

PROGRAMMATIC AGREEMENT

REGARDING COMPLIANCE WITH SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT FOR GRANTS FUNDED BY THE WILDLIFE AND SPORT FISH RESTORATION PROGRAM IN NEW MEXICO AMONG THE U.S. FISH AND WILDLIFE SERVICE, REGION 2, U.S. DEPARTMENT OF THE INTERIOR; THE NEW MEXICO STATE HISTORIC PRESERVATION OFFICER; AND THE NEW MEXICO DEPARTMENT OF GAME AND FISH

WHEREAS, the United States Fish and Wildlife Service, Region 2 (Service) provides financial assistance through grants awarded by the Wildlife and Sport Fish Restoration Program (WSFR) to the New Mexico Department of Game and Fish (NMDGF) for the management, restoration, enhancement, and creation of fish and wildlife habitats to benefit species and habitats on lands managed by NMDGF (Undertakings); and

WHEREAS, the Service is the lead agency with the authority and responsibility to comply with Section 106 of the National Historic Preservation Act (NHPA) of 1966 (54 U.S.C §306108) as amended and the regulations of the Advisory Council on Historic Preservation (ACHP), 36 CFR Part 800, for the WSFR Grant Programs (Appendix A) and the Service has determined that Undertakings funded by the WSFR Grant Programs may affect historic properties; and

WHEREAS, the NMDGF manages habitat on behalf of the New Mexico State Game Commission (SGC) and NMDGF initiates all proposed Undertakings with NMDGF/SGC collected revenues and FWS may provide WSFR grant funding for all or a portion of the Undertaking at any stage during the Undertaking; and

WHEREAS, the Service on December 12, 2012, authorized NMDGF to identify consulting parties, define the Area of Potential Effect (APE), identify historic properties, assess potential effects and make determinations and recommendations pursuant to 36 CFR 800.2(c)(4) for grants funded by WSFR (Appendix A) and NMDGF is an Invited Signatory to this Programmatic Agreement (PA); and

WHEREAS, this delegation does not extend to Undertakings being carried out on Federal lands; and

WHEREAS, the NMDGF has the responsibility to preserve, protect, and minimize harm to historic properties under the following New Mexico acts and their implementing rules: the Cultural Properties Act of 1969 as amended (§18-6-1 through §18-6-17 NMSA 1978; New Mexico Administrative Code (NMAC) Title 4, Chapter 10, Parts 3-8, 11, 14-18); the Cultural Properties Protection Act of 1993 (§18-6A-1 through §18-6A-6, NMSA 1978; §4.10.13 NMAC);

and the Prehistoric and Historic Sites Preservation Act of 1978, as amended (§18-8-1 through §18-8-8, NMSA 1978; §4.10.12 NMAC); and

WHEREAS, the Service has consulted with the New Mexico State Historic Preservation Officer (SHPO) during development of this PA and the SHPO is a Signatory to this PA under 36 CFR 800.6(c)(1)(i); and

WHEREAS, the Service recognizes that it has a unique legal relationship with Federally-recognized Native American Tribes (Tribes) set forth in the Constitution of the United States, statutes, and court decisions, and that consultation with all Tribes must, therefore, recognize the government to government relationship between the federal government and the Tribes; and

WHEREAS, the Service consulted with the Tribes in Appendix B pursuant to 36 CFR 800.2(c)(2) and 36 CFR 800.14(f); and the Isleta Pueblo, Jemez Pueblo, Santa Ana Pueblo, Tesuque Pueblo, San Felipe Pueblo, and Zia Pueblo all provided contact information to assist in developing the PA. The Hopi Tribe declined to participate and requested to continue to consult only project-by-project.

WHEREAS, the Service has consulted with the Advisory Council on Historic Preservation (ACHP) pursuant to section 800.14(b) of 36 CFR 800, the regulations implementing Section 106 of the NHPA as amended, and on July 13, 2017, the Service received notification that the ACHP declined to participate; and

WHEREAS, the parties to this PA recognize that a streamlined process for compliance with Section 106 of NHPA is appropriate and desirable, and the Service has consulted with the SHPO and NMDGF pursuant to 36 CFR 800.14(b) of the regulations implementing Section 106 of the NHPA; and

NOW, THEREFORE, the Service, the NMDGF, and the SHPO agree that the NMDGF grant programs funded by the WSFR shall be administered and implemented in accordance with the following stipulations in order to satisfy the Service's NHPA Section 106 responsibilities.

STIPULATIONS

The Service and NMDGF shall ensure that the following measures are carried out:

- I. APPLICABILITY AND SCOPE.** This PA sets forth the process by which the Service and NMDGF will meet their respective responsibilities for undertakings pursuant to Section 106 of the NHPA for undertakings on SGC lands or private lands that involve the granting of WSFR funds to NMDGF.
 - A. Service Responsibilities.** In compliance with NHPA, the Service is responsible for all findings and determinations made under this PA. The Service Regional Director is the responsible Agency Official.

1. As a condition of its award to NMDGF of any assistance under the WSFR, the Service will ensure that NMDGF fulfills its duties as specified in this PA and all cultural resource work carried out pursuant to this PA will conform to applicable ACHP standards and guidelines and the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 Federal Register 44,716-44,742, September 23, 1983) for undertakings subject to this PA.

B. NMDGF Responsibilities. The NMDGF shall ensure that historic properties are given full consideration in all NMDGF planning and management decisions and historic properties are identified, preserved, and protected and adverse effects are avoided whenever possible. The NMDGF Director will be the signatory agent for this agreement.

