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**STATE PROTOCOL  
BETWEEN  
THE NEW MEXICO BUREAU OF LAND MANAGEMENT  
AND  
THE NEW MEXICO STATE HISTORIC PRESERVATION OFFICER  
REGARDING THE MANNER IN WHICH BLM  
WILL MEET ITS RESPONSIBILITIES UNDER  
THE NATIONAL HISTORIC PRESERVATION ACT  
IN NEW MEXICO**

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### *Preamble*

On February 9, 2012, the Bureau of Land Management (BLM), the Advisory Council on Historic Preservation (ACHP) and the National Conference of SHPOs (NCSHPO) entered into a national Programmatic Agreement (nPA) that details the manner in which the BLM will meet its responsibilities under Sections 106, 110 (f) and 111 (a) of the National Historic Preservation Act (NHPA or the Act). The nPA is found at:

[http://www.blm.gov/wo/st/en/prog/more/CRM/blm\\_preservation\\_board/prog\\_agreement.html](http://www.blm.gov/wo/st/en/prog/more/CRM/blm_preservation_board/prog_agreement.html).

Through the provisions built into the nPA, the BLM, NCSHPO, and the ACHP—in consultation with Indian tribes, consulting parties and the public—ensure that the BLM will organize its programs to operate efficiently and effectively, according to the spirit and intent of Section 106 of the NHPA, and in a manner consistent with 36 CFR Part 800. The BLM will integrate its historic preservation planning and management decisions with other policy and program requirements to the maximum extent.

This State Protocol (Protocol) between the New Mexico BLM and the New Mexico State Historic Preservation Officer (SHPO) tiers off of the nPA and describes the manner in which the New Mexico BLM and the SHPO will interact and cooperate under the nPA. The BLM and the SHPO intend to streamline and simplify procedural requirements, and emphasize the common goal of planning for and managing historic properties under the BLM’s jurisdiction and control in the public interest. This Protocol supersedes the 2004 Protocol Agreement between the New Mexico BLM and SHPO.

**Bureau of Land Management.** The BLM, consistent with its authorities and responsibilities under the Federal Land Policy and Management Act of 1976 (FLPMA)( P.L. 94-579)(43 USC Part 1701 *et seq.*), is charged with managing public lands in New Mexico in a manner that will “protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values,” and “that will provide for outdoor recreation and human occupancy and use.”

The BLM also has specific responsibilities and authorities to consider, plan for, protect, and enhance historic properties and other resources that may be affected by its actions, in compliance with the National Environmental Policy Act (NEPA)(P.L. 91-190, as amended, 42 USC 4321 *et seq.*), the National Historic Preservation Act of 1966 (NHPA)(P.L. 89-665, 16 U.S.C. 470 *et seq.*) and implementing regulations of Section 106 of the NHPA at 36 CFR Part 800, the

Archaeological Resources Protection Act (ARPA)(P.L. 96-95, as amended, 16 USC 470aa *et seq.*) and implementing regulations at 43 CFR Part 7, the Native American Graves Protection and Repatriation Act (NAGPRA) (P.L. 101-601, 32 USC 3001 *et seq.*) and implementing regulations at 43 CFR Part 10, the Historic Sites Act of 1935 (16 USC 461 *et seq.*), the American Antiquities Act of 1906 ( 16 USC 431 *et seq.*), the American Indian Religious Freedom Act (AIRFA)(P.L. 95-341, as amended), Executive Order (EO) 13007 (“Indian Sacred Sites”), EO 13287 (“Preserve America”), EO 13175 (“Consultation and Coordination with Indian Tribal Governments”), and related authorities.

In carrying out its responsibilities specific to the NHPA, the BLM has:

1. developed policies and procedures through its directives system (BLM Manual Sections 8100-8170);
2. executed a nPA in 1997 and revised in 2012 to help guide the BLM’s planning and decision making as defined in the NHPA; and
3. assembled a cadre of cultural heritage specialists to advise the BLM’s managers and to implement cultural heritage policies consistent with the BLM’s statutory authorities.

In addition, under Section 110(a)(2)(D) and Section 110(a)(2)(E) of the NHPA, Federal agencies are required to consult with the SHPO to identify and evaluate historic properties for listing in the National Register of Historic Places (NRHP), and on the development and implementation of agreements [Memoranda of Agreement (MOAs) and Programmatic Agreements (PAs)] regarding the means by which adverse effects on such properties will be considered.

**State Historic Preservation Officer.** The New Mexico State Historic Preservation Officer (SHPO) has responsibilities under Section 101(b) of the NHPA that include:

1. advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;
2. identify and nominate eligible properties to the National Register and otherwise administer applications for listing historic properties on the National Register;
3. in cooperation with Federal and State agencies, local governments, and private organizations and individuals, direct and conduct a comprehensive statewide survey of historic properties and maintain inventories of such properties; and
4. consult with the appropriate Federal agencies in accordance with [the NHPA] on Federal undertakings that may affect historic properties, and the content and sufficiency of any plans developed to protect, manage, or to reduce or mitigate harm to such properties.

**Advisory Council on Historic Preservation.** The ACHP has the responsibility to:

1. administer the process implementing Sections 106, 110(f), and 111(a) of the NHPA;
2. to comment with regard to Federal undertakings subject to review under Sections 106, 110(f), and 111(a) of the NHPA in accordance with its implementing regulations (36 CFR Part 800); and
3. review the policies and programs of Federal agencies and recommend to such agencies methods to improve the effectiveness, coordination, and consistency of those policies and programs with the policies and programs carried out” under Section 202(a)(6) of the NHPA.

In addition, pursuant to the regulations implementing Section 106 of the NHPA (36 CFR 800.3(c)(4)), the ACHP may at times act in lieu of the SHPO.

**Indian Tribes.** The NHPA specifically requires that federal agencies consult with federally recognized Indian tribes as defined in that Act so that these Indian tribes may:

1. identify their concerns about historic properties, including those of traditional religious and cultural significance to them;
2. advise agencies on the identification and evaluation of historic properties;
3. articulate their views on the potential effects of an undertaking; and
4. participate in resolving adverse effects.

The BLM consults with Indian tribes on a government-to-government basis consistent with the Department of the Interior’s tribal consultation policy. While the BLM may initiate consultation under multiple authorities at one time, this Protocol governs compliance with the NHPA and in no way supersedes the BLM’s other treaty, trust, and consultation responsibilities to Indian tribes under multiple other authorities.

**Consulting Parties.** Consulting parties may include representatives of local governments, state agencies or departments, Indian tribes, project proponents, land owners, and certain organizations with a demonstrated interest in the undertaking due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties (36 CFR 800.2(c)(3-5)). The BLM, in consultation with SHPO, will identify consulting parties and invite them to participate in Section 106 consultation and shall consider all written requests of individuals and organizations to participate as consulting parties (36 CFR 800.3(f)).

**The Public.** The views of the public are essential to informed Federal decision-making, and the BLM shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties. The BLM must also provide the public with information about an undertaking and seek public comment and input (36 CFR 800.2(d)). Pursuant to 36 CFR 800.2(d)(3), the BLM may use its procedures to involve the public as described in this document or through its established NEPA procedures.

***Basis for Protocol***

Proceeding from these responsibilities, goals, and objectives, the BLM and SHPO acknowledge the following basis for agreement:

WHEREAS, the BLM's management of lands and mineral resources may affect historic properties as defined by the NHPA; and

WHEREAS, among other things, the BLM's historic preservation program, established in response to Section 110(a)(2) of the NHPA and related authorities provides a systematic basis for: (1) identifying, evaluating, and nominating historic properties under the BLM's jurisdiction or control to the NRHP; (2) managing and maintaining properties listed in or eligible for the NRHP in a way that considers the preservation of their archaeological, historical, architectural, and cultural values and the avoidance of adverse effects in consultation with Indian tribes, local governments, applicants, consulting parties, and the interested public; and (3) giving special consideration to the preservation of such values in the case of properties designated as having national significance; and

WHEREAS the BLM's program is also intended to ensure that its preservation-related activities will be carried out in consultation with Indian tribes, other Federal agencies, State agencies, local governments, consulting parties, and the interested public; and

WHEREAS the BLM's program also is intended to: (1) ensure that the BLM's procedures for compliance with Section 106 of the NHPA are consistent with current regulations issued by the ACHP pursuant to Section 211 of the NHPA (36 CFR Part 800, "Protection of Historic Properties"); (2) provide a process for the identification and evaluation of historic properties for listing in the NRHP and the development and implementation of agreements, in consultation with SHPOs, Indian tribes, local governments, consulting parties, and the interested public, as appropriate, regarding the means by which adverse effects on such properties will be considered and resolved; and

WHEREAS the SHPO, has an interest in continuing its cooperative relationship with the BLM to facilitate a more effective and efficient Section 106 consultation process, and promote activities of mutual benefit; and

WHEREAS the BLM acknowledges that Indian tribes possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them in accordance with 36 CFR 800.4(c)(1); and

WHEREAS the BLM's programs benefit from consultation with Indian tribes, including BLM's identification and management of properties of religious and cultural significance, and the BLM will ensure that its NHPA Section 106 procedures recognize the interests of Indian tribes in historic properties potentially affected by BLM decisions and will afford Indian tribes participation in the process leading up to a BLM decision, in accordance with 36 CFR Part 800; and

WHEREAS, the BLM employs the basic principles of government-to-government consultation with Indian tribes under cultural resources authorities including the NHPA as reflected in the nPA; and consults with the tribal representatives designated by the tribal governments for the purpose of identifying properties of religious and cultural significance that may be eligible for listing on the National Register and to understand tribal concerns; and

WHEREAS Indian tribes, especially those whose present or ancestral lands are located in areas where the BLM has surface or subsurface management responsibilities, may enter into formal or informal agreements with the BLM regarding consultation procedures under the NHPA Section 106 and that some Indian tribes may want to form a cooperative relationship with the BLM in a manner consistent with the purposes of the nPA to achieve a more effective and efficient Section 106 consultation process; and

WHEREAS the BLM continues to consult with the Apache Tribe of Oklahoma, the Comanche Nation, the Fort Sill Apache Tribe of Oklahoma, the Hopi Tribe, the Jicarilla Apache Nation, Kewa Pueblo (formerly Santo Domingo Pueblo), the Kiowa Tribe of Oklahoma, the Mescalero Apache Tribe, the Navajo Nation and affected Chapters, Ohkay Owingeh (formerly the Pueblo of San Juan), the Pawnee Nation of Oklahoma, the Pueblo of Acoma, the Pueblo of Cochiti, the Pueblo of Isleta, the Pueblo of Jemez, the Pueblo of Laguna, the Pueblo of Nambe, the Pueblo of Picuris, the Pueblo of Pojoaque, the Pueblo of San Felipe, the Pueblo of San Ildefonso, the Pueblo of Sandia, the Pueblo of Santa Ana, the Pueblo of Santa Clara, the Pueblo of Taos, the Pueblo of Tesuque, the Pueblo of Zia, the Pueblo of Zuni, the Pueblo of Ysleta del Sur, the White

Mountain Apache Tribe, the San Carlos Apache Tribe, the Southern Ute Tribe, and the Ute Mountain Ute Tribe and the BLM takes into consideration tribal comments in BLM's planning in management decisions; and

WHEREAS this Protocol does not apply to proposed BLM undertakings located on or affecting historic properties on tribal lands, with respect to which the BLM will comply with the standard Section 106 process under 36 CFR 800.3 through 800.7, the process under 36 CFR 800.8(c), or an applicable program alternative under 36 CFR 800.14; and

WHEREAS, due to their previous and ongoing demonstrated interest in historic preservation in New Mexico, the BLM and SHPO have solicited comment and input on this Protocol from, and will continue to consult with, parties including: the Archaeological Society of New Mexico (ASNM), Chaco Alliance, El Camino Real de Tierra Adentro Trail Association (CARTA), the Historical Society of New Mexico, National Trust for Historic Preservation, New Mexico Archaeological Council (NMAC), the New Mexico State Land Office, the Old Spanish Trail Association (OSTA), the San Juan Citizens Alliance, and the SRI Foundation regarding historic preservation matters in BLM's planning and management decisions; and

WHEREAS, the BLM and SHPO had a public comment period during the Protocol revision process and has solicited comments and input from various interest groups and industries, including the Independent Petroleum Association of New Mexico, the New Mexico Oil and Gas Association (NMOGA), and... [amend list based on results of public comment period]; and

WHEREAS the BLM and SHPO intend that efficiencies in the NHPA Section 106 process, realized through this Protocol, will enable the BLM and SHPO staffs to devote a larger percentage of their time and energies to: (1) focus on complex and priority undertakings; (2) analyze and synthesize data accumulated through decades of Section 106 compliance; (3) identify historic properties where information is needed; (4) plan for long-term preservation; (5) nominate properties to the NRHP; (6) manage historic properties in a planned and priority-based way; (7) engage in creative public education and interpretation; (8) engage in more effective tribal consultation and public outreach; and (9) embark on other activities that will have readily recognizable tribal and public benefits.

