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Department of
Agriculture

NATURAL RESOURCES CONSERVATION SERVICE

Tribal Ancestral Lands Consultation

Guidance for Natural Resources Conservation
Service Employees

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Developed by the NRCS

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Introduction

In 2015 NRCS formed the Tribal Ancestral Lands Consultation (TALC) work group 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. 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. 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 Section 800.16(m))

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

There is no one specific consultation policy or guidance for Federal agencies to properly consult with Indian Tribes. However, there are a number of important questions that NRCS staff should consider when consulting with Tribes regarding sites of religious and cultural significance on ancestral lands.

Obvious questions are:

- What are ancestral lands?
- Why should NRCS consult with Indian Tribes on ancestral lands?
- Who determines what ancestral lands are?
- Which Tribes should NRCS consult with?
- I don't have Indian Tribes in my State, so why should I consult?
- How do I get started?

Purpose of this Guidance

This handbook 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 Part 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.

The handbook supplements existing NRCS policy, including Title 410, General Manual (GM), Part 405, “American Indians and Alaska Natives;” Title 190, National Cultural Resources Procedures Handbook; Title 190, National Instruction (NI), Part 305, “NRCS Cultural Resources Training Module;” Title 410, NI, Part 300, “Key Tribal Policies, Procedures and Partnerships, A Reference Guide for NRCS Employees,” and Part 301, “Tribal Consultation, A Guide for NRCS Employees.”

It is recommended that prior to using this handbook, you familiarize yourself with 410-NI, Part 301, “Tribal Consultation: A Guide for Natural Resources Conservation Service (NRCS) Employees.”

Native Hawaiian Organizations (NHO) are not discussed in this handbook specifically because it mostly references government-to-government consultation, a process unique to Indian Tribes in the NHPA Section 106 process. NRCS recognizes that all lands in the State of Hawaii are “ancestral lands” to NHOs. As such, NHOs should be contacted during each undertaking to determine if there are sites of religious and cultural significance that may be affected. NHOs are, however, specifically included in the NRCS definition of “ancestral lands” provided in this document to ensure that staff recognizes that NHO’s must also be considered during this process.

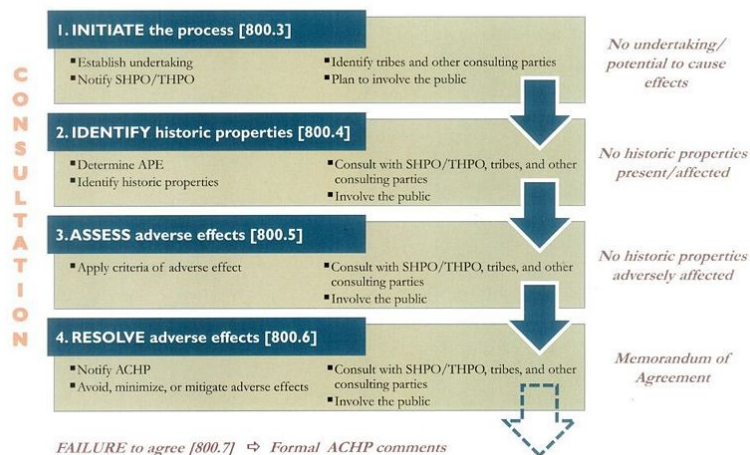
Why NRCS Consults with Federally Recognized Indian Tribes

NRCS consults with federally-recognized Indian Tribes as required by Federal laws, and Departmental and NRCS directives. Appendix F of this handbook contains a list of directives that regulate NRCS employees in consultation with Indian Tribes under the NHPA whenever an agency undertaking has the potential to affect historic properties.

Consultation became such an important issue in the NHPA that a definition was added to the implementing regulations. This definition in 36 CFR 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. 1).

Figure 1 ACHP's Section 106 process.

THE SECTION 106 PROCESS



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 and may exceed the NRCS cultural resources specialists' (CRS) understanding. NRCS staff must remember that consultation often involves complex or sensitive projects and information.

Often Federal agencies consider the consultation process as a legal requirement mandated under the National Environmental Policy Act (NEPA) and NHPA, and fear that consultation will hinder their agency project's progress. However, the knowledge Indian Tribes' possess of these cultural resources is necessary to ensure they are properly identified and assessed.

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

- Identify its concerns about historic properties.
- Advise on the identification and evaluation of historic properties, to include those of traditional religious and cultural importance.
- Articulate its views on the undertaking's effects on such properties.
- Participate in the resolution of adverse effects.

It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian Tribes to be consulted in the NHPA Section 106 process.

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 ancestral lands are. As it relates to the NRCS, this will be provided later in this handbook.

Historic Properties of Religious and Cultural Significance

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 two separate entities. However, for the purposes of NRCS these terms will be considered synonymously.

- Historic properties.—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).
 - To be a historic property that is eligible for listing on the National Register the property must have significance and integrity.
- 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", says traditional cultural significance is derived from the role a property plays in a community's historically rooted beliefs, customs, and practices.,

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 based on

significance because 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.

Understanding that the term “historic properties of religious and cultural significance” is designed to rely on the internal knowledge and perception of Indian Tribes is fundamental. 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 affects. This is also the basis for why the NHPA and its implementing regulations mandate consultation regarding historic properties of religious and cultural significance.

The NHPA directs that Federal agencies “shall consult” with Indian Tribes regarding sites of religious and cultural significance (54 U.S.C. 302706, “Eligibility for Inclusion on National Register,” Parts (a) and (b))
<http://www.achp.gov/docs/NHPA%20in%20Title%2054%20and%20Conversion%20Table.pdf>.

The ACHP’s regulations further define that this consultation requirement applies regardless of the location of the historic property (36 CFR Section 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 appendix H of this handbook, “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 Section 800.2(c)(2)(ii)(D)).

However, neither the NHPA nor its implementing regulations define what ancestral, aboriginal or ceded lands are. To assist NRCS staff, the TALC workgroup developed the following definition for ancestral lands. NRCS staff may refer to this definition for guidance when engaged in the section 106 process.

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, and/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.

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; overlapping and shifting territories exist. Appendix B of this handbook contains information on how to identify which Tribes may have ancestral lands in the project area you are working. All Indian Tribes capable of documenting a connection to a location can be a consulting party.

