

Part 315 – Tribal Ancestral Lands Consultation Under the National Historic Preservation Act – Guidance for Natural Resources Conservation Service Employees

Subpart A – Purpose, Background, and Responsibilities

315.0 Introduction

A. In 2015, NRCS formed the Tribal Ancestral Lands Consultation (TALC) workgroup consisting of employees from NRCS, the National Association of Tribal Historic Preservation Officers (NATHPO), the Advisory Council on Historic Preservation (ACHP), and representatives from federally recognized Indian Tribes. The National Historic Preservation Act's (NHPA's) implementing regulations define an Indian Tribe as—

“an Indian Tribe, band, nation, or other organized group or community, including a native village, regional corporation or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. Sec 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 Sec. 800.16(m))

B. This national instruction (NI) was developed by the TALC workgroup to help NRCS staff when consulting with Indian Tribes regarding sites of religious and cultural significance on ancestral lands during the NHPA Section 106 review process, which requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the ACHP a reasonable opportunity to comment.

C. Consultation with Indian Tribes can take many forms. As a result, there is no specific policy or guidance document available that will routinely guide Federal agencies during consultation. In addition to reviewing available NRCS documents regarding consultation, there are a number of important questions that NRCS staff should consider when consulting with Indian Tribes regarding sites of religious and cultural significance on ancestral lands.

D. Obvious questions are—

- (1) What are ancestral lands?
- (2) Why should NRCS consult with Indian Tribes on ancestral lands?
- (3) Who determines what and where ancestral lands are?
- (4) Which Indian Tribes should NRCS consult with?
- (5) No Indian Tribes are located in my State, so why should I consult?
- (6) How do I get started?

315.1 Purpose of this Guidance

A. This NI provides NRCS employees an overview of the regulatory requirements that mandate consultation with Indian Tribes regarding sites of religious and cultural significance on ancestral lands (36 CFR Pt. 800, “Protection of Historic Properties”). It also outlines how NRCS can effectively manage projects that incorporate Indian Tribe input acquired through consultation, and complete the NHPA Section 106 review process in a timely manner.

B. This NI supplements existing NRCS policy, including—

- (1) Title 410, General Manual, Part 405, “American Indians and Alaska Natives” (https://www.wtcac.org/files/9113/6787/6771/GM_410_405_C_Amend_8_October_2010.pdf).

- (2) Title 190, “National Cultural Resources Procedures Handbook” (https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs144p2_035721.pdf).
- (3) NI 190-306, “NRCS Cultural Resources Training Module on Working Effectively with Tribal Governments” (<https://directives.sc.egov.usda.gov/viewerFS.aspx?hid=26429>)
- (4) NI 410-300, “Key Tribal Policies, Procedures and Partnerships, A Reference Guide for NRCS Employees” (https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_021894.pdf).
- (5) NI 410-301, “Tribal Consultation, A Guide for NRCS Employees” (https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_021895.pdf).

C. Prior to using this NI, you should be familiar with NI 410-301.

D. Native Hawaiian Organizations (NHO) are not discussed specifically in this NI because it mostly references Government-to-Government consultation, a process unique to Indian Tribes in the NHPA Section 106 process. However, NHOs are specifically included in the NRCS definition of “ancestral lands” provided in this document. NRCS recognizes that all lands in the State of Hawaii are “ancestral lands” to Native Hawaiians and that the NHPA implementing regulations clearly require consultation with NHOs regarding sites of religious and cultural significance.

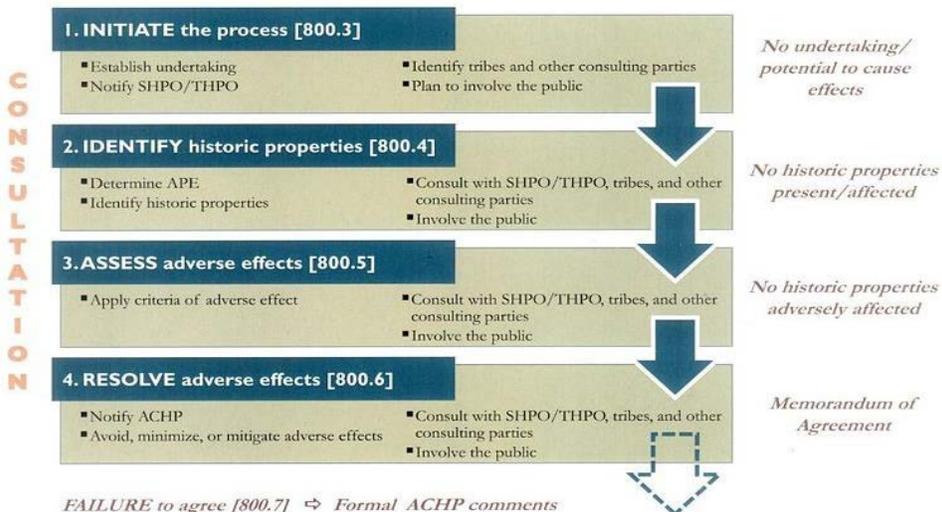
315.2 Why NRCS Consults With Federally Recognized Indian Tribes

A. NRCS consults with federally recognized Indian Tribes as required by Federal laws, and USDA departmental and NRCS directives. Exhibit 5 of this NI contains a list of directives that requires NRCS to consult with Indian Tribes under the NHPA whenever an agency undertaking has the potential to affect historic properties.

