

BEFORE THE BURIAL PRESERVATION BOARD
OF THE STATE OF MONTANA

In the matter of the adoption of New)	NOTICE OF PUBLIC HEARING ON
Rules I through VII, pertaining to)	PROPOSED ADOPTION AND
repatriation of human skeletal remains)	TRANSFER
and funerary objects and transfer of)	
ARM 2.65.102 through 2.65.108)	
pertaining to human skeletal remains)	
and burial site protection)	

TO: All Concerned Persons

1. On April 4, 2013, at 11:00 a.m., the Burial Preservation Board (board) of the state of Montana will hold a public hearing in Room 53 of the Mitchell Building, at 125 N. Roberts, Helena, Montana, to consider the proposed adoption and transfer of the above-stated rules.

2. The board will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the board no later than 5:00 p.m. on March 28, 2013, to advise us of the nature of the accommodation that you need. Please contact Monica Abbott, Department of Administration, 125 N. Roberts, Room 155, P.O. Box 200101, Helena, Montana 59620-0101; telephone (406) 444-2460; TTY (406) 444-1421; fax (406) 444-6194; or e-mail mabbott@mt.gov.

3. The new rules proposed to be adopted provide as follows:

NEW RULE I 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 [effective date of this rule]; 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 [effective date of this rule]. These rules define model requirements for rulemaking under the Montana Administrative Procedure Act.

AUTH: 22-3-804, 22-3-904, MCA

IMP: 22-3-904, 22-3-913, 22-3-914, MCA

Statement of Reasonable Necessity: Section 22-3-904, MCA, requires the board to adopt rules necessary to provide for filing of repatriation claims under the Montana Repatriation of Human Remains and Funerary Objects Act of 2001 (Repatriation Act), 22-3-901 through 22-3-922, MCA, and procedures for hearings

and resolving multiple claims. The rules must, at a minimum, address standards of evidence, standards of proof, and criteria for determining lineal descent and cultural affiliation. Hearings may not occur until the board has adopted such rules. The Attorney General's Model Rules cover the procedures for hearings and resolving claims and standards of evidence and proof in detail. The board has determined that the Attorney General's model rules will be sufficient to serve the board's purposes and, because those model rules already exist, the board saw no reason to craft its own originally written rules. The board is proposing to adopt the model forms, as applicable, because all the model forms may not apply to the board's activities. ARM 1.3.201(3) provides that agencies may adopt the Attorney General's model rules by incorporating them by reference. The board has determined such incorporation is the best approach because it will keep the board's rules to a manageable size.

Section 2-4-201, MCA, requires that the each agency adopt rules describing its organization and procedures. The Secretary of State's Model Rules are proposed to be adopted to satisfy this statutory requirement. The board has determined that, given the comprehensiveness of the Secretary of State's model rules, these rules will be sufficient to serve the board's purposes, and because those model rules already exist, the board saw no reason to craft its own originally written rules. ARM 1.3.301(3) provides that agencies may adopt the Secretary of State's model rules by incorporating them by reference. The board has determined such incorporation is the best approach because it will keep the board's rules to a manageable size.

Finally, the board proposes that the Attorney General's Model Rules and the Secretary of State's Model Rules be incorporated by reference to apply to the Human Skeletal Remains and Burial Site Protection Act (Protection Act), 22-3-801 et seq., MCA, which is a statute that the board also implements. The board makes this proposal for the same reasons stated above supporting adoption of these model rules for the Repatriation Act. Section 2-4-804(3)(i), MCA, authorizes the board to adopt rules necessary to administer and enforce the provisions of the Protection Act.

NEW RULE II 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.

AUTH: 22-3-904, MCA

IMP: 22-3-904, MCA

Statement of Reasonable Necessity: Confusion sometimes arises regarding whether NAGPRA supplants a state's repatriation laws. Congress intended NAGPRA, and in particular NAGPRA's repatriation provisions, to apply to governmental and educational institutions. However, there is no indication that Congress intended federal law to occupy this area entirely, to the exclusion of state law. The Repatriation Act plays an important role in covering gaps left by NAGPRA. State laws could be construed to overlap, to some extent, NAGPRA. To the extent that the state and federal laws conflict, then state law is preempted under Article VI, Section 2 of the U.S. Constitution commonly called the Supremacy Clause. The repatriation rules the board has proposed are structured to avoid potential conflicts in interpretation and to ensure the full protection of human remains, burial sites, and funerary objects under both federal and state law.

