

**STATE LEVEL AGREEMENT**

**RELATIVE TO CONSERVATION ASSISTANCE**

**BETWEEN**

**THE UNITED STATES DEPARTMENT  
OF AGRICULTURE**

**NATURAL RESOURCES  
CONSERVATION SERVICE**

**AND**

**THE LOUISIANA STATE HISTORIC  
PRESERVATION OFFICE**

**STATE LEVEL AGREEMENT**  
**BETWEEN**  
**THE UNITED STATES DEPARTMENT OF AGRICULTURE**  
**NATURAL RESOURCES CONSERVATION SERVICE**  
**AND**  
**THE LOUISIANA STATE HISTORIC PRESERVATION OFFICE**  
**RELATIVE TO CONSERVATION ASSISTANCE**

This agreement, entered into this 25 day of February, 2003, is between the Louisiana State Office of the U.S. Department of Agriculture's Natural Resources Conservation Service with offices at 3737 Government St., Alexandria, Louisiana (NRCS) and the Louisiana State Historic Preservation Officer (SHPO) located in the Louisiana State Capitol Annex Building, Baton Rouge, Louisiana.

**PURPOSE**

The purpose of this State Level Agreement is to tailor compliance procedures and requirements of the National Historic Preservation Act and Section 106 implementing regulations to local conditions that cannot be uniformly addressed at the national level.

**WITNESSED:**

**THAT, WHEREAS,** the NRCS, entered into an Agreement dated May 31, 2002 with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers (National Agreement); and

**WHEREAS,** the National Agreement (attached hereto as Attachment A) allows the NRCS to comply programmatically with its obligations under the National Historic Preservation Act, 16 U.S.C. 470f, (Act) and requires the NRCS to follow policies and procedures for protecting Cultural Resources set forth in the NRCS General Manual 420, Parts 401 and 601, attached hereto as Attachment B (General Manual) and specifically includes conditions under which Cultural Resources Investigations are to be conducted at the parish level NRCS offices and conditions under which this responsibility resides at the NRCS Office for the State (General Manual 420, Part 601.31; and

**WHEREAS,** the Louisiana State Historic Preservation Officer (SHPO) is appointed by the governor to administer the programs of the National Historic Preservation Act is charged with assisting federal agencies through maintenance and sharing of cultural resource inventory information and with preparation of a comprehensive statewide historic preservation plan; and

**WHEREAS,** the NRCS office for the State has consulted with the SHPO pursuant to the regulations implementing Section 106 of the Act (36 CFR Part 800); and pursuant to stipulation IV of the National Agreement and the General Manual;

**NOW, THEREFORE,** the NRCS State Office and the SHPO agree that all NRCS assistance activities in Louisiana shall be carried out in accordance with the following terms and conditions.

#### **RESPONSIBILITIES OF NRCS**

1) The Cultural Resources Coordinator is the officially designated liaison responsible for the implementation of cultural resources policy and procedures, and for the overall compliance and program activities in NRCS operations. The Cultural Resources Coordinator will consult on a case by case basis with a professional Cultural Resource Specialist (a person that meets the Secretary of Interior' standards for historic personnel) employed by the New Orleans District, Corps of Engineers to ensure that all requirements of this agreement, the National Historic Preservation Act and its amendments and the current implementing regulations for Section 106 of the NHPS are met. The roles and responsibilities of the Cultural Resource Coordinator, Cultural Resource Specialist and field personnel are outlined in Attachment C.

2) The NRCS will consult with Indian Tribes in a manner consistent with Section 101(d)(6)(B) of the Act and CFR Part 800. When mutually agreeable, NRCS will enter into a memorandum of understanding with federally recognized tribes for the purposes of implementing policies and procedures to effectively ensure that traditional cultural properties, historic properties and other cultural resources are thoroughly considered throughout all stages of natural resource conservation planning.

3) A schedule for training of field personnel on basic policy, procedures and field identification processes will be developed. Representatives from the SHPO staff and federally recognized tribes will be invited to participate in the training sessions.

4) The Louisiana NRCS will use the classification system defined in Appendix D to determine whether an assistance activity qualifies as an Undertaking. Any activity or practice that will result in a potential adverse effect to an historic property is considered an undertaking regardless of its status relative to the classification system.

5) The NRCS will follow the procedures as described in Appendix B, General Manual 420 part 601.37 "Procedures for Considering Cultural Resources During Emergency Work" for all activities under the Emergency Watershed Program.

6) The NRCS will follow public participation protocols in all assistance activities according to the National Environmental Policy Act and 36 CFR Part 800. Tribal representatives will be consulted on a case by case basis.

7) The NRCS will provide technical assistance to SHPO field staff to core and interpret soils on selected cultural resource sites.

#### **RESPONSIBILITIES OF SHPO**

- 1) The SHPO will provide the NRCS with assistance in conducting cultural resource reviews by providing Site data.
- 2) The SHPO will assist NRCS in providing cultural resource awareness training to NRCS field employees.
- 3) In cases where a site is discovered during the implementation of an NRCS assistance activity SHPO personnel will meet with NRCS personnel and consultants at the location of the discovery within 48 hours of notification subject to availability of SHPO staff.
- 4) The SHPO supervisory archaeologist is responsible for working with the NRCS cultural resources coordinator on Section 106 review and consultation procedures. The SHPO will sign all consultation correspondence and agreements with NRCS.

#### **MUTUALLY AGREED TO STIPULATIONS**

- 1) In the event of a dispute resolution between parties to this agreement, dispute resolution procedures found in the National Agreement are incorporated by reference in this Agreement.
- 2) Either party to this Agreement may terminate it upon sixty (60) days' prior written notice to the other party following conclusion of the dispute resolution process found in the National Agreement.
- 3) This document will be reviewed annually or as needed for the purpose of revising or amending its contents.

FOR THE NATURAL RESOURCES CONSERVATION SERVICE:

Donald W. Gohmert

DONALD W. GOHMERT  
State Conservationist

2/25/03  
DATE

FOR THE STATE HISTORIC PRESERVATION OFFICE

Laurel Wyckoff  
Laurel Wyckoff  
State Historic Preservation Officer

2/25/03  
DATE

**ATTACHMENT A**

NATIONAL PROGRAMATIC 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

**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<sup>1</sup> 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<sup>2</sup> pursuant to the National Historic Preservation Act of 1966 (NHPA) (16 U.S.C. 470f, 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(l).<sup>3</sup> These activities are therefore subject to review under Section 106 of the NHPA and the Council's implementing regulations; and

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,<sup>4</sup> 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 may be 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. 470f), 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 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 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 NHPA (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 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 SLA shall detail the roles and responsibilities of the trained field personnel and the professional Cultural Resources Specialist (s).

- 2) Provision for consultation with Indian Tribes consistent with Section 101(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 110(j) of the NHPA and its implementing regulations found at 36 CFR Part 78.<sup>5</sup> 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.

## 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)(1)), 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).
- 5) Timeframes for responses to requests for consultation.
- 6) A schedule for training of field personnel on basic NRCS policy. The NRCS 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 CONSULTATION PROTOCOLS

If for any reason a NRCS State Conservationist determines it is not possible to establish an agreement with the SHPO 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."

#### 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, independently by the agricultural producer<sup>6</sup> 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, wetlands determinations, determinations of highly erodible land, certification of the existence of a wetland or highly erodible land, determination of prime and unique farmland, and the like;
- 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)(1)). 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, 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. MONITORING.**

The NRCS (National Headquarters and State Offices) will inform the NCSHPO, 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 93-296). 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.

## 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 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

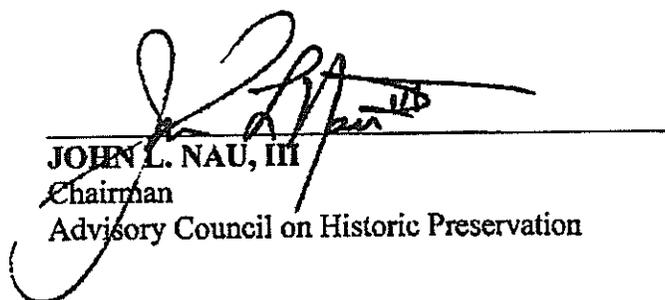
This agreement shall expire ten years from the date of execution. This agreement is dependent upon biennial (every other year) consultation among the signatories to review the adequacy of implementation of the Agreement.

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.

Signatories:

  
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**BRUCE I. KNIGHT**  
Chief  
Natural Resources Conservation Service

5/7/02  
DATE

  
\_\_\_\_\_  
**JOHN L. NAU, III**  
Chairman  
Advisory Council on Historic Preservation

May 31, 2002  
DATE

  
\_\_\_\_\_  
**EDWARD F. SANDERSON**  
President  
National Conference of State Historic  
Preservation Officers

May 16, 2002  
DATE

## ENDNOTES

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<sup>1</sup> 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)(1) defines signatories who have the sole authority to execute, amend or terminate a memorandum of agreement that defines resolution of adverse effects.

<sup>2</sup> 36 CFR Part 800.16(y) 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."

<sup>3</sup> 36 CFR 800.16(l)(1) 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(l)(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.

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

<sup>5</sup> 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(j) 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 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

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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.

