

STATE PROTOCOL AGREEMENT
BETWEEN THE
MONTANA/DAKOTAS STATE DIRECTOR, BUREAU OF LAND
MANAGEMENT AND THE
NORTH DAKOTA STATE HISTORIC PRESERVATION OFFICE
REGARDING THE MANNER IN WHICH THE
BUREAU OF LAND MANAGEMENT WILL MEET ITS RESPONSIBILITIES UNDER
THE NATIONAL HISTORIC PRESERVATION ACT AS PROVIDED FOR IN THE
NATIONAL PROGRAMMATIC AGREEMENT

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PURPOSE. This State Protocol Agreement (Protocol) implements the Bureau of Land Management's (BLM) responsibilities by describing how the North Dakota State Historic Preservation Office (SHPO) and the BLM will interact and cooperate under this PA. The goal of this Protocol is a meaningful and productive partnership between the BLM (also referred to as the BLM Montana/Dakotas State Office and the BLM North Dakota Field Office (NDFO) and the SHPO that will enhance the management of the process under which cultural resources are administered by the BLM. Unless otherwise indicated, all definitions in this Protocol comport with 36 CFR Part 800.16.

I. RELATIONSHIP TO OTHER AGREEMENTS

Other Programmatic Agreements (PA) and Memoranda of Agreement (MOA) may be developed as needed or required to meet BLM's requirements under Section 106 of the National Historic Preservation Act (NHPA). Circumstances which may require the development of other PAs and MOAs include but are not limited to:

A. Multiple Federal Agencies.

- a. If BLM accepts lead responsibility for Section 106 compliance, when more than one federal agency is involved, the BLM and the SHPO may agree to either follow the procedures of this PA or the BLM may develop a separate MOA or PA in accordance with 36 CFR Part 800.
- b. If a Federal agency other than BLM takes lead responsibility for Section 106 compliance, a separate PA or MOA may be developed specific to that undertaking and, if BLM is a Signatory, BLM will follow the provisions of that agreement or 36 CFR Part 800.
- c. Where other federal and state agencies projects impact BLM managed lands and there is no PA or MOA, BLM and the North Dakota SHPO agree to the following provision. In the case of negative reports or where no cultural resources are located on BLM managed surface, BLM would provide the SHPO a copy of their letter to the lead agency. For positive reports, the procedures under Section VII of

this agreement would be followed. The SHPO shall provide BLM a copy of any letters and correspondence concerning project effect and eligibility when it involves sites on BLM managed lands.

- B. Where a PA or MOA is requested by BLM or SHPO regarding specific land use decisions in a Resource Management Plan (RMP) (e.g., Travel Management Allocations implemented by a Record of Decision (ROD) for the RMP).
- C. Program Alternatives. For the development and approval of Program Alternatives, including project-specific PAs, BLM will follow the process under 36 CFR Part 800.14.

II. PROGRAMMATIC SHPO INVOLVEMENT IN BLM MANAGEMENT PROCESSES

A. Land Use Planning

Land Use Planning is defined as the following:

The process of developing Resource Management Plans (RMP) or other large-scale landscape-level efforts to guide how public lands are used over time.

- a. Scoping. BLM NDFO when preparing a land use plan at the regional or local level will invite, in writing, the SHPO to participate in scoping for the purpose of identifying issues to address in the plan. In writing, the BLM will invite the SHPO to comment on any proposed cultural resource use allocations, whether these are made in regional, local, or project plans. BLM will send all draft and final land use plans and cultural resource project plans to the SHPO for review and comment.
- b. Planning Effort. BLM NDFO when preparing a land use plan or significant amendments or revisions at the regional or local level will invite SHPO, in writing, to participate in the planning effort (BLM Manual 8130) and seek SHPO comment on proposed resource use allocations.

The SHPO may elect to participate in the specific land use planning efforts noted above. If the SHPO does not respond within sixty (60) days, it will have, by default, elected not to participate. The BLM will consider the views of the SHPO on specific land use planning efforts when those views are expressed in writing. A PA or MOA specific to the land use planning effort may be requested by either party. Completion of the consultation process for planning will be indicated by the BLM Field Office's written response to the SHPO's comments on the draft land use or cultural resource project plans. No decision documents for land use or cultural resource project planning will be issued by the BLM prior to completion of the consultation.

