

# NATIVE AMERICAN HERITAGE COMMISSION



October 4, 2024

## Draft CalNAGPRA Mediation Regulations Summary of Tribal Comments and Responses

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On January 19, 2024, the Native American Heritage Commission (NAHC or Commission) approved the release of draft regulations for mediation conducted under the California Native American Graves and Repatriation Act (CalNAGPRA). 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 January 19, 2024, version of these draft regulations. The NAHC accepted public comments on the draft regulations for 60 days during which time a total of 19 tribes participated in either individual tribal consultation or one of two virtual listening sessions held on March 6 and March 13, 2024.

In addition to comments captured during the virtual listening sessions, the NAHC received a total of six written comments from tribes.

The NAHC reviewed and considered all comments prior to revising the draft regulations and have provided 36 summaries of comments and our direct responses below, combining similar comments where appropriate.

In response to these comments and others discussed in detail below, we made the following major changes to the draft regulations:

1. Revised to make clear that these regulations are for the resolution of disputes that arise solely under CalNAGPRA. (29001 – Purpose and Applicability)
2. Removed all reference to the federal dispute resolution process as it would not be implicated in a dispute arising solely under CalNAGPRA. (29006 – Federal Dispute Resolution)
3. Added additional restorative justice principles that may be incorporated into the mediation process. (29013 (a) – Restorative Justice Principles)
4. Generally enlarged all deadlines by 14 days, give or take, to ensure that they are realistic and can be met.

Despite comments stating that we do not have authority to promulgate these regulations, because CalNAGPRA provides that the NAHC develop mediation procedures, as discussed more fully below, California law requires that we take this action.

## **A. General Comments**

**1. Comment:** In both the listening sessions and in written comments, the NAHC received concerns, regarding the interplay between the federal Native American Graves Protection and Repatriation Act (NAGPRA) and CalNAGPRA. One written comment stated:

“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.”

**NAHC Response:** While it is true that the updated NAGPRA regulations removed all reference to Indian groups without Federal recognition, these mediation regulations are not applicable to disputes arising under federal law. Instead, they will be used to resolve disputes between any California Indian Tribe and a Museum that is not subject to NAGPRA but is required to comply with CalNAGPRA.

**2. Comment:** A comment was received that the draft regulations need to clarify what actions will be taken by the Commission versus Commission staff to avoid conflicting roles with regard to repatriation matters.

**NAHC Response:** In revising the draft regulations, a concerted effort was made to clarify when actions would be taken by Commission staff and not the nine-member body comprising the Commission.

**3. Comment:** One comment received is that notices of dispute, required meet and confer, inability to settle a dispute, and intent to designate a precedent decision should be included on NAHC meeting agendas and the Commission’s website. The reason behind the suggestion is that in addition to increased transparency, a public record that mediation was occurring might encourage museums to resolve issues prior to mediation.

**NAHC Response:** After consideration it was determined not to include this suggested process as part of the regulations as any tracking or publicizing of mediations will be the subject of internal policy.

**4. Comment:** It was suggested for the NAHC to develop a bank of forms for use in the mediation and dispute resolution processes.

**NAHC Response:** Prior to finalization of the draft regulations, Commission staff will develop forms and make them available on the NAHC website.

**5. Comment:** One commentator suggested that the NAHC should track disputes and mediation outcomes and report out on general trends, process improvements, and other relevant information.

**NAHC Response:** While there will necessarily be internal tracking of disputes, how this information is shared will be the subject of an internal policy and thereby outside the scope of these draft regulations.

### **Section 29001            Purpose of the Dispute Resolution/Mediation Process (Revised: Purpose and Applicability)**

**6. Comment:** During the listening sessions and in written comments, the NAHC received feedback that it does not have the authority to promulgate these regulations. Specifically, concerns were raised that these draft regulations are being proposed to comply with California Health & Safety Code §8016(d)(8), requiring that the NAHC adopt mediation *procedures*.

**NAHC Response:** While Health and Safety Code §8016(d)(8) uses the word procedures rather than regulations, California courts have determined that a state agency rule or standard is a “regulation” if it applies generally rather than to a specific case and it implements, interprets, or makes specific the law enforced or administered by that state agency. (*Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) Cal.App.4th 214). As such, regulations are necessary.

**7. Comment:** Three comment letters included a request that the regulations make clear that they apply only to CalNAGPRA disputes and emphasize that the state law does not supersede federal NAGPRA. One written comment stated:

“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*.”

**NAHC Response:** The NAHC recognizes the controlling nature of NAGPRA when a Museum is subject to federal law. As such, this section was revised to clarify that the draft regulations “are applicable to all disputes arising under this subdivision that are not otherwise governed by the federal Native American Graves Protection and Repatriation Act.” Additionally, all references to the federal dispute resolution process were removed as it would not be implicated in a dispute arising solely under CalNAGPRA.

#### **Section 29002 Construction of Regulations**

**8. Comment:** One comment requested that the NAHC clarify the meaning of subsection (d), which reads “time limits set forth in these regulations are not jurisdictional.”

