PROTOTYPE PROGAMMATIC AGREEMENT
BETWEEN THE
U.S. DEPARTMENT OF AGRICULTURE,
NATURAL RESOURCES CONSERVATION SERVICE,
WEST VIRGINA -STATE OFFICE, AND THE
WEST VIRGINIA STATE HISTORIC PRESERVATION OFFICER,
REGARDING CONSERVATION ASSISTANCE

WHEREAS, the United States Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS) administers numerous voluntary assistance programs, special initiatives, and grant and emergency response programs for soil, water, and related resource conservation activities available to eligible private producers, States, commonwealths, Federally Recognized Tribal governments, other government entities, and other applicants for conservation assistance, pursuant to the Agricultural Act of 2014 (2014 Farm Bill, Public Law 113-79); 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 95-3341, 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 1 *985* (Public Law 99-198, as amended); the Federal Agricultural Improvement and Reform Act of 1996 (Public Law 104-127); and executive and secretarial orders, implementing regulations and related authorities; and

WHEREAS, the NRCS, through its conservation assistance programs and initiatives, provides assistance for activities with the potential to affect historic properties eligible for or listed in the National Register of Historic Places (NRHP), including National Historic Landmarks (NHLs) and therefore constitute undertakings subject to review under Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. 470f, and its implementing regulations, 36 CFR Part 800, including the provisions of these regulations addressing NHLs at 36 CFR Part800.10; and

WHEREAS, the NRCS has determined that the requirement to take into account the effects to historic properties of its undertakings may be more effectively and efficiently fulfilled through the use of a Prototype Programmatic Agreement (Prototype Agreement); and

WHEREAS, the NRCS West Virginia State Office has consulted with the West Virginia State Historic Preservation Officer (SHPO) and interested Indian tribes and followed the instructions in the ACHP letter that that accompanied the Prototype Agreement, dated November 21, 2014; and

WHEREAS, NRCS also is responsible for fulfilling the requirements of the National Environmental Policy Act (NEPA), including the use of categorical exclusions, and coordinating NEPA and Section 106 reviews, as appropriate; and

WHEREAS, NRCS developed this Prototype Agreement in consultation with the National Conference of State Historic Preservation Officers (NCSHPO) and its members, interested Indian tribes, Native Hawaiian organizations, interested historic preservation organizations, (such as the National Trust for Historic Preservation), and the Advisory Council on Historic Preservation (ACHP); and

WHEREAS, in accordance with 36 CFR Part 800.14(b)(4), the ACHP has designated this agreement as a Prototype Agreement, which allows for the development and execution of subsequent prototype agreements by individual NRCS State office(s) (West Virginia -based Prototype Agreements) to evidence compliance with Section 106; and

WHEREAS, this West Virginia -based Prototype Agreement conforms to the NRCS Prototype Agreement as designated by the ACHP on November 21, 2014, and therefore, does not require the participation or signature of the ACHP when the NRCS State Office and interested Indian tribes agree to the terms of the West Virginia -based Prototype Agreement; and

WHEREAS, this Prototype Agreement replaces the 2002 nationwide "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," as amended in 2011 and 2012, which expired on November 21, 2014; and

WHEREAS, the NRCS West Virginia State Conservationist is the responsible federal agency official within the state for all provisions of Section 106, including consultation with the West Virginia SHPO, and government-to government consultation with interested Indian tribes to negotiate the West Virginia -based Prototype Agreement; and

WHEREAS, the West Virginia -based Prototype Agreement does not apply to undertakings occurring on or affecting historic properties on Tribal lands, as defined by Section 301(14) of the NHPA, without prior agreement and execution of a Prototype Agreement with the concerned Indian tribe; and

WHEREAS, the NRCS has consulted with Indian tribe(s) or NHOs and has invited Indian tribes to participate in the development of this West Virginia - based Prototype Agreement; and

WHEREAS, this Prototype Agreement does not modify the responsibilities of the NRCS to consult with Indian tribes and NHOs on all undertakings that might affect historic properties and properties of religious and cultural significance to them, regardless of where the undertaking is located, without prior agreement by the concerned Indian tribe or NHO, and recognizes that historic properties of religious and cultural significance to an Indian tribe or NHO may be located on ancestral homelands or on officially ceded lands near or far from current settlements; and

WHEREAS, when NRCS West Virginia conducts individual Section 106 reviews for undertakings under this West Virginia -based Prototype Agreement, it shall identify and invite other agencies, organizations, and individuals to participate as consulting parties; and

NOW, THEREFORE, the NRCS West Virginia State Office and the West Virginia SHPO agree that undertakings in West Virginia State shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on historic properties.

STIPULATIONS

NRCS West Virginia shall ensure that the following stipulations are met and carried out:

I. APPLICABILITY.

A. Once executed by NRCS West Virginia and the West Virginia SHPO, this State- based Prototype Agreement sets forth the review process for all NRCS undertakings subject to Section 106 in the West Virginia State.

B. Execution of this West Virginia -based Prototype Agreement supersedes any existing State Level Agreement with West Virginia SHPO executed under the previous NRCS nationwide Programmatic Agreement, but does not replace any existing project-specific Section 106 agreements (Memoranda of Agreement or Programmatic Agreements).

C. This West Virginia-based Prototype Agreement applies only when there is a Federal Preservation Officer (FPO) in the NRCS National Headquarters (NHQ) who meets the Secretary of the Interior's Professional Qualification Standards (48 FR 44716).

D. This West Virginia -based Prototype Agreement applies only where there is staffing or access to staffing (through contracted services or agreements with other agencies or Indian tribes) who meet the Secretary of Interior's Professional Qualification Standards in the West Virginia NRCS state office.

II. ROLES AND PROFESSIONAL QUALIFICATIONS.

A. The NRCS West Virginia State Conservationist is responsible for oversight of its performance under this West Virginia -based Prototype Agreement.

B. NRCS West Virginia shall ensure that all NRCS staff or individuals carrying out Section 106 historic preservation compliance work on its behalf, including the NRCS West Virginia State senior historic preservation professional staff member (the Cultural Resources Specialist (CRS), or Archaeologist, or Historian), are appropriately qualified to coordinate the reviews of resources and historic properties as applicable to the resources and historic properties being addressed (site, building, structure, landscape, resources of significance to Indian tribes and other concerned communities). Thus, these staff and consultants must meet the Secretary of the Interior's Professional Qualification Standards and have the knowledge to assess the resources within an undertaking's area of potential effects (APE).

C. The NRCS West Virginia State Conservationist is responsible for consultation with the West Virginia SHPO and government to government consultation withinterested Indian Tribes to develop consultation protocols. These responsibilities may not be delegated to any other staff, nor carried out on behalf of NRCS by another federal agency.

D. The NRCS West Virginia CRS/Archaeologist/Historian and/or professional consultants shall provide technical historic property and resource information to the State Conservationist for use in Section 106 findings and determinations, after appropriate consultations with the SHPO, interested Indian tribes, and discussions with the landowner. The NRCS West Virginia CRS/Archaeologist/Historian shall monitor and oversee the work and reporting of all NRCS field office personnel and professional service consultants. The NRCS West Virginia CRS/Archaeologist/Historian shall also assist the NRCS West Virginia State Conservationist in determining whether an undertaking has the potential to affect historic properties, triggering Section 106 review, pursuant to 36 CFR Part 800.3(a).

E. NRCS West Virginia field office personnel involved in implementing this West Virginia-based Prototype Agreement, after completion of NRCS' web, classroom, and field awareness training acquired through USDA's AgLearn training site, shall work with the CRS/Archaeologist/Historian, as feasible, in completing historic preservation compliance (Section 106) field records for the agricultural producer's (NRCS' client or voluntary applicant for assistance) files and for use in producing initial historic property identification records (as set forth and outlined in NRCS' operational guidance, the National Cultural Resources Procedures Handbook, Title 190, Part 601).

F. The NRCS West Virginia CRS/Archaeologist/Historian shall oversee development of the scopes of work for investigation of the APEs for identified undertakings (see 36 CFR Part 800.4). NRCS West Virginia may use professional service contractors or consultants or partners to assist with cultural resources compliance studies. NRCS West Virginia shall ensure these contractors meet the Secretary of Interior's Professional Qualifications Standards.

G. NRCS West Virginia remains responsible for all consultation with the West Virginia SHPO, Indian tribes and THPOs and all determinations of NRHP eligibility and effect. NRCS West Virginia may not delegate consultation for findings and determinations to professional services consultants or producers/applicants for conservation assistance.

H. West Virginia SHPO and Indian Tribes, if provided sufficient data on a proposed undertaking and APE for the proposed undertaking by NRCS West Virginia, shall consult and provide a response to NRCS within 30 calendar days. The definition of sufficient data is provided in 36 CFR Part 800.11.

I. The ACHP shall provide technical guidance, participate in dispute resolution, and monitor the effectiveness of this agreement, as appropriate.

III. TRAINING.

A. NRCS West Virginia shall require personnel conducting cultural resources identification and evaluation work to complete, at a minimum, the NRCS Web-based (in USDA AgLearn – Modules 1-6) and field Cultural Resources Training in Modules 7-8.

B. NRCS West Virginia shall require the CRS/Archaeologist/Historian and/or other NRCS personnel overseeing cultural resource work to take the NRCS Cultural Resources Training Modules (awareness training) and the ACHP's Section 106 *Essentials* course, or a course with similar content, if approved by the NRCS FPO. Training must be completed within the first calendar year after execution of this West Virginia -based Prototype Agreement. NRCS West Virginia personnel shall review and update training completion with their supervisors and include their training in their Individual Development Plans.

C. NRCS West Virginia may invite the West Virginia SHPO or staff, and interested Indian Tribes to participate in presentations at agency classroom or field trainings.

D. NRCS West Virginia shall encourage all personnel conducting or overseeing cultural resources work to take additional appropriate specialized training as provided by the West Virginia SHPO, Indian tribes, the ACHP, National Park Service, General Services Agency or other agencies, as feasible.

IV. LEAD FEDERAL AGENCY.

A. For any undertaking for which the NRCS is the lead federal agency for Section 106 purposes per 36 CFR Part 800.2(a)(2), NRCS West Virginia staff shall follow the terms of this West Virginia - based Prototype Agreement. NRCS West Virginia shall notify the West Virginia SHPO and interested Indian Tribes of its involvement in the undertaking and the involvement of the other federal agencies.

B. For any undertaking for which the NRCS is not the lead federal agency for Section 106 purposes, including those undertakings for which the NRCS provides technical assistance to other USDA or other federal agencies, the terms of this West Virginia -based Prototype Agreement shall not apply to that undertaking. If the lead federal agency agrees, NRCS West Virginia may follow the approved alternative procedures in place for that agency.

V. REVIEW PROCEDURES.

A. In consultation with the West Virginia SHPO and interested Indian Tribes, NRCS West Virginia shall identify those undertakings with little to no potential to affect historic properties and list those undertakings in Appendix A. Upon the determination by the NRCS West Virginia CRS/Archaeologist/Historian that a proposed undertaking is included in Appendix A, as non-ground disturbing (NG), NRCS West Virginia is not required to consult further with the SHPO for that undertaking.

B. NRCS West Virginia and the West Virginia SHPO will use the classification system established in Appendix A when determining whether a particular activity being planned under any NRCS program has the potential to affect cultural resources.

1. Practices marked as "NG" are not considered to have the potential to effect and no cultural resources review actions need to be taken.

2. Practices marked "PG" (potentially ground disturbing) are considered to have the potential to effect except when non-intrusive or when installation will not exceed the depth and extent of previous cultivation. If installation exceeds the depth of previous cultivation, the area has not been previously cultivated or other reasons stated in the decision matrix, a cultural resource review will be completed.

3. Practices marked as "G" (ground disturbing) are considered to have the potential to effect and cultural resources review actions are required prior to their installation.

4. Practices not covered in Appendix A will be presumed to have the potential to effect cultural resources and will be reviewed. Such practices will be added to the appropriate category during yearly reviews of this agreement.

C. Exemptions: Consultation or advice, or technical assistance, including the development, review and/or approval of conservation plans or technical designs when NRCS West Virginia provides no financial assistance for their implementation or otherwise exercises no control over implementation (for example, design advice from our handbook of Conservation Practice Standards for a farm pond which is installed, independently, by the producer, with his or her own funds and private contractor). This type of conservation practice assistance will not be subject to cultural resources reviews.

D. NRCS West Virginia will follow the review process outlines in Appendix B and use review form shown in Appendix C.

E. The list of undertakings provided in the Appendix A may be modified through consultation and written agreement between the NRCS West Virginia State Conservationist and the West Virginia SHPO without requiring an amendment to this West Virginia -based Prototype Agreement. The West Virginia NRCS State office will maintain the master list and will provide an updated list to all consulting parties with an explanation of the rationale (metadata) for classifying the practices accordingly.

F. Undertakings not identified in Appendix A shall require further review as outlined in Stipulation V.B. NRCS West Virginia shall consult with the West Virginia SHPO and interested Indian Tribes to define the undertaking's APE, identify and evaluate historic properties that may be affected by the undertaking, assess potential effects, and identify strategies for resolving adverse effects prior to approving the financial assistance for the undertaking.

1. NRCS West Virginia may provide its proposed APE, identification of historic properties and/or scope of identification efforts, and assessment of effects in a single transmittal to the West Virginia SHPO and interested Indian tribes, provided this documentation meets the substantive standards in 36 CFR Part 800.4-5 and 800.11.

2. NRCS West Virginia shall attempt to avoid adverse effects to historic properties whenever possible; where historic properties are located in the APE, NRCS West Virginia shall describe how it proposes to modify, buffer, or move the undertaking to avoid adverse effects to historic properties.

3. Where NRCS West Virginia proposes a finding of "no historic properties affected" or "no adverse effect" to historic properties, the West Virginia SHPO and interested Indian Tribes shall have 30 calendar days from receipt of this documented description and information to review it and provide comments. NRCS West Virginia shall take into account all timely comments.

   a. If the West Virginia SHPO, interested Indian Tribes, or another consulting party disagrees with the findings and/or determinations of NRCS West Virginia, they shall notify NRCS West Virginia within the 30 calendar day time period. NRCS West Virginia shall consult with the West Virginia SHPO, interested Indian Tribes, or other consulting parties to attempt to resolve the disagreement. If the disagreement cannot be resolved through this consultation, NRCS West Virginia shall follow the dispute resolution process in Stipulation VIII below.

   b. If the West Virginia SHPO does not respond to NRCS West Virginia within the 30 calendar day period and/or NRCS West Virginia receives no objections from other consulting parties, or if the West Virginia SHPO concurs with the determination and proposed actions to avoid adverse effects, NRCS West Virginia shall document the concurrence/lack of response within the review time noted above, and may move forward with the undertaking.

