

APPENDIX D: LAWS PERTAINING TO HISTORIC PRESERVATION

The law—statutes, regulations, ordinances, master plans, and comprehensive plans among others—can provide a framework for the protection of our cultural resources. New Mexico is fortunate to have many laws that can protect these resources. *The Power to Preserve* (Merlan and Bieg 1966) is a comprehensive guide to these laws (available at HPD). A booklet that accompanied the Continuing Legal Education seminar sponsored by HPD in 1994, *Historic Preservation Law in New Mexico: A Guide to Federal and State Historic Preservation Law and How to Use it to Preserve New Mexico's Cultural Heritage* is available for reference at HPD. *The Preservation Law Reporter* (available at HPD and law libraries in New Mexico) provides informative and reliable reports on recent court decisions, legislative developments, real estate, and tax issues affecting historic preservation.

FEDERAL LAWS

Federal laws have created national registers of historic properties, programs that provide protection for archaeological and historic sites, federal tax credit programs, grants to states for historic preservation efforts, and protection for Native American cultural items.

The National Historic Preservation Act of 1966 (16 U.S.C. §470-470w-6, known as NHPA) NHPA creates the National Register of Historic Places, which identifies and evaluates properties of national, state, and local historic significance. This act also creates the matching grants-in-aid program designed to assist state and local support of historic preservation and the application of federal programs in each state. Grants support survey and inventory of historic and archaeological resources and other preservation activities, and give assistance to local governments that establish their own historic preservation programs. The NHPA requires that a state that accepts funding create its own historic preservation office, designate a director (State Historic Preservation Officer, or SHPO), hire a professional staff and participate in federal programs including the review of federal actions (NHPA, 16 U.S.C. §470f, commonly referred to as Section 106). The NHPA was the basis of most of the existing state historic preservation programs, since it made money available for restoration projects, surveys and staff.

The Advisory Council on Historic Preservation, created by NHPA (16 U.S.C. §470; 36 C.F.R. Part 800), comments on proposed federal actions that will affect significant historic and pre-historic properties. This authority is a procedural, not a substantive safeguard, but can be effective, particularly when backed by state preservation agencies and the courts.

Archaeological Resources Protection Act of 1979 (16 U.S.C. §§470aa through 470mm, usually referred to as ARPA). ARPA protects archaeological resources on federal and Indian lands. The law prohibits the removal, excavation or alteration of any archaeological resource from federal or Indian lands except by a permit issued by the Department of the Interior.

Department of Transportation Act of 1966 (49 U.S.C. §§1651 *et seq.*). Unlike Section 106, provides a substantive protection. By § 1653(f), formerly §4(f), Congress prohibits the destruction or adverse use of historic sites (as well as parklands) by transportation projects unless there is no feasible and prudent alternative.

National Environmental Policy Act (42 U.S.C. §§4321-4347 usually referred to as NEPA).

NEPA obligates federal agencies to prepare an environmental impact statement for every major federal action affecting the human environment, which is defined to include cultural resources. Accordingly, an environmental impact statement must include the comments of the Advisory Council on Historic Preservation and must also carry out the other requirements of the NHPA.

Tax Reform Act of 1986 (Public Law 99-514). The Tax Reform Act of 1986 comprehensively amended the Internal Revenue code to provide valuable tax credits for substantial rehabilitation of historic buildings and a favorable depreciation formula for rehabilitated buildings.

Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. §1272(e)). The Surface Mining Control and Reclamation Act governs surface mining activities in the United States. The Office of Surface Mining (OSM) issues permits for surface mining of coal and monitors state regulatory programs that operate by the delegated authority of the federal agency. The Act prohibits surface coal mining activities that would adversely affect any site entered in the National Register of Historic Places, unless approved by the regulatory authority and the federal, state, or local agency with jurisdiction over the site.

Americans With Disabilities Act of 1990 (42 U.S.C. §§12101-12213, known as ADA). ADA was designed to prevent discrimination in housing, employment and public accommodations and other areas. It is not a historic preservation statute but has already had a far-reaching effect on historic properties because it requires that historic buildings that are places of public accommodation conform to certain standards of accessibility. This may mean physical alterations, and such alterations may affect the building's historic or architectural character. In effect, any proposal to alter or restore a historic structure for a public purpose or with public support will mean a review by the state or local entity that enforces the ADA, and a negotiation to achieve the alteration without damaging the historic or architectural significance of the building.