NOW, THEREFORE, the BLM and the SHPO mutually agree that the BLM, consistent with the provisions of this Protocol, will meet its responsibilities under the NHPA as provided for in 36 CFR 800.14(b), rather than by following the procedure set forth in 36 CFR 800.3 through 800.7. The BLM will integrate the manner in which it meets its historic preservation responsibilities as fully as possible with its other responsibilities for land-use planning and resource management.

The BLM shall ensure that the following stipulations are carried out:

### ***Stipulations***

#### **I. BLM RESPONSIBILITIES AND GENERAL PROCEDURES**

To the extent of its legal authority, and in coordination with the SHPO, the BLM shall ensure that the measures in this Protocol are implemented. The Protocol establishes a streamlined consultation process for most BLM undertakings but includes provisions to follow the process in 36 CFR Part 800 or other agreement documents. It is a two-party agreement between the BLM and SHPO that specifies the manner in which the BLM works with SHPO and how the BLM consults with Indian tribes, consulting parties and the public in considering the effects of BLM's actions on historic properties and in its management of cultural resources under BLM jurisdiction.

#### **A. BLM Decisions and Responsible Officials**

- i. BLM agency officials who take legal and financial responsibility for Section 106 compliance include Field Office Managers, District Managers and the State Director. Only these individuals have approval authority for undertakings.
- ii. As acknowledged in the BLM 8100 Manuals and Handbooks, the NHPA, 36 CFR 800, and the Secretary of the Interior's *Standards and Guidelines for Archeology and Historic Preservation and Federal Agency Historic Preservation Programs*, BLM decisions regarding identification, determinations of eligibility, and treatment must be conducted by professionally qualified individuals. Those individuals within the BLM are the cultural resource specialists.
- iii. If BLM agency officials disagree with the advice provided to them by their cultural resource specialists, they may consult with the SHPO and/or the ACHP concerning these disagreements.

#### **B. BLM Project Planning**

Each Field Office is responsible for preparing land use planning documents such as Resource Management Plans (RMP), RMP amendments, RMP revisions, or cultural resource project plans at the regional or local level. Field Offices will, when beginning a planning effort, invite the SHPO, Indian tribes and other interested parties to participate in scoping for the purpose of identifying issues that should be addressed in the plan.

To facilitate broader and more proactive participation by SHPO, Indian tribes and other interested parties in BLM's management activities relating to cultural resources, the BLM will invite these parties to comment on any cultural resource use allocations (for BLM surface only), whether they are made in regional, local, or project plans. Recommended topics include: cultural resource identification, evaluation, nomination, condition, protection, maintenance, use, research, interpretation, consultation, public outreach, and community partnerships/heritage tourism opportunities.

In preparing planning documents, BLM will utilize all relevant information tools including SHPO records and documents, BLM Government Land Office (GLO) documents, municipal and county records, and electronic databases including the New Mexico Cultural Resource Information System (NMCRIS). The *User's Guide to the New Mexico Cultural Resource Information System: Guidelines for Submitting Cultural Resource Records* is available from the SHPO web site at <http://www.nmhistoricpreservation.org/documents/arms-documents.html>.

### C. BLM Handbooks

The BLM shall continue to manage historic properties in accordance with national BLM policies and procedures developed through its directives system (BLM Manual and Handbook Sections 8100-8170, and Instruction Memoranda). While the BLM's manuals and memoranda help guide decision-making, more precise standards and procedures applicable to New Mexico will continue to be found in the most current version of H-8100-1 *Procedures for Performing Cultural Resource Fieldwork on Public Lands in the Area of New Mexico BLM Responsibilities*. The handbook may be accessed at [http://www.blm.gov/pgdata/etc/medialib/blm/nm/programs/more/cultural\\_resources/cultural\\_docs.Par.77051.File.dat/H-8100-1\\_manual\\_final\\_V\\_8-21\\_.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/nm/programs/more/cultural_resources/cultural_docs.Par.77051.File.dat/H-8100-1_manual_final_V_8-21_.pdf). Copies of any proposed amendments to the manuals and handbooks will be forwarded to the SHPO, the ACHP, Indian tribes, and interested parties. These parties will be provided a minimum of 30 calendar days to comment on proposed changes. The BLM will take comments received during the review period into consideration in the final amendment. Copies of the final amendment will be provided to SHPO and other interested parties.

### D. Relationship of the Protocol to Other Agreements

- i. The most current versions of the following agreements will remain in effect indefinitely and are incorporated into this Protocol in *Appendix A*. Until they are modified to conform to this Protocol, compliance steps elaborated in these agreements will be followed even though they may vary somewhat from the procedures outlined in this Protocol. These agreements include:
  - a. Memorandum of Agreement (MOA) Governing Transfers of Public Lands to Private Ownership via Land Exchanges or Sales (*Appendix A.1*).

- b. MOU Regarding Cultural Resource Protection Responsibilities among USDI Bureau of Land Management, New Mexico and New Mexico State Land Office and New Mexico Historic Preservation Division (governs NM BLM-State land exchanges)(*Appendix A.2*).
  - c. Programmatic Agreement (PA) among U.S. Department of the Interior Bureau of Land Management New Mexico State Office (BLM); the New Mexico State Historic Preservation Officer (SHPO); and Advisory Council on Historic Preservation (ACHP) concerning Improved Strategies for Managing Historic Properties within the Permian Basin, New Mexico (*Appendix A.3*).
- ii. Additional existing agreements still in effect and negotiated under the previous Protocol or 36 CFR Part 800 are listed in *Appendix A*. These agreements will remain in effect until the undertakings have been completed, all reports submitted and approved and all terms of the agreements have been met. No existing informal and formal agreements between the BLM and an Indian tribe or tribes will be altered by this Protocol.
  - iii. Other PAs and MOAs may be developed when needed to define procedures that are not covered under the nPA or this Protocol. Agreement documents negotiated under this Protocol will be listed in *Appendix A* when signed and will be clearly differentiated from documents executed under the previous Protocol or under 36 CFR Part 800.

#### **E. When to Use the 36 CFR Part 800 Regulations in Lieu of the Protocol**

The regulations at 36 CFR 800.3 through 800.7, 800.8(c), and 800.14 will be followed in lieu of this Protocol in the following situations:

- i. Whenever the ACHP formally participates in the resolution of adverse effects for an undertaking;
- ii. When there are adverse effects to National Historic Landmarks (NHL);
- iii. Multi-state programs or projects;
- iv. If a field or District Office is decertified;
- v. When developing program alternatives, including project-specific PAs;
- vi. If the BLM or the SHPO terminates this Protocol;
- vii. If the national Programmatic Agreement is terminated or suspended for any reason;

- viii. For Resource Management Plans (RMPs) and RMP Amendments; and
- ix. Undertakings that are determined by the BLM or the SHPO to be subject to unusual public attention or involve strongly opposing viewpoints.

For large, multi-phased, or complex undertakings, the BLM and SHPO will consult to determine whether to follow the Protocol or the regulations at 36 CFR 800.3 through 800.7, 800.8(c), and 800.

#### **F. Multi-Federal Agency Undertakings**

- i. If an undertaking will affect lands administered within New Mexico by more than one federal agency, or funding or licensing is provided by another federal agency and the BLM is the lead agency for Section 106:
  - a. The BLM will determine whether to follow the Protocol or 36 CFR Part 800 (see Stipulation I.E);
  - b. When the situations at Stipulation I.E. do not apply, the BLM will utilize the Protocol for the entire undertaking if this is acceptable to the other federal agencies and Indian tribes. BLM will notify the SHPO of the decision to use the Protocol within 30 days, and the BLM will provide SHPO with documentation that the other federal agencies have agreed to follow the Protocol. Each land managing agency remains responsible for making determinations of National Register eligibility for resources it manages.
  - c. BLM will indicate on its initial submission that they are the lead federal agency and include a copy of the agreement with the other agency.
- ii. Where undertakings will affect lands within New Mexico administered by more than one federal agency, or funding or licensing is provided by another federal agency and another federal agency is the lead, consultation procedures used by the lead agency will be followed for the entire undertaking.
- iii. Where undertakings will affect lands within New Mexico administered by more than one Federal agency without a federal agency taking the lead, and the situations at Stipulation I.E. do not apply, the BLM will follow the Protocol for lands under its jurisdiction. The BLM will indicate on its initial submission to SHPO that this is a multi-federal agency undertaking submitted without a federal lead.

#### **G. BLM Responsibilities on Non-Federal Lands**

- i. The intent of the NHPA is to consider the effects of federal decision-making on historic properties regardless of land status. Therefore, the BLM will assure that its actions and authorizations are considered in terms of their effects on cultural resources located on non-federal as well as federal lands (16 U.S.C. 470h-2). The extent of BLM's responsibility for identifying and treating adverse effects to non-federal historic properties is based on the evaluation of the following factors:
  - a. Would the project remain viable if the federal authorization or funding were not provided?
  - b. How likely are historic properties to exist in the area of potential effects (APE)?
  - c. To what degree will the BLM authorizations affect the location of surface disturbing activities on non-Federal lands?
  - d. The amount of BLM land involved.
- ii. The BLM will conduct, or cause to be conducted, an inventory for and evaluation of cultural resources on non-federal lands within the APE, or in response to a land use application.
- iii. The BLM will consider the effects of its decision-making upon historic properties, and will resolve adverse effects to non-federal historic properties that would result from land uses carried out by or authorized by the BLM in accordance with Stipulation VIII.
- iv. When treatment involves data recovery, adequate time will be allocated for the analysis of the artifacts, samples, and collections recovered from non-federal lands and for report preparation. The artifacts, samples, and collections, except human remains, recovered from non-federal lands remain the property of the non-federal landowner unless donated to the federal government for curation. The BLM must receive complete and original copies of field notes, maps, records of analyses, photographs, other data, and reports for work conducted on behalf of the federal government. Reports resulting from work on non-federal land will be made available to the land owner.
- v. Identification and/or mitigation of adverse effects may be required as a condition of a lease, permit, or license issued by BLM, whether federal or non-federal lands are involved.
- vi. Because local regulations or state law (such as the New Mexico Cultural Properties Act, as amended (18-6-1 et seq.) may still apply to the non-Federal portions of an undertaking, the BLM will clarify for project sponsors the circumstances under which state, federal, or other laws and regulations apply.