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

**ATTACHMENT B**

UNITED STATES DEPARTMENT OF AGRICULTURE  
NATURAL RESOURCES CONSERVATION SERVICE

GENERAL MANUAL 420

PARTS 401 AND 601,

**PART 401 - CULTURAL RESOURCES (ARCHEOLOGICAL AND HISTORIC PROPERTIES)**

**SUBPART A - GENERAL**

401.1 (j)

**401.0 Purpose.**

This part establishes Natural Resources Conservation Service (NRCS) policy for: 1) the consideration of cultural resources (historical, archeological, architectural, and traditional cultural properties); and 2) sets forth the minimum requirements for the implementation of historic preservation legislation, executive orders, regulations, and guidelines that pertain to the consideration of cultural resources.

**401.1 Authorities for Considering Cultural Resources.**

The policy in Part 401 is based on and implements the following laws, regulations, Presidential directives, guidance, and training programs prepared under legal mandate.

(a) Antiquities Act of 1906 (P.L. 59-209, 34 Stat. 225, 16 U.S.C. 435, et seq.).

(b) Historic Sites Act of 1935 (P.L. 74-292, 49 Stat. 666, 16 U.S.C. 461, et seq.).

(c) Reservoir Salvage Act of 1960 (P.L. 86-523, 74 Stat. 220, as amended; 16 U.S.C. 469; et seq.).

(d) National Historic Preservation Act of 1966 (NHPA) (P.L. 89-665, 80 Stat. 915, as amended; 16 U.S.C. 470; et seq.).

(e) National Environmental Policy Act of 1969 (NEPA) (P.L. 91-190, 83 Stat. 852, 42 U.S.C. 4321, et seq.).

(f) Archaeological Resources Protection Act of 1979 (ARPA) (P.L. 96-95, 93 Stat. 721, as amended; 16 U.S.C. 470a; et seq.).

(g) Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) (P.L. 101-601, 25 U.S.C. 3001).

(h) Executive Order 11593 (36 CFR 8921), "Protection and Enhancement of the Cultural Environment," May 13, 1971.

(i) Archeological and Historic Preservation Act of 1974 (P.L. 93 291, 88 Stat. 174, 16 U.S.C. 469a, et seq.).

(j) American Indian Religious Freedom Act of 1978 (AIRFA) (P.L. 95-341, 92 Stat. 469, 42 U.S.C. 1996).

401.1(k)

- (k) National Register of Historic Places (NRHP) (36 CFR 60).
- (l) Protection of Historic and Cultural Properties (36 CFR 800).
- (m) Archeology and Historic Preservation, Secretary of the Interior's Standards and Guidelines (48FR44716).
- (n) National Cultural Resources Training Program, National Employee Development Staff, Natural Resources Conservation Service, USDA.

401.2 Definitions.

(a) **Adverse Effect** is the reduction in the characteristics that make an historic property eligible for the National Register of Historic Places. This is evidenced by diminishing the integrity of the location, design, setting, materials, workmanship, association, or other qualities that are important to defining the significance of the historic property.

(b) **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).

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

(d) **Cultural Resources** are the traces of all of the past activities and accomplishments of people. They 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 lifeways.

These same resources may also be: (1) resources that have little or no significance; (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.

(e) **Cultural Resources Investigation** is a general term including all types and levels of work to identify and evaluate cultural resources and those used in mitigating adverse effects to historic properties.

(f) **Cultural Resources Review** is an examination of current information to determine the likelihood that cultural resources are, or may be, present in an area that may be impacted by an NRCS undertaking. This review includes checking the current National Register of Historic Places, as well as equivalent state level registers, 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. The review is conducted by a cultural resources specialist or NRCS personnel who have completed the required cultural resources training.

(g) **Cultural Resources Coordinator** is the officially designated liaison responsible for the implementation of cultural resources policy and procedures, and for the overall compliance and program activities in NRCS operations.

(h) **Cultural Resources Specialist** is a professional (Federal or nonfederal) who meets the education and experience requirements of the Secretary of the Interior's Standards and Guidelines in the disciplines of history, cultural anthropology, archeology, architectural history, historic architecture, or other related fields.

(i) **Discovery During Implementation** is the unanticipated occurrence of a cultural resource after compliance with this part. Such a discovery includes the occurrence of previously unevaluated information, data, materials, or an unanticipated effect to known historic properties or cultural resources at any time that may have a bearing on the protection of said historic properties or cultural resources.

(j) **Discovery Plan** is a document outlining the actions of NRCS and the State Historic Preservation Office in the event of a discovery. Discovery plans may be general, establishing administrative processes, or specific to a single undertaking or group or class of undertakings. In certain cases, the Advisory Council on Historic Preservation and/or the Departmental Consulting Archeologist may be parties to such a plan.

401.2(k)

(k) **Effect** is any change, beneficial or adverse, in the quality of the significant historic, architectural, or archeological characteristics of the property. Effects are determined by applying the ACHP "Criteria of Effect."

(l) **Emergency Work** is conducted according to the regulations outlined by the NRCS Emergency Watershed Protection (EWP) Program. Technical and financial assistance are provided when a natural occurrence causes an imminent threat to life or property by sudden impairment of and damage to a watershed. Emergency work is performed under two categories - exigency and nonexigency situations. **Exigency** is defined as an immediate threat of damage to life or property. **Nonexigency** is defined as the near-term probability of damage to life or property high enough to constitute a continued hazard but not an immediate threat to life or property. [See National Watershed Manual, 509.4(e)].

(m) **Evaluation** is the process of applying NRHP criteria in an historic context to determine the significance of a cultural resource.

(n) **Field Inspection** is an examination of the area that may be impacted by an undertaking and is designed to physically locate and document the presence of cultural resources. The inspection is conducted by either a cultural resources specialist or NRCS personnel who have completed required cultural resources training. The scope of the inspection is generally small and is normally used on farm or ranch fields or conservation treatment areas.

(o) **Historic Property** is any prehistoric or historic district, site, building, structure, or object, included on, or eligible for inclusion on the National Register including artifacts, records, and material remains related to such a property or resource.

(p) **Identification** is a process of using specific methods or techniques to locate and describe cultural resources.

(q) **Impacts** is a set of effects that changes the qualities of a cultural resource characteristic.

(r) **Indian Lands** are those lands held in trust for federally recognized Indian groups (allotment land) and those lands administered by a recognized Indian group, Native Hawaiian, or Alaskan Native.

(s) **Indian Tribe** is any tribe, band, nation, or other organized group or community of Indians including any Alaska Native Village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act), which is recognized as

eligible for the special programs and services provided by the United States to Indians.

(t) **Interested Party** is any individual or organization concerned with the impacts of an undertaking on cultural resources or effects on historic properties.

(u) **Knowledgeable Individuals** are those individuals (or groups) who have special knowledge about and interest in the history and culture of the area to be studied. In the case of traditional cultural properties, this means those individuals and groups who may ascribe traditional cultural significance to locations within the study area and those who may have knowledge of such individuals and groups.

(v) **Lead Agency** is the agency with legislated responsibility or designated Departmental authority to administer public lands or Federal programs that provide financial or technical assistance.

(w) **Mitigation** refers to actions which lessen or eliminate the adverse effects of undertakings on historic properties. These actions may include: 1) minimizing the effect by limiting the degree or magnitude of the undertaking (avoidance); 2) rectifying the effects by repairing, rehabilitating, or restoring the affected historic properties; 3) preservation and maintenance operations during the life of the action; and 4) compensating for the effect by moving or documenting the historic property or conducting data recovery.

(x) **National Register Criteria** are the criteria established by the Secretary of the Interior for use in evaluating the eligibility of cultural resources for inclusion on the National Register of Historic Places, published at 36 CFR 60.

(y) **National Register of Historic Places (NRHP)** is the official list of districts, sites, buildings, structures, and objects which meet the NRHP criteria for evaluation and are worthy of preservation because of their significance.

(z) **Native American** includes and refers to all tribes, peoples, or cultures that are indigenous to the United States. This includes Indian Tribes; Hawaiians, who are descendants of aboriginal people occupying the State of Hawaii prior to 1778; and Alaska Natives recognized pursuant to the Alaska Native Claims Settlement Act of 1971.

(aa) **Operating Plan** for cultural resources is a document that contains an interim compliance process as well as a set of objectives for gathering information on issues on which NRCS and

401.2(aa)

SHPO cannot reach agreement. The operating plan is only a temporary supplement to national policy since the basic goal of the plan is to develop data that will be used to settle outstanding issues and reach state-level agreement. The document should be in narrative form and should clearly define the issues. It should contain action items that are specific and measurable, and the completion point of each action item should be clearly defined. A suggested format for the operating plan is that used for NRCS plan of operations. The operating plan and summary results will be used at annual NRCS/SHPO meetings and for agency reviews by the ACHP.

(bb) **Participant** is any landowner, cooperater, or project sponsor that receives NRCS assistance.

(cc) **Public Benefits** are the advantages to society from the social, economic, cultural, sociocultural, or educational aspects of an undertaking.

(dd) **Section 106 Process** is the action that implements the section of the National Historic Preservation Act of 1966, as amended, requiring Federal Agencies to take into account the effects of their undertakings and provide the Advisory Council on Historic Preservation an opportunity to comment on any Federal undertaking that may effect a cultural resource that meets the National Register of Historic Places criteria.

