

DEPARTMENT OF ADMINISTRATION

CHAPTER 65

BURIAL PRESERVATION BOARD

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## Subchapter 1

## Organizational Rule

2.65.101 ORGANIZATIONAL RULE (1) The Burial Preservation Board was established by 22-3-804, MCA. The board administers the provisions of 22-3-801, MCA, to ensure that all burials on state and private lands be accorded equal treatment and respect for human dignity.

(2) The Burial Preservation Board consists of 13 members appointed by the Governor for a two-year term. Meetings of the board will be scheduled by the chairperson or at the request of at least four board members. The board, however, should meet in person the first Wednesday in May, if possible. Minutes shall be kept of all board meetings and copies of the minutes distributed to all board members.

(3) Written notice of regular board meetings shall be provided at least 30 days prior to the meeting.

(4) The board may meet without notice if necessary to determine the appropriate disposition of human remains or burial material discovered under 22-3-805, MCA.

(5) Seven members in attendance at a board meeting shall constitute a quorum.

(6) The chairperson is nominated from the membership of the Burial Preservation Board.

(7) Any vacancies shall be filled in the same manner as the original appointed and only for the unexpired term. (History: 22-3-804, MCA; IMP, 22-3-804, MCA; NEW, 1998 MAR p. 478, Eff. 2/13/98; TRANS, from Commerce, 2001 MAR p. 2409.)

2.65.102 PROTECTION OF SITE (TRANSFERRED) (History: 22-3-804, MCA; IMP, 22-3-805, 22-3-808, 22-3-809, MCA; NEW, 1998 MAR p. 478, Eff. 2/13/98; TRANS, from Commerce, 2001 MAR p. 2409; TRANS, to ARM 2.65.301, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.103 NOTICE AND REPORTING REQUIREMENTS (TRANSFERRED) (History: 22-3-804, MCA; IMP, 22-3-804, 22-3-805, MCA; NEW, 1998 MAR p. 478, Eff. 2/13/98; TRANS, from Commerce, 2001 MAR p. 2409; TRANS, to ARM 2.65.302, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.104 FIELD REVIEW (TRANSFERRED) (History: 22-3-804, MCA; IMP, 22-3-804, 22-3-805, MCA; NEW, 1998 MAR p. 478, Eff. 2/13/98; TRANS, from Commerce, 2001 MAR p. 2409; TRANS, to ARM 2.65.303, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.105 REMOVAL OF REMAINS OR BURIAL MATERIALS (TRANSFERRED) (History: 22-3-804, MCA; IMP, 22-3-804, 22-3-805, MCA; NEW, 1998 MAR p. 478, Eff. 2/13/98; TRANS, from Commerce, 2001 MAR p. 2409; TRANS, to ARM 2.65.304, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.106 DISPOSITION OF REMAINS AND BURIAL MATERIALS  
(TRANSFERRED) (History: 22-3-804, MCA; IMP, 22-3-805, MCA; NEW, 1998  
MAR p. 478, Eff. 2/13/98; TRANS, from Commerce, 2001 MAR p. 2409; TRANS, to  
ARM 2.65.305, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.107 PERMITS FOR SCIENTIFIC ANALYSIS (TRANSFERRED)  
(History: 22-3-804, MCA; IMP, 22-3-804, 22-3-806, MCA; NEW, 1998 MAR p. 478,  
Eff. 2/13/98; TRANS, from Commerce, 2001 MAR p. 2409; TRANS, to ARM  
2.65.306, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.108 REPORTS AND BURIAL REGISTRY (TRANSFERRED) (History:  
22-3-804, MCA; IMP, 22-3-804, 22-3-807, MCA; NEW, 1998 MAR p. 478, Eff.  
2/13/98; TRANS, from Commerce, 2001 MAR p. 2409; TRANS, to ARM 2.65.307,  
2013 MAR p. 785, Eff. 5/10/13.)

## Subchapter 2

## Model Procedural Rules

2.65.201 MODEL PROCEDURAL RULES (1) The board adopts and incorporates by reference the following model rules, which may be found at <http://www.mtrules.org>;

(a) the Attorney General's model procedural rules ARM 1.3.211 through 1.3.224 and 1.3.226 through 1.3.233, including, as applicable, the appendix of sample forms in effect May 10, 2013; and

(b) the Secretary of State's model rules ARM 1.3.301, 1.3.302, 1.3.304, 1.3.305, 1.3.307 through 1.3.309, and 1.3.311 through 1.3.313 in effect May 10, 2013. These rules define model requirements for rulemaking under the Montana Administrative Procedure Act. (History: 22-3-804, 22-3-904, MCA; IMP, 22-3-904, 22-3-913, 22-3-914, MCA; NEW, 2013 MAR p. 785, Eff. 5/10/13.)

