

PROTOCOL AGREEMENT
Between
NEW MEXICO BUREAU OF LAND MANAGEMENT
And
NEW MEXICO STATE HISTORIC PRESERVATION OFFICER

I. PURPOSE

The Bureau of Land Management's (BLM) National Programmatic Agreement (PA) and pertinent BLM manuals and handbooks take the place of the Advisory Council on Historic Preservation's regulations at 36 CFR 800 and associated Advisory Council guidance. This Protocol implements the PA in New Mexico by describing how the New Mexico State Historic Preservation Officer (SHPO) and the New Mexico Bureau of Land Management (NM BLM) will operationalize the PA in New Mexico.

Objectives of this Protocol are to acknowledge the maturation of the NM BLM's cultural resources management program and encourage a shift toward more programmatic consultation with an emphasis on more proactive program accomplishments as a result. This second version of the Protocol reflects finalization of the BLM's national manuals governing the cultural resources program and the results of a complete cycle of Field Office program reviews within New Mexico.

II. APPLICATION OF PROTOCOL

A. RELATION OF PROTOCOL TO PMOA 168 AND 36 CFR 800

1. The New Mexico statewide cultural resources Programmatic Memorandum of Agreement No. 168 (PMOA) became effective October 19, 1982. This PMOA was suspended when the NM BLM became certified to operate under the PA. The PMOA will remain in a state of suspension for as long as the PA and this Protocol remain in effect. Should the PA be terminated, all NM BLM Field Offices will resume meeting their Section 106 obligations through procedures outlined in the PMOA until such time as it can be replaced with a new statewide programmatic agreement. Such a new statewide programmatic agreement would be prepared with full tribal government and general public input and consultation.

2. Should any Field Office become decertified for failure to live up to obligations specified in either the Protocol or its Field Office Certification Plan, that individual Field Office will meet its Section 106 obligations through the processes outlined in 36 CFR 800.

3. This Protocol does not apply to undertakings involving multiple SHPOs or areas within the jurisdiction of Tribal

Preservation Offices. The NM BLM will consult with both the SHPO and Tribal Preservation Officer as provided for in NHPA Section 101(d)(2)(D)(iii) when proposed undertakings could affect historic properties located on lands owned by the NM BLM which have been determined by the courts to constitute Dependent Indian Communities.

4. If any BLM office in NM feels it cannot comply with the procedures set forth in this Protocol for a particular undertaking, it shall notify the NM BLM Deputy Preservation Officer (DPO) and the SHPO prior to any decisions being made that could affect any historic properties within the area of potential effect. Following consultations with the SHPO and DPO, the Deputy State Director for Resources (NM 930) may allow Field Offices to meet their Section 106 responsibilities for that particular undertaking by complying with the procedures at 36 CFR 800, including all requirements for consultation with the SHPO, Advisory Council on Historic Preservation, Indian tribes, and interested parties.

B. RELATIONSHIP OF PROTOCOL TO EXISTING AND FUTURE BLM-SHPO AGREEMENTS

1. Existing. Project-specific PAs will remain in effect until the undertakings have been completed and all reports submitted and approved according to the terms of the Agreements. In addition, the most current versions of the following agreements will remain in effect indefinitely and are incorporated into this Protocol. Until they are modified to conform to this Protocol, compliance steps elaborated in these programmatic 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 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 2).

c. Assistance Agreement between United States Department of the Interior, Bureau of Land Management, and the State of New Mexico (governs support for the New Mexico Cultural Resources Information System--NMCRIS) (Appendix 3).

2. Future. The NM BLM and the SHPO may agree to amend the Protocol specifically to address particular geographic locations or classes of similar undertakings as new needs are recognized.

Such amendments will take these procedures into account and will be prepared only when compliance issues are complex and must vary to a considerable degree from this Protocol. Any future amendments negotiated under the terms of this Protocol will be executed solely by the NM BLM and the SHPO.

C. APPLICATION OF PROTOCOL TO MULTI-AGENCY UNDERTAKINGS WITHIN NEW MEXICO OR TO UNDERTAKINGS OCCURRING ACROSS SEVERAL STATES

1. If an undertaking will affect lands administered by several different agencies or Indian tribes within New Mexico and the NM BLM is the lead agency, the NM BLM will follow this Protocol for the entire undertaking if this is acceptable to the other agencies and Indian tribes. Each land managing agency, however, is responsible for making determinations of National Register eligibility for resources it manages. If any other agency or tribal government objects to the application of this Protocol to lands they administer, then the NM BLM along with all the other consulting parties will negotiate and adhere to provisions in a project-specific PA or other agreement or will follow the procedures contained within 36 CFR 800.

2. Where undertakings will affect lands administered by several different agencies within New Mexico and another federal agency is the lead, consultation procedures used by the lead agency will be followed. Each land managing agency, however, will be responsible for determinations of National Register eligibility for the resources it manages.

