PROTOTYPE PROGAMMATIC AGREEMENT
BETWEEN THE
US DEPARTMENT OF AGRICULTURE,
NATURAL RESOURCES CONSERVATION SERVICE MAINE STATE OFFICE,
AND THE PENOBSCOT INDIAN NATION
REGARDING CONSERVATION ASSISTANCE

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); the Soil Conservation and Domestic Allotment Act of 1935 (Public Law 74-46, 16 U.S.C. 590 a-f, as amended); the Flood Control Act of 1944 (Public Law 78-534, as amended); the Watershed Protection and Flood Prevention Act (Public Law 83-566, as amended, 16 U.S.C. 1001-1012); the Agricultural and Food Act of 1981 (Public Law 97-98, 95 Stat. 1213); the Agricultural Credit Act (Public Law 95-3341, Title IV, Section 403); the 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 Maine State Office has consulted with the Penobscot Indian Nation's Tribal Historic Preservation Officer (THPO) and followed the instructions in the Advisory Council on Historic Preservation (ACHP) letter that 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 this Prototype Agreement in consultation with the

National Conference of State Historic Preservation Officers (NCSHPO) and its members, interested Indian tribes, Native Hawaiian organizations (NHOs), interested historic preservation organizations (such as the National Trust for Historic Preservation), and the 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 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 Penobscot Indian Nation 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 State Conservationist is the responsible federal agency official within the state for all provisions of Section 106, including consultation with the State Historic Preservation Officer (SHPO), NHOs, and government-to government consultation with Indian tribes to negotiate the State-based Prototype Agreement; and

WHEREAS, the 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 has consulted with the Penobscot Indian Nation and has invited the Penobscot Indian Nation to enter this State-based Prototype Agreement as a signatory; 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; and

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 Maine State Office and the Penobscot Indian Nation agree that undertakings in Maine shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertakings 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 Penobscot Indian Nation, this State-based Prototype Agreement sets forth the review process for all NRCS undertakings subject to Section 106 of the NHPA in Maine.
b. Execution of this State-based Prototype Agreement supersedes any existing consultation protocol with the Penobscot Indian Nation executed under the previous NRCS nationwide Programmatic Agreement, but does not replace any existing project-specific Section 106 agreements (Memoranda of Agreement or Programmatic Agreements).
c. This State-based Prototype Agreement applies only when there is a Federal Preservation Officer (FPO) in the NRCS National Headquarters (NHQ) who meets the Secretary of the Interior's Professional Qualification Standards (48 FR 44716).
d. This State-based Prototype Agreement applies only where there is staffing or access to staffing (through contracted services or agreements with other agencies or Indian tribes) who meet the Secretary of Interior's Professional Qualification Standards in the NRCS Maine State Office.

II. Roles and Professional Qualifications.

a. The NRCS Maine State Conservationist is responsible for oversight of its performance under this State-based Prototype Agreement.
b. NRCS Maine shall ensure all NRCS staff or individuals carrying out Section 106 historic preservation compliance work on its behalf, including the NRCS Maine senior historic preservation professional staff member (the Cultural Resources Specialist [CRS]), 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, landscape, resources of significance to Indian tribes, and other concerned communities). Thus, these staff and consultants must meet the Secretary of the Interior's Professional Qualification Standards and have the knowledge to assess the resources within an undertaking's area of potential effects (APE).
c. The Maine State Conservationist is responsible for government-to-government consultation with the Penobscot Indian Nation and their THPO 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.
d. The NRCS Maine CRS and/or professional consultants shall provide technical historic property and resource information to the State Conservationist for use in Section 106 findings and determinations, after appropriate consultations with the SHPO, Indian

tribes, and discussions with the landowner. The CRS shall monitor and oversee the work and reporting of all NRCS field office personnel and professional service consultants. The CRS shall also assist the 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).

e. NRCS field office personnel involved in implementing this State-based Prototype Agreement, after completion of NRCS' web, classroom, and field awareness training acquired through USDA's AgLearn training site, shall work with the CRS, as feasible, 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).

f. The CRS in Maine shall oversee development of the scopes of work for investigation of the APEs for identified undertakings (see 36 CFR Part 800.4). The NRCS may use professional service contractors or consultants or partners to assist with cultural resources compliance studies. NRCS shall ensure these contractors meet the Secretary of Interior's Professional Qualifications Standards.

g. NRCS remains responsible for all consultation with the SHPO, Indian tribes and THPOs, 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.

h. The Penobscot THPO, if provided sufficient data on a proposed undertaking and APE for the proposed undertaking by the NRCS Maine State Office shall consult and provide a response to NRCS within 30 calendar days. The definition of sufficient data is provided in 36 CFR Part 800.11.

i. The ACHP shall provide technical guidance, participate in dispute resolution, and monitor the effectiveness of this agreement, as appropriate.