## Subchapter 3

## Human Skeletal Remains and Burial Site Preservation

2.65.301 PROTECTION OF SITE (1) After notification of a discovery, the person in charge of any survey, excavation, construction, agricultural practices or like activity on private or state lands which has disturbed or threatens to disturb human skeletal remains, a burial site or burial material, shall immediately take all reasonable steps to secure preservation of the site in situ by immediately stopping all activity destructive to it and by making a reasonable effort to secure it from vandalism, theft, erosion and other harmful disturbance. (History: 22-3-804, MCA; IMP, 22-3-805, 22-3-808, 22-3-809, MCA; NEW, 1998 MAR p. 478, Eff. 2/13/98; TRANS, from Commerce, 2001 MAR p. 2409; TRANS, from ARM 2.65.102, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.302 NOTICE AND REPORTING REQUIREMENTS (1) If helpful, the coroner may request the assistance of a board representative or archaeologist or physical anthropologist and/or anyone else with special expertise in his original examination under 22-3-805(2), MCA. If a coroner cannot make the necessary determinations listed in 22-3-805(2), MCA, within two working days after he or she was notified of a possible discovery of human remains, he or she shall notify a board member in writing and provide an approximate time frame for his or her completion of the examination.

(2) If after taking reasonable steps to make his or her determinations listed in 22-3-805(2), MCA, the coroner cannot make his or her determination without removing or disturbing the human remains, the coroner shall provide the chairperson of the board with written report on the steps he or she took to make his or her determination and the reasons why the remains had to be disturbed or removed. The coroner must provide this report to the chairperson of the board within three days after the remains were disturbed or removed.

(3) Within 24 hours of notification by the coroner or other notification of a discovery of human skeletal remains, a burial site or burial material, or threatened disturbance of human skeletal remains, a burial site or burial material, the state historic preservation officer shall contact the landowner, agency, company and/or person, if known, conducting the activity which disturbs or threatens to disturb an unmarked burial or human skeletal remains, by phone or mail of the discovery and the procedures, liabilities and penalties established by the Human Skeletal Remains and Burial Site Protection Act. The state historic preservation officer shall also notify all board members of such discovery.

(4) If a coroner is unable to notify the state historic preservation officer pursuant to the provisions of 22-3-805(4), MCA, the coroner shall notify the chairperson of the board or the law enforcement agency of the nearest Indian reservation by telephone. The chairperson of the board or the law enforcement agency who was contacted by the coroner shall immediately notify the landowner and board member representing the nearest reservation.

(5) The board shall develop a list, which includes the phone number of the chairperson, the state historic preservation officer and all the Montana reservation law enforcement agencies and make the list available to the Montana Coroners' Association.

(6) The board shall develop a telephone list of all board members and the state historic preservation officer and distribute it to all Montana reservation law enforcement agencies.

(7) The coroner shall provide the name, the description of the activity that led to the discovery and the phone number of the person who has discovered or disturbed human skeletal remains.

(8) When a coroner is satisfied that the discovery of human remains is not subject to the provisions of Title 46, chapter 4, MCA, or any other related provisions of law concerning the investigation and he or she has satisfied the provisions of Title 22, chapter 3, MCA, all responsibilities for the human remains, burial material and site are the responsibility of the Burial Preservation Board. (History: 22-3-804, MCA; IMP, 22-3-804, 22-3-805, MCA; NEW, 1998 MAR p. 478, Eff. 2/13/98; TRANS, from Commerce, 2001 MAR p. 2409; TRANS, from ARM 2.65.103, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.303 FIELD REVIEW (1) The board representative nearest to the discovery or a representative designated by the chairperson shall conduct a field review.

(2) With the permission of the landowner, a field review shall be conducted within 36 hours after the board received notice of a discovery of human skeletal remains, a burial site or burial material. The board representative may negotiate with the landowner for a reasonable extension of time to conduct a field review, if necessary.

(3) In conducting a field review, evidence that human remains or a burial site exists may include, but is not limited to the following:

(a) physical evidence on-site or by archeological techniques demonstrating the presence of human remains;

(b) previous grave markers;

(c) written documentation; and

(d) oral depositions, affidavits or oral histories.

(4) Subsurface testing to determine whether the property contains a burial site can only be conducted if the board determines that such testing is necessary. Such testing shall be conducted for the sole purpose of determining whether the property contains a burial site.