Special Expertise

Indian Tribes, and their designated traditional cultural authorities (NPS 2002) are the exclusive subject matter experts when it comes to historic properties of religious and cultural importance. The regulations state that:

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]

The ACHP's regulations also require that Federal agencies 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 both identified and recorded in a manner consistent with the site type. Adequate identification, evaluations and assessment, and resolution require diligent consultation.

Frequently sites of cultural and religious significance do not exhibit many of the routine physical markers that NRCS cultural resource personnel and archaeological contracting firms may be familiar with. These sites often include surface-based rock formations (cairn, effigy, etc.), naturally occurring features (rock outcroppings, trees, springs, etc.), and seasonally available plants. This information and recognizing the significance of a site requires interaction with personnel appointed by the Indian Tribe. NRCS staff or contractors may be able to identify these sites, however, sites of religious and cultural significance must be designated by the Indian Tribe.

Indian Tribes and NRCS personnel may view "significance" and "site type" differently. The National Park Service (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).

Sites may be eligible for the National Register even if their tangible features have "vanished" or if they are not "marked by physical remains" at all. When the NRCS is determining if a project may have the potential to affect a site, it is important to balance the special expertise identified in the regulations with the capacity of the NRCS personnel to aptly identify such sites. (See appendix H of this handbook, "Frequently Asked Questions.")

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 archaeological sites and architectural features. As a result, early coordination is the best tool for ensuring that these locations are both identified and accounted for during the

section 106 process in a manner that takes into account the site and does not delay implementation of undertakings.

What Type of Consultation is Required?

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

Within the Section 106 process the NRCS recognizes two methods of consultation: government-to-government and informal. Each of these processes is guided by specific protocols that are grounded in early notification, collaboration and ongoing communication.

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 the 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.

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.

Even though time is limited, Tribal leaders often prefer to meet directly with decisionmakers of Federal agencies when it comes to government-to-government consultation.

A federally recognized Indian Tribe may request government-to-government consultation at any time within the section 106 process. If this occurs, notify the Indian Tribe that NRCS policy requires that the appropriate NRCS personnel take over as the lead contact. 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 (DOI 2012). On a State level the State Conservationist (STC) fills 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, Tribal Historic Preservation Officers (THPOs), Cultural Program Department Head and/or 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 the NRCS only bring necessary personnel to a consultation meeting. This request may be dependent on a number of factors including the sensitivity of the information being shared. Accommodate those concerns where possible.

Consultation communication should be conducted 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 further facilitates the goals of both NRCS and Indian Tribe's operations and governance practices. Open communication begins by ensuring that the NRCS provides the Indian Tribe as much information as possible as early as possible to allow the Tribe the opportunity to review and consider the information in a timely manner before a meeting takes place. Notes taken by NRCS personnel should be shared with the Tribe at some point following the meeting and opportunities to continue the consultation should be presented to the Tribe.

In all levels of consultation and interaction with Indian Tribes, it is important to follow-up on any promises made, provide any information requested, and be reasonably available to address concerns in a timely manner.

Informal Consultation

A type of communication that frequently occurs between Federal middle-level management and technical staff at meetings, through telephone conversations, and during onsite visits. Although generally not recognized by Tribes as communication on a government-to-government basis, it serves as a useful conduit for sharing information, satisfying certain legal requirements, and developing important trust relationships.

Informal consultation take 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. In the event that an Indian Tribe does not have a designee familiar with the Section 106 process, accommodate accordingly and provide additional information where necessary.

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.

Building a Relationship

It is important for the NRCS leadership and the cultural resources personnel to emphasize and promote a true *partnership* with Tribal governments. One way to do this is by sharing information with the Tribal governments and their representatives on what we do, how we do it, providing specific project descriptions, and by touring specific project locations in which they have an interest.

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/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.

If you are unable to meet face-to-face, contact a THPO representative by email or phone call. Being proactive and making the initial effort to learn more about the Indian Tribe within your State can be rewarding.

Consultation versus Notification

NRCS has defined that consultation is 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.

NRCS staff must be aware that sending a letter to an Indian 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 should contain all necessary information regarding project details so the Tribal representatives are more informed and better qualified to provide a response.

Notifications should not be tied to project deadlines or restricted to 30-day response windows. You can provide information, begin communication and have conversations regardless of a project's status. Don't begin the 30-day countdown when information is initially sent to an Indian Tribe for the first time, if possible. While the regulations mandate allowing an Indian Tribe 30-days to comment, that is a minimum.

Identifying Tribes for Consultation on Ancestral Lands

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

Understanding which Indian Tribes NRCS should consult with requires research. The simplest method is to identify each 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 Tribes will be the ultimate resource.

Indian Tribe Web sites, the Native American Graves Protection and Repatriation Act (NAGPRA) database, State Historic Preservation Offices (SHPO), Federal agencies, and other Web-based and library resources are all useful tools to help identify which Indian Tribes are appropriate for consultation within the State. Refer to the appendices B and C in this handbook for more information.

When to Make Contact

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 Section 800.1 (a)-(c)).

NRCS employees base decision making on the nine-step planning process for delivering conservation assistance (Title 180, National Planning Procedures Handbook, Part 600.20).

Step 3 of NRCS' 9-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.

Steps 4 through 7 of the NRCS planning process 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 Section 800.1(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.

Considerations NRCS personnel should include—

- 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 Emergency Watershed Protection (EWP).
- Relationship with Indian Tribes.—Understanding your partner and their concerns can influence your decisionmaking regarding 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 an advantage in understanding if a project may involve a higher degree of coordination with Indian Tribes.
- Time constraints of partners.—Provide advance notice of potential projects. Consider that Indian Tribes receive consultation requests from multiple agencies for multiple

projects. A Tribe's priorities can vary based on resource, confidentiality, access, and/or funding concerns. Should you receive comments from an Indian Tribe following the 30-day comment period, and you are still able to respond and/or accommodate their request, comments should be addressed accordingly.

- Applicants must not approach the Indian Tribe during a project if there are delays, this may lead to 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.

Who is Appropriate to Contact an Indian Tribe?

This guidance is focusing on the interaction that NRCS employees will have with Indian Tribes regarding routine section 106 compliance. Each Indian Tribe is its own unique government, employees will have different authorities, and even different review and approval processes.

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 times Indian Tribes will have cultural committees, elder groups, or other advisory boards that participates in their Section 106 reviews, especially regarding sites of religious and cultural significance.