- B. Field Tours. The SHPO may participate in public field tours or other field examinations as requested by the SHPO or as invited by the BLM relating to land use planning efforts or specific undertakings whenever management of the cultural resources is involved. When the request for a field tour is initiated by the SHPO, the SHPO will be responsible for its expenses associated with the tour.
- C. Annual Work Plans. BLM field offices will transmit copies of annual work plans to the SHPO as they are developed through the budget process. The SHPO, at its discretion, may request to meet with the BLM field office regarding work identified in annual work plans. The BLM will address concerns raised by the SHPO and will welcome suggestions to facilitate heritage preservation goals.
- D. Meetings. The SHPO is encouraged to meet with the BLM Montana/Dakotas State Office, BLM MT/DAK Deputy Preservation Officer, a Field Manager, or Field Office personnel at any time to discuss annual work plans, specific undertakings, outreach efforts, or other issues related to cultural resources including those under Sections 106 and 110 of the NHPA.
- E. Informal Consultation. The SHPO, the BLM Deputy Preservation Officer, and Field Office personnel may consult informally at their discretion on specific undertakings or any aspect of the BLM's cultural resource management program including, but not limited to, site identification, evaluation, and treatment strategies. Such consultation is encouraged to take full advantage of the SHPO's experience with a broad range of Federal agencies and historic preservation efforts statewide.
- F. Internal BLM Field Office Program Review. The Montana/Dakotas State Office will invite SHPO participation in internal Field Office program reviews and will provide reports of reviews, exclusive of findings and recommendations specific to personnel matters. The BLM Deputy Preservation Officer will regularly review and determine whether BLM Field Offices are maintaining an appropriate level of technical capability and performance to meet the requirements of the Protocol. Review will also consider whether there are necessary procedures and commitments in place to manage cultural resources in accordance with BLM manuals and handbooks.

The BLM Deputy Preservation Officer will document the findings of BLM Field Office Program Review and the BLM State Director will submit these reports for SHPO review and written recommendations. When SHPO's recommendations are accepted by the BLM State Director, implementation of such recommendations will become the responsibility of the NDFO Field Manager, who will be required to initiate corrective actions within sixty (60) days from the date the recommendations are accepted by the BLM State Director. Failure to initiate corrective actions within the specified time or

failure to correct the deficiencies will require the BLM State Director to consider, in consultation with the BLM Deputy Preservation Officer and SHPO, actions under Stipulation XIII of this Protocol.

The SHPO may, at their initiative, and after providing notice in writing to BLM, conduct structured on-site compliance reviews of the BLM NDFO. The scope and content of the review will be developed by the SHPO in consultation with BLM. The review will afford both parties the opportunity to examine the aspects of cultural resource management in that Field Office. BLM will make available the BLM Deputy Preservation Officer, the Field Manager, and the Cultural Resource Specialist during these reviews. BLM will also provide pre-visit information to the SHPO as requested in written format. The format and content of such pre-visit information requests will be determined through consultation between BLM and the SHPO.

- G. Review of Undertakings. SHPO will participate in reviews of undertakings per Stipulations VII and VIII.
- H. Training. The BLM will provide an internal training program to instruct BLM line managers and cultural resource specialists on the policies underlying and embodied this Protocol. This training program will be provided to both existing and new managers and cultural resource specialists as needed to ensure compliance with this Protocol. The BLM will request participation and assistance of the SHPO in training sessions.

III. COOPERATIVE INFORMATION DEVELOPMENT & MANAGEMENT EFFORTS

- A. Shared Data. BLM NDFO will send the SHPO copies of all cultural resource inventory reports, site forms, treatment plans, and excavation/treatment reports and any documentation resulting from original research. Both hard copies and digital copies of reports, pertinent site information and Geographic Information System (GIS) data will be included by the BLM Field Office. BLM NDFO will provide these documents, transmitted under the field manager's signature or designee to the SHPO as they are completed to assist in the compliance process and/or to keep the State repository files current.

The BLM and the SHPO may develop a data sharing and digital data use agreement outlining access to ND SHPO's files/records and GIS data. This agreement will outline the conditions for using and protecting digital cultural resource information.

