

**MONTANA**  
HISTORICAL SOCIETY  
State Historic  
Preservation Office



# Montana SHPO Consultation Guide

A HANDBOOK FOR CULTURAL RESOURCE  
REVIEW AND COMPLIANCE IN MONTANA

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This document is a summary of accepted Montana standards for compliance and data management for historic properties. Individual state and federal agencies may, and often do, establish their own internal guidelines for cultural compliance, and it is the responsibility of the consultant to meet and exceed those standards.

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## Introduction

The Montana State Historic Preservation Office (SHPO) is responsible for working with others to comply with the provisions of the National Historic Preservation Act (NHPA) and to carry out duties described in the Montana State Antiquities Act (MTAA). Because many cultural resources and properties in Montana have not been identified, are irreplaceable, and are highly sensitive to ground disturbance, it is essential that these valuable resources are properly identified, evaluated, and reported prior to any action that may affect their significance and associated integrity or condition.

The Montana SHPO facilitates the preservation and protection of cultural resources to the greatest extent possible. Historic preservation's core principals are about preserving our history by keeping our important heritage places. Historic places connect us to our history and identity as Montanans. The past brings meaning to our lives and helps guide our future. Our historic, precontact, and traditional cultural places are tangible links to who we are and what we are becoming as a community and a state. Cultural resources enhance economies and contribute to ways of life. Numerous studies show that historic preservation adds value to communities and brings economic benefits and opportunities for local people.

Preservation and protection of a place begins by recognizing the place as historic and worthy of preservation. From there, the property owners and decision makers must have the desire and will to preserve. Instilling a will to preserve in others is at the heart of SHPO's mission. Preservation means meeting the resource on the resource's terms. Preservation sometimes requires a significant effort to accomplish; other times, preservation occurs by stepping away from the resource and letting it remain untouched.

This guide establishes Montana SHPO's expectations on consultation procedures, preparing cultural resource inventory reports, and all aspects of compliance with Section 106 of the NHPA and the MTAA. Montana's SHPO strives for open dialog with all parties, compliance with the National Park Service (NPS) and Advisory Council on Historic Preservation (ACHP) guidance, and decisions based on best science and industry standards.

Chapters 1 through 4 of this guide follow the four steps of the consultation process:

- Step 1: Initiate consultation, define the undertaking and the area of potential effect
- Step 2: Identify and evaluate historic properties within the area of potential effect
- Step 3: Assess effects to historic properties
- Step 4: Resolve adverse effects to historic properties

Chapter 5 describes expectations for preparing and submitting documentation for review by SHPO. Chapter 6 discusses rules and procedures regarding human remains and other inadvertent discoveries. Chapter 7 summarizes the consultation process with key points, tips, and reminders.

The appendices to this guide provide supplemental resources and quick reference checklists to aid in the consultation process, and include:

- A. References and Resources
- B. Glossary of Terms, Acronyms, and Abbreviations Used by Montana SHPO
- C. Answers to Frequently Asked Questions about Section 106 Compliance in Montana
- D. Checklists for Various Tasks During Consulting with Montana SHPO
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The decision to update this document in 2022 was prompted by conversations with THPOs, state and federal agency staff, and consultants, regarding questions and ambiguous language in the prior guidelines. Montana SHPO staff shared a link to a online survey about the guidelines in all their email signatures and directly invited individuals from their contact lists to complete the survey, provide input, and engage in more in-depth conversations regarding this update. The survey was active for three months and recovered 22 responses that helped guide update efforts. The ACHP also provided comments and suggestions in September 2021.

Survey results indicated that people were dissatisfied with Montana SHPO's consultation guidelines (satisfaction rated a 4 out of 10). Areas identified as needing improvement were: mapping recommendations, site monitoring expectations, definitions/examples of cultural reports, SHPO's role in NEPA, tribal consultation, and information about evaluation and effects to different types of historic properties. In this revision we have attempted to address these areas with added guidance.

A common suggestion that emerged from survey responses and conversations was the need to improve technology for digital submission of consultation documents. Montana SHPO is currently upgrading

database capabilities to accommodate full digital transmittal for consultation packages and correspondence. Electronic consultation—or “e-106”—is expected to be available by the end of 2023.

We are grateful for the constructive feedback, suggestions, and unique perspectives from each who contributed to the revision of these guidelines. A special thanks to Dan Norderud who donated his time to help edit this document.

## **PREVIOUS AND FUTURE VERSIONS OF THIS GUIDE**

This guide and its associated forms and templates are dynamic documents subject to ongoing review, amendments, and updates. Ensure that you are using the most current versions before each new undertaking.

Appendix E provides an index to SHPO Forms and Instructions, with links to download the most current guide and forms; also found at <https://mhs.mt.gov/Shpo/Archaeology/ConsultingWith>.





## 1 STEP ONE. Define the Undertaking and Initiate Consultation

In general, projects, activities, or programs funded by or under the jurisdiction of a federal agency; and projects on state-owned property require consultation with the Montana SHPO.

To get started, consulting parties need to agree on the definition of the undertaking, the area potentially affected by the project, and what parties need to be involved. Clear definition of the potential impact of the project, combined with initial inquiries into the known or potential occurrence of cultural resources, helps determine whether consultation will proceed to Step 2: Identifying Historic Properties.

Consultation must be completed **before** the action is approved or authorized if agencies are to consult effectively. If you are unsure whether an action qualifies as an undertaking or if that undertaking has the potential to affect historic properties, contact SHPO early in planning. Waiting until after an action has been approved but before action is taken is inappropriate. If actions have already occurred prior to consultation, our office is unable to provide input on the steps of the process that are required to occur prior to implementation, such as defining the area of potential effect and identification efforts. This may also constitute *foreclosure*, which is when the ACHP is precluded from commenting.

In some instances, rules or procedures guiding federal and state agency compliance with cultural resource requirements may not always appear to mesh well with the 36 CFR 800 regulations or this guidance document. When in doubt check with SHPO to resolve any differences. 36 CFR 800 regulations determine SHPO procedures.

## 1.1 CONSULTATION UNDER STATE LAWS

State agencies in Montana are required to consult with the SHPO by rules developed under the Montana State Antiquities Act (MTAA) (MCA 22-3-421 to 442) and the Montana Environmental Policy Act (MEPA – MCA Title 75, ch.1), concerning the identification and preservation of *Heritage Properties*.

Under the **Montana State Antiquities Act (MTAA)**, state agencies are to consult with the SHPO regarding efforts “*to avoid, whenever feasible, state actions or state assisted or licensed actions that substantially alter heritage properties...on lands owned by the state...*” (MCA 22-3-424). Some state agencies have their own implementing regulations or rules for the Montana State Antiquities Act – e.g., Montana Fish, Wildlife and Parks (FWP), and the Trust Lands Division of the Department of Natural Resources and Conservation (DNRC). All other state agencies responsible for state property and which do not have agency rules, must follow rules developed by the SHPO in 1998 (22-3-423 through 424 MCA).

*All state agencies under the State Antiquities Act are required to consult with the SHPO regarding potential impacts to the possible Heritage Properties on state lands.*

The MTAA applies to projects on state-owned property only. The Act provides for the review of agency-proposed projects and mitigation plans by the SHPO, the issuance of Antiquities Permits (required for the excavation, removal, or restoration of any *Heritage Property* on state lands), agency notification requirements to private landowners whose properties are being considered for eligibility to the National Register by an agency, and an appeal process. All state agencies under the State Antiquities Act are required to consult with the SHPO regarding potential impacts to possible Heritage Properties on state lands.

Some permits, licenses, or reclamation applications on non-state lands could require review under the **Montana Environmental Policy Act (MEPA)** or specific agency regulations. Questions regarding the relevance of MEPA to the proposed undertaking should be directed to the approving state agency.

Some state agencies also must comply with federal Section 106 regulations because they use federal funds, permitting, approvals or delegations. For example, Montana Department of Transportation work under the Federal Highways Administration, and—under certain circumstances—the Montana Department of Environmental Quality (DEQ) Coal Program are required to meet federal Office of Surface Mining Reclamation and Enforcement standards. DEQ may also consult with the SHPO and others such as Tribes under the **Major Facilities Siting Act** (Montana Code Annotated 75-20-102) and **Open Cut Rules** (gravel pits) (Administrative Rules of Montana 17.24).

In general, guidance for consulting under the federal Section 106 review process also applies to consultation under state laws. There are differences between the MTAA and Section 106 process regarding response timelines and the resolution of Adverse Effects (Step 4). For a deeper understanding of state laws concerning cultural resources in Montana, see Appendix G.

## 1.2 CONSULTATION UNDER FEDERAL LAWS

The National Historic Preservation Act (NHPA) defines procedural obligations that are ultimately the responsibility of the federal agency involved in the undertaking. It is the federal agency who is responsible for complying with the legislation and formally consulting with SHPO and other consulting parties.

The SHPO considers 36 CFR part 800 and the ACHP the authority on the NHPA Section 106 process. The National Park Service is the authority on the eligibility assessments of historic properties.

The Montana SHPO does not routinely review National Environmental Policy Act (NEPA) documents. NHPA and NEPA are two separate federal regulations. The SHPO serves a specific role in the NHPA process but does not have a corresponding role in NEPA. We will occasionally review or comment on NEPA documents when concerns are brought to our attention.

The NHPA process needs to be completed before the NEPA process is concluded with either a categorical exclusion (CE), environmental assessment (EA), or environmental impact statement (EIS). See Appendix G: NEPA/NHPA Integration.

For a deeper understanding of federal laws concerning cultural resources in Montana, see Appendix G.

### 1.3 CONSULTATION RESPONSIBILITY AND DELEGATION AGREEMENTS

When the undertaking is subject to consultation under state or federal laws, the responsibility for initiating consultation rests with the agency involved in the undertaking. While some federal agencies may delegate authority to applicants or consultants to act in place of the federal agency, **the agency is ultimately responsible for complying with the legislation and formally consulting with SHPO** and other parties.

There are situations where there are multiple federal agencies involved in a single undertaking. For example, if there was a FHWA funded project occurring on BLM owned lands. FHWA is involved because they are a federal agency providing funds for the undertaking. BLM is involved because they own and manage the land on which the undertaking will occur. When there are multiple agencies involved some or all agencies may choose to designate a *Lead Federal Agency*. The lead federal agency acts on behalf of the other agencies, fulfilling their collective responsibilities. Those agencies that do not designate a lead federal agency remain individually responsible for Section 106 compliance. If an agency has been designated the Lead Federal Agency, consultation with SHPO must include letters from the other agencies acknowledging and ceding this status. See section 5.2.2

Some agencies have legal delegation agreements established in Programmatic Agreements (PA) at the state or national level. When a federal agency has formally delegated some or all responsibilities under Section 106, it retains legal accountability and is required to try to resolve any disagreements that might arise.

The party delegated to is responsible for understanding the agreement, its parameters, and specifying which agreements apply when consulting with SHPO. Each agreement specifies instances where it is necessary for the agency to directly enter the consultation process, such as when an adverse effect finding is expected.

Unless specified in a PA, or other formal program alternative, SHPO will not evaluate the adequacy of avoidance stipulations, the eligibility of cultural resources, or the effect to eligible properties solely in consultation with proponents or their consultants. While a proponent or their consultant may make recommendations to the agency concerning eligibility or effect, the agency is solely responsible for reaching and stating their own findings and requesting SHPO's comment or concurrence. In the absence of a PA, the agency must review the adequacy of identification efforts and findings prior to action by the agency or the proponent.

Blanket delegations of authority—where the federal agency delegates the entire Section 106 review process to the applicant—are typically only used by non-land managing federal agencies. A federal agency must have a previous agreement in place with the ACHP and SHPO prior to utilizing a Blanket Delegation of Authority. Some agencies that commonly use blanket delegations of authority are:

- Federal Communications Commission (FCC) and Cell Tower Projects, and
- Department of Agriculture Rural Development (USDA/RD)
- Department of Agriculture Rural Utility Service (USDA/RUS).
- Department of Housing and Urban Development (HUD) and community development block grants.

**To avoid delays, applicants and agencies must identify who will initiate consultation with the SHPO. Federal agencies should notify the SHPO as early as possible when forming any delegation agreements.**

## 1.4 DEFINE THE UNDERTAKING

Under federal law, consultation with the Montana SHPO begins with identifying and defining the undertaking. While the first step of “define the undertaking,” is not explicitly described under state law, it is a practical and necessary step for initiating consultation for state projects.

The National Historic Preservation Act (NHPA) defines undertakings requiring consideration under the NHPA as follows:

*Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency.*

**Undertakings that require consideration under the NHPA include those that:**

1. take place on federally owned land
2. require a federal permits, license, or approval
3. receive federal funding or financial assistance
4. are carried out by or on behalf of the agency
5. are subject to state or local regulation administered pursuant to a delegation or approval by a federal agency.

Undertakings include everything from federal technical assistance projects, loan guarantees, property transfers, special use permits, and 404 permits, to large-scale ground-disturbing activities such as coal mining, infrastructure development, and logging.

### 1.4.1 Undertakings with No Potential to Cause Effects

36 CFR 800.3(a)(1) acknowledges that many *undertakings* do not have the potential to cause *effects* on *historic properties*. To meet the criteria for this determination it must be assumed that historic properties are present.

Examples of undertakings with “No Potential to Cause Effects” are a federal agency ordering their office supplies or hiring new staff. The decision regarding whether an activity has the potential to cause effects rests solely with the federal agency. Because there is no potential to cause effects in these circumstances, Section 106 review with the Montana SHPO is unnecessary. However, undertakings involving any ground-disturbing activity and most repair, routine maintenance, or other work on historic properties has the potential to cause effects and is therefore subject to Section 106 review. We encourage discussions with SHPO staff if an agency is unsure when this designation applies.

## 1.5 DEFINE THE AREA OF POTENTIAL EFFECT (APE)

Once an agency has determined that a proposed action is an *undertaking* under federal law, and that the undertaking has the potential to cause effects to historic properties, the agency then must consider and define the *Area of Potential Effect*.

### **The Area of Potential Effect (APE) is ...**

1. *the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist (36 CFR 800.16(d))*
2. influenced by the scale and nature of the undertaking and site- and project-specific variables
3. determined at the beginning of consultation with SHPO; often alongside a file search request
4. comprised of all locations where the undertaking may result in direct or indirect effects
5. determined by the potential for an undertaking to result in changes anywhere that would affect historic properties that may be subsequently found to exist

### **The APE is NOT ...**

1. constrained by administrative boundaries, ownership, or to discretionary actions
2. defined by consideration of the presence or absence of cultural resources
3. an arbitrary buffer or search area
4. one-size-fits-all for all projects
5. required to be a single contiguous area
6. always the same as an area of impact defined under NEPA.

Complete and accurate project descriptions are key to defining suitable APEs and readily identifying and assessing potential effects of the undertaking within the APE.

The APE includes identified *Historic Properties* (NRHP eligible or listed precontact and historic sites) directly within the area of project construction, and historic properties nearby which could be affected by the development of staging areas, access roads, noise, visual intrusion, or other indirect effects.

A project has a single APE, however the types of effects each of those areas may experience may differ. Agencies much consider both direct effects and indirect effects when defining their APE.

- The **Direct Effect Areas** typically includes all areas of ground disturbance, staging areas, heavy equipment use, and access roads.
- The **Indirect Effect Areas** includes areas that are within sight of the proposed undertaking, may be impacted by vibration, sound, and increased/decreased activity.

**The APE is determined in consultation with the SHPO/THPO:**

*Determine scope of identification efforts. The Agency official shall consult with the SHPO/THPO to:(1) Determine and document the area of potential effects, as defined in §800.16(d); (36 CFR 800.4(a))*

Because defining the APE is critical to all later steps, SHPO strongly recommends early consultation with SHPO regarding the APE definition, the identification of known cultural resources within the APE, and the possible need for further identification efforts before conducting any field work or deciding no further identification efforts are warranted.

Similar considerations should be used to define the project area under State law (MTAA and MEPA), with the exception that in most cases consideration is confined to State Lands. Montana DEQ permitted actions on private lands follow DEQ rules except for delegated 106 approval such as coal mining.

Where disagreements on the APE occur between consultants and SHPO, direct agency consultation is necessary since consideration of effects to historic properties is an agency responsibility under Section 106 and 36 CFR 800. With few exceptions established by law, agencies cannot delegate this responsibility to others.

**1.5.1 Area of Direct Effects**

Direct effects are caused by the action and occur at the same time and place as the undertaking. This includes the geographic location where all physical project actions will take place. This includes staging areas, access to the site, borrow areas, and lay down areas. Some examples of direct physical effects are ground disturbance, demolition, and relocation of historic materials.

**1.5.2 Area of Indirect Effects**

Indirect effects include reasonably foreseeable impacts caused by the undertaking but that occur later in time or further removed in distance. Indirect effects may include visual intrusions, noise, vibration, smell, and dust. This includes all project elements and potential indirect effects within a geographic area which will experience those effects.

The recommended *minimum* Indirect APE for most projects is ¼ mile, however project-specific details will often require increasing this distance. Many federal agencies offer guidance on how to determine the Indirect APE for a project.

In consultation or reports on a project, describe how potential indirect effects were factored into the APE definition, some common methods are: GIS tools with viewshed analysis, standard diameters based on construction height agreed upon in PAs, balloon test or other marker with photos of the proposed work area.

## 1.6 IDENTIFY AND INVOLVE CONSULTING PARTIES

Once an agency has established that it has an undertaking with the potential to cause effects to Historic Properties, the agency must notify SHPO and/or relevant Tribal Historic Preservation Office (THPO) in writing. However, consultation with SHPO/THPOs alone is not enough to ensure compliance with the NHPA or 36 CFR 800. Federal agencies must seek and consider the views of potentially interested parties.

Consultation is more than a simple notification about a planned undertaking. Consultation is a process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process (36 CFR 800.16(f)).

Consultation should not simply be a matter of providing project information to the parties, but instead should be an active effort to learn about their concerns and include those concerns in agency planning. Consultation is meant to be an interactive movement towards a collaborative solution.

Consulting parties often include:

1. Federal and State agencies
2. Native Nations / Indian Tribes
3. Relevant THPO or SHPO
4. Applicants for federal assistance/permits/licenses
5. Representatives of local governments
6. ACHP
7. Public
8. Parties with legal or economic interest in the undertaking or affected historic properties
9. Other people or groups under 36CFR 800.2(c) with special knowledge or interest in the undertaking or historic properties

*Consultation is a process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process.*

The agency is responsible for keeping a record of consultation efforts. When requesting SHPO's concurrence, include a summary of consultation activity and copies of written correspondence (letters and emails).

