

**PROGRAMMATIC AGREEMENT
BETWEEN
THE NATIONAL CEMETERY ADMINISTRATION
OF THE U.S. DEPARTMENT OF VETERANS AFFAIRS,
AND
THE NEW MEXICO STATE HISTORIC PRESERVATION OFFICER,
REGARDING THE ACQUISITION, CONSTRUCTION AND OPERATION OF
A NEW NATIONAL CEMETERY IN SANDOVAL COUNTY, NEW MEXICO**

WHEREAS, the National Cemetery Administration (NCA) of the U.S. Department of Veterans Affairs (VA) proposes to acquire an approximately 340-acre parcel (138 hectares) of land located in the City of Rio Rancho, Sandoval County, New Mexico for the construction and operation of a new national cemetery (undertaking); and

WHEREAS, NCA has determined the undertaking is subject to review under Section 106 of the National Historic Preservation Act (NHPA), as amended, 54 U.S.C. 306108, and its implementing regulations, 36 CFR Part 800 – Protection of Historic Properties, (collectively referred to here as “Section 106”); and

WHEREAS, NCA, in consultation with the New Mexico State Historic Preservation Officer (SHPO), has determined the Area of Potential Effects (APE) to be the parcel being acquired located south of the intersection of old State Highway 44 and U.S. Highway 550 in city of Rio Rancho, Sandoval County (Attachment #1); and

WHEREAS, NCA has not yet finalized development and layout plans for the new National Cemetery on the parcel, and will not finalize a design until after the property is acquired and preliminary design development plans are drafted, and therefore the full range of effects on historic properties cannot be determined at this time; and

WHEREAS, NCA will use a phased approach to identification of historic properties and assessment of adverse effect, pursuant to 36 CFR § 800.4(b)(2) and 800.5(a)(3); and

WHEREAS, NCA has determined that it is appropriate to develop a programmatic agreement (PA) in accordance with 36 CFR § 800.14(b), including 800.14(b)(1)(ii), which recognizes that a PA may be used when effects on historic properties cannot be fully determined prior to approval of an undertaking; and

WHEREAS, NCA has consulted with the SHPO; and

WHEREAS, NCA invited the New Mexico State Land Office (SLO) as the current property owner to participate in consultation, and SLO elected to participate and is a consulting party, and NCA has invited SLO to concur with this PA; and

WHEREAS, NCA has contracted with a qualified archaeologist to perform a 100-percent (Class III) pedestrian cultural resource survey, based on New Mexico Historic Preservation Division (HPD) and New Mexico Administrative Code (NMAC) requirements, which results are included in the report *Cultural Resource Survey For A Proposed VA National Cemetery Near Albuquerque, Sandoval County, New Mexico*; and

WHEREAS, NCA, in consultation with the SHPO and other consulting parties, has identified the following historic properties within the APE, pursuant to 36 CFR § 800.4: Archaeological Sites LA5882, LA32710, LA98387, LA98388, LA197266, LA197267, and LA197269 and concurred that they are

eligible for listing on the National Register of Historic Places (NRHP) under Criterion D, and three archaeological sites, LA Nos. 98391, 197268, and 197270, have undetermined eligibility status pending further archaeological testing (see New Mexico General Archaeological Investigation Permit NM-20-285-S); and

WHEREAS, NCA has invited the Advisory Council on Historic Preservation (ACHP) to consult and of its intent to develop a PA, pursuant to 36 CFR § 800.14(b), and the ACHP has elected not to participate in the consultation; and

WHEREAS, on October 9, November 11, November 14, and December 18, 2020, NCA invited the following Federally recognized tribes (Tribes) that might attach religious and cultural significance to historic properties in the city of Rio Rancho and Sandoval County, pursuant to 36 CFR § 800.2(c)(2), to participate in consultation: Ohkay Owingeh, Pueblo of Santa Clara, Jicarilla Apache Nation, Pueblo of San Ildefonso, Pueblo of Cochiti, Pueblo of San Felipe, Pueblo of Santa Ana, Pueblo of Sandia, Pueblo of Zia, Hopi Tribe, Pueblo of Jemez, Pueblo of Isleta, Pueblo of Laguna, Navajo Nation, Pueblo of Santo Domingo, Comanche Nation of Oklahoma, and the Pueblo of Tesuque; and

