

TO: Members of the State-Tribal Relations Interim Committee

FROM: Casey A. Barrs
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DATE: August 23, 2010

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.
- 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.
- 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?

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.