



Office of the State Archaeologist

SPECIAL REVIEW
March 2022

OFFICE OF THE LEGISLATIVE AUDITOR
STATE OF MINNESOTA

State of Minnesota
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OFFICE OF THE LEGISLATIVE AUDITOR

STATE OF MINNESOTA • Judy Randall, Legislative Auditor

March 2022

Members of the Legislative Audit Commission:

In May 2021, members of the Legislative Audit Commission's Evaluation Subcommittee recommended that the Office of the Legislative Auditor undertake a special review of the Office of the State Archaeologist (OSA). OSA is a small unit within the Minnesota Department of Administration that performs important functions related to certain burial and archaeology sites in Minnesota.

We recommend that the Legislature consider streamlining the archaeology licensing process so that an entity (OSA) within a state agency is fully responsible for issuing licenses; those duties are now split between OSA and the Minnesota Historical Society. We also recommend that the Legislature consider clarifying in statute that mediation is an option for resolving archaeology disputes. Finally, we recommend ways for OSA to improve its operations—for example, by updating its fieldwork-related guidance for licensed archaeologists.

We received full cooperation from the Department of Administration, OSA, and the Minnesota Historical Society.

Sincerely,

Joel Alter
Director, Special Reviews



OLA

Summary

The Minnesota Department of Administration houses the Office of the State Archaeologist (OSA). OSA licenses archaeologists who work on nonfederal public land and provides guidance for how they conduct their work, and OSA authenticates all burial grounds in Minnesota. For example, if a state highway project is planned near a known archaeological site or uncovers a previously unknown burial site, OSA may undertake duties outlined in state law to help protect and preserve information, artifacts, or human remains.

We found room for improvement in some important aspects of OSA's work. For example, OSA's website has limited information about the seven types of licenses it issues or how to apply for them. OSA's fieldwork manual for archaeologists is more than a decade old, and parts of it are outdated. For instance, the manual does not accurately describe the current licensing process; it does not accurately characterize requirements for the Department of Administration and OSA to consult with individual Indian tribes; and it does not provide guidance related to some techniques for conducting archaeological surveys that have come into common practice in recent years. We recommend that OSA make its license application process more transparent for potential applicants, and that it update its fieldwork guidance.

OSA has generally had good working relationships with key state agencies and the Minnesota Historical Society, but its relationships with practicing archaeologists have been mixed. Until recently, OSA relied largely on a private organization's electronic mailing list to communicate with archaeologists, but there were limitations to this approach. In addition, OSA and the Minnesota Historical Society implemented significant changes in archaeologist licensure in 2021—resulting in many archaeologists having to obtain additional licenses—but there was little opportunity for archaeologists to provide input on these changes until they were put in place. Also, until early 2022, OSA staff had not enrolled in tribal-state relations training, reportedly for budget reasons. This did not comply with state requirements, and it was ill-advised in light of OSA's regular need to communicate with tribes.

Since 1963, Minnesota law has established a licensing process in which the State Archaeologist approves applications for licensure and the Minnesota Historical Society issues the licenses, but the reasons for having two entities involved in the licensing process are no longer clear. We recommend that the Legislature consider amending state law so that a state office (OSA) is responsible for issuing licenses, rather than a quasi-state entity (the Minnesota Historical Society). However, OSA should seek the Historical Society's input during the process of reviewing license applications.

Minnesota law authorizes the contested case process for resolving licensing-related archaeology disputes. But this process can be lengthy. In a recent case, OSA initially denied a license to an archaeologist, an administrative law judge then recommended issuance of the license, and the Department of Administration ultimately issued an order

denying the license—in a process that took a total of two years. OSA’s website and manual should provide information on other possible dispute resolution options, such as mediation, arbitration, and the state’s Office of Collaboration and Dispute Resolution. The Legislature should also consider amending state archaeology statutes to explicitly mention the option of mediation. In addition, OSA should publicize a process by which ethics complaints against individual archaeologists may be reported for possible investigation. The Legislature should also consider whether to establish an advisory board to provide OSA with external input when there are appeals of OSA licensing decisions or other types of disputes.

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OLA

Introduction

The Office of the State Archaeologist (OSA) is a small office in state government, with only three employees. But, for nearly 60 years, the State Archaeologist has played an important role in archaeology projects in Minnesota on nonfederal public land. For example, if a planned state highway project will go near a known archaeological site, or if a highway construction crew uncovers what appears to be a burial site, OSA would become involved in: authenticating that the site is a burial site; reviewing site development plans; approving research designs; approving the license of the principal investigator at the site; and/or monitoring the activities of the licensee.

In May 2021, members of the Evaluation Subcommittee of the Legislative Audit Commission recommended that OLA initiate a “special review” of OSA.¹ Our review addressed the following questions:

- **Has OSA provided clear, timely guidance regarding state licensure and archaeological fieldwork?**
- **Are there appropriate mechanisms for resolving disputes related to the archaeological work that OSA oversees?**
- **Has OSA communicated effectively with entities that have an interest in its work?**

To conduct this review, we examined state laws and OSA guidance related to licensure and fieldwork. We interviewed OSA staff and representatives of agencies that work with OSA. We solicited input from all archaeologists who had a current state license as of August 2021, and we sought input from several archeologists who did not obtain licenses during 2021 or who work in academia.² We solicited observations about OSA from the tribal leaders and tribal historic preservation officers of each Minnesota Indian tribe, but we did not receive responses to these inquiries. We did, however, interview the executive director of the Minnesota Indian Affairs Council, a state agency.

A contested case stemming from OSA’s denial of an archaeologist’s license application in 2019 produced a large body of evidence, including testimony before an administrative law judge and other documents. We reviewed those documents, and we also reviewed (1) the judge’s 2020 report and (2) a 2021 order by the Department of Administration that upheld OSA’s denial of the license.³ An appendix to this report briefly summarizes this case.

¹ “Special reviews” usually have a narrower focus than OLA’s evaluations. Special reviews may be initiated by OLA, or OLA may undertake them at the direction or request of legislators.

² Altogether, we solicited input from 48 individuals who work in archaeology-related professions or academia, and we heard back from 27 of them (56 percent).

³ We reviewed this case’s documents to better understand how OSA oversees licensing and fieldwork, and to examine a key dispute resolution process. We did not review this case for the purpose of offering our own interpretation of the facts presented.

As part of our review of licensure, we considered whether there is a need to modify the process established in state law for issuing archaeology licenses, which currently involves two entities: OSA and the Minnesota Historical Society (MNHS). However, we did not examine a sample of individual license applications reviewed by OSA or MNHS, nor did we evaluate the merits of licensure changes implemented in 2021 by OSA and MNHS.

There were some other topics we did not examine. We did not comprehensively examine the extent to which OSA is fulfilling each of its statutory duties, nor did we examine the impact or effectiveness of OSA's activities. In addition, we did not examine whether OSA's funding and staffing are sufficient to fulfill its statutory duties. Finally, we did not review state archaeologist offices in other states, such as their enabling laws or their operating practices.

Chapter 1: Background

Archaeologists have helped Minnesota understand and preserve its history—through the identification of sites, artifacts, and remains that have cultural and religious significance. For example, in the late 1800s, two archaeologists—Theodore Lewis and Jacob Brower—mapped hundreds of mounds in Minnesota that were built by earlier civilizations.¹ Today’s archaeologists continue to uncover new information about Minnesota’s past.

The Office of the State Archaeologist (OSA) oversees Minnesota archaeology work primarily through its regulation of projects on nonfederal, public land. This chapter provides an overview of that office, including its history, duties, and budget.

History

Nearly 60 years ago, the Legislature passed the “Minnesota Field Archaeology Act of 1963.”² That legislation created the position of the State Archaeologist. It said:

The state archaeologist shall be a professional archaeologist on the staff of the [University of Minnesota] and shall be appointed by the director of the Minnesota historical society for a four year term.³

In 1978, the Legislature eliminated the provision that required the State Archaeologist to be a University of Minnesota employee.⁴ In 1994, the Legislature amended state law to require payment of a salary to the State Archaeologist, and the Legislature in 1996 amended the law to allow the State Archaeologist to “employ personnel”—funded by state appropriations—to assist in carrying out the State Archaeologist’s duties.⁵ Legislation passed in 1997 deleted the fixed (four-year) term for appointments to the State Archaeologist position.⁶ Amendments to state law in 1999 made the Commissioner of the Minnesota Department of Administration—rather than the Director of the Minnesota Historical Society—responsible for appointing the State Archaeologist.⁷

¹ By one account, these two archaeologists “laid the foundation for the study of prehistoric earthworks in Minnesota” with considerable technical competence. Joe Artz, Emilia Bristow, and William Whittaker, *Mapping Precontact Burial Mounds in Sixteen Minnesota Counties using Light Detection and Ranging (LiDAR)* (Office of the State Archaeologist, University of Iowa, 2013), 2.

² *Laws of Minnesota* 1963, Chapter 5, codified as amended in *Minnesota Statutes* 2021, 138.31-138.42.

³ *Laws of Minnesota* 1963, chapter 5, sec. 5, codified as amended in *Minnesota Statutes* 2021, 138.35, subd. 1.

⁴ *Laws of Minnesota* 1978, chapter 717, sec. 3, codified as amended in *Minnesota Statutes* 2021, 138.35, subd. 1.

⁵ *Laws of Minnesota* 1994, chapter 632, art. 4, sec. 49; and *Laws of Minnesota* 1996, chapter 452, sec. 31. The current statutory authorization for the State Archaeologist to hire staff is in *Minnesota Statutes* 2021, 138.35, subd. 1a.

⁶ *Laws of Minnesota* 1997, chapter 202, art. 2, sec. 38, codified as amended in *Minnesota Statutes* 2021, 138.35, subd. 1.

⁷ *Laws of Minnesota* 1999, chapter 91, sec. 1, codified as amended in *Minnesota Statutes* 2021, 138.35, subd. 1.

Since 1963, five individuals have served as the State Archaeologist, as shown in the box at right. The first two did not receive salaries for their duties in this position. After the second State Archaeologist resigned in 1992, there was a period of more than two years during which there was no State Archaeologist.

State Archaeologists Since 1963

Elden Johnson	1963-1978
Christy Hohman-Caine	1978-1992
Mark Dudzik	1995-2005
Scott Anfinson	2005-2016
Amanda Gronhovd	2016-present

Today, OSA is part of the Minnesota Department of Administration and has three employees: the State Archaeologist, a Research Archaeologist, and an Assistant to the State Archaeologist. Current state law provides that the State Archaeologist shall be “a qualified professional archaeologist” appointed by the Commissioner of the Department of Administration, in consultation with the Minnesota Historical Society’s Executive Council, the Minnesota Indian Affairs Council, and “other interested parties.”⁸

Duties



State Archaeological Site

...[A] land or water area, owned or leased by or subject to the paramount right of the state, county, township, or municipality where there are objects or other evidence of archaeological interest. This term includes all aboriginal mounds and earthworks, ancient burial grounds, prehistoric ruins, historical remains, and other archaeological features on state land or on land subject to the paramount rights of the state. Historical remains do not include bottles or ceramics manufactured after 1875.

— **Minnesota Statutes 2021, 138.31, subd. 14**

Minnesota law says: “The state of Minnesota reserves to itself the exclusive right and privilege of field archaeology on state sites, in order to protect and preserve archaeological and scientific information, matter, and objects.”⁹ The law defines state archaeological sites as shown in the box at left. In addition, the law defines field archaeology as the study of traces of human culture “by means of surveying, digging, sampling, excavating, or removing objects, or going on a site with that intent.”¹⁰

Exhibit 1.1 shows the duties that the State Archaeologist is required by state law to perform. OSA has a leading role in overseeing archaeology projects at state sites—for example, by approving which archaeologists may be licensed to work at these sites. In contrast, OSA does not regulate which archaeologists may work on private land, although the law says OSA shall “protect to the extent possible and...encourage the preservation of archaeological sites located on privately

owned property.”¹¹ Also, some archaeology projects occur on federal lands, which are subject to oversight by the federal agency that owns the land.

