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OPINION
OF
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Opinion No. 87-64

By: Alicia Mason
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To: Louis Rose
Office of General Counsel
Environmental Improvement Division
Health and Environment Department
State of New Mexico

QUESTION:

Does Section 18-6-9.1 of the Cultural Properties Act, Sections 18-6-1 through 18-6-17 NMSA (Supp. 1986), enable the state historic preservation officer to participate in the Environmental Improvement Division's deliberation whether to license a private discharge plan when the license would affect a registered cultural property on private land?

CONCLUSION:

Yes.

ANALYSIS:

Section 18-6-9.1, entitled "Review of Proposed State Undertakings," provides in pertinent part that:

> The head of any state agency or department having direct or indirect jurisdiction over any land or structure modification which may affect a registered cultural property shall afford the state historic preservation officer a reasonable and timely opportunity to

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> participate in planning such undertaking so as to preserve and protect, and to avoid or minimize adverse effects on, registered cultural properties.

Although the heading of the Section 18-6-9.1 refers to "state undertakings," its text does not qualify undertakings as "state undertakings." The statute must be given effect as it is written. Wittkowski v. State, Corrections Dep't of State of N.M., 103 N.M. 526, 530, 710 P.2d 93, 97 (Ct. App.), cert. quashed, 103 N.M. 446, 708 P.2d 1047 (1978). A legislatively enacted heading cannot limit the text's plain meaning. State v. Ellenberger, 96 N.M. 287, 288, 629 P.2d 1216, 1217 (1981).

Section 18-6-9.1 is not subject to construction unless its meaning and application are ambiguous rather than plain. New Mexico State Bd. of Educ. v. Bd. of Educ. of Alamorgordo Pub. School Dist., 95 N.M. 588, 590, 624 P.2d 530, 532 (1981). According to Section 18-6-9.1's plain meaning, a state agency must afford the historic preservation officer the opportunity to participate in that agency's planning of any undertaking where the undertaking will modify land or structures, and the modification may affect a registered cultural property. Thus, the statute applies to the agency's indirect jurisdiction over a private party's modification on private land.

The administrative interpretation of Section 18-6-9.1, as expressed in the Historic Preservation Division's regulations, reinforces the statute's plain meaning. A statute's construction by the agency charged with its administration is persuasive and will not be lightly overturned in court. City of Raton v. Vermejo Conservancy District, 101 N.M. 95, 99, 678 P.2d 1170, 1174 (1984); Perea v. Baca, 94 N.M. 624, 627, 614 P.2d 541, 544 (1980). Pursuant to its statutory authorization in Section 18-6-5(F) of the Cultural Properties Act, Sections 18-6-1 through 18-6-17 NMSA 1978 (hereinafter "the Act"), the Cultural Properties Review Committee adopted "Regulations For The Review of Proposed State Land or Structure Modifications Under Direct or Indirect State Jurisdiction Which May Affect Registered Cultural Properties," effective September 20, 1987. CPRC Rule 87-7. The regulations state as their purpose:

> The purpose of this regulation is to establish the procedure under which heads of state agencies or departments having direct or indirect jurisdiction over any land or structural modification which may effect a registered cultural property will coordinate with the state historic preservation officer during planning of such undertaking so as to preserve and protect, and to avoid and minimize adverse

> effects on, such registered cultural property. Section 18-6-9.1 NMSA 1978 authorizes and requires cooperation among State agencies in the identification and protection of significant cultural properties, furthering but not limited by the provisions of the National Historic Preservation Act of 1966 as amended.

Id. at 2. The regulations define the term "undertaking," as used in Section 18-6-9.1, to mean:

> "Undertaking" is defined with reference to Sections 101, 106 [16 U.S.C. § 470f], 110 of the National Historic Preservation Act of 1966, as amended, and with further reference to 36 C.F.R. 800.2(o), to mean any project, activity or program that can result in changes in the character or use of a historical property and is further defined to mean any modification, other than ordinary maintenance, under the direct or indirect jurisdiction of a State agency, entity, board or commission, of any land or structure which is entered in the State Register of Cultural Properties, or in the immediate vicinity of any such registered property. Undertakings include new and continuing projects, programs and activities under direct or indirect state jurisdiction on federal, state or private lands.