3. Where undertakings will affect lands administered by several different agencies within New Mexico without NM BLM or another federal agency taking the lead, NM BLM will follow the Protocol for lands under its jurisdiction. The NM BLM will indicate on its transmittal to SHPO that this is a multi-agency project submitted without a federal lead.

4. For large or multi-state undertakings, an attempt will be made to develop a single PA which will have to be negotiated and accepted by all the SHPOs and agencies involved. If this occurs, a federal lead, if possible, will be identified for multi-state undertakings.

III. SHPO INVOLVEMENT IN BLM MANAGEMENT PROCESSES

A. SHPO will be invited to act as a preparer/reviewer when NM BLM writes or prepares EISs, large-scale management plans, wild and scenic river plans, or wilderness management plans. SHPO will assist in the preparation or will provide review comments only for those planning efforts that could result in foreseeable effects to cultural resources.

B. When NM BLM programs other than cultural resources management formulate policies that could have a major impact upon historic properties, the BLM will afford the SHPO an opportunity to comment upon draft manuals, handbooks, and Instruction Memoranda.

IV. MONITORING

A. Each NM BLM Field Office will commit to in-field monitoring 10 percent of surveys undertaken by permittees in a given year. Carlsbad Field Office will monitor 5 percent of permittee surveys in a given year.

B. In addition, 10 percent of those undertakings where avoidance of historic properties was recommended will be monitored during or after construction to check the direct and indirect effects on nearby cultural resources for undertakings approved in a given year. Carlsbad Field Office will monitor 5 percent of those undertakings in a given year where avoidance of historic properties was recommended.

C. The NM BLM will monitor site conditions as agreed to in the following land exchange agreements:

Stanley (Taos Field Office)
 Shooting Range (Albuquerque Field Office)
 Navajo-Hopi (Las Cruces Field Office)
 Delaware I, II, and III (Carlsbad Field Office)
 Rio Bonito (Roswell Field Office)

D. Where it is difficult to complete monitoring with in-house personnel, the NM BLM will consider contracting for such inspections, including the use of any On-Call contracts that may be available or require the project proponent to contract for comparable services.

V. SUPPORT FOR COOPERATIVE PROGRAMS

A. DATA MANAGEMENT

1. COST. Subject to the availability of funding, the NM BLM will support NMCRIS at the rate of \$40,000 annually. These funds will be provided by the State Office from the benefiting activity program(s).

2. DATA SHARING. Services provided by ARMS, data submission requirements, and specifications for deliverables and reports are provided in the most current version of the Assistance Agreement between the NM BLM and the SHPO governing cooperation to support NMCRIS (Appendix 3).

3. SCHEDULES FOR DATA SUBMISSION.

a. Negative Results, Only Ineligible sites found, and No Effect Situations. Inventory reports in which only Isolated Manifestations or nothing was found; reports that document only sites found ineligible for nomination to the National Register; and reports in which all eligible historic properties are avoided to achieve a situation of no effect will be submitted monthly to the SHPO.

b. No Adverse Effect, and Adverse Effect. Inventory reports will be submitted to SHPO as they are completed.

4. COMPLETION OF INVENTORY REPORTS

a. The NM BLM will not allow projects to be completed without adequate provisions for the timely completion of all reports and site records generated under the terms of this Protocol.

b. All NM BLM-prepared inventory reports will be submitted to the SHPO within 6 months of completion of fieldwork.

c. The NM BLM may utilize provisions for office support contained within its On-Call contract to complete the preparation of all backlogged reports that BLM staff cannot submit in a timely manner.

d. Documentation of backlogged reports shall include reports with project activity forms and site records along with a xerox of the United States Geological Survey quadrangle map depicting the inventory area and site location(s), if applicable. Submissions will also include a project Activity Form completed to the degree possible according to the information known about the past project that generated the inventory.

5. STANDARDS

a. Definitions of Isolated Manifestations and Sites. Until modified by mutual agreement, the NM BLM and the SHPO will continue to utilize the definitions for Isolated Manifestations, Category 1, and Category 2 sites contained within Addendum No. 1 to PMOA No. 168, dated 11/2/87 (see Appendix 4).

b. Site Records. The NM BLM will ensure that all site records are prepared according to the latest NMCRIS guidance (Appendix 5). ARMS shall accommodate and support BLM standards for recording cultural resource locations using Global Positioning System (GPS) technology, through modification of current data forms and the NMCRIS database structure.

c. Survey Reports. The NM BLM will ensure that inventory reports are 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*. Current requirements for Small-Scale inventory project reports (Appendix 6) and Large-Scale inventory reports (Appendix 7) are attached.

d. Major Testing/Excavation Reports. The NM BLM will ensure that major testing and excavation reports are prepared according to the latest version of NM BLM reporting standards for data recovery projects (Appendix 8).

e. While, as stated in the BLM's National Programmatic Agreement, the BLM's National Manuals "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.

