LETTER OPINION
2014-L-11

July 11, 2014

The Honorable Jim Schmidt
State Representative
5165 Highway 1806
Huff, ND 58554-8721

Dear Representative Schmidt:

Thank you for your letter requesting my opinion regarding whether a Standing Rock Sioux Tribe resolution regarding Traditional Cultural Specialists applies to projects undertaken by non-members on fee land within the external boundaries of the Standing Rock Sioux Reservation.

As explained below, the relationship between a tribe, non-members living on a reservation and the federal government can be complicated and confusing. Because of issues of tribal sovereignty, federal preemption of state law and the state's jurisdictional boundaries, this office can only offer guidance to you to help navigate this difficult issue for your constituents.[1]

ANALYSIS

In January 2013, the Standing Rock Sioux Tribe Tribal Council passed Tribal Resolution No. 002-13 (Tribal Resolution) which states, in part:

> WHEREAS, the Standing Rock Sioux Tribe … has established a 100% survey policy [to protect sacred and historic properties] within the exterior boundaries of the Standing Rock Sioux Reservation…
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> WHEREAS, all surveys conducted within the exterior boundaries of the Standing Rock Sioux Reservation must be conducted under a permit from the Tribal Historic Preservation Office…and that all costs associated with any surveys for cultural resources are at the expense of an applicant, who

[1] See N.D.C.C. § 54-12-01(8) (duties of the Attorney General).

> must be qualified to conduct work under the permit, or be associated with an individual to conduct the work…
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> WHEREAS, the [Standing Rock Sioux Tribe Tribal Historic Preservation Office] may require that Traditional Cultural Specialists [formally (sic) referred to as Tribal Monitors] be present on projects or undertakings…
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> [T]he Standing Rock Sioux Tribe requires Traditional Cultural Specialists [formally (sic) Tribal Monitors] on all projects and undertakings in order to properly protect out (sic) spiritual and sacred sites from destruction; and…that any costs associated with any Traditional Cultural Specialists required for a project or undertaking are be (sic) considered as costs at the expense of the applicant. . . .[2]

It is my understanding that your question has arisen because non-members of the Tribe who own fee land within the external boundaries of the Standing Rock Sioux Reservation believe they are being wrongly or negatively affected by the Tribal Resolution. Specifically, I have been advised of a situation where a non-member has applied for federal funding for conservation practices through the Cedar Soil Conservation District (District), which determined that no historic properties would be affected by the practices.[3] I understand the Tribe has informed the District an applicant must obtain a survey and consult a Traditional Cultural Specialists pursuant to the Tribal Resolution before the Tribe will concur with the District's determination. You have advised that a non-member landowner has raised concerns with you regarding whether the Tribe may charge for a tribal survey and the services of the Traditional Cultural Specialist before he may proceed with the conservation practices on his land.

There are two possible legal bases for the Tribe's ability to compel the non-member fee landowner to obtain a survey and pay for Traditional Cultural Specialists' services: (1) the Tribe has jurisdiction over the activities of the non-member landowner, making the non-member landowner subject to the Tribal Resolution; or (2) federal or state law requires the non-member landowner to incur those expenses. The Tribe's jurisdiction over the activities of non-members on fee land is set forth in the Montana v. U.S. line of Supreme Court cases.[4] Under these cases, generally, "'a tribe has no authority itself, by way of

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[2] Standing Rock Sioux Tribe Tribal Resolution No. 002-13 (Jan. 15, 2013) (emphasis added).

[3] The National Historic Preservation Act federally-mandates a process to determine whether historic properties must be protected when certain activities are undertaken with federal money. See The Nat'l Historic Pres. Act, 16 U.S.C.A. § 470f.

[4] See Montana v. U.S., 450 U.S. 544 (1981).

tribal ordinance or actions in the tribal courts, to regulate the use of fee lands.'"[5] There are three limited exceptions to this general rule but, based on the facts you have provided, none of them appears to be applicable.[6] We therefore look to federal and state law to determine whether the non-member must obtain a survey or pay a fee for the Traditional Cultural Specialists' services.

