



United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Washington, DC 20240
<http://www.blm.gov>

Dear Sir or Madam:

I am pleased to transmit a final draft of the revised national Programmatic Agreement (PA) that the Bureau of Land Management (BLM) maintains with the National Conference of State Historic Preservation Officers (NCSHPO) and the Advisory Council on Historic Preservation (ACHP) (Attachment 1). We anticipate executing this PA with the NCSHPO and the ACHP in February 2012. The revised PA, which replaces the original 1997 PA, maintains the administrative efficiencies established between the BLM and individual State Historic Preservation Offices (SHPO) in complying with Section 106 of the National Historic Preservation Act (NHPA) while enhancing the role of tribal governments, consulting parties, and the public in the BLM project review process.

The PA has been revised to ensure terminology is consistent with 36 CFR 800.16 definitions. It further elaborates the role of tribes in the Section 106 process, incorporates a process for partnering with tribes through tribe-specific protocols, and clarifies the role of consulting parties and the public. It also fulfills other purposes specified in the BLM's December 29, 2009, *Federal Register* notice (74 FR. 68862).

In addition to a public comment opportunity, the PA revision was informed by an extensive process of outreach and consultation with tribes and other stakeholders which began in August 2008:

- In August 2008 the BLM Director sent the agency's existing policies, including the PA and applicable BLM-SHPO protocols, to over 600 tribal leaders and other stakeholders, and requested feedback and recommendations for improvement.
- From October 2008 through July 2009 the BLM State Directors held a series of listening sessions in which tribes and other stakeholders were afforded an opportunity to talk directly to BLM executive leadership and local line officers.
- In December 2009 the BLM Director sent a draft PA revision strategy to over 600 tribal leaders and other stakeholders, published a *Federal Register* Notice of its intent to revise the PA, and extended an invitation for government-to-government consultation on the revision.
- In September 2010 the BLM Director sent a draft revised PA to over 600 tribal leaders and other stakeholders asking for comment.
- At each step in the national outreach and consultation process, the BLM State and Field Offices followed-up with calls, letters, and meetings.

We thank every one of you who provided comments and recommendations for revision of the PA. We also appreciate the other suggestions for improvements provided to us that the BLM could implement or use to enhance our consultation policies and practices. This final draft agreement has been significantly revised, and we believe, appreciably improved as a result of your comments. Attached is a summary of the comments we received in the listening sessions, and from subsequent multiple reviews of the draft revised documents from tribes, private organizations, and others (Attachment 2).

Many of the comments we received were beyond the scope of the PA, which is specific to compliance with the National Historic Preservation Act (NHPA); however, they have served well to inform the development of new Department of the Interior (DOI) consultation policies. In fact, when the revised PA is signed, the BLM will begin implementation of the revision as a primary component of our implementation of the anticipated new DOI Tribal Consultation Policy. The new DOI Tribal Consultation Policy specifies when to consult with Indian tribes; mandates consultation performance measures for managers, training, continuing improvements; and provides clear points of contact. These principles are all supported by the PA.

As we move forward in both the implementation of the new PA and the new DOI Tribal Consultation Policy, we will look forward to your continued participation. Specifically, we will be reaching out to tribes and others on the following three efforts:

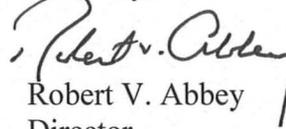
- Designation of BLM points of contact for tribal governments at the national and state offices.
- Relationship-building between BLM managers and tribal leaders to improve communications on the BLM's upcoming activities and opportunities for government-to-government consultation as part of the DOI Consultation Policy implementation.
- Review and revision of dated BLM-SHPO protocols, including consulting party participation, invitation to tribal consultation, and opportunity for public comment.

Thank you again for your consultation and significant engagement in these efforts. We understand that you have many demands on your time and resources, and value your input. For the BLM and tribes, government-to-government consultation is an ongoing process. We look forward to working with you on other issues that are important to your tribes.

If you have any questions on the PA in regard to tribal issues, please feel free to contact the BLM National Tribal Coordinator, Jerry Cordova at (202) 912-7245 or jcordova@blm.gov.

For all other questions or concerns, please contact BLM Preservation Officer Robin Burgess, Ph.D. at (202) 912-7241 or rburgess@blm.gov.

Sincerely,



Robert V. Abbey
Director

2 Attachments

- Attachment 1 - Final Draft of Revised National Programmatic Agreement (16 pp)
- Attachment 2 - Comments on the BLM Programmatic Agreement (12 pp)

**PROGRAMMATIC AGREEMENT
AMONG
THE BUREAU OF LAND MANAGEMENT,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS
REGARDING
THE MANNER IN WHICH THE BLM WILL MEET ITS RESPONSIBILITIES
UNDER THE NATIONAL HISTORIC PRESERVATION ACT**

Preamble

Bureau of Land Management. The Bureau of Land Management (BLM), consistent with its authorities and responsibilities under the Federal Land Policy and Management Act of 1976 (FLPMA), is charged with managing public lands principally located in the states of Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Wyoming 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), the National Historic Preservation Act of 1966 (NHPA) and implementing regulations of Section 106 of the NHPA at 36 CFR part 800, the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act, the Historic Sites Act of 1935, the Antiquities Act, the American Indian Religious Freedom Act, the Religious Freedom Restoration Act, 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 national programmatic agreement (PA) in 1997 to help guide the BLM’s planning and decision making as it affects historic properties 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.

State Historic Preservation Officers. State Historic Preservation Officers (SHPO) are represented by the National Conference of State Historic Preservation Officers (NCSHPO) for the purpose of negotiating and executing this agreement, and have responsibilities under state law as well as under Section 101(b) of the NHPA that include:

- “advise and assist as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;”
- “maintain inventories” of historic properties in cooperation with Federal and state agencies; and

- “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.”

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 (National Register), and on the development and implementation of agreements regarding the means by which adverse effects on such properties will be considered.

In certain cases, others may be authorized to act in the place of the SHPO. Where the Secretary of the Interior has approved an Indian tribe’s preservation program pursuant to Section 101(d)(2) of the NHPA, a Tribal Historic Preservation Officer (THPO) may perform some or all SHPO functions with respect to tribal lands, defined as all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities, consistent with 36 CFR 800.16(x). A certified local government acting through the chief local elected official may fulfill some SHPO-delegated functions, where the Secretary has certified the local government pursuant to Section 101(c)(1) of the NHPA, and its actions apply to lands in its jurisdiction. Pursuant to the regulations implementing Section 106 of the NHPA (36 CFR 800.3(c)(4)), the Advisory Council on Historic Preservation (ACHP) may at times act in lieu of the SHPO.

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.

Indian Tribes. This agreement is entered into pursuant to the NHPA, which specifically requires that agencies consult with federally recognized 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 agreement 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 include representatives of local governments, applicants, and certain individuals and 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)). In consultation with the SHPO/THPO, the BLM shall identify consulting parties and invite them to participate in 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 agency procedures as contained in the BLM-SHPO protocols or BLM NEPA procedures to involve the public.

The BLM, NCSHPO, and the ACHP—in consultation with Indian tribes and interested parties—now wish to ensure that the BLM will organize its programs to operate efficiently, effectively, according to the spirit and intent of Section 106 of the NHPA, and in a manner consistent with 36 CFR Part 800. The parties also wish to ensure that the BLM will integrate its historic preservation planning and management decisions with other policy and program requirements to the maximum extent. The BLM, the SHPOs, and the ACHP desire and intend, in the public interest, to streamline and simplify procedural requirements, reduce unnecessary paperwork, and emphasize the common goal of planning for and managing historic properties under the BLM’s jurisdiction and control.

