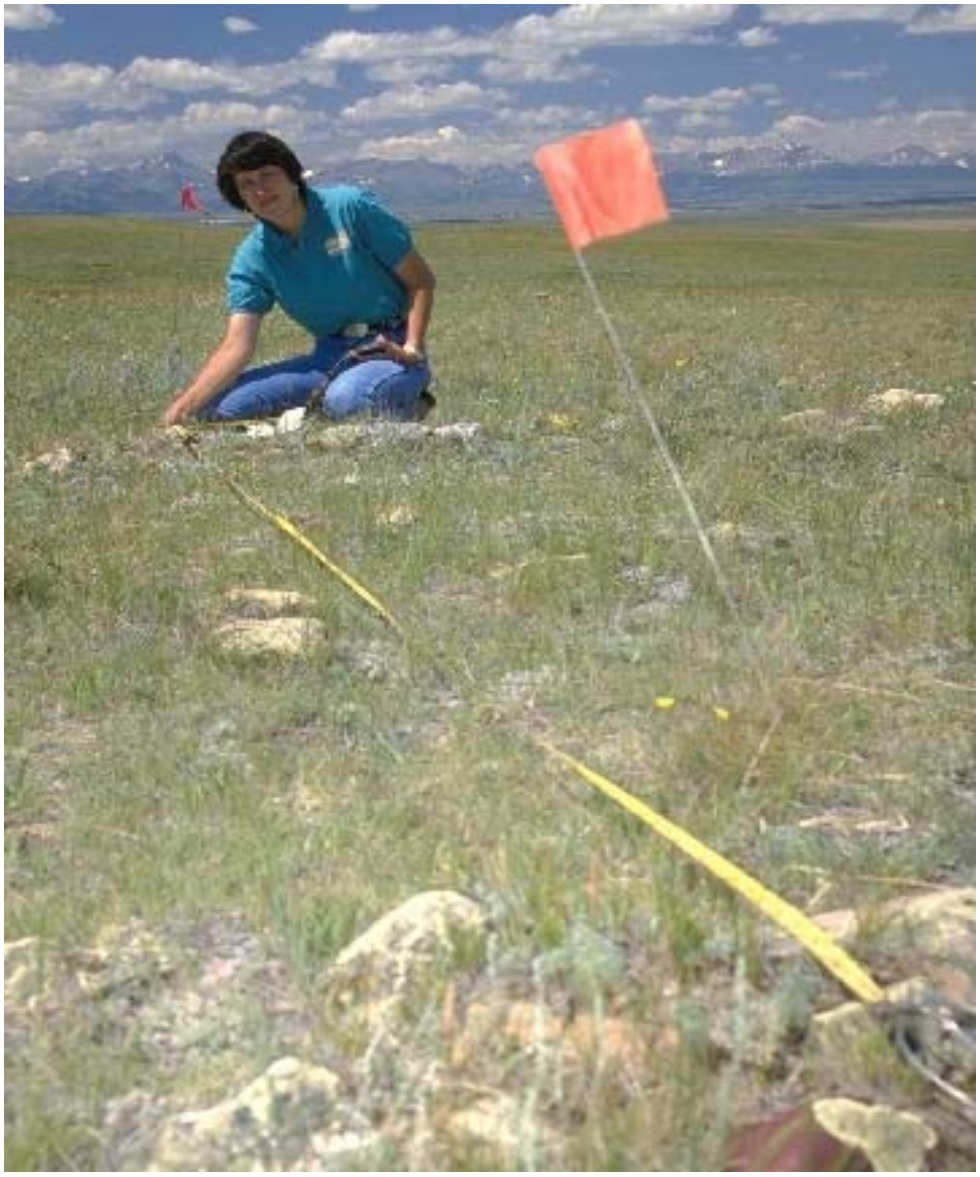
United States
Department of
Agriculture

Natural Resources
Conservation
Service

National Cultural Resources Procedures Handbook



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Part 601 - National Cultural Resources Procedures

Subpart A - General

601.0 Introduction and Purpose

A. The purpose of this handbook is to provide a procedural reference and guidance on processes the Natural Resources Conservation Service (NRCS), partners and consultants use to identify, evaluate and protect cultural resources, including historic properties, in compliance with the National Historic Preservation Act (NHPA –16 U.S.C. 470f, as amended) and several related authorities. The government-wide policy is found in the statute and NRCS' implementing policy is found in the General Manual (GM 420, Part 401). This compliance takes place during the course of project and program planning, development and implementation, in consultation with specific state and federal agencies and American Indian tribal governments.

B. In 1966, Congress passed the NHPA and directed all Federal agencies to establish a (historic) preservation program. This program is intended to create policies and procedures that foster agency program and project development so that our modern society and our prehistoric and historic resources will co-exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations. Additionally, every agency was directed to give consideration to programs and projects which will further this goal.

601.1 Background

A. Every agency is expected to contribute to this purpose, whether or not conservation and preservation are part of its central mission. These efforts must be carried out in consultation with required concerned parties, including State, local, and Indian tribal officials, landowners, and interested citizens. All agencies are responsible for considering and consulting on the effects of their actions on historic and cultural places – including actions that they may assist or permit – and taking actions to avoid or minimize adverse effects. Agencies are expected to show leadership in encouraging non-Federal parties to minimize harm to historic and cultural resources under their control.

B. The directive is contained in Sections 106 and 110 of the NHPA. The NHPA recognizes that each agency has one or more central and important missions and encourages early incorporation of cultural resources considerations into the planning process in order to avoid mission conflicts.

C. Prior and subsequent to 1966, numerous other laws, regulations, executive orders and policy statements directed agencies to protect the cultural and human environment for current and future generations. NRCS must also comply with state, tribal and local laws that cover the lands on which we work.

Part 601 - National Cultural Resources Procedures

Subpart B - Applications of NRCS Assistance to Undertakings with the Potential to Affect NRHP-Eligible Cultural Resources

601.10 General Policy Summary

(See GM for complete discussion of NRCS Policy and applications at the State Level and NRCS's May 31, 2002, Nationwide Programmatic Agreement with the Advisory Council on Historic Preservation and National Conference of State Historic Preservation Officers, appended)

This part applies to all NRCS assistance activities and programs including actions that may affect historic or cultural properties through policies, procedures, or service to the agency's clients.

A. The fundamental elements of NRCS cultural resources policy involve protection and enhancement of cultural resources and historic properties in their original location to the fullest practical extent, and mitigation of adverse effects that cannot be avoided through treatment of the historic or cultural properties. The policies and procedures in this part are designed to encompass a broad range of NRCS activities (including financial and technical assistance and program implementation) either led by NRCS or involving NRCS participation in cooperation with other agencies.

B. While nearly all NRCS activities could be considered undertakings under the definition in 36 CFR 800.16(y), not all activities have the potential to cause effects on historic properties. Examples of such assistance activities may include, but are not limited to providing basic information on soil and water conservation and crop production; providing general or broad based planning assistance across a district; and providing assistance that will not cause a ground disturbance or lead to greater disturbances of previously disturbed areas.

C. The following program activities (i.e. undertakings) generally do not have the potential to cause effects to historic or cultural properties:

(1) National Resources Inventory, water supply forecasts, snow and range surveys, wetlands inventories, and other types and forms of nonintrusive resource data collection.
(2) National Cooperative Soil Survey program activities that involve no ground disturbance or are limited to small-scale field investigations such as small shovel holes, auger holes, probe holes, and/or core holes. Larger-scale field investigations such as soil investigation pits, however, may have the potential to affect historic properties.
(3) Simple purchase of conservation or preservation easements where no subsequent ground-disturbing activities are planned or foreseen.

D. Individual conservation practices may affect cultural resources in a variety of ways, ranging from adverse to beneficial effects. In general, the potential effects of NRCS conservation practices may be categorized according to national standard installation criteria set forth in the National Handbook of Conservation Practices as having the potential, having low potential, or having no potential to affect historic properties. Criteria found in specific State Conservation Practice Standards may place practices in

(1) Practices that have the potential to cause effects to historic properties, assuming such historic properties are present, because the potential is high for disturbing the ground.
(2) Practices that have low potential to cause effects to historic properties (assuming such historic properties are present) if the following conditions apply:
  (i) Installation of the practice will not exceed the depth, extent, or kind of disturbance caused by previous cultivation(s); or
  (ii) The practice installation will not result in ground disturbance to land that has not been previously disturbed.
(3) Practices that do not have the potential to cause effects on historic properties, assuming such historic properties are present. These are primarily management related and have a benign or beneficial effect on cultural resources.

E. Conservation practices should be reviewed by NRCS and the SHPO/THPO and/or Tribes for their potential to affect cultural resources and placed into one of the categories through State Level Agreements and tribal consultation protocols.

F. NRCS also considers resources that are located during cultural resources or other investigations or actions which are of geological, paleontological, or of other scientific importance. Specific information handling these other resources may be found in Subpart G of this document and the NRCS Engineering Manual.

G. Administrative Actions. Certain NRCS administrative actions, such as obtaining (acquiring, constructing, or leasing) facilities for purposes of carrying out agency responsibilities, may have effects on historic properties (including structures and buildings) and are subject to this part.

Part 601 - National Cultural Resources Procedures

Subpart C - Procedures for Complying with Section 106 of the National Historic Preservation Act and Related Authorities

601.20 Introduction

A. Cultural resources take many forms and may require specific treatment by NRCS based on:

(1) The resource type(s);
(2) The location of the resource(s);
(3) The type of significance; and
(4) The law (or laws) which protect resources. For example, a resource may be classified as a material cultural resource where the physical remains such as an archeological site or historic building are important. Alternatively, a resource may be classified as a sacred site or traditional cultural place when the actions performed at this location are more important than the physical remains. The location of the resource may change the treatment, depending on whether the land is in public or private ownership and, if public, whether or not it is Federal, State, or tribally owned land. Finally, legislation affects how a resource is treated. The major authorities include the National Historic Preservation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act, Executive Orders on Consultation with American Indian Tribes, State counterparts to these regulations, and individual state mortuary statutes.

B. While all of these factors have the potential to make the cultural resources procedures quite complicated, the organization of the sections under Subpart C is designed to minimize these difficulties. These sections guide you through the general process to identify, avoid, and determine impacts to most cultural resources, regardless of the kind of resource or ownership.

C. A very important and special case may occur when cultural resources are discovered during implementation of an NRCS activity. In all such situations, NRCS must anticipate and develop a plan for the discovery of undocumented and/or unanticipated resources. These discovery plans stipulate the procedures to follow when such resources are found. Such plans may be general in nature and these will be stipulated in the state-level and tribal agreements between NRCS and the SHPO/THPO. More specific plans for grouped or complex undertakings are usually written as stand-alone documents. Specific information on developing plans can be found below in Subpart C.

D. While the processes of identification are relatively similar, the process of assessing the importance of a particular resource varies according to the factors discussed. Consequently, the assessment procedures have been broken into two sections of Subpart C. One section focuses on Section 106 of NHPA and gives the procedures to determine eligibility to the National Register of Historic Places. The majority of cultural resources potentially affected by NRCS assistance are in this category. The other section provides information on assessing the National Register eligibility of resources potentially affected by the provisions of other legislation.

(State Historic Preservation Officer, Tribal Historic Preservation Officer, American Indian tribes and Native Hawaiian Organizations, representatives of local government, applicants, other participants, the public).

A. Agency Official (NRCS State Conservationist). It is the statutory obligation of the Federal agency to fulfill the requirements of Section 106 and to ensure that an Agency Official with jurisdiction over an undertaking takes legal and financial responsibility for Section 106 compliance in accordance with Subpart B of this part. The Agency Official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of Section 106 compliance.

B. For the purposes of Subpart C of this part, the Agency Official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative (i.e. NRCS' nationwide Programmatic Agreement). In NRCS, the Agency Official is generally the State Conservationist. NRCS DOES NOT have the authority to delegate the Agency Official responsibility to any other party (i.e. State, local, or tribal government official—at present, only the U.S. Housing and Urban Development agency has such authority under the NHPA). It is the responsibility of the agency office to ensure that all activities recognize the following:

(1) Professional standards. Section 112(a)(1)(A) of the NHPA requires each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under guidelines developed by the Secretary of the Interior.

(2) Lead Federal agency designation. If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the Agency Official (in NRCS, the State Conservationist) who shall act on their behalf, fulfilling their collective responsibilities under section 106. Those Federal agencies that do not designate a lead Federal agency remain individually responsible for their compliance with Section 106.

(3) Limits on use of contractors. Consistent with applicable conflict of interest and procurement laws and regulations, the State Conservationist (Agency Official) may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The State Conservationist (Agency Official) remains legally responsible for all required findings, determinations and decisions. If a document or study is prepared by a non-Federal party, the Agency Official is responsible for ensuring that its content meets applicable standards and guidelines.

(4) The nature and scope of consultation. The State Conservationist, as Agency Official, shall involve the consulting parties in findings and determinations made during the Section 106 process. The State Conservationist should plan consultations appropriate to the scale of the undertaking and the scope of Federal involvement and coordinated with other requirements of other statutes, as applicable, such as the National Environmental Policy Act, the Native American Graves Protection and Repatriation Act, the American Indian Religious Freedom Act, the Archeological Resources Protection Act and agency-specific legislation. The Council encourages the State Conservationist as Agency Official to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of this part.

C. Advisory Council on Historic Preservation. The Council issues regulations to implement Section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the Section 106 process. The Council also consults with and comments to Agency Officials (State Conservationists) on individual undertakings and programs that affect historic properties.

(1) Council entry into the Section 106 process. When the Council determines that its involvement is necessary to ensure that the purposes of Section 106and the National Historic Preservation Act (NHPA) are met, the Council may enter the Section 106 process. Criteria guiding Council decisions to enter the Section 106 process are found in an appendix to 36 CRF Part 800. The Council will document that the criteria have been met and notify the parties to the Section 106 process as required by this part.

(2) Council assistance. Participants in the Section 106 process may seek advice, guidance and assistance from the Council on the application of this part to specific undertakings, including the resolution of disagreements, whether or not the Council is formally involved in the review of the undertaking. If questions arise regarding the conduct of the Section 106 process, participants are encouraged to obtain the Council's advice on completing the process.

D. Consulting Parties. The following parties have consultative roles in the Section 106 process.

(1) State Historic Preservation Officer.

(i) The State Historic Preservation Officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage. In accordance with section 101(b)(3) of the NHPA, the SHPO advises and assists Federal agencies in carrying out their Section 106 responsibilities.

(ii) If an Indian tribe has assumed the functions of the SHPO in the Section 106 process for undertakings on tribal lands, the SHPO shall participate as a consulting party if the undertaking takes place on tribal lands but affects historic properties off tribal lands, if requested in accordance with Sec. 800.3(c)(1), or if the Indian tribe agrees to include the SHPO pursuant to Sec. 800.3(f)(3).

(2) Tribal Historic Preservation Officer.

(i) The Tribal Historic Preservation Officer (THPO) appointed or designated in accordance with the Act is the official representative of an Indian tribe for the purposes of section 106. If an Indian tribe has assumed the responsibilities of the SHPO for Section 106 on tribal lands under section 101(d)(2) of the Act, the Agency Official shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.

(ii) If an Indian tribe has not assumed the responsibilities of the SHPO for Section 106on tribal lands under section 101(d)(2) of the Act, the Agency Official shall consult with a representative designated by such Indian tribe in addition to the SHPO regarding undertakings occurring on or affecting historic properties on its tribal lands.

(3) Indian tribes and Native Hawaiian organizations. Section 101(d)(6)(B) of the Act requires the Agency Official to consult with any Indian tribe or Native Hawaiian organization that attaches traditional religious and cultural significance to historic properties that may be affected by an undertaking. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

(i) The Agency Official shall ensure that consultation in the Section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects. It is the responsibility of the Agency Official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the Section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

(ii) The Federal government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in 36 CRR Part 800 is intended to alter, amend, repeal, interpret or modify tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or to preempt, modify or limit the exercise of any such rights.

(iii) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal government and Indian tribes. The Agency Official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian tribe or Native Hawaiian organization.

(iv) When Indian tribes and Native Hawaiian organizations attach traditional religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the Act requires Federal agencies to consult with such Indian tribes and Native Hawaiian organizations in the Section 106 process. Federal agencies should be aware that frequently historic properties of traditional religious and cultural significance are located off tribal lands and should consider that when complying with the procedures in this part.

(v) An Indian tribe or a Native Hawaiian organization may enter into an agreement with an Agency Official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of tribal participation in the Section 106 process, provided that no modification may be made in the roles of other parties to the Section 106 process without their consent. An agreement may grant the Indian tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the Section 106 process beyond those specified in subpart B of this part. The Agency Official shall provide a copy of any such agreement to the Council and the appropriate SHPOs.

(vi) An Indian tribe that has not assumed the responsibilities of the SHPO for Section 106 on tribal lands under section 101(d)(2) of the NHPA may notify the Agency Official in writing that it is waiving its rights under Sec. 800.6(c)(1) to execute a Memorandum of Agreement.

(4) Representatives of local governments. A representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur is entitled to participate as a consulting party. Under other provisions of Federal

law, the local government may be authorized to act as the Agency Official for purposes of section 106.

(5) Applicants for federal assistance, permits, licenses and other approvals. An applicant for federal assistance or for a federal permit, license or other approval is entitled to participate as a consulting party as defined in this part. The Agency Official may authorize an applicant to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the Agency Official. The Agency Official shall notify the SHPO/THPO and other consulting parties when an applicant is so authorized.

(6) Additional consulting parties. Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.

E. The public's involvement.

(1) Nature of involvement. Public involvement (seeking public comments) is NOT a substitute for required consultation. The views of the public are essential to informed federal decision-making in the Section 106 process. The State Conservationist, as Agency Official, shall seek and 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.

(2) Providing notice and information. The State Conservationist, as Agency Official, must, except where appropriate to protect confidentiality concerns of affected parties (see Subpart E section on FOIA Requests and Privacy Requirements), provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide views on their own initiative for the Agency Official to consider in decision-making.

(3) Use of agency procedures. The State Conservationist may use NRCS' procedures for public involvement under the National Environmental Policy Act (NEPA) or other program requirements in lieu of the NHPA public involvement requirements, if they provide adequate opportunities for public involvement consistent with the intent of the NHPA and the ACHP's regulations.

F. Summary of NRCS' Responsibilities to Consulting Parties

(1) The NRCS is required to provide all consulting parties with the opportunity to consult (not just comment) on a proposed undertaking throughout the planning and development of an action or program. NRCS should present the consulting parties with sufficient information to permit them to decide if they have concerns or recommendations; the consulting parties may ask for more information if such program/project data are not provided.

(2) Consultation is not a simple request for information on known resources within the projects' area of potential effect—it is an exchange of ideas. Therefore, NRCS should gather as much information as possible prior to initiating consultation with the various parties, including the mandatory consulting parties—SHPO, THPO, appropriate tribes and local officials. Once adequate documentation is provided, the SHPO/THPO are generally provided 30 days for their review (unless modified in a local state-level agreement or tribal consultation agreement).

(3) Each consulting party has the right to disagree with an NRCS position or finding within that 30-day review period. If the agency cannot resolve the disagreement, it must seek the Council's opinion. This opinion, while not binding, should influence NRCS' final decision.

(4) If the consulting party is an Indian tribe or Native Hawaiian organization that attaches traditional religious and cultural significance to a historic property, the ACHP urges the agency to "seek" the concurrence of that party. This means that the NRCS is encouraged, but not legally required, to obtain such concurrence. If the tribe or organization does not concur and disagrees with the proposed finding, either NRCS or the tribe or organization may refer the matter directly to the Council for an opinion.

601.22 Procedures for the Consideration of Cultural Resources in NRCS Undertakings: Identifying, Avoiding, and Determining Impacts to Cultural Resources

The following steps are required to identify, avoid, and determine impacts to cultural resources.

A. Determine if the planned action (i.e. undertaking) has the potential to cause effects on historic properties, assuming such historic properties exist. Examine each NRCS activity or practice to decide whether the action could cause a change in the characteristics of a cultural resource. If the action is determined not to be an undertaking with the potential to affect a cultural resource, document the decision and proceed with the action. If the determination is that the planned action has the potential to affect a cultural resource, follow the process below.

B. Determine the level and responsibility for cultural resource investigations.

(1) Conservation Planning (as defined in the National Planning Procedures Handbook). If authority for a conservation plan (including planning and implementation) is at the field office level, the Cultural Resource Review and Field Inspection may be conducted by an NRCS employee who has satisfactorily completed the National Cultural Resources Training Program, and provided that:
   (i) The planned activity is generally limited to lands owned, controlled, or managed by three or fewer cooperators, and
   (ii) The Field Office personnel have determined that no extenuating circumstances exist, such as particularly dense, unusual, or deeply buried cultural resources within the proposed Area of Potential Effect (APE).

(2) If a proposed activity with potential to affect cultural resources, or the scope of planning for a series of such activities involves more than three cooperators (this will normally include activities such as Land Treatment Watersheds (LTWs) or Hydrologic Unit Areas (HUAs)), or extenuating circumstances, such as those described, or the proposed activity or the scope appears to be of a size or complexity that warrants additional assistance, the Field Office shall contact the CRC/CRS. The CRC /CRS shall review the proposed action and make a recommendation addressing the amount and level of cultural resource assistance needed to meet the specifications contained in this part.

(3) If authority for a conservation plan (including planning and implementation) is above the field office level, the required cultural resource activities beyond the initial cultural resources review will be conducted by a Cultural Resources Specialist.

(4) Project Planning. All project plans (as defined in the National Planning Procedures Handbook) will require cultural resources activities beyond the initial cultural resources review to be conducted by a Cultural Resources Specialist.

(5) Special Cases and Studies.

(i) Special cases. Land Treatment Watersheds (LTWs) and Hydrologic Unit Areas (HUAs), which are initiated as projects during planning but installed at the Field Office with accelerated technical assistance, require a more practical approach to cultural resources inventories and compliance. While Federal funds are involved, their purpose is narrowly defined (e.g., water quality improvement) and instead of installing several large engineering practices (e.g., dams) on public land, many smaller structures are installed (typically less than 5 acres) or management practices are implemented on private land to accomplish the conservation objectives.

(ii) In these special cases, the planning process determines the general number and type of installations that are required to achieve the stated goal(s). These are grouped into evaluation units or treatment areas and are not tied initially to precise geographic locations because their placement is determined by the landowner and dependent upon the producer's cooperation. The selected practices may also be installed up to a period of 10 years. During this time, some landowners may decide not to participate in the program, while others may opt for alternatives such as land use conversion. Due to this planning and installation sequence, NRCS can produce general plans but is unable to tie these plans to exact Areas of Potential Effect (APEs) until contracts or commitments for implementation are made by the land owner.

(iii) Consequently, the following identification process for cultural resources will be used for these special cases. A general cultural resources review will be conducted for the entire planning area during the planning phase. The review will determine the types of cultural resources found in the project area and some estimation of the resource numbers that may be impacted by the conservation practices selected for individual treatment areas. The results of this review should be included in the plan document with recommendations on how further identification and evaluation of cultural resources should be accomplished. These recommendations will be formulated with the consensus of a Cultural Resources Specialist. The use of GIS-based predictive modeling techniques is strongly recommended in formulating the plan recommendations. Exact cultural resources locations should be filed separately for future reference prior to practice design and installation.

(iv) When conservation contracts/land treatment contracts (LTCs) or commitments are executed, cultural resources field investigations will be performed according to the work plan recommendations as far in advance of installation as possible. For convenience and efficiency, similar treatment areas or evaluation units should be grouped for field investigation by a Cultural Resources Specialist who will provide both identification and evaluations of significance. This will provide planners with information on the number of historic properties affected early enough to develop conservation alternatives or acceptable mitigation plans with the cooperator(s).

(v) Special studies. For special studies such as River Basin Studies and Natural Resource Planning, the study report or plan will include, at minimum:

- A general overview of cultural resources in the area, and

- A statement that, if elements of the report or plan are implemented, the lead Federal agency must carry out the requirements of Section 106 of the NHPA of 1966, as amended, prior to implementation. If the study report or plan identifies specific locations where there is a high probability that practices or measures will have the potential to affect cultural resources, cultural resources investigations for the study will follow the steps in this section.

C. Identify cultural resources and historic properties (including traditional cultural properties) within the area of potential effect (APE).

