

**PROTOTYPE PROGRAMMATIC AGREEMENT
REGARDING CONSERVATION ASSISTANCE
BETWEEN THE
US DEPARTMENT OF AGRICULTURE
WYOMING NATURAL RESOURCES CONSERVATION SERVICE STATE OFFICE,
AND THE
WYOMING STATE HISTORIC PRESERVATION OFFICE**

WHEREAS, the United States Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) administers numerous voluntary assistance programs, special initiatives, and grant and emergency response programs for soil, water, and related resource conservation activities available to eligible private producers, states, commonwealths, Federally Recognized Tribal governments, other government entities, and other applicants for conservation assistance, pursuant to the Agricultural Act of 2014 (2014 Farm Bill, Public Law 113-79); 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 95-3341, 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 executive and secretarial orders, implementing regulations and related authorities; and

WHEREAS, NRCS, through its conservation assistance programs and initiatives, provides assistance for activities with the potential to affect historic properties eligible for or listed in the National Register of Historic Places (NRHP), including National Historic Landmarks (NHLs) and therefore constitute undertakings subject to review under Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f, and its implementing regulations, 36 CFR Part 800, including the provisions of these regulations addressing NHLs at 36 CFR Part 800.10; and

WHEREAS, NRCS has determined that the requirement to take into account the effects to historic properties of its undertakings may be more effectively and efficiently fulfilled through the use of a Prototype Programmatic Agreement (Prototype Agreement); and

WHEREAS, the NRCS Wyoming State Office (NRCS-Wyoming) has consulted with the Wyoming State Historic Preservation Officer (SHPO) and followed the instructions in the ACHP letter which accompanied the Prototype Agreement, dated November 21, 2014; and

WHEREAS, NRCS also is responsible for fulfilling the requirements of the National Environmental Policy Act (NEPA), including the use of categorical exclusions, and

coordinating NEPA and Section 106 reviews, as appropriate; and

WHEREAS, NRCS developed the Prototype Agreement in consultation with the National Conference of State Historic Preservation Officers (NCSHPO) and its members, interested Indian tribes, Native Hawaiian organizations (NHO), interested historic preservation organizations, (such as the National Trust for Historic Preservation), and the Advisory Council on Historic Preservation (ACHP); and

WHEREAS, in accordance with 36 CFR Part 800.14(b)(4), the ACHP has designated this agreement as a Prototype Agreement, which allows for the development and execution of subsequent prototype agreements by individual NRCS State office(s) (State-based Prototype Agreements) to evidence compliance with Section 106; and

WHEREAS, this State-based Prototype Agreement (sPA) conforms to the NRCS Prototype Agreement as designated by the ACHP on November 21, 2014, and therefore, does not require the participation or signature of the ACHP when the NRCS State Office and the SHPO/Tribal Historic Preservation Officers (THPO) agree to the terms of the State-based Prototype Agreement; and

WHEREAS, this Prototype Agreement replaces the 2002 nationwide “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,” as amended in 2011 and 2012, which expired on November 20, 2014; and

WHEREAS, the NRCS-Wyoming State Conservationist is the responsible federal agency official within the state for all provisions of Section 106, including consultation with the SHPO, NHOs, and government-to government consultation with Indian tribes to negotiate the State-based Prototype Agreement; and

WHEREAS, this State-based Prototype Agreement does not apply to undertakings occurring on or affecting historic properties on Tribal lands, as defined by Section 301(14) of the NHPA, without prior agreement and execution of a State-based Prototype Agreement with the concerned Indian tribe; and

WHEREAS, the NRCS-Wyoming has consulted with Indian tribes and has invited the Native American Indian Tribes listed in Appendix E; Consulting Tribes, to enter into this State-based Prototype Agreement as concurring signatories; and

WHEREAS, this Prototype Agreement does not modify the NRCS’ responsibilities to consult with Indian tribes and NHOs on all undertakings that might affect historic properties and properties of religious and cultural significance to them, regardless of where the undertaking is located, without prior agreement by the concerned Indian tribe or NHO, and recognizes that historic properties of religious and cultural significance to an Indian tribe or NHO may be

located on ancestral homelands or on officially ceded lands near or far from current settlements;
a n d

WHEREAS, when NRCS conducts individual Section 106 reviews for undertakings under this State-based Prototype Agreement, it shall identify and invite other agencies, organizations, and individuals to participate as consulting parties; and

NOW, THEREFORE, the NRCS-Wyoming and the SHPO, agree that undertakings in the State of Wyoming shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on historic properties.

STIPULATIONS

NRCS shall ensure that the following stipulations are met and carried out:

I. Applicability.

- a. Once executed by the NRCS and the SHPO, this State-based Prototype Agreement (sPA) sets forth the review process for all NRCS undertakings subject to Section 106 in the State of Wyoming except for those on Tribal lands.
- b. Execution of this sPA supersedes any existing State Level Agreement with the SHPO executed under the previous NRCS nationwide Programmatic Agreement, but does not replace any existing project/undertaking-specific Section 106 agreements (Memoranda of Agreement or Programmatic Agreements).
- c. This sPA applies only when there is a NRCS Federal Preservation Officer (FPO) at the National Headquarters (NHQ) level and a Wyoming State Level Cultural Resources Specialist (CRS) who meets the Secretary of the Interior's (SOI) Professional Qualification Standards (48 FR 44716).
- d. This sPA applies only where there is staffing or access to staffing (through contracted services or agreements with other agencies or Indian tribes) who meet the SOI's Professional Qualification Standards in the NRCS-Wyoming.

II. Roles and Professional Qualifications.

The NRCS-Wyoming is responsible for oversight of its performance under this sPA (Appendix D). NRCS agrees to maintain regular and continuing access to a State Cultural Resources Specialist (SCRS). This person or persons will meet the qualifications contained in "Archeology and Historic Preservation; Secretary of the Interior's Standards and Guidelines - Professional Qualifications Standards." NRCS will maintain this access by 1) systematically contracting needed investigations and surveys for actions beyond the scope of NRCS employee

qualifications, certifications and responsibility, as agreed by the SHPO and/or 2) hiring permanent, temporary, or intermittent employees with appropriate qualifications.

