SLO RULE ORDER 2022-01

FINAL RULEMAKING ORDER APPROVING CREATION OF A NEW RULE PART, 19.2.24 NMAC, RELATING TO CULTURAL PROPERTIES PROTECTION

The Commissioner of Public Lands ("Commissioner"), executive officer of the New Mexico State Land Office ("SLO"), in accordance with law and a previously published Notice of Rulemaking, hereby promulgates and approves a new rule part, 19.2.24 NMAC, relating to cultural properties protection (the "Rule") which is attached to this Order as Exhibit 1 and incorporated herein, and effective December 1, 2022.

Procedure. In accordance with applicable laws and administrative rules, the Commissioner published a Notice of Public Hearing to Consider Proposed Amendments to State Land Office Rules 19.2 NMAC ("Notice"), specifically the proposed Rule, in the New Mexico Register, Vol. XXXII, Issue 15, on August 10, 2021.

The Notice informed the public where and how copies of the proposed new Rule could be obtained, stated that written comments regarding the rule could be submitted through October 21, 2021, and provided various options for how interested parties could submit written comments. The Notice also informed the public of the Commissioner's public hearing on the proposed Rule, which was held on October 22, 2021. At the hearing, the Commissioner extended the public comment period for another 45 days, through December 6, 2021. SLO concurrently posted on its webpage the Notice and the proposed Rule.

Legal Authority. Statutes give the Commissioner broad authority and discretion to manage and dispose of state trust lands, designating the Commissioner as the chief executive of the State Land Office, and giving her authority to make rules and regulations as to those matters.[1] In general, the term "rule" or "regulation," when used in a statute, means an agency rule issued as the result of a notice-and-comment process. *See* NMSA 1978 § 12-8-2(G) (Administrative Procedures Act definition of "rule" as including "regulation... of general or particular application adopted by an agency to implement, interpret or prescribe law or policy enforced or administered by an agency, if the adoption or issuance of such rules is specifically authorized by the law giving the agency jurisdiction over such matters") and § 12-8-4 (Administrative Procedures Act requirement that rules be issued only after notice and opportunity for comment).

Questions, Comments and Responses. The Commissioner solicited public comment on the proposed Rule beginning on August 10, 2021. On October 22, 2021, the Commissioner extended the public comment period through December 6, 2021.

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[1] *See* NMSA 1978, § 19-1-1 (Commissioner is "chief executive officer" of the SLO charged with "management, care, custody, control and disposition" of state trust lands) and § 19-1-2 (giving Commissioner the duty to receive applications and to issue leases and to "make rules and regulations for the control, management, disposition, lease and sale of state lands and perform such other duties as may be prescribed by law").

Public Hearing. The October 22, 2021 public hearing was held in a hybrid format, i.e. an in-person hearing at the State Land Office building in Santa Fe, New Mexico, with a virtual (online) option allowing interested parties to observe and participate remotely. Hearing Officer Felicia Orth presided over the hearing and prepared the report summarizing the hearing, attached to this Order as Exhibit 2.

Three SLO staff attended the hearing and provided testimony in support of the proposed Rule or answered questions from the public about the proposed Rule. Six interested parties appeared to provide in-person or virtual statements regarding the proposed Rule (some of those parties also provided written comments regarding the Rule).

Review and Synopsis of Public Comments. During the public comment period, the State Land Office received a total of around 35 written comments and questions. A number of public comments covered similar topics and made similar points. To reduce repetition, this Rulemaking Order addresses all comments making the same or similar points with consolidated responses. Comments and responses appear in sequential order (i.e. in the order of the relevant sections of the Rule), followed by general comments. A table identifying each comment by commenter name and affiliation is attached to this Rulemaking Order as Exhibit 3. SLO's summary of the substantive comments, and responses to each, are attached to this Order as Exhibit 4.

Questions that concern matters of implementation rather than the text of the Rule itself are generally not addressed in this Rulemaking Order, but instead are addressed in a separate Frequently Asked Questions document.

Comments or questions that are not primarily focused on cultural properties protection (for example, one comment suggested that "SLO should look into consolidating or merging state leases next to BLM lands" for improved management overall) are not addressed in this Rulemaking Order.

Concurrent with the publication of the final Rule, the State Land Office will post to its website the text of the final Rule; this Rulemaking Order; a copy of all written questions and comments received during the public comment period; a table identifying each substantive comment by commenter name (and affiliation, if applicable); the Hearing Officer's Report from the October 21, 2021 public hearing; answers to Frequently Asked Questions. These materials will be available on the agency's website at least through March 21, 2023, and will thereafter be available on request.

Reasons for Adoption of the Rule. The protection of cultural properties on state trust land is a top priority of this administration. Earlier this year, the Commissioner established a standalone Cultural Resources Office (CRO) to elevate the role of archaeology within the agency, create more direct lines of communication within SLO, and position the agency to proactively manage cultural resource protection efforts in a coordinated and responsive manner.

The Rule builds upon this effort by requiring that an archaeological survey be completed prior to any new surface disturbing activity, such as construction of roads, pipelines, oil and gas drilling, renewable energy installations, and other infrastructure development. The Rule is consistent with

existing practices on federal lands and New Mexico state law, and many state lessees already adhere to its requirements as a matter of practice. By making survey requirements applicable across all leasing programs, SLO will ensure that cultural resource protections are enforceable, meaningful, and consistent. Instituting greater protections prior to the commencement of a project will also ensure irreplaceable historical and cultural resources are not lost.

The Rule provides specific procedures for implementing survey requirements and confirming that parties understand their obligations to protect cultural properties before any work is done. Furthermore, because there are different statutory requirements that apply to the various types of leasing activities, the Rule is tailored to reflect those legal distinctions.

Final Rule. The final Rule incorporates all stylistic and formal requirements of the State Records Administrator set forth in 1.24.10 NMAC. The new Rule as proposed was modified as a result of comments received and further deliberation on the part of SLO, as described in this Order and as attached.

FOR THE ABOVE REASONS, AND IN ACCORDANCE WITH LAW, IT IS HEREBY ORDERED:

A new rule part, 19.2.24, relating to cultural properties protection, is hereby adopted as shown in Exhibit 1 attached to this Order, incorporated herein, and effective December 1, 2022.

Stephanie Garcia Richard Digitally signed by Stephanie Garcia Richard Date: 2022.08.26 08:34:34 -06'00'

Dated: August 25, 2022

Stephanie Garcia Richard
Commissioner of Public Lands

TITLE 19 NATURAL RESOURCES & WILDLIFE
CHAPTER 2 STATE TRUST LANDS
PART 24 CULTURAL PROPERTIES PROTECTION

19.2.24.1 ISSUING AGENCY: Commissioner of Public Lands - New Mexico State Land Office - 310 Old Santa Fe Trail - P.O. Box 1148 - Santa Fe, New Mexico 87501.
[19.2.24.1 NMAC - N, 12/01/2022]

19.2.24.2 SCOPE: This part pertains to the identification and protection of cultural properties on state trust lands.
[19.2.24.2 NMAC - N, 12/01/2022]

19.2.24.3 STATUTORY AUTHORITY: The commissioner is the executive officer of the state land office, pursuant to Section 19-1-1 NMSA 1978. The commissioner's authority to manage, control, and care for state trust lands is found in N.M. Const., art. XIII, Section 2 and in Section 19-1-1 NMSA 1978. The New Mexico Cultural Properties Protection Act, Sections 18-6A-1 to 18-6A-6 NMSA 1978, requires the state land office, as an agency with jurisdiction over state land, to exercise due caution to ensure that cultural properties on state trust lands are not inadvertently damaged or destroyed. The New Mexico Cultural Properties Act, Sections 18-6-1 to 18-6-17 NMSA 1978, authorizes the commissioner to initiate action against any person who violates the Cultural Properties Act by causing damage to or destroying cultural properties located on state trust lands. The authority to promulgate this part is found in Section 19-1-2 NMSA 1978.
[19.2.24.3 NMAC - N, 12/01/2022]

19.2.24.4 DURATION: Permanent.
[19.2.24.4 NMAC - N, 12/01/2022]

19.2.24.5 EFFECTIVE DATE: December1, 2022 unless a later date is cited at the end of asection.
[19.2.24.5 NMAC - N, 12/01/2022]

19.2.24.6 OBJECTIVE: The objective of this part is to establish and maintain processes to proactively identify cultural properties on state trust lands to ensure that such properties are not damaged or destroyed, by generally requiring informational reviews and archaeological surveys before surface disturbing activity on state trust lands takes place, requiring avoidance and mitigation of damage to cultural properties, and providing mechanisms to enforce protections for cultural properties. This part applies to all state trust lands, the surface of which is held in trust by the commissioner.
[19.2.24.6 NMAC - N, 12/01/2022]

19.2.24.7 DEFINITIONS: As used in 19.2.24 NMAC, the following terms have the meaning set forthin this section unless otherwise indicated in the text of this rule:

A. "Archaeological survey" or **"Survey"** means a visual inspection of land to examine, identify, record, evaluate, and interpret cultural properties, which may include communications with potentially impacted tribes and may include limited tests but shall not include excavation or test excavation, as provided in 4.10.15 NMAC. An archaeological survey is conducted by an archaeologist who meets the professional qualification standards in accordance with 4.10.8 NMAC.

B. "Area of potential effect" or **"APE"** means the geographic area or areas within which a project may directly or indirectly cause changes in the character or use of a cultural property, if any such properties exist, as provided in 4.10.15 NMAC. The APE is influenced by the scale and nature of the project, variation in topography and vegetation, and the results of consultations, and may be different for different kinds of effects caused by the undertaking and may include a buffer.

C. "ARMS inspection" means a search of the New Mexico cultural resources information system (NMCRIS) and the other cultural resource records maintained by the archaeological records management section (ARMS) of the historic preservation division of the New Mexico department of cultural affairs, in accordance with 4.10.15.9 NMAC.

D. "Commissioner" means the commissioner of public lands. The commissioner is the executive officer of the state land office and may delegate to state land office staff the performance of duties required of the commissioner under this rule.

E. **"Cultural property"** means a structure, place, site, object, or resource having historic, archaeological, scientific, architectural, or other cultural significance. A cultural property includes a property listed on or eligible for inclusion on either the New Mexico register of cultural properties pursuant to the Cultural Properties Act, or listed on or eligible for listing on the national register of historic places pursuant to the National Historic Preservation Act, 54 U.S.C. 300101 et seq.

F. **"Cultural Properties Act"** means the New Mexico Cultural Properties Act, Sections 18-6-1 through 18-6-17 NMSA 1978.

G. **"Cultural Properties Protection Act"** means the New Mexico Cultural Properties Protection Act, Sections 18-6A-1 through 18-6A-6 NMSA 1978.

H. **"Party"** means any person applying to the commissioner for a lease, sublease, easement, permit, license, grant, amendment, certificate or other instrument issued by the commissioner of public lands; any person to whom the commissioner has issued a lease, sublease, easement, permit, license, grant, amendment; certificate or other instrument; and any person who is otherwise lawfully present and conducting activities on state trust lands, including well operators and unit operators.

I. **"Person"** is a natural person or group of persons, or a partnership, corporate entity, association or organization, governmental entity, or any other legal entity.

J. **"Project"** means any surface disturbing activity or proposed surface disturbing activity on state trust lands that requires a lease, sublease, easement, permit, license, grant, amendment, certificate, or other entitlement from the commissioner, as well as any surface disturbing activity that is directly undertaken by the state land office. Project activity includes temporary work spaces and installation surface disturbing activities.

K. **"State historic preservation officer"** or **"SHPO"** means the individual appointed pursuant to Section 18-6-8 NMSA 1978 of the Cultural Properties Act who serves as the director of the historic preservation division of the New Mexico department of cultural affairs.

L. **"State land office"** means the New Mexico state land office.

M. **"State trust lands" or "trust lands"** means those lands, their natural products, and all assets derived from them, which are under the care, custody, and control of the commissioner.

N. **"Surface disturbance" or "Surface disturbing"** means any ground disturbing or ground breaking activity, including but not limited to blading, scraping, contouring, excavating, trenching, drilling, digging, burying, paving, covering, or compacting soil surfaces, whether or not previously disturbed, and whether or not the person engaged in those activities is authorized to occupy or use state trust lands.

O. **"Tribe"** means any tribe, nation, or pueblo that may or may not be federally recognized but has indicated cultural affinity to New Mexico areas as documented in the tribal consultation list maintained by the historic preservation division of the New Mexico department of cultural affairs.

P. **"Trust"** means the trust established by the Enabling Act (Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310) and that trust's assets, which are administered through the state land office by the commissioner.

[19.2.24.7 NMAC - N, 12/01/2022]

19.2.24.8 GENERAL REQUIREMENTS:

A. **Avoidance of damage.** Any persons engaged in activities on state trust lands are subject to the requirements of the Cultural Properties Act, the Cultural Properties Protection Act, and 19.2.24.13 NMAC. Persons shall not disturb, dislodge, damage, destroy, or remove any cultural properties on state trust lands. Any project on state trust lands that has the potential to directly or indirectly damage cultural properties is additionally subject to the requirements of Subsections B, C, D, and E of 19.2.24.8 NMAC.

B. **Signed acknowledgment.** Parties shall acknowledge, on a form prescribed by the commissioner, that they understand and agree to comply with applicable laws and rules pertaining to the protection of cultural properties on state trust lands.

C. **ARMS inspection and survey.** Prior to conducting surface disturbing activities, parties shall cause a permitted archaeologist to submit to the state land office an ARMS inspection of the entire area of potential effect. More detailed guidance regarding the submission process for ARMS inspection and surveys under this subpart will be provided in an instructional document to be published on the state land office's website and also will be provided to any party or other interested person upon request. The time when that submission is required is provided in Subsection E of this section. In the best interest of the trust, the commissioner, in the commissioner's discretion, may elect to provide the ARMS inspection for any particular portion of state trust land. The following subparagraphs describe the necessary steps to be taken after an ARMS inspection is conducted.

(1) If the ARMS inspection demonstrates that the entire area of potential effect has been surveyed, and that no cultural properties are located within the area of potential effect, then the party shall cause a permitted archaeologist to submit the ARMS inspection to the state land office, in which case the required archaeological review is complete.

(2) If the ARMS inspection or survey demonstrates that the entire area of potential effect has been surveyed, and cultural properties are identified within the area of potential effect, the party shall cause a permitted archaeologist to submit the most recent applicable survey(s) to the state land office. If a prior survey is submitted that is more than ten years old, the state land office will determine if the survey conforms to the requirements of 4.10.15 NMAC and if it does not, may require an updated survey. The party shall be subject to the requirements of Subsection D of this section.

(3) If the ARMS inspection demonstrates that the entire area of potential effect has not been surveyed, a complete archaeological survey must be conducted by a permitted archaeologist in accordance with the requirements of 4.10.15 NMAC and submitted to the state land office. The new survey need not include areas already subjected to acceptable surveys. The party shall be subject to the requirements of Subsection D of this section, if cultural properties are identified in the survey.

D. Compliance measures. For any application or project where any survey has identified cultural properties within the area of potential effect, the party shall cause a permitted archaeologist to develop and submit to the state land office compliance measures related to project siting, and avoidance and mitigation of damage to cultural properties; those compliance measures may be included within the survey that is submitted to the state land office on behalf of any party, or may be submitted separately. The state land office will review any applicable compliance measures, and determine if those measures are sufficient to protect or mitigate damages to the affected cultural properties, a review that may include consultation with the SHPO and shall include consultation with any impacted tribe. In the best interests of the trust, the state land office may require additional or different compliance measures as a condition to approval of the application or project. This review process will be completed within 60 calendar days of submission of an administratively complete submission (ARMS inspection or survey, and any applicable compliance measures), but that time period may be extended in the commissioner's discretion for up to an additional 60 calendar days as may be necessary to ensure appropriate review. Upon commissioner approval, the relevant leasing division shall include appropriate compliance measures in the relevant lease, easement, or other instrument, if applicable, consistent with applicable statutes and rules.