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 their Tribal governments to function as the sole point of contact for the review of undertakings both on and off Tribal lands. Therefore, Federal agencies should contact both the Tribal governmental leader(s) and the THPO prior to formal initiation of section 106 consultation to determine the appropriate point(s) of contact.

Remember, to make every effort to email or call Tribal leadership and preservation points of contact before sending out an official letter. This fosters the ongoing relationship between NRCS and their local Tribes. If possible, formalize the relationship processes in a consultation protocol that identifies the who/what/when/where/why of communication. This is discussed later in this handbook.

How to Make Contact

When necessary, contact the Tribe through personal contact, or 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:

- Always send a letter and address one to both the Tribal leader and THPO (or cultural resources point-of-contact) until directed otherwise.
- Follow the official mailer with a PDF version of the letter in an email for convenience and timeliness. Providing copies of all paper records in PDF format allows the Tribe easier access to information and facilitates internal coordination through the capacity to share information in a readily accessible manner. Do not assume that you can send all

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 record keeping purposes.

Follow up with a telephone call or an email with the relevant staff to ensure the written contact has been received. Certified mail only ensures that it is received by the Tribe, not necessarily the correct person.

- When you make a call, leave a voicemail with your name, title, work number and reason for calling. Follow it up with an email that includes relevant information. Ensuring that a Tribe has all the relevant information they need, in a format that is most easily accessed by them, will facilitate consultation in a positive manner.
- 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 parties are able to access. This is particularly important when sending images and GPS and GIS data. Be sure that you either provide, or voice your willingness to provide, paper copies of any documents attached via email. Requesting an email confirmation regarding receipt is recommended as well to verify that your email was both received and opened.

If an Indian Tribe feels that further consultation is necessary and they request a meeting, make your best effort to ensure that the meeting can take place on Tribal lands, onsite, or at a location preferred by the Indian Tribe.

During meetings the agency should ensure that the appropriate NRCS decisionmaker is available and briefed on the purpose of the meeting. Consultation meetings often last 2 to 3 hours, but you should allow the Tribal community as much meeting time as they need to become comfortable with the presented ideas/concepts.

- When establishing a meeting allow the Tribe to select the location, date and time if possible.
- Show willingness to travel to the Tribe and ensure that you bring adequate copies of meeting materials and that necessary staff, including decisionmakers, are present.
- Provide any materials that will be discussed in the meeting, including maps and photos, to the Tribe in advance of the meeting.

Attempt to utilize local NRCS staff within the State with knowledge of the 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). It is also good practice to notify the NRCS leadership in an Indian Tribe's resident State of your interaction. This can help ensure that NRCS' efforts regarding consultation are managed both effectively and similarly; a benefit to both the NRCS and Indian Tribes.

What to Say?

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 "Template Letter" in appendix I of this handbook (addressed to THPO with attachments; if no THPO, Preservation Director; and cc without attachments to Tribal leader) may be used by NRCS to introduce themselves to Tribal governments. The premise of the letter is to request whether or

not the Tribe is interested in consulting on projects within a specific area of your State. Remember, the Indian Tribe defines the boundary of their ancestral lands.

The letter should specifically explain NRCS, its mission, and give examples of the various types of projects we fund and support. It should also explain specifically why NRCS is contacting the Tribal government and requesting their input and consultation, and to find out specifically:

- The area of interest for the Tribe (consider providing a county map of the State to be filled in by Tribe) which should be kept confidential and is amendable at any time. This map does 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 them in regards to undertakings that may adversely affect historic properties of religious and cultural significance.
- Find out the Tribe's review process and any specific protocols that NRCS would need to be aware of regarding tribal consultation. Who are on-reservation and off-reservation points-of-contact. Should additional tribal personnel be contacted?
- Explain current project proposals and pending undertakings to familiarize the Indian Tribe with the types of activities that they could potentially concern themselves with, or elect not to engage in.
- Courtesy copy the CRS, STC, and Tribal liaison, in the resident State of the Indian Tribe. Build a network of contacts so that the relationship is based in the agency and not an individual.

The NRCS template letter is signed by the STC and should state that the CRS/CRC/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.

Developing a Tribal Consultation Protocol

These agreement types offer NRCS and the Indian Tribe an opportunity to formalize a relationship or process that promotes understanding, cooperation, and greater efficiency. As noted prior, consultation protocols document the who, what, when, where, why, and how of communication. These agreements draw their authority from the NHPA's implementing regulations (36 CFR Section 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.”

NRCS interprets this stipulation to mean that agreements (consultation protocols) can—

- Dispute resolution methods regarding identification and documentation techniques.
- Identify specific resources of concern.
- Develop preferred contact lists and methods for contact.

- Identify preferred treatment methods.
- Identify other routine processes that will—
 - Expedite section 106 reviews.
 - Facilitate better communication.
 - Enhance protection of resources and develop stronger relationships.

Consultation protocols are not vehicles for exemptions or mitigation.

Consultation protocol should not be one-sided and should not benefit one group over the other. Ensure that official contacts 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.)?

When a field office submits a project area to the CRS for the inventory it is useful for the CRS to already know what types of resources are of concern to the Tribes with ancestral ties to the project area. Prior conversations with the interested 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.

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.

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 relevant Indian Tribes. It is better to engage in consultation above and beyond your responsibility than to deny an Indian Tribe participation.

NRCS Staff Responsibilities

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

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.

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

NRCS' Investment in Consultation

NRCS Cultural Resources personnel should request allocation of funding for travel to meetings with Indian Tribes as this can expedite project reviews and facilitate consultation. Technical staff should add consultation meetings and travel expenses to their Individual Development Plans (IDPs). Performance appraisals may include elements on Tribal consultation required for both technical staff and leadership.

References

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>

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>

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/>

U.S. Department of Interior (DOI), National Park Service (NPS). 2002. Proposed Rule (36 CFR 61). <https://www.nps.gov/thpo/downloads/36CRF61ProposedRule.pdf>

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>

Appendix A

Definitions

Below are terms commonly used when engaging with Indian Tribes in the section 106 process. These terms come from NRCS, U.S. Forest Service (FS), Advisory Council on Historic Preservation (ACHP), National Park Service (NPS), and the Bureau of Indian Affairs (BIA) resources.

Allotted Lands (Off Reservation).—Public domain lands set aside to fulfill a need to maintain recognition of a specific group of Indian people. These are sometimes called “Public Domain Allotments.” Nearly all these acres are held in trust status by the Department of the Interior (DOI), and administered by the BIA. (FS 1997).