NRCS-Wyoming shall ensure all NRCS staff or individuals carrying out Section 106 historic preservation compliance work on its behalf, including the NRCS-Wyoming senior historic preservation professional staff member (CRS, or Archaeologist, or Historian) are appropriately qualified to coordinate the reviews of resources and historic properties as applicable to the resources and historic properties being addressed (site, building, structure, districts, objects, landscapes, Traditional Cultural Properties, cultural resources of significance to any ethnic group(s) or Tribes, and other concerned communities). Thus, these staff and consultants must meet the SOI's Professional Qualification Standards.

a. The NRCS-Wyoming is responsible for consultation with the SHPO, and government-to-government consultation with Native American Indian Tribes, when the NRCS-Wyoming is the lead federal agency. Those Native American Indian Tribes are listed in Appendix E, Consulting Tribes, with Tribal leaders and/or their THPOs, including: to develop consultation protocols. These responsibilities may not be delegated to any other staff, nor carried out on behalf of NRCS by another federal agency.

b. The NRCS-Wyoming CRS/Archaeologist/Historian who meets SOI standards shall provide technical historic property and resource information to the NRCS-Wyoming State Conservationist for use in Section 106 findings and determinations after appropriate consultations with the SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, and discussions with the landowner. The NRCS-Wyoming CRS/Archaeologist/Historian shall monitor and oversee the work and reporting of all NRCS field office personnel and professional service consultants. The NRCS-Wyoming CRS/Archaeologist/Historian shall also assist the NRCS-Wyoming State Conservationist in determining whether an undertaking has the potential to affect historic properties, triggering Section 106 review, pursuant to 36 CFR Part 800.3(a).

c. NRCS field office personnel involved in implementing this sPA, after completion of NRCS' web, classroom, and field awareness training acquired through USDA's AgLearn training site, shall work with the NRCS-Wyoming CRS/Archaeologist/Historian, in completing historic preservation compliance (Section 106) field records for the agricultural producer's (NRCS' client or voluntary applicant for assistance) files and for use in producing initial historic property identification records (as set forth and outlined in NRCS' operational guidance, the National Cultural Resources Procedures Handbook, Title 190, Part 601). NRCS field office personnel working with the NRCS-Wyoming CRS/Archaeologist/Historian will use the site and isolate definitions developed by the SHPO (Appendix C).

d. The NRCS-Wyoming CRS/Archaeologist/Historian shall oversee development of the scopes of work for investigation of the Area of Potential Effects (APE) for identified undertakings (see 36 CFR Part 800.4). The NRCS may use professional service contractors or consultants or partners such as other federal agencies CRS to assist with cultural resources compliance

studies. NRCS shall ensure these contractors meet the SOI Professional Qualifications Standards.

e. NRCS remains responsible for all consultation with Native American Indian Tribes listed in Appendix E; Consulting Tribes, the SHPO, and all determinations of NRHP eligibility and effect. NRCS may not delegate consultation for findings and determinations to professional services consultants or producers/applicants for conservation assistance. Dispute resolution over eligibility will follow 36 CFR 60.9

f. The SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, if provided sufficient data (meeting the requirements of a Class II or Class III report: <http://wyoshpo.state.wy.us>) on a proposed undertaking and APE for the proposed undertaking by NRCS-Wyoming shall consult and provide a response to NRCS within fifteen (15) calendar days or less as requested in writing. The definition of sufficient data is provided in 36 CFR Part 800.11.

g. The ACHP shall provide technical guidance, participate in dispute resolution, and monitor the effectiveness of this agreement, as appropriate; any party to the Section 106 process may request ACHP involvement per 36 CFR 800.2 b(1)

III. Training.

a. NRCS-Wyoming shall require personnel conducting cultural resources identification and evaluation work to complete, at a minimum, the NRCS Web-based training(s) (in USDA AgLearn) and a variation of the ACHP's Section 106 *Essentials* course that will be presented as part of the field Cultural Resources Training.

b. NRCS shall require NRCS-Wyoming CRS/Archaeologist/Historian and/or other NRCS personnel overseeing cultural resource work to take the NRCS Cultural Resources Training Modules (awareness training) and the ACHPs Section 106 *Essentials* course, or a course with similar content, if approved by the NRCS FPO. Training must be completed within the first calendar year after execution of this sPA. NRCS personnel shall review and update training completion with their supervisors and include their training in their Individual Development Plans.

c. NRCS-Wyoming requires personnel conducting cultural resources identification to complete a cultural resources refresher training every three (3) years.

d. NRCS-Wyoming will request the SHPO staff to participate in presentations at agency classroom or field trainings.

e. NRCS-Wyoming may invite the SHPO, the Northern Arapaho Tribe, the Eastern Shoshone Tribe, or staff to participate in presentations at agency classroom or field trainings.

f. NRCS-Wyoming shall encourage all personnel conducting or overseeing cultural resources work to take additional appropriate specialized training as provided by the SHPO, the Northern Arapaho, the Eastern Shoshone, the ACHP, National Park Service, General Services Agency, or other agencies, as feasible.

IV. Lead Federal Agency.

For any undertaking for which the NRCS is the lead federal agency for Section 106 purposes per 36 CFR Part 800.2(a)(2), NRCS staff shall follow the terms of this sPA. NRCS shall notify the SHPO and the Native American Indian Tribes listed in Appendix E; Consulting Tribes, Tribal THPO offices of its involvement in the undertaking and the involvement of the other federal agencies.