## **II. BLM CONSULTATION WITH OTHER ENTITIES UNDER THIS PROTOCOL**

In order to allow an opportunity for interested parties to comment on the BLM undertakings subject to Section 106 review, the BLM will maintain an online list containing basic information about upcoming projects. This is currently called the NEPA Log and it is found at [http://www.blm.gov/nm/st/en/prog/planning/nepa\\_logs.html](http://www.blm.gov/nm/st/en/prog/planning/nepa_logs.html). Interested parties should contact the Field Office contact listed in the NEPA Log to obtain additional information about an undertaking that they may have an interest in. Each Field Office at [www.blm.gov/nm](http://www.blm.gov/nm) has a webpage that includes phone numbers and email addresses for additional public contacts.

## **A. Advisory Council on Historic Preservation**

The BLM will invite the Advisory Council on Historic Preservation (ACHP) to participate in consultation when undertakings meet the thresholds listed below and will follow the process at 36 CFR 800.6(b)(2) or 800.14(b) to resolve adverse effects whenever the ACHP formally participates in the resolution of adverse effects for an undertaking. Any BLM field office correspondence with the ACHP should be coordinated with the BLM State Office.

- i. Thresholds for ACHP Notification:
  - a. interstate and/or non-routine interagency projects or programs;
  - b. undertakings adversely affecting National Historic Landmarks (NHLs);
  - c. undertakings that the BLM determines to be highly controversial;
  - d. undertakings that will have an adverse effect and those adverse effects cannot be resolved through formal agreement between BLM and SHPO;
  - e. the development and approval of program alternatives, including project-specific PAs; and
  - f. the BLM and SHPO may choose to consult to identify specific circumstances and conditions that, when met, call for the ACHP's notification.
- ii. The ACHP may enter into consultation at any time, per the nPA section 5.d.
- iii. At any point in the Section 106 process, the BLM, SHPO or other consulting party may request the ACHP's guidance or participation. The ACHP may or may not elect to participate.

## **B. Indian Tribes**

- i. The BLM will consider the effects of its undertakings on historic properties significant to Indian tribes because of the association with tribal history, including those of traditional religious and cultural importance to a tribe. For specific undertakings, the BLM will consult on a government-to-government basis. Where appropriate the BLM will coordinate Section 106 consultation with the NEPA process. The BLM shall assure that

Indian tribes have the opportunity to identify historic property concerns and to participate as consulting parties in all aspects of consultation for projects that are of interest to them. In consulting with Indian tribes or authorized tribal representatives, the BLM will be guided by the following:

- a. BLM Manual 8120, *Tribal Consultation under Cultural Resource Authorities*
  - b. BLM Handbook H-8120-1, *Guidelines for Conducting Tribal Consultation*
  - c. Executive Order No. 13007, Indian Sacred Sites
  - d. Executive Order 13175 Consultation and Coordination with Indian Tribal Governments
  - e. National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties
  - f. 2011 DOI Tribal Consultation Policy and companion Secretarial Order 3317
  - g. NEPA
  - h. Native American Graves Protection and Repatriation Act (NAGPRA)
  - i. ARPA
  - j. BLM Manual 1780 – Tribal Relations (under development)
- ii. The NEPA and Section 106 project file shall include a list of Indian tribes contacted and documentation of the tribal concerns and recommendations derived from the consultation process, consistent with the confidentiality considerations in IV.B.7.
  - iii. General notification will occur as early as possible in the planning process, but no later than the identification stage. In addition to formal government-to-government consultation, the BLM may notify Indian tribes of undertakings through a variety of sources that may include email links to NEPA logs posted on the BLM NM web site. The BLM will seek information from Indian tribes about any historic properties of traditional cultural or religious significance which may be present within an undertaking's area of potential effect. The BLM State Office and Field Offices will ensure that Indian tribes have access to NEPA lists of proposed actions as posted on the NM BLM web site at [www.blm.gov/nm](http://www.blm.gov/nm) and that current contacts for Indian tribes are maintained on NEPA mailing lists. In addition, the BLM shall utilize periodic meetings, supplemental project lists, and project-specific consultation requests as needed to assure that Indian tribes have the opportunity to identify tribal concerns and to participate as consulting parties in all aspects of projects that are of interest to them. Indian tribes contacted and tribal concerns and recommendations derived from the consultation process shall be documented and addressed in the NEPA and Section 106 project file, consistent with the confidentiality considerations in IV.B.6.

- iv. When it is determined that an undertaking may affect an historic property identified by an Indian tribe as having traditional cultural or religious significance, the BLM shall consult further with the tribe regarding the identification, evaluation, assessment of effects, and the resolution of adverse effects, if applicable, with respect to the property.
- v. In accordance with 36 CFR 800.2(c)(ii)(E), BLM will work towards developing consultation Memoranda of Understanding (MOU) with Indian tribes, or at a minimum, a consultation process that meets the needs of both the Tribe and BLM. Such MOUs will recognize government-to-government relationships and will specify how individual Indian tribes wish to be consulted in the Section 106 process. Copies of signed MOUs, or documentation of the agreed upon consultation process, will be provided by BLM to the Indian tribe, the SHPO and the ACHP.
- vi. The BLM shall be sensitive to tribal concerns and rights regarding confidentiality and privacy and shall protect sensitive information to the fullest extent permitted by law, using applicable provisions and exemptions of Section 304 of NHPA, Section 9 of ARPA, and Section (b) of the Freedom of Information Act.
- vii. If a THPO/Indian tribe does not concur with BLM's determination of effect, the BLM will continue to consult with these parties to attempt to achieve concurrence. If these consultation efforts fail, then the procedures at 36 CFR 800.5(c)(2)(i) through (iii) or 800.5 (c)(2)(i) through (iii) will be followed.

### **C. Consulting Parties**

The BLM in consultation with SHPO will identify potential consulting parties for individual undertakings based on the nature of the undertaking, in a manner appropriate to the nature, complexity, and significance of the historic properties likely to be affected by the undertaking, and the parties' demonstrated interest. A "demonstrated interest" may be indicated by an organization that focuses on historic preservation, as exhibited in their mission statement, charter or bylaws, or a Certified Local Government (CLG) as defined at 36 CFR Part 61. Private landowners have a demonstrated interest when an undertaking affects their property.

The BLM shall invite potential consulting parties to participate, or consulting parties may request to participate in the Section 106 consultation process (Sections IV through VIII below) if they have a demonstrated interest in a BLM undertaking or its effects on historic properties. Any confidentiality concerns of Indian tribes, private individuals and businesses shall be addressed.

If a consulting party does not concur with BLM's determination of effect, the BLM will continue to consult with the party to attempt to achieve concurrence. If these consultation efforts fail, then the procedures at 36 CFR 800.5(c)(2)(i) through (iii) or 800.5 (c)(2)(i) through (iii) will be followed.

#### **D. The Public**

The BLM will seek out and consider the views of the public when carrying out actions under the terms of this Protocol. The BLM shall notify the public of proposed undertakings in a manner appropriate to the nature, complexity, and significance of historic properties likely to be affected by the undertaking, and the likely public interest. Any confidentiality concerns of Indian tribes, private individuals and businesses shall be addressed. The BLM will solicit such input through the public participation opportunities afforded by BLM's land use planning and environmental review processes established under NEPA and FLPMA, and in accordance with regulations at 43 CFR 1610.3. The BLM will also coordinate NEPA and NHPA to the extent possible.

The BLM shall ensure that environmental documents include information on historic properties that may be affected by the proposed action and alternatives, and that the public has access to findings made pursuant to this Protocol, consistent with Section 304 of NHPA and Section 9 of ARPA, and will consider comments or objections by members of the public in a timely manner.

### **III. BLM CONSULTATION RESPONSIBILITIES WITH SHPO UNDER THIS PROTOCOL**

#### **A. Formal Consultation**

- i. Formal consultation shall occur between the SHPO and the BLM as outlined in the procedures in Sections IV through VIII of this document. Formal consultations are completed by a letter on BLM letterhead and may be sent electronically. The purpose of formal consultation is to afford SHPO the opportunity to comment and for BLM to make informed decisions while building BLM's administrative record for the undertaking. SHPO's formal response will be on SHPO letterhead or by signed stamp and will include the SHPO tracking number. This response may be sent electronically.
- ii. Field Managers may provide early notification to the SHPO about upcoming projects likely to have an adverse effect on known historic properties, National Historic Landmarks (NHLs), high-potential segments of the National Historic Trails (NHTs), properties of religious and cultural significance to Indian tribes, traditional cultural properties (TCPs), and known resources that have not been fully evaluated for inclusion in the NRHP. Field Managers should use their best judgment in determining what projects should be brought to the SHPO's attention early in the process. The agency official should plan notifications appropriate to the scale of the undertaking and the scope of Federal involvement.

#### **B. Meetings and Other Communication**

- i. The SHPO and the BLM (state office, district manager or a field manager and/or staff) may meet at any time to discuss annual work plans, specific undertakings, outreach efforts, or other issues related to the BLM's management of cultural resources. Both parties will make every effort to arrange such meetings in a timely manner and to provide information requested. The SHPO and Field Office personnel are encouraged to discuss specific undertakings prior to formal consultation or any aspect of BLM's cultural resource management program. Unless a topic falls under the category of formal consultation, BLM and SHPO may communicate via telephone and email.
- ii. SHPO and BLM Deputy Preservation Officer will meet with field office cultural staff and management on an as-needed basis to visit projects, and discuss any issues concerning performance under the Protocol (e.g., differences between BLM and SHPO in NRHP eligibility evaluations or effect findings, etc.). Face-to-face meetings are preferred, but alternative meeting arrangements can be made to conduct the field office review in an interactive format.
- iii. Under special conditions, such as staffing shortages, unforeseen events, or non-discretionary actions, specified time frames for SHPO review may be extended or shortened through mutual agreement between SHPO and a BLM Field Office or the BLM State Office. Changes in review timeframes will be documented in writing, usually via email.
- iv. The BLM may determine that large projects can be more efficiently completed if cultural resource survey is phased. If survey for a project is to be phased, the SHPO shall be notified in advance. The notification will include a brief description of the overall project. SHPO and BLM tracking numbers shall be referenced by the BLM and SHPO in all subsequent documentation relating to all phases of the project.
- v. Any meetings specifically designed to discuss agreement documents must be coordinated with the BLM State Office.

#### **IV. IDENTIFICATION OF HISTORIC PROPERTIES**

##### **A. Undertakings**

"Undertakings" are defined in 36 CFR 800.16(y) to mean a project, activity or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

The BLM cultural resource specialist will, after reviewing a proposed action, determine if the proposed action is an Undertaking, regardless of whether the environmental consequences of the proposed action will be analyzed in a CX, DNA, or Environmental Assessment.

## **B. Area of Potential Effect**

“The area of potential effect (APE) means the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking” [36 CFR 800.16(d)].