(1) Determine the Area of Potential Effect (APE). The APE is the geographic area or areas within which Federal agency planned actions or activities (undertakings) may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertakings. The APE should include all borrow, fill or temporary storage areas, access roads and any other lands that would be directly or indirectly affected by the proposed undertaking. In some cases, with very large or elevated projects, the APE may include visual effects.

(2) Conduct a cultural resources review or background study to determine if cultural resources are known in the APE. The review will consist, at a minimum, of checking or contacting the following sources and documenting the results:

(i) The National Register of Historic Places for listed and eligible properties, and any State and local registers of cultural properties.

(ii) Official state and regional site files and databases. Your CRC/CRS will instruct you in the proper procedure for accessing these files. The completeness, format, and accuracy of these databases differ by state. The actual procedure may be outlined or specifically addressed in state and tribal agreements.

(iii) The landowner, participant, or sponsor. These individuals may have a great deal of information about historic or prehistoric resources on a tract or property.

(iv) Cultural resources indicators, environmental indicators, and artifacts.

(v) Information from National Environmental Policy Act (NEPA) scoping meetings and in environmental documents prepared by, or for, Federal and State agencies. The scoping process conducted as a part of NEPA compliance may aid in locating cultural resources and/or knowledgeable cultural resources specialists. It is important to identify non-material cultural resources and/or the individuals who can identify them.

(vi) Sources that identify American Indian tribes or Native Hawaiian groups who currently live in or use the area, those who lived there in the past, and individuals knowledgeable about the cultural properties of the tribes or groups. Critical to locating and in determining the value of cultural resources is finding individuals who understand the traditions and customs of indigenous groups. These include professional social scientists, traditional religious leaders, and other knowledgeable individuals within a specific group. University departments that have anthropologists, historians, folklorists, or cultural geographers on staff are good sources of information for identifying cultural groups in an area and may be able to provide the names of knowledgeable individuals within the groups.

(vii) Tribes may have a designated Tribal Historic Preservation Officer (THPO). The THPO is appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program, is approved under provisions of the NHPA by the Secretary of Interior, and has assumed the responsibilities of the SHPO for the purposes of Section 106 compliance on tribal lands. Some tribal governments may not have a THPO, but may have a contact person to provide information about issues of interest to the tribe.

(viii) It is important to identify non-archaeological cultural resources and/or the individuals who can identify them. Additional efforts may be necessary in expanding public and scoping meetings to address concerns of Native American and other concerned ethnic groups and may aid in identifying cultural resources of concern to the groups.

(ix) Other sources can provide information to help build a background for individual planning checks. NRCS Field Office employees conducting reviews are not required to check these sources for each conservation plan, but collecting information from these sources into a file can save time and avoid discovery situations. These types of sources must be checked in reviews conducted by Cultural Resources Specialists.

- Museums
- Local historical or archaeological societies
- Libraries
- Local universities

(3) Examine the results of the Cultural Resources Review. Is there sufficient information to know what types of cultural resources are likely to occur in the planning area, what the distribution of the resources are or may be, and whether cultural resources might be affected by carrying out the planned action? Based on these or similar questions, it can be determined whether an action that is initiated at the Field Office level should continue to be handled at the Field Office, or should be referred to the CRC/CRS. If the review is either initiated by the CRC/CRS or is referred to the CRC/CRS by a Field Office, the CRC, working with the state CRS, and with the SHPO as specified in state level agreements and tribal consultation protocols, will recommend measures to complete the remaining investigation for the action. This will include determining if the complexity of probable or known cultural resources in the area of potential effect is great enough to warrant field inspection by a CRS.

(4) Conduct a field inspection of the APE to find previously known cultural resources and to locate new cultural resources.

(i) Define the boundaries and continuity of a site by the extent of cultural material observed and landscape features.

(ii) Define any boundaries of intangible cultural resources, of traditional cultural properties, or of an area that must be avoided because it is known to contain resources that have specific spatial location(s) not provided for security reasons. Requests by concerned parties that NRCS and others stay out of culturally sensitive areas may preclude field checks of those areas for material cultural resources. The participant should be informed that the agency may not be able to offer assistance until compliance requirements can be met in such culturally sensitive areas.

(iii) Documentation of compliance and the reporting of cultural resources will follow the policy in 401.41 and the specifics of each state level agreement. The absence of cultural resources must also be documented using procedures

contained in that same agreement, since this will prevent repetition of the same compliance work.

(iv) In all cases, NRCS will provide documentation to the landowner regarding the compliance process, resources located, and those considered significant.

D. Determine whether the proposed action (i.e. undertaking) will affect a cultural resource in the APE. Whenever possible, NRCS will avoid effects to the resource by either moving the practice to another area; changing the work limits; changing to an acceptable alternative practice or measure; or modifying the practice design. NRCS will consider and document the effect of planned actions on material and other cultural resources identified as follows:

(1) If the proposed action will not affect the located cultural resource(s) and the authority or approval is at the Field Office then the office will:
   (i) Document the location of the resource and the fact that it can be avoided and provide this information to both the SHPO and landowner;
   (ii) Send the completed site form to the official state site file, with a copy to the SHPO if that office is not the repository; and
   (iii) Allow 15 days (or less if so stipulated in state level agreement) for SHPO comment. If the SHPO concurs with NRCS or if no comment is received within the allotted time period, then continue with the assistance.

(2) If the proposed action will not affect the located cultural resource(s) and the authority or approval is above the field office level, then the Cultural Resources Specialist will follow normal documentation and consultation procedures as specified in 36 CFR 800, approved state level agreements and tribal consultation protocols, and related Federal and state guidelines. Upon completion NRCS may continue with the assistance.

(3) If the undertaking will affect the located cultural resource(s) and the authority or approval is at any level, then NRCS will follow the procedures defined in section below.

601.23 Assessing the National Register Eligibility of Resources Under Section 106 of the National Historic Preservation Act: Procedures for Evaluating Cultural Resources for Eligibility for the National Register of Historic Places

A. The process of evaluating the importance of any object or place is based on a comparison with a standard or with a similar item or concept, or both, by examining the role of the item within a specific context. This section and the one following describe the formal and informal processes NRCS will follow to evaluate the cultural resources which have been identified and which will be directly or indirectly affected by a proposed action. The CRC is responsible for coordinating the evaluation process. CRS's will evaluate cultural resources and assist in reviewing determinations of eligibility made by contractors. This first section describes the evaluation procedures for determining whether a tangible cultural resource is eligible for the National Register of Historic Places. This section covers the largest number of resources that NRCS will encounter and is thus separated out for clarity. The next section describes the identification and evaluation process for resources that are important because of other legislation or regulations. All field personnel and state personnel with field responsibilities should be familiar with the characteristics of all resource types.

B. Resources are evaluated according to the National Register of Historic Places criteria. Cultural resources which have been identified by a qualified CRS or NRCS employees who have completed the NRCS National Cultural Resources Training Program will be evaluated by a CRS following the formal process:

(1) Material cultural resources such as objects, sites, buildings, structures, and districts which have been identified will be placed within the appropriate historic context(s) and compared against the National Register of Historic Places criteria (36 CFR 60.4), to determine whether the resource is eligible for listing in the National Register. The specialist will provide a written rationale for the decision on each cultural resource. Historic contexts to be used in the evaluation process should be prepared by each State Historic Preservation Office as a part of the State Historic Preservation Plan. While it is always important to obtain sufficient information during the identification process to help place a resource in its historic setting, it is of particular importance when a state has not prepared historic contexts National Register Bulletin No.15 provides guidance. How evaluations will be conducted in the absence of a state plan can be an item in the state agreement with the SHPO.

- When little comparative information has been collected and/or NRCS and the SHPO/THPO disagree on the National Register eligibility of the resource, NRCS should identify and consult with individuals who are especially knowledgeable regarding the type of resource being evaluated and obtain the information necessary to complete an evaluation.

(2) Properties of traditional religious and cultural importance to American Indian tribes or Native Hawaiian groups may also be eligible for listing in the National Register, although they may not always contain material cultural resources. The value of such resources is determined through consultation with the appropriate tribal officials or Native Hawaiian representatives.

(i) Consultation should be approached with an understanding that the federally recognized Tribe is a sovereign government, and interaction between the agency and the Tribe is that of one government to another. Consultation with a Tribe benefits from a pre-existing dialogue and relations between the US and tribal governments. Agency Tribal Liaisons and Special Emphasis Program Managers can help determine the type and level of contact needed to initiate consultation.

(ii) Efforts to initiate consultation where there has been no prior contact between the Agency and Tribe may begin at a formal level of tribal council, elders, or chief(s) meeting with mid-level or top-level managers of the agency. In other cases the consultation relationship may come about through interaction between field-level staffs from the agency and tribe. While the goals of consultation are best expressed in writing in a memorandum of understanding or agreement of principles approved by the tribal government, there may be cases where the preferred method of consulting by the tribe is verbal and without a written document.

(iii) Consultation with tribes with an authorized Tribal Historic Preservation Officer (THPO) will probably initiate with the THPO, and be guided by the Tribe. The range of possible processes for consultation is wide, with some tribes preferring consultation activities entirely under the THPO, while others will use the THPO as a technical resource to tribal leaders. In all cases, an authorized THPO has the same legal authority on tribal lands as the SHPO

has on all other lands. A clear understanding of these functions at the beginning of consultation on cultural resources is helpful.

(3) Using the documentation prepared by the Cultural Resources Specialist, NRCS will agree or disagree with the specialist's recommendations on eligibility and consult with the SHPO/THPO.

(4) If NRCS determines any of the National Register Criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for Section 106 purposes.

(5) If the NRCS determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. The proposed actions can continue after appropriate documentation.

(6) If the agency and the SHPO/THPO cannot agree on the National Register eligibility of a cultural resource, NRCS will obtain a determination of eligibility from the Keeper of the National Register and complete the Section 106 process.

601.24 Assessing the Historic or Cultural Importance of Resources in Legislation other than the National Historic Preservation Act

A. Resources evaluated according to other formal criteria. Material cultural resources on public and Indian lands that meet the criteria for "archeological sites of interest" under the Archaeological Resources Protection Act (ARPA) are protected from disturbance. Examples of sites that may meet these criteria include an Anasazi field house, an 1890's mineshaft, and an 1890's corral. The determination that a site is of archeological interest is not dependent on or related to evaluation according to the National Historic Preservation Act. Any scientific investigation of these protected sites is conducted by permit from the land manager who is responsible for seeing that cultural resources are protected.

B. Among cultural resources protected from disturbance on public and Indian lands are those that have religious or spiritual value to Native Americans. These sites are protected under the American Indian Religious Freedom Act (AIRFA). Such sites may also be evaluated as eligible according to the National Register criteria, but National Register eligibility is not required for site protection. In order to assess these resources, NRCS will consult with the Federal land manager and/or tribal representative prior to beginning work on Federal or Indian lands.

C. Human remains. Human interments are of value to individuals who knew the person and/or the cultural group of which the person was a member. Human remains and associated objects that are interred on public or Indian lands are afforded protection under Federal law. An object associated with a burial (a funerary object) may meet a criterion making it eligible for listing in the National Register, but if it is not designated significant, the object will always be afforded protection and consideration as a part of an interment even if the object is separated from the burial. The value of the object lies not in its age or style, but in its placement with the deceased person as an object important to the person or representing a part of the belief system of the group to which the person belonged.

D. Many States also protect unmarked interments on state lands and in some cases on private lands. NRCS will follow the stipulations of state laws and state level agreements and tribal consultation protocols in the treatment of human remains and associated objects including identification, analysis, consultation with Native Americans and Native Hawaiians, and reburial.

E. All interments are regulated by some form of state mortuary law and, if disturbed, may be treated as a potential criminal case until their antiquity is assessed. Since it may be a felony not to report these interments, it is vital that the discovery of human remains in marked or unmarked interments be reported promptly according to State and local requirements.

F. Other cultural resources. Cultural resources also include products of human culture that are intangible or whose tangible aspects would not usually meet one of the types of criteria given previously. These traditional cultural values and expressions of folkways and folklife have time depth and are found within all ethnic groups. Their value lies in the part they play in maintaining the integrity of social groups and thus of our American heritage. The isolated store at a rural crossroads, a restaurant operated by several generations of a family in the same or different locations, and a rural African-American church are important for the part they play in continuing the way of life of the group(s) and are not evaluated on the basis of architecture, materials, or landscaping. Further discussion of these traditional cultural properties is provided in Subpart G, Glossary of Terms.

G. The goal of identifying, evaluating, and protecting cultural resources is to preserve them as a part of a living community and is described in this section. Adverse effects to such cultural resources cannot be mitigated. NRCS will consult with the group to which these resources have value and make a good faith effort to find appropriate ways to protect or provide access to such cultural resources. The decision to proceed with an undertaking that will destroy such a resource must clearly demonstrate the greater public benefit.

H. Other resources. Among the resources NRCS may consider are those that contain no cultural material and are not associated with a cultural belief or value but are of value for other reasons. These include geological, paleontological, and other scientific resources of interest. Additional information on these resources is located in Subpart G, Considering Scientific Resources other than Cultural Resources.

601.25 Procedures for Assessment and Resolution of Adverse Effects to Historic Properties

A. Assessment of Effects. If a cultural resource is determined to be an historic property, it is necessary to determine how the property will be affected by the proposed action, and, if so, whether that effect will be adverse. The steps in the process of assessing effect are detailed in 36 CFR 800.5(a)-(d). Additional guidance is in the publication "Preparing Agreement Documents: How to Write Determinations of No Adverse Effect, Memoranda of Agreement, and Programmatic Agreements Under 36 CFR 800," issued by the Advisory Council in September, 1989. NRCS should follow and document these steps for all historic properties that will be affected by a proposed action.

B. Effects to Historic Properties are assessed, in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches traditional religious and cultural significance to identified historic properties, according to the criteria in the context of the historical, architectural, archeological, or cultural significance possessed by the property.

C. An undertaking shall be considered to have an effect whenever any condition of the undertaking causes or may cause any change in the characteristic of a historic property that qualifies it for inclusion in or eligibility for the NRHP. An effect occurs when an

undertaking changes the integrity of location, design, setting, materials, workmanship, feeling, or association of the property that contributes to its importance in accordance with the NRHP criteria. An effect may be direct or indirect. Direct effects are caused by the undertaking and occur at the same time and place. Indirect effects include those caused by the undertaking that are later in time or farther removed in distance but are still reasonably foreseeable. Such effects may include changes in the pattern of land use, population density, or growth rate that may affect properties of historical, architectural, archeological, or cultural importance.

D. Effects assessments have three possible outcomes:

(1) No Potential to cause effects. This is when the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties are present. In this case, NRCS has no further obligations under section 106.

(2) Finding of No Adverse Effect occurs when the undertaking's effects do not meet the criteria for causing an adverse effect or the undertaking is modified or conditions imposed to avoid adverse effects. If the NRCS proposes a finding of no adverse effect, all consulting parties shall be notified and provided with documentation as specified in 36 CFR 800.11(e). NRCS may proceed with the activity if the SHPO/THPO agrees with the findings. If a consulting party does not agree with the finding, NRCS shall follow the procedures in 36 CFR 800.5(c)(2).

(3) Finding of Adverse Effect, when the undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the NRHP in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feelings, or association. If an adverse effect is found, the NRCS shall consult further to resolve the adverse effect as outlined below.

(i) Continue Consultation: NRCS shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertakings that could avoid, minimize, or mitigate adverse effects on historic properties. NRCS shall notify the ACHP of the adverse effect finding by providing the documentation specified in 36 CFR 800.11(e). Requirements for ACHP participation are in 36 CFR 800.6(a)(1).

(ii) If resolution of adverse effects is made without ACHP participation, and the NRCS and SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a Memorandum of Agreement (MOA). The NRCS must submit a copy of the executed MOA, along with documentation to the ACHP prior to approving the undertaking. If resolution of adverse effects is made with ACHP participation, the ACHP will be a signatory of the MOA.

(iii) Memorandum of Agreement: A MOA executed and implemented evidences the NRCS compliance with Section 106 and shall govern the undertaking and all of its parts. The NRCS shall ensure that the undertaking is carried out in accordance with the MOA.

601.26 Failure to Resolve Adverse Effects

If measures to avoid, minimize, or mitigate adverse effects on historic properties cannot be implemented and a decision is made by NRCS to consider an activity that will cause adverse effects to an historic property due to special circumstances or overriding participant concerns,

then case file documentation will be forwarded for a final determination by the Chief. The suggested documentation needed by the Chief and FPO includes:

A. Notification statements of effects to the SHPO/THPO and the ACHP.

B. Any results of consultation with interested parties. These may include:

(1) The head of the local government with jurisdiction over the area in which the undertaking is proposed to occur;
(2) Tribal representative if a THPO has not been designated;
(3) Landowner and applicants for assistance; and
(4) Others as determined by NRCS, SHPO/THPO, and ACHP.

C. Copies of documentation minimally involving a description of:

(1) The undertaking, including photographs, maps, and drawings, as necessary;
(2) Efforts to identify historic properties;
(3) Affected historic properties, using materials already compiled during evaluation of National Register eligibility; and
(4) Effects of the undertaking on the historic property and the basis for the determination.

D. Use of existing agency procedures to provide for an adequate opportunity for public comment, if necessary. NRCS, SHPO/THPO, or ACHP may elect to meet with interested parties or conduct public information meetings.

E. If NRCS and SHPO/THPO can agree on the effects, copies of Memoranda of Agreement and any supplements executed, and with ACHP comments, should be included.

F. Agreement cannot be reached, documentation of official termination of the consultation process, and notification to all interested parties and to the Advisory Council with a request for final ACHP comment. The required documentation for this termination process when there is no agreement is as follows:

(1) A description and evaluation of alternatives or mitigation measures that NRCS proposes for dealing with the undertaking's effects;
(2) A description of alternatives or mitigation measures considered but not chosen and the reasons for their rejection;
(3) Documentation of SHPO/THPO consultation regarding the identification and evaluation of historic properties, assessment of effect, and consideration of alternatives or mitigation measures;
(4) A description of agency efforts to obtain and consider the views of affected parties or persons;
(5) The planning and approval schedule for the undertaking; and
(6) Copies or summaries of written views submitted to NRCS concerning the effects of the undertaking and alternatives considered to reduce the effects.

G. Draft cover letter for signature of the NRCS Chief on final notification to the ACHP of NRCS intent to implement the undertaking that will cause adverse effects.

601.27 Procedures for the Withdrawal of Assistance

The following procedures address the conditions and documentation required in cases where NRCS must withdraw assistance from an undertaking. Cultural resources are a nonrenewable resource and as such, the mitigation of adverse effects cannot be accomplished after

destruction or severe damage. Mitigation is an alternative that must be considered before an irreversible action is taken. In cases where an adverse effect has occurred or is likely to occur through a participant's refusal to implement feasible mitigating measures, NRCS must insure that Federal assistance is not used to cause or further an adverse impact to a cultural resource.

A. Conditions under which withdrawal of NRCS assistance must be considered.

(1) If the participant, after application to NRCS or any other cooperating agency for which NRCS has technical responsibility, carries out an irreversible action that is related to the requested assistance and may adversely affect a cultural resource before the completion of NRCS cultural resource compliance responsibilities or if the applicant refuses to implement feasible mitigating measures, then NRCS will consider withdrawing assistance from the undertaking. Several conditions, however, should be determined prior to the withdrawal of the assistance. It should be determined if the cultural resource:

(i) Is within the APE;

(ii) Can be avoided or treated using alternative practices;

(iii) Has been found to be significant by a CRS; or

(iv) Will be adversely affected as determined by NRCS in consultation with SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches traditional religious and cultural significance to the historic property; and

(v) After consideration of the conditions, if the affected cultural resource is within the APE, can be avoided or treated, is significant, and will be adversely affected, then mitigation plans will be formulated and reviewed for adequacy. If a mitigation plan is formulated or is already in place, and the participant elects to not implement the mitigation plan, NRCS shall withdraw assistance from the undertaking or follow procedures on implementing adverse effects.

(2) Pursuant to Section 110(k) of the NHPA, NRCS will not provide assistance to a participant who intentionally adversely affects an historic property in order to evade compliance with Section 106 of NHPA. Adverse effects caused by a contractor are included in this provision, if the participant has both the knowledge and "legal power to prevent" the contractor from intentionally causing adverse effects. After full documentation and consultation with the SHPO/THPO and ACHP, NRCS may elect to continue assistance to the participant for actions which caused or permitted adverse effects. The consultation with the SHPO/THPO and the ACHP constitutes a review of the undertaking that will be adversely affected and the circumstances that may warrant continued assistance from NRCS.

(3) If the decision is made to withdraw NRCS assistance under either GM 401, the NRCS will inform the participant within five working days of the decision, including in the notification the specific reasons for the withdrawal.

B. Extent and duration of withdrawal. For those withdrawal cases considered under NRCS General Manual 420-401, withdrawal of assistance will be considered for the practice(s) under which potential adverse impacts might have occurred. This does not preclude the NRCS from continuing with assistance activities that will have no effect or may benefit cultural resources in the APE.

C. For withdrawal cases considered under Section 110(k) of the NHPA and NRCS GM 420-401, the minimum duration of NRCS withdrawal of assistance will be for the fiscal year in which the damage or destruction occurred, or the fiscal year in which the

participant refused to implement the mitigation plan. The minimum extent of withdrawal of assistance will be the specific APE for the damaged or destroyed cultural resource or the APE for the cultural resource for which a mitigation plan was prepared and refused by the participant.

D. Longer term or more extensive withdrawals will be made at the discretion of the State Conservationist. Decisions for longer term or more extensive withdrawals will be thoroughly documented and should be based on the severity or intentional nature of the destruction or damage to cultural resources, as well as other pertinent considerations.

E. Documentation necessary for mandatory withdrawal cases. If the decision is made to withdraw assistance, the NRCS will fully document the actions and events that lead to the decision. The necessary documentation will consist, at a minimum, of the following:

(1) A detailed description of the type(s) and location(s) of the cultural resource(s) in question.
(2) A detailed description of the conservation problems and needs being addressed in planning and the practices recommended to meet conservation needs. All participant names should be included.
(3) A description of the steps taken to avoid, mitigate, or use alternative treatments to achieve the conservation objectives while accounting for cultural resources in planning.
(4) A detailed discussion of NRCS actions in the case including dates and times of contacts with the participant(s), items discussed during each contact, and actions taken by NRCS and the participant(s) as a result of each contact. Also included are the date and method by which the participant(s) was notified of the presence of the cultural resources within the proposed APE(s).
(5) If applicable, a detailed description of the extent and amount of damage to cultural resource(s).
(6) Copies of any correspondence with the SHPO/THPO, other concerned parties and/or ACHP regarding the case, particularly any documentation regarding evaluations of National Register eligibility or recommendations of effect.
(7) If applicable, a copy of the mitigation plan.
(8) A copy of the notification from the NRCS to the participant(s) of intent to withdraw, with any accompanying documentation.

F. Responsibilities for preparing the documentation package. The CRC, in conjunction with a CRS and other appropriate personnel shall compile the necessary documentation. A CRS will review all detailed descriptions of resources and assessments of damage in assistance withdrawal cases.

G. Consultation and notification. The SHPO/THPO should be invited to provide comment on the circumstances and specifics of the withdrawal of NRCS assistance. If adverse effects from Section 110 as outlined above of this part are the basis for withdrawal of assistance, NRCS will also provide ACHP with notice of intent to withdraw, accompanied by the documentation package.

601.28 Procedures for the Consideration of Cultural Resources During Emergency Work

The procedures for emergency undertakings were developed to more closely match NRCS mission and program authorities. Under a programmatic agreement, they differ from the requirements of 36 CFR 800.12 so as to follow the process outlined in the NRCS National

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

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

B. Exigent situations. The SHPO/THPO shall be notified of NRCS funds obligated for exigent situations. NRCS funds for exigencies are obligated:

(1) 10 days after receipt of funds;
(2) 2 days after the disaster event; or
(3) When conditions permit construction activities. Exigency notification should include the types and amounts of funds obligated, circumstances creating the exigent situation, work to be undertaken, and any consideration of historic properties, as appropriate. NRCS will document and avoid adverse effects to cultural resources encountered during exigency work to the fullest extent practicable.

