

# Chapter 30

## HISTORIC AND ARCHAEOLOGICAL RESOURCES

**MDT ENVIRONMENTAL MANUAL**

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## Chapter 30

# HISTORIC AND ARCHAEOLOGICAL RESOURCES

### 30.1 OVERVIEW

Section 106 of the *National Historic Preservation Act* (NHPA) establishes requirements for taking into account the effects of proposed Federal, Federally assisted or Federally licensed undertakings on any district, site, building, structure or object included in or eligible for inclusion in the National Register of Historic Places (NRHP).

Other Federal and State of Montana directives impose additional requirements that must be addressed regarding effects of proposed undertakings on historic and archaeological resources and also on paleontological sites. Federal directives addressing historic and archaeological resource issues include Section 4(f) of the *US Department of Transportation Act*, the *Archaeological Resources Protection Act* and the *Native American Graves Protection and Repatriation Act*. State of Montana directives addressing historic and archaeological resource issues include the *Montana Antiquities Act* (which also addresses paleontological resources) and the *Montana Human Skeletal Remains and Burial Site Protection Act*.

The analyses and consultations for compliance with these directives are documented and coordinated with the analyses and documentation for compliance with the *National Environmental Policy Act* (NEPA) (42 USC 4321, et seq.) and the *Montana Environmental Policy Act* (MEPA) (MCA 75-1-101, et seq.).

This Chapter provides guidance and procedures for addressing Federal and State historic and archaeological resource compliance requirements, including requirements pertaining to treatment of paleontological sites, human remains and burial sites and sites/objects associated with Indian Tribes.

See [Chapter 15](#) for guidance and procedures that address Section 4(f) Evaluations.

## 30.2 LAWS, REGULATIONS AND GUIDANCE

### 30.2.1 **16 USC 470f “Effect of Federal Undertakings upon Property Listed in National Register; Comment by Advisory Council on Historic Preservation”**

This *United States Code* (USC) Section codifies Section 106 of the NHPA. It establishes requirements for taking into account the effect of proposed Federal or Federally assisted undertakings on any district, site, building, structure or object that is included in or eligible for inclusion in the NRHP. The responsible Federal agency must accomplish this evaluation, including affording the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment, prior to approval of the expenditure of any Federal funds or the issuance of any Federal license or permit for the undertaking.

### 30.2.2 **36 CFR 800 “Protection of Historic Properties”**

This Part of the *Code of Federal Regulations* (CFR) defines how Federal agencies are to meet the statutory responsibilities established by Section 106 of the NHPA for taking into account the effects of their undertakings on historic properties.

### 30.2.3 **36 CFR 63 “Determinations of Eligibility for Inclusion in the National Register of Historic Places”**

These regulations explain the process for requesting determinations of eligibility, in accordance with the ACHP regulations in 36 CFR 800.4(c)(2).

### 30.2.4 **16 USC 470aa, et seq. “Archaeological Resources Protection”**

These USC Sections codify the provisions of the *Archaeological Resources Protection Act*. These Statutes establish requirements for protection of archaeological resources and sites that are on public lands and Indian lands. Implementing regulations are provided in 18 CFR 1312 “Protection of Archaeological Resources: Uniform Regulations.” These regulations define permit requirements for actions affecting archaeological resources on public lands and Indian lands.

### 30.2.5 **23 USC 138, 49 USC 303 Section 4(f) of the US Department of Transportation Act**

These USC Sections codify the policy originally enacted in Section 4(f) of the *US Department of Transportation Act of 1966*. The policy provides that the Secretary of the US Department of Transportation shall not approve any program or project (other than certain projects for park roads or parkways) that requires the use of any publicly owned land from a public park, recreation area or wildlife and waterfowl refuge of national, state or local significance as determined by the Federal, state or local officials having jurisdiction thereof, or any land from a historic site of national, state or local significance as so determined by such officials unless:

- there is no feasible and prudent alternative to the use of this land, and



- the program includes all possible planning to minimize harm to park, recreational area, wildlife and waterfowl refuge or historic site resulting from their use.

