is not clear why there exists an option for the Commission to refer the matter to the California Office of Administrative Hearings (OAH). OAH lacks any substantive experience or expertise in tribal cultural resource issues and channeling a dispute through that body seems like it could draw out the process and delay resolution. It would be helpful if the NAHC’s could explain its rationale for including OAH.
- The adjudication process itself should not be part of these regulations as it is outside the scope of these “mediation procedures” and will further complicate the Agency’s overlapping duties. This must be a separate regulation and should be removed from this draft and promulgated through a separate set of regulations.
- Although, this section says what the Commission can/cannot act upon. The wording “in the minutes or for the record,” should be added.
- (a) Mediators do not render decisions, but rather, help parties reach agreement. The draft regulations should be revised to strike all references to mediator decisions.

- (b) It would be helpful to add more background on when and why a dispute would be routed through the California Office of Administrative Hearings for hearing and determination by an Administrative Law Judge (ALJ) rather than through the NAHC hearing process. Further, will the qualification requirements of AB 275 also apply to these hearing officers or ALJ's?
- (f) should clarify that Commissioners, under Section 29010 (b), are disqualified from serving as mediators, and only NAHC staff may serve or assist designated mediators. In addition, we question whether the phrase "or in another matter involving any of the same parties," is workable criteria. We are concerned that multiple matters "involving any of the same parties" could come before the NAHC which could disqualify any number of Commissioners over time.
- (g)(vi)(3) Examples of what can be changed would be helpful. Also, this should indicate where changes are noted or recorded.
- (g)(vii)(9) will create an unduly long process. In particular, the 100 days, or longer, by which the Commission must issue a final decision following rejection of a proposed decision, is too long.
- (g)(vii) This should constitute new subsection (i).
- (g)(vii)(9). There appears to be a typo in this subsection. We believe the language "The Commission shall issue its final decision within 100 days after the rejection of the final decision" should be "The Commission shall issue its *final* decision within 100 days after the rejection of the *proposed* decision." (Emphasis added.)
- (h) This section should include a cite to California Health & Safety Code Section 8029, which is the statutory provision authorizing the Commission to assess and collect civil penalties for noncompliance with CalNAGPRA.
- The subsection concerning what actions the Commission may take following an administrative officer or administrative law judge's proposed decision should be enumerated as Sec. 29014(h). Right now, it is listed as (iv) within subsection (g), which does not make sense since subsection (g) sets forth the technical requirements for briefs.

Section 29015 - Precedent Decisions

- (a) provides the Commission authority to also designate as precedential "any precedent decision issued by another California state government agency." What is the goal of this provision? And what other California state government agencies would issue decisions that are relevant in this context? Are the regulations referring to CalNAGPRA determinations made by a state museum or educational institution? Much more clarification is needed.
- (d) There should be a time limit for when the Commission must finalize its decision to designate a decision as precedent.
- (d) Are there examples where other adjudicatory bodies hold public hearings on whether a decision should be precedential? What is the rationale for doing so in this context? It seems cleaner for all

Commission decisions to be precedential, with sensitive information redacted or removed from the public version of the decision.

- (e) Please add that these decisions will be promptly posted on the NAHC website under their own tab in the CalNAGPRA section. Also, please cite in the note all sections of California law that support protecting cultural resource information.