WHEREAS the Pueblo of Santa Ana and the Pueblo of Tesuque have elected to participate and are consulting parties, and they are invited signatories to this PA; and

WHEREAS, NCA invited the City of Rio Rancho, Development Services Department (City) to participate in consultation, pursuant to 36 CFR § 800.2(c)(3), and the City has elected to participate and is a consulting party and NCA has invited the City to concur with this PA; and

WHEREAS, NCA invited the Historical Society of New Mexico to participate in consultation, pursuant to 36 CFR § 800.2(c)(5), and, at this time, it has not elected to participate; and

WHEREAS, NCA provided the public with information about the undertaking and sought comment and input, pursuant to 36 CFR § 800.2(d), through National Environmental Policy Act (NEPA) compliance efforts, including a comment period from December 20 2020 to January 20, 2021, no public comments related to cultural resources were received; and

NOW, THEREFORE, NCA and the SHPO, agree that undertaking shall be implemented in accordance with the following stipulations in order to take into account the effects of the undertaking on historic properties.

STIPULATIONS

I. APPLICABILITY

- a. NCA is responsible for ensuring implementation of the stipulations in this PA associated with the undertaking.
- b. The Anti-Deficiency Act, 31 U.S.C. 1341, prohibits federal agencies from incurring an obligation of funds in advance of or in excess of available appropriations. Accordingly, the parties agree that any requirement for the obligation of funds arising from the terms of this PA shall be subject to the availability of appropriated funds for that purpose, and that this agreement shall not be interpreted to require the obligation of funds in violation of the Anti-Deficiency Act.
- c. All references in the Stipulations below to "consulting parties" refers specifically to parties that have participated in consultation and are a signatory, invited signatory or concurring party.

II. GENERAL

- a. Consulting parties shall send and accept official notices, comments, requests for additional information and/or documentation, and all other communications required by this PA via email with NCA.
- b. Time designations shall be in calendar days.
- c. For the purposes of this PA, the definitions provided in 36 CFR § 800.16(a) through (z) shall apply.
- d. NCA shall ensure that Federal or Contractor staff who meet the applicable Secretary of the Interior's *Professional Qualification Standards* (36 CFR § 61), in the appropriate discipline (e.g. architectural history, history, archaeology, architecture, or historic architecture) participate in the review and implementation required as part of this PA; if any work is done pursuant to the terms of this PA prior to NCA acquiring the project parcel, NCA shall ensure that that Federal or Contractor staff also meet the standards outlined in section 4.10.8.13.A(1) of the NMAC.

III. CONTINUATION OF CONSULTATION

Identification of Historic Properties

- a. NCA, in consultation with the SHPO, invited signatories, and concurring parties, will complete the identification of historic properties that may have cultural and/or Tribal significance within the parcel consistent with 36 CFR § 800.4(b).

Assessment of Adverse Effects

- a. When the cemetery is at 35% conceptual design, NCA, in consultation with the SHPO, invited signatories, and concurring parties, will apply the criteria of effect consistent with 36 CFR § 800.5(a), to determine whether the undertaking will have an adverse effect on historic properties.
 - i. If NCA finds that there is no adverse effects to historic properties, and the signatories concur, no further consultation will be required.
 - ii. If NCA finds there will be an adverse effect to historic properties, it will consult further with the SHPO, invited signatories, and concurring parties to resolve the adverse effect.