V. Review Procedures.

a. In consultation with the SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, NRCS shall identify those undertakings with little to no potential to affect historic properties and list those undertakings in Appendix A. Additionally, NRCS shall also identify those undertakings considered exempt from case-by-case review by the SHPO (Appendix B). Upon the determination by the SCRS/Archaeologist/Historian that a proposed undertaking is included in Appendix A and/or Appendix B, the NRCS is not required to consult further with the SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, for that undertaking.

b. The list of undertakings provided in the Appendix A may be modified through consultation and written agreement between the NRCS-Wyoming and the SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, without requiring an amendment to this sPA. The NRCS-Wyoming will maintain the master list and will provide an updated list to all consulting parties with an explanation of the rationale) for classifying the practices accordingly.

c. Undertakings not identified in Appendix A or Appendix B shall require further review as outlined in Stipulation V.c. The NRCS shall consult with the SHPO and the Native American Indian Tribes listed in Appendix E; Consulting Tribes, to define the undertaking's APE, identify and evaluate historic properties that may be affected by the undertaking, assess potential effects, and identify strategies for resolving adverse effects prior to approving the financial assistance for the undertaking.

1. NRCS may provide its proposed APE, identification of historic properties and/or scope of identification efforts, and assessment of effects in a single transmittal to the SHPO and the Native American Indian Tribes listed in Appendix E; Consulting Tribes, provided this documentation meets the substantive standards in 36 CFR Part 800.4-5 and 800.11.
2. The NRCS shall attempt to avoid and minimize adverse effects to historic properties whenever possible. Where historic properties are located in the APE, NRCS shall describe

how it proposes to modify, buffer, or move the undertaking to avoid adverse effects to historic properties.

3. Where the NRCS proposes a finding of “no historic properties affected” or “no adverse effect” to historic properties, the SHPO and the Native American Indian Tribes listed in Appendix E; Consulting Tribes, shall have thirty (30) calendar days from receipt of this documented description and information to review it and provide comments. The NRCS shall take into account all comments received within that thirty (30) days.

i. If the SHPO/ Native American Indian Tribes listed in Appendix E; Consulting Tribes, or another consulting party, disagrees with NRCS’ findings and/or determination, it shall notify the NRCS within the thirty (30) calendar day time period. The NRCS shall consult with the SHPO and the Native American Indian Tribes listed in Appendix E; Consulting Tribes, other consulting parties to attempt to resolve the disagreement. If the disagreement cannot be resolved through this consultation, NRCS shall follow the dispute resolution process in Stipulation VIII below.

ii. If the SHPO and the Native American Indian Tribes listed in Appendix E; Consulting Tribes, whose’ THPOs do not respond to the NRCS within the thirty (30) calendar day period and/or the NRCS receives no objections from other consulting parties, or if the SHPO, and/or the THPOs concur with the NRCS’ determination and proposed actions to avoid adverse effects, the NRCS shall document the concurrence/lack of response within the review time noted above, and may move forward with the undertaking.

4. Where a proposed undertaking may adversely affect historic properties, NRCS shall describe proposed measures to minimize or mitigate the adverse effects, and follow the process in 36 CFR Part 800.6, including consultation with other consulting parties and notification to the ACHP, to develop an Agreement document appropriate to the undertaking to resolve the adverse effects.

VI. Emergency and Disaster Management Procedures (Response to Emergencies)

a. NRCS shall notify the SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, immediately or within forty-eight (48) hours of the emergency determination, following the NRCS’ Title 190 Part 601.28 (Appendix F)

b. The NRCS State office shall prepare procedures for exigency, following the rules for NRCS’ Emergency Watershed Program (EWP) regarding immediate threat to life and property requiring, response within five (5) days, in consultation with the SHPO and the appropriate Tribe(s) identified from the Native American Indian Tribes listed in Appendix E; Consulting Tribes.

c. If the NRCS-Wyoming has not developed specific procedures for responding to exigencies,

the NRCS shall follow the procedures in 36 CFR Part 800.12(b).

VII. Post-review discoveries of cultural resources or historic properties and unanticipated effects to historic properties.

a. Where construction has not yet begun and a cultural resource is discovered after Section 106 review is complete, the NRCS shall evaluate the cultural resources, consult to seek avoidance or minimization strategies in consultation with the SHPO, the Native American Indian Tribes listed in Appendix E; Consulting Tribes, and/or to resolve potential adverse effects in accordance with 36 CFR Part 800.6.

b. The NRCS shall ensure that every contract for assistance includes provisions for halting work/construction in the area when potential historic properties are discovered or unanticipated effects to historic properties are found after implementation, installation, or construction has begun. When such a discovery occurs, the producer who is receiving financial assistance or their contractor shall immediately notify the NRCS-Wyoming CRS, supervisory NRCS personnel for the area, and the landowner/applicant.

1. NRCS CRS shall inspect the discovery within forty-eight (48) hours, and in consultation with the local NRCS official (field office supervisor or District or Area Conservationist), Native American Indian Tribes listed in Appendix E; Consulting Tribes, THPOs, the SHPO, the NRCS-Wyoming State engineer or program supervisor, as appropriate), the landowner/producer (whomever NRCS is assisting), the CRS shall establish a protective buffer zone surrounding the discovery. This action may require inspection by tribal or cultural resources experts in addition to the CRS; consultation will ensue accordingly.

2. All NRCS contact with media shall occur only under the direction of the NRCS Public Affairs Officer, as appropriate, and the NRCS-Wyoming State Conservationist.

3. Security shall be established to protect the resources/historic properties, workers, and private property. Local law enforcement authorities will be notified in accordance with applicable State law and NRCS policy in order to protect the resources. Construction and/or work may resume outside the buffer only when the NRCS-Wyoming State Conservationist determines it is appropriate and safe for the resources and workers.

