NRCS A-3A75-2-64

PROGRAMMATIC AGREEMENT

AMONG

THE UNITED STATES DEPARTMENT OF AGRICULTURE NATURAL RESOURCES CONSERVATION SERVICE,

THE ADVISORY COUNCIL ON HISTORIC PRESERVATION AND

THE NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS

Relative to: Conservation Assistance

WHEREAS, the United States Department of Agriculture, Natural Resources Conservation Service (NRCS), formerly known as the Soil Conservation Service, carries out Conservation Assistance programs for soil, water, and related resource conservation activities under the Soil Conservation and Domestic Allotment Act of 1935 (Public Law 74-46, 16 U.S.C. 590 a-f, as amended); the Flood Control Act of 1944 (Public Law 78-534, as amended); the Watershed Protection and Flood Prevention Act (Public Law 83-566, as amended,16 U.S.C. 1001-1012); the Agricultural and Food Act of 1981 (Public Law 97-98, 95 Stat. 1213); the Agricultural Credit Act (Public Law 95-334), Title IV, Section 403); Food, Agriculture, Conservation and Trade Act of 1990 (Public Law 101-624); the Flood Control Act of 1936 (Public Law 74-738); the Food Security Act of 1985 (Public Law 99-198, as amended); the Federal Agricultural Improvement and Reform Act of 1996 (Public Law 104-127); and related authorities; and

WHEREAS, the NRCS, in consultation[1] with the Advisory Council on Historic Preservation (Council), the National Conference of State Historic Preservation Officers (NCSHPO), and a number of federally recognized Indian Tribes, has determined that certain categories of its conservation programs and activities that meet the definition of undertakings[2] pursuant to the National Historic Preservation Act of 1966 (NHPA) (16 U.S.C. 470f, as amended, Section 301(7)) and the Council's implementing regulations for Section 106 of the Act, "Protection of Historic Properties" (36 CFR Part 800) may affect historic properties as defined in 800.16(l).[3] These activities are therefore subject to review under Section 106 of the NHPA and the Council's implementing regulations; and

WHEREAS, because of the sovereign status of federally recognized Indian Tribes, the NRCS has determined, and the Council has concurred, that it is appropriate to invite each federally recognized Indian Tribe to develop independent consultation protocols with the NRCS (based upon government-to-government consultation) and, hence, no Tribes have been asked to be signatories to this agreement; and

WHEREAS, the NRCS has consulted with a number of federally recognized American Indian governments and Tribal Historic Preservation Officers (THPOs) through direct Nation-to-Nation communication and has extended an invitation to consult with other Tribal governments through several United States Department of Agriculture and NRCS liaison organizations (including the NRCS' State and Regional Tribal liaisons, the NRCS American Indian and

WHEREAS, this agreement does not modify Tribal roles and responsibilities as defined in 101 (d)(2) of the NHPA (16 U.S.C. 470f) nor to Tribal government roles and responsibilities on Tribal lands because these will be addressed by direct compliance with the 36 CFR Part 800 regulations or individual consultation protocols or agreements with federally recognized Tribes; and

WHEREAS, in the absence of State Level Agreements (SLAs) and/or appropriate Tribal consultation protocols, the NRCS' responsibilities for compliance under Section 106 of the NHPA shall be met by direct compliance with the Council's regulations (36 CFR Part 800, dated December 12, 2000 and in effect since January 12, 2001, or subsequent rules under that title), and

WHEREAS, unless otherwise defined in this Agreement, all terms are used in accordance with definitions codified at 36 CFR Part 800.16;

NOW THEREFORE, the NRCS, the Council, and the NCSHPO agree that a streamlined compliance process is desirable for the NRCS' conservation assistance activities and that the NRCS is committed to carry out its responsibilities under Section 106 of the NHPA in accordance with the statements above and the following stipulations, thereby taking into account the effects of its conservation program activities on historic properties that are eligible for listing in the NRHP. The NRCS shall acknowledge this commitment in any new State Level Agreements (SLAs) developed with the State Historic Preservation Officers. Additionally, the NRCS and the Council agree that in recognition of the sovereign status of federally recognized Indian Tribal governments, this nationwide agreement does not apply to Tribal lands nor Tribal review of undertakings pursuant to 101(d)(2) of the NHPA. Rather, the NRCS is committed to simultaneously seeking consultation protocols with individual THPOs and, where there is no 101(d)(2) THPO, other individual governments of federally recognized Indian Tribes.

