ARIZONA NRCS AGREEMENT NO. _____
HOPI TRIBAL AGREEMENT NO. _____

SWPA- 2003 - 0911

PROGRAMMATIC AGREEMENT

among

THE HOPI TRIBE;

THE NATURAL RESOURCES CONSERVATION SERVICE;

THE BUREAU OF INDIAN AFFAIRS, WESTERN REGIONAL OFFICE;

THE BUREAU OF INDIAN AFFAIRS, HOPI AGENCY; AND

THE ARIZONA STATE HISTORIC PRESERVATION OFFICE;

regarding

COMPLIANCE WITH SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT AND ORDINANCE NUMBER 26 OF THE HOPI TRIBE AND FOR CONSERVATION ASSISTANCE ACTIVITIES RELATIVE TO HOPI INTERESTS

RECEIVED NRCS OCT 9 2003

THE HOPI TRIBE OCT 13 2003 Cultural Preservation Office Dept. of Natural Resources

RECEIVED OCT 10 2003 ARIZONA STATE PARKS/S.H.P.O.

WHEREAS, the United States Department of Agriculture, Natural Resources Conservation Service (NRCS), carries out Technical Assistance and other natural resource conservation programs under the Soil Conservation and Domestic Allotment Act of 1936 (P.L. 74-46, 16 U.S.C. 590 a-f), as amended; the Flood Control Act of 1936 (P.L. 74-738); the Flood Control Act of 1944 (P.L. 78-534), as amended; the Watershed Protection and Flood Prevention Act (P.L. 83-566), as amended, Section 6; the Great Plains Act of 1956 (P.L. 84-1021); the Agricultural and Food Act of 1981 (P.L. 97-98, 95 Stat. 1213); the Agricultural Credit Act (P.L. 95-334, Title IV, Section 403); the Food, Agriculture, Conservation, and Trade Act of 1990 (P.L. 101-624); the Water Resources Planning Act of 1965 (42 U.S.C. 1962); the Food Security Act of 1985 (P.L. 99-198), as amended, Title XII and related authorities; and

WHEREAS, the Hopi Tribe and Hopi tribal members have indicated a desire to participate in certain NRCS programs; and

WHEREAS, the NRCS, in consultation with the Hopi Tribe, the Arizona State Historic Preservation Office (SHPO), and the Advisory Council on Historic Preservation (ACHP), has determined that certain NRCS conservation activities may affect properties listed in or eligible for listing in the National Register of Historic Places and Hopi Sacred and asTraditional Cultural Places (TCPs), and that these conservation activities are therefore subject to compliance with Title 36 Part 800 of the Code of Federal Regulations (36 CFR 800) (regulations implementing Section 106 of the National Historic Preservation Act [16 U.S.C. 470f] [NHPA]), and Hopi Tribal Ordinance No. 26 (HTO-26); and

RECEIVED HOPI AGENCY NOV 10 2003 OFFICE OF SUPERINTENDENT

OCT 2003 WESTERN REGIONAL OFC ENVIRONMENTAL SERVICES

WHEREAS, 36 CFR Part 800.14 provides for streamlined procedures for complying with Section 106 of NHPA through Programmatic Agreements, when appropriate; and

WHEREAS, the CPO has been consulted by the NRCS pursuant to 36 CFR.800.14; and

WHEREAS, the NRCS, the CPO, the SHPO, and the ACHP have concluded that a streamlined compliance process is appropriate to NRCS programs that involve numerous small and repetitive undertakings whose timely delivery is vital to Hopi clientele active in agricultural production; and

WHEREAS, the Regional Director, Bureau of Indian Affairs, Western Regional Office, (BIA-WRO) is identified in the implementing regulations for the Archaeological Resources Protection Act (ARPA), at 25 CFR Part 262, as having responsibility for consulting with contractors performing non-excavation, non-collection inventory surveys on the need for such contractors to obtain ARPA permits on the Hopi Reservation; and

WHEREAS, the Regional Director, BIA-WRO, has re-delegated Secretarial authority in ARPA matters pertaining to the Hopi Reservation to the Hopi Tribe; and