4. Protocol for Inadvertent Discovery of Human Remains.

When human remains are discovered, the site shall be considered an active homicide and the NRCS shall follow all applicable federal, tribal, and state burial laws and ordinances, including the Native American Graves Protection and Repatriation Act, and implementing regulations, when on tribal or federal lands, and related human rights and health statutes, where appropriate. NRCS shall also refer to the ACHP's Policy Statement regarding *Treatment of Burial Sites, Human Remains and Funerary Objects* and the ACHP's Section 106 Archaeology Guidance. NRCS shall also follow USDA and NRCS policy on treatment

of human remains and consultation. NRCS policy Human Remains: If human remains are identified in the APE during planning or during implementation of a conservation practice, the NRCS will request all activities cease and the following steps be taken:

- i. The county Sheriff and appropriate Tribal legal authority, if applicable, will be immediately contacted by NRCS personnel to determine whether remains are part of an ongoing investigation;
 - ii. The SHPO, and designated Tribal representative, if applicable, will be notified of the discovery;
 - iii. NRCS field personnel will request that the NRCS client take appropriate measures, such as erecting protective fence or barriers, to protect the remains until the plan for treating the remains, is completed;
 - iv. A CRS will be retained by the NRCS to determine tribal affiliation, if any, and approximate age of deposition;
 - v. If the remains are determined to be of Native American descent, the NRCS will follow 43 CFR 10, the Native American Graves Protection and Repatriation Act (NAGPRA), consult with the appropriate Native American representatives, and with the SHPO, to develop an appropriate treatment plan;
 - vi. If the remains are not part of an ongoing police investigation, and are not of Native American descent, the NRCS will consult with the SHPO in the development of an appropriate plan for treating the remains;
 - vii. Planning and construction activities at the site can recommence only after NRCS staff, the NRCS client, the SHPO, and if applicable, the designated Tribal representative, agree that the plan for treating the remains has been properly implemented.
5. NRCS CRS shall notify the SHPO and Native American Indian Tribes listed in Appendix E, THPOs, and the ACHP no later than forty-eight (48) hours after the discovery and describe NRCS' assessment of the National Register eligibility of the property, as feasible and proposed actions to resolve any adverse effects to historic properties. NRCS will consult with consulting and interested parties and make the determination.
6. The SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, and ACHP shall respond within forty-eight (48) hours from receipt of the notification with any comments on the discovery and proposed actions.
7. NRCS shall take any comments provided into account and carry out appropriate actions to resolve any adverse effects.

8. NRCS shall provide a report that meets the appropriate the SHPO requirements to the SHPO, and Native American Indian Tribes listed in Appendix E if they are consulting parties of the actions when they are completed.

VIII. Dispute resolution.

a. Should any consulting or signatory party to this sPA object to any actions proposed or the manner in which the terms of the agreement are implemented, the NRCS–Wyoming State Conservationist and CRS shall consult with such party to resolve the objection. If the NRCS–Wyoming State Conservationist determines that such objection cannot be resolved, he or she will:

1. Forward all documentation relevant to the dispute, including the NRCS–Wyoming State Conservationist’s proposed resolution, to the NRCS FPO, NRCS Senior Policy Official (SPO), the SHPO, and the ACHP. The ACHP shall provide the FPO, SPO, and NRCS–Wyoming State Conservationist with its advice on the resolution of the objection within fifteen (15) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, NRCS shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP and any signatory or consulting parties, and provide them with a copy of this written response. NRCS will then proceed according to its final decision.

2. If the ACHP does not provide its advice regarding the dispute within the fifteen (15) day time period, NRCS may make a final decision on the dispute and proceed. Prior to reaching such a final decision, NRCS shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories and consulting parties, and provide them and the ACHP with a copy of the written response.

b. The NRCS–Wyoming responsibility to carry out all other actions subject to the terms of this sPA that are not the subject of the dispute remains unchanged.

c. Any consulting party to this sPA may request the ACHP provide its advisory opinion regarding the substance of any finding, determination, or decision regarding compliance with its terms.

d. At any time during the implementation of this sPA, a member of the public may submit an objection pertaining to this sPA to the NRCS–Wyoming State Conservationist, in writing. Upon receiving such an objection, the NRCS–Wyoming State Conservationist shall notify the NRCS SPO and FPO, the SHPO, the Native American Indian Tribes listed in Appendix E; Consulting Tribes, take the objection into account, and consult with other consulting parties as appropriate to resolve the objection. The NRCS–Wyoming State Conservationist shall notify the SPO, FPO, SHPO, and the Native American Indian Tribes listed in Appendix E; Consulting Tribe of the outcome of this process.

IX. Public Involvement

The NRCS-Wyoming State Conservationist will ensure the public is involved in the development of this sPA and participates in Section 106 review as set forth above in Section V (reference to other parties) and all future undertakings pursuant to Section 106 will be posted on the NRCS-Wyoming website web link: wy.nrcs.usda.gov/undertakings/projects.

X. Annual Reporting and Monitoring.

a. Every year following the execution of this agreement, commencing December 1, 2015, until it expires or is terminated, the NRCS-Wyoming State Conservationist shall provide all consulting parties (including those parties who participate in the consultation but do not sign the agreement) and the FPO an executive summary report detailing work undertaken pursuant to its terms, including a list of undertakings falling under Appendix A as well as undertakings that required further review; a summary of the nature and content of meetings held with the SHPO, the Native American Indian Tribes listed in Appendix E; Consulting Tribes; and an assessment of the overall effectiveness of this sPA.

b. The NRCS-Wyoming State Conservationist, the SHPO, and the Native American Indian Tribes listed in Appendix E; Consulting Tribes, may request that the ACHP participate in any annual meeting or agreement review.

XI. Duration of Prototype Agreement.

a. This sPA will be in effect for ten (10) years from the date of execution unless amended or terminated pursuant to Stipulation XII below.