- B. Preservation Planning. The BLM and SHPO will work together to develop historic contexts, as needed, for historic properties located on public lands. BLM will update Class I overviews as part of the planning process and may participate in SHPO's five year historic context overviews if requested. Overviews will synthesize available data

from all sources including published and unpublished resources. These overviews will be made available to the SHPO, Indian tribes, and the interested public.

IV. COOPERATIVE PUBLIC EDUCATIONAL OR RESEARCH OUTREACH

Where appropriate and in concordance with BLM and SHPO preservation goals and mandates the BLM and SHPO will participate in avocational initiatives and encourage interest in history and archaeology on public land:

- A. Avocational Initiatives: The BLM and SHPO will participate in avocational initiatives and encourage interest in history and archaeology on public lands.
- B. Section 110 and Archeological Resource Protection Act (ARPA). Permitted activities (including field schools) will require advance notice by the BLM to the SHPO of the proposal. The BLM will submit a project report to the SHPO within a year of project activities and copies of all additional reports thereafter. For multi-year projects a progress report will be submitted each year in lieu of a project report. BLM will actively engage in Section 110 related inventory and efforts.

V. NATIVE AMERICAN PARTICIPATION AND TRIBAL CONSULTATION

The special legal status of Indian 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 Part 800.2(c) (2). Consistent with those directives and Department of the Interior's tribal consultation policy, the BLM will consult with the tribal government's official designee in accordance with the following policies for cultural resources. All Federally-recognized Indian tribes with aboriginal claims in Montana and the Dakotas are invited to review and comment on this Protocol as invited signatories

- A. The BLM State Director, District Manager, and Field Manager, as appropriate, will represent the United States in Government-to-Government meetings with Indian tribes.
- B. The BLM NDFO Field manager and BLM staff will establish working relationships with tribal officials comparable to their working relationships with State and local government officials.
- C. The BLM NDFO Field Manager or Eastern Montana/Dakotas District Manager, as appropriate, should plan to schedule at least one annual meeting with interested

tribes to discuss upcoming projects for the year. To the degree possible the topics at such meetings should include a description and general location of the undertakings, likely identification efforts by the BLM for these projects, and tribal interest in additional consultation on these undertakings.

- D. The BLM NDFO Field manager and BLM staff will recognize that traditional tribal practices and beliefs are an important, living part of our national heritage and seek to avoid to the degree possible under existing law and regulation their potential disruption as a consequence of proposed BLM land use decisions.
- E. The BLM NDFO Field manager and BLM staff will 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 regulations. BLM NDFO will maintain the confidentiality of sacred sites to the degree possible under existing law and regulation.
- F. The BLM NDFO Field manager and BLM staff will 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 users, such as gathering natural resources, and will, 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.
- G. The BLM NDFO Field Manager and BLM Staff will consult with Indian tribes to identify and consider tribal concerns related to the identification and management of historic properties in BLM planning and decision-making and will document all consultation efforts.
- H. The BLM NDFO Field Manager and BLM staff will 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 and regulation, BLM decisions do not substantially burden the pursuit of traditional religious and cultural practices. The BLM NDFO Field Manager and Staff will document tribal consultation findings in planning documents, National Environmental Policy Act (NEPA) documents, and eligibility determinations and effect findings submitted to the SHPO. If written tribal comment is received it will be included in the submittal to the SHPO. If the Field Office has a separate tribal consultation protocol which precludes sharing that information (generally or for specific undertakings), the tribal protocol will take precedence; however, its use will be documented with the SHPO.

VI. PUBLIC AND INTERESTED PARTY INVOLVEMENT

BLM will involve and inform the public and tribes on a continuous basis regarding federal undertakings through the NEPA process, NEPA logs for the NDFO will be hosted on MT\DAK BLM's web sites, and through the BLM ePlanning system.

- A. **Interested Parties.** Interested parties will be invited by BLM, in writing, to consult early in the review process if they have expressed an interest in a BLM undertaking or action subject to the Protocol. Such interested parties may include but are not limited to local governments; grantees, permittees, or owners of affected lands or land surfaces; Indian tribes, organizations, families and individuals; and those seeking to participate as consulting parties in a particular undertaking.
- B. **Public Involvement.** The BLM will invite the public to express views by seeking out and providing opportunities for public involvement and comment. The manner in which BLM seeks out and considers the views of the general public should reflect the nature and complexity of the undertaking and its effects on historic properties; the likely interest of the public in the effects on historic properties; confidentiality concerns of private individuals and businesses; and the relationship of the BLM's involvement in the undertaking. The BLM will encourage productive public involvement in a consultative process that seeks to accommodate historic preservation concerns with the needs of the BLM.