B. Consultation became such an important issue in the NHPA that a definition was added to the implementing regulations. This definition in 36 CFR Part 800, states that consultation is “the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the NHPA Section 106 process.” Interactive consultation has become the heart of NHPA Section 106 review. The NHPA is a procedural law that includes four steps (initiate, identify, assess, and resolve), each requiring coordination and communication between the NRCS and their consulting parties (fig. 315-A1).

Figure 315-A1: ACHP Section 106 process.

THE SECTION 106 PROCESS



C. Cultural resources are significant to Indian Tribes on multiple levels, including social, economic, cultural, and political, and require careful consideration during the consultation process to ensure these concerns are taken into account. Resources involved in NHPA Section 106 review are generally very significant to the Indian Tribe in ways that the NRCS cultural resources specialists (CRS) may not fully understand. Consultation often involves complex or sensitive projects and information.

D. The consultation process is a legal requirement mandated under the National Environmental Policy Act (NEPA) and NHPA, but Federal agencies may often be concerned that consultation will hinder their agency project's progress. However, the knowledge Indian Tribes possess of cultural resources of significance to them is necessary for NRCS to ensure that those resources are properly identified and assessed.

E. Consultation should commence early in the planning process, to identify and discuss relevant preservation issues and resolve concerns for the historic properties. Each Indian Tribe must be afforded a reasonable opportunity to—

- (1) Identify its concerns about historic properties.
- (2) Advise on the identification and evaluation of historic properties, to include those of traditional religious and cultural significance.
- (3) Articulate their views on the undertaking's effects on such properties.
- (4) Participate in the resolution of adverse effects.

F. The agency official must make a reasonable and good faith effort to identify Indian Tribes to be consulted in the NHPA Section 106 process.

G. NHPA directs agency actions regarding section 106 compliance, but it does not state how the consultation should be conducted, when it should be initiated, who it should be conducted with, or what and where ancestral lands are. As it relates to NRCS, this will be provided later in this NI.

H. NRCS staff can utilize several tools to reduce routine practice review and consultations while providing predictability and consistency in the consideration of effects to historic properties, and ensure flexibility and responsiveness to Tribal concerns. One tool is an NRCS prototype programmatic agreement (PPA), negotiated with an Indian Tribe and THPOs, which identifies streamlined consultation procedures and practices exempted from review.

- (1) NRCS and its partners have recognized the benefits of the PPA that include—
 - (i) Reduced paperwork production and transmission.
 - (ii) Focused cultural resource inventory reviews leading to increased identification and protection efforts.
 - (iii) Expedited grant application and technical assistance reviews, and improved working relationships.
- (2) Another tool includes consultation protocols and an agreement that identifies how section 106 consultations will be coordinated, but doesn't provide for exempting practices from review on Tribal land.

315.3 Historic Properties of Religious and Cultural Significance

A. The NHPA and the ACHP's regulations refer to "historic properties of traditional religious and cultural significance." It is important to remember that "historic properties" and "religious and cultural significance" are separate but interrelated terms.

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- (1) 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 (National Register).
- (2) Religious and Cultural Significance.—An ascribed significance to a site, object, district, building, or structure.

[National Register Bulletin No. 15](#), “How to Apply the National Register Criteria for Evaluation,” states that traditional cultural significance is derived from the role a property plays in a community’s historically rooted beliefs, customs, and practices.

C. To be eligible for the National Register, a property must have both significance and integrity, qualities that are inextricably linked during the evaluation phase. Integrity is the ability of a property to convey its significance. Only after significance is fully established can you proceed to the issue of integrity. The evaluation of integrity must always be grounded in an understanding of a property’s physical features and how they relate to its significance. Ultimately, the question of integrity is answered by whether or not the property retains the identity for which it is significant.

D. The term “historic properties of religious and cultural significance” relies on the internal knowledge and perception of Indian Tribes. This relationship between the Indian Tribe and their special expertise is necessary for the NRCS to properly identify historic properties, evaluate significance and integrity, and assess potential effects. This is also the basis for why the NHPA and its implementing regulations mandate consultation regarding historic properties of religious and cultural significance.

E. The NHPA directs that Federal agencies “shall consult” with Indian Tribes regarding sites of religious and cultural significance (54 U.S.C. Sec. 302706, “Eligibility for Inclusion on National Register,” Pars. (a) and (b))

<http://www.achp.gov/docs/NHPA%20in%20Title%2054%20and%20Conversion%20Table.pdf>.

