

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

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

- A. Determine if the planned action (i.e. undertaking) has the potential to cause effects on historic properties, assuming such historic properties exist. ***This initial determination is displayed in 601.68 Charts A. “NRCS Cultural Resources Procedures Flow Chart.” The first block asks the question “Undertaking Subject to Review?” This activity is part of the inventory phase of the planning process.*** Examine each NRCS activity or practice to decide whether the action could cause a change in the characteristics of a cultural resource. If the action is determined not to be an undertaking with the potential to affect a cultural resource, document the decision and proceed with the action. ***NRCS management has the authority to assess the potential impacts that conservation practices may have on cultural resources by utilizing staff expertise. NRCS management will decide when the agency enters into the consultation process with both SHPO and tribes. The Area Cultural Resources Specialists are an integral part of the process and may be requested by management to provide input.*** If the determination is that the planned action has the potential to affect a cultural resource, follow the process below.
- B. Determine the level and responsibility for cultural resource investigations. ***This consultation phase is displayed in 601.68 Charts A. “NRCS Cultural Resources Procedures Flow Chart.” The block directs the planner to “CONSULT with SHPO/THPO. Identify other consulting parties, including tribes, partners and public.” Subsequent blocks direct the planner to continue consulting, if appropriate.***
  - (1) Conservation Planning (as defined in the National Planning Procedures Handbook). If authority for a conservation plan (including planning and implementation) is at the field office level, the Cultural Resource Review and Field Inspection may be conducted by an NRCS employee who has satisfactorily completed the National Cultural Resources Training Program, and provided that:
    - (i) The planned activity is generally limited to lands owned, controlled, or managed by three or fewer cooperators, and
    - (ii) The Field Office personnel have determined that no extenuating circumstances exist, such as particularly dense, unusual, or deeply buried cultural resources within the proposed Area of Potential Effect (APE).
  - (2) If a proposed activity with potential to affect cultural resources, or the scope of planning for a series of such activities involves more than three cooperators (this will normally include activities such as Land Treatment Watersheds (LTWs) or Hydrologic Unit Areas (HUAs)), or extenuating circumstances, such as those described, or the proposed activity or the scope appears to be of a size or complexity that warrants additional assistance, the Field Office shall contact the CRC/CRS. The CRC /CRS shall review the proposed action and make a recommendation addressing the amount and level of cultural resource assistance needed to meet the specifications contained in this part.
  - (3) If authority for a conservation plan (including planning and implementation) is above the field office level, the required cultural resource activities beyond the initial cultural resources review will be conducted by a Cultural Resources Specialist.

- (4) Project Planning. All project plans (as defined in the National Planning Procedures Handbook) will require cultural resources activities beyond the initial cultural resources review to be conducted by a Cultural Resources Specialist.
- (5) Special Cases and Studies.
- (i) Special cases. Land Treatment Watersheds (LTWs) and Hydrologic Unit Areas (HUAs), which are initiated as projects during planning but installed at the Field Office with accelerated technical assistance, require a more practical approach to cultural resources inventories and compliance. While Federal funds are involved, their purpose is narrowly defined (e.g., water quality improvement) and instead of installing several large engineering practices (e.g., dams) on public land, many smaller structures are installed (typically less than 5 acres) or management practices are implemented on private land to accomplish the conservation objectives.
  - (ii) In these special cases, the planning process determines the general number and type of installations that are required to achieve the stated goal(s). These are grouped into evaluation units or treatment areas and are not tied initially to precise geographic locations because their placement is determined by the landowner and dependent upon the producer's cooperation. The selected practices may also be installed up to a period of 10 years. During this time, some landowners may decide not to participate in the program, while others may opt for alternatives such as land use conversion. Due to this planning and installation sequence, NRCS can produce general plans but is unable to tie these plans to exact Areas of Potential Effect (APEs) until contracts or commitments for implementation are made by the land owner.
  - (iii) Consequently, the following identification process for cultural resources will be used for these special cases. A general cultural resources review will be conducted for the entire planning area during the planning phase. The review will determine the types of cultural resources found in the project area and some estimation of the resource numbers that may be impacted by the conservation practices selected for individual treatment areas. The results of this review should be included in the plan document with recommendations on how further identification and evaluation of cultural resources should be accomplished. These recommendations will be formulated with the consensus of a Cultural Resources Specialist. The use of GIS-based predictive modeling techniques is strongly recommended in formulating the plan recommendations. Exact cultural resources locations should be filed separately for future reference prior to practice design and installation.
  - (iv) When conservation contracts/land treatment contracts (LTCs) or commitments are executed, cultural resources field investigations will be performed according to the work plan recommendations as far in advance of installation as possible. For convenience and efficiency, similar treatment areas or evaluation units should be grouped for field investigation by a Cultural Resources Specialist who will provide both identification and evaluations of significance. This will provide planners with information on the number of historic properties