While SHPO staff will informally discuss projects, all formal consultation must be written. **Phone conversations, because of the danger of misunderstandings, do not represent formal comment or consultation;** verbal requests for information, comment or recommendation need to be followed up in writing. Furthermore, public notices, scoping alerts, newspaper ads, or other requests for information aimed at a broad audience do not constitute SHPO consultation or notification.

### 1.6.1 Native Nations

Under 36 CFR 800 federal agencies are required to consult with Native Nations and Indian Tribes, regardless of whether or not the project is located within reservation boundaries. Agencies are also required to consult with Tribes regardless of whether or not that Tribe has established a THPO.

The ACHP provides detailed guidance on the consultation process including consultation with Indian Tribes. See *Consultation with Indian Tribes in the Section 106 Process: The Handbook*, *Section 106 Applicant Toolkit*, *Section 106 Consultation about Archaeology*, and other documents available from the ACHP.

*All requests for SHPO concurrence on the eligibility of a TCP or precontact site must include a summary of consultation efforts.*

Consultation with Native Nations is required for all federal undertakings, regardless of whether the undertaking’s APE includes federal, Tribal, state, or private lands. Section 106 of the NHPA requires federal agencies consult with Native Nations that attach religious and cultural significance to historic properties that may be affected by the agency’s undertakings.

While the regulations and legal language use the term *Indian Tribes*, the Montana SHPO prefers the term *Native Nations*, because it emphasizes sovereignty and minimizes potential for misconceptions about the term ‘tribe’. SHPO may still use the term *Indian Tribe* when referencing legal language or guidance from other agencies.

An agency’s interactions with federally recognized Nations must take place on a government-to-government basis. The federal agency staff responsible for carrying out Tribal consultation should be familiar with the history of the relationship between the U.S. Government and that Nation, and the applicable treaties, court decisions, and statutes that influence the relationship.

Under the U.S. Constitution, treaties with Native Nations have the same weight as federal statutes. This means that federal agencies are bound to give effect to treaty language and, accordingly, must ensure that federal agency actions do not conflict with Tribal treaty rights.

Some cultural resources require Tribal consultation when applying the National Register criteria and evaluating them. This is particularly true of Traditional Cultural Places (TCPs) and precontact sites. All requests for SHPO concurrence on the eligibility of a TCP or precontact site must include a summary of consultation efforts and a list of THPOs, Tribal cultural specialists, or Nations who were consulted on assessing the eligibility of that site.

*“... 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” (36 CFR 800.4(c)(1))*

In addition to the eight reservations and Nations currently identified in Montana, there are many more Nations with ancestral and cultural ties to places in the state (see table). THPOs whose current headquarters are outside of Montana may need to be consulted.

<b>Reservations and Nations in Montana</b>	<b>Partial List of Nations with Concerns in Montana</b>
Fort Peck Tribes of the Fort Peck Reservation, Assiniboine and Sioux	Red River Band of Lake Superior Tribe of Chippewa Indians
Blackfeet Tribe of the Blackfeet Nation	Cheyenne-Arapaho Tribes of Oklahoma
Fort Belknap Indian Community of the Fort Belknap Reservation, home of the Nakoda and Aaniiih Nations	Crow Creek Sioux Tribe
Apśáalooke Nation of the Crow Reservation	Eastern Shoshone
	Keweenaw Bay Indian Community
	Kiowa Indian Tribe
	Lower Brule Sioux Tribe
	Northern Arapaho

Reservations and Nations in Montana	Partial List of Nations with Concerns in Montana
Northern Cheyenne Tribe of the Northern Cheyenne Reservation	Northwestern Band of Shoshone Nation
Chippewa Cree Tribe of the Rocky Boy's Reservation	Prairie Island Indian Community
Confederated Salish and Kootenai Tribes of the Flathead Reservation	Red Cliff Band of Lake Superior Chippewa Indians of Wisconsin
Little Shell Tribe of Chippewa Ojibwe people (no reservation)	Rosebud Sioux Tribe
	Shoshone-Bannock Tribes Heritage Tribal Office
	Sisseton-Wahpeton Oyate of the Lake Traverse Reservation
	Spirit Lake Nation
	Standing Rock Sioux Tribal Council
	Turtle Mountain Band of Chippewa
	Nez Perce Tribe Cultural Resource Program
	Mandan, Hidatsa, and Arikara Nation

### 1.6.2 Tribal Historic Preservation Offices (THPO)

**If an undertaking will occur within the boundaries of a reservation in Montana, then the concurrence of the THPO, rather than SHPO, is necessary.** The NHPA (Section 101 (d)(2)) provides that Native Nations may assume all or any part of the SHPO's functions with respect to Tribal lands if the Secretary of Interior acting through the Director of the NPS finds that the Tribe can carry out the proposed functions.

While Montana SHPO office cannot offer concurrence on projects within reservation boundaries, we do encourage agencies to submit reports and/or site records from projects within reservation boundaries, so they can be added to the statewide cultural resources database.

### 1.6.3 Montana State Historic Preservation Office (SHPO)

Under the NHPA, the SHPO is charged with advising, assisting, and cooperating with federal, state, Tribal, and local authorities to ensure that historic properties and heritage properties in Montana are taken into consideration at all levels of planning and development. SHPO works to reflect the interests of the state and its citizens in the preservation of their cultural heritage (36 CFR 800.2(c)(1)). This most often takes the form of concurrence on an undertaking's effect on historic properties or the eligibility of an individual site.

Under the Montana State Antiquities Act, the SHPO is tasked with assisting state, federal, and other agencies in preserving heritage properties and paleontological remains. Additionally, SHPO encourages avoidance, whenever feasible, of actions that substantially alter heritage properties or paleontological remains on lands owned by the State of Montana.

SHPO maintains a survey and inventory program and is a repository of GIS and site information. Staff establish historic contexts and nominate eligible properties for listing in the National Register of Historic Places. The Historic Architecture Specialist provides technical advice on the preservation of historic architecture and is the state liaison between the NPS and applicants for the Federal Historic Rehabilitation Tax Credit program. The State Archaeologist is staff to the State Burial Preservation Review Board and provides advice regarding treatment of archaeological properties and artifacts.

#### 1.6.4 Applicants and Consultants

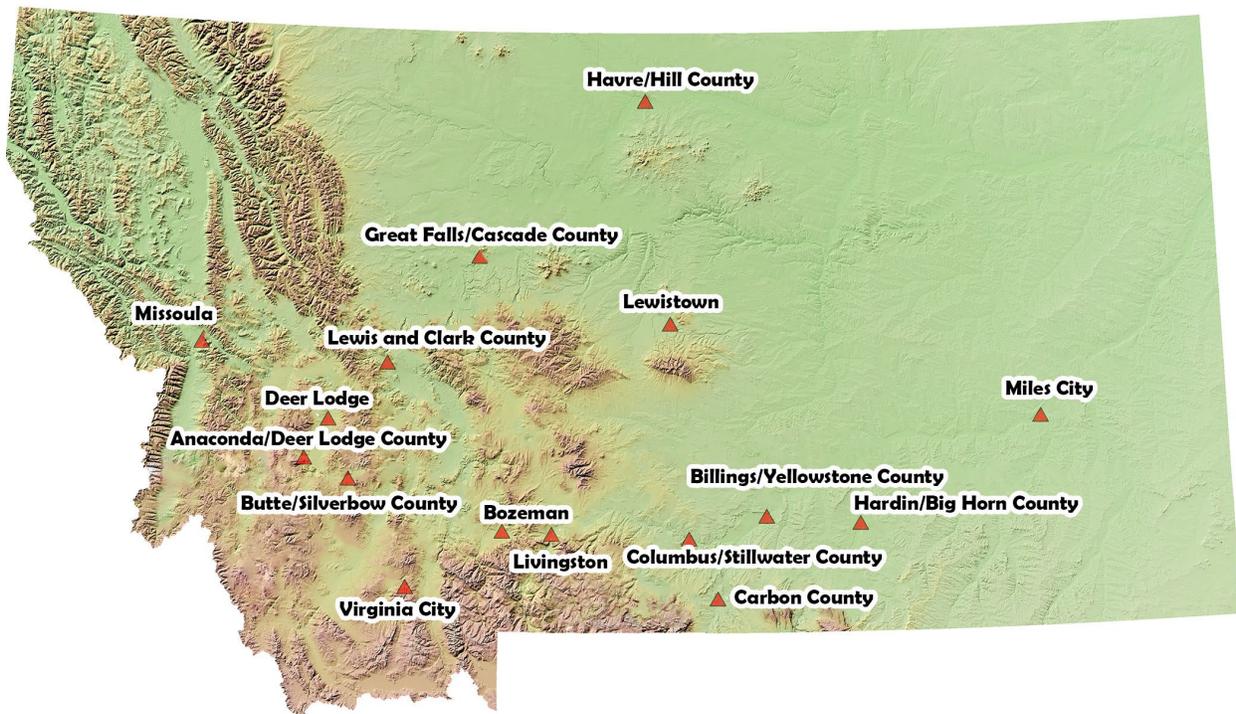
Federal agencies, rather than applicants or consultants, are responsible for consulting with the SHPO on all undertakings assisted, funded, undertaken, permitted, or licensed by the lead federal agency. In some instances, however, the lead federal agency delegates some or all of the Section 106 review process to the recipient (applicant) of the funding, license, or permit. See section 1.3 Consultation Responsibility and Delegation Agreements.

#### 1.6.5 Certified Local Governments (CLG)

Certified Local Governments (CLG) are community-driven groups that have been certified by the NPS and SHPO as active partners in historic preservation. **If a project's APE is within the area of interest of a CLG, the CLG should be consulted.** However, the concurrence of a CLG is not a substitute for SHPO consultation or concurrence.

In 2022, CLGs included sixteen counties, cities, and communities in Montana.

1. Anaconda / Deer Lodge County
2. Billings / Yellowstone County
3. Bozeman
4. Butte / Silver Bow County
5. Carbon County
6. Columbus / Stillwater County
7. Deer Lodge
8. Great Falls / Cascade County
9. Hardin / Big Horn County
10. Havre / Hill County
11. Lewis and Clark County
12. Lewistown
13. Livingston
14. Miles City
15. Missoula
16. Virginia City



### 1.6.6 Advisory Council on Historic Preservation (ACHP)

**The Advisory Council on Historic Preservation (ACHP)** is an independent federal agency that oversees Section 106 review and issues the regulations that implement it. The ACHP must be notified when an undertaking may adversely affect a historic property. The ACHP exercises its discretion in deciding to participate in consultation. The ACHP issues formal comments to the head of an agency when an agreement is not reached on how to resolve an undertaking's adverse effects. The ACHP also participates in the development of program alternatives under the regulations, and coordinates with federal agencies and consulting parties on these program alternatives. The ACHP provides technical assistance to all parties on the Section 106 review process.

Whether or not the ACHP becomes involved in consultation, anyone may contact the ACHP to express your views or to request guidance, advice, or technical assistance. Regardless of the scale of the project or the magnitude of its effects, the ACHP is available to assist with dispute resolution and to advise on the Section 106 review process for federal undertakings.

If you suspect, but have been unable to verify, federal involvement, or if you believe the federal agency or one of the other participants in review (including the Montana SHPO) has not fulfilled responsibilities under the Section 106 regulations, you can ask the ACHP to investigate. Be as specific as possible and have the following information available: name of the responsible federal agency and how it is involved; description of the project; historic properties involved; and a clear statement of your concerns about the project and its effect on historic properties.

### 1.6.7 Public

The views of the public are essential to informed federal decision making in the Section 106 process. **The regulations call for the federal agency official to actively seek and consider the view of the public during the review process.** This is especially important when developing Memorandums of Agreements (MOAs) and Programmatic Agreements (PAs).

At a minimum, the agency official must provide an opportunity for the public to examine the results of the agency's effort to identify historic properties, evaluate their significance and assess the undertaking's effects upon them.

When adverse effects are found, the agency official must also make information available to the public about the undertaking, its effects on historic properties and alternatives to resolve any adverse effects.

Additionally, the public must be afforded an opportunity to express their views on resolving adverse effects. 36 CFR 800.2(d) asks that the agency consider several factors in determining the level of public involvement including: the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the undertaking, and the presence of any confidentiality concerns.

## 1.7 REQUEST A FILE SEARCH

After SHPO and consulting parties have agreed upon the undertaking's APE, an agency designee, applicant, or consultant requests a "File Search" from SHPO. This step typically occurs at the same time the agency engages other consulting parties about the undertaking.

A “File Search” refers to a query of the Montana Cultural Records Database and reveals the presence or absence of documented historic, archaeological, or Traditional Cultural Property sites, and reports on results from previous surveys in the area. Searching the SHPO database of previously recorded sites and inventories provides agencies with baseline information to aid in project planning, and often saves agencies time and money in the long-term.

Montana SHPO requires all undertakings to receive a file search as part of meeting the requirements under 36 CRF 800.4a and b to seek information from SHPO about historic properties in the project area.

In some cases, the federal or state agency may require its licensees, grantees or borrowers, or project proponents to initiate some of the agency’s historic preservation responsibilities. Applicants or their professional consultants may be directly involved in interaction with the SHPO regarding cultural resource identification during the early stages of project review if the federal agency has directed them to do so. However, the ultimate responsibility for this consultation rests with the federal agency.

The Montana SHPO hosts a free public version of the Montana Cultural Records Database that provides general information about the presence or absence of previously recorded sites in a section. This public database does not provide the detailed information needed for a File Search. However, it does provide a free planning tool for agencies and consultants.

### **1.7.1 File Search Request Forms, Data, and Fees**

File search requests for compliance purposes require a completed File Search Request Form (FILE-F) and a map showing the proposed project area. An invoice for the file search will be sent with the SHPO’s response and the file search results. To request any data indicated as present by a file search, you will need to complete a Data Request Form (DATA-F) and a signed Data Use Agreement (DUA). Appendix D includes a step-by-step checklist for successfully requesting a file search from SHPO.

To complete the request form, you will need to prepare the following information about the project and consulting parties:

1. Name, address, and telephone number of the person making request
2. Name(s) of the federal or state agencies involved in the undertaking
3. Approximate date of proposed undertaking’s initiation
4. A description of the undertaking that identifies and explains ground disturbing activities, demolition or modification of buildings, structures, or objects. If no ground disturbance, or demolition or modification of existing buildings will take place, please say so;
5. A description of any previous disturbance and current land use and condition
6. Legal location (Township, Range, and Section) of the project area; Consider including an expanded search area. SHPO recommends that the File Search area include township, range, and sections or quarter sections within and adjacent to the project boundaries (APE). An expanded file search area helps identify sites that overlap or cross over the APE boundaries, and site types likely to occur in the APE. The Montana Cultural Resource Database system searches to quarter section.
7. Land ownership (federal /state /private / Tribal / other)
8. An image and the names of relevant U.S. Geological Survey (USGS) 7.5' quadrangle maps showing the project location. Urban projects must appear on a city map.

9. Provide a justified definition of the APE and delineate boundaries on the 7.5' USGS map. Clearly identify ancillary project locations such as access roads, borrow sources, staging areas etc. related to the undertaking.
10. Submit photographs and property addresses when requesting information on structures 50 years or older.
11. Include a description of cultural resources known or suspected by the agency or applicant to exist in the APE.

### **Remember!**

1. File Search results contain sensitive information and are therefore released only to personnel meeting Archaeological Resource Protection Act or Secretary of the Interior standards. Agencies must notify SHPO in writing when the agency delegates consultation to another qualified party (36 CFR 800.2(c)(4)). Please refer to section 2.1 for confidentiality standards concerning release and use of File Search and other cultural resource data.
2. Expect File Search results within 15 days. In emergencies or under special circumstances, SHPO may be able to provide some preliminary information over the phone. However, telephone responses to inquiries are considered to be informational only.
3. Data from a File Search generally expires after one year. After one year, depending on the project and its location, SHPO may ask for an additional record search. Discuss with SHPO whether a multiyear project would require additional file searches.
4. A lack of previously recorded sites in an APE does not mean that an agency can assume there are no historic properties present or that their identification efforts are complete.
5. SHPO archives project information submitted by consulting parties. Submission of incomplete, illegible, or confusing project information will delay the review process until consulting parties provide accurate information.

### **1.7.2 File Search Results and Recommendations to Identify Historic Properties**

Within 15 days of receiving a request for File Search, SHPO will review project plans and inform the consulting party in writing of presence or absence of any documented sites, previous surveys, and other information relevant to the project area. SHPO usually makes recommendations regarding the adequacy of information or the need to conduct further investigations—such as a field survey, historic map review, oral history interviews, and consultation with others knowledgeable about the area—to further identify historic properties.

Under 36 CFR 800.4 the agency shall consider recommendations by SHPO and other consulting parties to make additional efforts to identify Historic Properties. If the agency believes that SHPO's recommendation for additional consultation, inventory, or other consideration of possible historic properties is unwarranted, the agency should document a reasonable and good faith consideration of historic properties for further SHPO consultation (36 CFR 800.4(d)).

Generally, SHPO will recommend survey in areas that have not been recently inventoried unless there are clear indications the APE has been heavily disturbed. In some cases, only a portion of the project will warrant inventory.

The table below summarizes circumstances when SHPO typically WILL or WILL NOT recommend an inventory / survey.

Sensitive areas where inventory is typically RECOMMENDED	Circumstances when inventory is typically NOT RECOMMENDED
<p>Locations of, and the area around, known sites</p> <p>Areas around concentrations of sites</p> <p>Resources known to have been important to either historic or precontact populations</p> <p>Un-surveyed historic section of a town</p> <p>Areas of historic means of travel</p> <p>Certain landforms within areas near present or past bodies of water (places where people were likely to live, camp, work, or build)</p> <p>Areas on or around unusual or locally prominent landforms (places potentially used for burials, ceremonies, or viewpoints)</p> <p>Areas for which there is no official record of sites but there <u>are</u> artifact collections, or documents or other information indicating the probable presence of sites</p> <p>Areas that have never received a professional survey and do not have significant prior ground disturbance</p>	<p>Areas with previous adequate survey and reporting sufficient to document a finding of No Historic Properties present</p> <p>Projects involving work only in an existing constructed roadside ditch, or road pavement and shoulders; <i>NOTE that a distinction is made between existing ditches/shoulders and the legal description of the right-of-way which may or may not be entirely disturbed, some right-of-way still has the potential for sites</i></p> <p>Temporary light fencing activities, with little or no ground disturbance</p> <p>Projects located on artificial embankment, or fill/cut or other areas previously substantially modified</p> <p>Projects in an area or of a type specified in a formal agreement recognizing its low potential to affect historic properties</p> <p>Projects with scopes of activities unlikely to affect cultural resources. Aerial chemical weed control projects are an example.</p>

Remember, as archaeologists and historians continue to survey the state, new information determines high and low probability locations for sites. Geographic areas and types of landforms previously thought to have a low potential for containing sites may have a higher potential than previously realized, and vice-versa. This change in information will ultimately be reflected in project reviews. Thus, areas not requiring a survey now or in the past may require a survey in the future.