⁸ *Minnesota Statutes* 2021, 138.35, subd. 1. *Minnesota Statutes* 2021, 138.31, subd. 10, says a qualified professional archaeologist is “an archaeologist who meets the United States Secretary of the Interior’s professional qualification standards in Code of Federal Regulations, title 36, part 61, appendix A, or subsequent revisions.”

⁹ *Minnesota Statutes* 2021, 138.32. Regarding privately owned lands, this statute says the Legislature’s intent was to discourage field archaeology on those lands, “except in accordance with both the provisions and spirit of [Minnesota Statutes 2021] 138.31 through 138.42; and persons having knowledge of the location of archaeological sites are encouraged to communicate such information to the state archaeologist.”

¹⁰ *Minnesota Statutes* 2021, 138.31, subd. 7.

¹¹ The State Archaeologist told us that OSA receives frequent questions from individuals related to developments on private land, including requests to review development proposals. She said that, unlike public sites, OSA can only provide recommendations regarding developments on private sites.

Exhibit 1.1: Mandatory Duties of the State Archaeologist

- Sponsor, engage in, and direct fundamental research into the archaeology of Minnesota; encourage and coordinate archaeological research and investigation undertaken within the state.
- Cooperate with other agencies of the state which may have authority in areas where state archaeological sites are located, or which may have the responsibility for marking state sites, or arranging for their being viewed by the public.
- Protect to the extent possible and encourage the preservation of archaeological sites located on privately owned property.
- Retrieve and protect objects of archaeological significance discovered by field archaeology on state sites or discovered during the course of any public construction or demolition work and, to the extent possible, those discovered during the course of any other construction or demolition work.
- Obtain for the state other objects of archaeological significance and related data.
- Cooperate with the Minnesota Historical Society, the University of Minnesota, and others to preserve objects of archaeological significance and related data.
- Disseminate archaeological facts through the publication of reports of archaeological research conducted within the state.
- Approve licensing of qualified professional archaeologists to engage in field archaeology on state sites, as provided in state law.
- Implement and enforce state laws pertaining to archaeology.
- With the director of the Minnesota Historical Society, formulate and issue provisions for archaeological licensure.
- Determine the disposition of objects found in Minnesota by licensed agencies, schools, or institutions from other states.
- Consult with and keep the Minnesota Indian Affairs Council, the director of the Minnesota Historical Society, and the State Historic Preservation Office informed as to significant field archaeology, projected or in progress, and as to significant discoveries made. Produce annual reports summarizing the Office of the State Archaeologist's activities.
- Promptly review plans for construction or development on significant archaeological sites. The state archaeologist and Minnesota Historical Society must make recommendations for the preservation of sites within 30 days of receiving the plans. When sites are related to Indian history or religion, the state archaeologist must submit the plans to the Minnesota Indian Affairs Council for review and recommend action.
- Authenticate all burial grounds and allow data access to archaeologists, landowners, and land managers on their locations, as legally available to them. Determine the tribe or ethnicity of unidentified remains more than 50 years old found within or outside of recorded cemeteries, and handle the remains in accordance with procedures established by the state archaeologist and other appropriate authorities.

SOURCE: Minnesota Statutes 2021, 138.35, subd. 2; 138.37, subd. 2; 138.38; 138.40, subd. 3; and 307.08, subds. 3a, 5, and 7.

State law specifies situations in which the State Archaeologist must work closely with other entities. For example, OSA is required to conduct certain functions in conjunction with the Minnesota Historical Society (MNHS), which is a nonprofit organization that is sometimes called a “quasi-state” entity.¹² OSA and MNHS are required in law to develop and implement archaeologist licensing provisions.¹³ MNHS issues licenses for work at state archaeological sites, but it generally does so only after OSA has approved an individual for licensure.¹⁴ We discuss licensing further in Chapter 2.

Likewise, OSA is required to work or communicate with the Minnesota Indian Affairs Council (MIAC) to fulfill certain duties. For example, when OSA cannot determine the tribal identity of Indian burial remains found on public land, OSA is required by law to work with MIAC to determine how to address the remains.¹⁵ In addition, the law requires OSA to periodically inform MIAC and MNHS about field archaeology projects, significant discoveries, and the activities of state-licensed archaeologists.¹⁶ When there are proposals for development of public lands or waters at historic or archaeological sites that relate to Indian history or religion, OSA must submit the plans to MIAC for review.¹⁷

Many of OSA’s activities are regulatory in nature, but the statutes also assign research and education duties to OSA. For instance, OSA is directed by law “to sponsor, engage in, and direct fundamental research into the archaeology of this state.”¹⁸ In addition, OSA is “to disseminate archaeological facts through the publication of reports of archaeological research conducted within the state.”¹⁹ OSA operates an online system (called the “OSA Portal”) where archaeologists can access information on archaeological and burial sites throughout Minnesota.²⁰

¹² MNHS was founded by the territorial legislature in 1849, and it is referenced in the Minnesota Constitution. MNHS receives state appropriations, and state law assigns MNHS certain functions. However, MNHS is not a state department (as defined in *Minnesota Statutes* 2021, 15.01), nor is it part of one. *Minnesota Statutes* 2021, 352.04, subd. 6, refers to MNHS as a “quasi-state agency.”

¹³ *Minnesota Statutes* 2021, 138.36, subd. 1.

¹⁴ In addition, *Minnesota Statutes* 2021, 138.36, subd. 3, authorizes the director of MNHS or the state archaeologist to issue emergency licenses to individuals “not otherwise qualified to enable them to salvage objects or gather data in the time available.”

¹⁵ *Minnesota Statutes* 2021, 307.08, subd. 7. If the remains come from private land, state law gives MIAC authority to determine how to address the remains.

¹⁶ *Minnesota Statutes* 2021, 138.38.

¹⁷ *Minnesota Statutes* 2021, 138.40, subd. 3.

¹⁸ *Minnesota Statutes* 2021, 138.35, subd. 2(1).

¹⁹ *Minnesota Statutes* 2021, 138.35, subd. 2(7).

²⁰ Eighty percent of the funding to develop this system came from the Federal Highway Administration, and the remainder came from OSA and MIAC.

Budget

As shown in the box on this page, OSA has a small budget, primarily supported by General Fund appropriations. In Fiscal Year 2021, about two-thirds of OSA's estimated expenditures were paid from the General Fund. The State Archaeologist told us that most of the remainder of OSA's Fiscal Year 2021 expenditures were funded through an agreement with MnDOT. Under this agreement, OSA expedites reviews of archaeology work related to MnDOT projects, and it then bills MnDOT for the cost of this work.

Office of the State Archaeologist Expenditures, Fiscal Years 2018-2021

Fund Source	Fiscal Year Expenditures (\$ in thousands)			
	2018	2019	2020	2021
General	\$215	\$219	\$260	\$261
Restricted Miscellaneous Special Revenue	5	2	5	6
Other Miscellaneous Special Revenue	0	69	86	125
Arts and Cultural Heritage	90	74	0	0
Total	\$310	\$364	\$352	\$392

NOTE: 2018-2020 expenditures are actual; 2021 expenditures are estimated.

SOURCE: Minnesota Department of Management and Budget, *Fiscal Year 2022-2023 Governor's Budget Recommendations*, Minnesota Department of Administration (St. Paul, January 2021), 62.



OLA

Chapter 2: Licensing and Fieldwork

Some of the duties of the State Archaeologist are regulatory in nature. In particular, the State Archaeologist's responsibilities include approving which individuals may conduct archaeology on nonfederal, public land in Minnesota and enforcing the provisions of the Minnesota Field Archaeology Act. This chapter discusses issues related to the licensure of archaeologists and oversight of archaeology fieldwork.

KEY FINDINGS IN THIS CHAPTER

- **The reason for having two entities play official roles in the issuance of archaeology licenses is no longer clear.**
 - **The website of the Office of the State Archaeologist provides insufficient guidance for persons seeking archaeology licenses.**
 - **Some archaeologists expressed concern that the Office of the State Archaeologist and the Minnesota Historical Society implemented changes in the licensing process in 2021 with limited external input.**
 - **The State Archaeologist's guidance for archaeological fieldwork is not sufficiently up-to-date.**
-

Licensing

State laws govern the licensure of archaeologists who work at “state archaeological sites.”¹ These sites are defined in law as land or water areas that are “owned or leased by or subject to the paramount right of the state, county, township, or municipality where there are objects or other evidence of archaeological interest.”²

Statutory Licensing Responsibilities

State statutes specify two individuals—the Director of the Minnesota Historical Society (MNHS) and the State Archaeologist—to play central roles in the licensure of archaeologists working at state sites.³ These two individuals “shall formulate and issue such provisions for licenses as are required to carry out and enforce” state laws pertinent to field archaeology.⁴ Current statutes do not specify a leading role for either of these individuals in the development of these provisions.

¹ *Minnesota Statutes* 2021, 138.35, subd. 2(8); and 138.36.

² *Minnesota Statutes* 2021, 138.31, subd. 14.

³ *Minnesota Statutes* 2021, 307.08, subd. 3a, authorizes the Minnesota Indian Affairs Council to approve which archaeologist, anthropologist, or other expert will oversee work at a site where “probable Indian burial grounds are to be disturbed or probable Indian remains analyzed.” We did not look at the process by which the Council makes its selections.

⁴ *Minnesota Statutes* 2021, 138.36, subd. 1.

As shown in Exhibit 2.1, the statutes outline varying roles for these two individuals in the processes for issuing, renewing, revoking, and suspending licenses. Minnesota law requires licensed archaeologists to meet the minimum qualifications outlined in federal regulations for federal government archaeologists, but state law does not indicate other criteria the two individuals must use to issue most types of licenses. Presumably, such criteria are among the license provisions that the Director of the Minnesota Historical Society and the State Archaeologist are required by state law to develop.⁵

Although the statutes appear to authorize some circumstances in which either OSA or MNHS could issue certain licenses without the involvement of the other party, staff from the two entities told us they cannot recall recent instances in which that has

Exhibit 2.1: Roles of Key Officials in Archaeology Licensing Actions

License Action	Statutory Role of Minnesota Historical Society Director	Statutory Role of State Archaeologist
Issue license to conduct field archaeology at a state site	Issue the license	Approve the applicant prior to license issuance
Issue license to conduct preliminary or exploratory activities ^a	Issue the license	No specified role
Issue emergency license	Issue the license, potentially without involvement of the State Archaeologist	Issue the license, potentially without involvement of the Minnesota Historical Society Director
Renew license for an additional calendar year ^b	Issue the renewal	Specify information required for the renewal application
Revoke or suspend license	Revoke or suspend the license, potentially without involvement of the State Archaeologist	Revoke or suspend the license, potentially without involvement of the Minnesota Historical Society Director

NOTE: State law says that the Director of the Minnesota Historical Society or the State Archaeologist may issue an emergency license, and the law says that the Director of the Minnesota Historical Society or the State Archaeologist may revoke or suspend a license.

^a OSA told us that conducting fieldwork (such as site examination) at a state site would require a license, while preliminary activities such as literature research or interviews would not.

^b According to OSA, the statutes allow for renewals of Phase 1 licenses, but OSA and MNHS do not—in practice—renew Phase 1 licenses.

SOURCE: Office of the Legislative Auditor, summary of *Minnesota Statutes* 2021, 138.36, subds. 2-5.