In defining the APE, the BLM will consider potential direct, indirect, and cumulative effects to historic properties and their associated settings when setting is an important aspect of integrity, as applicable. The introduction of physical, visual, audible, or atmospheric elements has the potential to affect the historic setting or use of historic properties including but not limited to properties of religious and cultural significance to Indian tribes, and the BLM will take this into account in defining the limits of an indirect effects APE.

The BLM will consult with SHPO on undertakings for which a standard APE (see *Appendix B*) has not been developed, where the APE is smaller than those covered in the appendix, or where defining the APE is complicated or controversial (e.g. undertakings involving multiple agencies, multiple states, multiple applicants, and/or multiple Indian tribes).

The BLM will submit the APE documentation (maps and narrative explanation) to SHPO for a 10-day formal review, which can be transmitted electronically. The BLM may assume concurrence with the APE determination if SHPO does not respond within 10 days.

- i. Direct effects APE: The BLM will follow the established guidance on standard direct APEs for certain types of projects in *Appendix B*. The BLM cultural resource specialists will determine what portion of the APE will be subject to Class III inventory, including standard buffers. All cultural resources within the direct APE will be recorded and will be evaluated for NRHP eligibility.
- ii. Indirect effects APE: The indirect APE shall include known or suspected historic properties and their associated settings where setting is an important aspect of integrity. Identification efforts outside of the direct effects APE shall be at the approval of the BLM field manager, taking into account the recommendations of the BLM cultural resource specialist and the SHPO.

## **C. Undertakings Exempt from Further SHPO Consultation**

- i. The BLM and SHPO have identified specific projects or activities that are undertakings that do not have the potential to cause effects to historic properties. These undertakings are listed in *Appendix C: Undertakings Exempt from Further SHPO Consultation (Exemptions)*. The BLM and SHPO may agree that other classes of actions may be added to *Appendix C* by mutual agreement.
- ii. The BLM cultural resource specialist will determine if the undertaking is exempted as identified in *Appendix C*.
- iii. If the undertaking is exempted, the BLM has no further obligations under Section 106 or this Protocol.
- iv. BLM will contact SHPO if there is a question on whether a proposed action constitutes an undertaking that might affect historic properties. The SHPO will provide comments within 10 calendar days of receipt of the request. The SHPO's comments and the BLM's agreement or disagreement with the comments will be made part of the records for the proposed action.

#### D. Determine Information Needs

The BLM cultural resource specialist will, during the earliest feasible planning stage of any undertaking, determine the information needed to identify cultural resources (i.e., including but not limited to archeological sites, historic structures, engineering features, districts, properties of religious and cultural significance, and TCPs) situated within the direct and indirect APEs. Such determinations may be based on a file search of the SHPO and BLM cultural resource records, aerial photographs, GLO records, BLM land records, consultation with Indian Tribes and consulting parties, resource management plans, and project-specific NEPA documents of the proposed project. The BLM will take cumulative effects into consideration.

- i. Previous Adequate Inventory: The BLM cultural resource specialist will determine whether the existing inventory of the entire APE, or portion of the APE, is appropriate for the current undertaking. A BLM decision to accept the results of past inventory efforts will be based on the geomorphological stability of the APE, the field methods used, the adequacy of the historic property documentation, and confidence derived from field monitoring of the results of other surveys by the investigators involved. This will include an assessment of need for further consultation with Indian tribes, or site updates and/or reevaluations. The BLM may consult with SHPO to determine whether existing inventory is sufficient for the current undertaking. If the BLM determines that additional inventory is not necessary, the BLM shall document this finding (providing references to prior reports) and will assess effects and consult following the procedures in Section VI and VII.
- ii. Level of Inventory: BLM will complete a reasonable and good faith effort to identify

historic properties within the APE for undertakings it authorizes, licenses, or approves that have the potential to affect historic properties. When determining the level of inventory, the BLM will consider direct, indirect and cumulative effects.

- a. If the BLM determines that a Class III inventory of the APE is necessary, the BLM will not seek the SHPO's views on identification efforts.
  - b. If the BLM determines to conduct an inventory at less than a Class III level (except as specified in Section IV.B.iii. and iv. below), BLM will discuss the adequacy of the inventory design with SHPO prior to initiating the inventory or authorizing the proposed undertaking, unless specifically addressed in an appendix to this Protocol. The BLM will address SHPO comments in making a final determination of the inventory design. Alternative identification strategies, such as oral history interviews, background research, or Class II sample surveys may be sufficient to identify historic properties within the APEs for certain classes of undertakings. Less than Class III inventory may also be warranted when the conduct of such inventory would pose a health risk to the crew.
  - c. The BLM may determine that inventory for large projects should be phased. The BLM shall notify the SHPO by letter in advance and will provide a brief description of the project and the rationale for phasing. SHPO and BLM tracking numbers shall be referenced by the BLM and SHPO in all subsequent documentation related to all phases of the project.
  - d. The BLM may develop programmatic inventory strategies for certain classes of undertakings in consultation with the SHPO, Indian Tribes, and Interested Parties in addition to those already in use (BLM Manual). Once an inventory strategy has been approved by the above parties, the strategy will be added to the Protocol as an appendix. The BLM may apply that programmatic inventory strategy to applicable undertakings without additional consultation with the SHPO.
- iii. Disturbed Areas. The BLM cultural resource specialist will determine whether previous ground disturbance has modified the surface so extensively that the probability of finding intact cultural resources within all or part of the direct APE is negligible. If such disturbance has occurred within the APE, these areas may be exempt from inventory. Indirect and cumulative effects of the undertaking shall still be considered.
  - iv. Areas of Low Probability for Cultural Resources. The BLM may determine that specific areas do not need to be inventoried because current information suggests the area has little or no probability to contain cultural resources. Determinations regarding the applicability of low probability indicators may be made only by BLM cultural resource specialists following the consultation requirements below. Low probability for cultural resources due to environmental factors or other conditions may allow some lands to be

exempted from inventory. For example, BLM may exclude steep slopes (slopes of 30% or more) with no probability for sites such as rock art or rock shelters. If low probability areas for cultural resources occur within a field office, BLM will consult with SHPO to determine whether or not these areas will be exempted from inventory. Areas exempted for low probability will be negotiated between BLM and SHPO and will be appended to this Protocol. Other indicators of low probability may be agreed upon as developed jointly by BLM and SHPO.

## V. DETERMINATIONS OF ELIGIBILITY

### A. Agency Determinations

- i. BLM will determine if there are historic properties within the APE by applying all of the National Register criteria and criteria considerations found at 36 CFR 60.4. All cultural resources including but not limited to archaeological sites, historic buildings and structures, engineering features, properties of religious and cultural significance and TCPs will be evaluated. NRHP evaluations will be guided by the *Secretary's Standards and Guidelines for Evaluation*, the National Register Bulletin *How to Apply the National Register Criteria for Evaluation*, other National Register bulletins and appropriate historic contexts. The integrity of location, setting, design, materials, workmanship, feeling, and association will be considered as part of the evaluation, taking into account the nature of the property and its setting where setting is an important aspect of integrity.
- ii. Details of the NRHP eligibility evaluations shall be discussed and included in the report and on the appropriate NMCRIS forms. BLM's determinations shall be entered into NMCRIS.
- iii. If a property's NRHP eligibility remains uncertain after the inventory, that property will be treated as eligible for purposes of the BLM making an initial effect determination. If the property will be affected by the undertaking, the BLM will conduct additional studies as appropriate to make a final determination of NRHP eligibility.
- iv. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the BLM to reevaluate properties previously determined NRHP eligible or ineligible (36 CFR 800.4(c)(1)). If the BLM finds it appropriate to change the eligibility of a cultural resource or historic property from eligible to not eligible or from undetermined to not eligible, they must consult to seek SHPO concurrence on the changed determination.
  - a. The BLM will forward the report, site forms, and other documentation as

appropriate to the SHPO and include a justification for the change and initiate consultation. Requests for a change in eligibility as discussed above shall be a separate SHPO consultation.

- b. If SHPO does not respond within 10 days or within a mutually agreed period if SHPO needs additional time, the BLM may assume concurrence with the change in eligibility.
- c. If consensus cannot be achieved through further discussions, the BLM shall follow the steps in V.B.ii.

## **B. SHPO Involvement**

- i. The SHPO will monitor a sample of determinations of eligibility and complete the SHPO block in NMCRIIS. If SHPO disagrees with a BLM determination of eligibility, the SHPO will provide comments immediately to the BLM Field Office upon review. If the project has not been authorized, the BLM and SHPO will consult to reach consensus on the determination of eligibility. If the project has been authorized, the BLM will take the SHPO's comments on eligibility into consideration on future determinations of like properties. If the SHPO identifies patterns in differences in eligibility determinations, SHPO will contact the BLM to discuss the matter further. The SHPO and BLM may conduct onsite meetings, contact the BLM state office, or implement other measures as appropriate to improve BLM-SHPO agreement on eligibility evaluations.
- ii. The BLM field office and SHPO will consult to achieve consensus on the eligibility of cultural resources in New Mexico. If the field office and the SHPO cannot agree through further discussions on the eligibility of a cultural resource, they will seek assistance from the BLM state office to help reach agreement. If agreement cannot be reached, then the BLM will request a formal determination of eligibility from the Keeper of the National Register of Historic Places (Keeper), pursuant to 36 CFR 800.4(c)(2). The process detailed in 36 CFR Part 63, the National Park Service (NPS) regulations on *Eligibility for Inclusion in the National Register of Historic Places* will be followed. The Keeper's determination will be final. BLM cannot proceed with a final determination of effect until the eligibility of a property has been resolved.
- iii. The BLM and SHPO will collaborate on initiatives to improve eligibility determinations in New Mexico, including but not limited to preparing new historic contexts for specific property types, periods of significance, or under-researched areas; writing guidance for improving documentation for specific property types; establishing a workgroup to address a particular problem or issue; and holding workshops on various topics.

## VI. ASSESSMENT OF EFFECT

The BLM cultural resource specialist will assess the effects of an undertaking or project on historic properties including effects to the setting, feeling, association, location, design, materials, and workmanship. The assessment of effect shall consider reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative. If setting is a contributing aspect of integrity, the BLM will take measures to document the effects of the undertaking on the setting, e.g. viewshed analysis, visual simulations, or visual contrast rating (VCR) analysis. The BLM will consider atmospheric and auditory effects, when appropriate.

The BLM will avoid or minimize effects to historic properties where possible during project design by integrating standard measures and/or best management practices (BMPs). The final project design must incorporate all agreed upon standard measures and these will be included in the stipulations (e.g. Conditions of Approval) of the relevant authorization (e.g. Approved APD, ROW Grant etc.). Standard measures and BMPs are avoidance and minimization measures, and are not mitigation measures for resolving adverse effects.

### A. No Historic Properties Affected

If there are no cultural resources or historic properties identified, or if they are present but will not be affected by the undertaking, a determination of “No Historic Properties Affected” is appropriate. If a setting analysis is completed, and a proposed project will not be visible from the historic property, then a determination of “No Historic Properties Affected” is appropriate. A determination of No Historic Properties Affected is generally not appropriate when the undertaking involves new disturbance and passes through a historic property.

