

PROGRAMMATIC AGREEMENT

Between

**The White Mountain Apache Tribe
The Natural Resources Conservation Service
The Bureau of Indian Affairs, Western Regional Office;
The Bureau of Indian Affairs, Fort Apache Agency
and
The Advisory Council on Historic Preservation
For**

**Compliance with Section 106 of the National Historic Preservation Act
On the White Mountain Apache Trust Lands**

WHEREAS, the White Mountain Apache Tribe (WMAT) is a federally recognized tribe holding undiminished original rights to, and ongoing jurisdiction over, that portion of its aboriginal territory reserved for the exclusive use and benefit of WMAT Members and known as the White Mountain Apache Trust Lands (also known as the Fort Apache Indian Reservation [FAIR]); and

WHEREAS, pursuant to Section 101(d) of the NHPA, the WMAT has assumed all pertinent State Historic Preservation Officer functions for the FAIR, including responsibility for the review of Federal agency undertakings under Section 106 of the National Historic Preservation Act (NHPA); and

WHEREAS, the White Mountain Apache Tribal Council has granted the Tribal Historic Preservation Office (THPO) the authority to consult with Federal agencies and interested parties on behalf of the WMAT under 36 CFR 800.3(c)(1) and has directed the THPO to seek to avoid adverse effects and to facilitate beneficial effects to and uses of historic properties and other cultural resources on the FAIR; and

WHEREAS, pursuant to requests from WMAT 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, NRCS technical assistance and natural resource conservation programs qualify as undertakings as defined at 36 CFR 800.16 (y) of the Advisory Council on Historic Preservation (ACHP) regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. Part 470) (NHPA); and

WHEREAS, NRCS, in consultation with the ACHP and the THPO has determined that certain of these conservation program activities may affect properties listed in or eligible for listing in the National Register of Historic Places (NRHP), and that these activities are therefore subject to compliance with Section 106 of the National Historic Preservation Act (16 U.S.C. 4700 [NHPA]) and the ACHP's implementing regulation, "Protection of Historic Properties" (36 CFR Part 800); and

WHEREAS, the ACHP' regulations provide for the development and implementation of streamlined procedures for complying with Section 106 of NHPA through Programmatic Agreements, when appropriate (36 CFR Part 800.14); and

WHEREAS, a streamlined compliance process is appropriate to NRCS programs which involve numerous small and procedurally repetitive undertakings, and is also vital to the timely delivery of services to groups and individuals on FAIR whom are dependent on agricultural and range productivity and watershed quality; and

WHEREAS, NRCS has consulted with the WMAT, the ACHP, the THPO, and other potentially affected tribes in the development of this Programmatic Agreement (Agreement) pursuant to Section 106 of the NHPA and Section 800.14(b) of the regulations (36 CFR 800); and

WHEREAS, the THPO provides essential assistance to NRCS in complying with Section 106 of the National Historic Preservation Act (16 U.S.C. 4700 [NHPA]) on FAIR by conducting heritage resources background checks, consulting concerning areas of potential effect (APE), assisting in heritage object identification, and consulting concerning determination of National Register eligibility of heritage resources discovered during surveys; and

WHEREAS, the Regional Director, Bureau of Indian Affairs, Western Regional Office, (BIA-WRO) is identified through the implementing regulations for the Archaeological Resources Protection Act (ARPA), at 43 CFR 7 and 25 CFR 262, as having responsibility for consulting with contractors performing non-excavation, non-collection historic property inventories on the need for such contractors to obtain ARPA permits on the FAIR; and

WHEREAS, the Regional Director, BIA-WRO, has, through an Area Addendum to 30 BIA Supplement 2, dated 22 July 1992, and a memorandum to the Fort Apache Agency Superintendent (FAAS), dated 22 January 1993, re-delegated Secretarial authority in all ARPA matters pertaining to the FAIR to the FAAS, except issuance of ARPA permits; and

WHEREAS, the BIA-WRO, the BIA-Fort Apache Agency (BIA-FAA), share responsibility for the administration of permits issued pursuant to ARPA and implementing regulations 43 CFR 7.5 and 25 CFR 262 and have, therefore, been invited to participate as consulting parties and to concur in this Agreement; and

WHEREAS, the majority of historic property investigations undertaken to provide NHPA compliance support for NRCS undertakings are non-excavation, non-collection historic property inventories authorized by the THPO under authority granted by the White Mountain Apache Tribal Council; and

WHEREAS, pursuant to Section 101(d)(6)(B) of the NHPA, 36 CFR 800.3(2)(b), the American Indian Religious Freedom Act (42 U.S.C. Part 1996) (AIRFA), and Section 3(d) of the Native American Graves Protection and Repatriation Act (25 U.S.C. Part 3001) (NAGPRA), and its implementing regulations (43 CFR Part 10), the WMAT has been invited to participate as a signatory and to concur in this Agreement; and

WHEREAS, NRCS and WMAT acknowledge the interests of certain other federally recognized Indian tribes (especially the San Carlos Apache Tribe, the Hopi Tribe and Zuni Pueblo) in the appropriate identification, evaluation, and disposition of certain historic properties and other cultural resources on White Mountain Apache Trust Lands, particularly those historic properties having cultural and religious significance.