Resolution of Adverse Effects

- a. NCA, in consultation with the SHPO, invited signatories, and concurring parties, will seek measures to avoid and/or minimize any identified adverse effect consistent with 36 CFR § 800.6. As all the historic properties identified to date are archaeological resources, if avoidance of adverse effect is not feasible, NCA will seek to resolve those effects. Resolution of effects could be achieved through archaeological data recovery, which would be designed in consultation with the SHPO, invited signatories, and concurring parties, and would be consistent with the ACHP's "Recommended Approach for Consultation on Recovery of Significant Information from Archaeological Sites," (ACHP, 1999) and considering the New Mexico Administrative Code *4.10.16: Standards for Excavation and Test Excavation* (January 2006). However, if the consulting parties agree, resolution of effects could be in the form of an alternative mitigation effort acceptable to signatories and invited signatories.
- a. The execution of data recovery fieldwork may, but need not, proceed in geographic sections, if NCA determines that is a benefit to the project.
- b. NCA shall provide the SHPO and other consulting parties an opportunity to review and comment on the proposed mitigation plan and draft reports of the results of mitigation. NCA shall complete any requested revisions.
- c. A final report shall be prepared according to professional standards, including the Department of the Interior's Format Standards for Final Reports of Data Recovery Programs (42 FR 5377-79), if applicable.

- d. Upon concurrence with the draft mitigation report, NCA may proceed with development of the cemetery for the specific geographic section under consideration.

IV. POST-REVIEW DISCOVERIES

- a. In the event that a previously unidentified archaeological resource is discovered during ground disturbing activities associated with the undertaking, NCA shall immediately stop all work involving subsurface disturbance in the immediate area of the discovery and in the surrounding areas where additional subsurface remains can reasonably be expected to occur. Work in all other areas of the undertaking may continue.
- b. NCA shall notify the SHPO, invited signatories, and concurring parties within two (2) working days of the discovery. In the case of prehistoric or historic Native American sites, NCA shall also notify the appropriate federally recognized tribes with an interest in the area within two (2) working days of the discovery.
- c. NCA shall ensure that an archaeologist meeting the Secretary of the Interior's *Professional Qualification Standards* (48 FR 44739) investigates the work site and the resource; if any archaeological work is done pursuant to the terms of this PA prior to the NCA acquiring the project parcel, NCA shall ensure that that Federal or Contractor staff also meet the standards outlined in section 4.10.8.13.A(1) of the NMAC.
- d. NCA shall then forward to the SHPO, invited signatories, and concurring parties, and appropriate federally recognized tribes with an interest in the area if a prehistoric or historic Native American site, an assessment of the NRHP eligibility of the resource (36 CFR Part 60.4) and proposed treatment actions to resolve or avoid any adverse effects on historic properties. The SHPO, invited signatories, and concurring parties, and appropriate federally recognized tribes with an interest in the area shall respond within five (5) working days of receipt of NCA's assessment of NRHP eligibility of the resource and proposed action plan. NCA shall take into account the recommendations of the SHPO, invited signatories, concurring parties, and appropriate federally recognized tribes regarding NRHP eligibility of the resource and the proposed action plan when carrying out the actions.
- e. NCA shall ensure that ground disturbing work within the affected area does not proceed until the appropriate consultation and any other applicable processes are completed.

V. TREATMENT OF HUMAN REMAINS

- a. NCA shall make all reasonable efforts to avoid disturbing gravesites, including those containing Native American human remains and associated funerary artifacts. In the event that human remains and/or associated funerary objects are encountered during the implementation of this PA, NCA shall immediately halt all work in the area and contact the appropriate authorities.
- b. If NCA owns the property at the time of an unexpected discovery, and if the remains appear to be Native American in origin, any such remains and/or funerary objects shall be treated in accordance with the provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), 25 USC 3001. If the remains are determined not to be of Native American origin, NCA will retain an archaeologist who meets or exceeds the Secretary of the Interior's Professional Qualifications Standards for Archaeology, and shall consult with the SHPO, invited signatories, and concurring parties in a manner that is consistent with section 18-6-11.2 of the New Mexico Cultural Properties Act, and its implementing rule, NMAC 4.10.11.
- c. However, if the project parcel has not been transferred to NCA at the time of an unexpected discovery, NCA shall ensure that section 18-6-11.2 of the Cultural Properties Act, and its implementing rule, NMAC 4.10.11, will be followed.

- d. NCA shall treat all human remains in a manner consistent with ACHP's "Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects" (February 2007).