Basis for Agreement

Proceeding from these responsibilities, goals, and objectives, the parties 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 National Register of Historic Places (National Register); (2) managing and maintaining properties listed in or eligible for the National Register 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, 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 the bureau’s preservation-related activities will be carried out in consultation with Indian tribes, other Federal agencies, local governments, consulting parties, and the interested public; and

WHEREAS the BLM’s program also is intended to: (1) ensure that the bureau’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 National Register 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 BLM recognizes that the 1997 PA and resulting internal BLM formal guidance do not incorporate the current 36 CFR Part 800 definition of “adverse effect” and role

of “consulting parties” in the NHPA Section 106 process, and the BLM will initiate revision of the relevant manual sections upon execution of this agreement; and

WHEREAS individual SHPOs, particularly those in states containing a high percentage of public land under the BLM’s jurisdiction and control, have a great interest in forming a cooperative relationship with the BLM to facilitate a more effective and efficient Section 106 consultation process, and promote activities of mutual interest, 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 Part 800.4(c)(1), and;

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

WHEREAS this agreement will 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 regular 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, for undertakings not on tribal lands, the BLM employs the basic principles of government-to-government consultation with Indian tribes under cultural resources authorities including the NHPA as reflected in this PA; 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 tribes may want to form a cooperative relationship with the BLM in a manner consistent with the purposes of this agreement to achieve a more effective and efficient Section 106 consultation process; and

WHEREAS the parties intend that efficiencies in the NHPA Section 106 process, realized through this agreement, will enable the BLM, SHPO, and ACHP staffs to devote a larger percentage of their time and energies to proactive work, including: (1) analysis and synthesis of data accumulated through decades of Section 106 compliance; (2) historic property identification where information is needed, not just in reaction to proposed undertakings; (3) long-term preservation planning; (4) National Register nominations; (5) planning- and priority-based historic resource management; (6) creative public education and interpretation; (7) more efficient and effective BLM, SHPO, tribal, and ACHP coordination, including program monitoring and dispute resolution; and (8) other activities that will contribute to readily recognizable tribal and public benefits; and

WHEREAS the BLM has consulted with the Indian tribes and the interested public regarding ways to ensure that the BLM’s planning and management will be more fully integrated and consistent with the above authorities, requirements, and objectives;

NOW, THEREFORE, the BLM, the ACHP, and the NCSHPO mutually agree that the BLM, consistent with the provisions of Component 1 of this PA below, will meet its responsibilities under the NHPA through this agreement 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 under FLPMA, National Environmental Policy Act (NEPA), other statutory authorities, and executive orders and policies.

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

Components of Agreement

1. Applicability

This agreement supersedes the 1997 PA. Existing state-specific BLM-SHPO protocols under the 1997 agreement will remain in effect until the respective BLM state director executes a successor BLM-SHPO protocol with each state per Component 6 of this agreement or until terminated. No existing informal and formal agreements between the BLM and an Indian tribe or tribes will be altered by this agreement. Any state not operating under a BLM-SHPO protocol will operate under 36 CFR 800.3 through 800.7, 36 CFR 800.8(c), or an applicable program alternative under 36 CFR 800.14.

2. BLM Consultation Responsibilities with SHPOs and the ACHP under this Agreement

a. This agreement encourages:

- (1) BLM state directors and SHPOs to develop mutually agreed upon two-party BLM-SHPO protocols regulating their relationship and how consultation will take place;
- (2) BLM state directors and SHPOs to establish streamlined (as opposed to case-by-case) consultation on evaluation of cultural resources for National Register eligibility and for no-historic-properties-affected, no-adverse-effect, and adverse-effect determinations when BLM and SHPO reach agreement on resolving the adverse effect(s);
- (3) BLM state directors to make a schedule of pending actions, including land exchanges, available to the public and Indian tribes on a regular basis;
- (4) BLM state directors to contact on a regular basis Indian tribes affected by undertakings within his or her jurisdiction and develop tribe-specific procedures for tribal consultation; and
- (5) BLM state directors to use phased identification and evaluation as described in 36 CFR 800.4(b)(2) as a strategy for meeting the BLM's NHPA Section 106 responsibility for programs implemented through a phased decision making process beginning with land use planning designations that may affect large land areas. A phased compliance process requires that the bureau demonstrate that it has taken some steps to take into account the effect of the undertaking on potentially eligible sites in each phase, and that until a reasonable effort has been made to identify all potentially eligible sites, the bureau retains the ability to modify the project, if

necessary, e.g., through no-surface-occupancy or other stipulations, or specific permit restrictions or covenants.

b. This agreement requires:

- (1) the BLM to follow the process at 36 CFR 800.3 through 800.7, 36 CFR 800.8(c), or another applicable program alternative under 36 CFR 800.14, for undertakings within any state that does not have a BLM-SHPO protocol under this agreement and for undertakings on or affecting tribal lands;
- (2) the BLM to consult with the relevant SHPO, Indian tribes (see Component 6.c), and other consulting parties for all undertakings that will adversely affect properties that are eligible for listing in the National Register, and for the development of any procedures such as project-specific PAs;
- (3) the BLM to invite the ACHP to participate in consultation when undertakings meet the thresholds in Component 5 of this agreement; and
- (4) the BLM to 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.

3. Operation of the BLM's Preservation Board

a. The BLM Director will maintain a Preservation Board to advise the BLM Director, assistant directors, state directors, and district and field office managers in the development and implementation of the BLM's policies and procedures for NHPA implementation.

b. The Preservation Board will be chaired by the BLM's Federal Preservation Officer (FPO) designated under Section 110(c) of the NHPA, and will include a professionally qualified Deputy Preservation Officer (DPO) from each state office and the BLM national Tribal Coordinator as ex officio members. Field management will be represented by at least four line managers (i.e., officials who are authorized by the Director's or state directors' delegation to make land-use decisions). Field office cultural resource specialists will be represented by two members. Line manager and field office cultural resource specialist positions will be term positions.

c. The Preservation Board will perform primary staff work and make recommendations to the BLM Director and state directors concerning policies and procedures (Component 4 below), bureau-wide policy implementation (Component 4 below), training (Component 7 below), certification and decertification of district or field offices (Component 9 below), monitoring of district and field offices' historic preservation programs (Component 10 below), and responses to public inquiries (Component 10 below).

d. In addition, the Preservation Board shall meet with the ACHP and NCSHPO on a regular basis. In coordination with individual BLM DPO(s) and/or BLM Tribal Coordinator(s), as appropriate, the Preservation Board will address formal communications it receives from the ACHP and the NCSHPO, individual SHPOs, local governments, preservation and professional associations, individual tribes, and other tribal entities that have identified themselves to the Board as interested parties, regarding recurrent problems or concerns with state, regional, or national practice, and will otherwise seek to create opportunities to advance the purposes of this agreement.