### B. No Adverse Effect

i. If a historic property is being affected by a proposed undertaking, but the effect will not diminish the aspects of integrity nor alter, directly or indirectly, any of the characteristics that make the property eligible for listing in the NRHP, then a finding of “No Adverse Effect” is appropriate as defined in 36 CFR 800.5(b). This applies to all historic properties located within the APE.

ii. If it can be demonstrated that the portion of the property that will be affected, directly or indirectly, lacks integrity, then a finding of “No Adverse Effect” is appropriate. For archaeological sites this will usually involve documentation on how the archaeological site has been disturbed and a discussion of how the integrity of the deposits has been compromised.

iii. If setting, feeling and/or association are contributing aspects of integrity for any historic property, and a proposed undertaking will be visible from the historic property, but the

project elements will not dominate the setting or attract the attention of the casual observer, the BLM will document the decision and a finding of “No Adverse Effect” is appropriate as provided in 36 CFR 800.5(b).

iv. If the BLM proposes stabilization, rehabilitation, or reconstruction of NRHP eligible sites, buildings, structures, or objects, and the work is consistent with the Secretary of Interior’s Standards for the Treatment of Historic Properties, a finding of “No Adverse Effect” is appropriate as provided in 36 CFR 800.5(b).

**C. Adverse Effect**

- i. Per the Section 106 regulations at 36 CFR 800.5(a)(1), “An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the [NRHP] in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.”
- ii. If there are historic properties which may be affected by the undertaking, the BLM cultural resource specialist shall apply the criteria of adverse effect and will request and incorporate comments of appropriate consulting parties and/or Indian tribes in making its finding.
- iii. If the BLM determines that the undertaking will have an “adverse effect” on historic properties, they will document this finding and notify SHPO, Indian tribes, consulting parties and the public pursuant to 36 CFR 800.6(a) and will follow the procedures in Section V.F.ii of this Protocol.
- iv. If setting, feeling and/or association are contributing aspects of integrity for any historic property, and a proposed undertaking will be visible from the historic property, and the project elements dominate the setting, a finding of “Adverse Effect” is appropriate as provided in 36 CFR 800.5(a)(1). In these cases, BLM will document the finding and consult with SHPO following the procedures in Section V.F.ii of this Protocol.
- v. If the proposed undertaking will result in the physical destruction of or damage to all or part of the historic property, including research excavation projects, a finding of “Adverse Effect” is appropriate as provided in 36 CFR 800.5(a)(1). The BLM will document this finding and consult with SHPO following the procedures in Section V.F.ii of this Protocol.

**D. Non Concurrence with Determination of Effect**

If the SHPO, THPO, Indian tribe or any consulting party disagrees with BLM's determination of effect as outlined above, the procedures at 36 CFR 800.4(d)(1)(ii) through (iii); or 36 CFR 800.5(c)(2)(i) through (iii) will be followed.

**VII. REPORTING STANDARDS AND CONSULTATION PROCEDURES**

**A. Reporting and Documentation Standards**

- i. The BLM will ensure that all reports completed by BLM staff and by contractors permitted by the BLM to work in New Mexico will be prepared according to the latest guidance provided in H-8100-1 *Procedures for Performing Cultural Resource Fieldwork on Public Lands in the Area of New Mexico BLM Responsibilities* (H-8100-1).
- ii. The BLM will ensure that cultural resource investigations are registered in NMCRIS and that all sites, buildings, structures, objects and districts are documented online using the appropriate NMCRIS forms, including but not limited to the NMCRIS Investigation Abstract Form (NIAF), the Laboratory of Anthropology (LA) site record, the Historic Cultural Property Inventory Form (HCPI) and other specialized forms developed by SHPO (e.g., acequias/historic irrigation ditches). These forms will be prepared according to the current *User's Guide to the New Mexico Cultural Resource Information System: Guidelines for Submitting Cultural Resource Records*.
- iii. BLM and SHPO will collaborate on the development of revised standards for preparing inventory and treatment reports, including the review and modification of the NM BLM 8100.1 Handbook. BLM and SHPO will set a goal of revising the Handbook within two years of signature of this Protocol, in consultation with contractors permitted by the BLM to work in the state of New Mexico, Indian tribes, and interested parties. All future changes or amendments to the Handbook procedures will be made in consultation with the SHPO.
- iv. The BLM field offices may issue additional guidance to supplement the BLM 8100.1 Handbook. The BLM Deputy Preservation Officer (DPO) and the SHPO will have an opportunity to review and comment on the guidance prior to the guidance going into effect. The field offices will take the comments into consideration in the final guidance document.

**B. Completion of Cultural Resource Reports**

- i. The BLM will not allow projects to be completed without adequate provisions for the timely completion of all reports and associated records generated under the terms of this Protocol.
- ii. All BLM-prepared inventory reports will be submitted to the SHPO within 6 months of completion of fieldwork, if possible. If additional time is needed, the BLM will notify the SHPO and provide a date when the report(s) will be submitted.
- iii. The BLM may utilize contracts or other means of obtaining services to complete the preparation of all backlogged reports and associated forms for submittal to SHPO and NMCRIS. Backlogged reports are older than one year and not currently associated with an active project. Documentation of backlogged reports shall include reports, NMCRIS forms (NIAF, LA site records and other NMCRIS forms) and locational data on inventory area and site location(s) to the degree possible according to the information known about the past project that generated the inventory.

### **C. Consultation Procedures and Submittals**

BLM and SHPO will continue to collaborate to develop and implement a system for the electronic submission of records. The purpose of this system is to track agency actions as well as to facilitate the submission of report and site records electronically into NMCRIS, which will greatly increase the efficiency of data management, review, and annual reporting. BLM and SHPO will work to insure that this system meets agency and SHPO needs.

Until the electronic tracking and submittal system is established, the BLM will ensure that all reports and associated documents are submitted in a timely manner either monthly or within 30 days after making an effect finding, completing determinations of eligibility in NMCRIS and determining the report meets the appropriate standards.

Once the BLM has determined the eligibility of all cultural resources and made a decision about the effect of the undertaking, in consultation with Indian Tribes, consulting parties and the public as appropriate, the BLM will report the determinations to the SHPO and consult with SHPO to seek concurrence in the following manner.

#### **i. No Historic Properties Affected**

- a. When only isolated manifestations (isolated occurrences) or no cultural resources of any kind are identified by the inventory, the NIAF will be used to document the undertaking, the APE, and the results of the survey. The BLM will upload their review documentation

(e.g. record of review, cover letter) into NMCRIS after determining the NIAF meets standards. A list of No Historic Properties Affected undertakings and copies of the NIAFs, if applicable, will be submitted monthly to SHPO. The BLM will notify consulting parties and may proceed with the undertaking.

- b. When the inventory only identifies ineligible sites, buildings, structures or objects; or all effects to historic properties are avoided; the BLM will upload their review documentation into NMCRIS after determining the report meets standards and completing determinations of eligibility. Copies of the applicable reports and NMCRIS forms will be submitted monthly to SHPO. The BLM will notify consulting parties and may proceed with the undertaking.
- c. The SHPO will review a sample of the BLM's "No Historic Properties Affected" findings, reports and forms. If SHPO has questions about the documentation or the findings, they will provide comments to the BLM immediately upon review. The BLM will take these comments into consideration on future similar cultural resources and/or projects. If the SHPO identifies a pattern indicating that the BLM is not taking SHPO comments into consideration, the SHPO will contact the BLM to discuss the matter further to reach consensus if possible. The SHPO and BLM may conduct onsite meetings, contact the BLM state office, or implement other measures as appropriate to improve BLM-SHPO agreement.

ii. **No Adverse Effect**

a. **Historic Properties Eligible Only under Criterion D**

1. If undertakings affect historic properties eligible only under Criterion D, then the BLM will upload their review documentation into NMCRIS after determining the report meets standards and completing determinations of eligibility in NMCRIS. A list of No Adverse Effect findings and copies of the applicable reports and NMCRIS forms will be submitted monthly to SHPO. The BLM will notify consulting parties and may proceed with the undertaking.
2. The SHPO will review a sample of the BLM's "No Adverse Effect" findings, reports and forms for undertakings that only involve historic properties eligible under Criterion D. If SHPO has questions about the documentation or the findings, they will provide comments to the BLM immediately upon review. The BLM will take these comments into consideration on future similar historic properties and/or projects. If the SHPO identifies a pattern indicating that the BLM is not taking SHPO comments into consideration, the SHPO will contact the BLM to discuss the matter

further to reach consensus, if possible. The SHPO and BLM may conduct onsite meetings, contact the BLM state office, or implement other measures as appropriate to improve BLM-SHPO agreement.

b. Historic Properties Eligible under Criteria A, B and/or C or Multiple Criteria

1. If undertakings affect historic properties eligible under Criterion A, B, and/or C or multiple criteria, the BLM will submit the project report to the SHPO within 30 days after determining the report meets standards and completing determinations of eligibility in NMCRIS. The project report and NMCRIS recording forms must discuss how the effect to the property or the portion of the property will not diminish the aspects of integrity nor alter the characteristics that make the property eligible for the NRHP.
2. SHPO will review and comment on the effect determination within 30 days of receipt of the documentation. If the SHPO does not respond within 30 days, the BLM may proceed with the undertaking in accordance with the proposed conditions or standard treatment measures, provided there are no unresolved objections from other consulting parties or Indian tribes. The BLM may request a shorter timeframe for SHPO review.
3. If the SHPO objects to BLM's No Adverse Effect determination, the SHPO and the BLM will consult to resolve the objection. If the objection cannot be resolved, or if the SHPO does not respond and unresolved objections from other consulting parties exist, the BLM shall seek the views of the ACHP to resolve the objection per the dispute resolution process in Section XIV.

**iii. Adverse Effect**

If the BLM determines that an undertaking will have an "Adverse Effect" on historic properties, the BLM will submit the project report and NMCRIS forms to the SHPO within 30 days after determining the report meets standards. The SHPO will provide comments within 30 days of receipt of the report and forms. When the inventory report, NMCRIS forms and the data recovery plan or other treatment plan are submitted together, the SHPO may request a longer timeframe. If SHPO does not respond within the agreed-upon timeframe, BLM may assume concurrence with determinations of eligibility and effect. The BLM will proceed with the resolution of adverse effect procedures in Section VIII of this Protocol.

## VIII. RESOLUTION OF ADVERSE EFFECTS

The BLM will resolve adverse effects through one of two processes, with or without an agreement document. In a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the BLM will notify Indian tribes, consulting parties and the public of their adverse effect determinations and will invite their comments. If an Indian tribe, consulting party (including applicants, as appropriate) or the interested public wishes to participate in the resolution of adverse effects, the BLM will follow the process outlined in 36 CFR 800.6 and will prepare an agreement document. If no Indian tribe, consulting party or member of the public wishes to participate in the resolution of adverse effects, BLM and SHPO will follow a streamlined process that does not require preparation of an agreement document. The BLM field offices will prepare an annual list of adverse effect findings resolved using the streamlined process. This list will be included in BLM's annual report to SHPO.

Based on the effect of the undertaking on the historic property and the historic property's NRHP criteria, BLM will resolve adverse effects by developing and implementing a treatment plan to avoid, minimize and mitigate the adverse effect as appropriate. Treatment measures may include data recovery, Historic American Buildings Survey/Historic American Engineering Record/Historic American Landscapes Survey (HABS/HAER/HALS) documentation, archival research, public education and outreach, and/or compensatory mitigation. Public education and outreach should be included in any treatment plan, commensurate with the scale of the undertaking's effects.