WHEREAS, the BIA-WRO and the BIA-Hopi Agency (BIA-Hopi) share responsibility for the administration of permits issued under ARPA and Department of the Interior Regulations for the Protection of Archeaeological Resources on Public Lands (43 CFR 7.5) and have, therefore, been invited to participate as consulting parties and to concur in this Agreement; and

WHEREAS, SHPO is authorized to enter into this Agreement in order to fulfill its role of advising and assisting federal agencies in carrying out their Section 106 responsibilities under the following federal statutes: Sections 101 and 106 of the NHPA, and pursuant to the regulations implementing the NHPA, specifically, at 36 CFR 800.2(c)(1)(i) and 800.6(b); and

WHEREAS, SHPO is authorized to advise and assist federal and state agencies in carrying out their historic preservation responsibilities and cooperate with these agencies under Arizona Revised Statutes § 41-511.04(D)(4); and

WHEREAS, the majority of historic property investigations undertaken to provide NHPA compliance support for NRCS undertakings are non-excavation, non-collection inventory surveys and are authorized by the CPO; and

WHEREAS, the NRCS and the CPO in accordance with its authorty acknowledge the interests of certain other federally recognized Indian tribes (especially the Navajo Tribe and Zuni Pueblo) in the identification, evaluation, and disposition of certain historic properties on Hopi Tribal lands, particularly those properties having traditional and religious cultural importance.

NOW, THEREFORE, the NRCS, the CPO, the BIA-WRO, the BIA-Hopi, the SHPO, and the ACHP agree that NRCS shall take into account the effects of conservation activities on Hopi cultural and historic properties on the Hopi Tribal Lands and ancestral Puebloan historic properties elswhere, as stipulated in this Programmatic Agreement.

STIPULATIONS

1. The Hopi Tribe has designated the CPO as the Tribe's represenatative in matters relative to cultural resources.

2. NRCS conservation activities on Hopi Tribal lands will comply with 36 CFR 800, Section 106 of the NHPA, Program Regulations found in Title 7 of the Code of Federal Regulations, and all internal NRCS cultural resources directives established in General Manual 420 Part 401 and 601, through implementation of the policies and procedures set forth below and in the "Handbook of NRCS Cultural Resources Procedures for Hopi Tribal Lands" (Exhibit A) (hereinafter referred to as the Handbook). The Handbook may be periodically modified or updated by the NRCS with concurrence of the CPO through an exchange of letters.

3. The Handbook defines a streamlined compliance process appropriate for conservation assistance provided by NRCS at the field office level. These provisions notwithstanding, the NRCS may, for any undertaking, elect to comply with Section 106 of the NHPA by implementing the procedures specified in 36 CFR 800.3 through 36 CFR 800.6.

4. The definitions in Part B of the Handbook are applicable throughout this Programmatic Agreement.

5. NRCS will handle the discovery of any Native American human remains in strict accordance with the Hopi policy and applicable federal and state law. NRCS recognizes the authority of Hopi cultural resource law embodied in HTO No. 26 for work conducted on Hopi Tribal lands and will comply with these laws, regulations, and policies as agreed within this Programmatic Agreement.

6. NRCS recognizes that many Hopi TCPs are located outside of Hopi Tribal Lands and will consult with the CPO concerning any land-disturbing activities (non-exempt practices listed in the Handbook) that might pose a potential threat to Hopi TCPs located both on and off of the Hopi Reservation and within the area specified in the Handbook as the Hopi area of administrative interest. On the Hopi Tribal lands, the NRCS will consult directly with the Hopi Cultural Resources Advisory Task team (CRATT) at their monthly meeting. Consulting off Hopi Tribal lands will be conducted through the CPO. If the CPO does not respond to a NCRS request for consultation within thirty days, the NRCS may assume that the CPO has no objections to the NRCS proceeding with the project. Where appropriate, on a case by case basis, the NRCS will attempt to procure access for CRATT members to conduct TCP investigations from private landowners and from other tribes.

RESPONSIBILITIES

Natural Resources Conservation Service

1. The NRCS State Conservationist is responsible for ensuring overall cultural resources compliance in all NRCS activities on Hopi Tribal lands.