Allotted Lands (On Reservation).—The Dawes Act, or General Allotment Act, (1887) provided for dividing reservations into separate parcels to encourage individual Indians in agricultural pursuits. Parcels were 160 acres for each family or 80 acres per single person. Any remaining acres over the population allocation were deemed “surplus” and opened up for settlement by non-Indians. Under the Act, Indian-held lands declined from 138 million acres in 1887 to 48 million acres in 1934. In 1934, the Dawes Act was superseded by the Indian Reorganization Act. (FS 1997))

Ancestral Lands.—Can include Indian lands, Indian country and ceded lands as defined above. For the purposes of ancestral lands consultation, the NRCS defines this to mean the areas, whether discrete or continuous, where Tribal groups or their members have been affiliated with that have cultural, historical, spiritual, subsistence, and/or ceremonial significance to a Tribe. An Indian Tribe’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 to a Tribe. Ancestral lands are defined by Indian Tribes based on their knowledge of their history and ongoing connections with that area.

Ceded Lands.—First used in the Treaty with the Wyandot, 1789. Since that time, many treaties have referred to land cessions made by Tribes to the United States. Most Federal agencies and Indian Tribes prefer to use the term “ceded lands” when describing areas where a Tribe did... “cede, relinquish, and convey to the U.S. all their right, title, and interest in the lands and country occupied by them”...at treaty signing or when reservations were established. Ceded land references are qualified by the legal definition of original tribal occupancy issued in 1978 by the U.S. Court of Claims. In effect: “only lands actually owned by a Tribe can be ceded to the U.S.” This term is used interchangeably with “treaty boundary” described elsewhere in the definitions. (FS 1997).

Dependent Indian Communities.—The U.S. Supreme Court decision in *Alaska v. Native Village of Venetie Tribal Government* (522 U.S. 520 (1998)), held that “dependent Indian communities” refers to a limited category of Indian lands that are neither reservations nor allotments and that must satisfy two requirements: first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under Federal superintendence (ACHP 2013).

Fee Title (Fee Simple Title).—Absolute ownership of a land area unencumbered by any other interest or estate (FS 1997).

Indian Country.—(a) All land within the limits of any Indian reservation under jurisdiction of the US Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State; and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same (18 U.S.C. 1151).

Indian land.—(a) All land within the exterior boundaries of any Indian reservation; and (b) all dependent Indian communities (54 U.S.C. 300319).

Concerning the definition of Indian land, the NPS has, in their proposed rule (36 CFR Section 61.8–9) for the Certification of Tribal Historic Preservation Officer Programs, provided further guidance on the interpretation of this.

- First, within the boundaries of the existing reservation, the ownership status of the land makes no difference. A Tribe would assume jurisdiction for this program everywhere within the reservation boundaries.
- Second, this definition differs substantively from the definition of “Indian Country” found elsewhere in Federal statute. Specifically, this definition of Tribal lands does not include individual allotments held in trust outside existing reservation boundaries. Legal guidance issued to the NPS specifies that a Tribe may not assume responsibility for NHPA historic preservation responsibilities on individual allotments outside reservation boundaries.
- Third, in contrast to individual allotments, legal guidance affirms that lands held in trust for the benefit of a Tribe outside an existing reservation do fall within the meaning of Tribal lands for the purposes of the NHPA. It, therefore, qualifies as “Tribal lands” over which the THPOs may assume NHPA historic preservation responsibilities.
- Finally, legal guidance to NPS indicates that lands outside an existing reservation that are owned by a Tribe in fee simple but not held in trust are not dependent Indian communities and so are not Tribal lands for the purposes of this program (36 CFR Part 61, RIN 1024-AC79).

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)), that 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 Section 800.16(m), 54 U.S.C. 300309). Indian Tribes are commonly referred to as a “federally recognized Indian Tribe”.

Non-Federally Recognized Tribes.—Also called non-federally recognized groups, State recognized Tribes, and unrecognized tribal groups. These are groups who are not eligible for the special programs and services provided by the United States. Some non-federally recognized Tribes are groups that were once recognized prior to the termination era and other groups are seeking recognition. While non-federally recognized Tribes do not have a statutory right to be consulting parties in the Section 106 process, the agency may invite them to consult as an “additional consulting party” as provided under the ACHP’s regulations at 36 CFR Section 800.2(c)(5), if they have a “demonstrated interest” (ACHP 2012).

Treaty Rights.—From 1778 to 1871, the United States’ relations with individual American Indian nations indigenous to what is now the United States were defined and conducted largely through the treaty-making process. These “contracts among nations” recognized and established unique sets of rights, benefits, and conditions for the treaty-making Tribes who agreed to cede millions of acres of their homelands to the United States and accept its protection. Like other treaty obligations of the United States, Indian treaties are considered to be “the supreme law of the land,” and they are the foundation upon which Federal Indian law and the Federal Indian trust relationship is based. (DOI BIA)

REFERENCES

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>

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>

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/>

U.S. Department of the Interior (DOI) Indian Affairs (BIA) Web page. Frequently Asked Questions. <http://www.bia.gov/FAQs/>

Appendix B

Identifying Affiliated Indian Tribes

Understanding who to contact as part of the section 106 process is essential. Indian Tribes must be contacted during the course of your consultation process. Identification of interested Indian Tribes, and the areas they claim, is not always a simple task. States occupy a static territory with defined boundaries; their rights do not extend beyond their borders into other States. Indian Tribes can have static land bases as well, but they can also have legal rights and the rights to participate in statutory processes on lands not under their direct control.

Listed below are a series of resources that can help identify Indian Tribes that may have an affiliation to an area where the NRCS has an undertaking. It is important to note that none of these resources claim that they were developed in conjunction with Indian Tribes. The extent of an Indian Tribe's ancestral lands must either be developed by, or in conjunction with, that particular Indian Tribe.

The ACHP stresses that documentary or other sources of information that do not clearly support a Tribe's assertions should not be used to deny a Tribe the opportunity to participate in consultation. A common misunderstanding is that an Indian Tribe needs to document its ties to historic properties in the area of the undertaking. Instead, the NHPA requires agencies to consult with any federally recognized Indian Tribe that attaches religious and cultural significance to a historic property.