E. Timing of requirements. The undertakings required in Subsections A, B, and C of 19.2.24.8 NMAC are required at different points in time depending on the nature of the application or project, as follows:

(1) Leases, easements, or other instruments not requiring subsequent approval. For applications or projects where no review or approval is required after issuance of the applicable lease, easement, or other instrument: the acknowledgment specified in Subsection B of 19.2.24.8 NMAC, an ARMS inspection and survey specified in Subsection C of 19.2.24.8 NMAC, and any applicable compliance measures specified in Subsection D of 19.2.24.8 NMAC, are required at the time of submission of the application for the lease, easement, or other instrument, and in any event prior to commencement of surface-disturbing activities.

(2) Leases, easements, or other instruments requiring subsequent approval. For applications or projects where subsequent review by the commissioner is required after a lease, easement, or other instrument may be issued, and before project activities may take place: the acknowledgment specified in Subsection B of 19.2.24.8 NMAC is required at the time of submission of application or bid. The ARMS inspection or survey specified in Subsection C of 19.2.24.8 NMAC, and any applicable compliance measures specified in Subsection D of 19.2.24.8 NMAC, are required at the time of submission of the project plans or, if no project plans are required to be submitted, at least 60 calendar days prior to commencement of surface disturbing activities.

(3) Oil and gas leases. This subpart applies to oil and gas leases. The acknowledgment specified in Subsection B of 19.2.24.8 NMAC is required prior to issuance of a lease or any lease assignment. For all surface disturbing activities (whether under a new or existing lease or lease assignment), the description and location of the project, the ARMS inspection or survey specified in Subsection C of 19.2.24.8 NMAC, and any applicable compliance measures specified in Subsection D of 19.2.24.8 NMAC, must be received, reviewed, and approved by the state land office prior to any surface disturbing activity, along with the acknowledgment specified in Subsection B of 19.2.24.8 NMAC if one has not already been submitted by the party undertaking the surface disturbing activity for that particular lease. Upon authorization from the state land office, the party may commence the surface disturbing activity.

(4) Mining leases. This subpart applies to leases for mining as specified in Chapter 19, Articles 8-9 NMSA 1978, and 19.2.2, 19.2.3, 19.2.4, 19.2.5, 19.2.6, and 19.2.7 NMAC. The acknowledgment specified in Subsection B of 19.2.24.8 NMAC is required at the time of submission of an application or bid to lease. The ARMS inspection or survey specified in Subsection C of 19.2.24.8 NMAC and any applicable compliance measures specified in Subsection D of 19.2.24.8 NMAC, are required at the time of submission of an application for a mining permit with the mining and minerals division of the New Mexico energy, minerals, and natural resources department, or equivalent permitting agency, for leases that are subject to 19.2.2 and 19.2.6 NMAC; and prior to commencement of any surface disturbing activity for all other types of mineral leases.

F. Archaeological survey permits and notifications to survey. Individuals with valid archaeological survey permits issued by the New Mexico cultural properties review committee, as provided in 4.10.8 NMAC, are preapproved to access state trust lands for the sole purpose of conducting archaeological surveys pursuant to this rule, without the need for a separate authorization from the commissioner. For other project purposes (that is, other than archaeological surveys), parties who are already authorized to access and occupy particular state trust lands by virtue of a lease or easement are not required to obtain separate authorization from the commissioner. All other persons needing access to state trust lands for other project purposes (that is, other than archaeological surveys) shall apply for a right of entry permit on a form prescribed by the commissioner, and the state land office will process such application on a timely basis. The state land office should be notified at least 15 calendar days before an archaeological survey is conducted, except for exigent situations, including but not limited to responses to spills or hazardous conditions, in which case the state land office should be notified as soon as possible and in any event prior to the survey.
[19.2.24.8 NMAC - N, 12/01/2022]

19.2.24.9 ACKNOWLEDGMENT-ONLY REQUIREMENTS: The acknowledgement specified in Subsection B of 19.2.24.8 NMAC shall be included with applications for the following, with no ARMS inspection or survey as specified in Subsection C of 19.2.24.8 NMAC or compliance measures as specified in Subsection D of 19.2.24.8 NMAC, unless those additional measures are specifically required by the commissioner for a particular application:

A. renewals or reissues, assignments, conversions, and subleases of existing grants, leases or permits, and agricultural improvement replacements, where no new surface disturbance will occur, or when the area of potential effect of a new project activity is entirely within a previously disturbed area of the same nature and extent of disturbance;

B. applications for new agricultural leases in open acreage or through competitive bid; and

C. applications for non-surface disturbing rights of entry, with the final decision vested with the commissioner about whether or not the relevant activity is surface disturbing.
[19.2.24.9 NMAC - N, 12/01/2022]

19.2.24.10 EXEMPTIONS:

A. The following activities are exempt from the acknowledgment, ARMS inspection and survey, and compliance measures requirements of this rule. These exemptions do not provide authorization to enter or occupy state trust lands, which must be granted by the commissioner under a valid lease, easement, permit, or other instrument:

(1) law enforcement, emergency response, or natural disaster response ("emergency response") activities, whether or not undertaken by or in coordination with the state land office, that are necessary to protect immediate threats to public health, safety, or the environment, including but not limited to firefighting, flood management, or for controlling, containing, or capturing releases of hazardous or harmful materials. If the state land office is not already involved in undertaking or coordinating the emergency response, it shall be notified of the response as soon as practicable. Any known cultural property within the area of emergency response should be monitored to the extent practicable so that any adverse effects to the cultural property can be avoided, mitigated, or minimized;

(2) administrative actions performed by the state land office, such as executive orders or rule making activities, and any internal agency processes or decisions that do not create new surface disturbance;

(3) memoranda of understanding or agreements to cooperate executed by the commissioner;

(4) easements, leases, or other instruments granted by the commissioner to any person that do not directly expand current surface uses or create new surface disturbance;

(5) recreational access permits and educational access permits, applications for such permits, non-surface disturbing natural resource authorizations, or activities that already require the presence of an archaeological monitor such as special use agreements;

(6) projects analyzed under the National Environmental Policy Act of 1969, 42 U.S.C. Section 4321 et seq. and the National Historic Preservation Act of 1966, 16 U.S.C. Section 470 et seq., and their implementing regulations, so long as such analysis includes impacted state trust lands. For such projects, the party shall submit a copy to the state land office of the survey or portions thereof pertaining to impacted state trust lands;

(7) acquisition or disposition of lands through exchange or sale; and

(8) plugging, restoration, remediation, or reclamation activities that do not involve new surface disturbing activity outside the authorized boundaries of any existing roads, rights of way, well pads, associated oil and gas facilities or other structures.

B. Parties or other persons engaged in the activities exempted in Subsection A of 19.2.24.10 NMAC remain subject to the requirements of the Cultural Properties Act, the Cultural Properties Protection Act, and 19.2.24.13 NMAC.

C. Notwithstanding any other provision of this part, the commissioner may require an ARMS inspection or survey for any project when determined to be in the best interest of the trust.

[19.2.24.10 NMAC - N, 12/01/2022]

19.2.24.11 CONFIDENTIALITY: Consistent with the Cultural Properties Act, Section 18-6-11.1 NMSA 1978 and Section 19-1-2.1 NMSA 1978, any information in the custody of the state land office concerning the location of cultural properties, the preservation of which is in the interest of the state of New Mexico, shall remain confidential and not subject to inspection under the New Mexico Inspection of Public Records Act, Section 14-2-1 to Section 14-2-12 NMSA 1978 unless the commissioner determines that the dissemination of such information will further the purposes of the Cultural Properties Act and will not create a risk of loss of cultural properties.

[19.2.24.11 NMAC - N, 12/01/2022]

19.2.24.12 ENFORCEMENT AND IMPLEMENTATION:

A. In the event any party becomes aware of actual or threatened damage to cultural properties on state trust lands where that party is conducting project activities or has filed an application to conduct project activities, the party shall immediately notify the state land office, which will then notify the SHPO, and the party shall immediately suspend all project activities in the immediate area of the damage or the threatened cultural property, in consultation with the state land office. Project activities shall remain suspended until the state land office, in consultation with the SHPO and any impacted tribe, approves resumption of those activities, and such approval may be conditioned on the party's adoption of compliance measures relating to project siting, avoidance, or mitigation of impacts to the cultural properties at issue. If human remains are uncovered, project activities within 50 feet shall stop immediately and the party shall notify the local law enforcement agency with jurisdiction, the state land office and the SHPO pursuant to the Cultural Properties Act, Subsection C of Section 18-6-11.2 NMSA 1978. Subsequent response by local law enforcement is governed by 4.10.11 NMAC.

B. In the event a party conducts project activities without first performing a survey or does not comply with any applicable avoidance and mitigation measures established by the survey or contained within the relevant lease, permit, or other instrument, and cultural property is damaged in the process, the party will be required to conduct an archaeological damage assessment at the party's own expense and will be liable for damages as determined by the archaeological damage assessment in the amount equal to the cost of restoration, stabilization, and interpretation of the damaged cultural property. If the party failed to conduct an archaeological survey as required by this rule prior to conducting surface disturbing activity, that party shall undertake such survey after the fact. In addition, the commissioner may recover an amount equal to twice the cost of restoration, stabilization, and interpretation of the damaged cultural property, in accordance with the Cultural Properties Act, Section 18-6-9.2 NMSA 1978.

C. All parties that are subject to any provision of 19.2.24.8 and 19.2.24.9 NMAC shall promptly provide to the state land office all records relating to compliance with this part upon request.

D. As provided by the Cultural Properties Act, Section 18-6-9.2 NMSA 1978 the commissioner may initiate a civil action against any person violating the Cultural Properties Act on or with respect to state trust lands. This remedy is not exclusive and does not limit the rights or remedies that are otherwise available to the commissioner and the state land office under applicable law, including action against a lease, easement, or other instrument issued by the commissioner.

E. The commissioner may refer a criminal violation of the Cultural Properties Act, Sections

18-6-9, 18-6-9.1, and 18-6-9.3 NMSA 1978 to the New Mexico attorney general or to the district attorney in whose district the violation took place.

F. The state land office may undertake monitoring and staff training to protect against damage to cultural properties.

G. The commissioner will develop instructional materials and forms necessary for the implementation of this rule.

[19.2.24.12 NMAC - N, 12/01/2022]

HISTORY of 19.2.24 NMAC: [RESERVED]

STATE OF NEW MEXICO
BEFORE THE COMMISSIONER OF PUBLIC LANDS

In re: PROPOSED CULTURAL PROPERTIES PROTECTION RULE
19.2.24 NMAC

NEW MEXICO STATE LAND OFFICE,

Petitioner.

HEARING OFFICER'S REPORT

Introduction

The proposed Cultural Properties Protection Rule (Rule), drafted as 19.2.24 NMAC, was the subject of a public hearing on October 22, 2021. The hearing was held in hybrid fashion, with attendance invited in person in Morgan Hall (see the sign-in sheet for attendees), and on a virtual platform, where the maximum number of attendees reached 37. The hearing was conducted in accordance with the State Land Office Rulemaking Procedures in 19.2.16 NMAC. Testimony was accepted from State Land Office staff and the public; all testimony was taken under oath and subject to questioning. The hearing lasted two hours, and at the request of a stakeholder, the window for the subsequent submission of written public comment was extended 45 additional days to December 6, 2021. No written transcript was made; an audio recording is available for review in addition to the documents in the rulemaking file, written public comment, the staff's presentation slides, and this report.

State Land Office Testimony

Ari Biernoff, State Land Office General Counsel, presented witnesses for the Petitioner.

Rachael Lorenzo, Assistant Commissioner of Cultural Resources and Tribal Liaison, testified that on the recommendation of tribes to dedicate more resources to the protection of

cultural properties on state trust land, the Commissioner had established a standalone Cultural Resources Office (CRO). The current policy only *recommends* archeological surveys prior to surface disturbing activities; the Rule requiring such surveys was proposed to assure consistency across leasing programs and as a proactive approach to protecting cultural properties on state trust land. The Rule will help the trust's beneficiaries and help solidify the Office's relationship with tribes.

The draft Rule has been in process for 2.5 years. The CRO staff have worked with all divisions across the State Land Office, with outside parties, and with advisory groups to develop the final draft. Notice to the public around these efforts included meetings with tribes, press releases, information on the Office webpage, communications with Indian Affairs and the State Historical Preservation Office (SHPO), and notice of the proposed rule in the New Mexico Register. The public had opportunities to provide comment through the webpage, in an email to CRO, and at the hearing.

Dr. Evangelia Tsesmeli, an archeologist and Cultural Resources Office Manager, participated in the development of the Rule and meetings with stakeholders. The definition of "cultural property" is very broad: "a structure, place, site, object or resource having archeological, scientific, architectural, or other cultural significance...." The Rule has three main pillars, including a "good behavior" provision prohibiting the disturbance of cultural resources on state trust land; the requirement to survey prior to disturbing the surface of state trust land; and compliance measures where a solution must be found to avoid or mitigate encroachment.

The first step is an inspection of the New Mexico Cultural Resources Information System (NMCRIS) and other cultural resource records maintained by the Archeological Records

Management Section (ARMS) of the historic preservation division of the New Mexico department of cultural affairs. Credentials are required to log in for the ARMS Inspection, and one can search by a variety of criteria to find whether a property has been surveyed in the past. If it has not, a survey is required prior to undertaking surface-disturbing activities. The cost of a survey will vary depending upon acreage, terrain, and available access, among other things. The average cost for a small project might be 1-2 thousand dollars; perhaps rising to 10-30 thousand dollars for more than 100 acres. The fees charged by archeological consultants vary.

In order to shorten the time for the process between inspection and survey and the submission of avoidance or compliance plans, the CRO is handling all requested reviews for a project concurrently to avoid delays; if all documentation required is submitted, the review can be very fast. CRO has also streamlined the required forms.

Regarding exemptions from the Rule, a number of applications require only a signed acknowledgement form, not an ARMS Inspection, etc.: assignments, renewals, or reissues of leases with no new surface disturbance, and new applications for agricultural leases in open acreage or through competitive bidding. Other activities are exempt even from the acknowledgment requirement, as well as the ARMS Inspection, etc., including law enforcement and emergency response activities; administrative actions by the Office or agreements to cooperate that do not create new surface disturbance; recreational and educational access permits; projects analyzed under the National Environmental Policy Act (NEPA); and reclamation activities that do not involve surface disturbing activity.

Information about cultural property is confidential and protected from release under the Inspection of Public Records Act, pursuant to the Cultural Properties Act and the Cultural

Properties Protection Act. The State Land Office will monitor for compliance with the Rule using technology and field staff, as well as collaborating with other agencies. In addition to integrating forms and processes across the Office, CRO will also hire another manager for Rule implementation. CRO will measure success by reviewing the additional lands surveyed and the response time necessary to process applications.

The written public comment submitted on the draft Rule has been mainly positive, with requests to clarify certain terms and processes. All comments were considered; many were very helpful. The Office will need time to review proposed compliance measures, perhaps 60 days, but not in every case. CRO is not operating alone; SHPO may need to be involved if mitigation measures are proposed. CRO staff will inform applicants by phone or email when verification is complete; this is their current practice and it will not change. It is uncommon for a project to require protective measures, and the timeframe for compliance will depend upon the size of the project, perhaps 2-4 months. The Office will continue to take all pubic comment into consideration in order to make the Rule stronger and more effective.