The Repatriation Act provides for the repatriation of culturally affiliated human skeletal remains or funerary objects taken from burial sites in Montana before July 1, 1991, and in the possession or control of a museum, agency, or person, as those terms are defined in the Repatriation Act. 22-3-902(2)(b), 22-3-903, MCA. The Repatriation Act makes clear that items interred with human remains are not abandoned, and discoverers have no right of ownership to such items. 22-3-902(1)(c), MCA. The Repatriation Act is broader than NAGPRA in that it applies to Native and non-Native funerary objects and remains. 22-3-902(2)(a); see also *Written Testimony of D. Fred Matt, Chairman, Confederated Salish and Kootenai Tribes*, January 12, 2001, before the House Judiciary Committee ("With the passage of the proposed legislation, HB 165, The Montana Repatriation Act, the state of Montana would develop a mechanism for the repatriation of human remains and burial goods, regardless of ethnic origin, burial context, or age."). However, the Repatriation Act is also narrower than NAGPRA in that, while it provides for the repatriation of funerary items, it does not provide for the return of sacred objects and objects of cultural patrimony.

NAGPRA and the Repatriation Act encompass areas of exclusive application, as well as areas that could be construed as concurrent federal-state application. In areas of exclusive federal or state regulatory authority, there will be no preemption issues. With regard to NAGPRA, this includes its application to museums or other entities that receive federal funding but no state funding. Further, NAGPRA's inventory and repatriation requirements are exclusive with regard to Native American sacred objects and objects of cultural patrimony. Similarly, the Repatriation Act applies exclusively to those museums and other entities that receive state money but no federal money. State law is exclusive as it applies to private persons who possess or control human remains and funerary objects. State law is also exclusive as it applies to non-Native human remains and funerary objects.

However, NAGPRA and the Repatriation Act could be construed to overlap in their application to museums/entities that receive both federal and state funding, and which possess or control Native American remains and funerary items. In such instances the museum or agency must, if possible, abide by both NAGPRA and by the Repatriation Act. The federal and state laws function similarly in requiring: (1) an inventory or listing of items in a collection; (2) notification to lineal descendants and tribes of the inventory; and (3) provisions for the repatriation of culturally affiliated items. If in these areas the terms of the federal and state laws directly conflict, or if it is impossible to comply with both sets of law, or if the state law stands as an obstacle to federal objectives, then state law is preempted.

(a) Inventories

The inventory requirements of the federal and state laws contain potential conflicts. NAGPRA requires that item-by-item inventories of Native American human remains and associated funerary items were to be completed by 1995. 25 USC 3003(b)(1)(B), (c) (allowing for extensions of time). If, after 1995, a museum or agency receives a new holding or collection, or locates previously unreported items, it must prepare a new inventory. 43 CFR 10.13(b). An initial summary of the new materials must be sent to affiliated or potentially affiliated tribes within six months of the receipt of the materials by the museum or agency. 43 CFR 10.13(b)(1)(i). A detailed inventory must then be completed within two years of the receipt of the materials. 43 CFR 10.13(b)(1)(ii). Inventories of existing and new collections must identify, if possible, the circumstances of acquisition and the geographical and cultural information related to each listed item. 25 USC 3003(a); 43 CFR 10.9(c). In completing inventories of existing or new collections, a museum or agency must consult with tribal governments and traditional religious leaders. 25 USC 3003(b)(1)(A). NAGPRA also requires that museums or agencies prepare a summary of "unassociated funerary items"—defined to mean funerary objects that have become separated from a set of human remains. 25 USC 3001(3)(B). These summaries were to have been completed by 1993 and follow most of the same basic requirements as the inventories. 43 CFR 10.8(c). Inventories must also include a listing of all culturally unidentifiable remains and associated funerary objects. 43 CFR 10.9. NAGPRA provides for an extension of time to complete inventories upon a finding by the Secretary of the Interior that the museum is making a good faith effort to complete its work. 25 USC 3003(c); 43 CFR 10.9(f).

