

TITLE 4 CULTURAL RESOURCES
CHAPTER 10 CULTURAL PROPERTIES AND HISTORIC PRESERVATION
PART 12 IMPLEMENTATION OF THE PREHISTORIC AND HISTORIC SITES
PRESERVATION ACT

4.10.12.1 ISSUING AGENCY: Office of Cultural Affairs, State Historic Preservation Division.
[11/15/97; 4.10.12.1 NMAC - Rn, 4 NMAC 10.12.1, 1/1/08]

4.10.12.2 SCOPE: Applies to the state historic preservation division, the cultural properties review committee, state agencies and subdivisions of the state, and nonprofit corporations formally recognized as tax exempt under Section 501(c)3 of the Internal Revenue Code of 1986, whose declared purposes include the investigation, preservation or conservation of significant prehistoric or historic sites.
[11/15/97; 4.10.12.2 NMAC - Rn, 4 NMAC 10.12.2, 1/1/08]

4.10.12.3 STATUTORY AUTHORITY: This regulation is created pursuant to Section 18-8-8 NMSA 1978, which requires the state historic preservation officer to issue regulations for the implementation of the New Mexico Prehistoric and Historic Sites Preservation Act.
[9/15/89; 4.10.12.3 NMAC - Rn, 4 NMAC 10.12.3, 1/1/08]

4.10.12.4 DURATION: Permanent.
[11/15/97; 4.10.12.4 NMAC - Rn, 4 NMAC 10.12.4, 1/1/08]

4.10.12.5 EFFECTIVE DATE: 9/15/89, unless a later date is cited at the end of a section or paragraph. Reformatted to NMAC format effective 11/15/97.
[11/15/97; 4.10.12.5 NMAC - Rn, 4 NMAC 10.12.5, 1/1/08]
[Note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

4.10.12.6 OBJECTIVE: The purpose of this regulation is to establish procedures for the acquisition, stabilization, restoration or protection of significant prehistoric and historic sites by the state of New Mexico and corporations, to establish procedures and guidelines for determinations of the prudence and feasibility of alternatives to programs and projects requiring the use of land from significant prehistoric and historic sites, and to establish procedures and guidelines to determine whether all possible planning to preserve and protect and to minimize harm to significant prehistoric and historic sites affected by use of lands from such sites has been carried out. The purpose of the statute is to facilitate the preservation and protection of significant prehistoric and historic sites by authorizing partnerships between entities of government and corporations to that end, and by requiring substantial consideration of governmental actions that will have the effect of destroying or adversely affecting significant prehistoric and historic sites. The statute furthers the purposes of Sections 18-6-1 through 23 NMSA 1978 and of the National Historic Preservation Act of 1966 as amended and is consistent with the legislative finding (Section 18-6-2 NMSA 1978) that "the historical and cultural heritage of the state is one of the state's most valued and important assets; [and] that the public has an interest in the preservation of all antiquities, historic and prehistoric ruins, sites, structures, objects and similar places and things..."
[9/15/89; 4.10.12.6 NMAC - Rn, 4 NMAC 10.12.6, 1/1/08]

4.10.12.7 DEFINITIONS:

- A. "Acquisition" is the acquisition of a fee simple interest or of a lesser interest by appropriate mechanism, including but not limited to easement or lease, in a significant prehistoric or historic site.
- B. "Stabilization" is the act or process of securing a historic property against natural change, loss or deterioration of the existing fabric.
- C. "Restoration" is the act or process of accurately recovering the form and details of a historic property and its setting.
- D. "Protection" is the act or process of securing a historic property against change, loss, deterioration, theft, vandalism or other adverse effect caused by a human agent.

E. "Significant prehistoric or historic site" is a historic or prehistoric property, district, site, structure or object listed in the state register of cultural properties or national register of historic places, or property contributing to a historic district, and includes those lands within the boundaries of the property, site or district.

F. "State of New Mexico" is any state agency or political subdivision of the state, including but not limited to cities and counties.

G. "Entity" is any political subdivision of the state.

H. "Corporation" is a nonprofit corporation formally recognized as tax exempt under Section 501(c)3 of the Internal Revenue Code of 1986, whose declared purposes include the investigation, preservation or conservation of significant prehistoric or historic sites.