C. No exigent situations. For no exigencies, NRCS must prepare the project information in the form of Damage Survey Reports (DSR) for funding approval. The State Conservationist will request SHPO/THPO consultation and assistance in preparing cultural resources review information prior to submitting DSRs for NHQ approval. NRCS will take into account all cultural resources information provided by SHPO/THPO in preparing DSRs and specifications therein. If SHPO/THPO consultation and review:

(1) Locates or indicates high probability for historic properties in the DSR area, a Cultural Resources Specialist will be involved in assessing effects to those properties and performing additional consultation prior to repair work.
(2) Does not locate cultural resources in the DSR area, a Cultural Resources Specialist, or NRCS personnel certified in the National Cultural Resources Training Program in conjunction with CRS oversight, will perform Field Inspections prior to emergency repairs. The scale of the disaster and scope of the measures will govern the use of non-specialist NRCS personnel for such inspections and the relief response needed. These will be indicated during consultations with the SHPO/THPO.

(i) Should a cultural resource be discovered, the CRC will be notified, who will immediately notify the SHPO/THPO and the ACHP. A CRS will evaluate the resource.

(ii) The State Conservationist will make a final decision based on the CRS's evaluation, consultation on an appropriate course of action with the SHPO/THPO and the ACHP, and the need to protect life and property. The State Conservationist will inform the SHPO/THPO and ACHP immediately regarding the determination.

D. SHPO/THPO and ACHP will be provided copies of all final reports of NRCS emergency work activities involving cultural resources. Final reports are due to the NRCS Chief within 60 days of emergency work completion. Copies of all emergency work reports will be available upon request.

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

F. The State Conservationist will complete worksheet information in consultation with a CRS. The CRS will provide cultural resources guidance and technical oversight and assist in avoiding adverse effects to cultural resources when conditions permit.

G. The completed Emergency Waiver Worksheet must be signed by the NRCS Chief or designee and sent to the Secretary of Interior. Copies will be sent to the ACHP, SHPO/THPO, and the appropriate NRCS offices. Notification must take place within 12 days after signing the waiver.

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

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

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

K. Complete documentation of NRCS actions during the waiver period will be provided to the Secretary within 15 working days after the waiver has expired. Informational copies will also be provided to the ACHP, SHPO/THPO, and appropriate NRCS offices.

L. States are encouraged to develop emergency plans with their SHPOs/THPOs and respective State governments which best meet anticipated types of emergency situations. Guidelines are included in below sections.

601.29 Procedures for Construction Discoveries

A. General. The following procedures apply to all discoveries that occur while carrying out any NRCS program activity that has the potential to cause effects on cultural resources.

(1) The procedures in Subpart C must have been completed before a discovery situation exists. If those responsibilities have not been completed, this section does not apply.
(2) If procedures described under Subpart C have been completed and new information becomes known prior to commencing construction, or known historic properties will be affected in unanticipated ways, NRCS will ensure consideration of the information and effects by consulting with the SHPO/THPO, and if necessary ACHP, as described in this section.
(3) When the conditions described herein exist, NRCS may, at its discretion, assume that the cultural resource is eligible for the National Register of Historic Places for purposes of this section, or NRCS will consult with the SHPO/THPO about eligibility.
(4) Upon discovery of an unanticipated cultural resource after commencing construction, NRCS will:
    (i) Request that the landowner or sponsor halt actions in the area affecting the resource to allow the National Register eligibility of the resource to be determined; and
    (ii) Immediately document the resource, implement measures to protect the resource from further disturbance, and implement the discovery plan if a plan has been developed. In the absence of a discovery plan, NRCS will complete the requirements of Subpart C, Section on Procedures for Construction Discoveries;
    (iii) In the event that the action affecting the resource is not halted, consider immediately suspending assistance, and inform the landowner and sponsor that continuing to affect the resource may result in withdrawal of NRCS assistance.
(5) Any discovery on Federal or Indian land will be reported to the responsible manager, tribal authorities, and other appropriate authorities the same working day as the discovery occurs, and the action disturbing the resource will be stopped in the area of the resource being affected.
(6) The discovery of human remains or interments and/or associated artifacts on private lands will be handled in accordance with NRCS/SHPO/THPO state level agreements and tribal consultation protocols and applicable state grave protection laws.
(7) The guidelines for "Considering Resources of Scientific Value" in the Appendix should be followed if materials discovered on private land are purely of paleontological, geological, or of other scientific importance, and are not a potentially significant cultural resource (historic property).
(8) All reports of identification, evaluation, and mitigation efforts resulting from discovery situations will be provided to the SHPO/THPO and ACHP.

B. Notification and investigation of discovery. In the following procedures, notification and consultation with the SHPO/THPO, ACHP, and Departmental Consulting Archeologist (DCA) of the U.S. Department of the Interior differ depending on whether the discovery occurs during undertakings where responsibility is at the Field Office level or at the State office level.

(1) If the discovery occurs during an undertaking for which the Field Office has responsibility, NRCS will notify the SHPO/THPO and ACHP. NRCS will consult with the SHPO/THPO regarding the National Register eligibility of the resource and, if the resource is significant, develop feasible actions to avoid, minimize or mitigate adverse effects to the resource. Consultation with the SHPO/THPO will be completed within 48 hours of the discovery. NRCS will then describe to the ACHP the actions proposed to mitigate adverse effects and request ACHP comments. This may occur simultaneously with SHPO/THPO consultation. ACHP will provide interim comments to NRCS within 48 hours of the request and final comments within 30 days of the request. If the interim comments are agreed to, NRCS will implement the actions and may authorize continuation of the assistance prior to receiving final comments from ACHP.

(2) If the discovery occurs during an undertaking for which the State office has responsibility, NRCS will comply with 36 CFR 800.13 of the ACHP regulations.

Part 601 - National Cultural Resources Procedures

Subpart D - Procedures for Complying with Sections 110 and 112 of the National Historic Preservation Act

601.30 The Stewardship of Cultural Resources: Preservation Partnerships

A. Sections 110 and 112 of the National Historic Preservation Act call upon Federal agencies to lead the nation as stewards of our heritage resources. Section 110 calls for establishment of a sound historic preservation program that is effective in working in all the agency's mission areas. Technical Specialists responsible for historic preservation activities within the agency, according to Section 112(a), shall have the requisite education and experience to provide the best advice and practice options to clients, management, and partners.

B. Preservation Partnerships should be designed to work in concert with conservation districts, landowners, other Federal agencies, Indian tribes, states, SHPO/THPOs, local governments, private organizations, and other concerned individuals. The plan or program integration will take into account the agency's central mandates for the protection of soil, water, air, plant, animal and human resources. Implementation will be the responsibility of the NRCS State Offices. In general, the following elements should be reflected, if applicable:

(1) Fostering preservation within the community at large. In general, NRCS should provide technical assistance or encouragement regarding the preservation of federally and non-federally owned historic properties regardless of their relationship to NRCS activities. Specifically NRCS should provide technical assistance in the fields where it already has considerable expertise. These may include, but are not limited to:

(i) Erosion control: providing assistance in the development of erosion control plans where cultural resources are being damaged by or threatened by all forms of erosion. Whenever possible, criteria should be developed and documented for establishing site protection practices.

(ii) Geophysical survey: providing assistance in the use of remote sensing devices and products (such as ground penetrating radar and aerial photography) for the study and/or preservation of cultural resources.

(iii) Watershed protection planning: providing assistance in the development of plans for the assessment and treatment of a flood threat to cultural resources.

(iv) Cultural resources training: using agency materials and expertise to assist communities, schools, and other groups to inform the public of the importance of cultural resources.

(v) Informing landowners of the importance of cultural resources by:

- Providing information to the owners of properties containing cultural resources that have a demonstrated or likely research significance about the need for protection of such resources and any available means of protection.
- Encouraging owners to preserve historic properties and cultural resources intact and in place by providing information on incentive or assistance programs available for the donation of or preservation easements on lands containing historic and cultural resources.

(ii) Education through the display of artifactual material recovered in professional cultural resource investigations. Such a display is encouraged, provided that:
- The display is prepared with or follows the guidance of a cultural resources specialist or qualified museum professional;
- The artifacts are returned to the rightful owner or institution after display; and
- No human remains or items of sensitive religious or ritual significance are displayed.

(iii) No other displays of artifactual material will be permitted.

(3) Preservation work with recognized minority groups. NRCS shall:

(i) Endeavor to work with National Park Service sponsored preservation training programs at historically black colleges and universities, tribal colleges, and colleges with a high enrollment of Native Americans or Native Hawaiians. This should also include other appropriate ethnic/minority groups such as Hispanics, women, and Asian Americans to maximize diversity.

(ii) Assist State and local governments, Indian tribes, and Native Hawaiian organizations in the implementation of their historic preservation programs and activities.

(iii) Encourage the protection of Native American cultural items and of properties of traditional religious or cultural importance to Indian tribes, Native Hawaiians, or other Native American Groups.

(4) Data sharing with other agencies and institutions and development of technology. NRCS shall cooperate in the development of technology and cultural resources as related to data sharing agreements with other Federal, State, and local agencies, and private institutions and organizations. Specifically, NRCS will provide Geographic Information System (GIS) and other assistance to official entities on applications where cultural resource information can be integrated with other natural resources information, and where the exchange of information (such as digitized site information, soils, elevations, stream courses, etc.) can be beneficial to all parties. This information will be shared in accordance with NRCS National Bulletin Number 120-2-12, ADS-New Requirements for Privacy.

601.31 NRCS' Responsibilities to Preserve and Use Historic Buildings and Inventory Historic Properties

A. Section 110(a)(1) of the NHPA directs the heads of all Federal agencies to assume responsibility for the preservation of historic properties which are owned or controlled by the agency. Prior to acquiring, constructing or leasing buildings for agency use, to the maximum extent feasible each Federal agency is to use historic buildings available to the agency. Consistent with the mission of the agency and professional standards established pursuant to Section 101 of the NHPA, NRCS shall pursue preservation of such structures and buildings.

B. Additionally, Section 110 of NHPA directs Federal agencies to establish a program to inventory historic properties under their ownership or control. In addition, prior to acquiring, constructing, or leasing buildings for the purposes of carrying out agency responsibilities, historic property structures should be utilized to the maximum extent feasible.

C. The first step in this inventory process is the identification and evaluation (according to National Register criteria) of cultural resources on NRCS owned or controlled

properties. All properties currently under the jurisdiction of NRCS (such as Plant Materials Centers and leased non-federally owned structures) will need to be assessed for and complete a cultural resources survey of that property, if appropriate. The survey results will be used to determine NRHP eligibility of any cultural resources located. Following NRHP evaluation, NRCS will develop a specific treatment plan for managing the historic properties identified. No structures should be altered, or ground disturbing activity occur to these historic properties, nor should any be sold or sublet until the management plan has been completed. Once the identification, evaluation, and management plan have been completed, each NRCS manager will ensure that any effects to said historic properties are fully considered, and that appropriate covenants for continuing protection be made as part of any sale or lease agreement.

601.32 Establishing an Historic Preservation Program

A. Section 110 directs each agency to establish a preservation program, in consultation with the Secretary of the Interior, for the identification and protection of historic properties under its control, jurisdiction that considers the historic, archeological, architectural and cultural values and either inventory and nominate eligible properties to the NRHP or, if subject to agency actions or programs that might affect NRHP properties, give them full consideration during agency planning and in accordance with Section 106 of the Act.

B. Section 110 (k) and (l) emphasize that each Federal agency must comply with Section 106 and the ACHP implementing regulations (36 CFR Part 800). Section 110 (l) states that no Federal agency may delegate its responsibilities, including its identification, evaluation, treatment, consultation and, most important, decisionmaking responsibilities, under Section 106 of the act. In establishing the Historic Preservation Program, NRCS is expected to:

(1) Carry out its planning, historic preservation and NHPA Section 106 compliance-related activities in consultation with other Federal, State (including SHPOs), local agencies, Indian Tribes (including but not limited to THPOs), Native Hawaiian organizations.

(2) Ensure that its procedures for compliance with Section 106 (including State level agreements and consultation protocols with Indian Tribes):

(i) Are consistent with the ACHP's regulations (i.e., 36 CFR Part 800) issued pursuant to Section 211 of the NHPA;

(ii) Provide for an effective process of identification, evaluation, and treatment of NRHP eligible properties, and the development and implementation of agreements, in consultation with SHPOs/THPOs, Tribes, Native Hawaiian organizations, and the interested public, as appropriate, regarding consideration and avoidance of adverse effects;

(iii) Encourage the property owner to pursue appropriate disposition of collections and Native American cultural items (including consulting with Tribes and the Departmental Consulting Archeologist on disposition). Note: NRCS does not have the authority to take possession or carryout such disposition of collections;

(iv) Assure fully professional recording of historic properties prior to demolition resulting from an NRCS-controlled action or assistance activity;

(v) Designate a qualified official to be known as the agency's "preservation officer" (currently located in the Science and Technology area of NRCS);

(vi) Conduct NRCS programs and projects in a manner that is consistent with the intent of the NHPA;

(vii) Take every step possible to minimize harm to a National Historic Landmark (designated under the Historic Sites Act of 1935) prior to approval of a project or program (undertaking) that may cause an effect;

(viii) Include the costs of preservation on compliance activities as eligible project costs; and

(ix) Clearly recognize that the NHPA and implementing regulations should not be construed to require preparation of an environmental impact statement where it would not otherwise be required under NEPA and nothing in the NHPA exempts NRCS from compliance with NEPA if otherwise required. That is, compliance with the NHPA and NEPA may be coordinated but neither substitutes for the other.

Part 601 - National Cultural Resources Procedures

Subpart E - Guidance for Implementing Related Compliance Procedures

601.40 Planning for Discovery of Cultural Resources

This section addresses actions to prepare for discoveries that may occur during implementation of any NRCS actions. A general discovery plan is required. The preparation of a discovery plan specific to an action or group of similar activities is optional, but should be considered for NRCS project type assistance. A discovery plan helps maintain integrity of the installation schedule and effective and efficient negotiation of discovery situations when they occur.

A. Two levels of plans are necessary:

(1) General discovery plan. General processes about handling of cultural resources when discovery situations occur will be addressed in agreements between NRCS State Offices and SHPO's/THPO's. The general plan information should be contained in General Manual supplements to this part for all offices. State laws regarding human remains, and local government requirements for some types of cultural resources, may necessitate very specific language and processes for some NRCS offices. This variation should be taken into account through NRCS memoranda to the appropriate NRCS offices. The general discovery plan will address the following:

(i) Who should be contacted if a discovery occurs, when, how, and in what order. The minimum contacts are:

- The NRCS CRC and CRS, supervisory NRCS personnel for the area, other sponsors, landowner/s;
- SHPO/THPO, Indian tribes or Native Hawaiian organizations that attach traditional religious and cultural significance to identified historic properties; and
- The Departmental Consulting Archeologist (DCA) of the Department of the Interior. The DCA must be notified of a discovery that is the responsibility of the state office, whether or not a specific discovery plan has been initiated. Such notification does not constitute consultation unless requested by NRCS.

(ii) The responsibility of each of the persons or organizations having a role in a discovery situation;

(iii) How notifications will be documented.

(2) Specific discovery plan. A detailed discovery plan is specific to one action or a group of similar activities having similar potential effects and should be prepared if:

(i) Responsibility for the action is with the state office and unanticipated cultural resources may be encountered during installation; or

(ii) Responsibility for the actions is at the Field Office level;

(iii) There are multiple similar activities for which the planning period is relatively lengthy, installation is intermittent or on an individual basis; and

(iv) Unanticipated cultural resources may be affected in similar ways.

Discovery plans specific to one action or a group of activities will be developed in consultation with the SHPO/THPO and ACHP. Development of the plan should be completed sufficiently before installation begins to provide the consultation parties a reasonable opportunity for formal comments on the plan; usually the minimum is 30 days before beginning construction (some THPO's may not be under similar time constraints). Components of the plan should include:

(i) A research design presenting a summary of documentary research of typical APE's or regions, predictive modeling of high probability location in the practice area and a proposal of how NRCS will proceed with sound scientific reasoning in the event of a discovery.
(ii) Provisions unique to the plan, or stipulations from agreements, that establish constraints on use of the construction area or special treatments for particular areas.
(iii) Description of what will constitute new and unevaluated information.
(iv) Any arrangements for cultural resources specialists or non-specialists to monitor or inspect the construction area during construction.
(v) Handling of costs of cultural resources work during installation of the undertaking.
(vi) Pertinent project plans and any specifications that graphically illustrate locations of monitoring, sensitivity, constraints on use of limited areas, special construction treatment, and avoidance provisions.

601.41 Establishing a Cultural Resource Reporting Mechanism

In order to meet the reporting requirements stipulated under various agreements (including with States and Tribes) and to meet agency performance reporting requirements (i.e. the annual report to Congress) NRCS must have a system by which to record and report cultural resources. As part of their state level agreements and tribal consultation protocols (or as supplements to those agreements), NRCS will work with the SHPO/THPO to develop systems for reporting cultural resources. These systems will address landowner privacy, security of resources, and the mechanical means for reporting sites. Additional information on these topics is found in following sections.

A. Site Forms for Field Personnel. Each state NRCS office will draft a cultural resource reporting form or forms that, at a minimum, include the following information for field investigations performed by non-specialists in the field of cultural resources. These forms are for use in the situation that a CRS is unavailable to document the resource. Effort should be made to adopt the official state reporting forms whenever feasible.

(1) Temporary and permanent site number;
(2) Cultural resources type;
(3) Narrative description of resource and surrounding environment, including site condition and/or soil and erosion phase, ground cover, and land use;
(4) Elevation;
(5) Discovery status;
(6) National Register eligibility if known;
(7) UTM center point (anchor point);
(8) Length and width of site if determinable through visual inspection;
(9) USGS Quad Map(s) covering site area; and
(10) Descriptive list of artifacts and features found.

B. Site forms for Cultural Resources Specialists. Cultural Resources Specialists will fill out the full state site form for reporting, or the form established by the state/tribal agreement(s).

C. Security and confidentiality of information. The provisions found under Subpart E should be followed to assure security and confidentiality of information. This also applies to Traditional Cultural Properties that may require unusual security measures due to the sensitive nature of the subject and location.

D. Private property concerns and disclosure of information. The NRCS and SHPO/THPO will work together to address landowner concerns on how the disclosure of cultural resources location information to the SHPO/THPO affects the security of cultural resources and the security and economic value of private property.

E. Specifically, NRCS and SHPO/THPO will mutually agree upon programmatic methods of handling landowner objections to NRCS' providing cultural resources information (location, character, or ownership) to the SHPO/THPO. If NRCS and SHPO/THPO cannot agree on disclosure parameters at the programmatic level, the NRCS Chief or delegated representative shall make a final determination in consultation with the ACHP and the Secretary of the Interior.

F. In individual cases where disclosure concerns will result in the withdrawal of conservation assistance and either:

(1) Cause a significant invasion of privacy;
(2) Risk harm to the cultural resource; or
(3) Impede the use of a traditional religious or cultural site by practitioners, then a complete case file of the problem should be forwarded for review and final determination by the NRCS Chief in consultation with the ACHP and Secretary of the Interior.

601.42 Maintaining Access to Data and Reports

As NRCS conducts its cultural resources responsibilities, information is collected, acquired, and generated on those resources. This section defines categories of information beyond site reports and stipulates the limitations on access to cultural resources information. The limitations are necessary to protect the resource itself and/or the area or place where they are located. The authority for these limitations comes from Section 304 of the National Historic Preservation Act (as amended) and Section 9(a) of the Archaeological Resources Protection Act of 1979. NRCS National Bulletin 120-2-12 will also be followed.

A. Cultural resources data:

(1) All data and associated records resulting from recovery and analysis activities are the property of the NRCS. Upon request, NRCS will provide copies of the results of analysis and other records to landowners, cooperating agencies, or interested parties directly involved with an undertaking that requires data recovery in accordance with data-sharing policies. Such documentation is considered additional to that required to meet normal compliance documentation standards.
(2) NRCS shall protect cultural resources from intentional or inadvertent damage by restricting access to data and other information with distinguishing characteristics that would reveal their location. Such limitations are necessary to protect the cultural resources and the property upon which they are situated.

(3) Access to such data and information will be restricted following the Department of the Interior's Guidelines for Restricting Information About Historic and Prehistoric Resources (National Register Bulletin 29). In the absence of a resource specific agreement between the NRCS Chief and the Secretary of the Interior, it is assumed that public disclosure of such information would create a substantial risk of harm to either the resource or to the place where the resource is located.

B. Technical reports. Technical reports are defined as those letters, reports, memoranda, and the like that:

(1) Are generated as a result of an NRCS action;
(2) Are written by a professional in the field of cultural resources management; and
(3) Pprovide technical information of the results of the inventory and/or evaluation of cultural resources and the mitigation on effects to historic properties. Exact cultural resources locations are normally removed to a separate appendix for general distribution. Technical reports may or may not finalize compliance requirements and often contain information of use to management, specialists, and other interested parties. Limited copies for distribution should be provided to NRCS offices, SHPO/THPO, Indian tribes or Native Hawaiian organizations that attach traditional religious and cultural significance to identified historic properties, landowner or project sponsor, district officials, National Technical Information Service (NTIS), ACHP, DCA, cooperating agencies, and others as appropriate.

C. Annual report. Cultural resource activities are reported as an element of the Performance Results Measurement System. Responsibility for reporting is with the CRC or as directed by the individual State Conservationists.

601.43 Maintaining Compliance Documentation and Records

Documentation and organized records are essential to demonstrating agency compliance with cultural resources laws. Adequate records will also ensure management continuity and prevent any duplication of effort.

A. Compliance documentation is all of the information that provides proof that NRCS complied with cultural resources requirements for a specific action (i.e. undertaking) likely to affect NRHP-eligible cultural resources and records the results of that process. This includes any records of decision, reports, correspondence, agreements, contract stipulations, or resource description and data.

(1) Disposition. At minimum, one complete copy of the compliance documentation for each action likely to affect NRHP-eligible cultural resources shall be maintained at the office having direct responsibility for the activity. It should be noted that a permanent record of compliance must be kept for future use, therefore, when the compliance process is completed, records may be transferred to or maintained at the State office, or archived to SHPO/THPO or to other managing institutions with stipulations for NRCS access.
(2) Completeness and specificity. NRCS must make certain that all correspondence going to a compliance agency clearly specifies what is being sought. Cultural Resources Coordinators and NRCS personnel should be careful to obtain correspondence from SHPO/THPO or the compliance agency that clearly specifies what is agreed to. Adequate records must be kept and ensure that:

(i) All correspondence is dated;
(ii) The letter seeking concurrence is saved;
(iii) The letter of concurrence is saved;
(iv) If concurrence is not received, the facts and dates involved are noted; and
(v) All telephone conversations pertaining to compliance are documented as part of the consultation process.

B. Field Office records. All Field Offices will keep an addendum to each cooperator's conservation file, a separate 420 record or file of cultural resources consideration and compliance actions. If cultural resources are encountered in an undertaking's APE, a brief note of actions, results and recommendations will be included in the cooperator's plan file for future reference. Such notes can be incorporated in the assistance notes and/or TOOL KIT and/or portions of an adapted CPA 52 form.

C. State Office Records. All State offices will keep a file or records on all projects or undertakings that require input from Cultural Resources Specialists and frequent communication with SHPO/THPO staff. Without an organized, sequential set of records, compliance work may be severely delayed and legally indefensible. Over time, changes in policy, personnel, and standards can cause problems in attempting to document agency compliance.

(1) Restoration of incomplete documentation. If NRCS cultural resources documentation is incomplete for projects or undertakings that will affect cultural resources, the record of compliance should be reconstructed through prior compliance contacts and State files.
(2) Records of multistate projects. Projects that cross state borders can provide record-keeping challenges. The lead NRCS State office will provide copies of all relevant cultural resources documents to other NRCS state offices involved.
(3) Cultural resources spreadsheet. Record keeping can be facilitated by putting information on a spreadsheet. Such a format can be updated conveniently. Spreadsheet data can be communicated readily to others as well as providing information about what compliance steps are still needed. This type of format is a good management tool for administrators, managers, and engineers for considering cultural resources compliance during NRCS operations. A spreadsheet can also provide backup to conventional files. Other record keeping options or addenda can include such formats as the Customer Service Toolkit and PRMS.

