



State Historic Preservation Office: Transfer to the Department of Administration

Special Review
February 28, 2018

OFFICE OF THE LEGISLATIVE AUDITOR
STATE OF MINNESOTA

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OFFICE OF THE LEGISLATIVE AUDITOR

STATE OF MINNESOTA • James Nobles, Legislative Auditor

February 28, 2018

Members of the Legislative Audit Commission:

During the 2017 legislative session, Governor Dayton recommended that the Legislature transfer the State Historic Preservation Office (SHPO) from the Minnesota Historical Society to the Department of Administration. The Legislature mandated the transfer in the 2017 Omnibus State Government Finance Law.

In response to a request in the same law, the Office of the Legislative Auditor examined what triggered the Governor's recommendation and the Legislature's action. We found that the Governor and legislators were concerned that SHPO was exercising regulatory authority over certain development projects without adequate accountability to officials in the executive branch of state government.

The Historical Society, the Governor's Office, and the Department of Administration cooperated fully with our review.

Sincerely,

James Nobles
Legislative Auditor



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INTRODUCTION

In March 2017, Governor Dayton recommended that the 2017 Legislature transfer Minnesota's State Historic Preservation Office (SHPO) from the Minnesota Historical Society to the Department of Administration.¹ A spokesperson for the Governor said the transfer would "reduce inefficiency and improve accountability."²

A House committee and Senate committee held brief informational hearings on bills to implement the transfer. Later, members of the State Government Finance Conference Committee included provisions in the state government omnibus budget bill that mandated SHPO's transfer to the Department of Administration effective March 15, 2018. The Legislature approved the bill and the Governor signed it into law.³

The legislation also requested that the Office of the Legislative Auditor (OLA) evaluate Minnesota's SHPO.⁴ Given our other obligations and responsibilities, we were unable to fulfill the request. However, because the Legislature enacted the transfer with limited public discussion, we decided to prepare a brief report to address this single question:

What triggered the Governor's recommendation and the Legislature's action to transfer the Minnesota State Historic Preservation Office from the Historical Society to the Department of Administration?

As we will discuss in this report, criticism of SHPO's actions in two federal historic preservation reviews—referred to as Section 106 reviews—triggered the transfer.

In this report, we first present brief background information about the Historical Society and Minnesota's SHPO. We then present:

- Information about federal Section 106 historic preservation reviews.
- Information about participants in Section 106 reviews.
- Information about the concerns that triggered the transfer.
- Information about two controversial SHPO Section 106 reviews.
- OLA's analysis of SHPO's authority in Section 106 reviews.
- Recommendations to the Department of Administration on actions needed to ensure that the SHPO transfer achieves positive results.

¹ State of Minnesota, *Revised 2018-19 Biennial Budget*, Minnesota Historical Society (St. Paul, March 2017), 7.

² Shannon Prather, "Dayton wants to strip Minnesota Historical Society of its preservation role," *StarTribune*, April 24, 2017.

³ *Laws of Minnesota* 2017, First Special Session, chapter 4, art. 2, secs. 29, 30, 31, 38, 39, and 40.

⁴ *Laws of Minnesota* 2017, First Special Session, chapter 4, art. 2, sec. 53.

CONCLUSION

Because we did not conduct a full evaluation of SHPO, we do not offer a conclusion on SHPO's overall performance. We do concur, however, that SHPO should be directly accountable to officials in the executive branch of state government. We base that judgment on our conclusion that SHPO has assumed *de facto* decision-making authority in a federal regulatory process that can add costs to certain development projects.

BACKGROUND INFORMATION

In 1966, Congress passed and the President signed the National Historic Preservation Act into law.⁵ Among other important authorizations, the law authorized the Secretary of the Interior to “establish a program of matching grants-in-aid to States.”⁶

In 1969, the Legislature directed the Minnesota Historical Society to “do any and all things required of this state by such federal law and the rules and regulations...to obtain such federal money.”⁷ In response, the Society created a Minnesota SHPO to administer the programs and responsibilities authorized under the National Historic Preservation Act.⁸

Minnesota Historical Society

The Legislature's action in 1969—granting the Society authority to create and manage a SHPO—was not unusual. Although the Society is a private organization, the Society and the state have a long and close relationship. The Legislature has often delegated public functions and state responsibilities to the Society.⁹

Despite the close relationship between the Society and the state, the Society's legal status and governance structure were factors in SHPO's transfer into the Department of Administration. Advocates of the transfer said an office that exercises regulatory authority should be in the executive branch of state government, not in a private organization.

⁵ National Historic Preservation Act, Public Law 89-665; 80 STAT. 915; 16 U.S.C. 470 (October 15, 1966). Congress subsequently amended the law several times and in 2014 moved the law from Title 16 of the United States Code to Title 54.

⁶ 54 U.S. Code, sec. 101(a)(2). For additional information about the National Historic Preservation Act and the programs and organizations it created, see Advisory Council on Historic Preservation, *The National Historic Preservation Program*, <http://www.achp.gov/nhpp.html>, accessed November 4, 2017.

⁷ *Laws of Minnesota* 1969, chapter 894, sec. 8.

⁸ We present information on how other states have organized their SHPOs in Appendix A.

⁹ For example, by law, the Society is the Custodian of State Records and the Administrator of the State Archives. In addition, it administers state historic sites, controls certain physical features in the State Capitol, and administers various other public programs and state functions. See, for example, *Minnesota Statutes* 2017, 138.03, 138.161, 138.661, 138.68, and various other provisions in chapter 138.

The Historical Society's legal status as a private organization was established in 1849, when the Territorial Legislature authorized a group of individuals to establish the Society as a "body corporate and politic."¹⁰ A board of directors governs the Society and appoints its director/chief executive officer (CEO). The board (called an "executive council") currently has 37 members: 30 members elected by the Society's membership, the Society's immediate past president, the Society's director/CEO, and the state's five constitutional officers.

Beyond having one vote on the 37-member executive council, the governor has no legal authority over the Society. Particularly noteworthy, the governor has no authority to affect how the Society administers the government functions and programs the state has delegated to the Society.