f. Copies of the applicable standards are attached as appendices to this Protocol.

g. SHPO will provide Field Offices with immediate feedback concerning the submission of any reports or sites that, in the opinion of SHPO staff, fail to meet New Mexico Cultural Resource Information System standards.

h. Resource Management Plans (RMP). The level of cultural resource information and the kinds of long-term management decisions needed in land use plans are specified in BLM Information Bulletin No. 2002-101 (Appendix 12). This guidance provides direction for how Field Offices will identify and describe the cultural resources covered by the plan, establish goals for the cultural heritage program, assign use allocations to all cultural properties in the RMP area, and articulate management actions required to meet stated goals. Such planning will utilize ARMS' Geographical Information System capabilities to display projected cultural resource distributions or sensitivity maps for the planning area.

i. Electronic Records Submission. Whenever possible, the NM BLM will ensure that all cultural resource information submitted is in an electronic format compatible with NMCRIS standards. ARMS shall be responsible for developing exchange formats and computer applications to support such transfers and NM BLM will require its staff and permittees to follow these standards and use these applications. NM BLM and SHPO will collaborate to develop the workflow procedures and infrastructure required to track cultural resource projects electronically.

j. Seismic Project Documentation. The NM BLM will ensure that all cultural resource inventories conducted for the purpose of permitting seismic exploration undertakings submit geospatial

data to SHPO in current NMCRIS shapefile format. Polygon GIS layers must include archeological site locations as well as survey area boundaries and be documented as to projection, datum, and accuracy level. Data must be submitted directly to ARMS and be identified by NMCRIS and LA numbers assigned during registration.

B. JOINT BLM-SHPO OUTREACH, EDUCATION, AND DATA SYNTHESIS EFFORTS

1. Subject to the availability of funding, the NM BLM will commit \$20,000 annually towards support for such joint outreach, education, and data synthesis projects as the statewide Site Watch program, Project Archeology, and regional research designs. An attached Assistance Agreement (Appendix 9) describes the projects to be jointly undertaken, the products to be produced, and the obligations of each party.
2. The NM BLM and the SHPO may cooperatively publish research results, popular interpretations of the prehistory and history of New Mexico, as well as brochures or other media that can inform and inspire the public concerning New Mexico's wealth of cultural resources.
3. Each Field Office Certification Plan will describe those heritage education and public outreach activities it plans to engage in within its Proactive Elements Section.
4. The NM BLM will continue to support Heritage Preservation Month activities.

C. STEWARDSHIP AND SITE PROTECTION

The NM BLM supports SHPO efforts to develop and expand a statewide Site Watch program of citizen involvement in the monitoring and protection of endangered sites. The NM BLM agrees to serve on the Advisory Committee that coordinates and develops policies for the statewide Site Watch program.

D. HERITAGE TOURISM

The BLM is committed to fully implementing Executive Order 13287 entitled "Preserve America." The NM BLM will join with the SHPO and other State agencies such as the Department of Tourism to explore how NM BLM-managed heritage resources can best contribute to community economic development through heritage tourism. The NM BLM will seek to establish partnerships with State and local governments, Indian tribes, and the private sector to promote the preservation of heritage resources and to explore ways to realize the economic benefits these properties can provide.

E. CERTIFICATION AND TRAINING

1. The NM BLM will implement the provisions of this Protocol only with the professional cultural heritage specialists listed in the Statewide Certification Plan. However, other NM BLM staff may assist the professional cultural heritage staff in much the same manner as crewmembers. Such assistance may take the form of assisting NM BLM professional staff in field survey and site recordation, report preparation or the maintenance of maps and records, or site protective measures.

2. The SHPO will be provided the opportunity to acknowledge and concur with the most current version of the State Certification Plan (Appendix 10), which will be a compilation of all Field Office Certification Plans, by signing the document.

3. Within each Field Office's Certification Plan, adequate levels of professional staffing needed to carry out the plan over the next five years shall be specified. Opportunities to supplement the current professional cultural heritage staff with additional permanent hires, seasonal or temporary archeologists, or industry-funded archeological positions shall be identified.

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

5. SHPO will assist in development and implementation of all training connected with the Protocol. This may include updated training for NM BLM managers, NM BLM cultural heritage specialists, and SHPO staff concerning new consultation procedures, or any other NM BLM or SHPO training involving programs of mutual interest.

6. SHPO will participate in the annual review of a set of Field Offices to determine adherence to provisions of Field Office Certification Plans and compliance with the provisions of the Protocol. Within 30 days of the Field Office review, the SHPO shall submit to the BLM Deputy Preservation Officer and the Field Office Manager a written assessment of the office's adherence to the provisions of this Protocol and progress made in meeting the commitments expressed in Field Office Certification Plans.

7. If the SHPO determines that a Field Office has displayed a pattern of noncompliance with the Protocol or Field Office Certification Plan, the SHPO may request a review of a specific Field Office outside of the review schedule contained in the State Certification Plan.