4. Should the proposed undertaking have the potential to adversely affect a known National Historic Landmark, the NRCS shall, to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm to the NHL in accordance with Section 110(f) of the NHPA and 36 CFR Part 800.6 and 800.10, including consultation with the ACHP and respective National Park Service, Regional National Historic Landmark Program Coordinator, to develop a Memorandum of Agreement.

G. Access to Cultural Resources Information

1. The West Virginia SHPO has developed an online GIS database of the Cultural Resources located within West Virginia. This GIS database is protected and managed by the West Virginia SHPO. West Virginia SHPO routinely updates this online database and the GIS database is considered a reliable source for planning purposes. West Virginia SHPO will provide access to the GIS database to NRCS West Virginia individual(s) for the purposes of Cultural Resource Reviews that have meet qualification and/or experience requirements. Approved NRCS West Virginia individuals will be required to agree to the West Virginia SHPO's User Agreement as well as NRCS privacy policies.

2. The West Virginia SHPO has the right to terminate an individual's access to the GIS database if there has been a violation of the "User Agreement" signed by the individual. The West Virginia SHPO will also notify NRCS West Virginia of any terminations in writing at the time of termination.

3. NRCS West Virginia from time to time may change staff responsibilities. NRCS West Virginia will notify the West Virginia SHPO of staff changes related to this MOU. The individual's access will be terminated by the West Virginia SHPO after notification by the NRCS.

4. All paper files maintained by NRCS West Virginia will be kept in a locked cabinet or room with restricted access. In the event of staff changes, NRCS West Virginia will notify West Virginia SHPO of the new individuals assigned either as the Cultural Resource Coordinator, (CRC) Cultural Resource Specialist (CRS) or Cultural Resource Program Assistant (CRPA).

H. Compliance Documentation

1. NRCS West Virginia shall ensure that reports on all activities carried out according to this agreement are provided to the West Virginia SHPO and, upon request, to other interested parties (subject to restrictions contained in Section 304 of the NHPA and Section 9(a) of the Archaeological Resources Protection Act).

2. Individual Practices. NRCS West Virginia will provide the West Virginia SHPO with copies of all Cultural Resources Review Worksheets in which resources were known or discovered during the planning of the practice.

3. Site Evaluations. The NRCS West Virginia CRC/CRS and field office personnel will consult with the West Virginia SHPO, land owners, interested Indian Tribes, and other parties as listed in Stipulation V., as appropriate, for all evaluations of eligibility and will supply the West Virginia SHPO with all supporting decision making documentation.

4. Reporting. NRCS West Virginia agrees to provide a fiscal year summary of NRCS planned practices within the state. This report will be supplied to the West Virginia SHPO no later than March 30 for activities of the previous year. This report will consist of the number of practices installed, the number of these requiring cultural resources review worksheets, the number of cultural resources encountered, the number of these resources that were avoided and the number which required treatment. The report will be the same as that submitted annually to the U.S. Congress, entitled "Performance and Results Measurement System".

VI. EMERGENCY AND DISASTER MANAGEMENT PROCEDURES (RESPONSE TO EMERGENCIES)

A. NRCS West Virginia shall notify the West Virginia SHPO and interested Indian Tribes immediately or within 48 hours of the emergency determination, following the NRCS' Emergency Watershed Program (EWP) final rule (see Section 216, P.L. 81-516 Final Rule, 7 CFR Part 624 (April 2005).

B. The NRCS West Virginia State office shall prepare procedures for exigency (following the rules for NRCS' (EWP) regarding immediate threat to life and property requiring, response within 5 business days) in consultation with the West Virginia SHPO and Indian tribes. These procedures are appended to this document.

C. If the NRCS West Virginia State office has not developed specific procedures for responding to exigencies, and NRCS West Virginia shall follow the recently approved guidelines for Unified Federal Review issued by the Department of Homeland Security, Federal

Emergency Management Service (DHS, FEMA), the Council on Environmental Quality (CEQ), and the ACHP in July 2014, or the procedures in 36 CFR Part 800.12(b).

VII. POST-REVIEW DISCOVERIES OF CULTURAL RESOURCES OR HISTORIC PROPERTIES AND UNANTICIPATED EFFECTS TO HISTORIC PROPERTIES.

A. Where construction has not yet begun and a cultural resource is discovered after Section106 review is complete, NRCS West Virginia shall consult to seek avoidance or minimization strategies in consultation with the West Virginia SHPO, interested Indian Tribes, and other consulting parties to resolve adverse effects in accordance with 36 CFR Part 800.6.

B. NRCS West Virginia shall ensure that every contract for assistance includes provisions for halting work/construction in the area when potential historic properties are discovered or unanticipated effects to historic properties are found after implementation, installation, or construction has begun. When such a discovery occurs, the producer who is receiving financial assistance or their contractor shall immediately notify the NRCS West Virginia State Conservationist's Office, CRS, supervisory NRCS personnel for the area, and the landowner/applicant.

1. The NRCS West Virginia CRS shall inspect the discovery within 24 hours, if weather permits. The NRCS West Virginia CRS shall establish a protective buffer zone surrounding the discovery in consultation with the local NRCS West Virginia official (field office supervisor or District or Area Conservationist), concerned Indian tribes, the West Virginia SHPO, the NRCS West Virginia State engineering or program supervisor, and/or the landowner/producer (whomever NRCS is assisting) as appropriate. This action may require inspection by tribal or cultural resources experts in addition to the NRCS West Virginia CRS.

2. All NRCS contact with media shall occur only under the direction of the NRCS West Virginia Public Affairs Officer, as appropriate, and the NRCS West Virginia State Conservationist.

3. Security shall be established to protect the resources/historic properties, workers, and private property. Local law enforcement authorities will be notified in accordance with applicable State law and NRCS policy in order to protect the resources. Construction and/or work may resume outside the buffer only when the NRCS West Virginia State Conservationist determines it is appropriate and safe for the resources and workers.

4. The NRCS West Virginia CRS shall notify the West Virginia SHPO, interested Indian Tribes, and the ACHP no later than 48 hours after the discovery and describe NRCS' assessment of the National Register eligibility of the property, as feasible and proposed actions to resolve any adverse effects to historic properties. The eligibility determination may require the assessment and advice of concerned Indian tribes, the West Virginia SHPO, and technical experts (such as historic landscape architects) not employed by NRCS.

5. The West Virginia SHPO, interested Indian Tribes, and the ACHP shall respond within 3 business days from receipt of the notification with any comments on the discovery and proposed actions.
6. NRCS West Virginia shall take any comments provided into account and carry out appropriate actions to resolve any adverse effects.
7. NRCS shall provide a report to the West Virginia SHPO, interested Indian Tribes, and the ACHP of the actions when they are completed.

C. When human remains are discovered, the NRCS shall follow all applicable federal, Tribal, and state burial laws and ordinances, including the Native American Graves Protection and Repatriation Act, and implementing regulations, when on Tribal or federal lands, and related human rights and health statutes, where appropriate. NRCS West Virginia shall also refer to the ACHP's Policy Statement regarding *Treatment of Burial Sites, Human Remains and Funerary Objects* and the ACHP's Section 106 Archaeology Guidance. NRCS West Virginia shall also follow USDA and NRCS policy on treatment of human remains and consultation.

VIII. DISPUTE RESOLUTION.

A. Should any consulting or signatory party to this West Virginia -based Prototype Agreement object to any actions proposed or the manner in which the terms of the agreement are implemented, the NRCS West Virginia State Conservationist and the NRCS West Virginia CRS shall consult with such party to resolve the objection. If the NRCS West Virginia State Conservationist determines that such objection cannot be resolved, he or she will:

1. Forward all documentation relevant to the dispute, including the State Conservationist's proposed resolution, to the NRCS FPO and Senior Policy Official (SPO Deputy Chief for Science and Technology) and the ACHP. The ACHP shall provide the FPO, SPO, and State Conservationist with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, NRCS shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP and any signatory or consulting parties, and provide them with a copy of this written response. NRCS will then proceed according to its final decision.
2. If the ACHP does not provide its advice regarding the dispute within the thirty (30) day time period, NRCS may make a final decision on the dispute and proceed. Prior to reaching such a final decision, NRCS shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories and consulting parties, and provide them and the ACHP with a copy of the written response.

B. The responsibility of NRCS West Virginia to carry out all other actions subject to the terms of this agreement that are not the subject of the dispute remains unchanged.

C. Any consulting party to West Virginia -based Prototype Agreement may request the ACHP provide its advisory opinion regarding the substance of any finding, determination, or decision regarding compliance with its terms.

D. At any time during the implementation of the West Virginia -based Prototype Agreement, a member of the public may submit an objection pertaining to this agreement to the NRCS West Virginia State Conservationist, in writing. Upon receiving such an objection, the State Conservationist shall notify the NRCS SPO and FPO, the SHPO, take the objection into account, and consult with other consulting parties as appropriate to resolve the objection. The NRCS State Conservationist shall notify the SPO, FPO, the West Virginia SHPO, and interested Indian Tribes of the outcome of this process.

IX. PUBLIC INVOLVEMENT

The NRCS West Virginia State Conservationist will ensure the public is involved in the development of this West Virginia -based Prototype Agreement and participates in Section 106 review as set forth in this agreement including seeking comments and input at the NRCS State Technical Committee meetings.

X. ANNUAL REPORTING AND MONITORING.

A. Every year following the execution of this agreement, commencing December 1, 2015, until it expires or is terminated, the NRCS West Virginia State Conservationist shall provide all consulting parties (including those parties who participate in the consultation but do not sign the agreement) and the FPO a summary report detailing work undertaken pursuant to its terms, including a list of undertakings falling under Appendix A as well as undertakings that required further review; a summary of the nature and content of meetings held with the West Virginia SHPO and interested Indian Tribes; and an assessment of the overall effectiveness of the West Virginia -based Prototype Agreement. Such report shall include any scheduling changes proposed, any problems encountered, and any disputes and objections received in the efforts of NRCS West Virginia to carry out the terms of this agreement.

1. The NRCS FPO shall use the state reports to provide, through the NRCS SPO, an annual report to the ACHP.
2. The NRCS West Virginia State Conservationist shall use the state report to assess the need for annual meetings with the West Virginia SHPO each fiscal year.

B. The NRCS West Virginia State Conservationist will participate in an annual review with the NRCS Regional Conservationist regarding the effectiveness of the prototype agreement and submit a written (email) report following this review to the SPO (Deputy Chief for Science and Technology).

C. The NRCS West Virginia State Conservationist, the West Virginia SHPO, and interested Indian Tribes may request that the ACHP participate in any annual meeting or agreement review.

XI. COMPLIANCE WITH APPLICABLE STATE LAW AND TRIBAL LAW (WHEN ON TRIBAL LANDS).

NRCS shall comply with relevant and applicable state law, including permit requirements on state land, and with relevant and applicable tribal law, when on tribal lands.

XII. DURATION OF PROTOTYPE AGREEMENT.

This West Virginia -based Prototype Agreement will be in effect for 5 years from the date of execution unless amended or terminated pursuant to Section XIII Amendment and Termination below with a 5 year extension upon receipt of written mutual consent by signatories.

XIII. AMENDMENT AND TERMINATION.

A. This West Virginia -based Prototype Agreement may be amended if agreed to in writing by all signatories. The amendment will be effective on the date a copy, signed by all of the signatories, and is filed with the NRCS FPO, SPO, and the ACHP.

B. If any signatory to this West Virginia -based Prototype Agreement, or the ACHP, determines that its provisions will not or cannot be carried out, that party shall immediately consult with the other parties to attempt to develop an amendment per Stipulation XII.A. If, within 30 calendar days, or other time period agreed upon by the signatories, an amendment cannot be agreed upon, any signatory or the ACHP may terminate the agreement upon written notification to the other signatories.

C. If this West Virginia -based Prototype Agreement is terminated, or expires without being extended via the amendment process described above, and prior to continuing work on any undertaking, NRCS West Virginia shall comply with 36 CFR Part 800 for all individual undertakings in West Virginia State.

D. NRCS West Virginia will consider requests from other USDA agencies to become a signatory to the State- based Prototype Agreement following formal written requests and appropriate discussion with and approval by the NRCS FPO and SPO, and joint USDA Agency -NRCS State Office consultation with the ACHP, NCSHPO, and Indian tribes/THPOs, and other consulting parties, as appropriate. Such inclusion of the USDA agency may require amendment to this West Virginia -based Prototype Agreement.

E. Items not Specifically Covered by this Agreement. The parties agree that all matters not discussed in this agreement will be handled in accordance with Section 106 of the NHPA and Council regulations and NRCS GM 420 Part 401 (Appendix F).

Execution of this West Virginia -based Prototype Agreement by the NRCS and SHPO and implementation of its terms evidence that NRCS has taken into account the effects of its undertakings in West Virginia State on historic properties and afforded the ACHP a reasonable opportunity to comment.

SIGNATURES:

Natural Resources Conservation Service

United States Department of Agriculture

By: _____, State Conservationist Date: 5/21/16
Louis Aspey

West Virginia State Historic Preservation Officer

By: _____, Commissioner Date: 5/18/16
Randall Reid-Smith

APPENDIX A

LIST OF UNDERTAKINGS REQUIRING NO FURTHER SECTION 106 REVIEW IN NRCS [STATE OFFICE]

Pursuant to Stipulation V.B. above, in consultation with the West Virginia SHPO, the NRCS, through the qualified [CRS/Archaeologist/Historian] as described in Stipulation II.b., has determined that the following undertakings identified as "NG" (No Ground Disturbance) have little or no potential to affect historic properties. The NRCS is not required to consult further with the SHPO under Section 106 for any undertaking that is included in this Appendix identified as "NG" (No Ground Disturbance).

The undertakings identified as "PG" (potentially ground disturbing) are considered to have the potential to effect except when non-intrusive or when installation will not exceed the depth and extent of previous cultivation. If installation exceeds the depth of previous cultivation, the area has not been previously cultivated or other reasons stated in the decision matrix, a cultural resource review will be completed.

The undertakings identified as "G" (ground disturbing) are considered to have the potential to effect and cultural resources review actions are required prior to their installation.

