FEDERATED INDIANS OF
GRATON
RANCHERIA

March 28, 2024

Via Electronic Mail: tribal.consultation@nahc.ca.gov

Native American Heritage Commission
Attn: Raymond "Chuckie" Hitchcock, Executive Director
1550 Harbor Boulevard, Suite 100
West Sacramento, CA 95691

Re: Graton Rancheria's Comments on Proposed Mediation Regulations

Dear Executive Secretary Hitchcock,

On behalf of the Federated Indians of Graton Rancheria (Tribe), I submit the following comments to the Native American Heritage Commission (NAHC) concerning its proposed rulemaking on the mediation regulations to comply with the California Native American Graves Protection and Repatriation Act (CalNAGPRA).

The Tribe is a federally recognized sovereign nation. Our federally recognized status was restored in 2000 by the United States Congress and our traditionally and culturally affiliated territory includes what is now Sonoma and Marin Counties. The Tribe is very active in cultural and tribal cultural resources protection and preservation, and heavily engaged in repatriation efforts under the federal Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. Sec. 3001 et seq.). We are involved in repatriation efforts under CalNAGPRA and our Tribal Heritage Preservation Officer (THPO) sits on the University of California Systemwide Committee for NAGPRA and CalNAGPRA compliance. In addition, Lorelle Ross, Tribal Citizen and our former Vice Chair, sits on the Sonoma State University Campus-Wide Committee. Through strong leadership and action, the Tribe helped shape NAGPRA and CalNAGPRA implementation and compliance at the University of California. We hope this is also achievable for every California State University. Therefore, these proposed mediation regulations are very important to our Tribe, our citizens, and our ancestors. On April 4, 2022, we submitted comments to the NAHC on the initial regulatory proposal. We appreciate the efforts of NAHC staff and leadership in revising the draft regulations to address issues raised in our and other tribal comment letters. As we noted in our April 4, 2022, the NAHC held *one* listening session on the proposed regulations on February 24, 2022. This was during the National Association of Tribal Historic Preservation Officers annual conference. We asked for additional consultation in 2022 and we are now requesting NAHC conduct an additional round of tribal consultation after reviewing this round of comments. Consultations held in good faith and in a

meaningful and timely manner are the hallmarks of the NAHC tribal consultation policy and AB 923 (2022).

The Tribe's comments on the revised proposed regulations are outlined below.

1. Addressing the Primacy of Federal NAGPRA

Federal NAGPRA was enacted in 1990. CalNAGPRA, which followed in 2001 and has since been amended several times, was intended to serve as a complement to federal NAGPRA and flesh out the required processes for state institutions and requesting parties. It also provided a state-law based repatriation framework for instances where federal NAGPRA would not apply. CalNAGPRA does not, however, supersede or override federal NAGPRA. Where federal NAGPRA applies, it preempts state law to the extent a conflict may arise. Accordingly, the proposed regulations should be explicit that federal NAGPRA, where applicable, is *controlling*. This should be added to Chapter 1, such as by adding language to proposed Sec. 29001 concerning the purpose of the regulations.

Additionally, changes and clarifications should be made to proposed Sec. 29006. It is not clear what is the purpose of Sec. 29006(a). Is it primarily intended to be a notice provision, i.e. to inform the NAHC if disputing parties are pursuing the federal NAGPRA Review Committee dispute resolution process? And, if so, why does this provision appear to *require* disputing parties to submit to the NAHC mediation process *even if* they elected to pursue a federal dispute resolution process (which could be via the Office of Hearings & Appeals, NAGPRA Review Committee, arbitration or a federal court)?[1] If disputing parties mutually agree to utilize the federal NAGPRA Review Committee process, or other federal process, then the NAHC should not require those parties to also submit to the NAHC mediation process.

Proposed Sec. 29006(b) is similarly confusing. As currently drafted, this subsection would give the NAHC discretion to continue hearing a dispute even if the same dispute is being heard through a federal dispute resolution process. We are concerned that pursuing both the state and federal dispute resolution tracks simultaneously will lead to confusion and inconsistent outcomes. The section must make *clear* that 1) the NAHC cannot issue a decision that is contrary to a federal NAGPRA decision, and 2) in the event NAHC issues a decision prior to the issuance of a federal NAGPRA decision, and the two decisions conflict in some manner, then the federal decision controls.

2. Regulations or Procedures

The mediation "regulations" are being proposed by the NAHC in order to comply with California Health & Safety Code §8016(d)(8). Section 8016(d) provides criteria for what constitutes a dispute; identifies proscribed timeframes; allows the NAHC or a mediator to resolve a dispute; mandates that deference shall be given to tribal traditional knowledge, oral

[1] "If a state agency or state-funding museum is also subject to the federal Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.), and it cannot determine the most appropriate requester, then the parties ***must submit their dispute under this section***, otherwise consistent with federal law." Proposed Sec. 29006(a) (emphasis added).

histories, documentation, and relevant testimony; and provides for a final administrative decision by the NAHC if mediation fails but allows for judicial review no later than 30 days after the NAHC final decision. Section 8016(d)(8) provides: "No later than June 30, 2021, the commission shall develop and adopt mediation procedures that will recognize the need for mediators with qualifications and experience appropriate to a dispute's circumstances. Dispute procedures may incorporate aspects of restorative justice practices." (emphasis added).

CalNAGPRA requires mediation procedures. The NAHC is proposing mediation "regulations." NAHC should carefully determined it has authority for issuing regulations, rather than procedures, so that the agency and consulting tribes do not expend limited time and resources on pursuing regulations only to find out later in the process that regulations have not been properly authorized under state law. Should the NAHC determine, after conducting due diligence to ensure it is not developing an underground regulation, which are void in California, that mediation procedures will be adopted, we recommend the NAHC re-engage in meaningful tribal consultation on the issuance of procedures instead. To be sure, clarity on what is required is needed. The NAHC must be transparent, engage with the tribes in a timely manner, with the ultimate goal to resolve disputes in a manner that enhances and expedites timely repatriation.