2. The NRCS Moenkopi District Conservationist is responsible for ensuring that the specific provisions of the Handbook and this Programmatic Agreement are implemented for all undertakings administered at the field office level.

3. NRCS Cultural Resources Specialists (CRS) (individuals meeting the Secretary of the Interior's Standards and Guidelines for professional archaeologists or closely related positions) are responsible for supervising all cultural resources surveys on Hopi Tribal lands for recording all archaeological sites in a format specified by the CPO, and for providing overall cultural resource program guidance and oversight.

4. All NRCS employees are responsible for ensuring and accurately documenting that they have appropriate authorization before carrying out cultural resources investigations or implementing any NRCS-assisted activities on Hopi Tribal lands.

5. NRCS shall provide training and informational materials to all field office personnel involved with cultural resources on Hopi Tribal Lands. All NRCS employees responsible for planning, implementing, approving, or reviewing NRCS programs and/or Hopi cooperator's projects on Hopi Tribal lands will complete NRCS Cultural Resources Training Modules 1-8, and will be thoroughly familiar with the procedural requirements contained in the Programmatic Agreement and/or addressed in the Handbook. Any and all NRCS personnel independently conducting any cultural resource investigation on Hopi Tribal lands shall conduct the field portion of any such investigation only under a valid Hopi Tribal Permit issued.

6. NRCS retains final responsibility for ensuring that cultural resources compliance activities have been completed for all actions in which NRCS has legislated or designated departmental authority to administer specific federal programs, or when NRCS is providing technical assistance to its clients.

7. When participating in multi-agency projects, NRCS will not assume lead agency status for the purpose of cultural resources compliance except through written Programmatic Agreement with the CPO. When another agency is considered the lead agency for a particular multi-agency undertaking, NRCS may assume that CPO concurrence with the lead agency (per 36 CFR 800.3 through 36 CFR 800.6) is valid with regard to NRCS involvement in the same undertaking. NRCS shall request documented verification that the lead agency has satisfactorily met cultural resources compliance requirements and has the approval of the CPO to proceed. Failure by any party or agency to comply with

cultural resources compliance requirements may result in NRCS withdrawal from the action.

8. NRCS is responsible for ensuring the security of any cultural resources information provided by the CPO or revealed during NRCS investigations, and will normally withhold such information from public disclosure, in accordance with the law. The primary exception to this is that copies of the archaeological surveys and site reports submitted to the CPO will be forwarded to the SHPO by the NRCS. Other exceptions may include cooperators, contractors, other federally recognized Native America tribes with an ancestral interest in potions of the Hopi Reservation, and other parties on a need-to-know basis for the purpose of protecting cultural resources and advancing the goals of this Programmatic Agreement. All information collected by NRCS on Hopi Tribal lands related to cultural resources is the property of the Hopi Tribe, thus all collected data not required for the SHPO reports will be returned to the CPO once decisions related to NHPA, HTO-26, etc., have been reached. The NRCS will consult with the Hopi Tribe before release of any information pursuant to the Freedom of Information Act (FOIA) or other information regulations.

Hopi Tribe

The CPO has responsibility for consulting with NRCS regarding the effects of conservation program activities on any cultural resources on Hopi Tribal lands which may be eligible for inclusion in National Register of Historic Places and shall:

a) Maintain a comprehensive inventory of known cultural resources and historic properties on Hopi Tribal lands.

b) Advise and assist the NRCS, as appropriate and mutually agreed, in carrying out its historic preservation responsibilities, including the identification and evaluation of cultural resources, and in the development of measures to avoid adverse effects to such resources.

c) Provide NRCS access to cultural resources site records and other information as appropriate and necessary for NRCS to carry out historic preservation protection.

d) Provide periodic orientation and training about the CPO's Cultural Resources Management system to NRCS professional and field staff.

WITHDRAWING ASSISTANCE

1. NRCS may elect to withdraw assistance from a project when it is determined by the State Conservationist that cost or other factors involved with cultural resource mitigation are not feasible or are such that the undertaking will have adverse effects on significant cultural resources.

