Programmatic Agreement
Between
Bureau of Land Management, Egan Field Office
And
Nevada State Historic Preservation Office
And
Humboldt-Toiyabe National Forest
And
U.S. Fish and Wildlife Service, Ruby Lake National Refuge
And
Regarding
Overland Pass/Big Wash Habitat Improvement Project
White Pine County, Nevada

WHEREAS, the Egan Field Office of the Bureau of Land Management (BLM), The Ruby Mountains Ranger District of the Humboldt-Toiyabe National Forest (HTNF), the Ruby Lake National Wildlife Refuge of the U.S. Fish and Wildlife Service (RLNR) and the Nevada Department of Wildlife (NDOW) are preparing a plan to conduct multiple phased vegetation treatments on public lands for various locations within Huntington and South Ruby Watershed; Southern Ruby Valley—Overland Pass Area, White Pine County, Nevada (hereinafter referred to as the "Undertaking" as defined in 36 C.F.R. § 800.16[y]); and

WHEREAS, the BLM, HTNF, RLNR, and NDOW, hereinafter identified as the "Agencies", propose to implement the undertaking to comply with all relevant Federal regulations, policies, and laws; and implementing these policies subject to the requirements of the National Environmental Policy Act of 1969 (NEPA); the Agencies are responsible for completing NEPA and ensuring that it is in compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA), 16 U.S.C. § 470f, and its implementing regulations, 36 C.F.R. § 800; and

WHEREAS, the Agencies agree that the BLM shall be the lead federal agency responsible for ensuring compliance with NHPA; and

WHEREAS, the Area of Potential Effect (APE) includes lands managed by the RLNR and the HTNF. The RLNR and the HTNF will be responsible for participation in the identification and evaluation phase, and engage in consultation with BLM on assessing project affects within their agencies; and

WHEREAS, the Agencies have determined that the undertaking may have an effect upon properties eligible for inclusion in the National Register of Historic Places (NRHP), and has consulted with the Nevada State Historic Preservation Officer (SHPO) pursuant to NHPA; and

WHEREAS, there are approximately eight miles of the Pony Express National Historic Trail (Trail) within White Pine County, Nevada that may be affected by projects implemented under this PA, the Agencies will consult with the local chapter of the Pony Express Trail Association the Oregon-California Trails Association and the National Park Service, Intermountain Region

National Trails Office, as appropriate, on steps the Agencies can take to minimize or avoid adverse effects to the Trail;

WHEREAS, Fort Ruby, a designated National Historic Landmark, lies within White Pine County, Nevada near the APE and may be affected by projects implemented under this Programmatic Agreement (PA); and

WHEREAS, the BLM has consulted with the Advisory Council on Historic Preservation (ACHP), pursuant to 36 CFR §800.14(b), to develop and execute this PA and the ACHP has declined to formally enter consultation on the development of this PA; and

WHEREAS, BLM has consulted with the Nevada Department of Wildlife (NDOW) regarding the effects of the undertaking on historic properties and has invited them to sign this PA as a signatory party; and

WHEREAS, effects to historic properties in the APE cannot yet be fully determined and the signatories and invited signatory (hereinafter referred to as signatories) desire to enter into this PA to set forth procedures to be followed in satisfaction of the BLM's Section 106 responsibilities of NHPA, for the Undertaking; and

WHEREAS, the Agencies are responsible for conducting Native American Tribal consultation on a government to government level and ensuring that it is in compliance with the, Forest Service National Resource Book on American Indian and Alaska Native Relations, BLM Manual Handbook, H-8120-1, Guidelines for Conducting Tribal Consultation, the tribes consulted were the Ely Shoshone Tribe, South Fork, Wells, and Battle Mountain Bands of the TeMoak Tribe of Western Shoshone; and

WHEREAS, the undertaking would be implemented over the course of the next 10 years; and

WHEREAS, this PA covers all aspects of the planning, development, and implementation of undertaking including but not limited to prescribed fire, tree cutting and removal, mastication, chaining, herbicide treatments, weed prevention and treatment, aspen restoration, and seeding; and

NOW THEREFORE, the signatories agree that implementation of the NEPA decision record and Undertaking shall be administered in accordance with the following stipulations to ensure that historic properties will be treated to avoid or mitigate effects to the extent practicable, regardless of surface ownership and to satisfy the Agencies' NHPA Section 106 responsibilities for all aspects of the undertaking.