STIPULATIONS

I. COMPLIANCE THROUGH PROGRAMMATIC PROCEDURES

A. For purposes of compliance with Section 106 of the National Historic Preservation Act (16 U.S.C. 470(f) for conservation assistance activities, the NRCS will follow its policy and procedures for protecting historic properties set forth herein and the procedures resulting from this PA and issued in the NRCS General Manual and associated Cultural Resources Handbook (as they are updated). The procedures set forth in this agreement shall take effect only when an SLA with the relevant SHPO and consultation protocols with relevant Federally recognized Indian Tribes are in effect. Specifically, a) the SLAs are between the NRCS State Conservationist and the designated SHPO for actions on private and public lands; b) consultation protocols are between the NRCS State

Conservationist and the designated THPO for actions on Tribal lands; and c) between the NRCS State Conservationist, the SHPO and Tribal Government(s) for actions on Tribal lands where no THPO has been designated. The SLAs and consultation protocols may also cover procedures for Tribal consultation where a Tribe has an expressed interest in resources on non-Tribal lands (on private or public land, and recognizing the SHPO's consultation role for these lands as well). The NRCS, through its State Offices, will follow the Advisory Council's regulations, 36 CFR Part 800, in each State that does not have an SLA or consultation protocol in effect.

B. The NRCS will continue to update and refine policies and procedures for protecting historic properties to ensure that they are current with legislative mandates, pertinent executive orders and regulations. The NRCS will also issue directives to improve and clarify methods for protection of historic properties. The Council and the NCSHPO will provide the NRCS with copies of new policy and regulatory documents that may affect agency procedures.

2. STATE AGREEMENTS AND TRIBAL CONSULTATION PROTOCOLS

2) Provision for consultation with Indian Tribes consistent with Section 101(d)(6)(B) of the Act and 36 CFR Part 800 or Indian Tribal consultation protocols executed between the NRCS and the Indian Tribes that attach cultural and religious significance to historic properties in that state (see B below).

3) Delineation of SHPO staff responsible for working with the NRCS State Office on the Section 106 review and consultation procedures and the SHPO staff authorized to sign consultation correspondence and agreements.

4) A schedule for annual review with the SHPO and, as appropriate, for revision of the SLA.

5) A schedule for training of field personnel on basic NRCS policy, procedures and field identification processes, using the NRCS modular training or more recently updated training developed in the State Office. The NRCS State Offices shall encourage SHPO staff and the THPOs and Tribes (see B. Tribal Consultation Protocols) to attend and participate in the training sessions.

6) A list of practices and/or programs exempted from case-by-case review,

9) Dispute resolution provisions.

B. AMERICAN INDIAN TRIBAL CONSULTATION PROTOCOLS

The NRCS State Offices shall continue to consult with Tribal Historic Preservation Officers and Federally recognized Tribes that do not have a designated THPO in order to establish consultation protocols for undertakings on Tribal lands. Discussions in developing consultation protocols shall be government-to-government and direct, in person, and otherwise initiated in an appropriate manner for each individual Tribal government. The Tribal and NRCS representatives shall work together to develop the consultation protocols. Form letters and public notices, among other forms of notification, are not appropriate when used as the sole attempt to consult.

Whenever possible, the discussions and consultation protocols shall be built upon existing relationships between the NRCS and Tribal governments, established through the NRCS' technical assistance programs, while recognizing the importance of government-to-government communication with sovereign Indian Tribes. When agreed upon by all parties or as set out by the Council's regulations (36CFR800.3(c)(1)), the NRCS shall invite the SHPO to participate in these consultation activities.

During development of the consultation protocols, the State Office officials shall review with the Indian Tribe the list of exemptions outlined in Paragraph 3 (Exemptions, below) of this agreement. Exemptions developed with the SHPO in the SLA and the broad category exemptions included in Paragraph 3, "Exemptions," of this agreement do not necessarily apply to Tribal lands. All exemptions must be established during the development of individual Tribal consultation protocols and in accordance with 36 CFR 800.14(c).