Implementing regulations are provided in 23 CFR 774.

### **30.2.6 23 USC 144(o) “Historic Bridge Program”**

This USC Section includes provisions requiring States to inventory all bridges on and off the Federal-aid highway system to determine their historic significance and encouraging the retention, rehabilitation, adaptive reuse and future study of historic bridges (i.e., bridges included on or eligible for inclusion on the NRHP).

### **30.2.7 23 USC 139 “Efficient Environmental Reviews for Project Decision-Making”**

For projects involving preparation of an environmental impact statement and for environmental assessments being prepared in accordance with the FHWA “SAFETEA-LU Environmental Review Process Final Guidance,” this part of the USC requires that, at appropriate times during the study process, the lead agency or agencies for the project collaborate with agencies serving as participating agencies to determine the methodologies to be used and the level of detail required for assessing impacts, including historic and archaeological resource impacts. See [Chapters 11 “Preparing Environmental Documentation,” 13 “Environmental Assessment/FONSI” and 14 “Environmental Impact Statement/ROD”](#) for further guidance on this requirement.

### **30.2.8 43 CFR 10 “Native American Graves Protection and Repatriation Regulations”**

These regulations carry out the provisions of the *Native American Graves Protection and Repatriation Act* (25 USC 3001-3013) and define a systematic process for determining the rights of lineal descendants, Indian Tribes and Native Hawaiian organizations to certain Native American human remains, funerary objects, sacred objects or object of cultural patrimony with which they are affiliated.

### **30.2.9 MCA 22-3-421 et seq. “Antiquities”**

These *Montana Code Annotated* (MCA) Sections codify the provisions of the *Montana Antiquities Act*. These Statutes establish requirements for the protection of heritage properties (i.e., any district, site, building, structure or object that is significant in American history, architecture, archaeology or culture) or paleontological remains (i.e., fossilized plants and animals of a geological nature that are rare and critical to scientific research) located on lands owned by the State of Montana. The Statutes also include provisions requiring coordination with the State Historic Preservation Officer (SHPO) regarding implementation of the requirements for protection of heritage properties. Implementing rules are provided in ARM 10.121.901, et seq. “SHPO Rules.”

### **30.2.10 MCA 22-3-800 et seq. “Human Skeletal Remains and Burial Site Protection”**

These MCA Sections codify the provisions of the *Montana Human Skeletal Remains and Burial Site Protection Act*. These Statutes establish requirements for protection of human skeletal

remains, burial sites and burial material, including those in marked, unmarked, unrecorded, registered or unregistered graves or burial grounds located on State or private lands that are not protected as cemeteries or graveyards under existing State law. Implementing regulations are provided in ARM 2.65.101, et seq. "Burial Preservation Rules."

### **30.2.11 "Secretary's Standards – Archeology and Historic Preservation" Website**

This website provides access to the Secretary of the Interior's *Standards and Guidelines for Archeology and Historic Preservation*, as amended and annotated. The website includes links to all of the sections of the *Standards and Guidelines*, including those for Historical Documentation, Architectural and Engineering Documentation, Archeological Documentation and Qualification Standards.

### **30.2.12 Consulting with the Montana SHPO: Guidelines and Procedures for Cultural Resource Review and Consultation Under the National Historic Preservation Act and the Montana State Antiquities Act**

This publication, which is available on the Montana Historical Society website, provides detailed, step-by-step guidance for accomplishing consultation pursuant to the NHPA, the *Montana Antiquities Act* and associated implementing regulations. It includes an introduction section that provides an overview of responsibilities and key directives for the consultation process and the following steps:

1. Initiate the consultation process.
2. Identify historic properties.
3. Assess adverse effects.
4. Resolve adverse effects.

It also includes appendices containing forms and other useful information.