I. ROLES AND RESPONSIBILITIES

The signatories agree that the *STATE PROTOCOL AGREEMENT between the Bureau of Land Management, Nevada and the Nevada State Historic Preservation Office for Implementing the National Historic Preservation Act, Revised January 2012* (Protocol), except as amended here, will be utilized for this PA. This Protocol is incorporated by reference.

RLNR and HTNF will be responsible for participation in the identification and evaluation of cultural resource requirements. BLM will consult with RLNR and HTNF prior to assessing project affects. Copies of the final cultural resources reports will be provided to these agencies.

The BLM is responsible for administering this PA. This includes but is not limited to: ensuring that signatories carry out their responsibilities; overseeing cultural resource work; assembling submissions to the SHPO including reports, determinations of eligibility and effect, and treatment plans; and for seeking SHPO concurrence with agency compliance decisions.

II. AREA OF POTENTIAL EFFECT

The total project APE includes approximately 45,200 acres, but actual treatment units are approximately 18,570 acres. Approximately 70-80% of the treatment units would receive actual treatment of vegetation and fire management for various locations within the undertaking. The overall APE is shown in the map in Appendix A.

The APE shall be defined to include potential direct and indirect effects to cultural resources and properties of traditional religious and cultural importance from any activities associated with the undertaking without regard for land ownership.

Based on current data, there are known historic properties, inside and outside of the direct APE that may be adversely affected by visual effects from the proposed undertaking. Specifically, a segment of the Pony Express National Historic Trail (approximately eight miles) runs through the APE. Therefore, the APE for assessing visual effects on known historic properties will be guided by BLM VRM Manual 8410-1, and the Ely District RMP, 2008.

The BLM may amend the APE as needed or as requested by the signatories, the Tribes, or other consulting parties without amending the PA proper.

III. STIPULATIONS

The BLM shall ensure that the stipulations of this PA are carried out by its contractors, subcontractors, or other personnel involved with this undertaking.

The BLM shall ensure that ethnographic, historic, architectural, and archaeological work conducted pursuant to this PA is carried out by or under the direct supervision of persons meeting qualifications set forth in the *Secretary of the Interior's Professional Qualifications Standards* and that those who require permits for such work, issued by the BLM Nevada State Office, have them. Specialists conducting the work will be required to hold a BLM NV Cultural Resource Use Permit, issued by the NSO, per the 8100 Manual and the latest Guidelines and Standards for Archaeological Inventory.

A. Identification

1. The BLM shall ensure that appropriate cultural resource identification activities, including records research; informant interviews; context development; and archaeological, historic, or ethnographic inventory for the APE are conducted in a manner consistent with the Protocol and the latest edition of the "Guidelines and Standards for Archaeological Inventory".

2. Required identification activities shall be completed for the APE regardless of the ownership (public or private) of the lands involved and BLM shall be responsible for gaining access to privately held lands.

3. The RLNR and HTNF will participate as reviewers of the identification effort and evaluation of historic properties on lands managed by their respective agencies. BLM will send reports involving the recordation of sites on lands administered by non-BLM agencies to the corresponding agencies for a 30-day review, and will defer to those agencies on site eligibility and project effects in those cases. The BLM, as the lead agency, will consult on those determinations with SHPO.

4. The BLM shall make a good faith effort to consult with the Tribes and affected tribal members to identify properties of traditional religious or cultural importance. For tribal consultation procedures see Appendix B.

