

TITLE 14. ~~NATIVE AMERICAN HERITAGE COMMISSION~~ NATURAL RESOURCES

Division 18. Native American Heritage Commission

Chapter 1. CalNAGPRA Mediation and Dispute Resolution Procedures

PROPOSED REGULATION

The language proposed during the 45-day comment period is shown in single underline. Proposed changes for the 15-day notice are shown in double-underline for additions and double-strikethrough for deletions.

31001. Purpose and Applicability

These regulations of the Native American Heritage Commission (Commission) implement the California Native American Graves Protection and Repatriation Act, Division 7, Part 2, Chapter 5 of the Health and Safety Code (Health and Safety Code section 8016 (d)) and are applicable to all disputes arising under this subdivision that are not otherwise governed by the federal Native American Graves Protection and Repatriation Act.

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8016, Health and Safety Code ~~section 8016 (d)~~.

31002. Construction of Regulations

(a) As used in these regulations, words in the singular shall include the plural and words in the plural shall include the singular, unless the context otherwise requires.

(b) In these regulations, whenever a time is stated within which an act is to be done, the time is computed by excluding the first day and including the last day. If the last day is any day the Commission is closed for business, that day is also excluded.

(c) In these regulations, any time within which an act is to be done refers to calendar days, including weekends, unless otherwise specified.

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8016, Health and Safety Code.

31003. Definitions

The definitions contained in the California Native American Graves Protection and Repatriation Act (Division 7, Part 2, Chapter 5 of the Health and Safety Code) shall apply to this chapter, as well as the following definitions. ~~, unless the context clearly requires otherwise.~~

“Certified Mediator” means an individual who has ~~either completed a course offered through or approved by the Commission or a person with the training and experience that is routinely~~

required to serve on federal or California state court panels to receive referrals for court-ordered mediation.

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8016, Health and Safety Code.

31004. Confidentiality

Confidentiality in any mediation conducted under these regulations shall be governed by Government Code section 11420.30, ~~and Evidence Code sections 703.5, 1119-1126, and 1152.~~ Accordingly, all communications and records made or used in the course of the mediation proceedings described herein are protected as follows:

(a) Anything said, any admission made, and any document prepared in the course of, or pursuant to, mediation under these regulations is a confidential communication, and a party to the mediation has a privilege to refuse to disclose and to prevent another from disclosing the communication, whether in an adjudicative proceeding, civil action, or other proceeding. This subdivision does not limit the admissibility of evidence if all parties to the mediation proceedings consent.

(b) Except as provided for in section 31014, no reference to the mediation proceedings, including the mediator's written advisory decision, may be made in the context of (1) the Final Commission Determination provided for in section 31014, (2) any other administrative adjudicative proceeding, or (3) any civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose.

~~(c) No mediator, Commissioner, or Commission employee is competent to testify at (1) the Final Commission Determination provided for in section 31014; (2) any other administrative adjudicative proceeding; or (3) any civil action as to any statement, conduct, decision, or order occurring at, or in conjunction with, a mediation.~~

~~(c)~~ Evidence otherwise admissible outside of mediation under these regulations is not inadmissible or protected from disclosure solely by reason of its introduction or use in mediation under these regulations.

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code; and Government Code section 11420.30. Reference: Section 8016, Health and Safety Code.

31005. Commission Notification to Parties to Dispute

(a) Commission staff shall notify the ~~affected parties~~ agency or museum and the tribe(s) involved in the dispute via regular USPS mail, and if provided, via electronic mail, within 30 days of receiving a written notice of any of the following disputes:

(1~~†~~) More than one request for repatriation for the same item;

~~(2ii)~~ A dispute between the requesting party and the agency or museum;

~~(3iii)~~ A dispute as to the contents of an inventory or summary; or

~~(4iv)~~ A dispute related to the repatriation process.

(b) The notification to the agency or museum and the tribe(s) shall be on a form prescribed by the Commission and shall include the following:

(1) A copy of these regulations;

(2) Information about how to submit materials required under section 31006, including documentation related to the dispute; and

(3) An outline of deadlines as set forth in these regulations.

~~(be) Any involved party. An agency or museum or a tribe(s) may submit a written notice of dispute via regular USPS mail, which shall include the following:~~

~~(1i) A brief description of the nature of the dispute.~~

~~(2ii) The agency or museum involved in the dispute.~~

~~(3ii) The tribe(s) involved in the dispute.~~

(c) A written notice of dispute submitted by an agency or museum or tribe shall include the following:

(i) A brief description of the nature of the dispute.

