

Table of Contents

<u>Section</u>	<u>Page</u>
11.1 SECTION 106 COMPLIANCE PROCEDURES	11.1-1
Activity No. 1: Determine APE	11.1-3
Activity No. 2: Evaluate APE.....	11.1-4
Activity No. 3: Identify Historic Resources	11.1-5
Activity No. 4: Obtain Right-of-Entry Permits.....	11.1-6
Activity No. 5: Identify Properties Eligible for the NRHP	11.1-7
Activity No. 6: Assess Effects on Eligible Properties	11.1-8
Activity No. 7: Assess Adverse Effects	11.1-9
Activity No. 8: Resolve Adverse Effects.....	11.1-10
Activity No. 9: Implement Compliance Commitments.....	11.1-11

List of Figures

Figure

Page

Figure 11.1-A — SECTION 106 COMPLIANCE PROCEDURES FLOWCHART11.1-2

Chapter 11

SECTION 106

11.1 SECTION 106 COMPLIANCE PROCEDURES

Section 106 of the *National Historic Preservation Act* (NHPA) requires that proposed Federally funded or approved undertakings take into account effects on properties included in, or eligible for inclusion in, the National Register of Historic Places (NRHP). NDOT projects, materials sites or maintenance activities on Federal lands that may affect historic properties are reviewed by the appropriate Federal Land Management Agency (FLMA), the Nevada State Historic Preservation Officer (SHPO) and may also be reviewed by the appropriate Tribal Historic Preservation Officer (THPO) and the Advisory Council on Historic Preservation (ACHP).