⁵ State law outlines the circumstances in which emergency licenses may be issued. Specifically, *Minnesota Statutes* 2021, 138.36, subd. 3, says that emergency licenses may allow persons not otherwise qualified for licensure to conduct fieldwork if “time is of the essence to save objects or gather data.” *Minnesota Statutes* 2021, 138.31, subd. 10, defines “qualified professional archaeologist” as a person who meets standards established in the U.S. Secretary of the Interior’s regulations, but the statutes authorize OSA and MNHS to supplement this definition with other licensure provisions.

happened.⁶ The standard practice is that OSA approves the license application, and then MNHS issues the license. The person who issues licenses on behalf of MNHS is the MNHS Director of Archaeology.⁷

The reason for having two entities play official roles in the issuance of archaeology licenses is no longer clear.

The statutes do not distinguish between “approving” the license application—which is generally OSA’s role—and “issuing” the license—which is generally MNHS’s role. The State Archaeologist told us that the standards for approval are the same as those for issuance. A representative of MNHS told us she could not recall any instance in which MNHS has reached a different final conclusion about a license application than did OSA, although she said MNHS conducts its review independently of OSA.⁸

One state official told us the current model—involving two entities—may have made sense decades ago but it is “odd” today. This person said that, until the mid-1990s, the State Archaeologist was a “figurehead position,” held by people who had other jobs. In fact, statutes did not authorize the State Archaeologist to receive a salary until 1994 or to hire staff until 1996. Thus, as this official said, in the early years of the Minnesota Field Archaeology Act, MNHS had the staff capacity to review licenses that the State Archaeologist lacked.

Some practicing archaeologists we contacted questioned why there continues to be two entities involved in the licensing process, as exemplified in the two comments below:

When archaeological guidelines were developed decades ago, the MNHS virtually had the only working archaeologists on staff in the state. That reality has changed. ... [W]hile it may have made sense many decades ago for the MNHS to issue licenses, it is not appropriate now and has not been for a significant amount of time.

(Comment from a licensed archaeologist)

The involvement of MNHS in archaeological licensing is difficult to justify—every duty granted to the director of the MNHS in Minn. Stat. 138.36 could be handled by the OSA alone. The MNHS is not part of state government; it seems that the administration of licensing should be the responsibility of the state.

(Comment from another licensed archaeologist)

⁶ The MNHS Director of Archaeology—who issues state archaeology licenses—has served in this role since March 2020. OSA’s State Archaeologist has served in her position since March 2016. Neither recalled instances during their tenures when one agency made a licensing decision without the other’s involvement.

⁷ *Minnesota Statutes* 2021, 138.36, authorizes the MNHS Director to issue, renew, revoke, or suspend licenses, but, in practice, the MNHS Director of Archaeology fulfills this task. MNHS staff told us they are not aware of a formal mechanism by which this authority has been delegated to the current Director of Archaeology.

⁸ An MNHS representative told us that MNHS and OSA occasionally discuss an application for the purpose of obtaining additional information or clarifying the application.

The State Archaeologist told us she likes having “two separate sets of eyes” (those of OSA and MNHS) on each archaeology license application for complex projects, and she said MNHS has an extensive archaeology program. But she also acknowledged that there is an argument for having the quasi-state entity (MNHS) play a more limited role in the license issuance process—for example, providing consultation to OSA in making the licensing decision rather than issuing the license.

RECOMMENDATION

The Legislature should consider amending state law to give a state entity—the Office of the State Archaeologist—sole responsibility to issue archaeology licenses, but with explicit authority to consult with others in this process.

A recommendation to change the licensure process should not reflect negatively on MNHS or the diligence it has shown in reviewing license applications. However, we think state law should designate a state agency—rather than a quasi-state entity—as the issuer of state archaeology licenses. Licensure is required by state law, and it would make sense for this responsibility to reside in the state agency that has primary statutory authority to administer the Minnesota Field Archaeology Act.⁹

There are additional reasons for amending the statute. By assigning licensure responsibility to one entity rather than two, accountability for licensing decisions would be clearer. In addition, current law does not clearly distinguish the State Archaeologist’s role of approving license applications and MNHS’s role of issuing the licenses.

If state law was amended so that MNHS did not issue the licenses, OSA should still send applications to MNHS prior to licensure and benefit from MNHS’s expertise. MNHS told us that it is the curating entity for most archaeological materials recovered from licensed archaeological projects in Minnesota, and MNHS can therefore offer valuable input about how a proposed project’s artifacts should be handled.¹⁰ MNHS told us that its involvement in the licensing process ensures the proper conservation, preservation, and accessibility of objects recovered and the data generated.¹¹

Some archaeologists told us that state law should be amended to establish a state archaeology board to make licensing decisions—just as state boards license and regulate certain other professions, such as nursing and cosmetology. This is an idea worth considering, but—as we explain in Chapter 3—we think it may be preferable for a board to fulfill an advisory role rather than a decision-making role, perhaps including advice when someone appeals a licensing decision.

⁹ It is worth noting, for example, that a statutory requirement for state departments to consult with American Indian tribes does not apply to the Minnesota Historical Society.

¹⁰ OSA currently shares copies of approved licenses with the Minnesota Council of Indian Affairs, and it hopes to soon begin sharing copies of license applications with the Council in case the Council wishes to provide input.

¹¹ MNHS said that its curation role involves creating documents and forms related to curation, curating and conserving artifacts and samples recovered during licensed projects, archiving data generated in these projects, and making items available to certain interested individuals.

Licensing Guidance

Although two agencies—OSA and MNHS—play key roles in issuing archaeology licenses, only one of these agencies (OSA) has information on its website about the different types of archaeology licenses issued in Minnesota and the licensing process.

The website of the Office of the State Archaeologist provides insufficient guidance for persons seeking archaeology licenses.

The OSA website identifies seven types of archaeology licenses for which individuals may apply—shown in the box at right. Although OSA has a fieldwork manual that explains several of these types of licenses, the OSA Web page listing these license types does not clearly differentiate or define each type of license.¹² Furthermore, the website has a link to an application form for only one of the seven license types (“Phase 1”).¹³ For persons interested in two other types of licenses (“Phase 2” and “Phase 3”), the website simply instructs the individuals to contact OSA.¹⁴ For the other four types of licenses (burial authentication, construction monitoring, emergency, and education/research/public outreach), the website has no instructions for how to apply.

Types of Archaeology Licenses

1. Phase 1 reconnaissance
2. Phase 2 evaluation
3. Phase 3 data recovery
4. Burial authentication
5. Construction monitoring
6. Emergency
7. Education/research/public outreach

Several people told us that OSA’s long-time Research Archaeologist has been extremely helpful in answering their questions about the licensing process. For example, one person said: “I always knew that he would solve any problem I encountered with [the current and] previous licensing process, or any question regarding the laws applied to archaeological resources.” However, if prospective licensees seek licensing information at the OSA website or are not aware of the expertise of this staff person, they may not find answers to their licensing questions.

¹² Office of the State Archaeologist, “License Types,” <https://mn.gov/admin/archaeologist/professional-archaeologists/manuals-licenses/license-types/>, accessed December 1, 2021.

¹³ According to the OSA fieldwork manual, “Phase 1 surveys attempt to determine the presence or absence of sites within a specific area and initially define site limits, so the field methods must reasonably but efficiently maximize the vertical and horizontal sampling of the project area without significantly harming site integrity.” Office of the State Archaeologist, *State Archaeologist’s Manual for Archeological Projects in Minnesota* (St. Paul, August 2011), 16.

¹⁴ Office of the State Archaeologist, “Apply for a License,” <https://mn.gov/admin/archaeologist/professional-archaeologists/manuals-licenses/apply/>, accessed December 1, 2021. The OSA fieldwork manual (pp. 16–17) says: “Phase 2 surveys attempt to evaluate the importance of sites, refine site limits both vertically and horizontally, and provide enough understanding for developing and implementing Phase 3 research designs. Field methods must provide critical details with regard to the depositional setting, cultural contexts, site integrity, artifacts and feature densities, and the potential of the site to answer *important* research questions without significantly harming site integrity. Phase 3 projects gather enough data from important sites or portions of sites to mitigate adverse effects from development activities or fulfill research objectives by answering important research questions. Field methods must carefully but efficiently locate, define, and recover data from cultural horizons, use-areas, artifact concentrations, and features. Provenience data must be recorded in detail. Phase 3 research designs are often called *Data Recovery Plans*.”

RECOMMENDATION

The Office of the State Archaeologist should provide clear information on its website defining categories of licensure and indicating how to apply for licenses.

The archaeology licensure process should be transparent and understandable. Without better licensing information on the OSA website, the process may be too dependent on verbal communications and may not be clear to people who have not previously been licensed.

2021 Licensing Changes

Practices for issuing archaeology licenses have evolved over the past 16 years. From 2006 to 2011, OSA issued annual licenses to archaeologists for much of their work on nonfederal, public property. During this period, archaeologists could work on multiple Phase 1 or Phase 2 projects in a calendar year under a single license, but OSA required them to (1) notify OSA of each project, (2) submit to OSA separate reports for each project, and (3) provide OSA with an annual summary of all archaeological work conducted during the year under the annual license.

In 2011, OSA amended the licensing process. Projects requiring Phase 1 licenses continued to be covered by annual licenses. Archaeologists could still work on multiple Phase 1 projects per year under a single license. For other projects, OSA required archaeologists to obtain site-specific licenses.

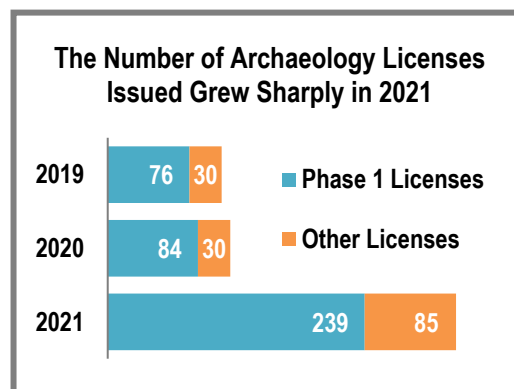
Starting in 2021, OSA and MNHS entirely ended the practice of issuing annual licenses and required that all licenses be project-specific.¹⁵ OSA and the Department of Administration said this change was consistent with longstanding state law, which authorizes the issuance of licenses “to engage in field archaeology on a specified site.”¹⁶ In addition, OSA and MNHS believed that project-specific licenses would increase accountability for project-related tasks. In particular, OSA said some archaeologists were not notifying OSA when they started projects at new sites, and some were not submitting artifacts collected at sites in a timely manner for curation.

The discontinuance of annual licenses was a significant change—both for archaeologists and the agencies that approved or issued licenses. Under the new requirements, archaeologists who worked on multiple projects in 2021 had to submit separate applications for each project, rather than relying on a single license application to cover all of their Phase 1 work. The move to project-specific rather than annual licenses contributed to a larger number of applications for OSA and MNHS to review

¹⁵ In addition to making all licenses project-specific, OSA and MNHS added several new “conditions” to archaeology licenses in 2021. For example, one new condition says, “If presentations or publications develop from this project, the OSA and MNHS must be notified....” (Office of the State Archaeologist and Minnesota Historical Society, “Conditions of Minnesota Archaeological Survey License,” effective 2021.)

¹⁶ *Minnesota Statutes* 2021, 138.36, subd. 2. This language was enacted as part of the Minnesota Field Archaeology Act of 1963.

and act on. As shown in the box at right, there was a tripling of the licenses issued in 2021 (for both Phase 1 licenses and overall) compared with 2019. OSA and the Department of Administration said the large increase in licenses issued may also have reflected an increase in development activity and greater awareness by developers and public land managers of their responsibilities relating to archaeology and burial sites.



