

12 Tamarack Programmatic Agreement

**PROGRAMMATIC AGREEMENT
AMONG
THE UNITED STATES DEPARTMENT OF AGRICULTURE, FOREST SERVICE
AND
THE MONTANA STATE HISTORIC PRESERVATION OFFICER
AND
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION
REGARDING
THE 12 TAMARACK PROJECT
SUPERIOR RANGER DISTRICT, LOLO NATIONAL FOREST
MONTANA
(April 10, 2015)**

WHEREAS, the U.S. Forest Service, Lolo National Forest (FS) is proposing to implement the 12 Tamarack Project (Undertaking) in the Superior Ranger District, Montana, under the authority of the Organic Act (16 U.S.C. 473-551, as amended); Multiple Use-Sustained Yield Act (P.L. 86-517); National Forest Management Act (P.L. 94-588, as amended), National Environmental Policy Act (P.L. 91-190); Federal Land Policy and Management Act (43 U.S.C. 1701-182); Cooperative Forestry Assistance Act (P.L. 95-313, as amended); Food, Conservation, and Energy Act (P.L. 110-234), and related laws, regulations and policies; and

WHEREAS, the FS Undertaking is described in the 12 Tamarack Environmental Assessment (EA) prepared pursuant to the National Environmental Policy Act (NEPA) (P.L. 91-190) and dated May 2015, which will improve water quality and aquatic habitat; restore vegetation resilience and wildlife habitat; address travel management issues; and enhance recreation opportunities. The Undertaking specifically involves timber harvest, fuels reduction, and prescribed burning of approximately 16,000 acres; temporary construction, relocation, closure, conversion, and maintenance of approximately 430 miles of road; and improvements to trailheads and recreation; and

WHEREAS, the FS has defined the Undertaking's Area of Potential Effect (APE), shown in Appendix A, as the area bounded by Interstate 90 and the St. Regis River to the south, Highway 135 (St. Regis Cutoff) and Clark Fork River to the east, Coeur d'Alene/Cabinet Divide to the north and Twelvemile Creek to the west; and

WHEREAS, the FS has determined that the Undertaking has the potential to affect historic properties, not yet identified or evaluated, which are eligible for listing in the National Register of Historic Places, and has consulted with the Montana State Historic Preservation Officer (MTSHPO) pursuant to 36 CFR Part 800, the regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. § 470f); and

WHEREAS, this programmatic agreement (PA) for the 12 Tamarack Project is executed because of the complex, multi-year scope of this Undertaking (36 CFR § 800.14(b)(1)(i)) and

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because its effects cannot be fully determined prior to the Forest Supervisor's approval of undertaking (36 CFR §800.14(b)(1)(ii)); and

WHEREAS, the FS has determined that a phased identification and evaluation of historic properties and application of criteria of adverse effect is appropriate for the Undertaking as specifically permitted under 36 CFR §800.4(b)(2) and 36 CFR §800.5(a)(3), such that completion of the identification and evaluation of historic properties, determinations of effect on historic properties, and consultation concerning measures to avoid, minimize, or mitigate any adverse effects will be carried out after the FS releases its NEPA decisions and prior to approving any activities associated with implementation of the Undertaking; and

WHEREAS, in accordance with regulations at 36 CFR §800.14(a)(1), the FS has notified and invited the Advisory Council on Historic Preservation (ACHP) to participate in development of this PA, and the ACHP has elected to participate in the Section 106 consultation and is a Signatory to this PA, per their letter dated March 19, 2015; and

WHEREAS, pursuant to Section 101(d)(6)(B) of the NHPA and 36 CFR §800.2(c)(2)(ii) of the NHPA implementing regulations, the FS has consulted with the Confederated Salish and Kootenai Tribes of the Flathead Nation (CSKT) and the Nez Perce Tribe on this Undertaking and this PA, and has invited those Tribes expressing an interest in the Undertaking to concur in this PA, with the further understanding that, notwithstanding any decision by these Tribes to decline concurrence, the FS shall continue to consult with these Tribes throughout the implementation of this PA; and

NOW, THEREFORE, the FS, ACHP, and MTSHPPO agree that the Undertaking shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on historic properties.

