



OFFICE OF THE LEGISLATIVE AUDITOR
STATE OF MINNESOTA

PROGRAM EVALUATION REPORT

State Archaeologist



APRIL 2001

Photo Credits:

The cover and summary photograph, the photographs on pages 7 and 36, and the artifacts displayed on page 38 were provided by the Minnesota Department of Natural Resources, Parks and Recreation Division; the map on page 6 was created by the Minnesota Indian Affairs Council; the maps displayed on pages 12 and 16, and the photographs on pages 13, 29, and 34 were provided by the Minnesota Office of the State Archaeologist; and the photograph on page 20 was provided by the Minnesota Historical Society.



Office of the Legislative Auditor

State of Minnesota • James Nobles, Legislative Auditor

April 10, 2001

Members

Legislative Audit Commission

In April 2000, the Legislative Audit Commission directed us to study several issues related to the Office of the State Archaeologist as soon as staff became available in early 2001. Legislators were concerned about the relationship between the state archaeologist's office in the Department of Administration and the Minnesota Indian Affairs Council as well as the overall organization and funding of the archaeologist's office.

We found a poor working relationship between staff at the archaeologist's office and the Indian Affairs Council, due largely to gradual changes in the structure and authority of the archaeologist's office, differences of opinion regarding the appropriateness of some archaeological methods and definitions, and poor communication and mistrust. We also found that almost all archaeologist's offices in other states receive most of their funding from a state or federal appropriation, rather than fees. Compared with other states, Minnesota's archaeologist's office has a relatively small budget and staff.

We recommend the adoption of administrative rules to clarify the state archaeologist's key procedures. We also recommend that the Department of Administration study the possibility of supplementing the archaeologist's budget with fees, but that most funding continue to come from the state's General Fund.

This report was researched and written by Jo Vos (project manager), David Chein, Lila Moberg, and Alan Frazier. We received the full cooperation of the Office of the State Archaeologist, the Minnesota Indian Affairs Council, the Minnesota Historical Society, individual Indian tribes, and others.

Sincerely,

/s/ James Nobles

James Nobles
Legislative Auditor

/s/ Roger Brooks

Roger Brooks
Deputy Legislative Auditor

Table of Contents

	<u>Page</u>
SUMMARY	ix
INTRODUCTION	1
1. ROLES AND RESPONSIBILITIES	3
State and Federal Laws	4
Conflicts	14
Relationship with Individual Indian Tribes	21
2. OPTIONS FOR CHANGE	23
Other States	24
Alternatives for Minnesota	32
APPENDIX A	43
SUMMARY OF RECOMMENDATIONS	45
FURTHER READING	47
AGENCY RESPONSES	49
RECENT PROGRAM EVALUATIONS	Back Cover

List of Tables and Figures

<u>Tables</u>	<u>Page</u>
1.1 Roles and Responsibilities for Issuing Permits	8
1.2 Roles and Responsibilities for Reviewing Development Plans	9
1.3 Roles and Responsibilities for Investigating Burial Sites	11
1.4 Tribal Representatives' Assessments of Working Relationships with State Agencies and Developers	22
2.1 Location of the State Archaeologist's Office in 50 States	26
2.2 Responsibility for Identifying and Authenticating Burial Sites in 28 States	30
2.3 Options for Changing the Structure or Authority of the State Archaeologist's Office	33
 <u>Figures</u>	
1.1 Location of Minnesota Indian Reservations and Communities	6
1.2 Location of Unplatted Earthworks and Burial Mounds in Minnesota	12
2.1 Estimated State Archaeologist Expenditures in 26 States, FY2000	27

Summary

Major Findings:

- Minnesota state government's involvement in the regulation of archaeological activities is complex. However, the Office of the State Archaeologist in the



- Department of Administration has a major role in protecting and preserving the state's archaeological resources. Other key players include the inter-tribal Minnesota Indian Affairs Council, the Minnesota Historical Society, and individual Indian tribes (pp. 4-7).
- There is a high level of mistrust and tension between staff at the archaeologist's office and the Indian Affairs Council, resulting from differences of opinion regarding what methods should be used to locate human burial sites and a shift of greater state authority to the archaeologist's office (pp. 19-21).
- On the other hand, three-fourths of Minnesota's Indian tribal leaders and their cultural resources staff report a "fair to good" relationship with the archaeologist's office, and most are satisfied with how the state identifies and protects Indian burial sites (pp. 21-22).

- States organize their archaeological function in various ways, but almost all receive most of their funding from a state or federal appropriation rather than fees. Compared with other states, Minnesota's archaeologist's office has a relatively small budget and staff (pp. 24-27).
- Unlike Minnesota, some states have mechanisms to resolve disputes regarding archaeological resources, including burial sites (pp. 31-32).

Key Recommendations:

- While we think that the Office of the State Archaeologist should continue to receive its funding primarily from a General Fund appropriation, the Legislature should direct the office to determine the feasibility of charging fees to supplement its budget (p. 40).
- The Legislature should require the Department of Administration, on behalf of the archaeologist's office, to adopt administrative rules for regulating archaeological activities, and require that parties use the contested case provisions of the Administrative Procedure Act to resolve disputes (pp. 35, 37).

Report Summary

Over the last several years, the working relationship between staff at the Office of the State Archaeologist and the Minnesota Indian Affairs Council has deteriorated. This report focuses primarily on the roles and responsibilities of these two agencies in protecting and preserving Minnesota's archaeological resources, including Indian burial sites. The report does not examine the activities of private archaeologists or archaeologists in other state agencies such as the departments of Natural Resources or Transportation.

Roles and Responsibilities for Regulating Minnesota's Archaeological Activities Are Complex

Two state laws, the Field Archaeology Act of 1963 and the Private Cemeteries Act, and two federal laws, the National Historic Preservation Act and the National Environmental Policy Act, help protect archaeological resources in Minnesota. The Office of the State Archaeologist in the Department of Administration plays a major role in protecting and preserving the state's archaeological resources. Other key players include the inter-tribal Minnesota Indian Affairs Council, the Minnesota Historical Society, and individual Indian tribes. According to law, archaeological resources include aboriginal earthworks and mounds, ancient burial grounds (considered sacred by many American Indians today), prehistoric ruins, historical remains, and artifacts.

The involvement of state agencies and individual Indian tribes depends largely on whether a site being considered for development or study might contain an archaeological

resource, whether the site is on public or private land, how the development is funded, and the type of archaeological resource involved. For example, the archaeologist's office and the Historical Society review development plans and issue permits for all archaeological investigations on state land. If the investigation is related to Indian history or religion, the Indian Affairs Council also reviews the plan. Archaeological investigations on federal or private land do not need a state permit. However, the Historical Society reviews development plans on private land if the project receives federal funds or requires a federal license, and individual Indian tribes must be consulted if sites involve Indian history or religion. The state archaeologist reviews these plans only if suspected burial sites could be affected. Finally, the state archaeologist identifies and authenticates all burials sites, including those of American Indians, on non-federal public and private land, and the Indian Affairs Council and the state archaeologist together try to determine the exact heritage of Indian burial remains (for example, Dakota or Ojibwe).

Conflicts Between Staff at the Archaeologist's Office and the Indian Affairs Council Can Affect Development Projects

Created in 1963, the Office of the State Archaeologist has experienced gradual changes in its structure and legal authority over the last several years. Indian Affairs Council staff have been critical of how the current state archaeologist has exercised this authority. This has, in part, contributed to a poor working relationship between the two agencies. Over the last 20 years, the Legislature has reduced the council's role in identifying and

The Minnesota archaeologist's office, Historical Society, and Indian Affairs Council are all involved in regulating archaeological activities.

The archaeologist's office and Indian Affairs Council disagree about using mechanical excavation.

authenticating Indian burial sites, while requiring more consultation between the archaeologist's office and the Indian Affairs Council. However, council staff want greater involvement, based partly on office procedures developed in the late 1980s and the practices of the previous state archaeologist.

In addition, differences of opinion regarding the appropriateness of some archaeological methods and definitions and poor communication and mistrust have added to the tension between the two offices. For example, council staff generally object to using mechanical excavation to verify Indian burial sites. They believe that the method may desecrate sacred ground and destroy the evidence that a burial exists. Instead, council staff prefer to rely on maps of suspected burial sites developed in the late 1800s and less invasive methods such as soil coring and shovel testing—methods that generally take longer, may be less effective and more subjective, and may lead to extra costs for developers. According to council staff, the previous state archaeologist considered burial sites identified in these maps to be authenticated burial sites. In contrast, the current state archaeologist requires additional proof that a burial exists in cases where there is no overt, physical evidence of a burial mound or related features, especially when the site has been heavily disturbed.

Concerned about the gradual changes in its working relationship with the archaeologist's office and the use of mechanical excavation, the Indian Affairs Council passed a resolution in late 1998 to have the current state archaeologist removed from office. In addition, the council worked with legislators to propose significant

changes to state laws in 1998 and 1999 that would have given the council, rather than the state archaeologist, the authority to identify and authenticate Indian burial sites.

However, despite the recent tension between staff at the two state agencies, most of Minnesota's Indian tribal leaders and their cultural resources staff report a "fair to good" working relationship with the archaeologist's office—only slightly lower than how they rate their relationship with the council. Furthermore, most tribal leaders and their staff are generally satisfied with how Indian burial sites are identified and protected.

While States Vary in How They Regulate Archaeological Activities, None Relies Significantly on Service Fees

States locate their archaeologist's offices in a variety of agencies, including historical societies, universities, and natural resource departments. Budgets and staffing vary, depending on the functions assumed by the state archaeologist. For fiscal year 2000, estimated expenditures in 25 comparison states ranged from \$53,000 to \$1.7 million. Estimated median expenditures were \$250,000, compared with \$196,000 in Minnesota. Unlike Minnesota, several states charge fees for such things as record searches, classes, materials, curation, site inventory, permits, or underwater archaeology. However, fees account for only a small percentage of budgets. Finally, the estimated number of full-time professional staff in 37 comparison states for fiscal year 2000 ranged from 1 to 30 with a median of 5, compared with a staff of 2 in Minnesota.

Like Minnesota, most states issue archaeological permits, identify and authenticate burial sites, and have some type of review process for selected development projects. In addition, many states, including Minnesota, require that the state consult either with an inter-tribal American Indian council or with individual tribal leaders regarding archaeological projects involving American Indian burial sites. To help resolve some of the conflicts that are likely to occur when archaeological, economic, and cultural positions clash, some states, such as Kansas, New Mexico, and Wisconsin, have established “burial” or “site preservation” boards. Minnesota does not have a formal dispute resolution process to help address problems related to archaeological preservation.

when various methods can be used and how decisions are made. In addition, rules could further define what it means to “consult” with other parties and could set forth timelines for reviewing development plans and investigating suspected burial sites. To minimize the costs and bureaucracy that a separate dispute resolution board would entail, the Legislature should direct parties to resolve their disputes using the contested case procedures set forth in the Administrative Procedure Act.

The Department of Administration should formally adopt rules to clarify its role in regulating archaeological activities.

The State Could Explore a Variety of Alternatives to Address Problems and Issues

The Legislature should consider various options to help address issues related to the funding and organization of the archaeologist’s office as well as options to help address the conflicts between the archaeologist’s office and the Indian Affairs Council. While the archaeologist’s office should continue to receive its funding primarily from a General Fund appropriation, the Legislature should direct the office to determine the feasibility of charging fees to supplement its current budget. In addition, the Legislature should require the Department of Administration, on behalf of the archaeologist’s office, to adopt administrative rules to help clarify agency roles, responsibilities, and procedures for regulating archaeological activities. Although differences of opinion regarding archaeological methods might continue, rules would help clarify

Introduction

Our study focused on the relationship between the archaeologist's office and Indian Affairs Council.

Minnesota has long supported efforts to identify and protect its archaeological resources, beginning with surveys to map American Indian burial mounds and campsites in the late 1800s. Currently the Office of the State Archaeologist takes a lead role in representing the state's interest in this area. In recent years, differences of opinion have developed between staff at the archaeologist's office and the Minnesota Indian Affairs Council regarding the methods used to verify Indian burial sites, many of which were mapped in the late 1800s. In May 1999, the Legislative Audit Commission received a request to consider the topic during its topic selection process, but decided to refer the problem to the Office of Dispute Resolution. While the archaeologist's office agreed to participate in mediation, the Indian Affairs Council was not interested.¹ Consequently, the topic was brought before the Legislative Audit Commission again the following year and, in April 2000, the commission directed the Office of the Legislative Auditor's Program Evaluation Division to address several issues related to the archaeologist's office as soon as staff became available in early 2001. Because the Governor's 2001 biennial budget proposed no General Fund appropriation for the archaeologist's office beginning in fiscal year 2003, we expanded the original scope of our study to examine funding and organization as well as relationship issues.

Because of time constraints, the scope of our study was limited. For example, we did not assess the substance of judgments made by the archaeologist's office, nor did we evaluate the timeliness of its operations. In addition, we did not examine the archaeological work performed by the departments of Natural Resources or Transportation. Again, our primary focus was on the relationship between the archaeologist's office and the Indian Affairs Council

Our study focused on the following research questions:

- **What are the current roles, responsibilities, policies, and procedures for protecting and preserving Minnesota's archaeological resources, including American Indian burial sites?**
- **What are the major sources of conflict between the Office of the State Archaeologist and the Minnesota Indian Affairs Council?**
- **How do other states regulate archaeological resources, including burial sites? How are they organized, and how do their budgets and staff compare with Minnesota's?**

¹ Memorandum from Roger Williams, Director, Office of Dispute Resolution to Susan Von Mosch, Office of the Legislative Auditor, dated December 27, 1999.

- **Are changes needed in the way the state regulates archaeological resources, including burial sites? If so, how could current policies and procedures be improved? How should disputes be resolved?**
- **Where should the Office of the State Archaeologist be located and how should it be funded?**

To answer these questions, we examined state and federal laws, policies, and practices and reviewed many archaeological publications and reports. We talked with staff from several state agencies, including the departments of Administration, Natural Resources, and Transportation, the Minnesota Historical Society, the Attorney General's Office, and the Minnesota Indian Affairs Council. We interviewed tribal leaders and cultural resources staff from all 11 of the American Indian reservations and communities in the state, as defined by the U. S. Bureau of Indian Affairs. We talked with archaeologists from the University of Minnesota, Hamline University, professional organizations, and private businesses; local government officials; and private developers. We also contacted state archaeologist's offices in all 50 states, and reviewed historic preservation and American Indian burial site statutes in 28 states, including Minnesota.

On the advice of staff at the Minnesota Indian Affairs Council, we have used the term "American Indian" or "Indian" rather than "Native American." Likewise, we have used the term "tribal leader" to refer to the chief executive, chairman, or president of the 11 Indian tribes in the state. Finally, we have used the term "archaeological resources" to include human burial remains because state and federal laws define archaeological resources in this way. We recognize, however, that staff at the Minnesota Indian Affairs Council and some tribal leaders object to defining human remains as an archaeological resource.

This report is divided into two chapters. Chapter 1 describes the overall roles and responsibilities of the major state agencies involved in regulating Minnesota's archaeological resources. It also discusses the sources of conflict between staff at the archaeologist's office and the Indian Affairs Council. Chapter 2 describes how other states organize and regulate their archaeological resources and presents a number of options that the Legislature could consider to address problems that we identified. This chapter also presents our recommendations.

