

CHAPTER 40-02-03
PROTECTION OF PREHISTORIC AND HISTORIC HUMAN BURIAL SITES, HUMAN
REMAINS, AND BURIAL GOODS

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40-02-03-01. Definitions.

The terms used throughout this chapter have the same meaning as in North Dakota Century Code section 23-06-27, except:

1. "Department" means the state department of health.
2. "Director" means the director of the state historical society as set forth in North Dakota Century Code section 55-02-01, or the director's designated representative.
3. "Duly designated representative" means any person who is so appointed by the respective tribal government and can provide written documentation of such appointment.
4. "In situ" means in the human burial site per se or in the proximate area or vicinity of the human burial site.
5. "Intertribal reinterment committee" means that committee comprised of representatives appointed by each tribal government to represent their respective tribe in matters related to the deaccession and reinterment of human remains and burial goods.
6. "Qualified archaeologist" means an individual who meets the minimum qualifications defined in subsection 1 of section 40-02-02-05.
7. "Society" means the state historical society of North Dakota.
8. "Study" means the examination by a qualified archaeologist, with assistance from specialist, as necessary, of human burial sites, human remains, and burial goods, which examination is conducted in situ, when feasible, and consists exclusively of the following activities under the following circumstances:
 - a. In all instances, the taking of soil and flora samples as may be appropriate.
 - b. In those instances wherein the burial can be restored by backfilling, stabilization, and protection from further disturbance, the measurement and visual observation in place and written description of those visible human remains and burial goods uncovered by the disturbance of the burial to be completed as soon as practicable.
 - c. In those instances wherein the burial cannot feasibly be restored but must be disinterred completely and reinterred in another location and the examination can feasibly be conducted in situ, the visual observation and written description of the human burial site, the measurement and weighing of the human remains and burial goods after disinterment from the burial and the limited photographing of the burial site, human

remains, and burial goods. Such photography is undertaken for the exclusive purposes of visual recording and research, and publication of these photographs is generally prohibited. The only exception to this general prohibition is the publication of closeup photographs of any physical anomalies present in the human remains.

- d. In those instances wherein in situ examination is not feasible because certain contents of a human burial have been physically separated from the original burial site, those human remains and any burial goods that have been so separated are delivered to the society. Upon their delivery, such human remains and burial goods are examined within the applicable scope of study as defined herein. As soon as practicable, a reasonable effort is made to locate the human burial site in which such human remains and any burial goods were originally interred. In the event that the original burial site is located, examination of such burial site, within the applicable scope of study as defined herein, is conducted as soon as practicable.
- e. In those instances wherein in situ examination is not feasible because the immediate excavation of a human burial site is necessary and there is insufficient time for in situ examination, those human remains and burial goods that have been archaeologically excavated are delivered to and maintained at the society until the completion of the examination thereof within the applicable scope of study as defined herein. The excavation and study of a multiple burial is completed within a period of ninety days from the date on which the decision to excavate the human burial site is made by the department staff and the society staff. The excavation and study of a single burial is completed within a period of sixty days from the date on which the decision to excavate the human burial site is made by the department staff and the society staff. Extensions of such time periods may be granted with the consent of the intertribal reinterment committee in certain cases of Indian burials, including, but not limited to, those instances wherein weather conditions prevent completion of the work within the specified time period.

History: Effective December 1, 1984; amended effective December 1, 1990.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 23-06-27

40-02-03-02. Inadvertent disinterment - Protection of site.

Repealed effective December 1, 1990.

40-02-03-03. Inadvertent disinterment - Notification.

Upon having received notification of the actual or potential disturbance or the discovery of a human burial site, human remains, or burial goods pursuant to either subsection 4 or subsection 5 of North Dakota Century Code section 23-06-27, the local law enforcement agency so notified shall, as soon as practicable, report the receipt of such notification to the society and to the department. Based upon the information received by the law enforcement agency from the person providing such notification, the agency shall additionally inform the society and the department of the exact location and state of the human burial site, human remains, or burial goods of which notification was received.

History: Effective December 1, 1984; amended effective December 1, 1990.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 23-06-27

40-02-03-04. Inadvertent disinterment - Study.