III. Training.

a. NRCS shall require personnel conducting cultural resources identification and evaluation work (i.e., those with the authority to make historic preservation recommendations and decisions) to complete, at a minimum, the NRCS Web-based (in USDA AgLearn) and field Cultural Resources Training in modules and the ACHP's Section 106 *Essentials* course.

b. NRCS shall require the CRS and/or other NRCS personnel overseeing cultural resource work to take the NRCS Cultural Resources Training Modules (awareness training) and the ACHP's 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 State-based Prototype Agreement. NRCS personnel shall review and update training completion with their supervisors and include their training in their Individual Development Plans.

c. NRCS may invite the Penobscot THPO or staff to participate in presentations at agency classroom or field trainings.

d. NRCS shall encourage all personnel conducting or overseeing cultural resources work

to take additional appropriate specialized training as provided by the SHPO, Indian tribes, the ACHP, National Park Service, General Services Agency or other agencies, as feasible.

e. All NRCS technical employees responsible for completing the NRCS Cultural Resources Review Worksheet (ME-CR-1; see Stipulation V below) will take the NRCS national Cultural Resources Training Modules and supplemental State training. The CRS will organize the training of NRCS field personnel periodically as sizable numbers of new employees are hired. Employees who have not had this training will work with trained NRCS personnel or the CRS to complete the Worksheet. The trained staff member will be responsible for the accuracy of the compliance documentation. Update training will be required every other year for NRCS field personnel.

IV. Lead Federal Agency.

a. 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 State-based Prototype Agreement. NRCS shall notify the Penobscot THPO of its involvement in the undertaking and the involvement of the other federal agencies.

b. For any undertaking for which the NRCS is not the lead federal agency for Section 106 purposes, including those undertakings for which the NRCS provides technical assistance to other USDA or other federal agencies, the terms of this State-based Prototype Agreement shall not apply to that undertaking. If the lead federal agency agrees, NRCS may follow the approved alternative procedures in place for that agency.

V. Review Procedures.

a. In consultation with the Penobscot THPO, NRCS shall identify those undertakings with little to no potential to affect historic properties and list those undertakings in Appendix A. Upon the determination by the CRS that a proposed undertaking is included in Appendix A, the NRCS is not required to consult further with the THPO for that undertaking.

b. The list of undertakings provided in the Appendix A may be modified through consultation and written agreement between the NRCS State Conservationist and the Penobscot THPO without requiring an amendment to this State-based Prototype Agreement. The NRCS State Office will maintain the master list and will provide an updated list to all consulting parties with an explanation of the rationale (metadata) for classifying the practices accordingly.

c. Undertakings not identified in Appendix A shall require further review as outlined in Stipulation V.c. The NRCS shall consult with the Penobscot THPO to define the undertaking's APE on Penobscot tribal land (both Reservation and Trust land), 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 THPO, provided this documentation meets the substantive standards in 36 CFR Part 800.4-5 and 800.11.

2. The NRCS shall attempt to avoid 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 THPO shall have 30 calendar days from receipt of this documented description and information to review it and provide comments. The NRCS shall take into account all timely comments.

i. If the THPO or another consulting party disagrees with NRCS' findings and/or determination, it shall notify the NRCS within the 30-calendar-day time period. The NRCS shall consult with the THPO or other consulting party 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 THPO does not respond to the NRCS within the 30-calendar-day period and/or the NRCS receives no objections from other consulting parties, or if the THPO concurs 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 a Memorandum of Agreement to resolve the adverse effects.

5. Certain non-Trust and non-Reservation lands in Maine may contain historic properties of traditional religious and cultural significance to the Penobscot Indian Nation. These lands include Fee lands (purchased by the Tribe in fee simple) and all portions of the counties of Franklin, Hancock, Kennebec, Knox, Penobscot, Piscataquis, Somerset, and Waldo and the town of Steuben in Washington County. For NRCS undertakings in these areas, NRCS shall make a reasonable and good faith effort to consult with the THPO to identify and discuss relevant preservation issues. The consultation will entail NRCS and the THPO generally following the review procedures described here in stipulation V.c. However, this consultation will be subject to the limitations noted in the ACHP's regulations of 36 CFR 800 for non-Tribal lands. Furthermore, this NRCS coordination with the Penobscot Indian Nation shall be in addition to that NRCS consultation required with the SHPO when an undertaking is off of Tribal land (36 CFR 800.2(c)).

6. Appendix B provides detailed instructions on how NRCS Maine and the THPO shall conduct the cultural resources reviews. Included there are discussions of the NRCS Cultural Resources Review Worksheet and other documentation.