XII. Amendment and Termination.

a. This sPA may be amended if 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 NRCS FPO, SPO, and the ACHP.

b. If any signatory to this sPA, or the ACHP, determines that its provisions will not or cannot be carried out, that party shall immediately consult with the other parties to attempt to develop an amendment per Stipulation XII.A. If within thirty (30) calendar days, or other time period agreed upon by the signatories, an amendment cannot be agreed upon, any signatory or the ACHP may terminate this sPA upon written notification to the other signatories.

c. If this sPA is terminated, or expires without being extended via the amendment process described above, and prior to continuing work on any undertaking, NRCS shall comply with 36 CFR Part 800 for all individual undertakings in Wyoming.

d. NRCS will consider requests from other USDA agencies to become a signatory to this sPA following formal written requests and appropriate discussion with and approval by the NRCS FPO and SPO, and joint USDA Agency-NRCS-Wyoming consultation with the ACHP, NCSHPO, and the Native American Indian Tribes listed in Appendix E; Consulting Tribes, and other consulting parties, as appropriate. Such inclusion of the USDA agency may require amendment to this sPA.

e. Execution of this sPA by the NRCS and the SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, and implementation of its terms evidence that NRCS has taken into account the effects of its undertakings in Wyoming on historic properties and afforded the ACHP a reasonable opportunity to comment.

XIII. General Provisions.

a. **Entirety of Agreement.** This State-based Prototype Agreement (sPA) consisting of thirty (30) pages, represents the entire and integrated agreement between the parties and supersedes all prior negotiations, representations and agreements, whether written or oral, regarding compliance with Section 106 of the National Historic Preservation Act.

b. **Sovereign Immunity.** The Wyoming, the SHPO and Native American Indian Tribes listed in Appendix E; Consulting Tribes, do not waive their sovereign or governmental immunity by entering into this sPA and each fully retains all immunities and defenses provided by law with respect to any action based on or occurring as a result of the sPA.

c. **Indemnification.** Each Signatory to this sPA shall assume the risk of any liability arising from its own conduct. No Signatory agrees to insure, defend, or indemnify another Signatory to this sPA.

XIV. Signatures.

a. The Signatories to this Agreement, either personally or through their duly authorized representatives, have executed this Agreement on the dates set out below, and certify that they have read, understood, and agreed to the terms and conditions of the Agreement.

Signatories:



Astrid Martinez
NRCS Wyoming State Conservationist

Date: 10-26-15


Mary Hopkins
Wyoming State Historic Preservation Officer

Date: 10/26/15

Wyoming Attorney General's Office
Approval as to Form:


S. Jane Caton, Senior Assistant Attorney General

Date: 10-16-15

APPENDIX A

LIST OF UNDERTAKINGS REQUIRING NO FURTHER SECTION 106 REVIEW IN NRCS Wyoming

Pursuant to Stipulation V.a. above, in consultation with the Wyoming SHPO, the NRCS, through the qualified CRS/Archaeologist/Historian as described in Stipulation II.b., has determined that the following undertakings have little or no potential to affect historic properties. The NRCS is not required to consult further with the SHPO / under Section 106 for any undertaking that is included in this appendix.

Legend:

- HP - High Potential**
- PE - Potential Effect**
- PNI - Potentially can be installed in a Non-Intrusive manner (little potential to affect)**
- N - No potential to adversely affect**

- AC- ACRES**
- AU- ANIMAL UNITS**
- FT- FEET**
- NO- NUMBER**

Practice Name and Unit(s)	Cultural Resource Affect Potential	Practice Code
Alley Cropping (ac)	N	311
Amendments for Treatment of Agricultural Waste	N	591
Anaerobic Digester, Ambient Temperature (no)	N	365
Anaerobic Digester, Controlled Temperature (no)	N	366
Animal Mortality Facility (no)	PNI	316
Animal Trails and Walkways (ft)	PNI	575
Anionic Polyacrylamide (PAM) Erosion Control (ac)	N	450
Atmospheric Resources Quality Management (ac)	N	370
Brush Management (ac)	PE	314
Channel Bank Vegetation (ac)	N	322
Channel Stabilization (ft)	PE	584
Clearing & Snagging (ft)	PNI	326
Closure of Waste Impoundments (no)	N	360
Composting Facility (no)	PNI	317
Conservation Cover (ac)	N	327
Conservation Crop Rotation (ac)	N	328
Contour Buffer Strips (ac)	N	332
Contour Farming (ac)	N	330
Contour Orchard and Other Fruit Areas (ac)	N	331
Cover Crop (ac)	N	340

Practice Name and Unit(s)	Cultural Resource Affect Potential	Practice Code
Critical Area Planting (ac)	PE	342
Cross Wind Ridges (ac)	PNI	589A
Cross Wind Trap Strips (ac)	N	589C
Deep Tillage (ac)	N	324
Drainage Water Management (ac)	N	554
Early Successional Habitat Development/Mgt. (ac)	N	647
Feed Management (no & au)	N	592
Fence (ft)	PE	382
Field Border (ft)	N	386
Filter Strip (ac)	N	393
Fish Passage (no)	PNI	396
Fish Raceway or Tank (ft & ft ³)	PNI	398
Fishpond Management (no)	PNI	399
Forage Harvest Management (ac)	N	511
Forest Slash Treatment (ac)	PE	384
Forest Stand Improvement (ac)	N	666
Fuel Break (ac)	PNI	383
Grazing Land Mechanical Treatment (ac)	PE	548
Heavy Use Area Protection (ac)	PE	561
Hedgerow Planting (ft)	PE	422
Herbaceous Wind Barriers (ft)	N	603
Irrigation System	PNI	
Microirrigation (no & ac)	PNI	441
Sprinkler (no & ac)	PNI	442
Surface & Subsurface (no & ac)	PNI	443
Irrigation System, Tailwater Recovery (no)	PNI	447
Irrigation Water Conveyance	PNI	
Ditch and Canal Lining	PE	
Plain Concrete (ft)	PNI	428A
Flexible Membrane (ft)	PNI	428B
Galvanized Steel (ft)	PNI	428C
Pipeline	PNI	
Aluminum Tubing (ft)	PNI	430AA
Asbestos-Cement (ft)	PNI	430BB
Nonreinforced Concrete (ft)	PNI	430CC
High-pressure, Underground, Plastic (ft)	PNI	430DD
Low-pressure, Underground, Plastic (ft)	PNI	430EE
Steel (ft)	PNI	430FF
Reinforced Plastic Mortar (ft)	PNI	430GG
Rigid Gated Pipeline (ft)	PNI	430HH
Irrigation Water Management (ac)	N	449
Land Clearing (ac)	PE	460
Land Reclamation, Toxic Discharge Control (no)	PNI	455
Lined Waterway or Outlet (ft)	PNI	468
Manure Transfer (no)	N	634
Mine Shaft & Adit Closing (no)	PE	457