If a previous inventory is more than ten years old, its usefulness needs to be reviewed for changing standards, changing exposures of buried sites, and changing integrity of structures. Since understanding of significance changes over time, some sites, buildings, structures, or features, which were not recorded in the past, may have become historic, and now require consideration. The passage of time may also call for

a reassessment of cultural resources previously determined Eligible or Not Eligible for listing in the NRHP (36 CFR 800.4(c)).

SHPO's criteria for recommending or not recommending surveys are subject to reinterpretation and modification as the database and our knowledge and understanding of the resource and potential impacts grows.

For example, ground disturbance in plowed fields is a subject of ongoing review and discussion. Currently, Montana SHPO believes that plowed fields warrant inventory except in areas of very limited soil deposition, such as upland glacial till. While disturbing shallowly buried archaeological deposits, plowing may also reveal otherwise buried sites with intact cultural deposition below the plow zone. There are numerous archaeology sites across Montana with intact features and artifacts beneath the plow zone.

Another example where ideas about appropriate levels of inventory are in development is prescribed fire management. The impact of low-intensity controlled burns on cultural resources is currently understood to be selective and therefore identification efforts may be directed only towards those resources that would likely be impacted by burning. At the same time, research is needed to better determine the range of impacts from prescribed burn. Moreover, in some cases prescribed fires can be justifiably argued to have limited impact on certain kinds of sites. However, a "prescribed" fire that gets out of control may have significant impacts.

Conditions to control a prescribed fire must be met and promises kept before an agency can conclude that it has sufficiently considered the potential impact of prescribed fire on cultural resources. Failure to meet prescriptions or protection of cultural resources as stipulated in a prescribed fire plan would not constitute compliance with federal and state preservation requirements.

*A lack of previously recorded sites in an APE does not mean that an agency can assume there are no historic properties present or that their identification efforts are complete.*

*The passage of time may also call for a reassessment of cultural resources previously determined Eligible or Not Eligible for listing in the NRHP.*

### **1.7.3 Predictive Modeling**

SHPO is currently testing a predictive model for precontact site locations in Montana. This model is based on nearest-neighbor algorithms of slope, distance to water, and recorded site locations. This predictive model will guide the advice that SHPO provides to agencies regarding inventory needs and the probability of precontact archaeological sites in the project area.



## 2 STEP TWO: Identify Historic Properties

In step 1, you initiated consultation by defining the undertaking and the APE (area of potential effect), identifying and involving consulting parties, and requesting a file search. If your project is an *undertaking* that is subject to consultation under state or federal laws and has the *potential to cause effects* to historic properties then consultation proceeds to Step 2: Identify Historic Properties.

Based on the results of the file search, SHPO makes recommendations regarding the adequacy of currently available information about the project area or the need to conduct further investigations. Scenarios when SHPO may or may not recommend further efforts to identify properties are discussed in Chapter 1 (1.4.2). Under 36 CFR800.4 the agency shall consider recommendations by SHPO and other consulting parties to make additional efforts to identify Historic Properties.

**Cultural resources** are the remains of past human activity, and may include buildings, structures, archaeological sites, rock inscriptions, earthworks, symbols, traditions, and cultural landscapes. The term, cultural resources is applied regardless of its National Register status.

**Historic Properties** are legally defined as *cultural resources* that have been determined eligible for, or are listed on, the National Register of Historic Places.

**Heritage Properties** is a term specific to the MTAA, which is equivalent to Historic Properties. It is defined as any district, site, building, structure, or object located upon or beneath the earth or under water that is significant in American history, architecture, archaeology, or culture.

**Site** is another inclusive term describing the location of a cultural resource, historic property, or heritage property.

Identification efforts need to include both cultural resources and historic properties. The process for identifying *cultural resources* in the APE may include methods like file search, field survey, historic map review, oral history interviews, or consultation with those familiar

*Historic Properties are legally defined as cultural resources that have been determined eligible for the National Register.*

with the area. However, identifying a *Historic Property* also requires evaluating the resource’s eligibility for listing on the National Register.

This section provides guidance to identify Historic Properties by:

- (1) recording cultural resources within the APE and
- (2) evaluating their eligibility for the National Register.

The presence or absence of cultural sites and their National Register eligibility status can determine whether consultation ends with a “No Historic Properties Affected” finding, or if consultation proceeds to Step 3, determining and evaluating effects.

## 2.1 CONFIDENTIALITY AND RESTRICTED INFORMATION

The Archaeological Resource Protection Act (ARPA) of 1979 prohibits releasing information concerning the nature and location of archaeological resources on federal lands. This restriction applies to releases of information to both consultants and the public. This is usually most pertinent to NEPA documents and cultural resource reports. In general, specific site locations may not be disclosed on maps intended for public release, like EAs or EISs.

*SHPO will not release site location information if there is any question regarding its use or disclosure.*

If consulting parties request SHPO File Search information for federal or tribal lands, they should first receive permission and instruction from the appropriate agency or Tribe on the use of that information. Similarly, under the NHPA Section 304, agencies have the responsibility to protect, and withhold as is prudent, information gathered in the course of their NHPA responsibilities. Confidentiality of information when gathered, or later requested, is further addressed at 36 CFR 800.4(a)(4) and .11(c). See also National Register Bulletin 29, *Guidelines for Restricting Information about Historic and Prehistoric Resources*.

State Heritage Properties are also protected from public disclosure when prudent in meeting the intent of the State Antiquities Act (MCA 22-3-423(12)).

Access to some site information in SHPO’s Cultural Resource Database may be restricted. Often, restricted sites include those that have burials, sensitive religious or cultural significance, or sites where the property owner has requested information be withheld. These site records or reports will have the word “Restricted” in the file name and will not be available for download. A minimal description and generalized location are available on the database. If you need additional information about a restricted site, contact the State Archaeologist.

SHPO will not release site location information if there is any question regarding its use or disclosure.

## 2.2 CONDUCTING A FIELD SURVEY

The terms *survey* and *inventory* are used interchangeably in this document and refer broadly to a list—or the process of compiling a list—of cultural resources, by type, age, and/or eligibility, within a given survey area or region. A field survey or inventory, performed by qualified personnel, is the primary method for identifying unknown cultural resources in the APE. This identification effort is predicated on

the definition of the undertaking, the APE, and initial information collection (such as file search results) illustrating previous inventory and sites in the vicinity.

Conversations with landowners, or land-owning agencies may provide insight into what types of cultural resources may occur in the area, and therefore help align qualified personnel and appropriate methodology for executing the survey work.

An intensive field survey seeks to identify **all cultural resources and historic properties in the surveyed area**, and **results in a detailed report** on each historic building, structure, district, object, or traditional cultural place, and the methods used to identify them. The basic requirement of a Cultural Resource Inventory Report is to establish a firm and clear basis for reporting agency findings to SHPO and other consulting parties. The following general guidelines for conducting a field survey will help consulting parties meet this requirement.

Sections 2.3 and 2.4 provide more detailed guidance for documenting sites, requesting Smithsonian numbers, and evaluating sites for eligibility to the National Register. Chapter 5 describes more specific considerations and expectations for reporting survey findings for review.

### 2.2.1 Timing: When to Survey

Agencies can avoid project scheduling delays by submitting projects and any new inventory work to SHPO for review as early in the planning process as possible. Identifying a project's potential to affect important cultural resources early allows agencies to exercise options which may not be available after planning has proceeded so far as to make modifications unlikely.

Weather and the seasonal timing of pedestrian inventories impact the efficacy of the work. SHPO does not consider archaeological inventory conducted when snow obscures the ground surface as valid.

### 2.2.2 Qualifications of Survey Personnel

The qualifications of survey personnel must match the type of inventory being proposed. Foresight regarding the type of cultural resources that are likely to be identified in an area can help ensure qualified individuals are enlisted to record those sites. For example, a survey of a downtown main street should include a SOI (Secretary of Interior)-qualified historic architect, and a survey in native prairie should include a SOI-qualified archaeologist. Surveys in areas with traditional cultural places should include a qualified traditional cultural specialist.

**Principal Investigator**—Cultural resource surveys must be carried out under the professional direction of a Principal Investigator (PI). The qualified PI must directly supervise inventory personnel. Failure to follow this prescription risks reports being returned, recommendations questioned, and other delays.

The PI should have documented experience identifying and recording Northern Plains and Rocky Mountain site types; and must meet SOI (Secretary of Interior) standards outlined in *Archaeology and Historic Preservation; Secretary of Interior's Standards and Guidelines, Federal Register 1983*, Vol. 48, No. 190, pages 44738-44739 for the specialty particular to the survey (archaeology, architectural history, historical architecture, or history). PIs often verify their qualifications by submitting a vita to SHPO. However, **SHPO does not have the authority or responsibility to certify professional consultants.**

**Paraprofessionals**—If an agency has paraprofessional training programs, SHPO must vet those programs to determine if the program qualifies for a formal agreement with SHPO that permits the use of paraprofessionals.

**Tribal Representatives**—Tribal representatives who do not meet the Secretary of Interior Standards for history or archaeology may still be qualified by THPOs to inventory or evaluate properties of religious or cultural significance to Tribes.

**Consultants**—Federal agencies, as well as applicants, often rely on the services of consultants and contractors to carry out research and prepare the necessary analyses and recommendations needed to inform the federal agency’s Section 106 review. But regardless of who carries out the studies and prepares the Section 106 documentation for review, the federal agency is responsible for ensuring that its content meets applicable standards and guidelines (36 CFR § 800.2(a)(3)).

*Qualifications of survey personnel must also match the type of inventory being proposed.*

SHPO maintains a list of cultural resource survey contractors, available at <https://mhs.mt.gov/Shpo/docs/Consultants.pdf>. Consultants and firms included on this list self-enroll using a public form and are not fully vetted by SHPO. Inclusion on this list does not represent a certification, endorsement, recommendation, or assumption of responsibility for the work of any consultant. There is no guarantee implicit or implied that any work produced by those on the list will meet federal or state requirements. Therefore, **the hiring party is responsible for making inquiries verifying professional qualifications appropriate for the survey.**

### 2.2.3 Survey Strategies and Agency Standards

Standard field survey methods are described in the Secretary of the Interior Guidelines and Standards at Federal Register, Part IV 48(2): 44716-44740. Specific and comprehensive guidelines for identifying and recording various categories of resources—such as buildings, structures, objects, and districts—are described in the National Register Bulletin series.

Federal agencies define different levels or classes of inventory for particular types of investigations. When conducting inventory, survey testing, and recording sites on public lands, consultants must be familiar with the specific requirements established by the respective federal and state land managing agency. Agencies often refer to survey strategies as Class I (document survey), Class II (windshield survey), and Class III (pedestrian survey). Because these terms are inexact and vary between different entities, inventory reports must discuss the specific methodology used during the survey.

Whichever methods are selected, they should be described in detail within the Cultural Resources Inventory Report. Be sure to include: rationale for selecting survey techniques; justification for any deviations from transect standards or APE coverage described below; descriptions of archival or legal documents that were referenced, or other research; and explanations for why you did or did not conduct subsurface testing.

To identify cultural resources and historic properties in the APE, the survey area should generally include the entire area where direct effects are likely to occur. When circumstances require deviations from standard survey coverage and methodology, clearly and thoroughly describing and documenting surveyed areas is especially important.

**In the report, be sure to:**

1. Clearly describe areas that were and/or were not surveyed and mark the location(s) on a 7.5' quadrangle map.
2. Provide legal descriptions and total acreage (rounded to the whole acre) for the area(s) surveyed.
3. In undertakings with more than one survey area, report acres for **each** survey area.
4. If the entire APE, or portions of the APE, was not surveyed, explain why.
5. If more than one survey method was used, indicate on the map their use in each survey area.

Surface visibility conditions (GSV or Ground Surface Visibility) throughout the survey area must be described in detail in the report, especially when conditions affect variations in methodology. Photos of the ground surface, exposures and vegetation must be included in the report. Incomplete information on ground surface visibility may delay the review process.

**2.2.3.1 Survey Transects and APE Coverage Standards**

Transects for an intensive field survey should, in general, be no more than 25 meters (approximately 80 feet) apart and should (in the absence of explicitly stated reasoned considerations) cover the entire area of direct effects. Any deviations from complete Direct APE survey coverage or the advised 25m transect interval standard need to be justified in the report narrative and the deviation(s) located on a 7.5' quadrangle map.

Some common reasons for deviation from standard transect spacing or APE coverage may include:

1. Slopes greater than 30% grade
2. Plow zone over upland glacial till
3. Areas historically built of fill material
4. Poor surface visibility
5. Dense unsafe deadfall-covered forests

**2.2.3.2 Surveying Beyond the APE**

When a site is located near or on the edge of the APE, and access is permitted, site boundaries should be inventoried and mapped, both inside and outside the APE, to properly record the nature and qualities of the cultural resource. Similarly, sites lying adjacent to but outside the APE should be recorded to confirm that the boundaries do not extend into the APE, or more importantly to demonstrate that the qualities and characteristics of the site will not be inadvertently affected. In which case, the definition of the APE will need to be adjusted accordingly.

**2.2.3.3 High Probability Areas**

Some landforms warrant more intensive survey coverage due to a higher probability of cultural resource occurrence. If any of the following high-probability areas are excluded from an inventory, the rationale needs to be provided in the report: rolling finger ridges, promontories, stream benches, fluvial-glacial terraces, plateau margins, ridge crests, saddles and approaches, confluences of streams (current and past), stream crossings and approaches, confluences of streams (current and past), stream crossings and

approaches, resource procurement features such as lithic sources/outcrops, ethnobotanical plant communities, mineral and paint outcrops, and rimrocks, and locations of reported or known sites.

#### **2.2.3.4 Transportation Rights-of-Way**

A transportation or road right-of way does not always equate with a level of disturbance that would eliminate the need for inventory. If prior disturbance is suspected, consult with SHPO to determine if an inventory is warranted.

Cable placed entirely within a constructed drainage or borrow ditch parallel to a maintained road or within the existing prism of a constructed surface (top of cut to toe of fill), may not warrant an intensive inventory. However, in this circumstance, SHPO requires a field check of previous disturbance areas along a staked project line, and a site records check (File Search).

#### **2.2.4 Maps**

Maps displaying accurate locations for project boundaries, affected areas, and cultural resources are critical, particularly if avoidance is proposed. Cultural Resource Inventory reports must include maps at a scale of 1:24,000 overlaid on the relevant USGS 7.5' topographic maps.

Maps should unambiguously convey the following elements:

1. Map title and legend that clearly convey the map's intent
2. Boundaries for the project area, APE, and surveyed area(s); clearly distinguish between the APE and survey area, whether or not these have the same boundaries
3. Location of known cultural resources within ¼ of a mile of the project area (located by survey or identified in the file search), including Isolated Finds (IFs)
4. Location of any subsurface testing
5. Ownership or administrative boundaries
6. Quad name for relevant 1:24,000 (7.5') topographic map
7. Legal description (township, range, and section)
8. Boundaries of previously disturbed areas, areas of proposed project disturbance, as well as proposed design changes or reroutes for avoidance must be clearly mapped in relation to known and newly identified cultural resources.

Additional exhibits may be warranted during site evaluation or effect determination such as:

1. Site distribution maps showing the spatial relationships between sites in the undertaking area
2. Aerial imagery of the project area
3. Smaller scale map showing the entire project area or indexing the location of other maps
4. larger scale maps detailing areas of high disturbance or avoidance methods
5. Archaeological probability areas as they apply to the APE
6. LiDAR imagery

SHPO recommends using GPS to record site datum and features. Digital shapefiles for site boundaries, inventory areas and the APE are required and should be formatted as polygons and submitted with the required digital copy of the report and site records.

When creating maps, follow modern cartographic design elements and readability rules, as described by the Geographic Information Technology Training Alliance and ESRI. Maps that are difficult to read will be returned to the agency with a request to improve legibility. Conveying too much information on a single map can make it difficult to read—presenting information on multiple maps may be preferable.

### 2.2.5 Photographs

Photographic documentation conveys a visual perspective and can improve understanding of findings and field conditions during an inventory. Digital photography technology provides ample opportunity for survey personnel to collect quality photographs that sufficiently document findings during a field survey. SHPO may require additional photographs (and fieldwork) if photographic documentation does not convey the necessary information.

Cultural Resource Inventory Reports should include at least one photograph of:

1. An overview of the APE
2. Each site within the APE
3. Relevant site details
4. Each feature within the site

Sketch maps, plan drawings, engineering schematics, and other graphical representations of the undertaking, the APE, or sites are encouraged, but not always applicable.

**APE Overview Photographs** help convey the general character of the project area. Images of major landforms, ground surface visibility, and any obstacles to inventory noted in the report (such as impassable vegetation or unsafe conditions which made survey impossible in an area) are essential to communicating visual perspectives from the field to the report.

**Site and Feature Photographs** must allow SHPO to generally corroborate on the site's type, condition, and significance. Photographs of site details and features may include: building foundation, window and door layout, construction techniques (e.g. notching on a log building), diagnostic artifacts, modern changes or disturbances, damage to site features (erosion, vandalism, etc.), and natural exposures used to evaluate subsurface potential or deposition.

**Photo Captions** should accompany each image and describe the subject of the photograph, indicate cardinal direction the photographer is facing, provide the date the photo was captured, and identify the photographer.

### 2.2.6 Subsurface Testing During Inventory or Survey

Initial survey and recordation will be based primarily on surface observations. Any excavation of archaeological sites located on federal, tribal, or state land without prior approval and necessary permitting violates federal (16 U.S.C. 470) or state law (MCA 22-3-432).

Procedures for collecting that information should be agreed upon before the inventory or subsurface testing begins. If partial excavation, or testing, by a professional archaeologist will be necessary, consultation regarding the scope and nature of that testing should involve the landowner or land managing agency, Tribes, SHPO, the proponent, and consultants. Based on this consultation, minimally destructive and necessary testing during inventory may be agreed upon. SHPO suggests submitting an archaeological testing plan to the State Archaeologist for review and comment. This allows SHPO to provide input regarding if the proposed plan would be sufficient to determine the site's eligibility.