B. Eligibility

1 For each phase of undertaking within the APE, the BLM, after seeking agreement on eligibility from the other Agencies (Stipulation III, A, 3), shall evaluate cultural resources for eligibility to the NRHP. The BLM will determine NRHP eligibility prior to the initiation of activities that may affect historic properties, using the Protocol as guidance.

2. The BLM shall consult with the Tribes or identified affected tribal members to evaluate the NRHP-eligibility of properties of traditional religious and cultural importance. Based on information shared with the BLM, the BLM would determine the NRHP eligibility of identified properties, and consult on these determinations with SHPO and the Tribes.

3. The BLM shall ensure that appropriate cultural resource inventories that identify and evaluate cultural resources are completed and that appropriate reports are prepared in accordance with the Protocol and with the Nevada BLM's *Cultural Resources Inventory General Guidelines, 5th edition* (January 2012), or the latest edition issued by BLM Nevada (Guidelines) at the date of implementation of each phase.

C. Treatment

1. To the extent practicable, the BLM shall ensure that project activities avoid adverse effects to historic properties through project design or redesign, relocation of activities, or by other means in a manner consistent with the Protocol. For undertaking activity descriptions see Appendix A.

2. In avoiding or mitigating effects, the BLM, in consultation and agreement with the Agencies and the SHPO, shall determine the precise nature of effects to historic properties identified in the APE, using the Protocol as guidance. BLM will send Historic Preservation and Treatment Plans/Data Recovery Plans (Plans) in regard to the mitigation of historic properties on lands administered by non-BLM agencies to the corresponding agencies for a 30-day review, and will defer to those agencies on the data recovery and project effects in those cases. The BLM, as the lead agency, will consult on the Plans with SHPO.

3. The BLM shall consult with the Tribes, or identified affected tribal members, to evaluate effects to properties of traditional religious and cultural importance. Based on information shared with the BLM, the BLM would determine the appropriate treatment to avoid or to minimize to the extent practicable adverse effects, and consult on these determinations with the Agencies, SHPO and the Tribes.

4. For properties eligible under NRHP criteria (a) through (c), mitigation other than data recovery may be considered in the treatment plan (e.g., Historic American Buildings Survey/Historic American Engineering Record recording, oral history, historic markers, exhibits, interpretive brochures or publications, etc.). Where appropriate, treatment plans may include provisions (content and number of copies) for a publication for the general public.

5. The BLM, in consultation with the Agencies and the SHPO, shall ensure that the fieldwork portions of any treatment plan (using BLM staff or contractors and subcontractors) are completed prior to initiating any activities that may affect historic properties located within the area covered by the plan.

6. BLM shall ensure that all records and materials resulting from identification and treatment efforts are curated in accordance with 36 CFR 79 in the Nevada State Museum. As defined in the Native American Graves Protection and Repatriation Act (NAGPRA) materials will be handled in accordance with 43 CFR Part 10. All materials collected will be maintained in accordance with 36 CFR Part 79 or 43 CFR Part 10, until the final treatment report is complete and collections are curated and/or returned to their owners.

IV. DURATION

This PA shall remain in effect for ten (10) years from the date of its execution. If proposed actions in the APE are not completed prior to such time, the BLM may consult with the other signatories to reconsider the terms of the PA and amend it in accordance with Stipulation X below. The BLM shall notify the signatories as to the course of action it will pursue.

V. POST-REVIEW DISCOVERY SITUATIONS

Stipulations of this PA and the Protocol are intended to identify and treat cultural resources that are eligible for inclusion in the NRHP. Unplanned, inadvertent discoveries of buried cultural resources are not anticipated. In the case of an unplanned inadvertent discovery, the BLM will ensure that provisions in the Protocol (Section VI.B) and Appendix B of this PA are met.