**NAHC Response:** After review, it was determined that this language is unnecessary and as such has been struck from the draft regulations.

#### **Section 29003 Confidentiality (Now 29004)**

**9. Comment:** A request was made to prohibit social media posting.

**NAHC Response:** After consideration, it was determined that the language regarding confidentiality is broad enough to include social media and as such no change is required.

**10. Comment:** One written comment received questioned whether the confidentiality provisions would prohibit a party from later using information and documents submitted in the formal part of the dispute resolution process provided for in the regulations.

**NAHC Response:** Subsections (a) and (d) permit the use of information and documents disclosed in mediation by the party whose material it is or by agreement.

#### **Section 29004 Commission Notification to Parties of Dispute (Now 29005)**

**11. Comment:** One comment was to clarify under subsection (a) whether Commission staff or the entire Commission will provide notice of the dispute.

**NAHC Response:** The draft regulations were revised to reflect that Commission staff will provide parties with the notice of a dispute.

## **Section 29006 Federal Dispute Resolution**

**12. Comment:** The NAHC received several comments, related to this section, expressing concerns about the potential for conflict and confusion with federal NAGPRA dispute processes.

**NAHC Response:** After careful analysis of CalNAGPRA and federal NAGPRA regulations, it was determined that the mediation and dispute resolution provisions of the draft regulations are applicable to disputes arising solely under CalNAGPRA. As such, the federal dispute resolution process will never be implicated and so to avoid confusion this section and all other references to the federal dispute resolution process have been removed.

## **Section 29007 Required Meeting of the Parties**

**13. Comment:** A comment requested clarification as to whether under subsection (a) Commission staff or the Commission as a whole will serve parties with the required documents and notice.

**NAHC Response:** The draft regulations were revised to reflect that Commission staff will provide parties with the required documents and notice.

**14. Comment:** It was requested that the NAHC revise subsection (b) to add a time in which the parties are to notify the Commission as to whether their discussions resolved all or part of the dispute.

**NAHC Response:** This subsection was revised to now require the parties to inform the Commission as to whether they resolved the dispute within seven days of completion of this meeting.

## **Section 29010 Designation of Mediator; Disqualification (Now 29009)**

**15. Comment:** One comment requested a revision to subsection (b) so that Commission staff members cannot serve as a mediator. The concern expressed is that having the same teams that perform investigations and fact-gathering assist with adjudication of a matter runs afoul of due process and administrative rules and best practices.

**NAHC Response:** After consideration, the NAHC declines to revise this subdivision.

**16. Comment:** We received three comments that the regulations should define what constitutes a “certified mediator” as referenced in subsection (b).

**NAHC Response:** The draft regulations have been revised to include a definition of this term.

**17. Comment:** One comment requested that subsection (b) include a requirement for the NAHC to keep mediators under contract.

**NAHC Response:** Due to budget uncertainties, the NAHC has declined to require that it keep mediators under contract. Additionally, the draft regulations have been updated to reflect that the Commission shall only bear the cost of mediation if funding is available.

**18. Comment:** One comment received requested that the language in subsection (a) regarding mediator experience be revised to mirror the 2021 University of California Policy for the All Systemwide Committee members. It is suggested that the language read “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.”

**NAHC Response:** After consideration, the NAHC declines to make this change as it could severely limit the number of qualified mediators.

**19. Comment:** It was requested by one commentator that “otherwise affiliated” be either removed from subsection (c)(3) or revised to read that “such affiliation would make the mediator unable to fairly and impartially facilitate resolution of the parties’ dispute.” This request was made out of concern that “otherwise affiliated” is vague and could be broadly construed to disqualify any mediator who has a professional or personal relationship with an individual employed by a party.

**NAHC Response:** After reviewing the draft regulations, the NAHC determined that the current language is necessary to ensure that a mediator does not have a conflict.

**20. Comment:** Three comments requested that subsection (e) either provide for a party to request disqualification of a mediator without stating any grounds, to permit a party to disqualify a mediator if after appointment a party learns information that would disqualify a mediator.

**NAHC Response:** This subsection has been revised to read “if at any time after designation of a mediator, a party learns information that disqualifies the mediator, the party may inform the Commission of this fact and provide the grounds for disqualification.”

### **Section 29011 Restorative Justice Principles (Now 29013)**

**21. Comment:** One comment noted that subsection (b) does not adequately capture the intention of section 8016(d)(8) of CalNAGPRA, noting that 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. Instead, the request was made to include mediation techniques that follow restorative justice principles. Examples provided were 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.

**NAHC Response:** This subsection has been revised to read: “the mediator shall consider and encourage the parties to consider restorative justice principles and values applicable to the dispute, 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.”

**22. Comment:** The NAHC received a comment that a new provision to subsection (b) should be added to provide for “the development and adoption of best practices for policies and procedures related to repatriation and the repatriation process.”

**NAHC Response:** The draft regulations were revised to include this language at (b)(11)(v).

**23. Comment:** One commenter requested that subsection (b) should further clarify what financial restitution is available under principles of restorative justice.