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

a. NRCS shall notify the Penobscot THPO immediately or within 48 hours of the emergency determination, following the NRCS' Emergency Watershed Protection Program (EWP) final rule (see Section 216, P.L. 81-516 Final Rule, 7 CFR Part 624 [April 2005]).

b. The NRCS State Office shall prepare procedures for exigency (following the rules for NRCS [EWP] regarding immediate threat to life and property requiring response within 10 days) in consultation with the THPO. These procedures are appended to this document (Appendix C).

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 Section106 review is complete, the NRCS shall consult with the Penobscot THPO (and the SHPO, if architectural historic properties may be affected) to seek avoidance or minimization strategies and/or to resolve 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 State Conservationist's Office, CRS, supervisory NRCS personnel for the area, and the landowner/applicant.

1. The NRCS CRS shall inspect the discovery within 24 hours, if weather permits, and in consultation with the local NRCS official (field office supervisor or District or Area Conservationist), the Penobscot THPO, concerned Indian tribes, the NRCS State engineering or program supervisor, as appropriate, and 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 cultural resources experts in addition to the CRS.
2. All NRCS contact with media shall occur only under the direction of the NRCS Public Affairs Officer, as appropriate, and the 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 tribal or State law and NRCS policy in order to protect the resources. Construction and/or work may resume outside the buffer only when the State Conservationist determines it is appropriate and safe for the resources and workers.
4. The NRCS CRS shall notify the Penobscot THPO and the ACHP no later than 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. The eligibility determination may require the assessment and advice of concerned Indian tribes, the Penobscot THPO, and technical experts (such as historic landscape architects) not employed by NRCS.
5. The Penobscot THPO and ACHP shall respond within 48 hours from receipt of the notification with any comments on the discovery and proposed actions.
6. NRCS shall take any comments provided into account and carry out appropriate actions to resolve any adverse effects.
7. NRCS shall provide a report to the Penobscot THPO and the ACHP of the

actions when they are completed.

c. When human remains are discovered, 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. If human remains are discovered in the APE during the planning or implementation of an NRCS undertaking, all activities deemed likely to damage the remains will cease and the following steps will be taken:

1. An NRCS representative will immediately contact Tribal law enforcement authorities, the CRS, and the Penobscot THPO.
2. The State coroner will determine whether or not the remains are of recent origin and under the jurisdiction of law enforcement authorities.
3. If the remains are not under the jurisdiction of law enforcement authorities, the CRS will, in cooperation with the THPO, arrange to determine the ethnicity of the remains and their approximate age. NRCS will follow procedures of this Prototype Agreement's review procedures (stipulation V.c) and consult with the THPO to develop an appropriate plan for evaluating and treating the discovery.
4. NRCS field personnel and NRCS contractors will take appropriate measures to protect the remains unless the State coroner or other law enforcement authorities take responsibility. NRCS will ensure that the remains are protected until evaluation and treatment are completed.
5. Planning and construction activities at the site where remains were discovered can continue only after NRCS and the THPO agree that the plan for treating remains has been properly implemented.
6. Maine State law (22 M.R.S.A. 2842-B) requires that a person or entity who possesses Indian human remains transfer them to an intertribal repatriation organization when the Native American Graves Protection and Repatriation Act (25 USC 3001) does not apply. Indian human remains are <u>not</u> the property of private landowners.
7. NRCS will also comply with 13 M.R.S.A. 1371, Approval for repair, maintenance and removal, and 1371-A, Limitations on construction and excavation near burial sites.

VIII. Dispute Resolution.

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

1. Forward all documentation relevant to the dispute, including the State Conservationist's proposed resolution, to the NRCS FPO and Senior Policy Official (SPO Deputy Chief for Science and Technology) and the ACHP. The ACHP shall provide the FPO, SPO, and State Conservationist with its advice on

the resolution of the objection within 30 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 30-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 Maine State Office responsibility to carry out all other actions subject to the terms of this agreement that are not the subject of the dispute remains unchanged.

c. Any consulting party to this State-based Prototype Agreement 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 the State-based Prototype Agreement, a member of the public may submit an objection pertaining to this agreement to the NRCS State Conservationist, in writing. Upon receiving such an objection, the State Conservationist shall notify the NRCS SPO and FPO, and the Penobscot THPO, take the objection into account, and consult with other consulting parties as appropriate to resolve the objection. The NRCS State Conservationist shall notify the SPO, FPO, and the THPO of the outcome of this process.

IX. Public Involvement

The NRCS State Conservationist will ensure the public is involved in the development of this State-based Prototype Agreement and participates in Section 106 review as set forth above in Section V (reference to other parties).