NOW, THEREFORE, it is mutually agreed that NRCS shall comply with 36 CFR Part 800 on the FAIR in accordance with the following stipulations.

STIPULATIONS

1. Scope of this Agreement

- a) This agreement exists in lieu of a consultation protocol between WMAT and NRCS.
- b) NRCS shall seek to avoid adverse effects to historic properties and other cultural resources on the FAIR.
- c) NRCS will comply with 36 CFR 800 (regulations implementing Section 106 of the National Historic Preservation Act of 1966, as amended [16 U.S.C. 470f]), through implementation of the policies and procedures set forth in the Arizona *Handbook of Cultural Resources Procedures on the White Mountain Apache Trust Lands (Handbook)*. The *Handbook* may be periodically updated by NRCS with concurrence of the THPO.
- d) This Agreement pertains only to NRCS undertakings described in the Applicability and Exceptions section of the *Handbook*. These undertakings shall be classified as either "*Exempt*" (having little or no potential for adverse effects

to historic properties and, therefore, exempt from the consultation process) or "*Non-Exempt*" (having potential for adverse effects to historic properties and requiring consultation). NRCS shall follow the procedures at 36 CFR 800 for all undertakings not described in the Applicability and Exceptions section of the *Handbook* and for all prospective undertakings entailing adverse effects to historic properties.

- e) The *Handbook* defines a streamlined compliance process appropriate for conservation technical and cost-share assistance delivered primarily at the field office level. Any NRCS undertaking that may fall outside the scope of this Agreement, as described in the *Handbook* itself, will comply with 36 CFR 800.
- f) The definitions in Part VI of the *Handbook* (Glossary) are applicable throughout this agreement.
- g) No provision of this agreement may, nor shall it be construed to represent, an abridgement or diminishment of any of the sovereign rights or powers of any tribe, or of any responsibilities of federal agencies as trustees for tribes, or of the government-to-government relationships between the United States and individual tribes.

2. Off-Reservation Consulting Provisions

- a) NRCS shall consult with the WMAT Cultural Resources Director (CRD) and THPO before initiating any **non-exempt** undertakings affecting potential Apache historic properties of cultural and religious significance, such as mountains and springs, within the off-reservation area bounded by Interstate Highway 40 on the north, Interstate Highway 10 on the south, the Arizona/New Mexico Border on the east, and Interstate Highway 17 on the West. NRCS consultation shall consist of a description of the project, a map of the project APE, and an assessment of why the project may have Apache affiliations.
- b) NRCS shall provide the CRD and THPO with the site records for all archaeological sites affected or potentially affected by NRCS undertakings that may have historical Apache origins or affiliations.
- c) If, within 30 days of receiving notice of the proposed off-reservation undertaking, the THPO and the CRD do not identify historic properties having cultural and religious significance within the APE, or do not refer NRCS to other appropriate and knowledgeable persons, NRCS shall consider the consultation process completed with respect to historic properties having cultural and religious significance to WMAT.

3. Tribal Authorization, BIA Notification, and Permit Requirements

- a) NRCS historic property inventories shall be undertaken by NRCS Field Office personnel trained in historic property identification, documentation, and protection. They will be assisted, as necessary, by NRCS Arizona State Cultural Resources Specialist (CRS) or other qualified persons designated by the CRS. The CRS shall provide Field Office personnel with training in southwestern historic property identification, documentation, and protection at two year intervals and shall invite the THPO to participate in such training. The THPO shall periodically provide training in historic property identification, documentation, and protection issues and methods particular to the FAIR and shall invite NRCS Field Office personnel to such training as appropriate.
- b) NRCS personnel intending to conduct a historic property inventory shall submit an undertaking description on the Tribal Plan and Project Review (TPPR) form (Appendix B of the *Handbook*) and a map of the undertaking and its preliminary Area of Potential Effect (APE) to the THPO for a historic property inventory and site file check at least 30 days prior to the scheduled date of the inventory. At that time NRCS will also schedule a meeting with the THPO to propose a definition of the project APE for the undertaking and to develop a historic property inventory strategy appropriate to the particular project to be undertaken. NRCS shall then submit the proposed APE and identification effort to the CRD and the FAAS.
- c) Written permission from the THPO to proceed with the historic property inventory and BIA notification shall fulfill NRCS permit and permit consultation requirements under WMAT law, ARPA, and 43 CFR 7.5.
- d) In the unlikely event that disturbance or collection is an anticipated element of the historic property inventory, NRCS shall consult with the THPO regarding permitting and Section 106 compliance requirements.