Minnesota's SHPO

In recent years, Minnesota's SHPO has been one of three units within the Historical Society's Heritage Preservation Department.¹¹ The other units are a Grants Office and an Office of Local History Services. According to Society officials, when fully staffed, the department has 23 staff, 13 of whom work on SHPO responsibilities.

Like SHPOs in other states, Minnesota's SHPO has a wide range of responsibilities.¹² Because it was the core concern that triggered the transfer, our review focused solely on SHPO's responsibility in federal Section 106 reviews. The National Historic Preservation Act defines that responsibility as follows. It says a SHPO must:

Consult with appropriate federal agencies on federal undertakings that may affect historic property and provide advice and input on the content and sufficiency of any plans developed to protect, manage, reduce, or mitigate harm to that property.¹³

We will assess SHPO's authority in Section 106 reviews later in this report.

¹⁰ *Laws of the Minnesota Territory* 1849, chapter 44. We provide additional information about the Historical Society's legal status in Appendix B.

¹¹ For additional information about the Society's Heritage Preservation Department, see <http://www.mnhs.org/heritagepreservation>, accessed October 3, 2017.

¹² We present a list of those responsibilities in Appendix C.

¹³ 54 *U.S. Code*, sec. 302303.

Section 106 Reviews¹⁴

The National Historic Preservation Act does not mandate preservation. Rather, it requires federal agencies to “take into account” the effect certain projects—called “undertakings”—will have on a historic property.¹⁵

A Section 106 review is the process agencies must follow to comply with this requirement. According to the regulations that govern Section 106 reviews:

The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the [Federal] agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.¹⁶

Through a Memorandum of Agreement (MOA) at the conclusion of the Section 106 review, federal agencies can establish historic preservation requirements a project must meet to move forward. We will discuss the MOA later in this report.

Participants in Section 106 Reviews

Federal agencies are responsible for Section 106 reviews; they are the ultimate decision makers.¹⁷ On the other hand, the law and related regulations require federal agencies to consult with various organizations and individuals, including the following:

- State Historic Preservation Offices. SHPOs are given a particularly strong role in the process. SHPOs help federal agencies identify historic properties, assess the effects an

¹⁴ The term “Section 106 review” was established based on a provision in the original 1966 National Historic Preservation Act (NHPA), which was codified in Title 16 of the *U.S. Code*. People in the historic preservation community decided to keep the term after a recodification that moved the provision into Title 54 of the *U.S. Code* (as section 306108).

¹⁵ Federal regulations define an “undertaking” as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit, license or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.” 36 *CFR*, sec. 800.16 (y). The National Historic Preservation Act defined “historic property” as “any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object.” 54 *U.S. Code*, sec. 300308. The criteria for being eligible for listing on the National Register of Historic Places are too lengthy to repeat here. They are available at: <http://www.nationalregisterofhistoricplaces.com/faq.html>, accessed January 8, 2018.

¹⁶ 36 *CFR*, sec. 800.1 (a).

¹⁷ 36 *CFR*, sec. 800.2 (a), which says in part: “It is the statutory obligation of the Federal agency to fulfill the requirements of section 106.... The agency official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of section 106 compliance.”

undertaking will have on a property, and offer comments on the sufficiency of proposed actions to “protect, manage, or reduce or mitigate harm” to historic property.¹⁸

- **Indian Tribes.** Federal laws and regulations also mandate a strong role for American Indian tribes in Section 106 reviews.¹⁹ In fact, a Tribal Historic Preservation Office (THPO) may assume the role of the SHPO if the project is on tribal land.²⁰ But even on nontribal land, federal regulations mandate a strong role for tribes when a project affects places that have cultural or religious significance to an American Indian tribe.²¹
- **Other Consulting Parties.** Federal regulations list various other individuals and organizations that may be included as “consulting parties.”²²

Memorandum of Agreement

When a project deemed to be a federal undertaking has adverse effects on a historical property, the aim of consultation is to achieve a Memorandum of Agreement (MOA). According to federal regulations, an MOA “records the terms and conditions agreed upon to resolve the adverse effects of an undertaking upon historic properties.”²³

Federal regulations specify who signs an MOA depending on who participated in the Section 106 consultation process.²⁴ In addition to the project’s lead federal agency, the participating SHPO and/or THPO would normally be signatories, as would the Advisory Council if it participated. Finally, the regulations provide that the lead federal agency “should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory.”²⁵

If a Section 106 review involves a complex project with multiple consulting parties who have conflicting interests and objectives, achieving an MOA can require considerable time and several drafts. As a result, the developers and public officials who want to move a project forward can

¹⁸ 54 *U.S. Code*, sec. 302303(b)(9). Also see 36 *CFR*, sec. 800.2 (c)(1)(i), which says: “The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage.... [T]he SHPO advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taking into consideration at all levels of planning and development.”

¹⁹ 54 *U.S. Code*, sec. 302702. Also see 36 *CFR*, sec. 800.2 (c)(2); and Advisory Council on Historic Preservation, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* (Washington, DC, 2012).

²⁰ *Ibid.*

²¹ *Ibid.*

²² They can include: (1) representatives of local governments affected by the project, (2) the organizations that have applied for federal funding, permits, licenses, or other approvals for the development project, (3) the Advisory Council on Historic Preservation, and (4) individuals and organizations with a demonstrated interest in the undertaking. For a list of “other consulting parties” in Section 106 reviews, see 36 *CFR*, sec. 800.2 (c)(3)(4)(5).

²³ 36 *CFR*, sec. 800.16 (o).

²⁴ 36 *CFR*, sec. 800.6 (c)(1) and (2).

²⁵ *Ibid.*

become frustrated, and that frustration can be aimed at the SHPO that is involved in the review process.

CONCERNS THAT TRIGGERED THE TRANSFER

During the 2017 legislative session, the Governor, as well as some legislators and others, claimed that SHPO participation in Section 106 reviews was harming development projects in Minnesota. They specifically cited the PolyMet mine project in northern Minnesota and the Chik-Wauk Museum expansion project in northern Minnesota. We present information about these projects later in this report.