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 Maine State Conservationist shall provide all consulting parties (including those parties who participate in the consultation but do not sign the agreement) and the FPO a 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 (i.e., an end-of-year NRCS Performance Results System report with other relevant information as needed and specified by the Penobscot THPO) ; a summary of the nature and content of meetings held with the THPO; and an assessment of the overall effectiveness of the State-based Prototype Agreement. Such report shall include any scheduling changes proposed, any problems encountered, and any disputes and objections received in NRCS' efforts to carry out the terms of this agreement.

1. The NRCS FPO shall use the state reports to provide, through the NRCS SPO, an annual report to the ACHP.
2. The State Conservationist shall use the state report to assess the need for annual meetings with the THPO each fiscal year.

b. The State Conservationist will participate in an annual review with the NRCS Regional Conservationist regarding the effectiveness of the prototype agreement and submit a written (email) report following this review to the SPO (Deputy Chief for Science and Technology).

c. The NRCS State Conservationist or THPO may request that the ACHP participate in any annual meeting or agreement review.

XI. Compliance with Applicable State Law and Tribal Law (when on Tribal Lands).

NRCS shall comply with relevant and applicable state law, including permit requirements on state land, and with relevant and applicable tribal law, when on tribal lands.

XII. Duration of Prototype Agreement.

This State-based Prototype Agreement will be in effect for 10 years from the date of execution unless amended or terminated pursuant to Stipulation XIII below.

XIII. Amendment and Termination.

a. This State-based Prototype Agreement 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 State-based Prototype Agreement, 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 XIII.a. If within 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 the agreement upon written notification to the other signatories.

c. If this State-based Prototype Agreement 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 Maine.

d. NRCS will consider requests from other USDA agencies to become a signatory to the State-based Prototype Agreement following formal written requests and appropriate discussion with and approval by the NRCS FPO and SPO, and joint USDA Agency - NRCS State Office consultation with the ACHP, NCSHPO, the Penobscot THPO, and other consulting parties, as appropriate. Such inclusion of the USDA agency may require amendment to this State-based Prototype Agreement.

Execution of this State-based Prototype Agreement by the NRCS and the Penobscot Indian Nation and implementation of its terms evidence that NRCS has taken into account the effects of its undertakings in Maine on historic properties and afforded the ACHP a reasonable opportunity to comment.

Signatory Parties

Date: 3/12/15

State Conservationist, Natural Resources Conservation Service Maine

Date: 3-9-15

Chief, Penobscot Indian Nation

APPENDIX A

LIST OF UNDERTAKINGS REQUIRING NO FURTHER SECTION 106 REVIEW IN MAINE BY NRCS

Pursuant to Stipulation V.a. above, in consultation with the Penobscot THPO, the NRCS, through the qualified CRS 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 THPO under Section 106 for any undertaking that is included in this appendix:

Conservation practices

Brush Management (314, using only control methods that do not disturb the soil surface layer)
Conservation Cover (327)
Conservation Crop Rotation (328)
Contour Buffer Strips (332)
Contour Farming (330, without removal of obstructions or woody vegetation)
Cover Crop (340)
Early Successional Habitat Development/Management (647, without controlled burning, new tillage, or removal of obstructions or woody vegetation)
Fence (382, except when postholes are augered)
Field Border (386)
Filter Strip (393)
Forage and Biomass Planting (512)
Forage Harvest Management (511)
Forest Stand Improvement (666)
Herbaceous Weed Control (315, using only control methods that do not disturb the soil surface layer)
Integrated Pest Management (595)
Irrigation System, Microirrigation (441, with all components above ground)
Irrigation System, Sprinkler (442, with all components above ground)
Irrigation Water Management (449, without structural components)
Mulching (484)
Nutrient Management (590)
Pond Sealing or Lining – Bentonite Sealant (521C)
Pond Sealing or Lining – Flexible Membrane (521A)
Pond Sealing or Lining – Soil Dispersant (521B)
Prescribed Grazing (528)
Residue and Tillage Management, Mulch Till (345)
Residue and Tillage Management, No Till/Strip Till/Direct Seed (329)
Residue and Tillage Management, Ridge Till (346)
Residue Management, Seasonal (344)
Stripcropping (585, without removal of obstructions or woody vegetation)
Tree/Shrub Pruning (660)
Upland Wildlife Habitat Management (645)

Conservation practices requiring no further *architectural* review (archaeological reviews still needed)