The Repatriation Act requires that museums and agencies with possession or control over human skeletal remains or funerary objects must have completed an inventory of these items by November 2001. 22-3-911(1), MCA. The inventory must, to the extent possible, identify the circumstances of acquisition including geographical information; cultural affiliation if known; and list those items that are not culturally identifiable. 22-3-911(1)(a) through (c), MCA. Whenever a museum or agency receives new remains or objects through loan or donation, it must update its inventory within six months. 22-3-911(4), MCA.

A museum or agency that has met the inventory requirements of NAGPRA for its existing collections will have met the inventory requirements of the Repatriation Act, with regard to Native American human remains and funerary objects. For existing collections held by museums prior to 1995 or 2001, these requirements should have been met long ago.

Potential conflicts arise with regard to holdings or collections acquired more recently. First, NAGPRA allows up to two years for the completion of an inventory, in consultation with tribes, of newly acquired items or collections (although an initial summary of the items must be completed within six months). 43 CFR 10.13(b)(1)(i), (ii). State law allows only six months for the completion of an updated inventory for newly acquired items and does not require tribal consultation. 22-3-911(4), MCA. Second, under NAGPRA an extension can be granted by the Secretary of the Interior to museums or agencies making a good faith effort to complete their inventories. 25 USC 3003(c); 43 CFR 10.9(f). Under state law, there is no provision for an extension. The shorter state timeline, the lack of tribal consultation, and the lack of any means to grant extensions under state law could be construed to undermine the federal objective of ensuring adequate time for tribal consultation and the preparation of thorough inventories of newly acquired Native American collections.

(b) Notification

After completion of an inventory, NAGPRA and the Repatriation Act require that various entities be notified of the inventory. Under NAGPRA, a museum or agency shall, not later than six months after the completion of an inventory, notify lineal descendants and tribes determined to be culturally affiliated with any remains or funerary items in the inventory. 25 USC 3003(d)(1); 43 CFR 10.9(e)(1), (3). The notice shall: (1) identify each set of remains and funerary objects and the circumstances of its acquisition; (2) list all remains and objects that are clearly identifiable as to tribal origin; (3) list remains or objects that are not clearly identifiable as to tribal origin, but that are reasonably believed to be affiliated with a tribe; and (4) describe those remains, with or without associated funerary objects, that are culturally unidentifiable. 25 USC 3003(d)(2); 43 CFR 10.9(e)(2). The notice must also be sent to the Secretary of the Interior, who is to publish it in the Federal Register. 25 USC 3003(d)(3); 43 CFR 10.9(e)(4).

The Repatriation Act requires that within three months of completing an inventory, the museum or agency must provide a copy to the board, the State Historic Preservation Office, and each tribal government in Montana. 22-3-911(2), MCA. There are no apparent conflicts that arise in complying with both the federal and the state notification provisions.

(c) Repatriation

After an inventory is completed and notification has been sent to the appropriate parties, repatriation may take place if certain requirements are met. The