1. NMDGF, on behalf of the Service, shall initiate consultation on individual undertakings with state agencies, Tribes and Pueblos and local governments pursuant to 36 CFR 800.2(c)(2) and (3). NMDGF, on behalf of the Service, will ensure that all municipal and state land managers that have land included within, or adjacent to, WSFR grant funded undertakings are copied on all records. Such land managers shall also be invited to participate in consultations regarding individual undertakings.
2. NMDGF shall provide the Service with copies of all records relating to the consultation including but not limited to the consultation letters and responses to demonstrate that it has fulfilled its responsibilities under this PA
3. NMDGF shall employ professional cultural resource staff who meet the qualifications set forth in the Secretary of the Interior's *Standards and Guidelines for Professional Qualifications* (36 CFR Part 61) and New Mexico professional qualifications set forth in §4.10.8 of the NMAC, in the appropriate field.
4. NMDGF shall ensure that all cultural resource work carried out pursuant to this PA, whether performed by the NMDGF Archaeologist, NMDGF cultural resource specialist, or consultants, is performed under the direct supervision of an individual who is listed in the SHPO Directory and who meets the qualifications set forth in the Secretary of the Interior's *Standards and Guidelines for Professional Qualifications* (36 CFR Part 61) in the appropriate field to provide professional and technical expertise necessary to implement the provisions of this PA.
5. NMDGF shall ensure that all cultural resource studies performed under this Agreement meet the Secretary of the Interior's *Standards and Guidelines for Archeology and Historic Preservation* (48 Federal Register 44,716-44,742, September 23, 1983) and conform to standards in Title 4 (Cultural

Resources) and Chapter 10 (Cultural Properties and Historic Preservation) of NMAC.

6. NMDGF will secure and protect historic properties from damage and theft by having the NMDGF archaeologist make periodic visits to known historic properties within SGC properties to assess surface conditions and, if warranted, seek through NMDGF law enforcement investigation and, where warranted prosecution pursuant to relevant sections of the Cultural Properties Act and §19.34.3.10(E) NMAC for any recorded loss and/or damage to historic properties; and
7. Maintain and keep current all state and/or federal archaeological and/or cultural resource permits to support NMDGF activities and programs as is required pursuant to the Cultural Properties Act and the Archaeological Resources Protection Act.

C. **Multi-Agency Undertakings.** If an undertaking will affect federal lands, the federal land management agency will take the lead for Section 106 consultation and this PA does not apply. Where undertakings will affect lands within New Mexico administered by more than one state agency, the NMDGF will follow the PA and consult with the state land managing agency for lands under its jurisdiction if this is acceptable to the other state agencies.

II. CONSULTATION WITH TRIBES. The federal government has a unique legal relationship with Tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Tribes must recognize the government-to-government relationship between the federal government and Tribes.

- A. The NMDGF is authorized to initiate consultation with Tribes on behalf of the Service. Upon receipt of a request from a Tribe or officially designated representative of a Tribe to consult with the Service in lieu of or in addition to NMDGF, NMDGF shall forward the request to the Service. When the Tribe or Pueblo so requests, the Service will consult with that Tribe in coordination with NMDGF.
- B. The Service and NMDGF shall ensure that Tribes have opportunities to identify concerns and participate as consulting parties in all aspects of consultation for undertakings that are of interest to them. When an undertaking may affect a property identified by a Tribe as having traditional cultural or religious significance, the NMDGF or Service shall consult further with the Tribe. The Service shall consult with a Tribe on any project determined to have an adverse effect, as this term is defined by NHPA, to historic properties.
- C. The Service and the NMDGF shall provide each Tribe with the opportunity to develop a consultation protocol among the agencies and the Tribe. Copies of signed Memorandum of Understanding or documentation of the agreed upon consultation process, will be provided by the Service to the Indian tribe, the

SHPO and the ACHP.

- D. For individual NMDGF undertakings funded by the WSFR Grant Programs, tribal consultation will be carried out as outlined in Stipulation V (“Standard Consultation Procedures”) below.

III. PUBLIC PARTICIPATION

Pursuant to 36 CFR 800.2 (d), NMDGF shall consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking. NMDGF will implement the National Environmental Policy Act public notification procedures, including the opportunity to comment, regarding historic properties at Public Scoping Meetings, Public Information Meetings, and Public Hearings via posting to the NMDGF website information about proposed undertakings that are funded in part by WSFR grant money.

IV. EXEMPTIONS. The following procedure is a review process for undertakings using WSFR Grant Program funds. Stipulations IV.A. through IV.E below will be completed by NMDGF’s archaeologist or cultural resource specialist.

- A. Appendix C identifies a list of undertakings that are exempted from further review or consultation. The potential effects of these undertakings on historic properties are foreseeable and likely to be minimal. The NMDGF Archaeologist or cultural resource specialist shall conduct a review of each exempted undertaking prior to implementation to determine if the proposed undertaking meets the criteria outlined in Appendix D.
- B. If the NMDGF Archaeologist or cultural resource specialist finds that the undertaking meets the criteria for a Screened Exemption (Appendix C), then the NMDGF is not required to notify or consult with SHPO, THPO, tribes or other parties regarding the undertaking unless historic properties are discovered during undertaking implementation. For any grant undertaking exempted under Appendix C the NMDGF Archaeologist or cultural resource specialist will provide written communication to the Service. If historic properties are discovered during implementation of the undertaking, the procedures in Stipulation VIII shall be followed.
- C. Appendix C may be revised or updated as needed by mutual agreement of the Service, NMDGF and SHPO. Revisions will include consultation with tribes if the proposed exemptions have the potential to affect properties of traditional, cultural and religious significance.
- D. NMDGF will contact SHPO if there is a question on whether a proposed action constitutes an undertaking that might affect historic properties. The SHPO will provide comments within 10 calendar days of receipt of the request. The SHPO’s comments and the NMDGF’s agreement or disagreement with the comments will be

made part of the records for the proposed action.