STIPULATIONS

The FS shall ensure that the following provisions are carried out:

I. COMMUNICATIONS AND COORDINATION ON PHASING

Because of project scale and scope, implementation will necessarily occur over a 10-year period based on the availability of agency and partnership funding, federal contracting processes, and other contingencies such as wildfire. In order to complete cultural resource inventory and related work, the FS will:

- A. Annually conduct inventory and related compliance work in accordance with the 12 Tamarack Heritage Implementation Schedule (Appendix B). Ensure that this work is part of the Lolo NF annual Program of Work (POW) planning, budgeting and work allocation.
- B. Provide copies of the year's implementation schedule to the CSKT as part of annual (pre-field season) POW consultations and to the MTSHPPO, ACHP, and other concurring

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parties as requested. Consult with tribes regarding annually scheduled work following the direction in 36 CFR 800.2(c)(2) and FSM 2361.22 and Lolo NF. The Nez Perce have deferred to the CSKT regarding tribal consultation, per communications dated December 14, 2012.

- C. Monitor and adjust the annual implementation schedule in the POW work as necessary to address communications, procedural or technical issues related to this Undertaking, as identified by any party to this agreement.
- D. If current year implementation work is conducted by a consultant or contractor, all work will be reviewed by the Lolo National Forest Heritage Program professional to ensure the documentation is prepared by qualified professionals (36 CFR 800.2(a)(1), meets the Secretary of the Interior's *Standards and Guidelines for Archaeology and Historic Preservation* (36 CFR 800.2(a)(3)), and adequate (36 CFR 800.11(a)).
- E. Individuals employed by cultural resource consultants or contractors that work for the Forest under the authority of this document must meet standards defined by 36 CFR §61 and the Secretary of Interior's Professional Qualifications. All work done by a cultural resource consultant or contractor will follow a scope of work (SOW) and a Permit for Archaeological Investigations prepared by the FS heritage professional in accordance with Forest Service Manual (FSM) 2367 –Heritage Program (Permitting).

II. IDENTIFICATION, EVALUATION, EFFECTS ASSESSMENT, AND RESOLUTION OF ADVERSE EFFECTS

After the Lolo Forest Supervisor approves the undertaking and prior to authorizing any activity associated with the implementation of the Undertaking, the following shall be annually completed in accordance with the 12 Tamarack Project POW:

A. IDENTIFICATION OF HISTORIC PROPERTIES

1. The FS will identify an area of potential effects (APE) as defined at 36 CFR 800.16(d).
2. The FS will overlay the APE with areas previously investigated and documented in the FS letter to the MTSHPD dated July 15, 2014.
3. The FS will complete historic property identification (inventory) in those areas of the APE which were not previously inventoried in accordance with the 12 Tamarack Heritage Implementation Schedule (Appendix B) and the Bitterroot, Flathead and Lolo NF Site Identification Strategy (SIS) (Appendix C) and FSM 2363-Identification, Evaluation and Allocation.
4. All records and material collections resulting from this Undertaking shall be curated or managed in accordance with 36 CFR §79 and, where applicable, provisions of the Native American Graves Protection and Repatriation Act (NAGPRA) and its implementing regulations at 43 CFR §10, and FSM 2366-Heritage Program (Collections). Unless

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threatened by damage or theft, in most cases artifacts will be left in situ during survey and evaluation work.

B. DETERMINATION OF NATIONAL REGISTER OF HISTORIC PLACES ELIGIBILITY

For each building, structure, object, site, or district that the FS identifies within the APE for the 12 Tamarack, the FS will determine, in consultation with MTSHP, CSKT, and any other consulting parties, whether it is eligible for the National Register of Historic Places by applying the Criteria for Evaluation (36 CFR Part 63). Any identified road and trail segment will be evaluated for eligibility if it is:

1. Historic in origin, as demonstrated by their presence on Government Land Office (GLO), survey and mineral claim records, FS maps, and other early records.
2. Linked to a significant historic property or set of properties such as a mining or homestead complex or district.
3. Contain an exposed historic or prehistoric cultural resource within the APE, such as a lithic scatter or homestead ruin that is bisected by a road or trail (roads and trails are a common discovery locus in forested environments).
4. Have value as a traditional cultural property to a tribe or other descendant communities, such as providing access to a tribal religious or traditional use site or currently-used historic recreation residences located on FS-designated tract.

The FS shall complete its determinations of eligibility and resolve any disagreements in accordance with the process in 36 CFR 800.4(c)(2).

C. ASSESSMENTS OF EFFECT/ADVERSE EFFECT AND RESOLUTION OF ADVERSE EFFECT

As inventory progresses according to the 12 Tamarack Implementation Schedule (Appendix B), the FS shall apply the definition of effect (36 CFR 800.16(i)) and determine whether the project activities will effect historic properties. If no historic properties will be affected, then the FS will provide documentation of its finding to the MTSHP, CSKT, and other consulting parties in accordance with Stipulation III (PA Reporting Process), below.