The Governor's Concerns

In response to our inquiry, a spokesperson for the Governor cited several reasons for the Governor's recommendation to transfer SHPO to the Department of Administration.²⁶ According to the spokesperson, the Governor is concerned that:

- SHPO seems to act as a "law unto itself" with no need to be accountable to anyone else.
- SHPO operates with a broad federal mandate that allows it to impose its authority over a wide range of development and infrastructure projects.
- SHPO lacks responsiveness to requests for information.

The Governor based his view, according to the spokesperson, in part on complaints his office received about SHPO's involvement in the PolyMet mining project and the Chik-Wauk Museum and Nature Center remodeling project.²⁷

Finally, the Governor's spokesperson asked us to clarify that the Governor's support for the transfer was not related to conflicts over Civil War paintings in the Governor's Reception Room at the Minnesota State Capitol. According to his office, "Governor Dayton considered SHPO's involvement in that debate to be an entirely appropriate exercise of its legitimate authority within its proper scope of responsibilities."²⁸

²⁶ Joanna Dornfeld, Chief of Staff to Governor Mark Dayton, e-mail message to James Nobles, Legislative Auditor, December 15, 2017.

²⁷ *Ibid.* The Governor's spokesperson also mentioned that the Governor had concerns about SHPO's involvement in a project to build a ballpark in downtown St. Paul. We reviewed SHPO's file on its involvement in that project, but we did not conduct additional research or include that project in this report.

²⁸ *Ibid.* During a major State Capitol restoration project, Governor Dayton objected to returning certain paintings depicting Civil War battle scenes to the Governor's Reception Room. The Governor conceded, however, that the Historical Society had the legal authority to decide, and the paintings were rehung in the reception room. For a media account of the dispute, see Shannon Prather, "Civil War paintings to remain on display at Capitol," *StarTribune*, December 9, 2017.

Legislators' Concerns

The legislative sponsors of the transfer expressed similar concerns about SHPO. For example, in the Senate hearing, the transfer bill's sponsor, Senator Tom Bakk, said:

Minnesota has a very difficult regulatory process when it comes to getting things built, and nobody understands it more than those of us up north...and most times the people that get blamed for our regulatory environment are the Department of Natural Resources and the Minnesota Pollution Control Agency. But there are other places in state government that are involved in economic development, and can either be helpful or can make the process more difficult.²⁹

Senator Bakk pointed to Minnesota's SHPO as another state organization that can make it difficult to get things built. He specifically noted a project on the Gunflint Trail called the Chik-Wauk Museum. He said:

...reading an e-mail this morning about that project, it was incredibly frustrating and it reminded me why I introduced the bill.... I mean, when you read through the e-mail from Chik-Wauk, there's a couple places in there where they submitted drawings and just got no response. It's like someone just threw them in the bottom drawer; in the meantime, the project can't move forward.... For some reason, there's not the level of accountability for things to get done in a timely manner for people that are trying to move projects along.³⁰

In presenting the transfer legislation to the House Government Operations and Election Policy Commission, Representative Rob Ecklund said:

Over the past couple years there have been concerns with the operations and the work of this office—the slowness of work, difficulty meeting deadlines, and keeping projects from moving forward, and difficulty interacting with state and federal agencies to keep projects moving towards completion. Concerns with SHPO are shared by cities, nonprofits, and private businesses. This transfer will create accountability to the office to help correct these issues.³¹

²⁹ Senator Tom Bakk, presentation on S.F. 2077 to the State Government Finance and Policy and Elections Committee, Minnesota Senate, April 5, 2017.

³⁰ *Ibid.*

³¹ Representative Rob Ecklund, presentation on H.F. 2366 to the Government Operations and Election Policy Committee, Minnesota House of Representatives, March 30, 2017.

Interest Groups' Concerns

During a committee hearing in the House, William Hefner, an attorney at the Environmental Law Group, testified in favor of the SHPO transfer.³² He said:

Historic preservation is obviously a very important thing. SHPO plays a very key role in that process. The point of this bill is not to undermine that role but to hopefully make it more efficient and to bring some accountability to that process.... The experience I and my clients have had...is frustration with what feels to be the inefficiency and the slowness with which that process happens.... We have a very limited construction season here in Minnesota, so...it only takes the addition of a couple of months to...take one out an entire year's construction season and to back a project off into another season, which again, can put funding and other things at risk.... The point of this bill would be to put SHPO within the context of a full-on regulatory agency that has experience with these sorts of things....³³

Mr. Hefner also pointed to what he called SHPO's "lack of accountability." He said:

When you are in the middle of this process, frankly, you're walking...a tightrope between trying to speed up your process and trying to make your concerns known...but at the same time, you need SHPO to be on your side ultimately...you're walking that fine line between trying to make them accountable and risking angering or alienating them and risking a negative determination on something you're putting before them and further lengthening the process....³⁴

A representative of the Preservation Alliance of Minnesota also expressed concerns about working with SHPO. Erin Berg, the organization's Director of Policy and Services, said:

We acknowledge and recognize that there is room for improvement in the operations of the State Historic Preservation Office because we hear about the

³² According to the law firm's website, the firm has represented businesses from "a wide variety of industrial sectors, including steel, mining, ethanol, traditional and alternative energy, plastics, paper, wood products, chemicals, agriculture, defense, and manufacturing." A significant number of the firm's clients, as noted on the firm's website, are Minnesota mining companies; for example: Cliffs Natural Resources, Inc., Hibbing Taconite Company, Northshore Mining Company, PolyMet Mining, and United Taconite, LLC.

³³ William Hefner, presentation to the Government Operations and Election Policy Committee, Minnesota House of Representatives, March 30, 2017.

³⁴ *Ibid.*

frustrations from our own members, and we've had our own challenges in working with the SHPO in the course of our work.³⁵

During the House committee hearing, several legislators and individuals questioned the need for the transfer and supported keeping SHPO in the Historical Society.

