

**PROGRAMMATIC AGREEMENT
AMONG
THE USDA-USFS HUMBOLDT-TOIYABE NATIONAL FOREST (USFS)
AND
THE NEVADA STATE HISTORIC PRESERVATION OFFICER (SHPO)
REGARDING THE MIDDLE KYLE PROJECT (MKP)**

WHEREAS, the USDA, Humboldt-Toiyabe National Forest (USFS), has approved a General Management Plan (GMP) for the Spring Mountain National Recreation Area (SMNRA) in 1996; and

WHEREAS, the USFS is now proposing to provide additional recreation opportunities consistent with stated goals and desired future conditions of the SMNRA GMP named the Middle Kyle Project (MKP); and

WHEREAS, the USFS has consulted with the Advisory Council on Historic Preservation (ACHP) and the Nevada State Historic Preservation Office (SHPO) pursuant to 36 CFR part 800, the regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. § 470f); and

WHEREAS, the USFS has consulted with the Southern Paiute/Chemehuevi tribes and Nuwuvi Working Group concerning properties of traditional cultural and religious significance; and

WHEREAS, the USFS has determined that the proposed actions in Middle Kyle, Clark County, Nevada will have an effect upon properties eligible for inclusion in the National Register of Historic Places (NRHP), and have consulted with the Nevada State Historic Preservation Officer, and the Advisory Council On Historic Preservation pursuant to Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA); and

WHEREAS, the MKP will be implemented over the course of 5 years according to the record of decision; and

WHEREAS, some of the elements of the MKP will be designed over the life of the Plan according to changing conditions and cultural resource mitigation of adverse effects will be undertaken as the elements of the plan are implemented; and

WHEREAS, this Programmatic Agreement covers all aspects of the planning, development, and construction of the elements of MKP as defined in the EIS, including but not limited to recreation areas, campgrounds, public use facilities, trails, roads within and adjacent to the project area, administrative sites, fire management, and vegetation management; and

WHEREAS, effects to historic properties in the Area of Potential Effect (APE) cannot be fully determined and the Parties desire to enter into this Agreement to set forth procedures to be followed in satisfaction of the USFS Section 106 responsibilities of the National Historic Preservation Act, for the MKP Undertaking in the APE, and .

WHEREAS, the ACHP has reviewed the project documentation and has chosen not to be a signatory to this PA.

NOW THEREFORE, the signatories agree that implementation of the MKP shall be administered in accordance with the following stipulations to ensure that historic properties will be treated to avoid or

mitigate effects to the extent practicable, regardless of land ownership, and to satisfy USFS Section 106 responsibilities for all aspects of the undertaking.

I. ROLES AND RESPONSIBILITIES

The signatories agree that the USFS will be responsible for implementing and administering this PA. This includes but is not limited to: overseeing all cultural resource work; assembling all submissions to the SHPO - including reports, determinations of eligibility and effect, and treatment or data recovery plans; and for seeking SHPO concurrence with all USFS compliance decisions.

II. AREA OF POTENTIAL EFFECT

The APE was delineated by the USFS and encompasses the entire impact area (maximum extent of ground disturbance) and a 25 meter buffer. The APE includes the maximum extent of ground disturbance for the proposed project as well as all construction staging areas. An analysis of the visual impact of the undertaking will be completed before the submission of the first inventory to the SHPO, as per stipulation A.1. An archaeological survey of the entire APE was completed for the proposed project. A map of the APE is attached as Appendix A.

III. STIPULATIONS

The USFS shall ensure that the following stipulations are carried out:

A. Identification

1. USFS, in consultation with the SHPO, shall ensure that all appropriate cultural resource identification activities, including inventory, records research, informant interviews, archaeological, historic, or ethnographic report preparation, excavation, and curation, based on the APE for all relevant activity areas, or portions thereof, are conducted in a manner consistent with Section 106 of NHPA, 36CFR.79, and the Secretary of Interior's Standards.
2. Required identification activities shall be completed regardless of the ownership (Federal or private) of the lands involved and USFS shall be responsible for gaining access to privately held lands through applying all reasonable means available.
3. USFS shall make a good faith effort to consult with tribes, and identified interested parties, to identify properties of traditional religious and cultural importance, and to inform the SHPO of their eligibility and suggest appropriate treatment to avoid adverse effects to historic properties. Consultation procedures are specified in Appendix C

B. Eligibility

1. USFS shall evaluate all cultural resources located within the APE of each individual action for eligibility to the National Register of Historic Places (NRHP) when appropriate. Eligibility will be determined prior to the initiation of activities that may affect cultural resources. Eligibility will be determined by applying the National Register criteria found in 36 CFR 63. This project may be phased or segmented, but no ground disturbing activities will be implemented within 200 meters of unevaluated or eligible sites until the property is evaluated, and mitigated through an

approved treatment plan as per stipulation C.