(ee) **Section 110 Guidelines** are guidelines issued by the Secretary of the Interior under authority of Section 101(g) of the National Historic Preservation Act (NHPA, P.L. 89-665, as amended) to be implemented by Federal agencies for establishing, monitoring, reviewing, and evaluating their historic preservation program. The historic preservation program of the Federal agency should incorporate the provisions of other revelant statutes, such as AIRFA, ARPA, and NAGPRA. State Historic Preservation Officers (SHPO) refer to the guidelines when providing assistance to Federal agencies under Section 101(b)(3) of the Act. The Advisory Council on Historic Preservation (ACHP) and SHPOs use the guidelines in agreements executed pursuant to Section 106 of the Act and the regulations of the ACHP (36 CFR 800). The guidelines are used in conjunction with the Secretary's Standards and Guidelines to develop and carry out historic preservation projects. Published as "The Section 110 Guidelines; Annotated Guidelines for Federal Agency Responsibilities under Section 110 of the National Historic Preservation Act (53 FR 4727)."

(ff) **Significance** is used to describe any cultual resource that, for the purpose of NHPA upon evaluation is concluded to meet the NRHP criteria for evaluation, and/or statutes such as AIRFA, NAGPRA, ARPA.

(gg) **NRCS Assistance Activity** is any action planned or carried out with technical or financial assistance from NRCS.

(hh) **Site** is the location of an event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, or vanished, where the location itself maintains historical, cultural, or archeological value regardless of the value of any existing structures. Examples are battlefields, historic campgrounds, ancient trails or gathering places, deposits of cultural debris, and historic farms.

(ii) **State Historic Preservation Officer (SHPO)** is the official who is responsible for administering the NHPA within the State or jurisdiction and is appointed pursuant to Section 101(b)(1) of the NHPA, as amended, or is a designated representative authorized to act for the SHPO.

(jj) **Traditional Cultural Properties (TCPs)** are properties associated with cultural practices or beliefs of a living community that are rooted in the community's history and are important in maintaining the continuing cultural identity of the community. TCPs may be determined eligible for the National Register of Historic Places, and as such, are considered under the Section 106 process.

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

(ll) **Undertaking** is any project, activity, or program under the direct or indirect jurisdiction of a Federal agency 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. It includes any project, activity or program that: 1) is carried out by or on behalf of the agency; 2) is financed in whole or in part with Federal financial assistance; 3) requires a Federal permit, license, or approval, including agency authority to disapprove or veto the project, activity, or program; or 4) is subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency. Undertakings include new and continuing projects, technical assistance related to the provision of Federal financial assistance, activities, or programs, renewals or reapprovals of such assistance, activities, or programs, and any of their elements not previously considered under Section 106.

401.3

**401.3 Applicability and Exceptions.**

This part applies to all NRCS programs and activities that may impact cultural resources or may affect historic properties through policies, procedures, or service to the agency's diverse clients. If any NRCS action may have an adverse effect, regardless of the program with which the action is associated, NRCS cultural resources policy and procedures will be followed to fully consider those effects. Under terms of a national Programmatic Agreement,

(a) Certain forms of NRCS technical assistance will not result in any change to cultural resources or are provided as information at the request and subsequent control of the landowner. This assistance is not considered an undertaking. Such assistance may include, but is not limited to providing basic information on soil and water conservation and general planning assistance of a districtwide or similar nature. In addition, the following program activities are not considered an undertaking:

(1) National Resources Inventory, water supply forecasts, snow and range surveys, wetlands inventories, and other forms of nonintrusive resource data collection;

(2) National Cooperative Soil Survey program activities, except for field investigation soil pits that are considered undertakings.

(b) Individual conservation practices may be categorized at different levels of effect based upon standard installation criteria set forth in the NRCS National Handbook of Conservation Practices. These include:

(1) Practices that are automatically considered because of their potential to affect cultural resources, as listed in Subpart D, 401.40.

(2) Practices that are considered except when installation conditions are nonintrusive, i.e., does not exceed the depth of plowzone or prior disturbance, as listed in Subpart D, 401.41.

(3) Practices that are not considered because they are primarily management related as listed in Subpart D, 401.42.

Current NRCS conservation practices are listed in Subpart D, Appendix under each of the above categories. For practices that are new, not listed, installed differently due to local criteria or conditions, or that involve resources of a special type or

class that may be affected by practices being considered, NRCS will consult with SHPO on placement into one of the above categories.

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.

SUBPART B - ADMINISTRATIVE RESPONSIBILITIES

401.11 (b) (1)

401.10 General Agency Responsibilities.

The Natural Resources Conservation Service is responsible for the identification and evaluation of cultural resources and the protection of historic properties affected by NRCS undertakings on nonfederal lands. In addition, NRCS will manage the cultural resources under its jurisdiction (owned or leased) in an effort to protect, preserve, rehabilitate, restore, and maintain them.

401.11 Lead Agency Responsibilities.

The Natural Resources Conservation Service is responsible for cultural resources compliance in all actions where NRCS is considered the lead agency, i.e., where NRCS has legislated responsibility or designated Departmental authority to administer specific Federal programs or when providing to nonfederal participants direct, single agency actions of technical and/or financial assistance that may effect cultural resources.

On Federal or State lands managed by other agencies or participation in multiagency projects, the lack of lead agency status does not abrogate NRCS responsibility to ensure that cultural resources are adequately protected. NRCS shall request copies of or verification that the lead agency involved has met the cultural resources compliance requirements.

(a) When NRCS provides cooperative conservation technical assistance to other agency programs or projects:

(1) NRCS may provide preliminary information, i.e., cultural resources identification and the recommended conservation alternatives, to the lead agency and participants either separated from or as part of the NRCS environmental evaluation performed for conservation practices that constitute undertakings.

(2) The lead agency's failure to comply with cultural resources compliance requirements may result in NRCS withdrawal from the action.

(b) NRCS may provide additional cultural resources assistance to another agency by assuming technical responsibilities for cultural resources compliance work when:

(1) A formal, written agreement has been executed between NRCS and the agency. The agreement must have the concurrence of the SHPO and ACHP, should reference policy and procedures to be used, and identify specific cultural resources compliance actions that NRCS will undertake, and

401.11 (b) (2)

(2) Stipulate the amount of resources or funds to be transferred for NRCS to carry out the cultural resources compliance work.

**401.12 NRCS Personnel Responsibilities.**

(a) **Chief.** The NRCS Chief is the responsible Federal official for implementing historic preservation legislation, protecting historic properties in NRCS soil and water conservation programs, signing documents allowing adverse effects on historic properties when the agency and other consulting parties fail to agree on the terms of mitigation, and providing historic properties information, guidance, and education programs for NRCS personnel and interested participants. The NRCS Chief shall designate a Federal Preservation Officer for the agency in accordance with Section 110(c) of NHPA.

(b) **Federal Preservation Officer.** The Preservation Officer is responsible for developing and coordinating the overall cultural resources program of the agency and providing policy advice to the Chief, the National Headquarter's Divisions, the natural resource disciplines, and NRCS offices.

(c) **State Conservationist.** Within each State or basin territory, the NRCS State Conservationist is the responsible Federal official for cultural resources compliance and the protection of historic properties in all NRCS activities. The State Conservationist shall designate a Cultural Resources Coordinator to carry out the cultural resources program, and will ensure that the State office has on staff or has regular and continuing access to a qualified Cultural Resources Specialist.

(d) **Cultural Resources Coordinator (CRC).** The person is officially designated by the State Conservationist to act as a liaison responsible for the daily functioning of the cultural resources program. The CRC serves as the knowledgeable liaison among NRCS, SHPO, ACHP, and historic preservation professionals and provides assistance and information to the field offices. The responsibilities of the CRC are described in Subpart D, Appendix. Because of their duties, all CRCs receive advanced training in cultural resources management and law.

(e) **Area and District Conservationists.** Within each area and district, the persons responsible for ensuring that the provisions of this part are implemented in their areas and offices. If appropriate, Area and District Cultural Resources Coordinators may be designated to facilitate assistance and interact with the State Coordinator.

(f) **Cultural Resources Specialists (CRS).** These are individuals who meet the minimum education and experience requirements for the Secretary of the Interior (SOI) Standards and Guidelines and are responsible for providing policy and procedural guidance for considering and managing cultural resources and historic properties, including oversight and quality control or assurance. They also conduct cultural resources investigations, evaluations, and develop treatment plans for mitigation.

**401.13 Advisory Council on Historic Preservation (ACHP) Responsibilities.**

The ACHP is an independent Federal agency established by Title II of the National Historic Preservation Act to advise the President and Congress on historic preservation matters. Among other things, the Council administers implementation of Section 106 of the National Historic Preservation Act through its regulations (36 CFR 800). The law directs Federal agencies to "take into account" the effects of their undertakings on properties listed in or eligible for inclusion in the National Register of Historic Places and to afford the Council a reasonable opportunity to comment with regard to such undertakings. The Council will provide technical advice and assistance to NRCS and SHPOs, monitor activities, participate in formal review and consultation, and help ensure that members of the public and other interested parties are provided an opportunity to participate in the planning, consultation, and decision-making process.