3. Mediator Qualifications

Like the qualifications as outlined in the 2021 University of California Policy (UC Policy) pursuant to CalNAGPRA (§ 8026(d)(2)), for the All Systemwide Committee members, any mediator must "have demonstrated, through their professional experience, the ability to work in collaboration with Native American tribes successfully on issues related to repatriation or museum collection management." In addition, CalNAGPRA recognized the need for mediators to have "qualifications and experience appropriate to the circumstances of these disputes" which must explicitly comply with the requirements of CalNAGPRA and also align with the UC Policy and future CSU policies. The regulations, specifically proposed Sec. 29010, should mirror the language from these authorities. Deviations from the law and the UC Policy will create confusion, delays and ultimately frustrate the policies and hopes of CalNAGPRA.

Additionally, proposed Sec. 29010 should define what constitutes a "certified mediator." This section should further require that a Commission staff member selected as a mediator also be certified. Moreover, while this section refers to a list of mediators with whom the NAHC has contracted, it does not explicitly require the NAHC to keep any mediators under contract. This requirement should be added. Last, proposed Sec. 29010(e) should allow tribal parties one (1) chance to request disqualification of a mediator without needing to specify the grounds. There may be situations where a tribe does not want to disclose sensitive information pertaining to why the mediator is being disqualified, so allowing one "free pass" helps protect tribally sensitive information without creating the potential for abuse.

4. Restorative Justice Principles

We appreciate the NAHC's inclusion of restorative justice principles in the proposed regulations. Proposed Sec. 29011(b)(3) provides that the mediator should consider, among other principles, "[t]he 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." Our only concern is whether this information must be reduced to writing and, if so, whether it will be protected from disclosure under the Public Records Act. The preferred approach would be for a tribal party to verbally disclose this information to the mediator so there is no risk of disclosure.

5. Issues Related to the Commission Adjudication Process

The procedures laid out in proposed Sec. 29014 for the Commission's adjudication process, in the event mediation is unsuccessful, are quite extensive and could be simplified. For example, it is not clear why there exists an option for the Commission to refer the matter to the California Office of Administrative Hearings (OAH). OAH lacks any substantive experience or expertise in tribal cultural resource issues and channeling a dispute through that body seems like it could draw out the process and delay resolution. It would be helpful if the NAHC's could explain its rationale for including OAH.

We are also concerned that some of the timelines pertaining to a Commission hearing, set forth in proposed Sec. 29014(g)(vii), will create an unduly long process. In particular, the 100 days, or longer, by which the Commission must issue a final decision following rejection of a proposed decision, is too long. See proposed Sec. 29014(g)(vii)(9). We also note that there appears to be a typo in this subsection. We believe the language "The Commission shall issue its final decision within 100 days after the rejection of the final decision" should be "The Commission shall issue its *final* decision within 100 days after the rejection of the *proposed* decision." (Emphasis added.)

6. Precedential Decisions

While we agree that a body of precedential decisions will be helpful to disputing parties, we have some concerns with proposed Sec. 29015. Subsection (a) provides the Commission authority to also designate as precedential "any precedent decision issued by another California state government agency." What is the goal of this provision? And what other California state government agencies would issue decisions that are relevant in this context? Are the regulations referring to CalNAGPRA determinations made by a state museum or educational institution? Much more clarification is needed.

Additionally, the hearing mechanism for whether or not a decision should be precedential is a bit of an oddity. See Subsection (d). Are there examples where other adjudicatory bodies hold public hearings on whether a decision should be precedential? What is the rationale for doing so in this context? It seems cleaner for all Commission decisions to be precedential, with sensitive information redacted or removed from the public version of the decision.

7. General Comments about the Proposed "Regulations"

Certain terminology or language is vague and warrants clearer explanation or deletion. For example, in proposed Sec. 29010(c)(3), potential mediators are disqualified if they or "their spouse or minor children, is employed by, a member of, or *otherwise affiliated* with a party." (Emphasis added.) The phrase "otherwise affiliated" is unduly vague and could be broadly

construed to disqualify any mediator who has a professional or personal relationship with an individual employed by a party. Given that the California tribal cultural resource world is small and THPOs, for example, have a statewide network, we recommend either deleting "otherwise affiliated" or caveating it with additional language requiring that "such affiliation would make the mediator unable to fairly and impartially facilitate resolution of the parties' dispute."

Additional legal authority should be provided in proposed Sec. 29103. This section concerns the mediation process and provides that all agreements entered into pursuant to mediation "must allow for Commission enforcement." This section should include a cite to California Health & Safety Code Section 8029, which is the statutory provision authorizing the Commission to assess and collect civil penalties for noncompliance with CalNAGPRA.

Proposed Sec. 29013 sets forth the briefing and mediation schedule. It is very difficult to follow. We recommend the NAHC break down the schedule into specific steps and/or provide some sort of visual or flow chart. For example, the filing timelines for Commission hearings, set out in proposed Sec. 29014(g)(vii), are easier to understand.

In Sec. 29014, there are two subsections that require basic reformatting. First, the subsection concerning what actions the Commission may take following an administrative officer or administrative law judge's proposed decision should be enumerated as Sec. 29014(h). Right now it is listed as (iv) within subsection (g), which does not make sense since subsection (g) sets forth the technical requirements for briefs. Pulling it out to constitute a new subsection (h) will require renumbering all the possible actions that are listed, as well as the remaining subsections. Similarly, the subsection currently listed as subsection (g)(vii), concerning the procedures should the Commission decide to reject a proposed decision hear a matter on the record, should either constitute new subsection (i) or otherwise be properly formatted to align with the first recommended formatting change in Sec. 29014.