- E. The NMDGF, at its discretion, may elect to consult on an otherwise exempt undertaking following the procedures in Stipulation V.

V. STANDARD CONSULTATION PROCEDURES. For undertakings not exempt from review, the NMDGF archaeologist or cultural resource specialist shall complete the following steps to identify consulting parties, determine the Area of Potential Effect (APE), identify historic properties, make determinations of eligibility and assess potential effects. All reviews conducted by SHPO will occur within 30 days unless otherwise stated in this PA. Time frames may be extended or shortened through mutual agreement between SHPO and NMDGF. SHPO comments will be transmitted by letter on SHPO letterhead or by signed stamp and will include the SHPO tracking number. This response may be sent electronically.

A. Undertaking Planning and Decisions. The Service and NMDGF will ensure that Section 106 consultation is completed prior to making a final decision to proceed with a proposed undertaking whenever WSFR Grant Program funding is received. To the maximum extent possible, this process will be completed at the earliest stage of planning or decision making; however, some undertakings may receive WSFR Grant Program funding after planning has been initiated but before on-the-ground work has begun.

B. Determination of Area of Potential Effect. The NMDGF archaeologist or cultural resource specialist will be responsible for establishing the undertaking and defining the APE for direct, indirect and cumulative effects. Prior to defining the APE, NMDGF shall initiate consultation with tribes and identify and invite other parties to participate in the consultation as appropriate. If any question exists as to an undertaking's APE, NMDGF will consult with SHPO and tribes to define a mutually agreeable APE. If agreement cannot be reached, the NMDGF shall submit all findings and documentation to the Service for resolution in accordance with Stipulation XII of this PA.

C. Level of Identification. The NMDGF archaeologist or cultural resource specialist shall assess what information is necessary to identify historic properties, cultural landscapes, traditional cultural properties and properties of religious and cultural significance to tribes within the APE.

1. If NMDGF proposes to conduct an intensive Class III (100%) pedestrian historic properties survey of the APE, no prior consultation on the level of inventory is necessary.
2. If NMDGF proposes to perform less than 100% inventory of the APE, the NMDGF shall notify the SHPO, the appropriate state land managing agency, Native American tribes and other consulting parties by letter and provide such parties thirty (30) days to comment on the proposed level,

extent, and design of the inventory. NMDGF shall take these comments into consideration in making a final determination on the design of the inventory. If agreement cannot be reached, the NMDGF shall submit all findings and documentation to the Service for resolution in accordance with Stipulation XII of this PA.

3. Based on existing inventory information, the NMDGF Archaeologist or Cultural Resource Specialist may determine that further inventory is not necessary if previous inventory has been performed to current professional standards and knowledge levels. Inventories more than ten (10) years old will be reexamined and considered for resurvey if they do not reflect current standards and knowledge levels. The NMDGF may consult with SHPO to determine whether existing inventory is sufficient for the current undertaking. If NMDGF determines additional inventory is not necessary, the NMDGF will provide references to prior inventories and will document such decision not to conduct further inventory in the consultation documentation provided to the SHPO, state land managing agency, tribes and other consulting parties.

D. Determination of Eligibility. The NMDGF archaeologist or cultural resource specialist, in consultation with the SHPO, the appropriate state land managing agency, tribe, and other consulting parties shall ensure that all historic properties identified within the APE are evaluated for eligibility for inclusion in the National Register of Historic Places (NRHP) as stipulated in 36 CFR 800.4(c) by applying the criteria found in 36 CFR 60.4 and the State Register of Cultural Properties. All properties for which the NMDGF has not made a determination of eligibility will be treated as eligible for management purposes until eligibility is resolved through consultation with the SHPO, tribes and the appropriate state land management agency.

1. The NMDGF will reevaluate properties previously determined eligible or ineligible due to the passage of time, changing perceptions on significance or if prior evaluations were, or are later determined to be, incomplete.
2. The NMDGF will seek the views of the state land managing agency for the historic properties that exist on lands administered by that state agency but the Service remains responsible for the determination of eligibility as the lead federal agency.
3. Details of the eligibility evaluations shall be discussed and included in the survey report and on the appropriate New Mexico Cultural Resources Information System (NMCRIS) forms. NMDGF's determinations shall be entered into NMCRIS.
4. If a property's eligibility remains uncertain after the inventory, that

property will be treated as eligible for purposes of the NMDGF making an initial effect determination. If the property will be affected by the undertaking, the NMDGF will conduct additional studies as appropriate to make a final determination of eligibility.

5. If the Service, NMDGF, SHPO and tribes cannot agree on the eligibility of a property, the Service will obtain a formal determination of eligibility from the Keeper of the National Register of Historic Places pursuant to 36 CFR 800.4(c)(2). The process detailed in 36 CFR Part 63, the National Park Service regulations on Eligibility for Inclusion in the NRHP will be followed. The Keeper's determination will be final.

E. **Determination of Effect.** The NMDGF shall provide copies of the survey or inventory report(s), supporting documentation and eligibility and effect determinations to the appropriate state land managing agency, and to tribes and other consulting parties upon request, prior to submittal of the documentation to SHPO. These parties will have up to thirty days (30) to review and provide comment to NMDGF.

