

HOUSE BILL NO. 452

INTRODUCED BY J. WINDY BOY

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A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS RELATED TO CONSULTATION OF TRIBES REGARDING IMPACTS TO HERITAGE PROPERTIES; REDEFINING "HERITAGE PROPERTY"; REQUIRING CONSULTATION WITH TRIBAL HISTORIC PRESERVATION OFFICERS; EXPANDING RULEMAKING AUTHORITY; EXPANDING LANDS ON WHICH IMPACTS TO HERITAGE PROPERTIES MUST BE ASSESSED; AND AMENDING SECTIONS 22-3-421, 22-3-423, 22-3-424, 22-3-428, 22-3-429, 22-3-430, 22-3-432, 22-3-433, 22-3-435, AND 82-4-434, 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) "Heritage property" means any district, site, building, structure, or object located upon or beneath the earth or under water that is significant in ~~American~~ history, architecture, archaeology, or culture. The term includes the ancestral homelands of each state and federally recognized tribe for which there is a tribal government in Montana.

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

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

(7) "Paleontological remains" means fossilized plants and animals of a geological nature found upon or

1 beneath the earth or under water which are rare and critical to scientific research.

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

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

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

6 (11) "State agency" means any executive agency of the state of Montana."
7

8 **Section 2.** Section 22-3-423, MCA, is amended to read:

9 **"22-3-423. Duties of historic preservation officer.** Subject to the supervision of the director of the
10 historical society, the historic preservation officer has the following duties and responsibilities:

11 (1) follow necessary procedures to qualify the state for money that is now or will be made available under
12 any act of congress of the United States or otherwise for purposes of historic preservation;

13 (2) conduct an ongoing statewide survey to identify and document heritage properties and
14 paleontological remains;

15 (3) maintain a state inventory file of heritage properties and paleontological remains and maintain a
16 repository for all inventory work done in the state;

17 (4) evaluate and formally nominate potential register properties according to the criteria established by
18 the register;

19 (5) prepare and annually review the state preservation plan, register nominations, and historic
20 preservation grant activity;

21 (6) maintain, publish, and disseminate information relating to heritage properties and paleontological
22 remains in the state;

23 (7) cooperate with and assist local, state, and federal government agencies in comprehensive planning
24 that allows for the preservation of heritage properties and paleontological remains;

25 (8) enter into cooperative agreements with the federal government, local governments, and other
26 governmental entities or private landowners or the owners of objects to ensure preservation and protection of
27 registered properties;

28 (9) adopt rules outlining procedures by which a state agency that has no approved rules under
29 22-3-424(1) shall systematically consider heritage properties or paleontological remains on public and
30 private lands owned by the state and avoid, whenever feasible, state actions or state assisted or licensed actions

1 that substantially alter the properties;

2 (10) respond to requests for consultation under section 106 of the National Historic Preservation Act, as
3 provided for in 22-3-429;

4 (11) develop procedures and guidelines for the evaluation of heritage property or paleontological remains
5 as provided in 22-3-428;

6 (12) protect from disclosure to the public any information relating to the location or character of heritage
7 properties when disclosure would create a substantial risk of harm, theft, or destruction to the resources or to the
8 area or place where the resources are located;

9 (13) report the information gathered pursuant to 22-3-422(6), along with any recommendations by the
10 historic preservation officer or the review board, to an appropriate legislative interim committee established under
11 Title 5, chapter 5, part 2. The report required in this subsection must also be incorporated into the biennial report
12 required to be submitted to the governor and the legislature under 22-3-107(8).

13 (14) any other necessary or appropriate activity permitted by law to carry out and enforce the provisions
14 of this part."

15

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

17 **"22-3-424. Duties of state agencies.** State agencies, including the Montana university system, shall:

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

23 (2) identify and develop, in consultation with the historic preservation officer and each tribal historic
24 preservation officer in Montana, methods and procedures to ensure that the identification and protection of
25 heritage properties and paleontological remains on public and private lands ~~owned by the state~~ are given
26 appropriate consideration in state agency decisionmaking;

27 (3) deposit in the historic preservation office all inventory reports, including maps, photographs, and site
28 forms, of heritage properties and paleontological remains; and

29 (4) pursuant to 22-3-422(6), provide to the preservation review board on the first Tuesday in February
30 of every even-numbered year the following information:

- 1 (a) a list of the heritage properties managed by the agencies as those properties have been identified
 2 pursuant to this section;
- 3 (b) the status and condition of each heritage property;
- 4 (c) the stewardship efforts in which the agencies have engaged to maintain each heritage property and
 5 the cost of those activities;
- 6 (d) a prioritized list of the maintenance needs for the properties; and
- 7 (e) a record of the agencies' compliance with subsections (1) and (2)."

