

INITIAL STATEMENT OF REASONS

PROBLEM STATEMENT

As part of the larger adoption of the California Native American Graves Protection and Repatriation Act (“CalNAGPRA”), the Legislature created Health & Safety Code section 8016(d), to allow for the resolution of disputes related to the repatriation of human remains and funerary and cultural items through mediation and if that is unsuccessful, by the Commission. Health & Safety Code section 8016(d)(8) requires that before the Commission can conduct mediation it shall adopt mediation procedures. While section 8016(d)(8) directs the Commission to develop mediation procedures that recognize the need for mediators with qualifications and experience appropriate to a dispute’s circumstances and provides that the procedures may incorporate aspects of restorative justice practices, the section, however, does not provide for how mediations and Commission determinations are to be conducted. Rather, the section leaves that to the discretion of the Commission. Finally, the Health & Safety Code does not explicitly state that the resolution of disputes under section 8016(d) applies when an institution is subject only to CalNAGPRA and not its federal corollary, the Native American Graves and Repatriation Act (“NAGPRA”).

BENEFITS

Benefits of the proposed regulation include creating an avenue for the resolution of disputes concerning the repatriation of human remains and funerary and cultural items when an institution is subject only to CalNAGPRA and not federal law. One benefit of these regulations is a shift in the adversarial dynamic that has long existed in California’s history of repatriation. These regulations will allow for dispute resolution in the form of mutually beneficial solutions as opposed to factually challenging enforcement and civil litigation. Simply put, these regulations will empower Tribes and Institutions to collaboratively navigate conflicts that historically have prolonged repatriation outcomes. Additionally, the regulations will benefit parties to mediation in that the regulations provide for the integration of restorative justice principles in both the conduct of mediation and agreed upon outcomes.

PURPOSE

Section 31001: The purpose of this section is to implement that section of CalNAGPRA found at Health and Safety Code section 8016 (d) and to advise that the regulations are applicable to all disputes arising under CalNAGPRA that are not otherwise governed by NAGPRA.

Section 31002: The purpose of this section is to advise as to how the regulations are to be construed, including the use of the singular and the plural and the calculation of time in which actions need to be performed.

Section 31003: The purpose of this section is to advise that the definitions contained within CalNAGPRA apply to this chapter, as well as providing a definition of a certified mediator.

Section 31004: The purpose of this section is to establish that all communications and records made or used in the course of the mediation are subject to confidentiality provisions set forth in Government Code section 11420.30, and Evidence Code sections 703.5, 1119-1126, and 1152.

Section 31005: The purpose of this section is to establish a process by which the Commission will notify parties of a dispute and set forth what information is necessary to initiate the mediation process.

Section 31006: The purpose of this section is to inform the parties to a dispute what information must be submitted to the Commission in response to receiving notice of a dispute as set forth in section 29005.

Section 31007: The purpose of this section is to create a meet and confer process to establish whether the parties may resolve the dispute without mediation and to inform the parties as to how they are to convey the results of this meeting to the Commission.

Section 31008: The purpose of this section is to define mediation for the parties and provide for the mutual termination of mediation by the parties or the mediator and establishes a process for informing the Commission of the termination of mediation.

Section 31009: The purpose of this section is to establish a process for the selection and disqualification of a mediator.

Section 31010: The purpose of this section is to set forth a scheduling for briefing ahead of mediation and the mediation.

Section 31011: The purpose of this section is to advise the parties to mediation as to the time and way to provide papers and documents submitted for mediation.

Section 31012: The purpose of this section is to inform the parties as to who is authorized to attend a mediation.

Section 31013: The purpose of this section is to advise the parties that the mediator is required to consider and encourage the parties to consider incorporating restorative justice principles and values applicable to the dispute into the process. Additionally, this section provides parties with a non-exclusive list of considerations to discuss to advance restorative justice principles in an agreed upon outcome.

Section 31014: The purpose of this section is to establish a process for the Commission to resolve a dispute that the parties cannot dispose of through mediation.

Section 31015: The purpose of this section is to create a process for the Commission to deem any of its determinations a precedent decision.

NECESSITY

These regulations are necessary to implement Health & Safety Code section 8016(d)(8), providing that the Commission establishes procedures for conducting mediation and resolving disputes that arise between tribes and institutions that are subject solely to CalNAGPRA.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS

The Commission relied on input provided by California tribes received during roundtable listening sessions and through written comments.

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

According to Commission records, as of December 26, 2024, there are 60 institutions in California that have reported that they hold collections of human remains, associated funerary objects, unassociated funerary objects, and objects of cultural patrimony. While it is not known to the Commission whether any of these institutions have not received federal funds and are thereby not subject to NAGPRA, it is reasonable to surmise that only a small number are solely subject to CalNAGPRA.

These proposed regulations will make specific the implementation of CalNAGPRA mediation pursuant to Health and Safety Code section 8016(d), for institutions solely subject to CalNAGPRA. The proposed regulations provide specificity to the statute; however they do not impose a financial burden on the institutions. The only potential cost to institutions would be if disputing parties mutually agree upon a mediator that is not under contract with the Commission, then those institutions would bear any costs by entering into a cost-sharing arrangement, as described in Section 29009(a)(4) of the proposed regulations.

EVIDENCE SUPPORTING FINDING NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

Although the proposed action may directly affect businesses statewide, including small businesses, the Commission concludes that the economic impact, including the ability of California businesses to compete with businesses in other states, will not be significant.

The requirement that, if requested, a museum that is subject to CalNAGPRA but not federal law engage in mediation, may affect small businesses because it will incur the expense of staff and possibly legal counsel participation in mediation and potentially before the Commission in a hearing. However, the Commission has determined that it is unlikely that

more than a few businesses in the state would be subject to these regulations as most entities possessing human remains and funerary and cultural items receive federal funds, which subject them to NAGPRA and its dispute resolution process. Therefore, the proposed regulations will not have a significant statewide adverse economic impact directly on institutions that are only subject to CalNAGPRA.

ALTERNATIVES DETERMINATION

No reasonable alternatives were proposed or considered, and these regulations are not prescriptive.