

ADDENDUM TO INITIAL STATEMENT OF REASONS

NECESSITY

Section 31001: This section is necessary to inform the public that the Native American Heritage Commission's purpose for implementing these regulations is to make specific the language in Health and Safety Code section 8016 (d) and to advise the public that the regulations are applicable to all disputes arising under CalNAGPRA that are not otherwise governed by NAGPRA.

Section 31002: This section is necessary to ensure clarity and uniformity in the interpretation of these regulations so that terms and timelines are not open to more than one interpretation. Specifically, subdivision (a) lets people know that for purposes of these regulations all words shall be interpreted as to be either singular or plural. Secondly, subdivision (b) and (c) provide specific rules for computing timelines so that there are no deadlines that could be open to more than one interpretation.

Section 31003: This section is necessary to define a singular term, "Certified Mediator", which is not defined in the authorizing statute the California Native American Graves Protection and Repatriation Act (Division 7, Part 2, Chapter 5 of the Health and Safety Code). Defining this term is necessary to this regulation to ensure clarity and specificity to the public as to who is eligible to conduct mediations pursuant to this regulation. Failure to define this term would undermine the legitimacy of the mediation set forth by these regulations in enabling inexperienced individuals to further entrench conflict intended to be resolved by this regulation.

Section 31004: By statute the Commission must facilitate document exchange between disputing parties requesting mediation and in doing so will receive both confidential and non-confidential documents. This section is necessary to specify to what extent information shared in the mediation process is considered confidential and protected from disclosure and when that confidentiality may be waived by the disputing parties. Specific references to the applicable code sections are necessary to inform the public of the provisions of law that will be applied to information shared in mediation. Subdivision (a) is necessary to inform parties whether their admissions or documentation disclosed in mediation under these regulations is confidential, and that they have the right to refuse to disclose and prevent another from disclosing the communication in adjudicative proceedings, civil actions, or other proceedings. Furthermore, subdivision (a) is necessary to inform parties that they have the option to mutually agree to admitting otherwise confidential evidence. Subdivision (b) is necessary to clarify that the mediator's written advisory decision will remain confidential and are not disclosed as part of the final commission determination or in any administrative or civil proceedings outside of the scope of this regulation. Subsection (c) is necessary to clarify that otherwise admissible evidence shared in mediation does not become inadmissible solely because of its use in mediation.

Section 31005: This section is necessary to make specific the provisions in Health and Safety Code 8016 (d), regarding when mediation may be requested. The Commission determined that it is necessary to establish a timeline and delivery method for Commission staff to respond to notifications of disputes and included this information in subsection (a). The Commission chose to allocate up to 30 days for staff review and processing of notifications of disputes because given the sensitivity of repatriation matters, expediency is important and more than a 30-day timeframe would not be appropriate. Subsection (a) (1) through (4) are set forth in statute and list those disputes under CalNAGPRA that may be mediated through this regulation. Subsection (b) (1) through (3) are necessary to advise the parties as to the information required to be included in a written notice of dispute to initiate mediation under this regulation. Subsection (c) is necessary to specify what information must be contained in a written notice of dispute sent to the Commission and subsection (d) is necessary to clarify the manner in which a written notice of dispute is to be sent to the Commission and to provide an address to send the notice.

Section 31006: Health and Safety Code Section 8016 subdivision (d) requires that disputing parties submit documentation describing the nature of the dispute to the Commission, who in turn forwards the documentation to the opposing party or parties. However, the statute does not set forth clear timelines or methods for this exchange of documentation. Therefore, the Commission found it necessary to establish clear and specific timelines and criteria for disputing parties to exchange documents. It was determined that 45 days is an appropriate amount time for parties to submit documentation pertaining to the dispute as to not place undue pressure on the parties while also weighing the sensitivity and urgency of repatriation matters. Subsection (a) is necessary to identify the parties to the dispute and those that are authorized to mediate on behalf of those parties. Subsection (b) is necessary to ensure the contact information for disputing parties is accurate for the exchange of information related to mediation. Subsection (c) is set forth in statute and requires that parties include in their submission to the Commission a description of the nature of the dispute. Subsection (d) is necessary because while CalNAGPRA requires parties to submit a description of the dispute it does not ensure the Commission receives records or tangible documentation that could assist a mediation. Subsection (e) is necessary to ensure that the parties share the relief requested by mediation to expediate the mutually beneficial resolution of disputes.