**401.14 State Historic Preservation Officer (SHPO) Responsibilities.**

The State Official appointed by the Governor to administer the programs of the National Historic Preservation Act for that State. The SHPO is charged to:

(a) In cooperation with Federal and State agencies, local governments, and private organizations and individuals, direct and conduct a comprehensive statewide survey of historic properties and maintain inventories of such properties;

(b) Identify and nominate eligible properties to the National Register and otherwise administer applications for listing historic properties on the National Register;

(c) Prepare and implement a comprehensive statewide historic preservation plan;

401.14(d)

(d) Administer the State program of Federal assistance for historic preservation within the State;

(e) Advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;

(f) Cooperate with the Secretary of the Interior, the Advisory Council on Historic Preservation, and other Federal and State agencies, local governments, and organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning;

(g) Provide public information, and education and training, and technical assistance in historic preservation;

## SUBPART C - POLICY

401.20(d)

## 401.20 General Policy.

The Natural Resources Conservation Service (NRCS) provides assistance to protect, maintain, and improve, soil, water, air, plant, and animal resources. Social, cultural, and economic considerations are a part of this assistance. NRCS recognizes that cultural resources are an integral part of our national heritage and recognizes its responsibilities for historic preservation, particularly as they are listed in the National Historic Preservation Act. NRCS will ensure that cultural resources are considered in all NRCS actions and programs. Furthermore, the conservation ethic of NRCS is in harmony with the requirements of Sections 110 and 112 of NHPA. Those sections mandate and authorize each Federal agency to develop a preservation program and become an active partner (beyond Section 106 compliance) in the stewardship of our Nation's cultural resources. Under the provisions of those sections, NRCS will promote the conservation and protection of cultural resources.

(a) NRCS will identify and protect cultural resources early in the planning and environmental evaluation processes of all assistance activities classified as an undertaking.

(b) NRCS will protect cultural resources in their original location to the fullest extent practicable by avoiding adverse impacts. If avoidance is not feasible, NRCS will determine significance in consultation with the SHPO. If the effect of an undertaking is determined in consultation with the SHPO to be adverse on historic properties, NRCS, in further consultation with SHPO, participants, Native Americans, the ACHP, and other interested parties, as appropriate, will develop appropriate mitigation measures before completing the assistance or beginning the construction phase of implementation.

(c) NRCS will consider cultural resources that may be significant for reasons in addition to or apart from authorities such as section 106 of the NHPA. When such resources (e.g. traditional cultural properties (TCP), traditional cultural values, landscape, or features having religious importance) may be impacted, NRCS will consult with concerned parties to determine what practices or treatments, if any, are acceptable to the concerned parties and will document the outcome of such consultation according to the statutes and authorities under which they are considered.

(d) If conflicts over acceptable treatment or mitigation cannot be resolved to the satisfaction of all concerned parties, NRCS will determine if continued assistance is warranted after

401.20(d)

completing appropriate Section 106 compliance requirements of this part.

(e) NRCS will inform participants about the importance of the cultural environment and provide information on opportunities to enhance the understanding of the Nation's heritage.

401.21 Considering Cultural Resources in NRCS Undertakings.

Under a national Programmatic Agreement (PA), NRCS will fulfill NHPA Section 106 requirements in accordance with the policy and procedures set forth in Parts 401 and 601 with a streamlined process for conservation technical assistance and other activities that are primarily delivered at the NRCS Field Office level. The PA, as allowed under 36 CFR 800.3(b) regulations, is appropriate for technical assistance and advice on the delivery of small-scale conservation practices on private property to diverse landowners who are dependent upon timely assistance in the production of agricultural commodities. The remainder of NRCS responsibilities for compliance with Section 106 and Sections 110 (f) and (k) of NHPA will be met by processes consistent with ACHP regulations (36 CFR 800).

(a) NRCS will determine whether the assistance requested is an undertaking. In all undertakings NRCS will consider the potential effects on cultural resources.

(b) Cultural resources investigations will begin as early in the planning as practical to identify and define which historic properties or other important cultural resources require additional consideration.

(c) Identification of cultural resources will be conducted by qualified Cultural Resources Specialists (CRS) or trained NRCS personnel in consultation with knowledgeable individuals to the appropriate procedures and standards detailed in the NRCS Cultural Resources Handbook and state agreements.

(d) The nature of the resources and planning authority will determine the identification level of cultural resources investigations:

(1) When the conservation planning authority or approval is at the Field Office level, NRCS personnel certified in the National Cultural Resources Training Program may be responsible for completing compliance requirements for Cultural Resources Reviews and Field Inspection.

(2) When the planning authority or approval is above the NRCS Field Office level, or when complex resource inventories

require area, state, or NTC assistance to Field Offices, a CRS will be involved in reviewing the results of identification.

(e) If identified cultural resources cannot be avoided and may be affected by a proposed undertaking, an evaluation of significance will be conducted by a CRS in consultation with the SHPO. If NRCS and the SHPO cannot agree on whether such cultural resources are eligible by National Register Criteria as an historic property, then the Keeper of the National Register of the National Park Service will be asked to render a final decision.

#### 401.22 Funding for Cultural Resources Compliance.

NRCS considers cultural resources as nonrenewable resources of cultural, scientific, educational, esthetic, inspirational, economic, and energy value that are in the public interest, and that the associated costs of protection and compliance with Section 106 result in a public benefit.

(a) NRCS may include the costs of cultural resources compliance activities as eligible costs in all undertakings. These costs may also include amounts paid by a Federal agency to any State, municipal entity, or participant to be used in carrying out preservation compliance responsibilities.

(b) For individual cooperators and small scale projects financed chiefly through grants and other funding sources, cultural resources compliance activities and associated costs may be delegated to the participant as a condition to the application for assistance.

(1) Since it is the responsibility of NRCS or the lead agency to avoid adverse effects, and because of the public benefit involved, the costs of evaluation and/or mitigation of significant cultural resources that have been identified are the responsibility of the Federal agency; however,

(2) If prior agreements or budget constraints do not allow NRCS to bear the full costs of compliance (evaluation or mitigation), then arrangements with the participant should be made to cover compliance activities and associated costs prior to the installation of the undertaking.

(c) If an unanticipated cultural resource is discovered after commencing construction, NRCS will request that the landowner or sponsor direct that actions affecting the resource be halted in the area containing the resources being affected and notify the Contracting Officer immediately. NRCS will bear the costs and liabilities of compliance responsibilities unless

401.22 (c)

otherwise provided under the terms of the contracts and agreements with contractors, sponsors, and cooperators to which NRCS is a party.

401.23 Requesting Assistance.

(a) NRCS will request cultural resources assistance or information from SHPOs, (particularly when a State Historic Preservation Plan is incomplete), NPS, ACHP, NRCS participants, and other agencies, cultural resources professionals, organizations, public interest groups, and knowledgeable individuals as needed or appropriate.

(b) NRCS field personnel shall request assistance from the designated Cultural Resources Coordinator or Specialist on policy, procedure, significance, effects, or situations involving a cultural resource that is not explicitly covered in this part.

401.24 Training and Certification.

NRCS will provide training and informational materials to field personnel and other interested parties for the consideration of cultural resources. All NRCS employees responsible for planning or implementing NRCS programs will complete the training to the level designated in the Leader's Guide for the NRCS National Cultural Resources Training program. Additional training may be required to ensure maximum consideration of historic properties in the performance of official duties. Further guidance on standards for employee training and certification are listed in the Cultural Resources Handbook.

401.25 Adverse Effects.

If adverse effects to an historic property in the APE cannot be avoided and mitigation alternatives cannot be implemented, NRCS will consider:

(a) The withdrawal of assistance from the specific undertaking in the APE; or,

(b) Proceeding with the adverse effects due to special circumstances or overriding participant concerns. NRCS will follow ACHP regulations (36 CFR 800) and NRCS Cultural Resources Handbook procedures in completing the Section 106 process and documenting the case for a final determination by the NRCS Chief or delegated representative.

**401.26 Withdrawal of NRCS Assistance.**

(a) NRCS may elect to withdraw assistance from a participant when it is determined by the State Conservationist that the cost or other factors involved with cultural resource compliance jeopardize the feasibility of an undertaking.

(b) NRCS shall consider withdrawing assistance if a participant, after application to NRCS:

(1) Carries out an irreversible action associated with requested technical assistance that adversely impacts a cultural resource prior to completion of NRCS compliance responsibilities, or

(2) Refuses to implement a recommended mitigation plan.

(c) Pursuant to Section 110(k) of the NHPA, NRCS will not provide assistance to a participant, who, after notification by the NRCS of the existence of an historic property within the Area of Potential Effect, with intent to avoid Section 106 requirements, has intentionally, significantly, or adversely affected an historic property to which the assistance would relate or having legal power to prevent it, allowed such significant adverse effect to occur. However, after consultation with the ACHP, NRCS can determine that circumstances justify granting such assistance despite the adverse effect created or permitted by the participant.

(d) All NRCS actions pertaining to the withdrawal of assistance because of cultural resources should be fully documented. This should include the participant's receipt of notice of significance or potential NRHP eligibility of an inventoried cultural resource prior to withdrawal actions. Upon NRCS withdrawal of assistance, the participant shall be notified in writing with accompanying reasons for such withdrawal.