Ms. Lorenzo added to her earlier testimony that Tribal Historic Preservation Officers (THPO) work to preserve areas important to their culture, and are a critical aspect of cultural properties protection for the Commissioner. The details of THPO consultations are not expressly set out in the draft Rule because after numerous meetings with tribes, it was apparent that not every tribe has a THPO, and some THPO have other duties. The Office is developing a tribal consultation policy to complement the draft Rule. The draft Rule is a first step; over 90%, or more than 9 million acres of state trust land have not yet been surveyed. The next step is to draft the complementary tribal consultation policy.

After this hearing, the Office will look at internal training and documentation, and will expand the CRO. They will continue to listen to stakeholders and evaluate written public comment; she is grateful for the input to date. The public notice of the proposed rulemaking was published August 10, 2021.

Sunalei Stewart, Deputy Commissioner of Operations, joined Ms. Lorenzo and Dr. Tsesmeli for questioning by the public, including **Adam Rankin** for the New Mexico Oil and Gas Association (NMOGA) and **Loren Patterson** for the Cattle Growers. On questioning, Dr. Tsesmeli addressed the possibility of a blanket acknowledgment to cover a lessee's entire operation. Current lessees have acknowledgements under the Cultural Properties Protection Act, and they want to continue that; as long as an operator doesn't change, they do not require additional acknowledgments. Even a new acknowledgment will not be an additional burden beyond what has been required in the past: checking a box that a lessee will abide by the Rule and the Act. For new lessees this will be three lines on a one-page form. The Office will consider additional provisions for those times when damage cannot be avoided.

Regarding existing disturbances, if an agricultural lessee upgrades a fence without further disturbing the surface, it is an existing disturbance and does not require a survey. If the fence is extended onto new ground, a survey will be required. The Office will review its communications to agricultural lessees to clarify the new provisions. Mr. Stewart stated that the Office does intend to provide guidance to lessees that are specific to their circumstances. Mr. Stewart also announced that the written public comment window would be extended 45 days to December 6, 2021, in response to Mr. Patterson's request.

Public Comment

Paul Reed, a preservation archeologist with Archeology Southwest, stressed the importance of surveying state trust lands, and encouraged the adoption and implementation of the proposed Rule.

Jim Winchester, Executive Director of Independent Petroleum Association of New Mexico (IPANM), stated that IPANM conceptually agrees it is important to protect state trust lands, and its members will continue to practice environmental stewardship; they do have some concerns about adverse impact on operators related to ambiguity in approval times. They suggest that the Office create a memorandum of understanding similar to the Bureau of Land Management (BLM) with timeframes so as to not unduly delay work; allow blanket acknowledgments; and provide the opportunity to start work on a well site when a survey is negative similar to BLM's 104 form. They remain open to further discussion with Office staff.

Sarah Mitchell, of COG Resources, spoke to the importance of the Rule, and commented in support.

Adam Rankin spoke on behalf of NMOGA. NMOGA generally supports the proposed Rule, which in many ways codifies existing practice. They still desire regulatory certainty, and propose that the Rule language follow the applicable statutory language to assure no conflict, especially as to terms of art.

John Cater of New Mexico State Parks requested further clarification around collaboration with other state agencies, such as Energy, Minerals and Natural Resources.

Nicole Martin thanked Office staff for its consideration of resources on sacred lands. Industry activities do harm, and this Rule will further protect cultural resources.

The hearing ended with thanks from Mr. Biernoff and the Hearing Officer, and a reminder that the written public comment window was extended 45 days to December 6, 2021.

Respectfully submitted,

Felicia L. Orth

Felicia L. Orth, Hearing Officer

Exhibit 3

A. List of Questions Asked and Corresponding Commenters

Question No	Comment Title	Rule Section	Name	Affiliation
1	Suggested revision to language regarding enforcem	19.2.24.3 – STATUTORY AUTHORITY	Leland Gould	New Mexico Oil & Gas Association
2	Wells located on federal lands	19.2.24.6 - OBJECTIVE	Scott Stedman	Steward Energy
3	Application of Rule to pre-existing improvements	19.2.24.6 - OBJECTIVE	Katelyn Hart	Llano Verde Coalition
			Randell Major	Major Land & Cattle Co.
4	Meaning and interpretation of “surface disturbance	19.2.24.7 - DEFINITIONS	Chad Smith	NM Farm and Livestock Bureau
			Gerald Matherly	Otero County Commissioner
			Katelyn Hart	Llano Verde Coalition
			Randell Major	Major Land & Cattle Co.
				New Mexico Cattle Growers' Association
			Cora Crews	Ute Creek Cattle Company
5	Definition of the term “archaeological survey”	19.2.24.7 - DEFINITIONS	Donna Connolly/Gov. J. Micha	Rothstein Donatelli law firm/ Pueblo of Santa Clara
6	Tribal vs. THPOs, and tribal involvement in review	19.2.24.7 - DEFINITIONS	Kathy Roxlau	SunStone Compliance Solutions, LLC
7	Question about trigger for communication with trib	19.2.24.7 - DEFINITIONS	Dalva Moellenberg	New Mexico Mining Assocition
			Donna Connolly/Gov. J. Micha	Rothstein Donatelli law firm/ Pueblo of Santa Clara
			Gerald Matherly	Otero County Commissioner
			Kathy Roxlau	SunStone Compliance Solutions, LLC
			Randell Major	New Mexico Cattle Growers' Association
			John Cater	New Mexico State Parks
8	Ambiguity in the definition of ‘archaeological survey	19.2.24.7 - DEFINITIONS	Dalva Moellenberg	New Mexico Mining Assocition
9	Various issues with ‘area of potential effect’	19.2.24.7 - DEFINITIONS	Dalva Moellenberg	New Mexico Mining Assocition
			Kathy Roxlau	SunStone Compliance Solutions, LLC
			Leland Gould	New Mexico Oil & Gas Association
10	Outdated citation to federal statute	19.2.24.7 - DEFINITIONS	Kathy Roxlau	SunStone Compliance Solutions, LLC
11	“Cultural resource” and “cultural property”	19.2.24.7 - DEFINITIONS	Leland Gould	New Mexico Oil & Gas Association
12	Breadth of definition of “project”	19.2.24.7 - DEFINITIONS	Brian Cribbin	New Mexico Gas Company
			Chad Smith	NM Farm and Livestock Bureau
			Katelyn Hart	Llano Verde Coalition
13	Concerns about retroactivity	19.2.24.7 - DEFINITIONS	Gerald Matherly	Otero County Commissioner
			Katelyn Hart	Llano Verde Coalition
			Randell Major	Major Land & Cattle Co.
				New Mexico Cattle Growers' Association
14	Application of Rule to repair and maintenance of ex	19.2.24.7 - DEFINITIONS	Gerald Matherly	Otero County Commissioner
			Katelyn Hart	Llano Verde Coalition
			Randell Major	Major Land & Cattle Co.
				New Mexico Cattle Growers' Association
15	ARMS inspection requirement	19.2.24.8 – GENERAL REQUIREMENTS	Justin Rein	J.T. Rein Archaeology, LLC
16	Incorrect internal citation	19.2.24.8 – GENERAL REQUIREMENTS	Carol Bada	Self
			Kathy Roxlau	SunStone Compliance Solutions, LLC
			Leland Gould	New Mexico Oil & Gas Association
17	Suggested revision to enforcement section	19.2.24.8 – GENERAL REQUIREMENTS	Leland Gould	New Mexico Oil & Gas Association
18	Allowing disturbance where necessary	19.2.24.8 – GENERAL REQUIREMENTS	Carol Bada	Self
19	Limitation of Rule to known cultural properties	19.2.24.8 – GENERAL REQUIREMENTS	Katelyn Hart	Llano Verde Coalition
20	Question about content of acknowledgment form	19.2.24.8 – GENERAL REQUIREMENTS	Gerald Matherly	Otero County Commissioner
			Randell Major	New Mexico Cattle Growers' Association
21	Burdensomeness of filling out acknowledgment forr	19.2.24.8 – GENERAL REQUIREMENTS	Jim Winchester	Independent Petroleum Ass'n of NM
22	Broadening the acknowledgment requirement	19.2.24.8 – GENERAL REQUIREMENTS	Cora Crews	Ute Creek Cattle Company
			Katelyn Hart	Llano Verde Coalition
23	Commissioner discretion to provide ARMS Inspectio	19.2.24.8 – GENERAL REQUIREMENTS	Chad Smith	NM Farm and Livestock Bureau
			Gary Scarbrough	Otero County Public Land Use Advisory Council
			Kathy Roxlau	SunStone Compliance Solutions, LLC
24	“And” vs. “or”	19.2.24.8 – GENERAL REQUIREMENTS	Leland Gould	New Mexico Oil & Gas Association

A. List of Questions Asked and Corresponding Commenters

Question No	Comment Title	Rule Section	Name	Affiliation
25	Request to clarify when surveys are needed	19.2.24.8 – GENERAL REQUIREMENTS	NM Farm and Livestock Burea	NM Farm and Livestock Bureau
26	Removal of “entire” from definition of APE	19.2.24.8 – GENERAL REQUIREMENTS	Leland Gould	New Mexico Oil & Gas Association
27	Request for clarification on steps after ARMS inspec	19.2.24.8 – GENERAL REQUIREMENTS	Brian Cribbin	New Mexico Gas Company
28	Age of prior surveys	19.2.24.8 – GENERAL REQUIREMENTS	Donna Connolly/Gov. J. Micha	Rothstein Donatelli law firm/ Pueblo of Santa Clara
			Mark Sechrist	Full Circle Heritage Services
29	No wait times for negative surveys	19.2.24.8 – GENERAL REQUIREMENTS	Jim Winchester	Independent Petroleum Ass'n of NM
30	Concern about fairness with respect to survey requ	19.2.24.8 – GENERAL REQUIREMENTS	Gary Scarbrough	Otero County Public Land Use Advisory Council
31	Allocation of responsibilities to permitted archaeolo	19.2.24.8 – GENERAL REQUIREMENTS	Dalva Moellenberg	New Mexico Mining Assocition
32	Need for new surveys	19.2.24.8 – GENERAL REQUIREMENTS	Brian Cribbin	New Mexico Gas Company
33	Various comments about survey process	19.2.24.8 – GENERAL REQUIREMENTS	Kathy Roxlau	SunStone Compliance Solutions, LLC
34	Endpoint for review of compliance measures	19.2.24.8 – GENERAL REQUIREMENTS	Adam Rankin	Holland & Hart on behalf of NMOGA
			Dalva Moellenberg	New Mexico Mining Assocition
			Leland Gould	New Mexico Oil & Gas Association
35	Cost of compliance measures	19.2.24.8 – GENERAL REQUIREMENTS	Gary Scarbrough	Otero County Public Land Use Advisory Council
36	General concerns about delay	19.2.24.8 – GENERAL REQUIREMENTS	Gerald Matherly	Otero County Commissioner
			Randell Major	New Mexico Cattle Growers' Association
37	Sequence of approvals	19.2.24.8 – GENERAL REQUIREMENTS	Kathy Roxlau	SunStone Compliance Solutions, LLC
38	Modification to 19.2.24.8(E)(2)	19.2.24.8 – GENERAL REQUIREMENTS	Leland Gould	New Mexico Oil & Gas Association
39	Request for clarification on 19.2.24.8(E)(2)	19.2.24.8 – GENERAL REQUIREMENTS	Jim Winchester	Independent Petroleum Ass'n of NM
40	Consistency of language throughout 19.2.24.8(E)	19.2.24.8 – GENERAL REQUIREMENTS	Kathy Roxlau	SunStone Compliance Solutions, LLC
41	Review process too open-ended	19.2.24.8 – GENERAL REQUIREMENTS	Jim Winchester	Independent Petroleum Ass'n of NM
42	Question about application forms	19.2.24.8 – GENERAL REQUIREMENTS	Bryan Troester	Centennial Resource Development Inc.
43	Meaning of “days”	19.2.24.8 – GENERAL REQUIREMENTS	Brian Cribbin	New Mexico Gas Company
44	Advance notification requirement for surveys	19.2.24.8 – GENERAL REQUIREMENTS	Jim Winchester	Independent Petroleum Ass'n of NM
			Justin Rein	J.T. Rein Archaeology, LLC
			Kathy Roxlau	SunStone Compliance Solutions, LLC
			Kimberly Parker	SWCA Environmental Consultants
			Stacy Galassini	Boone Archaeological Resource Consultants, LLC
45	Routine maintenance and repair activities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS	Carol Bada	Self
			Chad Smith	NM Farm and Livestock Bureau
			Cora Crews	Ute Creek Cattle Company
			Dalva Moellenberg	New Mexico Mining Assocition
			Don L. (Bebo) Lee	New Mexico Federal Lands Council
			Don L. (Bebo) Lee and Caren C	New Mexico Federal Lands Council
			Gary Scarbrough	Otero County Public Land Use Advisory Council
			Katelyn Hart	Llano Verde Coalition
			Katie Goetz	New Mexico Department of Agriculture
			Randell Major	New Mexico Cattle Growers' Association
			Tom Sidwell	Self/JX Cattle Co.
			Gerald Mathis	Mathis Land and Cattle, Inc.
46	Applicability of Rule to previously disturbed areas	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS	Brian Cribbin	New Mexico Gas Company

A. List of Questions Asked and Corresponding Commenters

Question No	Comment Title	Rule Section	Name	Affiliation
47	Transfer of agricultural leases	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS	NM Farm and Livestock Burea	NM Farm and Livestock Bureau
48	'Grandfathering' existing facilities	19.2.24.9 – ACKNOWLEDGMENT-ONLY	Dalva Moellenberg	New Mexico Mining Assocition
			Leland Gould	New Mexico Oil & Gas Association
49	Counties blading county roads;	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS	Don L. (Bebo) Lee	New Mexico Federal Lands Council
50	Concern about cost of compliance	19.2.24.9 – ACKNOWLEDGMENT-ONLY	Tom Sidwell	Self/JX Cattle Co.
			Dalva Moellenberg	New Mexico Mining Assocition
51	Exemption for routine maintenance and repair	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS	Katelyn Hart	Llano Verde Coalition
52	Application of Rule to mining operations	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS	Dalva Moellenberg	New Mexico Mining Association
53	Use of prior surveys vs. need for new surveys	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS	Jim Winchester	Independent Petroleum Ass'n of NM
54	Applicability of Rule to new agricultural leases	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS	Donna Connolly/Gov. J. Micha	Rothstein Donatelli law firm/ Pueblo of Santa Clara
55	Comment regarding acknowledgment-only requirer	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS	Donna Connolly/Gov. J. Micha	Rothstein Donatelli law firm/ Pueblo of Santa Clara
56	Emergency response	19.2.24.10 – EXEMPTIONS	Don L. (Bebo) Lee	New Mexico Federal Lands Council
			Don L. (Bebo) Lee and Caren C	New Mexico Federal Lands Council
			Gary Scarbrough	Otero County Public Land Use Advisory Council
57	Waivers for emergencies	19.2.24.10 – EXEMPTIONS	Gerald Matherly	Otero County Commissioner
			Randell Major	New Mexico Cattle Growers' Association
58	Concerns about impacts from recreation and huntir	19.2.24.10 – EXEMPTIONS	Don L. (Bebo) Lee	New Mexico Federal Lands Council
			Gary Scarbrough	Otero County Public Land Use Advisory Council
59	Example of executive order	19.2.24.10 – EXEMPTIONS	Gerald Matherly	Otero County Commissioner
			Randell Major	New Mexico Cattle Growers' Association
60	Damage to cultural properties caused by third parti	19.2.24.10 – EXEMPTIONS	Don L. (Bebo) Lee and Caren C	New Mexico Federal Lands Council
			Gary Scarbrough	Otero County Public Land Use Advisory Council
			Gerald Matherly	Otero County Commissioner
			Gerald Mathis	Mathis Land and Cattle, Inc.
			Randell Major	New Mexico Cattle Growers' Association
61	Suspension of project activities	19.2.24.12 – ENFORCEMENT AND	Leland Gould	New Mexico Oil & Gas Association
			NM Farm and Livestock Burea	NM Farm and Livestock Bureau
62	Discomfort with references to civil lawsuits	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION	Gerald Matherly	Otero County Commissioner
			Randell Major	New Mexico Cattle Growers' Association
63	Request for language clarifying that the Commissior	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION	Leland Gould	New Mexico Oil & Gas Association
64	Questions about staff monitoring and training, and	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION	Gary Scarbrough	Otero County Public Land Use Advisory Council
			Gerald Matherly	Otero County Commissioner
			Randell Major	New Mexico Cattle Growers' Association
65	Dispute resolution process	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION	Cora Crews	Ute Creek Cattle Company
			Katelyn Hart	Llano Verde Coalition
			Katie Goetz	New Mexico Department of Agriculture
66	Focus on existing rules rather than creating new on	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION	Clabe Pearson	Merchant Livestock
			Gerald Matherly	Otero County Commissioner