Section 31007: Health and Safety Code Section 8016 subdivision (d) requires that disputing parties submit documentation describing the nature of the dispute to the Commission, which in turn, must forward the documentation to the opposing party or parties. In addition, section 8016 (d) requires disputing parties to meet within 30 days of the date of the mailing of the documentation with the goal of settling the dispute. However, CalNAGPRA does not set forth a clear timeline or procedure for this statutorily required meeting of parties. The Commission determined that Section 31007 is necessary to provide clear structure and guidance on how and when the required meeting of parties must occur. Commission staff are tasked by statute with exchanging documentation received in section 31006 between

disputing parties and subsection (a) is necessary to establish timeframes in which Commission staff is to accomplish this task. The Commission determined that 21 days is an appropriate time to allow for the review and organization of information received while also not delaying already sensitive repatriation disputes. Subsection (a)(i) is necessary to clarify that the documents received pursuant to section 31006 are provided to each party. By statute parties must meet within 30 days of receiving these documents and subsection (a)(ii) is necessary to ensure that Commission staff will make clear this statutory requirement to parties when providing them with the opposing party's documentation. Subsection (b) is necessary to provide clear and specific guidance on the potential outcomes from pre-mediation and how to communicate those outcomes to the Commission. The language of subdivision (b) was chosen because if parties are at an impasse and cannot resolve a dispute by meeting alone the Commission must move forward in securing a mediator to provide formal mediation to resolve the dispute. Subsection (b)(2) is necessary because while parties may not have been able to resolve their dispute in their meeting they may have mutually agreed upon acceptable mediators. Receiving a list of mutually agreeable mediators would save Commission time and resources in seeking out mediators to resolve a dispute. However, if parties can resolve a dispute, then there is no longer a need for mediation, and it is necessary for parties to notify the Commission of this resolution so the Commission may take appropriate steps to close out the dispute in its records and divert no further resources to mediation.

Section 31008: The Commission is tasked by Health and Safety Code section 8016 (d) (2) to mediate or designate a mediator to mediate disputes arising under the code section. However, Section 8016 does not define or set forth clear and specific standards for mediation. Subsection (a) and (b) are necessary to inform the public clearly of what mediation consists of, the values that inform it, that it is not legally binding, and the role a designated mediator plays in the process with a focus on the need for procedural fairness. Further, subsections (c) and (d) are necessary to specify and clearly inform disputing parties of their right to terminate mediation at any time and the two potential avenues available to the parties if mediation is terminated. The language of subsection (c) is necessary because parties could reach an impasse and wish to no longer participate in mediation. If an impasse does occur the Commission needs to be notified so that it may elevate the dispute to the Commission for determination as set forth in section 31014. On the other hand, parties may decide that formal mediation is not working them towards a mutually agreeable solution and so the language in subsection (d) is necessary because the parties may wish to resolve the matter amongst themselves and terminate mediation through the Commission.

Section 31009: Health and Safety Code section 8016 (d) (2) requires that the Commission designate a mediator. The Commission recognizes that there may be instances where a mediator is not appropriate because of a conflict of interest. Therefore, it is necessary that the Commission provide a clear set of criteria and specific process for disqualification of mediators. To safeguard the objectivity required by the mediation principles set forth in