Undertaking not covered in Appendix A will be presumed to have the potential to effect cultural resources and will be reviewed. Such practices will be added to the appropriate category during yearly reviews of this agreement.

Ground Disturbance Potential*	Practice Code	Practice List
NG	102	Comprehensive Nutrient Management Plan CAP
NG	104	Nutrient Management CAP
NG	106	Forest Management Plan
NG	108	Feed Management Plan
NG	110	Grazing Management CAP
NG	114	IPM CAP
NG	118	Irrigation Water Management CAP
NG	122	Agricultural Energy Management - Headquarters CAP
NG	124	Agricultural Energy Management - Landscape CAP
NG	128	Agricultural Energy Management Plan (AgEMP)
NG	130	Drainage Water Management Plan
NG	138	Organic Transition CAP
NG	142	Fish-Wildlife CAP
NG	146	Pollinator CAP
NG	154	Integrated Pest Management Herbicide Resistance Weed Conservation
NG	311	Alley Cropping

NG	315	Herbaceous Weed Control
NG	344	Residue Management, Seasonal
NG	345	Residue and Tillage Management, Mulch Till
NG	355	Well Water Testing
NG	374	Farmstead Energy Improvement
NG	382	Fence
NG	399	Fishpond Management
NG	449	Irrigation Water Management
NG	472	Access Control
NG	484	Mulching
NG	511	Forage Harvest Management
NG	528	Prescribed Grazing
NG	554	Drainage Water Management
NG	554	Regulating Water in Drainage Systems
NG	590	Nutrient Management
NG	591	Amend. for Treat. of Ag. Waste
NG	592	Feed Management
NG	595	Integrated Pest Management (IPM)
NG	633	Waste Recycling
NG	643	Restoration and Management of Rare or Declining Habitats
NG	644	Wetland Wildlife Habitat Management
NG	645	Upland Wildlife Habitat Management
NG	647	Early Successional Habitat Development/Management
NG	660	Tree/Shrub Pruning
NG	670	Lighting System Improvement
NG	521A	Pond Sealing or Lining, Flexible Membrane
NG	521B	Pond Sealing or Lining, Soil Dispersant
NG	521C	Pond Sealing or Lining, Bentonite Sealant
NG	329A	Residue Management, Mulch Till and Seasonal
NG	329B	Residue Management, Mulch Till and Seasonal
NG	521A-E	Pond Sealing or Lining
NG	521D	Pond Sealing or Lining Compacted Clay Treatment
PG	314	Brush Management
PG	322	Channel Vegetation
PG	327	Conservation Cover
PG	328	Conservation Crop Rotation
PG	329	Residue and Tillage Management, No-Till/Strip Till/Direct Seed
PG	330	Contour Farming
PG	331	Contour Orchard and Other Fruit Area
PG	332	Contour Buffer Strips
PG	340	Cover Crop
PG	342	Critical Area Planting
PG	367	Roofs and Covers
PG	379	Multi-Story Cropping

PG	380	Windbreak/Shelterbelt Establishment
PG	384	Woody Residue Treatment
PG	386	Field Border
PG	390	Riparian Herbaceous Cover
PG	391	Riparian Forest Buffer
PG	393	Filter Strip
PG	422	Hedgerow Planting
PG	490	Tree/Shrub Site Preparation
PG	512	Forage and Biomass Planting
PG	544	Land Reconstruction
PG	558	Roof Runoff Structure
PG	562	Recreation Area Improvement
PG	570	Stormwater Runoff Control
PG	572	Spoil Spreading
PG	575	Animal Trails and Walkways
PG	601	Vegetative Barrier
PG	612	Tree/Shrub Establishment
PG	614	Watering Facility
PG	629	Waste Treatment
PG	634	Manure Transfer
PG	635	Vegetated Treatment Area
PG	636	Water Harvesting Catchment
PG	646	Shallow Water Development and Management
PG	655	Forest Trails and Landings
PG	666	Forest Stand Improvement
PG	798	Seasonal High Tunnel for Crops
PG	798i	Seasonal High Tunnel Structure
G	112	Prescribed Burning Plan
G	309	Agrichemical Handling Facility
G	313	Waste Storage Facility
G	316	Animal Mortality Facility
G	317	Composting Facility
G	324	Deep Tillage
G	326	Clearing and Snagging
G	348	Dam, Diversion
G	349	Dams
G	350	Sediment Basin
G	351	Well Decommissioning
G	356	Dike
G	360	Waste Facility Closure
G	362	Diversion
G	378	Pond
G	394	Firebreak
G	395	Stream Habitat Improvement and Management

G	396	Fish Passage
G	397	Aquaculture Ponds
G	398	Fish Raceway or Tank
G	400	Floodwater Diversion
G	402	Dam
G	404	Floodway
G	410	Grade Stabilization Structure
G	412	Grassed Waterway
G	423	Hillside Ditch
G	430	Irrigation Pipeline
G	432	Dry Hydrant
G	436	Irrigation Reservoir
G	441	Irrigation System, Microirrigation
G	442	Irrigation System, Sprinkler
G	460	Land Clearing
G	462	Precision Land Forming
G	466	Land Smoothing
G	468	Lined Waterway or Outlet
G	500	Obstruction Removal
G	516	Pipeline
G	527	Sink Hole and Sinkhole Area Treatment
G	533	Pumping Plant for Water Control
G	560	Access Road
G	561	Heavy Use Area Protection
G	562	Recreation Land Grading and Shaping
G	566	Recreation Land Grading and Shaping
G	568	Trails and Walkways
G	574	Spring Development
G	578	Stream Crossing
G	580	Streambank and Shoreline Protection
G	582	Open Channel
G	584	Channel Bed Stabilization
G	585	Stripcropping
G	587	Structure for Water Control
G	600	Terrace
G	606	Subsurface Drain
G	607	Surface Drainage, Field Ditch
G	608	Surface Drainage, Main or Lateral
G	620	Underground Outlet
G	632	Solid/Liquid Waste Separation Facility
G	638	Water and Sediment Control Basin
G	642	Water Well
G	648	Wildlife Watering Facility
G	649	Structures for Wildlife

G	654	Road / Trail / Landing Closure and Treatment
G	657	Wetland Restoration
G	658	Wetland Creation
G	659	Wetland Enhancement
G	672	Building Envelope Improvement
G	728	Stream Crossing or Access
G	757	Animal Use Area Protection
G	430DD	Irrigation Water Conveyance, High Pressure, Underground, & Plastic
G	430EE	Irrigation Water Conveyance, Low Pressure, Underground, & Plastic
G	521C	Pond Sealing or Lining, Bentonite Sealant
G	521D	Pond Sealing or Lining, Compacted Clay Treatment
* NG=No Ground Disturbance PG=Potential Disturbance, G=Ground Disturbance		

APPENDIX B

Cultural Resource Review Process

As part of the planning stage, any practices not listed on Appendix A identified as "NG" (No Ground Disturbance) that have the potential to effect cultural resources, will at a minimum have a cultural resources review using the "Request for Cultural Resource Review" form WV-SSC-4 (Appendix C) for the Area of Potential Effect (APE). The completed form will be sent by the NRCS field office to the NRCS Cultural Resources Coordinator (CRC) or Cultural Resources Specialist (CRS), as appropriate.

Exemptions: Consultation or 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 our handbook of Conservation Practice Standards for a farm pond which is installed, independently, by the producer, with his or her own funds and private contractor). This type of conservation practice assistance will not be subject to cultural resources reviews.

1. When the CRC/CRS receives request form and maps from the field, a site file search using the WV SHPO on-line GIS database will be conducted. Area of Potential Effect (APE) shall be clearly identified on a 7.5 Minute quad map at 1:24,000 scale.

   a. If no known cultural resources are within or near (within 1 mile) of the Area of Potential Effect (APE) and no circumstance exists to warrant further review, the CRC/CRS will clear the project and send the completed sheet back to the field office while retaining a copy at the state office.
   b. If circumstances warrant further review of the APE, the CRS will be contacted and arrangements will be made between the CRS and the field office for a field visit for further assessment.
   c. If a known cultural resource exists within the APE or if one is discovered during the cultural resources review process the following steps will be taken:
      1. Avoidance: If a resource is encountered during the planning and review stage of the practice, the resource boundaries will be determined and measures to avoid the resource will be determined by consultation between the NRCS, CRS, field office personnel, landowner and WVSHPO and others as described in State Programmatic Agreement.
      2. Evaluating Significance: If the resource cannot be avoided then it will be evaluated for its eligibility for inclusion on the National Register of Historic Places by the CRS in consultation with the WVSHPO. Treatment measures will be developed as appropriate for the resource by NRCS CRS in consultation with the WVSHPO and other parties described above.

2. Post Review Discoveries

All post review discoveries made in conjunction with any undertaking covered in this Agreement shall be treated in accordance with the following procedures: The NRCS Field Office personnel will immediately notify the NRCS Cultural Resources Coordinator and the SHPO and cease any construction activities. NRCS in consultation with the SHPO will develop a plan to avoid the resource if feasible. If avoidance is not feasible then NRCS will follow the Review process of State Programmatic Agreement outlined in Stipulation VII.

3. Human Remains

If human remains are discovered during the planning or installation/construction of a conservation practice all activities which could damage the remains shall immediately cease. The following actions will be taken.

a. The WV State Police and the CRC/CRS will be contacted by the NRCS field staff immediately to determine whether the remains are part of an ongoing investigation;
b. If the remains are not part of an ongoing police investigation the CRC/CRS will notify the WVSHPO. NRCS will secure the necessary expertise to determine the ethnicity of the remains and consult with SHPO.
c. If human remains are discovered, the NRCS shall follow all applicable federal, tribal, and state burial laws and ordinances, including the Native American Graves Protection and Repatriation Act, and implementing regulations, when on tribal or federal lands, and related human rights and health statutes, where appropriate. NRCS shall also refer to the ACHP's Policy Statement regarding *Treatment of Burial Sites, Human Remains and Funerary Objects* and the ACHP's Section 106 Archaeology Guidance. NRCS shall also follow USDA and NRCS policy on treatment of human remains and consultation

APPENDIX C

U.S. DEPARTMENT OF AGRICULTURE
Natural Resources Conservation Service

WV-SSC-1
03/2016

REQUEST FOR CULTURAL RESOURCES REVIEW

1. Field Office & NRCS Planner:

2. Date:	3. County:	4. Program:

AREA OF POTENTIAL EFFECT (APE)

5. List the practice(s). Include practice name, code, and the size of the APE in acres or linear feet:

6. Participant/Sponsor:	Farm #	Field #	Tract#

7. Proposed Construction Date:	
8. 7.5 Minute USGS Quad:	Lat/Long:

9. Current Land Use//Ground Cover//Slope %:

10. Landform (Check One): ☐ Floodplain ☐ Terrace ☐ Ridge Top ☐ Gap/Saddle ☐ Bench ☐ Other

11. Soil Type:

PROJECT SITE INSPECTION

12. After conducting a field inspection of APE, is there evidence of any of the following: (Check type)

☐ Stone or Brick foundations, ☐ Stone piles, ☐ Mounds, ☐ Dug Well, ☐ Depression, ☐ Ornamental Plantings, ☐ Flint/Chert outcrops, ☐ Flint/Chert flakes or ☐ Projectile points, ☐ Rock Overhangs, ☐ Manmade features or ☐ objects over 50 years old.

Describe what was found:

13. Send this form, along with a portion of a 7.5 minute quad map at 1:24,000 scale with APE identified and a conservation plan map with practices marked to: Cultural Resources Coordinator.

To be completed by the Cultural Resources Specialist:

☐ Cultural Resources are not likely to be affected. Proceed with implementation.

☐ Cultural Resources are likely to be present. Site visit required.

CRS Signature Date

Site visit was completed on

☐ Proceed with practice implementation.

☐ Do not proceed with practice implementation.

CRS Signature Date

APPENDIX D

PROCEDURES FOR EMERGENCY RESPONSE

The following procedures will ensure that the need to protect life and property in an emergency is accomplished while taking cultural resources into account:

Urgent and Compelling: In this situation NRCS shall notify the SHPO, interested Indian Tribes and ACHP. This notification should include circumstances creating the urgent and compelling situation, work to be undertaken, and any consideration of cultural resources, as appropriate. The SHPO will have 7 days to respond to NRCS after receipt of said notification. NRCS will document and avoid adverse impacts to cultural resources encountered during the urgent and compelling work to the fullest extent practicable.

In major disasters, NRCS may elect to waive all or part of its cultural resources responsibilities as allowed under 36 CFR 78 and 36 CFR 800.12.

APPENDIX E

GLOSSARY OF ACRONYMS USED IN THIS DOCUMENT

USDA	**United States Department of Agriculture**
NRCS	**Natural Resources Conservation Service**
ACHP	**Advisory Council on Historic Preservation**
NHL(s)	**National Historic Landmark(s)**
NRHP	**National Register of Historic Places**
SHPO	**State Historic Preservation Officer**
THPO	**Tribal Historic Preservation Officer**
NCSHPO	**National Conference of State Historic Preservation Officers**
NHO	**Native Hawaiian Organization**
NEPA	**National Environmental Policy Act**
CEQ	**Council on Environmental Quality DHS Department of Homeland Security**
FEMA	**Federal Emergency Management Agency**
NHPA	**National Historic Preservation Act**
FPO	**Federal Preservation Officer (Federal Preservation Officer)**
SPO	**Senior Policy Official (NRCS)**
NHQ	**National Headquarters (NHQ)**
APE	**Area of Potential Effect—from ACHP regulations 36 CFR Part 800 CRS Cultural Resources Specialist (NRCS—meets Secretary of Interior's Professional Qualification Standards, generally an archaeologist or historian)**
EWP	**Emergency Watershed Program (NRCS program)**

APPENDIX F

NRCS General Manual—Part 401

Subpart A - General

401.0 Purpose

This part establishes the Natural Resources Conservation Service (NRCS) policy regarding responsibilities to historic and cultural properties under the National Historic Preservation Act of 1966 (NHPA), implementing regulations, and other related authorities. This policy:

(1) Is consistent with Section 106 of the NHPA, recognizes NRCS' lead responsibility to take into account the effects of its actions, or the voluntary actions of participants in NRCS–administered conservation programs, on any cultural resource (district, site, building, structure, object, or traditional cultural property) and to appropriately protect historic properties under its control or affected by agency programs, projects, activities, or assistance.
(2) Acknowledges NRCS' non-delegable responsibility to consult with its partners, including but not limited to the State Historic Preservation Officers (SHPO), Tribal Historic Preservation Officers (THPO), federally- recognized American Indian Tribes, and local governments.
(3) Is consistent with Sections 106, 110, and 112 of the NHPA, acknowledges NRCS' responsibility to establish an historic preservation program appropriate to its conservation mission; designate a Federal Preservation Officer (FPO) to coordinate policy development and implementation; protect historic properties through avoidance of adverse effects whenever possible and through the professionalism of its employees and contractors; and to ensure NRCS actions meet the Secretary of the Interior's Personnel Qualifications Standards for the implementation of Federal historic preservation and environmental laws, regulations, and associated authorities.
(4) Is consistent with the NRCS Nationwide Programmatic Agreement (PA) with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers, ratified on May 31, 2002, which was developed in accordance with the NHPA (16 U.S.C. 470f) and implementing regulations for Section 106 of the Act, found at 36 C.F.R. Part 800.14 (b), and provides policy for streamlined compliance with the NHPA.