F. The ACHP’s regulations further define that this consultation requirement applies regardless of the location of the historic property (36 CFR Sec. 800.2(c)(2)(ii)(D)). That is, the NHPA’s requirement that the Federal agency consult with Indian Tribes regarding historic properties of religious and cultural significance applies to undertakings on all land status types, *including private land* (see exhibit 6 of this NI, “Frequently Asked Questions”).

“Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian Tribes and should consider that when complying with the procedures in this part” (36 CFR Sec. 800.2(c)(2)(ii)(D)).

G. Neither the NHPA nor its implementing regulations define what ancestral, aboriginal, or ceded lands are. The following definition was developed for NRCS use:

Ancestral Lands.—Areas, whether discrete or continuous, where Indian Tribes, NHOs, or their members have affiliation. These are areas that have cultural, historical, spiritual, subsistence, or ceremonial significance ascribed to them. An Indian Tribe’s or NHO’s physical connections to these areas may or may not persist into the modern era, an ongoing physical connection to an area is not required for a site to have religious and cultural significance. Ancestral lands are defined by Indian Tribes or NHOs based on their knowledge of their history and connections with that area.

- (i) Ancestral lands exist throughout the United States and should be assumed to exist for all undertakings regardless of current land use and ownership. It is also important to note that ancestral lands are not exclusive to one Indian Tribe. Throughout the course of history, Tribal territories have shifted for a number of reasons. As a result, multiple Indian Tribes may claim association to a project area, although the significance may vary.

- (ii) Exhibit 2 of this NI contains information on how to identify which Indian Tribes may have ancestral lands in the project area you are working.
- (iii) All Indian Tribes that claim a connection to a location may be consulting parties.

315.4 Special Expertise

A. Indian Tribes and their designated traditional cultural authorities (National Park Service (NPS) 2002) are the exclusive subject matter experts when it comes to historic properties of religious and cultural importance. The regulations state—

“The agency official shall acknowledge that Indian Tribes and Native Hawaiian organizations possess *special expertise* in assessing the eligibility of historic properties that may possess religious and cultural significance to them” [emphasis added].

B. The ACHP’s regulations require Federal agencies to consult with Indian Tribes regarding the assessment of adverse effects to these sites. Working with Indian Tribes early in the process to determine what site types may be affected by the undertaking recognizes the special expertise identified by the regulations. Further, adequate eligibility determinations and assessments of adverse effects necessarily require that sites of religious and cultural significance are identified and recorded in a manner consistent with the site type. Adequate identification, evaluation, assessment, and resolution require diligent consultation.

C. Frequently, sites of cultural and religious significance may not exhibit many of the routine physical markers that NRCS cultural resource personnel and archaeological contracting firms may be familiar with. Sites often include surface-based rock formations (cairn, effigy, etc.), naturally occurring features (rock outcrops, springs, etc.), and seasonally available plants. Recognizing the significance of a site requires interaction with personnel appointed by the Indian Tribe. While NRCS staff or contractors may be able to identify these sites, sites ascribed with religious and cultural significance must be designated as such by the Indian Tribe.

D. Indian Tribes and NRCS personnel may view “significance” and “site type” differently. The NPS provides guidance (NPS 2002) for documenting sites (district, site, building, structure) in relation to the National Register criteria. This document defines a site as a “location of a significant event, a prehistoric or historic occupation or activity, or a building or structure, whether standing, ruined, *or vanished*, where the location itself possesses historic, cultural, or archeological value regardless of the value of any existing structure... [a] site need *not be marked by physical remains* if it is the location of a prehistoric or historic event or pattern of events and if no buildings, structures, or objects marked it at the time of the events [emphasis added]” (NPS 2002).

E. Sites may be eligible for the National Register even if their tangible features have vanished or if they are not marked by physical remains. When the NRCS is determining if a project may have the potential to affect a site, balance the special expertise identified in the regulations with the capacity of the NRCS personnel to identify such sites. The decision to utilize Tribal expertise, including any remuneration, is a decision made by the State conservationist.

F. For various reasons (including funding limitations, privacy concerns, and access restrictions) sites that have religious and cultural significance to Indian Tribes have not been documented as extensively as other archaeological sites and architectural features. As a result, early coordination can ensure that these locations are identified and accounted for during the section 106 process. It should be noted that State historic preservation office (SHPO) databases may not contain all sites of Tribal concern, so coordination with Tribal offices is fundamental to consultation.

315.5 What Type of Consultation is Required?

A. Notifying an Indian Tribe of an NRCS action is not the same as consultation. Notification is a one-sided process. Consultation is an active two-sided process that considers an Indian Tribe's interests in the decision-making process. Consultation allows Indian Tribes to identify issues and propose or comment on management options that address those issues.