Clearing and Snagging (326)
Critical Area Planting (342)
Deep Tillage (324)
Irrigation Pipeline (430)
Irrigation Water Conveyance, Pipeline, Aluminum Tubing (430AA)
Irrigation Water Conveyance, Pipeline, Asbestos-Cement (430BB)
Irrigation Water Conveyance, Pipeline, Non-reinforced Concrete (430CC)
Irrigation Water Conveyance, Pipeline, High-Pressure, Underground Plastic (430DD)
Irrigation Water Conveyance, Pipeline, Low-Pressure, Underground Plastic (430EE)
Irrigation Water Conveyance, Pipeline, Steel (430FF)
Irrigation Water Conveyance, Pipeline, Reinforced Plastic Mortar (430GG)
Pipeline (516)
Riparian Forest Buffer (391)
Streambank and Shoreline Protection (580)
Tree/Shrub Site Preparation (490)
Underground Outlet (620)
Vegetated Treatment Area (635)
Wetland Enhancement (659)

Other activities requiring no further Section 106 review

Soil survey mapping with hand shoveling (ca. 10-x-24-inch test pits) or hand augering, except as specified in the notes below on Tribal lands. (Upon the discovery of archaeological resources, soil scientists shall close these test pits, leaving the materials in place and reporting the finds to the Cultural Resources Specialist. Larger characterization sampling pits or backhoe trenches *do* require further Section 106 review.)

Note regarding soil survey on Passamaquoddy Tribal land: All proposed soil survey mapping (including hand shoveling, augering, and characterization with larger sampling pits or backhoe trenches) on Passamaquoddy Tribal land (Reservation, Trust, and Fee land) shall necessitate cultural resource consultation between NRCS and the Passamaquoddy Tribal Historic Preservation Officer (THPO). However, planning for soil survey mapping on non-Tribal lands will not require consultation between NRCS and the Passamaquoddy THPO. (When archaeological resources are discovered on Passamaquoddy Tribal land during soil survey mapping, soil scientists shall close the test pits with the finds in place and report the finds to the Cultural Resources Specialist for further coordination with the Passamaquoddy THPO. Consultation between NRCS and the Passamaquoddy THPO may require other historic preservation actions on a case-by-case basis.)

Note regarding soil survey on Penobscot Indian Nation Tribal land: All proposed soil survey mapping (including hand shoveling, augering, and characterization with larger sampling pits or backhoe trenches) on Penobscot Indian Nation Tribal land (Reservation,

Trust, and Fee land) shall necessitate cultural resource consultation between NRCS and the Penobscot THPO. However, planning for soil survey mapping on non-Tribal lands will not require consultation between NRCS and the Penobscot THPO. (When archaeological resources are discovered on Penobscot Indian Nation Tribal land during soil survey mapping, soil scientists shall close the test pits with the finds in place and report the finds to the Cultural Resources Specialist for further coordination with the Penobscot THPO. Consultation between NRCS and the Penobscot THPO may require other historic preservation actions on a case-by-case basis.)

Advice or technical assistance, including the development, review, and/or approval of conservation plans (e.g., Conservation Activity Plans like Comprehensive Nutrient Management Plans) or technical designs, when NRCS provides no financial assistance for their implementation or otherwise exercises no control over implementation (e.g., design advice from the NRCS National Handbook of Conservation Practice Standards for a farm pond that is installed independently by the agricultural producer with his or her own funds and private contractor). When known to the NRCS, the agency will advise the producer when proposed practices that are to be installed without any Federal assistance appear to have the potential to affect historic properties and provide the name(s) of possible contacts (e.g., the SHPO and THPO) who may provide guidance on identifying and protecting historic properties. Additionally, the plan will advise the producer that state or local cultural resources, historic preservation, or state burial laws may apply. The producer may use these data if he/she decides to implement the conservation plan without NRCS financial assistance.

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

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

Development or revision of technical standards and specifications (with review by the Cultural Resources Specialist).

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

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

Conservation easement purchases (e.g., through the Agricultural Conservation Easement Program), the management plans for which do not call for structural modification or removal or ground disturbing activities.

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

APPENDIX B
DETAILED INSTRUCTIONS FOR CULTURAL RESOURCES REVIEWS

A. NRCS field personnel, who have completed the NRCS nine-module Cultural Resources Training Series and subsequent training and updates developed by NRCS, may conduct limited cultural resources reviews using Maine's NRCS Cultural Resources Review Worksheet (ME-CR-1 or Worksheet; see end of this Appendix B) for undertakings where:

   1) the authority for resource planning is at the field office level; and
   2) the undertaking is limited to lands owned or controlled by three or fewer persons or public entities.

   When these conditions are not met, the CRS will prepare the Worksheets in consultation with the field personnel.

