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NAHC HEADQUARTERS
1550 Harbor Boulevard
Suite 100
West Sacramento,
California 95691
(916) 373-3710
nahc@nahc.ca.gov

Draft CalNAGPRA Mediation Regulations Overview of Revisions

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 Protection 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.

On January 12, 2024, new regulations governing the Native American Graves Protection and Repatriation Act (NAGPRA) became effective. As NAHC counsel reviewed the new NAGPRA regulations, it became clear that the updated federal regulations impacted the CalNAGPRA draft mediation regulations in such a way that they required further revision.

Specifically, when there are competing claims made for repatriation under NAGPRA the museum or Federal agency is to determine the appropriate requester while CalNAGPRA provides that these disputes are resolved through non-binding mediation and if they cannot be resolved informally then by the Commission. Consequently, it would be impossible for an institution subject to both state and federal law to submit the dispute to CalNAGPRA mediation without running afoul of federal law, requiring that it determine the appropriate requestor. In cases where the institution cannot determine the appropriate requestor and repatriation is stayed, federal law permits resolution through agreement between the parties, which could be reached through mediation under CalNAGPRA. However, because CalNAGPRA provides that if mediation fails, the dispute is then resolved through Commission adjudication, which is not listed as a means to resolve a dispute under NAGPRA, it is also impossible in this instance for an entity subject to state and federal law to comply with both.

Additionally, in the case of other disputes, NAGPRA provides that the federal Review Committee may be enlisted to issue advisory findings of fact or recommendations to the parties which is similar to the CalNAGPRA mediation process except that the Commission will enter a binding determination when a dispute cannot be informally resolved. Because submission of a dispute to the federal Review Commission is optional, if an entity subject to both state and federal law chose mediation under CalNAGPRA, there should be no conflict. However, under CalNAGPRA disputes that are not resolved by mediation are then decided by the Commission, which is not permissible under NAGPRA.

Overall, the new federal NAGPRA regulations render the dispute resolution provisions in CalNAGPRA ineffective as they pertain to entities subject to both federal and state law. While the NAHC is not foreclosed from working in partnership with the federal NAGPRA program to assist with nonjudicial resolution of disputes arising under NAGPRA, because California Health & Safety Code section 8016(d) requires that all disputes not resolved by mediation be adjudicated by the Commission, any assistance would necessarily be rendered outside the CalNAGPRA process. As such, the draft dispute resolution regulations were revised to make clear that they are applicable to disputes arising strictly under CalNAGPRA.

Additionally, in response to comments received, the NAHC revised the draft regulations and made, among others, the following changes:

- Defined what is a certified mediator.
- Revised mediator disqualification process to include post-appointment removal.
- Included additional restorative justice principles that may be incorporated into the mediation process.
- Clarified how, under different circumstances, mediation may be terminated.
- Included additional considerations to advance restorative justice principles in any agreement reached between the parties.
- Removed the option to refer an unresolved dispute to an Administrative Law Judge and streamlined the Commission adjudication process to align with how other state boards and commissions function.
- Clarified how a hearing officer will be designated and provides that this individual will not be rendering a decision, but rather will assist the Commission in drafting its opinion.