B. NRCS is responsible for contacting federally recognized Indian Tribes with requests to participate in NHPA consultation. Nonfederally recognized Tribes (State-recognized) may express their interest in consultation on projects by providing a written request to the State conservationist, acting as an *interested* party, as stated in the ACHP Guidance on Consultation:

“Under ACHP’s regulations at Section 800.2(c)(5), the Federal agency may invite such groups to participate in consultation based on a demonstrated interest in the undertaking’s effects on historic properties. However, the term ‘Indian Tribe’ in NHPA refers only to federally recognized Indian Tribes. Accordingly, under NHPA and ACHP’s regulations, only a federally recognized Indian Tribe has the right to participate in section 106 consultation.”

C. Conduct consultation communication in an open and transparent manner that does not compromise the rights of either the Indian Tribes or project applicants. Consultation conducted in a good-faith manner facilitates the goals of both NRCS and the Indian Tribe’s operations and governance practices. Ensure NRCS provides the Indian Tribe as much information as possible to allow the Indian Tribe the opportunity to review and consider the information before a project meeting takes place.

D. After a meeting, follow up on any decisions made, provide any information requested, and be reasonably available to address concerns in all levels of consultation.

E. NRCS recognizes two methods of section 106 consultation: formal Government-to-Government and informal. These processes are guided by protocols grounded in early notification, collaboration, and communication.

- (1) Formal Government-to-Government Consultation.—Conducted between appropriate agency and Indian Tribe officials and aims to promote communication that is grounded in trust, respect, and shared responsibility. NRCS initiates and seeks consultation with an Indian Tribe. It is not the responsibility of the Indian Tribe to contact NRCS and express an interest in a project before their views are considered.
 - (i) Government-to-Government consultation is probably the most often cited, and insisted upon, by representatives of Tribal Governments when they want to engage in consultation. There is a true recognition of an Indian Tribe’s sovereign status when this level of consultation occurs. Tribal leaders often prefer to meet directly with decision makers of Federal agencies when it comes to Government-to-Government consultation.
 - (ii) A federally recognized Indian Tribe may request Government-to-Government consultation at any time within the section 106 process. If this occurs, NRCS policy requires appropriate NRCS personnel coordinate the participation of the State conservationist or other senior management officials. Notify the appropriate NRCS personnel immediately and facilitate communication between the Indian Tribe and NRCS senior staff as necessary.
 - The appropriate NRCS officials are those individuals who are knowledgeable about the matters at hand, are authorized to speak for the NRCS, and exercise delegated authority in the disposition and implementation of an agency action (U.S. Department of Interior (DOI) 2012). On a State level, the State conservationist (STC) fulfills this role and holds the authority to make decisions. STCs are supported by their historic preservation staff that provides technical expertise as necessary.

- The proper representatives of Indian Tribes are designated by the Tribal Government. Within section 106, these representatives commonly include Tribal Council, THPOs, cultural program department head, and cultural committee personnel depending on the context of the discussion and the organizational structure of the Tribe. Indian Tribes may bring multiple personnel to consultation meetings, and a Tribe may request that NRCS bring only necessary personnel to a consultation meeting. This request may be dependent on a number of factors including the sensitivity of the information being shared. NRCS should accommodate those concerns where possible. Remember that Tribal elected officials are not staff. They should be treated and addressed in the same manner as elected or appointed Federal officials.
- (2) Informal Consultation.—This type of communication frequently occurs between Federal middle-level management and Tribal technical staff at meetings, through telephone conversations, and during onsite visits. Although generally not recognized by Indian Tribes as communication on a Government-to-Government basis, it serves as a useful conduit for sharing information, satisfying certain section 106 requirements, and developing important trust relationships.
- (i) Informal consultation takes place between Tribal staff representatives and the staff of the Federal agency initiating a section 106 undertaking. This may occur between the CRS and the THPO, compliance staff member, or other designated representative of the Indian Tribe. If an Indian Tribe does not have a designee familiar with the section 106 process, accommodate accordingly and provide additional information where necessary.
 - (ii) Informal consultation is an effective means of establishing and maintaining an ongoing relationship with an Indian Tribe and can be achieved through annual project meetings, attendance at conferences, or at any other venue that provides an opportunity to interact with Indian Tribes. The importance of informal consultation should not be overlooked, and the utmost respect and professional courtesy should be shown by NRCS staff to the Indian Tribes.

315.6 Building a Relationship

A. NRCS leadership and the cultural resources personnel must emphasize and promote a true *partnership* with Tribal Governments. Share information with the Tribal Governments and their representatives on what NRCS does, how we do it, provide specific project descriptions, and coordinate tours for Tribal representatives on specific projects in which they have an interest.

B. A good way of building a relationship with a Tribal Government is by meeting face-to-face. This doesn't always have to happen during project reviews, it can be done through joint agency meetings, interagency or Tribal meetings, or attending conferences. It is important to understand that Indian Tribes often consider relationship building as a part of, or prerequisite to, the consultation process. These venues provide unique learning experiences for both the Federal agencies and the Tribal representatives and can be conducive to building better relationships.

If you are unable to meet face-to-face, contact a THPO representative by email or phone call. Be proactive and make the initial effort to learn more about the Indian Tribes with connections to your State.