(ii) The agency or museum involved in the dispute.

(iii) The tribe(s) involved in the dispute.

(d) A written notice of dispute shall be submitted to the Commission via regular USPS mail at the following address:

Native American Heritage Commission
1550 Harbor Boulevard, Suite 100
West Sacramento, CA 95691

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8016, Health and Safety Code-section 8016.

31006. Submission of Documentation by Disputing Parties

Upon issuance of a Commission notification in response to a written notice of dispute described in section 31005(a), each party shall have 45 days to submit the following information to the Commission:

- (a) The names of all parties involved in the dispute and, if any, their representatives, including attorneys.
- (b) The physical addresses, electronic mail addresses, and telephone numbers of the parties or their representatives, including attorneys.
- (c) A brief statement of the nature of the dispute.
- (d) Documentation related to the dispute, including records and arguments submitted to the State Agency and/or Museum.
- (e) Relief requested by the parties.

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8016, Health and Safety Code ~~section 8016~~.

31007. Required Meeting of the Parties

(a) Within 21 days of receiving from each party the submission described in section 31006, Commission staff shall send via physical address and electronic mail address to the parties:

(1~~1~~) The documentation provided pursuant to section 31006 and

(2~~1~~) A notice informing the parties of the requirement that they must meet within 30 days of the date of the Commission's mailing of the documentation with the goal of settling the dispute.

(b) The parties shall notify the Commission in writing within 7 days of completion of this meeting, indicating whether the parties were able to settle all or any part of the dispute, including whether any party is withdrawing its request for mediation. If the parties were unable to settle all or any part of the dispute, each party shall provide the Commission:

(1~~1~~) A written statement identifying the issues and facts still in dispute and

(2~~1~~) If available, the names of and contact information for mediators mutually agreed to by all parties.

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8016, Health and Safety Code ~~section 8016~~.

31008. Mediation Defined

(a) Mediation refers to a process whereby a neutral third person, a designated mediator, acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal, non-binding, and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable written agreement. The role of the designated mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem

solving, exploring resolution alternatives, and issuing an advisory decision to assist the parties in evaluating and assessing their claims and arguments.

(b) A mediator must conduct the mediation proceedings in a procedurally fair manner. “Procedural fairness” means a balanced process in which each party is given an opportunity to participate fully and without coercion. A mediator is not obliged to ensure the substantive fairness of an agreement reached by the parties.

(c) Mediation may be terminated at any time if either party or the mediator determines that continuation of the process would no longer advance the aims of the mediation. In this instance, the dispute will then proceed to resolution under section 31014.

(d) Mediation may be terminated at any time if the parties determine that they may better resolve the matter without the mediator’s facilitation. In this instance, the parties shall indicate in writing to the Commission that they are withdrawing from the mediation and dispute resolution process.

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8016, Health and Safety Code.

31009. Designation of Mediator; Disqualification

(a) After receiving notification pursuant to section 31007 that the parties were not able to settle all or any part of the dispute, Commission staff shall designate a Certified Mediator with training and experience adequate to mediate the parties’ dispute, including, to the extent possible, experience working with California Native American tribes and repatriation. The Commission will bear the costs associated with any of the mediator by either providing the parties with a mediator that the Commission has under contract or a trained Commission staff member, excluding Commissioners. ~~under contract with the Commission, if funding is available. If funding is not available, the parties will bear the costs of mediation. The Commission may, at its discretion, use the following options for the designation of a mediator:~~

~~(1i) Designate a mediator from a list of mediators the Commission has contracted with for this purpose; or~~

~~(2ii) Provide the parties with the names of mediators with whom the Commission has contracted for this purpose to allow for the parties to select a mutually agreed to mediator; or~~

~~(3iii) Utilize a trained Commission staff member, excluding Commissioners; or~~

~~(1iv) Allow~~ In the alternative the parties may ~~to~~ choose a mediator with training and experience adequate to mediate the parties’ dispute who is mutually agreeable to the parties. The parties shall bear any and all costs associated with using ~~a~~ the mediator ~~not currently under contract with the Commission~~ and shall enter into a cost-sharing arrangement prior to the mediation.