**401.27 Emergency Work.**

This section considers cultural resources affected by emergency work carried out by NRCS in the Emergency Watershed Program. The guiding principle in NRCS emergency policy is that the preservation of human life and property is a priority concern. The NRCS program of exigency and nonexigency emergency work will take into account effects on cultural resources to the fullest extent practicable. The procedural framework for NRCS emergency actions listed in Part 601.37 is an attempt to reconcile the variable directives contained in the NRCS National Watershed Manual (7 CFR 624) and 36 CFR 800.12. The State

401.27

Conservationist may elect to either follow NRCS procedures (and those derived under state agreements); ACHP regulations; or have the NRCS Chief or designee request an emergency waiver under 36 CFR 78 as an alternative for dealing with disasters of major scale. In this case NRCS will either develop an appropriate plan consistent with 36 CFR Part 78 or execute a programmatic agreement with ACHP for considering historic properties.

**401.28 Construction Discovery.**

When other pertinent procedures of this part have been completed and a previously unknown resource is discovered, an unevaluated resource will be affected, or it is determined that historic properties will be affected in a previously unanticipated manner by the Federal undertaking, NRCS will protect the resource from further damage to the fullest extent possible and follow procedures for discoveries in the Cultural Resources Handbook.

**401.29 Access to Cultural Resources Specialists.**

Each State office will have available on its staff or have regular and continuing access to a qualified Cultural Resources Specialist. Regular and continuing access is defined as being able to obtain expert advice and opinion from an assigned specialist to ensure that conservation technical assistance is not delayed and that cultural resources are not adversely impacted. Ways of obtaining specialists and their duties are listed in Subpart D Appendix.

**401.30 Deferring Identification and Evaluation of Cultural Resources.**

(a) When it is not possible or practicable to conduct detailed identification and evaluation activities during the planning phase of the project or undertaking, NRCS will conduct a Cultural Resources Review, summarize the results, and incorporate them into planning and environmental documents.

(b) NRCS shall then complete any deferred cultural resources responsibilities early in the installation phase and well ahead of construction. The decision to defer identification and evaluation should only be made as an exception. And the reasons for deferring the decision should be fully documented. In order to avoid costly construction delays, such a decision should only be made after considering the following:

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(1) The engineering and economic impact of moving or redesigning structures, or changing practices to avoid adverse effects to cultural resources. If these impacts are not acceptable then the identification and evaluation should be conducted during planning.

(2) The installation schedule and timing. The shorter the installation period the more important it is to identify cultural resources during planning, in order to avoid delays resulting from identifying unanticipated resources.

(3) The frequency and kind of cultural resources likely to be found in the APE. If high concentrations of diverse cultural resources occur, or are likely to occur, then the identification and evaluation must be conducted during planning.

#### 401.31 Compliance Documentation and Reporting Cultural Resources.

(a) Compliance Documentation. For the purposes of management continuity, monitoring, and reduction of work duplication, all NRCS field offices will keep records of their cultural resources decisions, including supporting data. A record of all cultural resources agreements and communications with SHPO, ACHP, participants, or other relevant parties concerning NRCS undertakings should be maintained at the State office.

(b) Reporting. NRCS will report on cultural resources found within the APE to the SHPO. The amount, content, and frequency of reporting such cultural resources information for the APE shall be determined in consultation with the SHPO and incorporate any requirements of state law, resource security, and private property concerns.

(c) When the authority or approval for an undertaking is above the Field Office level, NRCS shall document compliance and report all cultural resources in accordance with SHPO requirements for Federal agencies, or by separate agreements.

(d) When the authority or approval for an undertaking resides at the Field Office level, NRCS shall document and report cultural resources in the following manner:

(1) Cultural resources identified outside the APE may be documented either in the NRCS Field Office cultural resources file or with the SHPO. This documentation is not required but is encouraged in order to facilitate decisions regarding cultural resources and avoid the duplication of identification efforts.

401.31(d)(2)

(2) If a cultural resource within the APE can be avoided, it shall be documented with notification to the SHPO and landowner as to the effect and placement relative to the conservation practice installation. If no response from the SHPO is received within 15 days, NRCS will continue assistance.

(i) NRCS may request shorter SHPO review periods on an individual basis. This may be done with justification or through state-level agreements.

(ii) A waiver in all or part of the notification requirements for avoiding cultural resources in the APE may take place when NRCS and the SHPO have established agreement on an alternative system of reporting cultural resources and when a CRS is involved in preparing avoidance measures.

(3) NRCS will work with SHPOs and participants to alleviate mutual concerns on the use and security of cultural resources information reported. If the NRCS State office and the SHPO cannot agree on disclosure parameters for site reports, then the NRCS Chief or delegated representative shall make a final determination in consultation with the Advisory Council and Secretary of the Interior.

**401.32 Access To Data and Reports.**

When conducting cultural resources investigations, NRCS will collect, acquire, and generate the necessary information related to those resources. All cultural resources data and information resulting from agency assistance activities become the property of NRCS. Cultural resources locational data shall be restricted from public access in order to protect the resource and the property upon which it is located.

NRCS will prepare and distribute reports on cultural resources activities for compliance purposes and public benefit, including an Annual Report to Congress on cultural resources activities of the agency.

**401.33 Agreements and Supplements for Cultural Resources Activities.**

NRCS will continue to develop more efficient and effective means for implementing the agency's responsibilities for cultural resources and to promote stewardship of cultural resources through NRCS programs. Agreements clarify roles, expedite the compliance process, speed delivery of NRCS assistance, and promote protection and conservation of resources. Agreements may

be international, national, multistate, or specific to each state for individual or multiple undertakings.

Each State Conservationist shall negotiate a state-level agreement subordinate to this part with the State Historic Preservation Officer according to the guidelines found in Subpart D, Appendix 401.65. Supplements to this part are to be issued to implement the state agreements.

When any items listed for discussion under state agreements cannot be negotiated with the SHPO to form a complete supplemental document to this part, the State Conservationist shall conclude an agreement on the items for which there is agreement with the SHPO. For items not agreed to, an annual operating plan will be negotiated and initiated by NRCS to enact measures that will address the remaining issues and lead to agreement.

#### 401.34 Ethical Conduct on the Collection and Use of Information.

During cultural resources investigations, NRCS employees are required to conduct themselves in a professional manner, i.e., using cultural resources objects and information as follows:

(a) NRCS employees will not collect artifacts while on official duty except when directed by a specialist or as defined in state supplements or agreements with the SHPO and with permission of the participant or Federal/state land manager.

(b) NRCS employees shall use cultural resources information gained on the job only for official purposes or professional study. They will follow policy for reporting and confidentiality in parts concerning access to data and in state agreements.

#### 401.35 Ownership and Curation of Artifacts.

(a) When archeological or historic material remains are recovered during the course of NRCS activities on Federal or Indian lands, recovered materials are the property of the agency or group having jurisdiction over those lands. When such materials are recovered from lands administered by a state or municipal agency or other public entity, the recovered materials are the property of that agency or entity. When archeological or historic material remains are recovered from privately owned lands (nonfederal, and/or not tribally owned), recovered materials are the property of the landowner(s) unless state or local laws require otherwise. Curation of materials from Federal, Indian, state, or municipally administered lands, and

401.35(a)

privately owned lands is the responsibility of that agency, entity, group, or landowner(s). NRCS will encourage the owner of recovered artifacts having research value to donate them to an appropriate institution or curatorial facility. NRCS will provide assistance, upon request from a cooperating entity, agency, or individual, in coordinating curatorial arrangements with an appropriate facility.

(b) On lands owned, managed, leased, or otherwise directly controlled by NRCS (such as Plant Materials Centers), NRCS is responsible for the curation of recovered cultural materials relevant to the significance of an historic property. All recovered materials and records will be curated at appropriate State or Federal curatorial facilities to the standards found in 36 CFR 79.

(c) If materials are recovered during the course of an NRCS sponsored or assisted data recovery effort, the NRCS will ensure that appropriate analyses of all recovered materials are done prior to returning them to the owners. Associated records that are prepared or assembled in connection with a federally authorized cultural resources survey, excavation, or other study, regardless of the location of the resource, become the property of the lead Federal agency.

(d) Treatment of burials and other human remains will follow the process(es) outlined in individual NRCS state agreements or as required by Federal, state, or local law. All Native American remains recovered by NRCS that are traceable to existing, known, or recognized Indian tribes will be inventoried. Notification of and copies of all inventories will be made available to such tribes for possible repatriation, as appropriate to NAGPRA regulations.

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

### **601.30 Introduction**

Cultural resources take many forms and a resource may require specific treatment by SCS based on: 1) the resource type, 2) the location of the resource, and/or 3) the law (or laws) which protect it. 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, the major pieces of legislation affects how a resource is treated. The major pieces of legislation are the National Historic Preservation Act, The American Indian Religious Freedom Act, the Archeological Resources Protection Act, State counterparts to these regulations, and individual state mortuary law.

While all of these factors have the potential to make the cultural resources procedures quite complicated, the organization of the sections under Subpart C are designed to minimize these difficulties. Section 601.31 guides you through the general process to identify, avoid, and determine impacts to most of the combinations listed above. This is done in a simplified manner since these processes are very similar no matter what the combination.

A very important and special case identification may occur when cultural resources are discovered during implementation of an SCS activity. In all such situations, SCS must plan to deal with the discovery of 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 agreements between SCS and the SHPO. More specific plans for grouped or complex undertakings are usually written as stand-alone documents. Specific information on developing these plans for handling discoveries is found in 601.40.