C. Often, the relationship that an agency may have with Tribal partners is built on the personal interaction of specific individuals (i.e., NRCS CRS and the THPO). However, other agency and Tribal staff should be included in these interactions when possible to broaden this relationship. It is also recommended that you formalize these working relationships where possible to ensure continuity as personnel changes occur.

315.7 Consultation Versus Notification

A. NRCS staff must be aware that sending a letter to an Indian Tribe notifying them of a project or agreement and inviting their participation does not constitute consultation. Similarly, sending a letter requesting information also does not constitute consultation. However, to begin consultation, notification that takes place early and facilitates further interaction is an important step in the consultation process. The initial notification must contain all necessary information regarding project details (see 36 CFR Sec. 800.11) so the Tribal representatives are more informed and better qualified to provide a response.

B. NRCS defines consultation as an interaction that goes beyond notification and reporting information. It is an open and free exchange of information and opinions between parties that can lead to mutual understanding. Consultation involves the participants in the analysis of the issues and during the development and implementation of the resource management plans. NRCS guidance is clear that consultation requires two-way communication, an exchange of ideas—it is not notification.

C. While the section 106 regulations allows an Indian Tribe 30 days from date of receipt to comment, consider allowing more time when practicable. Provide information and begin communication as early as possible. Advance notice of a project, even if the undertaking is only conceptual, can greatly improve the consultation process and may potentially avoid or minimize impacts to historic properties. This benefits all parties involved by improving predictability of project review timelines, preserving historic properties, and potentially reducing project costs. For more guidance on when the 30-day time period is applicable, refer to the ACHP's section 106 guidance at <http://www.achp.gov/30daytimelimit.html>.

315.8 Identifying and Contacting Indian Tribes for Consultation on Ancestral Lands

A. NRCS is responsible for making a reasonable and good faith effort to identify Indian Tribes that should participate in consultation (36 CFR Sec. 800.2(c)(2)(ii)(A)). It is not the Indian Tribe's responsibility to inform the NRCS they want to consult on a project.

- (1) Understanding which Indian Tribes NRCS should consult with requires research. The simplest method is to identify each Indian Tribe within their respective State and gather information related to their historic residency or interests within the State. Many States will need to identify Indian Tribes who were either removed or relocated from their homelands. There are numerous print and electronic resources available, but the Indian Tribes will be the ultimate resource.
- (2) Indian Tribe web sites, the Native American Graves Protection and Repatriation Act (NAGPRA) database, the U.S. Department of Housing and Urban Development (HUD) Tribal Directory Assessment Tool (TDAT), SHPOs, Federal agencies, and other web-based and library resources are all useful tools to help identify which Indian Tribes should be consulted within the State. Refer to the exhibits 2 and 3 in this NI for more information.

B. When to Make Contact

- (1) Knowing when to consult is an important step in the section 106 process, and according to NHPA regulations, the earliest stages of project planning are best.

“The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation...commencing at the *early stages of project planning*... so that a broad range of alternatives may be considered during the planning process for the undertaking” [emphasis added] (36 CFR Sec. 800.1 (a)-(c)).

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- (2) NRCS employees base decision making on the nine-step planning process for delivering conservation assistance (Title 180, National Planning Procedures Handbook, Pt. 600, Subpt. C, Sec. 600.20).
- (3) Step 3 of NRCS’s nine-step planning process is to inventory resources in the project area. At this stage, Indian Tribes are often the only source of information about certain resources (medicinal plants, cultural sites, etc.); therefore, consultation with them at this stage is very important.
- (4) Steps 4 through 7 include steps to analyze the data acquired, develop and select alternatives, and make decisions. The NRCS planning process, if followed accordingly, is sufficient for ensuring that consultation with Indian Tribes is incorporated early and often into the planning and implementation of projects.

“The agency official shall ensure that consultation in the section 106 process provides the Indian Tribe or Native Hawaiian organization a reasonable opportunity to *identify its concerns* about historic properties, *advise on the identification and evaluation* of historic properties, including those of traditional religious and cultural importance, *articulate its views on the undertaking's effects* on such properties, and *participate in the resolution* of adverse effects” [emphasis added] (36 CFR Sec. 800.2(c)(2)(ii)(A)).

C. Consultation includes many steps, and takes time to complete in a manner that meets NRCS established standards and should not be delayed. NRCS must plan accordingly to prevent project delays. However, if delays occur, stay positive and remind applicants that no amount of project planning can expedite necessary reviews.

