

NATIVE AMERICAN HERITAGE COMMISSION

January 6, 2025

Draft CalNAGPRA Mediation Regulations Summary of Tribal Comments and Responses

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On October 18, 2024, the Native American Heritage Commission (NAHC or Commission) approved the release of a final draft of regulations for mediation conducted under the California Native American Graves and Repatriation Act (CalNAGPRA). 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. On January 19, 2024, the Commission released the revised version of these draft regulations, accepting public comments 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. After incorporating tribal comments received during the 60-day review period, on October 18, 2024, the Commission released a final draft of these regulations. Public comments on the final draft were accepted for 45 days during which time a total of five tribes participated in either individual tribal consultation or the virtual roundtable session held on November 20, 2024.

In addition to comments captured during the virtual roundtable session, the NAHC received a total of three written comments from tribes.

The NAHC reviewed and considered all comments and have provided 16 summaries of comments and our direct responses below, combining similar comments where appropriate.

In response to these comments, the draft regulations were revised for clarity and improved readability, but no substantive changes were made.

Section 29001 Purpose and Applicability (Now 30001)

1. Comment: We received a comment, acknowledging our efforts to clarify that the draft regulations apply only to disputes arising solely under CalNAGPRA and “not otherwise governed by the federal Native American Grave Protection and Repatriation Act.” However, one commentor suggested that this language may lead to confusion and that further clarification of the regulations’ applicability is necessary.

NAHC Response: After review, it was determined that the language was clear enough in conveying that the regulations do not apply to disputes arising out of the federal NAGPRA process and that no revision was needed.

Section 29004 Confidentiality (Now 30004)

2. Comment: One commentator suggested that the restrictions on use of information in this section could be interpreted as limiting the Commission’s ability to fully set forth the basis for a decision and that the draft should be revised to explicitly state that these confidentiality provisions do not prevent the Commission from fully explaining its reasons for a final decision.

NAHC Response: Because the limitations are expressly applicable to mediation, the Commission declines to make the requested change.

Section 29005 Commission Notification to Parties to Dispute (Now 30005)

3. Comment: Subsection (a) contains a very long sentence that is difficult to read and should be broken up.

NAHC Response: We revised this subsection for readability without changing the content.

4. Comment: Although what information should be included in a written notice of a dispute can be determined by reading the regulations, that should be spelled out in a new subsection.

NAHC Response: The draft regulations were revised in response to this request.

Section 29006 Submission of Documentation by Disputing Parties (Now 30006)

5. Comment: It was noted that for purposes of clarity the word “written” should be included whenever the notice of dispute is referenced.

NAHC Response: The draft regulations were revised to make this change.

Section 29007 Required Meeting of the Parties (Now 30007)

6. Comment: It was noted that while generally enlarging all deadlines in the draft regulations by 14 days was a positive, the 45-day timeframe provided for in subsection (a) conflicts with the statute, which sets a 30-day deadline.

NAHC Response: So that the regulations do not conflict with the statute, the deadline was revised back to the original 30-day timeframe.

7. Comment: It was suggested that for clarity, subsection (b) should indicate that the parties’ notice to the Commission is written.

NAHC Response: The draft regulations were updated to make this change.

8. Comment: We received a comment that the notice required under subsection (b) should provide for a party to inform the Commission that it is withdrawing its request for mediation.

NAHC Response: While 29008 (d) provides that the parties may withdraw from mediation at any time, for purposes of clarity, the draft regulations were revised in accordance with this comment.

Section 29009 Designation of Mediator; Disqualification (Now 30009)

9. Comment: It was suggested that while it is implied that the parties will pay the cost of mediation if Commission funding is unavailable, an explicit statement of that fact is needed.

NAHC Response: For purposes of clarity, the requested change was made.

10. Comment: Regarding subsection (a)(3), one commentor questioned whether the NAHC has sufficient staff and resources to offer mediation when staff will otherwise be tasked with supporting the NAHC through the Commission determination processes.

NAHC Response: While the Commission acknowledges this concern, the option of using a staff member who is trained in mediation is at the Commission’s discretion and any workload issues or potential conflicts will be determined at the time of the request for mediation. As such, the NAHC declines to make changes to who is qualified to serve as a mediator.

Section 29010 Briefing and Mediation Schedule (Now 30010)

11. Comment: One commentor expressed concern that the ability for the Commission to enforce mediation agreements was removed from subsection (f).

NAHC Response: While this subsection was revised for readability, the draft regulations still require that mediation agreements “provide the Commission with authority to require the parties to participate in renewed mediation under these regulations concerning enforcement or potential breaches of the agreement.”

Section 29013 Restorative Justice Principles (Now 30013)

12. Comment: One commentor reiterated its request that subsection (b) include language requiring the exercise of due diligence to locate all missing, in-use, stolen, or damaged, tribal ancestors and cultural items.

NAHC Response: Upon review and consideration of this comment, this topic is one that is best addressed in a memorandum or other collaborative agreement adopted by the parties.

13. Comment: The NAHC received a request to reconsider not including in subsection (b) a requirement that institutional research boards or museums create a policy of listing protocol with respect to information that was taken from tribal ancestors and cultural items, and in the future not to publish or use that information without the consent of the descendant community.

NAHC Response: Upon review and consideration of this comment, this topic is one that is best addressed in a memorandum or other collaborative agreement adopted by the parties.

14. Comment: We received a comment questioning why the ability for the mediator to incorporate restorative justice principles into the mediation process was removed.

NAHC Response: In Subsection (a) of 29013, the updated draft regulations not only preserve the ability of the mediator and the parties to incorporate restorative justice principles into the mediation process, but also provide specific examples of these 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.

Section 29014 Final Commission Determination (Now 30014)

15. Comment: It was suggested that statutory language, providing that the Commission’s decision constitutes a final administrative remedy that is reviewed in a superior court, be included in the regulations so that parties are fully informed about this potential remedy.

NAHC Response: The draft regulations were revised to incorporate this requested change.

Section 29015 Precedent Decisions (Now 30015)

16. Comment: One comment received expressed concern regarding the impact a court decision may have on a precedent decision and requested that we revise the draft regulations to give the Commission flexibility to modify a precedent decision.

NAHC Response: As the language in subsection (e) directs the Commission to modify a precedent decision that was reversed or declared in valid by a final judgment, we believe that the regulations already address this comment and decline to make additional changes.