### **30.2.13 NATHPO Website, Montana Tribal Historic Preservation Officer (THPO) Information**

The website for the National Association of Tribal Historic Preservation Officers (NATHPO) includes a link to a webpage that includes Montana THPO information. The webpage includes names and contact information for the current THPOs in Montana, which represent the following:

- Blackfeet Nation of the Blackfeet Indian Reservation,
- Chippewa Cree Tribe of the Rocky Boy's Reservation,
- Confederated Salish and Kootenai Tribes of the Flathead Reservation,
- Crow Tribe of Indians, and
- Northern Cheyenne Tribe.

**30.2.14 Consultation with Indian Tribes in the Section 106 Review Process: A Handbook**

This *Handbook* (published by the ACHP, and available on the ACHP website) includes guidance on Federal government consultation with Indian Tribes, consultation with Indian Tribes in the Section 106 process, general questions and answers, consultation with Indian Tribes for proposed undertakings off and on Tribal lands, consultation tools and principles and tips for successful consultation.

**30.2.15 “Indian Nations of Montana” Website**

This website contains links to a general information webpage for each Tribe in Montana. The general information talks about the Tribe’s people, location and economy, points of interest and contact information. The contact information for each Tribe includes a link to its official Tribal website that provides a broader array of more specific information about the Tribe.

**30.2.16 “Museum of the Rockies in Bozeman” Website**

This website includes links to contact information for Paleontology Department staff. Information regarding paleontological sites that may be affected by MDT projects is provided to the Paleontology Department at the museum.

**30.2.17 Montana Department of Transportation (MDT) Cultural Resources Reporting Manual**

This *Manual* provides guidance for individuals and companies preparing cultural resource compliance reports for MDT. It includes the following major sections and appendices:

- Introduction,
- Before You Go to the Field,
- Fieldwork,
- Developing Historic Contexts,
- Report Content and Formatting,
- Appendix A – MDT District Contacts,
- Appendix B – Tribal Contacts,
- Appendix C – Inventory Forms,
- Appendix D – Programmatic Agreements:
  - + Affecting Historic Roads and Bridges in Montana;

- + Regarding the Treatment of Historic Irrigation Ditches Affected by Highway Construction in Montana; and
  - + Regarding Implementation of All Highway Projects Affecting the Chicago, Milwaukee, St. Paul and Pacific Railroad Resources from 1990 Through 2010; and
- Appendix E – Examples of Historic Contexts.

### **30.2.18 FHWA Technical Advisory T 6640.8A**

The Technical Advisory, dated October 30, 1987, includes guidance for addressing historic and archaeological preservation. Provide discussion demonstrating that historic and archaeological resources have been identified and evaluated in accordance with the requirements of 36 CFR 800.4 for each alternative under consideration. The information and level of effort needed to identify and evaluate historic and archaeological resources will vary from project to project as determined by the Federal Highway Administration (FHWA) after considering existing information, the views of the SHPO and the Secretary of Interior's *Standards and Guidelines for Archeology and Historic Preservation*. The information for newly identified historic resources should be sufficient to determine their significance and eligibility for the NRHP. The information for archaeological resources should be sufficient to identify whether each warrants preservation in place or if it is important because of what can be learned by data recovery and has minimal value for preservation in place. Where archaeological resources are not a major factor in the selection of a preferred alternative, the determination of eligibility for the NRHP of newly identified archaeological resources may be deferred until after circulation/availability of the environmental documentation.

The discussion should summarize the following:

- methodologies used in identifying historic and archaeological resources;
- impacts of each alternative on and proposed mitigation measures for each resource and documentation of coordination with the SHPO on the significance of newly identified historic and archaeological resources;
- eligibility of historic and archaeological resources for the NRHP; and
- effects of each alternative on both listed and eligible historic resources.

The environmental documentation can provide the ACHP an opportunity to comment pursuant to Section 106 requirements, if the document contains the necessary information required by 36 CFR 800.8. The letter transmitting the environmental documentation to the ACHP should specifically request its comments pursuant to 36 CFR 800.6.