Historical Society's Response

Stephen Elliott, Director and Chief Executive Officer (CEO) of the Minnesota Historical Society, spoke against the transfer of SHPO to the Department of Administration. He said:

We believe that the proper place for the State Historic Preservation Office is the Minnesota Historical Society.... What has made [SHPO] successful is the ability to coordinate and collaborate with professional staff doing similar work.... That staff includes historians, historical architects, archaeologists, and other experts doing other work as well as within the larger Historical Society....³⁶

Mr. Elliott went on to point out that SHPO processed over 3,000 Section 106 reviews in the most recent fiscal year. He said that the vast majority of the reviews result in a finding of no adverse effect on historic resources and, therefore, they move along quickly. He added that it is only in a "small number of cases, less than 1 percent...that SHPO and federal agencies...have to determine the best way to avoid, minimize, or mitigate a negative effect on historic resources."

In addition, Mr. Elliott said:

Have we always performed perfectly? Well, of course, not. With this heavy of a workflow with sometimes complicated situations that require professional judgments in gray areas, with a process that people don't really want to participate in but they're required to and with many, many stakeholders involved, there's opportunity for disagreement and for error. If there are a small number of reviews that cause concern, we work together to resolve those issues.... There is no doubt in my mind that's best accomplished in the Minnesota Historical Society, which has the track record, long track record, and expertise to do this work well at the least cost.³⁷

³⁵ Erin Berg, Director of Policy and Services, Preservation Alliance of Minnesota, presentation to the Government Operations and Election Policy Committee, Minnesota House of Representatives, March 30, 2017. Ms. Berg described the Alliance as "a nonprofit organization with a mission to connect people to the historic places, promoting community vitality." She noted that the Alliance was established in 1981 and represents stakeholders who want to "save, revitalize, and honor the places that matter to them." Its members include individuals, communities, municipalities, other nonprofit organizations, developers, design professionals, and contractors.

³⁶ Stephen Elliott, presentation to the Government Operations and Election Policy Committee, Minnesota House of Representatives, March 30, 2017.

³⁷ *Ibid.*

TWO CONTROVERSIAL SHPO SECTION 106 REVIEWS

As noted, recent criticism of SHPO grew out of its involvement in several projects that were subject to federal Section 106 reviews. Critics often cited the PolyMet mine project and the Chik-Wauk Museum and Nature Center expansion project as examples of their concerns.

We reviewed SHPO's files on these two projects, as well as others. We also talked with several individuals and organizations that have been involved with SHPO's Section 106 reviews.³⁸ The common criticism we heard was that SHPO functions without accountability to anyone in state government. Several people also said that SHPO is not even responsive or accountable to federal government officials who supposedly control the Section 106 review process. As a result, critics said that when the review process bogs down and SHPO is unresponsive or unreasonable, people have no place to turn for help.

SHPO officials told us that many of the allegations made against them are untrue. They also said that their participation in Section 106 reviews has been consistent with the legal processes and standards established in federal laws and regulations. They emphasized that Minnesota's SHPO has taken a strong and independent position in Section 106 reviews because that is how the federal government designed the process. They told us that federal agencies need SHPO decisions and concurrence in order for them to approve and make a final decision regarding a project.

Again, because critics cited them, we provide additional information about SHPO's involvement with the PolyMet project and the Chik-Wauk project.

PolyMet Mining Project

PolyMet Mining, Inc. (PolyMet) is a mining development company that has proposed to mine copper, nickel, and platinum in St. Louis County, Minnesota.³⁹ The project requires permits from the Minnesota Department of Natural Resources and the Minnesota Pollution Control Agency.⁴⁰

Two federal agencies have also been involved with the project. First, to gain access to the minerals, the company had to negotiate a land exchange with the U.S. Forest Service (offering to give the Forest Service land the company owned in exchange for land the Forest Service

³⁸ Without exception, the people we talked with requested that we classify their comments as not public. They said that relationships in the preservation community are important and were concerned that candid comments about SHPO could have negative ramifications.

³⁹ PolyMet Mining, Inc. website, <http://polymetmining.com/>, accessed November 2, 2017.

⁴⁰ The State of Minnesota maintains a website about the state's permitting processes for the PolyMet Project at <http://polymet.mn.gov/>, accessed October 27, 2017. In addition, the company has a website that tracks the permitting process for the PolyMet project at <http://polymetmining.com/project-status/environmental-review/>, accessed October 27, 2017.

owned).⁴¹ In addition, the project requires permits from the U.S. Army Corps of Engineers because of the project's impact on certain wetlands.⁴²

The federal agencies deemed the PolyMet project an “undertaking” subject to a Section 106 review, with the U.S. Forest Service and the U.S. Army Corps of Engineers acting as co-lead agencies in the review process. The process began in 2004, although surveys designed to identify historically and culturally significant sites in the area were conducted earlier by the U.S. Forest Service and a PolyMet consultant. The consulting parties in the review included the lead federal agencies, SHPO, PolyMet, and three federally recognized Minnesota Ojibwe bands. Later in the review process, the Advisory Council on Historic Preservation joined as a consulting party and signed the PolyMet MOA.

The review process identified historic properties, including the Erie Mining Company Landscape Historic District and three properties of cultural and religious significance to tribes that would be affected adversely by the PolyMet project.⁴³ The review concluded in late December 2016, when the key parties signed a MOA that stipulates the actions PolyMet must take to address the adverse effects the mining project would have on historic properties. The two federal agencies will be responsible for ensuring that PolyMet meets the requirements specified in the MOA, but SHPO and the bands will continue to have a consulting role.

PolyMet officials claim that the Section 106 review process took longer and cost more than it should have because “SHPO approached the company and this project with hostility from the very beginning.” PolyMet officials alleged the following:

- SHPO revisited issues again and again, which resulted in costly delays.
- SHPO excessively edited the MOA.
- SHPO missed deadlines and cancelled meetings.
- SHPO refused to have direct communications with PolyMet officials.

⁴¹ United States Department of Agriculture, Forest Service, Superior National Forest, *Final Record of Decision, NorthMet Project Land Exchange*, January 2017. Also see PolyMet's website on the land exchange, <http://polymetmining.com/northmet-project/land-exchange/>, accessed November 6, 2017.

