

Negotiating and Enforcing Programmatic Agreements

September 12, 2018

**Rollie Wilson, Partner
Fredericks Peebles and Morgan LLP**



Programmatic Agreements

36 CFR 800.14 (b) Programmatic agreements.

The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.

Programmatic Agreements

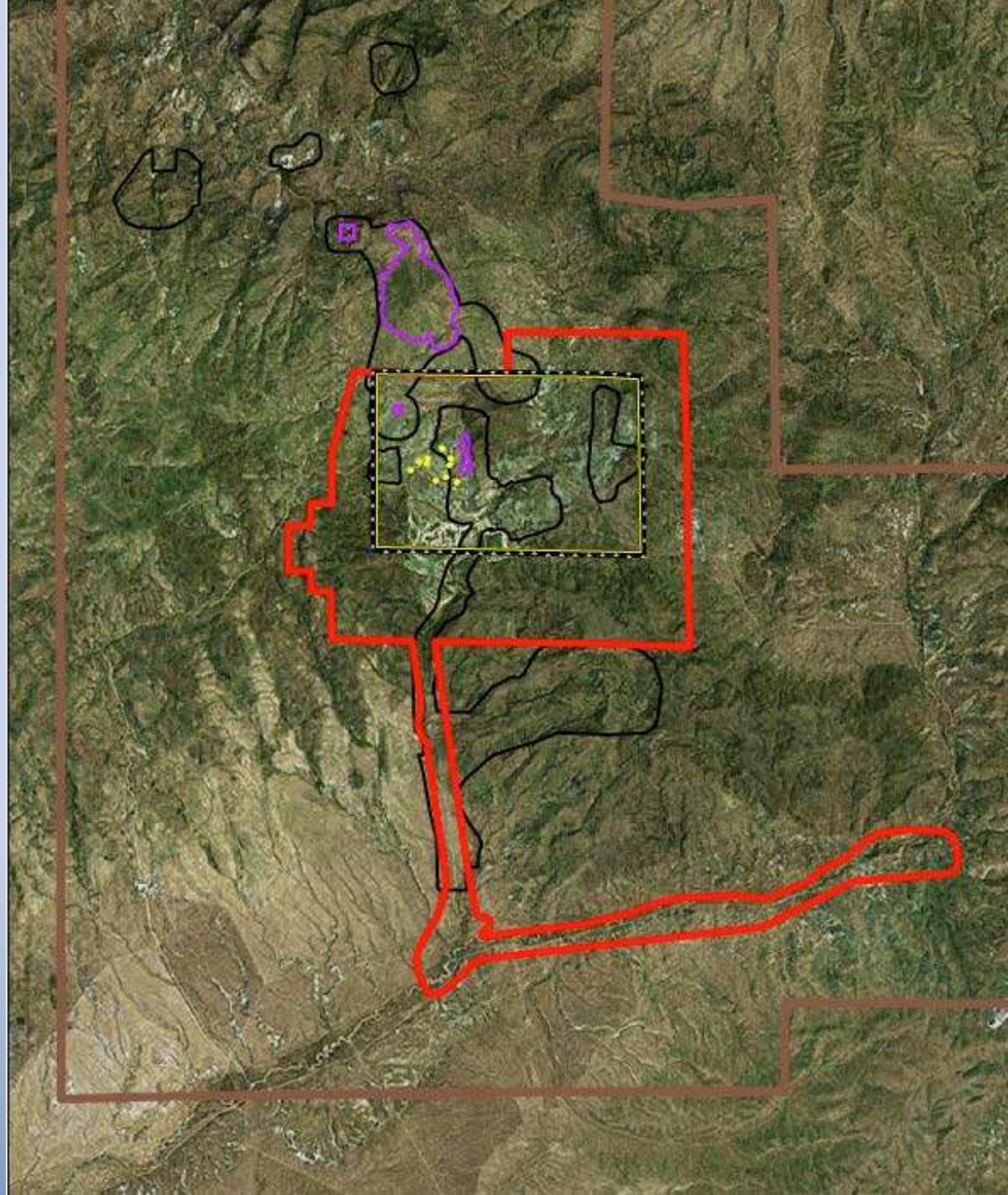
36 CFR 800.14 (b) (1) Use of programmatic agreements.