Intermodal Surface Transportation Efficiency Act of 1991 (23 U.S.C. §133, known as ISTEA). ISTEA establishes as national policy an "intermodal transportation system" that is "economically efficient and environmentally sound" and is also "energy efficient." Under this statute, the Department of Transportation makes grants to states, which in turn make grants to localities and public agencies to develop intermodal transportation plans and to convert railroad stations (in particular those listed in the National Register of Historic Places) into "intermodal transportation terminals" and civic and cultural activity centers. Under this statute, the New Mexico Highway Department has funded the development of the New Mexico Cultural Records Information System (NMCRIS) files, housed at the Archaeological Records Management Section in the Historic Preservation Division, Office of Cultural Affairs, since archaeological information is an aspect of transportation planning, and has funded the rehabilitation of several historic railway terminals. ISTEA has also funded other rehabilitation and stabilization of historic properties throughout the state.

Native American Graves Protection and Repatriation Act (P.L. 101-601). NAGPRA gives ownership of Native American cultural items — human remains, associated funerary objects, unassociated funerary objects, sacred objects, and items of cultural patrimony — to lineal descendants of the deceased, tribes on whose lands the cultural items are discovered, or to cul-

turally affiliated tribes. The law requires federal agencies and museums that receive federal funds to inventory archaeological and ethnological collections from their lands or in their collection for such cultural items and to arrange to repatriate these items on the request of the appropriate tribe. The law further requires that, on federal or tribal lands, any intentional excavation of Native American burials and other cultural items and any inadvertent discoveries of such cultural items be carried out according to specific provisions and in consultation with the appropriate tribe or tribes. (See additional discussion below under State Laws: Graves Protection Statutes).

STATE LAWS

Separate state legislative enactments have created:

The State Register of Cultural Properties

A tax credit program for individual taxpayers

A tax credit for corporations

A program of financial assistance to local governments and municipalities

A loan program for rehabilitation of historic registered properties

A program based on the federal transportation act, which protects historic sites (architectural and archaeological) against adverse state actions (often development of roads, buildings, etc.)

The ability to enforce protection of unmarked (historic and prehistoric) graves

A revolving fund to support cultural properties publications

The ability of communities to create plans and ordinances.

Cultural Properties Act of 1969 (§§18-6-1 through 17 NMSA 1978). The Cultural Properties Act states that it is designed to conform with but not be limited by the NHPA (the National Historic Preservation Act). It creates a State Register of Cultural Properties and an administrative entity, the Historic Preservation Division. Separate enactments in New Mexico have created a tax credit program for individual taxpayers, another tax credit for corporations, a program of financial assistance to local governments and municipalities, a loan program, the program based on the federal transportation act and protecting historic sites against adverse state actions, and a statute protecting unmarked (historic and prehistoric) graves.

Prehistoric and Historic Sites Preservation Act of 1989 (§§18-8-1 through 18-8-8 NMSA 1978). The Prehistoric and Historic Sites Preservation Act provides that the State of New Mexico may pay up to 90 percent of the cost of acquiring, stabilizing, restoring or protecting a prehistoric or historic site listed in the State Register of Cultural Properties or National Register of Historic Places, as funds are made available. This statute also prohibits use of state funds for projects or programs that will make adverse use of registered cultural properties unless there is no prudent and feasible alternative.

Cultural Properties Protection Act of 1993 (§§18-6A-1 through 6). The Cultural Properties Protection Act creates a cultural properties restraint fund in the state treasury. These funds are to be used solely to provide grants for interpretation, restoration, preservation, stabilization, and protection of cultural properties.

Zoning Regulations Act of 1965 (§§3-21-1 through 14 NMSA 1978). New Mexico Zoning Regulations Act authorizes counties, cities and towns to regulate and restrict construction, alteration, repair and use of buildings, structures and land within their respective jurisdictions.