Some archaeologists expressed concern that the Office of the State Archaeologist and the Minnesota Historical Society implemented changes in the licensing process in 2021 with limited external input.

OSA and MNHS are clearly authorized by state law to develop and implement archaeology licensing practices. The law says: “The director of the historical society and the state archaeologist shall formulate and issue such provisions for licenses as are required to carry out and enforce” sections of the law related to field archaeology.¹⁷

There is no requirement in law for OSA or MNHS to solicit public input when adopting licensing provisions. The law authorizes the Commissioner of Administration (who oversees OSA) to promulgate rules for archaeology licensure—using a public process—but it has not done so, nor is it required to do so.¹⁸

However, some archaeologists told us there should have been opportunities to provide their perspectives to OSA and MNHS before these entities initiated significant licensing changes. As one archaeologist said:

The licensure process has been updated and changed multiple times in the last 30 years, with the previous [State Archaeologist] coming to the community first to get input before making changes. The current licensing process in place was simply put upon the community and we were forced to react to its changes.

Others said that the timing and communication of the changes was inadequate. According to one archaeologist:

We were all still unsure what was going on with the process in February [2021], and field season was soon approaching, we really needed to know what to expect. We didn’t get any answers until the CMA [Council of Minnesota Archaeologists] tried to help mediate and asked OSA to communicate more.... Eventually, the State Archaeologist developed a Q&A [document] based on submitted questions and joined a CMA meeting to discuss, but the fact she needed

¹⁷ *Minnesota Statutes* 2021, 138.36, subd. 1.

¹⁸ *Minnesota Statutes* 2021, 138.39.

to be pushed that hard to communicate these changes, and hadn't already developed a plan for rolling out the significant changes prior to field season without being begged for it was poorly planned.¹⁹

The implementation of the 2021 licensing changes contributed to strained relationships between OSA and some members of the archaeology community. We offer no recommendations to address changes that have already been implemented, but we hope the 2021 experience provides “lessons learned” as OSA considers making possible changes to its fieldwork guidance, as discussed below.

Oversight of Fieldwork

“The Office of the State Archaeologist oversees all archaeological work conducted on public property within the state of Minnesota,” according to OSA’s website.²⁰ An OSA manual provides guidelines for archaeological fieldwork.²¹ According to OSA, these guidelines must be observed by archaeologists who are (1) doing archaeological work on nonfederal, public land, (2) assisting with the authentication of burial sites, or (3) doing archaeological survey projects funded by the Legacy Amendment of the Minnesota Constitution. In addition, OSA “reserves the right to reject any survey result or report that does not follow these guidelines” for archaeological work on private land or private development projects.²²

The State Archaeologist’s guidance for archaeological fieldwork is not sufficiently up-to-date.

The manual for archaeological fieldwork is an extensive document, totaling more than 50 pages. OSA issued the current document in August 2011; it was developed by the predecessor to the current State Archaeologist. A second manual—which discusses OSA’s procedures at burial sites—has not been updated since 2008.

Some of the basic methods of archaeology have remained largely the same over time. As one archaeologist told us, archaeology has always involved “walking” potential archaeology or burial sites, as well as digging holes. A Minnesota archaeology professor who has closely examined OSA’s 2011 fieldwork manual told us that portions of OSA’s manual need no significant revision, despite being more than a decade old.

¹⁹ OSA and the Department of Administration dispute the account presented in this quotation; they said OSA had communicated with archaeologists verbally and through e-mails about the upcoming changes for months beforehand, and they said OSA issued interim licenses for projects that needed to get started before the new forms were completed. The Council for Minnesota Archaeology—according to its website—is “a non-profit organization dedicated to promoting archaeological research and interpretation in Minnesota.... The Council serves as a forum for the exchange of news and ideas about Minnesota archaeology through membership meetings, a newsletter, and occasional symposia” (“About the Council,” <http://mnarcheology.org/>, accessed December 6, 2021). OSA’s Q&A document was dated May 14, 2021.

²⁰ Office of the State Archaeologist, <https://mn.gov/admin/archaeologist/professional-archaeologists/manuals-licenses/>, accessed December 1, 2021.

²¹ Office of the State Archaeologist, *State Archaeologist’s Manual for Archeological Projects in Minnesota* (St. Paul, August 2011).

²² Office of the State Archaeologist, “Survey Manual,” <https://mn.gov/admin/archaeologist/professional-archaeologists/manuals-licenses/survey-manual/>, accessed December 1, 2021.

But some archaeology practices have changed over time, and there are now different expectations for tribal consultation. As a result, parts of the State Archaeologist's manuals are out of date or need further clarifications. For example:

- The section of OSA's 2011 fieldwork manual that discusses Minnesota licensing procedures does not reflect changes that were implemented by OSA and MNHS in 2021. For example, the manual says Phase I licenses are issued yearly, but OSA now issues separate licenses for each project. Without an update, the section provides an inaccurate description of the licensing process.
- OSA's 2011 fieldwork manual says the State Archaeologist is not required to consult with individual Indian tribes on actions related to Indian-related public archaeological sites and unrecorded Indian burial sites.²³ However, since the manual was issued in 2011, there have been two executive orders from Minnesota governors directing state agencies to consult with tribes on important issues, and state law now requires such consultation.²⁴
- In recent years, OSA has established a Web-based portal, which provides access to not-public data on archaeological sites "for professional purposes by Qualified Users."²⁵ OSA's current manuals do not discuss the portal.



"Geophysics" is:

The subsurface site characterization of the geology, geological structure, groundwater, contamination, and human artifacts beneath the Earth's surface, based on the lateral and vertical mapping of physical property variations that are remotely sensed using non-invasive technologies.

— Environmental and Engineering
Geophysical Society

- The current manuals have limited guidance related to recent innovations and technologies. For example, the 2011 fieldwork manual does not mention drone technology or geophysics as methods for surface or subsurface mapping. In addition, the manuals do not address some potentially important techniques for laboratory analysis, such as optically stimulated luminescence, isotope analysis, and organic residue analysis.²⁶

²³ Office of the State Archaeologist, *State Archaeologist's Manual for Archaeological Projects in Minnesota* (St. Paul, August 2011), 5, says: "The State Archaeologist is required by statute to work closely with the MIAC [Minnesota Indian Affairs Council] with regard to Indian-related public archaeological sites and unrecorded historic Indian burials. The State Archaeologist is not required to consult individual tribes for these actions and relies on MIAC for tribal consultation, although the State Archaeologist often works directly with individual tribes."

²⁴ In 2013, Governor Mark Dayton issued Executive Order 13-10, which required cabinet-level agencies (including the Department of Administration, which houses OSA) to consult with each tribal nation annually to identify priority issues. The order directed the agencies to consult with tribes on priority issues before undertaking actions or implementing policies on those issues. In 2019, Governor Tim Walz issued Executive Order 19-24, rescinding Governor Dayton's earlier order and directing agencies to take additional steps to consult with tribes on agency matters. For example, the order said "each agency will develop and maintain ongoing consultation with the Minnesota Tribal Nations related to each area where the agency's work intersects with Minnesota Tribal Nations."

²⁵ "Office of the State Archaeologist (OSA) Portal," <https://osa.gisdata.mn.gov/OSAportal/Account/Register#terms>, accessed November 22, 2021.

²⁶ For instance, optically stimulated luminescence is an archaeology technique that has been used in parts of Minnesota where charcoal and carbon are often absent, making it difficult to accurately determine the age of objects with traditional radiocarbon dating methods.

- The manuals do not always direct archaeologists to current resources. For example, as one observer told us, the main fieldwork manual does not identify Web addresses where archaeologists can access topographic data, soil survey data, historic aerial photos and plat maps, fire insurance maps, or federal agencies with cultural resource records. OSA and the Department of Administration told us that Web addresses (as well as information on evolving technologies) change regularly and cannot be kept up-to-date in a manual, so it would be preferable for people to contact OSA directly to obtain such information.
- MNHS expressed concern that the manuals do not provide sufficient information regarding curation and storage of archaeological objects. For example, it suggested that the manuals should clarify the roles of MNHS, approved curation facilities, and tribal museums or cultural centers.
- Some people told us that it would be useful to have better guidance for working at burial sites.²⁷ The State Archaeologist told us that her office has been working with the Minnesota Indian Affairs Council to update the existing manual (from 2008) on this topic; she said the existing manual is “pretty out-of-date.” One archaeology professional told us that detection of human burial sites is always challenging, and conveyed the opinion that some of the people doing this work have not used proper methods.

In addition to the manuals, there is a need for OSA to develop or update certain forms. Earlier, we noted that there is an application form on the OSA website for only one of seven types of OSA licenses. Also, in May 2021, the State Archaeologist told two professors that her office was working toward developing permission forms for archaeologists proposing out-of-state analysis of artifacts on Minnesota projects, as well as authorization to transport the artifacts out-of-state. As of late 2021, these forms had not yet been developed.

RECOMMENDATION

The Office of the State Archaeologist should update written guidance related to archaeological fieldwork.

Each archaeology project presents unique challenges, and no manual can foresee and address all issues that may arise. But it is important for OSA to provide guidance that reflects and applies to current laws, technologies, and practices.

The State Archaeologist and the State Historic Preservation Office have briefly discussed working on updates to their respective archaeology fieldwork manuals, perhaps resulting in a single manual.²⁸ But this is a project that is not presently close to completion.

²⁷ Some archaeologists said there should be clearer written guidance, while others said they have had to wait long periods of time to get guidance from OSA related to particular burial projects.

²⁸ The State Historic Preservation Office’s archaeology fieldwork manual was written in 2005.

Some archaeologists told us that OSA is underfunded and understaffed. If OSA—with its staff of three—needs additional help to update its fieldwork manuals, the Department of Administration should consider ways to provide additional assistance, even on a temporary basis, to OSA. The department told us that it, too, is stretched thin—if so, it should consider seeking additional funding through the state’s budget process to ensure that there are sufficient resources to meet OSA needs.

Furthermore, OSA would be wise to engage archaeologists—in the field or in academia—in the process of drafting or at least reviewing proposed fieldwork guidelines. The current fieldwork manual says that this document was developed in 2011 “in consultation with Minnesota agencies and archaeologists.”²⁹

²⁹ *State Archaeologist’s Manual for Archeological Projects in Minnesota* (St. Paul, August 2011), unnumbered preface page.



OLA

Chapter 3: Dispute Resolution

In 2019, the Office of the State Archaeologist (OSA) denied an archaeology license to a licensee. The applicant appealed the decision using the state's contested case hearing process, which resulted in a final decision about two years after the initial license denial. This chapter discusses other possible mechanisms that might be used to resolve archaeology disputes, potentially in a more timely manner.

KEY FINDINGS IN THIS CHAPTER

- **State law authorizes the contested case process for addressing archaeology disputes related to licensure.**
 - **The contested case process can be lengthy and has rarely been used for archaeology disputes.**
 - **The Office of the State Archaeologist website and fieldwork manuals do not discuss potential options other than the contested case process for resolving disputes or complaints.**
-

Background

Archaeologists, like professionals in other fields, sometimes become involved in disputes. For example:

- **Licensing disputes.** If a person applies for an archaeology license but OSA does not approve the application, OSA's decision may be the subject of a dispute.
- **Interagency disputes.** In a 2001 report, our office discussed conflicts that had arisen between OSA and the Minnesota Indian Affairs Council (MIAC). That report said the conflicts

...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.¹
- **Disputes regarding specific archaeology projects.** Developers may believe, for instance, that OSA-approved archaeological projects are causing unnecessary delays in their construction projects. In addition, there can be disagreements about who owns the data associated with archaeology work, or with whom the data may be shared.