A. List of Questions Asked and Corresponding Commenters

Question No	Comment Title	Rule Section	Name	Affiliation
67	Reason for delayed applications	GENERAL	Randell Major	New Mexico Cattle Growers' Association
68	Coordination with BLM	GENERAL	Jim Winchester	Independent Petroleum Ass'n of NM
69	General concerns about efficiency, workflow, and re	GENERAL	Dalva Moellenberg	New Mexico Mining Assocition
			Gary Scarbrough	Otero County Public Land Use Advisory Council
			Jim Winchester	Independent Petroleum Ass'n of NM
			Katie Goetz	New Mexico Department of Agriculture
			Randell Major	New Mexico Cattle Growers' Association
70	Request for formal tribal consultation requirement	GENERAL	Christopher Chavez	Santo Domingo Pueblo (THPO)
			Donna Connolly/Gov. J. Micha	Rothstein Donatelli law firm/ Pueblo of Santa Clara
			Paul Yoder	Self
71	Questions addressed in Frequently Asked Questions	GENERAL	Gerald Matherly	Otero County Commissioner
			Randell Major	New Mexico Cattle Growers' Association
			Don L. (Bebo) Lee	New Mexico Federal Lands Council
			Don L. (Bebo) Lee and Caren C	New Mexico Federal Lands Council
			Gary Scarbrough	Otero County Public Land Use Advisory Council
			Gerald Matherly	Otero County Commissioner
			Gerald Mathis	Mathis Land and Cattle, Inc.
			Randell Major	New Mexico Cattle Growers' Association

B. List Of Commenters and Corresponding Asked Questions

Commenter Name	Affiliation	Question No	Comment Title	Rule Section
Adam Rankin	Holland & Hart on behalf of NMOGA	34	Endpoint for review of compliance measures	19.2.24.8 – GENERAL REQUIREMENTS
Brian Cribbin	New Mexico Gas Company	12	Breadth of definition of “project”	19.2.24.7 - DEFINITIONS
		27	Request for clarification on steps after ARMS inspection	19.2.24.8 – GENERAL REQUIREMENTS
		32	Need for new surveys	19.2.24.8 – GENERAL REQUIREMENTS
		43	Meaning of “days”	19.2.24.8 – GENERAL REQUIREMENTS
		46	Applicability of Rule to previously disturbed areas	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
Bryan Troester	Centennial Resource Development Inc.	42	Question about application forms	19.2.24.8 – GENERAL REQUIREMENTS
Carol Bada	Self	16	Incorrect internal citation	19.2.24.8 – GENERAL REQUIREMENTS
		18	Allowing disturbance where necessary	19.2.24.8 – GENERAL REQUIREMENTS
		45	Routine maintenance and repair activities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
Chad Smith	NM Farm and Livestock Bureau	4	Meaning and interpretation of “surface disturbance”	19.2.24.7 - DEFINITIONS
		12	Breadth of definition of “project”	19.2.24.7 - DEFINITIONS
		23	Commissioner discretion to provide ARMS Inspection	19.2.24.8 – GENERAL REQUIREMENTS
		45	Routine maintenance and repair activities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
Christopher Chavez	Santo Domingo Pueblo (THPO)	70	Request for formal tribal consultation requirement	GENERAL
Clabe Pearson	Merchant Livestock	66	Focus on existing rules rather than creating new ones	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION
Cora Crews	Ute Creek Cattle Company	4	Meaning and interpretation of “surface disturbance”	19.2.24.7 - DEFINITIONS
		22	Broadening the acknowledgment requirement	19.2.24.8 – GENERAL REQUIREMENTS
		45	Routine maintenance and repair activities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		65	Dispute resolution process	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION
Dalva Moellenberg	New Mexico Mining Association	7	Question about trigger for communication with tribes	19.2.24.7 - DEFINITIONS
		8	Ambiguity in the definition of ‘archaeological survey’	19.2.24.7 - DEFINITIONS
		9	Various issues with ‘area of potential effect’	19.2.24.7 - DEFINITIONS
		31	Allocation of responsibilities to permitted archaeologists	19.2.24.8 – GENERAL REQUIREMENTS
		34	Endpoint for review of compliance measures	19.2.24.8 – GENERAL REQUIREMENTS
		45	Routine maintenance and repair activities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		48	‘Grandfathering’ existing facilities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		50	Concern about cost of compliance	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		52	Application of Rule to mining operations	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		69	General concerns about efficiency, workflow, and resources	GENERAL
Don L. (Bebo) Lee	New Mexico Federal Lands Council	45	Routine maintenance and repair activities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		49	Counties blading county roads;	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		56	Emergency response	19.2.24.10 – EXEMPTIONS
		58	Concerns about impacts from recreation and hunting	19.2.24.10 – EXEMPTIONS
		71	Questions addressed in Frequently Asked Questions document	GENERAL

B. List Of Commenters and Corresponding Asked Questions

Commenter Name	Affiliation	Question No	Comment Title	Rule Section
Don L. (Bebo) Lee and Caren Cowan	New Mexico Federal Lands Council	45	Routine maintenance and repair activities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		56	Emergency response	19.2.24.10 – EXEMPTIONS
		60	Damage to cultural properties caused by third parties	19.2.24.10 – EXEMPTIONS
		71	Questions addressed in Frequently Asked Questions document	GENERAL
Donna Connolly/Gov. J. Michael Chavarria	Rothstein Donatelli law firm/ Pueblo of Santa Clara	5	Definition of the term “archaeological survey”	19.2.24.7 - DEFINITIONS
		7	Question about trigger for communication with tribes	19.2.24.7 - DEFINITIONS
		28	Age of prior surveys	19.2.24.8 – GENERAL REQUIREMENTS
		54	Applicability of Rule to new agricultural leases	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		55	Comment regarding acknowledgment-only requirement	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		70	Request for formal tribal consultation requirement	GENERAL
Gary Scarbrough	Otero County Public Land Use Advisory Council	23	Commissioner discretion to provide ARMS Inspection	19.2.24.8 – GENERAL REQUIREMENTS
		30	Concern about fairness with respect to survey requirement	19.2.24.8 – GENERAL REQUIREMENTS
		35	Cost of compliance measures	19.2.24.8 – GENERAL REQUIREMENTS
		45	Routine maintenance and repair activities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		56	Emergency response	19.2.24.10 – EXEMPTIONS
		58	Concerns about impacts from recreation and hunting	19.2.24.10 – EXEMPTIONS
		60	Damage to cultural properties caused by third parties	19.2.24.10 – EXEMPTIONS
		64	Questions about staff monitoring and training, and funding for Rule	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION
		69	General concerns about efficiency, workflow, and resources	GENERAL
		71	Questions addressed in Frequently Asked Questions document	GENERAL
Gerald Matherly	Otero County Commissioner	4	Meaning and interpretation of “surface disturbance”	19.2.24.7 - DEFINITIONS
		7	Question about trigger for communication with tribes	19.2.24.7 - DEFINITIONS
		13	Concerns about retroactivity	19.2.24.7 - DEFINITIONS
		14	Application of Rule to repair and maintenance of existing infrastructure	19.2.24.7 - DEFINITIONS
		20	Question about content of acknowledgment form	19.2.24.8 – GENERAL REQUIREMENTS
		36	General concerns about delay	19.2.24.8 – GENERAL REQUIREMENTS
		57	Waivers for emergencies	19.2.24.10 – EXEMPTIONS
		59	Example of executive order	19.2.24.10 – EXEMPTIONS
		60	Damage to cultural properties caused by third parties	19.2.24.10 – EXEMPTIONS
		62	Discomfort with references to civil lawsuits	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION
		64	Questions about staff monitoring and training, and funding for Rule	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION
		67	Reason for delayed applications	GENERAL
		71	Questions addressed in Frequently Asked Questions document	GENERAL
			Questions addressed in Frequently Asked Questions document	GENERAL
Gerald Mathis	Mathis Land and Cattle, Inc.	45	Routine maintenance and repair activities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		60	Damage to cultural properties caused by third parties	19.2.24.10 – EXEMPTIONS

B. List Of Commenters and Corresponding Asked Questions

Commenter Name	Affiliation	Question No	Comment Title	Rule Section
		71	Questions addressed in Frequently Asked Questions document	GENERAL
Jim Winchester	Independent Petroleum Ass'n of NM	21	Burdensomeness of filling out acknowledgment forms	19.2.24.8 – GENERAL REQUIREMENTS
		29	No wait times for negative surveys	19.2.24.8 – GENERAL REQUIREMENTS
		39	Request for clarification on 19.2.24.8(E)(2)	19.2.24.8 – GENERAL REQUIREMENTS
		41	Review process too open-ended	19.2.24.8 – GENERAL REQUIREMENTS
		44	Advance notification requirement for surveys	19.2.24.8 – GENERAL REQUIREMENTS
		53	Use of prior surveys vs. need for new surveys	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		68	Coordination with BLM	GENERAL
		69	General concerns about efficiency, workflow, and resources	GENERAL
John Cater	New Mexico State Parks	7	Question about trigger for communication with tribes	19.2.24.7 - DEFINITIONS
Justin Rein	J.T. Rein Archaeology, LLC	15	ARMS inspection requirement	19.2.24.8 – GENERAL REQUIREMENTS
		44	Advance notification requirement for surveys	19.2.24.8 – GENERAL REQUIREMENTS
Katelyn Hart	Llano Verde Coalition	3	Application of Rule to only new activities (pre-existing improvements)	19.2.24.6 - OBJECTIVE
		4	Meaning and interpretation of “surface disturbance”	19.2.24.7 - DEFINITIONS
		12	Breadth of definition of “project”	19.2.24.7 - DEFINITIONS
		13	Concerns about retroactivity	19.2.24.7 - DEFINITIONS
		14	Application of Rule to repair and maintenance of existing infrastructure	19.2.24.7 - DEFINITIONS
		19	Limitation of Rule to known cultural properties	19.2.24.8 – GENERAL REQUIREMENTS
		22	Broadening the acknowledgment requirement	19.2.24.8 – GENERAL REQUIREMENTS
		45	Routine maintenance and repair activities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		51	Exemption for routine maintenance and repair	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		65	Dispute resolution process	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION
Kathy Roxlau	SunStone Compliance Solutions, LLC	6	Tribal vs. THPOs, and tribal involvement in review	19.2.24.7 - DEFINITIONS
		7	Question about trigger for communication with tribes	19.2.24.7 - DEFINITIONS
		9	Various issues with ‘area of potential effect’	19.2.24.7 - DEFINITIONS
		10	Outdated citation to federal statute	19.2.24.7 - DEFINITIONS
		16	Incorrect internal citation	19.2.24.8 – GENERAL REQUIREMENTS
		23	Commissioner discretion to provide ARMS Inspection	19.2.24.8 – GENERAL REQUIREMENTS
		33	Various comments about survey process	19.2.24.8 – GENERAL REQUIREMENTS
		37	Sequence of approvals	19.2.24.8 – GENERAL REQUIREMENTS
		40	Consistency of language throughout 19.2.24.8(E)	19.2.24.8 – GENERAL REQUIREMENTS
		44	Advance notification requirement for surveys	19.2.24.8 – GENERAL REQUIREMENTS
Katie Goetz	New Mexico Department of Agriculture	45	Routine maintenance and repair activities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		65	Dispute resolution process	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION
		69	General concerns about efficiency, workflow, and resources	GENERAL

B. List Of Commenters and Corresponding Asked Questions

Commenter Name	Affiliation	Question No	Comment Title	Rule Section
Kimberly Parker	SWCA Environmental Consultants	44	Advance notification requirement for surveys	19.2.24.8 – GENERAL REQUIREMENTS
Leland Gould	New Mexico Oil & Gas Association	1	Suggested revision to language regarding enforcement actions and liability (	19.2.24.3 – STATUTORY AUTHORITY
		9	Various issues with 'area of potential effect'	19.2.24.7 - DEFINITIONS
		11	"Cultural resource" and "cultural property"	19.2.24.7 - DEFINITIONS
		16	Incorrect internal citation	19.2.24.8 – GENERAL REQUIREMENTS
		17	Suggested revision to enforcement section	19.2.24.8 – GENERAL REQUIREMENTS
		24	"And" vs. "or"	19.2.24.8 – GENERAL REQUIREMENTS
		26	Removal of "entire" from definition of APE	19.2.24.8 – GENERAL REQUIREMENTS
		34	Endpoint for review of compliance measures	19.2.24.8 – GENERAL REQUIREMENTS
		38	Modification to 19.2.24.8(E)(2)	19.2.24.8 – GENERAL REQUIREMENTS
		48	'Grandfathering' existing facilities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		61	Suspension of project activities	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION
		63	Request for language clarifying that the Commissioner cannot impose fines	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION
Mark Sechrist	Full Circle Heritage Services	28	Age of prior surveys	19.2.24.8 – GENERAL REQUIREMENTS
NM Farm and Livestock Bureau	NM Farm and Livestock Bureau	25	Request to clarify when surveys are needed	19.2.24.8 – GENERAL REQUIREMENTS
		47	Transfer of agricultural leases	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		61	Suspension of project activities	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION
Paul Yoder	Self	70	Request for formal tribal consultation requirement	GENERAL
Randell Major	Major Land & Cattle Co.	3	Application of Rule to only new activities (pre-existing improvements)	19.2.24.6 - OBJECTIVE
		4	Meaning and interpretation of "surface disturbance"	19.2.24.7 - DEFINITIONS
		13	Concerns about retroactivity	19.2.24.7 - DEFINITIONS
		14	Application of Rule to repair and maintenance of existing infrastructure	19.2.24.7 - DEFINITIONS
Randell Major	New Mexico Cattle Growers' Association	4	Meaning and interpretation of "surface disturbance"	19.2.24.7 - DEFINITIONS
		7	Question about trigger for communication with tribes	19.2.24.7 - DEFINITIONS
		13	Concerns about retroactivity	19.2.24.7 - DEFINITIONS
		14	Application of Rule to repair and maintenance of existing infrastructure	19.2.24.7 - DEFINITIONS
		20	Question about content of acknowledgment form	19.2.24.8 – GENERAL REQUIREMENTS
		36	General concerns about delay	19.2.24.8 – GENERAL REQUIREMENTS
		45	Routine maintenance and repair activities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		57	Waivers for emergencies	19.2.24.10 – EXEMPTIONS
		59	Example of executive order	19.2.24.10 – EXEMPTIONS
		60	Damage to cultural properties caused by third parties	19.2.24.10 – EXEMPTIONS
		62	Discomfort with references to civil lawsuits	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION
		64	Questions about staff monitoring and training, and funding for Rule	19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION
		67	Reason for delayed applications	GENERAL
		69	General concerns about efficiency, workflow, and resources	GENERAL

B. List Of Commenters and Corresponding Asked Questions

Commenter Name	Affiliation	Question No	Comment Title	Rule Section
		71	Questions addressed in Frequently Asked Questions document	GENERAL
			Questions addressed in Frequently Asked Questions document	GENERAL
Scott Stedman	Steward Energy	2	Wells located on federal lands	19.2.24.6 - OBJECTIVE
Stacy Galassini	Boone Archaeological Resource Consultants, LLC	44	Advance notification requirement for surveys	19.2.24.8 – GENERAL REQUIREMENTS
Tom Sidwell	Self/JX Cattle Co.	45	Routine maintenance and repair activities	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS
		50	Concern about cost of compliance	19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS

SECTION 19.2.24.3 – STATUTORY AUTHORITY

1. **Suggested revision to language regarding enforcement actions and liability**. A commenter stated that the phrase "authorizes the commissioner to initiate action against" should be changed to, "provides that … any person violating the Cultural Properties Act by causing damage to, or destroying, cultural properties located on state trust lands shall be liable for civil damages to the state land office."