### A. Resolutions of Adverse Effects Not Requiring an Agreement Document

- i. Data Recovery and Research Excavation. When the BLM proposes to resolve adverse effects through data recovery, then the BLM will prepare, or cause to be prepared, a data recovery plan and the BLM will implement the procedures as follows. This plan most often involves properties eligible under Criterion D only, but could include properties eligible under D and other criteria.
  - a. Data Recovery Plan. The BLM field office will submit the treatment plan to BLM's Data Recovery Review Team (DRRT). The DRRT is the group of senior BLM cultural resource specialists including the Deputy Preservation Officer (DPO), the BLM Permit Administrator, and the designated individuals from the Farmington, Albuquerque, Pecos, and Las Cruces districts. The DRRT comments on and suggests improvements to testing, data recovery and other mitigation proposals and communicates any needed changes to the BLM Field Office archeologists within 15 days of receipt of all materials.

Once the plan is accepted by DRRT, the BLM field office will send the plan to SHPO for review and comment. The SHPO will provide comments to the BLM within 10 days of receiving the data recovery plan. If the SHPO does not respond within 10

days, the BLM may assume SHPO concurrence with the plan. Comments submitted by the SHPO, shall be taken into consideration by BLM and the data recovery plan revised, if necessary. BLM will submit a written response to comments to SHPO prior to the start of data recovery.

Compliance with the approved data recovery plan will be included in the project Conditions of Approval in the ROW grant or Record of Decision. Objection to or failure to implement or comply with the approved data recovery plan by the project proponent will require consultation with SHPO to determine BLM's next steps.

- b. Data Recovery Reports: Preliminary (status) reports, if prepared, and draft final data recovery reports will be provided to the SHPO within 30 days of BLM review and acceptance. The SHPO will provide comments within 30 days of receipt of the draft. The BLM may request a shorter timeframe depending on the complexity of the project. If the SHPO does not intend to provide comments, the SHPO will notify the BLM immediately upon making this decision. Comments submitted by the SHPO shall be taken into consideration by the BLM and the draft data recovery report will be revised, if necessary.

Final data recovery reports will be provided to the SHPO within 30 days of BLM review and acceptance. The BLM will concurrently submit the documentation (report and updated site forms) to NMCRIS. The SHPO may review the BLM's final reports. If SHPO has concerns regarding the report, the SHPO will provide comments to the BLM Field Office. The BLM will take these comments into consideration on future data recovery projects.

- ii. Other Treatment Plans. If there are historic properties within the APE that will be adversely affected and data recovery is not the only treatment measure or is not the appropriate treatment measure, BLM will prepare, or cause to be prepared, a treatment plan. BLM is encouraged to discuss treatment measures with SHPO prior to preparation of the plan when any of the affected historic properties are eligible under criterion C. The BLM field office may submit the plan to the DRRT for review.

- a. Treatment may include but are not limited to the following:

- 1. Historic American Buildings Survey/Historic American Engineering Record/Historic American Landscapes Survey (HABS/HAER/HALS). Typically HABS/HAER documentation will be prepared for buildings and structures eligible only under Criterion C. Any HABS/HAER/HALS projects must be coordinated with the NPS Intermountain Region Office (IMR);
- 2. Preservation, Rehabilitation or Reconstruction. Treatment plans involving preservation (including stabilization), rehabilitation or

reconstruction will follow the Secretary of Interior's standards and guidance found in

[http://www.nps.history.gov/history/hps/TPS/standguide/;](http://www.nps.history.gov/history/hps/TPS/standguide/)

3. Archival Research. Treatment may involve researching the history of the historic property and/or the region and its people to address research themes. This may include primary research at sources including national, state or local archives, university collections, museum collections, HABS/HAER documentation, census data, General Land Office (GLO) records, local newspapers, family histories, land deeds, photos, maps, regional and economic data on precipitation averages, livestock and cash crop prices;
  4. Oral Histories. Treatment plans involving oral history should follow the guidance found in the Handbook for Oral History-NPS, 2004 by Janet A. McDonnell (31 pages): <http://www.cr.nps.gov/history/oh/oralh1.htm>; and Oral History Association: Principles and Best practices, 2009: [http://www.oralhistory.org/about/principles-and-practices/;](http://www.oralhistory.org/about/principles-and-practices/)
  5. Ethnography. Treatment plans involving ethnography should follow the guidance found in NPS Essential Competencies for an Ethnography; American Anthropological Association's statement on Ethnography: <http://www.aaanet.org/stmts/irb.htm>; NPS NRHP Bulletin 38-TCPs, Appendix II, Professional Qualifications for Ethnography: <http://www.nps.gov/nr/publications/bulletins/nrb38/nrb38%20apendix%202.htm>;
  6. Translations. Treatment may involve translation of documents to English, Spanish or other languages as appropriate; and
  7. Public Education and Outreach. Treatment may involve workforce training and education on cultural sensitivity; preparation of papers, brochures, articles, books or booklets written for the general public in jargon-free language and include professional quality photographs and/or drawings as appropriate; preparation of a curriculum for use in schools; a public interest story to be posted on the BLM's web site, press release, article for NewsMAC; and exhibits, including formal displays, posters, wayside exhibits, etc.
- b. SHPO Review of Treatment Plan. BLM will submit the treatment plan to SHPO for review and comment. If the SHPO does not respond within 30 days, BLM may assume concurrence with the proposed treatment plan. Comments provided by the SHPO shall be taken into consideration by the BLM and the treatment plan

revised, if necessary. The BLM will submit a written response to the comments to SHPO prior to implementation of the plan. Compliance with the approved treatment plan will be included in the project's Conditions of Approval. Objection to or failure to comply with the approved treatment plan by the project proponent will require consultation with SHPO and negotiation of a MOA.

- c. Draft and Final Reports. Preliminary (status) reports (if necessary) and draft final reports will be provided to the SHPO within 30 days of BLM review and acceptance. The SHPO will provide comments within 30 days of receipt of the draft. The BLM may request a shorter timeframe. If the SHPO does not intend to provide comments, the SHPO will notify the BLM immediately upon making this decision. Comments submitted by the SHPO shall be taken into consideration by the BLM and the draft report will be revised, if necessary.

Final data recovery reports will be provided to the SHPO within 30 days of BLM review and acceptance. The BLM will concurrently submit the documentation (report and updated site forms) to NMCRIS. The SHPO may review the BLM's final reports. If SHPO has concerns regarding the report, the SHPO will provide comments to the BLM Field Office. The BLM will take these comments into consideration on future data recovery projects.

## **B. Resolution of Adverse Effects Requiring an Agreement Document**

If an Indian tribe or consulting party wishes to participate in the resolution of adverse effects, the BLM will follow the process outlined in 36 CFR 800.6 and will prepare an agreement document. Upon receipt of SHPO concurrence of a determination of adverse effect, BLM will continue consultation with SHPO, Indian tribes and consulting parties, and as appropriate, the ACHP (if the undertaking meets the thresholds at II.A.i), to develop an agreement document. Standard measures and BMPs are not mitigation measures for resolving adverse effects, but must be applied prior to making a determination of effect.

- i. Parties to the Agreement:
  - a. Any meetings specifically designed to discuss agreement documents must be coordinated with the BLM State Office cultural staff. There are three formal types of consulting parties as set forth in 36 CFR 800.6(c)(1-3): Signatories, Invited Signatories and Concurring Parties.
  - b. Signatories: Signatories are the BLM, the SHPO and the ACHP (if they are participating). The signatories have sole authority to execute, amend or terminate the agreement.

- c. **Invited Signatories:** The BLM authorized officer may invite additional parties to participate as Invited Signatories and will invite any party with responsibilities under the agreement, such as the applicant, to participate as in the agreement. Any Invited Signatory that signs the MOA or PA shall have the right to seek amendment or termination of the MOA/PA. The refusal of any Invited Signatory to sign a MOA or PA does not invalidate the MOA or PA.
- d. **Concurring Party:** The BLM authorized officer may invite other consulting parties to concur. A consulting party invited to concur has no responsibility under the agreement, but may be invited to sign the agreement as a Concurring Party. The refusal of any Concurring Party invited to sign a MOA or PA does not invalidate that MOA or PA.

ii. Agreement Document Process

Preparation of a MOA/PA follows consultation between all consulting parties. Unless otherwise agreed upon, the BLM is responsible for preparing the MOA/PA. Stipulations included in the MOA/PA shall come from consultation among all consulting parties and will be incorporated into BLM's stipulations for the undertaking. Generally the MOA/PA will be drafted by the responsible BLM Field Office, and the BLM State Office will always participate. Refer to Section I.E of this Protocol to determine if an agreement document needs to be written under this Protocol or under the Regulations at 36 CFR Part 800. The detailed process for a MOA/PA is outlined in *Appendix D*. *Appendix E* is a template agreement document.

iii. Compensatory Mitigation

Compensatory mitigation, or compensating for an effect by replacement or providing substitute resources or environments, will be considered after application of all other forms of avoidance, minimization and mitigation within the APE have been exhausted. Compensatory mitigation can occur at, or immediately adjacent to, the area affected but can also be located anywhere in the same general geographic area or, in the case of linear properties (e.g. NHTs), at other places along that specific resource.

Compensatory mitigation may include, but is not limited to: educational materials, completion of NRHP nominations, professional publications, acquisition of conservation easements containing historic properties, development of interpretation plans, physical restoration of NHT segments, removal or modification of modern developments in settings of historic properties to restore integrity, acquisition of land or a historic property, through exchange or another process, where public access is possible, and/or stabilization of an associated property (e.g. a stage station along the trail).

Any compensatory mitigation must result from consultation among BLM, SHPO, ACHP (if participating), the applicant, and other consulting parties. Compensatory mitigation generally provides a public benefit and must be appropriate to the scale and scope of the effect being mitigated. Compensatory mitigation may be offered voluntarily by a project applicant for consideration by the consulting parties. If accepted by the Signatories, it will be incorporated into the agreement document and as a condition of the BLM authorization. In other cases, the BLM may find it necessary to advise the applicant that the project proposal cannot be approved without additional compensatory mitigation. Field Offices shall notify the BLM DPO as soon as it is recognized that a proposed undertaking may require consideration of compensatory mitigation. The BLM DPO will monitor the use of compensatory mitigation for consistency of application by the BLM statewide.

## **IX. DISCOVERY SITUATIONS**

### **A. Standard Discovery Plan**

BLM and SHPO have agreed upon a standard discovery plan which is attached to this Protocol as *Appendix F*. A field office may use this discovery plan without additional SHPO consultation.

### **B. Undertaking-specific plans**

The BLM will encourage development of undertaking-specific discovery plans for large and complex undertakings and location specific plans for areas known to contain buried archaeological sites following the guidance in *Appendix F*. Undertaking-specific and/or location-specific discovery plans will be forwarded to the SHPO for a 30 day review along with BLM's determination of effect for the undertaking unless the discovery plan has been included as part of a treatment plan reviewed under Section VIII.A or VIII.B. When a discovery plan has been accepted by BLM and SHPO, the BLM will follow the plan when cultural resources are discovered during implementation of an undertaking. The BLM shall make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties until treatment is completed in accordance with the discovery plan.

## **X. EMERGENCIES**

In the face of emergencies such as wildland fire suppression or hazardous materials incidents, the BLM will meet its Section 106 obligations in the following manner. The BLM will notify the SHPO/THPOs, any Indian tribe that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and will afford them an opportunity to comment within seven days of notification. If the agency official determines that circumstances

do not permit seven days for comment, the BLM official shall notify the SHPO/THPO and the Indian tribe and invite any comments within the time available.