There are also several typos or wording issues in the proposed regulations, specifically:

- In Sec. 29010(b)(2), "o" should be "or"
- In the section concerning restorative justice principles, specifically Sec. 29011(b)(11)(i), the proposed language is currently "museums working with tribes to *find* culturally appropriate exhibits." (Emphasis added.) The word "find" seems odd because while exhibit can refer to singular items, it can also refer to a curated display of a collection. We recommend the regulations use the word "determine" instead.
- In Sec. 29011(b)(11)(iv), "commitment" should be "committed"

We appreciate the NAHC's time and effort to ensure our ancestors are protected and returned. If you have questions, please contact our legal counsel, Maureen Geary at mgeary@jmandmplaw.com or Bethany Sullivan at bsullivan@jmandmplaw.com

Sincerely,

Greg Sarris

Greg Sarris, Chair
Federated Indians of Graton Rancheria

PECHANGA BAND OF INDIANS
Pechanga Indian Reservation

OFFICE OF THE GENERAL COUNSEL
Post Office Box 1477 • Temecula, CA 92593
Telephone (951) 770-6000 Fax (951) 695-1778

General Counsel
Steve Bodmer

Deputy General Counsel
Mark Vezzola

Senior Associate General Counsel
Lindsey Dollman

Associate General Counsel
Cole Bauman

March 29, 2024

VIA EMAIL tribal.consultation@nahc.ca.gov

Chairperson Pagaling and Commissioners
Native American Heritage Commission
1550 Harbor Boulevard, Suite 100
West Sacramento, CA 95691

Re: Pechanga Band of Indians Comments on Final Draft CalNAGPRA Dispute Resolution Mediation Regulations

Dear Chair Pagaling and Commissioners:

These comments are submitted on behalf of the Pechanga Band of Indians ("Tribe"), a federally recognized and sovereign Indian Nation, regarding the above-titled document. The Tribe has been actively participating in repatriation processes, both formally and informally, for approximately 20 years. The Tribe currently has representatives on both the UC Systemwide Repatriation Committee and the UC Riverside Campus Committee. The Tribe has extensive experience on repatriation policy in California as it was one of the original sponsor tribes with Emeritus Assemblyman Steinberg on the original iteration of CalNAGPRA in 2001 (AB 978), participated in the subsequent amendments to CalNAGPRA statues, participated in consultations concerning the UCOP Systemwide Policy, and participated in State legislative and policy hearings on repatriation, including the recent AB 389 concerning CSU compliance with federal NAGPRA, CalNAGPRA including policy on research concerning NAGPRA-eligible Native American cultural items held by CSU institutions. The Tribe is an expert in its own culture and repatriation policy.

Background & Basic Insufficiency of Proposed Regulations

The Tribe appreciates that the Native American Heritage Commission (NAHC) is progressing to implement procedures concerning CalNAGPRA, however at this time the Tribe asserts that this Final Draft Regulations package is not ready for rulemaking or finalization of any practice or policy under State law, including a formal Administrative Procedures Act (APA) Rulemaking process by the Office of Administrative Law (OAL). This Regulation must be subject to further tribal consultation and expert analysis by attorneys and practitioners with expertise in repatriation law and policy, including potential analysis and legal opinion on the federal Indian law issues, federal and State law conflicts, supremacy of federal law, issues of federal and State agency authority over repatriation

matters and federally recognized tribal rights and authority that this State policy appears to be impeding upon.

On December 6, 2023, the Department of the Interior publicly announced its publication of final regulations to improve implementation of NAGPRA. On January 12, 2024, the revised federal regulations on NAGPRA became effective.[1] These revised federal Regulations are arguably the most extensive modernization of federal repatriation policy since it was first implemented in 1990. On January 19, 2024, only 7-days after the new federal regulations became effective, the Commission voted to circulate these Regulations.[2] It is clear from review of the document that there has been little to no effort to ensure that this language does not run afoul the revised federal regulations. For example, the definition of California Native American Tribes, the standards for review and determinations on cultural affiliation, the requirements on duty of care, the removal of culturally unidentifiable (CUI), the federal dispute resolution procedures, and the expedited timelines need to be analyzed and understood concerning the repatriation processes and steps that may be subject to this mediation regulation. Although it may seem that these changes in federal law may not intersect with a State mediation process, they do. The very scope of who can bring disputes, the topics for dispute, and the ripeness of a dispute are affected by this change in the federal NAGPRA regulations. This must be analyzed including a thorough analysis of definitions related to repatriation in California, including the definition of Tribes as it pertains to CalNAGPRA and federal law. To not do so is not only misleading or confusing, but is likely a basis for rejection by the OAL in any Rulemaking effort.

There is no definition of Tribe or "Requestor" in these Regulations. The CalNAGPRA statute uses "California Native American Tribe" the definition that includes non-federally recognized groups, but that cannot simply be transplanted and used here because of federal law (NAGPRA), which does not extend to non-federally recognized groups.

Lack of definitions is a basic omission that is evidence these Regulations are not ready for any rulemaking or codification process. It is important to note that the State legislature has spoken numerous times over the years since 2001, in both the legislative intent and actual State repatriation statutes, concerning the interplay of State law and policy on repatriation with federal law and policy to *ensure that the state's repatriation policy must be applied consistently with the provisions of the Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 et seq.).*

The NAHC only held one "listening session" on the previous version of this document and only two "listening sessions" on this version of the Regulations, exactly 7 days apart from one another. This is not thorough or meaningful consultation by the State of California, especially by a State agency that should be setting the standard for tribal consultation. In addition, the "Summary of Tribal Comments" on the NAHC website is embarrassingly

[1] Both the Final Rule and the revised Regulations can be found at (note anytime the regulations use the term "Indian Tribe" it should be understood to mean a Federally recognized Indian Tribe): https://www.nps.gov/subjects/nagpra/regulations.htm

[2] https://nahc.ca.gov/proposed-dispute-resolution-mediation-regulations/

scant, sentences pulled out of context, and generally unhelpful. The NAHC continually misuses the concept of confidentiality as a basis for keeping tribes uninformed about its actions and the basis for its actions. From the Tribe's experience there was no explanation during the listening sessions, on the website, or in any written document as to the legal authority and/or origination source for much of this language, including but not limited to the actual mediation process itself, the Principles of Restorative Justice, the Final Commission Determination section, and the Precedent Decisions section. Tribal governments are entitled to be provided the basis and reasoning for State actions that potentially impede upon their sovereignty. The NAHC and California Natural Resources Agency (CNRA) has not only done a poor job of tribal consultation, but is potentially infringing upon tribal sovereignty with these Regulations.

Until tribal governments are satisfied as to the legal basis and justifications for the language contained in the Regulations, including but not limited to the requirements of the California Administrative Procedure (APA)[3] such as Necessity,[4] Authority,[5] Clarity,[6] Consistency,[7] and Nonduplication,[8] as well as the State policy and practice precedent your agency is setting concerning repatriation, the Tribe cannot support this Regulation.