(b) Mediators are disqualified from serving based on any of the following grounds:

- (1~~†~~) The mediator has personal knowledge of disputed evidentiary facts involved in the dispute.
- (2~~†~~) The mediator, or their spouse or their children, is a person with a third degree of relationship to a party or a person who provided professional advice to a party. A third degree of relationship includes a great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, cousin, niece, stepsiblings, or adopted relatives.
- (3~~†~~) The mediator, or their spouse or their children, is employed by, a member of, or otherwise affiliated with a party, including a Museum, Agency, or Native American tribe which is a party to the dispute.
- (4~~†~~) The mediator, or their spouse or their children, has a financial interest in the dispute or a party.
- (5~~†~~) The mediator is in discussions, or has a current arrangement, concerning prospective or existing employment or other compensated service with a party or related to the specific matter in the dispute. “In discussions” means that the mediator solicited or otherwise indicated an interest in accepting or negotiating possible employment or providing services.
- (6~~†~~) The mediator or the Commission believes, for any other reason, that they are unable to fairly and impartially facilitate resolution of the parties’ dispute.

(c~~†~~) Prior to designation of a mediator, Commission staff shall confirm with a prospective mediator that:

- (1~~†~~) The mediator agrees to be bound by the confidentiality provisions described in section 31004; and
- (2~~†~~) Upon having reviewed the names of the parties and the nature of the dispute, the mediator is not subject to disqualification.

(d~~e~~) If any party has information that disqualifies the mediator, the party may inform Commission staff of this fact and provide the grounds for disqualification ~~believes that a mediator designated by Commission staff should be disqualified, the party must notify the Commission of the grounds for disqualification.~~ Such notice shall be made in writing and submitted within 21 days of being notified of the mediator’s designation. Along with the notice, the party seeking to disqualify a mediator shall submit any evidence it has demonstrating that the mediator is disqualified under any of the grounds listed in subsection (b) (1) – (5). ~~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.~~ Within 21 days of receiving the notification of the grounds for disqualification, Commission staff shall review the notice and evidence submitted and shall contact the mediator and inform them that a request has been made to disqualify the mediator and under what grounds. The mediator may then either withdraw from the matter or submit evidence to Commission staff demonstrating why they are not disqualified under the grounds stated by the party. If Commission staff

determines that the evidence supports the disqualification of the mediator on the alleged grounds, they shall either designate another mediator consistent with this section. ~~or~~ If Commission staff determines that the evidence does not support the disqualification of the mediator on the alleged grounds, they shall notify the parties and the mediator that it has determined that the previously selected mediator is not disqualified.

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8016, Health and Safety Code ~~section 8016.~~

31010. Briefing and Mediation Schedule

(a) Opening Statement Briefs: Within 30 days of the Commission's designation of a mediator, each party to the dispute shall submit an opening statement brief to the mediator and all other parties identifying each issue or item in dispute, the facts supporting their positions, and the legal bases supporting their positions. The brief should be accompanied by any evidence demonstrating the truth of the facts presented in the opening statement brief. Any evidence presented with a brief should be separately identified with an exhibit list, including numbering and exhibit description. For instance, Exhibit 1: exhibit description. The exhibits shall be attached to the exhibit list.

(b) Response Briefs: Each party to the dispute is permitted, but not required, to submit a brief and evidence in response to the opening statement briefs. Any such responses shall be submitted to the mediator and all other parties within 20 days of the date of the last-submitted opening statement brief. The brief should be accompanied by any evidence demonstrating the truth of the facts presented in the response brief. Any evidence presented with a brief should be separately identified with an exhibit list, including numbering and exhibit description. For instance, Exhibit 1: exhibit description. The exhibits shall be attached to the exhibit list.

(c) Further Brief Requirements: As appropriate, the mediator has discretion to implement reasonable further requirements for briefing, including, without limitation, requesting exhibit indexes, imposing page limits, and requesting additional evidence or briefing from the parties.

(d) Mediation Sessions: ~~Within 20 days of receipt of responses from all parties, or 45 days of receipt of the last submitted opening statement brief if no responses were submitted, the mediator shall contact the parties to schedule an initial mediation session.~~ The mediation session shall be scheduled to occur within 20 days of the submission of the last-submitted response brief, or ~~45~~ 40 days from the submission of the last-submitted opening statement brief if no responses were submitted. If the parties are unable to agree upon a date, the designated mediator will provide the parties with a mediation date within this time frame. Mediation sessions may be continued as determined necessary by the mediator.