*Shovel testing is generally not sufficient to demonstrate lack of, or presence of, intact cultural deposits.*

**Shovel probing, augering,** or some other preliminary subsurface testing method may be acceptable as a step in intensive inventory. Such probing can be useful in exploring subsurface potential, substantiating surface observations, or used where vegetation obscures the ground surface. SHPO regards shovel testing and augering as being most useful in delineating site boundaries or as a means of evaluating the potential for soil deposition. Shovel testing is not generally sufficient to demonstrate the lack of, or presence of, intact cultural deposits.

Using **natural subsurface exposures**— like cutbanks, rodent holes, tree tips, etc. to assess subsurface deposits may also be useful but is seldom more than a complementary source of information and is seldom adequate as a primary source of information about subsurface potential. When used to assess subsurface potential, natural exposures should be described in detail, mapped, and photographed. Similarly, any combination of systematic and intuitive shovel testing should be described in detail, with rationale in the report.

Where surface visibility is low, SHPO may recommend a systematic shovel testing approach such as tests at 30-meter intervals on survey transects, but numerous probes should be based on consultation with SHPO and the agency.

SHPO recommends against extensive testing during survey within sites, though some testing is often warranted as an exploratory device within and between features or activity areas and to determine boundaries. All decisions to test or not to test should be justified. All testing spoil should be screened. The location of testing must have UTM coordinates and be referenced to a site datum located on the site plan map and on the USGS site location map.

There are also cases where formal square meter test units are more appropriate than shovel probes during inventory. However, formal test units will usually occur during eligibility evaluations, after the SHPO and other consulting parties have had a chance to comment on a testing design.

The SHPO recognizes that an appropriate testing proposal will be one that strikes the often-delicate balance between obtaining an accurate assessment of a site's information potential, and the destructive nature of obtaining that information. The ACHP's Notice of Guidance *Recommended Approach for Consultation on Recovery of Significant Information from Archaeological Sites* (Federal Register Vol.64, No. 95, 27085-7) is written primarily for those needing to address adverse effects but also offers useful background for the early steps of consultation including testing.

In meeting the balance, early consultation among the SHPO, tribes, agencies, proponents, and others is necessary to ensure that the fullest range of alternatives remain open for consideration. Extensive excavation or use of heavy equipment such as backhoes in a testing program without appropriate

consultation may render SHPO comment meaningless and precipitate a need for ACHP participation (see 36 CFR 800.9(c)).

## 2.3 DOCUMENTING SITES

If cultural resources—buildings, structures, objects, or districts that are at least 50 years old—occur in the APE of the proposed undertaking, they must be documented. Their eligibility for the National Register will determine if the resource is—by definition—a “Historic Property.”

### 2.3.1 Define the Resource / Site Type

Cultural resources fall into one of two temporal categories—precontact or post-contact—depending on the time-period they were created. Precontact sites are those that were created **before** Europeans brought continent-wide changes to what would become Montana, whereas post-contact sites, often called Historic sites, are those resources that were built or created **after** these changes and are at least 50 years old.

Sites are further classified as Archaeological, Architectural, and Traditional Cultural Properties (TCPs). A “district” refers to a combination or collection of sites with a shared historic context. Paleontological resources—fossilized remains, traces, or imprints of organism—also require consideration.

Qualified personnel who are familiar with and understand eligibility criteria and considerations specific to the type of resource should prepare site documentation. This helps ensure the appropriate recordation methods and forms are used, and sufficient information is provided for eligibility determination. Section 2.4.3 discusses special considerations when documenting and assessing eligibility for various types of sites.

### 2.3.2 Creating a Site Record and Requesting Smithsonian Numbers

Complete site records are key to effectively recording, documenting, and tracking cultural resources in Montana—and to obtaining a Smithsonian number. Site record forms, appended by high quality photographs, maps, and GIS shapefiles of the site boundary, fulfill the requirement for requesting a Smithsonian number—a prerequisite before concurrence on a site’s eligibility or effect determination.

The general recommendation for when to record a resource as a “site” using a site form is: if a feature is present, it must be recorded as a site.

However, as per SHPO guidance, the following **do not require a site form** or state Smithsonian number:

1. Cultural resources less than 50 years old (unless they are of exceptional significance and may be eligible for the National Register)
2. Cultural resources without definable locations
3. Individual artifacts or features that are part of a larger site already assigned a Smithsonian number
4. Isolated non-historic age features (such as a field clearing pile less than 50 years of age) do not warrant site numbers. However, they must be described in the report narrative.

For those features that DO require a site record form, the following overview will help you decide which form is appropriate to use. Appendix E includes detailed instructions on where to find and how to complete forms for various types of sites.

### **2.3.2.1 Cultural Site Record (CS-R) and Architecture/Engineering Record (AE-R)**

SHPO provides standard forms for documenting cultural resources. In general, the Architecture and Engineering Record (AE-R) is used to document buildings and structures; and the Cultural Site Record (CS-R) is used for everything else—including railroads, ditches, roads, and other non-architectural sites. Exceptions include Isolated Finds (IF-R), Stone Circles (SC-R) and Paleontological Sites (PALEO-R), which are recorded using forms specific to these unique resources.

Findings that should be recorded as a site and assigned a Smithsonian number include, but are not limited to:

1. **Precontact archaeological surface artifact scatters** of five or more non-diagnostic precontact objects located within 50 meters of each other
2. **Two or more diagnostic artifacts** located within 50 meters of one another
3. **Minimal artifact scatters located with some feature of other cultural activity** such as a hearth or stone circle
4. **Features such as precontact hearths or cairns**, unless they are included as part of a larger, bounded and numbered whole, in which case they should be individually described and photographed as part of that site or district form.
5. **Paleoindian period points or other exceptionally rare isolated finds**
6. **Historic debris** scatters with ten or more objects located within 50 meters of one another. Though if any items are diagnostic or appear to be associated with a feature, the number of objects can be less.
7. **All historic features, including isolated prospect pits outside known districts.** However, if several pits are located within 100 meters (about 330 feet) of one another or are located on the same landform and all appear to date from approximately the same period (based on vegetation growth or other indications) a single site number will usually be appropriate.
8. **Each historic building and structure**
9. **Bounded historic districts**, or a collection of individual sites or components with a thematic connection
10. **Linear features** that cross county lines and extend beyond the APE need to be recorded in their entirety— see section 2.3.3 for expectations when recording these sites.

### **2.3.2.2 Isolated Find Record (IF-R)**

**Artifact scatters less dense than the conditions described above**, such as single artifact finds, qualify as isolated finds (IF). A single item which was broken into multiple fragmentary pieces should be counted as one for the above metrics. For example, a single historic plate that broke into 12 pieces should be documented as one IF.

Exceptionally rare or unusual artifacts warrant individual Smithsonian numbers; however, the majority of IFs do not require Smithsonian numbers. A single Paleoindian period point is an example of an exception that warrants a site number.

Isolated Finds (IFs) must be plotted on survey maps and discussed in reports. Montana SHPO has an optional Isolated Find Record (IF-R) that can be used to document IFs, however, this same information can be provided in the body of the report in lieu of the formal form. The report must include a description, photo, and a map with the location of the IF.

### **2.3.2.3 Stone Circle Record (SC-R)**

The Stone Circle Record provides a recommended attribute table for sites with many stone circles or cairns present. A stone circle is a descriptive term for a series of stone arranged in a circle, crescent, or oval shape. Some stone circles have known functions, such as tipi rings, sweat lodges, or ceremonial sites; however, when first identified it is often difficult or impossible to assign a specific function to a stone circle. The SC-R form should be used in conjunction with the CS-R form, when documenting sites with multiple stone circles or cairns.

### **2.3.2.4 Paleontological Site Record (PALEO-R)**

The Montana Antiquity Act requires consideration of paleontological resources. When fossilized remains, traces, or imprints of organisms occur within the APE, they must be recorded and assigned a site number. SHPO recommends using the Paleontological Locality Record (PALEO-R).

### **2.3.2.5 Districts**

A “district” refers to a collection of individual sites or components with a thematic tie, such as common site type, age, etc. The collection of sites adds significance to the whole. Though each site within a district may be recorded on its own site record form with a unique Smithsonian number, a bounded historic district may also receive its own site number. Those reporting on a district must explain the rationale for bounding a district, even if boundaries are minimally defined by landform.

### **2.3.2.6 Human Remains**

If human remains or a burial is suspected, immediately cease all activity at the location and call law enforcement. If the remains are located on federal land, then the landowning agency will complete responsibilities under the Native American Graves and Repatriation Act. For private and state land, the coroner must notify the State Archaeologist or the nearest Burial Board member within 24 hours. See Chapter 6 for more information on human remains and other inadvertent discoveries.

## **2.3.3 Smithsonian Numbers / Site Numbers**

The Smithsonian system is a nationwide registry system consisting of three parts: state number + county two-letter designation + consecutive number. It is often referred to as a Smithsonian trinomial or smith number for this reason. The state number for Montana is “24.” Examples of Smithsonian numbers for properties in Montana include 24YL0001 (Pictograph Cave) and 24DL0290 (Anaconda Smokestack). More than 65,700 Smithsonian numbers have been assigned to sites or properties in Montana, ranging from

*All cultural resources more than 50 years old in the APE must be documented on a site record form and assigned a Smithsonian number. A Smithsonian number must be obtained before concurrence on an eligibility or effect determination is requested.*

single buildings/sites to neighborhood districts made up of many different houses.

Before requesting concurrence on eligibility or effect determination, agencies or consultants must request from SHPO a Smithsonian number for the site. SHPO will consider and assign Smithsonian numbers to sites with complete site records and GIS shapefiles of the site boundary. This is a separate process from submitting the final report and forms for SHPO review. Sites should already have Smithsonian numbers when the project report and site forms are sent to SHPO for concurrence on eligibility or effect.

A complete site record includes a site form, USGS 7.5' Quad map, and current site photographs combined into a single PDF. Digital site record PDFs and GIS files must be formatted and submitted as per instructions in Appendix D to receive a Smithsonian number.

### **2.3.3.1 Linear Sites**

Linear sites and features crossing county lines present a unique numbering problem because Smithsonian numbers are county specific. SHPO divides these sites on county lines with each segment getting its own county-derived number. Site forms and reports must cross-reference the other county's Smithsonian numbers.

Linear properties should be recorded for their full extent—though field examination for the full extent of the resource is not required. Portions of the route of the linear property outside of the project APE may be based on historic documents, general knowledge, maps, aerial photos, etc.

A complete legal description of all crossed townships, ranges, sections, and maps showing the full extent of the property within the county is required. A USGS map or maps outlining the entire route of the linear resource is expected. For example, when recording canals/laterals/ditches the entire site from point of diversion to its terminus. If the ditch extends into a different county, only the lineal feature within that county must be shown. The portion of the linear feature within another county should be recorded on a separate form and receive its own Smithsonian number. GIS shapefiles for the extent of the linear feature(s) are also required.

Recording linear sites in their entirety avoids future duplication of segment numbering and facilitates assessment of the complete property. Significant features of identifiable distinction such as major laterals or dams on irrigation systems or Civilian Conservation Corps (CCC) retaining walls along highways should be documented on individual forms and given unique numbers in addition to a number for the larger linear property of which the feature is a part.

There are lineal sites that cross large tracts of land and present challenges when defining the width of these resources. Travel corridors did not typically have people walking long distances in a single-file line, and instead a dispersed area would be used. Two examples are the Lewis and Clark National Historic Trail and the Nez Perce Trail. When travel corridors are mapped in SHPO's database we require a width of the corridor. The site form must explain how both the length and width were determined. SHPO recognizes that associated features of these sites and effects to these sites may be present far outside their mapped widths. These individual associated features may receive a separate Smithsonian number than the travel corridor's number. For example, Traveler's Rest is a specific campsite and key location along Lewis and Clark's Journey, and it is recorded under Smithsonian 24MO0176. The Lewis and Clark National Historic Trail in this area is documented with Smithsonian 24MO1667 and crosses through and beyond the Traveler's Rest site location.

## 2.4 EVALUATING SITE ELIGIBILITY FOR THE NATIONAL REGISTER

A cultural resource’s eligibility for the National Register (NR) determines if it is considered a “Historic Property.” Therefore, to identify historic properties in the APE, cultural resources identified during a field survey must be evaluated for significance and integrity under criteria established by the National Park Service. **Remember: A Smithsonian number is required before eligibility review!** (see 2.3)

Once an adequate survey is completed and sites in the APE recorded, those sites must be evaluated for historic significance. Unless the Agency stipulates that the project is redesigned so that all effects are completely avoided (and there is SHPO concurrence with the adequacy of avoidance), the agency must submit a written request for SHPO’s review of the agency’s determinations of eligibility.

Under both state and federal regulations, determinations of eligibility are made by applying the criteria for listing in the National Register to the qualities of significance and integrity identified for each cultural resource. All four of the significance criteria and all seven of the aspects of integrity must be considered when evaluating the eligibility of a site. Only after the question of significance is answered does the agency consider if the site retains enough integrity to convey that significance. If the site demonstrates both significance and integrity the site should be determined eligible for listing in the National Register.

“Determination” refers to the decision about whether a site qualifies (is eligible) or does not qualify (is not eligible) for listing in the NR. For the purposes of 36 CFR 800, eligible properties are referred to as “Historic Properties,” encompassing all types of properties including precontact archaeological or Traditional Cultural sites. In accordance with Executive Order 11593, unevaluated cultural resources must be treated as if they were found eligible for the National Register.

After the agency makes its determination, it must next seek SHPO concurrence in that determination. If the agency and SHPO cannot reach agreement or concurrence on eligibility, the agency must request the assistance of the Keeper of the National Register to resolve eligibility. The Keeper’s decision is final. Also, if the SHPO does not provide comments on a request for concurrence on eligibility within 30 days, the agency may assume SHPO concurrence and proceed accordingly.

For SHPO to review agency eligibility evaluations and provide concurrence, completed site record forms and GIS shapefiles of the site boundary must be submitted digitally to SHPO. As mentioned in Chapter 1, a site determination made more than 10 years ago may need reevaluation.

The entire site must be inventoried to evaluate it, and current photos and information included on the appropriate form. AE-R forms should be used when documenting standing buildings. CS-R forms should be used in all other cases. Smithsonian site numbers are assigned to all properties, which allows SHPO to track the property’s eligibility in the State Antiquities Database.

The request for SHPO review of report adequacy and/or eligibility assessments should be explicit in a submission letter that accompanies the inventory report or site forms. Regardless of any consultant’s recommendations, the agency should make their own evaluations clear in the submission letter to the SHPO with their rationale.

*...it is the sole responsibility of the agency to reach and state their own findings and request the comments or concurrence of SHPO.*

### 2.4.1 Eligibility Determinations: Not Eligible, Eligible, Unevaluated, and Unresolved

Specific and explicit agency determinations and findings are required during both eligibility evaluation and effect assessments, as well as for all stipulations of avoidance, should projects require redesign to avoid historic properties. **Each cultural resource will have a single eligibility status.** The site is either Not Eligible, Unevaluated, or Eligible for inclusion in the National Register of Historic Places. Terms such as “potentially eligible” or “partially ineligible” can confuse the issue and the consulting parties. The agency should only use the terms Not Eligible, Unevaluated, or Eligible when seeking concurrence on site eligibility statuses.

Please remember that SHPO focuses on sites and structures that are either *listed* in the National Register of Historic Places, *eligible* for the National Register, or unevaluated and may be determined to be eligible in the future. Until a site is formally determined *not eligible* for listing in the National Register, it must be treated as though it were eligible. SHPO's database reflects the official eligibility of a site, eligibility statements on site forms or reports reflect the recommendation of the author and may not match the official eligibility status of a site.

By statute and regulation, evaluations of eligibility are made by agencies directly, in consultation with SHPO, and sometimes the Keeper. While consultants may make recommendations, the agency in consultation with SHPO (or the Keeper alone) makes formal eligibility determinations in the Section 106 process.

An official determination requires sufficient documentation and SHPO agreement (concurrence). A qualified professional who understands the resource and eligibility criteria should document sites so that sufficient and appropriate information is provided (See 2.2.2). When an agency determines a site as eligible for inclusion in the National Register, they must state under which NR criteria that site is eligible (See 2.4.2).

Again, early planning and consultation well in advance of undertaking activities is prudent. If the undertaking is not redesigned to avoid impacts to cultural resources, identification efforts must continue until eligibility is resolved for all properties located in the defined APE.

The following four simplified scenarios illustrate most situations where sites are located during inventory and cannot be avoided. Overlap among them is also common in large undertakings where several sites may be located over a wide area.

#### 2.4.1.1 Not Eligible

If the SHPO agrees or “concur” with the federal or state agency that the evaluated resources are not eligible under National Register criteria, the SHPO will respond in writing to the agency, concurring with the “Not Eligible” determinations.

If ALL of the cultural resources found in the APE are determined to be **Not Eligible** for the National Register, then the agency provides “No Historic Properties Affected” documentation as described in Chapter 5 and at 36 CFR 800.11(d), which is subsumed in SHPO report and eligibility determination submission requirements. Consultation may then conclude with a finding of “No Historic Properties Affected” (See 3.3). If SHPO concurs or does not object within 30 calendar days, the Section 106 process is concluded, and the project proceeds as directed by the agency.

### **2.4.1.2 Eligible**

If any cultural resources located within the APE are determined to be **eligible** for the National Register, and SHPO concurs, then “Historic Properties” have been identified, and parties will explore how to minimize the effect of the undertaking most realistically on these Historic Properties in an effect assessment and finding (step 3).

### **2.4.1.3 Unresolved: Additional Information Needed**

In some cases, the eligibility of sites is not readily resolved with the information provided in an initial inventory report. For example, precontact archaeological sites may require additional subsurface testing or Tribal consultation, or historic buildings may require additional recordation or archival research to resolve eligibility.

When requesting concurrence on an eligibility determination, it is important for the agency or applicant contracting for a cultural resource survey to ensure that its consultation provides sufficient information to convey and justify an eligibility determination. If the SHPO finds site forms or inventory reports insufficient for the purposes of resolving eligibility, we will ask the agency for additional information. This may require additional fieldwork and time.

### **2.4.1.4 Unresolved: SHPO and Agency Disagreement**

**For Federal Agencies** - Under Section 106, determinations of eligibility are ultimately the responsibility of the federal agency, but the agency is required to reach this determination in consultation with the SHPO (and others), in what is known as a Consensus Determination (CD).

If a federal agency and SHPO cannot agree upon a determination, despite continued consultation, the agency must then request a formal determination of eligibility (DOE) from the Keeper of the National Register of Historic Places before proceeding. The Keeper’s decision regarding eligibility is final.