VII. TERMS OF THE PROTOCOL FOR REVIEW OF UNDERTAKINGS

For undertakings that do not meet the thresholds for case-by-case SHPO review (see Stipulation VIII), the Field Manager, with the assistance of qualified professional staff (36 CFR 61) and in consultation with the SHPO, Indian tribes, interested parties, and the public will assess the effects of the BLM's proposed actions on historic properties as follows:

- A. **Planning.** BLM NDFO Field Manager will consult with Indian tribes, interested parties, and the public at the outset of planning and environmental review for undertakings to seek information regarding historic properties in the Area of Potential Effect (APE), specifically to:

- (1) Identify properties of religious and cultural significance to Indian tribes and properties that may be eligible for listing in the National Register of Historic Places (NRHP). Where applicable, the National Register Bulletin series, the Secretary of the Interior's Standards for the Treatment of Historic Properties, and the attendant guidelines published by the National Park Service (NPS) will serve as the authority in matters concerning the eligibility and treatment of resources eligible for the NRHP;

a. **Special Oil and Gas Development Consideration.**

When BLM is supplied with a report or summary consistent with an appropriate level of investigation (as per ND SHPO standards, BLM policy, manuals and handbooks) commensurate to the level of development which summarizes existing conditions within the APE and where no historic properties of religious or cultural significance exist the NDFO Field Manager may approve the action and report those findings as part of the annual report (Stipulation XI).

- (2) Sufficiently understand the concerns of Indian tribes and other interested parties and the effects that the undertakings might have on historic properties; and
- (3) Consider comments provided, as described herein, in making decisions on the undertakings, and notify consulted parties of the relevant final undertaking planning decisions.

B. **Identification.** Prior to initiating or authorizing a proposed action that meets the definition of "undertaking" in 36 CFR Part 800.16(y) and is a type of activity that has the potential to cause effects to historic properties (with the assumption that historic properties are present), the BLM NDFO Field Manager will:

- (1) BLM will determine the undertaking APE in concert with the ND SHPO, to include both direct and indirect effects and which may involve historic properties that are large cultural landscapes or traditional cultural properties. The development of the APE may be established formally through agency correspondence or informally as per stipulation II (E.).
- (2) Review existing information on historic properties potentially affected by the undertaking, including existing documentation on cultural resources and inventory, and BLM documentation of previous tribal consultation;
- (3) Consult and seek information in accordance with BLM land use planning and environmental review processes from SHPO and Indian tribes and other consulting parties likely to have knowledge of, or concerns with, historic properties in the area, particularly properties of traditional religious and cultural significance;

(4) Determine the need for further actions, such as field surveys and predictive modeling to identify potential historic properties in the APE. The BLM will consider potential direct, indirect, and cumulative effects to historic properties and their associated settings as applicable, regardless of land ownership.

(5) No Inventory Decision. All undertaking decisions where no inventory occurs will be documented with rationale in the annual report (see Stipulation XI) as a No Inventory Decision.

a. Special Oil and Gas Development Consideration.

A "fee/fee/fed" well is an oil well where the well is located entirely on non-Federal land (fee surface over fee minerals), but some portion of the wellbore enters and produces from Federal minerals. The wellbore can enter and produce from any combination of private, state, and Federal minerals (As defined in BLM policy).

In the case of Fee-Fee-Fed where no new disturbance is proposed or where new disturbance is within an environment where the potential for intact cultural properties to be located is highly unlikely, or the action could move forward as planned due to entirely fee wells on the pad, the BLM will document the no inventory decision and report that to ND SHPO in the annual report as defined Section (XI).

An environment where the potential for intact cultural resources to be located that is highly unlikely may include but is not limited to the following:

- Existing ground disturbance that is prevalent and that has created such an environment where that previous disturbance would have removed historic properties.
- Natural environments which have extensively altered the landscape.

A traditional split estate, "fee/fed" well is an oil well where the well is located on non-federal land, but the wellbore is directly above the Federal minerals it is producing from. Similar to the aforementioned "fee-fee-fed" situation where no new disturbance is proposed or where new disturbance is within an environment where the potential for intact cultural properties to be located is highly unlikely BLM will document the no inventory decision and report that to ND SHPO in the annual report as defined Section (XI).