2. USFS, in consultation with the SHPO, shall consult with appropriate tribes, or identified ethnic groups to evaluate the eligibility of properties of religious and cultural importance.
3. To the extent practicable, eligibility determinations shall be based on inventory information. If the information gathered in the inventory is inadequate to determine eligibility, USFS, using its own staff or contractors and subcontractors, shall conduct limited subsurface testing or other evaluative techniques to determine eligibility. As needed, USFS, in consultation with SHPO, will develop testing plans. USFS shall provide tribes, and identified interested parties with the same review opportunity as afforded the SHPO. Any proposed testing shall be limited to disturbing no more than 25% of the surface area of the resource being evaluated.
4. If any of the signatories, tribes, or interested parties disagrees regarding eligibility, USFS shall seek a determination of eligibility from the SHPO. If the dispute cannot be resolved, USFS shall seek a formal determination of eligibility from the Keeper of the National Register. The Keeper's determination will be considered final.

C. Treatment of Historic Properties

1. In avoiding or mitigating effects, USFS, in consultation with the SHPO, shall determine the nature of effects to historic properties identified in the APE. USFS shall develop a comprehensive treatment or data recovery plan and seek SHPO concurrence on the consolidated plan. USFS shall provide tribes and identified interested parties with the same review opportunity as afforded the SHPO.
2. To the extent practicable, the signatories shall ensure that USFS avoids effects to historic properties through project design, redesign, or relocation of facilities. When avoidance is not feasible, USFS, in consultation with the signatories, appropriate tribes, and identified interested parties, shall develop an appropriate Treatment or Data Recovery Plan designed to lessen or mitigate project-related effects to historic properties.
3. For properties eligible under Criteria (a) through (c), mitigation other than data recovery may be considered in the Treatment Plan (e.g., Historic American Buildings Survey/Historic American Engineering Record recording, oral history, historic markers, exhibits, interpretive brochures or publications, etc.). Where appropriate, Treatment Plans shall include provisions for publication or interpretation for the general public.
4. When data recovery or research-oriented archaeological excavation is proposed, USFS, in consultation with the SHPO, shall develop a Data Recovery Plan that is consistent with the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation (48 FR 44716-37) and *Treatment of Historic Properties: A Handbook* (Advisory Council on Historic Preservation 1980), and ACHP's Recommended Approach for Consultation on the Recovery of Significant Information from Archaeological Sites dated June 17, 1999.
5. USFS shall implement and complete the fieldwork portions of any final Treatment or Data Recovery Plan (using USFS staff or contractors and subcontractors) prior to initiating any activities that may affect historic properties located within the area covered by the Plan. A summary of these efforts will be submitted to SHPO for review and concurrence prior to initiating any ground-disturbing activities in the vicinity of the historic property.

6. USFS shall ensure that all records and materials resulting from identification and treatment efforts are curated in accordance with 36 CFR 79 in a USFS approved facility in Nevada. All materials slated for curation will be maintained in accordance with 36 CFR 79 or 43 CFR 10 until the final treatment report is complete and collections are curated.
7. USFS shall ensure that all final archaeological reports resulting from actions pursuant to this PA will be provided to the SHPO, tribes, and other interested persons. All such reports shall be consistent with contemporary professional standards and the Department of Interior's Format Standards for Final Reports of Data Recovery Programs (42CFR 5377-5379).