Purpose and Scope of the Regulations

It is the Tribe's understanding that these Regulations proffered by the NAHC are to comply with Cal. H&S Code§ 8016(d)(8), which states:

> No later than June 30, 2021, the commission shall *develop and adopt mediation procedures* that will recognize the need for mediators with qualifications and experience appropriate to a dispute's circumstances. Dispute procedures may incorporate aspects of restorative justice practices.

The Statute specifically calls for "mediation procedures," and not Regulations. The Tribe understands that the State may aim for or be required to implement Regulations for CalNAGPRA in general, but that is more extensive than the statutory section the NAHC is aiming to fulfill with this Regulation. If the NAHC is aiming for Regulations instead of "procedures," this language is woefully unskilled and ineffectual concerning definitions of terms, clarity, consistency with other statutes and federal law serving the same purpose, including the actual federal repatriation dispute resolution process. It does not even have a definitions section. More complete CalNAGPRA Regulation language must be drafted to go along with these "mediation procedures," otherwise this document will be rejected by OAL and the Tribe will object to its submittal to OAL. We advise the NAHC to consult with OAL as to the permissible necessity, consistency, and scope of these mediation procedures, lest tribal governments will be misled about NAHC authority as well as the purpose and scope of mediation under CalNAGPRA.

---

[3] Cal. Govt Code §§11340-11361
[4] Cal. Govt Code 11349(a)
[5] Cal. Govt Code 11349(b)
[6] Cal. Govt Code 11349(c)
[7] Cal. Govt Code 11349(d)
[8] Cal. Govt Code 11349(f)

Consistency and Nonduplication with Federal Law

Federal NAGPRA was enacted in 1990. CalNAGPRA, which followed in 2001 and has since been amended several times, was intended to serve as a complement to federal NAGPRA and aid in the implementation of the federally required processes for state institutions and requesting parties. CalNAGPRA employs similar definitions and complementary processes as the federal law. It also provided a state-law based repatriation framework for instances where federal NAGPRA would not apply. CalNAGPRA does not, however, supersede or override federal NAGPRA. Where federal NAGPRA applies, it preempts state law to the extent a conflict may arise.

NAGPRA only requires consultation with Federally recognized Indian Tribes. Further, federally recognized Indian tribes are the only parties with standing to make requests for repatriation under NAGPRA. There is no process under the federal law in which a museum or agency can stay, stall, or halt a repatriation based upon a request from a non-federally recognized group. Further, there is no authority within CalNAGPRA for a non-federally recognized group to make a "competing claim" to a federally recognized tribe's Request for Repatriation.

Further, with regard to CalNAGPRA, the law clearly states that repatriation under CalNAGPRA can only proceed **after** completing the applicable requirements of federal NAGPRA (Cal. H&S Code Section 8016(a)(5)). Furthermore, CalNAGPRA does not provide a non-federally recognized group the legal right to make a repatriation claim unless the following has occurred: 1) the federal NAPGRA has been completed, and; 2) the repatriation request has the concurrence of the United States Department of Interior (Cal. H&S Code Section 8016(a)(5)). CalNAGPRA and NAGPRA are intended to run concurrently, however, CalNAGPRA does not contain a legal right for non-federally recognized tribes to make claims, as this impedes the completion of NAGPRA. There is no legal process or method for a non-federally recognized tribe repatriate under either NAGPRA or CalNAGPRA unless no culturally affiliated federally recognized tribes submit Requests for Repatriation on the collections/items at issue.

Accordingly, the proposed Regulations should be explicit that federal NAGPRA, where applicable, is *controlling*. This should be added to Chapter 1, such as by adding language to proposed Sec. 29001 concerning the purpose of the regulations. These legal realities concerning the interplay between NAGPRA and CalNAGPRA must be addressed throughout these Regulations as they go to the actual disputes and parties to the disputes that may be submitted to the NAHC and mediated under these Regulations.

Additionally, changes and clarifications should be made to proposed Sec. 29006. The purpose of Sec. 29006(a) is not clear. This provision appears to *require* disputing parties to submit to the NAHC mediation process *even if* they elected to pursue a federal dispute resolution process.[9] If disputing parties mutually agree to utilize the federal NAGPRA

[9] Which could be via the Office of Hearings & Appeals, NAGPRA Review Committee, arbitration or a federal court

Review Committee process, or other federal process, then the NAHC cannot not require those parties to also submit to the NAHC mediation process. This is a clear overreach by the NAHC, inconsistent with the CalNAGPRA statute and federal law. This will continue to cause confusion as to NAHCs authority and role with regard to repatriation.

Proposed Sec. 29006(b) is similarly confusing. As currently drafted, this subsection would give the NAHC discretion to continue hearing a dispute even if the same dispute is being heard through a federal dispute resolution process. We are concerned that pursuing both the state and federal dispute resolution tracks simultaneously is in violation of legal principles of necessity and consistency. Practically, it will lead to confusion and inconsistent outcomes. The section must make *clear* that 1) the NAHC cannot issue a decision that is contrary to a federal NAGPRA decision, and 2) in the event NAHC issues a decision prior to the issuance of a federal NAGPRA decision, and the two decisions conflict in some manner, then the federal decision controls.

There may also be an issue as to whether a State agency can even legally employ a mediation process on repatriation when there is a federal process, or what the scope of that mediation process can be, even if it currently appears in the CalNAGPRA statute.

Restorative Justice Principles §29011

Unfortunately, this section seems to miss the mark on the intention of §8016(d)(8). Many of the examples of restorative justice principles are actually basic tenants and concepts of repatriation law and policy that should automatically be part of any mediation. The Tribe asserts that §8016(d)(8) intended that the mediation process *itself* would employ mediation techniques that follow restorative justice 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. It's not simply about actual tangible results, but restorative justice is equally about empowering the parties to acknowledge the actual elements of the dispute, share the experience of the dispute, and collaboratively come to a resolution that fulfills their own restoration in terms of rebuilding trust and preventing the dispute from happening again. Section 29013(f) clearly runs afoul of restorative justice. There should be no language that provides authorization for a mediator to render a decision. This defeats the entire purpose of mediation and turns the process into an arbitration. Restorative justice mediation is providing the space for parties to come to an agreement themselves collaboratively. Yes, this process may take longer, but it goes further towards healing and restoration. This Regulation language clearly fails to employ methods of restorative justice in this mediation process.