- (6) Make a reasonable and good faith effort to identify historic properties that may be affected by the undertaking as described in 36 CFR Part 800.4(b) (1). All surveys and other efforts to identify historic properties will be documented according to standards set forth by the Secretary of the Interior, the BLM 8100 Manual, Handbook H-8110-1 Appendices 4-6 and the SHPO (including electronic pdf copy of reports and forms as well as all shape files). Prior surveys may be accepted as adequate inventories for all or part of a project APE based on review by the Field Office cultural staff and completion of documentation of such review with careful consideration of possible changes in standards, new information, and passage of time ensuring reports and data utilized to make decisions meets current BLM and ND SHPO standards.
- (7) Negative Inventory (No Cultural Resources). Following a 100% Class III Intensive Inventory of the entire APE, without exception for ownership or jurisdiction, which locates no cultural resource properties or only properties previously determined not eligible for reasons other than age, the Field Office Manager may approve and implement the undertaking. The negative inventory will be documented to current BLM and ND SHPO standards as well as conditions set forth in this Protocol and submitted to the SHPO within 180 days. Negative inventory reports will not be submitted together with positive inventory reports or in groups of more than ten (10) at one time. Note that if cultural resource properties are in the APE, but no historic properties affected or avoidance is proposed, proceed under Stipulation VII(D)(1)(a)).
- (8) Negative Inventory (Not Eligible Determinations). Following a 100% Class III Intensive Inventory of the entire APE, without exception for ownership or jurisdiction, which locates no eligible cultural resource properties, considering current standards and guidelines related to applicability of previous determinations. The Field Office Manager may approve and implement the undertaking. The negative inventory will be documented to current BLM and ND SHPO standards as well as conditions set forth in this Protocol and submitted to the SHPO within 180 days. Negative inventory reports will not be submitted together with positive inventory reports or in groups of more than ten (10) at one time. Note that if cultural resource properties are located in the APE, but no historic properties affected or avoidance is proposed, proceed under Stipulation VII(D)(1)(a)).

C. Eligibility. In the event that cultural resource properties exist in the APE and may be affected, the Field Manager will:

- (1) Determine, in consultation with Indian tribes and other interested parties, as necessary, if any properties identified within the APE, including properties of traditional religious and cultural significance to an Indian tribe, meet one or more eligibility criteria specified in 36 CFR Part 60.4.
- (2) Submit all eligibility determinations to the SHPO with correspondence indicating eligibility review/concurrence is requested. Effect findings (Stipulation VII (D)) may be made in conjunction with eligibility findings.

- a. If the Field Manager determines that a property does not meet the eligibility criteria in 36 CFR Part 60.4 they will provide such documentation to the SHPO no less than thirty (30) days prior to approval of the undertaking or its implementation. SHPO will concur or disagree in writing within thirty (30) days. If the SHPO disagrees with the findings made by the Field Office Manager within thirty (30) days, the BLM will reconsider its original finding, consult further with the SHPO, or submit documentation to the Keeper of the NRHP for a formal determination of eligibility. If SHPO does not respond within thirty (30) days the Field Manager may assume agreement.
 - b. If the Field Office Manager determines that a property does meet one or more eligibility criteria in 36 CFR Part 60.4, the property will be considered eligible for listing in the NRHP for purposes of complying with Section 106 of the NHPA. The Field Office Manager will provide such documentation to the SHPO no less than thirty (30) days prior to approval of the undertaking or its implementation. SHPO will concur or disagree in writing within thirty (30) days. If the SHPO disagrees within thirty (30) days the BLM will reconsider its original finding, consult further with the SHPO, or submit documentation to the Keeper of the NRHP for a formal determination of eligibility. If the SHPO does not respond within thirty (30) days the Field Manager may assume agreement.
- (3) Changes in Eligibility. If the BLM or SHPO find it appropriate to change the eligibility determination of a previously concurred upon cultural resource or historic property, they must formally consult to seek concurrence on the changed determination and must include justification for the proposed determination change. If the SHPO presents the change, they will write an email or letter to the ND Field Office with a justification for the change and request that BLM initiate consultation. If BLM presents the change on or off BLM managed property, they will mail the report, site forms, and other documentation to the SHPO and will include justification for the change and initiate consultation. If either party does not respond within thirty (30) days the other party may assume concurrence with the change in eligibility. Any consulting parties involved will be informed of the potential change in eligibility and provided the opportunity to comment. If the Keeper of the National Register has formally determined a property eligible for the National Register, but the property has not been listed, BLM will contact the Keeper of the Register with a formal request to change the eligibility of the site. BLM will provide any documents and justification for the change, including any correspondence with the SHPO, consulting parties, and Indian tribes concerning the site. Once the Keeper has reached a finding BLM will notify the SHPO, consulting parties, and Indian tribes on the Keeper's decision.