To the fullest extent possible, the final environmental documentation needs to demonstrate that all the requirements of 36 CFR 800 have been met. If the preferred alternative has no effect on historic or archaeological resources on or eligible for the NRHP, the environmental documentation should indicate coordination with and agreement by the SHPO. If the preferred

alternative has an effect on a resource on or eligible for the NRHP, the final environmental documentation should contain:

- a determination of no adverse effect concurred in by the ACHP;
- an executed memorandum of agreement (MOA); or
- in the case of a rare situation where FHWA is unable to conclude the MOA, a copy of comments transmitted from the ACHP to the FHWA and the FHWA response to those comments.

The proposed use of land from a historic resource on or eligible for the NRHP will normally require an evaluation and approval under Section 4(f) of the *US Department of Transportation Act*. Section 4(f) also applies to archaeological sites on or eligible for the NRHP that warrant preservation in place.

**30.2.19 AASHTO Practitioner's Handbook 06 Consulting Under Section 106 of the National Historic Preservation Act**

This February 2007 Handbook provides recommendations for complying with Section 106 of the NHPA during the environmental review process for Federally assisted transportation projects.

### 30.3 PROCEDURES

Figure 30.1 provides a process flowchart for evaluating and documenting historic and archaeological resources.

#### 30.3.1 Evaluate Potential for Historic and Archaeological Resource Impacts

The Historian and Archeologist begin the process for addressing historic and archaeological resource issues for a proposed project by reviewing the information in the project's Preliminary Field Review (PFR) Report. The PFR Report is prepared by the Design Team (DT) after the PFR and summarizes information on project scope and issues discussed during the PFR. The DT distributes the final PFR Report for review and comment. Within the Environmental Services Bureau, the Project Development Engineer (PDE) serves as the document champion to collect and coordinate comments from the other Sections. The PDE compiles the comments into a PFR review memorandum for signature by the Environmental Services Bureau Chief.

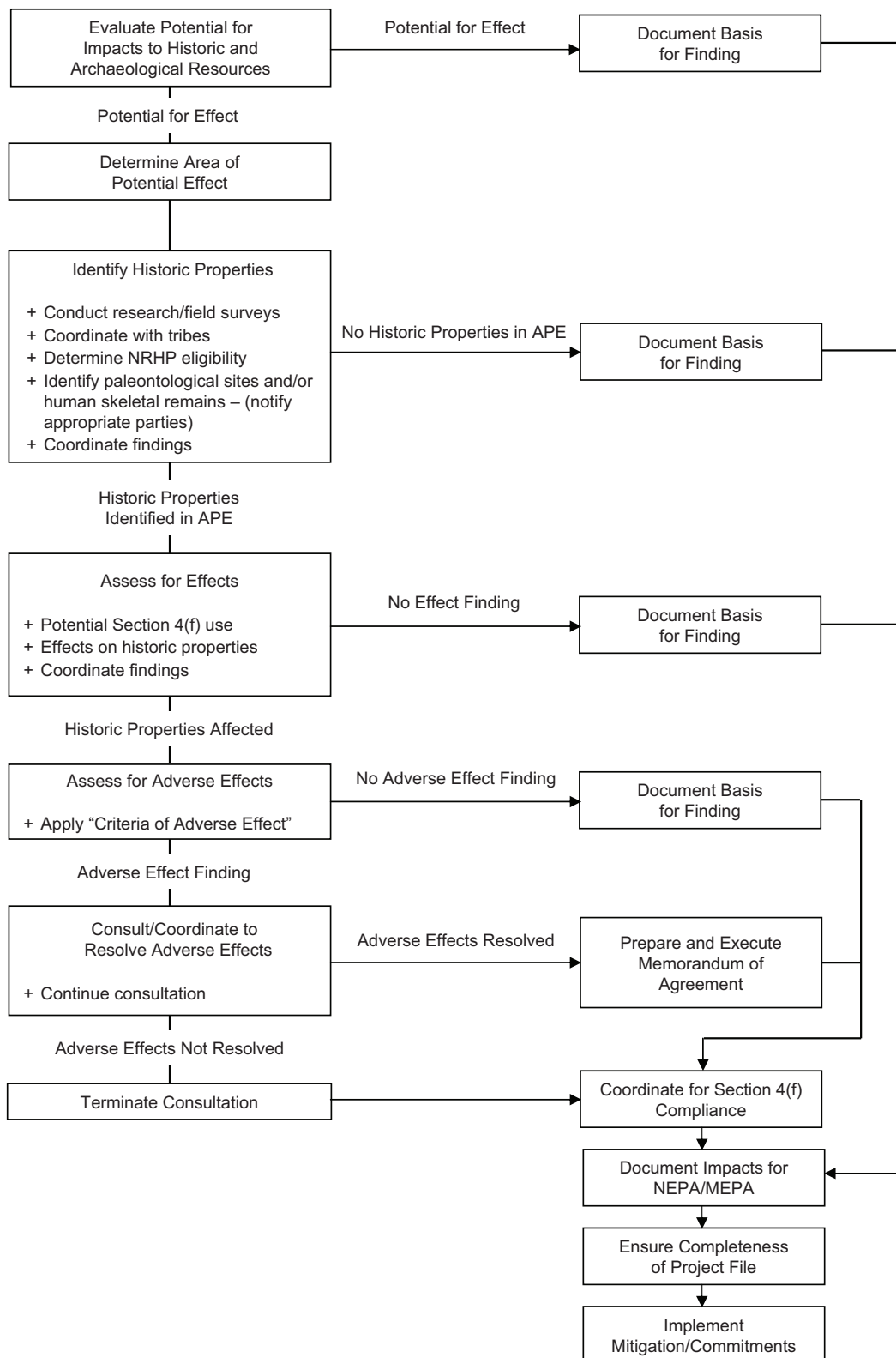
The Historian and Archeologist evaluate the information in the PFR Report to determine the project's potential for impacts to historic properties, historic structures and/or archaeological sites of national, State or local significance. Examples of actions with potential for impacts include:

- projects that may require new right-of-way or are located on new alignment that may affect previously undisturbed areas,
- projects that may require removal or relocation of structures that may be historic,
- projects that may require right-of-way from historic sites included on or eligible for inclusion on the NRHP, and
- projects that may introduce visual elements that would be out of character with historic properties located within the Area of Potential Effects (APE).

If the Historian and Archeologist determine the proposed project does not involve potential for affecting sites on or eligible for the NRHP, they document the basis for that determination for the project file and provide a copy of the documentation to the DT and the PDE.

If the Historian and Archeologist determine the project does have the potential for affecting sites on or eligible for the NRHP and the project is anticipated to involve Federal funding, approvals or permits, the Historian and Archeologist initiate the process for compliance with Section 106 and other directives applicable to historic and archaeological resources.

For projects subject to the requirements of 23 USC 139 "Efficient Environmental Reviews for Project Decision-Making," the Historian and Archeologist, in cooperation with FHWA, collaborate with participating agencies in determining the appropriate methodologies to be used and the level of detail required in the analysis of historic and archaeological resource impacts of project alternatives.



**Figure 30-1 — HISTORIC AND ARCHAEOLOGICAL PROCESS FLOWCHART**

### **30.3.2 Conduct Compliance Process for Historic and Archaeological Resources**

#### **30.3.2.1 Determine APE**

The Historian and Archeologist determine the APE for the proposed project. The APE is the geographic area or areas within which the project may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The APE is influenced by the scale and nature of the project and may be different for different kinds of effects caused by the project. The Historian and Archeologist establish the APE for archaeology, historic/architectural resources and Native American lands. For projects involving more than one alternative, the Historian and Archeologist define the APE to address all reasonable alternatives. The Historian and Archeologist consult with FHWA, SHPO and/or THPO and, if applicable, with Federal Land Management Agencies (FLMA) (e.g., Bureau of Land Management, US Forest Service, National Park Service) in determining the APE. For complex projects, the Historian and Archeologist may initiate action to have MDT coordinate with FHWA to seek formal concurrence from the SHPO/THPO and/or the FLMA on the extent of the APE. The Historian and Archeologist coordinate with the DT on an ongoing basis as project development activities proceed to monitor any changes in the project scope. If changes in the project require alterations in the APE, the Historian and Archeologist ensure appropriate identification and consideration of historic and archaeological resources within the altered APE.