NAHC Authority and Roles Regarding Repatriation

Another glaring issue that does not appear to have been examined or resolved by the NAHC as a State agency, is the potentially conflicting roles this State agency is statutorily required to take, is engaging in separate and apart from any statutory authority, or is barred from engaging in concerning repatriation matters. The CalNAGPRA statute from its origination had an intention to make the NAHC a State repatriation oversight Committee. That

intention was not completely clear at the time and it since morphed and become even more unclear. In addition, the Commission has made no overt attempts to organize itself as an agency to handle the various duties and roles it has been assigned. The NAHC has the role of assisting both tribes and agencies by serving as a clearinghouse for inventories and summaries and assisting with the listing and identification of potentially culturally affiliated tribes. The Agency has also taken on the role of serving as an enforcement of agreements and interpreter of the law. Further, it has the statutory role of serving as potential mediator and assisting in dispute resolution, including keeping records of mediations and potentially fact-finding. Lastly, it has the role of adjudication of issues amounting to a final administrative remedy before a party is entitled to seek a remedy through the courts. All of these administrative roles are vastly different and can very quickly become laden with conflicts and potential violations of due process and confidentiality, especially with the small staff team at the Agency. The Tribe has seen no plan from the NAHC as to how it intends to keep its enforcement roles separate from its adjudication roles or how it intends to safeguard its actions from prejudice.

For example, it is a well-established tenant of administrative adjudication that the same teams that perform investigations and fact-gathering cannot assist with adjudication of a matter. At this time the Tribe does not understand how the NAHC itself, meaning staff or individual Commissioners can ever mediate a conflict themselves without running into conflict and due process issues. It seems both from §8016(d)(8) itself and the daily activities of the NAHC that its role is simply to provide mediators and serve as a clearinghouse for records. These concepts need to be understood, legally clarified, and then upheld to in the Regulation language itself. This language proffered arguably expands beyond legally permissible bounds and/or does not separate duties and roles to meet legal requirements on due process and administrative rules and best practices. The Tribe does understand that some of these issues may be statutorily driven and may only be resolved by actual clarification of statutory language, however these issues must be daylighted by the NAHC, as a State agency, so it and the tribes understand the potential administrative organizational structures, due process, and authority of the NAHC in terms of repatriation issues. Moreover, there may be conflict and due process issues with the NAHC promulgating these Regulations themselves as they are the adjudicating body.

Relatedly, time must be spent parsing out when the Regulations should use the term Commission and Commission Departments (Advisory, Enforcement or Adjudicatory). Refinement and precision will be of tantamount importance here as the NAHC as an agency has potentially conflicting roles with regard to repatriation matters. This must be addressed before a competent and fair set of regulations can be promulgated.

In fact, the adjudication process itself should not be part of these regulations as it is outside the scope of these "mediation procedures" and will further complicate the Agency's overlapping duties. This must be a separate regulation and should be removed from this draft, and promulgated through a separate set of regulations.

We would also be remiss if we did not mention that there are already issues with NAHC staff providing incorrect legal interpretations of CalNAGPRA to museums and agencies, including the UC and CSU systems. The Tribe has directly run into two recent

circumstances where the Tribe has had to engage in legal remediation efforts with both UCLA and CSU campus' concerning ill-informed and incorrect information on repatriation processes from NAHC staff, which directly impeded federal law and the Tribe's sovereign rights. The Tribe does not have confidence that the NAHC, as an agency, can handle the technically complex navigation of State law and federal law, not to mention the overlapping and potentially conflicting roles of NAHC staff.

We thank the NAHC for this opportunity to submit comments. We urge the NAHC to address the issues set forth in our comment letter and to further revise these Regulations to comply with the CalNAGPRA statute itself, federal law, and the APA so that any regulations or procedures are clear, necessary, and legally valid.

Sincerely,

Steve Bodmer
General Counsel

cc: Melanie O'Brien, National NAGPRA
Wade Crowfoot, Secretary for Natural Resources
Geneva Thompson, Assistant Secretary Tribal Affairs

Rincon Band of Luiseño Indians

One Government Center Lane | Valley Center | CA 92082
(760) 749-1051 | Fax: (760) 749-8901 | rincon-nsn.gov

VIA ELECTRONIC MAIL ONLY
tribal.consultation@nahc.ca.gov

March 28, 2024

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

RE: COMMENTS ON PROPOSED FINAL DRAFT CalNAGPRA DISPUTE RESOLUTION MEDIATION REGULATIONS

Dear Commissioners:

This comment letter is written on behalf of the Rincon Band of Luiseño Indians ("Rincon Band" or "Tribe"), a federally recognized Indian tribe, in response to the updated, Final Draft CalNAGPRA Dispute Resolution Mediation Regulations (the "Regulations") discussed at the Native American Heritage Commission ("NAHC") virtual listening sessions held on March 6 and March 13, 2024. The Rincon Band commends the NAHC's commitment to a formal, transparent process and appreciates the opportunity to provide the comments below. Our perspective is informed by the Tribe's unique political status as a federally recognized sovereign in a government-to-government relationship with the United States and the State of California.

The newly added Section 29006, Federal Dispute Resolution, subsection (a) should be clarified to strike "or 'immediately after' requesting assistance from the Native American Graves Protection and Repatriation Review Committee if such request is made after the initial submission to the Commission" and replaced with "or 'within seven (7) days of' requesting assistance from the Native American Graves Protection and Repatriation Review Committee if such request is made after the initial submission to the Commission." The words "immediately after" should include a time certain for notice to the NAHC.