- (1) NRCS personnel should consider—
 - (i) Scale and nature of the project. Generally, smaller projects have fewer concerns. However, the potential still exists for these concerns to be significant. Be prepared to allow an Indian Tribe significantly more time when considering large projects, such as watershed program undertakings.
 - (ii) Relationships with Indian Tribes. Understanding your partner and their concerns can influence when you should contact them. There are often geographical areas or particular resource types that Indian Tribes consider significant. Being aware of these particular concerns can give NRCS staff a better understanding of whether a project may involve a higher degree of coordination with Indian Tribes.
 - (iii) Time constraints of partners. Provide advance notice of potential projects. Consider that Indian Tribes receive consultation requests from multiple agencies for multiple projects. An Indian Tribe’s priorities can vary based on resource, confidentiality, access, and funding concerns. Should you receive comments from an Indian Tribe after the 30-day comment period has closed and you are still able to take these comments into account, do so. Regardless of when a comment is received, provide the Indian Tribe with a response that indicates if their comments were accounted for and how.
- (2) Project applicants should not approach the Indian Tribe during a project if there are delays, this may lead to a confrontation that the NRCS should not be a party to. An applicant’s role in the section 106 process is limited and any such involvement must be authorized by the NRCS. Refer to the ACHP’s “Section 106 Applicant Toolkit” web page at <http://www.achp.gov/apptoolkit.html> for more information regarding parties who are the recipient of, or are applying for, Federal licenses, permits, assistance, or approvals.

D. When a field office submits a project area to the CRS for an inventory, it is useful for the CRS to already know what types of resources are of concern to the Indian Tribes with ancestral ties to the project area. Prior conversations with the interested Indian Tribes can identify if there are practices, resources or general locations of no concern, great concern, or concern when only special conditions

are present. This prior knowledge can expedite the review of these projects and can allow both the NRCS and Indian Tribe to focus their attention on more pressing matters.

It is important to remember that the potential to affect does not equal ground-disturbing activities. An adverse effect derives when an undertaking changes the character or use of a historic property in the manner that makes it eligible for the National Register. This could include logging projects, brush removal, or stock tank installation. In the event you question whether or not your project has the potential to affect historic properties, engage your supervisor and respective Indian Tribes. It is better to engage in consultation above and beyond your responsibility than to deny an Indian Tribe participation.

E. Who is the Appropriate Point of Contact for an Indian Tribe?

- (1) This NI is focused on the interactions that NRCS employees will have with Indian Tribes regarding routine section 106 compliance. Each Indian Tribe is its own unique Government; their employees will have different authorities and even different review and approval processes.
- (2) Informal contact with key Tribal employees, such as THPOs or other staff from their historic preservation or environmental compliance office is important. Notify them of your intent to send an official letter to begin the consultation process and your intention to include their primary elected official, relevant professional staff, and any other Tribal members they deem appropriate. Often Indian Tribes will have cultural committees, elder groups, or other advisory boards that participate in their section 106 reviews, especially regarding sites of religious and cultural significance.
- (3) It is important to consider if Indian Tribes have formally assumed the historic preservation officer functions on Tribal lands. If so, then they will have a THPO who is the designated Tribal preservation official of a federally recognized Indian Tribe. However, the THPO may not have been designated by his or her Tribal Government to function as the sole point of contact for the review of undertakings off Tribal lands (i.e., ancestral lands). Therefore, NRCS should contact both the Tribal Governmental leader or leaders and the THPO prior to formal initiation of section 106 consultation to determine the appropriate points of contact.
- (4) Make every effort to email or call preservation points of contact before sending out an official letter. This fosters the ongoing relationship between NRCS and their local Indian Tribes. If possible, formalize the relationship processes in a consultation protocol that identifies the who, what, when, where, and why of communication. This is discussed later in this NI.

F. Making Contact

- (1) Official contact with the Indian Tribe notifying them of an undertaking and inviting them to meet or engage in consultation should be completed through a letter addressed to the Tribal leader with copies to relevant staff. Sending a separate letter to the Tribal leader shows that NRCS recognizes the Government-to-Government relationship. Specific guidelines include the following:
 - (i) Always send a letter and address it to both the Tribal leader and THPO (or cultural resources point-of-contact) until directed otherwise by the Indian Tribe.
 - (ii) Follow the official mailer with a PDF version of the letter in an email for convenience and timeliness. In addition to emailing the letter, provide the Indian Tribe with PDF copies of all relevant information available for sharing. This level of detail helps the Indian Tribe facilitate internal document sharing and coordination amongst their various governmental programs that may be involved in the project.
 - (iii) When you send an email, make sure that all parties are visible; do not blind carbon copy (bcc) recipients. Be clear and provide adequate attachments in a format accessible to all

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parties. This is particularly important when sending images and GPS and GIS data. Provide, or voice your willingness to provide, paper copies of any documents attached by email. Requesting an email confirmation regarding receipt is recommended as well to verify that your email was both received and opened.