F. REPORTING AND REVIEW

1. The NM BLM will provide an annual report to the SHPO containing summary information on activities conducted under this Protocol. The report will include a duplicate of the Cultural Resource Program Annual Report submitted to BLM's Washington Office.

2. In addition to data contained in the above report, the NM BLM will also annually provide succinct information on the following:

a) Descriptions of circumstances when areas of effect were not surveyed to 100%, including projects covered by Categorical Exclusions (CX) and Determinations of National Environmental Policy Act Adequacy (DNA), and a justification for why less than Class III survey was carried out

b) Areas considered so disturbed that no archeological inventory was called for

c) Post-review discoveries

d) Circumstances where NM BLM disagreed with SHPO opinion that an action constituted an undertaking

e) Results of monitoring site conditions on those land exchanges listed in Section IV.C

f) Schedule for completion of cultural resource inventory reports for those projects where the fieldwork has been completed but the write-up has not been finalized

g) Any changes to or updates of individual Field Office Certification Plans

h) The circumstances under which undertakings were approved in contradiction to the procedures contained in this Protocol.

i) Any additions to Appendix 11, Actions Not Considered to be Undertakings.

j) Discussion of training and professional development accomplished during the previous year for the NM BLM cultural heritage specialists

k) Actions taken to deal with emergency situations

3. The Annual Report will be submitted to SHPO by October 31 of each year and will provide statistics for the preceding BLM fiscal year.

4. The SHPO will provide an annual report to the NM BLM on November 30 of each year. At a minimum, it will specifically address the following:

a) Section One will provide a status report of accomplishments, budget expenditures and any concerns associated with such joint projects as the ARMS Data Share Agreement (as a separate deliverable specified in the current Assistance Agreement), Data Synthesis efforts, such as regional overviews or regional research designs, heritage education projects, and the Site Watch program.

b) Section Two will offer any suggestions for improving the 106 process as defined by the Protocol. It is here that any feedback on eligibility determinations and the monitoring of no effect projects shall be provided.

c) Section Three will describe broad patterns of permittee performance in relation to standards for completing site forms and inventory reports. Identified areas of weakness may become the subject of joint NM BLM-SHPO sponsored training courses.

d) Section Four will provide a detailed comparative analysis of the performance and productivity of individual permittees.

e) Section Five will include any suggestions concerning additional training of NM BLM cultural heritage staff needed to fulfill their responsibilities under this Protocol.

5. Meetings may be called by either party involving the NM BLM management team, NM BLM cultural heritage specialists, and SHPO staff at any time to review how well this Protocol is being operationalized.

VI. CASE-BY-CASE REVIEW PARAMETERS

A. BLM PARTICIPANTS IN SECTION 106 PROCESS

1. This Protocol is founded upon two fundamental principles. These are that 1) NM BLM management recognizes and accepts its affirmative responsibilities for compliance with the NHPA and other cultural resource management legislation, and 2) streamlined consultation procedures are the direct result of the empowerment of NM BLM cultural heritage specialists and management's commitment to maintaining a high level of training and expertise of this staff.

2. Agency officials who take legal and financial responsibility for Section 106 compliance include Field Office Managers and the State Director. Only these individuals have approval authority for undertakings.

3. As acknowledged in the BLM National PA, 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* regarding identification, determinations of eligibility, and treatment, these activities must be conducted by professionally qualified individuals. Those individuals within the BLM are the cultural heritage specialists.

4. If NM BLM agency officials disagree with the advice provided to them by their cultural heritage specialists, they may consult with the SHPO concerning these disagreements under the case-by-case consultation procedures established within 36 CFR 800.

B. DETERMINATION OF UNDERTAKING

1. "Undertakings" are defined by the 1992 amendments to the National Historic Preservation Act to be "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 the agency; those carried out with Federal financial assistance; those requiring a Federal permit, license, or approval; and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." This is the definition that will be used in this Protocol.

2. NM BLM cultural heritage specialists will consult with Appendix 11 and determine whether a proposed action constitutes an undertaking, regardless of whether the environmental consequences of the proposed action will be analyzed in a CX, DNA, or Environmental Assessment. The NM BLM acknowledges its separate legal obligations under NEPA and NHPA and the fact that actions processed under NEPA as CXs or DNAs may still be undertakings subject to the provisions of this Protocol. If there is a question whether a proposed action constitutes an undertaking that might affect historic properties, the SHPO's opinion will be sought. The SHPO will provide such an opinion within 10 calendar days of receipt of the request for the opinion. The SHPO's opinion and the NM BLM's agreement or disagreement with that opinion will be made part of the records for the proposed action. The NM BLM's annual report to the SHPO will list each case where the SHPO's opinion was sought and whether the NM BLM accepted or disputed the SHPO opinion.