In addition, Section 29006 (b), with respect to discretion to grant requests for suspension of proceedings pending completion of the federal dispute resolution process, the Regulation should be revised to strike NAHC's discretion to suspend and replace it with mandatory suspension and deference to the federal process. Deference to the federal process would not only avoid the necessity of further clarification to the Regulations which would necessitate inclusion of criteria for the exercise of the NAHC's discretion to suspend but may also moot the CalNAGPRA dispute resolution process altogether. There are numerous examples where deference to the federal process satisfies the policy goals of expeditious repatriation set forth in both the Native American Graves Protection and Repatriation Act (25 U.S.C. Sec. 3001 *et seq.*) and CalNAGPRA.[1] Finally, CalNAGPRA

[1] https://www.federalregister.gov/documents/2021/11/08/2021-24313/notice-of-inventory-completion-boston-university-boston-ma; https://www.federalregister.gov/documents/2019/11/27/2019-25734/notice-of-inventory-completion-university-of-california-santa-cruz-santa-cruz-ca;

Section 29007 (b) with regard to the parties' notice to the NAHC of meeting completion, a time certain should be added to this section, e.g., "[t]he parties shall notify the Commission within seven (7) days upon completion of this meeting ...."

Section 29010 (b) should clarify that a "certified mediator" means a person with training and experience that is routinely required to serve on California state court panels to receive referrals for court-ordered mediation. We recognize that California has no statewide system for qualifying or licensing mediators, however, the state court certification standards applicable to "certified mediators" should be applicable to any NAHC staff designated by the NAHC as mediators.

Section 29010 (e) disqualification of designated mediators, the Regulations should allow disqualification "for cause" at any time before the conclusion of the mediation.

Section 29014 (f) should clarify that Commissioners, under Section 29010 (b), are disqualified from serving as mediators, and only NAHC staff may serve or assist designated mediators. In addition, we question whether the phrase "or in another matter involving any of the same parties," is workable criteria. We are concerned that multiple matters "involving any of the same parties" could come before the NAHC which could disqualify any number of Commissioners over time.

We sincerely appreciate the dedication, leadership and expertise of the NAHC and the hard work that has gone into the final draft of the Regulations. If you have additional questions or concerns, please do not hesitate to contact Denise Turner Walsh, Rincon Attorney General, at dwalsh@rincon-nsn.gov. Thank you.

Respectfully yours,

RINCON BAND OF LUISEÑO INDIANS

Bo Mazzetti
Tribal Chairman

Copy to: Denise Turner Walsh, Attorney General
Cheryl Madrigal, Tribal Historic Preservation Officer

---

https://www.federalregister.gov/documents/2021/04/22/2021-08399/notice-of-inventory-completion-california-department-of-transportation-sacramento-ca; https://www.federalregister.gov/documents/2021/04/22/2021-08397/notice-of-inventory-completion-california-state-university-sacramento-sacramento-ca; https://www.federalregister.gov/documents/2019/08/05/2019-16683/notice-of-inventory-completion-los-angeles-county-museum-of-natural-history-los-angeles-ca.

MIWOK United Auburn Indian Community
MAIDU of the Auburn Rancheria

Gene Whitehouse, Chairman | John L. Williams, Vice Chairman | Gabe Cayton, Secretary | Jason Camp, Treasurer | Leonard Osorio, Council Member

CONFIDENTIAL – Information Subject to the Protection of State Law

March 29, 2024

Reginald Pagaling
Chair
Native American Heritage Commission
1550 Harbor Blvd, Suite 100
West Sacramento, CA 95691

Subject: The United Auburn Indian Community of the Auburn Rancheria's Comments to the NAHC's Final Draft CalNAGPRA Dispute Resolution Mediation Regulations

Dear Commission Chair Pagaling and Commissioners,

The United Auburn Indian Community (UAIC) is comprised of Miwok and Southern Maidu (Nisenan) people. The Tribe's geographic area of traditional and cultural affiliation encompasses all of Amador, El Dorado, Nevada, Placer, Sacramento, Sutter, and Yuba counties, as well as portions of Butte, Plumas, San Joaquin, Sierra, Solano, and Yolo counties. We write in response to the Commission's request for comments on its draft CalNAGPRA Dispute Resolution Mediation Regulations.

CalNAGPRA has been critical to the success of our Tribe's repatriation efforts to date. As a result, we want to ensure that the draft regulations build upon and strengthen existing repatriation processes. Based on our review, we believe that these dispute resolution mediation regulations will do that by bringing much needed enforceability to the repatriation process. In general, the new regulations look good, and we were pleased to see that so many of the comments from our 2022 comment letter were incorporated into the new draft. However, there does need to be greater clarity with respect to the role of staff versus the role of Commissioners in the dispute resolution/mediation process. We also believe that there is an opportunity to strengthen the framework for restorative justice and have identified a few technical comments and revisions that will help accomplish that goal.

I. Role Clarification

In general, it is not always clear which responsibilities are carried out by Commission staff versus the ones that are carried out by Commissioners. For example, §29004 *Commission Notification to Parties to Dispute* states that, within 14 days the Commission will provide

the involved parties with notice of the dispute." Given the short timeline, it seems likely that this notification will be sent by Commission staff, but the regulations should be clear. We do not want there to be an argument that the Commission must meet and take formal action within the fourteen-day window. If Commission staff will be sending the notice, it would be helpful to clarify which staff have been delegated that authority.

Similarly, §29007 *Required Meeting of the Parties*, states that, " . . . the Commission shall serve upon all parties identified therein (1) a copy of each submission and (2) a notice informing the parties..." This action also seems like something that would be carried out by staff rather than by Commissioners. Because §29003(c) *Confidentiality* clearly distinguishes between Commissioner and Commission Employee, it seems reasonable that the remainder of the regulations could do so as well. Without that distinction between Commissioners and Commission staff, the mediation process is confusing for Tribes and Museums who are navigating it. The lack of clarity may also undermine the timelines established by the regulations as described above. For these reasons, the regulations should distinguish between actions that will be taken by the Commission and those that may be carried out by staff.

II. Additions to Restorative Justice

Thank you for incorporating the Tribe's request to include language on restorative justice. We were very pleased to see it in the revised draft regulations. This guidance is critical to moving repatriation forward in a good way that actually heals descendant communities. As we have completed repatriations, we have observed four key areas that are crucial to a repatriation process informed by restorative justice. We respectfully request that the Commission add them to the restorative justice practices listed in §2901d *Restorative Justice Principles*:

- **Due diligence for complete physical repatriation and documentation of Tribal Ancestors and Cultural Items:** Museums should exercise due diligence to locate all missing, in-use, stolen, or damaged Tribal Ancestors and cultural items.