Prior to initiating any ground disturbing activities within the APE, all BLM employees, Agencies, contractors, and subcontractors empowered to halt activities in a discovery situation shall be informed about who to contact and under what time frame. At least one of these individuals will be present during any project field activities.

Activities in the area of the discovery will be halted until the BLM Authorized Officer provides written authorization that the required mitigation is complete and activities can resume.

VI. NOTICES TO PROCEED

When appropriate, in consultation with the SHPO and in compliance with the PA stipulations, the BLM may issue Notices to Proceed for individual project phases, under the following conditions:

A. The BLM, in consultation with the Agencies and the SHPO, has determined that:

1. either there are no historic properties within the APE or through project design all historic properties will be avoided for the current phase of the undertaking; and

2. in consultation with the Tribes, no properties of traditional religious or cultural importance were identified within the APE for the current phase of the undertaking; or

B. The BLM, after consultation with the Agencies and the SHPO and in the case of properties of traditional religious or cultural importance, the Tribes, has implemented an adequate treatment plan for the current phase of the undertaking, and

1. the fieldwork phase of the treatment option has been completed; and

2. the BLM has prepared or accepted a summary description of the fieldwork performed and a schedule for reporting that work, and

3. the BLM shall provide a copy of the summary to the Agencies and SHPO; and

4. the SHPO shall review the summary and if the SHPO concurs or does not respond within two working days of receipt, BLM shall assume concurrence and issue the NTP; and

5. the BLM shall not begin any ground disturbing activities within the boundaries of any historic property until a NTP is issued for the property; and

6. BLM may issue a partial NTP for portions of the APE that are outside of the area that may affect historic properties.

C. The BLM shall notify RLNR and HTNF of projects scheduled on their lands within the APE.

VII. MONITORING AND REPORTING

A. Any signatory may monitor actions carried out pursuant to this PA. To the extent practicable, monitoring activities should minimize the number of monitors involved in the undertaking.

B. Reporting

1. A draft report of the identification, recordation, evaluation, treatment or other mitigative activities will be due to the BLM from any contractor within three (3) months after the completion of the fieldwork associated with the activity, unless otherwise negotiated.

2. BLM shall review and comment on any report submitted by contractors within 30 calendar days of receipt. RLNR and HTNF shall review and comment on any report submitted by contractors that takes place in their jurisdiction within 30 calendar days of receipt.

3. The BLM shall submit the results of identification, recordation, evaluation, and treatment efforts, including discovery situations, and treatment plans to the Agencies and SHPO for a 30 calendar day review and comment period.

4. If the SHPO fails to respond to the BLM within 30 calendar days of the certified receipt of a submission, the BLM shall presume concurrence with the findings and recommendations as detailed in the submission and proceed accordingly.

5. The BLM shall ensure that all final archaeological reports resulting from actions pursuant to this PA will be provided to the Agencies and SHPO and the Tribes (pending official request and an Memorandum of Understanding Information Sharing Agreement with the BLM is in place at the time of request). All such reports shall be consistent with contemporary professional standards and the *Department of Interior's Formal Standards for Final Reports of Data Recovery Programs* (48 Federal Register 44716-44740).

VIII. OTHER CONSIDERATIONS

A. The BLM shall ensure that all its personnel and all the personnel of its contractors and subcontractors are directed not to engage in the illegal collection of historic and prehistoric materials. All parties shall cooperate with the BLM to ensure compliance with the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470), as amended, on public lands and with Nevada Revised Statute (NRS) 383 for private lands.

B. The BLM shall ensure that any human remains, associated and unassociated funerary objects, objects of cultural patrimony, and sacred objects encountered during the undertaking are treated with respect. In coordination with this PA, human remains and associated grave goods found on public land will be handled according to the provisions of the NAGPRA , 25 U.S.C. 3001 et seq., and its implementing regulations (43 C.F.R. § 10). Human remains and

associated funerary objects on private land will be handled according to the provisions of NRS 383.