8

9 **Section 4.** Section 22-3-428, MCA, is amended to read:

10 **"22-3-428. Heritage property -- procedures and guidelines required.** The historic preservation officer
 11 shall adopt standardized procedures and guidelines for inventorying, collecting data on, documenting, and
 12 evaluating all types of heritage property. In adopting the standardized procedures and guidelines, the historic
 13 preservation officer may consult with state and federal agencies experienced in reviewing and mitigating
 14 environmental and cultural impacts caused by development of properties and shall consult with each tribal historic
 15 preservation officer in Montana."

16

17 **Section 5.** Section 22-3-429, MCA, is amended to read:

18 **"22-3-429. Requests for consultation -- public notice -- appeal of findings.** (1) A federal or state
 19 entity that acts upon a proposed federal or state action or an application for a federal, state, or local permit,
 20 license, lease, or funding ~~may~~ shall request the views of the historic preservation officer and the relevant tribal
 21 historic preservation officers in Montana concerning:

- 22 (a) the recommended eligibility for a register listing of any heritage property or paleontological remains;
- 23 (b) the effects of a proposed action, activity, or undertaking on heritage property or remains that are
 24 found to be eligible for register listing; and
- 25 (c) the appropriateness of a proposed plan for the avoidance or mitigation of effects.

26 (2) A request for comment pursuant to 16 U.S.C. 470f may be made simultaneously with a request
 27 pursuant to subsection (1). The historic preservation officer and each tribal historic preservation officer shall
 28 respond in writing to a request within 30 calendar days of receiving the request and shall address each property
 29 in the request and each topic of the request. In the event that an agency requests simultaneous consultation for
 30 two or more criteria under this section, the agency and ~~historic~~ the preservation officer officers may extend the

1 30-day review period by mutual agreement. If ~~the historic a~~ preservation officer fails to comment within that time,
2 that failure is construed as concurrence with the agency's recommendation. In the event of failure to comment
3 on a specific undertaking, ~~the historic a~~ preservation officer may not change a finding for a heritage property at
4 a later date.

5 (3) If the proposed finding is that a heritage property or paleontological remains are involved and that
6 a proposed activity will have an adverse impact on the property or remains, the proposed finding must address
7 all properties or remains involved and describe the characteristics that illustrate the qualities that make the
8 property or remains eligible for inclusion in the register. If the proposed finding includes a conclusion that a
9 property or remains may be eligible but additional information or study is needed to reach an eligibility finding,
10 the finding must specify the type and amount of information required in accordance with standards and guidelines
11 as provided in 22-3-428.

12 (4) At the time that the state or federal agency requests the views of the ~~historic preservation officer~~
13 officers as provided in subsection (1), the agency shall provide notice to the applicant, affected property owners,
14 and other interested persons of the request for consultation and shall identify locations where the submitted
15 materials may be reviewed.

16 (5) The applicant and any affected property owners have 20 days in which to appeal the ~~historic~~
17 preservation officer's finding officers' findings to the director of the historical society. The appeal notice must
18 include a written statement of reasons for the appeal and any additional supporting information.

19 (6) The director of the historical society shall issue a final finding within 30 days of the expiration of the
20 20-day appeal period provided for under subsection (5). The issuance of this finding does not limit the rights of
21 any applicant or affected property owner to challenge a finding under an existing federal law, regulation, or
22 regulatory or administrative process.

23 (7) If the applicant or an affected property owner is not satisfied with the finding of the director of the
24 historical society concerning the eligibility of the property or remains for listing in the register or a finding of
25 adverse effect to the property, the entity or property owner may appeal the finding to the district court in either
26 Lewis and Clark County or a county in which affected property is located. Appeal may be taken by filing a petition
27 with the district court citing the decision by the director of the historical society and the evidence upon which the
28 director relied. On appeal, the district court may consider any documents supporting or not supporting the finding,
29 the written comments received by the director of the historical society, and any additional evidence that may be
30 submitted to the court. The district court may substitute its judgment for the judgment of the director of the

1 historical society as to the weight of the evidence.

2 (8) A state agency may not require a historical or archaeological survey as a condition of applying for
3 or receiving a state or local permit, license, lease, or funding for a project to reconstruct or maintain an irrigation
4 ditch or appurtenant structures or equipment when the ditch or appurtenant structures or equipment are in use
5 or have been in use within the past 10 years, if the reconstruction or maintenance will occur within the existing
6 ditch easement and if the project is not on land owned by the state."