- Library of Congress.—This link provides maps of the land cessions made by American Indian Nations during the interval between the formal establishment of the United States and 1894. These are the same maps utilized by the NPS NAGPRA database.
<http://memory.loc.gov/ammem/amlaw/lwss-ilc.html>
- NPS databases.—The NPS' NAGPRA division has developed a series of Web pages that contain both Indian Land Cession and Indian Claims Commission information and the maps.
 - Indian Tribes associated with Indian Land Cessions that occurred between 1784-1894.
 - Table https://www.nps.gov/nagpra/ONLINEDB/Land_Cessions/INDEX.HTM
 - The Indian Claim's Commission was established by Congress in 1946 to settle land claim disputes between Indians and the U.S. Government. The following maps are based on information provided by the Indian Claims Commission.
 - Map <https://www.nps.gov/nagpra/DOCUMENTS/ClaimsMAP.htm>
 - Index <https://www.nps.gov/nagpra/DOCUMENTS/ClaimsMapIndex.htm>
- USFS.—The FS Indian Lands Map Viewer is designed to show Indian Lands in relation to National Forest System boundaries for general comparison purposes only. Historical Indian cessation maps are also depicted in order to informally give an overview of Indian land cessations.
<http://usfs.maps.arcgis.com/apps/webappviewer/index.html?id=fe311f69cb1d43558227d73bc34f3a32>

- Native Languages Interactive map.— This site contains an interactive map of the United States. Click on a State and a graphic appears depicting Tribal groups who, according to their research, occupied these areas. <http://www.native-languages.org/states.htm>.
- Tribal Directory Assessment Tool (TDAT).—The U.S. Department of Housing and Urban Development tool to help identify Tribes and Tribal contact information to assist in the consultation process. <http://egis.hud.gov/tdat/Tribal.aspx>
- Britannica.—The Britannica encyclopedia has a series of regional maps with names of Tribes placed on it. These maps represent the approximate locations that many Tribes traditionally inhabited according to their research. <http://www.britannica.com/topic/Native-American>
- Maps of current Indian reservations.—Two map resources for identifying the locations of current Indian reservations in the United States.
 - The BIA is the agency responsible for maintaining up-to-date information. <http://www.bia.gov/cs/groups/public/documents/text/idc013422.pdf>
 - The NAGPRA map displays both Federal and State Reservations. <https://www.nps.gov/nagpra/DOCUMENTS/ResMAP.HTM>. The map index <https://www.nps.gov/nagpra/DOCUMENTS/ResMapIndex.htm>

State Historic Preservation Offices are also a useful resource. SHPO offices work in coordination with section 106 undertakings and agreement documents related to those undertakings that often provide for and lead to many long-term consultations directly with federally-recognized Tribal governments. Many SHPOs provide pertinent information, Statewide Preservation Plans, and in some cases, suggested guidance underscoring Federal agency responsibilities under section 106 and the requirement to consult with certain Tribal governments within the State.

Other Federal and State agencies that have a long history of working with Tribes are also an invaluable resource. Many agencies may have lists of contacts, agreement documents, information from past meetings, and other information that can assist NRCS in their consultation requirement.

References

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>

Appendix C

Points of Contact Resource List

Knowing who to contact within a Tribal organization is important when conducting section 106 consultation. Because many projects are time sensitive, it is also important to include Indian Tribes in the early stages of planning as directed in the NHPA's implementing regulations. More importantly, early coordination can benefit both the Tribe and the applicant in achieving their desired goals in this process.

Tribal leader(s) (commonly referred to as a Council Chair, Tribal Chief, Business Committee Leader, etc.) are the heads of an Indian Tribe's government structure and are generally the lead officials for government-to-government consultation. As these leaders may change with elections, make sure you have the current leader identified before contacting the Tribe. Checking the Tribe's website can be useful for finding current personnel listing.

Tribal Historic Preservation Office (THPO) is a branch of the Tribal government that has assumed State Historic Preservation Officer (SHPO) duties on Indian land. These offices will generally host a Tribal contact that will have an ongoing relationship with the NRCS in regards to the section 106 process. Your contact in these offices may be the Tribal Historic Preservation Officer, the section 106 coordinator, or the program director/department head.

The following are resources that can assist in the identification of Tribal contacts regarding section 106:

- Tribal government Web sites should be the first source of your information. These are often the most up-to-date and reliable sources of contact information and personnel for the Tribes. If the Web site does not provide specific information related to section 106, there are contact menus that provide addresses and phone numbers for Tribal leadership and program staff.
- NPS THPO Program is the Federal agency that is responsible for maintaining and updating an official list of THPO contacts.
http://grantsdev.cr.nps.gov/THPO_Review/index.cfm
- NATHPO is a nonprofit organization that maintains a database of THPO's.
<http://nathpo.org/wp/thpos/find-a-thpo/>
- BIA publishes a list of current Tribal leaders on a biannual basis. The BIA is the responsible Federal agency for maintaining an accurate database of these leaders.
<http://www.bia.gov/WhoWeAre/BIA/OIS/TribalGovernmentServices/TribalDirectory/index.htm>
- BIA Indian Reservation map & BIA regions directory
<http://www.bia.gov/cs/groups/public/documents/text/idc013422.pdf>
- National Congress of the American Indian (NCAI) database identifies Tribal leaders and contact info.
<http://www.ncai.org/tribal-directory>

- List of federally recognized Indian Tribes as printed in the Federal Register
<http://www.narf.org/nill/triballaw/directories.html>
- NPS Tribal consultation database for NAGPRA claims shows NAGPRA contacts and contact information.
<http://grantsdev.cr.nps.gov/Nagpra/NACD/>
- Additional resources that can assist you in defining who you should contact include your State historic preservation office, State and local historical society, regional and local NPS office, Tribal Web sites, and NRCS Tribal liaisons.

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Appendix D

Example of Michigan-NRCS' Consultation Method and Agreement Development Process

In July 2015, NRCS-MI met with the Michigan Anishinaabek Cultural Preservation and Repatriation Alliance (MACPRA), a group that includes the 12 federally recognized Tribes and 2 State Historic Tribes that reside in Michigan to start development of a prototype programmatic agreement to address consultation on NRCS undertakings. NRCS staff prepared for the meeting by creating a document to share with the Tribal representatives that included several items. The goal was to properly introduce our agency and the type of work that we do to the participants and through discussion, determine the type of work, specifically conservation practices, that Tribes would have an interest in for consultation.