Practice Name and Unit(s)	Cultural Resource Affect Potential	Practice Code
Mulching (ac)	N	484
Multi-Story Cropping	N	379
Nutrient Management (ac)	N	590
Obstruction Removal (ac)	PNI	500
Pasture & Hay Planting (ac)	PE	512
Pest Management (ac)	N	595
Pipeline (ft)	PE	516
Pond Sealing or Lining	N	
Bentonite Sealant (no)	N	521C
Flexible Membrane (no)	N	521A
Soil Dispersant (no)	N	521B
Compacted Clay Treatment (no)	N	521D
Precision Land Forming (ac)	PNI	462
Prescribed Burning (ac)	PE	338
Prescribed Grazing (ac)	PE	528
Pumping Plant (no)	PE	533
Range Planting (ac)	N	550
Recreation Area Improvement (ac)	PNI	562
Recreation Land Grading and Shaping (ac)	PE	566
Recreation Trail and Walkway (ft)	PNI	568
Residue and Tillage Management, No Till/Strip Till/Direct Seed (ac)	N	329
Residue and Tillage Management, Mulch Till (ac)	N	345
Residue and Tillage Management, Ridge Till (ac)	N	346
Residue Management, Seasonal (ac)	N	344
Restoration and Management of Rare or Declining Habitats (ac)	N	643
Riparian Forest Buffer (ac)	N	391
Riparian Herbaceous Cover (ac)	N	390
Rock Barrier (ft)	PNI	555
Roof Runoff Structure (no)	PNI	558
Row Arrangement (ac)	N	557
Runoff Management System (no & ac)	PNI	570
Salinity and Sodic Soil Management (ac)	PNI	610
Sediment Basin (no)	HP	350
Shallow Water Development and Management (ac)	PNI	646
Silvopasture Establishment (ac)	N	381
Spring development	HP	XXX
Streambank and Shoreline Protection (ft)	PNI	580
Stream Crossing (no)	PNI	578
Stream Habitat Improvement and Management (ac)	PNI	395
Stripcropping (ac)	N	585
Surface Roughening (ac)	PNI	609
Tree/Shrub Establishment (ac)	PE	612
Tree/Shrub Preparation	N	490
Tree/Shrub Pruning (ac)	N	660

Practice Name and Unit(s)	Cultural Resource Affect Potential	Practice Code
Upland Wildlife Habitat Management (ac)	PNI	645
Use Exclusion (ac)	N	472
Vegetative Barrier (ft)	N	601
Waste Facility Cover (no)	N	367
Waste Treatment	N	629
Waste Utilization (ac)	N	633
Wastewater Treatment Strip (ac)	N	635
Water Harvesting Catchment (no)	PNI	636
Watering Facility (no)	PE	614
Well Decommissioning (no)	PE	351
Well Water Testing (no)	PE	355
Wetland Enhancement (ac)	PNI	659
Wetland Restoration (ac)	PNI	657
Wetland Wildlife Habitat Management (ac)	PNI	644
Wildlife Watering Facility (no)	PNI	648
Windbreak/Shelterbelt Establishment (ft)	PE	380
Windbreak/Shelterbelt Renovation (ft)	PNI	650

APPENDIX B

UNDERTAKINGS (CONSERVATION PRACTICES) EXEMPT FROM CASE-BY-CASE REVIEW IN WYOMING

The CRS, after determining information needed to identify and evaluate cultural properties, determines if specific projects or activities should be exempted from case-by-case review. The CRS may have justification to require an inventory and evaluation of cultural resources in these cases. The following actions are, in most circumstances, exempt from case-by-case review.

Activities which involve no more than two square meters of cumulative surface disturbance and no more than one square meter of contiguous disturbance in any given location, unless within the boundaries of a known historic property or an unevaluated cultural resource.

1. Acquiring lands and easements.
2. Minor, routine, or preventive operations and maintenance activities requiring no new surface disturbance and where facilities being maintained are not historic properties.
3. Installing signs and markers adjacent to existing roads, or placing recreational, special designation or information signs, or visitor registers, unless within known historic properties. Disturbance cannot exceed the exemption allowed in Item 1 above.
4. Maintenance of crowned or ditched roads that does not widen or otherwise extend surface disturbance, unless archaeological features which have not been evaluated are exposed.
5. Activities limited within stream channels, not including terraces and cut banks.
6. Continued development of borrow sources which have previously removed all Holocene and Pleistocene sediments and will not extend into any area which contains Holocene and Pleistocene sediments.
7. Water lines laid on the surface that do not require excavation or other surface disturbance and do not cross known historic properties or previously recorded unevaluated cultural resources.
8. New fence construction and modifications of existing fence lines that do not require surface disturbance (i.e. blading, grading, brush removal) beyond placement of posts and will not result in concentration of animals or creation of two track trails from vehicles.
9. Herbicide application where it would be unlikely to affect archaeological sites and features, rock art or traditional Native American plant gathering areas.
10. Issuing leases, easements, rights-of-way and permits (not including grazing permits) that do not authorize surface disturbance.
11. Issuing rights-of-way for existing developments or renewal of existing rights-of-way except

where operation, maintenance, or abandonment activities might result in new surface disturbance.

12. Renewal or transfer of grazing leases/permits and other permit administrative actions where types of animals do not change, numbers of animal unit months (AUMs) do not increase or seasons of use do not change.
13. Any undertaking that is proposed to occur in an APE that has been previously and completely disturbed by mechanical means to the extent and depth where no cultural resources exist and there are no indirect effects to extant cultural resources.