B. NRCS field personnel trained to the above standards will use the following procedure to consult with the Penobscot Indian Nation. Since the Penobscots have no historic preservation program in architectural history, NRCS *simultaneously* shall consult with the SHPO when undertakings may affect architectural historical properties. All steps of this procedure will be documented by the field office personnel on the Worksheet and appropriate attachments:

   1) NRCS field personnel will determine whether or not the planned action/practice is an undertaking that may affect historic properties by using the list in Appendix A.
   2) For undertakings which Appendix A exempts from further cultural resources reviews, the field personnel document this determination on the Worksheet and retain the Worksheet in field office project files.
   3) NRCS field personnel will complete a Worksheet for all undertakings <u>not</u> exempted from further review by Appendix A.

      a) If completion of the Worksheet indicates that no further cultural resources assessment is needed, the field personnel shall place a copy of the Worksheet in the project file, submit a copy of the Worksheet to the CRS for documentation and quality assurance, and may proceed with the undertaking.
      b) If completion of the Worksheet indicates that additional cultural resources review is needed, the field personnel retain a copy of the Worksheet for their project file and submit the original to the CRS.

   4) Upon receipt of the original Worksheet for an undertaking that has potential to affect historic properties, the CRS will review the contents for completeness and may conduct a field visit and limited background research to supplement the included information. The CRS then will submit a copy of the Worksheet, with

any supplemental data, to the Penobscot THPO (and to the SHPO when architectural historical properties may be affected) for evaluation and comment.

C. The THPO will analyze the information on the Worksheet submitted by NRCS and will make recommendations on the scope of efforts, if any, needed to identify historic properties. The THPO will respond in writing to the CRS's request for review within 30 calendar days of Worksheet receipt. The THPO's response will explain in appropriate detail any recommendations for further study or review.

D. If, based on the comments of the THPO (and the SHPO, if necessary) and on the information from the Worksheet and ancillary sources, NRCS determines that the undertaking is unlikely to affect historic properties (archaeological or architectural) or will have no adverse effect on such properties in the APE, the CRS will notify the NRCS field office. This notification will include copies of pertinent correspondence. NRCS field office personnel will inform the project landowner/sponsor of this determination and may proceed with the undertaking.

E. If, based on the comments of the THPO (and the SHPO, if necessary) and on the information from the Worksheet and ancillary sources, further investigations are needed to identify historic properties (archaeological and architectural) in the APE, the CRS will notify the NRCS District Conservationist (DC).

1) The CRS and the DC will inform the project landowner/sponsor of the specific investigations needed for compliance with Section 106 of the NHPA before NRCS may continue its assistance. In this consultation, the CRS and the DC also will relate the estimated time involved for the investigation and the potential outcomes of the study. A continuation of NRCS assistance for the planned undertaking is contingent on the presence of no feasible alternative and on adequate funding or staff to complete necessary investigations, as determined by NRCS's State Conservationist. If NRCS has the means to pursue the investigations, but the project landowner/sponsor does not wish NRCS to proceed according to historic preservation policy, then NRCS will withdraw all assistance for the undertaking
2) When NRCS determines that historic preservation investigations shall proceed, the CRS will conduct a field check and will arrange for necessary surveys to identify properties and to evaluate their eligibility for the National Register of Historic Places (36 CFR 60.4). The CRS will provide the written results of these investigations to the THPO (and the SHPO, if necessary) for a 30-calendar-day review and will consult with the THPO (and the SHPO, if necessary) to determine the presence of National Register eligible archaeological properties.

F. When NRCS determines from archaeological and architectural investigations that an undertaking will not affect or will not adversely affect historic properties in the APE, the CRS will submit documentation of this finding to the THPO (and to the SHPO, if necessary) for up to a 30-calendar-day review and concurrence. This NRCS submission of no effect and no adverse effect findings may occur simultaneously with the provision of the results of archaeological and architectural investigations described above. Upon receipt of the THPO's (and the SHPO's, if necessary) written

concurrence, the CRS will notify the DC, who will inform the project landowner/sponsor and may proceed with the undertaking.

G. When NRCS determines from archaeological and architectural investigations that an undertaking will adversely affect historic properties in the APE, the CRS and the DC will consult with the THPO (and the SHPO, if necessary) and the project landowner/sponsor to resolve the adverse effects according to the Council's regulations at 36 CFR 800.6-7. NRCS will commence this consultation by discussing with the project landowner/sponsor new alternatives for the undertaking, funding, and timing. Based on these preliminary discussions, the landowner/sponsor may refuse additional NRCS assistance or NRCS may decide not to pursue the undertaking any further. In both cases, NRCS would withdraw all assistance for the undertaking rather than continuing to assess and resolve adverse effects.

H. Pursuant to NRCS GM 401.30, NRCS will report cultural resources found within the APE on SHPO-approved forms. The CRS will complete the relevant forms and submit them to the THPO (with copies to the SHPO). Pursuant to section 304 of the NHPA, NRCS should treat archaeological site forms and state and field office files relating to archaeological sites as confidential and not subject to public disclosure.

