

A report from the Missing Indigenous Persons Review Commission

2021 – 2022
Report to the Legislative
Interim Committees:

State-Tribal Relations Interim
Committee

Law and Justice Interim
Committee

Montana Department of Justice
August 29, 2022

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Executive Summary

The 2021 Montana Legislature passed House Bill (HB) 35 to require the Montana Department of Justice (DOJ) to appoint the Missing Indigenous Persons (MIP) Review Commission. This report provides an overview of the 2021 and 2022 initiation of the Commission's work and the Montana DOJ staff that support them.

The passage of HB 35 formed the MIP Review Commission located in Montana Code Annotated (MCA) 2-15-2018. Current law sunsets on June 30, 2023. Montana DOJ and the Commission conducted the following activities in 2021 – 2022:

- MIP Review Commission assigned to the DOJ Division of Criminal Investigation (DCI) Special Services Bureau, Office of Victim Services;
- Membership identified November, 2021;
- DOJ legal analysis of MCA 2-15-2018 in December, 2021;
- State Tribal Relations Interim Committee Updated January, 2022;
- Membership appointed by the Attorney General March, 2022;
- Three MIP Review Commission virtual meetings held May, June and July, 2022;
- Collaboration with the DOJ Missing Persons Specialist;
- Commission adoption of data collection survey;
- Report to Law and Justice Interim Committee and State Tribal Relations Interim Committee August, 2022.

The passage this bill and laws governing the Montana Missing Indigenous Persons Task force by the Montana Legislature is a testament to the work of Montana Department of Justice and lawmakers' efforts to build on missing and murdered Indigenous persons awareness and the need to address these issues in native communities and statewide.

Background

Montana covers 145,552 square miles, with a 2022 estimated population of 1.14 million people. There are eight federally recognized tribes and the reservations include some of the largest in the United States. American Indians are 6.7% of Montana's total population.

Missing in Montana

Although Indigenous people make up 6.7% of the overall state population, the DOJ Montana Missing Persons Clearinghouse data confirms they are four times more likely to go missing in Montana. In 2021, Montana law enforcement entered 2,114 missing persons cases into the FBI's National Crime Information Center (NCIC) database of missing persons. Thirty percent, or 650, of the 2021 missing person cases were identified as Indigenous Persons; of those 457 were unique entries and 193 were reports of the same individual missing at least twice during 2021. Over 80% of the reports were youth under the age of 18. The *Location of Reports* graph below, represents the number of cases entered in the missing person database because a missing person's report was made to a law enforcement agency in 2021. These cases do not represent active cases but includes people that were reported multiple times as missing over the year. The missing Indigenous person clearance rate in 2021 was 95% and by May 30, 2022, eight, or 1%, of the 2021 cases were still open as missing.

The Montana Missing Indigenous Persons Task Force (MMIPTF) 2021-2022 Report to the State Tribal Relations (STRC) Interim Committee includes comprehensive 2021 data concerning missing Indigenous people. The MMIPTF report is posted on the Montana Department of Justice website:

https://media.dojmt.gov/wp-content/uploads/LINC_Report_STRIC_FINAL_Aug.pdf

Missing Indigenous Persons Review Commission

Legislation requires the Attorney General to appoint the following:

- Representatives from state departments involved in issues relating to missing indigenous persons;
- Representatives from private organizations involved in issues relating to missing indigenous persons;
- Representatives from local, state, federal and tribal law enforcement;
- Representatives of Indian tribes in Montana;
- Concerned citizens;
- A member of the Legislature who also serves on the house or senate judiciary committee.

Attorney General Knudsen appointed the MIP Review Commission in March, 2022. Many members of the commission have also served on the Native American Domestic Violence Fatality Review Commission and bring their background and experience to this issue.

Table 1: Montana MIP Review Commission Members

Tribe or Agency	MIP Review Commission Member
DPPHS/CFSD	Eric Barnosky, Regional Administrator, Eastern Region
DPPHS/American Indian Health	Stephanie Iron Shooter, Director
BIA/Victim Services	Wendy Bremner, Victim Specialist Coordinator
Montana Dept. of Corrections	Harlan Trombley, former Tribal Liaison
Fort Peck Assiniboine & Sioux Tribes	Stacie FourStar, Tribal Judge
BIA/Law Enforcement	Donna FallsDown, Program Analyst Garrick Declay, Special Agent Missing and Murdered Unit- Billings Steven Red Cloud, Special Agent Missing and Murdered Unit -Shelby
Northern Cheyenne Tribe	August Scalpcane-, Drug Coordinator/Lead Probation Officer
Butte Native Wellness Center	Jen Buckley, Executive Director
Tumbleweed Runaway Program	Georgia Cady
Missoula Sheriff Dept.	David Conway, Detective
Yellowstone Co. District Court	Rod Souza, District Judge
Indian Health Services	Dr. Alan Ostby, Psychologist
Montana Department of Justice	Joan Eliel, Director Victim Services/Team Coordinator