1. **No Historic Properties Affected.** When the appropriate level of inventory is completed and the inventory either: (1) does not find historic resources of any kind; (2) identifies isolated occurrences, as this term is defined by NMAC §4.10.15, (3) identifies ineligible sites, buildings, structures or objects, or (4) determines eligible or unevaluated properties are present but will be avoided, then a determination of "No Historic Properties Affected" is appropriate. The NMDGF shall document a finding of "no historic properties affected," and the undertaking may proceed following approval of the inventory report by a NMDGF Archaeologist or Cultural Resource Specialist and approval of the undertaking through appropriate NMDGF and Service channels.
 - a. The NMDGF will provide inventory documentation to the appropriate state land managing agency, and tribes and other consulting parties upon request, for review and concurrence on the determination of effect within thirty (30) days of completing the survey.
 - b. After consultation is complete with the Service, state land managing agency, tribes and other consulting parties, the NMDGF shall forward its final eligibility and effect determinations, one copy of the inventory report, associated recording forms and other supporting documentation along with comments received from the Tribes, agencies, and other consulting parties to SHPO for concurrence.

- c. The SHPO shall have thirty (30) days from receipt of the report and supporting documentation to concur or object to NMDGF's eligibility and effect determination. If the SHPO does not concur with NMDGF's findings, consultation shall continue in order to reach consensus on eligibility and effect if the undertaking has not been authorized. If the NMDGF determines consensus cannot be reached, NMDGF shall submit all findings and documentation to the Service for resolution in accordance with Stipulation XII of this PA. If the undertaking has been authorized, the NMDGF will take SHPO comments into consideration on future determinations of like properties and if the property has not been completely destroyed by the undertaking, the property's eligibility will be undetermined for future undertakings.
2. **No Adverse Effect.** If the NMDGF determines that the undertaking will not have an adverse effect to historic properties, then the NMDGF will provide inventory documentation along with determinations of eligibility and effect to the SHPO, the appropriate state land managing agency, tribes and other consulting parties and follow the standard review procedures defined in 36 CFR 800.5(b). The SHPO, the appropriate state land managing agency, tribes and other consulting parties shall have thirty (30) days to review and comment on the documentation and NMDGF's determinations of eligibility and effect. If the SHPO concurs with the finding, NMDGF may proceed with the undertaking provided no other consulting party objects to the finding.
 - a. If the SHPO objects to the NMDGF finding, SHPO will indicate the reason for disagreement. The NMDGF, SHPO and other consulting parties will consult further to resolve this matter, by identifying new alternatives that may result in a finding of no adverse effect on historic properties or ways to minimize the effects. If the SHPO or another consulting party continues to disagree with the finding, NMDGF, the Service, and the SHPO will attempt to resolve the disagreement. If the objection cannot be resolved, the Service shall seek the views of the ACHP in accordance with Stipulation XII.
3. **Adverse Effect.** If the NMDGF determines that the undertaking will result in an adverse effect to historic properties, the NMDGF shall notify the Service and the Service shall follow the standard review process defined in 36 CFR 800.6. Inventory documentation will be provided to the SHPO, the appropriate state land managing agency, tribe and other consulting parties.

- a. The SHPO, appropriate state land managing agency, tribe and other consulting parties will provide comments within thirty (30) days of receipt of the inventory documentation. If the SHPO does not respond within the agreed upon timeframe, the Service may assume concurrence with the determinations of eligibility and effect. The Service will proceed with the resolution of adverse effect determinations in accordance with the procedures in Section V.F of this PA.

F. **Resolution of Adverse Effect.** When a historic property cannot be avoided and may be adversely affected, the NMDGF and the Service shall prepare an agreement document, and following the process in 36 CFR 800.6, consult with the SHPO, tribes, and other consulting parties in order to resolve the adverse effect of the undertaking on historic properties.

Based on the effect of the undertaking on the historic property and the historic property's NRHP criteria, NMDGF will resolve adverse effects by developing and implementing a mitigation plan to avoid, minimize or mitigate the adverse effect as appropriate. Mitigation may include data recovery of archaeological sites, Historic American Buildings Survey/Historic American Engineering Record/Historic American Landscapes Survey (HABS/HAER/HALS) documentation, archival research, public education and outreach and/or compensatory mitigation.

VI. DOCUMENTATION STANDARDS. The Service and NMDGF shall ensure that all historic property surveys, documentation and evaluation of historic resources, and measures to mitigate adverse effects performed by NMDGF, the Service, or consultants to support the findings under this PA shall be consistent with 36 CFR 800.11 and conform to the standards and guidelines in Stipulation I.

A. NMDGF shall provide to SHPO copies of all identification, evaluation, treatment and data recovery reports, survey forms, digital survey information, and other relevant resource information as they are generated. All documentation will meet the standards of the NMCRIS and §4.10.19 NMAC.

VII. CURATION. The Service and NMDGF shall ensure that all materials and records resulting from the identification of historic properties are curated at the Museum of Indian Arts and Culture (MIAC) in accordance with 36 C.F.R. Part 79 and Section 18-6-6 of the Cultural Properties Act, NMSA 1978.

VIII. POST REVIEW DISCOVERIES

A. If historic properties or unmarked human burials are discovered during conduct of a undertaking, work in that part of the undertaking shall stop immediately and the undertaking leader will contact the NMDGF archaeologist as soon as possible. The NMDGF will inform the SHPO and the Service about historic properties discovery

by both telephone and in writing within 48 working hours of discovery, including providing a undertaking description, map showing Area of Potential Effect, explanation of how that area was determined, and details about the discovery. NMDGF shall contact any tribe that may ascribe traditional cultural and religious significance to the discovered property. Unmarked human burial discoveries will follow the process in Stipulation IX.

