State-Tribal Relations Committee

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62nd Montana Legislature

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MEMORANDUM

TO: State-Tribal Relations committee members
FROM: Casey A. Barrs, Legislative Analyst
DATE: January 3, 2012
RE: Cultural and historical preservation: LC-6666 and alternative approaches

The agency (DNRC, DEQ, and FWP) comments and concerns regarding LC-6666 have merit. Foremost was the proposed scope of lands covered:

> To the current definition of heritage property is added "tribal traditional cultural places", which means places significant to Indian tribes because of association with cultural practices, traditional knowledge and beliefs or other religious and cultural significance such as sacred sites based on tribal history, cultural patrimony and continuing cultural identity, or traditional knowledge and cultural heritage."

And:

> To the current duties of state agencies is added the more expansive wording: "…consultation with Indian tribes shall not be limited to lands owned by the state or reservation lands but shall include potential traditional cultural places on all lands in the state within historic tribal ranges and ancestral homelands."

Obligations under this part of Code dealing with Antiquities are ***triggered*** are by:

- "State actions" (water development, roads, breaking ground, etc.); and
- "State assisted or licensed actions" (any Environmental Impact Statements required under Montana Environmental Policy Act, [already an existing requirement] and the Major Facility Siting Act [a requirement that would be added under this draft bill]).

There was collective concern that the increased scope of lands covered increases agency obligation to consult and to assess impact well beyond the capacity of the agencies that would be affected. So there could well be a companion argument that an appropriation would be needed in order to enhance personnel capacity to comply adequately with the legislation—especially given that the draft bill *also* adds penalties for noncompliance.

This brief memo has been prepared for the simple purpose of looking into *an alternative legislative approach to the subject of cultural and historical preservation.* It is not as far-reaching as LC-666 but nevertheless addresses concerns that were raised when the topic was taken up last interim. It must be emphasized here that what follows is *merely draft language that*

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has not been vetted by any stakeholders but is intended to keep the conversation going and examined from new angles.

Noted below are a couple things that could be considered "inadequacies" in antiquities protection under current law and common practice which might be remedied, to significant benefit of common practice. (They do not include expanding the scope of applicable lands or of applicable situations for required consultation as LC-6666 does. Whether they include a penalty section is not addressed here.)

1. **The perceived lack of adequate consultation by agencies with tribes over cultural/historic property**. The Antiquities portion of Montana Code does not contain specific mention of Indians, Native Americans, tribes or anything tribal. Consultation is not defined anywhere in Title 22 where the MT antiquities laws reside, and the given statutes do not provide any elaboration. Conversations about this subject last interim indicated there was a rather wide interpretation in common practice as to what actually constituted "consultation". Depending upon the individuals involved, consultation could be adequate—or barely nominal. Last interim's bill draft would insert the wording that consultation shall reflect a "reasonable and good faith effort". That might represent a passable standard in the legal system. But in daily practice, and especially in the cross-cultural context of state-tribal relations, it might not be clear enough. The argument can easily be made that the treatment of something as sensitive and valued as cultural and historic preservation should not be left to such vagaries.

   Possible Remedy: Amend the ***Definitions*** in 22-3-421, MCA to include a definition of "Consultation". Elements of the definition might include:

   - Consultation is conducted between officials of a state agency and a tribe who have been authorized to represent their respective offices in any discussion about actions that might potentially affect "heritage property". These designated contact points may be identified in a Memorandum of Understanding between each state agency and tribe. The MoU may also describe any *pertinent* organizational or cultural protocols and procedures that the given state agency and tribe are governed by in such discussions.
   - The modes of communication that are appropriate are… (mailing? emailing? phone? visit in person?)
   - The essentials that shall be communicated are… (the specific properties that are at issue? the laws/regulations that are in play? the steps and timeframes that are involved?)

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- ~~Perhaps a form (to be drawn up) that the designated state and tribal officials sign off on summarizing the contact and opinions of each??~~

2. **The perceived lack of clear authority and adequate responsiveness by tribes to agency dealings with cultural/historic property**. This is another concern voiced during conversations about this subject last interim. There is thus a flip side to the points about an obligation to consult adequately: there should quite arguably be a corresponding obligation from each tribe to facilitate consultation and to help state counterparts ensure that (informational and timeliness) requirements of law and regulation are met. Existence of clear "go to" contacts and preferred protocols for dealing with such potentially sensitive issues was reportedly uneven from tribe to tribe. Awareness of the time-sensitive nature of agency assessment processes also was said to be uneven from tribe to tribe.

   Any remedy to this concern needs to be cognizant of a few things. **First**, the federal government considers *Tribal* Historic Preservation Officers (THPOs) approved by the National Park Service to be the proper entry point / line of authority for discussion of these properties. But even among some THPOs, the question of ultimate authority seemed unclear during last interim's discussions. In response to STR committee staff questions about the proper authority to consult, replies included: "cognizant tribal authority", "recognized tribal authority", "appropriate tribes or interested parties" and "National Parks Service-recognized Tribal Historic Preservation Officer". **Second** is that the fact that the state cannot legislate duties upon sovereign tribes per se. But it can legislate the duties of state agencies and this in turn can suggest the framework for MoUs or cooperative agreements that the state agencies and tribes alike may agree to abide by.

   Possible Remedy: Amend the ***Duties of state agencies*** in 22-3-424, MCA adding a new subsection cross-referencing the one cited earlier:

   - Consultation is conducted between officials of a state agency and a tribe who have been authorized to represent their respective offices in any discussion about actions that might potentially affect "heritage property". These designated contact points are identified in a Memorandum of Understanding between each state agency and tribe. The MoU also describes any *pertinent* organizational or cultural protocols that procedures that the given state agency and tribe are governed by in such discussions.

   As well as subsection(s):

   - elaborating on timeliness, i.e., consultation early on, meeting required deadlines, etc.; and

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- perhaps authorizing agency funding support to counterpart offices in the tribes to generate what can sometimes be an imposing amount of archeological data within those required timeframes.

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