2. NRCS will consult pursuant to 36 CFR 800.9 when a participant, after application to NRCS:

   a) Carries out an irreversible action associated with requested technical assistance that adversely impacts a cultural resource or historic property prior to completion of NRCS compliance responsibilities; or

   b) Refuses to implement a recommended mitigation plan; or

   c) Adversely affects a cultural or historic property in order to evade the requirements imposed by Section 106 of the NHPA or an approved conservation plan, provided that the participant has both the knowledge of the adverse effects and the legal power to prevent them.

HOPI TRIBAL CULTURAL RESOURCES PERMITS

1. Prior to conducting surveys on Hopi lands, NRCS employees shall apply to the CPO for a cultural resources survey (CRS) permit by submitting a written description and map of the proposed undertaking to the CPO. The NRCS employee shall also conduct records searchesfor previously known cultural resources in any NRCS project by consulting the Hopi Cultural Resources Atlas and shall ensure that Hopi Sacred and Traditional Cultural Places (TCPs) will not be damaged by consulting the Hopi Cultural Resources Advisory Task Team (CRATT). Before access to Hopi lands off of the Reservation, permission will be sought from the Hopi Land Team.

2. Persons with an interest in Hopi cooperator's projects assisted and funded by the NRCS, such as the cooperating farmer/rancher or members of associated Hopi agencies, may participate in cultural resources surveys and may comprise up to 50% of the project cultural resources survey crew, but may not conduct surveys independently.

3. Individuals whose reports or other activities under the CRS permit have been judged by NRCS or the CPO to be unsatisfactory with respect to the standards and level of accuracy developed under Hopi Tribe policy or described in the Handbook may have the permit revoked at any time and/or may be removed from the project at any time, provided a brief description of the problem and the means by which the individual might regain permit status is provided. The CPO will normally seek to remedy problems with permit compliance by appropriate measures directed towards individuals listed on the permit,

rather than by terminating this Programmatic Agreement altogether. Deficiencies will be reported to the NRCS, who will take appropriate action to remedy the errors.

CONSERVATION CONTRACTS

All NRCS financial and associated technical assistance projects are delivered through conservation contracts which must be signed within fiscal year deadlines in order to preserve funding. Therefore, when it is not feasible or practical to complete all cultural resources compliance requirements for long-term conservation contracts (five or more years in duration) within the allotted period, these requirements may be deferred until after the contract is signed. NRCS shall ensure that any deferred cultural resources requirements are completed and placed in the conservation plan as early in planning as possible and prior to any ground disturbing activities. NRCS conservation contracts are subject to substantial modification or cancellation for a variety of reasons, including protection of cultural resources.

COMPLIANCE DOCUMENTATION AND REPORTING CULTURAL RESOURCES

1. Inventory reports will incorporate all previous inventories that are recorded and mapped at CPO and all previously recorded cultural properties that are within one kilometer of the project area as of the documented date of the records search at CPO. A hard copy of the project specific permit will be attached to each report. Report preparation will focus especially on a complete and comprehensive description of the undertaking and the area and nature of potential effects. All inventoried areas and all resources encountered during inventory will be reported.

2. Standard forms and formats currently in use at CPO shall be employed in all documentation. Examples of completed forms and related materials are included Appendices of the Handbook.

3. The following procedures will be followed by NRCS unless separate arrangements have been requested by NRCS and approved and documented on a project specific basis by CPO:

   a) The standard for the survey of areas not previously surveyed is a 100% pedestrian inventory and transect intervals no wider than 50 feet (15 meters).

   b) The standard for avoidance will be 50 feet (15 meters) completely around properties determined eligible and recorded or checked by the NRCS CRS. Monitoring of all ground disturbances within these 50 foot "buffers" is standard.

   c) Monitoring can be conducted either by trained field staff or by the CRS and must be covered by a valid permit (NOTE: No excavation or removal of any archeological

resource by any NRCS staff will be allowed under any circumstances without a valid ARPA permit issued by the Bureau of Indian Affairs). A brief (letter style) report documenting the result of any monitoring effort will be submitted to CPO within 30 days of the completion of any monitoring effort.