¹ Office of the Legislative Auditor, Program Evaluation Division, *State Archaeologist* (St. Paul, April 10, 2001), 23.

- **Ethics concerns.** There may be complaints that individual archaeologists have violated professional standards or ethical obligations.

The 2001 evaluation of OSA by our office said Minnesota had no formal means of resolving archaeological disputes.² The report found that 10 of the 28 states reviewed had a method to resolve archaeological disputes, although states told our office at that time they had rarely or never used these mechanisms.³

To help minimize the need for dispute resolution, our 2001 report recommended that the Legislature require the Department of Administration to adopt administrative rules for regulating archaeological activities.⁴ After that report was issued, the 2002 Legislature authorized (but did not require) the Department of Administration to develop rules related to archaeological regulation.⁵ The department has not adopted such rules; the department told us that it did not receive funding to do so.

Our 2001 report also recommended that the Legislature enact legislation authorizing archaeological disputes to be resolved using the contested case provisions of Minnesota's Administrative Procedure Act.⁶ The Legislature passed such legislation for one type of dispute (regarding licensing decisions), and we discuss this process in the next section.

Contested Case Process for Licensing Disputes

The 2002 Legislature amended state law to authorize individuals to appeal archaeology licensing decisions through a contested case process.⁷ The Legislature did not authorize the contested case process for other types of archaeology disputes.

Today, state law authorizes the contested case process for resolving archaeology licensing disputes.

As a result of the Legislature's actions in 2002, archaeology licensing decisions may be appealed using the state's Administrative Procedure Act (*Minnesota Statutes* 2021, Chapter 14). This act includes provisions governing the contested case process for resolving disputes.⁸ State law defines "contested case" as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by

² Office of the Legislative Auditor, *State Archaeologist*, xii.

³ *Ibid.*, 31.

⁴ *Ibid.*, 35. The report (p. 35) said: "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."

⁵ *Laws of Minnesota* 2002, chapter 298, sec. 6, codified as *Minnesota Statutes* 2021, 138.39.

⁶ Office of the Legislative Auditor, *State Archaeologist*, 37.

⁷ *Laws of Minnesota* 2002, chapter 298, sec. 4, codified as *Minnesota Statutes* 2021, 138.36, subd. 6.

⁸ The contested case procedures are set forth in *Minnesota Statutes* 2021, 14.57-14.62.

law or constitutional right to be determined after an agency hearing.”⁹ The parties to a contested case have an opportunity to present their evidence—and to cross-examine witnesses—before an administrative law judge.

According to state law, the report of the administrative law judge must be made available to parties to the proceeding for at least ten days prior to the final decision.¹⁰ The law says there must be an opportunity for “each party adversely affected to file exceptions and present argument” to the officials who will render the decision.¹¹ According to statute, “Unless otherwise provided by law, the report or order of the administrative law judge constitutes the final decision in the case unless the agency modifies or rejects it...within 90 days after the record of the proceeding closes.”¹² Thus, the final word in a contested case rests with the state agency involved in the dispute. The agency may accept the judge’s recommendation, or it may modify or reject the judge’s recommendation.

Our discussions with the Department of Administration suggested to us that there is some room for confusion about the contested case process in archaeology licensing disputes. For example, the department told us the law **requires** use of the contested case process in such disputes. What the law says is that persons denied a license “may” request a contested case process, while also stating: “If the applicant does not request a contested case hearing within 30 days after receiving written notice of the decision, the [license denial] decision becomes final and the applicant may not appeal the decision.”¹³ Thus, the department told us, this statute gives the appearance of providing no option other than the contested case process for persons wishing to appeal licensing decisions. However, as we discuss later in this chapter, archaeology disputes can potentially be addressed through other approaches, such as mediation and arbitration.

The contested case process—which can be lengthy—has rarely been used for archaeological licensing disputes.

Minnesota statutes have authorized a contested case process for archaeology licensing disputes for about 20 years. However, a long-time employee of the Office of the State Archaeologist told us he can recall only one instance in which an individual used the contested case process to appeal an OSA licensing decision.

That instance occurred starting in May 2019, when the State Archaeologist did not approve an archaeologist’s application for a license to practice. The archaeologist—Sigrid Arnott—had been a licensed archaeologist in Minnesota for many years. In the Arnott case, the administrative law judge held a two-day hearing, and subsequently recommended that Arnott should receive the license for which she applied. However, the Department of Administration rejected or partially rejected many of the judge’s findings and conclusions, asserting that they were inaccurate or not supported in the

⁹ *Minnesota Statutes* 2021, 14.02, subd. 3.

¹⁰ *Minnesota Statutes* 2021, 14.61, subd. 1.

¹¹ *Ibid.*

¹² *Minnesota Statutes* 2021, 14.62, subd. 2a.

¹³ *Minnesota Statutes* 2021, 138.36, subd. 6.

contested case record. On April 8, 2021, the department issued its final order, affirming OSA’s denial of the license. This was nearly two years after the contested case process began. The appendix to this report provides additional information on this case.

Options for Future Consideration

As noted above, the contested case process has rarely been used to resolve archaeology licensing disputes. Perhaps this is because OSA does not deny large numbers of archaeology license applications, and therefore there are few disputes.¹⁴ Or, the rarity of contested case hearings could reflect the fact that this mechanism can be lengthy and expensive to use. In the Arnott case described above, the final licensing decision occurred about 27 months after the original license application.

We offer no recommendations for changes in the contested case hearing option for archaeology licensing disputes. However, if OSA or the Legislature want to consider additional options, we discuss several below.

Seeking Mediation of Disputes

According to Minnesota law,

“Mediator” means a third party with no formal coercive power whose function is to promote and facilitate a voluntary settlement of a controversy identified in an agreement to mediate.¹⁵

A representative of the Office of Administrative Hearings told us that mediation is always an option, even if a contested case hearing process has been initiated, or if an administrative law judge is writing the opinion of a contested case. This person told us that administrative law judges—once engaged in a contested case—seek to find mediation-type solutions and are trained to do so. Likewise, the Director of the Department of Administration’s Office of Collaboration and Dispute Resolution (OCDR) told us that, in general, mediation can always be considered by disputing parties as a way to address their differences.

The Minnesota Field Archaeology Act does not specifically mention mediation as an option for archaeology disputes, nor do the State Archaeologist’s fieldwork manuals or website.

A portion of state law—specifically *Minnesota Statutes* 2021, 138.31 through 138.42—is known as the Minnesota Field Archaeology Act. This act establishes the state’s responsibility to oversee activities at state archaeological sites, and it outlines the duties

¹⁴ The State Archaeologist told us that OSA denies several license applications annually for individuals who have not previously been licensed by OSA, and she said none of these denials have resulted in contested case hearings during her tenure.

¹⁵ *Minnesota Statutes* 2021, 572.33, subd. 2. Subdivision 3 says: “‘Agreement to mediate’ means a written agreement which identifies a controversy between the parties to the agreement, states that the parties will seek to resolve the controversy through mediation, provides for termination of mediation upon written notice from either party or the mediator delivered by certified mail or personally to the other people who signed the agreement, is signed by the parties and mediator and is dated.”

of the State Archaeologist. This section of the statutes does not mention the term “mediation.”

In contrast, another section of *Minnesota Statutes* 2021, Chapter 138, specifically mentions the option of mediation, but not for archaeology disputes. This section of statutes pertains to sites designated as historic, not archaeological sites. The law says:

The state, state departments, agencies, and political subdivisions, including the Board of Regents of the University of Minnesota, have a responsibility to protect the physical features and historic character of properties designated in sections 138.662 and 138.664 or listed on the National Register of Historic Places created by Public Law 89-665. Before carrying out any undertaking that will affect designated or listed properties, or funding or licensing an undertaking by other parties, the state department or agency shall consult with the State Historic Preservation Office pursuant to the society’s established procedures to determine appropriate treatments and to seek ways to avoid and mitigate any adverse effects on designated or listed properties.... If the parties cannot agree, any one of the parties may request that the governor appoint and convene a mediation task force consisting of five members....¹⁶

Again, this section of statutes does not mention archaeology disputes, nor does it specifically mention OSA. However, this statute indicates that—in some cases—the Legislature has explicitly authorized mediation as an option for addressing disagreements.

The director of OCDR told us it is useful when state law mentions the option of mediation. She said:

It is TREMENDOUSLY helpful for statute to mention mediation or even direct parties to try it—statute shouldn’t and can’t require parties to reach agreement in mediation but requiring them to attempt it [is] very useful. While most people know the word mediation, it is still not well understood. Across the country and across types of mediation, mediation has high rates of settlement and satisfaction but in most cases people default to adversarial approaches (or live with unresolved conflict).¹⁷

The OCDR director said mediation tends to take less time and be less expensive than more formal processes, such as contested case hearings.

It is worth noting that the OSA fieldwork manuals and website do not specifically mention mediation as an option for resolving archaeology-related disputes. Without such discussion, parties might not be inclined to think about mediation as a possible way to resolve a dispute.

¹⁶ *Minnesota Statutes* 2021, 138.665, subd. 2.

¹⁷ Mariah Levison, Director, Office of Collaboration and Dispute Resolution, Minnesota Department of Administration, e-mail to Joel Alter, Director of Special Reviews, Office of the Legislative Auditor, “RE: Questions about OCDR,” November 28, 2021.

Seeking Assistance from the Office of Collaboration and Dispute Resolution

Another possible option for resolving archaeology disputes is OCDR. OCDR's website says:

[OCDR] uses collaborative processes and human centered leadership approaches in decision-making and problem solving. Human centered mindsets can help government and stakeholders improve relationships, build trust, and develop wise and durable solutions to seemingly intractable issues.¹⁸

Mediation is an option available to OCDR, but it is one of what the office's director told us is a broad array of available dispute resolution processes. She said some parties receiving OCDR services have legal representation, but most do not. She added that the process primarily followed by OCDR usually takes "months if not a year."¹⁹ She said: "Our general approach is working on fewer issues but working on the most contentious issues and putting in the time and resources to finally find the path forward."²⁰ OSA has a small staff (three), but it could enter into contracts for outside assistance if funds were available.

Again, OSA's fieldwork manuals and website do not specifically mention OCDR as a potential resource for helping to address archaeology disputes.

Seeking Arbitration of Disputes

Another option for resolving disputes is arbitration. According to Minnesota Court Rules, arbitration is: "A forum in which a neutral third party renders a specific award after presiding over an adversarial hearing at which each party and its counsel present its position."²¹ The parties to arbitration may determine whether the arbitrator's decision will be binding or nonbinding. The Minnesota Field Archaeology Act does not specifically mention the option of arbitration.

The Department of Administration told us that arbitration is an option in an archaeology licensing dispute only after a contested case process has been initiated. However, state law governing contested case processes says, "*As an alternative to initiating or continuing with a contested case proceeding, the parties, subsequent to agency approval, may enter into a written agreement to submit the issues raised to arbitration by an administrative law judge.*"²² Thus, we think arbitration is an option that can be used in archaeology licensing disputes—as an alternative to starting the contested case process, or after the contested case process has begun. However, OSA's fieldwork

¹⁸ "Office of Collaboration and Dispute Resolution," <https://mn.gov/admin/government/ocdr/>, accessed December 3, 2021.

¹⁹ Mariah Levison, e-mail to Joel Alter, "RE: Questions about OCDR," November 28, 2021.

²⁰ *Ibid.*

²¹ Minnesota General Rules of Practice for the Courts, *Alternative Dispute Resolution*, Rule 114.02(a)(1) (1997).

²² *Minnesota Statutes* 2021, 14.57(b), emphasis added.

manuals and website do not specifically mention arbitration as a potential option for addressing archaeology disputes.