(5) If it is determined that human skeletal remains, a burial site or burial material exists, a determination of whether the site can be preserved in situ must be made during the field review.

(6) During the field review the board representative shall negotiate with the landowner concerning on-site reburial or disinterment and reburial. In conducting this negotiation the board representative should consider the following aspects of treatment of human remains or burial materials:

(a) avoidance of unnecessary disturbance of human remains and burial materials;

(b) avoidance of separation of human remains and burial materials; and

(c) avoidance of physical testing or modification of human remains and objects.

(7) The board representative and the landowner should attempt to reach an oral or written agreement on a time frame concerning final treatment or disposition of human skeletal remains or burial material.

(8) If within 40 days after notification of the board, the board representative and the landowner have not agreed to the final treatment of the human skeletal remains and burial material and mediation fails, the human skeletal remains and burial material must be removed according to the provisions of these rules.

(9) The board shall develop a form in which the findings of the field reviews can be reported. All field review reports shall be submitted to the state historic preservation officer to be included in the burial registry. (History: 22-3-804, MCA; IMP, 22-3-804, 22-3-805, MCA; NEW, 1998 MAR p. 478, Eff. 2/13/98; TRANS, from Commerce, 2001 MAR p. 2409; TRANS, from ARM 2.65.104, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.304 REMOVAL OF REMAINS OR BURIAL MATERIALS (1) If the human remains or burial material cannot be preserved in situ and it is necessary to remove them, the chairperson of the board shall designate someone to disinter the human remains or the burial material.

(2) If an agreement has been reached with the landowner providing for reburial on another site on his or her property, such reburial may be conducted by a board representative, archeologist or the landowner.

(3) The nearest board representative will monitor any disinterment of human remains or burial materials to ensure that the remains are treated with respect and dignity.

(4) The board shall give control and make its determination of the final disposition of human remains, or burial materials according to the following priority:

(a) the descendants, if identifiable;

(b) the tribe or other cultural group that has the closest cultural affiliation with the human skeletal remains or burial materials;

(c) the tribe or other cultural group recognized as having aboriginally or historically occupied the area where the remains or materials were discovered if, upon notification by the board, the tribe or cultural group state a claim for the remains or material; or

(d) if unclaimed by any tribe or cultural group, the board, which shall determine the appropriate disposition and oversee the reinterment of the remains and materials.

(5) The board or its designated representative may assume control and safekeeping of human remains and burial materials until final disposition is determined.

(6) A report of any removal and final disposition must be filed with the State Historic Preservation Office. (History: 22-3-804, MCA; IMP, 22-3-804, 22-3-805, MCA; NEW, 1998 MAR p. 478, Eff. 2/13/98; TRANS, from Commerce, 2001 MAR p. 2409; TRANS, from ARM 2.65.105, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.305 DISPOSITION OF REMAINS AND BURIAL MATERIALS (1) The board shall make reasonable attempts to notify the persons, tribe or groups identified in 22-3-805(7), MCA, of the discovery and disposition of the human remains and burial materials.

(2) If it is necessary to disinter the human remains and burial materials at another location, the board shall consult with those persons identified in 22-3-805(7), MCA, regarding the final disposition of the remains or materials. (History: 22-3-804, MCA; IMP, 22-3-805, MCA; NEW, 1998 MAR p. 478, Eff. 2/13/98; TRANS, from Commerce, 2001 MAR p. 2409; TRANS, from ARM 2.65.106, 2013 MAR p. 785, Eff. 5/10/13.)

### 2.65.306 PERMITS FOR SCIENTIFIC ANALYSIS

(1) All petitions for scientific analysis shall include a nonrefundable application fee of \$50, scientific justification for the study, qualifications of the person requesting the study, methodology and the time frame necessary to complete the study.

(2) Petitions shall be submitted to the state historic preservation officer and the physical anthropologist on the board. The state historic preservation officer and the physical anthropologist on the board shall review the proposed methodology and make a recommendation to the board.

(3) In evaluating whether a petition is scientifically justifiable the board should consider the following:

- (a) whether the study will contribute new information;
- (b) whether there is substantial public interest in the matter studied;
- (c) whether the information sought to be learned can be obtained by other methods;
- (d) qualifications of the person(s) who will conduct the study;
- (e) the methodology proposed;
- (f) the time frame proposed;
- (g) the nature of the items to be studied; and
- (h) the recommendations of lineal descendants, tribe or cultural group that has the closest cultural affiliation, if any.

(4) If the board issues a permit to conduct scientific analysis it shall prescribe the terms, conditions and procedures that the permittee must follow. This should include the time frame allowed for the study and a plan on the final disposition.