d) Site reports will be as complete as surface observation permits. United States Geological Survey Topographic (7.5 minute) map locations and sketch maps showing the original location of the undertakings, the approximate site boundaries, all obvious surface features, and any re-routes are required for all resources encountered during inventory.

e) All cooperators are encouraged to participate in the field inventory. The CRS may, however, draft determinations of eligibility and effect for the purpose of consultation without having been physically present on the site, if they feel they have been provided sufficient information to make the determination.

f) The use of photographs, maps, and appropriate oral statements from local residents is encouraged. This provision is especially critical for smaller manifestations that are not likely to meet the eligibility criteria for inclusion in the Register and for potential places of traditional religious and cultural importance, when the views of the land user can be incorporated into the determination. This provision may also be applicable for late nineteenth and twentieth century Hopi residences or use areas where implementation of a proposed practice(s) will not adversely affect historic properties or the important features that contribute to a property's eligibility.

4. NRCS will maintain records documenting compliance with this Programmatic Agreement. All resource specific information is the property of the Hopi Tribe and will be handled as previously stipulated in this Programmatic Agreement.

MONITORING AGREEMENT COMPLIANCE

1. NRCS will cooperate with the CPO in monitoring agency compliance with this Programmatic Agreement. NRCS CRS will perform quality control reviews, up to three per year, and will report the results to the CPO.

2. The CPO and the SHPO may also monitor, field check, or review any NRCS activity carried out under this Programmatic Agreement.

AMENDMENTS

Any party to this Programmatic Agreement may request that it may be amended or modified, whereupon the parties will consult in accordance with 36 CFR 800.13 to consider such revisions. Any resulting amendments shall be executed in the same manner as this original document.

DISPUTE RESOLUTION

1. Should any conflicts, real or perceived, arise between NRCS and CPO they will be resolved by good faith consultation among the parties with the intent of fully respecting the rights of the Hopi Tribal government. The parties agree to utilize any arbitration that is required under applicable court rules, and the Arizona SHPO and ACHP may be invited by either party to participate in such consultation.

2. If a dispute should arise between the NRCS and the CPO with regard to any individual undertaking; the NRCS CRS, the CPO, and any appropriate interested persons identified by the NRCS or the CPO shall consult to resolve the disagreement. If such consultation fails to resolve the disagreement within a reasonable amount of time, the NRCS shall provide the SHPO with complete documentation relevant to the dispute. SHPO participation is limited to issues directly related to interpretation of state and federal law, policies, and regulations. Within 30 days of receipt of the documentation, the SHPO will either:

   a) Provide NRCS and the CPO with recommendations which both parties shall consider in reaching a determination; or

   b) Notify NRCS that it will comment pursuant to 36 CFR 800.7 and proceed to comment. NRCS will consider SHPO comments in accordance with 36 CFR 800.7(c)(4), and Section 110(l) of the Act.

   c) Other NRCS activities under this Programmatic Agreement that are not subject to the dispute shall continue without interruption.

3. If a dispute cannot be resolved by consultation among the NRCS, the CPO, and the SHPO; any party can request mediation by ACPH. The requesting party shall provide the ACHP with complete documentation relevant to the dispute. ACHP participation is limited to issues directly related to interpretation of federal law, policies, and regulations. Within 30 days of receipt of the documentation, the ACHP will either:

   a) Provide NRCS and the CPO, with recommendations which both parties shall consider in reaching a determination; or

b) Notify NRCS that it will comment pursuant to 36 CFR 800.7 and proceed to comment. NRCS will consider ACHP comments in accordance with 36 CFR 800.7(c)(4), and Section 110(l) of the act.

c) Other NRCS activities under this Programmatic Agreement that are not subject to the dispute shall continue without interruption.

4. Should CPO raise any objection to any activity carried out by a specific NRCS field office or staff member, CPO will consider excluding that field office or staff member from participating in cultural resources activities under this Programmatic Agreement before withdrawing from or terminating the Programmatic Agreement altogether.