Roles and Responsibilities

SUMMARY

Several state agencies have specific roles and responsibilities for managing Minnesota's archaeological resources, including American Indian burial sites. The Office of the State Archaeologist has a major role in protecting and preserving Minnesota's archaeological resources. Created in 1963, the office has experienced gradual changes in its structure and authority over the last several years. Staff at the Minnesota Indian Affairs Council have been critical of how the current state archaeologist has exercised this authority. This has contributed to a poor working relationship between the archaeologist's office and the council. In addition, differences of opinion regarding the appropriateness of some archaeological methods and definitions and poor communication and mistrust have added to the tension between staff at the two offices.

Protecting archaeological resources is a state responsibility.

For nearly 40 years, the Legislature has expressed an interest in preserving Minnesota's archaeological resources. According to the Minnesota Field Archaeology Act of 1963, "It is in the public interest to provide for the preservation of historic sites, buildings, structures, and antiquities of state and national significance for the inspiration, use, and benefit of the people of Minnesota."¹ Other state laws echo this sentiment. The Minnesota Environmental Rights Act of 1971 includes historical resources in its definition of natural resources and states that ". . . each person is entitled by right to the protection of air, water, land and other natural resources within the state . . ."² Likewise, the Outdoor Recreation Act of 1975 says that ". . . the unique natural, cultural and historical resources of Minnesota . . . should be made available to all the citizens of Minnesota now and in the future."³ Preserving Minnesota's archaeological resources can also benefit American Indian tribal governments and communities by helping to record their culture, which is, according to some tribal leaders, being threatened by economic and social changes.

This chapter looks at how Minnesota regulates archaeological activities. It addresses the following research questions:

- **What are the current roles, responsibilities, policies, and procedures for protecting and preserving Minnesota's archaeological resources, including American Indian burial sites?**

¹ Minn. Stat. (2000) §138.51.

² Minn. Stat. (2000) §116B.01.

³ Minn. Stat. (2000) §86A.02, subd. 1.

- **What are the major sources of conflict between the Office of the State Archaeologist and the Minnesota Indian Affairs Council?**

To answer these questions, we examined state and federal laws, policies, and practices. We talked with staff from several state agencies, including the departments of Administration, Natural Resources, and Transportation, the Minnesota Historical Society, the Attorney General's Office, and the Minnesota Indian Affairs Council. We interviewed tribal leaders and cultural resources staff from all 11 of the American Indian reservations and communities in the state. Finally, we talked with archaeologists from the University of Minnesota, Hamline University, professional organizations, and private businesses; local government officials; and private developers.

STATE AND FEDERAL LAWS

Two major state laws regulate the protection and preservation of archaeological resources in Minnesota: the Field Archaeology Act of 1963 and the Private Cemeteries Act.⁴ The Field Archaeology Act defines archaeology as the study of the traces of human culture by surveying, digging, sampling, excavating, or removing objects of interest from land or water. The act further defines archaeological resources to include “. . . all aboriginal mounds and earthworks, ancient burial grounds, prehistoric ruins, historical remains, and other archaeological features,” as well as ancient implements, skeletons, bones, or other items of archaeological interest.⁵ The Private Cemeteries Act requires that all human burials and human skeletal remains, which by law are archaeological resources, be given equal treatment and respect without regard to their ethnic, cultural, or religious background. In addition to these state laws, the federal National Historic Preservation Act requires that archaeological resources be considered in all projects that are federally funded or licensed and the National Environmental Policy Act requires that they be considered during the environmental assessment process and in environmental impact studies.⁶

State law defines Indian burial sites as an archaeological resource.

Overall:

- **While several state agencies help regulate archaeological activities, the Office of the State Archaeologist has a major role in protecting and preserving Minnesota's archaeological resources, including human burial sites.**

Minnesota statutes require the Office of the State Archaeologist in the Department of Administration to: sponsor, conduct, and direct archaeological research; protect and preserve archaeological sites, objects, and data; disseminate archaeological information; identify, authenticate, and protect human burial sites;

⁴ *Minn. Stat.* (2000) §§138.31-138.42 and §§307.08-307.12.

⁵ *Minn. Stat.* (2000) §138.31, subd. 2.

⁶ P. L. 89-665 and P. L. 91-190. In addition, the federal Native American Graves Protection and Repatriation Act (P. L. 101-601) requires that all agencies receiving federal funds return all American Indian burial remains, funerary items, or items of cultural patrimony to the appropriate contemporary Indian community.

**The Minnesota
Indian Affairs
Council
represents
11 tribal
governments.**

and review and issue archaeological permits. The Commissioner of Administration, in consultation with the Minnesota Historical Society, the Minnesota Indian Affairs Council, and other interested parties, appoints the state archaeologist to a position in the classified service. The archaeologist's office has two full-time staff, both archaeologists, and a fiscal year 2001 operating budget of approximately \$196,000 from a General Fund appropriation.⁷

Minnesota statutes also give the Indian Affairs Council and the Historical Society specific responsibilities to help ensure that the state's archaeological resources are protected. In addition, statutes require that other state agencies whose activities may affect archaeological resources, such as the departments of Natural Resources and Transportation, cooperate with the archaeologist's office, the Historical Society, and the Indian Affairs Council.⁸

The Minnesota Indian Affairs Council is the official liaison between the State of Minnesota and the state's 11 tribal governments shown in Figure 1.1. The council provides a forum for urban Indian issues and administers various programs to enhance economic opportunities for Minnesota's Indians and protect their cultural resources. The Indian Affairs Council has a staff of eight, including an executive director appointed by the Board of Directors. One staff person works full time on cultural resources concerns, including burial issues. The council has an operating budget of approximately \$700,000 for fiscal year 2001, about two-thirds of which comes from a General Fund appropriation and one-third from special revenue and federal appropriations.

The Minnesota Historical Society was created by the territorial Legislature in 1849. It is an independent, nonprofit corporation governed by a 30-member Executive Council that appoints a director who is responsible for managing the society's staff and budget. The Historical Society carries out a number of duties on behalf of the state, as directed by statute. It houses the State Historic Preservation Office, which performs most of the society's regulatory functions related to historic preservation, including activities under the federal National Historic Preservation Act, the National Environmental Policy Act, the Minnesota Historic Sites Act, and the Minnesota Field Archaeology Act.⁹ The historic preservation office has 12 full-time staff, including one archaeologist, and an operating budget of \$445,000 for fiscal year 2001, of which 40 percent comes from federal sources.

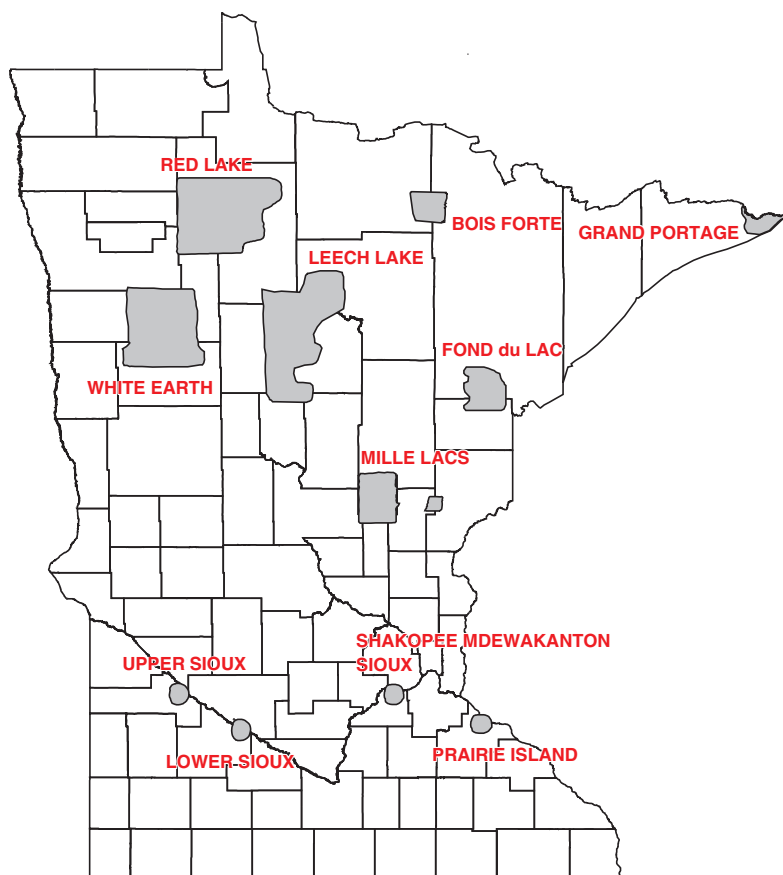
State and federal laws help preserve Minnesota's archaeological resources by requiring: (1) permits for archaeological investigations, (2) reviews of land development plans, and (3) the identification and authentication of burial sites and remains. The Field Archaeology Act designates the state archaeologist the "agent

⁷ The office also received about \$8,000 from a variety of other state, federal, and private sources specifically to help fund an archaeology conference and Minnesota Archaeology Week.

⁸ The Minnesota Department of Transportation has four archaeologists on staff and also contracts with private consulting firms for archaeological work related to highway construction. The Department of Natural Resources contracts with the Minnesota Historical Society for seven archaeologists to protect archaeological resources in state parks, forests, and trails. In addition, the Historical Society has six other archaeologists on staff who conduct research throughout the state.

⁹ P. L. 89-665, P. L. 91-190, *Minn. Stat.* (2000) §§138.51-138.585, and *Minn. Stat.* (2000) §§138.31-138.42.

Figure 1.1: Location of Minnesota Indian Reservations and Communities



SOURCE: Minnesota Indian Affairs Council.

of the state” in administering and enforcing the act’s provisions.¹⁰ The office often shares responsibilities with the Indian Affairs Council and the Historical Society. Although state law gives the Historical Society the authority to develop administrative rules for issuing permits and reviewing development plans, it has not done so.¹¹

As we show in the following sections:

- **Minnesota state government’s involvement in the regulation of archaeological activities is complex.**

¹⁰ *Minn. Stat.* (2000) §138.34.

¹¹ *Minn. Stat.* (2000) §138.39. Until 1994, statutes designated the Historical Society, rather than the Office of the State Archaeologist, as the lead agency charged with enforcing Minnesota’s archaeological laws.

The involvement of state agencies—and individual Indian tribal governments—depends largely on whether a site being considered for development or study contains an archaeological resource, whether the site is on public or private land, how the development is funded, and the type of archaeological resource involved.

Issuing Permits

In Minnesota, archaeologists must obtain a state permit before any archaeological work can begin on a state site.¹² The law defines a state site as any land or water “owned or leased by or subject to the paramount right of the state, county, township, or municipality.”¹³ The state does not require permits for archaeological work on private land.

Archaeologists need permits to work on sites on state land.



Archaeological excavation at Lake Carlos.

We found that:

- **Although both the Office of the State Archaeologist and the Minnesota Historical Society share responsibility for issuing archaeological permits, the state archaeologist oversees the permit process.**

As shown in Table 1.1, the Historical Society issues permits to qualified archaeologists for projects on state sites upon the recommendation of the state archaeologist. When a person applies for a permit, the archaeologist’s office uses standards adopted by the U.S. Department of Interior to review the qualifications of project staff. At the same time, the office examines the soundness of the

¹² Statutes refer to archaeological “licenses,” but we use the word “permit” because the process permits specific projects to proceed rather than licensing an individual to engage in archaeological fieldwork. Other states refer to these documents as permits.

¹³ *Minn. Stat.* (2000) §138.31, subd. 2.

Table 1.1: Roles and Responsibilities for Issuing Permits

Archaeologist's Office

- Make recommendations on permits for archaeological work on state sites
- Issue emergency permits for state sites
- Develop permit renewal application form and specify required information
- Revoke or suspend permits

Historical Society

- Issue permits for projects approved by the state archaeologist on state sites
- Make recommendations to Attorney General for district court injunctions
- Issue emergency permits for state sites
- Renew permits for state sites
- Revoke or suspend permits
- May adopt rules for issuing permits

Archaeologist's Office and Historical Society

- Formulate provisions related to issuing permits

SOURCE: Office of the Legislative Auditor.

proposed research methodology and helps identify ways to lessen any adverse impact the proposed project might have on archaeological resources. According to the archaeologist's office, in 1999 only one individual began archaeological fieldwork on a state site before obtaining a permit. The state does not charge permit fees, and archaeologists performing work on private or federal land do not need a state permit. Permits are issued for one year.¹⁴

We found that:

- **During calendar year 1999, the state issued 123 permits for 259 projects on state sites, mostly for archaeological work unrelated to American Indian history or religion.**

The number of projects exceeded the number of permits because some permits covered multiple projects or sites. For example, the departments of Natural Resources and Transportation obtain only one permit each that allows them to engage in numerous archaeological projects. Of the 259 licensed projects, about one-fifth (58) were on sites related to Indian history or religion.

As a condition of receiving a permit, project staff must submit site forms and final reports to the archaeologist's office for its review. The office also encourages archaeologists working on private land to submit site forms and final reports so that the office can maintain a current archaeological database. Maintaining an accurate and up-to-date database is vital to almost all of the state archaeologist's activities. During fiscal year 2000, the office entered data from 333 site forms

¹⁴ Although we did not examine how long it takes to issue permits, some archaeologists told us that since 1995, when the current state archaeologist was hired, they have been able to obtain permits generally within ten days of application. Before 1995, some archaeologists said that it often took months to receive a permit.

into its database, including information on 252 newly recorded sites and additional information for 81 previously recorded sites.¹⁵ Currently, the database contains information on approximately 9,000 verified archaeological sites in Minnesota, and about 6,500 additional sites that have been identified, but not verified.

Reviewing Plans

According to state and federal laws:

- **The Office of the State Archaeologist, the Minnesota Historical Society, the Minnesota Indian Affairs Council, or individual American Indian tribes must review development plans or be consulted before certain types of land development projects can proceed.**

As shown in Table 1.2, state agencies that suspect archaeological or historical sites may be affected by development projects on their land must submit plans to the archaeologist's office and the Historical Society for review.¹⁶ Historical society staff copy the state archaeologist on all correspondence with state agencies regarding plans that affect archaeological resources and also notify the agencies

Table 1.2: Roles and Responsibilities for Reviewing Development Plans

Archaeologist's Office

- Review state agency plans involving archaeological resources and local government plans involving burials on state sites
- Forward plans involving Indian history or religion on state sites to the Indian Affairs Council
- Review plans involving burial sites for projects on private land that receive federal funds or need a federal license
- Forward plans involving Indian burial sites for projects on private land that receive federal funds or need a federal license to the Indian Affairs Council

Historical Society

- Review state agency plans involving historical resources on state sites
- Review plans involving historical resources on federal land or for projects on private land that receive federal funds or need a federal license

Indian Affairs Council

- Review plans involving Indian history, religion, or burials on state sites
- Review federal plans involving Indian burial sites for projects on private land that receive federal funds or need a federal license

Tribal Communities

- Consult on plans involving Indian cultural resources on federal land or for projects on private land that receive federal funds or need a federal license

SOURCE: Office of the Legislative Auditor.

¹⁵ The office reviewed many other site forms that did not meet its criteria for being included in its archaeological database.

¹⁶ Local governments that suspect Indian burial sites may be affected by development projects on their land must submit development plans to the archaeologist's office and Indian Affairs Council for review.

There are different review processes for state and federal projects affecting archaeological resources.

that they must contact the state archaeologist. The archaeologist's office reviews the state plans that it receives to ensure that project staff are qualified, the research methodology is appropriate, and archaeological resources are safeguarded. The archaeologist's office submits information on plans that affect Indian sites, along with its recommendations, to the Minnesota Indian Affairs Council for review.