3. Appendix 11 lists those actions NOT considered undertakings. This list may be modified by the NM BLM if the NM BLM determines that any other actions do not constitute undertakings. The NM BLM will notify the SHPO when it is adding another action to the list in Appendix 11.

C. DISTURBANCE

NM BLM cultural heritage specialists will determine if land disturbance or other recent geomorphological conditions within the area of potential effects have reduced or eliminated the need for cultural resource inventories. If this is the case, the NM BLM will document this for inclusion in the annual report and will approve the action with a reduced level of inventory or no inventory with no SHPO consultation.

D. INVENTORY

1. NM BLM cultural heritage specialists will determine the area of potential effects that will be subject to inventory. This determination will define the geographic area within which the

undertaking might directly or indirectly cause changes to the character or use of any historic properties should they exist.

2. If the area of potential effects has been previously inventoried, the NM BLM cultural heritage specialist will determine the adequacy of previous inventory efforts, regardless of the date of the inventory. A NM BLM decision to accept the results of past inventory efforts will be based on the geomorphological stability of the area of potential effects, the field methods used, and confidence derived from field monitoring of the results of other surveys by the investigators involved.

3. Normally, the NM BLM will require that Class III inventories (100% coverage) will be conducted within the area of potential effects for all undertakings it authorizes, licenses, or approves that have the potential to affect historic properties.

4. The NM BLM and the SHPO agree that for certain classes of undertakings, less than Class III coverage may be appropriate and sufficient to document historic properties within the area of potential effects. Less than Class III coverage is appropriate where alternative identification strategies, such as oral history interviews, background research, or Class II sample surveys are sufficient to identify historic properties within the area of potential effects; the conduct of archeological surveys would pose a health risk to the crew; the effects to any historic properties are expected to be slight or non-existent; or the effects of the undertaking can be more properly assessed later in the decision-making process. Such undertakings include:

- * Low-impact fire or fuels treatments
- * Low and moderate value mineral exchanges
- * Hazardous material cleanup

5. It is agreed between the SHPO and NM BLM that knowledge of direct effects of fires and fuel treatments upon cultural resources is evolving and that consideration of data from current and upcoming studies will inform discussions about these effects and appropriate inventory and treatment during the life of this Protocol.

6. The NM BLM and the SHPO may jointly determine that specific areas do not need to be inventoried because current information suggests that the area has little or no potential to contain historic properties. Documented low site probability areas may be described and listed as an appendix to this agreement.

7. With the exception of the situations described in VI.C., VI.D.4., and VI.D.6., whenever the NM BLM proposes to approve an undertaking with Class I and/or Class II coverage, the SHPO will be provided a full justification in writing before the undertaking is approved.

E. DETERMINATION OF ELIGIBILITY

1. Normally, determinations of eligibility will be made by the NM BLM's professional cultural heritage specialists without consultation with the SHPO. However, any NM BLM cultural heritage specialist may contact the SHPO office concerning determinations of eligibility when he or she feels that assistance or additional perspectives relating to this decision would be helpful.
2. More detailed procedures for determining the eligibility of specific site types or regionally-specific eligibility criteria may be developed by the NM BLM in cooperation with the SHPO and attached later to this Protocol. If developed, such procedures will define how eligibility determinations will be made for particular sites, culture areas, geographic regions, or Field Offices.
3. When a new cultural heritage specialist is hired by a NM BLM Field Office, that individual will conduct determinations of eligibility in one of two ways for six months after beginning his or her employment. The cultural heritage specialist may either conduct consensus determinations of eligibility in consultation with the SHPO or, for those offices with more than one cultural heritage specialist, the individual can make preliminary determinations of eligibility that are reviewed and co-signed by another of the Field Office's cultural heritage specialists listed in the office's Certification Plan.
4. The NM BLM will consult with the SHPO regarding determinations of eligibility when a) its professional cultural heritage specialist lacks the experience, formal education, or training to evaluate the properties in question or b) during controversial undertakings its determinations are likely to be questioned by project proponents, Indian tribes, or outside parties.
5. The SHPO will monitor a sample of determinations of eligibility decisions throughout the year and report on the results during periodic Field Office Protocol reviews and within the annual report prepared for the NM BLM. Indications of substantial or systematic disagreement will be reported to the NM BLM for its consideration.
6. Any determination of eligibility that indicates that the property in question is of national significance will be guided by National Register Bulletin 15, Section IX.
7. Only exceptional properties will be considered eligible for nomination to the National Register of Historic Places based on

multiple criteria. General associations with events or persons significant in the past will not be considered sufficient for determinations under Criteria A or B. As specified in National Register Bulletin 15, "A property is **not** eligible if its associations are speculative... Mere association with historic events or trends is not enough, in and of itself, to qualify under Criterion A: the property's specific association must be considered important as well... Criterion B applies to properties associated with individuals whose specific contributions to history can be identified and documented." For example, sites considered eligible under Criterion D will also be considered eligible under Criterion A only when the site is specifically mentioned in oral and written traditions; under Criterion B only when depicted rock art figures represent specific, known personages, ceremonies, or historic events and are illustrative not commemorative of the person's important achievements; and under Criterion C when the property is truly significant for its physical design or construction.