Making Referrals of Ethics Complaints

A key reason the State Archaeologist cited for denying Sigrid Arnott's 2019 license application was alleged ethical violations during a previous project (the Mission Creek Project on Trunk Highway 23). In the Department of Administration order that upheld OSA's decision, the department said Arnott's performance on the project "violated state law and the ethical standards of her profession."²³

The State Archaeologist alleged that Arnott violated the Register of Professional Archaeologists (RPA) Code of Conduct and Standards of Research Performance. However, an avenue that the State Archaeologist did not pursue was referral of the alleged ethical violations to the RPA for investigation. The RPA is the only archaeology organization that has a grievance process and can censure or remove an individual's membership in the organization. The RPA has a grievance coordinator who draws on extensive training for this position and uses, as a point of reference, a 60-page manual. A person who served as RPA's grievance coordinator in 2013 and 2014 said the following in a report he submitted to a Minnesota administrative law judge:

If during [my tenure as RPA grievance coordinator], I were to have received [the Arnott] case as a grievance, I would have followed the *RPA Manual for Grievance Coordinators* and formed a Grievance Committee.... It is important to note, though, that these alleged violations [in the Arnott case] were never submitted to RPA for official consideration.... Individuals acting as sole arbitrators of ethical violations of RPA's Code and Standards do not serve the interest of fairness in policing the ethics of our profession.²⁴

Because the alleged ethical breaches were not referred to the RPA, there is no way to know what an RPA grievance committee would have decided.

The Office of the State Archaeologist's fieldwork manuals and website do not discuss how to file complaints involving possible ethics violations on archaeology-related topics.

The 2011 OSA fieldwork manual says:

Professional archaeologists should adhere to professional standards, guidelines, and the ethical obligations of an archaeologist regardless of

²³ Lenora Madigan, Deputy Commissioner, Department of Administration, *In the Matter of the Application of Sigrid Arnott: Findings of Fact, Conclusions of Law, and Order*, "Conclusions of Law," OAH 8-0200-36173 (April 8, 2021), 23.

²⁴ *Expert Report by James E. Bruseth, Ph.D, RPA #11186, In the Matter of the Application of Sigrid Arnott, (Minnesota OAH Docket No. 8-0200-36173)*, June 6, 2020. The Department of Administration and OSA said that Arnott did not (1) give Bruseth full access to the contested case exhibits and (2) allow Bruseth to listen to other witnesses' testimonies. Thus, they contend that Bruseth—who was an expert witness for Arnott—did not make his conclusions based on the full facts of the case.

land owner, type of legal oversight, or type of project. This includes projects that are completed on private land or Indian reservations. It also includes work on culturally sensitive sites and burials.

However, the manual does not suggest what actions someone should take if they believe that an archaeologist has violated ethical standards. Likewise, we did not see any such information on the OSA website.

The conditions for a Phase 1 archaeology license state that licenses may be denied, revoked, or suspended for “unethical professional behavior,” including but not limited to “falsifying field notes or reports, plagiarism, intentionally misrepresenting professional qualifications or experience, [or] mishandling archaeological and site information or materials owned by the state.” However, the license application does not indicate how unethical behavior is investigated or determined.

Recommendations

The statutes that comprise the Minnesota Field Archaeology Act do not specifically mention dispute resolution mechanisms other than the contested case hearing process for licensing disputes. Although we think options such as mediation and arbitration exist, it would be helpful if state law and OSA guidance referenced avenues besides the contested case process for resolving disputes.

RECOMMENDATION

The Legislature should consider amending the Minnesota Field Archaeology Act to mention the option of mediation for resolving archaeology disputes.

Just as *Minnesota Statutes* 2021, 138.665, subd. 2, mentions the option of a “mediation task force” for disputes related to historic sites, the law could be amended to explicitly encourage parties in archaeology disputes to consider mediation. Existing archaeology statutes do not prohibit parties from using mediation, but parties may be more inclined to consider mediation if it is mentioned in the law.

RECOMMENDATION

The Office of the State Archaeologist should amend its fieldwork manuals and website to provide information on the Office of Collaboration and Dispute Resolution, the options of mediation and arbitration for resolving disputes, and options for reporting allegations of unethical behavior.

OSA should help archaeologists understand that there are dispute resolution options that are less formal than the contested case process. If the parties are willing to participate, disputes can be addressed through mediation or actions by OCDR. OSA should also help archaeologists understand how to report possible ethics violations against individuals.

RECOMMENDATION

The Legislature should consider authorizing the creation of a board to advise the Office of the State Archaeologist on archaeology disputes.

Some people told us they favor the idea of having a multiperson archaeology board to make final licensing decisions. With such an approach, decisions would not rest in the hands of one individual. But with more than 300 archaeology licenses issued in 2021, it might be challenging for a board to act promptly on all applications.

An alternative approach would be to have a board that hears only disputed matters, and provides advice to OSA rather than making final decisions. Such disputes could involve various types of issues: denials of licenses, enforcement of license conditions, disputes regarding state archaeology site activities, or disputes among agencies. Appointees to such a board might include licensed archaeologists, members of academia, members of state (or quasi-state) agencies, and tribal representatives. The purpose of the board would be to provide OSA with a broad set of perspectives as it considers disputed issues. An advisory board would not change who has the ultimate responsibility for decisions, but it would provide a place where disputed OSA decisions could be discussed.



OLA

Chapter 4: Relationships with Interested Parties

It is important for the Office of the State Archaeologist (OSA) to establish and maintain good relationships with multiple entities, including state government organizations who are involved in archaeological work or reviews; American Indian tribes, whose artifacts and ancestors are buried at certain sites around the state; and professionals who work in the archaeology field. This chapter discusses those relationships.

KEY FINDINGS IN THIS CHAPTER

- **State (or quasi-state) agencies reported no concerns about their relationships with the Office of the State Archaeologist.**
 - **No staff from the Office of the State Archaeologist enrolled in “tribal state relations training” until 2022, contrary to state requirements.**
 - **Archaeologists reported mixed views about the adequacy of the Office of the State Archaeologist’s communications with them.**
-

Relationships with Other State Agencies

State law says the State Archaeologist shall “cooperate with other agencies of the state which may have authority in areas where state [archaeological] sites are located, or which may have the responsibility for marking state sites, or arranging for their being viewed by the public.”¹ To assess the working relationships between the Office of the State Archaeologist and other state-affiliated entities, we solicited input from representatives of the following organizations: the Minnesota Indian Affairs Council (MIAC), the Minnesota Department of Transportation (MnDOT) Cultural Resources Unit, the Minnesota State Historic Preservation Office (SHPO), and the Minnesota Historical Society (MNHS). The first of these organizations is a statutorily established state council and the next two are parts of state agencies. The Minnesota Historical Society is sometimes called a “quasi-state” agency; it is a nonprofit organization that receives state appropriations and is subject to certain state laws.

State (or quasi-state) agencies we contacted reported no concerns about their relationships with the Office of the State Archaeologist or their communications with that office.

About 20 years ago, a report by our office said the relationship between the Minnesota Indian Affairs Council and OSA was characterized by mistrust and poor

¹ *Minnesota Statutes* 2021, 138.35, subd. 2(2).

communication.² Although the report said the two agencies worked together successfully on many projects, there were concerns at that time about disrespectful and untimely communication, and a lack of true consultation between the agencies.

Today, however, the Executive Director of the Minnesota Indian Affairs Council told us that her agency trusts OSA for the first time in many years. She said the relationship is developing, but that the entities each have a good understanding of their respective responsibilities. As one example of this closer partnership, the two agencies initiated in mid-2021 an online application (the MIAC-OSA Review Application) that allows them to have a single place to store information and recommendations related to a given project, such as a proposed highway or housing project.

Likewise, a MnDOT representative told us there is a “very good” relationship between the MnDOT Cultural Resources Unit and OSA. The MnDOT representative noted that MnDOT partially funds an OSA staff position, which facilitates OSA’s reviews of highway projects. The two agencies have been meeting on a biweekly basis to discuss specific MnDOT projects and larger issues.

A representative of SHPO—which, like OSA, is located in the Minnesota Department of Administration—told us there is limited communication between SHPO and OSA, but he noted that they have largely different areas of responsibility.³ The SHPO representative told us the two agencies have coordinated on issues that have pertained to both agencies.

A representative of MNHS told us that the communication between OSA and MNHS is “very strong.” The two agencies worked together to plan the 2021 changes to the archaeology licensure process, and MNHS told us the two agencies have had no disputes when reviewing licensure applications.

Tribal Relations

Because of Minnesota’s cultural heritage, many locations in the state contain artifacts or remains of American Indians or their ancestors. Thus, it is important for OSA to appreciate the sensitive nature of these sites and work closely with tribes in its work related to archaeological or burial sites.

We solicited input regarding the Office of the State Archaeologist from the tribal leaders for each of Minnesota’s American Indian tribes, as well as each of the tribal historic preservation officers. However, we did not receive any responses.⁴ Thus, we have no basis from these inquiries for assessing the satisfaction of tribal representatives with OSA.

² Office of the Legislative Auditor, Program Evaluation Division, *State Archaeologist* (St. Paul, April 10 2001), 19.

³ The archaeologist for SHPO plays a consulting role, not a regulatory role. For example, if there are sites under consideration for placement on the National Register of Historic Places or if there are archaeology projects on federal land in Minnesota, the federal government consults with SHPO.

⁴ We e-mailed questions to each tribal leader and tribal historic preservation officer. When we did not receive responses by our suggested deadline, we communicated with the executive director of the Minnesota Indian Affairs Council, who then resent our questions to the tribal historic preservation officers on our behalf. Once again, we did not receive any responses.

The current State Archaeologist told us that one of the reasons she sought appointment to her position in 2016 was to foster stronger relationships between the archaeology profession and the state's American Indian tribes. She told us she hopes in coming months to make changes to the archaeology licensure process so that OSA provides copies of license applications to the Minnesota Indian Affairs Council and to tribal representatives before the licenses are issued.⁵

We are aware of only one recent dispute between a tribe and OSA. In late 2021, a tribal leader alleged to Governor Walz that OSA removed recently unearthed items of cultural significance from the tribe's jurisdiction "without consulting with the Mille Lacs Band of Ojibwe's Tribal Historic Preservation Office (THPO), and in violation of the [federal] Native American Graves Protection and Repatriation Act."⁶ The tribal leader said:

Federal law is very clear that all items of cultural patrimony unearthed from within the exterior boundaries of an Indian reservation are the jurisdiction of the tribal government, and Interior Department compliance officials...have confirmed that state agencies have no role to play within the reservation boundary.... State agency representatives agreed that Minnesota Statute 307.08 conflicts with federal law, but were insistent that they are required to follow state law; despite the fact that federal law preempts state law and despite the fact that actions by the OSA is an incursion into tribal sovereignty.⁷

In the State Archaeologist's account of this incident, a private company's crew unearthed artifacts during installation of a utility line in November 2021 on land that was within MnDOT's right of way and reservation boundaries. She said the archaeological consultant for the project recovered the items and gave them to the Mille Lacs Band of Ojibwe. OSA and MNHS advised the consultant to retain the artifacts, not knowing that the consultant had already given them to the band. The consultant then retrieved the items from the band, without the knowledge of OSA and MNHS. In early January 2022, at OSA's urging, the consultant returned the artifacts to the tribe.

The State Archaeologist told us this dispute resulted from a lack of clarity between federal and state statutes. Specifically, she said, it is unclear whether and how the Native American Graves Protection and Repatriation Act applies to OSA.⁸ The Department of Administration has requested a legal analysis from the Office of the Attorney General on this issue, and it may then seek amendments to state statutes that the State Archaeologist told us are "outdated and offensive." For example, the State Archaeologist said it is inappropriate for her office to be designated in law as the agency that authenticates American Indian burial sites; she said it would be more appropriate for MIAC or tribal representatives to play the leading role in these authentications.