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8 **Section 6.** Section 22-3-430, MCA, is amended to read:

9 **"22-3-430. Avoidance and mitigation of impacts.** (1) Avoidance of impacts to heritage property or
10 paleontological remains is preferred. Avoidance may not be construed to constitute neglect of the property or
11 anticipatory demolition.

12 (2) If it is not feasible to avoid impacts to heritage property or paleontological remains, a mitigation plan
13 must be developed by the agency, in consultation with the applicant, to minimize adverse effects to the property
14 or remains. Mitigation must be directed at the characteristics of the property that make it eligible for listing in the
15 register. If requested by the agency, the historic preservation officer and relevant tribal historic preservation
16 officers in Montana shall identify suggested mitigation actions in writing at the time that the ~~historic preservation~~
17 ~~officer submits~~ officers submit a proposed finding under 22-3-429."

18

19 **Section 7.** Section 22-3-432, MCA, is amended to read:

20 **"22-3-432. Antiquities permits.** (1) A person may not excavate, remove, or restore any heritage
21 property or paleontological remains on public or private lands ~~owned by the state~~ without first obtaining an
22 antiquities permit from the historic preservation officer.

23 (2) Antiquities permits are to be granted only after careful consideration of the application for a permit
24 and after consultation with the appropriate state agency and tribe or tribes, if applicable. Permits are subject to
25 strict compliance with the following guidelines:

26 (a) Antiquities permits may be granted only for work to be undertaken by reputable museums,
27 universities, colleges, or other historical, scientific, or educational institutions, societies, or persons with a view
28 toward dissemination of knowledge about cultural properties, provided a permit may not be granted unless the
29 historic preservation officer is satisfied that the applicant possesses the necessary qualifications to guarantee
30 the proper excavation of those sites and objects that may add substantially to knowledge about Montana and its

1 antiquities.

2 (b) The antiquities permit must specify that a summary report of the investigations, containing relevant
3 maps, documents, drawings, and photographs, must be submitted to the historic preservation officer. The historic
4 preservation officer shall determine the appropriate time period allowable between all work undertaken and
5 submission of the summary report.

6 (3) All heritage property and paleontological remains collected under an antiquities permit are the
7 permanent property of the state and must be deposited in museums or other institutions within the state or loaned
8 to qualified institutions outside the state, unless eligible for repatriation with a tribe or otherwise provided for in
9 the antiquities permit.

10 (4) An antiquities permit is not a substitution for any other type of permit that a state agency may require
11 for other purposes."
12

13 **Section 8.** Section 22-3-433, MCA, is amended to read:

14 **"22-3-433. Environmental review process.** (1) Each state agency responsible for the preparation of
15 an environmental impact statement in accordance with the Montana Environmental Policy Act shall, as a part of
16 its evaluation and study process, consult with and obtain the comments of the historic preservation officer and
17 relevant tribal historic preservation officers in Montana concerning the identification and location of heritage
18 properties and paleontological remains on public and private lands ~~owned by the state~~ that may be adversely
19 impacted by the proposed action. However, where the grant of an interest in state land requires the preparation
20 of an environmental impact statement under the Montana Environmental Policy Act, the environmental impact
21 statement shall be limited to an evaluation of the heritage properties and paleontological remains located in, on,
22 under, and within only the affected state land.

23 (2) When heritage properties and paleontological remains are located and identified as described in
24 subsection (1), the responsible state agency, in consultation with the historic preservation officer, relevant tribal
25 historic preservation officers, and the preservation review board, shall include as part of its environmental impact
26 statement a plan for the avoidance or mitigation of damage to heritage properties and paleontological remains
27 to the greatest extent practicable. Whenever necessary or appropriate, the state agency ~~may~~ shall require an
28 applicant for a lease, permit, license, or other approval for use of public or private land ~~owned by the state~~ to
29 develop an avoidance or mitigation plan in consultation with the historic preservation officer, the relevant tribal
30 historic preservation officer or officers, and the preservation review board."

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2 **Section 9.** Section 22-3-435, MCA, is amended to read:

3 **"22-3-435. Report of discovered heritage properties or paleontological remains.** Any person
4 conducting activities, including survey, excavation, or construction, who discovers on any lands ~~owned by the~~
5 ~~state~~ any heritage property or paleontological remains as defined in 22-3-421 or who finds that an operation
6 licensed or otherwise entitled by the state may damage heritage properties or paleontological remains on any
7 lands ~~owned by the state~~ shall promptly report to the historic preservation officer the discovery of such findings
8 and shall take all reasonable steps to ensure preservation of the heritage property or paleontological remains."
9

10 **Section 10.** Section 82-4-434, MCA, is amended to read:

11 **"82-4-434. Plan of operation -- requirements.** (1) The department shall immediately submit a plan of
12 operation received in a permit or permit amendment application involving expansion of the permit area to the state
13 historic preservation office and relevant tribal historic preservation officers in Montana for evaluation of possible
14 archaeological or historical values in the area, including heritage properties as defined in 22-3-421, to be mined.