A programmatic agreement may be used:

- (i) similar and repetitive or are multi-State or regional;**
- (ii) cannot be fully determined prior to approval;**
- (iii) nonfederal parties are delegated major decision making;**
- (iv) routine management activities at Federal installations, facilities, or other land management units; or**
- (v) other circumstances warrant a departure section 106.**

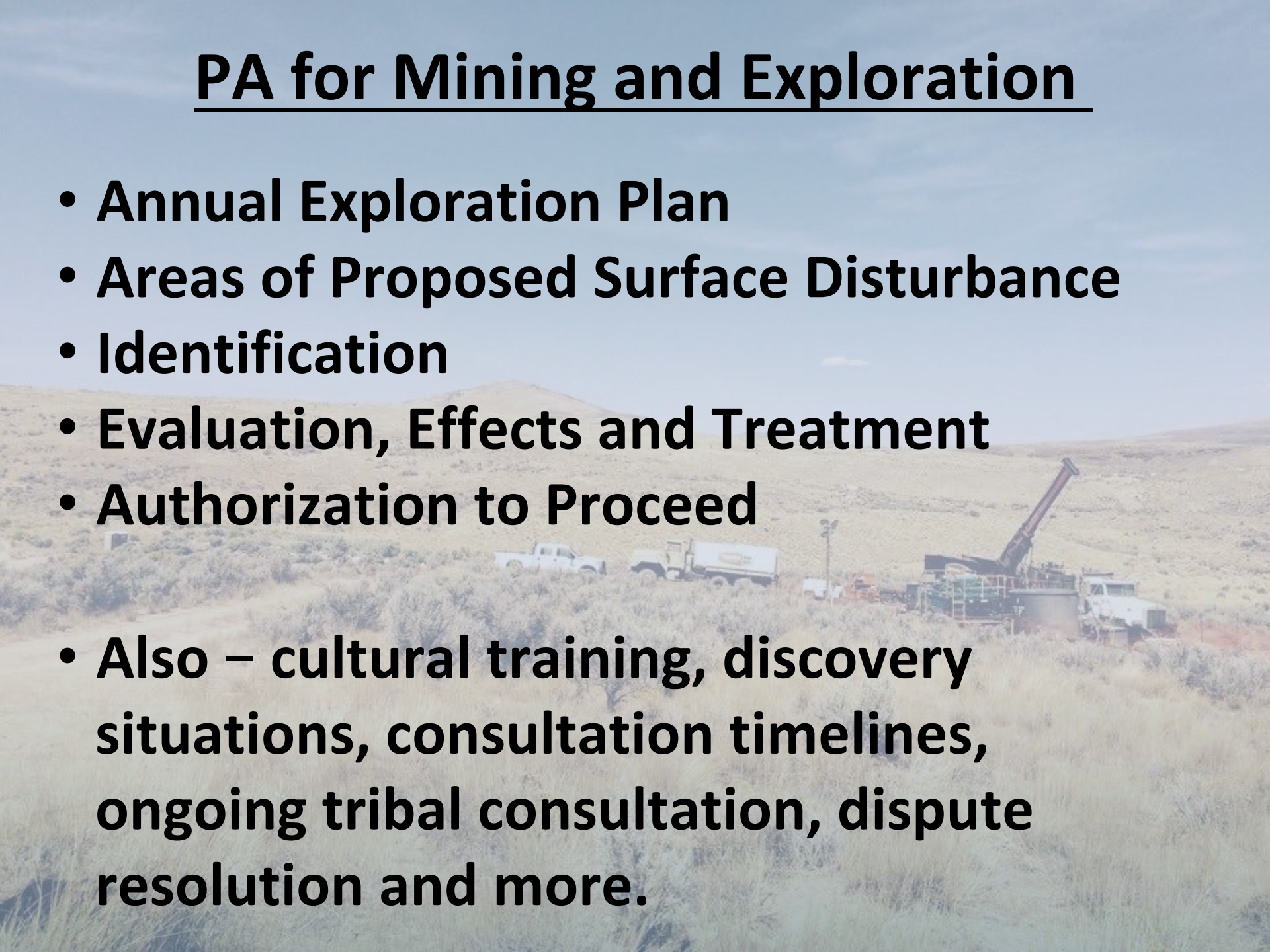
Programmatic Agreement for Mining and Exploration within the Tosawihi Quarries