To the extent that such actions do not compromise agency personnel or public safety or immediately threaten property, BLM will evaluate effects on known historic properties and newly discovered sites or historic structures for NRHP eligibility prior to continuing emergency operations. The BLM will make reasonable efforts to avoid, minimize, or mitigate adverse effects of emergency operations to any historic properties discovered. Such evaluations should occur within 48 hours of discovery, but if that cannot be accomplished all sites or structures will be treated as eligible. For eligible properties, the preferred course of action will be to identify and implement tactics so that adverse effects to historic properties are avoided. If adverse effects cannot be avoided, the BLM will insure that a treatment plan is prepared and executed so long as these actions will not compromise agency personnel or public safety or immediately threatened property.

The above notification applies only to undertakings that will be implemented within 30 days after the disaster or emergency has been formally declared by the appropriate authority. BLM may request an extension of the period of applicability from the SHPO/THPO prior to the expiration of the 30 days. Immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of Section 106 and this section of this agreement. A complete report on any emergency situations, any affected historic properties, and any data recovery carried out will be provided by the BLM to the SHPO.

If the emergency situation becomes more complex than can be handled locally and the BLM managers delegate authority for managing the incident to an Incident Command Team (ICT), BLM retains responsibility for Section 106 compliance on BLM lands. The process will follow the above procedures so long as the delegation of authority includes reference to this agreement and assigns a resource advisor to the ICT.

## **XI. STAFFING AND OBTAINING SPECIALIZED CAPABILITIES**

### **A. Staffing**

The BLM will allow identification and evaluation of cultural resources only by or under the direct supervision of specialists who meet the qualifications and are classified in the appropriate professional series by the Office of Personnel Management (e.g., Series 193 for archaeologists). Specialists at the GS-5 and GS-7 levels are considered to be performing duties in a trainee or developmental capacity. Reports prepared by GS-5 and GS-7 specialists, or any cultural resource consultant, must be reviewed and submitted to the SHPO by a GS-9 or higher-grade cultural resource specialist. New specialists at a GS-9 grade or higher who have not received training on this Protocol must follow the procedures required of a GS-7 cultural resource specialist until Protocol training is accomplished. All field offices must have at least one GS-9 or higher cultural resources specialist in order to operate under this Protocol.

## **B. Training in the Use of This Protocol**

The BLM, with SHPO's assistance, shall provide training and orientation on the Protocol to facilitate implementation of this Protocol. The training will include detailed explanation of the procedures in the Protocol and the roles of the consulting parties. Training will be for BLM managers with responsibilities affecting cultural resources (including, but not limited to, District Managers, Field Managers, Assistant Field Managers, Supervisory Natural Resource Specialists, or Deputy State Director for Resources) and cultural resource staff and will be initiated within 3 months from the effective date of the Protocol. Indian tribes will be invited to participate in the training to facilitate future coordination and consultation. Training for SHPO Section 106 review staff will be completed within 3 months.

When new managers or cultural resource specialists are hired, the BLM will ensure that they receive training on the implementation of this Protocol within 3 months of starting work. It shall be the responsibility of the BLM DPO, with SHPO participation, to provide appropriate orientation. Once orientation is completed, the DPO will formally notify the SHPO and BLM field offices, and the newly trained staff will be certified and allowed to follow the procedures of this Protocol.

When a new cultural resource specialist is hired by a BLM Field Office, in addition to the Protocol training, the new cultural resource specialist will conduct work under the Protocol in one of two ways until they are certified by the DPO or their Field Office's lead cultural resource specialist to follow the procedures of this Protocol independently, usually within 3 months after beginning their employment. The cultural resource specialist may either consult with SHPO on NRHP eligibility and effect or, for those offices with more than one cultural resource specialist, the individual can make preliminary determinations of each step in the process defined in this Protocol that are reviewed and co-signed by another of the Field Office's cultural resource specialists.

The SHPO, with BLM DPO participation, will ensure all new staff hired to conduct Section 106 reviews receive training in this Protocol within 3 months of starting work. The SHPO shall provide documentation to the BLM field offices when the training has been completed.

## **C. Specialized Capabilities**

When the BLM is involved in an undertaking requiring expertise not possessed by available BLM staff (e.g., architectural history, historic architecture, landscape architecture, ethnology, etc.), it will obtain the necessary expertise through contracts, BLM personnel from other states, or cooperative arrangements with other agencies for the purpose of determining National Register eligibility, effects, and treatment for the cultural properties in question. The BLM may request the assistance of SHPO staff in such cases.

## **D. Professional Development**

It is recognized that participation of BLM and SHPO cultural resource staff in professional societies and annual meetings (e.g. Society for American Archaeology, Society for Historical Archaeology, Southwest Symposium, Pecos Conference, Mogollon Conference or the Jornada Mogollon Conference, etc.) is integral to staying abreast of developments and advances in the discipline and for enhancing professional knowledge and skills.

## **XII. SUPPORTING PROGRAMS AND ACTIVITIES**

The BLM and the SHPO recognize the advantages of working together on a wide range of heritage preservation activities and will cooperatively pursue the following efforts:

### **A. Data Sharing and Information Management**

#### **i. Data System Management**

- a. The SHPO will maintain a statewide-automated cultural records database that is accessible to the cultural resource specialists from all BLM Field Offices. The BLM and SHPO will continue to collaborate on ways to synthesize and use the automated cultural resource data to develop Geographic Information System (GIS) capabilities. The BLM and the SHPO will continue to cooperate in this endeavor by providing financial, personnel, hardware and software resources as funding becomes available, including the contracting of services.
- b. The BLM and the SHPO recognize the importance of GIS and tabular cultural resources data available in real time and will work cooperatively to enter backlog data and legacy data into their shared system. The BLM will share data developed to deal with NMCRIS backlog issues and the SHPO will work with BLM to find ways to resolve the backlog.

### **B. Public Outreach and Heritage Education**

The BLM and SHPO will cooperate to obtain funding through grants and partnerships to develop heritage education programs and public outreach materials, either by BLM and SHPO staffs or through contracts through the following programs:

- i. Historic Preservation Month and Archaeology Month: The BLM and the SHPO will participate in and support financially, as funding permits, Historic Preservation Month activities, including public presentations, field tours and excavations, exhibits, archaeology fairs, posters, brochures, and educational activities.

- ii. Adventures in the Past/Heritage Education: The BLM and SHPO may, as funding permits, cooperatively work on the development of interpretation of cultural resources through a variety of media including, but not limited to, exhibits, brochures, lectures, radio and television promotions, Internet web pages, and interpretive signs.
- iii. Archaeological Society of New Mexico and Local Archaeological and/or Historical Societies: The BLM and SHPO are encouraged to work cooperatively with the New Mexico Archaeological Society and individual chapters to promote preservation ethics, good science, and professional standards statewide to amateur archaeologists and historians by participating in society meetings, serving as chapter advisors, providing presentations and demonstrations, and other assistance as appropriate.
- iv. Professional Organizations: The BLM and SHPO cultural resource specialists are encouraged to participate in and work cooperatively with professional historic preservation organizations (e.g., New Mexico Archaeological Council) to promote preservation ethics, good science and good history, professional standards statewide, and open dialogue regarding historic preservation issues.
- v. Site Stewardship: The BLM will support the SHPO's coordination and leadership in the New Mexico SiteWatch program, as funding and staff availability permit, to recruit and train members of the public to serve as monitors and stewards of New Mexico's cultural resources on public lands, and to assist with educational and other activities involving cultural resources. BLM and SHPO will cooperate in efforts to obtain funding and other resources, such as grants and partnerships, for these activities.
- vi. Public Dissemination of Information: When appropriate, the BLM, SHPO, or a project proponent will fund the development and distribution of brochures, monographs, or other media for the general public. These products can be stipulated in treatment plans or other agreement documents either part of the Section 106 compliance responsibility or Section 110 research on public lands.

### C. **State-Level Historic Preservation Training and Workshops**

The BLM and the SHPO will cooperate and participate in the training of BLM managers, BLM cultural resource staff, SHPO staff, relative to the implementation of this Protocol (see Section XI.B). Orientation meetings on this Protocol for cultural resource permittees, public land users, and other interested parties will be arranged upon request.

Other training and workshops may include, but are not limited to, the NM BLM 8100.1 Handbook, NMCRIS User Guide, BLM planning documents, and statewide historic context documents, writing and negotiating agreement documents and treatment plans, Visual Resource Management, etc. Review of training needs and/or additional workshops will occur on a yearly basis at the annual cultural resource staff meeting. Emphasis will be on

professional development training to expand professional skills of BLM and SHPO cultural resource staff.

#### **D. Historic Context Development**

Increased emphasis will be given to the development of historic contexts. The BLM and the SHPO will cooperatively recommend statewide priorities for historic context development for resources found. Recommendations will be considered in the BLM budget process as a statewide benefiting program. Field Offices may also develop project-specific contexts as their funding allows. In addition, the BLM will cooperate with the SHPO in the pursuit of funding to support the development of historic contexts through grant proposals. All historic contexts must be consistent with the *Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation* (48 FR 44716). Historic contexts which define site eligibility criteria, levels of adequate inventory, site documentation requirements, standards for assessment of effects, and/or appropriate treatment of historic properties shall require SHPO concurrence on those aspects.

### **XIII. ADMINISTRATIVE INTERACTION/ANNUAL MEETINGS**

#### **A. BLM Annual Report**

The BLM will provide SHPO with a copy of their Cultural Resource Program Annual Report submitted to BLM's Washington Office at the end of the fiscal year and a supplemental report including succinct information on the following:

- i. List of adverse effect undertakings resolved using the streamlined process (Section VIII.B);
- ii. List of agreement documents executed during the fiscal year;
- iii. Post-review discoveries;
- iv. Discussion of BLM and SHPO National Register eligibility evaluations and effect determinations, and recommendations to improve consensus, if necessary;
- v. Suggestions concerning additional training needed for BLM staff to fulfill their responsibilities under this Protocol; and
- vi. Recommendations for any amendments to improve the effectiveness of the Protocol including the addition or revision of appendices.

#### **B. SHPO Annual Report**

The SHPO will provide an annual report to the BLM at the end of each calendar year. At a minimum, it will specifically address the following:

- i. Suggestions for improving the 106 process as defined by the Protocol;

- ii. Discussion of BLM and SHPO National Register eligibility evaluations and recommendations to improve consensus, if necessary;
- iii. Discussion of SHPO monitoring of No Historic Properties Affected and No Adverse Effect findings and recommendations, if necessary;
- iv. Suggestions concerning additional training for SHPO staff needed to fulfill their responsibilities under this Protocol. Identified areas of weakness may become the subject of joint NM BLM-SHPO sponsored training courses; and
- v. Recommendations for any amendments to improve the effectiveness of the Protocol including the addition or revision of appendices.

### **C. Administrative Meetings**

Two meetings will be held annually at mutually agreed upon dates, to discuss issues related to this Protocol.

- i. The first meeting will include BLM Field Office and State Office cultural resource staff and SHPO staff. BLM will develop an agenda that includes SHPO input and SHPO will participate. A primary purpose of this meeting will be to prepare briefing papers, summaries, and recommendations for the BLM and SHPO executive management meeting to follow.
- ii. The second meeting will coincide with the first Executive Management Team (EMT) meeting following the annual cultural resource meeting, and may consist of a presentation at the EMT meeting by the DPO and/or the SHPO. This meeting will specifically discuss procedures, policies, amendments to the Protocol, or other matters as warranted. BLM and SHPO executive management will determine the agenda and representation at this meeting.
- iii. Additional meetings may be set up by the BLM management team, BLM cultural resource staff and SHPO staff at any time to review the effectiveness of the Protocol.