These consultation protocols shall establish:

1) Delineation of Section 106 review and consultation procedures specifying, by title, who carries out various portions of consultation, identification, evaluation, and review, and designating, by location and title, the Cultural Resources Specialist for the NRCS State Office who meets the Secretary of Interior's standards for historic preservation personnel (The Secretary of the Interior's Professional Qualification Standards (48 FR 44716, September 29, 1983). This specialist (archaeologist, historian, architectural historian, or other historic preservation professional) must be available to oversee resources identification, determinations of eligibility and development of historic properties treatment recommendations. The consultation protocol shall detail the roles and responsibilities of the trained field personnel and the professional Cultural Resources Specialist (s).

2) Who (by title), will participate in consultation for the NRCS and for the American Indian Tribe.

3) When, where, and in what format (written, face-to-face meetings, etc.) this consultation shall take place.

4) Any actions, programs or practices exempted from case-by-case review (including but not limited to the general exemptions herein).

5) Timeframes for responses to requests for consultation.

6) A schedule for training of field personnel on basic NRCS policy. The NRCS State Office shall encourage Tribal and/or THPO staff to attend and participate in the training sessions.

7) Any other specific needs (e.g. level and form of documentation of the proposed action) to complete the protocol.

8) Emergency provisions consistent with Section 800.12 of the Council's regulations and Section 110(j) of the NHPA and its implementing regulations found at 36 CFR Part 78.

9) Public participation provisions that recognize the rights of private and Tribal land owners and are consistent with Tribal ordinances and commensurate with the nature, scale, and complexity of the proposed actions (see 800.2 (c) and (d)).

10) Dispute resolution provisions.

C. COUNCIL PARTICIPATION IN DEVELOPMENT OF AGREEMENTS

At any time during negotiations for the development or revision of a SLA or Tribal

D. LACK OF A STATE LEVEL AGREEMENT OR CONSULATION PROTOCOLS

If for any reason a NRCS State Conservationist determines it is not possible to establish an agreement with the SHPO or it is not possible or appropriate to establish a consultation protocol with any Federally recognized Tribe, the NRCS State Conservationist shall document this fact in writing and place it in the NRCS State Office files, with a copy to the NRCS FPO. The FPO shall forward this documentation to the Council.

Until an SLA and consultation protocol(s) are properly executed, the NRCS State Office shall comply with Section 106 of the National Historic Preservation Act in accordance with 36 CFR Part 800.3-800.7 and *none of the provisions of this agreement shall apply*, including Paragraph 3, "Exemptions."

E. UPDATING, COMPLETION AND DISTRIBUTION OF AGREEMENTS AND PROTOCOLS

The NRCS will maintain a copy of each final SLA and American Indian consultation protocol on file in the Washington, DC office of the Council and with the NRCS FPO. All SLAs and American Indian Tribal consultation protocols must be consistent with this agreement and must meet the requirements of the Council regulations, 36 CFR Part 800. The NRCS State Conservationist shall submit each agreement and Tribal consultation protocol to the FPO and Council Washington, DC Headquarters office upon completion. The Council and the NRCS FPO (and members of the NRCS senior management, as necessary) will have 30 days to review and comment on the completeness and consistency of each agreement. Upon completion of this review and concurrence on and integration of needed revisions, or upon expiration of the 30 days, the agreement shall be in effect.

All extant SLAs or Tribal consultation protocols must be reviewed by all relevant parties (including the NRCS State Office, the SHPO, THPO, Tribes, the NRCS FPO and Council Washington Office) and updated to ensure consistency with the Council's regulations and this agreement. This review and update must take place within one calendar year of the date of ratification of this PA or the SLAs or Tribal consultation protocols shall be suspended. The NRCS State Offices shall forward all new SLAs or Tribal consultation protocols to the NRCS FPO after obtaining signatures of all participating parties. The FPO will forward copies of this document to the Council, Washington Office, for review and concurrence. Such agreements shall be in effect upon concurrence by the NRCS FPO and Council or after 30 calendar days, whichever comes first.

These SLAs and consultation protocols are to address the NRCS NHPA Section 106 compliance responsibilities for conservation assistance undertakings that may affect historic properties listed in or eligible for listing in the NRHP.

3. NATIONAL EXEMPTIONS

The NRCS provides conservation assistance through categories of programs or activities that, by definition (36 CFR 800.16(y)) are generally considered undertakings. The NRCS, the Council and the NCSHPO have determined that several broad categories of NRCS activities or programs may be undertakings but may also be exempted nationwide under the provisions of 36 CFR 800.14(c) because their potential effects are foreseeable and likely to be minimal or not adverse. These are:

A. Advice or technical assistance, including the development, review and/or approval of conservation plans or technical designs when NRCS provides no financial assistance for their implementation or otherwise exercises no control over implementation (for example, design advice from the NRCS National Handbook of Conservation Practice Standards for a farm pond that is installed, independently by the agricultural producer[6] with his or her own funds and private contractor).