15 (2) The department shall accept a plan of operation if the department finds that the plan complies with
16 the requirements of this part and the rules adopted pursuant to this part and that after the opencut operation is
17 completed, the affected land will be reclaimed to a productive use. Once the plan of operation is accepted by the
18 department, it becomes a part of the permit but is subject to annual review and amendment by the department.
19 Any amendment by the department must comply with the provisions of 82-4-436(2).

20 (3) The department may not accept a plan of operation unless the plan provides:

21 (a) that the affected land will be reclaimed for one or more specified uses, including but not limited to
22 forest, pasture, orchard, cropland, residence, recreation, industry, habitat for wildlife, including food, cover, or
23 water, or other reasonable, practical, and achievable uses;

24 (b) that whenever the opencut operation results in a need to prevent acid drainage or sedimentation on
25 or in adjoining lands or streams, catchments, ponds, or other reasonable devices to control water drainage and
26 sediment will be constructed and maintained, provided the devices will not interfere with other landowners' rights
27 or contribute to water pollution;

28 (c) that soil and other suitable overburden will be salvaged and replaced on affected land, when required
29 by the postmining land use, after completion or termination of that particular phase of the opencut operation. The
30 depth of soil and other suitable overburden to be placed on the reclaimed area must be specified in the plan.

- 1 (d) that grading will result in a postmining topography conducive to the designated postmining land use;
- 2 (e) that waste will be buried on site in a manner that protects water quality and is compatible with the
3 postmining land use or will be disposed of off site in accordance with state laws and rules;
- 4 (f) that all access, haul, and other support roads will be located, constructed, and maintained in a manner
5 that controls and minimizes erosion;
- 6 (g) that the opencut operation will be conducted to avoid range and wildland fires and spontaneous
7 combustion and that open burning will be conducted in accordance with suitable practices for fire prevention and
8 control. Approval of the plan for fire prevention and control under this part does not relieve the operator of the duty
9 to comply with the air quality permitting and protection requirement of Title 75, chapter 2.
- 10 (h) that archaeological and historical values on affected lands, including heritage properties, will be given
11 appropriate protection;
- 12 (i) that except for those postmining land uses that do not require vegetation, each surface area of the
13 mined premises that will be disturbed will be revegetated when its use for the opencut operation is no longer
14 required;
- 15 (j) that seeding and planting will be done in a manner to achieve a permanent vegetative cover that is
16 suitable for the postmining land use and that retards erosion;
- 17 (k) that reclamation will be as concurrent with the opencut operation as feasible and will be completed
18 within a specified length of time;
- 19 (l) that surface water and ground water will be given appropriate protection, consistent with state law,
20 from deterioration of water quality and quantity that may arise as a result of the opencut operation;
- 21 (m) that noise and visual impacts on residential areas will be minimized to the degree practicable through
22 berms, vegetation screens, and reasonable limits on hours of operation; and
- 23 (n) that any additional procedures, including monitoring, that are necessary, consistent with the purposes
24 of this part, to prevent significant physical harm to the affected land or adjacent land, structures, improvements,
25 or life forms will be implemented.
- 26 (4) If reclamation according to the plan of operation has not been completed in the time specified, the
27 department, after 30 days' written notice, shall order the operator to cease mining and, if the operator does not
28 cease, may issue an order to reclaim, a notice of violation, or an order of abatement or may institute an action
29 to enjoin further operation and may sue for damages for breach of the conditions of the permit, for payment of
30 the performance bond, or for both.

1 (5) (a) At any time during the term of the permit, the operator may for good reason submit to the
2 department a new plan of operation or amendments to the existing plan, including extensions of time for
3 reclamation.

4 (b) The department may approve the proposed new plan of operation or amendments to the existing plan
5 if:

6 (i) the new plan of operation or amendments comply with the requirements of this section; and

7 (ii) (A) the operator has in good faith conducted opencut operations according to the existing plan of
8 operation; or

9 (B) it is highly improbable that reclamation will be successful unless the existing plan of operation is
10 replaced or amended.

11 (6) The permit, plan of operation, and amendments accepted by the department are a public record and
12 are open to inspection."

13

14 NEW SECTION. **Section 11. Notification to tribal governments.** The secretary of state shall send
15 a copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell
16 Chippewa tribe.

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- END -