I. Artifacts recovered on private land are the property of the landowner. NRCS will return the artifacts that it or its archaeological contractor has collected to the landowner after necessary study and cataloging meeting *Archeology and Historic Preservation; Secretary of the Interior's Standards and Guidelines* (1983). However, where landowners relinquish ownership of artifacts, NRCS agrees on behalf of the landowner to turn over artifacts, copies of original documentation, and reports to a facility meeting curation standards pursuant to 36 CFR 79.

J. The CRS, in consultation with the THPO, may conduct annual spot checks or compliance reviews of selected NRCS offices and undertakings. NRCS will provide the THPO with a narrative summary of spot checks or other compliance reviews that apply to cultural resources protection. NRCS will submit this summary to the THPO within 30 days of sharing the summary report with the field office. NRCS will send follow-up or progress reports on necessary changes in cultural resources reviews to the THPO.

K. NRCS will keep copies of cultural resources compliance documentation for all undertakings at the field or State office level (depending on level of review involved) and will provide copies to the THPO as requested. NRCS will retain the documentation according to the following schedule: project correspondence and agreements—at least two years following project completion or agreement termination; sensitivity analyses—in perpetuity; historic preservation reports—in perpetuity.

L. NRCS cultural resource reports will meet the *Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines* and the SHPO's guidelines for archaeological work in Maine (27 M.R.S.A. 509).

[ME-CR-1 appended]

This Worksheet shall be used for all undertakings (projects, programs, and activities) for which NRCS helps to fund or provides controlling technical assistance (see full Worksheet Instructions).

NRCS CULTURAL RESOURCES REVIEW WORKSHEET

Landowner/Client Name(s):			*Date:*	
Full Mailing Address:	*No., Road:*	*Town:*	*State:*	*Zip:*
Location of Undertaking: **Tribal?** ☐	*Road:*	*Town:*	*County:*	
NRCS Planner:		*Office:*		
Tract No. (or other file ID):		*Proposed Funding Source:*		

Do you want sensitivity analysis for the entire farm or tract(s) to indicate where future undertakings might affect significant cultural resources? (Sensitivity analysis may be useful when multiple undertakings are planned—perhaps over a number of years—or there is flexibility in project location.)

☐ YES - Specify the land areas for analysis below. ☐ NO

1. **Undertakings.** List each proposed undertaking by conservation practice name, practice code, dimensions (length, width, depth, height), and acreage of area of potential effects (APE, rounded to nearest 0.1 acre). Label which, if any, **practices are exempt from review** under current SHPO/THPO agreements.

Add Row	Name	Code	Dimensions	Acreage	Exempt?
					☐
					☐
					☐
					☐

If all of the practices listed above are exempt from review, the Field Office does not need to complete the rest of this Worksheet but shall retain this ME-CR-1 in project files without sending a copy to the CRC/CRS.

Add Row *Describe construction or other practice methods (non-exempt practices):*

Add Row *Or, select a common scenario:*

Dates for first undertaking's contract signing: _____ ; implementation: _____

2. Conditions. Describe current and past landuse in the APE:

Based on interviewing the landowner/sponsor, is the entire APE on fill or previously disturbed to a depth below any impact of the undertaking? **Note: Do not consider previous tillage, animal traffic, or vehicular traffic as disturbance here.**

☐ YES, describe below how and why there is a disturbance and proceed to No.4. ☐ NO, go to No.3

3. Natural and cultural setting (archaeological sensitivity).

a. Is the location of any undertaking within 150 feet of a coastal shoreline, river, potentially canoeable stream, lake, natural pond, spring, peat bog, marsh, old channel, terrace margin or floodplain?

☐ YES, describe below. ☐ NO

Characterize the APE and its vicinity with respect to landforms (hills, terraces, etc.):

b. Is the soil of the APE attractive for prehistoric settlement? ☐ YES ☐ NO

Note: Check *YES* only if available Soil Survey data indicate that the soil is alluvial, glaciofluvial, or derived from fine sand, sand, gravelly sand, or gravel **and** all of the following conditions apply: the soils are not extremely stony, extremely bouldery, or rubbly; the soils are not poorly or very poorly drained; the slopes are not 10% or more.

List the Soil Survey map unit symbol(s) and complete name(s):

From your site visit, note any obvious inclusions in the APE of unmapped soils:

c. Is there a stone or brick foundation (without superstructure), an old stone wall (not a linear stone dump), a dug well **at least 50 years old**, an unusual depression, or a mound of soil or stone in the APE?

☐ YES, describe below. ☐ NO

d. Does the landowner/sponsor or others know of or suspect historic or prehistoric cultural material at or near the undertaking(s)?