**NAHC Response:** After reviewing the draft regulations it was determined that examples of financial restitution, including costs incurred with seeking repatriation, mediation, and eventual repatriation address this comment and so no changes were made.

**24. Comment:** We received a comment that subsection (b) should include language requiring the exercise of due diligence to locate all missing, in-use, stolen, or damaged, tribal ancestors and cultural items.

**NAHC Response:** This subsection was revised to include consideration for the adoption of memorandums or other collaborative agreements, which could include this topic.

**25. Comment:** One comment requested that provisions related to pesticides be more robust and include testing for pesticides and toxins in culturally appropriate ways.

**NAHC Response:** Subsection (b)(10) has been revised to include this suggested change.

**26. Comment:** The NAHC received a comment that subsection (b) should include a requirement that institutional research boards or museums have a policy of listing protocol with respect to information that was taken from tribal ancestors and cultural items, making it a future policy to not publish or use that information without consent of the descendant community.

**NAHC Response:** This subsection was revised to include consideration for the adoption of memorandums or other collaborative agreements, which could include this topic.

**27. Comment:** One comment expressed concerns about subsection (b)(3) which encourages the mediator and the parties to 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.” Specifically, this commentor questioned whether this information was required to be reduced to writing and, if so, whether such writings would be protected from disclosure under the Public Records Act.

**NAHC Response:** As detailed in the Confidentiality section of the draft regulations, even if reduced to writing, this information is protected by California law from disclosure or use in other proceedings.

#### **Section 29012            Attendance by Parties and Representatives**

**28. Comment:** It was requested that the NAHC clarify whether legal counsel is permitted to both attend and speak on behalf of a party.

**NAHC Response:** The draft regulations permit the parties to be accompanied by an attorney, but not attend on behalf of a party as the purpose of mediation is for parties to reach agreement in as much of a non-adversarial environment as possible.

#### **Section 29013            Mediation and Briefing Schedule (Now 29010)**

**29. Comment:** A comment received is that the briefing and mediation schedule are very difficult to follow.

**NAHC Response:** The draft regulations have been revised to make this information easily to read and implement.

**30. Comment:** The NAHC received two comments that subsection (f) and other similar language, referencing a mediator decision is contrary to principles of restorative justice, which provides for parties to come to an agreement themselves collaboratively.

**NAHC Response:** Because CalNAGPRA section 8016 (d)(4) provides that the mediation session is to result in a resolution between the parties or the mediator is to render a written decision, this provision cannot be removed from the draft regulations. However, the statute does not expressly provide for the weight of the mediator decision and so the NAHC determined that in the context of mediation, it is necessarily advisory.

## **Section 29014 Final Commission Determination**

**31. Comment:** The NAHC received more than one comment that the Commission's adjudication process is quite extensive and could be simplified. Specifically, commentors questioned why there is an option for the Commission to refer the matter to the California Office of Administrative Hearings (OAH) as this body lacks any substantive experience or expertise in tribal cultural resource issues.

**NAHC Response:** The draft regulations have been revised, streamlining the adjudication process, which includes removing the option to refer the matter to the OAH. Instead, as directed in CalNAGPRA section 8016 (d)(7), disputes that cannot be settled in mediation will be resolved by the Commission.

**32. Comment:** One comment received is that there should be separate regulations promulgated for adjudication of disputes by the Commission.

**NAHC Response:** Because CalNAGPRA ties the Commission determination to failed mediation, it is logical that this process be included in these regulations.

## **Section 29015 Precedent Decisions**

**33. Comment:** A comment received questioned the purpose of subsection (a), allowing the Commission the authority to also designate as precedential any precedent decision issued by another California state government agency. Specifically, it was asked what other California state government agencies would issue decisions that are relevant in this context.

**NAHC Response:** After review of this subsection, it was determined that it is inapplicable and was removed.

**34. Comment:** A suggestion was made that subsection (d) should include a time limit for when the Commission must finalize its decision to designate a decision as precedent.

**NAHC Response:** After reviewing the draft regulations, the NAHC declined to adopt the suggested change.

**35. Comment:** A written comment questioned whether subsection (d) should be revised so that all Commission decisions are automatically precedential. Additionally, concerns were raised about whether other adjudicatory bodies hold public hearings on whether a decision should be precedential.

**NAHC Response:** The NAHC considered this comment and declined to require all decisions be adopted as precedential as there may be circumstances in which the Commission may determine that factual circumstances to be so unique that it would be inappropriate for the decision to be established as precedent for future adjudications. As to the policy and process of other adjudicatory bodies, in the interest of transparency, the NAHC declines to revise the draft regulations and will require any inclusion of a decision amongst those that are precedential to be reviewed, discussed, and approved in an open public meeting.

**36. Comment:** One commentor requested that subsection (e) contain a requirement that as adopted as precedent, decisions will be promptly posted on the NAHC website under their own tab in the CalNAGPRA section.

**NAHC Response:** After consideration it was determined not to include this suggested process as part of the regulations, as where precedent decisions may be housed on the NAHC website will be the subject of internal policy.