APPENDIX C

WYOMING RESOURCE DEFINITIONS AND RECORDING GUIDELINES

WYOMING PREHISTORIC AND HISTORIC SITE DEFINITION

A prehistoric site is 15 or more spatially associated artifacts within a 30 meter diameter area (site may be much larger than 30 meters in diameter). An isolated feature is a site (e.g. hearth, cairn, stone circle).

A historic site is 50 or more spatially associated artifacts within a 30 meter diameter area (site may be much larger than 30 meters in diameter).

WYOMING ISOLATE/ISOLATE RESOURCE DEFINITION

A prehistoric isolate is defined as 14 or fewer spatially associated artifacts where no buried cultural materials or features are thought to exist.

A historic isolate is defined as 49 or fewer spatially associated artifacts where no buried cultural material or features are thought to exist.

DEFINED NON-SITES AND PROPERTY TYPES REQUIRING NO FORMAL DOCUMENTATION

The appropriate lead agency cultural resource specialists must review and approve any deviation from this list. In most cases, formal documentation of the property types listed below is not required. **Existence of these defined non-sites and property types within the survey area, and justification for their exclusion, must be discussed in the project report.** If any of these property types exhibit significant architectural or engineering features, or are associated with a National Register-eligible site or district (either within the boundary, or clearly related to the significance of a NRHP-eligible site or district), they should be recorded on a Wyoming Cultural Properties Form. Professional judgment and common sense should be applied. In general, Smithsonian numbers will not be assigned to the following property types:

1. Utility lines (i.e., power lines, towers, telephone lines, fiber optic cable, etc).
2. Pipelines (i.e., water, gas, etc. This does not include early wooden pipelines).
3. Isolated stock dams, troughs, spring boxes, and associated windmills.
4. Elevation, bench, and section markers (i.e. all survey or cadastral markers).
5. Car banks (i.e., the use of abandoned cars, farm machinery, appliances, etc. to stabilize riverbanks, stream banks, or drainages).
6. Rip-rap (i.e., the use of cobbles, rock, or wood to stabilize riverbanks, stream banks, or drainages).
7. Isolated abandoned motorized vehicles, appliances, and mobile homes.

8. Fences and enclosures (i.e., barbed wire, chain link, buck-and-pole, or other types of pasture fence). This does not include corrals, roundup or load-out facilities.
9. Unnamed two-track roads (i.e., ranch roads, seismic roads, etc). This will require standard historic research to determine if the roads are named. Named roads need to be formally recorded; generally, unnamed roads do not need to be recorded. Discuss in the report the historic research conducted (i.e. GLO check, county records, historic maps, etc).
10. Recent trash (i.e., highway trash, etc).
11. Producing oil/gas wells and dry hole markers.
12. Water control channels, laterals, spreaders, canals, and ditches that are not designated by name on the USGS Topographic maps. (Water records can be found on the SEO's website at <https://seoweb.wyo.gov/e-Permit/> or in the "tabulation of Adjudicated Surface Water Rights of the State of Wyoming: Water Division Numbers One-Four").
13. Samples of defined lithic landscapes. Approval from the lead agency cultural resource specialist must be obtained for the cultural resource permittee to apply this exclusion.
14. Short-term camps associated with stockgrazing and recreation that provide no significant information.
15. Temporary sawmill sites; slash piles, and isolated woodpiles.
16. Prospect pits associated with mineral exploration or mining with no associated features, cribbing, and/or less than 50 associated historic artifacts.
17. Roads that have been reconstructed within the last 50 years do not need to be recorded. Abandoned segments that are not associated with an eligible road do not need to be recorded.

APPENDIX D

GUIDELINES FOR QUALITY ASSURANCE OF NRCS CULTURAL RESOURCE COMPLIANCE IN WYOMING

Program responsibility for cultural resources and conducting quality assurance reviews belongs to the State Resource Conservationist.

1. Activities to be reviewed: All undertakings as defined by NRCS policy and Section 106 of the National Historic Preservation Act, as amended, are subject to Quality Assurance Reviews.
2. Frequency: Quality assurance reviews are to be conducted by a CRS or designee for each employee who has had the cultural resources training and will occur at a minimum of 25% of the field offices based on the fiscal year. The reviews will cover as many different practices as possible, demonstrating the employees' proficiency for compliance with cultural resource regulations in varying circumstances.
3. SHPO Involvement: SHPO may initiate quality assurance reviews on any NRCS undertaking after notifying the CRC. Onsite visitations will require landowner permission for both NRCS and SHPO personnel.
 - a. If errors or deficiencies are found, additional undertakings in the same category will be checked until reasons for deficiencies are defined and corrected.
 - b. Quality assurance reviews will exclude undertakings where advanced reviews or inspections were conducted by the CRS.
4. Methods: Cultural resources Quality Assurance Reviews will be combined with other program reviews.
 - a. The Wyoming Integrated Resources Management Analyst (IRMA) will be checked for consideration of cultural resources. Cultural Resources documentation will be checked for accuracy and completeness.
 - b. Field checks will be made of the area of the undertaking to confirm accuracy of information on in IRMA.
5. Quality: The quality assurance review will check the cultural resource evaluation. If there are deficiencies such as incomplete or inaccurate documentation, error in description or size of APE, etc., then the Quality Assurance Review report is to include:
 - a. Details of deficiencies in relation to compliance with National policy and established State procedures.
 - b. Recommendations for corrective actions needed to meet policy and Section 106 compliance.
 - c. Suggested training needs for specific persons or staffs to help prevent recurrence of deficiencies.

d. Deficiencies that result in possible adverse effects to cultural resources will be documented with notification of the SHPO and the Advisory Council on Historic Preservation, if needed.

- i) Corrective or necessary mitigation actions will be scheduled as part of the follow-up.
- ii) The quality assurance review will be drafted before leaving the NRCS office and will be reviewed by the NRCS office supervisor and quality assurance review team leader.