A different review process applies to federal projects. Often referred to as the "Section 106" process, it is overseen by the State Historic Preservation Office in the Minnesota Historical Society.¹⁷ It differs from the state process in four ways. First, the federal process requires agencies to consult with individual Indian tribes rather than the Minnesota Indian Affairs Council. Second, the federal process requires agencies to seek Indian tribes' input before plans are actually developed. In contrast, the state process requires that the Indian Affairs Council review plans before agencies solicit bids on the projects. Third, the federal review process applies to all projects on federal land and all private or public land development that receives federal funds or needs a federal license. In contrast, the state process only applies to state or local government land or water. Fourth, federal law does not require that the archaeologist's office be consulted or review federal plans even when certain types of archaeological resources, such as remnants from early Euro-American settlements, are affected. The archaeologist's office generally only reviews those federal plans that affect known or suspected burial sites.¹⁸ In these cases, the Historical Society notifies the archaeologist's office and encourages the federal agency to contact the state archaeologist.

We found that:

- **Most development plans involving state sites do not affect archaeological resources, including burial sites.**

During 1999, the Minnesota Historical Society reviewed approximately 2,100 state plans, including state environmental impact statements and assessment worksheets, and about 3,800 federal plans to determine if they could affect historical resources.¹⁹ According to Historical Society staff, a small fraction of the plans affected archaeological resources. The Historical Society sends copies of its reviews for projects affecting archaeological resources on state sites and for federal projects involving known or suspected burial sites to the archaeologist's office.

Staff at the archaeologist's office told us that they reviewed about 260 plans involving state sites in 1999—all as part of the permit process. As noted earlier, about one-fifth were on sites related to American Indian history or religion.

¹⁷ This process is mandated in section 106 of the National Historic Preservation Act.

¹⁸ Federal law does not specifically give the state archaeologist jurisdiction over suspected or known burial sites on federal land.

¹⁹ An undetermined number of plans involved both state and federal agencies and are thus reflected in both figures.

Identifying and Authenticating Burial Sites

Table 1.3 shows the division of responsibilities for identifying and authenticating burial sites. As the table shows:

- **State law gives the Office of the State Archaeologist sole authority to identify and authenticate burial sites, including those of American Indians.**

Table 1.3: Roles and Responsibilities for Investigating Burial Sites

Archaeologist's Office

- Identify and authenticate suspected burial sites on non-federal public or private land¹
- May turn over identified Indian remains to another archaeologist for further study before returning remains to tribal leaders²

Indian Affairs Council

- May turn over identified and authenticated Indian remains to another archaeologist for study before returning remains to tribal leaders¹
- Approve or disapprove all requests to relocate identified and authenticated Indian burials on non-federal public or private land

Archaeologist's Office and Indian Affairs Council

- Determine specific tribal identity of Indian remains on non-federal public or private land
- Approve archaeologists to help identify or authenticate Indian burials on state sites
- Establish procedures to return "culturally-unidentified" Indian remains
- Return identified Indian remains to contemporary tribal leaders

¹Federal law does not specifically authorize the state archaeologist to investigate burial sites on federal land.

²The federal Native American Graves Protection and Repatriation Act sets forth additional requirements for returning American Indian remains.

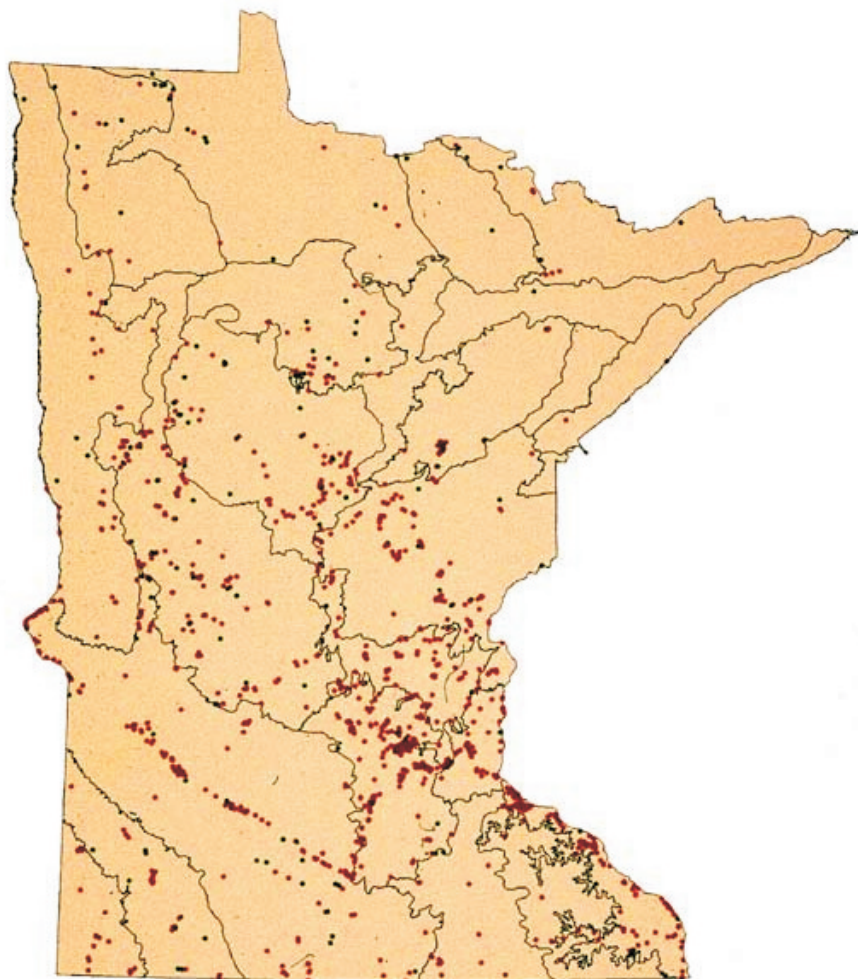
SOURCE: Office of the Legislative Auditor.

The Private Cemeteries Act makes it a felony to knowingly disturb marked or unmarked human burial sites. As shown in Figure 1.2, there are hundreds of known or suspected human burial sites that are located outside of platted or recorded cemeteries. Developers, landowners, and government agencies are encouraged to contact the archaeologist's office to ensure that burial sites will not be uncovered during land development. While developers generally contact the state archaeologist during project planning, contact can also occur during construction. To prevent costly delays, it is important that the state archaeologist's office respond promptly. Staff in the archaeologist's office told us that the office responds to hundreds of requests for burial site information each year.

To answer inquiries about the location of burial sites, the Office of the State Archaeologist mainly uses maps originally developed in the late 1800s that identify the location of suspected Indian burial sites. It also uses its own burial site database that pinpoints the location of known or suspected burial sites. If

Figure 1.2: Location of Unplatted Earthworks and Burial Mounds in Minnesota

**Minnesota
has hundreds
of known or
suspected
burial sites.**



SOURCE: Office of the State Archaeologist.

these sources suggest the possibility of a burial, the archaeologist's office uses a variety of on-site methods that are objective and replicable to determine whether a burial exists in a given location. These methods may include using soil coring, augers, hand excavation, remote-sensing devices, or mechanical excavation. Verifying the likelihood that a site contains a burial is often difficult because land development, agriculture, and natural processes may have partially or totally destroyed many of the physical features of burials. Once the state archaeologist determines that a site is likely to contain human remains, the archaeologist's office determines the heritage of the remains, for example American Indian or Euro-American heritage. This process is often referred to as "identification and authentication."



Headstone at Okaman Cemetery.

If the archaeologist's office determines that burial remains are Indian in origin, the office must work with the Indian Affairs Council to determine the exact tribal identity (for example, Dakota or Ojibwe). If the identity can be determined, the remains may be returned to the tribe at the discretion of both the archaeologist's office and the council. During this time, either the Indian Affairs Council or the state archaeologist may give the remains to a qualified professional archaeologist for study prior to returning them to the individual tribe. If tribal identity cannot be determined, the remains must be dealt with according to provisions jointly developed by the archaeologist's office and the Indian Affairs Council.²⁰ The Indian Affairs Council has the sole authority to determine whether authenticated Indian burial remains will be relocated, regardless of whether the remains were found on non-federal public or private land.

Staff from the archaeologist's office told us that they typically notify Indian Affairs Council staff when their office has been asked to authenticate a suspected Indian burial site. Because of time concerns, the archaeologist's office notifies council staff by telephone or by fax. To help ensure a timely response to authentication requests, the archaeologist's office and the Indian Affairs Council have jointly authorized six individuals to assist in authenticating Indian burial sites.²¹ In addition, the state archaeologist has authorized another seven individuals, including council staff and tribal representatives, to enter private property on behalf of the archaeologist's office to assess reported burial site disturbances.

²⁰ In January 1998, the federal government adopted Minnesota's model for dealing with "culturally unidentifiable" Indian remains. The model requires returning human remains to the tribal community presently living in the area where the remains were found.

²¹ *Minn. Stat.* (2000) §307.08, subd. 4.

Overall:

- **The Office of the State Archaeologist verified most of the suspected burial sites that it investigated in 1999.**

During 1999, the Office of the State Archaeologist was directly involved in investigating 87 suspected burial sites. The state archaeologist confirmed that 63 of these sites were burial sites, although some of the sites had been destroyed over time by development, agriculture, or other human or natural processes. Of the 63 burial sites, 42 sites were identified as American Indian and 21 as Euro-American. The state archaeologist used mechanical excavation techniques on four of these sites—two American Indian sites and two Euro-American sites. Mechanical excavations typically involve removing earth using machinery such as belly scrapers, graders, or bulldozers. In the remaining 24 cases, the office determined that the suspected sites did not involve human burials; the state archaeologist used mechanical excavation techniques on one of these sites.

CONFLICTS

In the process of identifying and authenticating burial sites, conflicts have arisen between staff at the Office of the State Archaeologist and the Minnesota Indian Affairs Council. To better understand the nature of the problems, we asked council staff as well as tribal leaders and their cultural resources staff to provide examples of recent cases involving significant discord. We also asked about instances of successful collaboration. To help identify the source of conflict, we talked with people involved in some of the “controversial” and “non-controversial” cases, including state and local government representatives, developers, and American Indians. As a result of these conversations, as well as other interviews and our analysis of roles and responsibilities, we identified three major problems that create tension between staff at the state archaeologist’s office and the Indian Affairs Council:

1. Differences of opinion regarding archaeological methods and definitions,
2. Gradual changes in the structure and authority of the archaeologist’s office, and
3. Poor communication and mistrust.

Government officials and private developers told us that they support the protection and preservation of Minnesota’s archaeological resources, although it can represent “extra” costs. The Minnesota Department of Transportation estimates that it spends approximately \$1 million per year on cultural resource preservation activities related to highway construction. But conflicts among the archaeologist’s office, the Indian Affairs Council, other state and federal agencies, individual tribal governments, or developers can create additional costs, construction delays, and overall frustration. For example, conflicts about the

There have been conflicts between staff at the archaeologist’s office and Indian Affairs Council.

archaeological effects of rerouting Highway 55 in Minneapolis in 1999 resulted in the district court requiring additional archaeological testing, which ultimately produced negative results.²²

Differences of Opinion Regarding Archaeological Methods and Definitions

We found that:

- **Differences of opinion about the appropriateness of some archaeological methods and definitions have created tension between staff at the archaeologist's office and the Indian Affairs Council.**

Most of the tension between staff at the Office of the State Archaeologist and the Minnesota Indian Affairs Council stems from disagreements over archaeological methods, specifically the use of mechanical excavation. As noted earlier, mechanical excavations typically involve removing earth using machinery such as belly scrapers, graders, or bulldozers. Statutes prohibit anyone from knowingly disturbing human burials, and staff at both the archaeologist's office and the Indian Affairs Council agree that it is preferable to use the least invasive methods possible, such as mapping, "walking the site," soil coring, or measuring soil composition, when authenticating burial sites. In the last few years, the archaeologist's office has been asked to verify the existence of suspected burials where there is no overt, physical evidence of a burial or where sites have been significantly disturbed by natural or human processes. In some of these cases, at times after trying less invasive methods first, the archaeologist's office has used mechanical excavation to gradually excavate a suspected site, removing soil a few inches at a time.²³ As noted earlier, the archaeologist's office used mechanical excavation in 5 of the 87 suspected burial sites that it investigated in 1999.

Indian Affairs Council staff object to mechanical excavation of suspected burial sites.

Indian Affairs Council staff generally object to mechanical excavation, believing that the method may desecrate sacred ground and may also destroy evidence that a burial exists. Staff prefer instead to rely on maps of burial sites developed in the late 1800s and less invasive methods such as soil coring and shovel testing—methods that generally take longer, may be less effective and more subjective, and may lead to extra costs for private developers. According to council staff, the previous state archaeologist considered burial sites identified in maps to be authenticated cemeteries. In contrast, the current archaeologist often requires additional proof that a burial exists when there is no physical evidence of a burial mound or related features or when a site has been significantly disrupted, regardless of what maps might show.

It was beyond the scope of this study to examine the appropriateness of the various archaeological methods used in trying to verify burial sites. Generally speaking, mechanical excavation of burial sites, when done appropriately, is an accepted practice in field archaeology, although it may be more destructive than other techniques, such as hand excavations. According to Wisconsin's

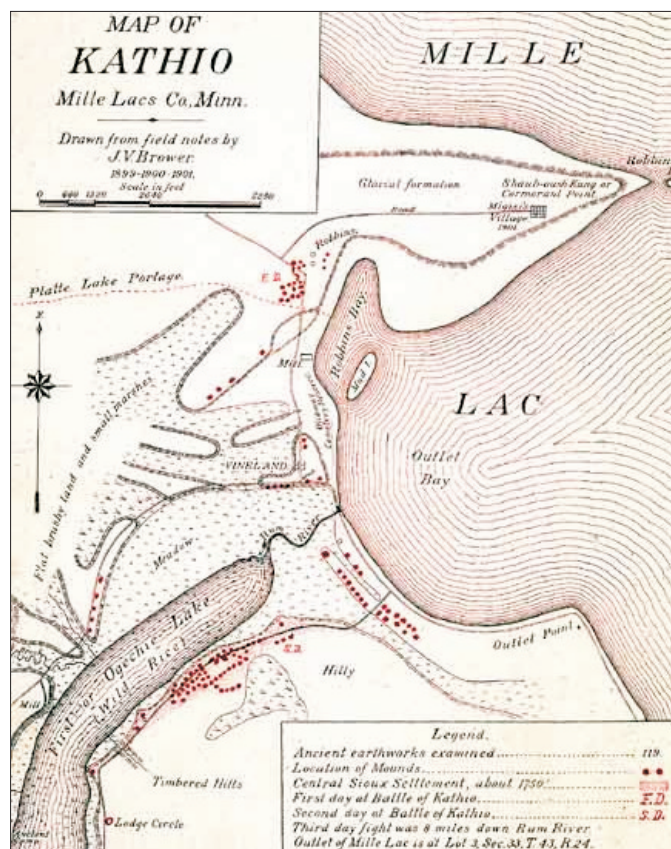
22 The Indian Affairs Council was not directly involved in the dispute.

23 According to the archaeologist's office, the previous state archaeologist also used mechanical excavation techniques to verify suspected burial sites at times.

archaeological guidelines, mechanical stripping of topsoil to locate suspected burial sites is “. . . recommended when early maps indicate the presence of Indian mounds within the present-day project area but surface indications of those cultural features no longer remain.”²⁴ The Bureau of Criminal Apprehension in

the Minnesota Department of Public Safety “. . . has used controlled mechanical excavation techniques numerous times over the years in unearthing clandestine graves in murder cases.”²⁵ The bureau reported only one incident of bone damage using this technique in the last 19 years.