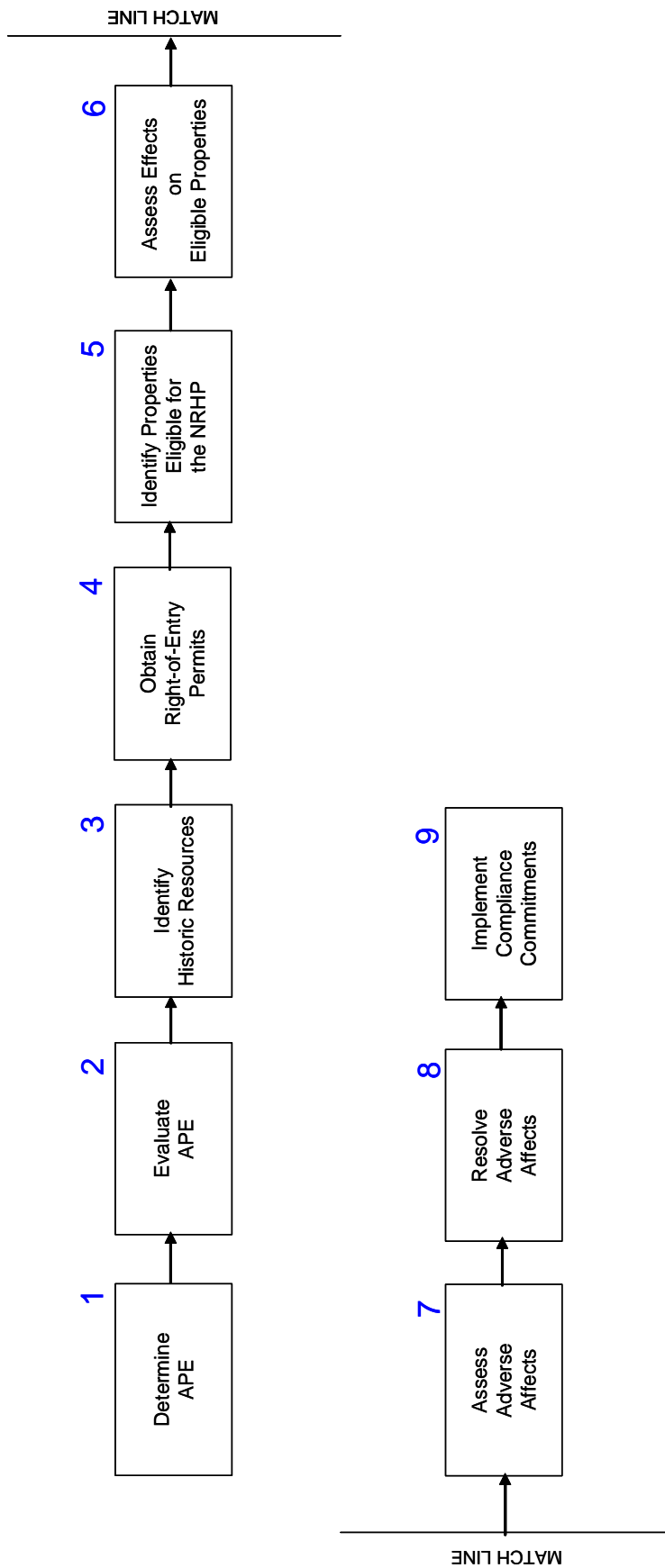


Figure 11.1-A— SECTION 106 COMPLIANCE PROCEDURES FLOWCHART

PROJECT ACTIVITY

Activity Title: Determine APE

Activity No.: 1

Activity Description:

The NDOT Cultural Resources Section will monitor the Project Scheduling and Management System (PSAMS), materials site requests and maintenance activities to identify NDOT projects or actions involving Federal funding, Federal approvals/permits or Federal Lands that have the potential to affect sites on or eligible for the NRHP (i.e., “historic property,” per 36 CFR Part 800.16(l)(1)). The NDOT will determine and document the Area of Potential Effects (APE) for the action (i.e., the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties). This activity will establish the extent of the APE for archaeology, historic/architectural resources and Native American Consultation/Coordination (see [Chapter 21](#)). Generally, there will be three different APE’s, one for each resource category (i.e., archaeology, historic/architectural resources and Native American issues). The APE will be defined to address the reasonable alternatives under study. The Cultural Resources Section will negotiate with the FHWA, the SHPO, and, as applicable, the FLMA to determine the APE. The NDOT will seek concurrence from the SHPO, through the FHWA and/or the FLMA, on the extent of the APE.

For historic architectural surveys, once the APE has been established, defined and justified, the package will be submitted through the FHWA to the SHPO for review and concurrence. The package will include the qualifications of the project’s architectural historian demonstrating that they meet the qualification standards as established by the Secretary of the Interior.

Regulations and Guidance

36 CFR Part 800 “Protection of Historic Properties”

PROJECT ACTIVITY

Activity Title: Evaluate APE

Activity No.: 2

Activity Description:

The NDOT Cultural Resources Section will coordinate with the NDOT Right-of-Way Division to determine ownership of the properties in the APE (e.g., privately-owned, State-owned, Federal lands). The Cultural Resources Section will determine which, if any, Native American groups/tribes claim an interest in lands within the APE that would require consultation/coordination.

The Cultural Resources Section will assign the project to an in-house or consultant Cultural Resources Specialist to conduct background research to determine the extent of information available on historic properties within the APE and the need for, and extent of, further identification efforts. The background research will include the following components:

- reviewing existing information on historic properties within the APE (e.g., previous/current surveys, previously recorded sites, existing clearance status of areas within the APE);
- seeking information, as appropriate from individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area; and
- gathering information from involved Native American group/tribe to assist in identifying properties, including those off tribal lands, that may be of religious and cultural significance and that may be eligible for the NRHP.

Regulations and Guidance

36 CFR Part 800 "Protection of Historic Properties"

PROJECT ACTIVITY

Activity Title: Identify Historic Resources

Activity No.: 3

Activity Description:

Based on the results of the background research and consultation accomplished in [Activity 2](#), the Cultural Resources Section will conduct further studies/surveys needed to identify historic resources within the APE for the reasonable alternatives under study. This may involve any or all of the following:

- further background research, consultation and/or oral history interviews;
- archaeology surveys and/or testing for evaluation of identified sites for NRHP eligibility determination;
- historic structures surveys/evaluations of identified structures for NRHP eligibility determination; and
- Native American Consultation/Coordination.

The Cultural Resources Section will determine whether field surveys will be conducted by consultants. If consultants will be used, the Cultural Resources Section will initiate the process to issue a Task Order for performing the work. Surveyors must meet the Secretary of the Interior's professional standards for their area or areas of expertise.

In consultation with the SHPO, the Cultural Resources Section will determine if there are other "consulting parties" and/or local governments that have an interest in the APE that should be invited to participate in the Section 106 process. The Cultural Resources Section also will consult with the SHPO on planning for public involvement to provide information about the undertaking and its effects on historic properties, and to seek comment and input. The Cultural Resources Section will give due consideration to confidentiality concerns of affected parties in planning for public involvement.