- Underground mine
 - Above ground exploration
- Directional core drilling
 - Road construction
- Substation, power line & facilities construction
- Negotiated by BLM and Mining Company
- Without legal review



PA for Mining and Exploration

- **Annual Exploration Plan**
- **Areas of Proposed Surface Disturbance**
- **Identification**
- **Evaluation, Effects and Treatment**
- **Authorization to Proceed**
- **Also – cultural training, discovery situations, consultation timelines, ongoing tribal consultation, dispute resolution and more.**



Negotiating and Enforcing Programmatic Agreements

Issues for Discussion

- 1) Section 106 vs. Programmatic Agreement**
- 2) Identification, Evaluation, Effects & Treatment**
- 3) What does the Programmatic Agreement Apply To?**
- 4) Tribal Monitors**
- 5) Dispute Resolution and Enforcement**



MINES

RANCHES



Section 106 vs. Programmatic Agreement

Programmatic Agreements are Bad

- These days everything is phased implementation.
- Agencies used to enforce the law.
- Tie hands before projects are known.
- Used to obtain early procedural commitments.
- Planning and projects proceed before impacts known.
- Hard to undo, redo and enforce.

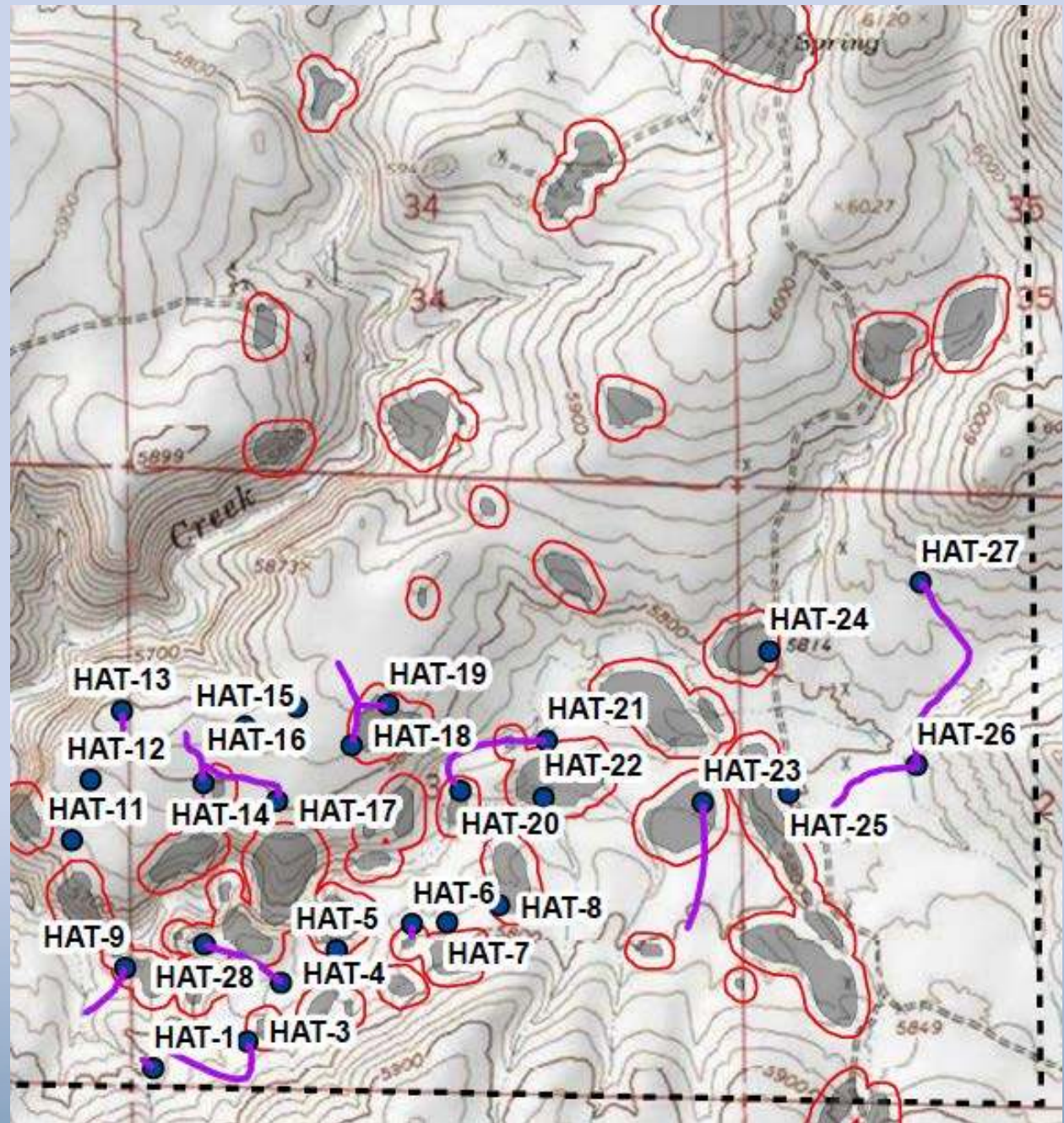
Programmatic Agreements are Good

- Ongoing assessment.
- Force consultation.
- Develop and obtain information.
- Build relationships.
- Opportunities for dispute resolution


Identification, Evaluation, Effects & Treatment

- **The heart of the Section 106 process.**
- **Refer out to the Section 106 Regulations.**
- **Does PA provide enough time?**
- **Watch out for streamlining.**
- **Will 10 year old Class III Surveys be used and did those include tribal consultation?**