- B. SHPO, NMDGF, and the Service shall consult to determine whether there is sufficient information to determine whether discovered historic properties are eligible for listing in the National Register of Historic Places. If the information on historic properties is not sufficient to determine National Register eligibility, the NMDGF must conduct an inventory and assessment, and provide a report of findings to SHPO. Tribes will be consulted on the determination of eligibility and may request a copy of the report.
- C. When the SHPO, the Service, NMDGF, and tribes concur that newly discovered historic properties are not eligible for listing in the National Register of Historic Places, or if the undertaking is redesigned to avoid and/or protect eligible historic properties, no further actions are required.
- D. When the consulting parties concur that the undertaking will damage and/or adversely affect newly discovered historic properties that are eligible for National Register listing, NMDGF and the Service will consult with the SHPO, ACHP, and tribes that may attach religious and cultural significance to the discovery to determine the extent of measures to be taken to avoid, minimize, and/or mitigate the adverse effects to the discovery caused by the undertaking.
- E. The consulting parties shall expedite the review of discoveries and shall respond to requests within 5 working days from the date of receipt of the request. The portion of the undertaking near newly discovered historic property cannot proceed until the agreed-upon treatment plan is implemented.

IX. UNMARKED HUMAN BURIALS

- A. If unmarked human burials are discovered during construction, work will stop. Work will not resume until the permitted archaeologist clears the site. The remains will be protected from further disturbance, and the local law enforcement agency and the Office of the Medical Investigator (OMI) will be notified immediately. If the OMI determines that the remains are without medico-legal significance, the OMI will terminate jurisdiction to the SHPO and the SHPO, in consultation with the NMDGF and the Service, will determine the steps to be taken to protect or remove the remains in accordance with the Cultural Properties Act §18-6-11.2, NMSA 1978 and implementing rule 4.10.11 NMAC.
- B. The NMDGF will consult with tribes that may attach religious and cultural significance to human remains, graves or associated funerary objects. This

consultation will be coordinated with the SHPO and may be conducted concurrently with SHPO notification to the tribes pursuant to 4.10.11 NMAC.

X. CONFIDENTIALITY

- A. Consistent with Section 304 of the NHPA, historic resources data obtained in association with the proposed undertaking will be treated as confidential by all Parties, except as otherwise required by law. The Signatories to the PA shall determine what information may be released to other parties in furtherance of compliance with the terms of this PA.
- B. Consistent with the New Mexico Cultural Properties Act (§18-6-11.1 NMSA 1978) information on the location of archaeological resources will be held confidential unless the custodian of such information determines that the dissemination of such information will further the purposes of the Cultural Properties Act as set forth in Section §18-6-2 NMSA 1978 and will not create a risk of loss of archaeological resources.

XI. ANNUAL REPORT

By December 1st of each year following the execution of this PA, the NMDGF shall provide an annual report to the WSFR Chief and the SHPO. A copy of this report shall be provided to tribes on request. The annual report will contain the following information listed below.

- A. A list of NMDGF undertakings that were funded through WSFR grants after initial consultation with SHPO and tribes.
- B. A discussion of any problems encountered in the implementation of this PA and suggestions on how to remedy such problems. This discussion should include any disagreements on NRHP eligibility evaluations and effect determinations and recommendations to improve consensus.
- C. Proposed modifications to Appendix C or other proposed changes to the PA.

The SHPO will review and provide comment within 30 days of receipt of the report. If necessary, a meeting will be scheduled to discuss any concerns or proposed modifications.

XII. 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 NMDGF shall consult with such party to resolve the objection. If the NMDGF determines that such objection cannot be resolved, NMDGF will notify the Service and the Service shall:

- A. Forward all documentation relevant to the dispute, including the Services' proposed resolution, to the ACHP. The ACHP shall provide the Service with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to implementing a final decision on the dispute, the Service

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 Service will then proceed according to its final decision.

- B. If the ACHP does not provide its advice regarding the dispute within the thirty (30) day time period, the Service may make a final decision on the dispute and proceed accordingly. Prior to implementing such a final decision, the Service shall prepare a written response that takes into 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.
- C. The Services' responsibility to carry out all other actions subject to the terms of this PA that are not the subject of the dispute remain unchanged.

XIII. 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.

XIV. TERMINATION

If any signatory to this PA determines that its terms will not or cannot be carried out, that party shall immediately consult with the other signatories to attempt to develop an amendment per Stipulation XIII, above. If within thirty (30) days (or another time period agreed to by all signatories) an amendment cannot be reached, any signatory may terminate the PA upon written notification to the other signatories.

Once the PA is terminated, the Service will be required to comply with Section 106 of the NHPA following the implementing regulations at 36 CFR Part 800.

XV. DURATION

This PA will be in effect for ten (10) years from the date of execution and may be renewed for an additional five years upon written agreement by all signatories.

XVI. COMPLIANCE WITH APPLICABLE LAWS AND REGULATIONS; SEVERABILITY CLAUSE

This PA is subject to all applicable Federal laws, regulations and rules, whether now in force or hereafter enacted or promulgated. Nothing in this PA shall be construed as in any way impairing the general powers of the Service under such applicable laws, regulations, and rules. If any term or provision of this PA is held to be invalid or illegal, such term or provision shall not affect the validity or enforceability of the remaining terms and provisions. Meeting the terms of this PA shall not excuse any failure to comply with all applicable laws and regulations, whether or not these laws and regulations are specifically listed herein.