Regulation and Guidance

36 CFR Part 800 "Protection of Historic Properties"
Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation

PROJECT ACTIVITY

Activity Title: Obtain Right-of-Entry Permits

Activity No.: 4

Activity Description:

Prior to initiating field surveys and/or studies, the NDOT will obtain appropriate clearance/permission to enter the affected properties. The Cultural Resources Section will accomplish the following:

1. Private Property. The Cultural Resources Section will work with the NDOT Right-of-Way Division to obtain written clearance/permission for right-of-entry to the property.
2. Federal Property. The Cultural Resources Section will obtain a Special Use Permit and Fieldwork Authorization for access to the property.
3. Native American Land. The Cultural Resources Section will consult with the affected tribal officials to inform them of the planned field work and to determine if there are tribal standards or guidelines (e.g., confidentiality concerns) that would affect how the work is to be performed. The Cultural Resources Section will provide the tribal officials a map of the APE and other available information (e.g., survey reports, information on known sites). The Cultural Resources Section will be sensitive to who the legal representative of the tribe is and will ensure that appropriate parties are involved in the consultations/negotiations.

Regulations and Guidance

Bureau of Land Management (BLM) – *Obtaining A Cultural Resource Use Permit For BLM Managed Lands in Nevada*

36 CFR Part 251.54 US Forest Service (USFS) “Land Uses, Proposal and Application Requirements and Procedures”

BLM Nevada State Office “Cultural Resources Inventory General Guidelines”

PROJECT ACTIVITY

Activity Title: Identify Properties Eligible for the NRHP

Activity No.: 5

Activity Description:

The NDOT Cultural Resources Section will initiate field surveys to identify properties within the APE that may be eligible for the NRHP.

After completing the site identification research/studies/surveys and documenting the findings, the Cultural Resources Section will initiate consultation and negotiations with the FHWA, the SHPO and, as applicable, the affected FLMA's and Native American groups/tribes to apply the NRHP eligibility criteria to the identified sites, structures and Native American issues within the APE that have not been previously evaluated for NRHP eligibility.

Upon conclusion of the preliminary consultation and negotiations, the Cultural Resources Section will prepare documentation of the recommended findings regarding site eligibility and will submit it through the FHWA and/or the FLMA to the SHPO. The NDOT Cultural Resources Section will negotiate, as necessary, with the SHPO to achieve concurrence with the eligibility recommendations approved and submitted by the FHWA and/or the FLMA as the responsible "Agency Official" for the Section 106 compliance process. In some instances, a request for a formal determination of eligibility from the Keeper of the National Register will be necessary.

Resources determined to meet the NRHP eligibility criteria will be treated as "historic properties" subject to further compliance with the Section 106 process. Historic sites on or eligible for the NRHP and archaeological sites that meet the NRHP criteria and are determined to warrant preservation in place are subject to Section 4(f) requirements. See [Chapter 12](#) for information on Section 4(f) properties and procedures.

If the APE changes as project development progresses, the Cultural Resources Section will ensure appropriate identification and consideration of "historic properties" in the altered APE. This may include issuing new Task Orders for additional surveys and background research.

Regulations and Guidance

36 CFR Part 800 "Protection of Historic Properties"

36 CFR Part 60.4 "Criteria for Evaluation"

36 CFR Part 63 "Determinations of Eligibility for Inclusion in the National Register of Historic Places"

36 CFR Part 65 "National Historic Landmarks Program"

Standards and Guidelines for Archeology and Historic Preservation, Secretary of the Interior Environmental Guidebook/Historic Preservation/Archaeology, FHWA

PROJECT ACTIVITY

Activity Title: Assess Effects on Eligible Properties

Activity No.: 6

Activity Description:

The Cultural Resources Section will work with the Project Management Team to determine the potential effects of the undertaking on historic properties in the APE (e.g., direct construction/maintenance impacts, impacts from temporary easements, utility easements, staging and storage areas, access roads, material sources, waste areas).

The assessment of effects will result in one of the following findings:

1. No Historic Properties Affected.

- no historic properties are present, or
- historic properties are present but the undertaking will have no effect on them.

If it is determined that no historic properties will be affected, the Cultural Resources Section will prepare documentation of this finding (see 36 CFR Part 800.11(d)) and submit it to the FHWA and/or the FLMA for forwarding to the SHPO.