⁵ For years, OSA has provided copies of licenses to the Minnesota Indian Affairs Council after they are issued; it does not provide copies of applications to the Council prior to issuance. OSA does not currently have a standard process for sharing license applications with tribal representatives.

⁶ Melanie Benjamin, Chief Executive, Mille Lacs Band of Ojibwe, letter to Governor Tim Walz, December 13, 2021.

⁷ *Ibid.*

⁸ The State Archaeologist said this federal act applies to MNHS, but it is unclear if it applies to OSA.

Until 2022, no staff from the Office of the State Archaeologist enrolled in “Tribal State Relations Training,” contrary to requirements set forth since 2019 in an executive order and since 2021 in state law.

In April 2019, Governor Walz issued an executive order that required 24 state agencies to engage in consultation with 11 federally recognized American Indian tribal nations in Minnesota.⁹ Among the agencies covered by this order is the Department of Administration, which houses the Office of the State Archaeologist.

This order designated “Tribal State Relations Training” (TSRT) as “the foundation and basis of all other tribal relations training sources.”¹⁰ The order said that all commissioners, deputy commissioners, and assistant commissioners must attend TSRT, and “all agency employees whose work is likely to impact Minnesota Tribal Nations will attend TSRT training.”¹¹ Before the COVID-19 pandemic, this training was provided through in-person, two-day training sessions at sites hosted by individual tribes. Since early 2021, TSRT has been provided virtually through multiple sessions spanning several months.

In 2021, after years in which mandates for state agencies to consult with tribes were contained in multiple governors’ executive orders, the Legislature placed such a mandate in state law.¹² The law expanded the number of state agencies subject to this requirement. In addition, the statutory language mandating agency employees to attend TSRT is virtually identical to the language in Governor Walz’s 2019 executive order.¹³

Through the end of 2021, neither the State Archaeologist nor her two staff had attended TSRT. The State Archaeologist told us that OSA staff had not enrolled in this training because of OSA and department budget constraints.¹⁴ She said she and her staff previously requested authorization from the Department of Administration to attend this training, but it was not approved due to OSA’s budget constraints.

We offer no recommendation because the three employees of OSA recently enrolled in Tribal State Relations Training, which started in January 2022. However, it will be critical for future OSA staff to complete this training, too. OSA’s work requires ongoing relations with tribes, particularly for sites involving American Indian artifacts and burial sites.

⁹ State of Minnesota Executive Order 19-24, “Affirming the Government to Government Relationship between the State of Minnesota and Minnesota Tribal Nations: Providing for Consultation, Coordination, and Cooperation,” April 4, 2019.

¹⁰ *Ibid.*, 2.

¹¹ *Ibid.*, 2-3.

¹² *Minnesota Laws* 2021, First Special Session, chapter 14, art. 11, sec. 5, codified as *Minnesota Statutes* 2021, 10.65.

¹³ *Ibid.* Minnesota law says “at a minimum all agency employees whose work is likely to include matters that have Tribal implications must attend Tribal-state relations training.” This provision of law was effective the day following the law’s final enactment on July 1, 2021.

¹⁴ The cost for a person to attend TSRT is \$300. The Department of Administration and OSA told us that the cost of this training prior to the pandemic was \$399 per participant, plus there were costs for travel, lodging, and meals when the training was held in person.

Relationships with the Archaeological Community

In addition to maintaining relationships with public agencies and tribes, it is important for OSA to communicate regularly with professional archaeologists. OSA approves license applications for archaeologists who work on state land, provides guidance to archaeologists regarding fieldwork, and is directed by state law “to sponsor, engage in, and direct fundamental research into the archaeology of this state and to encourage and coordinate archaeological research and investigation undertaken within the state.”¹⁵

We contacted individuals who do archaeology-related work to ask for their perceptions about OSA, including OSA’s communications with them. Specifically, we invited input from all archaeologists who obtained 2021 licenses, plus we contacted some archaeologists who work in academia or worked in 2021 on projects that were not subject to state licensure. Altogether, we solicited input from 48 individuals, and we heard back from 27 of them (56 percent). Twenty of the respondents completed a uniform set of questions we sent to them; we conducted interviews or exchanged correspondence with the other seven.

Archaeologists reported mixed views about the adequacy of the Office of the State Archaeologist’s communications with them.

Of the 20 archaeologists whom we asked to rate OSA communication on a scale from “excellent” to “poor,” 12 (60 percent) gave OSA an overall rating of “excellent” or “good.” Four respondents (20 percent) rated OSA’s communication as “fair” or “poor.” Four others gave OSA more than one rating.¹⁶ For example, one archaeologist said:

Excellent communication with the OSA when I have initiated the contact (they respond well and clearly). However, it was poor in regards to advance notice of the 2021 change in licensure.

Some archaeologists and members of academia expressed concern that OSA has relied to a large extent on a private group (the Council for Minnesota Archaeology) for communicating with the archaeology community. For example, one archaeologist said:

Currently, the OSA often uses the Council of Minnesota Archaeology’s (CMA) listserv as a means to communicate with archaeologists statewide. That is a massive oversight on their part, as CMA is a professional networking organization and does *not* include [every] archaeologist in the state of Minnesota who has sought/secured a license. In order to become a member of the CMA, you must apply and pay dues.... Any communication that is intended for all archaeologists who [have or have had] a license in Minnesota and is only communicated via the CMA listserv is effectively excluding a large number of archaeologists.

¹⁵ *Minnesota Statutes* 2021, 138.35, subd. 2(1).

¹⁶ Two respondents rated OSA’s communication as “fair to good,” and another said it was “fair to poor.” Another respondent said OSA’s communication has been “excellent” in some circumstances but “poor” in others.

The State Archaeologist acknowledged to us that this has been a problem at times, and her office recently obtained access to a private application (GovDelivery) that it will use in the future to communicate with persons in the archaeology field. OSA started using that application in late 2021.

Some people said the adequacy of OSA's communication and responsiveness varied, depending on the OSA staff person. Many archaeologists offered complimentary remarks about communications involving the person who has been at OSA for more than 25 years and handles license applications for the office. For example, one person said: "I have never asked [the long-time Research Archaeologist] a question that he hasn't responded to, usually within an hour or so, and always in a thorough, professional, and comprehensible way." Archaeologists who discussed the communications of individual staff persons within OSA tended to be less favorable in their comments on the State Archaeologist. A number of people said the State Archaeologist herself has not been sufficiently helpful or responsive.

Also, as noted in Chapter 2, some archaeologists expressed concern that there was limited opportunity for archaeologist input when OSA and MNHS planned changes in the licensing process that were implemented in 2021.

RECOMMENDATION

The Office of the State Archaeologist should ensure that it communicates more effectively with the broader archaeology community than it has in recent years, and that it solicits input from these professionals when needed.

We said above that perceptions of OSA's communications have been mixed. But it is worth noting that (1) OSA's communications have been a source of significant concern among some archaeologists and (2) many of the positive comments we heard about OSA's communications related to one staff person. It would be in OSA's best interests to employ stronger mechanisms for communicating with the broad archaeological community and soliciting their input when necessary.

List of Recommendations

- The Legislature should consider amending state law to give a state entity—the Office of the State Archaeologist—sole responsibility to issue archaeology licenses, but with explicit authority to consult with others in this process. (p. 12)
- The Office of the State Archaeologist should provide clear information on its website defining categories of licensure and indicating how to apply for licenses. (p. 14)
- The Office of the State Archaeologist should update written guidance related to archaeological fieldwork. (p. 18)
- The Legislature should consider amending the Minnesota Field Archaeology Act to mention the option of mediation for resolving archaeology disputes. (p. 28)
- The Office of the State Archaeologist should amend its fieldwork manuals and website to provide information on the Office of Collaboration and Dispute Resolution, the options of mediation and arbitration for resolving disputes, and options for reporting allegations of unethical behavior. (p. 28)
- The Legislature should consider authorizing the creation of a board to advise the Office of the State Archaeologist on archaeology disputes. (p. 29)
- The Office of the State Archaeologist should ensure that it communicates more effectively with the broader archaeology community than it has in recent years, and that it solicits input from these professionals when needed. (p. 36)



OLA

Appendix: 2019-2021 Contested Case Regarding a License Dispute

According to Minnesota law,

Any person whose application for a [state archaeology] license under this section has been denied or whose license has been modified, suspended, or revoked, may appeal the decision within 30 days of receiving written notice of the decision by filing a written request with the commissioner for a contested case hearing under chapter 14.¹

Staff from the Office of the State Archaeologist (OSA) told us they are aware of only one instance in which a licensing decision has resulted in a contested case process, pursuant to the above statutory language. This appendix briefly discusses that dispute. The case is noteworthy because (1) it illustrates that contested cases can take a long time to resolve (in this case, two years) and (2) two parties—an administrative law judge and the Minnesota Department of Administration—looked at the facts of this case and arrived at essentially opposite conclusions.

Case Background

In January 2019, an individual (Sigrid Arnott) applied to OSA for a Phase 1 archaeology license.² At that time (and until 2021), these types of licenses were issued on an annual basis; an archaeologist could obtain a single Phase 1 license to cover all Phase 1 projects they worked on during the course of a calendar year. Arnott had been a licensed archaeologist in Minnesota for many years. But, in a letter to the applicant, the State Archaeologist said that, based on a review of the archaeologist's work on a prior project,

This review indicates that you have failed to comply with applicable Minnesota law, violated the terms of your previous license, and violated professional ethical standards applicable to the practice of field archaeology.³

OSA's rejection of the license referenced a project Arnott had worked on in 2017-2018, known as the "Mission Creek" project. In 2017, a highway construction crew working on Trunk Highway 23 in Duluth had unearthed a prestatehood Ojibwe cemetery. The State Archaeologist, the Minnesota Indian Affairs Council, and the Fond du Lac Band

¹ *Minnesota Statutes* 2021, 138.36, subd. 6.

² According to the OSA fieldwork manual, "*Phase 1* surveys attempt to determine the presence or absence of sites within a specific area and initially define site limits, so the field methods must reasonably but efficiently maximize the vertical and horizontal sampling of the project area without significantly harming site integrity." Office of the State Archaeologist, *State Archaeologist's Manual for Archeological Projects in Minnesota* (St. Paul, August 2011), 16.

³ Amanda Gronhovd, State Archaeologist, Department of Administration, letter to Sigrid Arnott, "RE: Application for an Annual Reconnaissance Survey License," May 1, 2019.

of Lake Superior Chippewa verified the presence of remains of ancestors of the Fond du Lac Band at the construction site. The Minnesota Department of Transportation (MnDOT) hired Arnott as a consultant, starting in mid-2017, to assist with a survey of the burial site and with recovery of items from the site. In May 2018, MnDOT notified Arnott that it was terminating its contract with her for work at the Mission Creek site.

When OSA did not approve Arnott's application for a 2019 license, Arnott appealed the decision, filing a request with the Department of Administration for a contested case hearing.