affected early enough to develop conservation alternatives or acceptable mitigation plans with the cooperator(s).

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

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

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

- (1) Determine the Area of Potential Effect (APE). The APE is the geographic area or areas within which Federal agency planned actions or activities (undertakings) may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertakings. The APE should include all borrow, fill or temporary storage areas, access roads and any other lands that would be directly or indirectly affected by the proposed undertaking. In some cases, with very large or elevated projects, the APE may include visual effects. **Generally, the APE designation should be limited to a size that will ensure protection of all cultural resources that might be affected by the proposed undertaking. Designating an overly large APE will delay the process and may exceed the authority of the agency. Data will only be gathered within the designated APE. Adjacent or nearby sites and structures are beyond the purview of the agency's authority.**
- (2) Conduct a cultural resources review or background study to determine if cultural resources are known in the APE. The review will consist, at a minimum, of checking or contacting the following sources and documenting the results:
  - (i) The National Register of Historic Places for listed and eligible properties, and any State and local registers of cultural properties.
  - (ii) Official state and regional site files and databases. Your CRC/CRS will instruct you in the proper procedure for accessing these files. The completeness, format, and accuracy of these databases differ by state. The actual procedure may be outlined or specifically addressed in state and tribal agreements.
  - (iii) The landowner, participant, or sponsor. These individuals may have a great deal of information about historic or prehistoric resources on a tract or property. **Oral histories should be gathered only when the practice is planned in an area where historical or archeological sites are likely, and always in conjunction with conservation planning or other field visits in order to ensure an efficient process.**
  - (iv) Cultural resources indicators, environmental indicators, and artifacts.
  - (v) Information from National Environmental Policy Act (NEPA) scoping meetings and in environmental documents prepared by, or for, Federal and State agencies. The scoping process conducted as a part of NEPA

compliance may aid in locating cultural resources and/or knowledgeable cultural resources specialists. It is important to identify non-material cultural resources and/or the individuals who can identify them.

- (vi) Sources that identify American Indian tribes or Native Hawaiian groups who currently live in or use the area, those who lived there in the past, and individuals knowledgeable about the cultural properties of the tribes or groups. Critical to locating and in determining the value of cultural resources is finding individuals who understand the traditions and customs of indigenous groups. These include professional social scientists, traditional religious leaders, and other knowledgeable individuals within a specific group. University departments that have anthropologists, historians, folklorists, or cultural geographers on staff are good sources of information for identifying cultural groups in an area and may be able to provide the names of knowledgeable individuals within the groups.
- (vii) Tribes may have a designated Tribal Historic Preservation Officer (THPO). The THPO is appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program, is approved under provisions of the NHPA by the Secretary of Interior, and has assumed the responsibilities of the SHPO for the purposes of Section 106 compliance on tribal lands. Some tribal governments may not have a THPO, but may have a contact person to provide information about issues of interest to the tribe.
- (viii) It is important to identify non-archaeological cultural resources and/or the individuals who can identify them. Additional efforts may be necessary in expanding public and scoping meetings to address concerns of Native American and other concerned ethnic groups and may aid in identifying cultural resources of concern to the groups.
- (ix) Other sources can provide information to help build a background for individual planning checks. NRCS Field Office employees conducting reviews are not required to check these sources for each conservation plan, but collecting information from these sources into a file can save time and avoid discovery situations. These types of sources must be checked in reviews conducted by Cultural Resources Specialists. ***These sources should be checked when mitigation is likely, but are not necessary in most circumstances. The procedures listed above in items (i) through (viii) should be adequate to identify the likely presence or absence of historic or cultural resources most of the time.***
  - Museums
  - Local historical or archaeological societies
  - Libraries
  - Local universities