Within a period of twenty-four hours, or as soon thereafter as practicable, from the time the department or the society has received notification from a local law enforcement agency pursuant to

section 40-02-03-03, the department staff and the society staff, or a qualified archaeologist designated thereby, or in the case of a historic burial, the specialist appointed by the department, shall commence the initial examination of any human remains which are the subject of the notification and undertake the following activities:

1. The human remains must be initially examined by the department and the society staff, or by a qualified archaeologist designated thereby, to determine the race and age of the remains, if possible, using relevant available and solicited information, e.g., plats, maps, records, interviews with landowners, and associated burial goods.
2. If a presumption as to race and age can be made based upon location, historical data and any associated burial goods, this information must be used to determine the disposition of the human remains by the staff of the department and the society. Disposition must be in accordance with applicable society and department statutes and rules.
3. In those instances wherein a burial site, human remains, and burial goods may constitute evidence in a potential criminal prosecution other than those described in North Dakota Century Code section 23-06-27, the burial site, human remains, and burial goods may be studied by any criminal forensic examination methods as may be required in the process of criminal investigation.
4. If it is determined by initial examination that the human remains are non-Indian, the remains may be further examined within the applicable scope of study as defined in section 40-02-03-01.
5. If it is determined by initial examination that the human remains are Indian, the remains may be further examined within the applicable scope of study as defined in section 40-02-03-01.
6. If it cannot be determined by means of such initial examination that the human remains are either Indian or non-Indian, it must be presumed that the human remains are Indian, based upon experience of the staff of the department and the society.

History: Effective December 1, 1984; amended effective December 1, 1990.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 23-06-27

40-02-03-05. Inadvertent disinterment - Restoration or reinterment.

Whether or not the society intends to study a disturbed Indian burial site and its contents, the director shall provide timely notification of the disturbed burial to the duly designated representative of the intertribal reinterment committee. Within a period of twenty-four hours, or as soon thereafter as practicable, from the time of receipt of such notification, the representative shall make an inspection of the burial site. The representative shall then make a determination as to whether the burial can be adequately and safely restored and protected in situ or, in the alternative, the contents of the burial should be disinterred completely and reinterred in another location. Archaeological testing of a disturbed human burial site to determine its spatial limits and integrity is an acceptable activity under this section to reach such determination regarding restoration in place or disinterment of human remains and burial goods. Prior to the restoration or disinterment of the burial, the intertribal reinterment committee shall attempt to determine the tribal identity or affiliation of the human remains and any burial goods interred in the burial site.

If it is determined that the disturbed burial can be adequately and safely restored and protected in situ and any requisite consent of the private landowner has been secured, the intertribal reinterment committee shall, as soon as practicable and subsequent to the completion of any study conducted on the contents of the burial at the direction of the society, cause the burial to be backfilled, stabilized, and

protected from further disturbance by the human activities or natural processes which caused the disturbance in the first instance.

If, on the other hand, it is determined that the in situ restoration of the burial is not feasible and any requisite consent of the private landowner has been secured, the intertribal reinterment committee shall, as soon as practicable and subsequent to the completion of any study conducted on the contents of the burial at the direction of the society, cause the disinterred human remains and any and all burial goods to be reinterred on Indian lands within the boundaries of the appropriate Indian reservation, as determined by the intertribal reinterment committee.

Each such restoration and reinterment shall provide an opportunity for appropriate tribal religious ceremony or ceremonies. The expenses inherent in each such restoration and reinterment activity must be exclusively and fully incurred by the appropriate tribal government, as determined by the intertribal reinterment committee.

The disinterment of the contents of a burial must be conducted under the supervision of a qualified archaeologist in accordance with the procedures inherent in a standard archaeological and contextual analysis within the applicable scope of study as defined in section 40-02-03-01.

History: Effective December 1, 1984; amended effective December 1, 1990.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 23-06-27

40-02-03-06. Planned disinterment - Notification.

1. If a person, who plans to undertake any of the development activities enumerated in subsection 7 of North Dakota Century Code section 23-06-27, knows or has reason to believe that a human burial site may be disturbed by a development activity but does not have sufficient information to design the development to preserve the site or to prepare a scope-of-work for disinterment of human remains and burial goods, the person shall conduct archaeological tests. All of the following documentation must be filed with and approved by the department and the director prior to initiating such tests:
 - a. Description and location of the human burial site, including the site number, if any.
 - b. Copies of all site forms, descriptions, and technical reports related to the human burial site, unless already on file with the director or the department.
 - c. Description of the development activity which necessitates the proposed archaeological test.
 - d. A research design and scope-of-work for the proposed archaeological test.
 - e. The current credentials of a qualified archaeologist who has agreed to conduct the archaeological test.
 - f. A copy of a report describing the results of the test and an updated site form must be filed with the director and department before the development activity proceeds.

If any human remains or burial goods are discovered during the archaeological test, the testing must cease immediately and the director and the department must be notified of such discovery. The director and department, in consultation with the intertribal reinterment committee, will determine whether the test continues or is terminated.