(5) If a permit is granted, the permittee shall pay all costs of excavation, study and disposition.

(6) The board has 30 working days from the time a permit petition is received by the State Historic Preservation Office to either approve or deny a petition. If the board denies a petition, it must provide the applicant a written statement outlining its grounds for finding the petition scientifically unjustifiable.

(7) If a permittee violates any provision, term, condition or procedure of the permit the board may institute proceedings to suspend or revoke the permit pursuant to the Montana Administrative Procedure Act.

History: 22-3-804, MCA; IMP, 22-3-804, 22-3-806, MCA; NEW, 1998 MAR p. 478, Eff. 2/13/98; TRANS, from Commerce, 2001 MAR p. 2409; TRANS, from ARM 2.65.107, 2013 MAR p. 785, Eff. 5/10/13; AMD, 2021 MAR p. 1546, Eff. 11/6/21.

2.65.307 REPORTS AND BURIAL REGISTRY (1) A report of remains will be completed by the board or the board's representative and shall include the following:

- (a) for disinterment and removal:
    - (i) identification of the names and organizations, agency or institutional affiliations of all individuals participating in disinterment and removal;
    - (ii) date(s) of activity and the site, context and identification of remains and materials, including location from which remains were removed identified by county and legal description and/or map showing location of site;
    - (iii) cultural identification of remains or materials and descriptions of features or information used in making any determination; and
    - (iv) photograph of remains or materials or inventory of remains including number of human bones and bone fragments and inventory of any associated objects;
  - (b) for disposition:
    - (i) identification of names and group, agency or institutional affiliations of individuals participating in disposition;
    - (ii) date(s) of disposition and type of disposition (reburial, curation or other);
    - (iii) identification of remains including confirmation that remains received are as listed in the removal inventory or a complete list of remains received for disposition;
    - (iv) if the location of the burial is on an Indian reservation where permanent protection is feasible or if the final disposition is curation in a repository, the reservation or repository should be identified. If disposition is reburial on state or private lands, specific location of the reburial with a legal description and a map showing the reburial location should be provided.
- (2) The state historic preservation officer shall establish a burial registry that is separate and distinct from the cultural registry.
- (3) The state historic preservation officer shall assign a case file number to every report, discovery or situation relating to an unmarked burial site, human skeletal remains or burial materials.
- (4) All reports, field notes, maps, board action and other information regarding a reported burial site, human skeletal remains and burial materials shall be maintained in case files.
- (5) Burial site records are confidential and available only to criminal justice agencies or to federal, state and tribal personnel or their appointed representatives legally charged with administering laws protecting cultural resources. (History: 22-3-804, MCA; IMP, 22-3-804, 22-3-807, MCA; NEW, 1998 MAR p. 478, Eff. 2/13/98; TRANS, from Commerce, 2001 MAR p. 2409; TRANS, from ARM 2.65.108, 2013 MAR p. 785, Eff. 5/10/13.)

## Subchapter 4

## Repatriation of Human Skeletal Remains and Funerary Objects

2.65.401 SCOPE OF RULES (1) The board's repatriation rules apply to:

(a) Native American or non-Native American human skeletal remains and funerary objects discovered on state-owned or private lands in Montana and held by museums or state agencies in Montana that receive state funding but no federal funding;

(b) non-Native American human skeletal remains and funerary objects discovered on state-owned or private lands in Montana and held by museums or state agencies in Montana that receive state and federal funding; and

(c) Native or non-Native American human skeletal remains and funerary objects discovered on state-owned or private lands in Montana and held by a person.

(2) The federal Native American Graves Protection and Repatriation Act (NAGPRA), 25 USC 3001 et seq. and NAGPRA's implementing regulations, 43 CFR 10, apply exclusively to any museum or state agency that receives federal funding, either alone or in conjunction with state funding, and that possesses Native American human remains and funerary objects. (History: 22-3-904, MCA; IMP, 22-3-904, MCA; NEW, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.402 DEFINITIONS In addition to the definitions found in 22-3-903, MCA, the following definitions apply in this subchapter:

(1) "Culturally unidentifiable human skeletal remains or funerary objects" means human remains and funerary objects in a museum or an agency's possession for which no lineal descendant or cultural affiliation has been identified in the inventory process described in 22-3-911, MCA.

(2) "Group" means a "tribal group" as defined in 22-3-803, MCA, or a "cultural group" as defined in 22-3-805, MCA.