CONCURRENCE/APPROVAL PROTOCOLS

1. NRCS may assume the concurence and approval of the CPO and proceed with any undertaking with and APE of less than 100 acres that was documented by the CRS, provided:

   a) No properties were identified; or

   b) Fewer than six properties potentially eligible for either the National or Hopi Tribe Register were identified within the undertaking's APE and the identified properties have been avoided by a minimum of 50 feet; and

   c) A fifteen day (exclusive of mailing time) opportunity to object is provided to CPO along with appropriate inventory documentation before any irrevocable commitment or ground disturbance occurs; and

   d) NRCS remains (after the 15 day review period) committed to implementing, or facilitating the implementation of any feasible mitigation efforts should discoveries occur; and

   e) Any relatively minor problems (e.g. legal descriptions, mapping shortfalls, etc.) with the documentation identified in writing by CPO are promptly addressed by NRCS.

2. NRCS will proceed with the undertaking only after it has secured written concurrence with NRCS findings specific to the undertaking where:

   a) The APE of the undertaking exceeds 100 acres.

   b) When disturbance associated with the undertaking encroaches within 50 feet of a potentially eligible property.

c) When an inventory identifies six or more potentially eligible resources or requires consultation regarding:
   1) determinations of eligibility of a property; or

   2) effects to a potentially eligible property that cannot be avoided.

   3) Normally processing for cultural resources survey concurrence documentation requires 30 days from receipt at CPO and should be consistent with those times provided in 36 CFR 800. NRCS may, if necessary, assume the concurrence of the CPO under Section 106 after a 30 day period.

DISCOVERIES

In the event of a discovery ("discovery" means any previously unidentified or incorrectly identified cultural resources including but not limited to archaeological deposits, human remains, or locations reportedly associated with Native American religious/traditional beliefs or practices), all operations in the immediate vicinity of the discovery must cease and the CPO must be notified immediately. Discoveries will be handled on a case-by-case basis with particular attention paid to the need to complete approved undertakings and the adequacy of the original inventory effort.

TERMINATION

1. Any party to this Programmatic Agreement may terminate it by providing 60 calendar days notice to the other parties with specific reasons for such withdrawal, providing that the parties consulted during the period prior to termination under "Dispute Resolution", above, and had the opportunity to seek agreement on amendments or other actions that would avoid termination.

2. Execution of this Programmatic Agreement and implementation of its terms evidences that the NRCS has satisfied its cultural resources compliance responsibilities with respect to its undertakings on Hopi lands, and that it has received approval for undertakings implemented in accordance with this Programmatic Agreement.

3. One of the reasons SHPO may terminate this Agreement would be upon finding that a SHPO employee that was significantly involved in the creation of this Agreement is, at any time the agreement is in effect but no later than three years after its execution, an employee or consultant to any other party in the Agreement.

OTHER

1. Equal Opportunity/Non-Discrimination: The Parties agree to comply with any applicable federal or state laws relating to equal opportunity and non-discrimination.

2. Records: Pursuant to A.R.S. et seq. 35-214, 35-215 and 41-2548, all books, accounts, reports, files and other records relating to this Agreement shall be subject, at all reasonable times, to inspection and audit by the State for three years after the termination of this Agreement. Hopi Lawyer wants this whole paragraph dropped.

3. Conflict of Interest: The participation of the state in this Agreement is subject to cancellation by the State under A.R.S. 38-511 if a person significantly involved in the Agreement on behalf of the State is an employee or consultant of the NRCS cooperator or an employee of a contractor hired by the NRCS cooperator at any time while the Agreement or any extension of the Agreement is in effect.

4. Non-Availability of Funds: This Agreement shall be subject to available funding, and nothing in this Agreement shall bind the parties to expenditures in excess of funds authorized and appropriated for the purposes outlined in this Agreement.

Michael Somerville — 10/9/03
MICHAEL SOMERVILLE — Date
Arizona State Conservationist

Wayne Taylor, Jr. — 9/30/03
WAYNE TAYLOR, Jr. — Date
Chairman, Hopi Tribe

Wendell Honanie — 11/24/03
WENDELL HONANIE — Date
Superintendent, Hopi Agency

Wayne Nordwall — 11-5-03
WAYNE NORDWALL — Date
Director, BIA-Western Regional Office

HOPI - NRCS PA

James W. Garrison

JAMES W. GARRISON
Arizona State Historic Preservation Office

10/20/03
Date