Minnesota statutes list excavation as an acceptable archaeological method.²⁶ Staff from the archaeologist's office said that mechanical excavation is closely monitored and halted after every few inches of earth is removed to examine soil conditions and probe the area for indications of human remains. According



Map of burial mounds in Kathio Township drawn from late nineteenth century field notes of Jacob Brower.

to the archaeologist's office, the technique is especially cost-effective and, at times, the preferred method when burial sites are suspected on land that has already been significantly disrupted over time by development, agriculture, or other human or natural processes or on large tracts of land where exact burial locations cannot be determined.

A 1997 proposal for residential development in suburban Hennepin County provides a good example of the differences of opinion regarding mechanical excavation. Most private land in the Twin Cities area has been in agricultural, residential, or commercial use for over 150 years, leaving little or no visual evidence of burial sites that were mapped in the late 1800s. City officials advised a housing developer who wanted to develop a site where a series of Indian burial sites were previously mapped to contact the Office of the State Archaeologist.

²⁴ Wisconsin Archaeological Survey, *Guidelines for Public Archaeology* (Madison, WI, 1997), 82.

²⁵ Letter from Gary Kaldun, Crime Scene Coordinator, Bureau of Criminal Apprehension to Mark Dudzik, Office of the State Archaeologist, dated February 4, 1999.

²⁶ Minn. Stat. (2000) §138.31, subd. 5.

The state archaeologist, in turn, contacted the Minnesota Indian Affairs Council. Using original field notes from the late 1800s, computer-corrected magnetic bearings, and a tape measure, all 11 suspected sites were located although there was no visual evidence of burials. When soil coring, hand excavation, and other techniques at the 11 sites produced no evidence of human remains, the state archaeologist looked for evidence of burials by using controlled mechanical excavation. When this technique also failed to produce evidence of human remains, the archaeologist concluded that the suspected burial sites, even if they did exist, were likely destroyed in the intervening years. Provisions were made to preserve an intact burial mound that had been previously identified, and development proceeded as originally planned.

Concerned about the state archaeologist's use of mechanical methods in cases such as this, the Indian Affairs Council passed a resolution in late 1998 to have the Historical Society remove the current state archaeologist.²⁷ The resolution expressed concerns over the state archaeologist's use of invasive methods without first consulting and getting the agreement of the council. This action added considerable tension between staff at the archaeologist's office and the Indian Affairs Council.

Indian Affairs Council staff object to defining Indian burials as artifacts or objects.

Finally, staff at the Minnesota Indian Affairs Council object to having mounds and ancient burial grounds defined as "archaeological artifacts or objects" or as "cultural resources." According to council staff, Indian people want to assume responsibility for Indian burial sites and want them excluded from the definition of a "state archaeological site." Many of the tribal leaders and their staff that we talked with also objected to this terminology because it ignores the sacred significance that burial sites and related burial objects have for American Indians.

Gradual Changes in Statute and Practice

We found that:

- **Gradual changes in the Office of the State Archaeologist's structure and authority have further contributed to a poor working relationship between staff at the archaeologist's office and the Minnesota Indian Affairs Council.**

When the Legislature created the Office of the State Archaeologist in 1963, it provided no funding for its operation or staffing. In its first 30 years, the office was headed by only two state archaeologists, both of whom had other full-time jobs while they fulfilled their state responsibilities. The first state archaeologist served from 1963 through 1977, and the second from 1978 through 1992. The position was vacant until late 1994, when the current state archaeologist was hired. The Legislature did not provide funds for the office until 1984, and then it provided only minimal funding until 1994. For fiscal year 2000, the Office of the State Archaeologist had two full-time professional staff and an operating budget

²⁷ Minnesota Indian Affairs Council, *Resolution 111398-02* (St. Paul, November 13, 1998). At the time the resolution was passed, Minnesota law gave the Historical Society, in consultation with the Indian Affairs Council, the authority to appoint the state archaeologist. As mentioned earlier, the Commissioner of Administration currently appoints the state archaeologist.

**Indian Affairs
Council staff
want to be more
involved in
authenticating
Indian burial
sites.**

of \$196,000. Since the office gained funding and full-time staff, it “tightened up” the permit process and began to stress accountability. For example, the office redesigned various permit forms, clarified the terms and conditions of permits, and required that previously permitted archaeologists submit the necessary site forms and project reports before they could renew their permits. In addition, the office focused on providing more timely information to government agencies, private developers, and citizens.

In the last 20 years, the Legislature has reduced the Indian Affairs Council’s role in identifying and authenticating Indian burial sites.²⁸ At the same time, however, the Legislature passed laws that require more consultation between the archaeologist’s office and the Indian Affairs Council. For example, in 1986, the Legislature gave the state archaeologist the sole authority to identify and authenticate Indian burial sites.²⁹ Previously, this responsibility was shared by the two agencies (1976 to 1980) or delegated to an archaeologist approved by both agencies (1980-1986). The 1986 Legislature also required that the Indian Affairs Council be consulted on the appointment of the state archaeologist, and it gave the council review authority over state development plans that could affect American Indian history or religion.³⁰ In 1994, the Legislature required that the state archaeologist inform the Indian Affairs Council of significant archaeological work, file annual reports with the council, and forward certain state development plans to the council for review and recommendations.³¹

Regardless of statutory requirements, staff at the archaeologist’s office and the Indian Affairs Council have different expectations about the council’s involvement in Indian burial sites. The council’s expectations are partially based on office procedures developed and adopted by the Indian Affairs Council and archaeologist’s office in the late 1980s.³² According to council staff, the procedures, gradually developed over the prior 12 years, are still in effect and give the Indian Affairs Council more authority than it presently exercises. However, the archaeologist’s office told us that the procedures, applied inconsistently over the years by both the archaeologist’s office and the council, are no longer in effect and that they were simply guidelines that did not have the force of law. The archaeologist’s office has not developed more current procedures to help define expectations and relationships when identifying and authenticating burials.

Dissatisfied with the gradual changes in the working relationship between the Indian Affairs Council and the Office of the State Archaeologist, the council worked with legislators to propose significant changes to state law in 1998 and 1999. These changes, which the Legislature did not pass, would have given the council the authority to identify and authenticate American Indian burial sites.³³

28 See Appendix A for a history of statutory changes related to identifying and authenticating Indian burial sites.

29 *Minn. Laws* (1986), ch. 463, sec. 1.

30 *Minn. Laws* (1986), ch. 323, sec. 1-2.

31 *Minn. Laws* (1994), ch. 632, art. 4, sec. 50-51.

32 Office of the State Archaeologist and the Minnesota Indian Affairs Council, *Procedures for the Implementation of MN. ST. 307.08* (St. Paul, 1991).

33 S.F. 2361 and H.F. 2383 in 1998, and S.F. 406 in 1999.

Poor Communication and Mistrust

It was evident from our interviews that:

- **There are significant communication and “trust” problems between staff at the Minnesota Indian Affairs Council and the Office of the State Archaeologist.**

Although staff at the archaeologist’s office and the Indian Affairs Council told us that they communicate with one another, they also said it is not always as timely or useful as is needed. Staff at the archaeologist’s office, other state agency staff, local government officials, private developers, and American Indians told us that the Indian Affairs Council does not respond to their requests for input in a timely manner. The situation is further complicated by the fact that statutes do not set forth deadlines regarding certain regulatory activities. For example, statutes simply require that the archaeologist’s office and Indian Affairs Council review plans “promptly” rather than requiring reviews within a certain time period, for example, 30 days.

The state archaeologist is required by law to consult with the Indian Affairs Council.

At the same time, council staff told us that its input has little effect on the decisions made by the state archaeologist. State law requires that the archaeologist’s office “. . . consult with and keep the Indian affairs council . . . informed as to significant field archaeology, projected or in progress, and as to significant discoveries made.”³⁴ Although the archaeologist’s office believes that it consults with the council and seeks its input on all archaeological work (not just on significant projects), council staff told us that they expect their viewpoints to be given more consideration. Council staff believe that the archaeologist’s office does not consult with them as much as it simply notifies the council of the decisions the office has already made.

In addition, Indian Affairs Council staff believe that the state archaeologist is “disrespectful” and minimizes their role in protecting archaeological resources. Some people told us that the state archaeologist could be “more tactful” in working and communicating with the Indian Affairs Council and other interested parties. According to some observers, part of this problem stems from the state archaeologist’s reading of the statutes and the council’s desire for more input into decisions concerning American Indian burials. At the same time, however, some developers that we talked with appreciated the state archaeologist’s “blunt, no-nonsense” manner because he told them exactly what they had to do to comply with state law.

Finally, it should be noted that the Indian Affairs Council, like the archaeologist’s office, does not have to be consulted on all federal development projects, even if they affect archaeological resources. However, it can be difficult to tell the difference between a federal and a state project, and the council could perceive that it is sometimes being circumvented. As discussed earlier, development projects that occur on federal land, receive federal funds, or need a federal license must consult with individual American Indian tribes rather than the Indian Affairs Council. Both the archaeologist’s office and the Indian Affairs Council generally

³⁴ Minn. Stat. (2000) §138.38.



The Grand Mound in Koochiching County in 1900.

Despite their conflicts, there are examples of successful collaboration between the archaeologist's office and the Indian Affairs Council.

only become involved in federal projects that affect suspected or known burial sites. In contrast, the council must be consulted in all projects affecting Indian history or religion that occur on state sites.

Although we have concluded that there are significant communication and trust problems between staff at the Office of the State Archaeologist and the Minnesota Indian Affairs Council, the two agencies have successfully worked together on many identification, authentication, and reburial cases. Overall, there have been many more instances of successful collaboration than instances of significant conflict. For example, in late 1998 a local corporation began planning for a new building on property it owned on the bluffs of the Mississippi River. In compliance with the city's mound management plan, corporate staff consulted with the Historical Society, the Indian Affairs Council, the Department of Natural Resources, and the Office of the State Archaeologist. Several months of site research followed, consisting of maps, field notes, surveys, soil coring, and mechanical excavation. Upon advice from the archaeologist's office, the corporation proceeded to construct a new building while honoring and preserving an ancient Indian burial mound.

At another Twin Cities site, a potential conflict among a landowner, developer, area residents, and American Indians over the construction of eight townhouses was averted in early 2000. On the advice of city officials and local community activists, the builder met with the state archaeologist and Indian Affairs Council staff. Together they created a modified plan for the townhouses while permanently protecting an ancient burial site.

Finally, as noted previously, the archaeologist's office developed a model for dealing with "culturally unidentifiable" Indian remains that was later adopted by the federal government. According to staff at the Indian Affairs Council, the model "sets a national precedent that is bound to help tribes in other states, which are still fighting this issue."³⁵

RELATIONSHIP WITH INDIVIDUAL INDIAN TRIBES

We asked tribal leaders and cultural resources staff on each of Minnesota's 11 reservations and communities to describe their working relationship with the archaeologist's office regarding American Indian burial sites. Statutes do not require that the archaeologist's office work with Indian tribes on an individual basis. Nearly half of the tribal representatives told us that they have had little or no contact with the archaeologist's office in the last year, and that there was generally no reason to have contact. Other tribal representatives communicate with the archaeologist's office in varying degrees, depending largely on how involved tribal governments are in cultural resources issues. For example, there is more frequent communication when tribal governments have historic preservation offices or when they are establishing museums or cultural resource centers in their communities. Also, some tribal governments help support Minnesota Archaeology Week—a major educational activity of the archaeologist's office.

Although not all tribal governments work with the archaeologist's office, all of the tribal leaders and their cultural resources staff had an opinion about the office. We found that, despite the recent tension between staff at the archaeologist's office and the Indian Affairs Council:

- **Three-fourths of Minnesota's Indian tribal leaders and their cultural resources staff report a "fair to good" relationship with the archaeologist's office.**

These data are shown in Table 1.4. Overall, 14 of 22 tribal representatives that we talked with described their relationship with the Office of the State Archaeologist as "good," 4 described it as "fair," and 4 described it as "poor." They rated their relationship with the Minnesota Indian Affairs Council only slightly higher. As the table indicates, 3 tribal leaders and staff described their relationship with the Indian Affairs Council as "excellent," 14 described it as "good," 3 as "fair," and 2 described their relationship as "poor."

In addition, we found that:

- **Most American Indian tribal leaders and their staff are generally satisfied with how Indian burial sites are identified and protected.**

³⁵ David Peterson, "State Will Be First to Repatriate Indian Remains for Reburial," *Minneapolis Star Tribune*, September 19, 1999, sec. B, pp. 1, 8.

Table 1.4 Tribal Representatives' Assessments of Working Relationships with State Agencies and Developers

Rating	Archaeologist's Office	Indian Affairs Council	Historical Society	Natural Resources	Transportation	Private Developers
Excellent	0	3	20	20	0	0
Good	14	14	2	2	13	3
Fair	4	3	0	0	9	18
Poor	4	2	0	0	0	1
Total	22	22	22	22	22	22

SOURCE: Office of the Legislative Auditor telephone interviews, February 2001.

We asked tribal leaders and their staff about the current process for identifying Indian burial sites on non-reservation land. Of the 22 tribal representatives interviewed, 9 said that they were very satisfied with the process used to identify Indian burial sites and another 9 said that they were satisfied; no one expressed dissatisfaction. In addition, 19 representatives said that Indian burial sites on non-reservation land are adequately protected once they are identified.

Options for Change

SUMMARY

States organize the regulation of archaeological resources in various ways. One-half locate their archaeologist's office within a state historical society and a majority combine the state archaeologist with the state historic preservation office. Minnesota's archaeologist's office spends less money and has fewer staff than archaeologist offices in most other states. While some states charge fees for archaeological services, no state archaeologist's office generates its entire budget in that manner. While we think that the archaeologist's office should continue to receive its funding primarily from a General Fund appropriation, the Legislature should direct the office to determine the feasibility of charging fees to supplement its budget. To help reduce the confusion and mistrust that exists between staff at the Minnesota Indian Affairs Council and the Office of the State Archaeologist, the Legislature should require the state archaeologist to adopt administrative rules for regulating archaeological resources and allow contested case procedures to settle disputes.

In Chapter 1, we identified several areas where conflicts have arisen between staff at the Indian Affairs Council and the archaeologist's office about the proper treatment of Indian burial sites. These conflicts have mainly involved differences of opinion over the methods used to verify suspected burial sites and changes in roles and responsibilities. In addition, poor communication and mistrust have characterized the relationship between the agencies in recent years.

In this chapter, we examine how other states regulate archaeological resources and resolve conflicts and we suggest some alternatives for improving the way Minnesota regulates these activities. We asked the following research questions:

- **How do other states regulate archaeological resources, including burial sites? How are other state archaeologist offices organized, and how do their budgets and staff compare with Minnesota's?**
- **Are changes needed in the way Minnesota regulates archaeological resources, including burial sites? If so, how could current policies and procedures be improved? How should disputes be resolved?**
- **Where should the Office of the State Archaeologist be located and how should it be funded?**

To answer questions regarding other states' organizations and budgets, we contacted state archaeologist offices in all 50 states. We received responses from

48 states, although not all of them could provide us with accurate budget information.¹ Because many archaeologist offices are located in a larger agency, we compared budget data for 25 states where the archaeologist's office was not part of a larger agency or where it was able to separate the archaeologist's portion from the rest of the agency budget.