⁴² Because the PolyMet project affects wetlands, the company had to obtain a permit required by Section 404 of the U.S. Clean Water Act, issued by the U.S. Army Corps of Engineers. For more information about Section 404 permits, see <https://www.epa.gov/cwa-404/section-404-permit-program>, accessed November 8, 2017. For more information about PolyMet's Section 404 permit, see <http://www.mvp.usace.army.mil/Missions/Regulatory/PolyMet/>, accessed January 3, 2018.

⁴³ The three properties determined to be of cultural and religious significance to tribes were identified as Spring Mine Lake Sugarbush, Partridge Rivers Section of the Mesabe Widjiu, and the Partridge Rivers Segment of the Beaver Bay to Lake Vermilion Trail.

PolyMet officials said they finally contacted Historical Society officials about the situation, but their response was “tepid and disinterested.” As a result, PolyMet officials took their concerns to Governor Dayton and his staff.⁴⁴

Given the serious criticism PolyMet officials leveled against SHPO, we asked Historical Society and SHPO officials to respond to the criticism.⁴⁵ They said:

- PolyMet’s assertion that SHPO staff were (or are) hostile to the PolyMet project is “patently false.” SHPO staff acted professionally to fulfill their obligation to assist the federal agencies, identify and protect historic resources and, if the resources cannot be preserved, then to resolve adverse effects through appropriate mitigation.
- The PolyMet project is a large, complex development project, and Section 106 reviews of these types of projects always takes more time, consultation, and negotiations.
- The review was further complicated because two federal agencies—the U.S. Forest Service and the U.S. Army Corps of Engineers—were designated as “co-lead” agencies. That is extremely unusual and challenging in this situation because the agencies had very different perspectives and interests.
- PolyMet officials were unfamiliar and impatient with the Section 106 consultation process. The reason PolyMet officials had a perception that our office revisited issues again and again is that the federal agencies did not address and resolve issues that were brought up again and again during the review process. This led PolyMet officials to think that SHPO was hostile to the project and using delay tactics or drawing out consultation, which was not true.
- The need to reach agreement with three separate Indian tribal bands about mitigating the adverse impacts on sites important to the cultural heritage of those bands was an added complicating factor. In addition, the evidence supporting the historic importance of those sites was, in some cases, challenging to clearly establish.
- The co-lead federal agencies established a policy that did not allow SHPO to meet directly with PolyMet officials. The agencies could have delegated consultation to PolyMet, which would allow for direct communication and consultation, but they chose not to.
- SHPO met the majority of 30-day review time limits and in instances where they did not, SHPO asked for and received approval for time extension from the co-lead federal agencies. These extensions consisted of one to five days. One meeting was cancelled and later rescheduled.

⁴⁴ We obtained these statements from a document PolyMet circulated to “Interested Parties” during the 2017 legislative session. We also interviewed PolyMet officials about their concerns.

⁴⁵ We obtained these statements from Historical Society and SHPO officials in several written submissions they made to OLA in response to our questions and requests, as well as from interviews.

While we gathered information and opinions from both sides—PolyMet and SHPO—we are not able to render a definitive judgment on which side is “right.” Moreover, we think the conflict between PolyMet and SHPO about the Section 106 review reflects the organizations’ conflicting objectives and responsibilities.

Chik-Wauk Museum and Nature Center Expansion Project

The Chik-Wauk Museum and Nature Center is located on federal land in far northern Minnesota, on the Gunflint Trail, 55 miles northeast of Grand Marais, Minnesota. Before becoming a museum and nature center, the property was a private fishing resort. It closed in the 1980s when the area became federally administered as the Boundary Waters Canoe Area, and the owners transferred the property to the U.S. Forest Service.⁴⁶

In 2007, the Forest Service nominated the property for listing on the National Register of Historic Places. The Gunflint Trail Historical Society obtained a special use permit from the Forest Service to develop the property into a museum and nature center, which opened in 2010.⁴⁷

The museum attracted a large number of visitors, and the Gunflint Trail Historical Society proposed an expansion. The Gunflint Trail Historical Society proposed to add more parking, restrooms, a gift shop, museum educational and display spaces, a staff office area, and visitor cabins.⁴⁸ The state supported the expansion with several financial grants.⁴⁹

Because the museum expansion project would potentially affect a building and land owned by the federal government, the expansion project was subject to a Section 106 review. In the review, SHPO had its normal role as an advisor to the lead federal agency.

⁴⁶ We used several sources for information about Chik-Wauk Lodge, including: Chik-Wauk Cultural Landscape Report, prepared for Gunflint Trail Historical Society, by Quinn Evans Architects (April 2014), <http://www.gunflinttrailhistoricalsociety.org/images/ckeditor/files/Chapter%20One.pdf>, accessed December 4, 2017; and Minnesota Historical Society, Chik-Wauk Lodge Project Overview and Project Details, <http://legacy.mnhs.org/projects/2515>, accessed December 4, 2017.

⁴⁷ *Ibid.* Also see United States Department of Interior, National Park Service, National Register of Historic Places Continuation sheet, Supplementary Listing Record, NRIS Reference Number 07000599, 6-27-07, Chik-Wauk Lodge, <http://www.mnhs.org/preserve/nrhp/nomination/07000599.pdf>, accessed December 8, 2017.

⁴⁸ Minnesota Historical Society and State Historic Preservation Office, e-mail message to James Nobles, Legislative Auditor, “Chik-Wauk Museum and Nature Center,” January 5, 2018.

⁴⁹ The grant awards included the following: \$25,000 in 2010 to install an exhibit about life in the Gunflint Trail area; \$5,000 in 2011 to document in 3 to 5 interviews the history of residents along the Gunflint Trail and transcribe 10 additional interviews; \$4,733 in 2012 to make publicly accessible three films documenting the Gunflint Trail through copy to modern media formats; \$31,124 in 2013 to acquire professional services to write a cultural landscape report for the Chik-Wauk Lodge to prepare for future historic preservation projects; and \$250,000 in 2015 to complete phase two of the Chik-Wauk Museum and Nature Center. For more information about the grants, see <http://legacy.mnhs.org/projects?text=Chik-Wauk>, accessed November 3, 2017.