- If the Keeper determines the property eligible, then consultation proceeds to the consideration of effect as described next in Steps 3 and 4 of this guide.
- If the Keeper determines the property Not Eligible, then SHPO is notified of that determination, and the agency proceeds as described earlier for situations involving no eligible sites.

Before going to the Keeper, the agency may also consider SHPO comments and resubmit their findings with additional information or rationale for reconsideration by SHPO. The Keeper, if consulted for resolution, may also request additional information before making a final decision.

**For State Agencies** - Under the Montana State Antiquities Act, state agencies are directed to consult with the SHPO on site significance for sites located on state land. SHPO and state agencies must jointly determine whether properties on state land are significant Heritage Properties. Pursuant to the State Antiquities Act, the findings of the SHPO during consultation may be appealed to the Montana Historical Society Director or subsequently to a district court (MCA 22-3-429 (5) - (7)).

*The process of determining eligibility is best facilitated by providing our office with all the information that is available about a site. Remember, your site record may be the only documentation that the resource ever receives.*

## 2.4.2 Significance and Integrity: Eligibility Criteria and Considerations

Properties are eligible when they are found first to meet at least one NR criteria of evaluation (significance), and second to retain sufficient integrity to convey that significance. Evaluation of significance and assessment of integrity are two separate and sequential operations. Significance and integrity for properties involved in either state or federal undertakings are evaluated according to the National Register criteria and guidance.

Historic Properties determined by consensus to be Eligible for National Register listing are not actually listed in the Register but for the purposes of Section 106 are treated as though they were. To be listed in the Register, properties go through a separate nomination and review process involving the Montana Historic Preservation Review Board and the National Park Service.

### 2.4.2.1 Significance Criteria

To qualify for the National Register, a property must be significant; that is, it must represent a significant part of the history, architecture, archaeology, engineering, or culture of an area, and it must have the characteristics that make it a good representative of properties associated with that aspect of the past.

The significance of a historic property can only be explained when placed within its historic context. Historic contexts are those patterns, themes, or trends in history under which a property's significance is determined. Historic contexts and a property's significance occur at the local, state, and national level. A property can be significant within more than one historic context. It is also important to compare related properties within that context.

Four criteria established by the National Park Service allow a property to express its significance. These are known as Criteria A, B, C, and D. A site may be significant under one or multiple criteria.

#### **CRITERION A: Association with EVENTS that have made a significant contribution to the broad patterns of our history.**

Examples of properties significant under Criterion A include: the site of a battle, a hilltop associated in oral historical accounts with the founding of a Native Nation or society, a trail associated with western migration, or a downtown building representing a town's growth as the commercial focus of the area, a stone circle site contributing to patterns of precontact landscape use.

#### **CRITERION B: Association with the lives of PERSONS significant in our past.**

Examples of properties significant under Criterion B include: the home of an important labor organizer, the studio of a significant artist, or the business headquarters of an important industrialist.

Properties eligible under Criterion B must be associated with a person's productive life, reflecting the time period when he or she achieved significance. In some instances, this may be the person's home, but in other cases a person's business, office, studio, or laboratory may best represent his or her contribution.

**CRITERION C: Embodiment of the DISTINCTIVE CHARACTERISTICS of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction.**

Examples of properties significant under Criterion C include: a house or commercial building representing a significant style of architecture, a designed park associated with a particular landscape design philosophy, a bridge or dam representing engineering or technological advances, or the only remaining example of a standard design type

**CRITERION D: Yielded, or may be likely to yield, INFORMATION important in prehistory or history.**

Examples of properties significant under Criterion D include: an archaeological site with sufficient material remains to test a hypothesis, corroborate current research, or reconstruct the sequence of archaeological cultures. An irrigation system significant for the information it will yield toward early engineering practices may be eligible even though it is now filled in and no longer retains the appearance of an open canal.

### 2.4.2.2 Integrity Criteria

Integrity is the ability of a property to convey its significance. Seven aspects of integrity combine to produce the necessary integrity thresholds:

Location	place where the historic property was constructed or the place where the historic event occurred
Design	combination of elements that create the form, plan, space, structure, and style of a property.
Setting	physical environment of a historic property
Materials	physical elements that were combined or deposited during a particular period of time and in a particular pattern or configuration to form a historic property.
Workmanship	physical evidence of the crafts of a particular culture of people during any given period in history or prehistory.
Feeling	a property’s expression of the aesthetic or historic sense of a particular period of time
Association	direct link between an important historic event or person and a historic property.

Integrity is based on significance: why, where, and when a property is important. Only after significance is fully established can you proceed to addressing the issue of integrity (NR Bulletin 15:45).

As described above, the evaluation of significance and integrity are related but different steps. One cannot assess integrity without first establishing significance by defining what qualities the property should convey. Moreover, once the physical features are recorded, and the property’s significance identified within a historical context, the recorder of the property also must determine if the significance occurs at the local, state, or national level. Only with that information in hand may one then proceed to define the

essential physical features that must be present for the property to represent or convey its significance and retain its integrity.

Integrity then is not simply the physical condition or appearance of a property as it is recorded in the field – it must be related to the criteria of significance identified by research for the property and its level of significance. Comparison with similar properties within the same context and similar patterns of association may also be useful in assessing integrity. A property with diminished integrity that is one of the only remaining examples of its type is still Eligible.

The necessary and essential physical characteristics of any given property can vary by criteria of evaluation, level of significance and the overall ability of the property to convey or identify that significance. Inadequate evaluations of eligibility often result from equating integrity with physical condition alone or attempting to assess integrity without having first established significance.

### **2.4.3 Considerations for Eligibility of Various Historic Property Types**

Discussion of all aspects of eligibility evaluation and documentation for various property types is beyond the scope of these guidelines and we refer the reader to the NPS Bulletin series for more information.

The NHPA defines and refers to all places Eligible for listing in the National Register whether of historic, precontact, or traditional cultural importance as "Historic Properties." These guidelines also use the term "Historic Properties" in this general sense to refer to all eligible properties, but also use the terms "archaeological sites", "historical sites", and "traditional cultural properties or sites"— to refer more narrowly to different property types—when specific property categories are useful to achieve clarity.

Considerations for property eligibility vary somewhat by each property category; however, eligibility determinations for every property must consider and document the appropriate historical context, criteria of significance, and integrity. The process of determining eligibility is best facilitated by providing our office with all the information available about a site. Remember, your site form may be the only documentation that the resource ever receives.

All properties, regardless of type, must be evaluated under all four criteria. Furthermore, consultation with Native Nations or other consulting parties may be required to evaluate some properties. See ACHP Traditional Knowledge Bulletin 2021

As with all property types, the evaluation of the significance of historic places or sites is made within a historic context such as early exploration, mining, transportation, or homesteading. Within certain contexts, "nondescript" or "dilapidated" structures, those of modest or inconspicuous scale, and those of vernacular design and representative quality rather than high art, may also have significance and may convey that significance differently than properties evaluated as works of a master or of high artistic value.

There is no site type precluded from National Register Eligibility. There are eligible two-tracks, dumps, mine pits, roads, cabin remains, and utilitarian storage buildings.

#### **2.4.3.1 Precontact Sites (created before ~1500)**

Section 2.3.1 distinguishes two major categories of sites by the time period within which they were created, where precontact sites are created before Europeans brought continent-wide changes (around

1500), and historic sites are created after the changes occurred. Examples of precontact sites include stone circles, trails/travel corridors, buffalo jumps, rock art, and traditional plant harvesting areas. In general, precontact sites are most often archaeological sites, Traditional Cultural Places, or both.

Because precontact sites were created by Indigenous Peoples, evaluating them often requires consultation with Native Nations. Native Nations possess special expertise in assessing the eligibility of historic properties that may have religious and cultural significance to them (CFR 800.4(c)(1)).

#### **2.4.3.2 Historic Sites (created between ~1500 to 1975\*)**

Historic sites are those created after Europeans brought continent-wide changes to what we now call Montana, but not within the past 50 years. Examples of historic sites include: a home built by an Apsaalooke man at Fort Parker, a railroad, a 1970 commercial building, a mine, an irrigation ditch, a bridge, or a scatter of artifacts. Historic sites are defined by the time period they were created, not by the ethnicity of the builders or the purpose behind construction. Historic sites may be architectural, archaeological, or Traditional Cultural Places.

Historical sites that are not archaeological are commonly listed in the Register because of the significance of one or more historic buildings, structures, or objects. Usually, historic sites will be considered significant if they meet one or more of the first three National Register criteria listed in section 2.4.2 (A-C). However, sometimes historical sites, especially those with archaeological components, may also be significant as locations containing valuable information about past human activities (Criterion D).

Historic sites significant under criteria A, B, or C must possess several, and usually most of the seven aspects of integrity - location, design, setting, materials, workmanship, feeling, and association (NR Bulletin 15:44).

Eligibility recommendations should explicitly place properties within a context and apply the appropriate criteria of significance. They should also document all basic structural elements (e.g., windows, roofs, facades, trusses, abutments, supporting piers, etc.) and contributing features while assessing integrity. The importance of excellent photographs or photocopies cannot be overstated in conveying the integrity of historic sites.

Please use AE-R forms for documenting historic buildings, bridges, and structures; use CS-R forms to document railroads, ditches, roads and other non-architectural historic sites. More information on determining eligibility of irrigation ditches is included in Appendix H.

#### **2.4.3.3 Districts**

“District” refers to a collection or combination of sites with a shared historic context. An individual building or site may not meet the National Register criteria of significance and integrity individually but does meet criteria when considered as part of a greater whole, or eligible district. In other words, sites may contribute to eligible historic districts, even if they are not eligible as a standalone individual site.

When identifying cultural resources in an APE, consideration of whether individual cultural resources may in fact be part of an eligible larger resource is important. Those resources may be evaluated as contributing or non-contributing to a Historic District (NR Bulletin 15:5-6, 16:15, see also NR Bulletin 24). Districts may extend beyond an APE, making assessment of Eligibility and Effect difficult if the nature and qualities of the Historic District itself are poorly recorded and understood.

SHPO cannot meaningfully comment on whether a property contributes to a “potential district”. If the district has not been recorded and assigned a Smithsonian number, SHPO lacks the required information to assess this potential.

#### **2.4.3.4 Architectural Sites**

Architectural sites are buildings or structures designed and constructed by humans. Most architectural sites in Montana are historic in nature. The few remaining precontact architectural sites, such as wickiups, are exceedingly rare. Architectural sites include residential buildings, commercial buildings, fire lookouts, bridges, and agricultural structures.

The most common architectural styles found in Montana are associated with the late nineteenth century and beyond. Many of our historic main streets contain excellent examples of buildings in the Western Commercial style, while residential areas run the range from Queen Anne to Craftsman to Ranch style houses. Just because a building is utilitarian or vernacular in style does not preclude National Register eligibility.

When photographing architectural sites, be sure to capture each of the structure’s façades. When taking a photo of a building’s elevation, make sure that the whole elevation is visible in the frame. Consider taking close-up shots of character-defining features like windows, doors, roof lines, and other elements unique to the building. Label a map showing the location and direction of each photo of the building. If proposing changes to an architectural property, include photographs of the features or elements that are going to be changed. Include drawings, spec sheets, and any other attendant information that might be necessary to convey how the building will change and how changes will impact its historic integrity.

While Criterion C is the most obvious contender for National Register eligibility for an architectural site, all four criteria can apply as demonstrated by the following examples.

- A homestead that precipitated settlement of a region may be eligible under Criterion A.
- The writing studio of a prominent local author may be eligible under Criterion B.
- A building typical of a particular style of architecture may be eligible under Criterion C.
- A building exhibiting a local variation on a standard design can be eligible under Criterion D if a study could yield important information, such as how local availability of materials or construction expertise affected the evolution of a local building development.

Architectural sites should always be recorded on an AE-R form.

#### **2.4.3.5 Archaeological Sites**

An archaeological site is a location that contains material remains or other evidence of past human behavior and lifeways. Frequently this will take the form of buried cultural materials, but it may also include other kinds of evidence of past human activity in an area or landscape, e.g., surface stone alignments or rock art, and house foundations or historical trash dumps. An archaeological site may represent historic times, precontact times, or both.

When documenting archaeological sites, include all features and diagnostic artifacts in the site map and as part of photographic documentation. Provide detailed descriptions of artifacts located at the site. This may include descriptions of debitage’s reduction stages, lithic material type, ceramic temper used, and

identifying maker's marks. Soil deposition and the likelihood of additional buried deposits should be noted.

Archaeological sites can qualify for the National Register under any of the four criteria. Examples of archaeological sites eligible under criteria A, B, C, and D include:

- The site of a battle or a site where precontact Native Americans annually gathered for seasonally available resources and for social interaction may be eligible under Criterion A.
- The location where a leader made an important proclamation that shaped future events might be eligible under Criterion B.
- A petroglyph site with well-preserved images, or an established village that illustrates the important concepts in precontact community design and planning may be eligible under Criterion C.
- A site that has information potential to address research questions and temporal information may be eligible under Criterion D.

Archaeological sites are most commonly included in the National Register if they have yielded, or have the potential to yield, information important to the understanding of the history or prehistory of the United States or Montana (Criterion D). An archaeological site eligible under Criterion D must contain sufficient material remains to address a research question posed.

Archaeological site reports should evaluate the potential of the site to yield important information by explicitly answering the following sorts of research questions:

- 1) What kind of data is the site known to contain? Discuss the major physical characteristics of the property. Describe features (e.g., hearths, stone rings or alignments, foundations, depressions, trash dumps, etc.). Address the following as appropriate: What types of artifacts were identified at the site? Are these datable or diagnostic finds? Can an assemblage (i.e., an inter-correlated group of artifacts) be identified? Can the artifacts or site formation processes be used to help establish a time frame for the site's occupation? What, if any, oral history or written documentation is known?
- 2) What kinds of data might the site be reasonably expected to contain? Does the site contain a subsurface component? Is more subsurface testing necessary? Is the matrix and cultural deposition intact? Is there any indication of datable organics or paleosols? What types of written, oral, or photographic documentation might exist for the site?
- 3) How does the known and expected data contribute to the general or specific understanding of the history or pre-contact history of the United States or Montana based on research needs or questions? Can the site contribute to our knowledge of settlement patterns, resource use, or intersite patterns? Can the artifact assemblage answer research questions on such topics as subsistence, lithic procurement or reduction strategies, trade, ethnicity, technological change, quality of life, consumer behavior, cultural values, etc.? How is the site best understood in relation to other sites and or patterns?
- 4) What is the general history of the site and how does it relate to cultural historical contextual themes (such as McKean Complex, homesteading, or placer mining)? Sites should be evaluated in terms of potential to add to our knowledge of different periods through research questions tailored to individual site potential.

- 5) What is the condition of the site and how does that convey its National Register significance? National Register integrity and intact cultural stratigraphy should not be assumed to be the same thing. Discuss the probable functions of the property from the time of initial use or construction until its abandonment, noting reuse, recycling, or temporary abandonment episodes. Discuss site formation processes and subsequent land use history of the location, assessing impacts on the preservation of artifacts, features, and other relevant data categories. Discuss any human impacts that have either enhanced or detracted from preservation.

Remember, only the potential to yield important information is required for site eligibility under Criterion D. Some archaeological sites will also hold religious or cultural significance to Native American Nations. Therefore, when evaluating certain sites such as cairns, stone circles, or precontact artifact scatters, SHPO expects the agency to conduct Tribal consultation efforts as part of their evaluation, especially when assessing significance under Criterion A. It is difficult to state a site lacks association with significant events or patterns in history without consulting Tribes who may have special knowledge about such events and patterns.

Use the supplemental SC-R form when recording stone circles. For all archaeological sites, including railroads, ditches, roads, and other non-architectural historic sites, use the Cultural Site Record (CS-R) form.

#### **2.4.3.6 Traditional Cultural Properties/Places (TCP)**

TCPs are defined as places eligible for the National Register because of their *association with cultural practices or beliefs of a living community that are 1) rooted in that community's history, and 2) are important in maintaining the continuing cultural identity of the community* (NR Bulletin #38). Traditional lifeways, traditional knowledge, continuing traditional plant use, and oral traditions are some of the contextual themes under which such sites should be considered. This category of properties is not limited to Native American sites, and many other examples are illuminated in National Register Bulletin 38.

The NHPA states that properties of traditional religious and cultural importance to Indian Tribes may be determined eligible for the National Register. Usually, traditional cultural significance evaluation occurs based on associations with events that made important contributions to the broad patterns of history (Criterion A), although traditional sites may also hold associations with significant individuals (Criterion B), and significant design or construction characteristics (Criterion C).

Traditional Cultural Properties are the location of events or activities where the location itself possesses historic or cultural value (NR Bulletin #15:5). Importantly, Bulletin #15 states that 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 event* (#15:5). Thus, the statement in National Register Bulletin #38 that a TCP must be a tangible site with a historical and physical referent, does not mean buildings, structures, features, or objects need exist. Such sites need not contain physical evidence of the significant historic event or activities; the often-intangible beliefs or practices that give such sites significance must be considered together with the natural, spiritual, and physical referents or properties (NR Bulletin 38:9).

The property description for use in evaluating TCPs should include: contemporary appearance, historical appearance, traditional concepts of time and period of significance and how the property is described in relevant traditional belief, tradition, and practice. Also, like all other kinds of historic properties,

Traditional Cultural Properties must be geographically bounded and evaluated for integrity of location, design, setting, materials, workmanship, feeling, and association.

TCPs must, in addition, possess integrity of relationship (does the property have an integral relationship to traditional beliefs or activities that continue in the present?), and integrity of condition (is the condition of the property such that the relationship survives?). Documentation of these two aspects of integrity depends on careful and detailed consultation with the holders of the relevant traditional beliefs (NR Bulletin #38:10). Outside investigators not holding those beliefs or knowledge will be ill-equipped to identify the properties, their context, significance, or integrity without the help of those with the appropriate knowledge.

A relevant example of a TCP in Montana is the Fort Smith Medicine Wheel, listed in the National Register after being nominated by SHPO, at the request of the Crow Tribe, who provided critical supporting documentation.