The Historian and/or Archeologist decide whether they will use a term consultant to perform any of the work associated with the compliance process for historic and archaeological resources on the basis of the evaluations conducted for determining the APE, the complexity of the project, its location and current workload. Term consultants performing work for the historic and archaeological resource compliance process must meet the Secretary of the Interior's Archaeology and Historic Preservation "Qualification Standards" for their area or areas of expertise. If the Historian and/or Archeologist decide to use a term consultant, they work with the Consultant Design Bureau (CDB) in accordance with procedures in the *MDT Consultant Services Procedures Manual* to develop a cost estimate for use of the listed term consultants. The Historian and/or Archeologist select the term consultant and oversee the work performed for the duration of the contract.

#### **30.3.2.2 Identify Historic Properties**

For purposes of identification efforts, "historic property" includes any prehistoric or historic district, site, building, structure or object included in or eligible for inclusion in the NRHP. The term includes artifacts, records and remains that are related to and located within these properties. The term includes properties of traditional religious and cultural importance to an Indian Tribe that meet the criteria for inclusion in the NRHP. The term "eligible for inclusion in the NRHP" includes both properties formally determined eligible in accordance with the regulations in 36 CFR 63 and all other properties that meet the criteria for inclusion in the NRHP.



#### 30.3.2.2.1 Conduct Research

The Historian and/or Archeologist conduct background research to determine the extent of existing information available on historic properties within the APE and the need for, and extent of, further identification efforts. Background research includes the following components:

- review of existing information on historic properties within the APE (e.g., previous/current surveys, previously recorded sites, existing historic/archaeological resource clearance status of areas within the APE); and
- requests for information from individuals and organizations likely to have knowledge of, or concerns with, historic properties in the APE.

Examples of resources used in conducting background research include:

- Cadastral Survey information;
- Sanborn Fire Insurance maps;
- MDT's Road Image Viewer;
- bridge inspection reports and photographs;
- Cultural Resource Annotated Bibliographic System (maintained by the SHPO); and
- the internet (e.g., Google aerial maps).

The Historian and Archeologist document the research results in the project file and gather information from any Native American group/Tribe potentially involved within the APE to assist in identifying properties, including Tribal lands that may be of religious and/or cultural significance and that may be eligible for the NRHP.

#### 30.3.2.2.2 Conduct Further Research/Surveys

Based on the results of background research and information gathering, the Historian and Archeologist determine the type and extent of further studies/surveys needed to identify historic properties within the APE for all reasonable alternatives under study. This may involve any or all of the following:

- further background research, consultation and/or oral history interviews;
- archaeological field surveys and/or testing for evaluation of identified sites for NRHP eligibility; and
- surveys/evaluations of historic buildings and structures for NRHP eligibility.

If Tribal lands or issues are involved for affected Native American Tribal land, the Historian and Archeologist coordinate with the MDT Tribal Liaison to consult with officials (elders) of the affected Tribe. The purpose of the consultation is to inform them of planned fieldwork on Tribal lands and to determine if there are Tribal standards or guidelines (e.g., confidentiality concerns regarding sites discovered) that would affect conduct of the work. The Historian and Archeologist provide Tribal officials a map and description of the APE and other available information (e.g., survey reports, information on known sites). In conducting consultation, MDT

staff should identify the person who serves as the Tribe's legal representative and should ensure all appropriate parties are involved in consultations/negotiations.

After obtaining the necessary permissions (e.g., from private landowners) or permits (see the *MDT Cultural Resources Reporting Manual* for guidance) the Historian and Archeologist (or term consultant) proceed with any necessary field surveys to identify potential historic properties within the APE. The Historian and Archeologist (or term consultant) document the field survey results in accordance with the guidance in the *MDT Cultural Resources Reporting Manual*.