401.1 Authorities

A. NHPA of 1966, (Public Law (P.L. 89-665, 80 Stat. 915, as amended; 16 U.S.C. 470; et seq.).

B. NRCS' Nationwide PA NRCS A-3A75-2-64, May 31, 2002, entitled: "Programmatic Agreement among the Unites 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," see: http://www.nrcs.usda.gov/technical/ECS/culture/PA_31.pdf.

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

D. Executive Order 13007 "American Indian Sacred Sites," May 24, 1996.

E. Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments," November 6, 2000, and Presidential Memorandum to Heads of Executive Departments and Agencies on Tribal Consultation, November 5, 2009, see Presidential Memorandum on Tribal Consultation The White House.

F. Executive Order 13287 "Preserve America," March 3, 2003.

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

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

I. Alaska Native Claims Settlement Act of 1971 (P. L. 92-203).

J. Alaska National Interest Lands Conservation Act of 1980 (P. L. 96-487).

K. Advisory Council on Historic Preservation: Protection of Historic and Cultural Properties (36 C.F.R. 800).

L. The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act (63 FR 20495) published April 24, 1998, see Federal Agency Historic Preservation Program.

M. The Secretary of Interior's Standards and Guidelines, Professional Qualification Standards, see Secretary's Standards--Qualifications Standards.

N. Archeology and Historic Preservation: The Secretary of the Interior's Standards and Guidelines 1983 (48 FR 44716), as amended and annotated June 18, 2001, see Secretary's Standards--Identification.

O. Definitional Policy: "American Indian and Alaska Native Policy of the Natural Resources Conservation Service," June 7, 2000. Outlines establishment of Tribal Conservation Districts and bases for Government-to-Government relationship with American Indian Tribes.

401.2 Definitions

Terms listed below are used in the discussion of policy principles in the following sections. A full glossary of terms may be found in the NRCS National Cultural Resources Procedures Handbook (Title 190, Part 601) and is consistent with definitions found in the Advisory Council on Historic Preservation's (ACHP or Council) regulations for implementation of Section 106 of the NHPA (36 C.F.R. Part 800.16).

(1) Adverse Effect. Irreversible and/or incompatible alteration to the characteristics of a historic property qualifying it for inclusion in the National Register of Historic Places. The integrity of the location, design, setting, materials, workmanship, association, or other qualities that are important to defining the National Register eligibility of the historic property are diminished. Determination of adverse effects requires analysis; it may include ground disturbance or other physical or visual effects to the historic property. See ACHP "Criteria of Adverse Effect" found in 36 C.F.R. 800.5(1).

(2) Advisory Council on Historic Preservation (ACHP or Council). The independent Federal agency charged with the responsibility of advising the President, Congress, and Federal agencies on historic preservation policy and reviewing agency programs and activities related to historic and cultural properties. The ACHP was established pursuant to Title II of the NHPA (NHPA, 80 Stat. 915, 16 U.S.C. 470) and, with considerable public participation, authored the regulations for implementation of Section 106 of the NHPA. The Council has 20 members, including selected positions from the Cabinet, such as the Secretary of Agriculture. The Council also has support staff in Washington, D.C., who work directly with agencies, SHPOs, Tribes (including THPOs), local governments, and members of the public in advising on compliance with Section 106 of the NHPA and other related matters.

(3) Area of Potential Effect (APE). The geographic area or areas within which an undertaking (project, activity, program, or practice) may cause changes in the character or use of any historic properties or cultural resources present. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for various kinds of effects caused by the undertaking.

(4) NRCS Archaeologist. An individual who meets Office of Personnel Management (OPM) educational and experience requirements for the 0193 (Archaeology) series. This NRCS staff member prepares reports of findings, and makes recommendations, archaeological evaluations, and determinations. This individual performs cultural resource field inventories and documents the results in written reports for NRCS line officers, field staff, NRCS Cultural Resource Specialists and Cultural Resource Coordinators. This individual caries out investigations of NRCS proposed projects, ensuring that they meet NRCS and ACHP policy for historic preservation compliance.

(5) Consultation. The legal responsibility of Federal agencies to seek advice, guidance, and counsel from and confer with authorized parties on program, project, and policy issues. These issues include all matters related to historic preservation and cultural resources compliance. Authorized parties include, but are not limited to, SHPOs, American Indian Tribes, THPOs, project partners, landowners, the Departmental Consulting Archeologist, the ACHP and interested members of the public.

(6) Cultural Resources. Cultural resources are not defined in any of the pertinent historic preservation legislation however, the term is used throughout the Federal Government to refer to historic, aesthetic, and cultural aspects of the human environment (see also the NEPA). In NRCS, the term is sometimes used interchangeably to refer to any historic or archaeological property that has been identified during planning or to refer to "historic properties" as defined by the ACHP regulations. In fact, the term "cultural resources" is not identical to the term "historic properties" and may incorporate natural and broader cultural elements (i.e., spiritual) of the human environment. See this definition of historic property below.

(7) Cultural Resources Coordinator (CRC). The NRCS staff member officially designated by the State Conservationist as the point of contact for addressing historic properties, cultural resources, and compliance with the NHPA and related authorities. The CRC is responsible to the State Conservationist for the implementation of cultural resources policies and procedures and for the overall compliance and program activities in NRCS operations. The position is generally collateral to other duties and requires advanced NRCS and ACHP training in historic preservation and cultural resources compliance procedures in order to consult with State and Tribal Historic Preservation Officers staff, the Advisory Council staff, and the public and to work with NRCS' own Cultural Resources Specialist assigned to the State. A State CRC is officially designated as the point of contact for the entire State. There may be other CRCs for area or field offices.

(8) Cultural Resources Specialist (CRS). An individual (NRCS staff or consultant who works closely with the CRC) who meets the professional education and experience requirements in Archeology and Historic Preservation: The Secretary of the Interior's Standards and Guidelines, Professional Qualification Standards. These requirements include a graduate degree in anthropological archeology, history, cultural anthropology, architectural history, historic architecture, or related fields that are most appropriate to the State office's primary activities. In addition, a CRS should have several years of supervised archaeological experience and at least one full year of direct cultural resources management experience to perform (or fully

supervise a contractor performing) all phases of identification, evaluation, and treatment of cultural resources and/or historic properties. A State CRS has been designated by the State Conservationist to be the point of contact for addressing historic properties and cultural resources issues and compliance with the NHPA and related authorities for the entire State. The State CRS may consult with State and Tribal Historic Preservation Officers staff, the Advisory Council staff, and the public as directed by the State Conservationist. CRSs who meet the Secretary of Interior's Standards and Guidelines may be tasked for smaller administrative units, such as an area or field office.

(9) Effect. Alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register. Effects are determined by applying the ACHP "Criteria of Adverse Effect" found in 36 C.F.R. 800.5(1).

(10) Evaluation. The application of the National Register of Historic Places eligibility criteria, found at 36 C.F.R. 60.4, to a cultural resource. A professionally trained cultural resources specialist must complete this task for NRCS in consultation with SHPO/THPO or tribal staff. Components of an evaluation may be performed by historic preservation professionals (i.e. historical architects, historic landscape architects, historians, etc.) or others with applicable specialized training, under the direction and guidance of a CRS.

(11) FPO. The agency position responsible for coordinating the preservation program or agency-wide historic preservation policy and procedures is the FPO. In accordance with Section 110(c) of the NHPA, (unless specifically exempted under Section 214 of the NHPA), this position must be established in every agency. An FPO may have other agency duties in addition to historic preservation coordination, depending on the magnitude and degree of the agency's historic preservation activities and responsibilities. [Section 110(c)]. Agency officials designated as FPOs should have substantial experience administering Federal historic preservation activities and/or specifically assigned staff under their supervision who has such experience. Section 112 of the NHPA requires that agency personnel or contractors responsible for historic resources meet qualification standards established by OPM in consultation with the Secretary of the Interior. In NRCS, the FPO is the National Cultural Resources Specialist in the Ecological Sciences Division.

(12) Historic Property. Defined by the NHPA and expanded in the ACHP's 36 C.F.R. 800 regulations as": any prehistoric or historic district, site, building, structure, or object, included on, or eligible for inclusion on the National Register of Historic Places." This term includes artifacts, records, and remains that are related to and located within such properties. The term also includes historic and cultural landscapes, properties of traditional and cultural importance to an American Indian Tribe or Native Hawaiian organization, and meet the National Register criteria. The term is often (incorrectly) used interchangeably with "cultural resource."

(13) Identification. A process of using specific methods or techniques to locate and define the characteristics, nature, and extent, including the horizontal and vertical boundaries, of cultural resources and historic properties.

(14) Indian Tribe. An Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation or village corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Native Americans.

(15) Mitigation. Actions or treatments which lessen, eliminate, or compensate for the adverse effects of undertakings to historic properties. These actions may include, but are not limited to:

(i) Moving the undertaking to avoid effects ("avoidance").

(ii) Reducing the extent of the effects by redesigning the undertaking.

(iii) Compensating for the effects by repairing, rehabilitating, restoring, or interpreting (or any combination of these actions) the affected historic properties.

(iv) Preservation and protection actions during actual implementation of the undertaking; and

(v) Compensating for the effect by moving or documenting the historic property or conducting data recovery.

(16) National Register of Historic Places (NRHP). The Nation's official list of districts, sites, buildings, structures, and objects which meet the NRHP criteria and are worthy of preservation because of their importance in American history, prehistory, architecture, archeology, and culture. The NRHP is maintained by the Secretary of the Interior under the authority of Section 101 of the NHPA. The criteria are published at 36 C.F.R. 60.I.

(17) Nationwide Programmatic Agreement (PA). The "Nationwide Programmatic Agreement with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers" provides policy for streamlined compliance with Section 106 of the NHPA and defines methods to develop alternate procedures at the State level. This 10-year agreement was ratified in May 2002.

(18) Resolution of Adverse Effects. The process described in 36 C.F.R. 800.6 in which a Federal agency develops and implements "alternatives or modifications to [an] undertaking that... avoid, minimize, or mitigate adverse effects on historic properties." In this process, the agency consults with appropriate SHPOs, THPOs, and other parties, including Indian tribes and Native Hawaiian organizations. The agency also affords the ACHP an opportunity to participate in the consultation. Successful resolution of adverse effects results in an execution of a

memorandum of agreement.

(19) Senior Policy Official. The senior policy level official designated by the head of the agency pursuant to Section 3(e) of Executive Order 13287. In NRCS this official is the Deputy Chief for Science and Technology, or the equivalent, who has agency-wide policy oversight authority for the agency's historic preservation responsibilities. This official, or a subordinate employee reporting directly to the official, shall serve as the agency's FPO in accordance with Section 110 (c) of the NHPA.

(20) Section 106 Process. The series of actions (including continuous consultation, background studies, surveys, resources identifications, assessments, and treatments) that implement the section of the NHPA that requires Federal agencies to take into account the effects of their undertakings on any cultural resources or historic properties that meet the NRHP eligibility criteria. Part of this process involves taking action to avoid, minimize, or mitigate harm to eligible historic properties.

(21) State Historic Preservation Officer (SHPO). 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. The SHPO is a required consulting party in the Section 106 process; the SHPO does not have an oversight, regulatory, or approval role in Section 106 and should not be asked to be the final decisionmaker in the Section 106 process. The SHPO may concur with an agency's documented determination, decline to comment, disagree, or recommend referral to and consultation with the ACHP.

(22) State Level Agreement (SLA). An operating agreement with the SHPO, developed in accordance with Stipulation 2 of the nationwide PA. When developed under the provisions of, and used in conjunction with the nationwide PA, serves as alternate procedures (as defined by the ACHP regulations (see 36 C.F.R. Part 800.14(a)). The SLA(s) are designed to facilitate and streamline the Section 106 process and are tailored to meet NRCS State and SHPO needs and legal requirements.

(23) Technical Service Provider (TSP). An individual, private business, public agency, Tribal office, or non-profit organization outside of USDA that helps agricultural producers apply conservation practices on the land. These TSPs, when performing cultural resources studies, must meet the Secretary of the Interior's Professional Qualification Standards and are certified by NRCS through the TSP Registry (TechReg). When certified by NRCS for the cultural resources compliance studies category, TSPs function as data collectors and advisors. As with consultants and professional service contractors, NRCS is not authorized to delegate its consultation and findings responsibilities to TSPs.

(24) Traditional Cultural Properties (TCPs). Properties associated with cultural practices or beliefs of a living community that are rooted in the traditions or history of the community, and are important in maintaining the continuing cultural identity of the community. TCPs may be determined eligible for the NRHP, and as such, are considered under the Section 106 process.

(25) Treatment. Describes the mitigation and/or management procedures and desired outcomes for an historic property or cultural resource, designed to reduce or avoid adverse effects.

(26) Tribal Consultation Protocol. An operating agreement or procedure with a Tribal government; developed in accordance with Stipulation 2 of the nationwide PA. When developed under the provisions of and used in conjunction with the nationwide PA, serves as alternate procedures (as defined by the ACHP regulations (see 36 C.F.R. Part 800.14(a)). The Tribal Consultation Protocol(s) are designed to facilitate and streamline the Section 106 process, and are tailored to meet NRCS State and individual tribal needs and legal requirements.