Section 31008, the Commission chose to set forth specific and clear examples that could lead to disqualification of a mediator. Each disqualifying circumstance set forth in subdivision (b)(1) through (6) is necessary to eliminate any potential conflicts of interest. Subdivision (b)(1) is necessary because personal knowledge of disputed evidentiary facts involved in a dispute would bias a mediator's opinion of a dispute such that it would be unfair to either one or both of the parties. Subdivision (b)(2) is necessary because a direct familial tie to a dispute could bias a mediator's opinion of a dispute such that it would be unfair to either one or both of the parties. Subdivision (b)(3) is necessary because a direct familial tie to an employee of a party could bias a mediator's opinion of a dispute such that it would be unfair to either one or both of the parties. Subdivision (b)(4) is necessary because a direct or familial financial interest to a dispute could bias a mediator's opinion of a dispute such that it would be unfair to either one or both of the parties. Subdivision (b)(5) is necessary because prior or current discussions or arrangements involving potential employment by a party or party related to the dispute could bias a mediator's opinion of a dispute such that it would be unfair to either one or both of the parties. Subdivision (b)(6) is necessary because given the complexity and sensitive nature of repatriation matters many contributing factors could bias a mediator's opinion of a dispute such that it would be unfair to either one or both of the parties, therefore the mediator themselves or the Commission may determine that they are not able to serve as an impartial mediator. Subsection (c) is necessary to set forth a clear process for potential mediators to evaluate relevant information to determine if they are subject to disqualification while still maintaining confidentiality set forth in section 31004. Because there may be instances where a mediator who has a conflict of interest does not voluntarily disqualify themselves subsection (d) is necessary to ensure that a party may disclose information pertaining to a mediator's conflict of interest. Given the sensitivity of repatriation matters and the need for prompt conflict resolution, the Commission chose to allocate up to 21 days for staff to review a claim that a mediator is disqualified. Given the seriousness of such an allegation and the impact disqualification of a mediator would have on a dispute, the Commission felt it necessary to require that an allegation of disqualification be made in writing and allow the mediator to recuse themselves or rebut the allegation with their own evidence. The Commission also found it necessary to specify that in the event the evidence supports disqualification of a mediator, an alternate mediator will be secured and if the evidence does not support disqualification of a mediator the Commission shall notify the parties and the mediator that the mediator is not disqualified.

Section 31010: The requirement for parties to submit opening briefs and evidence is set forth in Health and Safety Code section 8016 (d) (3), and this section is necessary to make specific this provision by establishing a time in which parties are to submit these documents to the mediator. Subsection (a) highlights the statutory requirement for submitting briefs while also specifying that parties have up to 30 days to prepare their briefs. 30 days is necessary so as not to place undue pressure on the parties while still acknowledging the expediency needed to resolve disputes. The timelines and allocations in subdivision (b) are set forth by statute.

Subdivision (c) is necessary to allow a designated mediator to implement formatting requirements for briefs so that the parties have parameters for the submissions. Subsection (d) is necessary to clarify the timeline for holding mediation. The statutory language sets forth that mediation must occur within 20 days from the date of submission of responses; however, the statute does not specify whether this relates to the submission of opening briefs or response briefs. To provide clarity it is necessary to include language that mediation sessions must be scheduled to occur within 20 days of the submission of the last-submitted response brief, or 45 days from the submission of the last-submitted opening statement brief if no responses were submitted. While it is hoped that parties will agree on a mediation date, if they do not, the Commission included language that a mediator may designate a date for mediation. While the statute authorizes the Commission to facilitate mediation it does not provide specifics as to deciding mediation venues, party agreements resulting from mediations, or the impact of mediator advisory decisions. As such it was necessary for the Commission to specify how mediation locations could be determined, what outcomes could result from mediation, and the impact of mediator advisory opinions. Subsection (e) is necessary to clarify that mediation venues should be mutually agreed upon but if that does not occur, a venue shall be determined by the mediator. It was necessary to specify that mediations will occur in-person because given the complex and sensitive nature of repatriation matters, virtual mediations would be extremely burdensome and challenging to mediators in attempting to find a mutually agreeable solution. The statute sets forth that parties must either come to an agreement, or the mediator must issue a written decision. Subsection (f) is necessary to make specific that any agreement reached between the parties must be signed and dated by either the parties or their authored representatives. Because parties could potentially violate agreements reached in mediation it is necessary that the agreements include a clause enabling the Commission to enforce or mediate any agreement reached. The Commission required mediators to provide a copy of an agreement to ensure that the Commission has a record of the agreement for future enforcement or mediation of a violation of an agreement. The Commission chose 45 days as a deadline for submitting agreements to allow mediators with ample time to provide copies of agreements to the Commission. If parties are not able to come to an agreement the statute sets forth that the mediator must issue a written decision but does not provide any further instruction. Subsection (f) was necessary to help promote the mutually agreeable resolution of disputes arising under CalNAGPRA by requiring the parties to meet and review the mediator's written decision to potentially resolve the dispute. The language of subsection (g) is necessary to specify that a mediator's written decision shall contain multiple substantive components including the issues and/or items that remain in dispute; the parties' positions concerning each issue and/or item in dispute; the evidence supporting the parties' positions; and an assessment of the facts in dispute and the application of law to those facts, including the application of the restorative justice principles specified in section 31013.