federal process begins upon a museum's or agency's receipt of a repatriation request from a lineal descendant or culturally affiliated tribe. 25 USC 3005(a)(1); 43 CFR 10.10(a), (b). If the cultural affiliation of human remains and associated funerary objects is known per the inventory, then the museum or agency must expeditiously return such items to the requesting descendants or tribes. 25 USC 3005(a)(1). In cases where cultural affiliation has not been definitively established via the inventory, tribes have the opportunity to show cultural affiliation by a preponderance of the evidence. 25 USC 3005(a)(4); 43 CFR 10.14. With regard to unassociated funerary objects, lineal descendants and tribes must establish cultural affiliation and present evidence that a museum or agency has no right of possession. 25 USC 3005(a)(2), (c). The cultural affiliation of unassociated funerary objects can be established via the summary process or through presentation of a preponderance of evidence. 43 CFR 10.10(a)(2)(ii); 43 CFR 10.14. If the museum or agency cannot overcome the evidence indicating no right of possession, it must return the requested items. 25 USC 3005(c). Delays in repatriation may occur if the remains or items are needed for the completion of a scientific study of major benefit to the United States, or in cases of competing claims. 25 USC 3005(b), (e). Repatriation need not occur if a court of competent jurisdiction determines that a taking of property without just compensation would result. 43 CFR 10.10(c). In the case of culturally unidentifiable remains and associated funerary objects, the museum or agency must prove it has a right of possession or, if it cannot prove such a right, it must repatriate the remains to the tribe upon whose tribal or aboriginal lands the remains were found, if such tribes agree to accept them. 43 CFR 10.11(c).

The state repatriation process begins with the filing of a written claim with the board and the person possessing the claimed human skeletal remains and funerary objects. 22-3-912(1)(a), MCA. The claimant must then prove by a preponderance of the evidence the claimant's cultural affiliation with the remains and objects, and that the possessing entity has no right of possession. 22-3-912(1)(b)(i), (ii), MCA. A hearing under the Montana Administrative Procedure Act is the forum where the claimant presents its case. 22-3-913(1), MCA. If the hearing examiner concludes that the remains and objects are culturally affiliated with the claimant, and that the possessing entity has no right of possession, then the examiner shall recommend to the board that it order repatriation. 22-3-913(3)(a), MCA. Conversely, if the examiner finds that there is no cultural affiliation and that the possessing entity has a right of possession, then a recommendation must be made that repatriation not occur and that possession remain with the possessing entity. 22-3-913(3)(b). The board, upon receipt of the examiner's recommendation, makes the final decision on repatriation, subject to appeal to state district court. 22-3-916, 22-3-917, MCA.

As they apply to Native American human remains and funerary items, the state repatriation procedures are in potential conflict with the NAGPRA repatriation procedures. Under NAGPRA, if a museum or agency inventory establishes the cultural affiliation of Native American remains and associated funerary objects, they are to be expeditiously repatriated upon the request of lineal descendants or the affiliated tribe. 25 USC 3005(a)(1); 43 CFR 10.14. Under the Repatriation Act, even

when cultural affiliation is established during an inventory process, a claimant, before repatriation may occur, must in an administrative hearing still prove cultural affiliation and that the possessing entity has no right of possession. 22-3-912(1)(b)(i), (ii), 22-3-913, MCA.

The Montana state repatriation process could be construed to undermine the federal directive for expeditious repatriation when cultural affiliation is established by an inventory; duplicates the process for establishing cultural affiliation, which occurs during the federal inventory process; and imposes additional administrative processes and costs on claimants beyond what is required under NAGPRA.

In certain circumstances, NAGPRA does require claimants to prove cultural affiliation and disprove a museum's right of possession. With regard to human remains and associated funerary objects, claimants must prove cultural affiliation only when affiliation has not been established through the inventory process, but claimants do not have to prove that a museum or agency lacks a right of possession in human remains and associated funerary objects. 25 USC 3005(a)(1), (4); 43 CFR 10.10(b). Regarding unassociated funerary objects, a claimant is obligated to prove that the holding museum or agency lacks any right of possession before repatriation can occur. 25 USC 3005(a)(2), (c). A claimant must prove cultural affiliation only when the summary process does not establish such affiliation. 25 USC 3005(a)(4). In instances where it is necessary under NAGPRA for a claimant to present evidence, the evidence is submitted to the possessing entity itself, rather than to a hearing examiner in a neutral administrative forum. See 43 CFR 10.10; (*See also, Fallon Paiute-Shoshone Tribe v. US Bureau of Land Management*), 455 F.Supp.2d 1207 (Dist. Nev. 2006).