- (iv) Do not assume that you can send correspondence digitally. Do not limit a Tribe to digital correspondence unless it has been explicitly agreed to. Paper copies sent by the NRCS are often necessary for recordkeeping purposes.
- (2) Follow up with a telephone call or an email with the relevant staff to ensure the written contact has been received. Certified mail ensures only that it is received by the Indian Tribe, not necessarily the correct person.
 - (i) When you make a call, leave a voicemail with your name, title, work number, and reason for calling. Follow up with an email that includes relevant information. Ensure the Indian Tribe has all the relevant information they need in an easily accessed format to facilitate positive consultation.
 - (ii) Once initial contact is made, ask the THPO or other Tribal representative about their preferred contact method for future communication.
- (3) If an Indian Tribe feels that further consultation is necessary, and they request a meeting, try to ensure the meeting takes place on Tribal lands, onsite, or at a location preferred by the Indian Tribe.
- (4) For meetings, ensure the appropriate NRCS decision maker is available and briefed on the purpose of the meeting. Consultation meetings must allow the Tribal community as much meeting time as they need to become comfortable with the presented ideas and concepts.
 - (i) Allow the Indian Tribe to select the meeting location, date, and time if possible.
 - (ii) Be willing to travel to the Indian Tribe and ensure that you bring adequate copies of meeting materials and that necessary staff, including decision makers, are present.
 - (iii) Ask the Tribe what NRCS personnel they would like to have in attendance at the meeting and if they have any specific goals of topics to include in the agenda.
 - (iv) Provide any materials that will be discussed in the meeting, including maps and photos, to the Indian Tribe in advance of the meeting.
- (5) Attempt to utilize local NRCS staff within the State with knowledge of the Indian Tribe (when appropriate). Working with local staff and Tribal liaisons will help ensure that you are not conducting yourself in a manner that is disrespectful of Tribal customs. Local personnel can inform you of important events (election, funeral, and local holidays). Notify NRCS leadership in an Indian Tribe's resident State of your interaction to ensure effectively managed consultation.
- (6) If the topic of gifting your Tribal partners arises, discuss with appropriate NRCS administrative staff and your Tribal liaison or Tribal contact to determine if gifting is appropriate and expected. Some THPOs are prohibited from receiving gifts, while other Indian Tribes may consider gifting a sign of relationship building.

G. What to Say?

- (1) Before sending out a template NRCS introduction letter, notify the Tribal point-of-contact by email and telephone that you will be preparing an introductory letter. The example "Ancestral Lands Consultation Introduction Letter" in exhibit 8.3 of this NI (addressed to the Tribal leader and THPO copied with attachments) may be used by NRCS to introduce themselves to Tribal Governments. The premise of the letter is to request whether or not the Indian Tribe is interested in consulting on section 106 projects within a specific area of your State. Remember, the Indian Tribe defines the boundary of their ancestral lands.
- (2) The letter should specifically explain NRCS, its mission, and give examples of the various types of projects we fund and support. Explain specifically why NRCS is contacting the

Tribal Government and requesting their input and consultation, and to find out the following specific information:

- (i) The area of interest for the Indian Tribe (consider providing a county map of the State to be filled in by Indian Tribe) should be kept confidential and is amendable at any time. This map may not document an Indian Tribe's entire aboriginal territory; it is intended to document the locations where the Indian Tribe would prefer that the NRCS contact it in regard to undertakings that may adversely affect historic properties of religious and cultural significance.
 - (ii) Determine the Indian Tribe's review process and any specific protocols that NRCS would need to be aware of regarding Tribal consultation. Who are the on-reservation and off-reservation points of contact? Should additional Tribal personnel be contacted?
 - (iii) Explain current project proposals and pending undertakings to familiarize the Indian Tribe with the types of activities that it could potentially concern itself with or elect not to engage in.
 - (iv) Courtesy copy the CRS, STC, and Tribal liaison in the resident State of the Indian Tribe. Build a network of contacts so the relationship is based in the agency and not an individual.
- (3) The NRCS template letter is signed by the STC and should state that the STC, CRS, CRC, or Tribal liaison will be following up with a phone call or an email to set up a specific time to speak with them further regarding the letter.

H. What to do once an ancestral lands area is identified?

- (1) Once an Indian Tribe has identified its ancestral lands, NRCS staff can begin to conduct section 106 consultation for appropriate undertakings in those areas. While project-by-project consultations can be conducted, NRCS staff can also utilize annual program consultations (State example 2) or specialized programmatic agreements (PAs), PPAs, and consultation protocols to reduce routine practice review and consultations while providing predictability and consistency in the consideration of effects to historic properties and ensure flexibility and responsiveness to Tribal concerns. These three types of agreements can be negotiated with an Indian Tribe, THPOs, or NHOs.
- (2) PPAs can identify streamlined consultation procedures and practices exempted from review on Tribal and ancestral lands in the form of alternate section 106 procedures under 36 CFR Section 800.14(b)(4). Consultation protocols identify how section 106 consultations will be coordinated and can include exempting practices from review on ancestral lands, but not on Tribal land, as protocols do not create alternate procedures (36 CFR Sec. 800.2(c)(2)(ii)(E)). PAs can tailor the standard section 106 process to better fit in with agency management or decision making (36 CFR Sec. 800.14(b)(1)). For administrative efficiency, PPAs and consultation protocols are the preferred agreement types as both can be negotiated directly between the NRCS and preservation partner. While verbal agreements can occasionally be beneficial, written agreements or protocols create a record of what both parties agreed.