601.44 Reviews for Buildings and Other Structures

Performing initial reviews on buildings and other structures will reduce inventory costs, expedite the planning process, and serve as part of the documentation for NRCS consideration of these cultural resources. The reviews provide a framework for collecting basic information to be used in consultation with the SHPO/THPO and decisions on what level of inventory effort may be needed to determine whether any structures may be historic properties. These types of structural properties often require review and input from specialists with architecture, history, or engineering backgrounds that are on SHPO/THPO staff.

This section provides guidance about collecting information to assist in these initial reviews. Additional information and documentation according to National Park Service HABS/HAER guidelines may be required to adequately record significant historic structures. Worksheets for collecting information on structures are to be developed as part of state level agreements

and tribal consultation protocols. The following types of information should be collected for the initial review:

A. At least one photograph per structure, showing an oblique (corner) view of full front and partial or full sides. If unique or significant architectural details are present, these should be photographed separately. Major alterations, whether or not they contribute to or detract from the original construction, should also be photographed, as these reveal important information on integrity. "Snapshot" quality photos are normally adequate for this initial review.

(1) Black and white prints approximately 2-1/4 by 3-1/4 inches are commonly preferred.
(2) Color prints are acceptable. If a 35mm camera format is used, a wide angle lens is recommended. Polaroid style prints may be adequate but check with the SHPO/THPO on current standards. Digital pictures and videos provide excellent early documentation.

B. Obvious modern or recent construction (e.g. new bridges, modern subdivisions) may be photographed if appropriate, and should be described briefly by construction date, type, and location. Remember, the 50-year National Register guideline is just a rule of thumb and is not a criterion for eligibility; many newer historic properties (generally architectural or important in technology) are found to be eligible.

C. Each photograph should be labeled, preferably on the front margin or other inconspicuous place in order to maintain cross-referenced documentation. The label information for each photo should contain the project name, location, map reference, structure type, directional view, and date. Writing on the back of Polaroid photos is not recommended.

D. In addition to photographs, information should be collected on accompanying maps, structures or building type(s), construction material(s), address or location, setting or view, and recorder's name. Information on ownership and architect may be obtained from city or county records.

E. Map(s) included with the worksheet may vary in content and character. Even with only one structure, a map can help interpret context in a larger setting. The map may be a roughly scaled sketch, measured, or printed map with locations precisely plotted. Each map should be labeled with project name, address, photo number(s), scale, and north arrow. Depending upon the complexity of the situation, it may be appropriate to show the viewshed represented by the accompanying photos by drawing a cone-shaped diagram of the camera location relative to photographs of the structure(s).

F. No special formats are required for handling the information, maps, and photos. Simply staple the worksheet information in sequence by map numbers, and temporarily bind conveniently sized sets of photos. Normally, only one set of original photos is needed, but two are recommended. Make a copy of the entire set of photos, maps, and data to retain as agency file documentation.

G. Providing this information to the SHPO/THPO should be in accordance with the state level agreement and tribal consultation protocols.

601.45 Guidelines for Establishing an MOA on Emergency Work

NRCS State offices are encouraged to consult with the SHPO/THPO, any Indian tribe or Native Hawaiian organization that attaches traditional religious or other significance to

identified historic properties, and the ACHP, to create a plan that will assist compliance in emergency work. The following topics should be considered to determine whether they should be addressed in a MOA:

A. Area of the disaster. Emergencies that affect one or a few counties may be handled by procedures that would be inappropriate for a Statewide disaster.

B. The intensity of the disaster. Extreme emergencies need modified procedures to appropriately balance conflicting and rapidly changing needs.

C. Damage to administrative capabilities. Should NRCS, SHPO/THPO, or ACHP administrative centers be incapacitated by an emergency, procedures should be devised in advance to take this into account.

D. Disruption of communication. Procedures to handle situations where disruption of roads and/or telecommunications prevents consultation and assessment.

E. The kind(s) of disaster. Different kinds of disasters (e.g. floods, earthquakes, hurricanes, nuclear accidents, combinations of these, and other kinds of disasters) may differentially threaten categories of cultural resources and require modified procedures.

F. The kinds of cultural resources. Procedures are desirable to provide for the protection of certain kinds of resources which are considered unusually important or are concentrated in areas likely to be affected by an emergency.

G. The creation of hazardous areas. Procedures are needed for guidance in emergencies which produce hazardous zones (e.g. radiation leaks, biological hazards, and chemical spills) which would limit for safety reasons the assessment and mitigation of cultural resources.

601.46 FOIA Requests and Privacy Requirements

A. Section 2004 of the Farm Security and Rural Investment Act of 2002 (Farm Bill) mandated changes to the NRCS Freedom of Information Act (FOIA) Policy. A copy of Section 2004 follows along with Bulletin 120-2-12, dated June 6, 2002, may be found at: http://policy.nrcs.usda.gov. It states, in part:

"Effective immediately, information provided by individuals to NRCS to participate in conservation programs is not considered to be public information and is not releasable to the public by any employee. Information, including the location of National Resources Inventory data collection point, may be disclosed only if it has been converted into a statistical or aggregate form that does not allow the identification of the individual supplier."

B. Thus, under Section 304 of the NHPA, Section 800.11(c) of 36 CFR 800, and Section 2004 of the Farm Bill, cultural resources information in our files is not public information.

Part 601 - National Cultural Resources Procedures

Subpart F - Standards and Criteria Used for Cultural Resources Compliance

601.50 Cultural Resources Personnel Qualification Standards and Training

A. The basic professional standards for Federal cultural resources/historic preservation personnel and contractors. Under the Office of Personnel Management qualification standards, experience may substitute for formal education beyond the Bachelors' Degree.

B. The following professional qualifications standards were developed by a team of preservation experts including staff from the National Park Service, several federal agencies, including the USDA, SHPO staff, ACHP staff and outside consultants. They were previously published in the Code of Federal Regulations, 36 CFR Part 61 but also as stand-alone guidance in the Federal Register (48FR44716) on September 29, 1983. While other portions of the Secretary of the Interior's Standards have been revised, the professional qualification standards that NRCS and many other agencies follow are the 1983 version.

C. The qualifications define minimum education and experience required to perform identification, evaluation, registration, and treatment activities. In some cases, additional areas or levels of expertise may be needed, depending on the complexity of the task and the nature of the historic properties involved. In the following definitions, a year of full-time professional experience need not consist of a continuous year of full-time work but may be made up of discontinuous periods of full-time or part-time work adding up to the equivalent of a year of full-time experience. While some agencies use the term "paraprofessional," neither the Secretary of Interior's Standards nor NRCS' training programs use this ubiquitous and imprecise term. The Secretary of Interior's Standards are:

i. History

The minimum professional qualifications in history are a graduate degree in history or closely related field; or a bachelor's degree in history or closely related field plus one of the following:

a. At least two years of full-time experience in research, writing, teaching, interpretation, or other demonstrable professional activity with an academic institution, historic organization or agency, museum, or other professional institution; or

b. Substantial contribution through research and publication to the body of scholarly knowledge in the field of history.

ii. Archeology

The minimum professional qualifications in archeology are a graduate degree in archeology, anthropology, or closely related field plus:

a. At least one year of full-time professional experience or equivalent specialized training in archeological research, administration or management;

b. At least four months of supervised field and analytic experience in general North American archeology, and

c. Demonstrated ability to carry research to completion.

d. In addition to these minimum qualifications, a professional in prehistoric archeology shall have at least one year of full-time professional experience at a supervisory level in the study of archeological resources of the prehistoric

iii. Architectural History

The minimum professional qualifications in architectural history are a graduate degree in architectural history, art history, historic preservation, or closely related field, with coursework in American architectural history, or a bachelor's degree in architectural history, art history, historic preservation or closely related field plus one of the following

a. At least two years of full-time experience in research, writing, or teaching in American architectural history or restoration architecture with an academic institution, historical organization or agency, museum, or other professional institution; or

b. Substantial contribution through research and publication to the body of scholarly knowledge in the field of American architectural history.

iv. Architecture

The minimum professional qualifications in architecture are a professional degree in architecture plus at least two years of full-time experience in architecture; or a State license to practice architecture.

v. Historic Architecture

The minimum professional qualifications in historic architecture are a professional degree in architecture or a State license to practice architecture, plus one of the following:

a. At least one year of graduate study in architectural preservation, American architectural history, preservation planning, or closely related field; or

b. At least one year of full-time professional experience on historic preservation projects.

Such graduate study or experience shall include detailed investigations of historic structures, preparation of historic structures research reports, and preparation of plans and specifications for preservation projects.

D. All NRCS Cultural Resource Specialists and Cultural Resource Specialists under contract to NRCS responsible for the technical content and products of cultural resources studies, reports and recommendations, must meet the qualifications established by the Secretary of the Interior in "Archeology and Historic Preservation; Secretary of the Interior's Standards and Guidelines – Professional Qualifications Standards,"

E. NRCS' required training and national training standards for field personnel. The NRCS modular training program for field personnel is designed to develop a high degree of awareness of both NRCS' responsibilities to cultural resources during project and program planning and of specific local or regional cultural resources types. Some personnel will also be provided training, by their NRCS State Office, in rapid identification of archeological and historic resources in the field (as a collateral duty).

(1) All employees conducting conservation planning or application will complete the NRCS National Cultural Resources Training Program.

(2) Non-NRCS personnel (including Technical Service Providers (TSPs)) carrying out conservation planning, assistance, and particularly installation, under the technical oversight of NRCS, or conducting cultural resources data gather for NRCS' own compliance needs. That is, district employees, state employees, and contractors (including TSPs), should complete the NRCS National Cultural Resources Training and Conservation Planning Training courses unless conservation activities completed by them are overseen and concurred with by persons who meet the Secretary of Interior's professional qualification standards.

(3) Within one year of appointment, NRCS State Cultural Resources Coordinator (CRC*) must* complete at least one introductory Section 106 Training Course offered by the ACHP, or an equivalent (offered by academic and private training institutions), and *must* complete the NRCS national modular cultural resources training (offered by a CRS in their own state or a state within the same region). Additionally, within the second year in the position, the CRC:
   (i) Must complete all other advanced cultural resources and American Indian consultation training delivered to other NRCS employees;
   (ii) Should complete a brief formal archeological field school or other formalized training in disciplines related to historic preservation, that will improve the quality of considering cultural resources in NRCS undertakings, e.g. history, architectural history, traditional cultural properties; and
   (iii) Is encouraged to complete some formal academic training related to cultural resources management; e.g. general anthropology, cultural anthropology, physical anthropology, archeology, history, architectural history, historic preservation planning, and others to improve knowledge, and skill in considering cultural resources.

(4) Supplemental training.
   (i) In some states or geographic areas, additional training may be needed, depending on the complexity of NRCS program delivery, the variability of cultural resources, and the frequency at which resources may be affected. The State Conservationist determines appropriate additional training for NRCS and other employees based on state-specific needs. Training may be conducted on an individual basis or in groups. The training should be designed to meet State needs, and may be developed in consultation with the SHPO/THPO.
   (ii) NRCS, other Federal agencies, state agencies, and public and private institutions and organizations provide many opportunities for NRCS employees to obtain additional training related to cultural resources. The CRC/CRS can provide information about these many changing opportunities.

F. Quality control and quality assurance of training. Quality control and assurance of NRCS cultural resources training are based on the premise that accurate inventory information is essential for successful compliance with Section 106 and effective consideration of cultural resources.

(1) NRCS NEDC or NRCS headquarters may, at its discretion, periodically request from NRCS offices information regarding completion of the national cultural resources training program, and similarly may conduct quality assurance reviews.
(2) State offices should assure that cultural resources are among the quality review items considered by quality review teams. The SHPO/THPO or their staff should be encouraged to be involved in delivery and review of training.
(3) State training officers should record information about cultural resources training efforts, including numbers of employees trained, dates, and type of training. Individual training records should follow NRCS state and national policies regarding training records.
(4) Complete permanent records of training completion is to be maintained in NRCS' iCAMS system. This is the official record of completion.

601.51 National Register Criteria for Evaluation

The following criteria are from 36 CFR 60.4 and are designed to guide the States, Federal agencies, and the Secretary of the Interior in evaluating potential entries (other than areas of the National Park System and National Historic Landmarks) for the National Register of Historic Places:

A. The quality of significance in American history, architecture, archeology, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and --

(1) That are associated with events that have made a significant contribution to the broad patterns of our history [Criterion A];
(2) That are associated with the lives of persons significant in our past [Criterion B];
(3) That embody the distinctive characteristics of a type, period, or method of construction or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction [Criterion C]; or
(4) That have yielded, or may be likely to yield, information important in prehistory or history [Criterion D].

B. Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria or if they fall within the following categories:

(1) A religious property deriving primary significance from architectural or artistic distinction of historical importance;
(2) A building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event;
(3) A birthplace or grave of a historical figure of outstanding importance if there is no other appropriate site or building directly associated with his/her productive life;
(4) A cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events;
(5) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived;
(6) A property primarily commemorative in intent if design age, tradition, or symbolic value has invested it with its own historical significance; or
(7) A property achieving significance within the past 50 years if it is of exceptional importance.

601.52 ACHP Criteria of Effect and Adverse Effect

The following ACHP criteria is from 36 CFR 800.5 and are the standards used to assess adverse effects:

(a) Apply Criteria of adverse effect. In consultation with the SHPO/THPO and any Indian Tribe or Native Hawaiian organization that attaches religious and historic properties, the agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

(1) Criteria of adverse effect. An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

(2) Examples of adverse effect. Adverse effects on historic properties include but are not limited to:

(i) Physical destruction of or damage to all or part of a property;

(ii) Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material mediation, and provision of handicapped access, that is not consistent with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines:

(iii) Removal of the property from its historic location;

(iv) Change of the character of the property's use of physical features within the property's setting that contribute to its historic importance.

(v) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;

(vi) Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious cultural significance to an Indian tribe or Native Hawaiian organization; and

(vii) Transfer, lease, or sale of a property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic values.

(3) Phased application of criteria. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to Sec. 800.4(b)(2).

(b) Finding of no adverse effect. The agency official, in consultation with the SHPO/THPO, may propose a finding of no adverse effect when the undertaking's effects do not meet the criteria of paragraph (a)(1) of this section or the undertaking is modified or conditions are imposed, such as the subsequent review of plans for rehabilitation by the SHPO/THPO to ensure consistency with the Secretary's standards for the treatment of historic properties (36 CFR part 68) and applicable guidelines, to avoid adverse effects.

(c) Consulting party review. If the agency official proposes a finding of no adverse effect, the agency official shall notify all consulting parties of the finding and provide them with the documentation specified in Sec. 800.11(e). The SHPO/THPO shall have 30 days from receipt to review the finding.

(1) Agreement with finding. Unless the Council is reviewing the finding pursuant to Sec. 800.5(c)(3), the agency official may proceed if the SHPO/THPO agrees with the finding. The agency official shall carry out the undertaking in accordance with Sec. 800.5(d)(1). Failure of the SHPO/THPO to respond within 30 days from receipt of the finding shall be considered agreement of the SHPO/THPO with the finding.

(2) Disagreement with finding.

(i) If the SHPO/THPO or any consulting party disagrees within the 30-day review period, it shall specify the reasons for disagreeing with the finding. The agency official shall either consult with the party to resolve the disagreement, or request the ACHP to review the finding pursuant to paragraph (c)(3) of this section.

(ii) The agency official should seek the concurrence of any Indian tribe or Native Hawaiian organization that has made known to the agency official that it attaches religious and cultural significance to a historic property subject to the finding. If such Indian tribe or Native Hawaiian organization disagrees with the finding, it may within the 30-day review period specify the reasons for disagreeing with the finding and request the ACHP to review the finding pursuant to paragraph (c)(3) of this section.

(iii) If the ACHP on its own initiative so requests within the 30-day review period, the agency official shall submit the finding, along with the documentation specified in Sec. 800.11(e), for review pursuant to paragraph (c)(3) of this section. An ACHP decision to make such a request shall be guided by the criteria in appendix A to this part.

(3) ACHP review of findings. When a finding is submitted to the ACHP pursuant to paragraph (c)(2) of this section, the agency official shall include the documentation specified in Sec. 800.11(e). The ACHP shall review the finding and notify the agency official of its determination as to whether the adverse effect criteria have been correctly applied within 15 days of receiving the documented finding from the agency official. The ACHP shall specify the basis for its determination. The agency official shall proceed in accordance with the ACHP's determination. If the ACHP does not respond within 15 days of receipt of the finding, the agency official may assume concurrence with the agency official's findings and proceed accordingly.

(d) Results of assessment.

(1) No adverse effect. The agency official shall maintain a record of the finding and provide information on the finding to the public on request, consistent with the confidentiality provisions of Sec. 800.11(c). Implementation of the undertaking in accordance with the finding as documented fulfills the agency official's responsibilities under Section 106and this part. If the agency official will not conduct the undertaking as proposed in the finding, the agency official shall reopen consultation under paragraph (a) of this section.

(2) Adverse effect. If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to Sec. 800.6.

NOTE: The adverse effects and no adverse effects determination and recommendations are made by the Cultural Resources Specialist. This is particularly important because of the following judgment that was made against the ACHP in September of 2001:

On October 15, 2001, the ACHP posted the following on its Web page, regarding determinations of effect:

On September 18, 2001, a Federal district court upheld the Advisory Council on Historic Preservation's Section 106 regulations against numerous challenges raised by the National Mining Association and the Cellular Telecommunications and Internet Association. Nevertheless, the court invalidated two subsections of the Section 106 regulations insofar as they allowed the Council to effectively reverse a Federal agency's findings of "no historic properties affected" (Section 800.4(d)(2)) and "no adverse effects" (Section 800.5(c)(3)).

Prior to the court decision, an objection by the ACHP or State Historic Preservation Officer/Tribal Historic Preservation Officer (SHPO/THPO) to a "no historic properties affected" finding required the Federal agency to proceed to the next step, where it would assess whether the effects were adverse. An ACHP objection to a "no adverse effect" finding required the Federal agency to attempt to resolve the adverse effects.

The ACHP and the Department of Justice are presently studying the possibility of appealing the court's invalidation of the cited subsections. The ACHP will make an announcement on its Web site when a final decision is made regarding such an appeal. In the meantime, the ACHP plans to provide opinions to Federal agencies regarding their "no historic properties affected" findings, pursuant to Section 800.9(a) of its regulations, whenever appropriate. However, such opinions will be advisory and will not require the Federal agencies to continue to the next step in the Section 106 process.

In the event that a SHPO/THPO does not agree with a finding of "no historic properties affected," the agency official should [emphasis added] notify the ACHP and seek an advisory opinion. The ACHP believes this interim step, while not mandatory, would help resolve disputes and avoid the potential for litigation or other delays.

The Council will continue reviewing "no adverse effect" disputes referred to it under Section 800.5(c)(2) within the allotted 15 day period. Nevertheless, the Council's opinion on such matters will be advisory and will not require agencies to proceed to the next step in the process.

Part 601 – National Cultural Resources Procedures

Subpart G - Appendices

601.60 Glossary of Terms

Adverse Effect is the reduction in the characteristics that make an historic property eligible for the National Register of Historic Places. The integrity of the location, design, setting, materials, workmanship, association, or other qualities that are important to defining the National Register eligibility of the historic property is diminished.

Advisory Council on Historic Preservation (ACHP) is the independent agency mandated to advise the President, Congress, and Federal agencies and review their activities related to historic properties. ACHP was established pursuant to Title II of the National Historic Preservation Act of 1966 (80 Stat. 915, 16 U.S.C. 470, as amended).

Area of Potential Effect (APE) is the geographic area or areas within which an undertaking (project, activity, program or practice) may cause changes in the character or use of any cultural resources present.

Consultation is the legal responsibility of Federal agencies to seek advice, guidance and counsel from and to confer with authorized parties on program, project, and policy issues. These issues include all matters related to cultural resources compliance. Authorized parties include, but are not limited to, State Historic Preservation Officers, American Indian Tribes, Tribal Historic Preservation Officers, project partners, landowners, the Departmental Consulting Archeologist, the Advisory Council on Historic Preservation and interested members of the public.

Special Provisions for Consultation with American Indian Tribes

Tribal consultation should be approached with an understanding that the federally recognized Tribe is a sovereign government, and interaction between the agency and the Tribe is that of one government to another. In the same way that diplomatic relations require patience while a level of trust is achieved, consultation with a Tribe benefits from a pre-existing dialogue and relations between the US and tribal governments. The history of zigzagging federal policies, broken treaties, and one-sided negotiations has contributed to an atmosphere of mistrust by Tribes and reluctance to become involved with federal agencies, even in situations that may appear to be wholly advantageous to a Tribe. Agency Tribal Liaisons and Special Emphasis Program Managers can help determine the type and level of contact needed to initiate consultation.

Efforts to initiate consultation where there has been no prior contact between the agency and tribe may begin at a formal level of tribal council, tribal elders, or tribal chief meeting with mid-level or top-level managers from the Agency. In other cases the consultation relationship may come about through interaction between field-level staffs from the agency and tribe. Because cultural resources are remnants of pre-historic American Indian civilizations, consultation may occur regardless of the current federal recognition status of a tribe. Consultation occurs with federally recognized Tribes, nonfederally-recognized tribes, and tribes without a land base (e.g. Reservation land, owned lands, or Ceded Land Rights under a Treaty). Efforts to build a long-term working relationship with Tribes before undertaking consultation demonstrate an understanding of the sacred regard that Indian people hold for the landscape and the lifeways of their ancestors. This sacred regard transcends the greater society's perceived scientific and economic values for Cultural

Resources, therefore consultation is always enhanced by a sincere atmosphere of shared goals for protection of sites and items. While the goals of consultation are best expressed in writing in a Memorandum of Understanding or Agreement of Principles approved by tribal council, clan mothers, or tribal legal counsel there may be cases where the preferred method of consulting by the Tribe is verbal and without firm guidelines.

In sum, NRCS Tribal Liaisons and Special Emphasis Program Managers can be of assistance. Consultation with tribes with an authorized Tribal Historic Preservation Officer (THPO) will probably initiate with the THPO, and be guided by the tribe. The range of processes for consultation is wide, with some tribes preferring consultation activities entirely under the THPO, while others will use the THPO as an ancillary technical resource to assist elders and spiritual leaders who lead the consultation process. In all cases, an authorized THPO is legally obligated to perform functions that cannot be overlooked or superceded. A clear understanding of these functions at the beginning of consultation on cultural resources is helpful.

Criteria of Adverse Effect are standards/guidelines used to determine whether the effects caused by an activity, project or program (i.e., an undertaking that has the potential to affect cultural resources) will be detrimental to the historic property in accordance with the ACHP's regulations (36 CFR 800.5). An adverse effect is found when a project or program alters or destroys the characteristics of a property that qualify it for listing in the National Register of Historic Places. This may include diminishing the integrity of the property's location, design, setting, materials, workmanship, internal composition or association with past events or people. An adverse effect may include but is not limited to: 1) destruction or alteration of all or part of a property; 2) isolation from or alteration of the surrounding environment of the property; 3) introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting; 4) neglect of a property resulting in its deterioration or destruction; 5) transfer or sale of federally owned, leased or controlled property without adequate consultation on restrictions for the preservation and maintenance of the historic property.

Cultural Resources, in NRCS, are considered equivalent to "historic properties" as defined by the ACHP regulations for compliance with Section 106 of the NHPA. They include any prehistoric or historic district, site, building, structure or object listed in or eligible for listing in the National Register of Historic Places (maintained by the Secretary of the Interior). They also include all records, artifacts and physical remains associated with the historic properties. They may consist of the traces of all of the past activities and accomplishments of people. Cultural resources that are also protected under other authorities (such as the American Indian Religious Freedom Act) include (1) tangible traces such as districts, sites, buildings, structures and objects; (2) less tangible traces such as dance forms, aspects of folklife, landscapes, vistas, cultural or religious practices; (3) historical documents; (4) and some landscapes, vistas, cemeteries (if they have historic or cultural value) and lifeways.

This same term may also refer to: (1) resources that have little or no historic values but do have contemporary cultural value; (2) resources included in or determined eligible for inclusion in the National Register of Historic Places or an equivalent register maintained at the state or local level; (3) unevaluated resources that may be eligible for inclusion in the National Register or an equivalent; (4) properties that may qualify for the protections afforded by the Archeological Resources Protection Act or the Native American Graves Protection and Repatriation Act.

