**** Bill No. **

Introduced By *******

By Request of the ***

STATE-TRIBAL RELATIONS IC
JULY 20, 2012
Exhibit 8

A Bill for an Act entitled: "An Act expanding the definition of heritage property to include tribal traditional cultural places; requiring state agencies to consult with Indian tribes about actions potentially affecting heritage property on state-owned and reservation lands as well as lands in the state within historic tribal ranges and ancestral homelands; expanding provisions for accountability and appeal; and amending sections 22-3-421, 22-3-424, 22-3-433, and 22-3-442, MCA."

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 22-3-421 , MCA, is amended to read:

"22-3-421. Definitions. As used in this part, unless the context clearly indicates otherwise, the following definitions apply:

(1) "Affected property owner" means a person or entity whose real property will be physically affected by the activity of an applicant or whose real property is proposed for incorporation into a historic district proposed as eligible for listing in the National Register of Historic Places.

(2) "Antiquities permit" means the permit granted for excavation, removal, or restoration of heritage properties or

paleontological remains provided for in 22-3-432.

(3) "Applicant" means a person who applies to a governmental entity, including a federal, state, or local governmental entity, for a permit, license, or lease on property owned by the governmental entity.

(4) "Consultation" means a reasonable and good faith effort to seek, discuss, and consider the views of others, including tribal historic preservation officers approved by the national park service and any other authority designated by a tribe in accordance with any consultation protocols prescribed by a tribe or provided for in a memorandum of understanding with a tribe, and seeking agreement when feasible.

~~(4)~~ (5) "Heritage property" means any district, site, building, structure, ~~or~~ object, or tribal traditional cultural place located upon or beneath the earth or under water that is significant in American history or pre-contact history, architecture, archaeology, or culture.

~~(5)~~ (6) "Historic preservation office" means the office within the Montana historical society provided for in 2-15-1512.

~~(6)~~ (7) "Historic preservation officer" means the officer provided for in 2-15-1512.

~~(7)~~ (8) "Paleontological remains" means fossilized plants and animals of a geological nature found upon or beneath the earth or under water which are rare and critical to scientific research.

~~(8)~~ (9) "Preservation review board" means the board provided for in 2-15-1512.

~~(9)~~(10) "Register" means the National Register of Historic Places, the official list of the nation's heritage properties worthy of preservation because of national, state, or local significance.

~~(10)~~(11) "Registered property" means any heritage property listed in the register.

~~(11)~~(12) "State agency" means any executive agency of the state of Montana."

(13) "Tribal traditional cultural place" means a place 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.

{*Internal References to 22-3-421:*

2-17-107 *22-3-435*}

Section 2. Section 22-3-424 , MCA, is amended to read:

"22-3-424. Duties of state agencies. State agencies shall:

(1) in consultation with the historical society adopt rules for the identification and preservation of heritage properties and paleontological remains on lands owned by the state to avoid, whenever feasible, state actions or state assisted or licensed actions that substantially alter heritage properties or paleontological remains on lands owned by the state or, in the absence of such rules, act in compliance with rules adopted under 22-3-423;

(2) identify and develop, in consultation with the historic

preservation officer, methods and procedures to ensure that the identification and protection of heritage properties and paleontological remains on lands owned by the state are given appropriate consideration in state agency decisionmaking;

(3) consult with Indian tribes as early as possible in the planning process regarding any concerns or the potential for tribal traditional cultural places to be affected by state actions or state assisted or licensed actions. For the purposes of this part, 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.

~~(3)~~ (4) deposit in the historic preservation office all inventory reports, including maps, photographs, documentation of tribal consultation, and site forms, of heritage properties and paleontological remains."

{*Internal References to 22-3-424:*

22-3-423}

NEW SECTION. **Section 3. Memoranda of understanding.** State agencies are encouraged to reach memoranda of understanding with Indian tribes that specify the proper authority and protocols for consultation on actions that might impact tribal traditional cultural places.

Section 4. Section 22-3-433 , MCA, is amended to read:

"22-3-433. Environmental review process. (1) Each state agency responsible for the preparation of an environmental impact statement in accordance with the Montana Environmental Policy Act or the Major Facility Siting Act shall, as a part of its evaluation and study process, consult with and obtain the comments of the historic preservation officer concerning the identification and location of heritage properties and paleontological remains on lands owned by the state that may be adversely impacted by the proposed action. However, where the grant of an interest in state land requires the preparation of an environmental impact statement under the Montana Environmental Policy Act, the environmental impact statement shall be limited to an evaluation of the heritage properties and paleontological remains located in, on, under, and within only the affected state land or lands provided for in 22-3-424(3).

(2) When heritage properties and paleontological remains are located and identified as described in subsection (1), the responsible state agency, in consultation with the historic preservation officer ~~and the preservation review board~~, shall include as part of its environmental impact statement a plan for the avoidance or mitigation of damage to heritage properties and paleontological remains to the greatest extent practicable. Whenever necessary or appropriate, the state agency may require an applicant for a lease, permit, license, or other approval for use of land owned by the state to develop an avoidance or mitigation plan in consultation with the historic preservation officer and the preservation review board."
{*Internal References to 22-3-433:*

22-3-434}

Section 5. Section 22-3-442 , MCA, is amended to read:

"22-3-442. Accountability, appeal, and ~~Criminal~~ criminal penalty. (1) The head of any state agency violating any provision of 22-3-424, 22-3-429, 22-3-430, or 22-3-433 shall explain in writing to the tribe whose properties are affected, to the Governor's director of Indian affairs, and to the Governor the circumstances of that violation and systemic efforts towards a solution.