C. Information on the location and nature of cultural resources, and information provided by and considered proprietary by the Tribes, will be held confidential by all signatories to the extent provided by Federal and state law.

IX. DISPUTE RESOLUTION

If any signatory to this PA, or an interested person, objects to any activities proposed pursuant to the terms of this PA, the BLM Egan Field Office (EFO) Manager shall consult with the objecting party and the SHPO to resolve the issue. If the BLM EFO Manager determines that the objection cannot be resolved, they shall request the assistance of the BLM Nevada Deputy Preservation Officer, the other Agencies preservation officers, and the Ely District Manager to resolve the objection. The BLM Ely District Manager's decision will be considered final.

The signatories may continue all actions under this PA that are not in dispute.

X. AMENDMENT

Any signatory to this PA may request that this PA be amended, whereupon the signatories will consult to consider such amendment. The amendment will be effective on the date a copy signed by all of the signatories is filed with the ACHP.

XI. TERMINATION

Any signatory to this PA may terminate the PA by providing thirty (30) days advance written notice with cause to the other signatories, provided that the signatories will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination.

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

SIGNATORIES:

U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT

_____ Date _____
Jill Moore, Egan Field Office Manager

NEVADA STATE HISTORIC PRESERVATION OFFICER

_____ Date _____
Rebecca L. Palmer, SHPO

HUMBOLT-TOIYABE NATIONAL FOREST

_____ Date _____
Wendy Fuell, Ruby Mountain District Ranger

U.S. FISH AND WILDLIFE SERVICE

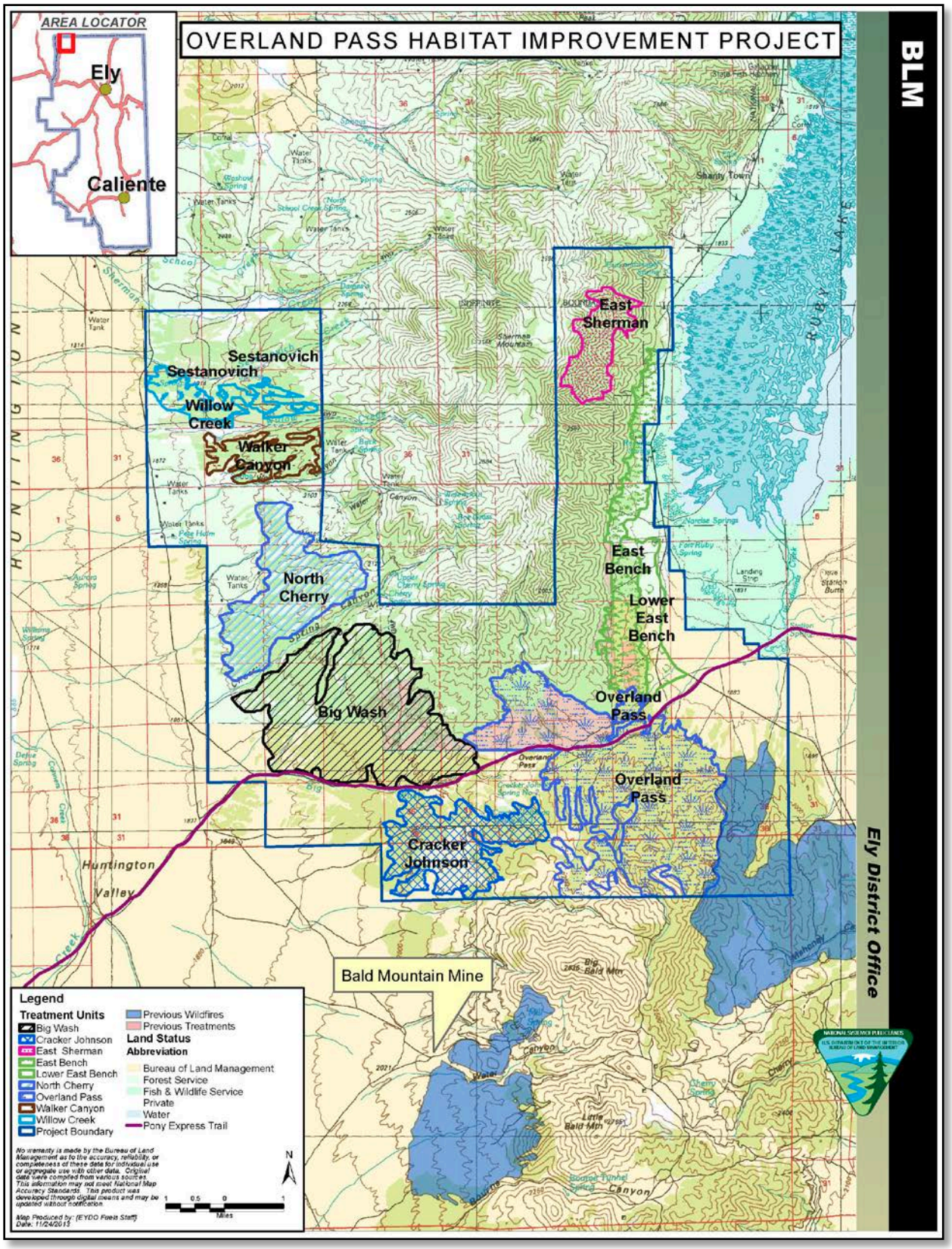
_____ Date _____
Guy Wagner, Ruby Lake National Refuge Manager