  As we have completed repatriations, each repatriation has a list of what is not being returned. These lists can be quite substantial. Up to 25% of the Ancestors and cultural items that should be present are missing, lost, stolen, de-accessioned (thrown away), or otherwise not present. Most museum staff consider the mere provision of such a list to be an adequate fulfillment of their duties with respect to repatriation. However, it is not adequate to us. We would like to see museum staff actively look for these missing Ancestors and cultural items. For example, Museum staff should be contacting research labs to coordinate the return of samples that were taken, reviewing publications to see if missing Ancestors and cultural items were simply loaned out and not returned (since many museums do not track their loans), and they should be keeping a record of this work.

  We spoke with a Repatriation Coordinator who was making a list of prior archaeology students and getting in touch with them, since it was common practice for archaeology students who participated in an excavation to take objects home from that excavation. Typically, these "gifts" or "souvenirs" were not recorded in catalogs, it was just a

common practice. Similarly, we have received many of these cultural items back from members of the public who return them when a grandparent who participated in the dig passed away. We were so pleased that this Repatriation Coordinator was doing that work, but out of 50+ active consultations, she is the only Repatriation Coordinator doing that type of due diligence. It is well known within the archaeological community that this type of "gifting" of our Tribal Ancestors and cultural items occurred, but because it was done without paperwork, it has simply been ignored to date. The regulations should support, if not require, similar efforts throughout the state.

Similarly, we have found that museums typically ignore collections of Ancestors and cultural items that are held by faculty and staff, labs, or departments outside of Anthropology. At best, they may require self-reporting. However, even such self-reporting, with no clear Human Resource penalties or consequences for faculty and staff who violate federal and state repatriation laws, leads to an organizational culture of tacit approval for "business as usual" that results in incomplete repatriations. We have come to realize that many museums plan to repatriate only those Ancestors and cultural items that they are not using for teaching, research, or display. Ancestors and cultural items that are in use are simply not reported, and so the use of those Ancestors quietly continues. Museums leave those Ancestors and cultural items listed as missing or simply leave them off their inventories and summaries entirely.

Finally, the return of damaged, altered, and incomplete Tribal Ancestors and cultural items is also frustrating and a failure of restorative justice. We frequently find that an item is present, but has been damaged, such as slices that are cut out of obsidian items so that obsidian hydration could be done or bones that are missing because of destructive analysis that was performed. We have also received Ancestors who were mounted and labeled for display, that still exhibit wiring and pins. Most cultural items have been painted with numbers and labeled. We have also fought with museums for decades regarding respectful handling of our Tribal Ancestors when museums have insisted that inspections and inappropriate handling *must* be done in order to repatriate. Part of what is most frustrating is that this damage and desecration is not reflected anywhere in the repatriation paperwork. It feels as if the documentation process in repatriation continues to be subverted. The documentation process *should* be used to document these types of harms so that we can have restorative justice. There *must* be an avenue for institutions and Tribes to be able to report these practices, or else we will continue to have this white-washing and erasure perpetually embedded in repatriation paperwork.

- **Due diligence on informing and offering to correct physical hazards associated with the use of poisons, pesticides, and other contaminants**: In the past, museums typically placed heavy metal pesticides (including mercury, arsenic and cyanide) as well as other harmful pesticides on basketry, regalia, and other cultural items. Federal NAGPRA requires museums to report such treatments, when they are known.

  However, we have found that most museums have addressed this issue of contamination by deciding to *not* prepare any pesticide histories (even though there is general common knowledge that such treatments have occurred). Museums inform Tribes that they do not

know of any treatments when the reality is that museums simply have not done the due diligence (i.e., compiling a pesticide history) or tried to identify those contaminants. Many museums are aware that these contaminants were used, but they fail to inform Tribes of this information. This failure puts Tribal staff and members at risk of harm from exposure to these contaminated items during the repatriation and reburial processes or during cultural use.

A few museums have adopted the opposite approach and will inform us that *everything* is contaminated with *every form of contaminant.* This information is similarly unhelpful, because it leaves us with no safe path forward for repatriation. Such an approach may protect the museum from liability by pushing all of the liability and risk onto Tribes but jeopardizes ever getting to repatriation outcomes.

The intent of the Federal NAGPRA language regarding contamination was to keep Tribes safe and informed during the repatriation process. However, it has not had the intended effect. The regulations should require museums to prepare pesticide histories, to offer to test for pesticides and toxins in culturally appropriate ways without costs being externalized on tribes, and to offer to remediate or remove those toxins where possible in consultation with the affiliated tribe. Exposure to poison should not be a condition of repatriation.

- **Use of data and knowledge that was taken from Tribal Ancestors without consent:** Most museums still use the information that was taken from Tribal Ancestors and cultural items without tribal consent. They also often use this information in ways that are objectionable or offensive such as in publications and presentations that interpret the Tribe's history and culture. These publications and presentations are typically published without obtaining consent from culturally affiliated Tribes, causing continuing pain to tribal communities sometimes many years after the repatriation has been completed. Museums should offer to update their institutional research board or ethical guidelines to identify that such information should not be used without obtaining consent from culturally affiliated Tribes. This information, taken from Tribal Ancestors and cultural items without consent, also needs to be returned so that that material may be treated in a culturally appropriate manner. Such a policy of requiring Tribal consent would also make the ethics around repatriation clearer.

  Currently when we go to professional anthropological conferences, we hear about how repatriation is harming anthropology, science, or the public good. We need to make it clear that research can and should be bounded by ethics. The dignity and privacy of our Ancestors and cultural items should be treated as appropriate and ethical, not as a threat to academic integrity. Affiliated tribes should have a say in whether and how their Ancestors are being interpreted and represented.

- **Adding: "The development and adoption of best practices for policies and procedures related to repatriation and the repatriation process**," as a new number in this section.