2. Historic Properties Affected. The Cultural Resources Section will initiate coordination with the Project Management Team to determine if adjustments can be made to eliminate potential adverse effects. Adjustments that are reasonable and feasible should be incorporated in the undertaking. If historic properties are still affected, the NDOT will coordinate with the FHWA and/or the FLMA to notify the consulting parties, including Native American groups/tribes, to invite their views on the effects and will then assess identified adverse effects (see [Activity 7](#)).

Regulations and Guidance

36 CFR Part 800 "Protection of Historic Properties"

PROJECT ACTIVITY

Activity Title: Assess Adverse Effects

Activity No.: 7

Activity Description:

In consultation with the SHPO and Native American groups/tribes that attach religious or cultural significance to identified historic properties, the Cultural Resources Section, with the FHWA and/or the FLMA, will apply the criteria of adverse effect (36 CFR Part 800.5) to historic properties that the undertaking will affect. Application of the criteria will result in one of the following findings:

1. Finding of No Adverse Effect. If the NDOT and the FHWA and/or the FLMA propose a finding of no adverse effect, the NDOT will initiate steps, with the FHWA and/or the FLMA, to notify consulting parties of the finding and provide them with supporting documentation.

If the SHPO agrees with the finding, and no consulting party has objected, the undertaking may proceed under the No Adverse Effect finding, provided the ACHP is not reviewing the finding (see 36 CFR Part 800.5).

If the SHPO or other consulting party provides written notification indicating that it disagrees with the finding, the NDOT and the FHWA and/or the FLMA will either consult with the party to resolve the disagreement or request the ACHP to review the finding.

2. Finding of Adverse Effect. If an adverse effect is found, the NDOT, with the FHWA and/or the FLMA, will continue consultation to resolve the adverse effect.

Regulations and Guidance

36 CFR Part 800 "Protection of Historic Properties"

Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Historic Sites

PROJECT ACTIVITY

Activity Title: Resolve Adverse Effects

Activity No.: 8

Activity Description:

The NDOT, with the FHWA and/or the FLMA, will confer with the SHPO, interested persons and, as appropriate, the ACHP to seek ways to avoid, minimize or mitigate adverse effects that an undertaking may have on a historic property. The NDOT and the FHWA and/or the FLMA will make information available to the public and afford an opportunity for members of the public to provide their views on resolving the adverse effects. A Memorandum of Agreement (MOA) outlining the measures that NDOT/FHWA will take to avoid, minimize or mitigate the adverse effects will be prepared and executed.

After execution of the final MOA, the NDOT Cultural Resources Section will prepare a mitigation plan for implementing the measures to avoid, minimize and mitigate the undertaking's adverse effects on historic properties.

Note that, in some cases, the consulting parties may be unable to resolve the adverse effects. See 36 CFR Part 800.7 for a description of the procedural options to address this situation.

If changes occur in the APE after completion of the compliance process, the Cultural Resources Section will determine if the Section 106 process will need to be reopened. If the NDOT determines that the changes in the APE will result in an adverse effect on a historic property, the Cultural Resources Section will consult with the SHPO and the FHWA and proceed with the process for resolution of the Adverse Effects.

See [Section 2.3 "Preparing An Administrative Record"](#).

Regulations and Guidance

36 CFR Part 800 "Protection of Historic Properties"

Final Nationwide Section 4(f) Evaluation and Approval for Federally-Aided Highway Projects With Minor Involvements With Historic Sites

43 CFR Part 7 "Protection of Archaeological Resources"

43 CFR Part 10 "Native American Graves Protection and Repatriation Regulations"

Environmental Guidebook/Historic Preservation/Archaeology Resources, FHWA

Environmental Guidebook/Historic Preservation/Historic Bridge Resources, FHWA

Environmental Guidebook/Historic Preservation/Historic Road Resources, FHWA

PROJECT ACTIVITY

Activity Title: Implement Compliance Commitments

Activity No.: 9

Activity Description:

NDOT's Cultural Resources Section will coordinate with the Project Management Team to ensure avoidance stipulations, as well as compliance commitments (e.g., minimization and mitigation measures) are explained in the Construction Contract Documents.

The NDOT will implement mitigation commitments as the project moves toward construction. During and after the project's construction, the Cultural Resources Section will monitor the activities to ensure fulfillment of avoidance stipulations and compliance commitments, including timely completion of agreed to mitigation reports, documents, etc.

See [Section 2.1 "Project Development Process."](#)

Regulations and Guidance

AASHTO Practitioner's Handbook 04 - *Tracking Compliance with Environmental Commitments/Use of Environmental Monitors*, November 2006