An appropriation in 2015 granted \$250,000 to help complete the expansion project. The law appropriating the grant money said: “Work within the National Register of Historic Places property [the Chik-Wauk Lodge] shall be approved by the Minnesota Historical Society.”⁵⁰

We examined SHPO files related to the Section 106 review of the project and found its “advice” was detailed and firm. SHPO essentially told the local Forest Service official what materials the Gunflint Trail Historical Society must use for SHPO to agree the expansion project would not result in adverse effects on the historic property.

For example, in a letter dated October 27, 2017, a SHPO official told the Superior National Forest’s Acting Gunflint District Ranger that some of the windows being proposed for the project did not meet standards established by the U.S. Secretary of Interior. The letter said:

A window design with grills between the glass is unacceptable and does not meet Standards.... To meet Standards the new window units should match the extant historic windows in profile, material and general appearance. As an aspect of that general appearance, they must be designed with either true divided lights or fully simulated divided lights with exterior, interior, and pacer muntins. In terms of typical window manufacturing specifications for full simulated divided lights, these are specified as “Simulated Divided Lites with Spacer Bars.” Please submit revised window details specifications that have either “three over three” true divided lights or fully simulated divided lights, not muntin grills between glass panes.⁵¹

Given the assertive tone of its “advice,” we asked SHPO officials to explain their role. In response they said, for example:

This kind of language and detailed recommendation is not out of the ordinary and is what the federal agency expects to see from our office in terms of detailed recommendations in order to meet the SOI [Secretary of Interior] Standards. The museum built two of their previous buildings not following what our office had reviewed and commented on, specifically in terms of the windows, and therefore we felt we needed to be very specific for this building which is in the heart of the Chik Wauk property’s historic landscape and setting.

From what we often hear, both agencies and applicants for federal assistance appreciate detailed recommendations from our office. If we were willing and able to, they’d prefer to have us design these rehab and new construction projects for them so there’s always a fine line between ensuring that the federal agency and

⁵⁰ *Laws of Minnesota* 2015, First Special Session, chapter 2, art. 5, sec. 4.

⁵¹ Sarah J. Beimers, Manager, Government Programs and Compliance, State Historic Preservation Office, Minnesota Historical Society, letter to Ellen C. Bogardus-Szymaniak, Integrated Resource Team Leader, Acting Gunflint District Ranger, Superior National Forest, *Construction of an Interpretive Cabin Chik-Wauk Museum and Nature Center, Superior National Forest*, October 27, 2017.

applicant are doing their due diligence in terms of appropriate architectural design and we are not designing the projects for them.⁵²

We again note that, for this project, SHPO had authority to advise the federal lead agency as part of the Section 106 review and to enforce state grant requirements. In short, it had a dual role. The fact remains that the tone of its “advice” to the U.S. Forest Service as part of the Section 106 review seemed to us markedly aggressive and detailed; it left no room for other opinions or perspectives.

OLA ASSESSMENT OF SHPO’S AUTHORITY IN SECTION 106 REVIEWS

The two cases summarized above are an extremely small sample of SHPO’s work.⁵³ Nevertheless, they are the cases that created concern about SHPO and resulted in its transfer from the Historical Society into the executive branch.

The Governor and key legislators concluded that SHPO is exercising regulatory authority in Section 106 historic preservation reviews. Based on this conclusion, they decided that SHPO should be subject to more oversight and accountability and transferred the office into the Department of Administration.

We think the perception that SHPO has acted as a regulator is valid, but the legal reality is more complicated.

Perception of SHPO’s Authority

Several people with deep experience with Section 106 reviews told us that federal agencies are extremely reluctant to conclude a review without agreement with the SHPO that was involved in the review. Moreover, Minnesota’s SHPO has reinforced that perception. As noted previously, SHPO officials told us that federal agencies cannot allow projects subject to a Section 106 review to move forward unless federal agencies obtain concurrence from the SHPO that is involved in the review.

We challenged that statement based on our analysis of the law, and a Historical Society official said SHPO had overstated its authority. While we appreciate the willingness of the Historical Society to correct SHPO’s statement, we think the statement is consistent with SHPO’s past

⁵² Minnesota Historical Society and State Historic Preservation Office, e-mail message to James Nobles, Legislative Auditor, “Chik-Wauk Museum and Nature Center,” January 5, 2018.

⁵³ We briefly noted earlier that SHPO fulfills various responsibilities in addition to participating in Section 106 reviews. In addition, as we noted earlier, Stephen Elliott, Minnesota Historical Society’s Director, told legislators that SHPO processes approximately 3,000 Section 106 reviews each year. He said that the vast majority of the reviews result in a finding of “no adverse effect” on historic resources and, therefore, they move along quickly. He added that it is only in a “small number of cases, less than 1 percent...that SHPO and federal agencies...have to determine the best way to avoid, minimize, or mitigate a negative effect on historic resources.”

actions in Section 106 reviews; it has presumed to be a decision maker in a federal regulatory process.

Legal Reality of SHPO's Authority

The legal authority of a SHPO in Section 106 reviews was addressed in an advisory opinion issued by the Council on Historic Preservation. The opinion said:

Although the SHPOs are involved in the Section 106 process, Section 106 remains exclusively a “preservation responsibilit[y] of the Federal agency”.... The SHPO role is one of assisting the federal agency in Section 106, and not one of assuming “responsibility” for it, making decisions for federal agencies, or replacing independent federal agency judgment.⁵⁴

In addition, the federal regulations that govern Section 106 reviews allow a federal agency to execute an MOA without agreement by a SHPO. The regulations say:

After consulting to resolve adverse effects...the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation.... If the SHPO terminates consultation, the agency official and the Council may execute a memorandum of agreement without the SHPO's involvement.⁵⁵

Finally, in a recent article, two Section 106 experts acknowledged that who is in charge of Section 106 reviews is often unclear. They said: “Although Section 106 regulations define the federal agency as decision-maker and describe the line of consultation and communication, in practice there is no real clarity on who actually decides....”⁵⁶

Given that SHPO has presumed to have decision-making authority in a federal regulatory process, we make the following recommendations:

RECOMMENDATIONS

1. Department of Administration officials should help clarify that SHPO is an advisor to federal agencies in Section 106 reviews and not the final decision maker.