D. Effect

The Field Manager, upon determining that NRHP-listed properties, eligible historic properties, or unevaluated cultural resources exist within the APE of an undertaking, will determine whether those properties may be affected by the undertaking, consulting with SHPO, Indian tribes, consulting parties and the public.

- (1) **No Historic Properties or Unevaluated Cultural Resources Affected.** If the Field Manager finds that the undertaking will not affect those characteristics of an eligible historic property that qualify it for listing in the NRHP or will avoid unevaluated cultural resources located within the APE, the Field Manager will document this finding and provide documentation of "No Historic Properties or Unevaluated Cultural Resources Affected" to the SHPO no less than thirty (30) days prior to approval or implementation of the undertaking. Such reports will be submitted individually with correspondence indicating that an effect finding review and concurrence is requested. Eligibility findings (Stipulation VII(C)) may also be requested in conjunction with effect findings. The SHPO will concur or disagree with the finding(s) within thirty (30) days. If the SHPO provides comments and/or questions within thirty (30) days, the BLM will reconsider its original finding, consult further with the SHPO, or submit documentation to the Advisory Council on Historic Preservation (ACHP) with a request for comment. If the SHPO does not respond within thirty (30) days the Field Manager may assume agreement.
- (2) **No Adverse Effect.** The Field Manager will apply the Criteria of Adverse Effect, pursuant to 36 CFR Part 800.5(a) (1), to determine whether the proposed undertaking may, directly or indirectly, diminish the integrity of the historic property's location, design, setting, materials, workmanship, feeling, or association. If the Field Manager finds that the undertaking will not have an adverse effect on a historic property or BLM will modify the undertaking to avoid adverse effects, per 36 CFR Part 800.5(b), and that the undertaking does not meet the threshold for SHPO case-by-case review (see Stipulation VIII) the Field Manager will document this finding and report to the SHPO no less than thirty (30) days prior to BLM's approval or implementation of the undertaking. Such reports will be submitted individually with correspondence indicating that a no adverse effect finding review and concurrence is requested. The SHPO will concur or disagree with the finding within thirty (30) days. If the SHPO disagrees within thirty (30) days, the BLM will reconsider its original finding, consult further with the SHPO, or submit documentation to the ACHP with a request for comment. If the SHPO does not respond within thirty (30) days the Field Manager may assume agreement.

Additional types of undertakings may be added to this list by mutual agreement of the signatories pursuant to Stipulation XIV. There is the potential that an undertaking that meets the description of the above- listed types of

undertakings could require additional mitigation depending on the undertaking scope, the significance of the site, and the anticipated effects. In such cases, the Field Manager should refer to Stipulation VII (D) (3) (c).

(3) **Adverse Effect.** If the BLM Field Manager determines that the undertaking will have an adverse effect on historic properties, BLM will make a reasonable and good faith effort (as defined by ACHP) to avoid, minimize, or mitigate adverse effects in consultation with the SHPO and with Indian tribes, consulting parties, and the public, as appropriate. The Field Manager will consider the nature of the adverse effects and the characteristics and qualities that lend the historic property its significance and integrity. Agreed-upon minimization or mitigation measures will be implemented through either a Two-Party MOA, a Multi-Party MOA, or proceed in accordance with 36 CFR Part 800.

- a. Two-Party MOA. For undertakings that do not meet the threshold for ACHP notification (see Stipulation IX), a Two-Party MOA will be developed between the BLM Field Manager and the SHPO to treat adverse effects to historic properties. Indian tribes and other consulting parties will be invited to participate, in writing by BLM. Upon execution of the MOA, the Field Manager will file the MOA with the ACHP. If the BLM Field Manager and SHPO cannot agree on an MOA, the Field Manager will proceed in accordance with 36 CFR 800.7 (Stipulation IX (D)) consult directly with the ACHP (Stipulation IX (D)).
- b. Multi-Party MOA. For undertakings that do meet the threshold for ACHP notification, the BLM will proceed in accordance with 36 CFR Part 800.6.