Id. at 4. "Undertaking," as defined in the regulations and as employed in the context of Section 18-6-9.1, refers only to projects, activities, or programs over which the State has indirect and direct jurisdiction. Therefore, the meaning of "undertaking" is clarified by the definition of the terms "direct" and "indirect" jurisdiction. The regulations define "direct jurisdiction" to mean "oversight, planning or direction of an undertaking of land or structure modification on federal, State or private lands by any State agency, entity, board or commission." Id. "Indirect jurisdiction" is defined to mean "the issuance of any authorization, permit, license, subsidy, loan, grant, support, or regulation by any State agency, entity, board, or commission for any land or structure modification on federal, State or private lands." Id.

The Committee's construction is not clearly erroneous. Indeed, it parallels Section 106 of the National Historical Preservation Act (hereinafter "NHPA") 16 U.S.C. §470f (1978). According to Section 18-6-2 of the Act, the purpose of the Act is "to provide for the preservation, protection, and enhancement of structures, sites,

and objects of historical significance within the state in a matter conforming with, but not limited by, the provisions of the National Historic Preservation Act of 1966 (P.L. 89-665)." (emphasis added). Because the Legislature recognized a relationship between the Act and NHPA, the meaning of "undertaking" in the NHPA is persuasive of the regulations' validity. See Valles v. State, 90 N.M. 347, 349, 563 P.2d 610, 612 (Ct. App.), cert. denied, 90 N.M. 637, 567 P.2d 486 (1977). Accord, Industrial Comm'n of Colo. v. Bd. of County Comm'rs of the County of Adams, 690 P.2d 839, 845 (Colo. 1984) (federal authorities are highly persuasive where provisions and purposes of a state statute parallel those of a federal enactment).

NHPA defines "undertaking" to mean "any action as described in Section 470f of this title." 16 U.S.C. § 470w(7). Section 470f includes licensing as an undertaking. Further, 36 C.F.R. § 800.2 (1978) defines "undertaking" to mean new and continuing projects and program activities that are:

> (1) Directly undertaken by Federal agencies;
> (2) Supported in whole or in part through federal contracts, grants, subsidiary loans, loan guarantees, or other forms of direct and indirect funding assistance;
> (3) Carried out pursuant to a Federal lease, permit, license, certificate, approval, or other form of entitlement or permission; or,
> (4) Proposed by a Federal agency for Congressional authorization or appropriation.

NHPA contemplates that, whenever there is any federal involvement in an activity that may affect a historical property, the federal government must have an opportunity to minimize the harm. Fowler, "Federal Historic Preservation Law; National Historic Preservation Act, Exec. Order 11592, and Other Recent Developments in Federal Law," 12 Wake Forest L.Rev. 31, 56 (1966). "NHPA requires all federal agencies to examine the effects of their actions on property included in or eligible for inclusion in the National Register of Historic Places." Colorado River Indian Tribes v. Marsh, 605 F.Supp. 1425, 1434 (C.D. Cal. 1985).[1] Further, NHPA's

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1 In Colorado River Indian Tribes v. Marsh, the developer of a proposed 156-acre residential and commercial development, to be built on the Colorado River directly across from the reservation, argued that NHPA was inapplicable because NHPA "has no or very limited application to agency permits for a

undertakings are not limited to federal projects or projects only on federal land. See Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271, 280 (10th Cir. 1983) (NHPA applies whenever a federal agency can exercise its authority, at any stage of an undertaking, to make alterations and modify the impact on historic properties). Consequently, the meaning of "undertaking" in the context of both Section 18-6-9.1 and NHPA includes an agency's licensing of a private project on private land.

Because the Committee's definition of "undertaking" is consistent with NHPA, there is no compelling indication that the Historic Preservation Division's construction is wrong. As the Committee stated in the relevant regulation, "Section 18-6-9.1 authorizes and requires cooperation among state agencies in the identification and protection of significant cultural properties, furthering but not limited by the provisions of...[NHPA] as amended." CPRC Rule 87-7, at 2 (emphasis added). The Committee's regulations indicate that a state agency's licensing of a private project is an example of the State's indirect jurisdiction over an undertaking. Consequently, Section 18-6-9.1 would apply whenever the Health and Environmental Department's licensing functions may affect registered cultural properties on private property.

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private project." Id. at 1434 n.6. The court noted that the developer's assertion was erroneous because it "overlook[ed] or ignor[ed] the definition of the word 'undertaking' for purposes of NHPA, 36 C.F.R. § 800.2(C), which includes non-Federal action carried out pursuant to a permit." Id. NHPA therefore clearly extends to licensing activities. Cf. Edwards v. First Bank of Dundee, 534 F.2d 1242, 1245 (7th Cir. 1976) (NHPA inapplicable to private project to demolish bank building because project did not involve any federal agency with authority to license any undertaking).