While the processes of identification are relatively similar, the process of assessing the importance of a particular resource varies according to the factors discussed above. Consequently, the assessment procedures have been broken into two sections. Section 601.32 focuses on Section 106 of NHPA and gives the procedures to determine eligibility to the National Register of Historic Places. This is done separately since the majority of cultural resources that SCS works with fall into this category. Section 601.33 provides information on assessing the significance of resources under the provisions of other legislation.

**601.31 Procedures for Considering Cultural Resources in SCS Undertakings: Identifying, Avoiding, Determining Impacts to Cultural Resources.**

The steps that are required in order to identify, avoid, and determine impacts to cultural resources are:

(a) Determine if an action is an undertaking. The first step is to determine if a planned action has the potential to be an undertaking according to applicability in SCS [See Subpart A, 601.10]. Then examine each SCS activity or practice listed in Appendix F or in state agreements to decide whether the action could cause a change in a cultural resource. The CRC can provide assistance in determining if an action is an undertaking. If the action is determined not to be an undertaking, document the decision and proceed with the action. If the action is determined to be an undertaking, follow the process below.

(b) Determine the level 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 SCS employee who has satisfactorily completed the National Cultural Resources Training Program and provided that:

(i) The undertaking 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).

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

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.

(2) 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.

(3) Special Cases and Studies.

(i) **Special cases.** Land Treatment Watersheds (LTWs) and Hydrologic Unit Areas (HUAs), which are initiated like a project in 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.

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 locations on the Earth's surface because their location is dependent upon landowner cooperation. The selected practices may also be installed up to a period of 10 years. During that 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, SCS 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 landowner.

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 (see 601.31(c) below). 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 undertakings (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.

When conservation 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 can provide both identification and evaluations of significance. This will provide planners with the number of historic properties effected early enough to develop conservation alternatives or acceptable mitigation plans with the cooperators.

(ii) **Special studies.** For special studies such as River Basin Studies and Natural Resource Planning, the study report or plan will include, at minimum: a) a general overview of cultural resources in the area, and b) 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 which are undertakings will be installed, cultural resources investigations for the study will follow the steps in this section.

(c) Identify cultural resources and other resources of value.

(1) Conduct a cultural resources review to find if cultural resources are known in the Area of Potential Effect (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 site files and databases. These files and databases of known cultural resource sites, usually organized by county, are maintained by the SHPO, another State agency, and/or a university. The completeness, format, and accuracy of these databases differ by state. Access to these databases by SCS field personnel will also differ by state and will be addressed specifically in state supplemental 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. See Module 4 of the National Cultural Resources Training Program study guide and state information from the State Historic Preservation Plan.

(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 presently 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 the group. 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. Some tribal governments now have a contact person to provide information about traditional cultural properties.

It is important to identify nonarcheological 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.

(vii) Other sources, including ones listed below, can provide information to help build a background for individual planning checks. SCS 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 as directed in Module 3 of the National Cultural Resources Training Program can save time and avoid discovery situations. These types of sources must be checked in reviews conducted by Cultural Resources Specialists.

- (a) Museums
- (b) Local historical societies
- (c) Libraries
- (d) Official amateur archeological societies

(2) 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 is or may be, and whether cultural resources might be impacted 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 Cultural Resources Coordinator (CRC). If the review is either initiated by the CRC, or is referred to the CRC by a Field Office, the CRC, working with the state CRS, the NTC CRS as needed or required, and with the SHPO as specified in state agreements, 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 cultural resource specialist, even when the inspection could normally be carried out by an SCS employee who has completed the National Cultural Resources Training Program.

(3) Conduct a field inspection of the Area of Potential Effect to relocate 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.

(ii) Define any boundaries of intangible cultural resources, 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 SCS 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, SCS will provide documentation to the landowner regarding the compliance process, resources located, and those considered significant.

(d) Determine whether the undertaking will impact a cultural resource in the Area of Potential Effect. Whenever possible, SCS will avoid impacts to the resource by a) moving the practice to another area; b) changing the work limits; c) changing to an acceptable alternative practice or measure; or d) modifying the practice design. SCS will consider and document the impact of undertakings on material and other cultural resources identified as shown below.

(1) If the undertaking will not impact 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 SCS or if no comment is received within the allotted time period, then continue with the assistance.

(2) If the undertaking will not impact 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, and related Federal and State guidelines. Upon completion SCS may continue with the assistance.

(3) If the undertaking will impact the located cultural resource(s) and the authority or approval is at any level, then SCS will follow the procedures defined in 601.32.

**601.32 Assessing the Significance 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.**

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 SCS will follow to evaluate the cultural resources which have been identified and which will be directly or indirectly affected by an undertaking. The Cultural Resources Coordinator is responsible for coordinating the evaluation process. Cultural

Resources Specialists will evaluate cultural resources. SCS Cultural Resources Specialists will 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 SCS 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.

(a) Resources evaluated according to the National Register of Historic Places criteria. Cultural resources which have been identified by qualified Cultural Resources Specialists or SCS employees who have completed the SCS National Cultural Resources Training Program will be evaluated by a cultural resources specialist(s) following the formal process below:

(1) The information on 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) found in Part 601.53, 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's 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.

(i) When little comparative information has been collected and/or SCS and the SHPO disagree on the significance of the resource, SCS 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 contain material cultural resources. The value of such resources is determined through consultation with Native Americans that are associated with the cultural resources.

(3) Using the documentation prepared by the cultural resources specialist, SCS will agree or disagree with the specialist's recommendations on eligibility and consult with the State Historic Preservation Office.

(4) If SCS and the SHPO agree that the resource meets one or more of the National Register Criteria or is eligible because of its importance to an American Indian tribe or Native Hawaiian organization, the resource is designated

as significant and eligible for listing in the National Register of Historic Places as an historic property.

(5) If the agency and the SHPO cannot agree on the significance of a cultural resource, SCS will obtain a determination of eligibility from the Keeper of the National Register, National Park Service in Washington, D.C.

**601.33 Assessing the Significance 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" in the Archeological Resources Protection Act (ARPA) are protected from disturbance. Examples of sites that may meet these criteria include an Anasazi field house, an 1990's mine shaft, 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.

Among cultural resources protected from disturbance on public and Indian lands are a type of site that has 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 significant according to the National Register criteria, for example, as a designated archeological site meeting criterion D, or through consultation with the American Indian or Native Hawaiian group, but National Register significance is not required for site protection. In order to assess these resources, SCS will consult with the Federal land manager and/or Tribal representative prior to beginning work on Federal or Indian lands.

(b) 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.

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

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.

(c) 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 Afro-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. Detailed information and examples of these are provided in Subpart F, Appendix.

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 impacts to such cultural resources cannot be mitigated. SCS 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.

(d) Other resources. Among the resources SCS 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 are located in Subpart F, Appendix.

#### **601.34 Procedures for Assessing Effects to Historic Properties, Consultation, and Mitigation Plans.**

(a) Determining if a property will be affected. If a cultural resource is determined to be an historic property, it is necessary to determine how the property will be affected by the undertaking, 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), found here in Part 401.88. Additional guidance for completing requirements of 36 CFR 800.9(c) is in "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. SCS should follow and document these steps for all historic properties which will be affected by an undertaking.

Resources are evaluated according to the criteria in the context of the historical, architectural, archeological, or cultural significance possessed by the property. An undertaking shall be considered to have an effect whenever any condition of the undertaking causes or may cause any change, beneficial or adverse, in the quality of the historical, architectural, archeological, or cultural characteristics that qualify the property to meet the criteria of 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 significance 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 significance.

(b) Consulting to avoid or reduce effects to an historic property which will be adversely affected. If the effect of an undertaking on an historic property is determined to be adverse and does not fall under provisions of 36 CFR 800.9(c), SCS shall notify the ACHP and shall consult with the SHPO to seek ways to eliminate or reduce the adverse effect. Either the SHPO or SCS may ask the ACHP to participate in developing a Memorandum of Agreement. The ACHP may also choose to participate without a request.

The steps that SCS will follow to reduce adverse effects are in 36 CFR 800.5(e)(1)-(4) and in 601.35. Note in 36 CFR 800.5(e) that if the Council has not participated in developing the MOA, the ACHP must be afforded an opportunity to comment.

If, during consultation on reducing or eliminating effects, SCS, the SHPO, or the ACHP decides that further consultation will not be productive, any party can so state and terminate consultation. The SCS notice of termination will be in writing, signed by the State Conservationist. SCS will then request the ACHP comments following 36 CFR 800.6.

(c) Implementing no adverse effect action plans and memoranda of agreement. After a No Adverse Effect (NAE) action plan or a Memorandum of Agreement (MOA) has been reviewed and accepted by the ACHP, SCS will ensure that the provisions agreed to, including any additional consultation, are carried out prior to implementing the undertaking or at appropriate junctures throughout. All SCS documents pertinent to the undertaking will include appropriate language to assure the actions required under the plan or MOA are completed.

The State Conservationist or the Chief, as appropriate, will notify signatory and other interested parties when all requirements of the NAE plan or MOA have been completed, either before beginning the undertaking, or if an action is to be completed during implementation, when the action is completed.

