PROGRAMMATIC AGREEMENT

AMONG

THE NATURAL RESOURCES CONSERVATION SERVICE,
THE NAVAJO NATION HISTORIC PRESERVATION OFFICER,
AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

REGARDING

COMPLIANCE WITH SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT AND SECTION 201 OF THE NAVAJO NATION CULTURAL RESOURCES PROTECTION ACT, FOR CONSERVATION ASSISTANCE ACTIVITIES ON NAVAJO NATION LANDS

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 Navajo Nation has indicated a desire to participate in certain NRCS programs; and

WHEREAS, the NRCS, in consultation with the Navajo Nation Historic Preservation Officer (NNHPO) and the Advisory Council on Historic Preservation (ACHP), has determined that certain of these conservation activities may affect properties listed in or eligible for listing in the National Register of Historic Places and the Navajo Nation Register of Cultural Properties, 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 the Navajo Nation Cultural Resources Protection Act (19 NNC 2001 et seq.) (CRPA); and

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 Navajo Nation Historic Preservation Officer (NNHPO) has assumed the responsibilities of the Arizona, Utah, and New Mexico State Historic Preservation Officers with respect to the NHPA and 36 CFR 800 on Navajo Nation lands, and has been consulted by the NRCS pursuant to 36 CFR.800.14; and

WHEREAS, the NRCS, the NNHPO, 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 diverse Navajo clientele active in agricultural production.

NOW, THEREFORE, the NRCS and the NNHPO and the ACHP agree that NRCS shall take into account the effects of conservation activities on Navajo cultural and historic properties as stipulated in this Programmatic Agreement.

STIPULATIONS

1. NRCS conservation activities on Navajo Nation lands will comply with 36 CFR 800, Section 106 of the NHPA, Section 201 of the CRPA, 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 Navajo Nation Lands" (Exhibit A) (herinafter referred to as the Handbook). The Handbook may be periodically modified or updated by the NRCS with concurrence of the NNHPO through an exchange of letters.

   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.

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

2. NRCS will handle the discovery of any Native American human remains in strict accordance with the Navajo Nations "Jischaa" policy and applicable federal law. NRCS recognizes the authority of Navajo Nation' cultural resource laws, regulations, and policies, as detailed below, for work conducted on the Navajo Nation and will comply with these laws, regulations, and policies as agreed within this Programmatic Agreement. Applicable Navajo Nation Laws, Regulations, and Policies are:

   a) Cultural Resources Protection Act,
   b) Policies, Procedures and Requirements for Obtaining Cultural Resource Investigation Permits,
   c) Policy for the Protection of Jischaa,
   d) Interim Fieldwork and Reporting Guidelines,
   e) Policy to Protect Traditional Cultural Properties,
   f) Guidelines for the Treatment of Historic, Modern, and Contemporary Abandoned Sites.

RESPONSIBILITIES

Natural Resources Conservation Service

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

2. NRCS District Conservationists are responsible, within each Navajo Conservation District Field Office, 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 providing overall cultural resource program guidance and oversight, for reviewing and approving all reports prior to submittal by NRCS to NNHPO, for conducting all required quality assurance reviews, and for carrying out and/or supervising field surveys and other large scale (50 acres or greater) cultural resources compliance activities.

4. The CRS will be permitted to serve "in general charge" as the term is defined in the policies developed under the CRPA for cultural resources investigations occurring on Navajo Nation lands.

5. 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 Navajo Nation lands.

6. NRCS shall provide training and informational materials to all field office personnel involved with cultural resources. All NRCS employees responsible for planning, implementing, approving, or reviewing NRCS programs and/or projects on Navajo Nation 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 Navajo Nation lands shall have completed an orientation program provided by the Navajo Nation Historic Preservation Department and shall conduct the field portion of any such investigation only under a valid Navajo Nation permit issued by NNHPO.

7. 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.

8. 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 NNHPO. When another agency is considered the lead agency for a particular multi-agency undertaking, NRCS may assume that NNHPO concurrence with the lead agency (per 36 CFR 800.3 through 36 CFR 800.6 and Section 201 of the CRPA) 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 NNHPO to proceed. Failure by any party or agency to comply with cultural resources compliance requirements may result in NRCS withdrawal from the action.

9. NRCS is responsible for ensuring the security of any cultural resources information provided by the NNHPO or revealed during NRCS investigations, and will normally withhold such information from public disclosure. Exceptions may include cooperators, contractors, 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 Navajo Nation lands related to cultural resources is the property of the Navajo Nation, thus all collected data will be returned to the Navajo Nation once decisions related to NHPA, CRPA, NEPA, etc., have been reached.

Navajo Nation

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

a) Maintain a comprehensive reservation-wide inventory of known cultural resources and historic properties.

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 to NRCS professional and field staff. This will consist of a one or two-day training course or orientation every two years orienting NRCS personnel to the tribe's Cultural Resources Management system.

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 36CFR 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 the CRPA, 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.

NAVAJO NATION CULTURAL RESOURCES PERMITS

1. Individuals who have successfully completed NRCS cultural resources training required by NNHPO will be listed as in "direct charge" on an annual blanket permit issued by the NNHPO in February of each calendar year (following application by NRCS). Prior to conducting surveys, NRCS employees covered by the permit shall submit a "Notice of Intent to Conduct an Archaeological Inventory" to the NNHPO. The notice of intent must contain location information and a brief description of the proposed undertaking and must be sent to NNHPO at least five days in advance of the cultural resources inventory (exclusive of mailing time). Field inventories shall not be conducted until a records search has been completed and the results have been reviewed by the individual in direct charge of the inventory.