I. "Division" is the historic preservation division, office of cultural affairs.

J. "Committee" is the cultural properties review committee created by Section 18-6-4 NMSA 1978.

K. "State historic preservation officer" (SHPO) is the state official named in Section 18-6-8 NMSA 1978.

L. "Appropriation" is the authorization and apportionment of funds by federal, state or local statute.

M. "Public funds" are any moneys, financial consideration or direct or indirect financial support from any political subdivision of the state or from any entity acting on behalf of or with the authority of any political subdivision of the state.

N. "Long-term management plan" is a document prepared by a corporation and approved by the division, describing a historic or prehistoric site and creating guidelines, standards and procedures for its restoration, protection, interpretation, operation, maintenance and disposition as more fully set forth in 4.10.12.10 NMAC below.

O. "Use" is an adverse effect on a significant historic or prehistoric site or lands of that site, including but not limited to partial or complete physical alteration or destruction; isolation of the site from its historic setting; the introduction of physical, audible, visual or atmospheric elements that substantially impair the historic character or significance of the site or substantially diminish the aesthetic value of the site; or the acquisition or taking of a historic or prehistoric site resulting in or designed to result in such alteration, destruction, isolation or introduction of elements that may alter the site. Ordinary maintenance or repair, including code work, which makes no visible alteration to the site and results in no substantial loss of the historic fabric; installation or upgrade of services, such as electricity and water, which makes no visible alteration to the site and results in no substantial loss of the historic fabric; or emergency repair or stabilization of a significant site, shall not be considered a use within the scope of this definition.

P. "Program" is a course of action or series of actions supported by public funds.

Q. "Project" is an individual action or segment of a program.

R. "Area of impact" is the entire geographic area or areas within which a program or project may affect a significant historic or prehistoric site or sites.

S. A "prudent alternative" is any alternative not rendered impossible by truly unusual factors present in a particular case, or by costs or community disruption likely to reach extraordinary magnitudes, or attended by unique problems.

T. A "feasible alternative" is an alternative that may be built as a matter of sound engineering. [9/15/89; 4.10.12.7 NMAC - Rn, 4 NMAC 10.12.7, 1/1/08]

4.10.12.8 ESTABLISHMENT OF CRITERIA:

A. The division and the committee shall cooperatively develop criteria for the acquisition, stabilization, restoration or protection of significant historic or prehistoric sites. Not less often than annually these criteria shall be reviewed and may be revised by the division and the committee in a regular, public and advertised meeting of the committee.

B. The criteria will include:

(1) the significance of the property in the prehistory and history of New Mexico, including consideration of national landmark status;

(2) the degree to which the property is threatened by deterioration or destruction;

(3) the rarity or uniqueness of the property or property type in New Mexico;

(4) the research potential of the property; and

(5) the value of the property for public interpretation and visitation. The established criteria will be available to interested persons at the offices of the division.

[9/15/89; 4.10.12.8 NMAC - Rn, 4 NMAC 10.12.8, 1/1/08]

4.10.12.9 SOLICITATION OF PROPOSALS: Not less often than annually the division shall make an announcement, by legal advertising in newspapers of general circulation and by other appropriate means, to all state agencies holding property, to all municipalities and counties in New Mexico and to 501(c)3 organizations whose stated purposes include the investigation, preservation or conservation of significant prehistoric and historic sites. This announcement will 1) note the availability of any funds for acquisition, stabilization, restoration or protection of significant prehistoric or historic sites, and 2) request proposals for the acquisition, stabilization, restoration or protection of significant prehistoric and historic sites. This announcement will note the general requirements of a management plan as described herein.

[9/15/89; 4.10.12.9 NMAC - Rn, 4 NMAC 10.12.9, 1/1/08]

4.10.12.10 LONG-TERM MANAGEMENT PLAN:

A. A long-term management plan shall include but not be limited to:

- (1) a site description and statement of significance. The national register nomination may be used;
- (2) a site map;
- (3) documentation of site ownership, including a copy of the deed and a statement regarding outstanding mortgages, liens or other encumbrances on the property; this documentation must demonstrate that the applying agency or organization has legal control of the property;
- (4) a schedule of any stabilization, restoration, monitoring or protection measures proposed;
- (5) a program budget including a funding formula for the project indicating the proposed allocation of funds by the state and the agency or corporation, and the availability of funding by third parties;
- (6) a contract, agreement or proposed agreement for the disposition of the property in the event that the corporation goes out of existence;
- (7) a maintenance schedule, including approximate costs;
- (8) a plan for public interpretation when appropriate;
- (9) documentation of the 501(c)3 status of the corporation;
- (10) a statement designed to demonstrate the viability of the corporation; this statement will include vitas or resumes of appropriate personnel, operating budget, income projections and a recent audited financial statement;
- (11) a statement indicating the appropriateness of the site for acquisition, restoration or stabilization with reference to the criteria established as provided for in 4.10.12.8 NMAC above.