(2) Any tribe seeking remedy may appeal an agency finding in either the district court in Lewis and Clark County or in the county where the heritage property is located.

(3) A person violating any provision of 22-3-432, 22-3-435, or 22-3-441 is guilty of a misdemeanor and upon conviction shall be fined not more than $1,000 or be imprisoned in the county jail for not more than 6 months, or both. Each day of continued violation of any provision of 22-3-432, 22-3-435, or 22-3-441 constitutes a distinct and separate offense."

{*Internal References to 22-3-442: None.*}

NEW SECTION. **Section 6. {standard} Notification to tribal governments.** The secretary of state shall send a copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell Chippewa tribe.

- END -

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TO: Members of the State-Tribal Relations Interim Committee

FROM: Casey A. Barrs
Legislative Research Analyst

DATE: ~~August 23, 2010~~ ~~March 13, 2012~~ April 2, 2012

RE: Agency Comments on LC-6666 (Cultural and historical preservation)

The following remarks about the draft of LC-6666 were culled from written comments and phone conversations with the DNRC, DEQ, and FWP. The agencies understood that LC-6666 is still a thinking-out-loud document, and appreciated the opportunity to comment at this stage in its drafting. The following observations were posed by one or more of these three agencies:

Definitions

- The phrase "reasonable and good faith effort" needs to be better defined.
    - Note: STR staff has suggested that this might be clarified through the establishment of tribal protocols or MOAs / MOUs that describe line of authority for consultation, whether consultation means verbal or written contact, whether replies are required and by when, etc.
- The phrase "any other authority" needs to be defined.
    - See Note above.
- Have tribal "traditional cultural places" been identified? Who will conduct such studies? How will that intensive work be funded? [A]
- The phrase "historic tribal ranges and ancestral homelands" has the potential for conflicting claims and general disagreement. Tribes' interpretations of what is "historic" and "ancestral" can differ from those of science and archaeology/anthropology/historians, so these terms may require further definition.
- The phrase "historic tribal ranges and ancestral homelands". Is there an agreed-upon map or other documentation that illustrates the location of "historic tribal ranges and ancestral homelands"? Without such recourse, how will [our agency] know what tribes are appropriate to contact for consultation purposes?
- The phrase "significant to Indian tribes" is in danger of being too open a statement. Is this to include any tribe that has an "interest" in a given project?

Lines of authority

- THPOS are not always seen as the ultimate authority or arbiter of cultural resource questions. Imagine just one person being responsible for saying what is culturally important for a tribe.
    - Note: Even among some THPOs, the question of ultimate authority seemed unclear. In response to STR 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"

- "Consultation" is typically viewed by tribes as government to government discussions between official representatives of the US government with the official members of the Tribal government. The wording here seems to represent more there should be clarity that this would be staff to staff, not government to government, if that is indeed the intent.
- Until a clear and detailed protocol is outlined, [our agency] has no ability to estimate amount of staff time required to effect consultation. Specifically, how will [our agency] know which THPO to initiate consultation with on a project-by-project basis? How will we know if an "other authority" is designated by a tribe for consultation purposes?... Who within [our agency] is the appropriate party for initiating consultation with a THPO? Or "other authority" designated by a tribe? It is our understanding... that it is only appropriate for agency staff with decision-making authority to consult with Tribal authorities.

Moving beyond state lands

- "...shall not be limited to lands owned by the state...on all lands" The end result of this statement is that it pulls in all state agencies into jurisdiction of the Montana Antiquities Act, not just land-owning agencies and SHPO. The most obvious problem with this condition is the increased workload and financial burden that will be placed on all state agencies that are required to produce an EIS.

Workload

- The most obvious problem with this condition is the increased workload and financial burden that will be placed on all state agencies that are required to produce an EIS.
- <u>Each agency given this new level of responsibility would need to be funded another FTE to do the coordination and analysis involved. [A]</u>
- The State Historic Preservation Office (SHPO) would be overwhelmed by the added responsibilities and likely would not want them.
- The Tribal Historic Preservation Office (THPO) would be overwhelmed by the added responsibilities. They lack resources: when they have extra duties they sometimes want our agency to contract them to investigate something. They are understaffed. Only [one tribe] seems to have the capacity.

Timeframes

- An important issue for the agencies would be getting timely responses from the tribes.
- Specifically how long should we have to wait for comments? We suggest that this take place within 30 days of receipt of an application by [our agency], and tribes have 30 days to respond with recommendations. What happens if there is no timely response from the tribes?
- <u>Under 22-3-421(4) "Consultation" the phrase "in accordance with any consultation protocols prescribed by a tribe" risks conflict with requirements under the MFSA to complete an EIS within 9 months. [B]</u>

Other

- A penalty could make this bill a nonstarter.
- This should probably be restricted to Montana Tribes as recognized by the state of Montana. Wording crafted to include some historically documented tribes that also have resided within the state at one time may be acceptable.

These are substantive questions that still need to be answered. Whether they are addressed in proposed legislation (changing Montana's antiquities act is just one avenue) remains to be seen. But notably, even within the current legal framework, there may be scope for each tribe to help ensure that their counterparts in the relevant state agencies understand the lines of authority and the protocols to be followed, and also ensure that tribal responses to agency inquiries are timely.