4. Cultural Resource Management Procedures for Consideration of the Effects of the BLM's Undertakings on Historic Properties

As required by the NHPA Section 106 process and this agreement, the field manager—with the assistance of qualified professional staff and in consultation with the SHPO according to the process in the BLM-SHPO protocol, and with Indian tribes and consulting parties—identifies, evaluates, and assesses effects of the BLM's proposed actions on historic properties. This Component sets out the alternative framework, which, at a minimum, must be reflected in BLM-SHPO protocols or reflected with respect to individual projects utilizing this agreement to comply with Section 106.

a. Consultation with Indian tribes and the SHPO at the outset of land use planning is a vital part of identification and management of historic properties. Involving tribal governments and SHPOs closely at this level of resource consideration will greatly facilitate coordination and consultation at later stages of planning and project development and will afford the best opportunity to foresee and avoid potential conflicts between BLM-authorized land uses and significant historic properties. District and Field office managers will seek information in accordance with BLM land use planning and environmental review processes and the tribal consultation policies outlined in Section f of Component 4 below, from Indian tribes and other parties likely to have knowledge of or concerns with historic properties in the area to:

- (1) Identify properties of religious and cultural significance that may be eligible for listing in the National Register of Historic Places;
- (2) Understand tribal and other parties' concerns sufficiently to better understand the effects that potential future Federal undertakings might have on eligible properties; and
- (3) Consider comments provided in making decisions on the land use plan, and notify consulted parties of the relevant final land use planning decisions.

b. Prior to initiating or authorizing a proposed action that meets the definition of "undertaking" in 36 CFR 800.16(y) and is a type of activity that generically has the potential to cause effects to historic properties (with the assumption that historic properties are present), the responsible district or field office manager shall:

- (1) Determine the undertaking's area of potential effects;
- (2) Review existing information on historic properties potentially affected by the undertaking, including documentation of previous tribal consultation;
- (3) Seek information in accordance with BLM land use planning and environmental review processes from Indian tribes and other parties likely to have knowledge of or concerns with historic properties, particularly properties of traditional religious and cultural significance, in the area;
- (4) Determine the need for further actions, such as field surveys and predictive modeling to identify historic properties in the area;
- (5) Make a reasonable and good faith effort to identify historic properties that may be affected by the undertaking as described in 36 CFR 800.4(b)(1); and

(6) Determine if any properties within the area of potential effect, including properties of traditional religious and cultural significance to an Indian tribe, meet one or more eligibility criteria specified in 36 CFR 60.4 (association with events; association with lives of significant persons; embodiment of distinctive characteristics of a type, period, or method of construction or possessing high artistic value; have yielded or are likely to yield important data), while acknowledging that a formal determination of eligibility may be requested from the Keeper of the National Register pursuant to 36 CFR 800.4(c)(2) and 36 CFR part 63.

(i) If the BLM field manager determines, consistent with the process in the State's BLM-SHPO protocol, that a property does not meet the eligibility criteria in 36 CFR 60.4, he or she will provide documentation to the SHPO according to the reporting schedule in the State's BLM-SHPO protocol, and the property shall be considered not eligible for listing in the National Register and therefore not subject to further consideration under Section 106 and this PA.

(ii) If the field manager determines, consistent with the process in the State's BLM-SHPO protocol, that a property meets one or more eligibility criteria in 36 CFR 60.4, the property shall be considered eligible for listing in the National Register for purposes of complying with Section 106 of the NHPA and this PA (i.e., an "historic property").

c. The field manager, upon determining that National Register-listed or eligible historic properties may be affected by an undertaking, shall determine whether those properties may be affected, giving consideration to the views of the interested public and any consulting parties, including, but not limited to Indian tribes.

(1) If the field manager finds that the undertaking will not affect those characteristics of the property that qualify it for listing in the National Register, the field manager will document this finding, proceed with the undertaking, and provide documentation of "no historic property affected" to the SHPO in accordance with the reporting schedule specified in the State's BLM-SHPO protocol.

(2) If the field manager finds that the undertaking may affect those characteristics of the property that qualify it for listing in the National Register, the field manager will apply the Criteria of Adverse Effect to determine whether the proposed undertaking may alter, directly or indirectly, those characteristics in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association (36 CFR 800.5(a)(1)) and will document this finding. If the field manager finds that the effect is not to be adverse or the undertaking is modified to avoid adverse effects, per 36 CFR 800.5(b), and does not meet the threshold for case-by-case review in the State's BLM-SHPO protocol or the threshold for ACHP notification, the field manager will document this finding, proceed with the undertaking, and report it to the SHPO according to the BLM-SHPO protocol.

d. When a proposed agency decision or undertaking meets the threshold for case-by-case review in accordance with the BLM-SHPO protocol and/or the threshold for ACHP notification as specified in this PA (see Component 5), the field manager shall consult with the SHPO to determine the specific process to be followed in that case including, as appropriate:

(1) Additional actions necessary to identify historic properties;

- (2) National Register-listed or eligible historic properties affected by the undertaking;
- (3) Effects the undertaking would have on National Register-listed or eligible historic properties; and
- (4) Methods for avoiding, minimizing, or mitigating adverse effects.

e. If the field manager finds the effect to be adverse and decides to proceed with the undertaking, he or she shall make a reasonable and good faith effort to avoid, minimize, or mitigate adverse effects to the most reasonable and fitting extent, in consultation with the SHPO, Indian tribes, and other consulting parties, considering the nature of the effects and the characteristics and qualities that lend the property its significance.

f. The special legal status of tribal governments requires that the BLM's official interactions with them, including consultation, will be carried out in accordance with government-to-government procedures to ensure that tribal participation occurs pursuant to the statutory and regulatory directives in Sections 101(d)(6) and 110(a)(2)(E) of the NHPA and 36 CFR 800.2(c)(2). Consistent with those directives and Department of the Interior tribal consultation policy, the BLM will consult with the tribal government's official designee in accordance with the following policies.

- (1) BLM State directors, and district and field office managers, as appropriate, shall represent the United States in government-to-government meetings with Indian tribes.
- (2) District and/or field managers shall establish working relationships with tribal officials comparable to their working relationships with State and local government officials.
- (3) District and/or field managers and staffs shall recognize that traditional tribal practices and beliefs are an important, living part of our Nation's heritage and seek to avoid to the degree possible under existing law and regulation their potential disruption as a consequence of a proposed BLM land use decision.
- (4) District and/or field managers and staffs shall protect from disclosure to the public sensitive and confidential information about traditional tribal practices and beliefs, and the locations with which they are associated, to the greatest degree possible under law and regulation. District and field offices shall maintain the confidentiality of sacred sites to the degree possible under existing law and regulation.
- (5) District and/or field managers and staffs shall consider and consult with Indian tribes regarding whether a proposed undertaking may inhibit or destroy tribal access to public lands for the purposes of religious use and other traditional uses, such as gathering natural resources, and, shall, consistent with Executive Order 13007, seek to accommodate access to and ceremonial use of sacred sites, as well as avoid unnecessary interference with or adverse effects to traditional religious and cultural properties.
- (6) District and/or field managers and staffs shall consult with affected Indian tribes to identify and consider tribal concerns related to the identification and management of historic properties in BLM land use planning and decision-making, and shall document all consultation efforts.

- (7) District and/or field managers and staffs shall ensure that information on tribal religious and cultural issues receives good faith consideration during decision-making, and that, to the extent consistent with the law, BLM decisions do not substantially burden the pursuit of traditional religious and cultural practices.

5. Thresholds for ACHP Notification

a. The BLM procedures will identify specific circumstances and conditions that, when met, call for the ACHP's notification.

b. At a minimum, the BLM will request the ACHP's participation in the following classes of undertakings:

- (1) nonroutine interstate and/or interagency projects or programs;
- (2) undertakings adversely affecting National Historic Landmarks;
- (3) undertakings that the BLM determines to be highly controversial; and
- (4) undertakings that will have an adverse effect and with respect to which disputes cannot be resolved through formal agreement between BLM-SHPO, such as a memorandum of agreement.

c. The development and approval of program alternatives, including project-specific PAs, will follow the process under 36 CFR 800.14.

d. The ACHP reserves the right to participate, on its own initiative or at the request of the SHPO, an Indian tribe, a local government, an applicant or other consulting party, in any proceeding taking place in fulfillment of the BLM's NHPA Section 106 responsibilities under the regulations, this agreement, or BLM-SHPO protocols, in a manner consistent with its role under 36 CFR Part 800 and the criteria under Appendix A of 36 CFR Part 800 and will notify the responsible BLM state director, and/or district or field office manager and the Director when it decides to participate.

