

VOLUME NO. 41

OPINION NO. 53

ANTIQUITIES - Historic preservation officer's duties to identify potential heritage properties;

HISTORICAL SOCIETY - Historic preservation officer's duties to identify potential heritage properties;
PRESERVATION REVIEW BOARD - Historic preservation officer's duties to identify potential heritage properties;
STATE AGENCIES - Duties concerning identification of potential heritage properties;
MONTANA CODE ANNOTATED - Sections 22-3-421 to 22-3-442;
MONTANA LAWS OF 1979 - Chapter 563;
OPINIONS OF THE ATTORNEY GENERAL - 41 Op. Att'y Gen. No. 8 (1985).

HELD: The responsibilities of the state historic preservation officer in the identification of heritage properties on state-owned lands may not be limited by a state agency.

13 March 1986

Robert Archibald, Director
Montana Historical Society
225 North Roberts Street
Helena MT 59620

Dear Mr. Archibald:

You have asked my opinion on the following question:

May the responsibilities of the state historic preservation officer in the identification of heritage properties on state-owned lands be limited by a state agency?

According to your request, this inquiry arises as the result of a policy adopted by the university system which assumes that the identification of heritage property located on the premises of the university system rests solely with the university system itself and not with the historic preservation officer.

The State Antiquities Act, adopted in 1979, and codified in sections 22-3-421 to 442, MCA, provides for the preservation of "heritage property" and paleontological remains. Heritage properties include those properties which are "significant in American history, architecture, archaeology, or culture." § 22-3-421(2), MCA. As heritage properties are identified, they may be added to statewide inventories and included in the

National Register of Historic Places. The Preservation Review Board (hereinafter referred to as the Review Board) must approve or disapprove all nominations to the National Register of Historic Places and all additions to statewide inventories of heritage properties. § 22-3-422, MCA. Nominations are formally made by the preservation officer for Review Board consideration. § 22-3-423(4), MCA. Your question concerns who may "identify" potential heritage properties so that they may be evaluated and nominated by the preservation officer and approved or disapproved by the Review Board for addition to statewide inventories or for nomination to the National Register of Historic Places.

In April 1985, I issued 41 Op. Att'y Gen. No. 8, wherein I concluded that the Antiquities Act gives exclusive authority to the Preservation Review Board to determine which properties on state-owned lands are "heritage properties." In that opinion, I referred to the legislative history of the Antiquities Act as indicating that the intent of the Act was to allow the state's heritage preservation staff to give direction to the overall preservation program and to centralize authority in the state with respect to historical sites. Minutes of the Senate Natural Resources Committee, March 7, 1979, on House Bill 785 (ch. 563). 41 Op. Att'y Gen. No. 8 (1985) also states:

The State's inventory file is maintained by the historic preservation officer who is also responsible for conducting an ongoing survey to "identify" heritage properties. § 22-3-423(2) and (3), MCA. The historic preservation officer's duty to identify heritage properties is shared with state agencies [Emphasis added.]

The conclusion that the responsibility to "identify" potential heritage properties for eventual consideration by the Review Board is shared by state agencies and the preservation officer is borne out by the language of the statutes themselves. Section 22-3-423(2), MCA, gives the preservation officer the duty to "conduct an ongoing statewide survey to identify and document heritage properties and paleontological remains." (Emphasis added.) State agencies are given the authority to "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." (Emphasis added.) § 22-3-424 (2), MCA.

The above-cited statutes require that the preservation officer share with state agencies the responsibility of identifying potential heritage properties on state-owned lands. This conclusion, also reached in 41 Op. Att'y Gen. No. 8 (1985), means that if the policy adopted by a state agency restricts or abolishes the preservation officer's authority to identify potential heritage properties on state-owned lands, such a policy is inconsistent with the statutes and is therefore invalid.

THEREFORE, IT IS MY OPINION:

The responsibilities of the state historic preservation officer in the identification of heritage properties on state-owned lands may not be limited by a state agency.

Very truly yours,

MIKE GREELY
Attorney General