In taking charge of SHPO, Department of Administration officials need to ensure that SHPO staff and the people they interact with clearly understand SHPO's role and authority. Administration officials should certainly allow SHPO staff to offer advice and recommendations

⁵⁴ Advisory Council on Historic Preservation, *National Historic Preservation Act Authorization for Federal Agency Assistance to State Historic Preservation Officers* (Washington, DC, not dated), 1, <http://www.achp.gov/docs/LegalOpinionFederalFundingforStates.pdf>, accessed November 9, 2017. It is important to emphasize that the opinion was not related to any action taken by or concern raised about Minnesota's SHPO.

⁵⁵ 36 *CFR*, sec. 800.7 (a)(1) and (2).

⁵⁶ Kimball M. Banks and Renee M. Boen, “Who's on First: Federal Agencies and Compliance with the National Historic Preservation Act,” *The National Historic Preservation Act: Past, Present, and Future* (New York: Routledge, 2016), 47.

based on their expertise and professional judgment, but SHPO staff should not present their advice and recommendations as requirements.

2. Department of Administration officials should establish a stakeholder group to provide them with insights and advice about historic preservation.

Historic preservation affects many people, organizations, and interests. Administration officials should, of course, receive advice and input from SHPO staff, but they should also hear from a wide range of people from outside the office. More specifically, they should establish a stakeholder advisory group that includes local government planning and economic development offices, American Indian communities, historic preservation consultants, business organizations, and federal agencies that commonly have projects in Minnesota that require a Section 106 review.

3. Department of Administration officials should actively oversee SHPO.

Administration officials are taking charge of a complex and important government activity. Although they are already spread thin managing a wide range of disparate government functions, they should not treat SHPO as a passive acquisition.

To effectively oversee SHPO, they will need to study the federal laws and regulations that govern historic preservation. They should also review the national historic preservation literature, which includes useful studies about issues and controversies that have arisen throughout the United States. That will help them place the recent criticism of Minnesota's SHPO in a broader context.

4. Department of Administration officials should strengthen SHPO's communication with public officials and others affected by SHPO's work.

In both the public testimony we reviewed and in the interviews we conducted, people often expressed frustration with SHPO's lack of transparency and slowness in responding to information requests. In fact, this was a key factor in the Governor's recommendation and legislative support to transfer SHPO into the Department of Administration.

We are confident that officials at the Department of Administration are well aware of the importance of open and frequent communications with people affected by their actions, especially when those people are public officials. Nevertheless, given the negative impact inadequate communication has had on SHPO, we thought we should put this recommendation on the record.



APPENDIX A: SHPOs IN OTHER STATES

During the 2017 legislative session, people who supported transferring SHPO said that only two states (Minnesota and Ohio) have their SHPO in a private organization rather than in the state government's executive branch. Legislators asked OLA to examine this claim and provide them with information on how other states organize and govern their SHPO.

According to the National Conference of State Historic Preservation Officers, every state, eight U.S. territories, and the District of Columbia have established a SHPO.⁵⁷ We researched only how states have organized their SHPO.

First, we confirmed that, like Minnesota, the Ohio SHPO is within a private, nonprofit organization, the Ohio History Connection (formerly the Ohio Historical Society).⁵⁸ In addition, we found four other states where the SHPO is within an organization with a mix of public and private control. They are as follows:

- Colorado's SHPO is within History Colorado. According to its website, it is a 501(c)(3) charitable organization and an agency of the State of Colorado under the Department of Higher Education. Following the enactment of legislation in 2015 by the Colorado Legislature, the governor appoints the organization's nine-member Board of Directors.⁵⁹ The change came after controversy over spending and oversight at History Colorado.⁶⁰
- Nebraska's SHPO is within the Nebraska State Historical Society. According to its website, a 15-member Board of Trustees governs the Society; the governor appoints 3 members and the Board elects the 12 other members.⁶¹
- Oklahoma's SHPO is within the Oklahoma Historical Society. According to its website, a 25-member Board of Directors governs the Society; the governor appoints 12 members and the Board appoints 13 members.⁶²
- Wisconsin's SHPO is within the Wisconsin Historical Society. According to its website, the Society is a "public-private partnership," governed by a 34-member Board of Curators. The Board includes 8 statutory appointments and up to 30 curators who are

⁵⁷ The following U.S. territories have a SHPO: American Samoa, Guam, Republic of the Marshall Islands, Federated States of Micronesia, Commonwealth of the Northern Mariana Islands, Republic of Palau, Commonwealth of Puerto Rico, and U.S. Virgin Islands. See <http://ncshpo.org/about-us/what-is-shpo/>.

⁵⁸ Ohio History Connection website, <https://www.ohiohistory.org/about-us>, accessed December 23, 2017.

⁵⁹ History Colorado website, <https://www.historycolorado.org/board-and-leadership>, accessed December 23, 2017.

⁶⁰ Ed Sealover, "History Colorado Center Questioned in State Audit," *Denver Business Journal*, July 15, 2014. https://www.bizjournals.com/denver/blog/capitol_business/2014/07/state-questions-history-colorado-center-spending.html?s=print, accessed December 27, 2017.

⁶¹ Nebraska State Historical Society website, <https://history.nebraska.gov/about/about-us>, accessed December 23, 2017.

⁶² Oklahoma Historical Society website, <http://www.okhistory.org/about/board>, accessed December 23, 2017.

selected according to the Society's constitution and bylaws. Three curators, appointed by the governor with Senate consent, serve staggered three-year terms.⁶³

Based on the information we obtained, the 44 remaining states organize their SHPOs as follows:⁶⁴

- 13 are within a Department of Natural Resources.
- 11 are within a Department of Cultural Resources.
- 10 are within a Department of History or Heritage Affairs.
- 10 are within various other departments or under a separate board or commission.

⁶³ Wisconsin Historical Society website, <https://www.wisconsinhistory.org/Records/Article/CS3543>, accessed December 23, 2017.

⁶⁴ Our primary source was a consultant report prepared for the Iowa Department of Cultural Affairs. Lord Cultural Resources, *2014 Iowa Department of Cultural Affairs*, Research Report (June 2014), 144.