To answer questions about states' archaeological laws, we reviewed the National Conference of State Legislatures' State Historic Preservation Legislation Database.² The database contains summaries of statutes on historic preservation and American Indian burial sites. We examined laws in 28 states, primarily in the west and midwest, including Minnesota and all 21 states where American Indians comprised at least 0.9 percent of the state's 1999 population.³ We talked with several state archaeologists to clarify ambiguities and to shed additional light on dispute resolution mechanisms.

We developed a list of options for the Legislature's consideration from numerous interviews with staff from the archaeologist's office, the Indian Affairs Council, and other state agencies; tribal leaders and their staff; archaeologists from universities and private consulting firms; and representatives of local government and private development firms. In addition, we reviewed many archaeological publications and reports and we considered the information we learned about archaeological services in other states.

OTHER STATES

As discussed in Chapter 1, the relationship between staff at the archaeologist's office and the Indian Affairs Council has deteriorated in recent years. Conflicts over the role of the two agencies, the methods used to authenticate Indian burial sites, and poor communication and mistrust have created a tense atmosphere. We looked at how other states regulate archaeology and resolve disputes to see if there are any models that Minnesota could use. In addition, the Governor's biennial budget proposes replacing the Office of the State Archaeologist's General Fund appropriation with fee-for-service funding beginning in fiscal year 2003. In light of this proposal, we also looked at how other states organize and fund their archaeologist offices. In general, we found that:

- **States organize the regulation of archaeological resources in a variety of ways.**

1 Hawaii and New Jersey did not respond.

2 National Conference of State Legislatures, *1999 State Historic Preservation Laws*, <http://www.ncsl.org/programs/arts/statehist99.cfm>; accessed February, 2001.

3 The 28 states are: Alaska, Arizona, Arkansas, California, Colorado, Georgia, Idaho, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming.

Unlike Minnesota, most state archaeologist's offices are part of a larger historic preservation office.

Location of State Archaeologist Offices

While all states have laws regulating archaeological activities, 13 states do not have a state archaeologist designated in statute. States where laws do not provide for a state archaeologist designate someone to serve in that capacity.⁴ Usually, this person is a deputy or other staff member in the state's historic preservation office, which has responsibility for historic sites in general. Many states combine their archaeologist with the historic preservation office and do not have a separate budget for each. In 37 of the 48 states that we were able to contact, the archaeologist's office is part of a larger state historic preservation office. While many states (including Minnesota) locate their state historic preservation office in a state historical society, some locate it in a department of natural resources or other department. In Minnesota, the state archaeologist is separate from the historic preservation office.

We found that:

- **Although one-half of the states locate the archaeologist's office within a state historical society, commission, or department, there is considerable variation among states in where they locate the archaeologist's office.**

As shown in Table 2.1, 25 of the 50 states have their archaeologist offices located in a state historical society, commission, department, or museum. In nine states, the office is located in a natural resources, environment, or parks and recreation department. Seven states house their state archaeologist in a state university. The remaining nine states locate the archaeologist's office in another state department including: three in a tourism or economic development department; two in a department of state; one in a department of cultural resources; one in a housing and community development department; one in a commerce and community affairs agency; and one (Minnesota) in an administration department.

Estimated Expenditures and Staffing

Comparing the size of Minnesota's archaeologist office with those of other states is difficult because the scope and responsibilities of the offices vary. Accordingly, we restricted our budget and staffing comparisons to states where the archaeologist is not jointly administered with the state historic preservation office or where state officials were able to estimate the archaeologist's budget separate from the larger agency in which they are embedded. Our analysis showed that:

- **Most state archaeology offices that are similar to Minnesota's have, on average, larger budgets and staffs than Minnesota's office.**

Figure 2.1 shows the estimated annual expenditures for fiscal year 2000 for Minnesota and 25 comparison states. Annual expenditure estimates varied greatly, ranging from a low of \$53,000 in New Hampshire to \$1.7 million in Texas. The average for the 25 comparison states was \$394,000 and the median

⁴ The states without an official archaeologist are Arizona, California, Maine, Missouri, Nebraska, Nevada, New York, North Dakota, Ohio, Oregon, Pennsylvania, Virginia, and West Virginia.

Table 2.1: Location of the State Archaeologist's Office in 50 States

Agency or Department	States
State History Society or Commission (17)	Alabama, Colorado, Delaware, Idaho, Illinois, Kansas, Maine, Massachusetts, Montana, Nebraska, New Mexico, North Dakota, Ohio, Rhode Island, South Dakota, Texas, Wisconsin
State Historical Department (4)	Mississippi, New Hampshire, Virginia, West Virginia
State Museum (4)	Arizona, Nevada, New Jersey, Pennsylvania
State Natural Resources, Environment, or Parks and Recreation Department (9)	Alaska, California, Georgia, Hawaii, Indiana, Missouri, New York, Oregon, Tennessee
State University (7)	Arkansas, Connecticut, Iowa, Kentucky, Oklahoma, South Carolina, Wyoming
Other State Department (9)	Florida, Louisiana, Maryland, Michigan, Minnesota , North Carolina, Utah, Vermont, Washington

NOTE: The number of states located in each category is in parentheses. For the two states that we were unable to contact (Hawaii and New Jersey), we determined their state archaeologist's location from their addresses in a directory provided by the National Association of State Archaeologists, <http://www.uiowa.edu/%Eosa/nasa/index.html>; accessed January, 2001.

SOURCE: Office of the Legislative Auditor's telephone survey of state archaeologist offices, February-March, 2001.

States vary in the amount of resources they provide for their archaeologist's offices.

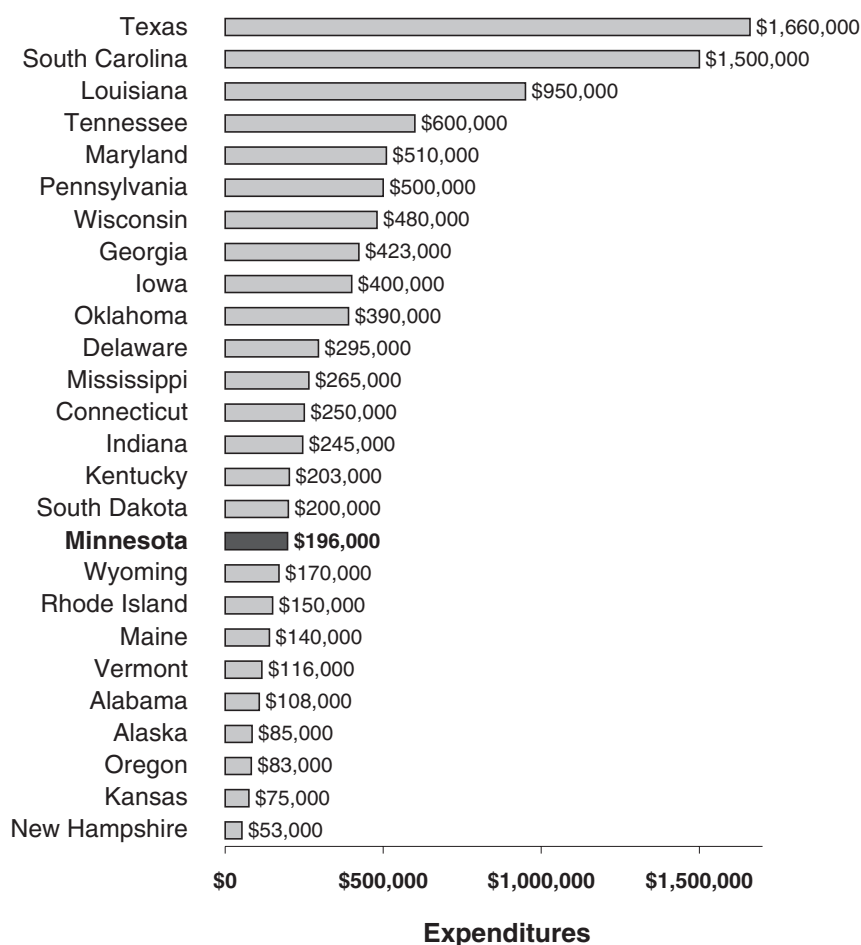
was \$250,000, compared with fiscal year 2000 expenditures of \$196,000 in Minnesota. Several of the 25 states received federal funding for a portion of their budget. We asked a few states about the nature of the federal funding and were told that it involved historic preservation services that the archaeologist was performing for the state historic preservation office.⁵ In contrast, Minnesota's Office of the State Archaeologist is completely independent from the State Historic Preservation Office and Minnesota's state archaeologist receives only minimal federal funds.⁶

Several state archaeologist offices charge for providing for some services, such as database searches, field services, and educational seminars and training. One state, Connecticut, supported its entire 2000 budget of \$250,000 with grants and honoraria. However, in most states that charge for services, fees accounted for only a small portion of their total funding.

⁵ Only one state in this group received over half of its funding from federal grants.

⁶ As noted in Chapter 1, the archaeologist's office received \$8,000 from a variety of other state, federal, and private sources in fiscal year 2001 for an archaeology conference and to help sponsor Minnesota Archaeology Week.

Figure 2.1: Estimated State Archaeologist Expenditures in 26 States, FY2000



SOURCE: Office of the Legislative Auditor's telephone survey of state archaeologists, February-March, 2001.

The number of professional full-time equivalent staff working in the archaeologist's offices in 37 states that were able to provide information ranged from one (Connecticut, Montana, New Mexico, and Oregon) to 30 (South Carolina). The average number of professional staff in these 37 state archaeologist offices was 7 and the median was 5, compared with 2 in Minnesota. Some states have more staff because the archaeologist's office performs field services for other state agencies. For example, Iowa's archaeology office has a contract with the state's transportation department to conduct archaeological investigations for state road projects. On the other hand, some state archaeologist offices have large budgets and low numbers of staff because they contract for services.

Issuing Archaeological Permits

We examined summaries of state historic preservation and burial statutes in 28 states. We found that:

- **Most states require a permit to conduct archaeological investigations, including burial site investigations.**

Most states require a permit for archaeological activities, but few charge permit fees.

In 24 of the 28 states, a permit (called a license in Minnesota) is required to conduct archaeological investigations. While statutory wording differs, permits are usually required for investigating, excavating, restoring, or removing any historic or prehistoric ruins or artifacts. Most states only require permits on publicly owned land but a few states also require permits for archaeological investigations or excavations on private land. Arkansas, California, Iowa, and Nebraska do not require permits, and Missouri only requires a permit for underwater salvage operations.

Regarding fee-for-service arrangements, we found that:

- **Most states, including Minnesota, do not charge a fee to issue permits.**

Five of the 24 states that require a permit provide for a permit fee. In Kansas, the fee is up to \$50, depending on the class of permit. Montana and Oklahoma also have a \$50 filing fee. The fee in Missouri is \$100, and in North Dakota there is a \$100 annual fee plus \$50 for each investigation field report. As noted earlier, states that charge fees told us that the revenues they collect from fees do not constitute a significant portion of their budgets.

Identifying and Authenticating Burial Sites

We found that:

- **There is wide variation among states in assigning responsibility for identifying and authenticating burial sites.**

Unlike Minnesota, most states do not explicitly empower one individual or agency with responsibility for authenticating burial sites. Rather, responsibility is implied, since an individual or agency is responsible for issuing archaeology permits, notifying the appropriate American Indian tribal leaders when remains are found, and arranging for the final disposition of burial remains.

In most states, it is a crime to knowingly disturb a burial site.

In almost all of the 28 states whose laws we analyzed, it is a crime to willfully or knowingly disturb, excavate, deface, or remove burial remains or associated burial objects. States differ regarding the severity of penalties (it is a felony in Minnesota), but they usually include both fines and incarceration. In some states, penalties are greater for subsequent offenses and, in other states, there are harsher penalties for selling or profiting from burial remains. Most states, including Minnesota, also have lesser penalties for failing to disclose the discovery of



Late nineteenth century mound mapper Jacob Brower.

remains to authorities, violating the terms of excavation permits, or otherwise violating laws pertaining to archaeological investigations and historical artifacts. Some states, including Minnesota, also specifically allow individuals or organizations to seek civil damages against anyone who illegally defaces or disturbs a burial site.

Almost all of the 28 states require anyone uncovering human skeletal remains on public land to inform local law enforcement or the county coroner or medical examiner. Once the authorities determine that the remains are not relevant to a criminal investigation, they notify the department or person responsible for investigating the source of the remains.⁷

Table 2.2 shows the agency or individual responsible for identifying and authenticating American Indian burial remains in each of these states. The most common office with this responsibility is the state historical society (six states) followed by the state archaeologist (five states), the State Historic Preservation Office (four states), or a special burial or site preservation board (three states).

⁷ An exception is California, where the county coroner is responsible for investigating the remains and notifying the Native American Heritage Commission if Indian burials are involved.

Table 2.2: Responsibility for Identifying and Authenticating Burial Sites in 28 States

Person or Agency	States
State Historical Society	Idaho, Nebraska, North Carolina, North Dakota, Utah, Wisconsin
State Archaeologist	Colorado, Iowa, Massachusetts, Minnesota , Oklahoma, South Dakota
Historic Preservation Office	Illinois, Missouri, Nevada, Oregon
Special Board	Kansas, Montana, New Mexico
Dept of Natural Resources	Alaska, Georgia, Michigan
Other State Department	New York, Washington
State Museum	Arizona
State University	Arkansas
County Coroner	California

NOTE: Wyoming has no specific statute on burial sites.

SOURCE: Office of the Legislative Auditor's analysis of summaries of state historic preservation laws in National Conference of State Legislatures, *1999 State Historic Preservation Laws*, <http://www.ncsl.org/programs/arts/statehist99.cfm>; accessed February, 2001.

The agency responsible for identifying and authenticating burial sites varies by state.

We also found that:

- **In most states, either the Indian affairs office (if there is one) or tribal representatives or both must be notified when an American Indian burial site has been uncovered.**

In 21 of the 28 states (including Minnesota), the statutes specifically require the responsible agency to notify either a specific tribe (if the remains can be identified as belonging to someone from that tribe) or an intertribal group about the discovery. For example, when human skeletal remains or burial goods of American Indian origin are discovered in Nebraska, the state historical society must notify the Commission on Indian Affairs and any Indian tribes reasonably linked to the remains. Similarly, South Dakota law requires the state archaeologist to notify the Office of Indian Affairs upon the discovery of an Indian burial site, and to also notify the tribe if one can be linked to the remains. In most states, the role of the tribe or inter-tribal group is advisory, except that permission is sometimes required when remains are to be moved or reburied. Tribal notification is not required by statute in Arkansas, Illinois, Iowa, New Mexico, New York, Washington, and Wyoming.⁸

⁸ Arkansas and Illinois have no state or federally recognized tribes and Iowa has only one. Wyoming has no specific statute on Indian burial sites.

Dispute Resolution Mechanisms

According to our analysis:

- **Ten of the 28 states that we studied have a method to resolve archaeological disputes; however, states that we contacted told us that they rarely or never have to use it.**

States use a variety of methods to resolve archaeological disputes.

Five states permit or require mediation efforts to resolve disputes. In Arizona, persons who disagree with a decision of the Director of the Arizona State Museum regarding the disposition of human burial remains may seek third party resolution of the dispute. If mediation fails, they may appeal the decision to the courts. In Montana, mediation is required in disputes between a landowner and the Burial Preservation Board regarding the disposition of remains, but the board takes possession of the remains if mediation fails to resolve the dispute. However, Montana officials told us that they have never had to use mediation to resolve disputes.

In Alaska, if the Department of Natural Resources delays a construction project over 90 days because it determines that a historic, prehistoric, or archaeological site will be adversely affected, the agency sponsoring the project may apply to the governor to proceed with the project. In Nevada, the State Historic Preservation Office is authorized to mediate disputes between landowners and American Indian tribes for the treatment and disposition of Indian burial sites.