Section 31011: This section is necessary to provide the regulated public with clear and specific guidelines for document exchange in mediation pursuant to this regulation.

Section 31012: This section is necessary to ensure that only appropriate representatives are attending mediations conducted under this regulation.

Section 31013: Health and Safety Code section 8016 (d)(8) states that the Commission may incorporate restorative justice practices in this regulation. Restorative justice principles are an integral and necessary foundation to mediation and conflict resolution which differs from traditional litigation. The Commission chose to incorporate this section specifying and clarifying restorative justice principles to ensure that mediation is conducted in a way consistent with leading academic and professional standards in the conflict resolution field. Subsection (b) clarifies the specific principles that are necessary to mediate culturally sensitive matters of repatriation in a way that aims to restore past and present harms. Subsection (b) (1) and (3) are necessary to ensure that the mediator understands the historical context of harm to tribal communities that resulted in the displacement of sacred and valuable ancestors and cultural items. Deference to tribal knowledge specified by subsection (4) is required by statute. Subsection (5) is necessary to specify and highlight tribal customs related to human remains and cultural items to avoid future conflict and promote conflict resolution under this regulation. Subsection (6)-(9) are necessary to ensure that the specific and real costs of repatriation and repatriation disputes are considered by mediators. Subsection (10) is necessary to address the very real and significant threat to tribal cultural practitioner's health that can be posed by the contamination of repatriation items by pesticide treatments. Subsection (11) is necessary to provide clear examples of mutually beneficial creative solutions specifically related to repatriation.

Section 31014: The statute requires the Commission to resolve a dispute if the parties are unable to resolve it through mediation. The statute further states that the determination made by the Commission is deemed to constitute a final administrative remedy. However, the statute does not provide a clear and specific step-by-step process by which the public could reasonably pursue this outcome. As such, this section is necessary to provide a clear and specific process by which parties can request, participate in, and receive a commission determination. Subsection (a) informs the public of a clear and specific deadline for parties to submit a written request for a final determination from the Commission. Subsection (b) informs the public how the Commission will delegate this request to provide a hearing officer to rule on the admission and exclusion of evidence. Subsection (c) informs the public clearly and specifically of who hearings will be held in front of. Subsection (d) clearly informs the public of the criteria for disqualification of Commissioners to avoid any conflict-of-interest challenges to hearings held pursuant to this regulation. Subsection (e) clearly informs the public of the factors that will be considered in determining a Commission decision as well as a specific deadline for the Commission to issue its decision. The statute states that the Commissions' decision constitutes a final administrative remedy and that parties may seek

judicial review, and subsection (f) clearly establishes a reasonable timeline of 45 days from the issuance of a Commission decision to seek judicial review.

Section 31015: The Commission chose to incorporate language regarding precedent decisions to ensure the public was clearly informed of the potential impacts of Commission decisions, as well as to enable the Commission to facilitate the significant legal and policy authority granted to it by statute. Subsections (b) through (f) are necessary to clearly and specifically inform the public of how these precedent decisions will be designated, withdrawn, and posted for the public's review.

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

The Commission relied on the following:

Federated Indians of Graton Rancheria Letter dated March 28, 2024.

Pechanga Band of Indians Letter dated March 29, 2024.

Rincon Band of Luiseno Indians Letter dated March 28, 2024.

United Auburn Indian Community of the Auburn Rancheria Letter dated March 29, 2024.

Xolon Salinan Tribe undated communication.