- **Newly designated Historic Properties?**
- **Use of smaller buffer zones.**
- **Treatment via Excavation?**

Identification, Evaluation, Effects & Treatment



What Does the PA Apply To?

- **Definition of Project.**
 - **Definition of Areas of Potential Effect**
- 
- A background image showing a yellow and black excavator working on a grassy hillside. The excavator is positioned on a dirt path or cleared area, with its arm extended. The hillside is covered in green grass and some dry patches. The sky is clear and blue.
- **Entire project or parts?**
 - **Historic properties designated when Record of Decision issued or ongoing?**

Tribal Monitors

- **Required by Programmatic Agreement?**
- **Separate contract mining company or cultural resources contractor?**
- **Contractors or employees?**
- **Notice and scheduling.**
- **Meet up times and locations.**
- **Time sheets and payment for work.**
- **Safety equipment.**
- **Use to gather information.**

Dispute Resolution and Enforcement

Appendix E: Cultural Resource Avoidance Protocol and Staking



Dispute Resolution and Enforcement



Dispute Resolution and Enforcement

- **PA is a contract between BLM and Mining Company.**
- **PA is only enforceable by BLM.**
- **ACHP Dispute Resolution can be helpful.**
- **Negotiate for a stay of project activities during dispute resolution.**
- **If BLM will not enforce, go to federal court to get compliance with NHPA and Section 106.**
- **PA can provide a presumption of compliance.**

Negotiating and Enforcing Programmatic Agreements Discussion

**Rollie Wilson, Partner
Fredericks Peebles and Morgan LLP
202-340-8232
rwilson@ndnlaw.com**