Task Force Meetings

DOJ preparation, dates and topics of MIP Review Commission Meetings

The MIP Review Commission functions are modelled on both the Montana Domestic Violence Fatality Review Commission and the Montana Native American Domestic Violence Fatality

Review Commission. The two DOJ fatality review commissions study deceased persons and circumstances contributing to those deaths. Due to criminal justice concerns about reviewing open cases with individuals still missing or cases in which the person was located deceased, the MIP Review Commission will review cases involving living persons. Thus, the task of the MIP Review Commission requires active engagement with living Montana citizens who have been reported missing and either returned or been located. A study of living persons raises some concerns and requires a different approach. In December 2021, the Montana DOJ completed a legal review of HB 35 of this report to identify any challenges. The memo is addendum #1 in this report. On January 15, 2022, a summary of the challenges identified in the legal review were presented to the STRC for discussion. The summary is addendum #2 in this report.

Joan Eliel, Director of the DOJ Office of Victim Services (OVS), facilitated three meetings. Agendas were developed in consultation with MIP Commission members, the DOJ Special Services Bureau Chief, and the DOJ Missing Persons Specialist.

- May 26, 2022 Virtual Task Force Meeting
- June 24, 2022 Virtual Task Force Meeting
- July 29, 2022 Virtual Task Force Meeting

In May, the commission reviewed MCA 2-15 -2018 and the codified responsibility to:

- Examine trends and patterns of missing indigenous persons;
- Educate the public, law enforcement and policy makers about the issue and investigation and prevention strategies;
- Recommend policies and practices for jurisdictional collaboration, coordination and reduction of the incidences of missing indigenous persons.

The law requires that the commission include the following information in reports:

- Reasons that the person went missing;
- Whether a missing person report was filed in a timely manner;
- Whether the person remains missing;
- If the person went missing from interior boundaries of an Indian Reservations;
- Whether the complexities of federal state, local and tribal law enforcement jurisdiction inhibited a timely and effective investigation of the case.

In the June and July 2022, meetings, the commission discussed possible procedures and processes for a review of missing indigenous person cases. Brian Frost, DOJ Missing Person Specialist, informed the commission about both state and federal laws governing missing persons reports, and provided Montana data on missing indigenous persons. Subsequently, the commission chose to conduct a survey study of 86 missing indigenous persons cases from a six-month period in 2021. At the writing of this report, the survey study is in the planning stage, with implementation in September, 2022.



STATE OF MONTANA
DEPARTMENT OF JUSTICE
AGENCY LEGAL SERVICES BUREAU

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MEMORANDUM

CONFIDENTIAL
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ATTORNEY WORK PRODUCT

TO: Dana Toole
Special Services Bureau Chief
Montana Department of Justice

FROM: JEFFREY M. DOUD
Assistant Attorney General

RE: Legal Analysis – HB 35 Legal Review

DATE: December 1, 2021

MEMORANDUM

You asked that I research any potential issue with HB 35 which created the Missing Indigenous Persons Review Commission . This memorandum will provide you with my legal analysis as to perceived potential issues that may arise.

LEGAL ANALYSIS

1. Missing Indigenous Persons Review Commission Generally

The Missing Indigenous Persons Review Commission (Commission) is tasked with examining the trends and patterns of missing indigenous persons in the state, educating the public, law enforcement, and policymakers about missing indigenous persons and strategies for investigation and prevention, and recommending policies and practices that may encourage jurisdictional collaboration and coordination and reduce the incidence of missing indigenous persons.

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The Commission is made up of various individuals, who are responsible for reviewing missing persons cases selected by the Attorney General. All members of the Commission may require its members to execute a confidentiality agreement, and are subjected to civil penalties for disclosure of confidential information obtained through the Commission's review.

Importantly, meetings and proceedings of the commission are confidential and are exempt from the provisions of Title 2, chapter 3. The records of the commission are confidential information as defined in Mont. Code Ann. § 2-6-1002 and are protected from disclosure. The records are not subject to subpoena, discovery, or introduction into evidence in a civil or criminal action unless the records are reviewed by a district court judge and ordered to be provided to the person seeking access. The commission shall disclose conclusions and recommendations on request but may not disclose information, records, or data that are otherwise confidential. The commission may not use the information, records, or data for purposes other than those designated by subsections (2)(a) and (2)(c).