B. The long-term management plan must be approved by the division prior to commencement of the project.

C. The division and committee will cooperatively select proposals for funding in regular public and advertised meetings of the committee. Selection of proposals for funding will be based on the criteria set forth in 4.10.12.8 NMAC above and on evaluation of the long-term management plan.

D. After the long-term management plan is approved by the division, the division and the corporation shall enter into a contract consistent with that plan and providing for the management, interpretation and preservation of any property acquired, stabilized, restored or protected under the provisions of the New Mexico Prehistoric and Historic Sites Preservation Act.

[9/15/89; 4.10.12.10 NMAC - Rn, 4 NMAC 10.12.10, 1/1/08]

4.10.12.11 PRUDENT AND FEASIBLE ALTERNATIVES: Whenever an entity proposes to spend public funds on any program or project that may require the use of or any portion of or any land from a significant prehistoric or historic site, that entity shall, at the earliest practicable stage in planning the program or project, make a determination that there is no prudent and feasible alternative to such use. The affirmative responsibility of showing that there is no such alternative rests on the entity. This showing shall be arrived at in the following manner:

A. At an early stage in the development of a proposal to carry out a program or project that may use land from a significant prehistoric or historic site, the entity shall submit an appropriately substantial written and graphic description of the proposed program or project and a map showing the area of impact of the proposed program or project to the division, and shall request the determination of the division as to whether the program or project will use a significant prehistoric or historic site. Within thirty days of receipt of such request the division will respond with a determination and a list of any prehistoric or historic sites which will be used, including sites entered in the state register of cultural properties or national register of historic places. The division will also inform

the entity about any sites determined by the division to be eligible to either register, sites in process of nomination to either register, and the status of prehistoric and historic inventory of the area.

B. If the SHPO determines that the proposed program or project will use a significant prehistoric or historic site, the entity shall, at an early stage in the planning for that program or project, hold at least one public hearing, advertised not less than thirty days in advance of such hearing in one newspaper of statewide circulation and one newspaper in the locality or region of the action, to solicit proposed alternatives that will avoid such use. The entity shall give direct and timely written notice of such hearing to the SHPO. At such public hearing, the entity shall take oral and written testimony of interested persons. The entity shall hold the hearing record open for an additional fifteen days to take additional written comments. The SHPO may propose an alternative or alternatives at the hearing or for the hearing record. The entity may employ any timely design, public information or other hearing, e.g., a hearing provided for in its standard procedures, as the forum for soliciting alternatives.

C. Only those prehistoric or historic sites entered in the state register of cultural properties or national register of historic places as of the closing date of the hearing record shall be deemed to fall within the scope of this regulation. However, any proposed change in the scope of a program or project which brings a significant prehistoric or historic site within the area of impact of that program or project will require full consideration under this section and the following section of this regulation. It shall be the responsibility of the division to give timely written notice of any proposal to enter a property in the state register of cultural properties to the property owner, the affected municipality if any, and the affected county not less than thirty days before a meeting of the committee to consider such proposal.

D. The entity, on the basis of testimony received in the hearing and upon its own initiative and responsibility shall document alternatives to the proposed use. It shall then be the affirmative responsibility of the entity to prepare a written, reviewable and appropriately substantial record of its examination of alternatives, including a discussion of social and environmental concerns, of any identified hazard or emergency, and of the cost and community disruption resulting from each alternative. Commonly available alternatives may include use of federal or state funds for preservation and maintenance of the significant prehistoric or historic site or sites and the no-build alternative. The entity must make a written conclusion of the imprudence or infeasibility of alternatives, including the no-build alternative, identified by itself or by the state historic preservation officer. Arguments based on cost and technical feasibility must be supported by affidavit of a qualified architect or engineer. It shall not be deemed sufficient for the purposes of this analysis to reject an alternative as imprudent or infeasible because it would affect other significant prehistoric or historic sites, or would affect the same sites in a different manner.