## **XIV. DISPUTE RESOLUTION**

- A. Disputes on eligibility are handled under Section V.B.ii of this Protocol. Disputes on effect and all other types of disputes, disagreements or objections not explicitly addressed in this Protocol will be handled according to the Regulations at 36 CFR 800.4 through 800.6. The resolution will be documented in writing.
- B. Disputes regarding specific undertakings must be resolved prior to approval of the undertaking. Approval of an undertaking prior to resolution of the dispute may constitute a foreclosure and will require notification of the ACHP. All dispute resolutions will be documented in writing and will be distributed to all consulting

parties. If the undertaking has already been approved and there is a case-specific dispute, the undertaking may continue, provided that no actions are taken which would adversely affect the properties involved in the dispute.

**C. Disputes Involving BLM and SHPO**

- i. If the BLM or the SHPO disagree on an undertaking/action proposed or taken by the other pursuant to this Protocol, or on how this Protocol is being implemented, they will consult with one another to resolve the issue. If the disagreement is about an action in a BLM Field Office, the field manager will notify the BLM DPO and will consult with the SHPO to resolve it. If the disagreement is with the State Office, or the matter is referred to the State Office by a field manager or the SHPO, the BLM DPO, the SHPO, the field manager, and the district manager (if warranted) will consult to resolve the issue. If the dispute cannot be adequately resolved at this level, the objecting party shall notify the other party in writing. Within ten (10) calendar days following receipt of notification, the parties shall initiate a formal 45 calendar day consultation period to resolve the objection. If the objection is resolved within this time frame, the parties shall proceed in accordance with the terms of that resolution.
- ii. If the dispute cannot be resolved through XIV.C.i above, and the parties have not agreed to extend the consultation period, the BLM DPO shall refer the dispute to the BLM Preservation Board (the Board), which will provide the State Director with its recommendations, per Component 3 of the nPA. If the State Director accepts the Board's recommendations, the State Director shall promptly notify the SHPO of such acceptance, provide a copy of the Board's recommendations, and afford the SHPO 30 calendar days following receipt of the notification to comment on the recommendations. If the SHPO concurs in the Board's recommendations within this time frame, the State Director and the SHPO shall proceed in accordance with the Board's recommendations to resolve the objection.
- iii. If either the State Director or the SHPO rejects the Board's recommendations after a period of consideration not to exceed 30 calendar days, the State Director shall promptly notify the Board in writing of the rejection, and immediately thereafter submit the dispute, including copies of all pertinent documentation, to the ACHP for comment in accordance with Component 5 of the nPA. Within 30 calendar days following receipt of any ACHP comments, the State Director shall take into account any comments received from the Board, the SHPO, and the ACHP pursuant to this stipulation and make a final decision regarding resolution of the dispute. The State Director shall notify in writing the Board, the SHPO and the ACHP of that decision. The dispute shall thereupon be resolved.
- iv. The BLM's responsibilities to carry out all other actions subject to the terms of this

Protocol that are not the subject of the dispute remain unchanged.

**D. Disputes Brought by a Federally-recognized Indian tribe or a Member of the Public**

If any Indian tribe or any member of the public objects at any time to the process by which this Protocol is being implemented, the BLM and the SHPO will consult with the objecting party to resolve the issue. If the BLM, the SHPO, and the objecting party are unable to resolve the issue, the BLM will refer the matter to the Preservation Board or the ACHP, whichever is appropriate.

- i. The BLM will forward all documentation relevant to the dispute, including the proposed resolution to the Preservation Board or the ACHP.
  - a. When resolving a dispute with the Preservation Board, the parties shall follow the process outlined above in Section XIV.C.ii through iv.
  - b. When the ACHP is involved in the resolution of a dispute, they shall provide BLM with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, BLM shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP and other consulting parties, and provide them with a copy of this written response. BLM will then proceed according to its final decision. If the ACHP does not provide its advice regarding the dispute within the thirty (30) day time period, the BLM may make a final decision on the dispute and proceed accordingly.
- ii. The BLM's responsibilities to carry out all other actions subject to the terms of this Protocol that are not the subject of the dispute remain unchanged.

**XV. LEVELS OF CERTIFICATION**

**A. Certification:** Certification of Field Offices allows them to use this Protocol rather than 36 CFR 800.3 through 800.7. Field Offices will be certified under this Protocol after undergoing orientation by the BLM DPO and SHPO in the components/terms of this agreement.

**B. Program Review:** If the SHPO documents persistent problems in complying with the terms of this Protocol, the dispute resolution procedures at Section XIV of the Protocol will be followed. If a pattern of failure to comply with the terms of this Protocol can be demonstrated, a field manager, the DPO, the SHPO, or the ACHP may, upon written notification to the BLM State Director, request a review of a Field Office's status and its capability for carrying out the

terms of the nPA and this Protocol. The State Director may request a review and recommendations from appropriate staff, and/or the Preservation Board, and/or the ACHP. Based on the review, the BLM DPO will make a recommendation to the State Director to resolve issues that could include the development of a provisional status or a decertification action plan, or the recommendation could be that the issues are not significant enough to warrant the development of an Action Plan.

**C. Action Plans:** The DPO, SHPO, or the ACHP may recommend that the State Director place a Field Office on a provisional status or be decertified based on findings from a review. The BLM, in consultation with the SHPO, and the ACHP (if they are participating), shall develop an action plan to be followed by the Field Office in order to bring that office into compliance with this Protocol. After the involved Field Office can demonstrate it has completed all of the actions specified in the plan, it will notify the BLM DPO who will review compliance with the action plan with SHPO and the ACHP if they are participating. The BLM DPO will inform the State Director of the action plan compliance to determine Field Office status.

**D. Provisional Status:** A BLM Field Office is under provisional status when designated as such by the State Director. Provisional status may extend from six months to two years, although the term of the provisional status shall be a matter of agreement between the parties involved and shall reflect the complexity of the deficiencies identified. The involved BLM office will continue to operate generally under terms of the Protocol until deficiencies are corrected within the terms and time limits set under the Action Plan (for example, review times may be different, “notify and proceed” submissions may not be allowed). While on provisional status, a Field Office will work to correct the deficiencies identified during the review. After the Field Office can demonstrate it has completed the actions specified in the plan, it will notify the State Director through the BLM DPO. If all parties agree that the problems have been corrected, the State Director will notify the affected field manager, SHPO and the ACHP (if they are participating) in writing that the Field Office is once again in compliance and restored to full status. If the provisional status time period is about to expire and the Field Office has made significant progress but has not met the full terms of the action plan, the BLM DPO and the SHPO may recommend that the State Director extend the provisional status time period. Should the parties determine that significant deficiencies remain uncorrected, or if new significant deficiencies are identified, the findings shall be conveyed and decertification shall be recommended to the State Director by the BLM DPO.

**E. Decertification:** Decertification may occur if: (1) the Field Office has failed to comply with the provisional status action plan, or (2) findings from a Field Office review indicate that immediate decertification is warranted. Only the State Director may decertify a Field Office from operating under the terms of this Protocol. Decertification from this Protocol will require that the affected Field Office comply with Section 106 of the NHPA by following the most current implementing regulations at 36 CFR Part 800. The BLM, in consultation with the SHPO, and the ACHP (if they are participating) shall develop an action plan to bring any decertified office into compliance

with this Protocol. Decertification does not have a pre-established time frame. A Field Office is decertified until it is found to have restored the basis for certification.

The district or field manager, the DPO or the SHPO may request that the Preservation Board review a district or Field Office's certification status. The Preservation Board will respond under the terms of the nPA at Component 9. If the Preservation Board finds that a BLM office does not maintain the basis for its certification (e.g., the professional capability needed to carry out these policies and procedures is no longer available, or the office is not in conformance with this Protocol), and the BLM field or district manager has not voluntarily suspended participation under this Protocol, the Preservation Board will recommend that the State Director decertify the district or office, per the nPA. A Field Office may ask the State Director to review the Preservation Board's decertification recommendation, in which case the State Director may request the ACHP's participation in the review. After the affected BLM office believes that it has completed the actions specified in the plan, it will notify the State Director through the BLM DPO. All parties will review the documentation and will make a recommendation to the State Director. If the problems have been corrected, and the SHPO concurs, the State Director will notify in writing the affected field manager, SHPO and the ACHP (if participating) that the Field Office is once again in compliance and restored to certified status. If the Field Office is found to not have resolved the issues, it will continue to operate under the 36 CFR Part 800 regulations.

**F. Recertification:** If a decertified Field Office is found to have restored the basis for certification, the Preservation Board will recommend that the State Director recertify the office. Recertification of the affected Field Office, which will allow that office to resume operating under the terms of this Protocol, will occur at the discretion of the BLM State Director after consultation with the SHPO and the ACHP (if they are participating). The State Director will notify the Field Office, the SHPO and the ACHP (if they are participating) in writing when the Field Office is recertified.

## **XVI. AMENDMENTS TO THE PROTOCOL**

If the BLM or the SHPO wish to amend this Protocol at any time, they will consult to consider requested changes. During the amendment process, the BLM and SHPO may identify specific sections and/or appendices that are subject to amendment. Amendments will become effective when signed by both parties.

- A. Changes to NHPA or 36 CFR Part 800:** Should changes occur to the National Historic Preservation Act or its regulations at 36 CFR Part 800, the SHPO and the BLM will meet and discuss the need to amend this document to reflect changes in the authorities under which the Protocol functions.
- B. Review of the Protocol:** Five years from the last signature date of this Protocol, the parties will formally review its terms and propose any needed revisions.

## **XVII. TERMINATION**

The BLM or the SHPO may terminate this Protocol by providing 90 days' notice to the other party, providing that they consult during this period to seek agreement on amendments or other actions that would avoid termination. The BLM DPO may request the assistance of the BLM Preservation Board, the National Conference of State Historic Preservation Officers, or the Council in the consultation process. If the Protocol is terminated, the BLM will be required to comply with Section 106 of the NHPA by following the implementing regulations at 36 CFR Part 800.

## **XVIII. LEGAL ENFORCEABILITY**

This Protocol between the BLM and the SHPO is a legally enforceable document in a court of law for those parties, including the SHPO, with legal standing under 36 CFR 800 or as otherwise allowed under NHPA.

## **XIX. APPENDICES**

The following appendices are attached and incorporated into this Protocol. New appendices may be added and existing appendices may be modified as needed upon written concurrence of the Signatories.

- A. Existing Agreements Tiered to this Protocol
  - A.1. *NM BLM-SHPO Private Land Exchanges or Sales MOA*
  - A.2. *NM BLM-SLO-SHPO MOU on Land Exchanges*
  - A.3. *Permian Basin PA*
- B. Standard Areas of Potential Effect (APE)
- C. Undertakings Exempt from Further SHPO Consultation
- D. Agreement Document Procedures and Checklist
- E. Agreement Document Template
  - E.1 Memorandum of Agreement Template
  - E.2 Programmatic Agreement Template
- F. Standard Discovery Plan
- G. Glossary

**APPROVED BY:**

\_\_\_\_\_  
Jesse Juen,  
New Mexico State Director, Bureau of Land Management

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Date

\_\_\_\_\_  
Jeff Pappas,  
New Mexico State Historic Preservation Officer

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Date