Cultural Resources Investigation is a general term that includes all types and levels of research and data gathering to identify and evaluate cultural resources, especially historic

properties, that may be in the area of potential effect (APE) of an undertaking. Several types of cultural resource investigations are used in NRCS, including Cultural Resources Review, Field Inspection, and Cultural Resources Survey.

Cultural Resources Review is an examination of existing information to determine the likelihood that cultural resources are, or may be, present in an area that may be affected by an NRCS undertaking. This review includes checking the current National Register of Historic Places, as well as equivalent state level registers and state site files, consulting the State Historic Preservation Officer, and talking with the landowner(s)/cooperator(s). It should also include obtaining the views of the State archeologist, State historian, and State archivist and other knowledgeable individuals and organizations; archeological and historical societies; and other appropriate individuals or organizations. It also includes research on the history, prehistory, ethnography, and ecology of the area. Thus, the review also includes files searches, records searches, review of past research reports, unpublished compliance reports and monographs, and published articles and books. A cultural resources specialist (CRS) or NRCS personnel who have completed the required NRCS cultural resources training conduct the review.

Cultural Resources Survey is a systematic set of field investigations that may range in scope from a reconnaissance survey to an intensive survey. A reconnaissance survey examines all or part of an area in sufficient detail to make generalizations about the types and distributions of cultural resources that may be present. An intensive survey, which is a detailed examination of an area, is designed to gather information about cultural resources sufficient to evaluate them against predetermined criteria of eligibility for listing in the National Register of Historic Places. This assessment of eligibility must take into account the specific historic contexts of the project area. A cultural resources survey must be preceded by a cultural resources review in order to avoid duplication of effort and waste of resources.

Cultural Resources Coordinator (CRC) is NRCS' officially designated point of contact in the State Office. The CRC is responsible to the State Conservationist for the implementation of cultural resources policy and procedures and for the overall compliance and program activities in NRCS operations. The position is generally collateral to other duties and requires advanced training in historic and cultural resources compliance procedures in order to consult with State and Tribal Historic Preservation Officers staff, the Advisory Council staff, and the public and to work with NRCS' own Cultural Resources Specialist assigned to the State.

Cultural Resources Specialist (CRS) is a NRCS staff member who meets the professional education and experience requirements of the Secretary of the Interior's Professional Qualifications Standards and Guidelines for Archaeology and Historic Preservation. These requirements include a degree in anthropological archaeology, history, cultural anthropology, architectural history, historic architecture, or other related fields that are most appropriate to the State Office's primary activities. In addition, a cultural resources specialist should have several years of supervised experience and at least one full year of direct cultural resources management experience in the Americas. The CRS must have the necessary formal education and experience to perform (or fully supervise a contractor performing) all phases of identification, evaluation, and treatment of cultural resources and/or historic properties.

Departmental Consulting Archeologist (DCA) is the professional archaeologist in the National Park Service designated by of the Secretary of the Interior to carry out certain government-wide review and reporting responsibilities for the Secretary under the Antiquities Act of 1906 (P.L. 59-209, as amended), Archeological and Historic Preservation Act of 1974 (P.L. 93-291), the Archaeological Resources Protection Act of 1979 (ARPA, P.L. 96-95), and

the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA, P.L. 101-601). The DCA, in accordance with the National Historic Preservation Act, compiles an annual, comprehensive nationwide report to Congress on all agencies' cultural resources compliance and educational activities and also consults with Federal agencies regarding technical/scientific archaeological matters.

Discovery generally refers to unanticipated identification of a historic property/cultural resource or of an unanticipated adverse effect to a cultural resource during implementation of an undertaking. These may occur with or without prior planning for such discoveries and after comprehensive Section 106 compliance (including consultation with all appropriate parties) is complete. When this occurs, the field supervisor will cease operations and notify the NRCS State CRS and/or CRC who will follow the procedures defined in the ACHP regulations at 800.13, Post-review discoveries. .

Discovery Plan outlines the actions of NRCS in the event of a discovery. Discovery plans are developed in consultation with the SHPO, THPO and Tribes (for tribal lands) and identify by title the participants responsible for implementation of the plan. The plan generally takes the form of a programmatic agreement (as discussed in 800.13(a)(1)) or as part of the State Level Agreement. Discovery plans may be general, establishing administrative processes, or specific to a single undertaking or group or class of undertakings. See the ACHP regulations at 36 CFR 800.13, Post-review discoveries.

Effect is any alteration to those characteristics of a historic or cultural property that qualify it for inclusion in the National Register of Historic Places (e.g. disturbing an archaeological site feature, such as a house ring or foundation). An effect, whether positive or negative, requires Section 106 review and consultation. See also Criteria of Adverse Effect..

Emergency or Disaster Situations exist when the President, governor, tribal leader or state conservationist declare that an immediate threat to life or property or sudden impairment to a watershed exists. Emergency Section 106 compliance is conducted according to the procedures outlined in NRCS' Emergency Watershed Program, as long as they are implemented in a manner consistent with 36 CFR 800.12. Thus, emergency procedures are appropriate only if technical or financial assistance undertaking is implemented within 30 days of the declared emergency. Immediate rescue, recovery and salvage operations conducted in the immediate aftermath of a disaster to preserve life or property are exempt from the provisions of Section 106 and 36 CFR Part 800. (See NRCS' Watershed Manual, the ACHP's web publication, *Emergency Response Under the National Contingency Plan,* found at http://www.achp.gov/NCP-PA-intro.html, and 800.12(d) applicability.)

Evaluation of a historic or cultural resource is the application of the National Register of Historic Places eligibility criteria, 36 CFR 60.4 to that property. A professionally trained cultural resources specialist must complete this task for NRCS in consultation with SHPO, THPO, and/or tribal staff.

Field Inspection is an on-site field examination of an undertaking's area of potential effect. It is designed to locate and document evidence of presence of cultural resources. The inspection may be completed, as appropriate, by a cultural resources specialist or NRCS personnel who have completed the required NRCS cultural resources training, including the field modules, if this is specifically approved by the State Conservationist and/or is permitted in the State's state-level agreement with the SHPO. If location of resources requires subsurface testing, it must be completed or supervised by a professionally trained archaeologist (usually an NRCS cultural resources specialist)). The scope of the inspection is generally small.

Historic Property is defined by the National Historic Preservation Act and expanded in the 36 CFR 800 regulations as: "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places." This term includes artifacts, records and remains that are related to and located within such properties. The term also includes historic and cultural landscapes, properties of tradition and cultural importance to an American Indian Tribe or Native Hawaiian organization and that meet the National Register criteria. The term is often used by NRCS interchangeably with "cultural resource." Both terms are used in Federal laws and regulations designed to protect these resources.

Identification is a process using specific methods or techniques to locate and define the characteristics, nature and extent, including the boundaries of cultural resources and historic properties. (See the Secretary of Interior's Standards and Guidelines for Identification).

Impacts is equivalent to the term "effects." Effects is the term used in the National Historic Preservation Act and implementing regulations.

Indian Lands as used herein are defined in the Archaeological Resources Protection Act of 1979, 16 U.S.C. 470aa-470mm, as: "…lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for subsurface interests not owned or controlled by an Indian tribe or Indian individual."

Indian Tribe is any American Indian Tribe, band, nation, or other organized group or community of Indians, including any Alaska Native Village, regional corporation, or village corporation (as defined in section 3 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Interested Party is any individual or organization concerned with the effects of an undertaking on cultural resources or historic properties. These may request an opportunity to participate in the Section 106 process as consulting parties.

Knowledgeable Individuals are those individuals (or groups) who have special knowledge about and interest in the history and resources of the area under review. In the case of traditional cultural properties, this means those individuals and groups who may ascribe traditional cultural value to locations within the study area, and those who may have knowledge of such individuals and groups.

Lead Agency is the agency with legislated responsibility or designated Departmental authority to administer public lands or Federal programs and provide financial or technical assistance. When this responsibility is shared, the lead agency is that agency that accepts the role.

Local Government is a city, county, parish, township, municipality, borough, board, district, or other general purpose political subdivision of a state.

Mitigation refers to actions or treatment which lessen, eliminate, or compensate for the adverse effects of undertakings to historic properties. These actions may include, but are not limited to: 1) moving the undertaking to avoid effects; 2) reducing the extent of the effects by redesigning the undertaking; 3) compensating for the effects by repairing, rehabilitating, or restoring the affected historic properties; 4) preservation and protection actions during actual implementation of the undertaking; and/or 5) compensating for the effect by documenting the historic property, moving the historic property to a protected area, or conducting data recovery. (See the Secretary of Interior's Standards and Guidelines Note on Documentation

and Treatment of Historic Properties, Historical Documentation, Architectural and Engineering Documentation and Archeological Documentation.

National Historic Landmark is a historic property that meets the criteria of the National Register of Historic Places and has been designated by the Secretary of the Interior for its special national importance in the history of the United States.

National Register Criteria are established by the Secretary of the Interior for use in evaluating the eligibility of historic properties and cultural resources for inclusion on the National Register of Historic Places. There are four broad criteria that are applied to buildings, structures, sites, objects, and districts significant in history, prehistory, and culture (including traditional history). All eligible properties must meet at least one criterion. The criteria are published in 36 CFR Part 60.

National Register of Historic Places (NRHP) is the Nation's official list of districts, sites, buildings, structures, objects and districts which meet the criteria and are worthy of preservation because of their importance in American history, prehistory, architecture, archeology, and culture. The NRHP is maintained by the Secretary of the Interior under the authority of section 101 of the National Historic Preservation Act of 1966.

Native Hawaiian means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

Native Hawaiian Organization is any organization which serves and represents the interests of Native Hawaiians, has as a primary and stated purpose the provision of services to Native Hawaiians, and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians.

Natural Resources Conservation Service (NRCS) Assistance Activity is any undertaking planned or carried out with technical or financial assistance from NRCS. Only those assistance activities where NRCS is able to exercise control over the outcomes (generally financial assistance) are considered undertakings that have the potential to affect cultural resources.

Partner is any landowner, cooperator, or project sponsor that receives NRCS assistance or any participant in the Section 106 compliance process (e.g. SHPO, THPO, Tribes, interested public).

Project Sponsors are local units of government having the legal authority and resources to install, operate, or maintain works of improvement or a non-governmental organization (NGO) with the resources to maintain easements or operate projects/conservation works.

Public Benefits are the advantages or outcomes that accrue to the general public, including the environmental, economic, social, cultural, or educational aspects of an undertaking.

Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to Section 110 of the National Historic Preservation Act (Published in Final Federal Register 24 April 1998) and Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines (48FR44716) see (h) and (i) under Regulations and Guidelines below.

The Standards and Guidelines are a series of guidance documents created by the Secretary of the Interior under authority of the National Historic Preservation Act of 1966 (NHPA, P.L. 89-665, as amended). The Standards and Guidelines do not set agency policy but assist in organizing information about historic preservation activities; in describing steps achieved by Federal agencies, States, and others when planning for the identification, evaluation,

registration, and treatment of historic properties, and in integrating the diverse efforts of the various entities to preserve the Nation's cultural heritage.

Section 106 Process is the series of actions (including continuous consultation, background studies, surveys, resource identifications, assessments and treatments) that implement the section of the National Historic Preservation Act that requires Federal agencies to take into account the effects of their undertakings on any cultural resources or historic properties that meet the National Register of Historic Places criteria. Part of this process involves taking action to avoid or minimize harm to eligible resources.

Section 110 Guidelines, issued by the Secretary of the Interior under authority of Section 101(g) of the National Historic Preservation Act, provides guidance to Federal agencies in establishing, monitoring, reviewing, and evaluating their historic preservation program. The historic preservation program of the Federal agency should incorporate the provisions of other relevant statutes, such as AIRFA and NEPA published as "The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to Section 110 of the National Historic Preservation Act," the guidelines define the required components of a sound Federal historic preservation program (see (i) under Regulations and Guidelines).

Site is the location of an event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or removed, where the location itself maintains historical, cultural, or archeological value and integrity. Examples are battlefields, historic campgrounds, ancient trails or gathering places, deposits of cultural debris (i.e. middens or trash dumps), and historic homesteads and farms.

State Historic Preservation Officer (SHPO) is the official appointed or designated pursuant to section 10l(b)(1) of the NHPA who is responsible for administering the NHPA and State historic preservation program within the State or jurisdiction, or is a designated representative to act for the SHPO.

Traditional Cultural Properties (TCPs) are properties associated with cultural practices or beliefs of a living community that are rooted in the history of the community, and are important in maintaining the continuing cultural identity of the community. TCPs may be determined eligible for the NRHP, and as such, are considered under the Section 106 process. Examples of TCPs include: 1) locations where Native American or other groups traditionally gather wild foods or medicines; 2) ethnic neighborhoods whose cultural character is important to those who live in them; 3) rural landscapes reflecting traditional patterns of agriculture or social interaction; and 4) landforms associated with Native American traditions and religious practices.

Traditional Cultural Values are underlying beliefs and principles held in common by a cultural group that may be reflected in actions and behaviors that are sometimes associated with particular locations and settings.

Tribal Historic Preservation Officer (THPO) is the tribal official, appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program, who has assumed the responsibilities of the SHPO for purposes of Section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act. This official is approved to assume the responsibilities of the SHPO on tribal land by the Secretary of Interior under the NHPA.

Treatment Plan is a management document that describes the mitigation and/or management procedures and desired outcomes for an historic property or cultural resource, designed to reduce or avoid adverse effects. (Also see mitigation.)

Undertaking is any project, activity or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including a Federal project, activity or program that is 1) carried out by or on behalf of a Federal agency; 2) carried out with Federal financial assistance; 3) requires a Federal permit, license or approval; 3) subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency (as defined in the National Historic Preservation Act, as amended) that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. Only those undertakings which have the potential to affect cultural resources and over which NRCS is able to exercise control over the outcomes are subject to review under Section 106.

601.61 Nationwide Programmatic Agreement with the Advisory Council for Historic Preservation and the National Conference of State Historic Preservation Officers for Protection of Cultural Resources

NRCS A-3A75-2-64

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

WHEREAS, the United States Department of Agriculture, Natural Resources Conservation Service (NRCS), formerly known as the Soil Conservation Service, carries out Conservation Assistance programs for soil, water, and related resource conservation activities under 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 95-334), Title IV, Section 403); Food, Agriculture, Conservation and Trade Act of 1990 (Public Law 101-624); the Flood Control Act of 1936 (Public Law 74-738); the Food Security Act of 1985 (Public Law 99-198, as amended); the Federal Agricultural Improvement and Reform Act of 1996 (Public Law 104-127); and related authorities; and

WHEREAS, the NRCS, in consultation' with the Advisory Council on Historic Preservation (Council), the National Conference of State Historic Preservation Officers (NCSHPO), and a number of federally recognized Indian Tribes, has determined that certain categories of its conservation programs and activities that meet the definition of undertakings pursuant to the National Historic Preservation Act of 1966 (NHPA) (16 U.S.C. 4701', as amended, Section 301(7)) and the Council's implementing regulations for Section 106 of the Act, "Protection of Historic Properties" (36 CFR Part 800) may affect historic properties as defined in 800.16(1). These activities are therefore subject to review under Section 106 of the NHPA and the Council's implementing regulations; and

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WHEREAS, because of the sovereign status of federally recognized Indian Tribes, the NRCS has determined, and the Council has concurred, that it is appropriate to invite each federally recognized Indian Tribe to develop independent consultation protocols with the NRCS (based upon government-to-government consultation) and, hence, no Tribes have been asked to be signatories to this agreement; and

WHEREAS, the NRCS has consulted with a number of federally recognized American Indian governments and Tribal Historic Preservation Officers (THPOs) through direct Nation-to- Nation communication and has extended an invitation to consult with other Tribal governments through several United States Department of Agriculture and NRCS liaison organizations (including the NRCS' State and Regional Tribal liaisons, the NRCS American Indian and Native Alaskan Employees Association, the Inter-Tribal Agriculture Council, the Southwest Indian Agricultural Association), the NRCS American Indian Program Manager, the United Southern and Eastern Tribes, members of the National Association of Tribal Historic Preservation Officers, regarding this agreement and establishment of the NRCS policy regarding establishment of Tribal consultation protocols; and

WHEREAS, a streamlined NRCS compliance process for technical assistance activities delivered at the Field Office (county) level is appropriate to the large number of small undertakings on private and public property and Tribal lands, the NRCS has determined there is: (1) the need for timely services to diverse NRCS clientele dependent upon agricultural production; (2) the need to provide categorical exemptions for certain NRCS programs, activities and technical assistance practices that are clearly undertakings but with effects that are foreseeable and likely to be minimal or not adverse, to historic properties (in accordance with 36 CFR 800.14(c)); (3) the need to reconcile the variable emergency directives contained in NRCS (7 CFR Part 624) and Council (36 CFR 800.12) regulations; and (4) the need for reliance on agreements or consultation protocols with State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPO) and Governments of Federally recognized Indian Tribes (in accordance with the ACHP regulations, 36 CFR 800.2(c)(1) and 800.2(c)(2)):, and

WHEREAS, 36 CFR 800.14(c) permits agencies to propose categories of programs or activities that maybe exempted from review under the provisions of 36 CFR 800, Subpart B, the Section 106 Process. The NRCS provides conservation assistance through categories of programs or activities that, by definition (36 CFR 800.16(y)) may be considered undertakings. Under provisions of 36 CFR 800.14(c), some broad categories of these programs and activities may be exempt because the potential effects are foreseeable and likely to be minimal or not adverse.

WHEREAS, the NRCS proposes to comply programmatically with Section 106 of the NHPA (16 U.S.C. 4700, as authorized by the Council regulations (36 CFR 800.14(b)) by means of subsequent agreements with the designated SHPO for actions on private and public lands within a particular state, and consultation protocols with the designated THPO for actions on Tribal lands, and the SHPO and Tribal Government(s) for actions on Tribal lands where no THPO has been designated by the National Park Service of the

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US Department of the Interior or where a Tribe has an expressed interest in resources on non-Tribal lands; and

WHEREAS, this agreement does not modify Tribal roles and responsibilities as defined in 101 (d)(2) of the NHPA (16 U.S.C. 470f nor to Tribal government roles and responsibilities on Tribal lands because these will be addressed by direct compliance with the 36 CFR Part 800 regulations or individual consultation protocols or agreements with federally recognized Tribes; and

WHEREAS, in the absence of State Level Agreements (SLAs) and/or appropriate Tribal consultation protocols, the NRCS' responsibilities for compliance under Section 106 of the NHPA shall be met by direct compliance with the Council's regulations (36 CFR Part 800, dated December 12, 2000 and in effect since January 12, 2001, or subsequent rules under that title), and

WHEREAS., unless otherwise defined in this Agreement, all terms are used in accordance with definitions codified at 36 CFR Part 800.16;

NOW THEREFORE, the NRCS, the Council, and the NCSHPO agree that a streamlined compliance process is desirable for the NRCS' conservation assistance activities and that the NRCS is committed to carry out its responsibilities under Section 106 of the NHPA in accordance with the statements above and the following stipulations, thereby taking into account the effects of its conservation program activities on historic properties that are eligible for listing in the NRHP. The NRCS shall acknowledge this commitment in any new State Level Agreements '(SLAs) developed with the State Historic Preservation Officers. Additionally, the NRCS and the Council agree that in recognition of the sovereign status of federally recognized Indian Tribal governments, this nationwide agreement does not apply to Tribal lands nor Tribal review of undertakings pursuant to 101 (d)(2) of the NHPA. Rather, the NRCS is committed to simultaneously seeking consultation protocols with individual THPOs and, where there is no 101 (d)(2) THPO, other individual governments of federally recognized Indian Tribes.

STIPULATIONS

1. COMPLIANCE THROUGH PROGRAMMATIC PROCEDURES

A. For purposes of compliance with Section 106 of the National Historic Preservation Act (16 U.S.C. 470(f) for conservation assistance activities, the NRCS will follow its policy and procedures for protecting historic properties set forth herein and the procedures resulting from this PA and issued in the NRCS General Manual and associated Cultural Resources- Handbook (as they are updated). The procedures set forth in this agreement shall take effect only when an SLA with the relevant SHPO and consultation protocols with relevant Federally recognized Indian Tribes are in effect. Specifically, a) the SLAs are between the NRCS State Conservationist and the designated

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SHPO for actions on private and public lands; b) consultation protocols are between the NRCS State Conservationist and the designated THPO for actions on Tribal lands; and c) between the NRCS State Conservationist, the SHPO and Tribal Government(s) for actions on Tribal lands where no THPO has been designated. The SLAs and consultation protocols may also cover procedures for Tribal consultation where a Tribe has an expressed interest in resources on non-Tribal lands (on private or public land, and recognizing the SHPO's consultation role for these lands as 'well). The NRCS, through its State Offices, will follow the Advisory Council's regulations, 36 CFR Part 800, in each State that does not have an SLA or consultation protocol in effect.

B. The NRCS will continue to update and refine policies and procedures for protecting historic properties to ensure that they are current with legislative mandates, pertinent executive orders and regulations. The NRCS will also issue directives to improve and clarify methods for protection of historic properties. The Council and the NCSHPO will provide the NRCS with copies of new policy and regulatory documents that may affect agency procedures.

2. STATE AGREEMENTS AND TRIBAL CONSULTATION PROTOCOLS

A. STATE LEVEL AGREEMENTS

Designated NRCS State Office officials shall meet with the SHPOs to develop State Level Agreements (SLAs) or to update existing SLAs to ensure they meet the requirements of this agreement, the National Historic Preservation Act and its amendments and the current implementing regulations for Section 106 of the NHP,A (36 CFR Part 800). The purpose of these State Level Agreements is to tailor compliance procedures and requirements of the NHPA and the Section 106 implementing regulations to local conditions that cannot be uniformly addressed at the national level. These SLAs are to include:

1) Delineation of Section 106 review and consultation procedures specifying, by title, who carries out various portions of consultation, identification, evaluation, and review, and designating, by location and title, the Cultural Resources Specialist for the NRCS State Office who meets the Secretary of Interiors standards for historic preservation personnel (The Secretary of the Interiors Professional Qualification Standards (48 FR 44716, September 29, 1983). This specialist (archaeologist, historian, architectural historian, or other historic preservation professional) must be available to oversee resources identification, determinations of eligibility and development of historic properties treatment recommendations. The SLA shall detail the roles and responsibilities of the trained field personnel and the professional Cultural Resources Specialist (s).

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2) Provision for consultation with Indian Tribes consistent with Section

10l(d)(6)(B) of the Act and 36 CFR Part 800 or Indian Tribal consultation protocols executed between the NRCS and the Indian Tribes that attach cultural and religious significance to historic properties in that state (see B below).

3) Delineation of SHPO staff responsible for working with the NRCS State Office on the Section 106 review and consultation procedures and the SHPO staff authorized to sign consultation correspondence and agreements.

4) A schedule for annual review with the SHPO and, as appropriate, for revision of the SLA.

5) A schedule for training of field personnel on basic NRCS policy, procedures and field identification processes, using the NRCS modular training or more recently updated training developed in the State Office. The NRCS State Offices shall encourage SHPO staff and the THPOs and Tribes (see B. Tribal Consultation Protocols) to attend and participate in the training sessions.

6) A list of practices and/or programs exempted from case-by-case review, as appropriate to the cultural, historical, and ecological conditions within the State, beyond those listed in Paragraph 3, "Exemptions," below, because they are a type of activity with foreseeable effects that are minimal or not adverse to resources eligible for listing in the NRHP. Practices and programs may also be exempt from case-by-case review where the reasonable and foreseeable effect of implementation benefits historic properties. These lists will be developed by the designated the NRCS State Office staff and the SHPO staff and incorporated into the final SLA.

7) Emergency provisions consistent with Section 800.12 of the Council's regulations and Section 1 10(j) of the NHPA and its implementing regulations found at 36 CFR Part 78. These procedures are to be developed as part of each SLA or a stand-alone pre-disaster agreement (to be incorporated into the State's Emergency Watershed Program Pre Disaster Plan) in consultation with the SHPO and/or THPO.

8) Public participation provisions that recognize the rights of private and Tribal land owners and are commensurate with the nature, scale and complexity of proposed projects (see 800.2 (c) and (d)). These must address Tribal consultation in those undertakings that are not on Tribal land.