#### **2.4.3.7 Criteria Consideration: Exceptions to Eligibility Criteria**

Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that achieved significance within the past 50 years are not considered eligible for the National Register. However, such properties will qualify if they fall within the following categories:

- a) A religious property deriving primary significance from architectural or artistic distinction or historical importance
- b) A building or structure removed from its original location, but significant primarily for architectural value, or as the surviving structure most importantly associated with a historic person or event
- c) A birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with their productive life
- d) A cemetery that derives its primary significance from graves of persons of transcendent importance, from age, distinctive design features, or from association with historic events
- e) A reconstructed building when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other building or structure with the same association has survived
- f) A property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance
- g) A property achieving significance within the past 50 years if of exceptional importance

#### **2.4.4 Notification Requirements Regarding Evaluations of Eligibility**

All reports and correspondence regarding evaluations of cultural resources must list all federal and state agencies involved in the project as well as other interested parties with land affected by the project. The 1992 amendments to the NHPA specify in Sections 106 and 110 that agencies specifically seek and consider the views of Indian Tribes, other agencies, CLGs, interested parties, and the public in their consultation. Furthermore, the Montana State Antiquities Act states that in cases where agencies request project impact reviews under Section 22-3-429 that:

*At the time that the state or federal agency requests the views of the historic preservation officer as provided for in section (1) [regarding property eligibility, effects, and mitigation plans], the agency shall provide notice to the applicant, affected property owners, and other interested persons of the request for consultation and shall identify locations where the submitted material may be reviewed.*

SHPO concurrence does not substitute for a good faith effort to consult with interested parties, state or federal agencies, local government authorities and American Indian Tribes.



### 3 STEP THREE: Effect Determinations

When cultural resources are located within the APE and determined to be eligible for the National Register, then “Historic Properties” have been identified. The next step in the consultation process is to determine if the proposed undertaking will have effects on the Historic Properties—and if those effects are adverse.

After the agency’s identification efforts, two outcomes are possible:

1. The first possibility is that no sites were located within the APE. This is typically referred to as a “Negative” or “No Properties” inventory. The official effects determination for this is subsumed in the **No Historic Properties Affected finding** (36 CFR 800.4(d)(1)).
2. The second possibility is that sites were located. This is typically referred to as a “positive” inventory. In this circumstance the agency will then need to evaluate the historic significance and integrity of those sites to make an eligibility determination. The agency should provide a written statement describing if historic properties were identified within the APE when consulting with SHPO. If the agency is able to redesign or adapt their project to avoid effects to the historic properties within the APE, it may still reach a **No Historic Properties Affected finding**.
3. If the project cannot be designed to avoid impacting historic properties identified in the APE, this situation describes a case of ‘**Historic Properties Affected**’ (36 CFR 800.4(d)(2)) is the result of the identification efforts. Subsequently, the agency must determine if that Effect is *Adverse* or *Not Adverse* (36 CFR 800.5).

Agencies in consultation with SHPO, and sometimes the ACHP, are the only parties able to make formal assessments of possible effects to eligible properties. While SHPO can assist the proponent, the agency remains responsibility for making a finding of effect.

### 3.1 AVOIDING EFFECTS

Once the eligibility of all properties in the APE has been resolved, agencies must assess the effect of the proposed project on any Historic Properties not completely avoided. However, the Agency should document their consideration of the following options, along with their final effect finding.

- 1) Moving the undertaking to another location,
- 2) Using an alternative project design,
- 3) Designing a new undertaking to address the need,
- 4) Canceling the undertaking.

Section 3.3.2 provides further discussion of parameters and commonly used tactics for avoiding effects. The earlier in the planning process that these options are considered with an informed awareness of possible effects to important cultural resources, the more likely reasonable alternatives can be designed. Once the agency has considered and rejected these options, the agency moves to consider the effects of the project on Historic Properties.

### 3.2 EFFECTS, ADVERSE EFFECTS, AND EFFECT DETERMINATIONS

An *effect* is defined as “an alteration to the characteristics of a historic property that qualify it for inclusion in or eligibility for the National Register of Historic Places.”

1. Effects are not constrained by administrative boundaries, ownership or discretionary action.
2. Effects can be direct or indirect. Direct effects occur at the time and place of the action. Indirect effects are removed in time or location, but still reasonably foreseeable.
3. Changes need not be negative to be Effects. The action must only alter the characteristics making the property Eligible in order to result in Effects.
4. Potential effects must also be considered under Section 106.

An *adverse effect* is when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify it for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.

When historic properties are located in the APE, and effects to them cannot be completely avoided, the effects of the project need to be assessed to determine if they are *adverse*.

*Effect determinations* encompass the entire undertaking and are not made on a site-by-site basis. However, when dealing with potential adverse effects, an explanation of which sites may or may not be adversely affected is important.

#### **One of three possible Effect Determinations is made for an entire undertaking:**

1. No Historic Properties Affected (no eligible sites were located, or effects to them are completely avoided)
2. No Adverse Effect (effects will not diminish the site’s integrity and eligibility)
3. Adverse Effect (effects will diminish site’s integrity and eligibility)

As part of an Effect Determination, it is the responsibility of the agency to obtain and consider the views of interested persons, Tribes, CLGs, local governments, as well as others who have notified the agency of

their interest. Any participant may request ACHP advice, guidance and assistance including the resolution of disagreements regarding effects (36 CFR 800.2(b)(2)). In making an Effect Determination the agency should notify all consulting parties.

Documentation standards to be submitted to SHPO for a finding of No Adverse Effect or Adverse Effect are summarized in Chapter 5 and 36 CFR 800.11(e).

With concurrence on a finding of “No Historic Properties Affected” or “No Adverse Effect”, consultation concludes, and the project can proceed. However, “Adverse Effects” must be resolved with additional consultation.

### **3.3 “NO HISTORIC PROPERTIES AFFECTED” FINDING**

#### **3.3.1 No Sites Located: Negative Inventory**

If no eligible cultural resources are identified during a survey, a “negative inventory” report should be sent to the SHPO along with a cover letter from the agency indicating acceptance of the report. Once the SHPO has concurred that there are No Historic Properties Affected due to no properties are located in the APE, the agency concludes its Section 106 responsibilities, and the undertaking may proceed.

Standards for submitting documentation to SHPO for a finding of No Historic Properties Affected by reason of no sites present are summarized in Chapter 5 and 36 CFR 800.11(d).

#### **3.3.2 Sites Located, But Avoided: Undertaking Redesigned to Avoid Effects**

All cultural resources within the APE should be evaluated for eligibility and must be assessed for effects. If the cultural resources are *completely avoided*, then a finding of No Historic Properties Affected may be appropriate.

Early survey and consultation with SHPO allows agencies to identify cultural resources and avoid effects to those resources by redesigning the project. This is in the best interests of both the agency and the resources. In such a case, the agency must provide SHPO with written stipulations of project redesign for complete avoidance. Only then can SHPO concur that the undertaking has been sufficiently redesigned to avoid effects to all Historic Properties.

Appropriately determining a No Historic Properties Affected finding result does not allow for excluding areas or corridors from consideration within the APE (cutting donut holes) or determining that portions of a site are noncontributing to the significance or eligibility of the site. This finding means there are no sites in the APE or that the Undertaking and APE have been modified to avoid all potential effects to any historic property.

This is particularly true for linear sites such as irrigation features where some segments may have been impacted by cumulative developments more than others. Rather than define segments with presumed less integrity as “noncontributing” or excluding parts of sites or the APE, we recommend concluding that there is a decreased likelihood that additional alterations will affect the overall integrity or significance of the site as a whole. This conclusion depends on the nature and scope of the undertaking. The appropriate effect finding avoids eliminating the portions of presumed reduced integrity from consideration.

### 3.3.2.1 Buffers

Some agencies utilize buffer zones, or areas around recorded sites within which certain project activities are prohibited. If a buffer zone is proposed as part of undertaking conditions or redesign, SHPO must be consulted. Thirty meters (30 m) is often proposed as an adequate buffer, but appropriateness depends on the nature of the undertaking and the site. SHPO is wary of the use of standard buffers, as they often ignore the individual characteristics and challenges of a particular site. When dealing with an archaeological site with a subsurface component one of the most important factors will be the presence, absence, or likelihood of finding subsurface materials. Landforms are often a better indicator of site boundaries and potential than an arbitrary distance.

### 3.3.2.2 Monitors

The use of monitors is another common method agencies use to ensure avoidance or proper implementation of other mitigation measures. A monitor is an individual who is present during project implementation and is assigned cultural resource tasks. They are responsible for ensuring avoidance of sites and documenting cultural resources. SHPO expects monitors to be SOI-qualified, have the authority to stop and modify implementation work, and submit a summary of the monitoring activities after completion.

The National Park Service's guide on *Cultural Resources Monitoring and Fire (2021)* describes that Monitoring is essential to:

- Ensure that standard cultural protective measures are effective;
- Experiment with and gauge the efficacy of new treatments for cultural resource protection;
- Test assumptions regarding the types of resources to be found within un-surveyed areas;
- Inventory areas that were visually and/or physically inaccessible prior to the activity;
- and protect cultural resources from looting, erosion, and vandalism

If a previously undocumented cultural resource is revealed or previously undocumented effects occur the monitor should contact SHPO within 48 hours and follow the steps in section 6.1 on unanticipated discoveries.

## 3.4 "NO ADVERSE EFFECT" FINDING

An *effect* is caused when a project action may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register. This effect may be adverse or not adverse. To reach a finding of No Adverse Effect, the agency seeks and obtains the concurrence of the SHPO and consulting parties.

The agency may propose that it has modified or conditioned an undertaking such that any effects on Historic Properties could be found to be Not Adverse. Two major examples include: 1) when the undertaking is limited to rehabilitation of structures and the work conforms with the Secretary of the Interior's Standards, or 2) when the undertaking is limited to the sale, transfer, or lease of a federal historic property, and conditions are included to ensure preservation of the historic qualities of the property.

Data recovery at archaeological sites does not meet the criteria for a No Adverse Effect finding.

No Adverse Effect documentation is described at 36 CFR 800.11(e) and summarized in Chapter 5. This documentation includes explicit description of any conditions or stipulations necessary to be considered a No Adverse Effect and the views of consulting parties and the public. No Adverse Effect condition descriptions should include the details of actual actions proposed, such the window repairs for rehabilitation of a building, or the language of preservation easements for a land exchange.

No Adverse Effect conditions differ from “mitigation” in that the conditions must directly and completely preserve the significant qualities and integrity of eligible properties, whereas Adverse Effect mitigation encompasses actions to lessen adverse effects and may be considerably broader. See chapter 4.

### 3.5 “ADVERSE EFFECT” FINDING

While an *effect* is determined when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register, an *adverse effect* does so in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association.

Adverse Effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative (36 CFR 800.5(a)(1)).

According to regulation, Adverse Effects on historic properties include, but are not limited to (36 CFR 800.5(a)(2)):

1. *Physical destruction of or damage to all or part of the property;*
2. *Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access, that is not consistent with the Secretary’s Standards for the Treatment of Historic Properties (36 CFR 68);*
3. *Removal of a property from its historic location;*
4. *Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;*
5. *Introduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features;*
6. *Neglect of a property which causes its deterioration;*
7. *Transfer, lease, or sale of property out of federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property’s historic significance.*

If consultation results in an “Adverse Effect” finding, notify the ACHP and proceed to Step 4: resolving adverse effects.

***For State Heritage Properties*** reviewed under the State Antiquities Act, effect findings, mitigation or treatment plans for state Heritage Properties are reviewed by the SHPO, but decision-making authority and documenting justification rests with the state agency. Appeals to effect findings may be submitted under 22-3- 429-(5)-(7) MCA.

The discussion in this guide regarding the criteria and assessment of adverse effects apply primarily to federal undertakings under Section 106. In principle, however, the considerations are the same under state law. The biggest difference is that there is no consultation or involvement of the ACHP in state-only actions and undertakings. The criteria of adverse effect are the same.

### **3.6 ASSESSING EFFECTS TO NATIONAL HISTORIC LANDMARKS (NHLs)**

National Historic Landmarks (NHLs) are designated by the Secretary of the Interior under the Historic Sites Act of 1935 (49 U.S.C. 303 PL 100-17, 1987). NHLs were added to the National Register of Historic Places when the NR was created under the NHPA in 1966. Since then, National Register properties with national significance are eligible to be nominated as NHL but must be done so through a separate NPS process. Montana currently has more than 28 NHLs, a few notable examples are: the Bannack Historic District (HD), Bear Paws Battlefield, Great Falls Portage, Virginia City HD, Fort Benton, Pictograph and Ghost Caves, Fort Union, the Hagan Site, Three Forks of the Missouri, Grant-Kohrs Ranch, and Granite Park Chalet HD.

Assessing impacts to National Historic Landmarks involves a special consultation process. Section 110(f) of the NHPA requires that federal agencies exercise a higher standard of care when considering potential adverse effects to NHLs. Agencies must “to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark.” (16 U.S.C. 470a-2).

In addition to consulting with SHPO when NHLs are involved, federal agencies are required to:

1. Notify the ACHP if any undertaking may cause Adverse Effects to an NHL and invite their participation,
2. Notify the Secretary of the Interior and invite their participation,
3. Consider the findings of the Interior and the ACHP if the ACHP has asked for a formal report from the Interior,
4. Advise all interested parties of potential Adverse Effects with complete background, alternatives and action taken to advance a preservation outcome,
5. Similarly notify the public, and
6. Inform the public of the outcome and include provisions of resulting MOA, PA or ACHP comment.



## 4 STEP FOUR: Resolve Adverse Effects

Adverse Effects are those that would diminish the integrity of the characteristics that make a Historic Property eligible for listing in the National Register of Historic Places. If in Step 3 the undertaking is found to meet criteria of Adverse Effect, then the effect is adverse. In Step 4, parties will notify the ACHP about the Adverse Effect finding and consult with SHPO and other parties to resolve the Adverse Effects. Resolution may include—but is not limited to—project redesign, relocation, or cancellation to avoid effects completely, or—when avoidance is not possible—forming agreements and making plans for mitigation.

Before considering how to mitigate an adverse effect, the agency should first consider, and document consideration of avoidance and minimization methods. Mitigation options should be sensitive to the qualities making the eligible properties important but should extend beyond the conditions and treatments common in No Adverse Effect agreements or avoidance measures. Moreover, because the scope of consultation broadens with Adverse Effects we refer readers to the ACHP's *Public Participation in Section 106 Review; A Guide for Agency Officials*.

### 4.1 NOTIFICATION REQUIREMENTS

Agencies are required to notify the ACHP as soon as an Adverse Effect is found and shall consult further to resolve adverse effects under 36 CFR 800.6. Upon receipt of the required information specified in 36 CFR § 800.11(e), the ACHP will determine if it will participate in consultation consistent with their *Criteria for Council Involvement in Reviewing Individual Section 106 Cases*.

### 4.2 AVOIDING AND MINIMIZING EFFECTS

Both the Federal and State laws concerning cultural resources in Montana require agencies to consider alternatives to causing Adverse Effects to Historic Properties. Avoidance should always be the first consideration when dealing with impacts to Historic Properties. Section 1 of the NHPA states clearly that:

*(4) the preservation of [our] irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, esthetics, inspirational, economic and energy benefits will be maintained and enriched for future generations (16 U.S.C. 470).*

The agency is responsible for considering alternatives in consultation with SHPO and others, although the PI's recommendations, as well as any other recommendations, should be carefully considered.

### 4.3 AGREEMENTS AND MITIGATION PLANS

Relevant laws recognize that it is not always reasonable, feasible, prudent or in the best interests of the public to avoid historic properties. Once an agency has determined that eligible properties will be affected and that avoidance alternatives are not reasonable, a treatment or mitigation plan to lessen the impact, if possible, must be considered.

Parties should seek a plan by common agreement that will serve the public good and demonstrate a good faith effort to consider the concerns of interested parties. A formal Memorandum of Agreement (MOA) stipulating the mitigation or treatment plan agreed upon is the general practice in resolving Adverse Effects. For details on drafting an MOA the reader is referred to the ACHP's *Preparing Agreement Documents*. For MOAs involving archaeological sites, see *Recommended Approach for Consultation on Recovery of Significant Information from Archaeological Sites* (Federal Register Vol. 64, No.95:27085-27087).

### 4.4 MITIGATION IDEAS FOR ADVERSE EFFECTS

Consultation on Adverse Effect mitigation is a process of negotiation and an open exchange of ideas. There is no “standard mitigation”, nor should there be one. Mitigation hinges on the details of the property involved and the extent of the proposed Adverse Effect. The more that is known about the property and what qualities make it Eligible, the easier it will be to balance effects with limitations imposed by the undertaking in a way that is commensurate both with the scale of the undertaking and concerns of the public, Native Nations, and others.

*There is no “standard mitigation”...*

Agency mitigation options may focus on what can be done to the property, or what can be done to the project, and may even include off-site proposals. There is no simple list of mitigation options or plans. Just as the qualities or characteristics making properties eligible vary, the feasibility or effectiveness of a treatment or mitigation plan will vary.

Suggestions and past treatments that have proven successful are offered below. By grouping possible mitigation efforts by significance criteria, treatment considerations are focused on the qualities adversely affected. Properties found eligible under multiple criteria will require additional consideration and use of multiple mitigation options.

Regardless of property type or undertaking, several factors are critical to the successful negotiation of mitigation. In almost all discussions about mitigation it is required to clearly articulate and accept all opportunities as well as limitations of the parties involved. There must also be an understanding of the qualities which make the properties significant and a strong willingness on everyone's part to exercise careful thought and creativity.

**For Historic Properties found Eligible under Criterion A—association with events or trends—**mitigation options may include treatment of properties or approaches to preserving and interpreting historical events if the property itself cannot be protected.

Some possible options are:

1. Historically sensitive exterior rehabilitation
2. Interior modifications for new or reuse of the buildings
3. Modification of city codes to allow historic set-back and store front window treatments
4. Repairing historic street lighting and other historic street furniture
5. Restrictive easements
6. Sympathetic landscaping, speed controls, noise walls with historic texturing and coloring and unobtrusive signage to reduce the effects of adjacent modern travel corridors
7. Interpretive signage describing the significance of the area and efforts to preserve its qualities
8. Completion of National Register nominations for preserved eligible properties in the area
9. Conduct a historic survey in associated neighborhoods or with associated event(s)
10. Creation of an interpretive public website

**For Historic Properties found Eligible under Criterion B—association with significant persons—an** agency might consider:

1. Interpretive signage
2. Publications or educational film
3. Partial Reconstruction
4. Relocation, rehabilitation, or maintenance covenants.
5. Historic survey or National Register nominations for other locations associated with the significant person
6. Design and facilitation of a traveling museum exhibit about the significant person.