INVITED SIGNATORY:

NEVADA DEPARTMENT OF WILDLIFE

_____ Date _____
Steve Foree, Supervisory Habitat Biologist

APPENDIX A: MAP OF THE AREA OF POTENTIAL EFFECT



APPENDIX B: TRIBAL CONSULTATION PROCEDURES

I. Identification of Parties for consultation

Consultation on the proposed action was initiated in October 2011, following the procedures described below. Parties for consultation were identified by the Native American Coordinator from the BLM Egan Field Office of the Ely District who has experience with tribal consultation in this area. A letter was sent to the Ely Shoshone Tribe, South Fork, Wells, and Battle Mountain Bands of the Te-Moak Tribe of Western Shoshone, the federally recognized tribes with cultural and natural resources interest in the Ely District. After follow-up discussions of the APE and the initial phase of proposed action, a consultation meeting was hosted in the field by the BLM with member of the aforementioned tribes on November 10, 2011. Comments received by the Tribes during consultation were incorporated into the project's NEPA documentation and this PA.

BLM will initiate additional consultation for implementation of each phase of action over the life of the NEPA decision record and this PA, and for any action identified in initial consultation as of interest to the Tribes, traditional cultural and religious leaders, and other interested tribal organizations or members.

Based on a written request, any federally recognized tribe may be included in this PA as a concurring party.

II. Consultation Methods

The method of the BLM contacting, communicating, and coordinating with the Tribes will include letters, telephone calls, and/or face-to-face meetings, as appropriate and necessary to afford the Tribes the opportunity for input.

A. Letter Contact

The BLM Authorized Officer or designated party will prepare a letter to the Tribes as early as possible in the process explaining the proposed project or phase of activity and indicating that this will begin a formal government-to-government consultation process. The letter will be prepared to ensure that Tribes are part of the initial contact and scoping process. The letter initiating the consultation will be signed by the BLM Authorized Officer.

The proposed activity will be explained in sufficient detail to allow for the Tribes to determine its level of interest, if any. The scope of work, a proposed schedule, and any significant activities, such as planned field visits or a decision date, will be included in the written document.

B. Follow-up Telephone Contact

The Authorized Officer or designated party will follow-up the initial letter with telephone contacts after 10 working days after the letters have been mailed. Information from these telephone contacts will be documented in a telephone log format. This telephone log will be kept up to date and will become part of the project record. Any follow-up action recommended by the Tribes will be noted.