   Response: The commenter's suggested revision is a correct quote from the Cultural Properties Act. The State Land Office (SLO), however, views the existing Rule language as consistent with the statute and framed actively. Parties damaging cultural properties on state trust lands need to be aware that they face legal action filed by the Commissioner, not merely that those parties may passively "be liable" for damage. The SLO does not adopt the recommended revision.

SECTION 19.2.24.6 – OBJECTIVE

2. **Wells located on federal lands**. A commenter asked if the Rule would apply to wells drilled on federal lands that access state minerals.

   Response: No. The Rule applies only to surface state trust lands (i.e., lands owned by the State of New Mexico held in trust for public beneficiaries, and managed by the Commissioner of Public Lands).

3. **Application of Rule to pre-existing improvements**. Commenters stated their view that the Rule should state more clearly that it applies "only to new activities and not to pre-existing improvements, roads and structures."

   Response: The Rule applies only to new surface disturbing activity (*See* also Response to Comments 4, 14, 45, 46). Use or maintenance of existing roads, structures, or other improvements, by itself, does not trigger the affirmative requirements of the Rule (i.e., to obtain an ARMS inspection or survey, and to submit avoidance/mitigation measures if applicable). *See, e.g.*, Response to Comment 45 (ARMS inspection, survey, and compliance measures not required for specified activities, including agricultural improvement replacements, "where no new surface disturbance will occur").

   While use, maintenance, or replacement of existing improvements does not by itself trigger the affirmative requirements of the Rule, interested parties are advised that those activities would trigger the affirmative requirements of the Rule, if any new surface disturbance occurs in the course of those activities.

   Example 1: An agricultural lessee replaces gravel on a road located on the lease premises that was constructed in the 1980s. The Rule's affirmative requirements do not apply.

Example 2: An agricultural lessee materially widens a road that was originally constructed on the lease premises in the 1980s. The lessee now blades 10 feet of previously undisturbed ground on each side of the existing road. The Rule's affirmative requirements do apply.

SECTION 19.2.24.7 - DEFINITIONS

4. **Meaning and interpretation of "surface disturbance"**. A commenter noted that the meaning of "surface disturbance" in the Rule is too broad and discretionary, and would require an archaeological survey for replacing a fence post. Another commenter stated that they "request that more specific language be added to avoid any subjective assertion of impact or effect."

   Response: The Rule's definition of "surface disturbance" is deliberately and necessarily inclusive. Drilling, excavating, contouring, paving, compacting, and other activities that alter the ground all have the potential to harm cultural properties that might be located in the path of those activities. Contrary to the first commenter's statement, the Rule does not require an ARMS inspection or survey for replacement of a fence post; *see, e.g.*, 19.2.24.9(A) (no ARMS inspection, survey, or compliance measures required for specified activities, including agricultural improvement replacements, "where no new surface disturbance will occur"). *See also* Response to Comments 3, 14, 45, 46. To the second commenter's stated concern that decisions about effect are subjective, Rule compliance will primarily be managed by trained archaeologists (archaeologists working on behalf of lessees or other affected parties, as well as SLO staff archaeologists) who have the expertise to assess impacts and make appropriate judgments based on their professional training and adherence to applicable laws and rules (for example, 4.10.8 and 4.10.15 NMAC), as opposed to personal preferences.

5. **Definition of the term "archaeological survey"**. A commenter requested that the definition of "archaeological survey" be changed to "survey" because the modifier "archaeological" omits cultural resources that are not solely archaeological in nature.

   Response: SLO recognizes the importance of an inclusive definition of "cultural properties" or "cultural resources." At the same time, the term "survey" can mean many different kinds of study – cadastral surveys, biological surveys, geological surveys, etc. To avoid ambiguity, the Rule retains the term "archaeological survey" to describe one of the affirmative requirements for new surface-disturbing activity.

6. **Tribes vs. THPOs (RP07.04)**. The Draft Proposed Rule made several references to communication with "tribal historical preservation officers," or THPOs. A commenter suggested that because not all tribes have THPOs, those references should be changed to "tribes."

   Response: SLO agrees with the commenter and the Final Rule references impacted tribes, rather than THPOs.

7. **Question about trigger for communication with tribes**. Commenters asked what event will trigger a requirement to contact THPOs (as discussed above, references to THPOs are amended in the Final Rule to "tribes."). One commenter stated that "[i]f consultation with one or more THPOs is required it should be done within a specified time period, say a maximum of 30 days, so it does not become an open-ended process."

   Response: SLO emphasizes that it is the agency, not an outside party (such as a lessee or applicant) that has the responsibility to communicate with tribes about areas of specific concern. When a proposed project cannot avoid cultural properties, and portions of those properties may be damaged, the SLO will communicate with the State Historic Preservation Officer and tribes (*See, e.g.*, 19.2.24.12(A)). To the commenter's point about avoiding an open-ended process, there are already several safeguards in the Rule to ensure the SLO processes cultural properties-related submissions expeditiously. *See, e.g.*, 19.2.24.8(D) (providing presumptive 60-day time frame for review of compliance measures).

8. **Ambiguity in the definition of "archaeological survey"**. A commenter stated that the definition of "archaeological survey" states that surveys "may include limited tests but shall not include excavation or test excavation as provided in 4.10.15 NMAC." The commenter stated this language provides insufficient guidance regarding what is permissible and what is not. In addition, the commenter suggested a rephrasing of the definition and adding a more specific cite to another section of the New Mexico Administrative Code.

   Response: The Rule imports the definition of "archaeological survey" from the definition of 'survey' found in 4.10.15.7(JJ) NMAC, with an additional reference to communicating with potentially impacted tribes. The survey process will be managed by professional archaeologists (both SLO staff archaeologists as well as archaeologists working on behalf of interested parties such as lessees and applicants) who are well-versed in the applicable survey standards and rules, *see* 4.10.15 NMAC, so the definition of 'archaeological survey' is not ambiguous. The Final Rule retains the original citation (4.10.15 NMAC) because that reference is most comprehensive.

9. **Various issues with "area of potential effect"**. Commenters asked what the SLO intends by referencing 'results of consultations,' when a buffer is included, and who determines the area of potential effect (APE); suggested adding language to the end of the definition, "buffer area to adequately account for direct and indirect effects"; and stated that the Rule fails to identify which entity will determine the APE, suggesting that the outside party (such as a lessee or applicant) determine the APE in the first instance and the SLO review that determination.

   Response: The minimum requirements for determining the area of potential effect (APE) are described in 4.10.15 NMAC. The lessee's (or other affected party's) permitted archaeologist will, in the first instance, make a determination about APE when performing an ARMS inspection, conducting a survey (if a survey is required), and preparing compliance measures (if applicable). When linear projects are involved, such minimum

requirements amount to 15-meter (50-feet) buffer around the main project area (4.10.15.10(B) NMAC). For other, non-linear projects, at least the minimum requirement of 15 meters (50 feet) should be followed. A 50-foot buffer is not always sufficient or appropriate, because of great variability in landscape and terrain conditions. Pursuant to 4.10.15.10 NMAC, "[t]he state agency with jurisdiction may specify additional requirements and standards that meet or exceed" that specification. Again, it is the outside party's archaeologist who will make this determination in the first instance, subject to review and oversight from the SLO.

10. **Outdated citation to federal statute**. A commenter noted that the definition of "cultural property" needs an updated citation for the National Historic Preservation Act, from 16 U.S.C. Section 470, to 54 U.S.C. 300101 et seq.

    Response: The commenter's correction is accepted and the Final Rule reflects the updated United States Code citation.

11. **"Cultural resource" and "cultural property"**. A commenter stated that the word "resource" should be removed from the definition of "cultural property."

    Response: The SLO will retain the definition of "cultural property" from the proposed Rule. Numerous state laws and rules refer to "cultural resources" rather than "cultural properties" – defining the term to include "resource[s]" will provide a necessary linkage to other sources of law that may have a bearing on the application of the Rule. *See, e.g*., 1.21.2.177 NMAC (record retention schedule for documents pertaining to "cultural resources"); 4.10.8.8 NMAC (providing that archaeological surveys on state land "may be conducted under a general permit when applicants propose to identify, record, evaluate and interpret cultural resources"); 4.10.17.7(D) NMAC (defining "cultural property" and "cultural resource" coextensively).

12. **Breadth of definition of "project"**. Several commenters took issue with the proposed Rule's definition of "project." One commenter noted that the term "conflates the broad variety of activities and conditions which an applicant may face; a narrow trench cut by a walk-behind trencher in an existing utility corridor is functionally the equivalent of widespread clearing and grubbing of rangeland." Another commenter noted a perceived disconnect between the definition of "project" and the coverage of the Rule. A third commenter stated that the definition should be limited to any new or proposed new project, to avoid requiring ARMS inspections and surveys for routine maintenance and repair of existing improvements.

    Response: The Rule is intended to be broad and inclusive, since many different types of activity take place on state trust land. Only those projects or intended projects that will create new surface disturbance, not confined to previously disturbed areas of the same scope and extent, are subject to the affirmative requirements of the Rule. To the first commenter's point, a small linear trench and a large excavation project would both require compliance with the affirmative requirements of the Rule (although not, to use the commenter's hypothetical, if the trench was entirely within a pre-existing area of

disturbance). However, the amount of work, cost, and timing of compliance will vary depending on the nature and extent of the new surface disturbance; a small linear trench will take less time to survey (if a new survey is required) than a large area. To the third commenter's point, the SLO has made clear in the Final Rule that repairs and maintenance of existing improvements are not subject to the affirmative requirements of the Rule.

13. **Concerns about retroactivity**. Several commenters stated that the Rule should include language stating it is not retroactive.

    Response: The Rule makes clear that it applies to new (i.e., on or after the effective date of the Rule) surface-disturbing activity; the affirmative requirements of the Rule (ARMS inspection, survey, compliance measures) do not apply to pre-existing surface disturbance. However, a pre-existing lessee or grantee is not exempt for all time from the requirements of the Rule simply by virtue of holding an old lease or easement; new surface disturbance outside a previously disturbed area does require compliance with the Rule's affirmative requirements, regardless of the age of the lease or easement in question.

    If a new project takes place on both areas of pre-existing disturbance, and previously undisturbed areas, the affirmative requirements of the Rule (ARMS inspection, survey, compliance measures) apply with respect to the previously undisturbed areas.

14. **Application of Rule to repair and maintenance of existing infrastructure**. A number of commenters stated that "[t]here is no clear language [in the Rule] that exempts pre-existing conditions," and that the Rule should not apply to repairs and maintenance of existing infrastructure.

    Response: The Rule makes clear that it applies only to new surface disturbing activity, not to routine maintenance of fences, windmills, water tanks, or other pre-existing infrastructure. *See also* Response to Comments No. 3, 4, 45, and 46, under Sections 19.2.24.6 – Objective, 19.2.24.7 – Definitions, and 19.2.24.9 – Acknowledgment-Only Requirements.

SECTION 19.2.24.8 – GENERAL REQUIREMENTS

15. **ARMS inspection requirement**. A commenter asked if a written ARMS review is required for each project regardless of the need for a survey, because currently, if a project requires a survey, contract archaeologists proceed straight to notification letter and field survey.

    Response: An ARMS inspection is the first step in the process for a project involving new surface disturbing activity on state trust lands. Permitted archaeologists perform an ARMS inspection up front, to determine if they need to conduct an archaeological survey or if a recent survey already exists on file. The ARMS review will either stand alone, if a survey was already conducted, or will be incorporated within the archaeological survey report, if an archaeological survey is necessary.

16. **Incorrect internal citation**. Two commenters noted that the proposed Rule contained numerous references to "19.2.24.13 NMAC," but there is no Section 13 in the Rule.

    Response: SLO agrees with the commenters. The incorrect references to Section 13 had not been properly updated from a prior draft. In the Final Rule, the references to 19.2.24.13 have been corrected to refer to 19.2.24.12.

17. **Suggested revision to enforcement section**. A commenter suggested revising a reference from"[p]ersons shall not disturb, dislodge, damage, destroy, or remove any cultural properties on state trust lands" to "any person violating the provisions of the Cultural Properties Act with respect to state trust lands shall be liable for civil damages to the state land office in an amount equal to the cost or, in the discretion of the court, in an amount equal to twice the cost of restoration, stabilization and interpretation of the cultural property."

    Response: While the commenter supplies an accurate quotation from the Cultural Properties Act, SLO believes it is appropriate to paraphrase that statute, particularly by making more direct and clear the principle that parties occupying or using state trust lands shall not damage cultural properties. Accordingly, the Final Rule does not incorporate this commenter's suggested revision.

18. **Allowing disturbance where necessary**. A commenter stated that the proposed Rule is "unclear whether surface disturbances of cultural properties can be allowed or approved by the State Land Office … Subsection D [of Section 8] appears to contemplate mitigation activities, which would only be necessary if disturbance is allowed. Section 8 needs to be modified to allow the … Commissioner to permit disturbance of cultural properties if avoidance is not possible."

    Response: The Rule sets out SLO's general expectation that parties (including SLO itself) not damage cultural properties on state trust lands. SLO also recognizes that in extraordinary circumstances, where avoidance is not possible, other mitigation measures – which in any given case may include monitoring, protective covering or fencing, or data recovery – may be required. References in 19.2.24.8(C) to mitigation measures are not an approval of damage per se, but a recognition that in exceptional cases mitigation (as opposed to avoidance) of a cultural property may be the most responsible action available.

19. **Limitation of Rule to known cultural properties**. A commenter stated that the Rule should apply only to new projects or proposed projects that have the potential to directly or indirectly cause damage to known cultural properties.

    Response: Most state trust lands are unsurveyed. SLO does not accept this suggested revision because limiting the Rule to known cultural properties would undermine the purpose of the Rule, which is the protection of all cultural properties on state trust lands, whether presently known or yet to be discovered. To the commenter's other point, the Rule applies to new surface disturbance, even undertaken as part of a pre-existing facility or project.

Example: A wind energy lessee has operated a wind farm on state trust lands since 2020. The lands where the existing infrastructure is located already have been surveyed. In 2024, the lessee decides to install a new wind turbine on the same lease, but in a portion of the lease that had not previously been surveyed or disturbed. Although the new wind turbine may be considered to be part of the same "project," it is new surface disturbance in a previously undisturbed area, and therefore requires compliance with the affirmative requirements of the Rule (ARMS inspection, a survey if one has not already been performed in the same area, and if applicable, compliance measures).

20. **Question about content of acknowledgment form**. Commenters asked if there is a draft version of the signed acknowledgment form referenced throughout the Rule (*e.g.* 19.2.24.8(B), 19.2.24.9 NMAC).

    Response: SLO is developing an acknowledgment form which will be made available to all interested parties prior to the effective date of the Rule.