VI. EXECUTION AND DURATION

- a. This PA shall be executed in counterparts, with a separate page for each signatory. NCA shall file a complete copy of the executed PA, including all signatory pages and Attachment #1, with the ACHP and distribute a copy to the SHPO, invited signatories, and concurring parties.
- b. Subsequent to the execution of this PA, if NCA acquires the parcel as identified in the Undertaking, it will then notify the SLO in writing that its participation in the execution and implementation of this PA as a consulting party is no longer required per the date of the acquisition. All other signatories' responsibilities will remain unchanged.
- c. This PA shall expire if its stipulations are not carried out within ten (10) years from the date of execution, unless it is terminated prior to that date. Six (6) months prior to such time, NCA may consult with the SHPO and invited signatories to reconsider the terms of the PA and amend it in accordance with Stipulation VIII below.
- d. Upon the annual anniversary of the execution of this document, NCA will provide the consulting parties to the undertaking with an annual report, documenting that year's progress on: the status of work completed and estimates for additional consultation timeframes, if available; fulfillment of stipulations; objections received and disposition of the dispute; amendments executed; and changes to the list of consulting parties.

VII. DISPUTE RESOLUTION

- a. Should any consulting party to this undertaking object in writing to the implementation of any stipulation(s) of this PA, NCA shall notify the Signatories, invited signatories, and concurring parties of the objection and consult with that party or parties to resolve the objection. If NCA determines that the objection cannot be resolved, NCA shall:
 - i. Forward all documentation relevant to the dispute, including NCA's proposed resolution, to the ACHP. The ACHP shall provide NCA with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, NCA shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP and the SHPO, and provide them with a copy of this response. NCA will then proceed according to its final decision.
 - ii. If the ACHP does not provide its advice regarding the dispute within thirty (30) days, NCA may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, NCA shall prepare a written response which takes into account any timely comments regarding the dispute from the SHPO and provide it and the ACHP with a copy of such written response with its final decision.
 - iii. NCA's responsibility to carry out all actions under this PA that are not the subject of the dispute shall remain unchanged.
 - iv. Should a member of the public object in writing to NCA regarding the manner in which the measures stipulated in this PA are being implemented, NCA shall notify the SHPO, the ACHP, and other consulting parties, and consider the views of the member(s) of the public making such objection in accordance with 36 CFR § 800.2(d).

VIII. AMENDMENTS

- a. Any signatory or invited signatory to this PA may propose that it be amended, whereupon the signatories and invited signatories shall consult to consider such an amendment.
- b. Any amendment will be agreed to in writing by all signatories and will be effective on the date a copy with all signatures is filed with the ACHP.

IX. TERMINATION

- a. If NCA determines that it cannot implement the terms of this PA, or if the SHPO or invited signatories determine that this PA is not being properly implemented, a signatory or invited signatory may propose to the other parties that this PA be terminated.
- b. The party proposing termination shall so notify the other signatory or invited signatories to this PA explaining the reasons for termination and affording at least thirty (30) days to consult and seek an alternative to termination.
- c. Should such consultation fail, and the PA is terminated, NCA shall notify all consulting parties and shall either consult to develop a new agreement, in accordance 36 CFR § 800.6, or request the comments of the ACHP, under 36 CFR § 800.7(a).

EXECUTION AND IMPLEMENTATION of this PA and implementation of its terms evidence that NCA has taken into account the effects of this undertaking on historic properties and afforded the ACHP an opportunity to comment.

Signature Pages and Attachment #1 follow.

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SIGNATORY:

**Department of Veterans Affairs
National Cemetery Administration**

Bradley G Phillips Digitally signed by Bradley G
Phillips 156860
156860 Date: 2021.05.07 08:59:21 -07'00'

DATE:

Bradley Phillips, Pacific District Executive Director

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SIGNATORY:

New Mexico State Historic Preservation Officer



DATE: 5/6/2021

Jeff Pappas, PhD, New Mexico State Historic Preservation Officer

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INVITED SIGNATORY:

Pueblo of Santa Ana



Ulysses Leon, Governor

DATE: 4/21/2021

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