Finally, a person who possesses information or records that are necessary and relevant to a missing person case review, including relevant confidential criminal justice information as defined in Mont. Code Ann. § 44-5-103, shall, as soon as practicable, provide the commission with the information and records. A person who provides information or records on request of the commission is not criminally or civilly liable for providing information or records in compliance with this section.

2. Analysis.

Montana has a strong privacy provision within its Constitution. The Montana Constitution provides that the right of individual privacy shall not be infringed without the showing of a compelling state interest. Mont. Const. Art. II, § 10. The Montana Supreme Court has repeatedly interpreted Montana's unique constitutional language as affording Montana citizens a greater right to privacy than the U.S. Constitution, and, therefore, provides broader protection.

Given the language HB 35, which established the Commission, the Legislature has attempted to safeguard an individual's right to privacy from public view. The bill includes provision that make all the records of the Commission confidential under Mont. Code Ann. § 2-6-1002, and are precluded from dissemination in any civil or criminal matter absent a Court order. Moreover, the Commission's meetings and proceedings are

confidential and exempt from open meeting laws. However, that does not necessarily mean that an individual’s right to privacy is not implicated by the Commission’s review.

Depending on the type of information collected on a missing person’s case, there could be a privacy interest in those records. For instance, if the Commission were to seek mental health records, those would be subject to federal HIPAA laws. If the person were the victim of human trafficking, the details of their ordeal are sufficiently private to affect one’s privacy.

Additionally, an individual’s right to privacy could be detrimentally implicated if it is determined that the confidentiality provisions contained within the bill are not constitutional. Montana’s Constitution contains strong right to know and public participation provisions. Article II, Section 9 of the Montana Constitution, the “Right to Know” provision, provides: No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

While Subsections 7 & 8 of HB 32 declare that the Commission’s records are confidential, as defined under Mont. Code Ann. § 2-6-1002, and that its proceedings are exempt from the public’s right to participate, it remains to be seen whether those declarations would survive scrutiny, as they conflict with the corresponding constitutional provisions. If a judicial determination were made that the Commission’s records and deliberations were subject to the right to know/participate, then that would certainly trigger individual’s right to privacy in the information obtained by the Commission.

As a practical matter, the Commission may want to consider contacting the missing persons or their families, prior to conducting an inquiry, to see if the person has any objection to the Commission’s inquiry into their case. This would provide the Commission with the opportunity to explain the process and reasoning for the collection of the missing person’s information. It could also prevent any accusation or litigation regarding the missing person’s right to privacy arising out of the Commission’s inquiry.

Finally, while the Subsection 6 commands any person who receives a written request from the Commission to provide the requested information, including confidential criminal justice information (CCJI), to the Commission as soon as practicable, there is a question as to whether HB 35 abrogates the procedure for disseminating CCJI as set forth in Mont. Code Ann. § 44-5-301, et seq.

HB 35 Requirements:

- AG appointment of up to 18 commission members;
- Examine trends and patterns;
- Educate the public, law enforcement and policy makers;
- recommend policies and practices to increase jurisdictional collaboration and reduce the number of missing indigenous persons.

Completed Steps:

- Commission members are identified and due to be appointed this month;
- Reviewed the MT Missing Persons Clearinghouse to identify possible cases for commission review;
- Identified questions about procedures;
- Legal analysis of HB35 DOJ Agency Legal Services Office to clarify role of the commission and case selection.

Challenges Identified:

- Commission, although modelled on existing DOJ Fatality Review commissions, will required new procedures to review the case of a living individual;
- Legal right to privacy concerns:
 - Individual privacy is protected by the confidentiality sections of the bill; however, the bill could be challenged as not strong enough protection under the Montana Constitution Article II, sections 9 & 10;
 - Consent could be given by an individual, then withdrawn during the process, and consent alone will not prevent a legal challenge;
 - Individual's whose case is reviewed could legally assert a right to copies of the commissions review documents;
- Previously unreported or ongoing crime/s and abuse/s identified by commission review may need to be reported to the appropriate authority by the commission members; A crime or abuse identified by the commission would halt the review immediately;
- MCA 44-5-301 directs the process for dissemination of confidential criminal justice information and HB 35 may not override the existing code if challenged;
- Information gathering from family members, friends, and others may cause issues for the individual whose case is under review;
- The commission authority cannot compel any tribal or federal records be provided for review;
- Maintaining anonymity of the case for the official report will be difficult due to the low number of cases that will qualify for a review.

Next Steps Identified:

- Appoint the commission;
- Schedule commission to meet to develop case review procedures;
- Generate a report prior to the 2023 Legislative Session to report the findings and recommendations of the commission.