D. Discovery Situations

1. Prior to initiating any activities within the APE, all USFS employees, contractors, and subcontractors empowered to halt all activities in a discovery situation shall be informed about who to contact in the event of inadvertent discoveries. At least one of these individuals will be present during all project activities.
2. As soon as there is a discovery or unanticipated impact situation, all activities will halt in the immediate vicinity of the discovery and thereafter be directed away from an area at least 300 feet in all directions from the point of discovery. A USFS archaeologist will visit the discovery location within two working days of the discovery to examine the cultural remains.
3. USFS shall notify the SHPO, tribes, and interested parties as appropriate within two working days (through e-mail, telephone, and fax) with a description of the discovery or unanticipated impact, and consider their initial comments on the situation. USFS will also initiate the procedures outlines on Appendix B. Within two working days after its initial notification, USFS shall provide any written assessment of the discovery to signatories or other parties and notify them to either allow activities to proceed or to require further evaluation or mitigation.
4. If, in consultation with the SHPO, Indian tribes or interested parties, USFS determines that mitigation for discoveries or unanticipated impacts is required, USFS shall solicit comments from the SHPO, tribes, and interested parties, as appropriate, to develop mitigating measures. The SHPO, tribes, and interested parties, as appropriate, will be allowed three working days to provide USFS with comments to be considered when USFS decides on the nature and extent of mitigative efforts. Within seven working days of initial SHPO notification, USFS will inform all signatories of the nature of the mitigation required, and ensure that such mitigative actions are implemented before allowing activities to resume.
5. USFS shall ensure that any human remains, funerary objects, objects of cultural patrimony, and sacred objects encountered during the undertaking are treated with the respect due such materials. In coordination with this PA, NAGPRA items found on Federal land will be handled according to the provisions of the NAGPRA and its implementing regulations (43 CFR 10). Human remains and associated grave goods on private land will be handled according to the provisions of Nevada statute NRS 383.
6. USFS shall ensure that reports of mitigation efforts for discovery situations are completed in a timely manner. Final reports shall be submitted to the SHPO, other signatories, and interested parties for informational purposes.

7. Any disputes or objections arising during a discovery situation that cannot be resolved by USFS and SHPO shall be referred to the ACHP for resolution. The USFS will take the comments of the ACHP into consideration when making their final decision
8. Activities in the area of the discovery will be halted until USFS authorized officer provides written authorization that mitigation is complete and activities can resume.

E. Other Considerations

1. USFS shall ensure that all stipulations of this PA are carried out by its contractors, subcontractors, or other personnel involved with this undertaking.
2. USFS shall ensure that ethnographic, historic, architectural, and archaeological work conducted pursuant to this PA is carried out by or under the direct supervision of persons meeting qualifications set forth in the Draft Secretary of the Interior's Professional Qualification Standards dated June 20, 1997 (62FR33707-33723) and who have been permitted for such work by the signatories.
3. USFS shall ensure that all its personnel and all the personnel of its contractors and subcontractors are directed not to engage in the illegal collection of historic and prehistoric materials. All parties shall cooperate with USFS to ensure compliance with the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470).
4. USFS shall bear the expense of identification, evaluation, and treatment of all historic properties directly or indirectly affected by project-related activity. Such costs shall include, but not be limited to, pre-field planning, fieldwork, post-fieldwork analysis, research and report preparation, interim and summary report preparation, publications for the general public, and the cost of curating project documentation and artifacts.
5. In general, the identification, evaluation, and treatment of cultural properties directly affected by MKP implementation shall be limited to the individual project-related APE, including all areas needed temporarily for construction. However, identification, evaluation, and treatment efforts may extend beyond the geographic limits of an APE when a resource being considered extends beyond the boundary of an APE. For those cultural properties that extend beyond project boundaries, the identification, evaluation, and treatment activities should be necessary, practical, and reasonable, and the associated expenses should be consistent with comparable activities within site boundaries.
6. Properties of cultural and religious importance will be identified, evaluated, and treated through consultation with appropriate tribes. USFS may contract for data gathering to assist in identifying, evaluating, and treating these properties. However, formal consultation, as needed, will be done by USFS in consultation with the related tribes. Properties of cultural and religious significance shall be identified, evaluated, and treated consistent with the National Register Bulletin 38.
7. Information on the location and nature of all cultural resources, and all information considered proprietary by tribes, will be held confidential to the extent provided by Federal and state law.

F. Monitoring

1. Any signatory may monitor actions carried out pursuant to this PA. To the extent practicable, all monitoring activities will be done so as to minimize the number of monitors involved in the undertaking.