4. Identification of Heritage Properties

- a) NRCS Heritage property inventory personnel shall seek to identify the full range of historic properties potentially affected by the *non-exempt* NRCS undertakings identified in the Applicability and Exceptions section of the *Handbook* by strictly adhering to the Secretary of the Interior's *Standards and Guidelines for Archaeology and Historic Preservation* (48 FR 44716) and to the THPO/NRCS historic property inventory strategy developed for each project.
- b) The heritage property inventory strategy developed by the THPO and NRCS for each *non-exempt* undertaking shall, at a minimum, include a non-excavation, non-collection, pedestrian inventory survey to identify historic properties within the APE. NRCS shall immediately notify the THPO if any properties, artifacts, or

property elements that are found during the historic property inventory would likely be removed or damaged if left uncollected or unprotected.

- c) Until such time as the WMAT becomes a signatory to the Programmatic Agreement among the BIA, Arizona State Historic Preservation Officer, and the ACHP regarding consultation with Indian tribes in the State of Arizona for undertakings on another tribe's land, for undertakings that occur beyond the boundaries of established communities and involve cumulative disturbance of more than five acres of previously undisturbed terrain, NRCS shall consult with the Hopi Tribe, Zuni Pueblo, and the San Carlos Apache Tribe concerning the effects of the proposed undertaking on any prospective historic properties having cultural or religious significance, pursuant to 36 CFR 800.2 (c) (2)(ii).
- d) If historic properties or other cultural resources having significance to federally recognized Indian tribes other than the WMAT are identified and may be affected by an undertaking covered under this Agreement, NRCS will consult with appropriate and knowledgeable persons identified by the tribe(s) expressing an interest in such properties.

5. No Heritage Properties Found

If the efforts set forth above identify no heritage properties within the undertaking's APE, NRCS shall notify the THPO of this outcome using the "No historic properties or other cultural resources within the APE" check box on the "Historic Properties Field Inventory" form (Appendix C of the *Handbook*) and a map of the undertaking. Upon providing this affirmation of a "no historic properties affected" determination to the THPO, NRCS shall consider that its obligations under Section 106 have been met, and the undertaking may proceed when the Tribal Plan and Project Review (TPPR) process has been completed and project approval has been received. Completion of the TPPR process may require up to 10 weeks after submission.

6. Heritage Properties Found

- a) If one or more heritage properties are identified during a heritage property inventory, NRCS personnel conducting the heritage property inventory shall complete an Fort Apache Indian Reservation Site Record (Appendix D of the *Handbook*) and shall consult with the THPO to evaluate these properties according to the National Register *Criteria for Evaluation* (36 CFR 60.4) and 36 CFR 800.4 (c) to determine whether any heritage properties are eligible for nomination onto the National Register of Historic Places. If the evaluation concludes that no heritage properties are present, the NRCS shall provide documentation of this determination to the THPO and may proceed with the undertaking.

- b) If historic properties are found within the undertaking's APE, and NRCS determines that the undertaking will not have an effect upon them as defined in §800.16(i), NRCS shall provide documentation of this finding to the THPO, pursuant to 36 CFR 800.11 (d). Unless the THPO objects within 15 days of receipt of the finding, NRCS responsibilities under Section 106 are fulfilled, and the undertaking may proceed.
- c) If the efforts set forth above result in a determination that the undertaking may have an effect on historic properties, NRCS shall, in consultation with the THPO, follow the procedures set forth in 36 CFR 800.5 - 800.7.