**For Historic Properties found Eligible under Criterion C—embodiment of a type, period or method of construction—**An agency might consider the following mitigation options:

1. Rehabilitation and design modifications preserving the visual qualities of the structure while meeting upgraded standards.
2. Relocation and reuse.
3. Change in the use pattern of the building or structure. For example, changing a vehicular bridge that is undersized for current traffic into a pedestrian walkway and scenic overview or changing the bridge to one way traffic and building a sympathetic bridge to handle traffic in the other direction.
4. If a number of examples of a property exist which are subject to similar effects - a programmatic treatment involving additional research, educational publications for the whole set of properties, or documentary films and systematic proactive commitments for preservation of the type elsewhere might also be appropriate.
5. Conducting Historic American Building Survey / Historic American Engineering Record / Historic American Landscapes Survey Documentation (HABS/HAER/HALS).

**For Historic Properties found Eligible only under Criterion D—for their information value—**consider their research potential carried out within the framework of a data recovery plan and

methodology to share that newly recovered information. The data recovery plan must be reviewed by and accepted by SHPO and/or the ACHP before any work begins. The research design must be relevant to the targeted site and its identified research potential. Not all archaeological sites are important for the same reason. Sites can be significant because they contain different sorts of information, and the same data recovery plan will not fit every site. For many archaeological sites, data recovery means excavation, although for others perhaps, additional surface mapping may suffice. Mitigation should also consider the best way to disseminate the results of the data recovery plan such as presentation at conferences, public educational opportunities, written reports, or articles

The presentation of the research design should include:

1. One or more hypothesis (proposed statement for testing)
2. Test Implications (if X is true, then...)
3. Data Requirements (collectable information necessary for the test implications)
4. Field Techniques (methods to be used to collect data)
5. Analytical Techniques (methods to analyze the collected data)
6. Reporting (documentation to describe and share results)

*Excavation of archaeological sites—even with the best and most careful work—destroys a nonrenewable resource.*

Excavation of archaeological sites—even with the best and most careful work—destroys a nonrenewable resource. The destructive nature of excavation is formalized in the ACHP's *Recommended Approach for Consultation on Recovery of Significant Information from Archaeological Sites* (Federal Register Vol. 64, No.95: 27085-27087). Excavation should not be accepted as mitigation without careful consideration of avoidance options. At the same time, avoidance must be complete before warranting no further consideration of treatment. Boring-under a site may not constitute avoidance without conclusive evidence about the depth of the site. Burial of archaeological sites under fill will not constitute avoidance in many cases, as changes may occur to sites by putting large volumes of dirt over them.

**For Traditional Cultural Properties and Properties of Religious and Cultural Significance to Native Nations.** Devising reasonable and feasible mitigation can be difficult for TCPs and other sites associated with special religious or cultural significance. The variety of cultures, lifeways, and traditions potentially significant under this site category adds to the complications involved.

Once avoidance is ruled out by an agency there is often a very real problem of identifying any acceptable mitigation, getting parties to identify and discuss the qualities that make TCPs significant, and negotiating treatment of Adverse Effects on those qualities.

Boundaries, if not adequately defined at the identification or evaluation stages, may also become points of controversy in discussing mitigation. Indirect, as much as direct, Adverse Effects are commonly involved with TCPs. These difficulties do not absolve agencies of their responsibility to attempt to lessen Adverse Effects to TCPs. Mitigating Adverse Effects to a TCP must involve consultation with the community that ascribes significance to the site.

Some past efforts to minimize Adverse Effects to Native Nations' TCPs have included:

1. Viewshed analysis followed by vegetative or other screening to minimize project intrusiveness
2. Timing the proposed undertaking to avoid the most critical traditional use periods
3. Use of off-site treatments. For example: aiding Nations in their efforts to set up THPOs, providing money for ethnographic study of traditional beliefs of the group involved, language or plant use and funding the efforts to pass this information on to younger people
4. Re-introduction or relocation of traditionally important plants

#### 4.5 RESOLVING ADVERSE EFFECTS UNDER STATE LAW

The requirement for agencies to document their effect finding and apply the criteria of adverse effect is the same under the NHPA Section 106 process and the MTAA process. However, the process for resolving an adverse effect differs.

Under the Montana Antiquity Act if an adverse effect will occur to a heritage property or paleontological remains the agency must prepare a list of alternatives considered and a written explanation of why one of the following four actions will be taken (ARM 10.121.907):

1. Avoid the heritage property
2. Abandon the proposed action
3. Modify or redesign the action to avoid or lessen adverse effect or mitigate harm. This may include items such as: relocating the project, productive use of the heritage property, scientific excavation of the archaeological or paleontological deposits, production of a public education program about the property
4. Continuance of the project with no avoidance/mitigation measures.

The agency must submit the justification of its decision in a **single page mitigation plan** to SHPO for review and comment. Mitigation plans must include a discussion of the above four options and address whether the properties might be utilized for practical purposes. Practical purposes that must be considered are (ARM 10.121.907):

1. Whether there is potential for promotional, commercial, recreational, or other uses which may provide economic gain to citizens of the state or use by units of the government;
2. Embody educational information which may be applied to instruct children or adults in aspects of Montana's history or prehistory;
3. Have social associations which illustrate the interaction and behavior of people in Montana's history of prehistory;
4. Possess attributes which support the appreciation of heritage values through sightseeing, photography, painting or other means of personal experience or artistic expression;
5. Have cultural associations which illustrate and contribute to the understanding of human cultures;
6. Contribute to the understanding of paleontological resources.

The SHPO will comment on the mitigation plan within 10 days of receipt. The agency and SHPO are to seek agreement and resolve any differences regarding adverse effect resolution. Should agreement not be reached, the agency decides how to proceed and provides SHPO with a copy of its final decision.

SHPO encourages state agencies to utilize a memorandum of agreement (ARM 10.121.911) to document the resolution of adverse effects and mitigation strategies.





## 5 Documentation Standards and Review Process

Documentation standards apply to various correspondence with Montana SHPO, from requesting file searches to concurrence on site eligibility and various effects findings, to resolving mitigation plans and project alternatives. Regardless of the requested action, correspondence and documentation submitted to SHPO should meet standards at 36 CFR 800.11—to establish a firm and clear basis for the agency and SHPO to make informed and legally defensible decisions regarding efforts to identify cultural resources, evaluating their eligibility for the National Register, and assessing the potential impacts of the undertaking.

Chapters 1 through 4 describe and establish standards for carrying out the four-step consultation process. This chapter revisits and summarizes when documentation is required, who should submit documentation, and what to submit for various requests and findings. Sample outline and content for a cover letter and cultural resource inventory report, and an overview of the review process with tips for a successful consultation are also included.

In the following sections you will learn how to assemble and submit documentation in a manner that meets standards for effective review. Be sure to review previous chapters of this guide for details about gathering adequate information and providing rationale for decisions about the undertaking and potential effects on historic properties. Appendix D includes quick reference checklists for assembling and submitting documentation for file search requests, site records, and cultural resource inventory reports.

## 5.1 WHEN TO SUBMIT DOCUMENTATION TO SHPO

During various steps in the consultation process, you are likely to exchange official correspondence with SHPO and other parties several times. Early in the process, you may request a file search, or concurrence on a finding of “no historic properties affected” from SHPO. Later in the process, you may request concurrence on site eligibility determinations, findings of “no adverse effect,” or resolution of effects through avoidance, project alternatives, and mitigation plans.

Regardless of the desired outcome of each correspondence, providing adequate information will expediate the review process and minimize delays. Agencies will need to supply additional information if the provided documentation is insufficient for SHPO to concur on findings, potentially delaying project review and implementation.

Corresponding early with SHPO to establish agreement regarding the definitions of the undertaking and APE can avoid problems later. If SHPO disagrees with an agency or designee definition of the APE, SHPO may be unable to comment beyond disagreeing with the defined APE, and unable to concur in the findings proposed by the agency. Without agreement on the APE, no subsequent finding by the agency could adequately consider all reasonably foreseeable potential effects caused by the undertaking. Therefore, **it is best to resolve any questions about the APE during the agency's consultation regarding appropriate scope of identification effort and before any field survey proceeds.**

## 5.2 WHO SHOULD SUBMIT DOCUMENTATION

Like other aspects of consultation, agencies are ultimately responsible for all official correspondence and documentation during consultation. SHPO will discuss projects with proponents and contractors; however, all formal written consultation (which is distinct from conversation) must come from the responsible agency.

By statute and regulation, evaluations of eligibility are made by agencies directly, in consultation with SHPO, and sometimes the Keeper. Similarly, agencies in consultation with SHPO, and sometimes the ACHP, are the only parties able to make formal assessments of effects to eligible properties. A proponent or their consultant may only make recommendations to the agency concerning eligibility or effect, but it is the sole responsibility of the agency to reach and state their own findings and request the comments or concurrence of SHPO.

### 5.2.1 When there is a delegation agreement in place...

If there is a delegation agreement in place, contractors and proponents may act on behalf of the agency (see 1.3). Any such agreements must be explicitly referenced in a cover letter that accompanies documentation, including a copy of or link to the delegation agreement. If a consultant submits a report, the cover letter must provide the names and addresses of involved federal agencies and the proponent for whom the report is prepared.

### 5.2.2 When a “Lead Agency” has been designated...

When there is more than one agency involved in an undertaking, agencies may designate a Lead Agency who shall act on the behalf of the other agencies, thus fulfilling their collective responsibilities under the

laws. SHPO encourages the designation of lead agencies to avoid duplication of efforts. If an agency chooses not to designate a Lead, they remain individually responsible for compliance. If an agency has been designated the Lead Federal Agency, consultation with SHPO must include letters from the other agencies acknowledging and ceding this status.

### **5.2.3 When other parties are consulted...**

Frequently there are multiple landowners or public land managing agencies, Native Nations, and other interested parties in a single undertaking or project. Agencies must provide SHPO with a list of interested parties and documentation of consultation with those parties. The lead federal agency is responsible for soliciting and considering concerns of other agencies and interested parties. SHPO may alert an agency to possible interested parties but does not coordinate consultation for the agency or a project proponent.

Other agencies and interested parties may also need to review the cultural resource inventory report. SHPO is not responsible for soliciting those other review comments. But if an inventory report is complete, includes consultation with appropriate others, and concludes that no cultural resources are in the project APE, SHPO will review those findings and provide comment to the agency or to the consultant for transmittal to the agency as requested.

### **5.2.4 When the ACHP is involved...**

The agency will consult directly with the ACHP when SHPO and the agency cannot resolve disagreements about the adequacy of documentation or identification efforts. Interested parties may also request ACHP participation in consultation.

### **5.2.5 When a project is a State undertaking...**

State agencies follow the same procedures as federal agencies to submit reports to SHPO. For projects that must comply with both NHPA Section 106 and the Montana Antiquity Act, SHPO expects both the federal and state agency to have come to an agreement about the eligibility of cultural resources and the effects of an undertaking before the report is submitted to SHPO. This will often mean a report is reviewed separately by the federal agencies and state agencies before it is sent to SHPO.

### **5.2.6 When a project is on State Trust Lands (DNRC)...**

The Department of Natural Resources and Conservation's general policy is that all reports concerning actions on State Trust Lands, pursuant to the State Antiquities Act, conducted by proponents or their consultants, be submitted directly to DNRC. DNRC will then consult with SHPO. Generally, if state lands and a federal agency are involved, DNRC anticipates that the federal agency will submit the report to SHPO (*DNRC Guidelines*, Rennie 1996:1-2).

## **5.3 WHAT TO SUBMIT FOR VARIOUS REQUESTS AND FINDINGS**

Whether you are requesting a file search, comment, or concurrence, always ensure that you are providing adequate information to allow for a substantiated response from SHPO. For potentially sensitive information, ensure that you are complying with confidentiality standards (see 2.1). Although we've

provided a suggested format for Cultural Resource Inventory reports below, SHPO will accept alternative formatting as long as the information is complete.

In cases where a full cultural resource inventory report may not be necessary (e.g., when a survey is not recommended by SHPO), the agency may opt to provide documentation in a “letter report” or “short form report”. Regardless of the documentation format, **all consultations must include the following components:**

1. Cover letter
2. Description of the proposed actions and APE
3. Photographs
4. Maps
5. Justification / rationale for decisions made about the APE, identification methods, and effects determination

If you are seeking comment or concurrence from SHPO regarding a site eligibility determination, or findings of No Properties Affected, No Adverse Effect, or Adverse Effect, explicitly state that request and your determinations in the cover letter. SHPO cannot assume that recommendations included in a report or site forms are equivalent to the agency’s official determination.

### **5.3.1 Site Eligibility Determination (without an inventory report)**

Many agencies combine site documentation and evaluation steps and include eligibility recommendations in a cultural resource inventory report. However, this is not always possible as additional fieldwork and/or research and documentation may be necessary to evaluate eligibility effectively.

When submitting documentation for site eligibility determinations without an inventory report, be sure to include a cover letter explicitly requesting concurrence on site eligibility recommendations with a list of sites and their proposed eligibilities. SHPO requires a complete site record (new record or current update), GIS shapefiles of the site boundary, and the site’s Smithsonian number to review for eligibility. If it is a newly recorded site, you will need to request Smithsonian numbers first in a separate process (see Chapter 2.3.3). A complete site record includes a CS-R or AE-R form with photographs and maps attached. See the section on Documenting Sites (2.3) for more information on site records, site boundary GIS shapefiles, and Smithsonian numbers.

**Remember, each site within the project’s area of potential effect will have a single eligibility status:** Not Eligible, Unevaluated, or Eligible for inclusion in the National Register of Historic Places. Terms such as *potentially eligible* or *partially ineligible* can confuse the issue and consulting parties. The agency should use the terms *Not Eligible*, *Unevaluated*, or *Eligible* when seeking concurrence on site eligibility.

### **5.3.2 No Historic Properties Affected**

If identification efforts **do not** reveal any historic properties in the undertaking’s area of potential effect, or identified properties are **completely avoided**, a finding of “No Historic Properties Affected” may be appropriate. For SHPO to concur or comment on this finding, agencies need to submit the following documentation, as per 36 CFR 800.11:

1. Description of the undertaking and federal and state involvement.

2. Definition of the APE with maps, photographs, drawings and schematics as necessary.
3. Steps taken to identify any cultural resources, including consultation with persons, tribes, agencies, or documents.
4. Basis for the finding that No Properties are present or that none will be affected.

A cultural resource inventory report may accompany this finding and should cover all the information listed above. Section 5.5 includes recommendations for preparing an inventory report that meets criteria for effective review. A cover letter must accompany a request for SHPO concurrence.

### 5.3.3 No Adverse Effect or Adverse Effect

If identification efforts **do** reveal historic properties in the undertaking's area of potential effect, and evaluation of the undertaking's effect on historic properties reveals that effects cannot be avoided, then a finding of either "No Adverse Effect" or "Adverse Effect" is determined.

For SHPO to concur or comment on this finding, agencies need to submit the following information as per 36 CFR 800.11:

1. A description of the affected historic properties, including information on the characteristics that qualify them for the National Register
2. A description of the undertaking's effects on historic properties
3. An explanation of why the criteria of adverse effect were found applicable or inapplicable, including any conditions or future actions to avoid, minimize or mitigate adverse effect
4. Copies or summaries of any views provided by consulting parties and the public

A cultural resource inventory report will typically accompany this finding and should cover all the information listed above. Section 5.5 provides SHPO's recommendations for preparing an inventory report that meets criteria for effective review. A Report Submittal form is required for inventory report submittals and collects key information for indexing reports in the Montana Cultural Resources database. A cover letter must accompany a request for SHPO concurrence.

**Remember, each undertaking has a single project effect determination:** No Historic Properties Affected, No Adverse Effect, or Adverse Effects. Effect determinations encompass the entire undertaking and are not made on a site-by-site basis or separated by sections of the APE. However, when dealing with potential adverse effects, include an explanation in the report about which sites are or are not going to be adversely affected.

## 5.4 PREPARING CULTURAL RESOURCE INVENTORY REPORTS FOR SUBMITTAL

A cultural resource inventory, or field survey, typically results in one of two outcomes: no sites are located within the APE (negative inventory), or sites are located (positive inventory). Evaluation of inventory outcomes and site documentation provides a basis for eligibility and effects findings, project alternatives, and potential effects mitigation.

Regardless of the survey outcome, results must be reported to SHPO and other consulting parties in a Cultural Resource Inventory Report. Inventory reports provide context for the inventory (background information about the undertaking, the APE, consulting parties, etc.), survey methodology, and findings.

By following guidelines provided in the previous sections of this chapter, consulting parties can prepare reports that provide a firm and clear basis for reporting findings to SHPO and other consulting parties.

To meet criteria for SHPO review, cultural resource inventory report submittals must include digital and physical copies of the report with appendices, site records, maps and GIS shapefiles with inventory areas and the APE (if different from the inventory area), Report Submittal form, and a cover letter. The following describes how to organize and submit documentation successfully. Quick reference checklists for site record and report submittals are included in Appendix D.

**Remember: A single effect determination is made for an undertaking, and a single eligibility determination is made for each site.** For the agency and SHPO to make informed and legally defensible decisions regarding efforts to identify and evaluate eligibility and effects on cultural resources, reports must include clear and detailed information regarding the location, significance, and integrity of cultural resources and anticipated effects caused by the undertaking.

Some aspects of inventory work can have a level of subjectivity, such as the site probability in each locale or the eligibility of a site. Therefore, it is important to justify and rationalize decisions and clearly state why certain categories do or do not apply. Insufficient explanations of these subjective aspects are a primary reason SHPO must request additional information from the agency, potentially delaying review.

*Insufficient justification for decisions made about subjective aspects of inventory work is the primary reason SHPO requests additional information, potentially delaying review.*

### 5.4.1 Submittal Cover Letter

A letter of submission should be included with every report detailing the request for SHPO comment or consultation on the project. Cover letters must include:

1. a list and description of all involved agencies;
2. a brief project description;
3. description of any programmatic agreements, memorandums of agreement, or program alternatives relevant to the project;
4. actions the agency is committing regarding site avoidance or other site effect minimization efforts;
5. explicit agency recommendations, determinations, and findings for which SHPO comment and review are requested. Often this will include a request for SHPO concurrence on site eligibility status (Eligible or Not Eligible) and/or project effect (No Historic Properties Affected, No Adverse Effect, or Adverse Effect). If concurrence is requested on site eligibility status, a list of sites and their proposed eligibilities should be included in the letter.