8. If the NM BLM makes a determination of eligibility without consultation with the SHPO, that determination shall be considered final for Section 106 purposes. If SHPO disagrees with a NM BLM determination of eligibility, the SHPO will provide written comments and the NM BLM will take these comments into consideration on future determinations of like properties.

9. If the NM BLM elects to make a determination of eligibility decision as a consensus determination in consultation with the SHPO and a disagreement arises between the NM BLM and the SHPO regarding the eligibility for a particular property or group of properties and if consensus cannot be achieved through further discussions, a final determination of eligibility will be sought from the Keeper of the National Register.

F. RESULTS OF IDENTIFICATION AND EVALUATION

1. If archeological surveys find only isolated manifestations or no cultural resources at all, the report will be sent in monthly to the SHPO. The undertaking will be approved by NM BLM with no SHPO consultation.

2. Undertakings that have the potential to only damage or destroy sites determined not to be eligible will be approved with no SHPO consultation. Such reports will be sent to the SHPO on a monthly basis.

3. If the inventory documents sites determined to be eligible and they cannot be avoided to achieve a situation of no effect, then the NM BLM will follow the procedures described below under DETERMINATIONS OF EFFECT/TREATMENT.

G. DETERMINATIONS OF EFFECT/TREATMENT

1. When a new cultural heritage specialist is hired by a NM BLM Field Office, that individual will conduct determinations of effect in one of two ways for six months after beginning his or her employment. The cultural heritage specialist may either conduct consensus determinations of effect in consultation with the SHPO or, for those offices with more than one cultural heritage specialist, the individual can make preliminary determinations of effect that are reviewed and co-signed by another of the Field Office's cultural heritage specialists listed in the office's Certification Plan.

2. **No Effect.** No effect is understood to mean that implementation of the undertaking will not alter the characteristics of the historic properties that would qualify them for inclusion in the National Register. If all sites documented by the inventory that are determined to be eligible for nomination to the National Register of Historic Places are avoided so that a situation of no effect results, then the report will be sent in monthly to the SHPO. The undertaking will be approved by NM BLM with no SHPO consultation. The SHPO will review a sample of such undertakings periodically throughout the year and will report the results of such monitoring in the annual report to the BLM. Any recommendations regarding no effect determinations will be given due consideration by the NM BLM.

3. **No Adverse Effect.** No adverse effects can be found when the undertaking's effects do not meet the criteria of adverse effect or the undertaking is modified or conditions imposed to avoid adverse effects.

a. **NO ADVERSE EFFECT BASED ON DATA RECOVERY.** (i) No Adverse Effect Based on Data Recovery can include treatment of historic or prehistoric archeological properties known or suspected to contain human remains. The NM BLM will determine appropriate treatment requirements for applicants or project sponsors. Copies of proposed treatment measures will be forwarded to SHPO, who shall be afforded 30 days to review and comment. Where the NM BLM cultural heritage specialist is a senior staff person with experience preparing and directing data recovery on similar sites in similar environments, no SHPO comments are expected.

(ii) The SHPO will inform the NM BLM within 10 working days if they will comment. If the SHPO does comment, they will do so within the 30-day time limit. If the SHPO objects to the adequacy of the treatment measures, the NM BLM and the SHPO must reach an agreement or the disagreement will be forwarded to the Advisory Council for their input in accordance with Section 4 of the PA. Following Advisory Council comment, the NM BLM will make a final decision.

(iii) "Agreed-Upon-Treatment-Measures" may be defined for certain classes of historic properties. They may be attached to this protocol and periodically updated through amendments to the protocol. Undertakings that employ the Agreed-Upon-Treatment-Measures for affected historic properties in specified regions can be authorized by the NM BLM without waiting for SHPO comment and concurrence. (Previous examples of such agreed upon treatments include the Fruitland Coal Gas Gathering System Data Comparability Guidelines and Overview and Research Design for the Fruitland Coal Gas Development Area). The NM BLM will notify the SHPO when proposing to use these measures in a new geographic region prior to implementation.

b. NO ADVERSE EFFECT WHERE EFFECT IS POSITIVE. For those undertakings that will affect historic properties positively, such as stabilization/restoration projects, the same procedures presented in paragraphs VI.G.3.a (i-iii) above will be followed.