G. Notices to Proceed

When appropriate, after compliance with Stipulation A-B, USFS, in consultation with the SHPO, may issue Notices to Proceed (NTP) for individual plan elements, under any of the following conditions:

- (a) USFS and SHPO have determined that there are no cultural resources within the APE for the construction segment; or
- (b) USFS and SHPO have determined that there are no historic properties within the APE for the construction segment; or
- (c) USFS after consultation with the SHPO and interested persons has implemented an adequate Treatment Plan for the construction segment, and
 - (1) The fieldwork phase of the treatment option has been completed; and
 - (2) USFS has prepared and/or accepted a summary description of the fieldwork performed and a reporting schedule for that work and the SHPO has reviewed and concurred that the work performed was adequate.

H. Time Frames

1. Reports: USFS shall review and comment on any report submitted by contractors within 30 calendar days of receipt.
2. Consultation with Interested Parties: Prior to SHPO consultation, USFS shall submit the results of all identification and evaluation efforts to tribes and other identified interested parties for a 30 calendar-day review and comment period.
3. SHPO Consultation: After review by tribes, and interested parties, USFS shall submit the results of all identification, evaluation, and treatment to the SHPO for a 30 calendar-day from receipt review and comment period.
4. Treatment Plans will be developed following consultation on the inventory, evaluation and effects, and will be submitted to tribes, interested parties, and SHPO. The treatment plans will be approved with SHPO prior to any project implementation..
5. If any signatory to this PA or other interested person fails to respond to USFS within 30 calendar days of the receipt of a submission, USFS shall presume concurrence with the findings and recommendations as detailed in the submission and proceed accordingly.
6. Reports: A draft final report of all identification, evaluation, treatment or other mitigative activities, as well as inadvertent discoveries, will be due to USFS from any contractor within nine (9) months after the completion of the fieldwork associated with the activity, unless otherwise negotiated.

7. Curation: All reports, records, photographs, maps, field notes, artifacts, and other materials collected or developed for any identification, evaluation, or treatment activities will be curated in a facility approved by the signatories at the time the final report associated with that activity is accepted by USFS, unless materials and artifacts must be returned to the owner.

I. Dispute Resolution

1. If any signatory to this PA, or an interested person, objects to any activities proposed pursuant to the terms of this PA, USFS shall consult with the objecting party and the SHPO to resolve the issue. If USFS determines that the objection cannot be resolved, it shall request the assistance of the ACHP to resolve the objection. USFS Supervisors Office will take the advice of the Council into consideration when making their final decision.
2. The signatories may continue all actions under this PA that are not in dispute.

J. Amendment

Any signatory to this PA may request that this PA be amended, whereupon the signatories will consult to consider such amendment.

K. Termination

Any signatory to this PA may terminate the PA by providing thirty (30) days advance written notice with cause to the other signatories, provided that the signatories will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination.

L. Execution

1. Execution and implementation of this PA evidences that the signatories have satisfied their Section 106 responsibilities for all actions associated with the construction and installation of the MKP elements.
2. This PA shall remain in effect for ten years or until all proposed actions in the implementation plan are completed.

HUMBOLDT-TOIYABE NATIONAL FOREST, SPARKS, NV

By: *Edward C. Henry* Date: *12/23/2009*

Title: Forest Supervisor

NEVADA STATE HISTORIC PRESERVATION OFFICE

By: *Rand M. ...* Date: *12/24/09*

Title: *State Historic Preservation Officer*

APPENDIX A: AREA OF POTENTIAL EFFECT

Insert Map

APPENDIX B: DISCOVERY AND UNANTICIPATED IMPACTS PROCEDURES

In the event that previously unknown cultural resources are discovered within the area of potential effects of the MKP, or should known resources be directly or indirectly impacted in an unanticipated manner, the following actions, at a minimum, will be initiated by USFS in consultation with the SHPO:

1. All activities will halt in the immediate vicinity of the discovery and all actions will be directed away from an area at least 300 feet in all directions from the point of discovery.
 - a. USFS archeologist and SHPO will be notified immediately by the contractors working on the project or USFS staff. USFS will ensure that a cultural resources specialist, with the proper expertise for the suspected resource type, is on-site as soon as possible.
 - b. USFS will initiate consultation with the appropriate parties as set out in Stipulation D of the PA.
 - c. In the event that a cultural resource specialist or other necessary persons are not immediately available, USFS may be required to cover and/or otherwise protect the resource until such time that the appropriate parties can be present for inspection and/or evaluation.
2. Upon arriving at the site of the discovery, the cultural resource specialist shall assess the resource. The assessment shall include:
 - a. The nature of the resource (e.g., number and kinds of artifacts, presence/absence of features). This may require screening of already disturbed deposits, photographs of the discovery, and/or other necessary documentation.
 - b. The spatial extent of the resource. This may require additional subsurface testing, mapping or inspection, as is appropriate to the resource.
 - c. The nature of deposition/exposure. This may require interviews with construction personnel, other persons having knowledge concerning the resource or, in rare instances, the expansion of existing disturbances to establish the characteristics of the deposits.
3. Discoveries and unanticipated impacts to known resources will be managed according to the provisions of this PA. After consultation with the appropriate parties, USFS shall then make a determination of eligibility, treatment and effect. If necessary, USFS, in consultation with the appropriate parties, shall ensure that a treatment plan is prepared following the guidance provided in this PA
4. Any items covered by NAGPRA encountered in a discovery, or unanticipated impact situation, will be handled according to 36 CFR 10 or Nevada state laws, as appropriate.

5. All MKP implementation activities in the area of the discovery, or unanticipated impact, will be halted until USFS documents in writing that mitigation is complete and activities can resume.

APPENDIX C: TRIBAL CONSULTATION PROCEDURES

I. Identification of Parties for Consultation

Consultation on the MKP was started in February, 2009, following the procedures described below. Parties for consultation were identified by the cultural resource staff and tribal relations coordinator from USFS Spring Mountain National Recreation Area who have experience with consultation in the area. A Paiute-Chemehuevi Tribal Working Group, Nuwuvi, was established and with the assistance of a Forest Service contracted ethnographer, consultation meetings and field trips were conducted. A report of the results of the Nuwuvi Participatory Consultation was completed in November of 2009. Comments received during the consultation process were incorporated into the MKP and the NEPA document (EA).

For implementation of each action over the life of the plan involving archaeological testing or excavation, or any other action identified in initial consultation on the MKP as of interest to Federally-recognized tribes, traditional cultural and religious leaders, and appropriate tribal organizations or interest, additional consultation will be completed.

II. Consultation Methods

The methods of contacting, communicating, and coordinating will include letters, telephone calls, and/or face-to-face meetings, as appropriate and necessary to afford tribes the opportunity for input.

Letter Contact: USFS Authorized Officer or designated party will prepare a letter to the identified Tribes, and the Nuwuvi Working Group as early as possible in the study process explaining the proposed project or activity and indicating that this will begin a formal government-to-government consultation process. The letter will be prepared to ensure that Tribes are part of the scoping process.

The proposed activity will be explained in sufficient detail to allow for the Tribe to determine its level of interest, if any. A scope of work, a proposed schedule, and any significant activities, such as scoping meetings, or a decision date will be included as attachments.

Follow-up Phone Contact: The Authorized Officer or designated party will follow-up the initial letter with telephone contacts after 10 working days after the letters have been mailed. Information from these telephone contacts will be documented using the attached telephone log format. This telephone log will be kept up to date and will become part of the administrative record. Any follow-up action recommended by the Tribe(s) will be noted.

Planned Meetings: The Authorized Officer or Designated Party will meet with designated Tribal Leaders and/or designated tribal representatives as soon as possible upon request of the Tribe in order to discuss the proposed project and related issues

Meetings will take place on the reservations or at other mutually agreed upon locations in order to minimize costs to tribal members and to ensure maximum participation.

Meeting dates will be coordinated with designated Tribal points of contact at least 10 working days prior to the meeting date.

The meeting will be confirmed by a letter to the Tribal leadership, with a copy furnished to the designated tribal representative or point of contact. The letter will include a purpose statement, a proposed agenda and a list of agency attendees.

Meeting summaries will be prepared within 5 working days following the meeting and will be distributed to the tribes, other appropriate parties and team members in draft. Comments will be incorporated as appropriate before finalizing the notes. Final meeting notes will be distributed within 10 working days following distribution of the draft notes.

Concluding Consultation: After reasonable and good faith efforts to address and resolve issues, USFS Authorized Officer, in consultation with the signatories, will determine the appropriate point of closure of the consultation on the proposed action or project and notify the Tribal leadership levels and representatives in writing. If ongoing consultation is productive, the Federal agencies and officially designated Tribal representative will make that determination and outline the appropriate scope, level, and process. (Ongoing consultation may include such things as continued coordination, updated information and/or participation of tribal monitors.)