Like other states, New Mexico grants this authority to local governments for the purpose of promoting health, safety, and welfare. In basic terms, zoning is intended to ensure that mutually incompatible land uses, such as industrial and residential uses, are kept physically separate. Counties and municipalities, under the state law, may regulate building heights, numbers of stories, building size, the percentage of a lot that may be occupied, the size of yards, courts and other open space, density of population, and the location and use of buildings, structures and land for trade, industry, residence and other purposes.

Historic District and Landmark Act (§§3-22-1 through 17 NMSA 1978). The Historic District and Landmark Act states that any county or municipality empowered by law to adopt and enforce zoning ordinances may create, as part of building and zoning regulations and restrictions, a zoning district designating certain areas as historical areas and landmarks and adopt and enforce regulations and restrictions dealing with the erection, alteration, and destruction of exterior features of buildings and other structures subject to public view from any public street, way or public place.

The New Mexico Subdivision Act (§§47-1-1 through 30, 37 and 42 NMSA 1978). The New Mexico Subdivision Act sets forth legal requirements for subdividing land within counties, requires each county to adopt a regulation setting forth the county's requirements for protecting cultural properties, archaeological site and unmarked burials. Subdividers are required to provide documentation to the county of protections for these properties, sites, and burials. The Board of County Commissioners may not approve a subdivision plat without such documentation.

Graves Protection Statutes. Most human remains and associated grave goods are protected from disturbance on all lands in New Mexico. On federal and tribal lands, the provisions of the Native American Graves Protection and Repatriation Act require consultation with tribes prior to disturbance of Native American graves and repatriation of the remains and the grave good to the affiliated tribe. The Cultural Properties Act accords protection to all human burials in the state interred in any unmarked burial ground. "Human burial" includes funerary objects and artifacts associated with the burial (Cultural Properties Preservation Act of 1969, §18-6-11.2 NMSA 1978). There are also criminal laws against "disturbing a marked burial ground" (§30-12-12 NMSA 1978) and "defacing tombs" (§30-12-13).

Cultural Properties Preservation Easement Act of 1995 (47-12A-1 through 6 NMSA 1978). In 1995, the New Mexico Legislature passed legislation enabling property owners to donate preservation easements on significant historic properties to nonprofit preservation organization. The owner receives federal income tax relief in the amount of the assessed value of the donated easement while still retaining ownership and virtually all nondestructive use of his property. Such easements also reduce the value of the property for purposes of inheritance tax calculation, assisting long-term residents in keeping historic properties in the family despite rising land values. Easements may be held by nonprofit groups; they may not be held by the state.

New Mexico State Income Tax Credit Income Tax Act and Corporate Income Tax Act (§§7-2-18.2 and 7-2A-8.6). The income tax program is applicable to any site or structure listed in the State Register of Cultural Properties either individually or as a significant or contributing

structure in a State Register historic district. The credit is available to property owners who incur expense for the restoration, rehabilitation, or preservation of a registered property. Approved amounts expended in a given year may be carried forward up to five subsequent years. The amount of the credit may be \$25,000, or one-half of the approved total for restoration, or the actual tax liability for up to five years, whichever is least.

Ditches and Acequias: Disturbing course of ancient acequias prohibited (§73-2-6 NMSA 1978). The Act states that the course of ditches or acequias established prior to July 30, 1851, shall not be disturbed.

Traditional Historic Community Act (§3-7-1 NMSA 1978). Communities that qualify as “traditional historic communities” under the statute may be annexed by petition of a majority of the registered qualified electors of the territory within the traditional community proposed to be annexed by the municipality. They may be annexed by the arbitration method of annexation only upon petition of a majority of registered qualified electors of the territory within the traditional historic community.

TRIBAL LAWS

A number of New Mexico tribes and pueblos have tribal ordinances governing preservation-related issues. Under the 1992 amendments to the National Historic Preservation Act, a tribal government may assume the role of the SHPO in reviewing undertakings on Tribal land, provided that the tribal preservation program meets certain standards set by the National Park Service. As of this writing, only one New Mexico tribe, the Navajo Nation, has formally requested to assume SHPO responsibilities.