9) Dispute resolution provisions.

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B. AMERICAN INDIAN TRIBAL CONSULTATION PROTOCOLS

The NRCS State Offices shall continue to consult with Tribal Historic Preservation Officers and Federally recognized Tribes that do not have a designated THPO in order to establish consultation protocols for undertakings on Tribal lands. Discussions in developing consultation protocols shall be government-to- government and direct, in person, and otherwise initiated in an appropriate manner for each individual Tribal government. The Tribal and NRCS representatives shall work together to develop the consultation protocols. Form letters and public notices, among other forms of notification, are not appropriate when used as the sole attempt to consult.

Whenever possible, the discussions and consultation protocols shall be built upon existing relationships between the NRCS and Tribal governments, established through the NRCS' technical assistance programs, while recognizing the importance of government-to-government communication with sovereign Indian Tribes. When agreed upon by all parties or as set out by the Council's regulations (36CFR800.3(c)(l)), the NRCS shall invite the SHPO to participate in these consultation activities.

During development of the consultation protocols, the State Office officials shall review with the Indian Tribe the list of exemptions outlined in Paragraph 3 (Exemptions, below) of this agreement. Exemptions developed with the SHPO in the SLA and the broad category exemptions included in Paragraph 3, "Exemptions," of this agreement do not necessarily apply to Tribal lands. All exemptions must be established during the development of individual Tribal consultation protocols and in accordance with 36 CFR 800.14(c).

These consultation protocols shall establish:

1) Delineation of Section 106 review and consultation procedures specifying, by title, who carries out various portions of consultation, identification, evaluation, and review, and designating, by location and title, the Cultural Resources Specialist for the NRCS State Office who meets the Secretary of Interior's standards for historic preservation personnel (The Secretary of the Interior's Professional Qualification Standards (48 FR 44716, September 29, 1983). This specialist (archaeologist, historian, architectural historian, or other historic preservation professional) must be available to oversee resources identification, determinations of eligibility and development of historic properties treatment recommendations. The consultation protocol shall detail the roles and responsibilities of the trained field personnel and the professional Cultural Resources Specialist (s).

2) Who (by title), will participate in consultation for the NRCS and for the American Indian Tribe.

3) When, where, and in what format (written, face-to-face meetings, etc.) this consultation shall take place.

4) Any actions, programs or practices exempted from case-by-case review

(including but not limited to the general exemptions herein).

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5) Timeframes for responses to requests for consultation.

6) A schedule for training of field personnel on basic NRCS policy. The NRC S State Office shall encourage Tribal and/or THPO staff to attend and participate in the training sessions.

7) Any other specific needs (e.g. level and form of documentation of the proposed action) to complete the protocol.

8) Emergency provisions consistent with Section 800.12 of the Council's regulations and Section 110(j) of the NHPA and its implementing regulations found at 36 CFR Part 78.

9) Public participation provisions that recognize the rights of private and Tribal land owners and are consistent with Tribal ordinances and commensurate with the nature, scale, and complexity of the proposed actions (see 800.2 (c) and (d)).

10) Dispute resolution provisions.

C. COUNCIL PARTICIPATION IN DEVELOPMENT OF AGREEMENTS

At any time during negotiations for the development or revision of a SLA or Tribal consultation protocol, any party may request in writing that the Council participate in the negotiations. The Council shall then investigate the need for participation and within 30 days of the request inform the requesting party and all other consulting parties of the decision about whether to participate. Should the Council choose to participate, the State SLA or Tribal protocol may include the Council as a signatory. Should the Council choose not to participate, the parties may proceed to complete consultation regarding terms of the SLA or protocol and sign it prior to filing the SLA or protocol with the Council Headquarters in Washington, DC, and the NRCS Federal Preservation Officer (FPO)

D. LACK OF A STATE LEVEL AGREEMENT OR CONSULATION PROTOCOLS

If for any reason a NRCS State Conservationist determines it is not possible to establish an agreement with the SI-IPO or it is not possible or appropriate to establish a consultation protocol with any Federally recognized Tribe, the NRCS State Conservationist shall document this fact in writing and place it in the NRCS State Office files, with a copy to the NRCS FPO. The FPO shall forward this documentation to the Council.

Until an SLA and consultation protocol(s) are properly executed, the NRCS State Office shall comply with Section 106 of the National Historic Preservation Act in accordance with 36 CFR Part 800.3-800.7 and none of the provisions of this agreement shall apply, including Paragraph 3, "Exemptions."

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E. UPDATING, COMPLETION AND DISTRIBUTION OF AGREEMENTS AND PROTOCOLS

The NRCS will maintain a copy of each final SLA and American Indian consultation protocol on file in the Washington, DC office of the Council and with the NRCS FPO. All SLAs and American Indian Tribal consultation protocols must be consistent with this agreement and must meet the requirements of the Council regulations, 36 CFR Part 800. The NRCS State Conservationist shall submit each agreement and Tribal consultation protocol to the FPO and Council Washington, DC Headquarters office upon completion. The Council and the NRCS FPO (and members of the NRCS senior management, as necessary) will have 30 days to review and comment on the completeness and consistency of each agreement. Upon completion of this review and concurrence on and integration of needed revisions, or upon expiration of the 30 days, the agreement shall be in effect.

All extant SLAs or Tribal consultation protocols must be reviewed by all relevant parties (including the NRCS State Office, the SHPO, THPO, Tribes, the NRCS FPO and Council Washington Office) and updated to ensure consistency with the Council's regulations and this agreement. This review and update must take place within one calendar year of the date of ratification of this PA or the SLAs or Tribal consultation protocols shall be suspended. The NRCS State Offices shall forward all new SLAs or Tribal consultation protocols to the NRCS FPO after obtaining signatures of all participating parties. The FPO will forward copies of this document to the Council, Washington Office, for review and concurrence. Such agreements shall be in effect upon concurrence by the NRCS FPO and Council or after .30 calendar days, whichever comes first.

These SLAs and consultation protocols are to address the NRCS NHPA Section 106 compliance responsibilities for conservation assistance undertakings that may affect historic properties listed in or eligible for listing in the NRHP.

3. NATIONAL EXEMPTIONS

The NRCS provides conservation assistance through categories of programs or activities that, by definition (36 CFR 800.16(y)) are generally considered undertakings. The NRCS, the Council and the NCSHPO have determined that several broad categories of NRCS activities or programs may be undertakings but may also be exempted nationwide under the provisions of 36 CFR 800.14(c) because their potential effects are foreseeable and likely to be minimal or not adverse. These are:

A. Advice or technical assistance, including the development, review and/or approval of conservation plans or technical designs when NRCS provides no financial assistance for their implementation or otherwise exercises no control over implementation (for example, design advice from the NRCS National Handbook of Conservation Practice Standards for a farm pond that is installed,

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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.

B. Technical determinations based upon empirical or factual findings and determinations of compliance or non-compliance including, but not limited to, w 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;

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

D. Development or revision of technical standards and specifications.

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

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

G. Conservation easement purchases, 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 Part 621), specifically: River Basin Studies, Floodplain Management Studies, Natural Resource studies.

Before implementing any nationally exempted activities, the NRCS State Cultural Resources Specialist or Coordinator will review the foreseeable effects of the activity to ensure that there are no special circumstances that might result in adverse effects to NRHP eligible resources.

Exemption of NRCS conservation practice standards installed in the field must be reviewed at a local or regional level, taking into account the cultural, historical, ecological and environmental variables, local methods of installation and maintenance considerations that may comprise direct or indirect effects (800.5(a)(l)). These local or regional exemptions will be included in SLAs and Tribal consultation protocols (see Stipulation 2, above) and, therefore, developed in consultation with the relevant SHPO,

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THPO or Indian Tribe and subject to review and revision by the NRCS Headquarters and the Council prior to final implementation.

4. MONITORING, ANNUAL REPORTING AND REVIEW

A. MONITOR

The NRCS (National Headquarters and State Offices) will inform the NCSFIPO, individual SHPOs, THPOs, American Indian Tribal Governments, and the Council regarding NRCS actions pursuant to this Agreement or individual State Level Agreements, and Tribal consultation protocols. Such monitoring may be initiated through NRCS management reviews, as necessary, or through Council staff reviews.

B. ANNUAL REPORTING.

The NRCS Headquarters shall provide the Council, NCSHPO and any Tribal government that requests it, a copy of the annual cultural resources report it submits to the Department of Interior. This report is generally available by March 1 (and no later than March 30) for the preceding calendar year. The report is produced for incorporation into the Executive Branch's annual report to Congress in accordance with the Archaeological and Historic Preservation Act of 1974 (PL 93-2 96). This report includes:

1) A summary of activities conducted by the NRCS in each state and on Tribal lands.

2) A descriptive summary of the NRCS efforts to conduct its cultural resources training program for field personnel, partners and cooperating agencies and any problems encountered and accomplishments achieved in this effort.

3) A report, as appropriate, identifying any issues, initiatives or goals the NRCS will address in the coming year with regard to its cultural resource program, and any guidance or assistance that the Council or NCSHPO may provide to help make compliance activities more effective.

4) A discussion identifying any problems the NRCS encountered in carrying

- out the terms of this agreement that need to be addressed by the signatories through amendments or development of guidance documents.

5) Any other information the NRCS wishes to provide that might improve the effectiveness of this agreement.

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C. REVIEW

Upon receipt of the annual report, the Council, NCSHPO, and any recipient Tribal government shall have thirty (30) days to review and comment on the adequacy of the report, and to respond to any questions or requests posed by the NRCS regarding its content and findings.

1) Any signatory to this Programmatic Agreement may request in writing signatories meet to review and discuss any aspect of the annual report. Upon receipt of such a request, the NRCS shall arrange for the parties to meet (in person or by teleconference) and invite other participants, as necessary, and discuss the questions or concerns.

2) Failure by the NRCS to provide an annual report by March 30 of the following year without explanation may constitute grounds for the Council and NCSHPO to suspend this agreement. Such a suspension of the agreement will take effect, after discussion with the NRCS FPO and appropriate members of the NRCS senior management and upon receipt by the NRCS of written notification from the Council and NCSHPO. Such a suspension shall be lifted upon receipt of the report by the NCSHPO and Council.

5. DISPUTE RESOLUTION

Should any signatory to this agreement object to any actions or documents issued under the terms of this agreement, the NRCS shall, in an effort to resolve the objection, confer with the signatory. If the NRCS or objecting party determines that the issue cannot be resolved within 30 days of receipt of the objection, the NRCS shall provide all relevant information regarding the dispute, including the NRCS proposed resolution to the Council for comment. Within 30 days of receipt of all relevant documentation, the Council will either:

A. Provide the NRCS with recommendations which the NRCS shall take into account in reaching a final decision regarding the matter; or

B. Notify the NRCS FPO that it will comment pursuant to 36 CFR Section 800.7(c), and proceed to comment within 45 days of notification to the NRCS.

C. Any recommendations or comments provided by the Council shall be taken into account by the NRCS with reference to the subject of the dispute, in accordance with 36 CFR Section 800.7(c). Any recommendations or comments provided by the Council will be understood to pertain only to the subject of the dispute; the NRCS responsibilities to carry out all actions that are not the subjects of the dispute will remain unchanged.

D. At any time during implementation of this agreement, should a member of the public or a Federally recognized Indian Tribe object to any measure of this agreement, or its implementation, the NRCS shall take into account the objection and confer with the objecting party, SHPO, THPO, and/or Council as needed to

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resolve the objection within 45 days. The NRCS is responsible for making the final decision after conferring with the other parties.

6. AMENDMENT

Any signatory to this agreement may propose that it be amended or modified, whereupon the parties will confer and consider such amendment. Any resulting amendment shall be executed in the same manner as the original agreement and require the agreement of all signatories.

7. TERMINATION

Any signatory to this agreement may terminate it by providing written notice to the other parties with specific reasons for such termination. During a 60-day period following the notice, the signatories shall consult and attempt to resolve the issue(s) leading to the notice. If the signatories are unable to resolve the issues, termination will occur at the end of the 60-day period. As stated above, under such termination, the NRCS will complete its Section 106 compliance for individual undertakings in accordance with the Council's regulations, 36 CFR Part 800.

8. EXPIRATION

This agreement shall expire ten years from the date of execution. This agreement is dependent upon biennial (every other year) consultation among the signatories to review the adequacy of implementation of the Agreement.

Execution of this programmatic agreement and implementation of its terms evidences that the NRCS has taken into account the effects of its assistance activities and programs on historic properties, and has afforded the Council a reasonable opportunity to comment on its assistance activities and their likely effects on historic properties.

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Signatories:

ENDNOTES

1 36 CFR 800.16(f) defines consultation as: "the process of seeking, discussing and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's 'Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act:' provide further guidance on consultation."

This definition is used in this agreement. Section 800.2 defines the participants in the Section 106 process (agency official, Council, consulting parties, the public); Section 800.2(c) outlines the consulting parties who work with the agency official (SHPO, Indian Tribes and THPOs and Native Hawaiian organizations, representatives of local government, applicants for Federal assistance, and others with demonstrated interest); and Section 800.6(c)(l) defines signatories who have the sole authority to execute, amend or terminate: a memorandum of agreement that defines resolution of adverse effects.

2 36 CFR Part 800. l defines Undertaking as: "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; those requiring a Federal permit or license or approval; and those subject to State or local regulations administered pursuant to a delegation or approval by a Federal agency."

3 36 CFR 800.16(I)(l) defines historic property as: "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria." 36 CFR 800.16(1)(2) defines "eligible for inclusion in the National Register" to include "both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria." NOTE: NRCS uses the phrase "cultural resources" to be equivalent to "historic properties," when discussing compliance with Section 106 of the NHPA.

4 Section 800.16(x) states Tribal Lands "means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities"

5 Section 800.12, Emergency situations, addresses emergencies and encourages agencies to develop procedures for use during emergency programs designed to respond to a disaster or emergency declared by the President, a Tribal government or Governor of a State or to respond to other immediate threats to life or property (such as NRCS' Emergency Watershed Program).

Section 110 of the NHPA, as implemented by 36 CFR Part 78, permits NRCS to waive Section 110 compliance if the Chief or his/her designee (State Conservationist) determines that emergency action is necessary to ensure the immediate "preservation of

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human life or property." 36 CFR Part 78.3 states that the waiver may be invoked in only a limited range of circumstances involving "major natural disaster or imminent threat to

the national security.' In such cases, within 12 days, the Chief or his designee (the State Conservationist) must notify the Secretary of the Interior, in writing, identifying: (1) the major disaster necessitating the waiver; (2) the period of effect of the waiver (generally no more than 30 days after the determination that disaster assistance is needed); (3) which parts of Section 110 have been waived; (4) the geographic area to which the waiver applies; (5) the measures to be taken to minimize harm to historic properties. In all cases, information copies of the notice sent to the Secretary of the Interior shall also be forwarded to the Council, the SHPO and the NRCS FPO in NRCS Ecological Sciences Division. In all other cases, the SHPO must be consulted and follow-up documentation shall be sent to the Council.

6 "Producer" refers to an agricultural or livestock producer, that is, a farmer or rancher.

601.62 Guidance on NRCS Cultural Resources Consultation with American Indian Tribes in Accordance with the National Historic Preservation Act of 1966 and other Related Authorities

A. Why Consultation with American Indian Tribes is Important

(1) TRIBAL SOVEREIGNTY - American Indian Tribes have special legal status as sovereign governments. Tribes also have certain rights that differ from those of other Americans based upon treaties, Federal laws, and executive orders.

(i) Consultation must recognize the special status and rights of Tribes.

(ii) The sovereign status of Tribes means that they have the authority to make and enforce laws and establish courts and other legal systems to resolve disputes. However, these rights are limited by treaties, laws, and executive orders.

(iii) Because Tribes are sovereign governments, the relationship between Tribes and the Federal Government is described as "nation to nation" or "government to government."

(iv) Each individual is a distinct sovereign, separate from other Tribes, States, counties and Federal agencies.

(v) Thus, Tribes are not "interest groups" nor "members of the general public" simply involved in public participation.

(vi) Conventional public participation involves Federal officials informing affected parties of their proposed actions and soliciting their input. This input may or may not affect the ultimate decisions.

(vii) Tribes are to be afforded the opportunities defined in treaty, law, and executive order to consult on and participate in the development of certain decisions that may affect them.

(2) FEDERAL TRUST RESPONSIBILITY - The Federal government has a *trust* responsibility to Tribes. This responsibility is rooted in the treaties through which the Tribes ceded major portions of aboriginal lands to the US government in return for promises to protect tribal rights as self-governing communities within the reserved lands.

(i) Under the trust doctrine, the Federal government has fiduciary obligations to the Tribes (similar to those of a trustee).

(ii) These obligations include duties to manage and protect natural and cultural resources for the benefit of Tribes and individual landowners.

(iii) While the Bureau of Indian Affairs (BIA) is the agency with the lead role in carrying out the trust responsibility, the courts have ruled that all Federal agencies share this responsibility.

(3) TREATY RIGHTS - Treaties are agreements between sovereign nations entered into by Congress for the U.S. Government. The U.S. Government entered into over 400 treaties with tribal governments. In these treaties, the Tribes gave up vast parts of their aboriginal lands in exchange for promises from the U.S. government.

(i) In these treaties, the U.S. Government committed to protect the lands reserved for the Tribes, including their cultural, natural and subsistence resources, as well as to protect the rights of the Tribes to use certain resources off these reserved lands.

(ii) In 1871, Congress ended the practice of entering into treaties but did continue ratifying agreements negotiated by agencies (usually, land-managing agencies).
(iii) Only Congress has the power to break treaties with Tribes and foreign governments.

B. Consultation with Non-Federally Recognized Tribes, Other Indigenous Groups and Individual Tribal Members

Some indigenous groups also have distinctive rights to participate with other public groups in expressing their (often distinct) opinions and concerns about agency projects and actions. Individual members of Tribes and tribal organizations also have the same rights as other citizens to have their concerns and opinions considered during federal decisionmaking.

These include State-recognized and non-federally recognized Tribes, Pacific Basin communities, Caribbean communities, Native Hawaiian Groups, Native Alaskan communities, and Alaskan Native Corporations (the last three have Federal status distinct from non-recognized Tribes).

C. There are a Number of Presidential Directives Written to Guide Agencies' Relations and Interactions with American Indian Tribal Governments and Individual Tribal Members

(1) 2000 Executive Order 13175 "Consultation with Indian Tribal Governments" revokes the 1998 Executive Order 13084 ("Consultation and Coordination with Indian Tribal Governments") and holds:
   (i) Federal agencies are to respect tribal self-governance and sovereignty, tribal rights, and tribal responsibilities whenever formulating policies that may affect tribal governments by providing for meaningful and timely consultation.
   (ii) If policies or regulations are discretionary, agencies must provide for tribal compliance costs; it is the policy of the NRCS to make every effort to minimize costs to the Tribes by holding required cultural resources consultation meetings as close to their homelands as possible.
(2) 1994 Presidential Memorandum on Government-to Government Relations
   (i) Federal agencies must respect tribal sovereignty.
   (ii) Agencies must ensure that they operate within a government-to-government relationship with individual federally recognized Tribes.
   (iii) Thus the head of each agency or his/her executive representative (e.g. NRCS State Conservationist) shall make initial contacts with the leadership of each Tribe's government and ensure that all consultations are open, candid, and respectful of tribal government structure and values.
(3) 1996 Executive Order 13007 Indian Sacred Sites
   (i) Agencies must develop policies and procedures for avoiding physical adverse effects or blocking access to Indian sacred sites on public land.
   (ii) Thus, for NRCS, this relates principally to our work on other agencies' lands, some of our plant materials centers, and tribal lands; and abiding by tribal and other agencies' policies and procedures.
(4) Executive Order 12898 Environmental Justice

(i) Agencies are, to the maximum extent feasible, to avoid disproportionate adverse environmental impacts (physical, social, cultural) to low-income and minority populations.
(ii) This may involve avoidance of adverse effects to subsistence, cultural, historical, and natural resources of the community.

D. What Does Consultation Mean

(1) Essentially, consultation is collaboration.
(2) Consultation involves the participants in analysis of the issues and development and implementation of the resource decisions.
(3) Consultation requires two-way communication—it is NOT notification.
(4) Consultation means the process of seeking, discussing, and considering the views of others, and where feasible, seeking agreement on resource decisions.
(5) Consultation is based on the exchange of ideas.

However, consulting parties do not have the power to stop an agency by withholding consent. When decisions involve resources on tribal land, agencies, exercising their Trust responsibilities (to protect the resources and rights of Tribes), are expected to give deference to tribal resource values, policies, preferences, and conservation and management plans.

E. Several Laws Specify Tribal Consultation Responsibilities for Agencies

(1) The National Historic Preservation Act of 1966
(i) Directs all Federal agencies, including NRCS, to consult with American Indian Tribes about cultural resources throughout the Section 106 compliance process.
(ii) The consultation should be carried out on a nation-to-nation (diplomatic) basis and focus on resources of concern to each individually involved Tribe.
(iii) NRCS' approach is discussed in this document.

(2) The National Environmental Policy Act of 1969

Does not specifically mention American Indian Tribes, but the Council for Environmental Quality (CEQ) regulations require agencies to contact and provide Tribes opportunities to become involved in several steps in the preparation of an Environmental Impact Statement (EIS) when effects may occur to tribal lands:

(i) As a cooperating agency;
(ii) As a participant in scoping;
(iii) As commenter on EISs;
(iv) As a participant in analysis of environmental consequences; and
(v) As a participant in public involvement.

(3) American Indian Religious Freedom Act of 1979
(i) Deriving from the First Amendment of the Constitution, AIRFA emphasizes that free exercise of religion applies to indigenous religions.
(ii) Agencies must respectfully consider Native American religious practices and the effects of agency actions on them. Thus agencies must make every effort to avoid adverse effects to tribal use and access to spiritual places (while avoiding violation of Establishment clause).

(4) Native American Graves Protection and Repatriation Act of 1989 and the Archaeological Resources Protection Act of 1979
   (i) These two laws apply to treatment of human remains, grave goods, objects of cultural patrimony, and archaeological collections on or from federal and Tribal lands, only.
   (ii) Thus, our concerns would be for our plant materials centers, only.
   (iii) If these items are from tribal lands, their disposition is handled by the tribal government or the BIA.

F. Under the NHPA, NRCS consults with American Indian Tribes within four contexts

(1) Tribes with Tribal land and THPOs who have assumed the SHPO responsibilities for these Tribal lands (i.e. have signatory authority on agreements).
   The SHPO does not participate in consultation unless a private or individual landowner within the reservation boundaries requests it.
(2) Tribes with tribal land and THPOs who have not assumed all the SHPO responsibilities.
   (i) Both the THPO and SHPO consult on undertakings on tribal lands and the THPO's special knowledge is given priority. The procedures for consulting with the individual Tribe may be established within a consultation agreement between NRCS and the Tribe.
   (ii) The SHPO has signatory authority on any project-specific agreements.
(3) Tribes with tribal lands who do not have a THPO.
   (i) The SHPO retains primary consultation responsibility (signatory responsibility for agreements).
   (ii) The tribal government consults if it wishes because of its special sovereign status. This may be established within a consultation agreement between NRCS and the individual Tribe.
(4) Tribes with no tribal lands in the State but interest in properties of traditional religious and cultural importance or with tribal lands in the State but interest in these properties beyond the boundaries of their current reservation lands.
   (i) These Tribes may wish to work with NRCS as consulting parties (but not signatory parties to project-specific agreements) regarding resources off tribal lands.
   (ii) Because of their sovereign status, the tribal governments must be given the opportunity to participate as consulting parties. This may take place as part of the public participation process but the tribal leaders must be afforded the respect and deference of heads of State.

G. How should NRCS sort out and work with these differing roles and responsibilities

(1) Develop Consultation Protocols or Consultation Agreements. These are developed at the highest governmental levels through formal consultation procedures.
(2) This option was initially established in NRCS' August 10, 2000, PMOA extension agreement and remains in effect as policy.
(3) These agreements/protocols establish the "who, when, what, where, why and how" of consultation for each individual Tribe and NRCS.
(4) Many of these relationships have already been established through years of program delivery at the district level, and years of cordial but formal

relationships between NRCS State Conservationists and staff and tribal governments.