6. Cooperation and Enhanced Communication

This section establishes how the BLM will implement the alternate process afforded by Component 4 above with respect to potential and/or existing BLM-SHPO protocols. It also establishes how the BLM will develop cooperation and enhanced communication with the States and with Indian tribes potentially affected by BLM undertakings.

a. Information on the Web. The BLM will ensure the following information is available on the national BLM web site and will widely publicize this availability:

- (1) copy of this revised agreement;
- (2) reference copy of the existing BLM internal guidance, including Manual Sections and Manual Handbooks related to "Cultural Resource Management;"
- (3) copy of existing BLM-SHPO protocols under the 1997 agreement, used by the BLM within an individual state office's jurisdiction;

- (4) current list of Preservation Board members;
- (5) list of BLM DPOs and BLM tribal contacts for each state office;
- (6) map of each state showing BLM district and field office boundaries;
- (7) annual BLM Washington Office reports; and
- (8) BLM's Preserve America Section 3 report.

b. BLM-SHPO Protocols

Within 12 months of execution of this agreement, each BLM state director or his/her designee will meet with each relevant SHPO to review and consider the need for changes in the BLM-SHPO protocol for that state to meet the minimum requirements specified in this component and notify the ACHP of the results of their review. The state director may request ACHP assistance in identifying specific changes needed in the State's BLM-SHPO protocol prior to the state director initiating any changes associated with implementation of this agreement. BLM-SHPO protocols determined to require revision must be changed within 24 months of the date of this agreement.

The SHPO or BLM state director may ask the NCSHPO, the Preservation Board, and/or the ACHP to assist at any stage in revising BLM-SHPO protocols. The Preservation Board and the ACHP will be kept informed of the progress of protocol review and revision, and the BLM state office will provide the ACHP an opportunity to review and comment on revised protocols before execution. The state director will also provide the Preservation Board, ACHP, and NCSHPO with an information copy of any signed revision and post it on the BLM web site for that state.

Recognizing that BLM-SHPO protocols implement this agreement, any revisions to BLM-SHPO protocols that alter the process for complying with Section 106 specified in this agreement and any BLM-SHPO protocol that was executed or last revised 10 or more years prior to the date of this agreement, will be subject to consultation requirements as set forth in 36 CFR 800.14, including, in particular, the tribal consultation requirements under 36 CFR 800.14(f).

At a minimum, BLM-SHPO protocols will incorporate the framework outlined in Component 4 of this agreement and address the following:

- (1) a means for making a schedule of pending undertakings, including land transfers, available to the public and Indian tribes on a regular basis
- (2) a commitment to fulfill tribal consultation obligations;
- (3) the manner in which public participation is addressed for protocol-guided compliance processes;
- (4) the manner in which the involvement of consulting parties is addressed for protocol-guided compliance processes;
- (5) data sharing, including information resource management development, support and security—at a minimum annual transmittal of all site forms and project reports;

- (6) data synthesis, including geographical and/or topical priorities for reducing the backlog of un-synthesized site location and report information, and data quality improvement;
- (7) public education and community involvement in preservation;
- (8) preservation planning;
- (9) cooperative stewardship;
- (10) agreement as to the types of properties for which BLM may determine ineligibility without seeking SHPO agreement. Eligibility determinations regarding possible traditional cultural properties will continue to require SHPO agreement and consultation with tribes.
- (11) agreement as to types of undertakings and classes of affected properties that will trigger case-by-case review, including all undertakings that will have an adverse effect on historic properties, as well as any development of alternative procedures such as project-specific PAs, and how this review will proceed, consistent with Component 4 above;
- (12) manner in which the BLM will ensure that appropriate professional expertise will be obtained or made available for specific types of undertakings or historic properties;
- (13) provisions for resolving disagreements and amending or terminating the BLM-SHPO protocol;
- (14) circumstances under which the BLM and/or SHPO may choose to operate under 36 CFR 800.3 through 800.7 in place of the BLM-SHPO protocol;
- (15) the substance and format of supplemental information to the BLM annual report that the state director will prepare in satisfaction of Component 10b of this agreement and the manner in which the report will be made available to affected Indian tribes and the public via the state BLM website. Supplemental information shall include information on BLM actions relative to undertakings and classes of affected properties that did not trigger case-by-case review; and
- (16) training of a new manager or archaeologist with Section 106 responsibilities in a state that operates under this PA within 90 days of his or her report date in the procedures outlined in the PA and appropriate BLM-SHPO protocol.

c. BLM-Tribal Relations

BLM shall consult with Indian tribes on individual undertakings in the context of an ongoing government-to-government relationship sustained through regular periodic meetings supplemented by additional undertaking-specific consultation. Within 12 months following execution of this agreement, each state director will have begun contacting Indian tribes that are affected by BLM undertakings within his or her jurisdiction on a regular basis for the purpose of initiating a discussion about ways in which BLM and each Indian tribe can foster better communication. This discussion between the appropriate BLM and tribal representatives is an

opportunity to establish effective methods for meeting tribal consultation requirements regarding identification and evaluation of historic properties, including traditional cultural properties, and for the resolution of adverse effects of undertakings. This process should be carried out in coordination with other state directors, as appropriate, and should seek to:

- (1) identify geographic areas, types of historic properties, and undertakings of concern to Indian tribes;
- (2) identify confidentiality issues;
- (3) answer questions on the existing BLM-SHPO protocol;
- (4) provide a tribal point of contact for the state office and each district and field office within his or her jurisdiction;
- (5) develop a process for providing information and schedules of pending actions, including land exchanges, permits, and approvals on a regular basis; and
- (6) offer Indian tribes the opportunity to establish a formal ongoing relationship through an agreement for conducting the consultation required under the NHPA Section 106 within the framework of the BLM's government-to-government relationship with Indian tribes and other authorities.

d. The state director, will seek, as appropriate, the active participation of SHPOs, Indian tribes, and the interested public in BLM land-use planning and associated resource management activities consistent with section 202 of FLPMA, 43 U.S.C. § 1712, and implementing regulations at 43 CFR 1610.2. This participation will be sought so that historic preservation considerations may influence large-scale decisions and inform the analysis of cumulative effects of more routine decisions, before the BLM makes key commitments and its management options are limited.

e. If deemed helpful and appropriate by the Indian tribe and the BLM, the BLM will seek to establish agreements and/or other formalized working arrangements with Indian tribes, relative to identifying undertakings, identifying properties, evaluating properties, determining effects, and protecting historic properties. All existing project and special purpose agreements with Indian tribes will function normally according to their terms.

f. When potentially relevant to the purposes and terms of this agreement, the BLM FPO will forward to the ACHP and the NCSHPO, in a manner that allows for consultation at their request, information concerning the following:

- (1) major policy initiatives;
- (2) proposals for new BLM regulations;
- (3) proposals for organizational change potentially affecting relationships addressed in this agreement;
- (4) the Administration's budget proposal for BLM historic preservation activities, following its submittal to Congress;
- (5) relevant training opportunities; and

(6) long range planning and regional planning schedules.