1. If actions implemented during the 12 Tamarack Project will affect historic properties, then the FS will apply the criteria of adverse effect (36 CFR 800.5(a)) to determine whether the activities will adversely affect historic properties. If the annual actions identified in the POW and 12 Tamarack Heritage Implementation Schedule (Appendix B) will have no adverse effect then the FS will provide documentation of its finding to the MTSHP, CSKT, and other consulting parties in accordance with Stipulation III, below.
2. If the actions implemented during the 12 Tamarack Project have potential to adversely affect historic properties, the FS will apply site avoidance as the primary avoidance

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treatment, including establishing, at minimum, a 200-foot buffer around the affected historic property or unevaluated cultural resource. If the FS can commit to successfully avoiding adverse effect, then it will return to Stipulation II above to revise its finding.

3. If the FS finds that it cannot avoid adverse effects to historic properties by applying a buffer, then the FS will initiate consultation with the MTSHP, CSKT, and other consulting parties to develop and consider alternatives to avoid, minimize, or mitigate such adverse effects (36 CFR 800.6(a)). The ACHP waives its rights to notification of such consultation (36 CFR 800.6(a)(1)), but the FS or any other party may request ACHP participation in accordance with the Dispute Resolution Stipulation.
4. The FS, MTSHP, and other parties may conclude the resolution of adverse effects for the activities of an annual POW by executing a Memorandum of Agreement (36 CFR 800.6(b)(1)).

III. PA REPORTING PROCESS: FS AND MTSHP REPORTING

The FS will use the following reporting procedures in order to meet the intent and purpose of this PA:

- A. Reporting will conform to FSM 2360; FS Handbook 2309.19, and MTSHP Planning Bulletin 21 standards and guidelines.
- B. All Negative Inventory and No Historic Properties (Adversely) Affected Inventory reports will be submitted to the MTSHP prior to December 31 of the calendar year in which the inventory was completed so they can be included in the annual report required under this PA.
- C. The MTSHP may periodically review incoming Negative Inventory and No Historic Properties (Adversely) Affected Inventory reports and may provide comment to the FS if non-compliant or problematic reporting is identified.
- D. The FS Heritage Professional will submit to the MTSHP:
 1. Paper and digital copies of each Negative or No Historic Properties Affected inventory report.
 2. ArcGIS shape files for inventoried areas and cultural resources.
 3. A cover letter signed by the Forest Heritage professional or a Line Officer clearly identifying the 12 Tamarack EA Undertaking(s); compliance status; and Heritage Professional contact information.
- E. Each calendar year following the execution of this PA until it expires or is terminated, the FS will provide all parties to this PA a 12 Tamarack EA cultural resource report of the annual work undertaken pursuant to its terms, unless the party specifically declines in

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writing that the report is unnecessary. The cultural resource report will include any scheduling changes proposed including those affecting the APE, any problems encountered, and any disputes and objections received in the Lolo NF Heritage Program efforts to carry out the terms of this PA.

- F. The FS Lolo NF Heritage Professional will submit an annual (calendar year) 12 Tamarack report to the MTSHPPO consisting, at minimum, of:
1. Title, Executive Summary, and Table of Contents;
 2. Forest SIS Strategy discussion for the reporting year;
 3. Table showing all Negative and No Historic Properties (Adversely) Affected inventory reports.
 4. Table showing all Adverse Effect projects, and mitigation measures applied, reviewed under standard procedures at 36 C.F.R. 800.4 through 800.7.
- G. The MTSHPPO shall provide comments to the Lolo NF Heritage Program regarding the annual 12 Tamarack report by March 15 of the calendar year following the year being reported so that adjustments to field or reporting methods or procedures can be made well in advance of the upcoming field season and next reporting period. Any revisions of the annual reports will be negotiated by the MTSHPPO and Lolo NF Heritage Program Professional.

IV. TRIBAL CONSULTATION

The FS Lolo NF Heritage Program will fulfill its and NHPA Section 106 responsibilities for this Undertaking by following FS and Region One Tribal Consultation Protocols (Appendix D), including but not limited to:

- A. Consulting with concurring tribal parties to this PA regarding the annual FS activities within the POW and this Undertaking, including the yearly work identified in the 12 Tamarack Heritage Implementation Schedule (Appendix B).
- B. Providing opportunities for on-site visits to the project area to address general or specific areas of interest or concern to THPOs, culture committees, and Elders, at their request.
- C. Providing opportunity to review all cultural reports and documentation related to this project, including field identification procedures and site protection efforts.
- D. Consulting with tribes that request such consultation of whatever kind regardless of their status as a Concurring Party to this PA.