(27) Tribal Historic Preservation Officer (THPO). The tribal official appointed by the tribe's chief governing authority, or designated by a tribal ordinance or preservation program, who has assumed the responsibilities of the SHPO for purposes of Section 106 compliance on tribal lands in accordance with Section 101(d)(2) of the Act. This official is approved to assume the responsibilities of the SHPO on tribal Lands by the Secretary of the Interior, National Park Service, under the NHPA. The THPO is a required consulting party in the Section 106 process; the THPO does not have a regulatory role in Section 106 off tribal lands and should not be asked to be the final decisionmaker in the Section 106 process. The THPO may have a regulatory role under tribal law on designated tribal lands.

(28) Tribal Lands. For purposes of this policy (and to make it consistent with the ACHP regulations), all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities. This definition is consistent with the definition in the NHPA; other statutes use alternate definitions.

(29) Undertaking. Any 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; and those requiring a Federal permit, license or approval. Only those undertakings that have the potential to affect historic properties, that can result in changes in the character or use of these properties, if any such historic properties are located in the area of potential effects, and for which NRCS is able to exercise control over the outcomes, are subject to review under Section 106 of the NHPA. This determination is either documented in the SLA and Tribal Consultation Protocols or on a case-by-case basis, as appropriate. In instances where agreements with the SHPO and/or Tribes do not

exist, NRCS will comply with the ACHP regulations and assess the effects of each undertaking that has the potential to affect National Register-listed or eligible resources. This assessment shall occur in consultation with the SHPO, THPO, appropriate Federally-recognized Tribe(s), and other appropriate consulting parties (see 36 C.F.R. Part 800.3).

401.3 Applicability and Exceptions

A. This part applies to all NRCS programs and activities that may affect historic properties through policies, procedures, or service to the agency's diverse clients. Section 106 of the NHPA (and implementing regulations) requires every Federal agency to take into account the effects of their programs (including assistance programs), actions, and decisions on historic properties (i.e., cultural resources that meet the National Register eligibility criteria) in consultation with the SHPO, THPO, American Indian Tribe, and other consulting parties, as appropriate. NRCS policy found herein and in the nationwide PA is consistent with the NHPA.

B. Section 110 of the NHPA. This section sets out the broad historic preservation responsibilities of Federal agencies and is intended to ensure that historic preservation is fully integrated into the ongoing planning and programs of all Federal agencies. This intent was first put forth in the preamble to the NHPA upon its initial adoption in 1966. When the Act was amended in 1980, Section 110 was added to expand and make more explicit the statute's statement of Federal agency responsibility for identifying and taking into account historic properties during program and project planning and implementation; it directs Federal agencies to consider all feasible alternatives to avoid or minimize harm to historic properties. Section 110 also charges each Federal agency with the affirmative responsibility for considering projects and programs that further the purposes of the NHPA, and it declares that the costs of preservation activities are eligible project costs in all undertakings conducted or assisted by a Federal agency (as permitted).

The 1992 amendments to the Act further strengthened the provisions of Section 110. Under the law, the head of each Federal agency must assume responsibility for the preservation of historic properties owned or controlled by the agency, establish a preservation program for the identification and evaluation of historic properties within project areas funded by the agency, and protect historic properties in program and policy development. Each Federal agency must, to the maximum extent feasible, use historic properties available to it in carrying out its responsibilities. The 1992 additions to Section 110 also set out specific benchmarks for Federal agency preservation programs, including: historic properties under the jurisdiction or control of the agency are to be managed and maintained in a way that considers the preservation of their historic, archeological, architectural, and cultural values; historic properties not under agency jurisdiction or control but potentially affected by agency actions are to be fully considered in agency planning; agency compliance activities (Section 106) are to be carried out in consultation with SHPOs and applicable local agencies, Indian tribes, Native Hawaiian organizations, and the public; agency procedures for compliance with Section 106 of the Act are to be consistent with regulations issued by the ACHP; and an agency may not grant assistance, a license, or permit to an applicant who damages or destroys historic property with the intent of avoiding the requirements of Section 106, unless specific circumstances warrant such assistance. On April 24, 1998, the Department of the Interior published "The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act."

C. Section 110(k) of the NHPA prohibits Federal agencies from providing assistance to an applicant who, with the intent to avoid the requirements of compliance with Section 106, significantly adversely affects or destroys historic properties that are in the assistance project's area of potential effect (APE). See 16 U.S.C. 470h-2(k) and 36 C.F.R. Part 800.9(c) for complete discussion. In such cases, NRCS may give the assistance if it determines, after consultation with the ACHP, that circumstances justify the action despite the effects to the historic property.

D. In accordance with the NRCS nationwide PA, SLAs and Tribal Consultation Protocols may exempt certain conservation practices from Section 106 review. These SLAs and Protocols are subject to review by the ACHP and NRCS FPO. Once the SLAs and Protocols are final, programmatic exemptions listed in the PA also apply within the State.

Subpart B - Administrative Responsibilities

401.10 General Agency Responsibilities

In accordance with the NHPA and related statutes and regulations, NRCS is responsible for the identification and evaluation of cultural resources and the protection of historic properties affected by NRCS undertakings. In addition, NRCS will manage the historic properties under its jurisdiction (owned or leased land) in an effort to protect, preserve, rehabilitate, restore, and maintain them.

401.11 Lead Agency Responsibilities

A. NRCS is responsible for historic preservation and 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 non-Federal participants direct, single agency actions of technical and/or financial assistance where NRCS controls the outcome of the assistance.

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

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

(i) NRCS may provide preliminary information, i.e., cultural resources and historic property identification and the recommended conservation alternatives, to the lead agency and participants either separated from or as part of the NRCS program or project planning performed for conservation practices.

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

(2) NRCS may provide additional cultural resources assistance to another Federal agency by assuming responsibilities for certain technical cultural resources and historic property identification activities under the following conditions:

(i) A formal, written agreement has been executed between NRCS and the agency that references the policy and procedures that are being used, identifies the technical cultural resources activities NRCS will undertake, and clearly states if, when; and how funds or other resources will be transferred to NRCS to defray expenses or compensate for staff time.

(ii) NRCS has advised the SHPO, THPOs, Tribal governments (as appropriate), and ACHP of the agreement and explained NRCS' technical (non-administrative) role.

(iii) NRCS does not agree to carry out administrative compliance activities, such as Government-to-Government consultation with Tribal governments, and SHPOs, and cannot take responsibility for making final decisions regarding evaluation or treatment of historic properties as part of compliance for the other agency.

401.12 NRCS Personnel Responsibilities

A. Chief

The NRCS Chief is the senior Federal official responsible for implementing historic preservation legislation, protecting historic properties in NRCS conservation technical assistance programs, and signing documents allowing adverse effects on historic properties when the agency and other consulting parties fail to agree on the terms of treatment. The NRCS Chief shall designate a Senior Policy Official and FPO for the agency in accordance with Section 110(c) of NHPA.

B. Regional Conservationist

The NRCS organization in its East, Central, and West regions is headed by a Regional Conservationist. Regional Conservationists are management representatives of the Chief and are responsible for providing overall direction of NRCS programs and activities consistent with the Chief's guidance; acting as representatives of the Chief at meetings; and supervising the State Conservationists and the Directors of the Pacific Islands and Caribbean Areas.

C. Senior Policy Official

An NRCS Associate Chief, Deputy Chief, or the equivalent, who has agency-wide policy oversight responsibility for the agency's historic preservation program. This official, or a subordinate employee reporting directly to the official, shall serve as the agency's FPO in accordance with Section 110(c) of the NHPA.

D. Program Manager

The NRCS employee who is responsible for the fiscal, resource, and scientific administration of a conservation program, either at the national or State level.

E. FPO

The NRCS FPO is the National CRS who meets the professional standards for this position set by Section 110 of the NHPA. The FPO is responsible for coordinating NRCS' overall cultural resources and historic preservation policy, procedures, training requirements beyond those specified by the NHPA, and national activities associated with compliance with the NHPA and related authorities. This position is charged with providing policy advice to the Chief, Senior Policy Official, Associate and Deputy Chiefs, National Headquarters' Divisions, program managers, and other natural resource disciplinary leaders, and upon request, Regional and State Conservationists (also see definitions).

F. State Conservationist (including Pacific Islands and Caribbean Area Conservationists)

(1) Within each State or Area, the NRCS State/Area Conservationist is the senior Federal official responsible for cultural resources and historic preservation compliance and the protection of historic properties in all NRCS activities. The State Conservationist shall designate a CRC to carry out the cultural resources administrative responsibilities, and will ensure that the State office has on staff, or has reg ular and continuing access to, a qualified CRS.
(2) The State Conservationist is also responsible for providing historic properties information, guidance, and education programs for NRCS personnel within the State and for interested partners. The State Conservationist takes the lead in developing and executing both a SLA with the SHPO and Consultation Protocols with American Indian Tribal governments in accordance with the nationwide "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 for Conservation Assistance."
(3) The State Conservationist ensures that field personnel who work with NRCS CRCSs in implementing Section 106 compliance responsibilities, receive up-to-date NRCS modular (Web-based and field) cultural resources training and, as appropriate, external training, to, at a minimum, permit these individuals to determine if an action or practice is an undertaking that has the potential to affect historic properties, and to recognize physical evidence of cultural resources in the field.

G. CRC

(1) CRCs are officially designated by the State or Area Conservationist as the point of contact for addressing historic properties and cultural resources issues, and compliance with the NHPA and related authorities. The CRC is responsible to the State Conservationist for the implementation of cultural resources policies and procedures and for the overall compliance and program activities in NRCS operations. The position is generally collateral to other duties and requires advanced NRCS and ACHP training in historic preservation and cultural resources compliance procedures in order to consult with State and Tribal Historic Preservation Officers staff, the Advisory Council staff, and the public and to work with NRCS' own CRS assigned to the State. Each State may designate a single CRC as the point of contact for the entire State. There may be other CRCs for area or field offices.
(2) All new and continuing CRCs and CRSs must complete the NRCS Web-based modular Cultural Resources Training (modules 1-6, 9), the classroom and field modules (modules 7 and 8) and modules 1-8 of the Conservation Planning Training within the first 6 months of their tenure, and take the ACHP Section 106 basic and advanced training as soon after their appointment as the State budget permits.

H. Area and District Conservationist

Within each State, the area and conservation district conservationists are responsible for ensuring that the provisions of this part are implemented in coordination with the State CRC and CRS. If appropriate, and with sufficient specialized cultural resources training approved by the State Conservationist, area and district CRCs and CRSs may be designated to facilitate assistance and back-up the CRC and CRS.

I. CRS

CRSs are individuals who meet the Professional Qualification Standards established by the Secretary of the Interior pursuant to the NHPA (Section 112(a)(i)(B), 12 U.S.C. 470-4(a)) and OPM. They are responsible for providing technical, scientific, and procedural guidance for considering and managing cultural resources and historic properties within their State or jurisdiction. They also conduct cultural resources and historic property investigations, and evaluations, and develop treatment plans for mitigation. The responsibilities of the CRS are further described in GM-420, Part 401, Subpart D, Coordination with Other Authorities and Responsibilities, Section 401.42, Cultural Resources Specialist and CRC Qualifications and Duties. Because of their duties, all CRSs must receive advanced training in cultural resources management and law—at a minimum, all new and continuing CRSs must complete the NRCS Web-based modular training within the first 6 months of their tenure (including the field modules taken from a CRS in an adjacent or nearby State) and take the ACHP Section 106 basic and advanced training as soon after their appointment and as the State budget permits. The CRS is charged with working with the CRC in ensuring that all field personnel working in any manner with Section 106 compliance complete the NRCS Web-based and field

modules before they carry out their historic preservation responsibilities. The CRSs also are charged with designing, (in accordance with NRCS requirements outlined in AgLearn), and presenting the field-based training modules (7 and 8) to State and field staff and partners, generally in collaboration with SHPO and THPO staffs.

401.13 ACHP Responsibilities

The ACHP is an independent Federal agency established by Title II of the NHPA to advise the President and Congress on historic preservation matters. Also, the Council administers implementation of Section 106 of the NHPA through its regulations (36 C.F.R. 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 NRHP and to afford the Council a reasonable opportunity to comment with regard to such undertakings. The Council may provide technical advice and assistance to NRCS, State and Tribal Historic Preservation Officers, and Indian Tribes. The Council also serves to 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 SHPO Responsibilities

A. The State Official appointed by the Governor to administer the programs of the NHPA for that State. By Federal law, the SH PO is charged to:

(1) 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.
(2) Identify and nominate eligible properties to the National Register and otherwise administer applications for listing historic properties on the National Register.
(3) Prepare and implement a comprehensive statewide historic preservation plan.
(4) Administer the State program of Federal assistance for historic preservation within the State.
(5) Advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities.
(6) Cooperate with the Secretary of the Interior, the ACHP, Federal and State agencies, local governments, organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning.
(7) Provide public information, education, training, and technical assistance in historic preservation.

B. The SHPO may be assigned additional duties and responsibilities based on state legislation requiring individual NRCS State Offices to supplement the national policy (i.e., permits, reporting requirements) or address those in SLAs.

401.15 THPO Responsibilities

A. The tribal official appointed by the tribe's chief governing authority or designated by tribal ordinance or preservation program to carry out the responsibilities of the SHPO for Section 106 compliance on tribal lands (in accordance with Section 101(d)(2) of the NHPA). The THPO also may administer the Tribal Historic Preservation Program, including:

(1) In cooperation with Federal and State agencies, local governments, and private organizations and individuals, direct and conduct a comprehensive survey of historic properties and maintain inventories of such properties.
(2) Identify and nominate eligible properties to the National Register and otherwise administer applications for listing historic properties on the National Register.
(3) Prepare and implement a comprehensive historic preservation plan.
(4) Administer the program of Federal assistance for historic preservation.
(5) Advise and assist, as appropriate, Federal, Tribal, and State agencies and local governments in carrying out their historic preservation responsibilities.
(6) Cooperate with the Secretary of the Interior, the ACHP, 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 and development.
(7) Provide public information, education, training, and technical assistance in historic preservation.
(8) Cooperate with local governments in the development of local historic preservation programs.
(9) Consult with appropriate Federal agencies in accordance with the NHPA on Federal undertakings that may affect historic properties; the content and sufficiency of any plans developed to protect, manage, or to mitigate harm to such properties; and advise and assist in the evaluation of proposals for rehabilitation projects that may qualify for Federal assistance.

B. The THPO may be assigned additional duties and responsibilities based on tribal law requiring

individual NRCS State offices to supplement the national policy (i.e., permits, reporting requirements) or address those in Tribal Protocol Agreements.