## Sample Letter

Agency Letter Head Address and Phone Number
Date
Pete Brown, SHPO State Historic Preservation Office PO 201202 Helena, MT 59620 - 1202
Re: Project Name, Project Designation Number
Dear Mr. Brown,
Please find enclosed the cultural resource inventory report for (the project name) (agency project number). Three cultural resources were located within the APE. Pursuant to regulations found at 36 CFR 800 we request SHPO review of the enclosed inventory, and the eligibility determinations stated below. We request your concurrence that site 24ZZ0001 and 24ZZ0002 are not eligible, site 24ZZ0003 is Eligible under criteria A and D, and that the undertaking will have No Adverse Effect.
The proposed undertaking is located partially on lands administered by (your agency name) and partially owned by the applicant, (proponent's name) as indicated on attached (map name). Following consultation with SHPO (date), (your agency name) defined the APE as the area between the dividing ridgelines to the east and west of Blake Creek, and 100 m north and south of the dikes to be built across Blake Creek. This area is indicated by the hatched blue lines on the attached map. Both alternative implementations (A and B) for this undertaking are accurately described in detail on page 2 of the report. As the report indicates, all borrow and ancillary locations are contained within the APE as defined, except for the access route, which is an existing road, constructed in 1985. All actions proposed under both Alternative A and B are contained within this APE. (your agency name) believes that the APE as defined adequately considers all reasonable potential effects to Historic Properties from this proposed undertaking. We also believe that the report prepared by (consultant's name) for (proponent's name) and subsequently reviewed by (your agency name) is adequate and we agree with their methods.
We initiated consultation with the Northern Cheyenne and Crow Culture Commissions (date). Neither Tribe has expressed concerns or provided additional information regarding cultural resources of importance to them in the APE. Copies of consultation letters with those Nations are included.
Please contact (your name at #) if you have any questions.
Sincerely, (your manager's name/Agency Official)

### 5.4.2 Report Metadata Submittal Form (META-F)

Cultural resource inventory reports are added to the Montana Cultural Resource Database. Maintained by Montana SHPO, this database contains cultural resource information on over 65,000 known historic and archaeological sites, 38,000 previously conducted cultural resource inventories, grey literature, National

Register site status, and cultural resource management project information. To index and improve report searchability, metadata is collected with the Report Metadata Submittal Form (META-F).

Completing this form completely and accurately is important for maintaining quality control in the statewide database and is also required to begin SHPO's review process. Submittal packages without the required META Form will not be accepted. See *Appendix E: Index to SHPO Forms* to access the META Form and instructions.

### **5.4.3 Report Outline**

The following is a *suggested* format for Cultural Resource Inventory Reports submitted for SHPO review. Agencies may organize report content differently, and SHPO will accept alternate formats that contain equivalent information. If the required information is not provided, SHPO cannot concur on requested findings and will return the report to the agency.

#### **I. COVER AND TITLE PAGE**

- a) Report title
- b) Report date
- c) Identify the party(ies) for whom this report was prepared
- d) Report Author and Principal Investigator(s): Name, signature, affiliation/agency, business address
- e) Project and/or permit numbers relevant to the undertaking

#### **II. TABLE OF CONTENTS**

- a) Include major section headings with page numbers
- b) Include a list of appendices and attachments

#### **III. PROJECT SUMMARY**

- a) Describe the proposed work and define the undertaking.
- b) List agencies involved in the project
- c) Describe the Area of Potential Affect and how it was determined. Include both direct and indirect APE descriptions and the expected vertical and horizontal extent of ground disturbances.
- d) Provide a legal description and agency/ownership of the APE, areas surveyed, and areas not surveyed
- e) Identify those who sponsored the survey and describe why the survey was conducted.
- f) Reference any relevant maps, photos, or other appendices and attachments as needed.

#### **IV. BACKGROUND**

- a) Describe the general topography, geology, and vegetation of the project area.
- b) Provide a brief historic or cultural context of the area as applicable to cultural resources under consideration.
- c) Summarize previous research and survey in the area, including locations, types, and eligibility status of known sites. Reference the date, SHPO project number, and results summary from the File Search conducted for this undertaking.
- d) Reference any relevant maps, photos, or other appendices and attachments as needed.

## **V. SURVEY METHODS**

- a) Identify individuals who supervised and participated in field work
- b) Indicate the date(s) and field conditions when the survey was completed
- c) Describe the location, size, and coverage of surveyed and un-surveyed areas: report the total number of acres surveyed rounded to a whole acre, and the number of acres in each individual survey area (if more than one). Justify decisions made to survey or not survey different areas if the entire APE was not surveyed.
- d) Describe distribution and width of survey transects, justify any deviations from standards describe in section 2.2.1 of this guide.
- e) Describe in detail survey techniques employed and the rationale for selecting those techniques. In instances when different techniques are used in different areas of the project, document their use in the report narrative and on the map.
- f) Reference any relevant maps, photos, or other appendices and attachments as needed.

## **VI. RESULTS AND RECOMMENDATIONS**

When a report deals with multiple sites, it should be organized to make it as convenient as possible for users to locate individual site information. Please place narrative, figures, tables, recommendations, photos etc. relating to a single site in a section devoted to that site. This will speed review by SHPO, benefit later researchers, and simplify agency cultural resource management in the future.

- a) Site-by-site discussion for cultural resources located in the APE that includes:
  1. Description of the site
  2. Justified recommendations of National Register eligibility, with reference to criteria of significance, context, and integrity.
  3. Recommendations for avoidance, additional work, and mitigation as appropriate; or reference any separate Effect/Mitigation reports submitted by the agency.
  4. Reference to any curation agreements
  5. Reference any relevant maps, photos, or other appendices and attachments as needed.
- b) Discussion of Isolate Finds or IF-R forms: Include a map, photo, and description of each IF

## **VII. REFERENCES**

Bibliographic listing of consulted sources, oral history interviews, additional records searches (such as county land entry and mining claim records), General Land Office or Sandborn maps, etc.

## **VIII. APPENDICES**

### **A. Consultation Summary**

Summarize and provide documentation and results of consultation with others, including other agencies, the public, and Native Nations. This may also include documentation of Lead Federal Agency designation or delegation agreements.

### **B. Maps**

Reports must include maps that show, and explicitly label, the APE, the inventoried areas, and cultural resources at a scale of 1:24,000 overlaid on the relevant USGS 7.5' topographic map. Additional

reference maps may also be necessary for example: depicting the location of proposed actions, treatment type areas, areas of ground disturbance, areas of modified survey strategy, decreased scale maps showing overviews, increased scale maps showing reroutes and/or site avoidance methods. Details about what to include and how to prepare acceptable maps are described in section 2.2.4 of the guide.

REMEMBER to submit digital GIS shapefiles for APE and inventoried area boundary polygons, and individual site boundaries.

### **C. Photographs**

Photographs or laser quality color photocopies of the following:

- a) Each site in the APE
- b) Overview of field conditions in the APE
- c) Overview of areas of proposed disturbance or activity

Section 2.2.5 provides more information about how to ensure that photo documentation is sufficient for SHPO to evaluate eligibility and effects.

### **D. Site Record Forms**

Cultural Site Records (CS-R) and Architecture/Engineering Records (AE-R) (including site specific photos and maps) must be included for all sites located by the survey. This includes both newly identified sites and updates to previously documented sites located by the survey. This includes every site within the APE, as well as sites outside the APE that were relocated to confirm their boundaries. Use the SC-R or PALEO-R forms to record stone circles or paleontological sites, respectively. See section 2.3 and instructions included with site record forms for guidance on how to prepare complete site records.

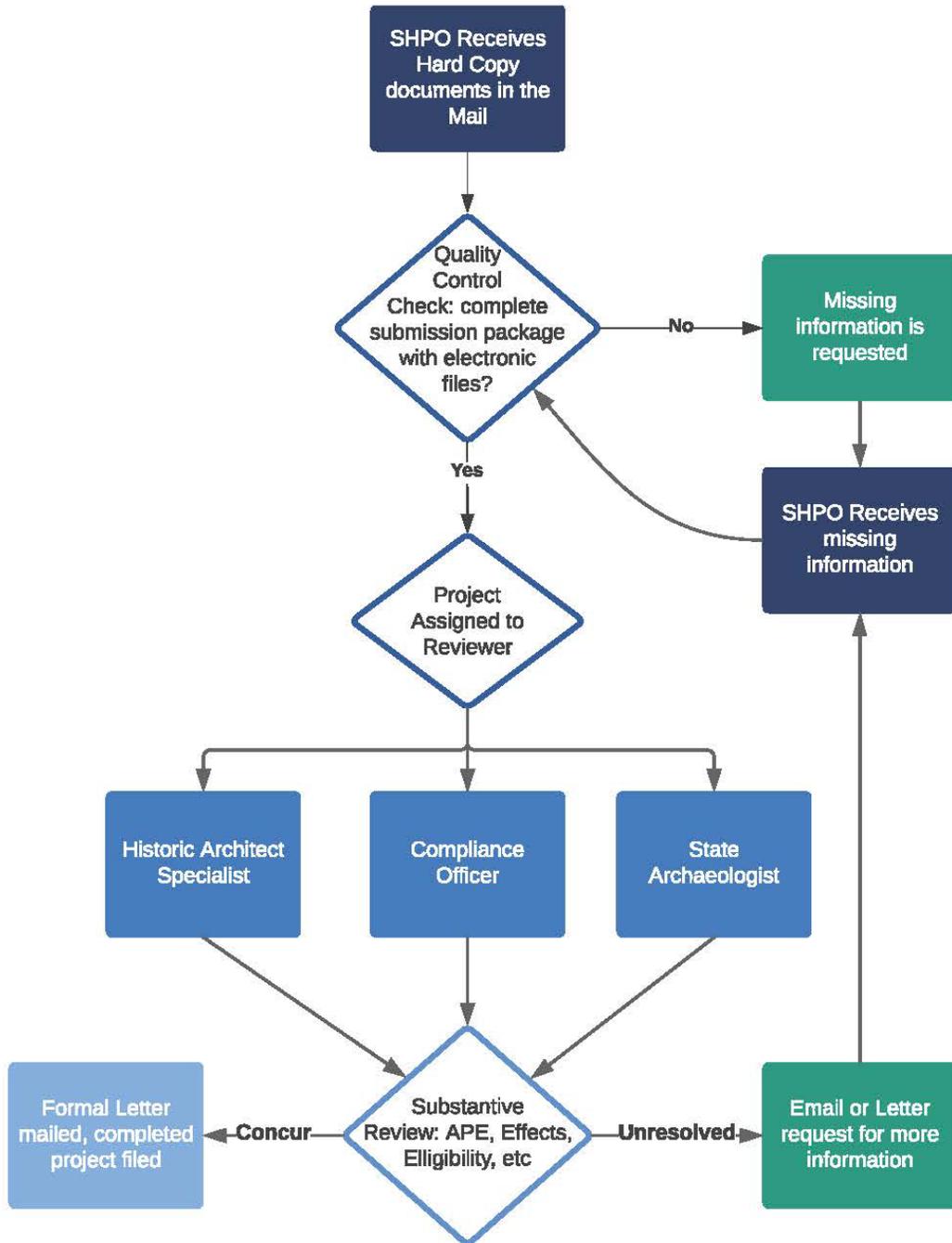
## **5.5 SHPO REVIEW PROCESS AND TIPS FOR SUCCESS**

Once SHPO receives a complete submittal package, reviewers have thirty days to respond. This will include physical and digital copies of all required components (cover letter, report metadata submittal form, report, site forms, and GIS). If information is missing, the 30-day review period restarts when SHPO receives a complete submittal.

Depending on the lead federal agency, nature of the undertaking, and type of resources that occur within the affected area, project review will be assigned to a compliance officer, historic architecture specialist, or the state archaeologist. After reviewing documentation, SHPO will either respond with a concurrence letter—at which point the project information is archived and consultation is complete—or request additional information.

The project review is considered “unresolved” until SHPO concurs with the agency’s findings. If parties cannot reach agreement, the ACHP may need to be involved.

### 5.5.1 The Review Process





## 6 Inadvertent Post-Review Discoveries and Human Remains

### 6.1 INADVERTENT DISCOVERIES

If historic properties are discovered or unanticipated effects on historic properties are found after the agency has completed the Section 106 process and construction has already commenced, the agency must take steps to avoid, minimize, or mitigate adverse effects to those properties. Notify SHPO, any Indian Tribe that might attach religious and cultural significance to the property, and the Advisory Council on Historic Preservation **within 48 hours** of the discovery.

This notification should include

- The Agency’s initial assessment of National Register eligibility of the property. In the event of an unanticipated discover, the agency may choose to assume a property is eligible under specified criteria, without detailed analysis.
- Proposed actions to avoid effects or resolve adverse effects

The SHPO and other notified organizations should respond within 48 hours of the notification. The Agency must consider these comments and move forward with appropriate actions. Afterwards the agency must send a report of what occurred, summarizing actions taken.

A best practice for agencies is to proactively develop the administrative steps that will occur in the circumstance of an unanticipated or post-review discovery. Agencies are encouraged to create programmatic agreements or procedures to plan for this possibility.

### 6.2 HUMAN REMAINS

#### 6.2.1 If human remains or a burial is discovered on State or Private Land

If human remains or a burial is suspected, immediately cease all activity at the location and call the County Coroner or Sheriff. Following examination, the coroner must notify the State Archaeologist or the nearest Burial Board member within 24 hours.

The State Burial Board determines if preservation in place is appropriate. Regardless of ethnic origin, burial context or age of the burial site, remains should not be disturbed before Burial Board review unless required by the coroner during evaluation of a possible crime scene.

### 6.2.2 If human remains or a burial is discovered on federal land...

If human remains are found on federally owned lands, then the provisions of the Native American Graves Protection and Repatriation Act apply. This will typically involve immediate cessation of all activity at the location of the find and notifying the agency's law enforcement personnel and NAGPRA coordinator.

### 6.2.3 Laws regarding burials and human remains

The **Unmarked Burial Act** (Montana Codes Annotated 22-3-801 through 811) establishes the State Burial Board and protects from disturbance all human remains not within recorded graveyards or cemeteries on both state and private lands. This law states:

*22-3-802(e) preservation in place is the preferred policy for all human skeletal remains, burial sites, and burial materials.*

The law further specifies rules for discovery, reporting requirements and review procedures, requires a permit for scientific analysis, and provides penalties for certain acts including knowingly destroying or allowing the disturbance of any unmarked burial or associated materials.

Under state law any human remains and associated funerary objects not protected under the Unmarked Burial Act due to disturbance prior to 07/01/1991 are protected by the **Montana Repatriation Act** of 2001 (Montana Code Annotated 22-3-901 through 921). This act requires agencies and museums to complete inventory of human remains and funerary objects and provides for hearings regarding claims for culturally affiliated remains and objects covered by the act. The State Archaeologist is the primary contact regarding state Burial Laws.

Montana Code Annotated Title 46 Chapter 4 (Authority of Coroners) does not authorize removal of human remains solely for documentation of ethnicity, age or other study. However, the coroner may remove the remains to determine if a criminal inquiry or inquest is warranted.

Information about the location of human remains and burial sites is protected under the same law. All burial information is confidential unless the Board determines otherwise. This includes previously recorded sites which may show up in your file search without any information. In that case contact the State Archaeologist who will determine what information can be shared.

The ACHP's "*Policy Statement Regarding the Treatment of Burial Sites, Human Remains and Funerary Objects*" guides federal agencies in making decisions about the identification and treatment of burial sites, human remains, and funerary objects encountered during the Section 106 process, including those instances where federal or state law does not prescribe a course of action. The policy is not exclusively directed toward Native American burials, human remains or funerary objects, but those would be included under the policy. In accordance with Section 106, the policy does not recommend a specific outcome from the consultation process, but rather focuses on issues and perspectives that federal agencies ought to consider when making their Section 106 decisions.



## 7 Summary and Conclusion

Preserving Montana’s historic and heritage properties is guided in part by laws and regulations, but also by our shared motivation to learn from and preserve our collective identity as Montanans. While Montana SHPO’s responsibilities lie with the historic properties and the regulatory procedure, we strive to find common ground with consulting parties through transparency and open communication. Our ultimate goal is to help parties successfully navigate the consultation process while protecting remnants of our past.

This document synthesizes compliance processes dictated by the NHPA Section 106 and the Montana Antiquity Act. As you learned in previous chapters, both laws follow the same general four-step process—determine the undertaking, identify historic properties, assess effects, resolve adverse effects—but consultation may not necessarily follow a linear progression.

Section 7.1 summarizes tips and reminders for an effective and efficient consultation with Montana SHPO. Various consultation paths, from initiation to conclusion are summarized in 7.2

Across Montana, preservationists must engage with each other equitably and inclusively to protect our important places. All of us at SHPO strive to promote and support sustainable preservation of our diverse historic and cultural properties.

### **We want to hear from you!**

If you have questions or want to share feedback about this guide, please send an email to [mtshpo@mt.gov](mailto:mtshpo@mt.gov) with “Compliance Guide Feedback” in the subject.

## 7.1 TIPS FOR SUCCESSFUL CONSULTATION

Regardless of the path, the following reminders will help you successfully navigate the consultation process.

1. **SHPO is here to help!** We want you to be successful in implementing your project while protecting cultural resources. Please reach out to our compliance team for clarification and answers to your questions about any aspect of the consultation process.
2. **This guide is dynamic** and will be updated periodically to reflect changing needs and circumstances. Please let us know when you have suggestions for improving this guide and sign up to be notified when new versions of this guide are released.
3. **Downloading new forms** for each new consultation is highly recommended, as these are dynamic documents as well.
4. **Initiate consultation EARLY**—BEFORE the project is approved.
5. **Be thorough and inclusive when identifying consulting parties** and other interested parties and ensure that you are fulfilling notification requirements throughout the consultation process.
6. **Enlist qualified personnel** for inventories and research. Individuals who are identifying historic properties need to have background, training, and skills that align with the type of cultural resources and landscapes likely found in the project area. Take the time to find professionals that will uphold industry standards and provide comprehensive and high-quality documentation.
7. **Provide sufficient rationale to justify choices and decisions made throughout the consultation process.** Explain any decisions made to survey or not survey, or why a site is eligible or not eligible. Insufficient justification for decisions made about subjective aspects of inventory work is the primary reason SHPO requests additional information from agencies, potentially delaying review.
8. **Respect and protect confidentiality** and integrity of sensitive and vulnerable sites.
9. **Use the Quick Reference Checklists** for requesting file searches, requesting Smithsonian numbers, and submitting inventory reports to ensure that you are providing a complete submittal package that meets SHPO's criteria for review.
10. **Save time by providing thorough documentation**, quality photographs, and well-designed maps that convey enough detail for SHPO to concur or comment on your findings.
11. **First strive to avoid**, then work to minimize and mitigate adverse effects to historic properties.

## 7.2 SUMMARY OF CONSULTATION PATHS FROM INITIATION TO CONCLUSION