Nebraska requires arbitration for issues pertaining to the return of Indian artifacts to the appropriate tribe. If the parties cannot agree on the designation of an arbitrator, the Public Counsel assumes that role.⁹ Nebraska officials told us that, to date, the Public Counsel has not been used to help identify and authenticate Indian burial remains.

In Oregon, a dispute about issuing an archaeological permit or disposing of human remains or burial goods must be submitted to mediation and, if mediation fails, to arbitration. The arbitration is conducted by the state's Dispute Resolution Commission which must choose a panel consisting of representatives from the State Historic Preservation Office, the Commission on Indian Services; the Oregon State Museum of Anthropology; the Indian tribe involved in the dispute; and a member of the public. So far, disputes have been resolved without the need to convene an arbitration panel.

Two states specifically provide for an administrative hearing process to review decisions relating to Indian burials. In Georgia, an aggrieved party may request a hearing before an administrative law judge who is appointed by the Board of Natural Resources, and whose decision is final. In South Dakota, a decision by the state archaeologist not to return remains to the appropriate tribe may be reviewed as a final agency action under the state's administrative procedure act. South Dakota's state archaeologist told us that this process has never been used to settle disputes involving Indian burial remains.

⁹ Nebraska's Public Counsel is a small state agency created to arbitrate and rule on disputes involving other state agencies.

Two states have created special panels to hear appeals or help resolve disputes regarding the treatment and disposition of Indian burial remains. In Utah, a Native American Remains Review Committee (consisting of four members from Indian tribes and three from museums) reviews, upon the request of any affected party, findings relating to the identity or cultural affiliation of remains or the return of those remains. Utah officials told us that this process has worked well in dealing with disputes regarding the repatriation of remains held in museums. The committee has helped maintain communication and provide for a common understanding on this issue. Authenticating remains has not been a problem in Utah.

In Wisconsin, a three-member review board hears appeals about the Director of the State Historical Society's decisions regarding field archaeology. The board consists of one member each from the Wisconsin Archaeological Society, the Wisconsin Archaeological Survey, and the Board of Curators of the Historical Society. The review board submits its recommendations to the Board of Curators of the Historical Society for a final decision. Wisconsin officials told us that this review panel has never had to hear an appeal.¹⁰

ALTERNATIVES FOR MINNESOTA

We identified five alternatives for the Legislature to consider in trying to improve the relationship between the archaeologist's office and the Indian Affairs Council.

As we discussed in Chapter 1, there are significant problems between staff at the Office of the State Archaeologist and the Minnesota Indian Affairs Council regarding the appropriateness of archaeological methods and definitions, changes in structure and authority, and poor communication and mistrust. This section presents five alternatives that the Legislature could consider to address these issues. In addition, we review the proposal currently being considered by the Legislature to fund the Office of the State Archaeologist entirely with service fees. Finally, we discuss the issue of where the office should be located. These alternatives are shown in Table 2.3.

We used several criteria to evaluate the options and make recommendations. Foremost in our consideration was to recommend options that promote effective, timely, and least costly ways to regulate archaeology and protect archaeological resources. We also considered how other states organize archaeological services and how they resolve disputes, and we considered the history of archaeological regulation in Minnesota and past efforts to deal with problems and disputes.

Maintain the Status Quo

Maintaining the status quo requires no procedural or structural changes to the current organization of archaeological responsibilities. However, staff from the Office of the State Archaeologist and the Minnesota Indian Affairs Council could

¹⁰ Wisconsin also has a Burial Site Preservation Board, comprised of three members selected from a list submitted by the Wisconsin Archaeological Survey and three members of federally recognized tribes selected from names submitted by the Great Lakes inter-tribal council and the Menominee tribe. The board maintains a register of burial sites and advises the director of the state historical society on issues relating to the identification and authentication of sites. According to the Wisconsin state archaeologist, the Burial Sites Preservation Board has helped the state avoid major controversies about burial sites.

Table 2.3: Options for Changing the Structure or Authority of the State Archaeologist's Office

- Maintain the status quo.
- Increase authority of the Minnesota Indian Affairs Council.
- Clarify definitions and procedures.
- Create a dispute resolution mechanism.
- Realign the state's review process to parallel the federal review process.
- Charge fees for archaeological services.
- Relocate the Office of the State Archaeologist.

But, we recognize there is no easy solution to the mistrust between the archaeologist's office and the Indian Affairs Council.

pursue management training in communications or team building. Many tribal leaders and staff with whom we talked stressed the need for frequent, open communication. According to one tribal leader, "We may need to get everyone together and start shouting until all the emotion is out in the open and then we [need to] sit down to talk about differences."

Although staff at the archaeologist's office and the Indian Affairs Council cooperate successfully in many ways, we think that some degree of conflict over archaeological resources, especially Indian burials, is inevitable. Staff at both the Indian Affairs Council and the archaeologist's office bring different philosophies and priorities to bear on archaeological issues. However, in the final analysis, staff must be able to communicate with one another and discuss concerns in an atmosphere that allows them to "agree to disagree."

We doubt that management training by itself will resolve all of the problems between the archaeologist's office and the Indian Affairs Council. The poor relations and mistrust between the two agencies have persisted for several years. While the work of the state archaeologist is still being done, council staff believe that the rights of the Indian community are not being protected. In addition, as noted in Chapter 1, development projects could be delayed or incur additional costs because of the disputes.

Increase the Authority of the Minnesota Indian Affairs Council

One option to reduce the conflict between the Indian Affairs Council and the archaeologist's office would be to increase the authority of the council. For example, the Legislature could require that the Minnesota Indian Affairs Council, rather than the state archaeologist, identify and authenticate American Indian burial sites. While increasing the authority of the council might alleviate the concerns of council staff, developers and other state agencies might question the council's objectivity and object to such a change. The council's mission is "to protect the sovereignty of the 11 Minnesota tribes and ensure the well-being of

American Indian citizens throughout the State of Minnesota.”¹¹ Also, state agency staff and other tribal leaders told us that council staff have been slow to respond when their input has been sought. The state archaeologist, on the other hand, serves as a buffer between the competing interests of developers and those more concerned about protecting and preserving burial sites and archaeological resources.



Mounds Park, St. Paul.

In our view, while the Indian Affairs Council’s input should be sought and its views considered, a neutral official such as the state archaeologist is better suited to objectively evaluate the evidence related to the authentication of burial sites. As noted in Chapter 1, the council has previously proposed legislation that would have given it the authority to authenticate American Indian burial sites but the legislation did not pass. Finally, while the current situation between the Indian Affairs Council and the archaeologist’s office is, at times, contentious and stressful, issues and questions regarding specific burial sites are ultimately resolved without court intervention.¹²

Clarify Definitions and Procedures

To help clarify roles, responsibilities, and procedures, the Legislature could direct the Office of the State Archaeologist to develop written procedures for reviewing plans and identifying and authenticating archaeological sites, with input from all affected parties. Alternatively, the Legislature could direct the Department of

¹¹ Minnesota Indian Affairs Council, *About Us*, <http://indians.state.mn.us/aboutus.html>; accessed March, 2001.

¹² As discussed in Chapter 1, the district court intervened in rerouting Highway 55, but the Indian Affairs Council was not directly involved in the dispute.

Formal, written rules would help provide better understanding of the state archaeologist's role in regulating archaeological activities.

Administration, on behalf of the archaeologist's office, to develop rules under the Administrative Procedure Act.¹³

We prefer administrative rules rather than guidelines because rules have the force and effect of law. Guidelines, on the other hand, have no legal standing and are unlikely to be upheld if challenged in court. Furthermore, there are no standards for developing guidelines. In contrast, rules must be adopted with public input and must meet the standards of need and reasonableness. Currently, the Department of Administration does not have explicit rulemaking authority regarding archaeological activities; thus, the Legislature would need to give the department that authority.

Rules about the roles and responsibilities of the archaeologist's office, the Indian Affairs Council, and other parties would help ensure that all parties have similar expectations. Although there would still be differences of opinion regarding the appropriateness of various archaeological methods, rules would help clarify when and how decisions are to be made. In addition, rules could further define what it means to "consult with" other parties and could set forth timelines for reviewing plans and identifying and authenticating procedures. For example, the rules could require the archaeologist's office to review plans within 30 days of their submission and to answer requests for burial site information within 5 days. Likewise, the rules could require the Indian Affairs Council to review plans within the same timeframe.

RECOMMENDATION

The Legislature should require the Department of Administration, on behalf of the Office of the State Archaeologist, to adopt administrative rules for regulating archaeological activities.

There are costs associated with this recommendation, although it is difficult to know in advance what those costs would be. According to rough estimates provided to us by the Office of Administrative Hearings, rules that require a hearing usually need approximately 10 hours of administrative law judge time and about 15 hours of staff attorney time. This includes reviewing written comments, conducting the hearing, and issuing written findings. At \$91 and \$50 per hour respectively, the cost would total about \$1,660.¹⁴ However, if all of the interested parties could come to agreement about the rule and avoid a hearing, only two to three hours of staff attorney time would be required to review the legality and reasonableness of the proposed rule.

These estimates do not include the time spent by agency staff soliciting opinions from interested parties and drafting the proposed rule. In addition, the agency might need legal assistance in drafting the rule. In our 1993 study of administrative rulemaking, we examined cost data for a sample of 50 rules and found wide variations in cost depending on the scope and complexity of the rule and the

¹³ Minn. Stat. (2000) §§14.001-14.69.

¹⁴ Legislation proposed this session to provide general funding for the Office of Administrative Hearings, if passed, could result in reduced charges for the office's services.

amount of controversy associated with it.¹⁵ The average cost was \$26,577, which is equivalent to about \$33,000 in 2000 dollars.¹⁶ About 80 percent of the expenditures was for the salaries and benefits of the state employees who worked on drafting and developing the rule.¹⁷

Create a Dispute Resolution Mechanism

As noted previously, several states have formal procedures for resolving disputes relating to archaeological investigations and Indian burials. However, Minnesota currently has no formal process to resolve archaeological disputes. There are several avenues that the Legislature could pursue in this regard.



Department of Natural Resources archaeologists at work.

First, the Legislature could require that parties engage a mediator or arbitrator to help them settle disputes. In 1998, the Department of Administration's Management Analysis Division brought the Office of the State Archaeologist, Minnesota Indian Affairs Council, and others together to resolve disagreements about a suspected American Indian burial site. The parties agreed to bring in an archaeologist approved by both sides to determine what should happen, but an attempt to get the archaeologist's office and Indian Affairs Council to develop standards for authenticating burial sites failed. Another attempt was made in 1999

¹⁵ Actual costs ranged from \$1,300 to \$325,000. Some rules were very extensive and controversial and took years to adopt. Office of the Legislative Auditor, *Administrative Rulemaking* (St. Paul, 1993), 37-39.

¹⁶ The inflation adjustment is based on the change from 1992 to 2000 in the Bureau of Economic Analysis' price index for state and local government.

¹⁷ Office of the Legislative Auditor, *Administrative Rulemaking*, 37.

**The state's
“contested case”
process could
help resolve
specific disputes.**

to have the Office of Dispute Resolution mediate the disputes between the council and the archaeologist's office, but the council declined to participate. Nevertheless, binding arbitration might work in individual cases if the parties could agree on a panel of arbitrators who could be called upon to settle disputes when they arise.

A second alternative would be for an administrative law judge from the Office of Administrative Hearings to help settle disputes under the contested case hearings provisions of Minnesota's Administrative Procedure Act.¹⁸ This process allows input from interested parties and requires a judge to issue proposed findings based on the evidence and applicable law. The Commissioner of Administration would issue a final decision after considering the judge's report. Many state regulatory agencies use contested case proceedings to settle disputes. For example, contested case procedures are used to hear appeals of disciplinary actions taken by occupational licensing boards. Similarly, contested case procedures are used to hear appeals by companies that receive penalties for workplace safety violations.

Third, the Legislature could create a “Burial Preservation Review Board” or similar panel to resolve disputes involving the identification and authentication of burial sites. The panel could include heads of state agencies or their designees; representatives from Indian tribes or communities; archaeologists representing universities, professional organizations, and consulting firms; and members of the public. Several states have review boards to help settle disputes, although most of the states we contacted indicated that they did not need to use the boards. This approach would create a new layer of bureaucracy and would require a mechanism to provide organization and support for the board.

RECOMMENDATION

The Legislature should enact legislation requiring disputes relating to decisions of the state archaeologist to be resolved using the contested case provisions of the Administrative Procedure Act (Chapter 14).

Adopting this recommendation would provide an impartial forum for dispute resolution without creating a new board. While there would be costs to use this process, there would be no costs to establish the process. According to estimates provided by the Office of Administrative Hearings, a typical contested case hearing before an administrative law judge lasts about six hours. There could be an additional ten hours each of administrative law judge and staff attorney time reviewing the evidence and preparing the report for a total cost of about \$1,956 per contested case. The archaeologist's office would incur these costs. The parties to the dispute would also incur costs related to staff time and, if required, legal assistance to prepare their cases.

¹⁸ Minn. Stat. (2000) §§14.50-14.69.

Federal law requires that individual tribes be consulted on federal projects.

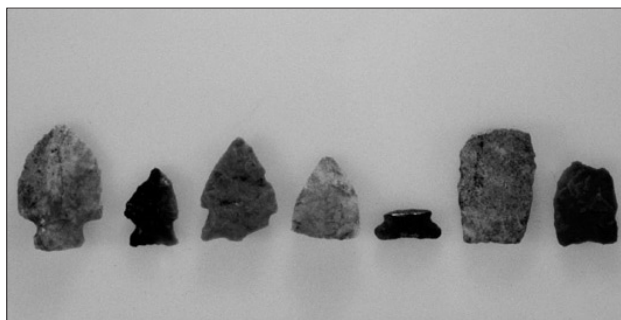
Realign the State Review Process to Parallel the Federal Review Process

As noted in Chapter 1, the federal government requires that agencies consult with individual Indian tribes rather than the Minnesota Indian Affairs Council. To partially align the federal and state plan review processes, the Legislature could require that Minnesota Indian tribes, in addition to the Indian Affairs Council, review development plans for state sites. Several of the Minnesota Indian tribal leaders and staff that we talked with like the federal process because it allows them to deal with their own concerns and problems. In addition, some tribal leaders told us that the Indian Affairs Council does not always represent the views of individual tribes. Also, working directly with American Indian tribes rather than a state agency (like the Indian Affairs Council) helps ensure a more government-to-government relationship and is more aligned with the concept of tribal sovereignty. Finally, some developers and state agency staff told us that they get quicker responses when dealing with individual tribal leaders than with council staff.

RECOMMENDATION

The Legislature should amend Minnesota Statutes (2000) §138.40 to require the state archaeologist to submit development plans on state sites that relate to Indian history or religion to the appropriate Minnesota Indian tribe in addition to the Minnesota Indian Affairs Council.

To further align the two processes, the Legislature could also consider expanding the coverage of the state review process to include all state funded or licensed projects, including those on private land. This would parallel the federal process. Currently, some private development projects are not reviewed by state agencies or American Indian tribal leaders. Although developers are encouraged to contact the archaeologist's office before beginning construction, not all do so. Illinois and New York have implemented state plan review processes that mirror the federal process.



Projectile points excavated at Lake Carlos.

On the other hand, the archaeologist's office does not have sufficient resources to review all of the development plans on private land. The office is working on creating an interactive website with burial location data. If local governments and private developers are aware of the existence of a burial site, they could consult with the state archaeologist and plan the development to ensure that the burial site is protected.