7. BLM Staff Training Program

The BLM will maintain an internal training program to: (a) instruct BLM line managers and cultural heritage specialists on the policies underlying and embodied in this agreement, including tribal consultation and state specific BLM-SHPO protocol implementation; and (b) enhance skills and knowledge of other BLM personnel involved with “Heritage Resource Management” activities, including land use planning and resource management staffs. In cooperation with the ACHP and NCSHPO, the BLM may identify partners, as appropriate, to assist in developing training programs. The BLM may seek the active participation of Indian tribes and individual SHPOs in training sessions.

8. Professional Development

a. The DPOs, in consultation with supervising line managers and cultural heritage specialists in their state, will document each district and field office’s preservation professional staffing capabilities in their annual report to the SHPO. Documentation will include any recommended limitations on the nature and extent of authorized functions. Where a field manager’s immediate staff does not possess the necessary qualifications to perform specialized preservation functions (e.g., historical architecture, historical landscape architecture, ethnography), the field manager will seek specialized expertise from outside the immediate staff.

b. The DPOs may request that the Preservation Board assist the supervising line manager and the cultural heritage specialist in assessing the manager’s needs for special skills not presently available on the immediate staff, and the specialist’s opportunities for professional development and career enhancement through training, details, part-time graduate education, and other means.

9. District or Field Office Certification and Decertification

a. The Preservation Board, in coordination with the appropriate DPO, SHPO, and the ACHP, and with consideration of tribal comments, may choose to review the status of a district or field office’s certification to employ BLM-SHPO protocols developed pursuant to this agreement; or the district or field manager, the state director, the ACHP, or the SHPO, may request that the Preservation Board initiate a review of a district or field office’s certification.

b. If a review is being conducted, the FPO, appropriate DPO(s), SHPO(s), the ACHP, and the Preservation Board will participate in the review, and the BLM may consider including other legitimate affected parties as participants in the review, as appropriate.

(1) If a district or field office is found not to have maintained the basis for its certification (e.g., lacks the professional capability needed to carry out these policies and procedures, or is proceeding in contravention of its BLM-SHPO protocol or BLM internal guidance), and the office’s manager has not voluntarily suspended participation under this agreement, the Preservation Board will recommend that the state director decertify the district or field office. If a suspended or decertified district or field office is found to have restored the basis for certification, the Preservation Board will recommend that the state director recertify the district or field office.

- (2) A state director may ask the Director to review the Preservation Board's decertification recommendation, in which case the Director may request the ACHP's participation in the review.
- (3) The Preservation Board will notify the appropriate SHPO(s), the ACHP, and the review requestor, of the findings of the review, including any recommended changes to the certification status of the office.
- (4) When a district or field office is suspended or decertified, the district or field manager will follow the procedures of 36 CFR 800.3 through 800.7, or 36 CFR 800.8(c), or an applicable program alternative under 36 CFR 800.14, to comply with Section 106.

c. If the Preservation Board receives a request to perform a review and decides not to conduct the review, it will provide a response to the requester, including the rationale for its decision.

10. Accountability Measures

a. It will be the Preservation Board's duty in accordance with Component 3.c and 3.d above to foster consistency and conformity with BLM policies and procedures. Where problems with implementation are found, it will be the Preservation Board's duty to move promptly toward effecting correction of the problems, in coordination with the individual DPO.

b. Each state director will prepare an annual report in consultation with the appropriate SHPO(s), outlining the preservation activities conducted under this agreement. The annual report will be consistent with the BLM's annual Washington Office reporting requirements, and will include supplemental information agreed upon by the BLM and SHPO. The state reports will be made available to the public via the BLM state web sites, and BLM will notify the ACHP of their availability via email.

c. Annually, each state director that maintains a BLM-SHPO protocol pursuant to this agreement or his/her designee will meet with the SHPO to review the implementation of that BLM-SHPO protocol.

d. The Preservation Board or the BLM Washington Office, in consultation with the ACHP and SHPOs, may select one or more certified state, district, or field offices for a detailed field review of this agreement's implementation. The FPO and the appropriate DPO(s), SHPO(s), and the ACHP will participate in the review and may include other parties as appropriate. Findings and recommendations based on this field review will be provided to the participants, the Director, the state director, and the Preservation Board for appropriate action.

e. The FPO and DPOs will prepare responses to public inquiries for the signature of the Director or a state director regarding inquiries about the BLM's exercise of its authorities and responsibilities under this agreement, such as the identification, evaluation, and management of resources. Responses will include establishing the facts of the situation and, where needed, recommendations to the Director or state director for corrections or revisions in a practice or procedure.

f. Each meeting of the Preservation Board will be documented by a report. The Preservation Board will post a copy of each report on the national BLM web site.

11. Reviewing and Changing the Agreement

a. The signatories to this agreement may agree to revise or amend it at any time. Changes that would affect the opportunity for public participation or tribal consultation will be subject to public notice and tribal consultation. An amendment will go into effect when signed by all the signatories.

b. Should any signatory to this agreement object to any matter related to its implementation, the signatories will meet to attempt to resolve the objection. If a signatory determines that such objection cannot be resolved, BLM will:

1. Forward all documentation relevant to the dispute, including the BLM's proposed resolution, to the other signatories. The signatories shall provide BLM with their response to the BLM's proposed 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 signatories, and provide them with a copy of this written response. BLM will then proceed according to its final decision.

2. If the signatories do not provide their advice regarding the dispute within the thirty (30) day time period, BLM may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, BLM shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories to the agreement, and provide them with a copy of such written response.

3. BLM's responsibility to carry out all other actions subject to the terms of this agreement that are not the subject of the dispute remain unchanged.

c. Any signatory to this agreement may terminate it by providing 90 days notice to the other signatory, provided that the signatory will meet during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, all state-specific BLM-SHPO protocols developed under the authority of this agreement and/or the 1997 PA will be terminated, and the BLM will comply with Section 106 through the process in 36 CFR 800.3 through 800.7, or 36 CFR 800.8(c), or an applicable program alternative under 36 CFR 800.14.

d. Within 1 year of the execution of this agreement and every 2 years thereafter, the signatories to this agreement will meet to review its implementation.

e. Specific references to 36 CFR Part 800 are to the regulations that became effective on August 5, 2004. Generic references to 36 CFR Part 800 in this agreement may be read in the future as referencing the version that is in effect at the time of reading.

f. This agreement will be in effect for a period of 10 years from the date of execution, with an option for renewal in 2-year increments with agreement of its signatories.

Affirmation

The signatures below represent the affirmation of the Bureau of Land Management, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers that successful execution of the Components of this agreement will satisfy

the BLM's obligations under Section 106 and serve as partial satisfaction of the BLM's obligations under Sections 110(f) and 111(a) of the National Historic Preservation Act.

Robert V. Abbey
Director, Bureau of Land Management

Date

John M. Fowler
Executive Director, Advisory Council on Historic Preservation

Date

Ruth Pierpont
President, National Conference of State Historic
Preservation Officers

Date

Comments on the Bureau of Land Management Programmatic Agreement

General

Comment: The Bureau of Land Management (BLM) must consult on more than cultural resources -- for instance, also consider sacred sites and traditional use areas, including treaty areas.

Response: The BLM National Programmatic Agreement (PA) now states that National Historic Preservation Act (NHPA) Section 106 consultation is part of a greater agency responsibility to consult on all issues of relevance to the tribes in the government-to-government relationship.

Comment: Return to the old BLM 8160 Manual Section.