There was a previous memorandum of understanding (MOU) between NRCS-MI and MACPRA that stated that we would consult on NRCS projects but it did not provide specifics of day-to-day consultation. This previous MOU had been terminated but the group expressed an interest in developing a new group agreement as opposed to separate agreements with individual Tribes. NRCS gave a presentation regarding this history of the past agreement and of the following information provided in a handout:

- History and background of NRCS
- NRCS mission and vision
- NRCS-MI organizational structure with photographs of our leadership and Tribal liaisons assigned to each Tribe
- Brief overview of the conservation planning and delivery processes
- Listing of conservation practices (with numbers and funds obligated for each) that have been contracted with Michigan's federally recognized Tribes and Tribal colleges over the past 10-plus years
- Before and after photographs of selected practices
- Information on past NRCS assistance to Tribes from the Rose Lake Plant Materials Center and presentation of sweetgrass braids prepared by NRCS staff in appreciation to the Tribal representatives for working with us
- Information on the agreement that we were working to create, with related reference materials

The above provided background understanding for the following discussion. Using an NRCS facilitator, we reviewed each conservation practice used in Michigan. This was done using a 20-page listing of practices within the handout that included a brief description and count planned/installed over the last 3 years (to show disturbance and frequency) for each. The listing was organized in groups based on NRCS assignment of degree of potential to affect cultural or historic properties (high, low, or no). As we read each practice and described what was involved, State specialists clarified the disturbance created by each talking about the method or methods of installation, the resource concern that the practice commonly addresses and answering any questions. Tribal representatives expressed any concerns and either agreed or disagreed with the present listing providing Tribal perspective of potential effects. This process, although long, did raise the awareness of NRCS about concerns not previously considered, such

as access restriction that could prevent access to sacred sites unknown to NRCS and application of herbicides possibly affecting culturally significant plants and health of Tribal members.

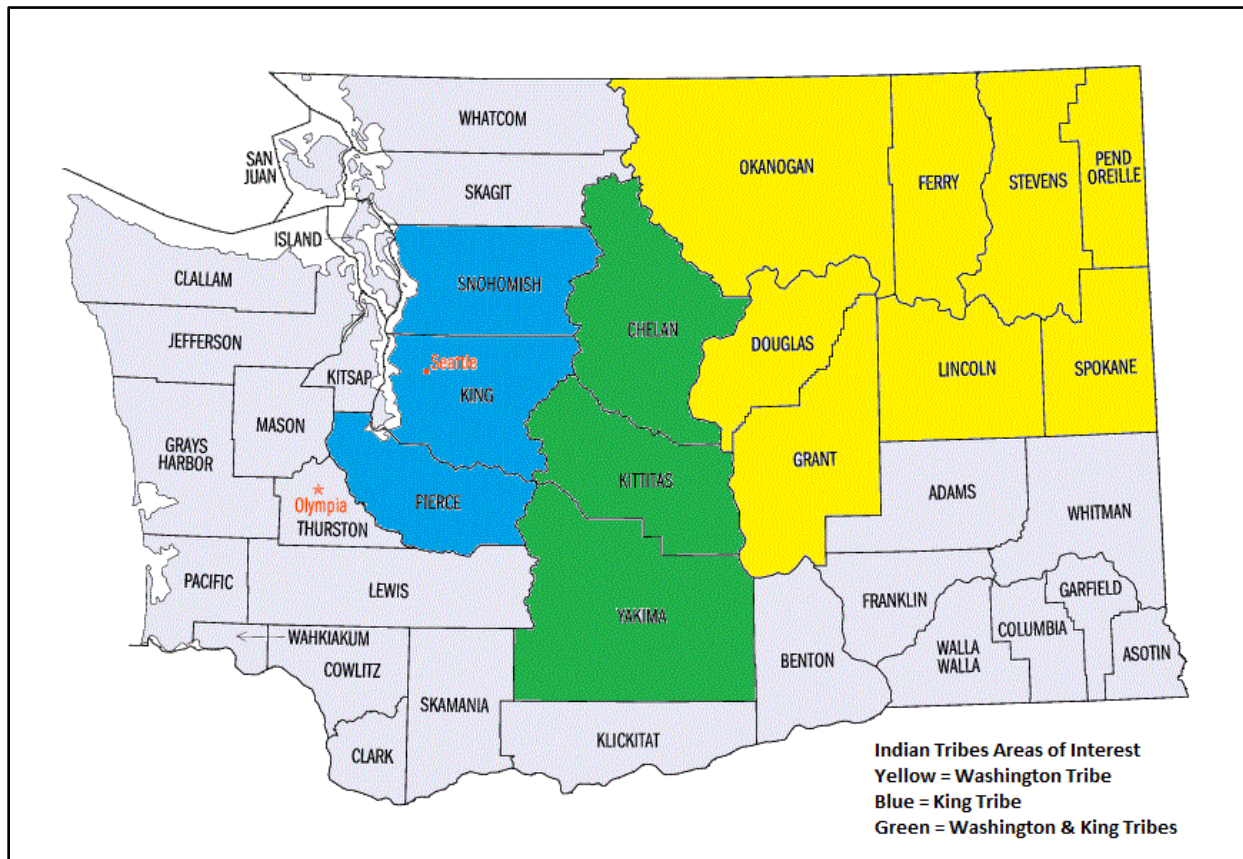
A questionnaire was distributed for each individual Tribe to provide specific feedback on their area of interest, Tribal lands, consultation format, and comments.

NRCS staff present included: cultural resources coordinator, outreach coordinator, area biologist, design engineer, State forester, multiple district conservationists some of which were also Tribal liaisons and an area conservationist.

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Appendix E

Tribal area of interest map example



Map of Tribal interests (Tribal names are for demonstration purposes only)

Be aware that while NRCS may combine the data they receive from all Tribes into one cohesive map, do not share Indian Tribe ancestral land information without their express written consent.

Appendix F

Federal Regulations for Consultation with Indian Tribes

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 Title 190, National Cultural Resources Procedures Handbook, Part 601. The authorities include—

- USDA Departmental Regulation 1340-6, Policies on American Indians and Alaska Natives, October 16, 1992.
- Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, November 6, 2000.
- Executive Order 13270, Tribal Colleges and Universities, July 3, 2002.
- Public Law 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.
- Executive Order 13007, Indian Sacred Sites, May 24, 1996.
- Presidential Memorandum to Heads of Executive Departments and Agencies on Tribal Consultation, November 5, 2009, Presidential Memorandum on Tribal Consultation, | The White House.
- Prototype programmatic agreements.