XVII. ANTI-DEFICIENCY ACT

Implementation of this PA by the Service is subject to the requirements of the Anti-Deficiency Act and the availability of appropriated funds. Nothing in this PA will be construed by the parties to require the obligation, appropriation, or expenditure of any money from the U.S. Treasury. The parties acknowledge that the Service will not be required under this PA to expend any Federal agency's appropriated funds unless and until an authorized official of that agency affirmatively acts to commit to such expenditures as evidenced in writing. If compliance with the Anti-Deficiency Act alters or impairs the Service's or NMDGF's ability to implement the stipulations of this PA, the Service or NMDGF will consult pursuant to Stipulations XII and XIII.

XVIII. LIABILITY

The parties recognize they will be responsible for their own actions and omissions and results, thereof. Accordingly, each party (where liability is otherwise imposed by law) is responsible alone (exclusive of the other parties) for any injury to persons or property resulting in any manner from its conduct of its own operations, and the conduct of its agents or employees occurring in furtherance of the objectives of this PA. Each party further releases and waives all claims against the other party for compensation for any loss, cost, damage, expense, personal injury, death, claim, or other liability arising out of the performance of this PA, including without limitation any loss, cost, damage, expense, personal injury, death, claim, or other liability arising out of the other party's negligence, provided, however, that any party may agree to voluntarily compensate another party for damage to equipment. In the performance of this PA, the parties shall act in an independent capacity and not as officers, or employees, partners or agents of the other parties. If any action at law or in equity, including any action for declaratory relief, is brought to enforce or interpret the provisions of this PA, then each party shall pay its own attorney's fees and costs. Each party shall be solely responsible for its own actions, and no party shall be liable in monetary damages to any other party for any breach of this PA, any performance or failure to perform a mandatory or discretionary obligation imposed by this PA, or any other cause of action arising from this PA.

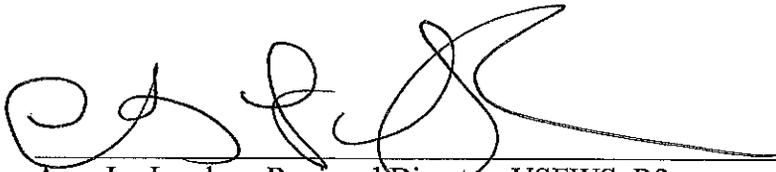
The parties recognize that each party reserves all rights, powers, and remedies now or hereafter existing in law or in equity, by statute, treaty, or otherwise. Nothing in this PA is or shall be construed to be a waiver of the sovereignty of a signatory party, nor a waiver of any legal or equitable defense or immunity. This PA is intended solely for the purposes of facilitating cooperation between the parties, and creates no rights in third parties or the right to judicial review. This PA is not a contract, Federal rule or regulation. This PA shall not be construed as or interpreted to be final Federal agency action.

If any provision of this PA is held invalid, the other provisions shall not be affected thereby.

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

SIGNATORIES:

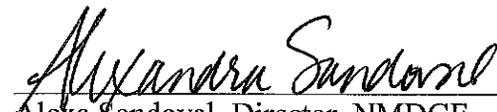
FISH AND WILDLIFE SERVICE



Amy L. Lueders, Regional Director, USFWS, R2

Date *April 6, 2018*

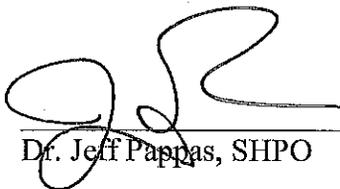
NEW MEXICO DEPARTMENT OF GAME AND FISH



Alexa Sandoval, Director, NMDGF

Date *4/6/18*

STATE HISTORIC PRESERVATION OFFICER



Dr. Jeff Pappas, SHPO

Date *4/6/18*

APPENDIX A

SERVICE DELEGATION OF AUTHORITY LETTER FOR NMDGF



United States Department of the Interior



FISH AND WILDLIFE SERVICE

P.O. Box 1306

Albuquerque, New Mexico 87103

December 12, 2012

In Reply Refer To:
FWS/R2/RD-WSFR

Dr. Jeff Pappas
State Historic Preservation Officer
New Mexico Historic Preservation Division
Department of Cultural Affairs
407 Galisteo Street, Suite 236
Santa Fe, New Mexico 87501

Dear Dr. Pappas:

The U.S. Fish and Wildlife Service (Service) with this letter is providing notification that we are formalizing the role of the New Mexico Department of Game and Fish (NMGF) to assist the Service in carrying out our Section 106 compliance responsibilities. The Service provides financial assistance to the NMGF through the Wildlife Restoration Act (WR), Sport Fish Restoration Act (SFR), State Wildlife Grants (SWG), Boating Infrastructure Grants (BIG), Clean Vessel Act (CVA), and Endangered Species Act (ESA). Attached is a summary of the grant programs. Additional grant program information is available at the following link:
http://www.fws.gov/southwest/federal_assistance/index.html

In order to streamline the Service's compliance with Section 106 and its implementing regulations, "Protection of Historic Properties" (36 CFR Part 800), the Service is authorizing NMGF under the WR, SFR, LIP, SWG, BIG, CVA and ESA grant programs to initiate consultation pursuant to 36 CFR § 800.2(c) (4). Effective immediately, NMGF may consult with the State Historic Preservation Officer (SHPO) to initiate the review process established under 36 CFR Part 800 and to carry out some steps. Specifically, NMGF is authorized to identify consulting parties, identify historic properties, assess potential effects and make determinations/recommendations. The Service remains responsible for all findings and determinations, provided that we are properly notified by NMGF, in advance, of measures taken by NMGF to comply with granting requirements, including any and all special arrangements NMGF intends to make with third party cooperators. This is an interim measure until the Programmatic Agreement can be executed under 36 CFR 800.14 which will account for other jurisdictions and further streamline the Section 106 compliance process.