(5) These somewhat more formal protocols and agreements document our recognition of sovereign rights over cultural resources on tribal lands and special knowledge of the Tribe about their cultural and spiritual heritage.

(6) Development of these agreements/protocols *cannot* be delegated to a third party, such as a contractor, cooperating agency, SHPO. This is a *Federal* agency responsibility.

(i) The SHPO may *not* conduct these consultations for us; it is appropriate to provide the SHPO copies of our agreements but not expect or ask for SHPO review.

(ii) When we assist fellow USDA agencies in meeting their 106 responsibilities (e.g. RD or FSA) or provide the technical environmental reviews for shared programs, we *cannot* assume their tribal consultation responsibilities for other agencies. *They* must carryout these activities on a government-to-government basis.

H. How To Do Consultation: Guiding Principles for NRCS

(1) Build on existing consultative relationships with American Indian Tribes. That is, use established relationships to develop new cultural resources consultation protocols and agreements. NRCS already has strong relationships in many states through:

(i) Tribal Conservation Districts;

(ii) Established technical assistance delivery programs; and

(iii) Regional, state and field office tribal liaisons.

(2) Institutionalize consultation and collaboration procedures. NRCS has started this by developing and implementing consultation agreements and protocols. More are well on their way.

(i) Until agreements are established, we follow the 36 CFR Part 800 regulations.

(ii) These agreements have been negotiated though tribal council chiefs and state conservationists.

(iii) The specifics have been worked-out by the NRCS Cultural Resources Coordinators and Specialists (CRC/CRS), the NRCS state tribal liaison, and the tribal THPO, attorneys, or resources coordinators.

(3) Include, at a minimum, the following specifics in the agreements/protocols:

(i) Who are the primary contacts (generally THPO, (NRCS' tribal liaison or CRC/ CRS);

(ii) How contacts are made (telephone, email, etc.);

(iii) Which lands are covered (tribal lands, non-tribal lands, adjacent lands, all);

(iv) When consultation should take place (should scheduling take into account tribal council meeting times);

(v) What practices, programs or activities are covered--provide clear descriptions!;

(vi) Timeframes for all involved parties;

(vii) Procedures for settlement of disputes; and

(viii) Procedures for cancellation or amendment of the agreement/protocol.

(4) Initiate consulting on specific/new matters (such as setting-up consultation agreements) as early as possible in the project or program planning process. Use established relationships, if they exist, to make initial contacts. This is necessary to ensure sufficient time for tribal decisionmaking procedures (e.g. Council

meeting, discussion and decision). Do not depend on customary public participation notices or letters and do not expect immediate responses. Respect and work within each Tribe's governmental decisionmaking framework.

(5) Establish training programs on consultation procedures and protocols in conjunction with Tribes within the State. The NRCS Social Sciences Institute has developed a training program for managers—if possible, use some of their materials and staff to develop your own training. This should be a NRCS/tribal collaborative effort; if available, invite USDA Intertribal Agriculture Council (IAC) members and/or NRCS American Indian and Native Alaskan Employees Association to participate in the development and presentation of the training. The SHPO may be involved but should not develop the training.

(6) Maintain NRCS' reputation of honesty and integrity in working with Tribes. NRCS has established a relationship of trust and mutual respect with many Tribes. Do not ignore this. If there are constraints (budget, time, engineering, other laws and rules) advise the tribal representatives and work collaboratively to resolve any conflict they may introduce.

(7) Know the Tribes in your service area. Know the Tribes resident in the area and those with interest in properties of traditional religious and cultural importance. Recognize the cultural and administrative distinctiveness of each Tribe. Allow sufficient time for Tribes to receive, process and respond to requests for consultation. Understand that some information is sensitive, especially regarding sacred areas.

(8) Maintain government-to-government relationship by interacting at appropriate levels of authority or governmental stature. THERE IS NO "COOKBOOK" FOR CONSULTING WITH INDIVIDUAL SOVEREIGN TRIBES—WORK WITH EACH TRIBE IN DEVELOPING AND MAINTAINING THE GOVERNMENT-TO-GOVERNMENT RELATIONSHIP. Initial contacts should be at the highest administrative/managerial level (e.g. state conservationist and tribal chair). Ultimately, tribal liaisons or CRCs/CRSs and THPOs or tribal resources specialists will probably conduct the daily tasks of collaboration and consultation.

(9) Focus cultural resources consultation protocols and agreements on pertinent issues for both NRCS and the individual sovereign Tribe. Approach development of protocols and agreements as a collaborative process. Templates and models for agreements are not likely to work without considerable modification; they may limit creativity. We do have examples but respect the sovereign status of each Tribe and remember one size does not fit all. Cover the practices, programs, resources, lands, timeframes that work for the NRCS State and Field Offices and the individual Tribe.

(10) Tribal lands that cross State boundaries. In cases where tribal lands cross more then one State the state conservationists are encouraged to work together to develop consultation protocols which are agreeable to the Tribe.

601.63 Advisory Council Native American Program Guidance for Federal Agencies for Consultation with Indian Tribes and with Native Hawaiian Organizations, April 2003. (See http://www.achp.gov/nap.html for continual updates)

Advisory Council on Historic Preservation Guidance on Consulting with Indian Tribes in the Section 106 Review Process (April 2003).

Introduction.

This guidance is a clarification of the requirements for Federal agencies to consult with Indian tribes in the Advisory Council on Historic Preservation's (ACHP's) regulations, "Protection of Historic Properties" (36 CFR Part 800), implementing Section 106 of the National Historic Preservation Act (NHPA). Accordingly, it outlines when Federal agencies must consult with Indian tribes and what the consultation must address. It is not meant to be a comprehensive guide on consultation and, thus, does not address how Federal agencies conduct consultation or which Indian tribes to contact regarding specific projects.

The National Historic Preservation Act.

The National Historic Preservation Act, amended in 1992, is the basis for the tribal consultation provisions in ACHP regulations. The two amended sections of NHPA that have a direct bearing on the Section 106 review process are Section 101(d)(6)(A), which clarifies that historic properties of traditional religious and cultural significance to Indian tribes may be eligible for listing in the National Register, and Section 101(d)(6)(B), which requires Federal agencies, in carrying out their Section 106 responsibilities, to consult with any Indian tribe[1] that attaches religious and cultural significance to historic properties that may be affected by an undertaking. ACHP regulations incorporate these provisions and reflect other directives about tribal consultation from Executive orders, Presidential memoranda, and other authorities.

Section 106.

Section 106 of NHPA requires Federal agencies to consider the effects of their actions on historic properties and to seek comments from ACHP. The purpose of Section 106 is to avoid unnecessary harm to historic properties from Federal actions. Commonly known as Section 106 review, the procedure for meeting Section 106 requirements is defined in ACHP's regulations, "Protection of Historic Properties" (36 CFR Part 800). The regulations include both general direction regarding consultation and specific requirements at each stage of the review process.

What ACHP's regulations say about consultation with Indian tribes?

Section 800.2(c)(2) of the regulations outlines important principles and general directions to Federal agencies regarding consultation:

A. The regulations remind Federal agencies that historic properties of religious and cultural significance to an Indian tribe may be located on ancestral, aboriginal or ceded lands of that tribe. Accordingly, agencies must make a reasonable and good faith effort to identify Indian tribes that attach such significance but may now live at great distances from the undertaking's area of potential effect.

B. Federal agencies should be respectful of tribal sovereignty in conducting consultation and must recognize the government-to-government relationship that exists between the Federal Government and federally recognized Indian tribes.

C. The regulations also provide for an Indian tribe to enter into an agreement with a Federal agency regarding any aspect of tribal participation in the review process. The agreement may provide the Indian tribe with additional participation or concurrence in agency decisions under Section 106 provided that no modification is made to the roles of other parties without their consent.

Is consultation with Indian tribes required only when an undertaking will occur on or affect historic properties on tribal lands?

No, NHPA and ACHP's regulations require Federal agencies to consult with Indian tribes when they attach religious and cultural significance to a historic property *regardless of the location of that property.* The circumstances of history may have resulted in an Indian tribe now being located a great distance from its ancestral homelands and places of importance. It is also important to note that while an Indian tribe may not have visited a historic property in the recent past, its importance to the tribe or its significance as a historic property of religious and cultural significance may not have diminished for purposes of Section 106.

Does a property of traditional cultural and religious importance requiring agency consultation with tribes under Section 101(d)(6) of NHPA have to be determined eligible for the National Register or meet the National Register criteria?

Yes. NHPA only requires consultation with Indian tribes and Native Hawaiian organizations regarding those properties of traditional religious and cultural importance that are listed in or eligible for the National Register. However, agencies should be aware that Sections 800.4(a) and (b) require them to consult with Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to a property when the agency carries out the identification and National Register evaluation of potential historic properties. Likewise, Executive Order 13007, the American Indian Religious Freedom Act, or other authorities may impose obligations, independent of Section 106 and NHPA, with regard to Indian sacred sites that do not meet the National Register criteria. Agencies should review their own internal policies in that regard.

If there are no federally recognized Indian tribes in the State where the project is located, does the Federal agency still have to consult with any tribes?

The Federal agency has to make a reasonable and good faith effort to identify Indian tribes that may have an interest. The present absence of federally recognized Indian tribes in a State does not absolve the agency of its obligations to make a reasonable and good faith effort to identify Indian tribes that should be consulted. The circumstances of history may have resulted in an Indian tribe now being located a great distance from its ancestral homelands and places of importance.

What is a Federal agency's responsibility to consult with a State-recognized Indian tribe or non-recognized Native American group?

Under ACHP's regulations at Section 800.2(c)(5), the Federal agency may invite such groups to participate in consultation based on a demonstrated interest in the undertaking's

effects on historic properties. However, the term "Indian tribe" in NHPA refers only to Federally recognized Indian tribes. Accordingly, under NHPA and ACHP's regulations, only a federally recognized Indian tribe has the right to participate in Section 106 consultation.

Where can I find information on Indian tribes?

The Department of Interior, Bureau of Indian Affairs (BIA) maintains a list of federally recognized Indian tribes and posts this information on its Web page at www.doi.gov/bureau-indian-affairs. There are also BIA regional offices throughout the country.

How does a Federal agency consult with an Indian tribe that does not want to divulge information about a historic property of religious and cultural significance?

An Indian tribe may not wish to divulge information, or may be prohibited from disclosing certain kinds of information, about certain historic properties. Therefore, the Federal agency should remain flexible in its approach to identification and evaluation of historic properties and consultation to resolve adverse effects.

Section 304 of NHPA provides protection from public disclosure of information about a historic property that might result in harm to the property, a significant invasion of privacy, or impediments to traditional religious practice at a site. ACHP's regulations include reminders of the need for Federal agencies to consider tribal and public concerns regarding sensitivity of information.

Several Indian tribes assert that they have an interest in a historic property. Is the Federal agency obligated to consult with all of them? What if the tribes disagree?

Federal agencies should keep in mind that there may be multiple Indian tribes that attach significance to a historic property. There may also be Indian tribes that attach significance to historic properties on another Indian tribe's lands. The Federal agency is obligated to consult with each of the Indian tribes and may have to approach the consultation with flexibility. It is often the case that all consulting parties do not agree. Federal agencies should approach all such consultation with an open mind, carefully weighing the views of all parties in concluding the Section 106 review process.

If the Federal agency has not identified an Indian tribe nor invited that tribe to participate, what can the Indian tribe do?

The tribe may write to the Federal agency requesting to be a consulting party. If the tribe is one that attaches religious and cultural significance to a historic property in the area of potential effect, the tribe must be considered a consulting party by the agency.

The Section 106 Review Process.

The following guidance is divided into two major sections: consultation on tribal lands and consultation off tribal lands. While the basic steps of the review process are the same for undertakings on or affecting properties on tribal lands and undertakings off tribal lands, there are some differences in the consultation requirements. The guidance is structured this way to help clarify consultation requirements for instructional purposes only.

Consultation with Indian Tribes for Undertakings On or Affecting Tribal Lands.

Federal agencies should recognize that in addition to the consultation requirements embodied in ACHP's regulations, tribal sovereignty and other authorities also influence consultation, may dictate additional consultation, and further strengthen an Indian tribe's position in the Federal decisionmaking process.

ACHP's regulations recognize an Indian tribe's sovereign authority on its tribal lands in several ways. The regulations require the Federal agency to provide an Indian tribe an opportunity to review, and, thus, to concur in or object to, agency findings and determinations. The regulations also require Federal agencies to invite the tribe to sign memoranda of agreement (MOAs), and if the tribe terminates consultation, ACHP must comment to the head of the agency rather than execute an agreement without the tribe. Federal agencies should be aware, however, that the sovereign status of Indian tribes on their lands may dictate other obligations and requirements in addition to those outlined in ACHP's regulations.

I. Initiation of the Section 106 Process.

One of the first steps a Federal agency takes is to determine if the undertaking may occur on or affect historic properties on tribal lands and, if so, whether the Indian tribe has assumed the duties of the State Historic Preservation Officer (SHPO) under Section 101(d)(2) of NHPA[2].

If a tribe has assumed the duties of the SHPO, does the SHPO still participate in consultation for undertakings on tribal lands?

Only if a non-tribal property owner within the exterior boundaries of the reservation requests that the SHPO participates, or if the Tribal Historic Preservation Officer (THPO) and agency agree to invite the SHPO to participate, does the SHPO still participate in consultation for undertakings on tribal lands. In all other cases, the Federal agency consults with the THPO *in lieu of* the SHPO on tribal lands.

What is the purpose of the provision that allows property owners on tribal lands to request SHPO participation in addition to the THPO?

The provision, following the express language of Section 101(d)(2)(D)(iii) of NHPA, provides that a non-tribal property owner who owns lands within the exterior boundaries of a reservation can request the SHPO to participate in a Section 106 consultation even when the tribe has assumed the role of the SHPO. It is designed to provide an opportunity for a property owner, whose interests in historic preservation may not necessarily be represented by the THPO, to include the SHPO in the consultation.

Does the THPO have the same role and responsibilities in the Section 106 process on tribal lands as the SHPO does off tribal lands?

Yes, the THPO carries out all of the Section 106 review functions of the SHPO and is bound to respond to requests to review an agency's findings and determinations within the time frames set by the regulations. Failure of a THPO to respond when there is such a time frame permits the agency to assume concurrence with a finding or determination or to consult with ACHP in the THPO's absence. Subsequent involvement by the THPO is not precluded but the THPO cannot reopen a finding or determination that it failed to respond to in a timely manner earlier in the process.

When there is no THPO, who represents the tribe in consultation for an undertaking on tribal land, including signing an MOA on behalf of the tribe?

Tribal participation in the Section 106 process is conducted through the tribe's official governmental structure. The formal representation, including designation of the tribal signatory for the tribe, is determined by the tribe in accordance with tribal law, internal structure, and governing procedures. Other tribal members who wish to participate in the Section 106 process must do so as members of the public and may seek to become consulting parties with the consent of the Agency Official. However, the views of the Indian tribe are provided only by an officially designated representative of the tribal government.

When there is no THPO, does the agency also consult with the SHPO?

Yes, the agency consults with the tribal designated representative and the SHPO when there is no THPO. If the SHPO withdraws from consultation, the Federal agency and the tribal representative may complete the review process. An Indian tribe may enter into an agreement with the SHPO specifying the SHPO's participation in the Section 106 review process on tribal lands.

Does the Federal agency have to consult with other Indian tribes when the undertaking is on tribal lands?

A Federal agency must make a reasonable and good faith effort to identify Indian tribes that attach religious and cultural significance to historic properties affected by the undertaking. Some tribes may attach such significance to historic properties located on another tribe's lands. The Federal agency must consult with them as well. While this may present challenges in carrying out consultation, it does not absolve the Federal agency from the obligation to consult. The Federal agency must respect a tribe's sovereignty in matters such as access to historic properties within the reservation. Accordingly, it may be necessary for the agency to consult with each tribe individually and to do so off the reservation.

II. Identification of Historic Properties

What are the consultation requirements at this stage of the process?

The Federal agency is required to consult with the THPO/tribal representative:

(1) To determine and document the area of potential effects;

(2) To review existing information;

(3) To seek information from consulting parties and gather information from Indian tribes to assist in identifying historic properties which may be of religious and cultural significance; and

(4) To carry out identification and to evaluate the National Register eligibility of identified historic properties.

What happens if there is a disagreement between the SHPO and tribal representative on National Register eligibility?

The concurrence of both the SHPO and the tribal representative is required for an agency's determination of eligibility or ineligibility to stand. If either disagrees, the

Federal agency is obligated to seek a formal determination of eligibility from the Keeper of the National Register.

What happens if there is a disagreement between the THPO and the agency on National Register eligibility?

The agency must seek a formal determination of eligibility.

III. Assessment of Adverse Effects

What are the consultation requirements at this step?

The Federal agency consults with the THPO/tribal representative:

(1) To apply the Criteria of Adverse Effect to historic properties within the area of potential effects, and

(2) In reaching a finding of "no adverse effect."

What happens if there is a disagreement between the THPO/tribal representative and the agency on a finding of "no adverse effect"?

If the THPO/tribal representative disagrees within the 30-day review period, the agency must either consult with the THPO/tribal representative to resolve the disagreement or request ACHP to review the finding.

IV. Resolution of Adverse Effects

What are the consultation requirements at this step?

The Federal agency consults with the THPO/tribal representative and other consulting parties in an attempt to develop and evaluate alternatives or modifications to the undertakings to avoid, minimize, or mitigate adverse effects. Any consulting party may request ACHP to participate in this consultation.

What happens if agreement is reached?

The Federal agency and consulting parties, including Indian tribes, develop an MOA outlining how the adverse effects will be resolved. The Federal agency must invite the THPO/tribal representative to be a signatory to an MOA.

What happens if the Federal agency and the THPO/tribal representative fail to agree?

The agency must then invite ACHP to join the consultation. The THPO/tribal representative may determine that further consultation will not be productive and terminate consultation. The tribe must then notify the agency and other consulting parties of the determination and the reasons for terminating. ACHP must comment when the Indian tribe terminates consultation since the agency and ACHP cannot execute an agreement without the tribe.

When an undertaking takes place or affects historic properties on tribal lands, can a two-party agreement be concluded between an agency and an Indian tribe when the SHPO opts out of consultation even though the tribal representative is not a THPO?

Yes, because such a tribe has the same rights as a THPO. An Indian tribe may reach agreement with a Federal agency on the terms of an MOA. Execution of the MOA by a tribal representative and the Agency Official (along with filing the MOA with ACHP) would complete the Section 106 process.

Consultation with Indian Tribes for Undertakings off Tribal Lands

I. Initiation of the Section 106 Process

If the undertaking will not occur on or affect historic properties on tribal lands, is the Federal agency required to consult with Indian tribes?

Yes, Section 101(d)(6)(B) of NHPA requires consultation with Indian tribes that attach religious and cultural significance to historic properties (hereinafter "relevant Indian tribes"). The Federal agency must make a reasonable and good faith effort to identify such Indian tribes and invite them to be consulting parties. If such Indian tribes have not been invited by the agency to consult, the tribes may request in writing to be consulting parties and must be considered as such by the agency.

II. Identification of Historic Properties

In the initial information gathering steps, does the Federal agency consult with Indian tribes?

The Federal agency consults with the SHPO to determine and document the area of potential effects, review existing information, seek information from consulting parties, and gather information from Indian tribes to assist in identifying historic properties that may be of religious and cultural significance.

Does the Federal agency consult with Indian tribes to carry out identification and evaluation of historic properties?

Yes, the Federal agency consults with the SHPO and relevant Indian tribes to carry out identification and to evaluate the National Register eligibility of identified historic properties.

Does the Federal agency need to obtain a relevant Indian tribe's concurrence with eligibility findings?

No, but the Federal agency must acknowledge that Indian tribes possess special expertise in assessing the eligibility of historic properties that may be of significance to them. Also, if an Indian tribe disagrees with an agency's determination of eligibility, the Indian tribe may ask ACHP to request the agency to obtain a determination from the Keeper of the National Register. However, ACHP retains the discretion as to whether or not it should make the request of the Federal agency.

Does an agency consult with a relevant Indian tribe in determining if there are historic properties affected?

No, but the agency does provide notification of the finding to relevant Indian tribes and makes the documentation available for public inspection.

What happens when the Federal agency finds that there are historic properties which may be affected by the undertaking?

The agency notifies relevant Indian tribes, invites their views on the effects, and proceeds to assess adverse effects, if any.

III. Assessment of Adverse Effects

Which parties does the Federal agency consult with to apply the Criteria of Adverse Effect to historic properties within the areas of potential effect?

The agency consults with the SHPO and relevant Indian tribes to apply the Criteria of Adverse Effect to historic properties within the areas of potential effect.

When proposing a finding of “no adverse effect,” does the agency consult with Indian tribes?

No, the agency consults with the SHPO in reaching a finding of “no adverse effect” and notifies consulting parties including relevant Indian tribes and provides them with documentation.

What happens if a relevant Indian tribe disagrees with a finding of no adverse effect?

If a relevant Indian tribe disagrees with a finding of no adverse effect, it must specify in writing the reasons within the 30-day review period. When a timely filing of disagreement is received, the Federal agency must either resolve the disagreement or request ACHP to review the "no adverse effect" finding. Relevant Indian tribes can also request ACHP to review an agency’s finding. The agency should seek the concurrence of Indian tribes that attach religious and cultural significance to the historic property subject to the finding. This means that the agency is encouraged, but not legally required, to obtain such concurrence. If the relevant Indian tribe does not concur and disagrees with the proposed finding, it can refer the matter directly to ACHP for resolution.

IV. Resolution of Adverse Effects

Which parties does the Federal agency consult with to develop and evaluate alternatives or modifications to the undertakings to avoid, minimize, or mitigate adverse effects?

The Federal agency consults with the SHPO, relevant Indian tribes, and other consulting parties. The Federal agency must provide project documentation to all consulting parties at the beginning of consultation. Any consulting party may request ACHP to participate in consultation.

What happens if agreement is reached?

If agreement is reached, the Federal agency and consulting parties, including relevant Indian tribes, develop an MOA outlining how the adverse effects will be addressed.

Is the Federal agency obligated to invite a relevant Indian tribe to sign or concur with the MOA?

No, the agency may, but is not required to, invite the relevant Indian tribe to sign or concur. An Indian tribe that signs the MOA has the same rights with regard to seeking amendment or termination of the agreement as the other signatories. Refusal by a relevant Indian tribe to sign or concur, however, does not invalidate the MOA.

What happens if agreement is not reached?

If agreement is not reached, the Federal agency, SHPO, or ACHP, if participating, may terminate consultation. Other consulting parties, including relevant Indian tribes, may decline to participate but they cannot terminate consultation. After consultation is terminated, ACHP issues its formal comments to the agency head.

Other Opportunities and Consultation Requirements

Requests from Indian Tribes for ACHP Participation in Consultation

Any party, including Indian tribes, may request that ACHP review the substance of any agency's finding, determination, or decision on the adequacy of an agency's compliance with the regulation. An Indian tribe may request that ACHP enter the Section 106 review process because of concerns about the identification of, evaluation of, or assessment of effects on, historic properties. An Indian tribe may request ACHP involvement in the resolution of adverse effects or where there are questions about policy, interpretation, or precedent under Section 106 or its relation to other authorities such as the Native American Graves Protection and Repatriation Act (see Appendix A of the regulations).

Consultation with Indian Tribes in the Development of Program Alternatives

The Federal agency must conduct government-to-government consultation with affected THPOs or tribal representatives, and relevant Indian tribes in the development of program alternatives.

If a program alternative includes undertakings that would affect historic properties on tribal lands, the agency must identify and consult with the Indian tribes having jurisdiction over such lands. A Programmatic Agreement only takes effect on tribal lands when the THPO, Indian tribe, or designated tribal representative is a signatory to the agreement.

If a program alternative may affect historic properties of religious and cultural significance to an Indian tribe located off tribal lands, the agency must identify those Indian tribes and consult with them.

When the proposed program alternative has nationwide applicability, the agency must develop and implement appropriate government-to-government consultation with Indian tribes in accordance with existing Executive orders, Presidential memoranda, and applicable laws.

In all cases, the agency and ACHP must take into account the views of Indian tribes in reaching a final decision.

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[1]NHPA defines "Indian tribe" as "an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" (16 U.S.C. 470w).