- (3) Examine the results of the Cultural Resources Review. Is there sufficient information to know what types of cultural resources are likely to occur in the planning area, what the distribution of the resources are or may be, and whether cultural resources might be affected by carrying out the planned action? Based on these or similar questions, it can be determined whether an action that is initiated at the Field Office level should continue to be handled at the Field Office, or should be referred to the CRC/CRS. If the review is either initiated by the CRC/CRS or is referred to the CRC/CRS by a Field Office, the CRC, working with the state CRS, and with the SHPO as specified in state level agreements and

tribal consultation protocols, will recommend measures to complete the remaining investigation for the action. This will include determining if the complexity of probable or known cultural resources in the area of potential effect is great enough to warrant field inspection by a CRS.

- (4) Conduct a field inspection of the APE to find previously known cultural resources and to locate new cultural resources.
  - (i) Define the boundaries and continuity of a site by the extent of cultural material observed and landscape features.
  - (ii) Define any boundaries of intangible cultural resources, of traditional cultural properties, or of an area that must be avoided because it is known to contain resources that have specific spatial location(s) not provided for security reasons. Requests by concerned parties that NRCS and others stay out of culturally sensitive areas may preclude field checks of those areas for material cultural resources. The participant should be informed that the agency may not be able to offer assistance until compliance requirements can be met in such culturally sensitive areas.
  - (iii) Documentation of compliance and the reporting of cultural resources will follow the policy in 401.41 and the specifics of each state level agreement. The absence of cultural resources must also be documented using procedures contained in that same agreement, since this will prevent repetition of the same compliance work. ***The documentation shall be limited to potential impacts within the APE. NRCS does not have the authority to investigate sites except those directly impacted by practices installed with NRCS financial assistance. The documentation shall be concise and limited in scope.***
  - (iv) In all cases, NRCS will provide documentation to the landowner regarding the compliance process, resources located, and those considered significant.

D. Determine whether the proposed action (i.e. undertaking) will affect a cultural resource in the APE. Whenever possible, NRCS will avoid effects to the resource by either moving the practice to another area; changing the work limits; changing to an acceptable alternative practice or measure; or modifying the practice design. ***The goal of the review is to avoid impact to cultural resources. Investigations are intended to identify the extent of sites in order to facilitate safe practice installation. Impacts requiring mitigation should be rare.*** NRCS will consider and document the effect of planned actions on material and other cultural resources identified as follows:

- (1) If the proposed action will not affect the located cultural resource(s) and the authority or approval is at the Field Office then the office will:
  - (i) Document the location of the resource and the fact that it can be avoided and provide this information to both the SHPO and landowner;
  - (ii) Send the completed site form to the official state site file, with a copy to the SHPO if that office is not the repository; and
  - (iii) Allow 15 days (or less if so stipulated in state level agreement) for SHPO comment. ***In Washington State, the SLA calls for a 30 day SHPO response period.*** If the SHPO concurs with NRCS or if no comment is received within the allotted time period, then continue with the assistance.
- (2) If the proposed action will not affect the located cultural resource(s) and the authority or approval is above the field office level, then the Cultural Resources Specialist will follow normal documentation and consultation procedures as

specified in 36 CFR 800, approved state level agreements and tribal consultation protocols, and related Federal and state guidelines. Upon completion NRCS may continue with the assistance.