VIII. THRESHOLDS FOR CASE-BY-CASE SHPO REVIEW OF UNDERTAKINGS

BLM will follow the procedures set forth in 36 CFR Part 800 in lieu of the Protocol (Stipulation VII) in the following specific situations:

- A. **Anticipated Adverse Effect on a National Historic Landmark (NHL).** Where undertakings are anticipated by BLM to have an adverse effect as defined by 36 CFR Part 800.S(a) (1), on an NHL.
- B. **Unanticipated Adverse Effects.** Where unanticipated, potentially adverse effects are discovered by BLM after completing the procedural steps at Stipulation VII of this Protocol.
- C. **Multi-State Jurisdiction.** Where the BLM acts either as lead federal agency on behalf of other federal agencies or in cooperation with other federal agencies for

undertakings that may have effects on historic properties beyond the boundaries of the State of North Dakota and which involve other State Historic Preservation Officers. In such cases, BLM will consult with the respective SHPOs and Federal or State agencies regarding an appropriate compliance process in accordance with 36 CFR Part 800.

- D. Less Than 100% Inventory. Where an undertaking has the potential to affect Historic Properties or unevaluated cultural properties and the BLM proposes to complete less than a 100% BLM Class III Intensive Inventory of the affected lands, including when such a proposal is a result of multiple jurisdiction, ownership and or split estate, or special circumstances.
- E. Large Land Transfer. Where a BLM undertaking involves a transfer or allocation of public lands exceeding 10,000 acres regardless of the BLM survey class.
- F. Transfer of Land to the State of North Dakota. Where the BLM undertaking proposes to transfer lands to the State of North Dakota absent a separate SHPO agreement document governing the undertaking.
- G. Specialized Expertise. Where professional expertise necessary to implement this Protocol is unavailable to the Field Office.
- H. Resource Management Plans and Phased Identification. Where phased identification may be proposed for RMPs, supplements to RMPs, travel plans or major non-routine projects such as interstate major infrastructure and other complex undertakings requiring EA/EIS BLM will consult with SHPO on mutually agreeable strategies for phased identification.
- I. Internal BLM Disagreement. Where unresolved disagreements or disputes concerning BLM determinations exist between cultural resource staff and BLM Field Managers concerning an undertaking, an APE, an eligibility determination, or an effect finding.
- J. Potential Incompatibility with the BLM Manual or Policy. Where protocols and procedures in the BLM 8100 Manual procedures may conflict with the procedures established in 36 CFR Part 800.
- K. Supplemental Requirements for Consultation. Where supplemental BLM procedures that may be appended to this Protocol require consultation.

IX. THRESHOLDS FOR ACHP NOTIFICATION

At a minimum, the BLM will request the ACHP's participation for the following types of undertakings:

- A. Non-routine interstate and/or interagency projects or programs. Examples are

interstate pipelines or transmission lines which involve multiple jurisdictions and require the preparation of NEPA Environmental Impact Statements (EIS).

- B. Undertakings involving NHLs or historic properties of national significance;
- C. Undertakings that the BLM determines are highly controversial and are likely to involve significant disputes and substantive disagreements concerning potential adverse effects to historic properties; •
- D. Undertakings that will have an adverse effect to historic properties, which cannot be resolved through formal agreement (i.e. MOA or PA) between the BLM and SHPO; and
- E. Unresolved disagreements between the BLM and SHPO regarding the application of the Protocol (other than eligibility findings).

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, the BLM NPA, or this Protocol, 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 BLM and SHPO.

X. OBTAINING SPECIALIZED EXPERTISE

When the BLM is involved in an undertaking requiring expertise not adequately possessed by available BLM staff (e.g., architectural history, historic architecture, historic archaeology and traditional cultural properties) it will obtain that expertise for the purposes of determining NRHP eligibility, and for determining effects and applying appropriate treatment to the historic properties in question. The BLM may request the assistance of SHPO staff in such cases or may obtain the necessary expertise through contracts, BLM personnel from other states, or cooperative arrangements with other agencies.