Charge Fees for Archaeological Services

The Governor's proposed budget for the Office of the State Archaeologist for the 2002-03 biennium provides no General Fund appropriation for fiscal year 2003. Instead, the office would have to generate its entire budget—approximately \$196,000—through fee-for-service arrangements.¹⁹ This proposal was made in the context of the Governor's challenge to agencies to save money in one activity and direct it to an activity with a higher priority. Department officials told us that their budget proposal for the archaeologist's office should not be seen, however, as a diminishment of their commitment to the work of the office.

The department has not conducted a study to thoroughly examine the implications of its fee-for-service proposal. In addition, the department has not developed a plan regarding how the fee-for-service concept would work, although staff told us that possible sources of revenue could include permit fees or charges for site visits when requested by developers.

Although many state programs operate on fees, we have several concerns regarding the proposed change in funding for the archaeologist's office. First, imposing permit fees would not save the state much money because Minnesota statutes only require permits for projects on state sites. Consequently, other state agencies (primarily the departments of Transportation and Natural Resources) would bear most of the cost. Furthermore, the office would have to charge about \$750 per project to generate enough money to totally fund its activities (\$196,000). To cover only one-half of its budget, the office would have to charge about \$375 per project. This is far more than what other states charge.

Second, private developers are not required to contact the archaeologist's office for information about burial sites. While some development projects are undertaken by large corporations that could afford to pay for the state archaeologist's time, many others involve small businesses and homeowners who could find these costs prohibitive. Private citizens and developers might be discouraged from contacting the state archaeologist if they had to pay for such services. The archaeologist's office depends on the willingness of others to provide it with information on archaeological sites so that its archaeology database is current. If citizens are discouraged from providing information because they are charged for the office's investigation expenses, some site information may not be reported and some sites may be unprotected.

Third, if the archaeologist's office had to charge for fieldwork, it would have to compete for business with other archaeologists. In a competitive market, there is a limit to how much the archaeologist's office could charge for fieldwork and, therefore, it is unclear how much money could be generated in this manner. Some services performed by the archaeologist's office are also available at no charge from the Historical Society. For example, the Historical Society also provides information about the location of archaeological resources to developers and government officials. In addition, the archaeologist's office would be competing for business with other archaeologists that it regulates. This could be viewed as a conflict of interest. During the 1980s and early 1990s when the office was not

Funding the base budget of the archaeologist's office with permit fees would shift costs to other state agencies.

¹⁹ Department of Finance, *2002-2003 Biennial Budget* (St. Paul, 2001), F-112.

funded, there were frequent allegations of conflict of interest in issuing archaeological permits.

Finally, as noted in Chapter 1, the state has a statutory obligation to ensure that archaeological resources are protected for all citizens. State agency staff, tribal leaders, archaeologists, developers, local government officials, and others with whom we spoke all opposed the proposal to fund the archaeologist's office entirely on a fee-for-service basis. We also reviewed several letters that the state archaeologist received from local government, professional organizations, and tribal officials that support the work of the office and oppose having the office's entire budget generated from fees. No state relies on service fees to fund its archaeological activities in their entirety. Most states that collect fees told us that service fees represent only a small percentage of their overall budget.

While we found little or no support from archaeologists, developers, tribal representatives, or the Indian Affairs Council for requiring the archaeologist's office to generate its entire budget from fees, there is less opposition to charging reasonable fees for selected services to supplement the office's budget. For example, these funds could be used to expand the office's outreach and educational activities or they could be used to help the office hire temporary clerical assistance. Many other states charge fees for specific archaeological services such as permits. Also, several state agencies receive partial funding from the entities that they regulate.

Fees should be considered to supplement the archaeologist's budget.

RECOMMENDATION

While the Office of the State Archaeologist should continue to receive its funding primarily from a General Fund appropriation, the Legislature should direct the office to determine the feasibility of charging fees to supplement its budget.

Relocate the Office of the State Archaeologist

Finally, we considered the placement of the Office of the State Archaeologist within the Department of Administration. Some people that we talked with questioned the department's commitment to archaeological activities in light of its budget proposal. Others questioned whether archaeological activities "fit" with the department's overall mission as a service agency. As noted previously, there is considerable variation among states regarding the location of their state archaeologist's office, with half of the states having the office in a state historical society, commission, or department. Other locations include natural resources or parks and recreation departments and state universities.

We do not think that relocating the archaeologist's office would address any of the major problems that we identified in our study, and could introduce new problems or reintroduce old ones. For example, placing the archaeologist's office in the Minnesota Historical Society or the Department of Natural Resources could present a conflict of interest, since the archaeologist's office licenses and ultimately oversees the archaeological activities of these two agencies. In addition, the Historical Society is primarily a nonprofit corporation whose focus is

educational rather than regulatory. Likewise, the University of Minnesota's primary focus is research and education rather than regulation. In contrast, the archaeologist's activities are largely regulatory in nature. Furthermore, we previously recommended that the state archaeologist's office adopt administrative rules, and the University of Minnesota does not have rulemaking authority. Finally, the Office of the State Archaeologist has, in the past, been affiliated with the Historical Society and the University of Minnesota. As with today, the past has not been without problems and controversy. The Legislature only moved the archaeologist's office to the Department of Administration in 1997, and only gave appointment authority to the Commissioner of Administration in 1999.²⁰

The Department of Administration is home to several small offices, such as the Office of Citizenship and Volunteer Services, that are too small to be separate state agencies but do not logically fit into other state agencies. Aside from funding concerns, we detected no major problems with the current arrangement.

RECOMMENDATION

The Office of the State Archaeologist should remain in the Department of Administration.

²⁰ *Minn. Laws* (1997), ch. 202, art. 2, sec. 38, subd. 1a, and *Minn. Laws* (1999), ch. 91, sec. 1, subd. 1.

History of Statutory Responsibility for Identifying and Authenticating Indian Burial Sites

APPENDIX A

Minn. Laws (1976), ch. 48 amended *Minn. Stat.* (1974) §307.08 to read: “Subd. 3. The state archaeologist and the Indian affairs board shall authenticate and identify Indian burial grounds when requested by the political subdivision which has title to Indian burial grounds.”

Minn. Laws (1980), ch. 457 amended *Minn. Stat.* (1978) §307.08, subd. 3 to read: “Subd. 4. A qualified professional archaeologist approved by the state archaeologist and the Indian affairs intertribal board shall authenticate and identify Indian burial grounds when requested by the political subdivision in which the alleged Indian burial grounds are located, or by a concerned scientific or contemporary Indian ethnic group.”

Minn. Laws (1983), ch 282 amended *Minn. Stat.* (1982) §307.08, subd. 4 to read: “Subd. 4. The state shall retain the services of a qualified professional archaeologist, approved by the state archaeologist and the Indian affairs intertribal board, for the purpose of authenticating and identifying Indian burial grounds when requested by a concerned scientific or contemporary Indian ethnic group, when Indian burials are known or suspected to exist on public lands or waters controlled by the state or political subdivision.”

Minn. Laws (1986), ch. 463 amended *Minn. Stat.* (1984) §307.08, to read: “Subd. 3a. The state archaeologist shall authenticate all burial sites for the purposes of this section and may enter on property for the purpose of authenticating burial sites. Only after obtaining written permission from the property owner or lessee, descendants of persons buried in burial sites covered by this section may enter the burial sites for the purpose of conducting religious ceremonies. This right of entry must not unreasonably burden property owners or unnecessarily restrict their use of the property.”

Minn. Laws (1986), ch. 463 amended *Minn. Stat.* (1984) §307.08, subd. 4 to read: “Subd. 4. The state shall retain the services of a qualified professional archaeologist, approved by the state archaeologist and the Indian affairs council, for the purpose of gathering information to authenticate or identify Indian burial grounds when requested by a concerned scientific or contemporary Indian ethnic group, when Indian burials are known or suspected to exist on public lands or waters controlled by the state or political subdivision.”

Summary of Recommendations

- The Legislature should require the Department of Administration, on behalf of the Office of the State Archaeologist, to adopt administrative rules for regulating archaeological activities.
- The Legislature should enact legislation requiring disputes relating to decisions of the state archaeologist to be resolved using the contested case provisions of the Administrative Procedure Act (Chapter 14).
- The Legislature should amend *Minnesota Statutes* (2000) §138.40 to require the state archaeologist to submit development plans on state sites that relate to Indian history or religion to the appropriate Minnesota Indian tribe in addition to the Minnesota Indian Affairs Council.
- While the Office of the State Archaeologist should continue to receive its funding primarily from a General Fund appropriation, the Legislature should direct the office to determine the feasibility of charging fees to supplement its budget.
- The Office of the State Archaeologist should remain in the Department of Administration.

Further Reading

American Indian Research and Policy Institute. *To Build a Bridge: An Introduction to Working with American Indian Communities* (St. Paul: 1999).

Carnett, Carol L. *A Survey of State Statutes Protecting Archaeological Resources*, National Trust for Historic Preservation, U.S. Department of the Interior, National Park Service, Cultural Resources, Archaeological Assistance Division (Washington D.C.: August 1995).

Deloria, Vincent, ed. *American Indian Policy in the Twentieth Century* (Norman, OK: University of Oklahoma Press, 1995).

Echo-Hawk, Walter and Roger Echo-Hawk. *Battlefields and Burial Ground: The Indian Struggle to Protect Ancestral Graves in the United States* (Minneapolis, MN: Lerner Publications, 1994).

Griffin, James Bennett. *The Burial Complexes of the Knight and Norton Mounds in Illinois and Michigan* (Ann Arbor, MI: University of Michigan Press, 1990).

Gulliford, Andrew. *Sacred Objects and Sacred Places* (Boulder, CO: University Press of Colorado, 2000).

King, Thomas. "On Point: More on TCPs and Section 106," Society of American Archaeology (SAA) Bulletin 14 (1) website: <http://www.anth.ucsb.edu/SAABulletin/14.1/SAA10.html>.

Lauer, Tammy. *American Indians and Repatriation*, American Indian Research and Policy Institute (St. Paul: 1995).

Marcus, Price. *Disputing The Dead: U.S. Law on Aboriginal Remains and Grave Goods* (Columbia, MO: University of Missouri Press, 1991).

Meister, Barbara, ed. *Mending The Circle: A Native American Guide to Repatriation: Understanding and Implementing NAGPRA and the Official Smithsonian and Other Repatriation Policies*, American Indian Ritual Object Repatriation Foundation (New York, NY: 1996).

Messenger, Phyllis Mauch. *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* (Albuquerque, NM: University of New Mexico Press, 1999).

Mihesuah, Devon A., ed. *Repatriation Reader: Who Owns American Indian Remains?* (Lincoln, NE: University of Nebraska Press, 2000).

Minnesota Indian Affairs Council. *2000 Annual Report* (Bemidji, MN: November 2000) website: <http://www.indians.state.mn.us/00annl>.

Minnesota Department of Human Services. *Tribal Resource Book* (St. Paul: 2000).

Annual Report, Fiscal Year 2000. Minnesota Office of the State Archaeologist (St. Paul: July 2000).

Minnesota House of Representatives Research Information. *Indians, Indian Tribes and State Government* (St. Paul: 1993).

_____. *Racial/Ethnic Minorities in Minnesota, Geographical Distribution Among the Counties* (St. Paul: February 2001).

National Congress of American Indians and National Conference of State Legislatures. *Government to Government: Understanding State and Tribal Government*, (Washington D.C.: June 2000).

Swidler, Nina, Kurt Dongoske, Roger Anyon, and Alan Downer, eds. *The Role of Native Americans in Archaeology: Stepping Stones to Common Ground* (Walnut Creek, CA: AltaMira Press, 1997).

United States Congress, House of Representatives: Committee on Interior and Insular Affairs. *Protection of Native American Graves and The Repatriation of Human Remains and Sacred Objects*, One Hundred First Congress, second session (Washington D.C.: July 17, 1990).

United States Department of Interior: Bureau of Indian Affairs (BIA) website <http://www.doigov/bia> (last modified April 2000).

Zimmerman, Larry J. *Epilogue: A New and Different Archaeology*, American Indian Quarterly/Spring 1996/Vol.20(2).



April 9, 2001

James Nobles, Legislative Auditor
Office of the Legislative Auditor
658 Cedar Street, Room 140
St. Paul, MN 55155-1603

RE: *Office of the State Archaeologist Program Evaluation*

Dear Mr. Nobles,

I would like to thank you and the staff of the Office of the Legislative Auditor (OLA) for your deliberate and thoughtful efforts throughout this evaluation process. The resulting *Program Evaluation Report: State Archaeologist* clearly and concisely documents the many challenges and opportunities which the Office of the State Archaeologist (OSA) faces on a daily basis.

The report recommendations advanced by OLA will provide a template for better ensuring stability of programming (budget recommendation, agency affiliation); enhancing reliability and accountability (recommended dispute resolution process, administrative rules); and increasing collaboration with tribal governments (increased direct consultation with tribes). The result will be improved delivery of program services to the people of Minnesota - consistent with the Department of Administration's commitment to "Service First".

OSA looks forward to working with the Legislature, tribal interests, and the Department of Administration to realize the recommendations outlined in OLA's report.

Again, thank you for efforts.

Sincerely,

/s/ Mark J. Dudzik

Mark J. Dudzik
State Archaeologist



Admin **MINNESOTA**

Department of Administration

April 9, 2001

Commissioner's Office
200 Administration Building
50 Sherburne Avenue
St. Paul, MN 55155
Voice: 651.296.1424
Fax: 651.297.7909
TTY: 651.297.4357

James R. Nobles, Legislative Auditor
First Floor South, Centennial Building
658 Cedar Street
St. Paul, MN 55155

Dear Mr. Nobles:

Thank you for the opportunity to discuss, with you and your staff, the results of the program evaluation audit of the Office of the State Archaeologist. We appreciate the research and analysis you performed and detailed in this report.

We are very supportive of the Office of the State Archaeologist and the critical role it plays in the research, identification, protection, and preservation of prehistoric and historic archaeology in Minnesota. We also appreciate the complexities in the regulation of archaeological activities, the performance of the office functions, and the key players interested and involved in archaeology in this state.

As to the recommendations contained in this report, which are directed to the Legislature, the Department of Administration is prepared to address any legislation enacted this session affecting changes in the Office of the State Archaeologist.

Very truly yours,

/s/ David Fisher

David Fisher
Commissioner



MINNESOTA HISTORICAL SOCIETY

April 9, 2001

Roger Brooks
Deputy Legislative Auditor
140 Centennial Office Building
658 Cedar Street
St. Paul, MN 55155-1603

Dear Mr. Brooks:

Thank you for sending a copy of the Office of the Legislative Auditor's (OLA) draft report on Archaeology for the Society's review. We very much appreciate the Commission's willingness to take on this difficult issue, and the OLA staff's diligence in pursuing extensive research and consulting with a wide range of stakeholders.

The Society generally agrees with the findings and recommendations contained in the draft report. Specifically, we would highlight the following areas of agreement:

- Funding for this important operation should be largely from the General Fund. While it is *possible* that fees could help to supplement General Fund appropriations, it is more likely that fees, if set at a reasonable level, would not raise a great deal of money. In addition to being unpredictable and irregular, fees for services could tend to discourage consultation with the OSA, particularly in the case of potential burials on private land.
- Some sort of written guidelines (whether by policy or rule) should be put in place to help guide the parties as to the proper field procedure and where there are disagreements over the handling of specific cases.
- We would agree with the finding that the OSA should remain in the Department of Administration. This arrangement has generally worked well in the time that it has been in place.