21. **Burdensomeness of filling out acknowledgment forms**. A commenter wrote that "forcing operators to complete an acknowledgment form for each surface disturbance is unnecessarily burdensome and inefficient," and recommended striking the provision. The commenter also stated that the provision "adds an unnecessary, and possibly unlawful, approval process."

    Response: The commenter's suggestion is not adopted, for the following reasons. The signed acknowledgment is not required "for each surface disturbance." Rather, the acknowledgment is required at different stages depending on the type of lease issued. For example, an agricultural lease – which falls under the category of "leases, easements, or other instruments not requiring subsequent approval" – will require an acknowledgment at the time of application for the lease. 19.2.24.8(E)(1). No further acknowledgment is required, until such time, if any, when the lease is assigned to a different party. 19.2.24.9(A). For an oil and gas lease, because there is not an "application" per se, the acknowledgment is required prior to lease issuance (or, in any case, before surface disturbance begins). 19.2.24.8(E)(3). No further acknowledgment is required, unless and until the lease is assigned. 19.2.24.9(A). The acknowledgment does not require notarization, does not impose any fee, and will be incorporated into existing forms – such as lease applications or assignment forms – wherever possible, to reduce any possible burden associated with additional paperwork.

22. **Broadening the acknowledgment requirement**. Two commenters stated that if lessees, grantees, or applicants are required to sign an acknowledgment form, then so should every other user of state trust land.

    Response: The Rule does contemplate that a broad range of activities will require acknowledgment of the party's obligation to follow this Rule in furtherance of cultural properties protection. However, a number of activities that are authorized by the Commissioner, such as recreational use and hunting, are not likely to create more than *de minimis* surface disturbance on state trust lands.

For example, SLO's recreational access permit rule specifically forbids permittees from disturbing, damaging, or removing cultural sites or artifacts, and also forbids permittees from conducting commercial operations, mining, and other activities with the potential to harm any cultural properties present in the area. *See* 19.2.19.18(A) NMAC. Recreationists, hunters, and anglers that use state trust lands and damage cultural properties in the process remain liable under the Cultural Properties Act and under 19.2.24.8(A) of the Final Rule.

23. **Commissioner discretion to provide ARMS Inspection**. A commenter asked when the Commissioner would elect to provide an ARMS inspection, and to whom. Two other commenters asked what factors are involved in determining the "best interest of the trust," and asked whether this decision could "be construed to appear to show favoritism?" The latter commenters noted that "[t]his added requirement also has the potential to be cost prohibitive to the lessee, grantee, and/or applicant." One of these two commenters stated further that "it appears the commissioner can request an ARMS Survey at any time and on any lease."

    Response: These comments refer to the statement in the proposed Rule that that "[i]n the best interest of the trust, the commissioner, in the commissioner's discretion, may elect to provide the ARMS inspection for any particular portion of state trust land." Addressing the last comment first: The Rule does not provide that SLO can require a lessee or grantee to provide an ARMS inspection on any lease, at any time. Rather, it provides that an ARMS inspection and, if applicable, a survey and compliance measures, are required prior to new surface disturbance (unless that disturbance is entirely within an already-disturbed area, of the same extent and nature of disturbance). The referenced language about the Commissioner's discretion does not impose any "added requirement" on lessees. To the contrary, in instances where the Commissioner directs SLO to provide the ARMS inspection itself, that would relieve other parties of the obligation to do so. State law delegates the Commissioner with broad authority to manage state trust lands and such management requires substantial exercise of discretion. Situations may arise where providing an ARMS inspection in-house reduces the risk of damage to cultural properties.

    By way of example, if a spill migrates from a location external to state trust land onto state trust land, the Commissioner might elect to provide the ARMS inspection for the protection of the affected land, which is of benefit to the trust. Similarly, SLO might contemplate a land restoration project that creates new surface disturbance on a particular tract of land. SLO, rather than an outside party, is the proponent of the project, and may therefore obtain the ARMS inspection in-house.

24. **"And" vs. "or"**. A commenter suggested changing the header of 19.2.24.8(C) from "ARMS Inspection and Survey" to "ARMS Inspection or Survey."

    Response: Most of the references in the body text of the Rule have been revised to "ARMS Inspection or Survey" to make clear that an ARMS inspection may be sufficient, *i.e.*, that for some surface-disturbing projects, a new survey is not required, if one is already on file with the New Mexico Cultural Resources Information System. *See* 19.2.24.7(C).

However, SLO is retaining the conjunction "and" for the title of this subsection, because the subsection addresses both ARMS inspection requirements and survey requirements.

25. **Request to clarify when surveys are needed**. A commenter stated that it "encourages [SLO] to clarify when a survey will be needed. The proposed rule is ambiguous."

    Response: SLO does not view the proposed (or Final) Rule as ambiguous. An ARMS inspection is required for new surface-disturbing activities that are not entirely within an area of prior disturbance of the same extent and type; depending on the results of that preliminary inquiry, a survey may be required; and depending on the findings of any applicable survey (one already on file, as revealed by the ARMS inspection, or else a newly commissioned survey), compliance measures also may be required. The timing of these activities differs for different types of leases or other SLO instruments, which the Rule explains. *See* 19.2.24.8(E).

26. **Removal of "entire" from definition of APE**. A commenter suggested removing the modifier "entire" from several references in 19.2.24.8(C) to the "entire area of potential effect."

    Response: The Final Rule will retain the phrasing of the proposed Rule. The reason for retaining the modifier "entire" is that an ARMS inspection might indicate that prior surveys cover only portions of the area of potential effect; in that case, a survey would be required for areas excluded from the prior survey.

    Example: A company applies for a business lease for a three-acre produced water recycling facility in 2023. Its archaeologist conducts an ARMS inspection, consistent with the Rule (19.2.24.8(C) and 19.2.24.8(E)). A prior survey from 2019 included two acres of the lands intended for the recycling facility. A new survey is required, but only for the previously unsurveyed acre, not for the entire footprint of the project. The end result would be that the entire area of potential effect would be included in archaeological surveys (in this case, from two different surveys, one in 2019 and one in 2023).

27. **Request for clarification on steps after ARMS inspection**. A commenter noted that 19.2.24.8(C)(1) of the proposed Rule is vague, and that it's unclear what happens after submission of an ARMS inspection that demonstrates the entire area of potential effect has been surveyed and no cultural properties were identified within it.

    Response: SLO adopts the commenter's suggestion and has revised the language of 19.2.24.8(C)(1) to indicate that in such instance, "the required archaeological review is complete" and the project may proceed, subject to other SLO requirements (that is, any SLO processes outside this Rule for reviewing and approving leases, easements, or other projects).

28. **Age of prior surveys**. A commenter suggested SLO should consider a time frame for the age of prior surveys being accepted, as "conditions can change over time and some older surveys might not have used practices compatible with current standards." Another

commenter requested that new surveys be required if prior surveys are more than five years old.

Response: The Final Rule indicates that prior surveys ten years old or less will be accepted. 19.2.24.8(C)(2). The ten-year threshold borrows from New Mexico's administrative code, 4.10.15.9(D) NMAC. That does not mean, though, that SLO will automatically reject surveys that are older than ten years; only that SLO staff archaeologists will review, and determine in their professional judgment if an updated survey is required in such cases. The Final Rule does not accept the suggestion to reduce the presumptive "in effect" date for prior surveys from ten years to five years; existing language is retained in the Rule, to ensure consistency with other state agencies' approach and to avoid requiring parties to unnecessarily expend resources on new surveys when surveys from the recent past are already available.

29. **No wait times for negative surveys**. A commenter stated that "[i]f an operator completes a survey … and the survey is negative (no cultural resources are present), then the operator should be able to begin work," without waiting for SLO to review the negative survey.

    Response: SLO review is required to ensure that the agency, and the outside party's permitted archaeologist, are in accord that a sufficient review was performed. For example, SLO may determine that the permitted archaeologist did not provide a sufficient buffer, or failed to consult all available prior surveys. However, this review will be limited in scope (the findings SLO has to review) and therefore in duration (the amount of time it takes before a project can proceed).

30. **Concern about fairness with respect to survey requirement**. A commenter stated that the survey requirement "is another cost prohibitive action that will be thrust upon the lessee, grantee or applicant. It also has the potential for unequal treatment," because some lessees or other parties "may use other government programs … that will partially or fully fund the proposed project. This would put those who choose not to use those programs at an unfair disadvantage." The commenter also stated that it should be SLO's responsibility to "bear the cost of any and all inspections and/or surveys" required by the Rule.

    Response: It is reasonable and appropriate for parties deriving economic benefit from the use of publicly-owned state trust lands to bear the limited cost of compliance with the Rule. SLO disagrees that Rule compliance is cost-prohibitive. As provided by the Final Rule and noted throughout this Rulemaking Order, routine maintenance and replacement of existing improvements does not trigger application of the Rule's affirmative requirements, *i.e.*, does not impose any out-of-pocket cost on any party. New surface disturbance does require ARMS inspection and – depending on the findings of that inspection – possibly a survey and compliance measures, but most new surface-disturbing improvements on an agricultural lease will occupy a limited footprint and therefore any survey will be correspondingly limited. As the commenter noted, existing federal and state assistance programs (NRCS, USDA, etc.) can help defray the limited costs of archaeological review. If a lessee or other affected party chooses to forego available funding from third parties,

that is their own decision but hardly a basis for stating that they are being treated unfairly under the Rule.

31. **Allocation of responsibilities to permitted archaeologists**. A commenter stated that it appears from the proposed Rule that a party would commission a survey to identify sites, evaluate their eligibility for listing, and – if eligible cultural properties appear on the survey, develop compliance measures; "[o]nly then will the SLO review the process and assess the proposed mitigation and avoidance measures, but not the quality of the survey work, whether the Area of Potential Effect was appropriated determined, and whether the eligibility listing criteria were properly applied." The commenter asked if this approach was what SLO intended.

    Response: Successful implementation of the Rule depends on the professionalism and expertise of the permitted archaeologists who will manage Rule compliance on behalf of lessees and other affected parties. SLO reviews those archaeologists' submissions, a review that will necessarily rely on existing surveys, identifies and proposes revisions for any ambiguities or deficiencies that might be present in those surveys.

32. **Need for new surveys**. A commenter started that 19.2.24.8(C)(3) "does not explicitly state that an ARMS inspection which reveals cultural properties mandates a new project-specific survey."

    Response: A party may rely on a pre-existing survey as long as that survey encompasses the entirety of the area where the party's surface-disturbing activities will take place, and the survey is either (1) from the past ten years or (2) SLO archaeologists determine that the survey, if older than ten years, is nonetheless accurate and reliable. If a pre-existing survey meets these criteria, a new project-specific survey is not required. SLO has clarified in the Final Rule that parties cause permitted archaeologists to conduct ARMS inspections, perform surveys, and prepare compliance measures – that is, parties are responsible for ensuring this work is performed, but do not perform the work themselves.

33. **Various comments about survey process**. The proposed Rule provides that "[i]f the ARMS inspection demonstrates that the entire area of potential effect has been surveyed, and that no cultural properties are located within the area of potential effect," an ARMS inspection is required. 19.2.24.8(C)(1). A commenter suggested this provision be changed to "…entire area of potential effect has been previously surveyed," asked if SLO needs to concur in such finding, and noted that in some instances it may be difficult to state definitively that no cultural properties exist in a specific area, due to shifting topography. Second, the commenter also asked who decides when a particular condition has been demonstrated, the outside party or SLO. Third, the commenter suggested switching (2) and (3) of subsection (C) of section 8 of the proposed Rule, to follow a more natural train of thought. Fourth, the commenter offered some suggested changes to the phrasing of 19.2.24.8(C)(2) (which is now contained in 19.2.24.8(C)(3) in the Final Rule as a result of adopting the commenter's third point).

Response: The SLO does not adopt the commenter's first suggestion, to add the modifier "previously," because a current survey may also suffice. To the commenter's second point, as with many aspects of Rule implementation, the outside party's permitted archaeologists make judgment calls in the first instance, for example when they conduct surveys or prepare compliance measures, but those determinations are subject to SLO's review and approval. Third, SLO adopts the commenter's recommendation to switch the sequence of (2) and (3) in the proposed Rule. Finally, SLO adopts the substance of the commenter's fourth suggestion, and clarifies that "the most recent applicable survey(s)" be submitted to SLO, in instances where one or more prior surveys cover the area where the new surface-disturbing activities will take place.

34. **Endpoint for review of compliance measures**. A commenter suggested that "SLO should consider revisions to the proposed timeframe for [its] review of compliance measures." The commenter stated that SLO should remove the ability to extend the 60-day presumptive deadline for SLO's review, or else "provide a specified period of time for the completion of an extended review …. If SLO chooses to retain the authority to allow for an extension … no more than one extension [should] be allowed, and the period of an extension should not exceed an additional 60 days." A second commenter submitted a statement suggesting various changes to the compliance measure review process, including the first commenter's suggestion that SLO may extend the 60-day review period by up to an additional 60 days, and also noted that after 60 (or 120) days elapse, the project should be deemed approved.

    Response: SLO agrees with and adopts a portion of the commenters' suggested revisions. To provide parties with greater certainty about the amount of time during which compliance measures may remain under SLO review, the Final Rule indicates that the Commissioner may extend the 60-day presumptive review period by a maximum of an additional 60 days. SLO does not accept the second commenter's suggestion that projects are automatically approved if SLO does not take action on compliance measures within the 60- or 120-day timeframe. SLO intends to follow its own rules and is devoting significant resources to making the implementation of this Rule successful. But in the event SLO misses a deadline, it cannot run the risk of essentially greenlighting destruction of cultural properties; there are other mechanisms available to SLO and to outside parties to ensure that project approvals are not delayed beyond the specified review periods.

35. **Cost of compliance measures**. A commenter expressed dissatisfaction that SLO "is transferring the cost to the lessee" of complying with the Rule, and asked for "clear guidelines as to what the avoidance and mitigation of damage to cultural properties entails."

    Response: Compliance will be managed by permitted archaeologists. Lessees (or other outside parties) are not expected to have the expertise to know what steps are needed to protect cultural properties that are identified within a project area.

    Complying with almost any law or rule involves at least some time and cost. Oil and gas operations have to follow rules about methane emissions; farms and ranches may have to

follow rules pertaining to humane animal handling, or wastewater discharge; employers have to follow rules about wages and working conditions. What's important is that the cost of compliance be reasonable and proportionate to the benefit obtained. As noted throughout this Rulemaking Order, the Rule does not require surveys or other out-of-pocket costs for use, maintenance, and repair of existing infrastructure; only new surface-disturbing activity triggers the affirmative requirements of the Rule. Many lessees or other parties will have very limited costs, if no cultural properties are identified in the area where the party intends to conduct project activities, or if cultural properties can easily be avoided (for instance, by moving a trench or the foundation of a building 50 feet in one direction).

36. **General concerns about delay**. Two commenters stated that "[h]aving to notify the State Land Office and then the SHPO and the THPO may delay or impede the State Land Office in their role of income producing activities."

    Response: As noted, the Final Rule references impacted tribes rather than THPOs. Also as noted, it is incumbent on the SLO – not lessees or other outside parties – to communicate with the State Historic Preservation Officer and potentially impacted tribes about projects that are located in areas where cultural properties are present. Undoubtedly, compliance with the requirements of the Rule will add some time to the preparation and implementation of projects on state trust lands, but the SLO expects those periods of time to be minimal in most cases. Furthermore, the SLO has created a new Cultural Resources Office to efficiently handle general responsibilities related to the protection of cultural resource and the implementation of the Rule.

37. **Sequence of approvals**. A commenter stated that compliance measures should be completed prior to surface disturbing activities occurring.