2. Individuals whose reports or other activities under the permit have been judged by NRCS or the NNHPO to be unsatisfactory with respect to the standards and level of accuracy developed under Navajo Nation policy or described in the Handbook may be removed by NRCS or NNHPO from the permit at any time, provided a brief description of the problem and the means by which the individual might regain permit status is provided. The NNHPO 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. Reporting deficiencies will be reported to the NRCS CRS who will take appropriate action to remedy the errors.

CONSERVATION CONTRACTS

All NRCS financial and associated technical assistance projects are issued permits and 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. Inventory reports will incorporate all previous inventories that are recorded and mapped at NNHPO and all previously recorded cultural properties within one kilometer of the project area as of the documented date of the records search at NNHPO.

COMPLIANCE DOCUMENTATION AND REPORTING CULTURAL RESOURCES

1. Inventory reports will incorporate all previous inventories that are recorded and mapped at NNHPO 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 NNHPO. A hard copy of the

"Notice of Intent to Conduct Survey" or project specific class (b) inventory 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 NNHPO shall be employed in all documentation. It is, however, understood that non-specialist NRCS field personnel will provide verbal descriptions (e.g. - "hundreds of black-on-white sherds", a "foundation", etc.) and will not ordinarily provide specialized technical information such as archeological period, detailed ceramic and or lithic typologies and counts. Further, non-specialist field staff will document properties/resources but will not make recommendations regarding the National or Navajo Register eligibility of properties that are avoided by more than one hundred feet. CRSs recording any property or visiting any property documented by non-specialists staff will review and update existing documentation and complete documentation about the property to HPD standards unless other project specific arrangements have been requested by NRCS and approved and documented by NNHPO. 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 NNHPO:

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

   b) The standard for avoidance will be 100 feet (30 meters) for archeological properties identified by non-specialist staff and 50 feet (15 meters) for properties determined eligible and recorded or checked by the CRS. Monitoring of all ground disturbances within these 50 or 100 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 NNHPO within 30 days of the completion of any monitoring effort.

   d) Site forms will be filled out as completely as the limited training of field staff allows. USGS 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. Permitted NRCS field staff (or 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 Navajo 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 Navajo Nation and will be handled as previously stipulated in this Programmatic Agreement.

MONITORING AGREEMENT COMPLIANCE

1. NRCS will cooperate with the NNHPO 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 NNHPO.

2. The NNHPO and the ACHP 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, be discovered between NRCS and NNHPO they will be resolved in good faith consultation among the parties with the intent of fully respecting the rights of the Navajo Nation Government. The ACHP may be invited by either party to participate in such consultation.

2. If a disagreement should arise between NRCS and the NNHPO with regard to any policy, requirement, interpretation, or determination under the CRPA, the written determination of the Navajo Nation Historic Preservation Officer shall be considered final when these issues are related to land under the jurisdiction of the Navajo Nation.

3. If a dispute should arise between the NRCS and the NNHPO with regard to any individual undertaking; the State CRS, the NNHPO, and any appropriate interested persons identified by the NRCS or the NNHPO 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 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 NNHPO 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. Other NRCS activities under this Programmatic Agreement that are not subject to the dispute shall continue without interruption.

4. Should NNHPO raise any objection to any activity carried out by a specific NRCS field office or staff member, NNHPO will consider excluding that field office or staff member from 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 NNHPO and proceed with any undertaking of less than 50 acres that was documented by NRCS field staff, or any undertaking of less than 100 acres when inventory was led by a permitted CRS, provided:

   a) No properties were identified; or

   b) Fewer than six properties potentially eligible for either the National or Navajo Register were identified and the identified properties have been avoided by a minimum of 100 feet. A 50 foot avoidance buffer is acceptable if both the property and the buffer were evaluated by an on-the-ground inspection by a CRS; and

   c) A fifteen day (exclusive of mailing time) opportunity to object is provided to NNHPO 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 NNHPO are promptly addressed by NRCS.

2. NRCS will proceed with the undertaking only after it has secured an NNHPO Cultural Resource Compliance Form specific to the undertaking where:

   a) The undertaking exceeds 50 acres when documented by NRCS field staff or 100 acres when documented by CRS's.

   b) When disturbance associated with the undertaking encroaches within 100 feet of a potentially eligible property.

   c) When an inventory identifies more than five 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 this type of documentation requires 30 days from receipt at NNHPO and should be consistent with those times provided in 36CFR800. NRCS may, if necessary, assume the concurrence of the NNHPO under Section 106 after a 30 day period, but cannot assume approval under the CRPA for projects as described in the CONCURRENCE APPROVAL PROTOCOLS stipulation 2 (a-c) of this Programmatic Agreement.

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 Navajo Nation Historic Preservation Department must be notified at (520)-871-7132. 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, an 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 Navajo Nation lands, and that it has received approval pursuant to section 201 of the CRPA for undertakings implemented in accordance with this Programmatic Agreement

MICHAEL SOMERVILLE
Arizona State Conservationist

3/22/01
Date

ROSENDRO TREVINO
New Mexico State Conservationist

3/16/01
Date

ALAN DOWNER
Navajo Nation Historic Preservation Officer

2/1/2001
Date

Advisory Council on Historic Preservation

4/20/01
Date