(e) Mediation Venue: Mediation sessions shall occur at locations mutually agreeable to the parties and the mediator. If the parties are unable to agree upon a location, the location shall be chosen by the mediator. Mediation sessions shall be conducted in-person, and a mediator may hold joint mediation sessions or separate the parties in different rooms during the process. With the mediator's consent, the parties may agree to hold virtual mediation sessions using video-conferencing technology.

(f) Agreements: Any agreements reached by the parties resolving some or all disputes shall be written, signed, and dated by the parties or their authorized representatives and shall 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. Within 45 days of reaching an agreement, the mediator shall provide a copy of the agreement to Commission staff.

(g) Mediator Advisory Decision: If the parties are unable to reach an agreement to fully resolve their dispute through the mediation process, then, within 7 days of the last day of mediation, the mediator shall render a written advisory decision as to all issues that remain unresolved. In the decision, the mediator shall identify the issues and/or items in dispute, the parties' positions concerning each issue and/or item in dispute, the evidence supporting the parties' positions, the applicable law, 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. Before seeking a final Commission determination under section 31014, the parties must meet to discuss the advisory decision in an effort to resolve the matter.

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8016, Health and Safety Code-section 8016 (d).

31011. Providing Copies of Papers for Mediation

All papers and documents submitted for mediation should be provided to the mediator with copies to all parties as specified in the briefing schedule under section 31010 of these regulations. Parties should provide electronic copies whenever possible. The mediator may also allow a party to submit records and other evidence to the mediator without providing copies to the other parties where the mediator determines the party has a reasonable justification for doing so.

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8016, Health and Safety Code-section 8016.

31012. Attendance by Parties and Representatives

Each party, or an officer or member of the party with authority to bind the party in a settlement or agreement, shall attend each mediation session. Parties are permitted to be accompanied by their representatives, including attorneys. Other non-parties may attend only with the permission of all parties and with the consent of the mediator.

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8016, Health and Safety Code-section 8016.

31013. Restorative Justice Principles

(a) In conducting mediation sessions and issuing any written decision, 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. Additionally, mediators are encouraged to, if requested, incorporate tribal customs and traditions regarding dispute and meditation processes.

(b) In resolving a dispute, the mediator shall consider and encourage the parties to consider restorative justice principles. The following is a non-exclusive list of considerations to discuss to advance restorative justice principles.

- (1~~i~~) The harm(s) caused to the affected tribes and communities by the discovery (unearthing) and/or removal of any ancestral remains and cultural items, as well as the benefits of their return.
- (2~~ii~~) The harm(s) to affected tribes if remains and cultural items are left un-repatriated and/or not reinterred with culturally appropriate treatment.
- (3~~iii~~) The 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.
- (4~~iv~~) Deference to tribal knowledge concerning the remains or cultural items, and related history, including the significance of the location of their discovery.
- (5~~v~~) Tribal customs regarding preservation in place, removal, handling and storage of remains and cultural items during a dispute, as well as for their repatriation or reinterment with culturally appropriate treatment.
- (6~~vi~~) The effort and costs incurred by the tribe(s) in seeking repatriation or the reinterment of remains and cultural items with culturally appropriate treatment.
- (7~~vii~~) Any assistance tribes will need in repatriation and/or reinterment with culturally appropriate treatment, including providing sites for reinterment and related ceremonies.
- (8~~viii~~) Direct and indirect costs associated with the meditation and repatriation process, including costs to tribes or others to prepare items for reburial or other treatment, assessing and cataloguing items, obtaining places to repatriate the items, and incidental expenses such as travel.
- (9~~ix~~) Restitution for lost, stolen, or damaged cultural items and ancestral remains.
- (10~~x~~) Pesticide histories and the need to conduct tests for pesticides and toxins in culturally appropriate ways, culturally appropriate corrective actions to reduce or remove contamination of remains and cultural items, or restitution if such corrective actions are unavailable.
- (11~~xi~~) Other measures mitigating harms caused to the tribes, including contributions and improvements to Native American programs and studies or other measures to

foster a greater understanding and appreciation of California Native American tribes, people, and culture, including, but not limited to:

(A~~1~~) Museums working with tribes to determine culturally appropriate exhibits.