The District receives funding from the Natural Resources Conservation Service (NRCS), a program of the United States Department of Agriculture. Because NRCS is a federally-funded agency, it must adhere to the procedures set forth in the federal National Historic Preservation Act (Act), and its associated rules, for the identification and protection of historic properties.[7] Pursuant to the Act, all federal agencies (such as the District), prior to spending federal funds on an undertaking, must "take into account the effect of the undertaking on any district, site, building, structure, or object that is in or eligible for inclusion in the National Register."[8] The process for doing so is called the "Section 106 process" because it stems from Section 106 of the Act. The Secretary of the Interior (Secretary) established State Historic Preservation Programs to assist with the directives

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[5] Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 329 (2008) (citation omitted).

[6] See e.g., Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 445-46 (1997); Montana v. U.S., 450 U.S. 544 (1981); Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201, 1209-10 (9th Cir. 2001). The three exceptions are as follows. First, if the non-member has entered into a consensual relationship with the tribe through commerce, contracts, leases or other arrangements, the tribe may regulate the non-member with regard to the basis of the consensual relationship. Owning land within reservation boundaries does not create a consensual relationship under this exception, however. Brendale v. Confederated Tribes and Bands of The Yakima Indian Nation, 492 U.S. 408, 429 (1989). Second, the tribe has jurisdiction over the activities of the non-member if the activity of the non-member threatens the political integrity, economic security of health or welfare of the tribe. This exception is very narrow and applies only when the conduct at issue "'imperil[s] the subsistence' of the tribal community" and would be "'catastrophic' for tribal self-government." Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 341 (2008). Third, the tribe may exercise jurisdiction over the non-member's activities if the federal government has jurisdiction over the activities and expressly delegates that jurisdiction to the tribe. See e.g., Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Strate v. A-1 Contractors, 520 U.S. 438, 445-46 (1997); Montana v. U.S., 450 U.S. 544 (1981); Bugenig v. Hoopa Valley Tribe, 266 F.3d 1201 (9th Cir. 2001).

[7] 16 U.S.C.A. § 470f.

[8] Id.

of the Act and the Section 106 process.[9] Among other requirements, each state program must have a person designated as the State Historic Preservation Officer (SHPO) to administer the state program.[10] The Act also directs the Secretary to establish a program through which Indian tribes are allowed to assume some or all of the SHPO duties. Under this program, a tribe may submit a historic conservation plan to be approved by the Secretary.[11] If a plan is approved by the Secretary, the Tribal Historic Preservation Officer (THPO) acts in lieu of the SHPO on projects within the THPO's tribal lands.[12] In 1996 Standing Rock Sioux Tribe's conservation plan was approved by the Secretary, and in the plan, its THPO assumed certain SHPO functions.[13]

Although a non-member may own lands within reservation boundaries, federal law broadly defines Tribal lands as including "all lands within the exterior boundaries of any Indian reservation" and "all dependent Indian communities."[14] Therefore, non-member-owned fee lands within the exterior reservation boundaries are considered tribal lands under the Act.[15] As a result, THPOs can assume SPHO responsibilities for undertakings on non-member-owned fee lands. In Standing Rock's 1996 conservation plan, one of the specific functions the THPO assumed was "[r]eview[ing] Federal undertakings pursuant to Section 106" of the Act on tribal lands.[16] However, the federal law provides that non-members who own fee lands may request that an SPHO, in addition to the THPO, become involved in the Section 106 process.[17]