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- E. Documenting NHPA Section 106 tribal consultation in cultural resource reports and consultation over the project following procedures established by the FS Office of Tribal Relations (OTR) program.

V. CONFIDENTIALITY OF CULTURAL RESOURCE DATA

The FS may withhold confidential information in accordance with NHPA, Section 304, and the Archaeological Resources Protection Act, Section 9(a). Cultural resources data obtained from this undertaking will be treated as confidential by all Signatories and not released to any party not a Signatory to this agreement. Duplication or distribution of cultural resource data by any signatory requires written authorization from the FS.

VI. DURATION

This PA will expire if its terms are not carried out within ten (10) years from the date of its execution. Prior to such time, the FS may consult with the other Signatories and Invited Signatories to reconsider the terms of the PA and amend it in accordance with Stipulation XI.

VII. POST-REVIEW DISCOVERIES

If potential historic properties or unevaluated cultural resources are discovered or unanticipated effects on historic properties found, the FS shall implement the Northern Region Unanticipated Discovery Plan and Discovery of Human Remains and FSM 2363 (Unanticipated Discovery) protocols, and the Native American Graves and Repatriation Act (NAGPRA) and 43 C.F. R. 10 in the case of unanticipated discoveries involving human remains and cultural resource damage (Appendix E).

VIII. DISPUTE RESOLUTION

Should any signatory or concurring party to this PA object at any time to any actions proposed or the manner in which the terms of this PA are implemented, the FS will consult with such party to resolve the objection. If the FS determines that such objection cannot be resolved, the FS will:

- A. Forward all documentation relevant to the dispute, including the FS's proposed resolution, to the ACHP. The ACHP shall provide the FS with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation.
- B. Prior to reaching a final decision on the dispute, the FS shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP, signatories and concurring parties, and provide them with a copy of this written response. The FS will then proceed according to its final decision.
- C. If the ACHP does not provide its advice regarding the dispute within the thirty (30) day time period, FS may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, FS shall prepare a written response that takes into

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account any timely comments regarding the dispute from the signatories and concurring parties to the PA, and provide them and the ACHP with a copy of such written response.

IX. AMENDMENTS

This PA may be amended when such an amendment is agreed to in writing by all signatories. The amendment will be effective on the date a copy signed by all of the signatories is filed with the ACHP.

X. TERMINATION

If terminated prior to the completion of the terms of this PA, the FS must either (1) execute another PA pursuant to 36 CFR §800.14(b) or (2) revert to the 36 CFR §800 implementing regulations to address any remaining Section 106 responsibilities. The FS shall notify the signatories as to the course of action each agency will pursue.

XI. EXECUTION AND EFFECTIVE DATE

This PA shall take effect on the date of the last signatory signature. Any amendments or appendices to this PA shall take effect on the dates they are fully executed by the signatories, or such other self-executing dates as may be described in those documents.

Execution of this PA by the FS, MTSHPO and ACHP and implementation of its terms evidence that the FS has taken into account the effects of this undertaking on historic properties and afforded the ACHP an opportunity to comment.

APPENDICES

- A. 12 Tamarack APE Map, 2013
- B. 12 Tamarack Heritage Implementation Schedule, 2015
- C. Bitterroot, Lolo, and Flathead NF Site Identification Strategy, 2003
- D. Lolo National Forest Tribal Consultation Protocols (Draft), 2015
- E. Northern Region Unanticipated Discovery Plan and Discovery of Human Remains Protocols, 2011

SIGNATORIES

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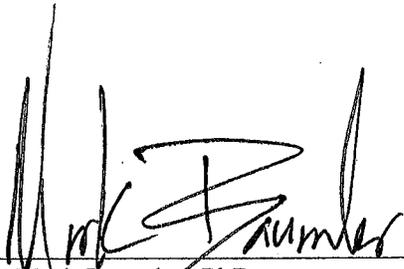
Timothy Garcia, Forest Supervisor
Lolo National Forest

June 26, 2015

Date

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Dr. Mark Baumlör, PhD
Montana State Historic Preservation Officer

6/19/2015
Date

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SUPERIOR RANGER DISTRICT, LOLO NATIONAL FOREST

MONTANA


for John M. Fowler, Executive Director
Advisory Council on Historic Preservation

7/20/15
Date