- (3) If the undertaking will affect the located cultural resource(s) and the authority or approval is at any level, then NRCS will follow the procedures defined in section below. *If during the development of the conservation plan, it is discovered that the practices needed to solve the identified resource concerns will have adverse effects on known cultural resources that cannot be mitigated, the practice should not be recommended. Additionally, if because of the high risk potential of the site, costly compliance studies, surveys, reports, and monitoring are going to be required, NRCS should not contract with the producer for the practice.*

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

- A. The process of evaluating the importance of any object or place is based on a comparison with a standard or with a similar item or concept, or both, by examining the role of the item within a specific context. This section and the one following describe the formal and informal processes NRCS will follow to evaluate the cultural resources which have been identified and which will be directly or indirectly affected by a proposed action. The CRC is responsible for coordinating the evaluation process. CRS's will evaluate cultural resources and assist in reviewing determinations of eligibility made by contractors. This first section describes the evaluation procedures for determining whether a tangible cultural resource is eligible for the National Register of Historic Places. This section covers the largest number of resources that NRCS will encounter and is thus separated out for clarity. The next section describes the identification and evaluation process for resources that are important because of other legislation or regulations. All field personnel and state personnel with field responsibilities should be familiar with the characteristics of all resource types.
- B. Resources are evaluated according to the National Register of Historic Places criteria. Cultural resources which have been identified by a qualified CRS or NRCS employees who have completed the NRCS National Cultural Resources Training Program will be evaluated by a CRS following the formal process:
  - (1) Material cultural resources such as objects, sites, buildings, structures, and districts which have been identified will be placed within the appropriate historic context(s) and compared against the National Register of Historic Places criteria (36 CFR 60.4), to determine whether the resource is eligible for listing in the National Register. The specialist will provide a written rationale for the decision on each cultural resource. Historic contexts to be used in the evaluation process should be prepared by each State Historic Preservation Office as a part of the State Historic Preservation Plan. While it is always important to obtain sufficient information during the identification process to help place a resource in its historic setting, it is of particular importance when a state has not prepared historic contexts National Register Bulletin No.15 provides guidance. How evaluations will be conducted in the absence of a state plan can be an item in the state agreement with the SHPO. *Only objects within the APE shall be*

*evaluated. Relatively few 50 year old structures will meet the criteria for registration.*

- When little comparative information has been collected and/or NRCS and the SHPO/THPO disagree on the National Register eligibility of the resource, NRCS should identify and consult with individuals who are especially knowledgeable regarding the type of resource being evaluated and obtain the information necessary to complete an evaluation.
- (2) Properties of traditional religious and cultural importance to American Indian tribes or Native Hawaiian groups may also be eligible for listing in the National Register, although they may not always contain material cultural resources. The value of such resources is determined through consultation with the appropriate tribal officials or Native Hawaiian representatives.
    - (i) Consultation should be approached with an understanding that the federally recognized Tribe is a sovereign government, and interaction between the agency and the Tribe is that of one government to another. Consultation with a Tribe benefits from a pre-existing dialogue and relations between the US and tribal governments. Agency Tribal Liaisons and Special Emphasis Program Managers can help determine the type and level of contact needed to initiate consultation.
    - (ii) Efforts to initiate consultation where there has been no prior contact between the Agency and Tribe may begin at a formal level of tribal council, elders, or chief(s) meeting with mid-level or top-level managers of the agency. In other cases the consultation relationship may come about through interaction between field-level staffs from the agency and tribe. While the goals of consultation are best expressed in writing in a memorandum of understanding or agreement of principles approved by the tribal government, there may be cases where the preferred method of consulting by the tribe is verbal and without a written document.
    - (iii) Consultation with tribes with an authorized Tribal Historic Preservation Officer (THPO) will probably initiate with the THPO, and be guided by the Tribe. The range of possible processes for consultation is wide, with some tribes preferring consultation activities entirely under the THPO, while others will use the THPO as a technical resource to tribal leaders. In all cases, an authorized THPO has the same legal authority on tribal lands as the SHPO has on all other lands. A clear understanding of these functions at the beginning of consultation on cultural resources is helpful.
  - (3) Using the documentation prepared by the Cultural Resources Specialist, NRCS will agree or disagree with the specialist's recommendations on eligibility and consult with the SHPO/THPO.
  - (4) If NRCS determines any of the National Register Criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for Section 106 purposes.
  - (5) If the NRCS determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. The proposed actions can continue after appropriate documentation.
  - (6) If the agency and the SHPO/THPO cannot agree on the National Register eligibility of a cultural resource, NRCS will obtain a determination of