☐ YES, describe below. ☐ NO

4. Architectural Resources (above ground).

Use information from a visual reconnaissance, an interview with the landowner/client, and a check of the current online version of the National Register of Historic Places to determine if there are architectural resources (buildings, structures, objects, landscape sites or districts) **at least 50 years old** that the undertaking might affect either directly or indirectly. Direct effects include physical modification, repair, and visual impacts; indirect effects may entail alteration of land use, foreseeable development, changes in water quality/quantity for traditional resource use, and so forth. *Note:* Consider here all historic buildings and other architectural resources within the same historic tract as the proposed NRCS practice(s) and, as appropriate, on adjacent land.

☐ YES, there are architectural resources; and these are their types and approximate construction dates:

☐ NO, there are no architectural resources, or the attached correspondence from the SHPO indicates that the architectural resources are ineligible for the National Register.

Go to No.5.

5. Review Documentation.

a. No further cultural resources *assessment* is needed **when the answers to the above questions indicate both no archaeological sensitivity and no architectural resources** (i.e., Question 2 is YES and Question 4 is NO; or Questions 3a-3d and 4 are all NO). *However,* the Field Office must provide the CRC/CRS review documentation for quality assurance, data entry in Performance Results System, and issuance of an effect determination (36CFR800.4(d)). ACCORDINGLY, SEND A COPY OF THIS WORKSHEET -- WITH ATTACHED USGS QUADRANGLE DELINEATING THE APE AND WITH ANY CORRESPONDENCE REQUIRED FOR QUESTION 4 --TO THE CRC/CRS WITHIN 14 DAYS.

Upon receipt of the CRC's/CRS's finding of no effect on historic properties, the Field Office must file this Worksheet and the effect determination in the project file and may proceed with the undertaking. Be alert to unanticipated discoveries during other planning and construction.

b. If you are requesting a sensitivity analysis or if your answers to the above questions indicate archaeological sensitivity or architectural resources (i.e., at least one of Questions 3a-3d or 4 is YES), then send this Worksheet and the following attachments to the CRC/CRS for further review:

- USGS Quadrangle with Quad name and boundaries of APE
- Aerial photo or plan with proposed layout of conservation practices
- Soil Survey map with boundaries of APE
- Photo(s) of the APE and general vicinity labeled with direction of view
- Copy of prior SHPO/THPO correspondence on the same tract
- Numbered photos of any architectural resource at least 50 years old within the APE
- Map or aerial photo showing any architectural resources and labeled with the APE's boundaries and the spots where the numbered architectural photos were taken

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Based on my discussions with the landowner/client and my in-field inspection of the APE, I have provided the above information to the best of my knowledge and I have given and explained to the landowner/client the fact sheet entitled Cultural Resources and Your Conservation Project.

Certified Conservation Planner's Signature: _____ Date: _____

APPENDIX C
PROCEDURES FOR EMERGENCY RESPONSE

NRCS and the Penobscot THPO will use the following procedures to ensure that the need to protect life and property in an emergency is accomplished while taking cultural resources into account to the maximum extent possible.

A. **Exigency Situations (Emergency Watershed Protection Program).** NRCS shall notify the THPO (and the SHPO, if architectural historic properties may be affected) of funds obligated for exigency situations. This notification will include the types and amount of funds obligated, circumstances creating the exigency situation, work to be undertaken, and any consideration of historic properties, as appropriate. NRCS will take into account THPO comments received before exigency work must begin (within 10 days after the committal of funds) and will document and avoid adverse effects to cultural resources discovered during exigency work to the fullest extent practicable. NRCS shall provide the THPO with this documentation of cultural resources following the emergency work.

B. During **certain other emergency situations** NRCS shall follow the procedures described in 36 CFR 800.12(b).

APPENDIX D
GLOSSARY OF ACRONYMS USED IN THIS DOCUMENT

ACHP	**Advisory Council on Historic Preservation**
APE	**Area of Potential Effects—from ACHP regulations 36 CFR Part 800**
CEQ	**Council on Environmental Quality**
CRS	**Cultural Resources Specialist (NRCS—meets Secretary of Interior's Professional Qualification Standards, generally an archaeologist or historian)**
DHS	**Department of Homeland Security**
EWP	**Emergency Watershed Protection Program (NRCS program)**
FEMA	**Federal Emergency Management Agency**
FPO	**Federal Preservation Officer**
NCSHPO	**National Conference of State Historic Preservation Officers**
NEPA	**National Environmental Policy Act**
NHL(s)	**National Historic Landmark(s)**
NHO	**Native Hawaiian Organization**
NHPA	**National Historic Preservation Act**
NHQ	**National Headquarters**
NRCS	**Natural Resources Conservation Service**
NRHP	**National Register of Historic Places**
SHPO	**State Historic Preservation Officer**
SPO	**Senior Policy Official (NRCS)**
THPO	**Tribal Historic Preservation Officer**
USDA	**United States Department of Agriculture**