This delegation does not extend to projects being carried out on Federal lands. The Service also remains responsible for initiating government-to-government consultation with federally recognized Indian Tribes. The Service's responsibility to consult on a government-to-government basis with Indian Tribes as sovereign nations is established through specific authorities and is explicitly stated in 36 CFR Part 800.

NMGF must notify the Service whenever:

- Either NMGF or the SHPO believes that the Criteria of Adverse Effect pursuant to 36 CFR § 800.5, apply to the proposal under consideration by the Service;
- There is a disagreement between NMGF and the SHPO about the scope of the area of potential effects, identification and evaluation of historic properties and/or the assessment of effects;
- There is an objection from a consulting party or the public regarding their involvement in the review process established by 36 CFR Part 800, Section 106 findings and determinations, or implementation of agreed upon measures; or
- There is the potential for a foreclosure situation or anticipatory demolition as defined under 36 CFR § 800.9(b) and 36 CFR § 800.9(c), respectively.

The Service will participate in the consultation when such circumstances arise. The Service expects NMGF to involve consulting parties in Section 106 findings and determinations and to carry out the exchange of documentation and information promptly. Technical assistance is available to NMGF from the Service regarding the coordination of Section 106 reviews, if needed.

If you have any questions, please contact Nicole Jimenez at 505-248-7466.

Sincerely,



Stephen M. Robertson
Chief, Wildlife and Sport Fish Restoration Program

Enclosures

cc: James S. Lane, Jr., Director, New Mexico Department of Game and Fish
Jean Higgins, FA Coordinator, New Mexico Department of Game & Fish

Grant Program Summary

Wildlife Restoration Act (WR)

- Restoration, conservation, management, and enhancement of wild birds and wild mammals, and providing for public use and benefit from these resources
- Educating responsible hunters and archers in skills, knowledge, and attitudes

Sport Fish Restoration Act (SFR)

- Restoring, conserving, managing, and enhancing sport fish, and providing for public use and benefit from these resources. Sport fish are limited to aquatic, gill breathing, vertebrate animals, bearing paired fins, and having material value for sport or recreation
- Enhancing the public's understanding of water resources and aquatic life forms, and assisting them in developing responsible attitudes toward the aquatic environment.

Endangered Species Act (ESA)

- Conserving species of fish, wildlife, or plants included on Federal or State lists of endangered or threatened species, or those that are candidates for listing status. Activities may include:
 - a) Acquisition of endangered or threatened species habitat.
 - b) Introduction of species into suitable habitats within their historic range.
 - c) Enhancement of habitat.
 - d) Surveys and inventories of habitats or populations.
 - e) Research on endangered species.
 - f) Propagation of animals and plants for introduction or protection of the species.
 - g) Protection of listed or candidate species, or their habitat (e.g., mitigation of threats).

Boating Access Program (BA)

- The purpose of this program provides is to provide access to America's waterways by developing new access facilities or renovation and/or improvement of existing facilities.

Boating Infrastructure Grant Program (BIG)

- The purpose of this program is to construct, renovate, and maintain tie-up facilities with features for transient boaters in vessels 26 feet or more in length, and to produce and distribute information and educational materials about the program.

Clean Vessel Act (CVA)

- The purpose of this program is to construct, renovate, operate, and maintain pumpout stations and waste reception facilities for recreational boaters and also for educational programs that inform boaters of the importance of proper disposal of their sewage.

State Wildlife Grants (SWG)

- Targets species and their habitats identified in State Wildlife Action Plans (SWAP) to address conservation needs, such as research, surveys, species and habitat management, and monitoring, identified within the SWAP.

APPENDIX B

TRIBAL CONSULTATION LIST

Tribes consulted and invited to participate in the development of this PA are listed below. Tribes (32 Tribes and Pueblos) to be consulted for specific undertakings using Wildlife and Sport Fish Restoration grants will be identified using the County list that SHPO provides for Native American Consultations. This list can be found on SHPO's website at www.nmhistoricpreservation.org.

Pueblo of Acoma
Pueblo of Isleta
Pueblo of Laguna
Pueblo of Ohkay Owingeh
Pueblo of Cochiti
Pueblo of Jemez
Pueblo of Nambe
Pueblo of Picuris
Pueblo of Pojoaque
Pueblo of San Felipe
Pueblo of Santa Ana
Apache Tribe of Oklahoma
Comanche Nation of Oklahoma
Ft Sill Apache Tribe
Kiowa Tribe of Oklahoma
Pawnee Nation of Oklahoma
Southern Ute Indian Tribe
Ute Mountain Ute Tribe
White Mountain Apache Tribe
Wichita and Affiliated Tribes
Ysleta del Sur Pueblo
Pueblo of Kewa
Pueblo of Tesuque
Pueblo of Zuni
Pueblo of Sandia
Pueblo of San Ildefonso
Pueblo of Santa Clara
Pueblo of Taos
Pueblo of Zia
Jicarilla Apache Nation
Mescalero Apache Tribe
Navajo Nation

APPENDIX C

SCREENED EXEMPTIONS

Pursuant to Stipulation IV (Exemptions), the New Mexico Department of Game and Fish (NMDGF) archaeologist or cultural resource specialist shall review the following activities to determine whether they have the potential to affect historic properties. If the NMDGF archaeologist or cultural resource specialist determines the activity does not have the potential to affect historic properties, NMDGF will provide written communication to the Service but NMDGF is not required to notify or consult with SHPO regarding the activity. The NMDGF archaeologist or cultural resource specialist may require an inventory and evaluation of historic properties even though the action is listed below. In most circumstances, the following actions do not require SHPO consultation.