401.16 Responsibilities of American Indian Tribes without THPOs

NRCS must afford federally-recognized American Indian tribes the opportunity to consult on programs, projects, and other undertakings. The tribes may elect or decline to consult. This is covered in more detail in Subpart C, Policy, Section 401.21, Considering Cultural Resources in NRCS Programs and Activities and Subpart D, Coordination with Other Authorities and Responsibilities, Section 401.41, Consultation with American Indian Tribes.

Subpart C - Policy

401.20 General Policy

A. NRCS recognizes that cultural resources, including historic properties, are an integral part of our national heritage and recognizes its responsibilities for historic preservation, particularly for properties listed on or eligible for listing on the NRHP. Further, the NHPA of 1966, as amended, mandates that all Federal agencies must take into account the effects of their undertakings on these historic properties.

B. NRCS shall ensure that cultural resources and historic properties are considered in all NRCS actions and programs. Furthermore, the conservation mission 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 participant in the stewardship of our Nation's historic properties. Under the provisions of those sections, NRCS shall promote the conservation and protection of historic properties.

C. NRCS shall identify cultural resources and historic properties early in the NRCS planning and environmental review processes for all assistance activities classified as undertakings that have the potential to affect historic properties.

401.21 Considering Cultural Resources in NRCS Programs and Activities

A. NRCS shall fulfill NHPA Section 106 requirements in accordance with the ACHP implementing regulations, 36 C.F.R. 800, or the nationwide PA, executed under 36 C.F.R. 800.14(a). This PA, when implemented by the State Conservationists with SLAs and Tribal Consultation Protocols, serves as alternate procedures to the ACHP regulations (i.e., substitutes for all or part of Subpart B of the regulations) pursuant to 800.14(a) and Section 110(a)(2)(E) of the NHPA. NRCS shall also follow procedures set forth in the NRCS National Cultural Resources Procedures Handbook (Title 190, Part 601).

B. The nationwide PA provides for a streamlined Section 106 process appropriate for conservation technical assistance, financial assistance, and other activities. Under the PA, State Conservationists are required to take steps to negotiate and execute SLAs with their SHPO and to take steps to develop consultation protocols with Indian Tribes.

C. With or without the PA in place, in order to consider cultural resources during project and program planning:

(1) NRCS defines the APE and determines if a proposed undertaking has the potential to affect historic properties within the undertaking's APE.
(2) NRCS initiates consultation with the SHPO/THPO, American Indian Tribes, and other consulting parties if the State or Area Conservationist (upon the advice of the State Cultural Resources Specialist or Coordinator) determines that the undertaking has the potential to affect cultural resources, including historic properties, listed in or that might meet the criteria for listing in the NRHP.
(3) NRCS identifies historic properties (properties that meet NRHP eligibility criteria) in areas of potential effect as early in the planning process as possible.
(4) NRCS ensures that initial identification of cultural resources, including historic properties, is conducted by CRSs, trained NRCS personnel, or trained conservation partners, consultants, or TSPs in collaboration with SHPOs, THPOs, Indian Tribes, and other identified consulting parties, as appropriate. NRCS conducts all formal consultation.
(5) NRCS shall ensure that if identified cultural resources cannot be avoided, and may be affected by a proposed undertaking, a CRS will evaluate the identified property against the National Register eligibility criteria in consultation with the SHPO/THPO/Tribes. This evaluation must completely delineate the boundaries of the identified property. If NRCS and the SHPO/THPO/Tribes cannot agree on whether identified cultural resources are eligible (meet National Register criteria) as historic properties, then NRCS must submit a formal request for a determination of eligibility to the Keeper of the National Register in the National Park Service. The Keeper's decision on eligibility is final.

401.22 Adverse Effects

It is the policy of NRCS to protect cultural resources in situ to the fullest extent possible. If NRCS, in consultation with the SHPO and appropriate tribes or THPOs, determines an undertaking will have an adverse effect on an historic property as outlined in 36 C.F.R. 800.5, NRCS will enact treatment measures as described in the National Cultural Resources Procedures Handbook (Title 190, Part 601) to resolve adverse effects. If adverse effects to an historic property cannot be avoided, and treatment alternatives cannot be implemented, NRCS will consider:

(1) Withdrawing all assistance from the specific undertaking.
(2) Proceeding with the adverse effects and take steps to minimize or mitigate these effects in consultation with the SHPO, THPO, Tribes, and the ACHP. NRCS will follow ACHP regulations (36 C.F.R. 800.7 and 800.11) and NRCS' steps in the National Cultural Resources Procedures Handbook (Part 601, Section 601.26, Failure to Resolve Adverse Effects).

401.23 Withdrawal of NRCS Assistance

Any decision to withdraw NRCS assistance shall be made by the State or Area Conservationist. The reasons why the State or Area Conservationist may make this decision are as follows:

(1) NRCS may withdraw assistance from a participant when it is determined by the State or Area Conservationist that the cost or other factors involved with cultural resource compliance jeopardize the feasibility of an undertaking.
(2) NRCS may withdraw assistance if a participant, after application to NRCS:
(i) Intentionally carries out an irreversible action associated with requested technical or financial assistance that adversely impacts a cultural resource prior to completion of NRCS compliance responsibilities (see Section 110(k) of the NHPA), or
(ii) Refuses to permit implementation of a recommended mitigation plan.
(3) All NRCS actions pertaining to the withdrawal of assistance because of cultural resources shall be approved by the State or Area Conservationist and fully documented, in accordance with the NRCS National Cultural Resources Procedures Handbook (Title 190, Part 601, Section 601.27).

401.24 Post-review Discovery

When other pertinent procedures of this part have been completed and a previously unknown cultural resource is discovered, an unevaluated cultural resource will be affected, or it is determined that known cultural resources will be affected in a previously unanticipated manner by the NRCS-assisted undertaking, NRCS will protect the resource from further damage to the fullest extent possible and follow procedures for discoveries as described in the ACHP regulations (36 C.F.R. 800.13) and the NRCS National Cultural Resources Procedures Handbook (Title 190, Part 601).

401.25 Emergency Work

A. This section considers cultural resources affected by emergency work carried out by NRCS in the Emergency Watershed Protection Program or as lead agency in accordance with the National Response Plan (NRP). Preservation of human life and property shall be the priority concern and focus of the emergency measures while taking into account the effects on cultural resources to the fullest extent practicable.

B. SLAs and Tribal consultation Protocols shall contain emergency provisions consistent with the NRCS Nationwide PA (Stipulation 2.A.(7) and B.(8)). When no SLA or Tribal Consultation Protocols exist, procedures outlined in the NRCS National Cultural Resources Procedures Handbook (Title 190, Part 601) and ACHP regulations shall be followed.

C. The State Conservationist may elect to either follow NRCS procedures (and those derived under SLAs and Tribal Consultation Protocols); ACHP regulations; or have the NRCS Chief or designee request an emergency waiver under 36 C.F.R. 78 as an alternative for dealing with disasters of major scale. In this case NRCS will either develop an appropriate plan consistent with 36 C.F.R. Part 78 or execute a PA with ACHP for considering historic properties.

401.26 Training of NRCS Personnel and Partners

A. In accordance with Section 106 of the NHPA, 36 C.F.R. 800 implementing regulations, the nationwide PA, State Level Agreements SLAs, and Tribal Consultation Protocols, NRCS will provide basic awareness training to field personnel and partners that helps them understand NRCS' cultural resource responsibilities. This training will provide the necessary awareness, skills, and knowledge for implementation of the NRCS cultural resource planning process as set forth in GM-180, Part 409, Sections 409.3 and 409.9. The basic awareness training shall consist of NRCS National Cultural Resource Modules 1-9.

B. Each State Conservationist shall determine which NRCS employees shall complete NRCS' Web-based, classroom and field cultural resources training modules (modules 1-9). Additional training may be required to ensure appropriate consideration of historic properties in the performance of official planning and program implementation duties. Further guidance on standards for employee training is provided in the National Cultural Resources Procedures Handbook (Title 190, Part 601) and in this part, Section 401.14, NRCS Personnel Responsibilities. Additional information on completion of the NRCS training may be obtained through the State Training Officer or AgLearn.

C. TSPs who are to carry out cultural resources compliance studies or the cultural resources portions of conservation planning shall complete training modules 1-8 (see the TechReg Web site at USDA-NRCS Technical Services Provider Registry.

401.27 Funding for Cultural Resources Compliance

State Conservationists, consistent with NRCS programs policy and in consultation with the National and State Program Managers, are responsible for deciding when conservation technical assistance (CTA), technical or financial assistance funds are to be used for complying with Section 106.

401.28 Access to Cultural Resources Specialists

Each State/Area office shall have available on staff or have regular and continuing access to a CRS. This is necessary to ensure that Section 106 compliance consultation and reviews occur in a timely manner so that conservation technical assistance is not delayed due to lack of available expertise. Specialist expertise may be obtained through direct hire, professional services contracts (such as indefinite quantity indefinite delivery contracts), or cooperative agreements with other agencies or institutions. TSPs and short-term professional service contracts may be used to carry out project-specific work but not to provide the long-term regular and continuing CRS expertise and guidance for the State.

401.29 Deferring Identification and Evaluation of Cultural Resources

It is NRCS policy to identify and evaluate cultural resources as early as possible during the planning process. This policy is consistent with Section 106 and Section 110 (a) and (f) of the NHPA. However, there are rare instances when cultural resources compliance activities must be deferred or implemented in phases (such as monitoring during construction). In the instances when deferral is acceptable; the procedures are found in the ACHP regulations (36 C.F.R. 800.4(b)(2)). Deferral of cultural resources compliance activities may require negotiation and execution of a memorandum of agreement pursuant to 36 C.F.R. 800.6.

401.30 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 shall keep records of their cultural resources decisions, including supporting data. A record of all cultural resources agreements and communications with SHPO; THPO, ACHP, participants, or other relevant parties concerning NRCS undertakings should be maintained at the State office.

B. Reporting. NRCS shall report on cultural resources identification studies and cultural resources and historic properties found within the APE to the SHPO/THPO/Tribe. Such reports shall explain and describe the survey methodologies used, field and analytical recording methods employed, the findings, and recommendations. The amount, content, and frequency of reporting such cultural resources information for the APE shall be determined in consultation with the SHPO/THPO/Tribe and incorporate any requirements of State or tribal law, State or tribal agreements, and resource security.

C. Documentation standards are outlined in the ACHP regulations (36 C.F.R. 800.11) and supplemental ACHP guidance. NRCS must follow these standards in its Section 106 compliance work.

(1) Cultural resources identified inside the APE may be documented either in the NRCS field office producer file or with the SHPO/THPO/Tribe.
(2) Cultural resources identified outside the APE may be documented either in the NRCS field office producer file or with the SHPO/THPO/Tribe. This documentation is not required but is encouraged in order to facilitate decisions regarding protection of cultural resources and avoid future duplication of identification efforts.
(3) If a cultural resource within the APE can be avoided, NRCS shall provide documentation and effect determination (i.e., No Adverse Effect) to the SHPO/THPO/Tribe and landowner. If the SHPO/THPO/Tribe does not respond within 30 days, NRCS will continue assistance. NRCS may request shorter SHPO/THPO/Tribal review periods on an individual basis or through State-level agreements/Tribal consultation protocols.
(4) If adverse effects to a historic property cannot be avoided, in consultation with the SHPO, THPO, Tribes, and all other consulting parties, NRCS will develop a mitigation plan and incorporate this plan into a memorandum of agreement that shall be executed and, thereby, resolve adverse effects.

401.31 Access To Data and Reports

A. Historic property data shall be protected. Access is appropriate for planning by NRCS or other planners conducting work for NRCS and the landowner. Section 304 of the NHPA provides that the head of a Federal agency, after consulting with the Secretary of the Interior, has the authority to withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners.

B. Other issues of confidentiality and data access may be found in 36 C.F.R. 800.11(c), NRCS national

and State policies, and directives for implementing the Freedom of Information Act, the Privacy Act, privacy provisions of Section 1619 of the Food, Conservation, and Energy Act of 2008 (Farm Bill), and Sections 601.41 and 601.42 of the NRCS National Cultural Resources Procedures Handbook (Title 190, Part 601).

401.32 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, remains, and information as follows:

(1) NRCS employees (other than CRSs) shall not collect artifacts or other cultural items while on official duty except during the course of compliance studies when directed by a CRS or as defined in State supplements or agreements with the SHPO/THPO and with permission of the participant or Federal/State land manager.
(2) NRCS employees shall use cultural resources information gained on the job only for official purposes or professional study. They shall always follow NRCS, Department of the Interior (Secretary of Interior's Standards), and ACHP policy for reporting studies and finds, and for confidentiality and privacy.
(3) See also NRCS Ethics Chapter of the GM-110, Part 405 and Section 112 of the NHPA.

401.33 Ownership and Curation of Artifacts and Collections

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 landowner (individual, Tribe, government agency, community). 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 (non-Federal, and/or not tribally owned), recovered materials are the property of the landowner (s) unless State or local laws require otherwise. When archeological or historic material remains are recovered from Tribal lands as defined herein, recovered materials are the property of the tribal government in accordance with tribal law. When archeological or historic material remains are recovered from Federal lands, the recovered materials are the property of the Federal Government in accordance with Federal law. The Native American Graves and Repatriation Act (NAGPRA) may apply. Curation of materials from Federal, tribal, State, or municipally- administered lands is the responsibility of the landowner(s). NRCS shall encourage the owner of recovered material remains from private lands to donate them to an appropriate curatorial facility. If human remains are recovered and have not been repatriated in accordance with State, local, or tribal law, NRCS shall encourage donation to the appropriate parties (in accordance with ACHP policy).

B. On lands owned, managed, leased, or otherwise directly controlled by NRCS (such as some Plant Materials Centers), NRCS is responsible for the curation of recovered cultural materials. All recovered materials and records will be curated at appropriate curatorial facilities to the standards found in 36 C.F.R. 79.

C. If materials are recovered during the course of an NRCS sponsored or assisted data recovery effort, NRCS will ensure that appropriate analyses of all recovered materials are complete (as State, tribal, or local law permit) 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 NRCS. Copies of all records shall be made to accompany all collections.

D. Treatment of burials and other human remains shall follow the process(es) outlined in applicable Federal, tribal, State, or local law and/or ACHP policy. All human remains shall be treated with respect.