A claimant that must prove cultural affiliation and/or that a museum or agency lacked a right of possession would thus be required to present evidence to two different bodies: the possessing entity under NAGPRA and the hearings examiner under the Repatriation Act. It is quite possible that those two bodies may come to different conclusions as to affiliation and repatriation. Appeals from these decisions would go to different courts: federal district court under NAGPRA, and state district court under the Repatriation Act. In such an event, it could be impossible for a claimant to simultaneously comply with both the federal repatriation process and the state repatriation process.

Given that certain provisions of the Repatriation Act could be construed to overlap and conflict with NAGPRA, as they apply to Native American remains and funerary objects held by facilities that receive both state and federal funding, the board believes that these conflicts may be overcome by the distinctions outlined in the proposed rule. These distinctions relieve the board from constructing a duplicative and potentially conflicting set of administrative rules with regard to museums and agencies that receive federal funding and possess Native American remains and funerary objects, and ensure that such entities are protected from liability that may arise under conflicting state law. Further, the distinctions eliminate

the confusion and conflicts that could arise in attempting to comply with two different sets of law—federal and state—at the same time.

Because the proposed rules will be implementing the Repatriation Act, there is no need that these rules mirror the NAGPRA repatriation rules. The board, however, has used some of the NAGPRA rules as models for these proposed rules. The board has taken this approach because the NAGPRA rules have gone through extensive public review and the resulting rules are clear and fairly concise.

Finally, and importantly, the above approach is consistent with recommendations made by the Montana Attorney General's Office.

NEW RULE III 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, Flathead (Flathead Reservation);
- (j) Salish or Upper Kalispell (Flathead Reservation);
- (k) Cheyenne;
- (l) Cree (Rocky Boy's Reservation);
- (m) Kiowa;
- (n) Shoshone;
- (o) Bannock; and
- (p) Apachean.

AUTH: 22-3-904, MCA

IMP: 22-3-904, 22-3-911, 22-3-912, MCA

Statement of Reasonable Necessity: 22-3-911, MCA, directs that an agency or museum, as those terms are defined in the Repatriation Act, shall complete an inventory identifying, among other things, the human skeletal remains or funerary objects that are not clearly identifiable as to cultural affiliation. The Repatriation Act, however, does not define or explain what "culturally unidentifiable" means. The new rule provides a definition, which was taken from the NAGPRA regulations, 43 CFR

10.2(e)(2). The board opted to use the NAGPRA definition because this definition is well accepted by professionals in this field, and the board saw no need to craft its own definition. In addition, the board believed that maintaining consistency between the federal and state rules, where appropriate, will eliminate unnecessary confusion.

In addition, the board considered whether or not it should propose rules regarding disposition of culturally unidentifiable human remains or funerary objects. NAGPRA regulations do address the disposition of culturally unidentifiable human remains and associated funerary objects. 43 CFR 10.11. In summary, these federal regulations require that a museum or federal agency must initiate a consultation process with Indian tribes or Native Hawaiian organizations arising from either a request to transfer control of culturally unidentifiable remains and associated funerary objects from an Indian tribe or Native Hawaiian organization, or if no request is received, before any offer to transfer control of culturally unidentifiable human remains and associated funerary objects is made. 43 CFR 10.11(b)(1)(i), (ii).

The Repatriation Act, however, does not empower the board to adopt rules regarding disposition of culturally unidentifiable human remains or funerary objects. The board's rulemaking authority under the Repatriation Act is limited to addressing claims for repatriation of culturally affiliated human remains and funerary objects. Given this lack of statutory authority, the board declines to propose such rules.

The Repatriation Act defines "right of possession" in part as "possession obtained with the voluntary consent of a group or individual that had authority of alienation over the human skeletal remains or funerary object." 22-3-903(15)(b), MCA. In comments the board received to the last set of proposed repatriation rules (MAR Notice No. 2-65-432 published October 14, 2010), which were not adopted, a commenter requested that the board define the word "group." After considering this request, the board proposes to use the definitions of tribal group and cultural group. These definitions adequately address the subject matter, and the board saw no need to craft its own definitions.