A. General

1. Activities that involve one square meter or less of cumulative ground disturbance and outside known State or National Register listed, eligible, or unevaluated historic properties.
2. Activities where previous natural and human disturbance has modified the landscape so extensively that the likelihood of finding or affecting historic properties is negligible.
3. Maintenance of existing fence lines including post and wire replacement and vegetation removal when conducted by hand.
4. Pedestrian activities involved with cadastral surveys; motorized activity must be restricted to existing roads.
5. Routine pedestrian and/or horseback law enforcement activities; motorized activity must be restricted to existing roads.
6. Activities limited to within active stream channels, excluding terraces, cut-banks and sand bars.
7. Installation of signs, posts and monuments on New Mexico State Game Commission-owned property and outside the boundaries of known State or National Register listed, eligible, or unevaluated historic properties.
8. Removal of modern materials and trash scatters less than 50 years old and not associated with a larger historic property. Abandoned vehicles and equipment and modern trash dumps are included in this class.
9. 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.
10. Routine foot-trail maintenance within the established trail alignment using hand tools and outside the boundaries of known State or National Register listed, eligible, or unevaluated historic properties.

B. Agricultural

1. Tillage and other agricultural activities within areas of existing or previously tilled cropland and depth of previous disturbance are not exceeded.

2. Maintenance of ditches and irrigation laterals that are 45 years or older when maintenance does not alter the existing ditch alignment, nor alter, and/or replace head-gates or other irrigation infrastructure, unless it is in-kind replacement.

C. Animal Habitat and Vegetation Improvements

1. Trap staking when the individual anchor stakes are round within no holding spades and do not exceed 3.8 centimeter (1.5 inch).
2. Surveys and inventories of habitats or populations that do not involve ground disturbance; motorized activity must be restricted to existing roads.
3. Pesticide spray projects when no known historic properties of traditional cultural and religious values are present.
4. Hand removal of vegetation on foot that the vegetation spoils are left in place. Any affiliated motorized staging and/or access will be by established roads and/or two tracks. Removal of vegetation within known State or National Register listed, eligible, or unevaluated historic resources is encouraged/recommended but the removal strategy/plan must be reviewed by agency archaeologist prior to implementation.
5. Routine vegetation management including mowing, pruning/trimming, and the removal of dead or dying vegetation within a developed or landscaped area that is not a contributing element to a historic district.
6. Planting of new vegetation in previously developed landscaped areas when no known archaeological sites are present and not within historic districts.
7. Planned controlled burns for habitat improvement when no known, at risk historic properties are present (*i.e.: that have materials and/or would have contributive properties that can be affected by excess or sustained heat and/or resulting aspects of combustion*).. Any ground disturbing activity in association with the burn is subject to standard review and consultation.

D. Transportation, Utilities, Structures and Other Infrastructure

1. Minor boat ramp extensions constructed during periods of low water in areas where the boat ramp has not been previously extended.
2. Renovation and/or maintenance of existing structural facilities that are less than 45 years old and that are not within a historic district and do not involve ground disturbance.
3. Maintenance of existing structural improvements (e.g. pipelines, reservoirs, cattle guards, gates, fences, signs, stock tanks, docks, buoys, vault toilets, etc.) that do not involve ground disturbance and the facilities themselves are less than 45 years old.
4. The repair and maintenance of facilities using in-kind material to match original features, materials, and craftsmanship for the preservation and specific maintenance of existing structures and infrastructure that have degraded to the point of eminent failure.
5. Maintenance of crowned or ditched roads that does not exceed the current existing right-of- way and alignment when the road is outside known State or National Register listed, eligible, or unevaluated cultural deposits or exposed archaeological deposits.
6. Repair of existing paved roads and parking lots which include sealing cracks, fog

- coating, milling, re-compaction, overlay, and filling potholes.
7. The repair and/or replacement of existing underground utilities that are the same size and footprint and in the same location and outside the boundaries of known State or National Register listed, eligible, or unevaluated historic properties.
 8. Maintenance of existing authorized gravel roads and parking lots which includes grading and adding gravel, unless within or immediately adjacent to known State or National Register listed, eligible, or unevaluated historic properties and as long as all repairs are done in-kind to match existing, original materials, construction methods, and craftsmanship.

E. Dam Maintenance

1. Dewatering and dredging of the stilling basin below the outlet works of a dam for the purposes of inspection.
2. The clearing of debris from trash-racks of dams.
3. Dredging of sediments from dam intake structures.
4. Routine installation, maintenance, and repair of monitoring equipment within the embankment of the dam such as piezometers, slope indicators, pressure pipes, settlement plates, and pressure relief wells.
5. Installation and upkeep of stationing markers on the dam crest.
6. Routine and preventative maintenance actions performed frequently on functioning elements of the dam, including but not limited to cleaning of drains, greasing of components, changing of fluids, replacement of disposable components such as filters, light bulbs and seals, repair and replacement of mechanical components such as valves and packing glands, in-kind touch up of paint and epoxy on operating portions of the dam to prevent corrosion and water damage.
7. Repair of structures using in-kind or substantially similar materials, of areas of spalling, cracking, crazing, and/or pop-outs on the concrete surfaces of dams and spillways.
8. The replacement and repair of rip-rap used for flood control, irrigation and dam structures.