401.34 State Supplements

This section is reserved for State Conservationists to add any required State or tribal laws or regulations which may affect how cultural resources are considered during the planning of agency undertakings. See guidance provided in GM-420, Part 401, Subpart D, Coordination with Other Authorities and Responsibilities, Section 401.43.

401.35 Cultural Resources Management Activities Outside of the Section 106 Context

A. Several NRCS programs allow for the treatment, interpretation, and protection of historic properties. These include easement and assistance programs. Refer to individual program policies and manuals for further guidance.

B. NRCS State offices are encouraged to work with outside organizations and other agencies which can assist landowners in the protection of cultural resources on private lands.

Subpart D - Coordination With Other Authorities and Responsibilities

401.40 Coordination with the National Environmental Policy Act (NEPA)

A. Early Coordination. NRCS will coordinate compliance with Section 106 of the NHPA with procedures to comply with the NEPA (see GM 190, Part 410). When coordinating Section 106 compliance with NEPA, NRCS will follow guidance set forth in 36 C.F.R. 800.8, "Coordination with the National Environmental Policy Act."

(1) The NEPA documents including NRCS' Environmental Evaluation Sheet (EE Sheet, CPA-52), Environmental Assessments/Findings of No Significant Impacts (EA/FONSI) or Environmental Impact Statements/Records of Decision (EIS/ROD) require explanation and documentation of the level of Section 106 compliance already completed and scheduled for completion prior to implementation of the proposed project.

(2) Section 106 compliance must start early in the NEPA planning process. NRCS will, whenever feasible, plan public participation, analysis, and review of public comment in such a way that they meet the purposes and requirements of both statutes.

B. Scoping. NEPA planning includes appropriate scoping, identification of historic properties (in addition to other resources), assessment of effects, and consultation (with all appropriate participants, including SHPOs, tribes, and partners) leading to resolution of adverse effects in accordance with memoranda o f agreement, treatment plans, or other cultural resources and NEPA planning documents.

C. Documentation. NEPA planning documents record Section 106 compliance planning activities but do not necessarily include information on all of the required consultations, Section 106 technical and resource documents, correspondence, and records of research and consultations.

401.41 Consultation with American Indian Tribes

Consultation with American Indian tribal governments and THPOs is to be carried out in accordance with Section 106 of the NHPA and implementing regulations, related authorities on consultation, and policy principles found in GM-410, Part 405, American Indians and Native Alaskans, and guidance outlined in the National Cultural Resources Procedures Handbook (Title 190, Part 601). The authorities include:

(1) USDA Departmental Regulation 1340-6, Policies on American Indians and Alaska Natives, October 16, 1992.

(2) Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000.

(3) Executive Order 13270, Tribal Colleges and Universities, July 3, 2002.

(4) P.L. 89-665, October 15, 1966, 16 U.S.C. 470, et seq. (NHPA and its 22 amendments, and implementing regulations for Section 106 of the Act, 36 C.F.R. Part 800), especially regarding special the consultation role of American Indian Tribes, THPOs, and Native Hawaiian organizations.

(5) Executive Order 13007, Indian Sacred Sites, May 24, 1996.

(6) Presidential Memorandum to Heads of Executive Departments and Agencies on Tribal Consultation, November 5, 2009, Presidential Memorandum on Tribal Consultation | The White House.

(7) Nationwide PA among the NRCS, ACHP, and the National Conference of State Historic Preservation Officers, May 31, 2002 (NRCS A-3A75-2-64), especially regarding Government-to-Government negotiation of tribal cultural resources consultation protocols.

401.42 CRS and CRC Qualifications and Duties

A. CRS Qualifications:

CRSs used by NRCS must meet minimum OPM education requirements and commensurate experience and the qualifications outlined in the Secretary of the Interior's Personnel Qualification Standards listed in the National Cultural Resources Procedures Handbook. These standards are also found on the National Park Service's Web site Secretary's Standards--Qualifications Standards and referenced in Section 112(b) of the NHPA.

B. CRS Principal Duties

CRSs are to, upon request, provide advice to the State Conservationist and principal staff, assistance in determinations of significance, consulting with SHPOs/THPOs on NRHP eligibility, oversight for reviews of NRCS undertakings, field surveys, guidance for field personnel on identification and avoidance, compliance documentation for SHPO/THPO, training, and quality assurance and/or control reviews. Specialists may also serve as the CRC and provide assistance to the contracting officer on cultural resources projects (see CRC duties below). If the CRS is not an NRCS employee (i.e., contractor or TSP) all formal findings, decisions, and consultation with SHPO/THPO and tribes must be made by NRCS.

C. CRC Principal Duties

The State Conservationist designates a CRC to oversee the cultural resources activities in each State. The CRC is the principal coordinator of administrative and procedural matters associated with cultural resources. Coordination may be accomplished by a CRS if the specialist is on the staff, and thus the coordinator and specialist may be the same person. In the absence of a specialist on the NRCS staff, and even with a specialist on staff, the duties may be effectively divided between technical matters done by the specialist and coordination of non-technical, administrative, and many procedural actions done by the CRC.

D. The CRC:

(1) Advises the State Conservationist on staffing, training, and cultural resources compliance needs and implementation barriers to ensure that NRCS can carry out its legal responsibilities.
(2) Develops, maintains, and makes available to NRCS staff and partners up-to-date reference files of national, State, and local laws, regulations, standards, guidelines, authorities, and other materials relevant to NRCS cultural resources responsibilities.
(3) Coordinates consultation and other cultural resources activities with other NRCS offices, the SHPO, American Indian Tribes, National Park Service, the ACHP, other Federal and State agencies, and NRCS clients.
(4) Creates and maintains cultural resources data and information files and makes them available to NRCS staff as appropriate and permitted under the law, for planning purposes.
(5) Inputs or oversees input of cultural resources compliance information in NRCS' Performance Results System and other NRCS performance tracking systems, compiles State office information for the annual national report of NRCS cultural resources activities, and provides these data to NHQ on schedule.
(6) With the direct guidance from a CRS, the CRC may assist with:
(i) Design and delivery of technical aspects of NRCS cultural resources training.
(ii) Literature review, records checks, field inspections, and minor technical aspects of limited survey activity.
(iii) Preparation of technical specifications for contracts and agreements or may act as the Contracting Officer's Technical Representative or Contracting Officer's Representative.
(7) Reviews technical reports to ensure that essential administrative and technical information is present.
(8) Preparation of documentation of compliance with this part and with the cultural resources sections of NRCS plans and other pertinent documents.

Note: If the CRC is not a CRS, the CRC may coordinate or assist with other cultural resources activities as agreed to with the SHPO in specific cases, or as agreed to in State agreements between NRCS and the SHPO.

401.43 Guidance for Executing Agreements and State Supplements

The scope, purpose, and type of agreements concerning cultural resources are diverse. Agreements improve the efficiency of carrying out NRCS responsibilities, minimizing delays of NRCS assistance. Agreements may be international, national, multi-State, multiagency, or for each specific State in order to implement stewardship through NRCS programs or to carry out NRCS responsibilities in individual or multiple undertakings. All agreements executed under Section 106 for single States must be approved by the Senior Policy Official of the State or Area and the FPO before they are signed and sent to the ACHP. Multi-State or multiagency (Federal) agreements also require approval and signature of the Regional Conservationist, who may determine certain multiagency agreements require review and approval of the Chief.

(1) National and Multi-State Agreements
(i) NRCS may request execution of a PA with the ACHP for a particular program or class of undertakings that would otherwise require numerous individual requests for comments under this part or the ACHP regulations (36 C.F.R. 800). Such agreements will be developed in accordance with 36 C.F.R. 800 and shall include the National Conference of State Historic Preservation Officers (NCSHPO) or multiple SHPOs involved as parties to the agreement.
(ii) National and multi-State agreements may also be necessary for stewardship activities not centrally related to the Section 106 process, such as policy or resource studies that do not affect historic properties or other cultural resources but contribute to the general purposes of the NHPA. These agreements shall include as signatories all parties that will substantively contribute to the activity, such as the ACHP, other Federal agencies, individual tribal governments or groups, the NCSHPO, or others as appropriate.
(2) SLAs

These agreements are developed and operated at the State level to facilitate NRCS actions. The minimum and suggested contents address items that vary greatly between States and across program lines within individual States. The State Conservationist shall negotiate an agreement subordinate to this with the SHPO. The nationwide PA lists items that should be included in every agreement. Copies of the signed SLAs shall be sent to the National Cultural Resources Specialist in the Ecological Sciences Division for review and comment and transfer to the ACHP

for their review. All reviews and suggestions for modifications will be complete within 30 days of receipt of the SLA by the ACHP. If no comments are returned to the State office within these 30 days, the SLA is filed as final.

(3) American Indian Tribal Consultation Protocols or Agreements

NRCS State offices shall consult with THPOs and the governments of federally-recognized Indian Tribes that do not have designated THPOs in order to attempt to establish consultation protocols, procedures, or agreements regarding undertakings on tribal lands and lands which a tribe holds as traditionally or culturally important under Section 101(d)(6). Discussions in developing consultation protocols shall be Government-to-Government and direct, in person, and otherwise initiated in an appropriate and respectful manner for each individual tribal government. More information on consultation protocols may be found in the nationwide PA and National Cultural Resources Procedures Handbook (Title 190 Part 601). Copies of the signed protocols shall be sent to the National Cultural Resources Specialist in the Ecological Sciences Division for review and comment and transfer to the ACHP staff for their review. All reviews and suggestions for modifications will be completed within 30 days of receipt of the SLA by the ACHP. If no comments are returned to the State office within these 30 days, the signed protocol is filed as final.

(4) Agreements of Less Than National Scope for Section 106 Compliance

NRCS State offices may develop a memorandum of agreement with the ACHP, SHPO, THPO, Indian Tribe(s), and/or other partners for completion of a large, complex, or lengthy undertaking. State offices may develop PAs with the ACHP, SHPO, THPO, Indian Tribe, and other consulting parties for programs or classes of undertakings, as appropriate, in accordance with the ACHP regulations (36 C.F.R. 800). Such agreements may involve more than one State.

(5) State Supplements to the GM

(i) State policy on cultural resources matters must be established and implemented by means of supplements to this part.

(ii) Draft copies of State supplements to this part will be sent to the National Cultural Resources Specialist FPO for review before they are issued.

(iii) Copies of final State supplements, technical notes, and guidelines relating to cultural resources State agreements will be sent to the NRCS FPO for central records.

Appendix E

ADVISORY COUNCIL ON HISTORIC PRESERVATION

POLICY STATEMENT
REGARDING
TREATMENT OF BURIAL SITES, HUMAN REMAINS AND FUNERARY OBJECTS

Preserving America s Heritage

ADVISORY COUNCIL ON HISTORIC PRESERVATION

POLICY STATEMENT
REGARDING
TREATMENT OF BURIAL SITES, HUMAN REMAINS AND FUNERARY OBJECTS

Preamble: This policy offers leadership in resolving how to treat burial sites, human remains, and funerary objects in a respectful and sensitive manner while acknowledging public interest in the past. As such, this policy is designed to guide federal agencies in making decisions about the identification and treatment of burial sites, human remains, and funerary objects encountered in the Section 106 process, in those instances where federal or state law **does not prescribe a course of action**.

This policy applies to all federal agencies with undertakings that are subject to review under Section 106 of the National Historic Preservation Act (NHPA; 16 U.S.C. § 470f), and its implementing regulations (36 CFR Part 800). To be considered under Section 106, the burial site must be or be a part of a historic property, meaning that it is listed, or eligible for listing, in the National Register of Historic Places.

The Advisory Council on Historic Preservation (ACHP) encourages federal agencies to apply this policy throughout the Section 106 process, including during the identification of those historic properties. In order to identify historic properties, federal agencies must assess the historic significance of burial sites and apply the National Register criteria to determine whether a property is eligible. Burial sites may have several possible areas of significance, such as those that relate to religious and cultural significance, as well as those that relate to scientific significance that can provide important information about the past. This policy does not proscribe any area of significance for burial sites and recognizes that the assessment must be completed on a case-by-case basis through consultation.

The policy is not bound by geography, ethnicity, nationality, or religious belief, but applies to the treatment of all burial sites, human remains, and funerary objects encountered in the Section 106 process, as the treatment and disposition of these sites, remains, and objects are a human rights concern shared by all.

This policy also recognizes the unique legal relationship between the federal government and tribal governments as set forth in the Constitution of the United States, treaties, statutes and court decisions, and acknowledges that, frequently, the remains encountered in Section 106 review are of significance to Indian tribes.

Section 106 requires agencies to seek agreement with consulting parties on measures to avoid, minimize, or mitigate adverse effects to historic properties. Accordingly, and consistent with Section 106, this policy does not recommend a specific outcome from the consultation process. Rather, it focuses on issues and perspectives that federal agencies ought to consider when making their Section 106 decisions. In many cases, federal agencies will be bound by other applicable federal, tribal, state, or local laws that do

ADVISORY COUNCIL ON HISTORIC PRESERVATION
1100 Pennsylvania Avenue NW, Suite 803 Washington, DC 20004
Phone: 202-606-8503 Fax: 202-606-8647 achp@achp.gov www.achp.gov

prescribe a specific outcome, such as the Native American Graves Protection and Repatriation Act (NAGPRA). The federal agency must identify and follow applicable laws and implement any prescribed outcomes.

For undertakings on federal and tribal land that encounter Native American or Native Hawaiian human remains and funerary objects, NAGPRA applies. NHPA and NAGPRA are separate and distinct laws, with separate and distinct implementing regulations and categories of parties that must be consulted.[1] Compliance with one of these laws does not mean or equal compliance with the other. Implementation of this policy and its principles does not, in any way, change, modify, detract or add to NAGPRA or other applicable laws.

Principles: When burial sites, human remains, or funerary objects will be or are likely to be encountered in the course of Section 106 review, a federal agency should adhere to the following principles:

Principle 1: Participants in the Section 106 process should treat all burial sites, human remains and funerary objects with dignity and respect.

Principle 2: Only through consultation, which is the early and meaningful exchange of information, can a federal agency make an informed and defensible decision about the treatment of burial sites, human remains, and funerary objects.

Principle 3: Native Americans are descendants of original occupants of this country. Accordingly, in making decisions, federal agencies should be informed by and utilize the special expertise of Indian tribes and Native Hawaiian organizations in the documentation and treatment of their ancestors.

Principle 4: Burial sites, human remains and funerary objects should not be knowingly disturbed unless absolutely necessary, and only after the federal agency has consulted and fully considered avoidance of impact and whether it is feasible to preserve them in place.