4. **Adverse Effect.** Adverse effects occur when an undertaking will alter the characteristics of historic properties that qualify them for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Adverse effects include reasonably foreseeable effects caused by the undertaking that are later in time or further removed in distance.

a. For those undertakings where the adverse effects to historic properties cannot be fully mitigated through some form of study or treatment, the NM BLM will consult with the SHPO to devise treatments that will minimize the adverse effects. A Memorandum of Agreement (MOA) shall be executed between the SHPO and the NM BLM to document their agreement regarding how adverse effects will or will not be treated. If the NM BLM and the SHPO cannot reach agreement regarding an acceptable response to a situation of adverse effect, the issue will be raised with the Advisory Council. Following input from the Advisory Council, the NM BLM will make a final decision.

b. When an undertaking will directly and adversely affect a National Historic Landmark (NHL), the NM BLM shall, to the maximum extent possible, undertake such planning and actions to minimize harm to the NHL. The NM BLM will consult with the SHPO and the Secretary of the Interior, usually represented by the National Park Service, regarding effects or treatments to NHLs. The NM BLM will also consult with the Advisory Council pursuant to Section 4.b.2 of the PA. Following receipt of input and advice from the Advisory Council, the NM BLM will make a final decision.

VII. POST-REVIEW DISCOVERIES

A. PLANNING FOR DISCOVERIES

The NM BLM will encourage applicants to develop discovery plans for large and complex undertakings and those involving land disturbance in areas known to contain buried sites. Copies of such discovery plans will be forwarded to the SHPO along with any proposed treatment plans according to the provisions of VI.G.3.a.

B. UNPLANNED DISCOVERIES

If sites are discovered in the absence of a discovery plan, the NM BLM will make reasonable efforts to avoid, minimize, or mitigate adverse effects to those historic properties discovered. The NM BLM will halt any further actions that could cause additional damage to the discovered sites. The NM BLM will determine the National Register eligibility of the sites within 72 hours of discovery. For eligible properties that will be adversely affected, the NM BLM will insure that a treatment plan is prepared. The treatment plan will specify actions that will be taken to mitigate or minimize adverse effects to the historic properties. Any such unplanned discoveries and selected treatments will be reported fully in the annual report that the NM BLM will provide to the SHPO.

VIII. EMERGENCY SITUATIONS

In the face of emergency unplanned undertakings, such as wildland fire suppression, the NM BLM will meet its Section 106 obligations in the following manner. The NM BLM will make reasonable efforts to avoid, minimize, or mitigate adverse effects to those historic properties discovered. To the extent that such actions do not threaten life or property, the NM BLM will halt further actions until the discovered sites can be evaluated. Such evaluations of significance are expected to occur within 48 hours of discovery. For eligible properties, the preferred course of action will be to redesign the project so that adverse effects are avoided. To the extent that such actions will not threaten life or property for eligible properties that will be adversely affected, the NM BLM will insure that a treatment plan is prepared and executed. A complete report on any emergency situations, any affected historic properties, and any data recovery carried out will be included in the annual report provided by the NM BLM to the SHPO.

IX. NATIVE AMERICAN TRIBAL GOVERNMENT PARTICIPATION

A. Native American tribal governments will be encouraged to raise issues, express concerns, provide information, and identify

resources and places they would like the NM BLM to consider in its decision making.

B. The NM BLM recognizes that some cultural properties of traditional importance can only be identified through information supplied by the tribes and that the NM BLM has a responsibility to consult with tribes regarding the identification and determinations of effects to such properties.

C. In reaching a decision on how to treat affected historic properties, the NM BLM will fully consult with tribes as required by NHPA, the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act, and other applicable legal mandates. Such consultation will occur regardless of the streamlined procedures governing NM BLM-SHPO consultation on treatment and will occur whether or not Agreed-Upon-Treatment-Measures have been negotiated and agreed to by the NM BLM and SHPO for certain classes of historic properties. After considering tribal input, the NM BLM will make the decision on how to proceed with appropriate treatment.

D. While consultations regarding specific undertakings may occasionally occur, the NM BLM will usually consult with Indian tribes programmatically through the public participation opportunities afforded by the land use planning and environmental review processes associated with the development of EISs and other large-scale regional plans.

E. In addition, the NM BLM will comply with the following guidance:

* BLM Manual 8120, Tribal Consultation under Cultural Resource Authorities.

* BLM Handbook H-8120-1, Guidelines for Conducting Tribal Consultation.

X. NM BLM RESPONSIBILITIES ON NON-FEDERAL LANDS

A. The intent of the National Historic Preservation Act is to consider the effects of Federal decision-making on historic properties regardless of the land status involved. Therefore, the NM BLM will assure that its actions and authorization are considered in terms of their effects on cultural resources located on non-Federal lands as well as Federal lands.

B. The NM BLM will determine the extent of its responsibility for identifying and mitigating adverse effect to non-Federal historic properties even if the undertaking is processed as a CX or DNA based on the independent evaluation of the following factors:

- 1) Would the project remain viable if the Federal authorization were not provided?
- 2) How likely are historic properties in the area of potential impact?
- 3) The amount of NM BLM lands involved.
- 4) The degree to which NM BLM authorizations affect the location of surface disturbing activities on non-Federal lands.