7. Properties Discovered During Implementation of an Undertaking

- a) NRCS shall take all reasonable precautions to avoid adverse effects to all historic properties and other cultural resources, including the efforts described in stipulations 5 and 6 above and the written notification of all cooperators and contractors in non-exempt projects of the mandate to avoid adverse affects.
 - 1) If historic properties, other cultural resources, or unanticipated effects to properties or resources are discovered during implementation of an undertaking, NRCS shall (1) ensure that the cooperator immediately stops work in the vicinity of the discovery, (2) notifies the THPO within 24 hours of the discovery, (3) takes any other actions necessary to protect all threatened or damaged cultural resources, and (4) prepare a through damage assessment report.
 - 2) If human remains, funerary objects, or sacred objects are discovered, NRCS shall also notify the CRD as soon as possible, but no more than 24 hours following the discovery.
- b) If NRCS and THPO agree that there would be an adverse effect to one or more historic properties, but that through project redesign such effects can be avoided resulting in a No Historic Properties Affected or No Adverse Effect determination, NRCS shall provide documentation of this determination to the THPO and may proceed with the redesigned undertaking.
- c) Should it be determined that there will be, or has been, an adverse effect to a historic property, or properties, discovered during implementation of the project, NRCS, in consultation with the THPO, the CRD, and other affected tribes (if any) shall develop a treatment plan in the form of an MOA to resolve the adverse effects. If one of the signatories believes that ACHP involvement is warranted, the ACHP may be afforded an opportunity to comment in accordance with §§800.6 through 9.
- d) *NAGPRA Coordination.* If human remains or funerary items are involved; the efforts described above shall be coordinated, as appropriate, in consultation with

the CRD, representatives of other potentially affected tribes, and the THPO; pursuant to the inadvertent discovery provisions of NAGPRA (Section 3d) and 43 CFR 10.5 and 10.6.

8. Information / Report Distribution

All reports and information generated from NRCS' efforts to comply with NHPA and NAGPRA on the FAIR are considered confidential and privileged by the WMAT and shall be withheld from the public, pursuant to Section 304 of the NHPA and 36 CFR 800.11 (c), except as distributed by or with the written permission of the THPO.

9. Dispute Resolution

Should any party to this agreement, or any federally recognized tribe, object in writing to NRCS regarding any action carried out or proposed, with respect to the implementation of this agreement, NRCS shall consult with the objecting party to resolve the objection. If after initiating such consultation NRCS determines that the objection cannot be resolved through consultation, NRCS shall forward all documentation relevant to the objection to the ACHP, including NRCS' proposed response to the objection. Within 30 days of receipt of all pertinent documentation, the ACHP shall exercise one of the following options:

- a) Advise NRCS that the ACHP concurs in NRCS' proposed response to the objection, whereupon NRCS will notify the affected parties and may proceed with the proposed response.
- b) Provide NRCS with recommendations, which NRCS shall take into account in reaching a final decision regarding its response to the objection; or
- c) Refer the objection and comment pursuant 36 CFR 800.7 (c). The resulting comment shall be taken into account by NRCS in accordance 36 CFR 800.7 (c) and 110(1) of the NHPA.
- d) Should the ACHP not exercise one of the above options within 30 days after receipt of all pertinent documentation, NRCS may assume the ACHP's concurrence in its proposed response to the objection.
- e) NRCS shall take into account any ACHP recommendation or comment provided in accordance with this stipulation with reference only to the subject of the objection. NRCS' responsibility to carry out all actions under this agreement that are not the subjects of the objection shall remain unchanged.

10. AMENDMENTS

Any party to this Agreement may propose to NRCS that the Agreement be amended, whereupon NRCS shall consult with the other parties to this Agreement to consider such

an amendment. If the parties cannot agree on changes to the Agreement, the proposed amendments shall remain unchanged.

11. TERMINATION

- a) Any party to this Agreement may terminate it by providing 45 days written notice to the other parties and proposing arrangements for consultation during that period prior to termination to seek agreement on amendments that would avoid termination. In the event of termination, NRCS will comply with §§800.3 through 800.7 with regard to undertakings covered by this Agreement.
- b) Execution of this Agreement by NRCS, WMAT, BIA, THPO and ACHP, and implementation of its terms, is evidence that NRCS has afforded the ACHP an opportunity to comment on the construction of the exempt and non-exempt classes of NRCS undertakings identified in the Applicability and Exceptions section of the *Handbook*.

NATURAL RESOURCES CONSERVATION SERVICE, ARIZONA STATE OFFICE

By: Michael Somerville 8/24/04
Michael Somerville Date
Arizona State Conservationist

THE WHITE MOUNTAIN APACHE TRIBE

By: Dallas Massey, Sr. 4-1-04
Dallas Massey, Sr. Date
Chairman, White Mountain Apache Tribal Council

THE BUREAU OF INDIAN AFFAIRS, WESTERN REGIONAL OFFICE

By: Wayne Nordwall 4-19-04
Wayne Nordwall Date
Regional Director, Western Regional Office

THE BUREAU OF INDIAN AFFAIRS, FORT APACHE AGENCY, WHITERIVER

By: Benjamin Nuvamsa 4/6/04
Benjamin Nuvamsa Date
Superintendent