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[9] 16 U.S.C.A. § 470a(b).
[10] 16 U.S.C.A. § 470a(b)(1)(A).
[11] 16 U.S.C.A. § 470a(b)(1).
[12] 16 U.S.C.A. § 470a(d)(2).
[13] This agreement was described in a letter from Mr. Joe Wallis, Heritage Preservation Servs. Program, U.S. Dep't of the Interior, to Mr. James Sperry, Superintendent, State Historical Society of N.D. (Sept. 11, 1996). The Jan. 2013 Tribal Resolution refers to a "Traditional Cultural Specialist" rather than a "Tribal Historic Preservation Officer" (THPO). This position appears to be acting as or on behalf of the THPO.
[14] 36 C.F.R. § 800.16(x) (emphasis added).
[15] http://www.nps.gov/history/thpo/index.htm -- National Park Service Tribal Historic Preservation Officer Application Instructions, page 3.
[16] Nat'l Historic Pres. Act Tribal Assumption of Formal Responsibilities – Profile Information (Aug. 14, 1996) (attached to Wallis Letter).
[17] 36 C.F.R. 800.3(c)(1).

The role of the THPO in the Section 106 process is to provide consultation on the undertaking at hand.[18] Even though THPOs provide consultation, the federal agency involved in the undertaking is authorized to make the actual determinations regarding these issues.[19] When analyzing a tribe's consultative role in the Section 106 process, one federal court of appeals noted, "[t]he Tribe is entitled to 'identify its concerns,' to 'advise,' to 'articulate,' and to 'participate'… [b]ut consultation is not the same thing as control over a project."[20]

To make a determination regarding historic properties, the District must make a reasonable and good faith effort to identify historic properties that may be affected by the undertaking and gather sufficient information to evaluate the eligibility of these properties for the National Register.[21] Federal regulations state that the effort "may include background research, consultation, oral history interviews, sample field investigation and field survey."[22] Also, the agency:

> shall take into account past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects . . . [and] should also consider other applicable professional, State, tribal, and local laws, standards and guidelines.[23]

If, based on this type of reasonable and good faith effort, the agency finds no historic properties will be affected, the agency must then provide the documentation of that finding to the THPO or SHPO, notify any other consulting parties and make the documentation available to the public.[24] The SHPO or THPO then has thirty days to object to the

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[18] Federal agencies subject to the Section 106 process consult with THPOs on various issues, including whether the proposed undertaking may affect historic properties, what steps should be taken to identify those properties and how to resolve any adverse effects on those properties. See Section 101(b)(3) of the Act; 36 C.F.R. 800.1 et seq.; Memorandum from Advisory Council On Historic Pres. regarding Fees in the Section 106 Review Process (July 6, 2001) (2001 Memorandum); see also Fees in the Section 106 Review Process, http://www.achp.gov/regs-fees.html (accessed May 19, 2014).

[19] 36 C.F.R. 800.5 et seq.

[20] Narragansett Indian Tribe v. Warwick Sewer Authority, 334 F.3d 161, 168 (1st Cir. 2003).

[21] 36 C.F.R. 800.4 (emphasis added).

[22] 36 C.F.R. 800.4(b) (emphasis added).

[23] 36 C.F.R. 800.4(b).

[24] 36 C.F.R. 800.4(d).

finding.[25] If the SHPO or THPO objects to the finding, the agency must either consult with the objecting party or submit the issue to the Advisory Council on Historic Preservation (the entity charged with promulgating rules under the Act), which then has an additional thirty days to render an opinion.[26] If the Advisory Council does not provide an opinion in that timeframe, the agency has fulfilled its Section 106 responsibilities and may move ahead with the project.[27]

Additionally, an SHPO or THPO may object to the documentation used to support the agency's finding. Federal regulations set forth the specific types of documentation required for the various determinations made in the Section 106 process. It is important to note that there is no requirement that federal agencies involved in the Section 106 process obtain surveys to determine whether historic properties will be affected by the undertaking at issue.[28] If a THPO believes that an applicant has not met the relevant documentation standards, however, the THPO should notify the agency.[29] If a disagreement over documentation persists, either party can then seek assistance on the issue from the Advisory Council on Historic Preservation.[30]

In the situation you describe, the parties involved cannot move past the issue of a survey and its cost. The North Dakota office of the NRCS has requested guidance from the Advisory Council on Historic Preservation regarding this matter and received correspondence. This office has requested but not received that correspondence. It is therefore impossible for this office to determine whether any of the thirty-day timelines were triggered and, if so, met. According to the NRCS, the Advisory Council advised them to continue discussions and attempt to resolve the matter. The NRCS also informed this office that the issue regarding payments to the Tribe has existed for more than three years and affected multiple parties.