   When known to the NRCS, the agency will advise the producer when proposed practices that are to be installed without any Federal assistance appear to have the potential to affect historic properties and provide the name(s) of possible contacts (e.g. the SHPO and THPO) who may provide guidance on identifying and protecting historic properties. Additionally, the plan will advise the producer that state or local cultural resources, historic preservation or state burial laws may apply. The producer may use these data if he/she decides to implement the conservation plan without NRCS financial assistance.

B. Technical determinations based upon empirical or factual findings and determinations of compliance or non-compliance including, but not limited to, wetlands determinations, determinations of highly erodible land, certification of the existence of a wetland or highly erodible land, determination of prime and unique farmland, and the like;

C. Analyses of data from technical determinations or resource inventories, including but not limited to Soil Survey (7CFR Part 611), Snow Survey and Water Supply Forecasts (7CFR Part 612), Plant Materials for Conservation recommendations (7 CFR Part 613), River Basin Studies under Section 6 of P.L 83-566 (7 CFR Part 621);

D. Development or revision of technical standards and specifications.

E. Changes or amendments to approved actions when the NRCS State Office, in consultation with the SHPO/THPO, concur that such changes have no potential to affect National Register eligible properties.

F. Resource inventory, monitoring, field trials, and other information gathering activities that do not involve subsurface disturbance.

G. Conservation easement purchases, the management plans for which do not call for structural modification or removal or ground disturbing activities.

Programs of study under the authority of Public Law 83-566, as amended (implemented through 7 CFR Part 621), specifically: River Basin Studies, Floodplain Management Studies, Natural Resource studies.

Before implementing any nationally exempted activities, the NRCS State Cultural Resources Specialist or Coordinator will review the foreseeable effects of the activity to ensure that there are no special circumstances that might result in adverse effects to NRHP eligible resources.

Exemption of NRCS conservation practice standards installed in the field must be reviewed at a local or regional level, taking into account the cultural, historical, ecological and environmental variables, local methods of installation and maintenance considerations that may comprise direct or indirect effects (800.5(a)(1)). These local or regional exemptions will be included in SLAs and Tribal consultation protocols (see Stipulation 2, above) and, therefore, developed in consultation with the relevant SHPO, THPO or Indian Tribe and subject to review and revision by the NRCS Headquarters and the Council prior to final implementation.

4. MONITORING, ANNUAL REPORTING AND REVIEW

A. MONITORING.

The NRCS (National Headquarters and State Offices) will inform the NCSHPO, individual SHPOs, THPOs, American Indian Tribal Governments, and the Council regarding NRCS actions pursuant to this Agreement or individual State Level Agreements, and Tribal consultation protocols. Such monitoring may be initiated through NRCS management reviews, as necessary, or through Council staff reviews.

B. ANNUAL REPORTING.

The NRCS Headquarters shall provide the Council, NCSHPO and any Tribal government that requests it, a copy of the annual cultural resources report it submits to the Department of Interior. This report is generally available by March 1 (and no later than March 30) for the preceding calendar year. The report is produced for incorporation into the Executive Branch's annual report to Congress in accordance with the Archaeological and Historic Preservation Act of 1974 (PL 93-296). This report includes:

1) A summary of activities conducted by the NRCS in each state and on Tribal lands.

2) A descriptive summary of the NRCS efforts to conduct its cultural resources training program for field personnel, partners and cooperating agencies and any problems encountered and accomplishments achieved in this effort.

3) A report, as appropriate, identifying any issues, initiatives or goals the NRCS will address in the coming year with regard to its cultural resource program, and any guidance or assistance that the Council or NCSHPO may provide to help make compliance activities more effective.

4) A discussion identifying any problems the NRCS encountered in carrying out the terms of this agreement that need to be addressed by the signatories through amendments or development of guidance documents.

5) Any other information the NRCS wishes to provide that might improve the effectiveness of this agreement.