eligibility from the Keeper of the National Register and complete the Section 106 process.

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

- A. Assessment of Effects. If a cultural resource is determined to be an historic property, it is necessary to determine how the property will be affected by the proposed action, and, if so, whether that effect will be adverse. The steps in the process of assessing effect are detailed in 36 CFR 800.5(a)-(d). Additional guidance is in the publication "Preparing Agreement Documents: How to Write Determinations of No Adverse Effect, Memoranda of Agreement, and Programmatic Agreements Under 36 CFR 800," issued by the Advisory Council in September, 1989. NRCS should follow and document these steps for all historic properties that will be affected by a proposed action.
- B. Effects to Historic Properties are assessed, in consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches traditional religious and cultural significance to identified historic properties, according to the criteria in the context of the historical, architectural, archeological, or cultural significance possessed by the property.
- C. An undertaking shall be considered to have an effect whenever any condition of the undertaking causes or may cause any change in the characteristic of a historic property that qualifies it for inclusion in or eligibility for the NRHP. An effect occurs when an undertaking changes the integrity of location, design, setting, materials, workmanship, feeling, or association of the property that contributes to its importance in accordance with the NRHP criteria. An effect may be direct or indirect. Direct effects are caused by the undertaking and occur at the same time and place. Indirect effects include those caused by the undertaking that are later in time or farther removed in distance but are still reasonably foreseeable. Such effects may include changes in the pattern of land use, population density, or growth rate that may affect properties of historical, architectural, archeological, or cultural importance.
- D. Effects assessments have three possible outcomes:
  - (1) No Potential to cause effects. This is when the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties are present. In this case, NRCS has no further obligations under section 106.
  - (2) Finding of No Adverse Effect occurs when the undertaking's effects do not meet the criteria for causing an adverse effect or the undertaking is modified or conditions imposed to avoid adverse effects. If the NRCS proposes a finding of no adverse effect, all consulting parties shall be notified and provided with documentation as specified in 36 CFR 800.11(e). NRCS may proceed with the activity if the SHPO/THPO agrees with the findings. If a consulting party does not agree with the finding, NRCS shall follow the procedures in 36 CFR 800.5(c)(2).
  - (3) Finding of Adverse Effect, when the undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the NRHP in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feelings, or association. If an adverse effect is found, the NRCS shall consult further to resolve the adverse effect as outlined below.

- (i) Continue Consultation: NRCS shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertakings that could avoid, minimize, or mitigate adverse effects on historic properties. NRCS shall notify the ACHP of the adverse effect finding by providing the documentation specified in 36 CFR 800.11(e). Requirements for ACHP participation are in 36 CFR 800.6(a)(1).
- (ii) If resolution of adverse effects is made without ACHP participation, and the NRCS and SHPO/THPO agree on how the adverse effects will be resolved, they shall execute a Memorandum of Agreement (MOA). The NRCS must submit a copy of the executed MOA, along with documentation to the ACHP prior to approving the undertaking. If resolution of adverse effects is made with ACHP participation, the ACHP will be a signatory of the MOA.
- (iii) Memorandum of Agreement: A MOA executed and implemented evidences the NRCS compliance with Section 106 and shall govern the undertaking and all of its parts. The NRCS shall ensure that the undertaking is carried out in accordance with the MOA.