[2]The 1992 amendments included provisions for Indian tribes to assume the responsibility of the SHPO on tribal lands. The regulations use the term "THPO" to mean the Tribal Historic Preservation Officer under Section 101(d)(2).

Updated April 4, 2003

Advisory Council on Historic Preservation Guidance on Consulting with Native Hawaiian Organizations in the Section 106 Process (April 2002).

Introduction

The 1992 amendments to the National Historic Preservation Act (NHPA) place major emphasis on the role of Native Hawaiian organizations. Subsequent revisions published May 18, 1999, to the regulations of the Advisory Council on Historic Preservation (ACHP[1]), 36 CFR Part 800, incorporate specific provisions for Federal agencies to consult with Native Hawaiian organizations throughout the process.

Consultation with Native Hawaiian organizations in the regulations

A. The Federal agency (agency[2]) must consult with any Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking (henceforth, Native Hawaiian organizations). Such organization is a consulting party.

B. The agency must make a reasonable and good faith effort to identify Native Hawaiian organizations to be consulted.

C. The Native Hawaiian organization may enter into an agreement with the agency regarding any aspect of its participation in the review process. The agreement may provide the Native Hawaiian organization with additional participation or concurrence in agency decisions under Section 106 provided that no modification may be made in the roles of other parties without their consent.

Participation of Native Hawaiian organizations in consultation

A. Section 101(d)(6)(b) of NHPA requires Federal agencies to consult with any Native Hawaiian organization that may attach religious and cultural significance to a historic property that may be affected by an undertaking regardless of its location.

B. There may be multiple Native Hawaiian organizations that attach significance to a historic property. The agency is required to consult with any Native Hawaiian organization that may attach religious and cultural significance to a historic property, again, regardless of its location.

Role of Native Hawaiian organizations in initiation of the Section 106 review process. (Step I)

A. The agency must make a reasonable and good faith effort to identify Native Hawaiian organizations that might attach religious and cultural significance to historic properties in the area of potential effects and invite them to be consulting parties.

B. Native Hawaiian organization can request in writing to be a consulting party.

C. The agency can collapse multiple steps in the process, but consulting parties, including Native Hawaiian organizations and the public, must still be given an adequate opportunity to express their views.

Role of Native Hawaiian organizations in identification of historic properties. (Step II)

A. The agency gathers information from Native Hawaiian organizations to assist in identifying historic properties that may be of religious and cultural significance.

B. The agency consults with Native Hawaiian organizations to carry out identification.

C. The agency consults with Native Hawaiian organizations to evaluate National Register eligibility of identified properties. The agency must acknowledge "special expertise" of Native Hawaiian organizations in assessing eligibility of historic properties of religious and cultural significance to them.

D. If a Native Hawaiian organization disagrees with an eligibility determination, it may ask ACHP to request the agency to obtain a determination from the Keeper of the National Register. Concurrence of the Native Hawaiian organization in eligibility determination is not required.

E. The agency must notify Native Hawaiian organizations of its finding of either No Historic Properties Affected or Historic Properties Affected. Failure to object within 30 days allows the agency to assume concurrence and proceed.

Role of Native Hawaiian organizations in assessing adverse effects. (Step III)

A. The agency consults with Native Hawaiian organizations to apply the Criteria of Adverse Effect.

B. The agency notifies consulting parties, including Native Hawaiian organizations, of the finding of No Adverse Effect (NAE), and provides documentation. Failure to disagree within 30 days allows the agency to assume concurrence and proceed.

C. If the consulting party, including Native Hawaiian organizations, disagrees, it must specify reasons within 30 days. When a timely filing of disagreement is received, the agency must either resolve the disagreement or request ACHP to review the NAE finding. Native Hawaiian organizations can also request ACHP to review Agency finding.

D. The agency should seek concurrence of Native Hawaiian organization that attaches religious and cultural significance to the historic property subject to the finding.

Role of Native Hawaiian organizations in resolving adverse effects (Step IV)

A. The agency consults with Native Hawaiian organizations to develop and evaluate alternatives to avoid, minimize, or mitigate adverse effects.

B. Native Hawaiian organizations may request ACHP to participate in consultation.

C. The agency may invite a Native Hawaiian organization to sign or concur with the Memorandum of Agreement (MOA). Refusal to sign or concur does not invalidate the MOA.

Requests from Native Hawaiian organizations for ACHP participation

A. Any party, including Native Hawaiian organizations, may request that ACHP review the substance of any agency's finding, determination, or decision or the adequacy of an agency's compliance with the regulation.

B. A Native Hawaiian organization may request that ACHP enter the Section 106 review process because of concerns about the identification of, evaluation of, or assessment of effects on, historic properties.

C. A Native Hawaiian organization may request ACHP involvement in the resolution of adverse effects or where there are questions about policy, interpretation, or precedent under Section 106 or its relation to other authorities such as NAGPRA (see Appendix A of the regulations).

Involvement of Native Hawaiian organizations in the development of program alternatives

A. The agency must consult with affected Native Hawaiian organizations in the development of program alternatives.

B. If a program alternative may affect historic properties of religious and cultural significance to a Native Hawaiian organization, the agency shall identify those organizations and consult with them.

C. The agency and ACHP must take into account the views of Native Hawaiian organizations in reaching a final decision.

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[1]*ACHP:* The Advisory Council on Historic Preservation issues regulations to implement Section 106, provides guidance and advice on the application of the procedures in this part, and generally oversees the operation of the Section 106 process. ACHP also consults with and comments to Agency Officials on individual undertakings and programs that affect historic properties.

[2]*Agency:* It is the statutory obligation of the Federal agency to fulfill the requirements of Section 106 and to ensure that an Agency Official with jurisdiction over an undertaking takes legal and financial responsibility for Section 106 compliance in accordance with **subpart B** of the regulations. The Agency Official has approval authority for the undertaking and can commit the Federal agency to take appropriate action for a specific undertaking as a result of Section 106 compliance. For the purposes of **subpart C** of the regulations, the Agency Official has the authority to commit the Federal agency to any obligation it may assume in the implementation of a program alternative. The Agency Official may be a State, local, or tribal government official who has been delegated legal responsibility for compliance with Section 106 in accordance with Federal law.

Updated April 4, 2003

601.64 Summary of Cultural Resources Laws that Govern the Natural Resources Conservation Service's Consideration and Treatment of Cultural Resources

A. National Historic Preservation Act of 1966, as amended (NHPA), (PL 89-665; 80 Stat. 915, as amended;16 U.S.C. 470a, et seq.), sets forth Federal policy to protect and provide incentives to preserve the cultural environment, including historic and cultural sites and values, in cooperation with other nations and in partnership with States, local governments, Indian Tribes, and private organizations and individuals. It establishes the National Register of Historic Places to be expanded and maintained by Secretary of the Interior and to include National Historic Landmarks. It also establishes the Advisory Council on Historic Preservation (ACHP), State Historic Preservation Officers (SHPOs), and Tribal Historic Preservation Officers (THPOs).

Section 106 of the Act calls for Federal procedures for agencies to protect properties eligible for listing in the National Register of Historic Places in consultation with the ACHP, SHPOs, THPOs, Tribes and the public. Section 106 also directs agencies to carry out their missions in accordance with the purposes of the Act, and to consider activities that will advance these purposes. Thus, agencies are to manage impacts to historic and cultural resources in creative and thoughtful ways while carrying out their central missions. The strategies for identifying, evaluating and protecting or managing these resources must be developed in consultation with mandated preservation partners. Section 106 is implemented by the ACHP's regulations, 36 CFR Part 800.

Section 110 directs agencies to establish internal programs for meeting their responsibilities and to designate an agency Federal Preservation Officer with appropriate professional education and experience to coordinate the agency's activities under the NHPA. Section 110 also directs agencies to establish programs that are consistent with the ACHP's regulations.

Section 112 of the NHPA directs agencies to maintain access to professionally qualified staff to make required professional resource assessments, and to establish a management system to carry out agency historic preservation responsibilities. Agency personnel and contractors are to meet qualification standards for the required technical skills (e.g. archeology, historical architecture, history, etc.) established by the Office of Personnel Management in consultation with the Secretary of the Interior.

B. Historic Sites Act of 1935 (PL 74-292; 16 USC 461 et seq.; 49 Stat. 666).

Section 1 declares a national policy to preserve historic sites, buildings, antiquities, and objects of national significance, for public use, including those located in or purchased for the National Parks system. Section 2 provides procedures, through the National Park Service, for designation, acquisition, administration, and protection of such sites and designation of National Historic Landmarks (also now part of the National Register of **Historic Places), and establishes the Historic American Building Survey and Historic American Engineering Record.**

C. The American Indian Religious Freedom Act of 1978 (AIRFA) (PL 95-341; 42 USC 1996, et seq.) makes it a policy to protect and preserve for American Indians, Eskimos, Aleuts, and Native Hawaiians their inherent right of freedom to believe, express, and exercise their traditional religions. The act allows them access to sites, use and possession of sacred objects, and freedom to worship through ceremonial and traditional rights. It further directs various Federal departments, agencies, and other instrumentalities

responsible for administering relevant laws to evaluate their policies and procedures in consultation with Native traditional religious leaders to determine changes necessary to protect and preserve Native American cultural and religious practices.

D. Antiquities Act of 1906 (PL 59-209; 16 USC 431 et seq.; 34 Stat. 225) was the first general act providing protection for archeological and historic resources. It protects all historic and prehistoric remains and objects of antiquity on Federal lands and prohibits excavation or destruction of such antiquities without the permission (Antiquities Permit) of the Secretary of the department which has the jurisdiction over those lands. It also authorizes the President to declare areas of public lands as National Monuments and to reserve or accept private lands for that purpose. The applicable regulation is 43 CFR 3, Antiquities Act of 1906.

E. Archaeological Resources Protection Act of 1979, as amended (PL 96-95; 16 USC 470aa-470ll; 93 Stat. 721) applies to Federal and American Indian tribal lands only. It supplements the provisions of the Antiquities Act of 1906. It makes it illegal to excavate or remove from Federal or Indian lands any archeological resources without a permit from the land manager. Permits may be issued only to qualified persons, and only if the resulting activities will increase knowledge about archeological resources in the public interest. Major criminal and civil penalties for violating the law are included. Regulations (43 CFR 7) for the ultimate disposition of materials recovered as a result of permitted activities state that archeological resources excavated on public lands remain the property of the United States. Those excavated from Indian lands remain the property of the Indian or Indian tribe having rights of ownership over such resources.

F. Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) (PL 101-601; 25 USC 3001-13; 104 Stat. 3042) applies to Federal and American Indian tribal lands and resources and to remains from these lands, only. It assigns ownership and control of Native American cultural items, human remains, and associated funerary objects that were excavated or discovered on Federal or Indian tribal lands to the specified lineal descendents, American Indian tribe or Native Hawaiian organization. It also establishes requirements for the treatment of Native American human remains and sacred or cultural objects found on Federal land and Indian tribal lands. This act further provides procedures for the protection, inventory, and repatriation of Native American cultural items, human remains, and associated funerary objects from Federal and Indian tribal lands. When these items are inadvertently discovered on Federal or Indian or Native Hawaiian lands, cease activity, make a reasonable effort to protect the items, and notify the appropriate Indian tribe(s) and/or Native Hawaiian organization(s).

As of November 16, 1995, Federal agencies in possession of any such remains or objects were required to issue an inventory of any human remains or funerary objects. As of November 16, 1993, agencies must have issued a written summary of all funerary objects not associated with human remains, or sacred or cultural objects under their control, along with all available information on geographical or cultural affiliation of such items. In any case where such items can be associated with specific tribes or groups of tribes, the agency is required to provide notice of the item in question to the tribe or tribes. Upon request, each agency is required to return any such item to any lineal descendant or specific tribe with whom such item is associated. NRCS does not have the authority to take possession of such collections, to hold them for other agencies or individuals, or to repatriate them to American Indian tribal governments for others.

G. Other laws familiar to NRCS employees but no longer in use (because of later statutes or amendments):

(1) Archaeological and Historic Preservation Act of 1974 (Moss-Bennett Act) (PL 86-523; 16 USC 469-469c). This law amends the Reservoir Salvage Act of 1960 and authorizes the Secretary of the Interior or the responsible Federal agency to undertake recovery, protection, or preservation of historical and archeological data that would otherwise be lost as a result of federal or federally licensed construction activities. In addition, the Act authorizes Federal agencies to expend up to one percent of authorized project costs for the protection of archeological and historical data. This limitation applies to mitigation only. All of these provisions were amended and replaced by provisions of the NHPA in 1980; no appropriations for this act have been passed since the late 1970s.

(2) Reservoir Salvage Act of 1960 (PL 86-523). This law stated that Federally constructed reservoirs represented a major source of destruction of archeological resources that could not be resolved without a specific source of funding. The act required Federal agencies building or permitting the building of reservoirs to notify the Secretary of the Interior when such activities might destroy important archaeological, historic, or scientific data. The Secretary of the Interior was authorized to conduct appropriate investigations to protect those data. The act also authorized agencies to spend up to 1 percent of their construction funds on the protection of historic and archaeological resources. This was the first act to recognize that archaeological sites were important for their data content and to provide a source of funding for collecting archeological data.

In 1974, the Reservoir Salvage Act was amended by the Archeological and Historic Preservation Act to extend the provisions of the 1960 Act to all federal construction activities and all federally licensed or assisted activities that cause loss of scientific, prehistoric, or archeological data. In 1980, both laws were amended by the NHPA. Today, funding of all cultural resources protection, in accordance with the NHPA, may be part of the program or project funding.

601.65 Summary of Regulations and Guidelines that Govern NRCS' Consideration and Treatment of Cultural Resources

A. **Protection of Historic Properties; Advisory Council on Historic Preservation, Final Rule, 36 CFR Part 800, December 12, 2000, in effect January 11, 2001** . These regulations implement the provisions of Section 106 of the National Historic Preservation Act. They guide Federal agencies, State Historic Preservation Officers, Tribal Historic Preservation Officers, American Indian tribes, other interested parties, and the Advisory Council on Historic Preservation in the conduct of the Section 106 cultural resources review process. The regulations define a procedure to be followed by Federal agencies that have jurisdiction over a Federal, federally assisted, or federally licensed activity or program. This procedure requires the Federal agency to consult with the appropriate SHPO, THPO, American Indian Tribes, and concerned members of the public regarding the effects each of their undertakings has on cultural resources that are included in or eligible for the National Register of Historic Places. Additionally, if the agency and consulting parties cannot reach agreement on the eligibility of the resources or the effects of the proposed activity, prior to its approval, the agency must afford the Advisory Council on Historic Preservation an opportunity to comment on the undertaking.

The purpose of the regulations is to ensure that Federal agencies consult SHPOs, THPOs, American Indian Tribes, the public, and the ACHP to identify potential conflicts among consulting parties and to resolve such conflicts.

B. **National Register of Historic Places (36 CFR Part 60)**. The National Historic Preservation Act authorizes the Secretary of the Interior (through the National Park Service's Keeper of the National Register) to expand and maintain a National Register of Historic Places which includes historic and cultural districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, landscape and culture. These regulations set forth the procedures that must be followed to list these cultural resources in the National Register of Historic Places. NRCS and other Federal agencies may nominate only Federally owned properties, private properties are nominated by the State Historic Preservation Officer (SHPO), with the permission of the owner. NRCS staff may assist private property owners and SHPO in nominating properties to the National Register of Historic Places.

C. **Determinations of Eligibility for Inclusion in the National Register of Historic Places (36 CFR Part 63)**. These regulations have been developed to assist agencies in identifying and evaluating the eligibility of cultural resources for listing in the National Register of Historic Places. This process is required for compliance with Section 106 of the National Historic Preservation Act, as implemented by the ACHP's regulations, 36 CFR Part 800. These regulations guide Federal agencies in assessing the significance of cultural resources on lands under their jurisdiction or control or on lands to be affected by proposed actions.

D. **Protection of Archaeological Resources (43 CFR Part 7)**. These regulations implement provisions of the Archaeological Resources Protection Act of 1979 and apply to all Federal land managers in providing protection for archaeological resources, located on public lands and Indian lands. They enable Federal land managers to protect archaeological resources through permits authorizing excavation and/or removal of archaeological resources, through civil penalties for unauthorized excavation and/or removal, through provisions for the preservation of archaeological resource collections and data, and through provisions for ensuring confidentiality of information about

archaeological resources when disclosure would threaten the archaeological resources. NRCS must comply with these regulations when working on tribal or Federal lands.

E. **Native American Graves Protection and Repatriation Act (43 CFR Part 10)** These regulations set forth the procedures for Federal agencies and museums to inventory, consult and repatriate archeological collections and collections of human remains, sacred objects and objects of cultural patrimony to American Indian Tribes and Native Hawaiians. They also set forth procedures to be followed in the identification and treatment of human remains (including inadvertent discovery) of American Indian tribal descent on Federal and tribal lands. NRCS follows the procedures of Federal or tribal partners when working on Federal or tribal lands. NRCS does not have the authority to repatriate remains from private lands but may facilitate or encourage landowners to repatriate human remains, sacred objects and objects of cultural patrimony.

F. **Curation of Federally Owned and Administered Archaeological Collections (36 CFR Part 79)**. These regulations are to be followed by Federal agencies to preserve collections of prehistoric and historic material remains, and associated records recovered by Federal agencies in compliance with a variety of cultural resources laws. They establish:

(1) Procedures and guidelines to manage and preserve collections;
(2) Terms and conditions for Federal agencies to include in contracts, memoranda, agreements or other written instruments with repositories for curatorial services;
(3) Standards to determine when a repository has the capability to provide long-term curatorial services; and
(4) Guidelines to provide access to, loan and otherwise use collections. NRCS does not have the authority to take or manage archeological collections from private or tribal land; the landowners are responsible for arranging for such management. NRCS may assist private landowners in locating appropriate curatorial facilities for their collections.

G. **Enhancement, Protection, and Management of the Cultural Environment (7 CFR 1)**. This regulation is a short statement of policy, dating from 1984, which sets forth U.S. Department of Agriculture (USDA) general policy and procedural direction pertaining to the cultural environment.

H. **Archeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation were first published in the Federal Register, September 29, 1983 (48FR44716)**. The Standards and Guidelines were developed under the authorities of Section 101 and 110 of the National Historic Preservation Act by representatives of Federal agencies (including USDA), the National Park Service, State Historic Preservation Officers and the Advisory Council on Historic Preservation staff. They are intended to provide technical advice about archeological and historic preservation activities and methods. They cover:

1) preservation planning;
2) identification;
3) evaluation;
4) registration;
5) historical documentation;
6) architectural and engineering documentation; and
7) archeological documentation.

In addition they contain professional qualification standards and guidelines for Federal Agency Historic Preservation Programs pursuant to the National Historic Preservation Act and a glossary of historic preservation terms. Because these standards are constantly reviewed and updated, we urge users to consult the National Park Service web site: http://www.cr.nps.gov/local-law/Arch_Standards.htm#crit.

I. **The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to Section 110 of the National Historic Preservation Act (Published in Final Federal Register 24 April 1998)**. Section 110 of the National Historic Preservation Act sets out the broad historic preservation responsibilities of Federal agencies including responsibility for identifying and protecting historic properties and avoiding unnecessary damage to them. Section 110 also charges each Federal agency with the affirmative responsibility for considering projects and programs that further the purposes of the NHPA, and declares that the costs of preservation activities are eligible project costs in all undertakings conducted or assisted by a Federal agency. Federal agencies must develop, in cooperation with the Secretary of the Interior, guidelines that define the components of a sound agency historic preservation program. The guidelines emphasize that the head of each Federal agency, acting through its Federal Preservation Officer (FPO) and management, should become familiar with all the statutes, regulations and guidelines that bear upon the historic preservation program. Because these Standards and Guidelines are updated frequently, we urge users to consult the NPS web site: http://www2.cr.nps.gov/pad/sec110.htm

601.66 Summary of Executive Orders that govern NRCS' Consideration and Treatment of Cultural Resources

A. **E.O. 11593, Protection and Enhancement of the Cultural Environment (1971).** This order requires Federal agencies to take a leadership role in preservation by surveying all lands under their ownership or control and nominating to the National Register of Historic Places all properties which appear to qualify. It also requires agencies to avoid inadvertently destroying such properties during project or program development and prior to completing their inventories. Codified as part of the 1980 amendments to the National Historic Preservation Act.

B. **E.O. 12898 Environmental Justice in Minority Populations (1994).** Agencies are, to the maximum extent feasible, to avoid disproportionate adverse environmental impacts (physical, social, cultural) to low income and minority populations. This may involve avoidance of adverse effects to subsistence, cultural, historical, and natural resources of the community.

C. **E.O. 13007 American Indian Sacred Sites (May 24, 1996).** This Executive Order requires that all Executive Branch agencies that have responsibility for the management of Federal lands will provide access to and ceremonial use of Indian sacred sites by Indian religious practitioners and will avoid adversely affecting the integrity of such sacred sites where practicable, permitted by law, and not clearly inconsistent with essential agency functions. The order also requires that Federal agencies, when possible, maintain the confidentiality of sacred sites. Agencies must develop policies and procedures for avoiding physical adverse effects or blocking access to Indian sacred sites on public land. Thus, for NRCS, this relates principally to our work on other agencies' lands and abiding by their policies and procedures.

D. **E.O.13175 Consultation and Coordination with Indian Tribal Governments (November 6, 2000) replaced E.O. 13084 Consultation and Coordination with Indian Tribal Governments (1998).** Federal agencies are directed to establish meaningful consultation and collaboration with tribal officials in the development of federal policies having tribal implications, to strengthen the Administration's government-to-government relationship to tribes, and to reduce the imposition of unfunded mandates by ensuring that all Executive departments and agencies consult with tribes and respect tribal sovereignty as they develop policies on issues that impact Indian communities. Federal agencies are to respect tribal self-governance and sovereignty, tribal rights, and tribal responsibilities whenever formulating policies that may affect tribal governments by providing for meaningful and timely consultation. If policies or regulations are discretionary, agencies must provide for tribal compliance costs.

E. **E.O. 13006 Locating Federal Facilities in Historic Properties (May 21, 1996).** Calls on Federal agencies to assist in strengthening communities by encouraging them to acquire and utilize space in suitable buildings of historic, architectural, or cultural significance. he order also instructs Federal agencies to seek the assistance of the Advisory Council on Historic Preservation in identifying and removing regulatory barriers that have in the past made it difficult for agencies to acquire and use historic properties.

601.67 Resources of Scientific Value Other Than Cultural Resources

Among the resources NRCS should consider are those that contain no cultural material but are of value for other reasons. These resources include geological, paleontological, and other scientific resources of interest. A description of some of these follows.

A. Geological resources include structural features that are of local or regional significance, such as faults, folds, or discontinuities (due to erosion or interruptions in deposition). Other geological resources that may be of significance include specific mineral deposits or the occurrence of specific rock types. The mineral deposits may be scientifically important because of composition, crystallinity, structure, or mode of occurrence, and rareness or uniqueness of the occurrence. Rock types may be important as "type" locations, where the rock has been characterized to represent mappable rock formations.

B. Paleontological deposits include plant and animal fossils, which may be the original preserved organism, molds, and casts, and casts which have been completely replaced by minerals. Secondary fossils may also be of local importance, such as animal foot prints and preserved burrows. An index fossil, one that identifies and dates the stratum or succession of strata in which it is found, may also be important. A fossil may be unique because it is a rare occurrence, represents an important link in understanding the evolution of its species, or is a museum quality specimen. The rocks surrounding important paleontological sites are also significant resources, because the rocks provide information about the environment in which the ancient plants and animals lived.

C. Caves are natural underground environments as well as recreational opportunities for spelunkers and naturalists. Their access points and other attributes may be of local significance. Other landforms, for example volcanic necks, are unique in some regions, providing opportunities for scientific research or recreation. Geological exposures of rock formations may contribute to the scenic and recreational use of the landscape, such as in waterfalls and gorges.

Responsibility and procedures for handling these noncultural resources are defined in the National Engineering Manual in part 531.30. The NRCS State Geologist should be contacted for additional guidance.

601.68 Charts

A. Flow Chart of NRCS Section 106 Compliance Procedures--Reserved

B. Diagram: What Are Cultural Resources--Reserved

C. Coordinating Section 106 and NEPA Review--Reserved