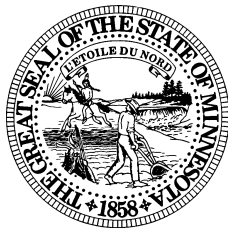
Should the Legislative Auditor or any of the organizations or individuals involved in this area wish to pursue legislative changes, the Society would appreciate the opportunity to participate in discussions of such changes.

Sincerely,

/s/ Nina Archabal

Nina Archabal
Director

NMA/DK;jh



State of Minnesota
INDIAN AFFAIRS

525 Park Street, Suite 303
St. Paul, Minnesota 55103
Phone: (651) 284-3567
Fax: (651) 284-3573

1819 Bemidji Avenue
Bemidji, Minnesota 56601
Phone: (218) 755-3825
Fax: (218) 755-3739
e-mail: miac@mail.paulbunyan.net
website: www.indians.state.mn.us

TO: JAMES NOBLES
Legislative Auditor
Division of the Legislative Auditor
State of Minnesota

DATE: April 9, 2001

FROM: JOE DAY
Executive Director of
Minnesota Indian Affairs Council

SUBJECT: **State Archaeologist's Report**
Dated April 6, 2001

The Indian Affairs Council offers the following response to the report on the State Archaeologist's Office done by the Program Evaluation Division Office of the Legislative Auditor for the State of Minnesota. The Report by the Legislative Auditor's Office attempts to evaluate the programs and authority provided to the State Archaeologist in carrying out the functions of that office in its relationship with other state agencies involved with protection of private cemeteries and human burial remains within the State of Minnesota. The Indian Affairs Council recognizes that the Legislative Auditor's Office was given a difficult task in being asked to examine the relationships of state agencies within this report and to make determinations based on the scope of its review and the limited time that it had to make the study. Both of these factors necessarily bear on the outcome of the report and may limit its usefulness in providing a meaningful analysis of the current conflicts and contradictions that are involved with protection of human remains and burials within the State.

Several areas in the report contain factual inaccuracies and unsubstantiated legal conclusions that concern the Indian Affairs Council. With regard to the legal conclusions, the Indian Affairs Council does not agree that the State Archaeologist has sole lead authority for application of the burial protection statutes within Minnesota. Moreover, Minnesota State Law does not give the State Archaeologist "primary responsibility" for either permits or reviews. Perhaps most troubling was the report's characterization that over the past 15 years, the State Archaeologist had received more authority to apply the burial protection laws of the State and

that the Indian Affairs Council had had its authority reduced. There is no substantiation in law for this conclusion.

The Indian Affairs Council feels that these mistaken legal conclusions and inaccuracies call into question the validity of the report and demonstrate that the report needs more focus on the sources of conflict and tension that exists, including an understanding that conflict is inherent in the law and arises, in part, between the developers that seek to use the property and the process that exists for protection of the same lands.

The Report does identify the conflict and tension that exists between the two agencies that are supposed to jointly implement the State's laws for protection of burial sites. But it does not give deference to the cultural differences that exist between the Indian Affairs Council and the State Archaeologist's Office and the accepted methods of carrying out that protection as well. Nor does the report focus on the positive aspects of other interrelations between state agencies that also have played a part in providing protection for burial sites on state and private lands. The Indian Affairs Council feels that it would be much more constructive to focus on the need for improving the relationship between Indian Affairs Council and the State Archaeologist's Office rather than finding specific blame in its past relationship.

Special emphasis must be placed on examining the differences between the State Archaeologist's methods that establish the existence of the burial sites. The State Archaeologist's use of mechanical excavation has been a main source of conflict that needs to be addressed. Culturally, the Indian Affairs Council is much more comfortable with less intrusive means, those means of burial site identification that are more in line with those used by past State Archaeologists. The Council sharply disagrees with the Report's conclusions that less intrusive means of identification may necessarily lead to higher costs for authentication.

The Indian Affairs Council is deeply concerned that the Legislative Auditor's Office has not had the time to conduct an extensive and comprehensive analysis of all of the state programs involved with protection of burials and burial sites that involve both the State Archaeologist and the Indian Affairs Council to make meaningful conclusions about the conduct or the relationship of either office involved. This report should not be focusing on the perceived shortcomings of the Indian Affairs Council. What is needed are positive suggestions and ways to make the relationship between the two state agencies work in a constructive and cooperative manner. Many of the reports conclusions about comparisons with other state agencies or the relationships that the Indian Affairs Council or the Archaeologist's Office have with other agencies are not relevant to the analysis here, nor is comparison on how the Bureau of Criminal Apprehension may conduct investigations and reviews within its jurisdiction. Much time is spent analyzing what other states do in this area but the relevance is lost as to how it applies in Minnesota. The Council feels that more must be done before the Legislative Auditor's Report adequately addresses the issues that it sought to resolve in this complex area of Minnesota Law.

To summarize Indian Affairs comments and concerns:

1. This report is not complete and that the scope has not been comprehensive enough to provide meaningful analysis.

2. More needs to be done to clarify the definitions and the procedures in the relationship between the Indian Affairs Council and the State Archaeologist's Office and enforcement of burial protection statutes.

3. The Indian Affairs Council agrees that the State review process could be brought more in line with the federal review process.

4. The Indian Affairs Council agrees that a dispute resolution mechanism would be helpful in at least two ways. First, where a license or permit has been denied for particular site, and secondly, where agreement cannot be reached as to the proper application for burial site identification method.

5. The Indian Affairs Council feels that proper location for the State Archaeologist's Office is where many other states have it and that is within their Historical Societies. Thus, the State Archaeologist's Office should be at the Minnesota History Center.

6. The Indian Affairs Council objects to using fee for service as a means of funding the State Archaeologist's Office since the State is responsible for bearing the costs of most of the identification and protection measures provided by statute. It will only increase State costs.

More specific concerns include the following points:

- *Chapter 1, page 15, 1st Paragraph:* Mechanical excavation was never used by the previous State Archaeologist to verify suspected burial sites. Mechanical excavation was used in some cases where MIAC had given permission for removal of any burials which might remain in a burial site, and was only used after hand excavation had been completed. It was never used to verify or detect burial sites. This and several other incorrect statements could have been avoided had the authors of this report included an extensive interview with the former State Archaeologist. Failure to include this input led to a lack of understanding of the history and development of burial protection laws within Minnesota.
- *Chapter 1, page 15, 2nd paragraph:* "Methods that generally take longer, may be less effective and more subjective,....." This is the crux of one of the major problems, and it has been inadequately addressed in this document. A number of court cases upheld the previous State Archaeologist's position that Hill-Lewis survey notes are sufficient to establish the authenticity of a burial site. For example, outside parties brought suit against a landowner for placing a trailer on a location indicated by Lewis as a burial. The court ruled that the trailer must be removed and did not require other documentation that the area had contained or currently still contained a human burial. It is also incorrect to refer to the documentation from the 1800s as "maps." Maps were never used to determine burial locations. Survey documentation was used to determine burial locations.

- *Chapter 1, page 16, last paragraph:* Contain an incorrect statement. Most burial sites identified in the metro area during the late 1800s still had visual evidence during the decade of the 1980s. There is no basis for this statement; it is flatly incorrect.
- *Chapter 1, page 16, 1st paragraph:* Surveyed cemeteries are not murder scenes. The BCA approach is irrelevant to this situation.
- *Chapter 1, page 18, second paragraph:* Contain incorrect statements. The Council and the State Archaeologist never “shared” authority to identify and authenticate burial sites. The 1986 changes were made to reduce disputes among archaeologists and developers by clarifying the procedure for determining if a cemetery existed within a project area. They were not intended to, nor did they, “reduce” the Council’s overall authority.
- *Chapter 1, page 18, 3rd paragraph:* The law specifically requires that the State Archaeologist and the Council develop “provisions” for dealing with remains which have no clear tribal identity (which are most Indian remains). These provisions are the “procedures” which were developed by the State Archaeologist and the Council with input from the archaeological community. There were a series of meetings held to discuss these procedures, and they included archaeologists, Council representatives, and representatives from the reservations. See 307.08, subd. 7. We do not see where these were “applied inconsistently over the years.” They were developed so that we would all know what was consistent and have the same expectations.
- *Chapter 2, page 34, 2nd paragraph:* It is inaccurate and somewhat offensive to portray the State Archaeologist as “neutral?” The State Archaeologist can represent the interests of profit-making contractors and professionals whose livelihood is based on Indian remains and Indian history. This hardly makes him (them) “neutral.” The Indian Affairs Council recognizes that any evidence used to authenticate a burial site must be sufficient to hold up in a court of law.

This list of concerns does not fully exhaust the points where the Indian Affairs Council feels that the Legislative Auditor’s Office has missed the mark with its analysis. Several more areas could be identified if time allowed. The Indian Affairs Council is willing to meet, as it always has been, to discuss these comments and concerns in more detail and feels that this report can serve as the basis for identifying where both agencies can agree on positive ways to improve the relationship and define the roles and responsibilities of burial protection in Minnesota.



Office of the Legislative Auditor

State of Minnesota • James Nobles, Legislative Auditor

Date: April 10, 2001

To: Members
Legislative Audit Commission:

From: Jim Nobles
Legislative Auditor

Subject: Response from Minnesota Indian Affairs Council

We think the response from the Minnesota Indian Affairs Council contains several inaccurate and misleading comments. One requires a rejoinder.

In its response, the council says there is no substantiation in law for our conclusion that its role in identifying and authenticating Indian burial sites has been reduced in recent years. In our view, the changes in law could not be more clear, though they are undoubtedly changes the council wishes had not occurred.

Appendix A shows the following:

- In 1976, the Legislature amended Minnesota statutes to say that “the state archaeologist and the Indian affairs board shall authenticate and identify Indian burial grounds.”
- In 1980, the Legislature amended this subdivision to say that “the state shall retain the services of a qualified professional archaeologist, approved by the state archaeologist and the Indian affairs board, for the purpose of authenticating and identifying Indian burial grounds.”
- In 1986, the Legislature amended statutes again to say that “the state archaeologist shall authenticate all burial sites.”

In our view, this demonstrates clear legislative action to diminish the council’s authority to identify and authenticate burial sites.

Recent Program Evaluations

<i>Truck Safety Regulation</i> , January 1992	92-01	<i>Property Assessments: Structure and Appeals, A Best Practices Review</i> , May 1996	96-07
<i>State Contracting for Professional/Technical Services</i> , February 1992	92-02	<i>Recidivism of Adult Felons</i> , January 1997	97-01
<i>Public Defender System</i> , February 1992	92-03	<i>Nursing Home Rates in the Upper Midwest</i> , January 1997	97-02
<i>Higher Education Administrative and Student Services Spending: Technical Colleges, Community Colleges, and State Universities</i> , March 1992	92-04	<i>Special Education</i> , January 1997	97-03
<i>Regional Transit Planning</i> , March 1992	92-05	<i>Ethanol Programs</i> , February 1997	97-04
<i>University of Minnesota Supercomputing Services</i> , October 1992	92-06	<i>Statewide Systems Project</i> , February 1997	97-05
<i>Petrofund Reimbursement for Leaking Storage Tanks</i> , January 1993	93-01	<i>Highway Spending</i> , March 1997	97-06
<i>Airport Planning</i> , February 1993	93-02	<i>Non-Felony Prosecution, A Best Practices Review</i> , April 1997	97-07
<i>Higher Education Programs</i> , February 1993	93-03	<i>Social Service Mandates Reform</i> , July 1997	97-08
<i>Administrative Rulemaking</i> , March 1993	93-04	<i>Child Protective Services</i> , January 1998	98-01
<i>Truck Safety Regulation, Update</i> , June 1993	93-05	<i>Remedial Education</i> , January 1998	98-02
<i>School District Financial Reporting, Update</i> , June 1993	93-06	<i>Transit Services</i> , February 1998	98-03
<i>Public Defender System, Update</i> , December 1993	93-07	<i>State Building Maintenance</i> , February 1998	98-04
<i>Game and Fish Fund Special Stamps and Surcharges, Update</i> , January 1994	94-01	<i>School Trust Land</i> , March 1998	98-05
<i>Performance Budgeting</i> , February 1994	94-02	<i>9-1-1 Dispatching: A Best Practices Review</i> , March 1998	98-06
<i>Psychopathic Personality Commitment Law</i> , February 1994	94-03	<i>Minnesota State High School League</i> , June 1998	98-07
<i>Higher Education Tuition and State Grants</i> , February 1994	94-04	<i>State Building Code</i> , January 1999	99-01
<i>Motor Vehicle Deputy Registrars</i> , March 1994	94-05	<i>Juvenile Out-of-Home Placement</i> , January 1999	99-02
<i>Minnesota Supercomputer Center</i> , June 1994	94-06	<i>Metropolitan Mosquito Control District</i> , January 1999	99-03
<i>Sex Offender Treatment Programs</i> , July 1994	94-07	<i>Animal Feedlot Regulation</i> , January 1999	99-04
<i>Residential Facilities for Juvenile Offenders</i> , February 1995	95-01	<i>Occupational Regulation</i> , February 1999	99-05
<i>Health Care Administrative Costs</i> , February 1995	95-02	<i>Directory of Regulated Occupations in Minnesota</i> , February 1999	99-05b
<i>Guardians Ad Litem</i> , February 1995	95-03	<i>Counties' Use of Administrative Penalties for Violations of Solid and Hazardous Waste Ordinances</i> , February 1999	99-06
<i>Early Retirement Incentives</i> , March 1995	95-04	<i>Fire Services: A Best Practices Review</i> , April 1999	99-07
<i>State Employee Training: A Best Practices Review</i> , April 1995	95-05	<i>State Mandates on Local Governments</i> , January 2000	00-01
<i>Snow and Ice Control: A Best Practices Review</i> , May 1995	95-06	<i>State Park Management</i> , January 2000	00-02
<i>Pollution Control Agency's Use of Administrative Penalty Orders, Update</i> July 1995	95-07	<i>Welfare Reform</i> , January 2000	00-03
<i>Development and Use of the 1994 Agency Performance Reports</i> , July 1995	PR95-22	<i>School District Finances</i> , February 2000	00-04
<i>State Agency Use of Customer Satisfaction Surveys</i> , October 1995	PR95-23	<i>State Employee Compensation</i> , February 2000	00-05
<i>Funding for Probation Services</i> , January 1996	96-01	<i>Preventive Maintenance for Local Government Buildings: A Best Practices Review</i> , April 2000	00-06
<i>Department of Human Rights</i> , January 1996	96-02	<i>The MnSCU Merger</i> , August 2000	00-07
<i>Trends in State and Local Government Spending</i> , February 1996	96-03	<i>Early Childhood Education Programs</i> , January 2001	01-01
<i>State Grant and Loan Programs for Businesses</i> , February 1996	96-04	<i>District Courts</i> , January 2001	01-02
<i>Post-Secondary Enrollment Options Program</i> , March 1996	96-05	<i>Affordable Housing</i> , January 2001	01-03
<i>Tax Increment Financing</i> , March 1996	96-06	<i>Insurance for Behavioral Health Care</i> , February 2001	01-04
		<i>Chronic Offenders</i> , February 2001	01-05
		<i>State Archaeologist</i> , April 2001	01-06

Evaluation reports can be obtained free of charge from the Legislative Auditor's Office, Program Evaluation Division, Room 140, 658 Cedar Street, Saint Paul, Minnesota 55155, 651/296-4708. Full text versions of recent reports are also available at the OLA web site: <http://www.auditor.leg.state.mn.us>