315.9 Developing a Tribal Prototype Programmatic Agreement (PPA)

On November 21, 2014, the ACHP designated a PPA for NRCS. A PPA is a type of program alternative that assists a Federal agency in its efforts to comply with the requirements of NHPA Section 106 and its implementing regulations, "Protection of Historic Properties" (36 CFR Pt. 800). The PPA is intended to be a template or model to suggest a consistent approach to section 106 review. The NRCS PPA provides for greater predictability in costs, time, and outcomes, as well as the flexibility to address specific situations and conditions. It creates a consistent approach for section 106 reviews for projects occurring across the Nation. The PPA allows the NRCS, through the development of State-based prototype agreements, to expedite the review of

the majority of routine activities that have limited potential to affect historic properties, provide predictability in the consideration of effects to historic properties, and ensure flexibility and responsiveness to State and Tribal concerns. (See exhibit 8.7 of this NI for Tribal PPA examples. Remember, these are merely examples and final documents need to be developed through consultation.)

315.10 Developing a Tribal Consultation Protocol

A. Consultation protocols identify how section 106 consultations will be coordinated between NRCS and Indian Tribes. These agreements draw their authority from the NHPA’s implementing regulations (36 CFR Sec. 800.2(c)(2)(ii)(E));

“An Indian Tribe or a Native Hawaiian organization may enter into an agreement with an agency official that specifies how they will carry out responsibilities under this part, including concerns over the confidentiality of information. An agreement may cover all aspects of Tribal participation in the section 106 process, provided that no modification may be made in the roles of other parties to the section 106 process without their consent. An agreement may grant the Indian Tribe or Native Hawaiian organization additional rights to participate or concur in agency decisions in the section 106 process.”

B. For NRCS, this means that consultation protocols can—

- (1) Specify resolution methods regarding identification and documentation techniques.
- (2) Identify specific resources of concern.
- (3) Develop preferred contact lists and methods for contact.
- (4) Identify preferred treatment methods.
- (5) Identify other routine processes that will—
 - (i) Expedite section 106 reviews.
 - (ii) Facilitate better communication.
 - (iii) Enhance protection of resources and develop stronger relationships.

C. Consultation protocols are not vehicles for exemptions or mitigation.

D. Consultation protocols can ensure that official position titles for project correspondence are listed for both NRCS and the Indian Tribe. Determine how information should be shared (electronic, mail, telephone, etc.) and who should receive this information. Are there resources or locations of special concern that the NRCS needs to be aware of? Are there select individuals or groups at the Indian Tribe that the NRCS staff can work with (cultural committees, traditional cultural authority, etc.)? (See exhibit 8.5 of this NI for an example of a Tribal consultation protocol. Remember, this is merely an example and final documents need to be developed through consultation.)

315.11 NRCS Staff Responsibilities

A. The STC is the responsible Federal official in the State and should be involved in all Government-to-Government consultations involving their State. The STC signs formal agreements and consultation correspondence. Although ancestral lands consultation may involve Indian Tribes that are not resident in that State, the project consultation involves activities within that State and are therefore the responsibility of the STC.

B. The State Tribal liaison may be responsible for coordinating between the STC and NRCS staff regarding meetings and other activities with Tribal partners. This typically does not include project-specific correspondence.

C. The CRS and CRC typically are directly involved with informal consultation between NRCS and designated Tribal staff related to individual projects. The local NRCS Tribal liaisons and district conservationists should be included as a copy in project-by-project correspondence as appropriate.

315.12 NRCS's Investment in Consultation

NRCS cultural resources personnel should request allocation of funding for travel to meetings with Indian Tribes to expedite project reviews and facilitate consultation. Technical staff should add consultation meetings and travel expenses to their individual development plans. Performance appraisals may include elements on Tribal consultation required for both technical staff and leadership.

315.13 References

- A. Advisory Council on History Preservation (ACHP). 2013. Role of the Tribal Historic Preservation Officer in the Section 106 Process. <http://www.achp.gov/docs/Role%20of%20the%20THPO.pdf>
- B. ACHP 2012. Consultation with Indian Tribes in the Section 106 Review Process: A Handbook. <http://www.achp.gov/pdfs/consultation-with-indian-tribes-handbook-june-2012.pdf>
- C. U.S. Forest Service 1997. National Resource Guide to American Indian and Alaska Native Relations (FS-600, Appendix B). <http://www.fs.fed.us/people/tribal/>
- D. U.S. Department of Agriculture (USDA) Natural Resources Conservation Service (NRCS). 2009. Tribal Consultation: A Guide for NRCS Employees. https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_021895.pdf
- E. U.S. Department of Interior (DOI), National Park Service (NPS). 2002. Proposed Rule (36 CFR Pt. 61). <https://www.nps.gov/thpo/downloads/36CRF61ProposedRule.pdf>
- F. U.S. DOI. 2012. Policy on Consultation With Indian Tribes. <https://www.doi.gov/sites/doi.gov/files/migrated/cobell/upload/FINAL-Departmental-tribal-consultation-policy.pdf>