The Repatriation Act defines "cultural affiliation" as the "existence of a shared group identity that can reasonably be 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." 22-3-903(6), MCA. The Repatriation Act, however, does not define the term "identifiable earlier tribe." Given that this term is an integral part of the definition of "cultural affiliation," the board believes that it is important to define it so that everyone is working from the same base of knowledge.

Most of the list of tribes was taken from the Montana House Joint Resolution No. 27 (2009 legislative session) urging educators, journalists, and public speakers in Montana to learn and use, when writing or speaking, the names of each tribe in Montana as used in the tribe's own language. Experts on the board also identified three additional earlier tribes. One such earlier tribe is the Kiowa, which has been

documented as having members in Montana in the early 18th century but whose members moved south along the Front Range in the late 18th century and now have tribal headquarters in Oklahoma. Others would be the Shoshone or Bannock, who were probably residents of Montana for thousands of years, but who now have tribal headquarters in Idaho and Wyoming. Finally, the Apacheans (Athabaskan speakers including modern Navajo and Apaches) moved from Alberta through Montana to the eastern Great Basin about 1200 years ago, and down the Rocky Mountain Front perhaps 500 years ago. The board believes the proposed list is complete. However, future other "identifiable earlier tribes" may be documented as having been resident in Montana.

NEW RULE IV 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 [NEW RULE III]. 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 [NEW RULE III].

(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.

AUTH: 22-3-904, MCA

IMP: 22-3-903, 22-3-904, MCA

Statement of Reasonable Necessity: The board proposes a process allowing a person to petition the board to add to the list. The board has chosen this approach because it is certainly possible that a person may offer evidence about a tribe or tribes that the board has not considered. The board proposes a "preponderance of evidence" standard as the benchmark for finding if a tribe or tribes should be passed on to the rulemaking process under the Montana Administrative Procedure Act. The board proposes this standard because it is the most common standard used in civil proceedings. This standard means that the evidence shows as a whole that the fact(s) sought to be proved is more probable than not. The Repatriation Act uses a "preponderance of evidence" standard to determine cultural affiliation.

The board considered alternatives to the "preponderance of evidence" standard. First, it considered whether any evidentiary standard was appropriate. The board rejected this alternative because without an evidentiary standard of some kind, the board would have no framework to make a decision and the process would appear arbitrary and fickle. Second, the board considered standards greater than a preponderance of evidence, such as clear and convincing evidence. "Clear and

convincing" evidence is evidence that is not a mere preponderance of the evidence but a preponderance of evidence that is definite, clear, and convincing. "Clear and convincing" does not mean unanswerable or conclusive evidence or evidence beyond a reasonable doubt (applied in criminal cases). *Thibodeau v. Bechtold*, 347 Mont. 277, paragraph 23, (2008). The board determined the "clear and convincing" and "beyond a reasonable doubt" standards were too severe given that the Repatriation Act and NAGPRA repatriation regulations apply a "preponderance of evidence" standard and that the stricter standards generally are used in criminal and related matters.

Since the board has proposed to list the "identifiable earlier tribes" in rule, an amendment to the rule must follow the Montana Administrative Procedure Act. This process will allow public comment on the board's decision to add a tribe or tribes to the list. In (4), the board proposes that if a petitioner does not meet the burden of proof, then the board must dismiss the petition without prejudice. "Without prejudice" means that the petitioner may resubmit its petition at a later date buttressed with additional evidence. The board opted for the "without prejudice" standard because it allows for the possibility that new evidence may come to light, supporting a decision to add to the list. The board considered the alternative of dismissing a petition with prejudice, meaning a petitioner could not refile a petition on the same matter. This standard was judged too harsh, since evidence regarding tribes is evolving and no good reason exists to truncate the learning process.

In comments received to the board's last set of proposed repatriation rules, which were not adopted, a commenter suggested that the board change the statutory definition of "Right of possession" by striking the word "nonculturally" and replacing it with the words "culturally unidentifiable." 22-3-903(15), MCA. The board has no authority to change a statutory definition. Only the Montana Legislature may do that. In addition, the board must follow the definition of "Right of possession" when implementing the Repatriation Act.