Principle 5: When human remains or funerary objects must be disinterred, they should be removed carefully, respectfully, and in a manner developed in consultation.

Principle 6: The federal agency is ultimately responsible for making decisions regarding avoidance of impact to or treatment of burial sites, human remains, and funerary objects. In reaching its decisions, the federal agency must comply with applicable federal, tribal, state, or local laws.

Principle 7: Through consultation, federal agencies should develop and implement plans for the treatment of burial sites, human remains, and funerary objects that may be inadvertently discovered.

Principle 8: In cases where the disposition of human remains and funerary objects is not legally prescribed, federal agencies should proceed following a hierarchy that begins with the rights of lineal descendants, and if none, then the descendant community, which may include Indian tribes and Native Hawaiian organizations.

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[1] The ACHP's publication *Consulting with Indian Tribes in the Section 106 Process* and the National Association of Tribal Historic Preservation Officers' publication *Tribal Consultation: Best Practices in Historic Preservation* provide additional guidance on this matter.

DISCUSSION:

Principle 1: Participants in the Section 106 process should treat all burial sites, human remains and funerary objects with dignity and respect.

Because the presence of human remains and funerary objects gives a historic property special importance as a burial site or cemetery, federal agencies need to consider fully the values associated with such sites. When working with human remains, the federal agency should maintain an appropriate deference for the dead and the funerary objects associated with them, and demonstrate respect for the customs and beliefs of those who may be descended from them.

Through consultation with descendants, culturally affiliated groups, descendant communities, and other parties, federal agencies should discuss and reach agreement on what constitutes respectful treatment.

Principle 2: Only through consultation, which is the early and meaningful exchange of information, can a federal agency make an informed and defensible decision about the treatment of burial sites, human remains, and funerary objects.

Consultation is the hallmark of the Section 106 process. Federal agencies must make a "reasonable and good faith" effort to identify consulting parties and begin consultation early in project planning, after the federal agency determines it has an undertaking and prior to making decisions about project design, location, or scope.

The NHPA, the ACHP's regulations, and Presidential Executive Orders set out basic steps, standards, and criteria in the consultation process, including:

- Federal agencies have an obligation to seek out all consulting parties [36 CFR § 800.2(a)(4)], including the State Historic Preservation Officer (SHPO)/Tribal Historic Preservation Officer (THPO) [36 CFR § 800.3(c)].

- Federal agencies must acknowledge the sovereign status of Indian tribes [36 CFR § 800.2(c)(2)(ii)]. Federal agencies are required to consult with Indian tribes on a government-to-government basis in recognition of the unique legal relationship between federal and tribal governments, as set forth in the Constitution of the United States, treaties, statutes, court decisions, and executive orders and memoranda.

- Consultation on a government-to-government level with Indian tribes cannot be delegated to non-federal entities, such as applicants and contractors.

- Federal agencies should solicit tribal views in a manner that is sensitive to the governmental structures of the tribes, recognizing their desire to keep certain kinds of information confidential, and that tribal lines of communication may argue for federal agencies to provide extra time for the exchange of information.

- Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined eligible for inclusion on the National Register [16 U.S.C. § 470a(d)(6)(A)], and federal agencies must consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to such historic properties [16 U.S.C. § 470a(d)(6)(B) and 36 CFR § 800.2(c)(2)(ii)(D)].

Principle 3: Native Americans are descendants of original occupants of this country. Accordingly, in making decisions, federal agencies should be informed by and utilize the special expertise of Indian tribes and Native Hawaiian organizations in the documentation and treatment of their ancestors.

This principle reiterates existing legal requirements found in federal law, regulation and executive orders, and is consistent with positions that the ACHP has taken over the years to facilitate enfranchisement and promote broad participation in the Section 106 process. Federal agencies must consult with Indian tribes on a government-to-government basis because they are sovereign nations.

Indian tribes and Native Hawaiian organizations bring a special perspective on how a property possesses religious and cultural significance to them. Accordingly, federal agencies should utilize their expertise about, and religious and cultural connection to, burial sites, human remains, and associated funerary objects to inform decision-making in the Section 106 process.

Principle 4: Burial sites, human remains and funerary objects should not be knowingly disturbed unless absolutely necessary, and only after the federal agency has consulted and fully considered avoidance of impact and whether it is feasible to preserve them in place.

As a matter of practice, federal agencies should avoid impacting burial sites, human remains, and funerary objects as they carry out their undertakings. If impact to the burial site can be avoided, this policy does not compel federal agencies to remove human remains or funerary objects just so they can be documented.

As this policy advocates, federal agencies should always plan to avoid burial sites, human remains, and funerary objects altogether. When a federal agency determines, based on consultation with Section 106 participants, that avoidance of impact is not appropriate, the agency should minimize disturbance to such sites, remains, and objects. Accordingly, removal of human remains or funerary objects should occur only when other alternatives have been considered and rejected.

When a federal agency determines, based on consultation with Section 106 participants, that avoidance of impact is not appropriate, the agency should then consider any active steps it may take to preserve the burial site in place, perhaps through the intentional covering of the affected area, placement of markers, or granting of restrictive or other legal protections. In many cases, preservation in place may mean that, to the extent allowed by law, the locations of burial sites, human remains, and funerary objects should not be disclosed publicly. Alternatively and consistent with the Section 106 regulations [36 CFR § 800.5(a)(2)(vi)], natural deterioration of the remains may be the acceptable or preferred outcome of the consultation process.

Principle 5: When human remains or funerary objects must be disinterred, they should be removed carefully, respectfully, and in a manner developed in consultation.

When the federal agency decides that human remains or funerary objects must be disturbed, they should be removed respectfully and dealt with according to the plan developed by the federal agency in consultation. "Careful" disinterment means that those doing the work should have, or be supervised by people having, appropriate expertise in techniques for recognizing and disinterring human remains.

This policy does not endorse any specific treatment. However, federal agencies must make a reasonable and good faith effort to seek agreement through consultation before making its decision about how human remains and/or funerary objects shall be treated.

The plan for the disinterment and treatment of human remains and/or funerary objects should be negotiated by the federal agency during consultation on a case-by-case basis. However, the plan should provide for an accurate accounting of federal implementation. Depending on agreements reached through the Section 106 consultation process, disinterment may or may not include field recordation. In some instances, such recordation may be so abhorrent to consulting parties that the federal agency may decide it is inappropriate to carry it out. When dealing with Indian tribes, the federal agency must comply with its legal responsibilities regarding tribal consultation, including government-to-government and trust responsibilities, before concluding that human remains or funerary objects must be disinterred.

Principle 6: The federal agency is ultimately responsible for making decisions regarding avoidance of impact to or treatment of burial sites, human remains, and funerary objects. In reaching its decisions, the federal agency must comply with applicable federal, tribal, state, or local laws.

Federal agencies are responsible for making final decisions in the Section 106 process [36 CFR § 800.2(a)]. The consultation and documentation that are appropriate and necessary to inform and support federal agency decisions in the Section 106 process are set forth in the ACHP's regulations [36 CFR Part 800].

Other laws, however, may affect federal decision-making regarding the treatment of burial sites human remains, and funerary objects. Undertakings located on federal or tribal lands, for example, are subject to the provisions of NAGPRA and the Archaeological Resources Protection Act (ARPA). When burial sites, human remains, or funerary objects are encountered on state and private lands, federal agencies must identify and follow state law when it applies. Section 106 agreement documents should take into account the requirements of any of these applicable laws.

Principle 7: Through consultation, federal agencies should develop and implement plans for the treatment of burial sites, human remains, and funerary objects that may be inadvertently discovered.

Encountering burial sites, human remains, or funerary objects during the initial efforts to identify historic properties is not unheard of. Accordingly, the federal agency must determine the scope of the identification effort in consultation with the SHPO/THPO, Indian tribes and Native Hawaiian

organizations, and others before any archaeological testing has begun [36 CFR § 800.4(a)] to ensure the full consideration of avoidance of impact to burial sites, human remains, and funerary objects.

The ACHP's regulations provide federal agencies with the preferred option of reaching an agreement ahead of time to govern the actions to be taken when historic properties are discovered during the implementation of an undertaking. In the absence of prior planning, when the undertaking has been approved and construction has begun, the ACHP's post-review discovery provision [36 CFR § 800.13] requires the federal agency to carry out several actions:

(1) make reasonable efforts to avoid, minimize, or mitigate adverse effects to such discovered historic properties;
(2) notify consulting parties (including Indian tribes and Native Hawaiian organizations that might attach religious and cultural significance to the affected property) and the ACHP within 48 hours of the agency's proposed course of action;
(3) take into account the recommendations received; and then
(4) carry out appropriate actions.

NAGPRA prescribes a specific course of action when Native American and Native Hawaiian human remains and funerary objects are discovered on federal or tribal lands in the absence of a plan—cessation of the activity, protection of the material, notification of various parties, consultation on a course of action and its implementation, and then continuation of the activity. However, adherence to the plan under Principle 5 would cause new discoveries to be considered "intentional excavations" under NAGPRA because a plan has already been developed, and can be immediately implemented. Agencies then could avoid the otherwise mandated 30 day cessation of work for "inadvertent discoveries."

Principle 8: In cases where the disposition of human remains and funerary objects is not legally prescribed, federal agencies should proceed following a hierarchy that begins with the rights of lineal descendants, and if none, then the descendant community, which may include Indian tribes and Native Hawaiian organizations.

Under the ACHP's regulations, "descendants" are not identified as consulting parties by right. However, federal agencies shall consult with Indian tribes and Native Hawaiian organizations that attach religious and cultural significance to burial sites, human remains and associated funerary objects, and be cognizant of their expertise in, and religious and cultural connection to, them. In addition, federal agencies should recognize a biological or cultural relationship and invite that individual or community to be a consulting party [36 CFR § 800.3(f)(3)].

When federal or state law does not direct disposition of human remains or funerary objects, or when there is disagreement among claimants, the process set out in NAGPRA may be instructive. In NAGPRA, the "ownership or control" of human remains and associated funerary objects lies with the following in descending order: specific lineal descendants; then tribe on whose tribal lands the items were discovered; then tribe with the closest cultural affiliation; and then tribe aboriginally occupying the land, or with the closest "cultural relationship" to the material.

Definitions Used for the Principles

- **Burial Site**: Any natural or prepared physical location, whether originally below, on, or above the surface of the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited [25 U.S.C. 3001.2(1)].
- **Consultation:** 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 review process [36 CFR § 800.16(f)].
- **Consulting parties:** Persons or groups the federal agency consults with during the Section 106 process. They may include the State Historic Preservation Officer; the Tribal Historic Preservation Officer; Indian tribes and Native Hawaiian organizations; representatives of local governments; applicants for federal assistance, permits, licenses, and other approvals; and/or any additional consulting parties [based on 36 CFR § 800.2(c)]. Additional consulting parties may include individuals and organizations with a demonstrated interest in the undertaking due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties [36 CFR § 800.2(c)(6)].
- **Disturbance:** Disturbance of burial sites that are listed in or eligible for listing in the National Register of Historic Places will constitute an adverse effect under Section 106. An adverse effect occurs when "an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, setting, materials, workmanship, feeling, or association" [36 CFR § 800.5(a)(1)].
- **Federal land:** Lands under a federal agency's control. Mere federal funding or permitting of a project does not turn an otherwise non-federal land into federal land (see *Abenaki Nation of Mississquoi* v. *Hughes*, 805 F. Supp. 234 (D. Vt. 1992), aff'd, 990 F. 2d 729 (2d Cir. 1993) (where the court found that a Clean Water Act permit issued by the US Army Corps of Engineers did not place the relevant land under federal "control" for NAGPRA purposes).
- **Funerary objects:** "items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed intentionally at the time of death or later with or near individual human remains" [25 U.S.C. 3001(3)(B)].
- **Historic property:** "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. It includes artifacts, records, and remains that are related to and located within such properties, and it includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register of Historic Places criteria" [36 CFR § 800.16(1)].
- **Human remains:** The physical remains of a human body. The term does not include remains or portions of remains that may reasonably be determined to have been freely given or naturally shed by the individual from whose body they were obtained, such as hair made into ropes or nets [see 43 CFR § 10.2(d)(1)].
- **Indian Tribe**: "An Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act [43 U.S.C. 1602], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" [36 CFR § 800.16(m)].
- **Native American:** Of, or relating to, a tribe, people, or culture that is indigenous to the United States [25 U.S.C. 3001 (9)]. Of, or relating to, a tribe, people, or culture indigenous to the Unites States, including Alaska and Hawaii [43 CFR 10.2(d)].

- **Native Hawaiian:** Any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the state of Hawaii [36 CFR § 800.16(s)(2)].
- **Native Hawaiian Organization:** Any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians [36 CFR § 800.16(s)].
- **Policy statement:** A formal statement, endorsed by the full ACHP membership, representing the membership's collective thinking about what to consider in reaching decisions about select issues, in this case, human remains and funerary objects encountered in undertakings on federal, tribal, state, or private lands. Such statements do not have the binding force of law.
- **Preservation in place:** Taking active steps to ensure the preservation of a property.
- **Protection of Historic Properties**: Regulations [36 CFR Part 800] implementing Section 106 of the National Historic Preservation Act.
- **Section 106**: That part of the National Historic Preservation Act which establishes a federal responsibility to take into account the effects of undertakings on historic properties and to provide the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such action.
- **State Historic Preservation Officer:** The official appointed or designated pursuant to Section 101(b)(1) of NHPA to administer the state historic preservation program.
- **Tribal Historic Preservation Officer**: The official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of Section 106 compliance on tribal lands in accordance with Section 101(d)(2) of NHPA.
- **Treatment:** Under Section 106, "treatments" are measures developed and implemented through Section 106 agreement documents to avoid, minimize, or mitigate adverse effects to historic properties.

Acronyms Used for the Policy Statement

- **ACHP**: Advisory Council on Historic Preservation.
- **ARPA**: Archaeological Resources Protection Act [16 U.S.C. 470aa-mm].
- **NHPA**: National Historic Preservation Act [16 U.S.C. § 470f].
- **NAGPRA**: The Native American Graves Protection and Repatriation Act [25 U.S.C. 3001 et seq].
- **SHPO**: State Historic Preservation Officer
- **THPO**: Tribal Historic Preservation Officer

[The members of the Advisory Council on Historic Preservation unanimously adopted this policy on February 23, 2007]