C. The NM BLM will conduct, or cause to be conducted, an inventory and evaluation of cultural resources on non-Federal lands within the area potentially impacted by proposed land uses, whether the undertaking was initiated by NM BLM or in response to a land use application.

D. The NM BLM will consider the effects of its decision-making upon historic properties. It will either mitigate, or cause to be mitigated, adverse effects to non-Federal historic properties that would result from land uses carried out by or authorized by NM BLM or will consult with the SHPO and Advisory Council on the basis of an adverse effect determination.

E. When mitigation 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 recovered from non-Federal lands remain the property of the non-Federal landowner unless donated to the Federal Government, a State facility, or are otherwise subject to State law. The NM BLM must receive complete and true copies of field notes, maps, records of analyses, photographs, other data, and reports when mitigation work is conducted on behalf of the Federal Government. Reports resulting from work on non-Federal land will be made available to the landowner.

F. Identification and/or mitigation of adverse effects may be required as a condition of a lease, permit, or license issued by NM BLM, whether Federal or non-Federal lands are involved.

G. Because local regulations or state law (such as the New Mexico Cultural Properties Act, as amended 18-6-1 through 17) may still apply to the non-federal portions of an undertaking, the NM BLM will clarify for project sponsors the circumstances under which state, federal, or other laws and regulations apply.

XI. LEGAL ENFORCEABILITY

The BLM's National PA requires that each BLM state develop a Protocol agreement with their SHPO that specifies how they will interact under the PA. This Protocol between the NM SHPO and the NM BLM fulfills a key prerequisite for the NM BLM to operate under the terms of the PA. As such, this Protocol 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.

XII. AMENDING THE PROTOCOL

A. Should changes occur to the National Historic Preservation Act, 36 CFR 800, or the National Programmatic Agreement, the SHPO and the NM BLM will meet and discuss the need to amend this document to reflect changes in the authorities under which the Protocol functions.

B. If the NM BLM or the SHPO wish to amend this Protocol at any time, they will consult to consider requested changes. Amendments will become effective when signed by both parties.

C. Five years from the last signature date of this agreement, the parties will formally review its terms and propose any needed revisions.

XIII. DISPUTE RESOLUTION

A. If, at any time, the NM BLM or the SHPO questions case-specific actions taken or recommendations made under this Protocol, they will consult to resolve the issue. If the issue involves actions proposed or taken by a Field Office, the SHPO will consult with the Field Office Manager to resolve it. If the issue cannot be resolved, the questioning party will request the assistance of the Deputy Preservation Officer to resolve the issue. If the issue still cannot be resolved, the Deputy Preservation Officer will refer it to the BLM Preservation Board. The BLM Preservation Board will provide recommendations to the State Director, who will make the final decision.

B. During the course of 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. If any Native American tribal government or any member of the public objects at any time to the process by which this Protocol is being implemented, the NM BLM and the SHPO will together consult with the objecting party to resolve the issue. If the NM BLM, SHPO, and objecting party are unable to resolve the issue, the NM BLM will refer the matter to the BLM Preservation Board. The BLM Preservation Board will provide recommendations to the State Director, who will make the final decision. Such a final decision is subject to the appeal process described in 43 CFR Part 4.

XIV. TERMINATION OF PROTOCOL

The NM BLM or the SHPO may terminate this Protocol by providing sixty days notice to the other party, provided that they consult during this period to seek agreement on amendments to the Protocol, Field Office Certification Plans, or other actions that would avoid termination. The Deputy Preservation Officer or the SHPO may request the assistance of the BLM Preservation Board, National Council of State Historic Preservation Officers, or the Advisory Council on Historic Preservation in the consultation. If the Protocol is terminated for the entire state, the NM BLM will resume operating under the provisions of PMOA No. 168. (If an individual Field Office is decertified, that Field Office will operate under 36 CFR 800).

XV. APPENDICES

The following appendices are attached and incorporated into this Protocol:

1. NM BLM-SHPO Private Land Exchanges or Sales MOA
2. NM BLM-SLO-SHPO MOU on Land Exchanges
3. NM BLM-SHPO ARMS Assistance Agreement
4. Definition of Isolated Manifestations and Sites
5. NMCRIS Site Form Standards
6. NM BLM Small-scale Inventory Report Standards
7. NM BLM Large-scale Inventory Report Standards
8. NM BLM Data Recovery Report Standards
9. NM BLM-SHPO Data Synthesis, Heritage Education, and Site Stewardship Program Assistance Agreement and Modification One
10. NM BLM Statewide Certification Plan
11. List of Actions Not Considered to be Undertakings
12. Information Bulletin No. 2002-101, "Cultural Resource Considerations in Resource Management Plans"

APPROVED BY:

John S. ... *6/5/04*
New Mexico State Director Date
Bureau of Land Management

Katherine Stieb *17 June 2004*
State Historic Preservation Officer Date
New Mexico