Appendix G

Tribal Ancestral Lands Consultation Workgroup Members

Natural Resources Conservation Service

- **Ms. Melissa Gutierrez**, Cultural Resources Coordinator, NRCS, East Lansing, Michigan.
- **Mr. John Riggs**, Cultural Resource Specialist and Tribal Liaison, NRCS, Lonoke, Arkansas.
- **Ms. Sharron Santure**, Cultural Resources Specialist and Tribal Liaison, NRCS, Edwards, Illinois.
- **Mr. Dana Vaillancourt**, Federal Preservation Officer, NRCS, Washington, D.C.

National Association of Tribal Historic Preservation Officers

- **Ms. D. Bambi Kraus**, President, National Association of Tribal Historic Preservation Officers.
- **Mr. Robert Cast**, Tribal Archaeologist, Choctaw Nation of Oklahoma.

Forest County Potawatomi Community

Ms. Melissa Cook, former Tribal Historic Preservation Officer, Forest County Potawatomi Community.

Choctaw Nation of Oklahoma

- **Ms. Lindsey Bilyeu**, Senior Review and Compliance Officer, Choctaw Nation of Oklahoma Cultural Services.

Advisory Council on Historic Preservation

- **Mr. Ira L. Matt**, Program Analyst, Advisory Council on Historic Preservation, NRCS, USFS, and NPS; and Liaison to NRCS.

Appendix H

Frequently Asked Questions (FAQ)

The NRCS Tribal Ancestral Lands Consultation (TALC) work group developed the following frequently asked questions to provide additional information to the reader.

What are “Ancestral Lands”?

Ancestral Lands are the areas, whether discrete or continuous, where NHOs, Indian Tribes or their members have affiliation. These are areas that have cultural, historical, spiritual, subsistence, and/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.

Why is the definition of Ancestral Lands so broad?

The definition of ancestral lands utilized by the NRCS is purposely broad so that it encompasses the concepts of ceded, aboriginal, and ancestral land as written in the NHPA’s implementing regulations. It is meant to be an inclusive definition rather than exclusive.

Through an examination of each of these terms it can be reasonably understood that lands relinquished to the Federal Government (ceded) and lands utilized by an Indian Tribe and their ancestors (ancestral and aboriginal) are to be considered during the course of your section 106 review.

How is “ancestral lands consultation” any different than the regular consultation process under section 106?

First, sites of religious and cultural significance are not limited to Tribal lands, this significance may be attributed to sites off Tribal lands including Federal, State, and private lands. Second, if a site has religious and cultural significance attributed to it by an Indian Tribe, and the agency has determined that it may be affected by the undertaking, the Indian Tribe is considered a consulting party regardless of the land status or interest in the undertaking. A third factor to consider is that the regulations specifically reference an Indian Tribe’s “special expertise” regarding sites of religious and cultural significance and the fact that an agency “shall” acknowledge said expertise.

How do you *identify* historic properties that may possess traditional religious and cultural significance to Indian Tribes?

NRCS staff can conduct research and may be assisted by Tribal members or contractors knowledgeable of these site types. However, historic properties that are of traditional religious and cultural significance to an Indian Tribe must be confirmed by an Indian Tribe’s designated representative. The “Tribal Ancestral Lands Consultation: Guidance for Natural Resources Conservation Service Employees” provides further insights into how you can locate relevant Indian Tribes, and how to contact the appropriate Tribal representative.

What are Royce maps and can they help? Don’t they already show where ancestral, aboriginal and ceded lands are?

The Royce maps are a collection of materials located in the “Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, 1896–1897”.

These maps illustrate the “location of each cession by or reservation for the Indian Tribes from the organization of the Federal Government.” That is, these are maps that show lands ceded from Indian Tribes to the U.S Government and any lands retained (reservation land) by said Indian Tribe.

This data is very useful at showing land cessions resulting from treaty negotiations, and the NPS and FS have digitized these maps for easy access. However, this information does not include references or illustrations regarding ancestral or aboriginal lands as discussed in the NHPA’s implementing regulations.

How do I determine if historic properties of traditional religious and cultural significance to Indian Tribes *may be affected* by the proposed undertaking?

If the undertaking is the kind of action that might affect places such as archaeological sites, burial areas, stone or earthen features, ceremonial areas, or plant communities, then you should consult with Indian Tribes that might attach significance to such places. Unless such properties have already been identified through archaeological and ethnographic surveys conducted in the past and the information is readily available, you probably will not know in advance. It is through consultation with Indian Tribes themselves that such properties can be properly identified and evaluated.

Are TCP’s the same as “historic properties that are of traditional religious and cultural significance”?

TCPs are defined only in NPS guidance and are not referenced in any statute or regulation, and refer to places of importance to any community, not just to Indian Tribes. Therefore, this terminology may be used when an agency is considering whether any property is eligible for the National Register. Within the section 106 process, the appropriate terminology for sites of importance to Indian Tribes is “historic property of religious and cultural significance to an Indian Tribe.” Unlike the term TCP, this phrase appears in NHPA and the section 106 regulations and applies strictly to Tribal and NHO sites, unlike the term TCP. Furthermore, NHPA Section 101(d)(6)(A), reminds agencies that historic properties of religious and cultural significance to Indian Tribes may be eligible for the National Register. Thus, it is not necessary to use the term TCP when considering whether a site with significance to a Tribe is eligible for the National Register as part of the section 106 process. The NPS Bulletin 38 guidelines are helpful, however, in providing an overview of how National Register criteria are applied (ACHP 2012).

What do I do if I notify an Indian Tribe of a project and they do not respond?

Follow the procedures recommend in this guidance regarding “How to Make Contact” and ensure that your initial letter notification is followed up with a phone call and/or email. Document your contact efforts. In the event that you are not receiving responses after several attempts, contact the Tribe to ensure that you have up-to-date contact information. Personnel shifts, changes in email addresses and phone numbers, and unforeseen circumstances can and do impact communication. If pre-project contact cannot be achieved, maintain a copy of all relevant project records and offer to review the project with the Tribe during a subsequent project review or meeting.

Can I formalize a communication process with an Indian Tribe?