APPENDIX E

Native American Indian Tribes consulted with by Wyoming NRCS

Crow
E. Shoshone
Fort Peck Assiniboine and Sioux Tribes
Lower Brule Sioux
N. Arapaho
N. Cheyenne
Oglala Sioux
Rosebud Sioux
Santee Sioux
Shoshone/Bannock
Standing Rock Sioux
Three Affiliated Tribes- Mandan, Arikora, Gros Ventre
Ute
Yankton Sioux

APPENDIX F

Procedures for the Consideration of Cultural Resources During Emergency Work

The procedures for emergency undertakings were developed to more closely match NRCS mission and program authorities. Under a programmatic agreement, they differ from the requirements of 36 CFR 800.12 so as to follow the process outlined in the NRCS National Watershed Manual, Part 509, Emergency Watershed Protection. These procedures will ensure that the need to protect life and property in an emergency is accomplished while taking cultural resources into account to the maximum extent congruent with rapidly changing priorities and circumstances. Each State Conservationist, in consultation with the appropriate SHPO/THPO, affected Indian tribes and Native Hawaiian organizations, is encouraged to develop procedures for taking historic properties into account during operations which respond to a disaster or emergency declared by the President, a tribal government, or the Governor of a State, or which respond to other immediate threats to life or property. NRCS emergency work procedures are implemented by the State Conservationist in response to requests from the local government for assistance after disaster event(s). The two types of emergency work recognized are exigency situations that are done within 30 to 40 days of fund obligation and non-exigency situations that are completed within 220 days of fund obligation.

A. The State Conservationist will notify SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, and ACHP as soon as practicable after the declaration of emergency, with the date(s) that emergency work and procedures are in effect. Notification to SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, and ACHP will be coordinated with that to NRCS National Headquarters, i.e., within 10 days of the disaster event or 2 days after access is permitted to damaged areas. NRCS will take into account SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, and ACHP comments received within 7 days of notification for all subsequent emergency work.

B. Exigent situations. The SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, shall be notified of NRCS funds obligated for exigent situations. NRCS funds for exigencies are obligated:

- (1) 10 days after receipt of funds;
- (2) 2 days after the disaster event; or
- (3) When conditions permit construction activities.

Exigency notification should include the types and amounts of funds obligated, circumstances creating the exigent situation, work to be undertaken, and any consideration of historic properties, as appropriate. NRCS will document and avoid adverse effects to cultural resources encountered during exigency work to the fullest extent practicable.

C. No exigent situations. For no exigencies, NRCS must prepare the project information in the

form of Damage Survey Reports (DSR) for funding approval. The State Conservationist will request SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, consultation and assistance in preparing cultural resources review information prior to submitting DSRs for NHQ approval. NRCS will take into account all cultural resources information provided by SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, in preparing DSRs and specifications therein. If SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, consultation and review:

(1) Locates or indicates high probability for historic properties in the DSR area, a Cultural Resources Specialist will be involved in assessing effects to those properties and performing additional consultation prior to repair work.

(2) Does not locate cultural resources in the DSR area, a Cultural Resources Specialist, or NRCS personnel certified in the National Cultural Resources Training Program in conjunction with CRS oversight, will perform Field Inspections prior to emergency repairs. The scale of the disaster and scope of the measures will govern the use of non-specialist NRCS personnel for such inspections and the relief response needed. These will be indicated during consultations with the SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes.

(i) Should a cultural resource be discovered, the CRC will be notified, who will immediately notify the SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, and the ACHP. A CRS will evaluate the resource.

(ii) The State Conservationist will make a final decision based on the CRS's evaluation, consultation on an appropriate course of action with the SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, and the ACHP, and the need to protect life and property. The State Conservationist will inform the SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, and ACHP immediately regarding the determination.

D. SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, and ACHP will be provided copies of all final reports of NRCS emergency work activities involving cultural resources. Final reports are due to the NRCS Chief within 60 days of emergency work completion. Copies of all emergency work reports will be available upon request.

E. In major disasters, NRCS may elect to waive all or part of its cultural resources responsibilities under 36 CFR 78. The NRCS Chief or official designee applies for this type of waiver. For single event disasters confined to one State or territory, the State Conservationist is the Chief's designee and may apply directly. For disasters that involve several States, the NRCS Chief or official designee at NHQ may coordinate a single application; otherwise, the State Conservationist will do so independently. The first step in obtaining a waiver under 36 CFR 78 is initiated by completing the Emergency Waiver Worksheet.

F. The State Conservationist will complete worksheet information in consultation with a CRS.

The CRS will provide cultural resources guidance and technical oversight and assist in avoiding adverse effects to cultural resources when conditions permit.

G. The completed Emergency Waiver Worksheet must be signed by the NRCS Chief or designee and sent to the Secretary of Interior. Copies will be sent to the ACHP, SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, and the appropriate NRCS offices. Notification must take place within 12 days after signing the waiver.

H. The Secretary of Interior will review the waiver to determine if it is consistent with the intent of the NHPA. The Secretary must comment within 5 days of receipt of the waiver notification. The Secretary can then accept the waiver without comment, make recommendations to the NRCS Chief, or terminate the waiver. Termination of the waiver by the Secretary is final.

I. If the time period specified in the waiver is still in effect when comments are received from the Secretary, then NRCS will consider these comments as well as any comments received (during the 5 day comment period) from the ACHP or SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, NRCS will consider these comments before deciding to continue, withdraw, or modify the waiver. NRCS may either accept or reject the Secretary's recommendations. If the recommendations are rejected, then rationale must be provided explaining the reasons for rejection. Informational copies of the decision will be forwarded to the ACHP, SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, and appropriate NRCS offices.

J. If the waiver is no longer in effect when comments are received from any of the commenting parties, then these comments should be considered in "similar future emergencies."

K. Complete documentation of NRCS actions during the waiver period will be provided to the Secretary within 15 working days after the waiver has expired. Informational copies will also be provided to the ACHP, SHPO, Native American Indian Tribes listed in Appendix E; Consulting Tribes, and appropriate NRCS offices.