C. REVIEW

Upon receipt of the annual report, the Council, NCSHPO, and any recipient Tribal government shall have thirty (30) days to review and comment on the adequacy of the report, and to respond to any questions or requests posed by the NRCS regarding its content and findings.

1) Any signatory to this Programmatic Agreement may request in writing signatories meet to review and discuss any aspect of the annual report. Upon receipt of such a request, the NRCS shall arrange for the parties to meet (in person or by teleconference) and invite other participants, as necessary, and discuss the questions or concerns.

2) Failure by the NRCS to provide an annual report by March 30 of the following year without explanation may constitute grounds for the Council and NCSHPO to suspend this agreement. Such a suspension of the agreement will take effect, after discussion with the NRCS FPO and appropriate members of the NRCS senior management and upon receipt by the NRCS of written notification from the Council and NCSHPO. Such a suspension shall be lifted upon receipt of the report by the NCSHPO and Council.

5. DISPUTE RESOLUTION

Should any signatory to this agreement object to any actions or documents issued under the terms of this agreement, the NRCS shall, in an effort to resolve the objection, confer with the signatory. If the NRCS or objecting party determines that the issue cannot be resolved within 30 days of receipt of the objection, the NRCS shall provide all relevant information regarding the dispute, including the NRCS proposed resolution to the Council for comment. Within 30 days of receipt of all relevant documentation, the Council will either:

A. Provide the NRCS with recommendations which the NRCS shall take into account in reaching a final decision regarding the matter; or

B. Notify the NRCS FPO that it will comment pursuant to 36 CFR Section 800.7(c), and proceed to comment within 45 days of notification to the NRCS.

C. Any recommendations or comments provided by the Council shall be taken into account by the NRCS with reference to the subject of the dispute, in accordance with 36 CFR Section 800.7(c). Any recommendations or comments provided by the Council will be understood to pertain only to the subject of the dispute; the NRCS responsibilities to carry out all actions that are not the subjects of the dispute will remain unchanged.

D. At any time during implementation of this agreement, should a member of the public or a Federally recognized Indian Tribe object to any measure of this agreement, or its implementation, the NRCS shall take into account the objection and confer with the objecting party, SHPO, THPO, and/or Council as needed to resolve the objection within 45 days. The NRCS is responsible for making the final decision after conferring with the other parties.

6. AMENDMENT

Any signatory to this agreement may propose that it be amended or modified, whereupon the parties will confer and consider such amendment. Any resulting amendment shall be executed in the same manner as the original agreement and require the agreement of all signatories.

7. TERMINATION

Any signatory to this agreement may terminate it by providing written notice to the other parties with specific reasons for such termination. During a 60-day period following the notice, the signatories shall consult and attempt to resolve the issue(s) leading to the notice. If the signatories are unable to resolve the issues, termination will occur at the end of the 60-day period. As stated above, under such termination, the NRCS will complete its Section 106 compliance for individual undertakings in accordance with the Council's regulations, 36 CFR Part 800.

8. EXPIRATION

This agreement shall expire ten years from the date of execution. This agreement is dependent upon biennial (every other year) consultation among the signatories to review the adequacy of implementation of the Agreement.

Execution of this programmatic agreement and implementation of its terms evidences that the NRCS has taken into account the effects of its assistance activities and programs on historic properties, and has afforded the Council a reasonable opportunity to comment on its assistance activities and their likely effects on historic properties.

Signatories:

BRUCE I. KNIGHT
Chief
Natural Resources Conservation Service

DATE 5/7/02

JOHN L. NAU, III
Chairman
Advisory Council on Historic Preservation

DATE May 31, 2002

EDWARD F. SANDERSON

DATE May 16, 2002

President

ENDNOTES

the national security." In such cases, within 12 days, the Chief or his designee (the State Conservationist) must notify the Secretary of the Interior, in writing, identifying: (1) the major disaster necessitating the waiver; (2) the period of effect of the waiver (generally no more than 30 days after the determination that disaster assistance is needed); (3) which parts of Section 110 have been waived; (4) the geographic area to which the waiver applies; (5) the measures to be taken to minimize harm to historic properties. In all cases, information copies of the notice sent to the Secretary of the Interior shall also be forwarded to the Council, the SHPO and the NRCS FPO in NRCS Ecological Sciences Division. In all other cases, the SHPO must be consulted and follow-up documentation shall be sent to the Council.

[6] "Producer" refers to an agricultural or livestock producer, that is, a farmer or rancher.