Yes. Consultation protocols are effective methods of ensuring that consultation with an Indian Tribe is pursued in a regular and collaborative manner. Regardless of whether or not a protocol has been established, NRCS staff should make every effort to *identify the processes* that the Tribe has in place to be involved in the project consultation. In the event that a Tribe shows interest in formalizing a process, refer to the “Consultation Protocol” section of this handbook.

What do I do if the Tribes tell me they want to look at every project?

Indian Tribes have the choice of requesting what information they need to make informed decisions and this should be honored. Discuss with the Tribal representative the desire for reducing paperwork and streamlining the Section 106 process for BOTH parties. NRCS cultural resources personnel should be prepared present a list of project practices that we consider to have little to no effect on historic properties and those that we consider to have a higher probability to adversely affect historic properties.

Keep in mind that Indian Tribes may have a different perspective of what constitutes an adverse effect. Their knowledge of the resource, what makes it significant, and how an undertaking may adversely affect integrity is a reason why the NRCS conducts consultation in the first place. Once a relationship has been built with the Tribe, often, these processes can be streamlined through the development of a consultation protocol.

How do I verify a Tribe’s determination of significance before making a National Register eligibility determination?

The ACHP’s guidance has stated that an agency is not required to verify a Tribe’s determination that a historic property is of religious and cultural significance to the Tribe. The ACHP regulations at 36 CFR, Section 800.4(c)(1) state, in part, that “[t]he agency official shall acknowledge that Indian Tribes...possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.” The National Register considers the information obtained from a Tribe’s recognized expert to be a valid line of evidence in considering determinations of significance. For additional guidance on making eligibility determinations, the agency should consult with the staff of the National Register (ACHP 2012).

I don’t have Indian Tribes in my State, so why should I consult?

The NRCS consults with Indian Tribes to maintain compliance with Federal law and NRCS policy. Many Indian Tribes were removed from their homelands, while others traditionally moved from place to place. Consequently, an Indian Tribe may attach significance to historic properties located in an area where they may not have physically resided for many years. An ongoing physical connection to the historic property is not required for an Indian Tribe to ascribe religious and cultural significance to a historic property. As discussed in this guidance, the NHPA and its implementing regulations direct an agency implementing an undertaking to consult with Indian Tribes that attach religious and cultural significance to a historic property regardless of its location.

I have not received any complaints regarding consultation, why should I start doing this now?

While you may not have received any complaints, the ACHP’s regulations state that Federal agencies must make “a reasonable and good faith” effort to identify each and every such Indian Tribe and invite them to be consulting parties. To be in legal compliance you must attempt to

engage relevant Indian Tribes in consultation. While it may be true that some Indian Tribes will elect to not participate, there is a significant difference between not contacting a Tribe and a Tribe electing not to participate. It is the agency's responsibility to initiate consultation, not to wait to be asked by the Tribe.

How can I show that I conducted a reasonable and good faith effort to identify Tribes and engage them in consultation?

Documentation of consultation is important because it allows consulting parties to more accurately track the stages of the section 106 process. Federal agencies should document all efforts to initiate consultation with an Indian Tribe or Tribes, as well as documenting the consultation process once it has begun. Such documentation, in the form of correspondence, telephone logs, emails, etc., should be included in the agency's official section 106 record (ACHP 2012).

Agencies should also keep notes so that the consultation record documents the content of consultation meetings, site visits, and phone calls in addition to information about dates and who participated. Be sure to share these records, as they are produced, with your Tribal partners. By openly demonstrating your efforts to conduct and document the process, all parties will be aware of what has been said and where you are in the section 106 process. Doing so allows agencies and consulting parties to review proceedings and correct any errors or omissions, thus facilitating better overall communication.

Why aren't Alaska natives and Native Hawaiian Organizations discussed in this document?

Although not called out specifically, Alaska natives are included. The term "Indian Tribe" as written in 36 CFR Section 800.16(m), means "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."

What if the Tribes want to review ancestral lands projects off Tribal lands that are exempt from review under our prototype programmatic agreement (PPA) with the SHPO?

If the Tribes were not signatories to the PPA, the exemption list does not apply to them. While the agency official has some latitude in determining if an activity does not have the potential to cause effects on historic properties, assuming such historic properties are present (under part 800.3(1)), the agency should recognize the special expertise the Tribes have when it comes to historic properties of religious and cultural importance and that these sites may be affected by NRCS activities in a manner not previously considered by NRCS. Project-by-project consultation may better identify these concerns or the development of consultation protocols.

Can the Tribes tell me what projects they want to look at and what they don't want to review on ancestral lands?

On Tribal lands, NRCS needs to consider the effects of their undertakings on historic properties in the same manner they do when working off Tribal lands. Unless these activities are exempted from review under a Tribal PPA, NRCS needs to conduct standard section 106 actions, including consultation.

Off Tribal lands, while NRCS needs to consider the effects of their undertakings on historic properties, a Tribe may inform NRCS regarding projects or locations they'd like to be consulted on and those they do not. NRCS should document those decisions and may follow that guidance. These reviews or review areas should be reevaluated annually during meetings with your Tribal partners. Consider formalizing these Tribal decisions in a consultation protocol agreement as discussed earlier in this handbook.

The Tribe has not identified any sites of religious and cultural significance near my project area, but still request that the NRCS conduct a cultural resource survey. What do I do?

NRCS is responsible for making a reasonable and good faith effort to identify historic properties and consulting with others who may have knowledge of historic properties in the area. This effort should include, at a minimum, a review of existing information on historic properties that are located or may be located within the area of potential effects (APE). If the Tribe does not provide information on sites of religious and cultural significance near the project area or why they think there may be sites there, NRCS decides what level of review is appropriate based upon existing information and the level of government involvement. Bear in mind that Tribes may be reluctant to divulge specific information regarding the location, nature, and activities associated with such sites (36 CFR Section 800.4(a)(4)). The responsible agency official should address concerns raised about confidentiality pursuant to the NHPA's implementing regulations.

What do I do if I notify an Indian Tribe of a project and they do not respond?

If you do not get a response to your initial contact letter, always follow-up with a phone call and email. Document the letter, phone call, email, and follow-up with the Tribe again before any agency decisions are made regarding the undertaking. If you receive a limited response (i.e., "we have no concerns at this time"), make sure the response is documented and a copy is placed in the project files.

References

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>

Appendix I

Template for NRCS Introductory Letter

Add letter

NRCS DRAFT