E. It shall be the affirmative responsibility of the entity either to determine that there is no prudent and feasible alternative to a proposed program or project or to select the alternative to a proposed program or project which causes the least harm to any significant prehistoric or historic site or sites. The entity shall issue this determination in the form of a written record of decision to all interested parties, including direct notice to the division.

F. It shall be the affirmative responsibility of the SHPO to respond to the record of decision and to concur with or to dissent from its conclusions within forty-five days of receipt of the record. The SHPO shall state in writing his finding that there is or is not a prudent and feasible alternative to the proposed program or project, or that the alternative causing the least harm to any significant prehistoric or historic site or sites has or has not been selected, and that all possible planning to minimize harm to a significant prehistoric or historic site or sites has or has not been carried out as further set forth in 4.10.12.12 NMAC below.

G. Compliance with federal rule or regulation which:

- (1) requires a determination that there is no prudent or feasible alternative to a program or project affecting a significant prehistoric or historic site or sites;
- (2) requires all possible planning to minimize harm to any affected significant prehistoric or historic site or sites; and
- (3) requires consultation with the SHPO, may substitute for compliance with this regulation.

[9/15/89; 4.10.12.11 NMAC - Rn, 4 NMAC 10.12.11, 1/1/08]

4.10.12.12 PLANNING TO MINIMIZE HARM:

A. This section applies either when no prudent or feasible alternative is found which will avoid use of a significant prehistoric or historic site or sites, or when more than one alternative which will affect a significant prehistoric or historic site or sites is found. In either case, a plan to minimize harm to the affected significant prehistoric or historic site or sites shall be incorporated as a separate section of the record of decision described in 4.10.12.11 NMAC above. The plan must contain the following:

- (1) a map of the area of impact, including the significant historic or prehistoric sites to be used;
- (2) documentation of ownership of the area of impact;
- (3) a description of the significant historic or prehistoric site or sites to be used and a statement of the historic, architectural or archaeological significance of the site or sites. The state or national register nomination form may be the source of this statement;
- (4) documentation of alternatives, if more than one alternative has been found, totaling the harm caused by each alternative, and making a conclusion, based on comparisons stated in appropriately substantial detail, that given alternative in association with any specific measures for stabilization, restoration, protection or data recovery causes the least harm to a significant historic or prehistoric site or sites;
- (5) estimated costs relating to (4) above;
- (6) any contract, agreement or proposed agreement relating to the disposition or maintenance of the significant prehistoric or historic site or sites;
- (7) any schedule of maintenance of the significant prehistoric or historic site or sites, including approximate costs.

B. The entity may upon request hold an additional public hearing, advertised no less than thirty days in advance in one newspaper of statewide circulation and one newspaper in the locality or region of the proposed program or project, to receive written and oral testimony on the plan from interested persons. The entity shall give direct and timely written notice of any such hearing to the SHPO. In the event of such hearing, the entity shall hold the hearing record open for an additional fifteen days to take additional written comments.

C. The only relevant factor in making a determination as to whether an alternative minimizes harm to a significant prehistoric or historic site is a quantum of harm to the site caused by that alternative.
[9/15/89; 4.10.12.12 NMAC - Rn, 4 NMAC 10.12.12, 1/1/08]

4.10.12.13 ENFORCEMENT: Either the SHPO or any other interested person may seek enforcement of the provisions of the New Mexico Prehistoric and Historic Sites Preservation Act by an action for injunction or other appropriate relief in a court of competent jurisdiction.
[9/15/89; 4.10.12.13 NMAC - Rn, 4 NMAC 10.12.13, 1/1/08]

HISTORY OF 4.10.12 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the commission of public records, state records center and archives under:
HPD Rule 89-2, Regulations for the Implementation of the New Mexico Prehistoric and Historic Sites Preservation Act, filed 9-15-89, amended 9/26/89.

History of Repealed Material: [RESERVED]

Other History: HPD Rule 89-2, Regulations for the Implementation of the New Mexico Prehistoric and Historic Sites Preservation Act (filed 9/15/89) was renumbered, reformatted and replaced by 4 NMAC 10.12, Implementation of the New Mexico Prehistoric and Historic Sites Preservation Act, effective 11/15/97.
4 NMAC 10.12, Implementation of the New Mexico Prehistoric and Historic Sites Preservation Act (filed 11/03/97) renumbered, reformatted and replaced by 4.10.12 NMAC, Implementation of the New Mexico Prehistoric and Historic Sites Preservation Act, effective 1/1/08.