C. Planned Meetings

1. The Authorized Officer or designated party will meet with designated tribal leaders and/or designated tribal representatives as soon as possible upon request of the Tribes in order to discuss the proposed project, specific project phase, or related issues.

2. Meetings will take place on the tribal reservations, in the field at the location of proposed actions, or at other mutually agreed upon locations in order to minimize costs to tribal members and to ensure maximum participation.

3. Meeting dates will be coordinated with designated tribal points of contact at least 10 working days prior to the meeting.

4. The meeting will be confirmed by a letter to the tribal leadership, with a copy furnished to the designated tribal cultural committee lead or point of contact. The letter will include a purpose statement, a proposed agenda, and a list of agency attendees.

5. BLM will prepare meeting summaries within 5 working days following the meeting and distribute them to the tribal leadership and other appropriate parties in draft, and incorporate comments from the tribal representatives as appropriate before finalizing the notes. Final meeting notes will be distributed within 10 working days following distribution of the notes.

D. Concluding Consultation

After reasonable and good faith efforts to address and resolve issues, the BLM Authorized Officer, in consultation with the signatories, will determine the appropriate point of closure of the consultation on the proposed action or phase of the project. Closure of a phase of consultation will be provided by the BLM, in writing, to the tribal leadership and representatives. If ongoing consultation is productive, the BLM and the Tribes will make that determination and outline the appropriate scope, level, and process for its continuance. (Ongoing consultation may include such things as continued staff-to staff coordination, weekly project phase reporting and/or participation of tribal monitors).

APPENDIX C: DISCOVERY AND UNANTICIPATED IMPACTS PROCEDURES

In the event that previously unknown cultural resources are discovered within the area of potential effects of the undertaking, or should known cultural resources be directly or indirectly impacted in an unanticipated manner, the following actions, at a minimum, would be initiated by the BLM in consultation with the signatories:

1. All activities will halt in the immediate vicinity of the discovery and all actions will be directed away from an area at least 100 meters in all directions from the point of discovery.

    a. A BLM cultural resources specialist (CRS) will be notified immediately by the contractors or BLM staff working on the project. The BLM will ensure that a CRS, with the proper expertise for the suspected resource type, is on-site as soon as possible.

    b. The BLM will initiate consultation with the appropriate parties, including the SHPO, other federal agencies, the Tribes, and interested parties as appropriate.

    c. In the event that a CRS or other necessary persons are not immediately available, BLM may be required to cover and/or otherwise protect the resource until such time that the appropriate parties can be present for inspection and/or evaluation.

2. Upon arriving at the site of the discovery, the CRS will assess the resource. At a minimum, the assessment will include:

    a. The nature of the resource (e.g., number and kinds of artifacts, presence/absence of features). This may require screening of already disturbed deposits, photographs of the discovery, and/or other necessary documentation.

    b. The spatial extent of the resource. This may require additional subsurface testing, mapping or inspection, as is appropriate to the resource.

    c. The nature of deposition/exposure. This may require interviews with construction personnel, other persons having knowledge concerning the resource or, in rare instances, the expansion of existing disturbances to establish the characteristics of the deposits.

3. Discoveries and unanticipated impacts to known resources will be managed according to the provisions of this PA and the Protocol. After consultation with the appropriate parties, BLM shall then make a determination of eligibility, treatment and effect. If necessary, BLM, in consultation with the SHPO, the Tribes and appropriate parties, shall ensure that a treatment plan is prepared following the guidance provided in this PA.

4. Any items covered by NAGPRA encountered in a discovery, or unanticipated impact situation, will be handled according to 43 C.F.R. § 10 or Nevada state laws, as appropriate.

5. All implementation activities in the area of the discovery will be halted until the BLM documents in writing that identification and treatment is complete and activities can resume.