It is unclear why this situation has been allowed to continue for over three years. In 2001, the Advisory Council on Historic Preservation issued a memorandum regarding the tribes' requests for payment during the Section 106 process.[31] The memorandum is still posted

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[25] Id.
[26] Id.
[27] Id.
[28] 36 C.F.R. 800.11 sets forth the requirements for documentation of the agency's determinations. In particular, subsection (d) lists the documentation required for findings that no historic properties will be affected by an undertaking. See also 36 C.F.R. 800.4(b).
[29] 36 C.F.R. 800.11(a).
[30] Id.
[31] 2001 Memorandum, supra n.18.

on the Council's website[32] and acknowledges the significant concern generated by this issue.[33] It clearly states that neither the Act nor its implementing regulations require federal agencies or applicants to pay for any aspect of tribal participation in the Section 106 process. Specifically, it states:

> Throughout the Section 106 process, the regulations impose on Federal agencies (and applicants who assume an agency's duties) an obligation to consult with Tribal Historic Preservation Officer and Indian tribes… When the Federal agency or applicant is seeking the views of an Indian tribe to fulfill the agency's legal obligation to consult with a tribe under a specific provision of the [Advisory Council on Historic Preservation's] regulations, the agency or applicant is not required to pay the tribe for providing its views. If the agency or applicant has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process.[34]

The memorandum also notes that other federal agencies may require the development of information beyond what is required by Section 106 and that an applicant may request that a tribe perform the necessary services to obtain that information.[35] In such cases, the tribe would generally be compensated for the work performed outside the Section 106 consultative services.[36]

The 2001 memorandum is consistent with a federal appeals court opinion regarding a similar situation to the one at hand. In Narragansett Indian Tribe v. Warwick Sewer Authority,[37] a federal agency consulted with both an SPHO and a TPHO on a construction project. The SHPO recommended the agency conduct certain monitoring activities in consultation with the THPO.[38] The tribe in that case, however, wanted the agency to hire a specific individual and, apparently, tribe members to perform the monitoring.[39] The agency agreed the tribe members could help perform the monitoring but told the tribe it would not pay them.[40] The tribe then filed for an injunction of the agency's work, in part

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[32] See Fees in the Section 106 Review Process, http://www.achp.gov/regs-fees.html (accessed May 19, 2014).
[33] 2001 Memorandum, supra n.18.
[34] 2001 Memorandum, pp. 2-3 (emphasis added).
[35] 2001 Memorandum, p. 1.
[36] 2001 Memorandum, p. 3.
[37] Narragansett Indian Tribe v. Warwick Sewer Authority, 334 F.3d 161 (1st Cir. 2003).
[38] Narragansett, at 165.
[39] Id.
[40] Id.

because the agency hired different monitors.[41] The appellate court affirmed the trial court's denial of the tribe's requested injunction.[42]

CONCLUSION

The issues discussed herein are not matters of North Dakota state law. Federal law dictates the scope of Indian tribes' jurisdiction over non-members' activities on fee lands and federal agencies have authority to make decisions regarding the Section 106 process and tribes' attempts to collect fees for actions related to that process.

According to federal law, the non-member landowner must consult with the TPHO if they engage in undertakings subject to the Section 106 process set forth in the Act. However, neither the Act nor its implementing regulations require the District or landowners to obtain surveys from the Tribe as part of the Section 106 process. The District must only engage in reasonable and good faith efforts to determine whether any historic properties will be affected by the proposed undertaking. Additionally in 2001, the Advisory Council provided guidance stating tribes may not charge for that consultation.

Sincerely,

Wayne Stenehjem
Attorney General

cn/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.[43]

[41] Narragansett, at 168.
[42] Narragansett, at 169.
[43] See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).