If these items were added to the restorative justice list, then it establishes them as reasonable components of repatriation and makes it more likely that they will be implemented, even without resorting to dispute resolution/mediation. We urgently need these items because they are not part of current repatriation processes, and those gaps are causing ongoing harm to California Tribes. We thus experience a process that inflicts further harm—not healing—any time we seek repatriation. This additional harm needs to be removed from the repatriation process.

III. Technical Comments

In addition to the important changes above, we have some technical comments and notes:

a. §29001 *Purpose of the Dispute Resolution/Mediation Process*: The NAHC should consider making a stronger statement in the regulation text that these procedures apply *only* to CalNAGPRA mediation and not to other mediation processes the NAHC may be statutorily involved in. (Also, ensure the parenthesis is closed at the end of this section.)

b. §29014(a) *Restorative Justice Principles*; §29013(f) *Briefing and Mediation Schedule;* and §29014(a) *Final Commission Determination:* Each of these sections references a mediator's "decision". Mediators do not render decisions, but rather, help parties reach agreement, as recognized elsewhere in the regulations. The draft regulations should be revised to strike references to mediator decisions.

c. §29002(d) *Construction of Regulations:* Can you clarify what is meant by, "Time limits set forth in these regulations are not jurisdictional." Currently, it is unclear.

d. §29003(a) *Confidentiality, "... to prevent another from disclosing the communication":* Please clarify this section to avoid unintended consequences. Specifically, we want to ensure that cultural information that is provided by Tribes is not unintentionally restricted from future use by those Tribes, later in the mediation process (or elsewhere).

e. §29006(b) *Federal Dispute Resolution: "Any party may also request that the Commission suspend dispute resolution under these regulations pending the completion of the federal dispute resolution process. Suspension of dispute resolution under these regulations shall be at the Commission's discretion."* (emphasis added): Museums could use this tactic to substantially delay repatriation, since the federal dispute resolution process is slow, non-binding, and does not favor Tribes. At a minimum, there should be a requirement that parties are notified and given an opportunity to respond to or oppose a request to suspend the dispute resolution process. At a maximum, the regulations should clarify that the Commission will only grant a request to suspend the dispute resolution process if both parties agree to it.

f. §29010(e) *Designation of Mediator; Disqualification, "If any party believes that a mediator designated by the Commission should be disqualified, the party must notify the Commission of the grounds for disqualification within 10 days of being notified of the*

mediator's designation": Please add a clause allowing such notifications to be made later, if a party finds out some information later in the process, especially that which could not be known with a reasonable amount of inquiry within 10 days of such notification.

g. *Notices:* The new draft regulations have added four types of notices (Dispute, Required Meeting, Inability to Settle Dispute, and Intent to Designate Precedent). It would be helpful and create transparency if these notices were listed on NAHC agendas and on the NAHC website, since they are not otherwise public. Such a public listing might also encourage museums to resolve issues prior to mediation, since there would be public record that mediation was occurring. Typically, notices are public documents.

h. §29014(b) *Final Commission Determination:* It would be helpful to add more background on when and why a dispute would be routed through the California Office of Administrative Hearings for hearing and determination by an administrative law judge (ALJ) rather than through the NAHC hearing process. Further, will the qualification requirements of AB 275 also apply to these hearing officers or ALJs?

i. §29014(f)(vi)(4) *Final Commission Determination:* States that the hearing officer or ALJ *should* prepare a revised proposed decision; "should" should be replaced by "will" or "shall".

j. §29015(e) *Precedent Decisions:* Please add that precedent decisions will be promptly posted and appear under their own tab on the NAHC website in the CalNAGPRA section for finding ease. Please cite in the Note all the various sections of California law that support protecting cultural resource information.

k. The regulations propose many formal steps, and this presents pros and cons for tribes. The cons are that it will require stamina and resources for tribes to bring their concerns through the process; the pro seems to be that there may be many places for potential settlement and resolution. Is there any reasonable way to flatten the process to reduce burdens on tribes?

l. It may be helpful if the NAHC were to develop a bank of forms to be used in the dispute resolution/mediation process.

m. Will the NAHC track disputes and mediation outcomes and report out on general trends, process improvements, etc.?

Thank you again for your work to date on these mediation regulations. We believe that the revised regulations will play a critical role in continuing to repair the repatriation process so that tribes experience repatriation outcomes that are timely and respectful to our Ancestors, cultural items, and living tribal communities. Thank you also for hosting listening sessions. They were very helpful in allowing us to better understand some of the new aspects of the draft regulations, such as the ALJ process. Finally, thank you for considering our comments. Should you have any

questions, please contact Melodi McAdams, Tribal Heritage Manager, at (530) 401-7470 or by email at mmcadams@auburnrancheria.com.

Sincerely,

Gene Whitehouse
Chairman

cc: Josef Fore, UAIC Tribal Historic Preservation Officer
Jerome Encinas, Interim UAIC Tribal Historic Preservation Director
Becky Johnson, UAIC Tribal Administrator
Kristopher Serrano, UAIC Tribal Historic Preservation Committee Chair
Melodi McAdams, UAIC Tribal Heritage Manager
Anna Starkey, UAIC Cultural Regulatory Specialist
Brian Guth, UAIC General Counsel
Courtney Ann Coyle, UAIC Outside Counsel

Good day,

Thank you for the information, unfortunately this process does not do justice for the State of CA. non-Federal Tribes, no matter mediation nor restorative justice criterion's, will help bring our ancestors home for repatriation.

NAGPRA, and a sponsored Federal Recognized Tribe that has historical relations in the past to the Xolon Salinan, hold the keys.

This law (AB275) had good intentions but it carries unethical provisions towards the Non-Federal Tribes of the State of CA.

Since the 1990's we have had ancestors remains, withheld from us on a Federal Fort Installation within the heartland of our ancestral territory.

To this day, they remain in a box, because a NAGPRA lawyer ruled not in favor to allow the Xolon Salinan rights to repatriate our ancestors.

This ruling took place in the 1990's and it still holds today.

We consulted with 3 agencies, from museums to UC's, they basically stated the same concerns.

We do not have a voice in this matter and it's terrible and offensive.

Karen R White, Council Chair
Xolon Salinan Tribe