    Response: The SLO strives to balance two very important needs – protecting cultural properties on state trust land, and facilitating economically productive leasing activity on state trust lands. Similarly, the SLO recognizes that most parties have good intentions; the agency will verify compliance where needed, but is unable to police compliance with respect to every instance of surface disturbing activity. However, compliance measures have to be developed, and approved, prior to new surface disturbance, which provides an important safeguard for cultural properties protection.

38. **Modification to 19.2.24.8(E)(2)**. A commenter suggested replacing the word "specified" with "any applicable compliance measures specified…".

    Response: The SLO accepts the substance of this proposed revision.

39. **Request for clarification on 19.2.24.8(E)(2)**. A commenter asked for clarification that the 60-day notice described in 19.2.24.8(E)(2) "only be required off lease, as notice with all approvals is already covered through 19.2.24."

    Response: Oil and gas leases do not require subsequent approvals, so 19.2.24.8(E)(2) does not apply to oil and gas leases; that is, while subject to all applicable laws and rules

(including this Rule, once it takes effect), oil and gas lessees do not submit project plans or otherwise seek SLO's approval for on-lease development activities (such as drilling wells, creating roads, etc.). Under 19.2.24.8(D), there is a presumptive 60-day window of time for SLO to review any required compliance measures, including those submitted in connection with oil and gas lease activity. In the Final Rule, in response to public comments, SLO provides that the 60-day period may be extended at the Commissioner's discretion as needed, for a maximum of another 60 days (i.e. 120 days total).

40. **Consistency of language throughout 19.2.24.8(E)**. A commenter stated that 19.2.24.8(E)(3) includes the statement, "upon authorization from the state land office, a person may commence the surface disturbing activity," and that this clause should be included in subsections (E)(1), (E)(2), and (E)(4) as well.

    Response: The proposed revision is not accepted. Different forms of leasing activity have different requirements and are initiated in different ways. For example, leases or other instruments requiring subsequent approval (addressed in 19.2.24.8(E)(2)) do not need the "upon authorization … a person may commence" clause, because approval of compliance measures alone does not necessarily mean surface disturbing activity can proceed; the project plans or other subsequent submission must be evaluated on other grounds unrelated to cultural properties protection and this Rule. In contrast, oil and gas leases do not require submission of project plans and therefore, surface disturbing activity may proceed once it is established either that no cultural properties are in the area of potential effect of the disturbance, or alternatively that if cultural properties are present, appropriate avoidance or other compliance measures will be in place.

41. **Review process too open-ended**. A commenter states that the review and approval process in 19.2.24.8(E)(3) is open-ended, "which creates uncertainty when it comes to wellsite activities," and suggests a 30-day review period, after which "[i]f an operator doesn't hear back … the surface disturbance work be presumed to be approved."

    Response: The Rule does provide for a standard 60-day review period for compliance measures, where those measures are required. *See* 19.2.24.8(D) NMAC. In unusual circumstances the SLO, upon Commissioner direction, may need up to an additional 60 days to complete the review process. The suggestion to presume approval is not accepted. The SLO is dedicating significant resources to cultural properties protection, including the creation and staffing of the Cultural Resources Office, and cannot risk the damage to or destruction of cultural properties that might follow from simply deeming projects as "approved" absent complete review. *See also* Response to Comment No. 35.

42. **Question about application forms**. A commenter asked if application forms for Rule compliance are available now.

    Response: The SLO's Cultural Resource Office is finalizing forms for the various aspects of Rule implementation (acknowledgment forms, project descriptions, etc.). Those forms will be made available on the SLO's website and on request before the Rule's December 1, 2022 effective date.

43. **Meaning of "days"**. A commenter indicated that the notification period of 19.2.24.8(F) "is not specified as calendar or business days."

    Response: The Final Rule clarifies that the notification period is in calendar days.

44. **Advance notification requirement for surveys**. One commenter asked if the 15-day advance notification for conducting surveys on state trust land will be sent to SLO archaeologists, and also asked if SLO will provide a response or if approval is required prior to the survey being conducted. A second commenter noted that the 15-day "waiting period serves no practical purpose, and will only lead to unnecessary delays," and suggested that the proposed Rule be amended to allow a permitted archaeologist to provide contemporaneous (rather than advance) notice of entry onto state trust lands. Several other commenters echoed these points. Finally, a commenter asked if notification of intent to survey is required if a general permit is held by the person conducting the survey.

    Response: To the first comment – SLO has developed an online submission process for the survey notification that will be easy to use and will provide the sender a digital record (pdf format) of the survey notification details as receipt of their submission. SLO does not approve or separately notify the sender that SLO received the survey notice; the requirement is for SLO's information only, so the agency is aware of third parties that may be present on state trust lands for lawful purposes such as conducting archaeological surveys. This awareness helps the agency anticipate questions from other lessees that might arise if archaeologists are observed on state trust land without prior warning, and allows SLO and other parties to minimize potential conflicts. SLO may offer feedback to the permitted archaeologist on the scope of their intended survey, but again, SLO does not approve the survey notification. Upon notification, the permitted archaeologist has satisfied the Rule's requirements and may proceed to survey. The archaeologist does not need to submit any additional paperwork or pay any fee for entry to the state trust lands in question. They may, however, still need to arrange for access across other lands (*e.g.*, private lands) to reach the state trust lands they intend to survey.

    To the second comment – the 15-day notification requirement is simply to provide SLO with knowledge of who is present on particular state trust lands, when, and for what purpose. It is a safety net to ensure that SLO knows who is present on state trust lands, and affords sufficient time for the agency to communicate with lessees or other interested parties in advance of the archaeologist's intended visit. Most commercial projects are planned well in advance, and building in an approximately two-week notification window for surveying can be easily incorporated into the planning process. For those reasons, SLO does not adopt the second commenter's suggested revision.

    Finally, the notification of intent to survey on state land is required for a person holding a general survey permit. Only permitted archaeologists should conduct the survey.

SECTION 19.2.24.9 – ACKNOWLEDGMENT-ONLY REQUIREMENTS

45. **Routine maintenance and repair activities**. Numerous commenters noted that the Rule could, in the words of one commenter, be "construed to impact routine operations such as road maintenance [and] fence maintenance," or that the Rule "should exempt previously disturbed surfaces so that water lines, water troughs, windmills, erosion-control structures, roads, buildings, and other infrastructure essential to agricultural production can be maintained and repaired."

    Response: The Rule makes clear that it applies only to new surface disturbing activity, not to routine maintenance of fences, windmills, water tanks, or other pre-existing infrastructure. *See also* Response to Comments 3, 4, 14, and 46. Furthermore, in line with what these commenters request, the Rule already makes clear it does not apply to "previously disturbed surfaces" so long as any new surface disturbance is entirely within the already-disturbed area and the nature of the disturbance is the same. *See* 19.2.24.9(A) (No ARMS inspection, survey, or compliance measures required where "a new project activity is entirely within a previously disturbed area of the same nature and extent of disturbance").

    Example 1: An agricultural lessee wishes to replace a buried water pipeline. She needs to dig in order to access and remove the old pipeline, and the new pipeline will be placed in the same location. The location of the new surface disturbance is entirely within a previously disturbed area of the same nature and extent. The affirmative requirements of the Rule do not apply (that is, ARMS inspection, survey, or compliance measures are not required).

    Example 2: The agricultural lessee in the example above discovers that there is a leak in the pipeline that requires the line to be rerouted to a new, undisturbed area. The affirmative requirements of the Rule apply to the new, undisturbed area (the rerouted waterline corridor).

    Example 3: An oil and gas lessee wishes to drill a new oil well at the same approximate location as a 1980s-era livestock corral. Although the new oil well will be located near a previously disturbed area, the new project (the oil well) may encroach on previously undisturbed areas, and in any event is significantly different in scope and character from the earlier surface disturbance. An ARMS requirement or survey, and compliance measures to the extent applicable, are required.

46. **Applicability of Rule to previously disturbed areas**. A commenter expressed that the Rule "should clearly state that a project which will be limited to previously disturbed areas does not require an ARMS inspection or archaeological survey." The commenter also stated that it should be an option on the acknowledgment form (required by 19.2.24.8(B) of the proposed Rule) to indicate that a project is entirely within an area of preexisting disturbance to "allow SLO staff to exercise appropriate oversight of proposed projects without creating an undue paperwork burden for either the SLO or applicant."

Response: The Final Rule clearly states that projects do not require an ARMS inspection, survey, or compliance measures "where no new surface disturbance will occur, or when the area of potential effect of a new project activity is entirely within a previously disturbed area of the same nature and extent of disturbance." 19.2.24.9(A) NMAC. The acknowledgment form provides confirmation that a party (lessee, applicant, etc.) will comply with all applicable cultural properties protection laws and rules. The acknowledgment form is not a vehicle for detailing various facts or assumptions about a particular project. If indeed a project takes place on top of existing disturbance and does not create any new disturbance, then it falls within the Acknowledgment-Only section of the Rule and does not require any other affirmative action to be taken.

47. **Transfer of agricultural leases**. A commenter stated that clarification is needed on the application of the Rule to transfer of agricultural leases within a family or to an outside party.

    Response: The Rule already provides that mere assignment of a lease (agricultural or otherwise) does not impose any of the affirmative obligations of obtaining an ARMS inspection or survey, or proposing compliance measures. *See* 19.2.24.9(A). Rather, all that an assignee of an agricultural lease or other lease must do at the point of transfer is provide written acknowledgment that they will comply with the Rule in their use of the leased premises going forward.

48. **'Grandfathering' existing facilities**. One commenter stated that the SLO should add a "grandfathering exemption" or "include a grandfathering provision for existing operations … that would allow existing facilities the flexibility to continue to engage in approved activities … while the entities [such as lessees] pursue the ARMS inspection as required under the proposed regulation." Another commenter suggested limiting application of the Rule to "issuance of a lease or any lease assignment approved by the commissioner as of the effective date" of the Rule.

    Response: The Rule makes clear that new projects in previously disturbed areas are generally exempted from the affirmative requirements of the Rule. However, to exempt entire pre-existing leases or facilities would undermine the purpose of the Rule. SLO oil and gas leases are generally in effect so long as the lease produces oil or gas in paying quantities; many agricultural lessees, rights-of-way, and other instruments are renewed regularly. Across its leasing divisions, the SLO manages numerous leases that have been in place for many decades. Allowing those lessees/grantees to conduct new surface disturbance without triggering application of the Rule would put cultural properties on state land at significant risk. In addition, allowing existing operations (as opposed to just existing areas of surface disturbance) to be 'grandfathered' while requiring new lessees to adhere to all of the Rule's requirements creates an unworkable double standard based on when a person or business happened to obtain its lease. The fairest dividing line is new surface disturbing activity in previously undisturbed areas, regardless of when the lease or other instrument where that disturbance is taking place was first issued.

49. **Counties blading county roads**. A commenter stated that counties blading county roads on state trust land should be exempt from the Rule.

    Response: Counties are not exempt from the application of the Rule going forward. All new surface-disturbing activity on state trust lands, regardless of the identity of the party conducting the activity or the ultimate purpose of the activity, are subject to the affirmative requirements of the Rule. Routine maintenance of pre-existing county roads, however, does not trigger the affirmative requirements of the Rule.

    Example 1: A county wishes to add new gravel to an existing county road in 2023. The road crosses through state trust land and was bladed in the 1960s. The addition of new gravel will not extend the road beyond its existing width. The county does not need to obtain an ARMS inspection or survey or follow the other affirmative steps of the Rule.

    Example 2: A county holds a right-of-way from the SLO for a county road that was bladed in the 1960s. The county wishes to widen the road by 30 feet. Portions of the widened road will be bladed on undisturbed ground. The affirmative steps of the Rule apply.

50. **Concern about cost of compliance**. As in Comment No. 35, commenters expressed concern about the costs of archaeological surveys. One commenter stated that the Rule "is a disincentive and an added expense for me to improve the state land to the same level as … deeded land."

    Response: Complying with almost any laws or rules involves some cost. What's important is that the cost of compliance be reasonable and proportionate to the benefit obtained. As noted throughout this Rulemaking Order, the Rule does not require surveys or other out-of-pocket costs for use, maintenance, and repair of existing infrastructure; only new surface-disturbing activity triggers the affirmative requirements of the Rule. *See also* Response to Comment No. 36.

51. **Exemption for routine maintenance and repair**. A commenter suggested adding an exemption for "routine, normal and necessary maintenance and repairs to existing improvements, roads and other existing necessary lease infrastructure."

    Response: The SLO does not accept the suggestion, because the Rule already makes clear that it does not apply to routine maintenance and repair of existing improvements. *See* 19.2.24.9(A), 19.2.24.10(A)(4). There is no need to add a separate exemption for that category of activity.

52. **Application of Rule to mining operations**. A commenter observed that mine operators are already subject to cultural properties review requirements under other sources of law (the New Mexico Mining Act and, in some cases, the National Environmental Policy Act).

    Response: Projects analyzed under the National Environmental Policy Act are exempt from the Rule, so long as the analysis includes impacted state trust lands, although a copy of the relevant survey must be forwarded to the SLO. *See* 19.2.24.10(A)(6). NEPA aside, no

survey is required for activities located entirely on areas of pre-existing surface disturbance. 19.2.24.9(A).

Example 1: A mining lessee wishes to continue existing mining activities entirely within a previously disturbed area. No survey or compliance measures are required.

Example 2: A mining lessee wishes to double the surface area of its existing mine. The new area of disturbance, i.e., outside the existing mine operation, is subject to the affirmative requirements of the Rule and must be evaluated through an ARMS inspection, followed by a survey and compliance measures, if applicable.

53. **Use of prior surveys vs. need for new surveys**. A commenter noted that the proposed Rule "does not provide adequate guidance" about whether or when a prior survey may be used; "[s]hould an operator determine it is necessary to enlarge a well pad (or downsize, for that matter) it is not clear whether a new survey must be performed for an area that has already once been surveyed."

Response: A new survey is not required for areas already surveyed, provided (1) the prior survey is from the past ten years, or (2) if the prior survey is older than ten years, SLO archaeologists determine the prior survey conforms to current requirements. 19.2.24.8(C)(2). However, a new survey is required if a party intends to conduct new surface-disturbing activity in a previously undisturbed area.

Example 1: An oil and gas lessee intends to enlarge an existing well pad to include an additional acre of land that has not previously been surveyed. A survey is required under the Rule.

Example 2: An oil and gas lessee intends to enlarge an existing well pad to include an additional acre of land that has previously been surveyed, about five years prior. No new survey is required.

Example 3: An oil and gas lessee intends to downsize an existing well pad. The new development is entirely within an already disturbed area, so no survey is required. *See* 19.2.24.9(A).

54. **Applicability of Rule to new agricultural leases**. A commenter stated that applications for new agricultural leases should be subject to the Rule's requirements, *i.e.*, require affirmative steps of ARMS inspection, survey if applicable, and compliance measures if applicable, rather than being included in the acknowledgment-only section of the Rule.

Response: Under the proposed and Final Rule, the mere issuance (or assignment) of an agricultural lease does not trigger any affirmative requirements beyond an acknowledgment of the Rule. Some agricultural lessees do not engage in any surface disturbing projects. However, just as with other types of lease and other SLO instruments, if a party intends to initiate a surface disturbing project on state trust lands encompassed by an agricultural lease, the party will need to comply with the Rule's affirmative

requirements of ARMS inspection, survey if applicable, and compliance measures if applicable.

55. **Comment regarding acknowledgment-only requirement**. A commenter suggested revising the language in 19.2.24.9(3) in the proposed Rule – now 19.2.24.9(C) in the Final Rule – to read, "applications for non-surface disturbing rights of entry."

    Response: The proposed Rule already used this phrasing, which the Final Rule also employs.

SECTION 19.2.24.10 – EXEMPTIONS

56. **Emergency response**. Commenters suggested that lessees be included within the scope of emergency response activities that are exempted from the Rule. In the words of one commenter, "[l]essees are often first responders and they should be included within the exemption."