This commenter also suggested that the board adopt NAGPRA's definition of "cultural affiliation." 43 CFR 10.2(e)(1). The Repatriation Act, however, defines "cultural affiliation" in 22-3-903(6), MCA, and since, as discussed above, these proposed rules address areas not governed by NAGPRA, the board must follow the Montana Legislature's definition.

NEW RULE V 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.

AUTH: 22-3-904, MCA
IMP: 22-3-904, 22-3-912, MCA

Statement of Reasonable Necessity: 22-3-912, MCA, allows for the filing of claims for repatriation. This statute, however, is unclear regarding what minimum information a claim must contain and what happens if a claim is deemed insufficient. New Rule V is necessary to provide the information that a claim must have and clarify that a claim omitting the necessary information must be dismissed, but that the claimant may refile a claim.

In comments the board received to the last set of proposed repatriation rules, which again were not adopted, a commenter asked what standard of evidence should be utilized for a claim to be dismissed under this proposed rule. Under proposed (2), the board would determine whether a claim contains the minimum information since, under the Repatriation Act, the claimant must file the claim with the board. 22-3-912(1)(a), MCA. No standard of evidence would apply at this stage. A claim either has the information or it does not. That is, the claimant must state the claimant's cultural affiliation with the human remains or funerary objects and why the claimant believes the possessing entity does not have the right of possession. At this point, all the board would be reviewing is whether the claim includes these elements. The board would not be determining if the claimant has proven by a preponderance of the evidence that the claimant has a cultural affiliation with the human remains or funerary objects and that the possessing entity does not have a right of possession. That is for the hearing examiner to decide at a hearing. The board believes it is important that it act as the initial reviewer so that the hearing examiner is not burdened with this responsibility. After the conclusion of the hearing, the hearing examiner issues a recommended decision to the board. 22-9-913(3)(a), (b), and (c), MCA. The board then reviews the hearing examiner's decision and issues findings of fact and conclusions of law regarding the case. 22-3-916(1)(a), (b), and (c), MCA.

The board considered other alternatives to this approach of having the claim refiled if it lacked sufficient information. For example, the board could accept a filing and have its staff complete the details by contacting the claimant. The board rejected this approach because the claimant is the person who best knows its claim and is best able to express its request. Also, the board does not have the staff to assist claimants with their claims. Another alternative is that the board could simply reject an incomplete claim and not allow refileing. The board believed this approach was punitive and would not serve the goals of the Repatriation Act.

NEW RULE VI 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 decedance 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) archeological;

(d) anthropological;

(e) linguistic;

(f) folklore;

(g) oral tradition;

(h) historical; or

(i) other relevant information or expert opinion.

AUTH: 22-3-904, MCA

IMP: 22-3-903, 22-3-904, 22-3-912, MCA

Statement of Reasonable Necessity: As noted in the Statement of Reasonable Necessity for New Rule I, the board must adopt rules addressing criteria for determining lineal descent and cultural affiliation. The criteria for a lineal

descendent are derived from the NAGPRA regulations, 43 CFR 10.14(b). The board opted to use the NAGPRA definition because this definition is well accepted by professionals in this field, and the board saw no need to craft its own definition. This definition concisely and clearly defines the criteria. In addition, the board believed that maintaining consistency between the federal and state rules, where appropriate, will eliminate unnecessary confusion.

The cultural affiliation criteria are derived from the definition of "cultural affiliation" in 22-3-903(6), MCA, and the NAGPRA regulations, 43 CFR 10.14(c), (d), and (e). The board took this approach because it determined that the criteria for determining cultural affiliation should be consistent with the statutory definition of "cultural affiliation" under 22-9-903(6), MCA. The board chose to follow the NAGPRA subsections addressing requirements for establishing cultural affiliation because these requirements are well accepted by professionals in this field, and the board saw no need to write its own requirements.

NEW RULE VII 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.