(3) "Identifiable earlier tribe" means:

(a) Blackfeet;

(b) Gros Ventres;

(c) Crow;

(d) Sioux;

(e) Kootenai (Flathead Reservation);

(f) Assiniboine (Fort Belknap Reservation);

(g) Assiniboine (Fort Peck Reservation);

(h) Chippewa (Rocky Boy's Reservation and Little Shell Tribe);

(i) Pend d'Oreille or Upper Kalispell (Flathead Reservation);

(j) Salish or Flathead (Flathead Reservation);

(k) Cheyenne;

(l) Cree (Rocky Boy's Reservation);

(m) Kiowa;

(n) Shoshone;

(o) Bannock; and

(p) Apachean. (History: 22-3-904, MCA; IMP, 22-3-904, 22-3-911, 22-3-912, MCA; NEW, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.403 PETITION TO ADD A TRIBE (1) A person, as defined in 22-3-903(12), MCA, or tribe may petition the board to add a tribe or tribes to the list in ARM 2.65.402. The petition must be in writing and include evidence supporting the proposal to add a tribe or tribes to the list.

(2) The board shall consider each petition and decide, based on the petitioner's evidence and any other evidence coming to the board's attention, whether adding a tribe or tribes to the list is justified.

(3) If, based on a preponderance of the evidence, the board finds that the petition documents an identifiable earlier tribe, the board shall propose to amend ARM 2.65.402.

(4) If, based on a preponderance of the evidence, the board finds that the petition fails to document an identifiable earlier tribe, the board shall dismiss the petition without prejudice, allowing a person to resubmit a petition with additional evidence. (History: 22-3-904, MCA; IMP, 22-3-903, 22-3-904, MCA; NEW, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.404 CONTENTS OF A CLAIM FOR REPATRIATION (1) A claimant shall file its written claim with the board. A written claim for repatriation must include a description of the claimant's cultural affiliation to the human skeletal remains or funerary objects and an explanation why the possessing entity does not have the right of possession.

(2) In reviewing a claim, the board shall determine whether the claim includes the information described in (1). The board may not review the merits of the claim at this stage of the review.

(3) If a claimant fails to provide the above information, the board shall dismiss and return the claim to the claimant. A claimant may file a revised claim with the board. (History: 22-3-904, MCA; IMP, 22-3-904, 22-3-912, MCA; NEW, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.405 CRITERIA FOR DETERMINING LINEAL DESCENT AND CULTURAL AFFILIATION WHEN REVIEWING A REPATRIATION CLAIM (1) A lineal descendant is an individual tracing his or her ancestry directly and without interruption by:

(a) means of the traditional kinship system of the appropriate tribal or other cultural group; or

(b) the common law system of descent to a known individual whose human skeletal remains or funerary objects are being requested under these rules.

(2) Cultural affiliation is a relationship of shared group identity that may be reasonably traced historically or anthropologically between a tribal group and an identifiable earlier tribe. It may also include a shared identity that can reasonably be traced historically between an individual and an identifiable individual lineal descendant or next of kin. All of the following requirements must be met to determine cultural affiliation between a claimant and the human remains or funerary objects:

(a) existence of an identifiable present-day Indian tribe; and

(b) evidence of the existence of an identifiable earlier group. Support for this requirement may include, but is not necessarily limited to evidence sufficient to:

(i) establish the identity and cultural characteristics of the earlier group; or

(ii) document distinct patterns of material culture manufacture and distribution methods for the earlier group; and

(c) evidence of the existence of a shared group identity that can be reasonably traced between the present-day Indian tribe and the earlier group.

Evidence to support this requirement must establish that a present-day Indian tribe has been identified from prehistoric or historic times to the present as descending from the earlier group.

(3) A finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.

(4) Evidence of a kin or cultural affiliation between a present-day individual, Indian tribe, and human remains or funerary objects must be established by using the following types of evidence:

(a) geographical;

(b) kinship;

(c) archaeological;

(d) anthropological;

(e) linguistic;

(f) folklore;

(g) oral tradition;

(h) historical; or

(i) other relevant information or expert opinion. (History: 22-3-904, MCA, IMP, 22-3-903, 22-3-904, 22-3-912, MCA; NEW, 2013 MAR p. 785, Eff. 5/10/13.)

2.65.406 DELAY OF REPATRIATION FOR SCIENTIFIC STUDY (1) If the hearing examiner determines that a possessing entity has provided evidence supporting a good faith effort regarding scientific study, the hearing examiner shall provide a reasonable period of delay, not to exceed 12 months from the date of the hearing examiner's order, to allow completion of the study before repatriation. (History: 22-3-904, MCA; IMP, 22-3-904, 22-3-915, MCA; NEW, 2013 MAR p. 785, Eff. 5/10/13.)