Response: The old BLM 8160 Manual Section addressed tribal consultation beyond cultural resource authorities, and is beyond the scope of the BLM PA. The PA lists the multiple authorities under which the BLM consults with Native Americans, but is specific to the BLM's consultation responsibilities under Section 106. Issuance of the forthcoming Department of the Interior Tribal Consultation Policy will require the review of the BLM's existing consultation guidance.

Comment: The BLM 8150 Manual Series significantly restricts when consultation is required under the Archaeological Resources Protection Act for survey and recordation permits.

Response: The PA is specific to the BLM's responsibilities under Section 106 of the NHPA and does not address the BLM's Archaeological Resources Protection Act (ARPA) responsibilities.

Comment: Insert a reference concerning consultation with tribal governing bodies and tribal designees on policy development as required by EO 13175.

Response: The PA acknowledges the responsibilities of the BLM under EO 13175, but is itself specific to the BLM's responsibilities under Section 106 of the NHPA.

Comment: Add the protection of paleontological resources to the PA.

Response: The PA is specific to the BLM's responsibilities under Section 106 which does not extend to consideration or protection of paleontological resources.

Comment: It appears the BLM wishes to deregulate its requirements.

Response: With over 11,000 undertakings a year at the current pace of applications for commercial development, the BLM and the State Historic Preservation Officers (SHPO) who wish to take advantage of efficiencies offered will focus on those undertakings that pose the greater risks to properties that are eligible for the National Register of Historic Places (NR).

Comment: The PA should not limit the type of undertakings subject to tribal consultation.

Response: The PA only addresses the communications between the BLM, SHPOs, and the Advisory Council on Historic Preservation (ACHP) in pursuing compliance with Section 106. The agency recognizes that the PA does not alter responsibilities to tribes, and does not limit responsibilities to consult under other authorities.

Comment: The Section 106 process is onerous, unpredictable, time-consuming, and the cause of delays and cost increases.

Response: The goal of the PA is to maintain an efficient Section 106 compliance process through the development of state-specific communication protocols that reduce the routine bureaucratic workload for SHPOs and the ACHP while allowing the BLM to meet its responsibilities under Section 106 to consult with tribes, interested members of the public, and consulting parties, including proponents.

Comment: The PA should streamline and clarify the relationship between Section 106 and the National Environmental Policy Act (NEPA).

Response: The PA encourages the coordination of Section 106 and NEPA compliance by requiring the BLM State Offices to seek, as appropriate, the active participation of SHPOs, Indian tribes, and the interested public in the BLM's land use planning process consistent with the Federal Land Management Policy Act (FLPMA) and NEPA, and to develop a means for making a schedule of pending undertakings available to the public and tribes. As part of implementing the new revised PA, the BLM Washington Office has already developed a detailed guide on the coordination of the NEPA and NHPA processes to emphasize the increased responsibilities to the public and consulting parties under the 2004 regulations

Comment: The PA revision should streamline and clarify the relationship of NEPA and tribal consultation.

Response: The PA clarifies the BLM tribal consultation requirements. As an agreement among the BLM, the ACHP, and NCSHPO, the PA cannot alter tribal consultation requirements in any manner. The PA does require State Directors to encourage the active participation of Indian tribes in the BLM's land use planning process; to meet with tribes and develop a process for providing schedules of pending actions on a regular basis; and offer the opportunity to establish a formal relationship through an agreement for conducting tribal consultation required by Section 106 within the framework of the BLM's government-to-government relationship with Indian tribes.

Comment: The PA should not impose measures that go beyond Congressional intent that agencies take into account the effects of an undertaking and seek ways to avoid, minimize, or mitigate adverse effects, but not necessarily resolve them.

Response: The PA addresses the BLM's responsibilities under the NHPA. This includes, but is not limited to Section 106. The PA embodies a commitment to build better working relationships, establish a more open and transparent process, improve efficiency in routine

compliance activities, and use Section 106 as a planning tool that informs the BLM's decisions. It does not mandate a specific outcome.

Comment: The BLM needs to do greater proactive work such as making National Register nominations.

Response: The BLM seeks to improve its efforts to inform interested persons of the accomplishment of proactive activities. For instance, since 1998, the BLM has completed 68 successful NR nominations that placed 1093 individual properties on the NR. The BLM's Preserve America reports, prepared pursuant to EO 13287 in 2004, 2005, 2008, and 2011, include many examples of the BLM's recent proactive work.

Comment: The PA should include an end date.

Response: The PA states that it will be in effect for ten years from the date of execution, with an option for renewal in two-year increments with agreement of its signatories.

Comment: The PA is full of vague and confusing language.

Response: The revised PA strives to substitute or clarify the meaning of terms that have been identified as vague or confusing.

Comment: The PA needs to clarify the BLM's responsibilities to tribes for consultation under Section 106 of the NHPA.

Response: A new section was added to the PA to further emphasize tribal consultation than was provided in the original PA document.

Comment: The PA should reiterate the BLM's tribal consultation policies from agency manuals and handbook.

Response: Key policy statements in the BLM Manual 8120 Tribal Consultation under Cultural Resource Authorities and H-8120-1 Guidelines for Conducting Tribal Consultation have been inserted in the PA so that the reader does not have to refer to other documents in addition to the PA to appreciate the breadth of the BLM Tribal Consultation Policy.

Comment: The Bureau of Indian Affairs is the Federal agency that conducts consultation on tribal lands, so please specify when and how the BLM would determine that its undertaking would affect tribal lands?

Response: This PA will not apply to proposed BLM undertakings located on or affecting historic properties on tribal lands, with respect to which the BLM will comply with 36 CFR Part 800. The BLM 8120.08E.1 addresses consultation requirements on or affecting tribal lands. The definition of tribal lands in the NHPA includes all lands within the exterior boundaries of any Indian reservation which could include lands within the jurisdiction of the BLM.

BLM Preservation Board

Comment: The composition of the Preservation Board (Board) should be expanded to include tribal representatives and others.

Response: The Board operates under a formal charter under the direction of the Assistant Director of Renewable Resources and Planning, and is charged inherently with Federal actions of developing policies and budget guidance. For that reason, the Board is structured as a strictly internal body. However, the Board composition is being extended to include the BLM National Tribal Coordinator. The Board also has taken strides to invite interested outside parties to attend and actively participate in the Board meetings.

Cultural Resources Management Procedures

Comment: Section 2b in existing agreement refers to “notification” of tribes rather than consultation; Section 2d refers to consultation with SHPO, not tribes, on adverse effects.

Response: Section 2 now requires the BLM to consult with the relevant SHPO, Indian tribes, and other consulting parties for all undertakings that will adversely affect properties that are eligible for the National Register of Historic Places (NR). It also encourages the BLM State Directors to make a schedule of pending actions available to Indian tribes and contact them on a regular basis, and develop tribe-specific procedures for tribal consultation.

Comment: Section 6.d ignores the rights of tribes that have been relocated or removed.

Response: Section 6.d. (now Section 6.c) relates to developing ongoing government-to-governing relationships sustained through regular meetings as well as project-specific consultation. The PA specifically acknowledges consultation with Indian tribes whose ancestral are located in areas where the BLM has surface or subsurface responsibilities. Section 4.f requires BLM consultation with tribal governments affected by an action.

Comment: The PA is not in conformance with 2004 36 CFR Part 800 regulations; and therefore, is not in conformity with Section 110(a)(2)(E)(I) of NHPA.

Response: One of the major goals in updating the PA was to assess the changes in the regulations and how those changes should be addressed in BLM procedures under the PA. The current draft is consistent with the 2004 regulations.