(B~~2~~) Universities partnering with tribes on tribally led research and programing.

(C~~3~~) Acknowledgements of ancestral lands.

(D~~4~~) Apologies for wrongs committed towards California Native Americans.

(E~~5~~) The development and adoption of best practices for policies and procedures related to repatriation and the repatriation process.

(F~~6~~) The development and adoption of memorandums of understanding or other collaborative agreements for communications, partnerships, and other relationships.

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8016, Health and Safety Code ~~section 8016 (d)(8).~~

31014. Commission Determination

(a) If mediation is terminated or the parties cannot resolve the matter after meeting to discuss the mediator's advisory decision, the parties must notify the Commission in writing within 45 days to initiate the Commission Determination process. In this written communication, the parties shall not transmit a copy of the mediator's advisory decision, briefs, evidence, or other information shared during meditation to the Commission. The parties shall not include information from the mediator's decision in the parties' briefs or arguments as part of the Commission Determination.

(b) Upon the parties' notification that they are unable to resolve their dispute through mediation, Chief Counsel of the Commission will designate a Commission attorney or, if a Commission attorney is unavailable, an attorney from the Department of Justice to serve as a hearing officer subject to the same disqualification provisions for mediators set out in section 31009. The hearing officer shall rule on the admission and exclusion of evidence and advise the Commission on matters of law.

(c) Hearings will be before a ~~quorum~~ majority of the Commissioners and conducted consistent with Chapter 4.5 of the California Administrative Procedure Act, sections 11400, et seq. of the Government Code.

(d) A Commissioner who would be disqualified as a mediator on any of the grounds listed in section 31009 must recuse themselves from the hearing. ~~Such hearings will be closed to the public, and, to the extent permitted by law, evidence shall not otherwise be made public to~~

protect records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Commission, and/or another state or local agency. Such evidence includes information related to the location, description, and use of tribal cultural resources as described under section 21082.3 of the Public Resources Code, as well as records that relate to archaeological site information and reports in the possession of the Commission or other state agencies obtained during a consultation process between a California Native American tribe and the state or local agency consistent with section 7927.005 of the Government Code.

(e) At the completion of the hearing, the hearing officer shall assist the Commission to prepare a decision that will consider the facts as presented by the parties; the applicable law; tribal traditional knowledge, oral histories, documentation, and testimonies relative to other relevant categories of evidence as provided in Health and Safety Code section 8016 (d)(6); restorative justice principles described in section 31013; and the resolution and remedies. The Commission shall issue its final decision within 90 days after the hearing.

(f) The Commission's decision constitutes a final administrative remedy. Parties may seek judicial review by filing a case in a California superior court. A petition for review must be filed in a California superior court no later than 30 days after the issuance of the Commission decision.

(g) Until the issuance of a Commission decision, the parties shall retain the option and are encouraged to come to an agreement resolving all or part of their dispute.

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8016, Health and Safety Code; and Sections 114500, et seq., Government Code. ~~Government Code section 11126.~~

31015. Precedent Decisions

(a) The Commission may designate, as a precedent decision, any decision or part of any decision that contains a significant legal or policy determination of general application that is likely to recur.

(b) Once the Commission designates a decision or part of a decision as precedent, the Commission may rely on it or that part of it as precedent and the parties may cite such decision in their argument to the Commission and courts.

(c) The Commission may reverse in whole or in part the prior designation of a decision as a precedent decision.

(d) Notice of intent to designate or withdraw designation of a precedent decision shall be given with the notice of a Commission meeting. Before or during the scheduled Commission meeting, members of the public may submit written or oral comments for or against the proposed action, following the Commission's standard public comment policies and procedures. The Commission may decide the issue at that meeting or put the matter over to a subsequent meeting.

(e) If a final judgment of a court of competent jurisdiction reverses or declares invalid a precedent decision, the Commission shall promptly modify the precedent decision to conform in all respects to the judgment of the court. The modified precedent decision shall supersede the prior precedent decision for all purposes.

(f) All precedent decisions shall be posted on the Commission's website with the goal of transparency and ease of research. Precedent decisions may be redacted to protect confidential information including sensitive cultural resource information.

Note: Authority cited: Section 8016, Health and Safety Code; and Section 5097.94, Public Resources Code. Reference: Section 8016, Health and Safety Code; and Section 11425.60, Government Code-section 11425.60.