Contested Case Hearing and Decision

Minnesota Statutes 2021, 14.57-14.62, sets forth the laws governing Minnesota's contested case process. According to state law, the report of the administrative law judge must be made available to parties to the proceeding for at least ten days prior to the final decision.⁴ The law says there must be an opportunity for "each party adversely affected to file exceptions and present argument" to the officials who will render the decision.⁵ According to statute, "Unless otherwise provided by law, the report or order of the administrative law judge constitutes the final decision in the case unless the agency modifies or rejects it...within 90 days after the record of the proceeding closes."⁶

Administrative Law Judge Eric Lipman held a two-day evidentiary hearing in June 2020 to consider the facts of the case. In November 2020, Judge Lipman said:

The Administrative Law Judge concludes that Ms. Arnott sustained her burden of establishing that: (a) her performance on the Mission Creek project was within the professional and ethical standards of field archeology; and (b) the State Archeologist did not have sufficient grounds to deny Ms. Arnott's application for a Phase I Field Archeology license. The Administrative Law Judge therefore recommends issuance of a Phase I Field Archeology license to Ms. Arnott.⁷

In a memorandum attached to the recommendation, Judge Lipman said Arnott "is not the villain that the State Archaeologist believes her to be."⁸ In addition, Judge Lipman said:

The hearing record demonstrates that Ms. Arnott cared about the things that matter: the long-term best interests of the Anishinaabe community; the safety and well-being of her crew members; effective use of public monies;

⁴ *Minnesota Statutes* 2021, 14.61, subd. 1.

⁵ *Ibid.*

⁶ *Minnesota Statutes* 2021, 14.62, subd. 2a.

⁷ Eric Lipman, Administrative Law Judge, Office of Administrative Hearings, *In the Matter of the Application of Sigrid Arnott: Findings of Fact, Conclusions of Law, and Recommendation*, "Summary of Recommendations," OAH 8-0200- 36173 (November 4, 2020), 1.

⁸ *Ibid.*, "Memorandum," 28.

and the propagation of culturally sensitive methods for demarking sacred spaces. The record also shows that Ms. Arnott consistently prioritized these broader community interests over the interests of her firm and her finances.... Ms. Arnott upheld the ethics and standards of her profession during her work on the Mission Creek project.⁹

By law, the Department of Administration was not bound by Judge Lipman's recommendation. State law establishes a window of time in which a state agency may modify or reject a judge's recommendation; if the agency takes no action in this period, the judge's recommendation is final.¹⁰ Both parties in the case subsequently submitted written arguments and "exceptions" to the Commissioner of Administration regarding Judge Lipman's recommendation.

In April 2021, the Department of Administration issued a final order, rejecting Judge Lipman's recommendation.¹¹ Specifically, the Deputy Commissioner of the Department of Administration rejected (in whole or in part) 12 of Judge Lipman's 111 "findings of fact" and 16 of his 24 "conclusions of law" regarding the case. The Deputy Commissioner's order denied a license to Arnott, stating:

The Commissioner rejects the [administrative law judge's] recommendation in the Report because it is founded on erroneous conclusions of law regarding the burden of proof and the State Archaeologist's demonstration that Arnott's performance on the Mission Creek project violated state law and the ethical standards of her profession. The recommendation also improperly ignores the State Archaeologist's demonstration that Arnott violated the terms of her 2017 license.¹²

A person who disagrees with the final administrative decision in a contested case may seek judicial review of the decision. In this matter, Arnott did not appeal her case to the courts.

⁹ Eric Lipman, *In the Matter of the Application of Sigrid Arnott*, "Memorandum," OAH 8-0200- 36173, 28-29.

¹⁰ *Minnesota Statutes* 2021, 14.62, subd. 2a.

¹¹ After the parties in the Arnott case had opportunities to file written "argument and exceptions" in response to the administrative law judge's recommendation, the record of the contested case proceeding closed on January 11, 2021.

¹² Lenora Madigan, Deputy Commissioner, Department of Administration, *In the Matter of the Application of Sigrid Arnott: Findings of Fact, Conclusions of Law, and Order*, "Conclusions of Law," OAH 8-0200- 36173 (April 8, 2021), 23.



OLA

February 25, 2022

Ms. Judy Randall
Office of the Legislative Auditor
Centennial Building, Room 140
658 Cedar Street
Saint Paul, MN 55155

Dear Ms. Randall:

Thank you for the opportunity to review and comment on the Office of the Legislative Auditor's special review of the Office of the State Archaeologist (OSA). We appreciate the opportunity to work with the OLA in identifying ways in which OSA could improve on its statutory duties and work with its partners.

The Department of Administration (Admin) takes its responsibility to ensure compliance with legal requirements seriously. The OLA's careful review of Admin's initial comments and subsequent revisions to make the report as accurate, clear, and objective as possible are appreciated.

Admin's response to each of the recommendations in the special review is detailed below.

Recommendation:

The Legislature should consider amending state law to give a state entity—the Office of the State Archaeologist—sole responsibility to issue archaeology licenses, but with explicit authority to consult with others in this process.

Response:

Although Admin is neutral on this recommendation to the legislature, we believe that the OLA's subsequent recommendation of greater input by the broader archaeological community is relevant to this recommendation. Removing the Minnesota Historical Society from the licensing process would be a significant change to current law and should be undertaken only after consultation and engagement with key stakeholders.

Recommendation:

The Office of the State Archaeologist should provide clear information on its website defining categories of licensure and indicating how to apply for licenses.

Response:

We agree that the OSA can provide greater clarity around licensing on its website and will continue enhancing the information that is provided. Given the importance of the licensing process to protecting irreplaceable cultural resources, we would also like to highlight the importance for individuals seeking licenses to work directly with the OSA team. From an accessibility standpoint, the OSA website should not be the sole source of information upon which individuals seeking licenses rely. While it may be the first place an individual looks for information, there will be inevitable follow-up necessary for the unique

or complicated situations that licensing presents. This is where reliance on the OSA team is necessary and remains a key aspect for individuals seeking licenses.

Recommendation:

The Office of the State Archaeologist should update written guidance related to archaeological fieldwork.

Response:

Admin agrees that updates are necessary to the written guidance related to archaeological fieldwork. In recent years, the OSA has prioritized immediate issues such as timely reviews of construction and development plans and addressing the unearthing of inadvertently discovered human remains. However, this is also a priority project, and the OSA team remains committed to completing it over the next year in a process that is consultative and collaborative with tribal governments and the broader archaeological community.

Recommendation:

The Legislature should consider amending the Minnesota Field Archaeology Act to mention the option of mediation for resolving archaeology disputes.

Response:

Admin is neutral on this recommendation to the legislature. Admin's highest legislative priority remains amending the Private Cemeteries Act to address aspects that are outdated and potentially offensive to the Tribal Nations, specifically related to the OSA's current designation in law as the agency that authenticates American Indian burial sites.

Recommendation:

The Office of the State Archaeologist should amend its fieldwork manuals and website to provide information on the Office of Collaboration and Dispute Resolution, the options of mediation and arbitration for resolving disputes, and options for reporting allegations of unethical behavior.

Response:

Admin believes that this recommendation is inconsistent with current state law. Under Minnesota's Field Archaeology Act, specific to licensing (Minn. Stat. § 138.36), a person may appeal the decision by requesting a contested case hearing. Additionally, "[i]f the applicant does not request a contested case hearing within 30 days after receiving written notice of the decision, the decision becomes final and the applicant may not appeal the decision." Under this statutory framework, the contested case process is not only *authorized*, it is *required*. If other dispute resolution options in licensing disputes were allowable, we believe that they would have been identified in statute. If the parties decide to resolve the dispute through mediation or arbitration once the contested case process is initiated, that is acceptable. However, those alternate dispute resolution options are not available until the contested case process is initiated. Consequently, the OSA cannot legally include potential options other than the contested case process for resolving licensing disputes on its website or in manuals.

Recommendation:

The Legislature should consider authorizing the creation of a board to advise the Office of the State Archaeologist on archaeology disputes.

Response:

Similar to a previous recommendation, Admin is neutral on this recommendation to the legislature. We believe that the OLA's subsequent recommendation of greater input by the broader archaeological community is also relevant to this idea.

Recommendation:

The Office of the State Archaeologist should ensure that it communicates more effectively with the broader archaeology community than it has in recent years, and that it solicits input from these professionals when needed.

Response:

Admin agrees that effective communication with the archaeology community is both important and necessary. We appreciate that more outreach could have been done and have implemented better tools to seek input and disseminate information. For example, the OSA began to its new way to disseminate important information through GovDelivery prior to the special review beginning.

We recognize the value of ensuring that our partners are well informed and that they feel as though their feedback is actively solicited. We will continue to assess and improve our communications, but are somewhat heartened that of the nearly 30 survey respondents, only four rated OSA communications as fair or poor.

We appreciate the opportunity to respond to your recommendations and the opportunity work with you throughout this special review. We value the work of your office and the professionalism of your staff. If you have any questions or need additional information, please contact Lenora Madigan at 651-201-2563.

Sincerely,

A handwritten signature in black ink that reads "ARobertsDavis". The signature is written in a cursive, flowing style.

Alice Roberts-Davis
Commissioner



OLA

February 25, 2022

Judy Randall
Legislative Auditor

Joel Alter
Director of Special Reviews, Office of the Legislative Auditor

Dear Ms. Randall and Mr. Alter:

Thank you for the opportunity to provide comments on the Office of the Legislative Auditor's Special Review of the Office of the State Archaeologist (OSA). We appreciate Mr. Alter's time in reviewing and discussing with our staff the Minnesota Historical Society's role in archaeology and specifically, the licensing process.

The draft report contains important suggestions for improvements to processes in how both OSA and the field of archaeology work. We are prepared to assist the Office of the State Archaeologist and archaeological community in implementing changes recommended in the Special Review to make this process more clearly transparent and understood by stakeholders.

We would like to focus our comments on Chapter 2, "Licensing and Fieldwork." This chapter contains a recommendation that is relevant to the Minnesota Historical Society's work in this area and its role in the licensing process.

The report makes the following recommendation:

"The Legislature should consider amending state law to give a state entity - the office of the State Archaeologist - sole responsibility to issue archaeology licenses, but with explicit authority to consult with others in this process."

We do not agree with this recommendation. The scope of this report reviews only OSA's roles and responsibilities. This report does not fully outline or evaluate in detail all the steps of the licensing process, particularly final report completion and curation. As discussed briefly in the report, an extremely important part of the licensing process is the final disposition of archaeological collections and associated data (such as final reports, artifact catalogs, photographs, maps, field notes, results from specialized analyses, accompanying digital records and more).

While the Minnesota Historical Society is not the only repository for these materials, MNHS holds a vast collection of artifacts (numbering 2.5 *million* objects) that represent archaeological projects in Minnesota. In addition, the Minnesota Historical Society serves as a holding

archaeological repository for other institutions and museums (e.g., University of Minnesota). This is a significant responsibility of the Minnesota Historical Society for which the organization has invested considerable staffing and space to hold and care for artifacts and data and to make archaeological collections and information accessible to Minnesota's communities.

The MNHS's role in licensing provides a step in the process which ensures that curation and repository agreements are executed properly and that archaeological investigations are completed in a respectful and responsible manner. Before any major changes to the licensing process would be made, we would suggest that a thorough review of the licensing process would need to be completed including a review, evaluation, interviews with personnel and communities regarding the work that the Minnesota Historical Society does and/or partners with OSA on, including on tasks such as the issuing of repository agreements, review of licensing and modifications, review of requests for specialized analyses, and final disposition of archaeological collections and associated documentation. In addition a review of how similar offices, museums, and institutions work together in the region and across the United States should be considered.

We believe that a continuing role in archaeological licensing for the Minnesota Historical Society, potentially with some process and communication improvements, would best serve the long-term protection of cultural resources in Minnesota.

Further, as mentioned in the report, the State Archaeologist commented that having experts from multiple perspectives reviewing license applications, particularly on complex projects, serves the field of archaeology, and the State, well. We agree that this collaborative process furthers the protection of resources.

Again, we appreciate the opportunity to review and provide input into this important review.

Sincerely,

A handwritten signature in blue ink that reads "Kent Whitworth". The signature is fluid and cursive, with a large, stylized initial "K" and a long, sweeping underline.

Kent Whitworth
Director and Chief Executive Officer



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