Comment: Multiple layers of agreements and protocols are confusing and make it difficult to interpret the BLM’s responsibilities.

Response: The new PA incorporates national guidance from the pertinent BLM 8100 Manual Sections rather than refer to them by number. However, activities involving the BLM lands and the various parties that have a stake in those activities vary greatly around the country. Multiple

layers of agreements and protocols are maintained in the new PA to continue to maximize regional/local adaptation while ensuring national consistency with basic policies and principles of inclusion, and in part recognition of tribal sovereignty in which each tribe is unique in its cultural history and interests.

Comment: A Traditional Cultural Property (TCP) inventory needs to be included as part of any plan or Federal activity on public lands. Tribal cultural interests are not represented in archaeological surveys.

Response: As part of the standard project review process, the BLM consults with tribes to identify places of traditional cultural and religious importance. Cultural landscape assessments, referred to as TCP inventories by some, are more commonly associated with large or complex projects. As stated in the PA, prior to initiating or authorizing a proposed undertaking, the BLM reviews existing information to determine the need for further action, including consultation, to determine if any properties within the area of potential effect, including properties of traditional religious and cultural importance to an Indian tribe, are eligible for the NR. Properties or resources that are not eligible for the NR may be considered under other authorities.

Comment: There is no mention of addressing indirect effects and cumulative effects of undertakings in the PA.

Response: These important concerns will be addressed by the resulting BLM-SHPO protocols and subsequent changes in BLM policy and guidance in its manual series.

Comment: The role of consulting parties needs to be expanded in the PA. The BLM should consider the benefit of conferring with the project proponents and other members of the interested public in the same fashion as it confers with other key stakeholders.

Response: References to consulting parties, including project proponents, have been added in multiple locations in the PA with assistance from marked drafts provided to BLM.

Comment: The PA must enhance public involvement.

Response: The BLM Washington Office has developed a detailed guide on the coordination of the NEPA and NHPA processes to emphasize the increased responsibilities to the public and consulting parties under the 2004 regulations

Comment: The PA must distinguish public involvement through NEPA and role of consulting parties under NHPA. Under NHPA, agencies must seek out consulting parties.

Response: The revised PA explicitly makes this distinction.

Comment: The PA should support the phased approach to Section 106; however, too often it has served to defer identification and evaluation actions until too late in the environmental review process.

Response: The phased approach to Section 106 compliance is embraced by the new PA, but with emphasis on the early initiation of outreach to tribes and consulting parties and the public, as opposed to deferring later stages of compliance to following a decision on the proposed project by management.

Comment: The PA should support addressing impacts at landscape level resources and this must be accomplished early in the project review process to ensure all parties have been adequately consulted prior to leasing or conveying development rights in some manner.

Response: A key function of the phased approach is to more effectively address landscape scale concerns and resources. The BLM is also pursuing other avenues for performing landscape assessments outside the realm of Section 106.

Comment: The PA must include specific criteria to guide state protocol revisions; current protocols are inconsistent with the regulations in several ways.

Response: The revised PA includes 16 criteria to guide protocol development for consistency, while still allowing flexibility for regional variations in SHPO and agency needs.

Comment: The PA should limit the ability for protocols to include exemptions from Section 106 review; proposed exemptions of project types in protocols should be provided to public and consulting parties for review and comment.

Response: The BLM State protocols, including any exemptions, will be subject to consultation with tribes and made available for public comment.

Comment: The BLM may not make unilateral decisions of “no historical properties affected” without involvement of other parties concerning potential effects and eligibility.

Response: The PA is intended to increase efficiencies in BLM-SHPO-ACHP correspondence, not with other parties. The PA clarifies that interested parties should be consulted on these determinations unless agreed to otherwise.

Comment: Do not draft agreements on the basis of archaeologists, historians, and bureaucrats and then send them to us for signature.

Response: The PA requires that BLM State Directors contact tribes affected by BLM undertakings within his or her jurisdiction to initiate a discussion about ways in which BLM and each Indian tribe can foster better tribe specific communication.

Comment: Thresholds for ACHP involvement should be set high enough so as not to lead to unnecessary project delay or increased program costs when addressing non-unique resources.

Response: The PA focuses on resolution of project effects and design of mitigation measures at the local/regional level, reserving ACHP involvement to cases where local interested parties cannot reach consensus on the treatment of affected NR eligible historic properties.

Comment: We request that the BLM provide public notification when revising the BLM manual. Public land users are particularly interested in sections of BLM Manual Section 8140.

Response: Through the PA, the BLM commits to a transparent process of manual revision that involves tribal consultation, public notification, and consulting party participation.

Comment: The PA may allow the BLM to essentially decide whether and how to take effects on historic properties into account without really discussing the matter with anyone outside government.

Response: By seeking efficiencies in the BLM and SHPO administrative processes, the involvement of tribal governments, consulting parties, and the public should be enhanced if affected at all by this document.

Comment: The PA should include a list of “categorical exclusions” under NHPA.

Response: Activities involving the BLM lands and the various parties that have a stake in those activities vary greatly around the country. The PA allows flexibility in designing regional/local thresholds for consultation, while ensuring national consistency with basic policies and principles of inclusion.

BLM-SHPO Protocols

Comment: Clarify that PA and state protocols only focus on BLM-SHPO communication process, not tribal consultation and the consulting party role. It should not alter or infringe on consultation policies and responsibilities provided elsewhere.

Response: The PA now more explicitly states that it does not alter or restrict other consultation responsibilities within the Section 106 process to other parties such as tribal governments and consulting parties, nor is it intended to inhibit consultations outside the realm of Section 106 compliance.

Comment: BLM-SHPO protocol revisions must be consistent with the 2004 regulations and the BLM should submit proposed protocol revisions to the ACHP for consistency determination.

Response: The revised Protocols will be submitted to ACHP for consistency determination.

Comment: The BLM must consult on protocol revisions and provide public notice in the *Federal Register* of proposed revisions.

Response: The PA states that revised draft protocols must be published in the *Federal Register* to provide public notice

Comment: The BLM must consult on state protocols.

Response: The PA now explicitly states that the revision of state protocols under authority of this PA requires the agency to invite tribal governments to consult and to seek out potential consulting parties.

Comment: By limiting or potentially-limiting SHPO involvement in certain determinations, we fear that tribal and interested party involvement will be diminished.

Response: This PA addresses the administrative processes between BLM and the individual State SHPOs through the development of individual protocols based on each state's unique needs and limitations. Participation of tribes and interested parties should not be affected; they should be able to request SHPO participation if not already involved. Training to implement this PA will emphasize this requirement to those carrying out its provisions.

Comment: The BLM-SHPO protocols should include specific timeframes for consultation.

Response: BLM-SHPO protocols in individual states do include specific timeframes for some steps in the 106 compliance process, but only for the BLM and the SHPO.

BLM-Tribe Relations

Comment: Tribal Historic Preservation Officers (THPOs) are left out of the PA.

Response: The PA is now more explicit about the role of THPOs. Please note that the PA does not apply to BLM's undertakings on or that may affect tribal lands and resources, where THPOs have jurisdiction.

Comment: The BLM should designate points of contact for tribes at each office.

Response: BLM is emphasizing that the points of contact with tribes should be line officers. This message was recently reinforced in a national meeting of State Directors and Washington leadership. The BLM does employ some tribal liaisons in field offices.

Comment: The BLM should revise the PA to show that government-to-government is with federally recognized tribes.

Response: The PA specifically defines Indian tribes as federally recognized tribes. The BLM consults with other Native American entities including non-recognized Indian groups, as part of its Section 106 public and consulting parties responsibilities.