AUTH: 22-3-904, MCA

IMP: 22-3-904, 22-3-915, MCA

Statement of Reasonable Necessity: Section 22-3-915, MCA, allows the hearing examiner to order a reasonable delay of repatriation if the possessing entity has provided evidence supporting a good faith effort regarding a scientific study. The board strongly believes that a maximum of 12 months is sufficient for such a study. This period is the same maximum period allowed for scientific studies under the Protection Act. The board considered time periods less than and greater than 12 months. The board determined that maintaining consistency with the Protection Act was important since the board implements both of these laws.

In comments the board received to the last set of proposed repatriation rules, a commenter stated that it opposed scientific studies of any kind, urging that no invasive or intrusive scientific studies be allowed. The Repatriation Act, however, allows the hearing examiner to approve a scientific study by a possessing entity on human skeletal remains or funerary object if the possessing entity has provided evidence supporting a good faith effort regarding a scientific study. 22-3-915(2), MCA. Given this law, the board cannot prevent scientific studies.

4. The board proposes to transfer the following rules:

<u>OLD</u>	<u>NEW</u>	
ARM 2.65.102	ARM 2.65.301	PROTECTION OF SITE

AUTH: 22-3-804, MCA
IMP: 22-3-805, 22-3-808, 22-3-209, MCA

ARM 2.65.103 ARM 2.65.302 NOTICE AND REPORTING REQUIREMENTS

AUTH: 22-3-804, MCA
IMP: 22-3-804, 22-3-805, MCA

ARM 2.65.104 ARM 2.65.303 FIELD REVIEW

AUTH: 22-3-804, MCA
IMP: 22-3-804, 22-3-805, MCA

ARM 2.65.105 ARM 2.65.304 REMOVAL OF REMAINS OR BURIAL
MATERIALS

AUTH: 22-3-804, MCA
IMP: 22-3-804, 22-3-805, MCA

ARM 2.65.106 ARM 2.65.305 DISPOSITION OF REMAINS AND BURIAL
MATERIALS

AUTH: 22-3-804, MCA
IMP: 22-3-805, MCA

ARM 2.65.107 ARM 2.65.306 PERMITS FOR SCIENTIFIC ANALYSIS

AUTH: 22-3-804, MCA
IMP: 22-3-804, 22-3-806, MCA

ARM 2.65.108 ARM 2.65.307 REPORTS AND BURIAL REGISTRY

AUTH: 22-3-804, MCA
IMP: 22-3-804, MCA

Statement of Reasonable Necessity: The board is proposing the renumbering of its current rules to better serve those who use the rules, and to follow the Secretary of State's guidance regarding title organization. The rules will be more logically separated in subchapters by topic.

5. Concerned persons may submit their data, views, or arguments concerning the proposed action either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Monica Abbott, Department of Administration, 125 N. Roberts, Room 155, P.O. Box 200101, Helena, Montana 59620-0101; telephone (406) 444-2032; TTY (406) 444-1421; fax (406) 444-6194;

or e-mail mabbott@mt.gov and must be received no later than 5:00 p.m. on April 11, 2013.

6. Michael Manion, Chief Legal Counsel for the Department of Administration, has been designated to preside over and conduct this hearing.

7. The board maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this board. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies the person wishes to receive the board's notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 or may be made by completing a request form at any rules hearing held by the Department of Administration.

8. An electronic copy of this proposal notice is available through the board's web site at <http://burial.mt.gov>. The board strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that if a discrepancy exists between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the board works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods due to system maintenance or technical problems.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. Notification was sent to the sponsor of HB 165 by e-mails dated September 7, 2011, and September 23, 2011, that the board was contemplating work on the substantive content and the wording of the proposal notice. On February 1, 2012, the primary sponsor informed the board by e-mail that she had no initial comments to offer and she advised the board to proceed. Given the sponsor's comments, the board began drafting the proposal notice. The bill sponsor was provided a copy of this notice on February 27, 2013.

By: /s/ Reuben Mathias
Reuben Mathias, Chair
Burial Preservation Board

By: /s/ Michael P. Manion
Michael P. Manion, Rule Reviewer
Department of Administration

Certified to the Secretary of State March 4, 2013