APPENDIX B: MINNESOTA HISTORICAL SOCIETY'S LEGAL STATUS

As noted briefly in the Background Information section of this report, the Territorial Legislature authorized several individuals to establish the Minnesota Historical Society as a private corporation. The following is additional information on the legal status of the Society.

Legal Opinion of William Barrett for the Minnesota Historical Society

One of the individuals authorized to establish the Historical Society, Henry H. Sibley, later had an attorney, William Barrett, prepare a legal analysis on the private nature of the Historical Society. The opinion acknowledged that the state was the founder of the Society and its “most munificent patron and benefactor.” But according to the opinion, “this fact cannot change the character of the corporation from a private to a public one.” The opinion added: “The act of incorporation of the Historical Society vested in the [in]corporators, and their successors, as trustees, the entire and exclusive control and management of the affairs of the Society. The rights and powers of the trustees of this Society are paramount, and subject to no supervision, except that of the court.”⁶⁵

Legal Opinion of the Minnesota Attorney General

The Minnesota Attorney General addressed the Society's legal status in a 1944 opinion. The key question addressed in the opinion was whether the Legislature could subject the Society to the Reorganization Act of 1939, and the answer was “no.” The opinion said the only control the state could exercise over the Society was through conditions attached to the use of state money appropriated to the Society. According to the opinion: “The Society is not a state department or agency but a private corporation.... Its management is vested in its officers and its executive council which is elected by its membership and the state has no voice in it except through the membership on the executive council of the constitutional officers of the state.”⁶⁶

⁶⁵ William Barrett, *The Historical Society of Minnesota: What Is It? Of Whom Is It Composed? What Are the Rights and Duties of Its Members? An Opinion* (St. Paul, 1877), 8-9.

⁶⁶ *Minnesota Historical Society – Private Corporation Not State Department*, Opinion of the Minnesota Attorney General (May 26, 1944).



APPENDIX C: SHPO'S RESPONSIBILITIES

Federal Responsibilities⁶⁷

Under the National Historic Preservation Act SHPO also has a responsibility to:

- (1) Conduct a statewide survey of historic property and maintain inventories of the property;
- (2) Identify and nominate eligible property to the National Register of Historic Places;
- (3) Prepare and implement a comprehensive statewide historic preservation plan;
- (4) Administer a state program of federal assistance for historic preservation;
- (5) Help federal, state, and local agencies fulfill their historic preservation responsibilities;
- (6) Help local governments establish certified historic preservation programs;
- (7) Provide information, education, and technical assistance on historic preservation issues;
- (8) Advise and assist in the evaluation of proposals for rehabilitation projects that may qualify for Federal assistance; and
- (9) Consult with appropriate federal agencies on federal undertakings that may affect historic property and provide advice and input on the content and sufficiency of any plans developed to protect, manage, reduce, or mitigate harm to that property.

State Responsibilities⁶⁸

In addition, under state laws, SHPO has a responsibility to:

- (1) Administer a tax credit and grant program for rehabilitation of historic structures;
- (2) Approve grants-in-aid for architectural, archaeological, and historic preservation made by state agencies;
- (3) Advise state agencies, political subdivisions, and the University of Minnesota on how they can find ways to “avoid and mitigate any adverse effects on historic properties.”

⁶⁷ 54 U.S. Code, sec. 302303.

⁶⁸ Minnesota Statutes 2017, 290.068; 138.081, subd. 2; and 138.665.





February 27, 2018

Mr. James Nobles, Legislative Auditor
Office of the Legislative Auditor
Room 140 Centennial Office Building
658 Cedar Street
St. Paul, MN 55155

Dear Mr. Nobles:

Thank you for the opportunity to respond to the Office of the Legislative Auditor's special review of the MN State Historic Preservation Office and the transfer of this office. We appreciate your diligence in learning more about the federal and state laws and regulations that guide this important work. The review has helped to highlight the complexity of historic preservation laws, the consultative nature of the review process, and the primary role given to federal agencies to carry out historic preservation laws for their own agency's actions.

As mentioned in our testimony before the Legislature and included in your review, we believe that the Minnesota Historical Society (MNHS) has provided consistently high quality service to the people of Minnesota for the nearly fifty years it has housed the State Historic Preservation Office. Tens of thousands of reviews have been successfully completed, thousands of historic properties have been listed in the National Register of Historic Places, millions of dollars have been invested in historic properties through state and federal historic rehabilitation tax credits, and many Minnesotans have been engaged in historic preservation statewide through the excellent work of this office. Staff in the State Historic Preservation Office and across all MNHS areas have provided professional and timely responses to requests and inquiries from all levels of government and the public.

Since there have been very few complaints or issues about the work of the Office in the nearly 50 years that it has been housed at MNHS, we are disappointed that a detailed and thorough policy analysis was not completed before the legislation was passed to transfer the Office. Nevertheless, we recognize the authority of the Governor and the Legislature to make this policy change, and they have done so. Accordingly, we have spent thousands of staff hours working with the Department of Administration over the summer, fall and winter to make this transition as smooth as possible so that the State Historic Preservation Office can continue to serve Minnesotans with the high quality service they are used to receiving.

Letter to James Nobles
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Your report cites two reviews that generated complaints by citizens or legislators. These two are among an average of 3,000 reviews per year successfully completed by the MN State Historic Preservation Office in cooperation with federal agencies. Both reviews resulted in agreements that follow federal and state laws and regulations and benefit the people of Minnesota by protecting historic resources, as the laws were intended.

In each of those cases, if there had been concern over the process, the federal agencies had the option to discontinue consultation with the SHPO and place the reviews in the hands of the federal Advisory Council for Historic Preservation (ACHP), as allowed under federal law. This part of the process allows for accountability and checks and balances within the federally-driven framework. This path was not selected, and all parties signed a memorandum of agreement within the timeframe requested by the federal agencies.

We are proud of the Minnesota State Historic Preservation Office's forty-nine years of service to the people of Minnesota and preservation of our heritage and are confident that this excellence will continue as it transitions to the Department of Administration.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen Elliott", with a long, sweeping horizontal line extending to the right.

D. Stephen Elliott
Director and Chief Executive Officer





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