    Response: The SLO agrees that lessees often have the most current knowledge of the land they are utilizing and often may serve as first responders. The Rule provides an exemption for all legitimate emergency response activity, whether conducted by governmental agencies, lessees, volunteers, or otherwise.

57. **Waivers for emergencies**. Commenters asked if the SLO has "evaluated … certain activities that are critical and emergent" and cannot be planned in advance, and asked if a waiver will be afforded for such activities.

    Response: The proposed Rule included, and the Final Rule adopts, an exception to Rule compliance for response to genuine emergencies. 19.2.24.10(A)(1). "Emergency" is not defined exhaustively, nor should it be, to permit reasonable flexibility for situations of exceptional risk and urgency; but the Rule does indicate that fires, floods, other natural disasters, threats to public health and safety, and releases of hazardous materials are all included within that definition.

    Example 1: An oil and gas lessee learns of a serious new leak from a produced water line that is spreading onto state trust lands including a nearby waterway. The event is considered an emergency under the Rule's definition because of its time-sensitive nature and its potential effect on public health or natural resources. The lessee may take action to contain the leak by repairing the produced water line immediately without hiring an archaeologist to perform an ARMS inspection or survey, and without fulfilling the other affirmative requirements of the Rule. (Independent of the Rule, the lessee would be required to report the spill to SLO and OCD).

    Example 2: A fire has erupted on a private parcel and has spread onto state lands where it threatens structures and wildlife. SLO has been notified and its staff monitors and evaluates the situation. State Forestry and other responders work to contain the fire. They are exempt

from the Rule's requirements. To the extent practicable, SLO will monitor whether any known cultural resources can be avoided and may propose measures to minimize the danger of damaging them.

Example 3: A pipeline operator learns that it might lose a future contract with a valuable client if it does not obtain a specific pipeline connection within 10 days. The pipeline would be located on a previously undisturbed portion of state trust land. Obtaining a survey and following the other requirements of the Rule would take longer than 10 days. The operator's commercial opportunity, while meaningful to that operator, is not an "emergency" as contemplated by the Rule such that compliance would be waived.

58. **Concerns about impacts from recreation and hunting**. A commenter stated that hunters, campers, recreationists "should have the opportunity [to] share in cultural property documentation" by being required to capture GPS points where they create surface disturbance. A number of other commenters asked who is responsible for damage to cultural properties caused by hunters, expressed concern that agricultural lessees would be held liable for damage they did not cause, and stated that SLO should require hunters to comply with the same requirements as lessees.

    Response: SLO does not adopt the first commenter's suggestion, for the reasons explained in Response to Comment No. 22. With respect to the remaining comments: hunting and recreation do not involve more than *de minimis* surface disturbance, in contrast to the construction of new improvements on agricultural leases, or operations on oil and gas or business leases, or the blading of roads or installation of pipelines under right-of-way easements. However, hunters and recreationists are responsible for any damage they might cause to cultural properties, just as lessees or easement grantees are. *See* 19.2.24.8(A). Lessees are no more responsible for damage to cultural properties caused by third parties than they are responsible for waste or trespass generally. A lessee who deliberately ignores third party destruction of a cultural property may indeed may bear some responsibility for the damage, but in general it is the party causing damage whom SLO will hold legally liable for the damage. *See also* Response to Comment 60.

59. **Example of executive order**. Two commenters asked for an example of an executive order from the SLO or SLO rulemaking activities that would be exempt from the Rule. The same two commenters asked for the definition of recreational access permits and educational permits.

    Response: An example of an executive order is the Commissioner's order from January 2020 directing the establishment of a paid parental leave policy for agency employees. This executive order would not trigger application of the Rule.

    A recreational access permit is defined by SLO rules as "an instrument issued by the commissioner that authorizes recreational access by the recreational access permittee" and a permitted number of others (family members or members of a school class or educational group). 19.2.19.7(E) NMAC. An educational permit is a specific type of recreational access permit. 19.2.19.7(E)(2) NMAC. SLO's Rule Relating to Recreational and

Educational Access to State Trust Lands (Rule 19) governs the issuance of recreational access permits, including the activities authorized (or forbidden) to recreational access permittees. Rule 19 is available on SLO's website and a number of other public sources, including the New Mexico State Records Center and Archives website (https://www.srca.nm.gov/parts/title19/19.002.0019.html).

60. **Damage to cultural properties caused by third parties**. Several commenters asked for clarification on whether SLO lessees are responsible for damage caused on their leased lands by third parties, such as hunters.

    Response: Hunters and recreationists are responsible for any damage they might cause to cultural properties, just as lessees or easement grantees are responsible for damage they might cause. *See* 19.2.24.8(A). A lessee who willfully ignores third party destruction of cultural properties on state land they are leasing may indeed bear some responsibility for the damage, but in general it is the party causing damage whom SLO will hold legally liable for the damage. *See also* Responses to Comments Nos. 22 and 58.

SECTION 19.2.24.12 – ENFORCEMENT AND IMPLEMENTATION

61. **Suspension of project activities**. A commenter stated SLO should strike language in 19.2.24.12(A) requiring a party to suspend project activities when it learns of imminent harm to cultural properties until SLO, in consultation with the State Historic Preservation Officer and applicable Tribal Historic Preservation Officers (changed in the Final Rule to "tribes") approve resumption of those activities. Another commenter expressed concern about potential liability for lessees if they "discover[ ] something during the project, after meeting all required surveys and Land Office approval."

    Response: To address the first commenter's concern, the Final Rule includes the language "in the immediate area of the damage or the threatened cultural property." There is no requirement that the party suspend all project activities, just those that the party learns are directly placing cultural properties at risk.

    Example: An oil and gas producer is constructing a new well pad and drilling on that pad. The company is also trenching an area several hundred feet away from the pad, intended for the installation of a pipeline. The company discovers artifacts in the area where the pipeline will be installed. The company must suspend the trenching and notify SLO. The company may proceed with, *i.e.*, is not required to suspend, work on the well pad including well completion.

    Regarding the second comment, the intention of the Rule is to prevent harm to cultural properties, not to punish lessees or other outside parties who are acting carefully and diligently. In the example posed by the commenter, if damage to cultural properties is discovered in the course of project work, even though the party has complied with the Rule's requirements to date, the party should suspend work in the immediate area of the damage or threatened damage, and notify SLO.

62. **Discomfort with references to civil lawsuits**. Two commenters noted that "filing a civil lawsuit seems extreme," and that some lessees may not understand the processes established by the Rule and shouldn't be penalized if they believe they have completed all requirements, even if they have not done so.

    Response: The Rule is intended as a proactive approach to protect cultural properties, not as a punitive measure. Instances of known damage to cultural properties on state trust land are fortunately very infrequent. At least in the recent past (2015 to present), the SLO has not needed to file any civil actions to recover for archaeological damage; the agency instead has been able to resolve incidents of damage cooperatively with the responsible parties. However, filing suit is a necessary last resort in the event that a party responsible for damage to cultural properties refuses to remedy the damage, and is expressly authorized by the Legislature. *See* NMSA 1978, § 18-6-9.2(C).

    If parties are unsure of how to comply with the Rule or whether they have done so, SLO's Cultural Resources Office stands ready to answer questions or otherwise assist. CRO staff can be reached by email at croinfo@slo.state.nm.us.

63. **Request for language clarifying that the Commissioner cannot impose fines**. With respect to 19.2.24.12(B) and (D), a commenter suggested striking "and will be liable for damages as determined by the archaeological damage assessment in the amount equal to the cost of restoration, stabilization, and interpretation of the damaged cultural property," and "[i]n addition, the commissioner may recover an amount equal to twice the cost of restoration, stabilization, and interpretation of the damaged cultural property, in accordance with the Cultural Properties Act, NMSA 1978, § 18-6-9.2." The commenter stated that such changes would help make clear that the Commissioner cannot impose fines or penalties but must file a civil action in court to recover damages.

    Response: The language in the proposed Rule does not provide that the Commissioner can impose fines or penalties for the damage of cultural properties through an administrative process; rather, the "may recover" language comes directly from state law (the Cultural Properties Act), which also provides that a civil action is the mechanism for obtaining that outcome if a responsible party does not come to terms with the SLO. SLO's preference is to reach resolution with responsible parties quickly upon completion of an archaeological damages assessment. Nearly all parties responsible for unintentional damage to cultural properties on state trust lands are forthcoming and committed to remedying the damage they caused. In the recent past (*i.e.*, 5-10 years), SLO has not had to file a civil action to recover for damages to cultural properties on state land.

64. **Questions about staff monitoring and training, and funding for Rule**. Commenters asked the meaning of 19.2.24.12(F)'s statement that the SLO may undertake staff monitoring and training. In addition, a commenter asked if resources would be diverted from other areas to fund staff training and monitoring under the Rule, and asked if it is "feasible for the State Land Office to pursue these additional expenses which may be at the detriment of the constitutional purpose of the State Land Office."

Response: The SLO is committed to the successful implementation of the Rule. That process will require staff in leasing divisions, as well as the Cultural Resources Office, to develop processes and workflows to manage applications, internal review, and communications with interested parties. Training on the Rule's requirements and how the Rule will be incorporated into everyday agency business operations is an essential component of the implementation process. In addition, monitoring is essential to ensure that if avoidance or mitigation is required to avoid damage to cultural properties, those steps are followed. SLO staff have spent considerable time developing the text of the Rule, and the processes necessary to implement the Rule, to harmonize with existing operations.

Funding will not be reduced from other project areas to enable Rule implementation; the SLO has established a free-standing Cultural Resources Office which will lead the office's implementation efforts. Protection of cultural resources as well as natural resources on state trust lands is entirely consistent with the Commissioner's constitutional and statutory duties, the mission of the SLO, and the protection of state land trust assets, and therefore expenditure of resources in support of that effort is lawful, appropriate, and necessary.

65. **Dispute resolution process.** A number of commenters noted that the proposed Rule does not contemplate a separate process for resolving disputes if a party is alleged to have violated provisions of the Rule. Commenters requested that additional language be added that would create a dispute resolution process for any applicant, lessee or grantee accused of being in violation of the proposed Rule. Some commenters stated that "a grazing lessee could be arbitrarily accused of causing damage or failing to comply with the proposed rule," and that especially in the case of inadvertent damage "it would be far fairer and more constructive to have a defined dispute resolution process which could be first meeting with [SLO staff] to determine if there is an actual problem."

    Response: The SLO already has a formal dispute resolution process in place for all manner of potential disputes, not limited to this Rule. State Land Office Rule 15 (19.2.15 NMAC), "Administrative Proceedings Before the Commissioner of Public Lands," provides an administrative remedy for parties who are aggrieved by final agency decisions. An aggrieved party initiates that process by filing a petition for contest, which usually includes an informal evidentiary hearing and ultimately results in a final order from the Commissioner, which any party can appeal to district court. Rule 15 describes that process in greater detail.

    The SLO encourages all lessees and other interested parties to first raise issues of concern or potential disputes with staff informally; in the collective experience of agency staff, many issues can successfully be resolved on that basis. SLO staff under the leadership of CRO stand ready to answer questions and provide guidance. The SLO's interest in promulgating the Rule is protective rather than punitive.

66. **Focus on existing rules rather than creating new ones**. A commenter stated that SLO should enforce existing rules rather than creating additional "targeted" rules.

Response: The SLO does vigorously enforce existing rules pertaining to protection of state trust land and resources, and takes non-compliance seriously. Pre-existing rules, however, do not provide a mechanism for requiring archaeological inspections and surveys prior to new surface-disturbing activity.

GENERAL (Comments and questions that are not linked to a specific provision of the Rule)

67. **Reason for delayed applications**. Two commenters asked, "[w]hat would constitute cause for an application to be delayed or denied?"

    Response: SLO assumes the commenters are referring to an application for a lease or easement that requires subsequent Commissioner approval, or another instrument or transaction (such as an agricultural lease improvement application) tied to an existing instrument. An application for a new lease or easement requiring subsequent approval may be denied if the affirmative requirements of the Rule (such as an ARMS inspection or survey, or compliance measures) are not completed, or if required documentation has not been provided by the party or its permitted archaeologist.

68. **Coordination with BLM**. A commenter suggested that SLO enter into a memorandum of understanding with the United States Bureau of Land Management (BLM) similar to the Permian Basin Programmatic Agreement. The commenter also noted that as a practical matter, operators are already likely dealing with SLO in conjunction with the BLM on projects or unit agreements, and recommends that SLO accept proof of BLM Section 106 compliance on state land in lieu of applying the processes required by the Rule, where there is a nexus between federal and state lands in a single project.

    Response: The proposed Rule included an exemption for "projects analyzed under the National Environmental Policy Act of 1969 … and the National Historic Preservation Act of 1966 … and their implementing regulations, so long as such analysis includes impacted state trust lands." The Final Rule includes this provision as well. 19.2.24.10(A)(6) NMAC. To the extent the Permian Basin Programmatic Agreement that the commenter references also provides for a functionally equivalent compliance process to proactively protect cultural properties, SLO is willing to study and consider applying similar measures.

69. **General concerns about efficiency, workflow, and resources**. Commenters raised concerns about the burdens that Rule compliance will place on both affected parties and the agency. In the words of one commenter, the Rule is "another approval step in the SLO permit process could create costly approval time delays for operators." That commenter suggested that SLO create a plan to address additional workload as a result of Rule implementation, hire additional staff to ensure timely approvals, and upgrade software to offer an online submission process. Another commenter also addressed the need to hire and retain sufficient staff to carry out the additional workload the agency can be expected to experience as a result of promulgating the Rule. And a third expressed the view that the Rule "could add significantly to the workload of the SLO and its applicants."

Response: Commenters raise valid concerns about the implementation of the Rule, concerns that SLO has considered carefully. The Commissioner created a new Cultural Resources Office, with new staff hires, in part to help manage the successful implementation of the Rule to avoid unnecessary delays and duplication of effort. For instance, SLO is incorporating the required acknowledgment (*see* 19.2.24.8(A)) into existing forms, to the extent possible. In addition, SLO has developed an online web portal to streamline compliance with the affirmative requirements of the Rule and to help ensure that the submission process is as efficient and user-friendly as possible.

70. **Request for formal tribal consultation requirement**. Two commenters made a variety of suggestions to require formal tribal consultation under the Rule, such as recommending a separate section be created to govern any surface disturbing activity undertaken directly by SLO to require a request for consultation to all New Mexico tribes and pueblos, and recommending that tribal consultation be required prior to oil and gas related projects on state trust lands.

    Response: The Commissioner and SLO recognize that tribes may have very significant interests in activities that occur on, or are proposed for, state trust lands. The Rule does reference that SLO may need to communicate with impacted tribes about particular issues, such as the adequacy of compliance measures (19.2.24.8(D)) and protective measures needed to avoid imminent damage to cultural properties (19.2.24.12(A)). After meetings and discussions with tribes, it became evident that there is wide variability in the way each tribe approaches tribal consultation. In order to ensure that there is flexibility for SLO and impacted tribes, SLO decided to take a stepwise approach to cultural resources protection by first promulgating this Rule and then developing a forthcoming, stand-alone Tribal Consultation Policy that will complement the Rule instead of being shoehorned into the Rule. Although these comments are not adopted into the Final Rule, SLO recognizes the need to work harder to communicate with and seek input from tribes regarding the agency's operations.

71. **Questions addressed in Frequently Asked Questions document**. A number of additional questions not directed to the provisions of the Rule itself are addressed in the separate Frequently Asked Questions document designed to aid lessees and other interested parties in understanding and complying with the provisions of the Rule. By way of example, those questions include: How much archaeological surveys cost, how a lessee can obtain an archaeological survey, how long a survey will take to complete, how many contract archaeologists are working in New Mexico, and where an interested party can find a list of permitted archaeologists.