XI. ANNUAL REPORT (SEE APPENDIX 2)

The BLM Montana/Dakotas State Office will provide an annual fiscal year report to the SHPO containing narrative and statistical information from the Field Office for activities conducted under the Protocol. The format and content of this report will result from BLM and SHPO consultation efforts but will include information currently collected for the BLM National Cultural Resource Program Annual Report. The annual report will be submitted to the SHPO by December 15th of each year. By mutual consent the BLM and North Dakota SHPO may extend the deadline due to unforeseen circumstances such as government wide shut down or loss of key personnel. If BLM requests the extension, it will notify the SHPO in writing of the request, explain the circumstances of the request, and provide a date when the report will be finished. Any questions the SHPO may have about the information in this report will be answered by the BLM Montana State Office or the BLM Field Office

XII. RESOLVING ISSUES

If, at any time, the BLM or SHPO questions an action taken by the other party under this Protocol, they will consult to resolve the issue. If the issue concerns an action taken by a BLM Field Office, the SHPO will consult with the Field Manager to resolve it. If the issue cannot be resolved, the questioning party will request the BLM Deputy Preservation Officer or the BLM Preservation Board to assist in resolving it. If the issue still cannot be resolved, the BLM Deputy Preservation Officer will refer it to the ACHP. Upon full consideration of all issues, concerns, and recommendations, the BLM State Director will make the final decision and provide a rationale.

If a member of the public or an Indian tribe object at any time to the manner in which this Protocol is being implemented, the BLM and SHPO will together consult with the objecting party to resolve the issue. If the BLM, SHPO and objecting party are unable to resolve the objection, the BLM will refer the issue to the ACHP. Upon full consideration of all issues, concerns, and recommendations, the BLM State Director will make the final decision and provide a rationale.

XIII. DECERTIFICATION OR SUSPENSION OF THE FIELD OFFICE

If as a result of the Field Office Operations Review by the BLM Deputy Preservation Officer or as initiated by the SHPO (see Stipulation II(F)), or through other means (e.g. losses in key personnel), a Field Office cannot demonstrate continued capability to operate under the Protocol that office will be decertified or suspended by the BLM State Director. The Field Office will subsequently operate under regulations found at 36 CFR Part 800. If a suspended or decertified Field Office is found to have restored the basis for certification, the BLM Deputy Preservation Officer will recommend that the BLM State Director, with SHPO concurrence, recertify the office.

XIV. AMENDING THE PROTOCOL

If the BLM or SHPO proposes to amend this Protocol at any time, they will consult with the other party to consider requested changes and provide either party a minimum 90-day comment/review period. Amendments will become effective when signed by both parties and reviewed by the ACHP.

XV. TERMINATING THE PROTOCOL

Either the BLM or SHPO, or both, may terminate this Protocol by providing notice ninety (90) days prior to the termination date to the other party, providing that they consult during this period to seek agreement on amendments or other actions that would avoid termination. The BLM Deputy Preservation Officer may request the assistance of the BLM Preservation Board, the National Conference of State Historic Preservation Officers (NCSHPO), or the ACHP in the consultation. If the Protocol is terminated, the BLM will resume operating under the provisions of 36 CFR Part 800.

XVI. OTHER STATE-SPECIFIC PROCEDURES.

In addition to the procedures described in national BLM directives and manuals, the Montana BLM State Office will be guided by manual supplements, handbooks, and Instruction Memorandums (IM) issued by the Montana BLM State Office. Currently, these consist of Montana Manual Supplements 8111 (Inventory and Evaluation), 8143 (Avoidance and/or Mitigation of Adverse Effects to Cultural Properties), and the Handbook H-8110-1. The BLM will update these manual supplements and handbook as needed to conform to national BLM directives and manuals, policies issued by the BLM State Director, National Register Bulletins, new laws, and new regulations. The SHPO will be provided an opportunity to participate in revising the Manual Supplements and Handbooks.

XVII. EXPIRATION

This protocol will expire in ten (10) years from the day of the last signature of BLM and SHPO unless renewed by consensus by both BLM and SHPO.

Approved by:


Montana State Director, Bureau of Land Management

3-12-25
Date


State Historic Preservation Officer

3-12-25
Date

Appendix 1: National PA

Appendix 2: SHPO Annual Report format