#### 601.35 Procedures Involving Adverse Effects.

If mitigation measures cannot be implemented and a decision is made by SCS to consider an undertaking 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 steps and documentation involved will include:

- (a) Notification statements of effects to the SHPO 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;
  - (3) Landowner and applicants for assistance;
  - (4) Others as determined by SCS, SHPO, and ACHP.
- (c) Copies of documentation minimally involving a description of the:
  - (1) 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 significance; and
  - (4) Effects of the undertaking on the historic property and the basis for the determinations.
- (d) Use of existing agency procedures to provide for an adequate opportunity for public comment, if necessary. SCS, SHPO, or ACHP may elect to meet with interested parties or conduct public information meetings.
- (e) If SCS and SHPO can agree on the effects, copies of Memoranda of Agreement and any supplements executed, and with ACHP comments, should be included or if;
- (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 when there is no agreement is as follows:
  - (1) A description and evaluation of alternatives or mitigation measures that SCS 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 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 SCS concerning the effects of the undertaking and alternatives considered to reduce the effects.

(g) Draft cover letter for signature of the SCS Chief on final notification to the Advisory Council of SCS intent to implement the undertaking that will cause adverse effects.

#### **601.36 Procedures for the Withdrawal of Assistance.**

The following procedures address the conditions and documentation required in cases where SCS must withdraw assistance from an undertaking.

Cultural resources are a nonrenewable resource and as such, the mitigation of adverse impacts 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 impact has occurred or is likely to occur through a participant's refusal to implement feasible mitigating measures, SCS 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 SCS assistance must be considered.

(1) If the participant, after application to SCS or any other cooperating agency for which SCS has technical responsibility, carries out an irreversible action that is related to the requested assistance and may adversely impact a cultural resource before the completion of SCS cultural resource compliance responsibilities or the applicant refuses to implement feasible mitigating measures, then SCS 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 or cannot be avoided or treated using alternative practices;
- (iii) Has been found to be significant by a specialist; or
- (iv) Will be adversely affected as determined by SCS in consultation with SHPO.

After consideration of the above conditions, if the impacted cultural resource is within the APE, is significant, and will be adversely effected, 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, SCS shall withdraw assistance from the undertaking or follow procedures on implementing adverse effects.

(2) Pursuant to Section 110(k) of the NHPA, SCS 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 ACHP SCS may elect to continue assistance for undertakings in which a participant caused or permitted adverse effects. The consultation with the Council constitutes a review of the circumstances of the undertaking in which the adverse effect occurred and circumstances that may warrant continued assistance from SCS.

If the decision is made to withdraw SCS assistance under either GM 401.37(b) or (c), the SCS 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 SCS General Manual 420-401.40(a), withdrawal of assistance will be considered for the practice under which potential adverse impacts may have occurred. This does not preclude the SCS from continuing with assistance activities which will have no effect or may benefit cultural resources in the APE.

For withdrawal cases considered under Section 110(k) of the NHPA and SCS GM 420-401.37(b), the minimum duration of SCS withdrawal of assistance will be for the fiscal year in which the damage or destruction occurred, or the fiscal year in which a mitigation plan was prepared and the participant refused to implement the 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.

Longer term or more extensive withdrawals will be made at the discretion of the State Conservationist. Decisions for a 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.

(c) **Documentation necessary for mandatory withdrawal cases.** If the decision is made to withdraw assistance, the SCS 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, including participants names.

(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 SCS actions in the case including dates and times of contacts with the participant, items discussed during each contact, and actions taken by SCS and the participant as a result of each contact. Also included are the date and method by which the participant 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 resources(s).

(6) Copies of any correspondence with the SHPO or ACHP regarding the case, particularly any documentation regarding evaluations of significance or recommendations of effect.

(7) If applicable, a copy of the mitigation plan.

(8) A copy of the notification of intent to withdraw, with any accompanying documentation, from the SCS to the landowner.

(d) Responsibilities for documentation. A cultural resource specialist will prepare and/or review all detailed descriptions of resources and assessments of damage in assistance withdrawal cases. The Cultural Resource Coordinator, in conjunction with a Cultural Resource Specialist, and other appropriate personnel, should compile the necessary documentation.

(e) Consultation and notification. The SHPO should be invited to provide comment on the circumstances and specifics of the withdrawal of SCS assistance. If adverse effects under subsection (a)(2) of this part are the basis for withdrawal of assistance, SCS will also provide ACHP with notice of intent to withdraw, accompanied by the documentation package.

#### 501.37 Procedures for Considering Cultural Resources During Emergency Work.

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

SCS 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 nonexigency situations that are completed within 220 days of fund obligation.

(a) The State Conservationist will notify SHPO and ACHP as soon as

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

(b) Exigent situations. The SHPO shall be notified of SCS funds obligated for exigent situations. SCS funds for exigencies are obligated a) 10 days after receipt of funds, b) 2 days after the disaster event, or c) 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. SCS will document and avoid adverse impacts to cultural resources encountered during exigency work to the fullest extent practicable.

(c) Nonexigent situations. For nonexigencies, SCS must prepare the project information in the form of Damage Survey Reports (DSR) for funding approval. The State Conservationist will request SHPO consultation and assistance in preparing cultural resources review information prior to submitting DSRs for NHQ approval. SCS will take into account all cultural resources information provided by SHPO in preparing DSRs and specifications therein. During SHPO consultation and review:

(1) Locate or indicate high probability for historic properties in the DSR area, a Cultural Resources Specialist will be involved in assessing impacts to those properties and performing additional consultation prior to repair work.

(2) Do not locate cultural resources in the DSR area, a Cultural Resources Specialist, or SCS personnel certified in the National Cultural Resources Training Program in conjunction with CRS oversight, will perform Field Inspections prior to emergency repairs. The use of nonspecialist SCS personnel for such inspections will be governed by the scale of disaster and relief response needed, and will be indicated during consultations with the SHPO.

(i) Should a cultural resource be discovered, the CRC will be notified, who will immediately notify the SHPO and the ACHP. A Cultural Resources Specialist will evaluate the resource. The State Conservationist will make a final decision based on the CRS's evaluation, consultation on an appropriate course of action with the SHPO and the ACHP, and the need to protect life and property. The SHPO and ACHP will be informed immediately regarding the determination by the State Conservationist.

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

(e) In major disasters, SCS may elect to waive all or part of its cultural resources responsibilities under 36 CFR 78. This type of waiver is applied for by the SCS Chief or official designee. 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 SCS 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. 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 impacts to cultural resources when conditions permit.

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

The Secretary of Interior will review the waiver, 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 SCS Chief, or terminate the waiver. Termination of the waiver by the Secretary is final.

If the time period specified in the waiver is still in effect when comments are received from the Secretary, then SCS will consider these comments as well as any comments received (during the 5 day comment period) from the ACHP or SHPO. SCS will consider these comments before deciding to continue, withdraw, or modify the waiver. SCS 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, and appropriate SCS offices.

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."

Complete documentation of SCS 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, and appropriate SCS offices.

(f) States are encouraged to develop emergency plans with their SHPOs and respective State governments which best meet anticipated types of emergency situations. Guidelines are included in 601.45.

#### **601.38 Procedures for Construction Discoveries.**

(a) General. The following procedures apply to all discoveries that occur while carrying out any SCS program activity considered to be an undertaking.

(1) The procedures in Subpart C, 601.31 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 601.31 have been completed and new information becomes known prior to commencing construction, or known historic properties will be affected in unanticipated ways, SCS will ensure consideration of the information and effects by consulting with the SHPO, and if necessary ACHP, as described in this section.

(3) When the conditions described herein exist, SCS may, at its discretion assume that the cultural resource is eligible for the National Register of Historic Places for purposes of this section, or SCS will consult with the SHPO about significance.

(4) Upon discovery of an unanticipated cultural resource after commencing construction, SCS will:

(i) Request that the landowner or sponsor halt actions in the area affecting the resource to allow the significance 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, SCS will complete the requirements of 601.38.

(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 SCS 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 SCS/SHPO state agreements.

(7) 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), the SCS person responsible for the undertaking will follow the guidelines for "Other Resources" in 601.63.

(8) All reports of identification, evaluation, and mitigation efforts resulting from discovery situations will be provided to the SHPO and ACHP.

(b) Notification and investigation of discovery. In the following procedures, notification and consultation with the SHPO, 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, SCS will notify the SHPO and ACHP. SCS will consult with the SHPO regarding the significance of the resource and, if the resource is significant, develop feasible actions to minimize adverse effects to the resource. Consultation with the SHPO will be completed within 48 hours of the discovery. Completion, however, may take longer. SCS will then describe to ACHP the actions proposed to mitigate adverse effects and request ACHP comments. This may occur simultaneously with SHPO consultation. ACHP will provide interim comments to SCS within 48 hours of the request and final comments within 30 days of the request. If the interim comments are agreed to, SCS 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, SCS will:

(i) Notify the DCA within 48 hours of the discovery. Initiate notice by telephone and forward written notification within the time period specified by the DCA at the time of notification. Notification does not constitute consultation; however, consultation may ensue if SCS so requests.

(ii) If not consulting with the DCA following notification, implement the discovery plan prepared under 601.40, consulting with the SHPO and ACHP as provided for in the discovery plan, and carrying out the provisions of the plan.

(iii) If a discovery plan has not been prepared, SCS will complete either of the two following actions:

(a) Comply with the Archeological and Historic Preservation Act and implementing regulations, if the historic property is principally of archeological value and is discovered after land modifying activities have begun by consulting with the DCA. Consultation will follow the most current procedures distributed by the DCA. Resolution of how to proceed is normally within 48 hours of discovery. Data recovery or other treatment measures may require additional time and are determined on a case-by-case basis.