Comment: The BLM must rely on tribes to identify Traditional Cultural Properties (TCP).

Response: BLM's basic tribal relations policy, which remains unaltered by this PA, is that tribal members are the principle persons able to identify traditional use areas through tribal consultation and/or cultural landscape assessments.

Comment: The BLM should establish regular meetings with individual tribes to enhance tribal involvement on 106.

Response: One of the principles of the new DOI Tribal Consultation policy is consultation within an ongoing relationship based often on regular meetings.

Comment: Consultation is oriented to agency actions and time tables versus tribal workloads, seasonal activities, and ability to meet. Meetings should be held once a year when other activities such as subsistence, wood cutting, fishing and hunting are not taking place.

Response: The PA requires BLM State Directors to meet with tribes and develop process for providing schedules of pending actions, including land exchanges, on a regular basis, and offer Indian tribes the opportunity to establish a formal ongoing relationship through an agreement for conducting consultation within the framework of the BLM's government-to-government relationship with tribes. Such an agreement would be an opportunity to agree on the timing of consultation meetings. It is BLM policy to accommodate tribal logistical needs and concerns to the extent feasible given time constraints associated with specific projects.

Comment: The BLM should provide regular schedules of actions to tribes.

Response: The new PA requires the BLM to employ a means of regularly conveying proposed project information to all interested parties, including tribes, in a manner agreed to locally.

Comment: Web postings shift the burden of initiating consultation to tribes.

Response: Web postings are an additional tool for improved transparency and communication. The PA does not encourage the use of the web as a substitute for government-to-government consultation with Indian tribes or compel tribes to initiate consultation rather than the agency, though tribes might identify projects they were not familiar with before and request that the agency initiate consultation.

Comment: Contemporary tribal use of sites and areas must be addressed in the revision.

Response: This PA addresses only concerns relevant to Section 106. The BLM's tribal consultation though involves a much broader range of issues and concerns, such as contemporary community issues.

Comment: Whether a site is eligible for National Register is irrelevant to tribes.

Response: This PA addresses only Section 106 types of concerns. The BLM's tribal consultation responsibilities involve a much broader range of issues and concerns such as contemporary community issues.

Comment: Federal agencies are obligated to fulfill their treaty/trust responsibilities.

Response: This PA addresses only Section 106 types of concerns, which includes places of traditional cultural and religious importance which may include areas where treaty rights are exercised. In addition, the BLM's tribal consultation involves a much broader range of issues and concerns such as non-historic places and non-confined areas where treaty rights are exercised.

Comment: The main issue of concern is the lack of compensation by the BLM for services rendered. Appropriate to compensate tribes, even on a reimbursement basis.

Response: The BLM policy is to avoid creating attendance difficulties for consultation meetings whenever possible. The BLM does not compensate individuals or organizations for contributing information or comments as input to the BLM's administrative process. Consultation is not considered a service, but an opportunity for tribes to identify concerns about a particular proposal or action. The BLM does compensate Native American individuals, firms, or organizations for services such as reports or other specific deliverables, consistent with Federal procurement rules.

Comment: The BLM should provide recommendations on the protection and sharing of sensitive information, both information from tribes and information from archaeological inventories.

Response: The sharing of information with tribes may be addressed in data sharing agreements between tribes and the BLM, that are consistent with the BLM's responsibilities under Section 304 of the NHPA and under the ARPA to protect sensitive site locations. The PA states that Field Office managers and staff will protect from disclosure to the public sensitive and confidential information about traditional tribal practices and beliefs, and locations with which they are associated, to the greatest extent possible under law and regulations. Section 6.c of the PA requires the BLM to identify confidentiality issues in meetings with tribes within 12 months of the PA's signature.

Comment: Tribal consultation under Section 106 should be transparent. Section 106 agreements should not be with one party (a tribe) to the exclusion of others and the broader Section 106 process should not be constrained by secret arrangements or procedures between the BLM and tribes.

Response: The Federal Government has a unique trust responsibility with tribal governments that influences the sometimes guarded communications on sensitive issues. In addition, the BLM-Tribe protocols for consultation address primarily the manner and timing of BLM-Tribe communications and are not agreements on the resolution of effects for specific Section 106 undertakings.

Comment: Trust responsibility and Executive Order 13175 should play a predominate role in the revised PA.

Response: The PA focuses on Section 106 of the NHPA and relations between BLM and the States. The BLM tribal consultation policy is defined elsewhere in its manual and handbook series (8120 and H-8120-1) and is much broader than the NHPA requirements.

Comment: BLM will continue the dialogue with tribes and others that it began in 2008.

Response: The PA recognizes that a basic principle of tribal consultation is establishment of an ongoing relationship through which a dialogue on the PA and actions taken under the PA are subject to an ongoing dialog.

Training and Professional Development

Comment: Include Indian tribes in the section on assistance with the development of training programs.

Response: The PA states that the BLM may seek the active participation of Indian tribes in training sessions.

Comment: The BLM needs Section 106 and Native American training for all departments.

Response: The PA states that the BLM will maintain a training program to instruct BLM line managers and cultural heritage specialists on policies in the PA, including specifically tribal consultation.

Comment: Tribes need training in land use planning, carbon sequestration, the Native Allotment and 14c processes, Native American Graves Protection Act, and NHPA.

Response: Training on authorities other than the NHPA is beyond the scope of the PA.

Field Office Certification and Decertification

Comment: Tribes or interested members of the public should also be able to request that the Preservation Board initiate a review of a district or field office.

Response: The PA states that the BLM Preservation Board, in coordination with individual BLM Deputy Preservation Officers and/or Tribal Coordinators, will address formal communications it receives from various entities including individual tribes, other tribal entities, and members of the public, regarding recurrent problems or concerns with state, regional, or national practice.

Comment: The PA outlines a procedure for certification and decertification of field offices, but the BLM does not appear obligated to follow the Board's recommendations.

Response: The Board's function is to advise the BLM Director, Assistant Directors, and other management in the development of the BLM's policies and procedures for NHPA implementation, and on matters concerning certification. The Director and other executive management have the authority to apply the advice in the manner they believe most appropriate. However, the PA includes several accountability measures and signatories have the ability to raise objections at any time to the manner in which the PA is being implemented.

Accountability

Comment: The BLM should make the annual reporting requirement more consistent, meaningful, transparent, and accessible.

Response: The PA now requires that each state's annual report under the PA will be consistent with the BLM's annual Washington Office reporting requirements plus supplemental information agreed to by the individual SHPO and BLM State Office.

PA Revision Process

Comment: The BLM has not consulted on this draft but only had listening sessions.

Response: The BLM initiated a very broad tribal outreach effort on its tribal consultation policies and practices in August 2008. That effort included a mailing of all its consultation policies and making available a series of State Director-hosted listening sessions. The BLM responded to requests for consultation during this period as they occurred. In December 23, 2009, the BLM explicitly offered invitations for government-to-government consultation on the PA revision. The December letter also sent a summary of the listening sessions and a draft PA revision strategy to over 600 tribal leaders. After reviewing the results of consultations that occurred and numerous comments received, the BLM sent a draft revised PA to tribal leaders and all commenters in September 2010. The current draft responds to comments received on the September 2010 draft PA.

Comment: The BLM should provide a summary of comments it has received and explain how they have been addressed.

Response: This document addresses the request.

Comment: Tribes must have a signature block.

Response: This PA addresses administrative efficiencies between BLM and the States and does not alter tribal consultation requirements of NHPA and other authorities.