2. If a person, who plans to undertake any of the development activities enumerated in subsection 7 of North Dakota Century Code section 23-06-27, desires to disinter and move human remains and any burial goods interred in a human burial site which is recorded with the

state historical board or with the department, all of the following documentation must be provided to the department and to the director:

- a. A description of the human burial site for which the disinterment action is proposed, including the site number, if any.
- b. Copies of all site forms, descriptions, and technical reports related to the human burial site, unless already on file with the director or the department.
- c. A description of the development activity which necessitates the proposed disinterment.
- d. A statement justifying the need to disinter rather than avoid the human burial.
- e. A research design and scope of work for the proposed disinterment, including coverage of excavation, study, expertise to be employed, and report preparation and dissemination considerations. All costs of excavation, disinterment, study and reinterment must be borne by the proposed developer. The intertribal reinterment committee shall arrange for and incur the costs inherent in the conduct of the appropriate tribal religious ceremony or ceremonies.
- f. The current credentials of a qualified archaeologist who has agreed to conduct the work described in the research design and scope-of-work submitted, if not already on file with the director, or a commitment to obtain the services of such an individual and to submit that individual's credentials for approval by the director if not already on file with the director.

The information and notification must be provided to the director and to the department at least sixty days prior to the intended date of disinterment or the person will be deemed to be in violation of subdivision a of subsection 3 of North Dakota Century Code section 23-06-27.

This section is not applicable when evaluation and mitigation of adverse effects to cultural resources are provided for by other state and federal laws or regulations.

History: Effective December 1, 1984; amended effective December 1, 1990.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 23-06-27

40-02-03-07. Planned disinterment - Study.

Within a period of twenty-four hours, or as soon thereafter as practicable, from the time each such notification of a planned disinterment of an Indian burial site is received by the director pursuant to section 40-02-03-06, the director shall contact the intertribal reinterment committee for the purpose of giving notice to the committee of the planned disinterment and shall direct to the committee a copy of all documentation received pursuant to section 40-02-03-06.

As soon as practicable after receipt by the director of each such notification pursuant to section 40-02-03-06, the society, in conformity with the applicable requirement prescribed by subsection 7 of North Dakota Century Code section 23-06-27, shall cause the appropriate representatives of the society to commence negotiations with the person proposing disinterment in an effort to achieve the avoidance altogether of the human burial site at issue by the proposed development activity. Such negotiations must be conducted during a period no greater than sixty days from the date on which the director received notification pursuant to section 40-02-03-06. The director shall give to the intertribal reinterment committee reasonable notice of the prospective negotiations and said committee shall have the opportunity to consult with the director regarding such negotiations through appropriate representatives. Should negotiations fail within the sixty-day period and should the state historical board not choose to seek alternative judicial relief to enjoin the proposed disturbance of the burial at issue, the director, upon having determined that the documentation provided by the person pursuant to

section 40-02-03-06 is sufficient, shall direct written notification to the person that the proposed development through the location of the human burial at issue may proceed as planned; provided, however, that the development may not actually proceed through the location of such burial, until such time as the human remains and any and all burial goods interred in the burial site have been disinterred. Any person who otherwise proceeds to cause the disinterment of the burial at issue will be deemed to be in violation of subdivision a of subsection 3 of North Dakota Century Code section 23-06-27.

In those instances wherein such written notification has been directed by the director to the person proposing disinterment, the director shall thereafter notify the intertribal reinterment committee of any intent of the society to direct a qualified archaeologist to conduct a study of the human burial site and its contents. Should such intent be expressed by the director, the intertribal reinterment committee may make arrangements for the appropriate duly designated representative to accompany the representative of the society to the human burial site at the earliest practicable time.

Such duly designated representative may be present at the site of the burial throughout the course of the conduct of the study by the qualified archaeologist and may provide any necessary assistance in conjunction with the conduct of the study.

Subsequent to the completion of the conduct of any study, the qualified archaeologist who performed the study shall file a written report of the work completed and data recovered with the director, who shall direct a copy of said report to the intertribal reinterment committee.

History: Effective December 1, 1984; amended effective December 1, 1990.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 23-06-27

40-02-03-08. Planned disinterment - Reinterment.

In those instances wherein a person has been authorized by the director to proceed with the proposed development as planned, as provided in section 40-02-03-07, the intertribal reinterment committee shall attempt to determine the tribal identity or affiliation of the human remains and any burial goods interred in the burial site at issue.

Thereafter, the intertribal reinterment committee shall, as soon as practicable and subsequent to the completion of any study conducted on the contents of the burial at the direction of the society, cause the disinterred human remains and any and all burial goods to be reinterred on Indian lands within the boundaries of the appropriate Indian reservation, as determined by the intertribal reinterment committee.

Each such reinterment shall provide an opportunity for appropriate tribal religious ceremony or ceremonies.

The disinterment of the contents of a burial must be conducted under the supervision of a qualified archaeologist in accordance with the procedures inherent in a standard archaeological and contextual analysis within the applicable scope of study as defined in section 40-02-03-01.

History: Effective December 1, 1984; amended effective December 1, 1990.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 23-06-27

40-02-03-09. Conflict with federal law.

If any of the rules of this chapter conflict with controlling federal law, the controlling federal law will prevail and be applied in place of the conflicting rule.

History: Effective December 1, 1990.

General Authority: NDCC 28-32-02

Law Implemented: NDCC 23-06-27