(b) Comply with 36 CFR 800.6 of the ACHP regulations.

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**ATTACHMENT C**

COMPLIANCE WITH SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT  
AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION'S REGULATIONS  
(36 CFR PART 800)

## Attachment C

### COMPLIANCE WITH SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION'S REGULATIONS (36 CFR PART 800)

#### I. Determination of Undertaking

- A. Trained NRCS field personnel will determine whether or not a planned conservation practice or activity is an undertaking by using the classification system and list of conservation practices in Attachment D and by taking into account site specific conditions and methods by which the practice will be installed.
- B. If a planned practice is not an undertaking, no further action with regards to cultural resources is required.
- C. If a planned practice is an undertaking, it will be necessary to determine if cultural resources are present within the Area of Potential Effect (APE) as described in Section II below.

#### II. Field Review to Identify Cultural Resources

- A. If a planned practice is determined to be an undertaking, NRCS personnel will conduct a field inspection to determine if cultural resources are present in the APE. The APE includes the "footprint" of the practice plus all disturbed areas in the work zone including temporary access roads, stockpiling areas, etc. Cultural resources of concern may include concentrations of prehistoric and/or historic artifacts, shell middens, foundations of buildings or other structures, and human remains.
- B. The field inspection will be conducted in the APE before installation of the practice, preferably during the planning process and before the practice is fully designed.
- C. The Cultural Resource Coordinator will also use the SHPO inventory as well as other available information to determine whether cultural resources were previously found or are likely to be found in the APE.
- D. If no cultural resources are identified NRCS personnel will document the negative finding and proceed to install the practice.
- E. If NRCS personnel find cultural resources within (or outside of) the APE, their location will be noted. The services of a Cultural Resource Specialist may be requested to determine the site's eligibility for inclusion in the National Register of Historic Places. With the landowner's permission, NRCS will send information concerning these resources to the SHPO.

### III. Avoidance and Other Actions

- A. If cultural resources are located outside of the APE, NRCS field office personnel will document their location and characteristics as described in Section II.E. above for future planning purposes. No further action is required as long as these resources will not be adversely affected by any NRCS practices.
- B. If cultural resources are found within the APE, NRCS personnel will document their location and characteristics as described in Section II.E. above and will proceed as follows:
  - 1. Relocate the practice or design the practice in a manner that will avoid damaging the cultural resource.
  - 2. Work with the landowner to select an alternative (nonground-disturbing) practice, which will accomplish all or most of the landowners objectives without damaging the cultural resources.
- C. If relocation, design modifications, or selection of an alternative practice is not feasible then SHPO personnel will be contacted for guidance and consultation.
- D. If NRCS determines in consultation with SHPO personnel that a professional site evaluation is needed then NRCS will contract with a professional to perform the evaluation.
- E. If NRCS determines in consultation with SHPO personnel that the cultural resources will not be adversely affected by the proposed practice this determination will be documented and the practice can be installed as planned.
- F. If NRCS determines in consultation with SHPO personnel that the cultural resources will be adversely affected by the proposed practice, NRCS will work with the landowner to evaluate the following options:
  - 1. Do not implement the proposed conservation practice.
  - 2. Select an alternative conservation practice, which will protect the cultural resources, even though the practice may not accomplish the landowner's original objectives.
- G. If the landowner wants to pursue the conservation practice as originally proposed, NRCS will discuss the need and feasibility of a formal cultural resource survey sufficient to evaluate whether the cultural resources are significant and thus eligible for listing on the National Register of Historic Places, and recovery of data if the resources are determined significant.
- H. If NRCS personnel and/or funding are not available for a cultural resource survey or data recovery then NRCS will request the landowner to pay for the work. If funding from the

landowner or other sources is unavailable and the landowner wants to continue installation of the practice then NRCS will notify the landowner in writing that all technical and financial assistance on that practice will be withdrawn.

#### IV. Discoveries

- A. In the event that previously unidentified cultural resources are discovered during implementation of a conservation practice, NRCS will immediately cease all damaging activities under its control and will request that contractors under the control of landowners cease working in the immediate vicinity of the discovery.
- B. NRCS will inform the landowner about the discovery and will advise the landowner that the SHPO will need to be consulted about further actions.
- C. NRCS will notify SHPO personnel of the discovery within one working day. The NRCS Cultural Resources Coordinator in consultation with a professional Cultural Resources Specialist will provide on-site assessment of the discovery within two working days and will discuss any additional findings about the discovery with SHPO personnel.
- D. If NRCS determines in consultation with SHPO personnel that further consideration of the discovery is not warranted, then installation of the practice can continue. NRCS will document this determination in the case file.
- E. If NRCS determines in consultation with SHPO that additional investigations are needed, NRCS will work with the landowner, a professional Cultural Resource Specialist and SHPO to develop alternatives which will avoid or minimize further damage to the cultural resources, or which will mitigate the adverse effects of the practice. These alternatives may include:
  - 1. Selecting an alternative conservation practice or changing the design of the partially installed practice to avoid further damage to the cultural resources;
  - 2. Not completing construction of the partially installed practice and restoring the site to a stable condition; or,
  - 3. Conducting an archeological survey sufficient to determine site significance and conducting archeological data recovery (if needed) before the remainder of the practice is installed.

#### V. Special Conditions for Human Remains and Burials

If human remains are identified in the area of potential effect during planning or during implementation of a project or conservation practice, all activities deemed likely to damage the remains will cease and the following steps will be taken:

- A. The Louisiana State Police and/or parish sheriff will be contacted by Louisiana NRCS personnel to determine whether the remains are part of an ongoing investigation.
- B. The NRCS Cultural Resources Coordinator will be notified who will in turn notify the appropriate tribal representative, contact SHPO and request professional archeological assistance as needed. Consultation among the foregoing shall determine cultural affiliation and develop an appropriate plan for treating the remains.
- C. Planning and or construction activities at the site can recommence only after NRCS staff, the appropriate tribal representatives, and the SHPO agree that the plan for treating the remains has been properly implemented.

**ATTACHMENT D**

**GUIDANCE FOR DETERMINING UNDERTAKINGS INVOLVING THE INSTALLATION OF  
CONSERVATION PRACTICES**

## B. Potential Undertakings

Some conservation practices may affect cultural resources unless they are installed under two different situations. First, the installation of the practice will not exceed the depth, extent, or kind of previous cultivation. Second, if the land has not been previously cultivated, and the installation of the practice will result in no ground disturbance. If these situations apply, no further cultural resource considerations are needed. These practices are:

Bedding	Filter Strip
Conservation Cover	Fishpond Management
Conservation Crop Rotation	Irrigation System, Surface
Conservation Tillage	Pasture and Hayland Planting
Contour Farming	Prescribed Grazing
Cover and Green Manure Crop	Residue Management
Fencing	Woodland Direct Seeding
Field Border	

## C. Non Undertakings

Some conservation practices are primarily management related and will not have any physical effects or alter a cultural resource. Such practices do not require cultural resources considerations. These practices are:

Delayed Seedbed Preparation	Pond Sealing
Forest Stand Improvement	Residue Management
Irrigation Water Management	Row Arrangement
Livestock Exclusion	Tree Establishment
Mulching	Waste Utilization
Nutrient Management	Wildlife Habitat Management
Pasture and Hayland Management	Use Exclusion
Pest Management	

**Attachment D**

GUIDANCE FOR DETERMINING UNDERTAKINGS INVOLVING THE INSTALLATION OF  
CONSERVATION PRACTICES

An "undertaking" is a project or activity that can have an adverse effect on cultural resources if any are present in the area of potential effect. The following is a detailed explanation of the three undertaking classification categories and the practices to which they apply.

A. Undertakings.

Some conservation practices have a high potential to adversely affect cultural resources when installed to standard NRCS criteria. Practices which are primarily structural and involve excavation, grading, shaping, and other ground disturbance beyond normal farming activities are likely to affect cultural resources if present. Such practices are considered undertakings and cultural resource consideration is required. The practices are:

Access Road	Land Reclamation
Brush Management	Land Smoothing
Channel Vegetation	Levee
Chiseling and Subsoiling	Open Channel
Clearing and Snagging	Pipeline
Composting Facility	Pond
Commercial Fishponds	Precision Land Forming
Controlled Drainage	Prescribed Burning
Critical Area Planting	Pumping Plant
Dams	Recreation Trail and Walkway
Dike	Sediment Basin
Diversion	Stock Trails and Walkways
Firebreak	Streambank and Shoreline Protection
Forest Harvest Trails and Landings	Structure for Water Control
Forest Site Preparation	Surface Drainage
Grade Stabilization Structure	Terrace
Grassed Waterway	Underground Outlet
Heavy Use Area Protection	Waste Management System
Irrigation Canal	Waste Storage Pond
Irrigation Field Ditch	Waste Storage Structure
Irrigation Land Leveling	Waste Treatment Lagoon
Irrigation Reservoir	Well
Irrigation System, Tailwater Recov.	Wetland Development and Restoration
Irrigation Water Conveyance	Wildlife Watering Facility
Land Clearing	Wildlife Wetland Habitat Management