#### 30.3.2.2.3 Evaluate NRHP Eligibility and Address Sites Requiring Special Treatment

The Historian and Archeologist review the compiled information from background research and field surveys to identify properties requiring evaluation of historic significance (i.e., properties that have not been previously evaluated against the NRHP eligibility criteria in 36 CFR 60.4) and any sites that warrant other special treatment (i.e., paleontological sites, human skeletal remains).

For sites requiring evaluation of historic significance, the Historian and Archeologist apply the NRHP eligibility criteria. For each site, the Historian and Archeologist document the basis for determining the site eligible or not eligible for the NRHP.

The "National Register Criteria for Evaluation," as set forth in 36 CFR 60.4, are as follows:

*The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and*

- (a) *that are associated with events that have made a significant contribution to the broad patterns of our history; or*
- (b) *that are associated with the lives of persons significant in our past; or*
- (c) *that embody 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; or*
- (d) *that have yielded, or may be likely to yield, information important in prehistory or history.*

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

- (a) *a religious property deriving primary significance from architectural or artistic distinction or historical importance; or*

- (b) *a building or structure removed from its original location but which is significant primarily for architectural value, or which is the surviving structure most importantly associated with a historic person or event; or*
- (c) *a birthplace or grave of a historical figure of outstanding importance if there is no appropriate site or building directly associated with his productive life; or*
- (d) *a cemetery which derives its primary significance from graves of persons of transcendent importance, from age, from distinctive design features, or from association with historic events; or*
- (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; or*
- (f) *a property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance; or*
- (g) *a property achieving significance within the past 50 years if it is of exceptional importance.*

*This exception is described further in NPS "How To" #2, entitled "How to Evaluate and Nominate Potential National Register Properties That Have Achieved Significance Within the Last 50 Years," which is available from the National Register of Historic Places Division, National Park Service, United States Department of the Interior, Washington, D.C. 20240.*

If paleontological sites are identified in the APE, the Archeologist and/or Historian provides information regarding the location and nature of the sites to the Paleontology Department of the Museum of the Rockies in Bozeman, Montana.

If human skeletal remains are identified in the APE, the Archeologist and/or Historian complies with applicable notification requirements. If the remains are located on State or private land, the Archeologist and/or Historian notifies the county coroner and the SHPO in accordance with the *Montana Human Skeletal Remains and Burial Site Protection Act* (MCA 22-3-800, et seq.). If the remains are located on Federal or Tribal lands, the Archeologist and/or Historian provides telephone notification of the discovery, with written confirmation, to the responsible Federal agency official with respect to Federal lands and to the responsible Indian Tribe official with respect to Tribal lands. This notification procedure is in accordance with the "Native American Graves Protection and Repatriation Regulations" in 43 CFR 10.

#### 30.3.2.2.4 Document and Coordinate Findings

The Historian and/or Archeologist prepares a Cultural Resources Report (CRR) to present the recommended findings regarding NRHP eligibility of identified sites. This includes evaluation of current applicable programmatic agreements and documentation of findings regarding resource eligibility in accordance with the agreements. The Historian and/or Archeologist prepares the CRR in conformance with the format and content guidance in the *MDT Cultural Resources Reporting Manual*.

The Historian and/or Archeologist provides affected property owners copies of MDT Site Forms for any properties identified on their land that the Historian and/or Archeologist has determined are eligible for the NRHP.

The Historian and/or Archeologist submits the CRR to the SHPO/THPO with a request for concurrence in the findings presented. The SHPO/THPO provides a written response to the CRR either concurring with, or disagreeing with, the findings in the report. If the SHPO/THPO disagrees with the findings in the CRR, the Historian and/or Archeologist provides additional data to attempt to resolve the disagreement, or the Historian and/or Archeologist may coordinate with FHWA to elevate the issue to the Keeper of the NRHP for a formal eligibility determination in accordance with 36 CFR 63 “Determinations of Eligibility for the National Register of Historic Places.” One of the following will apply:

1. No Historic Properties Present. If coordination with the SHPO/THPO and, if applicable, the Keeper of the NRHP, confirms a finding that there are no historic properties within the APE, this completes the compliance process. The Historian and/or Archeologist provides documentation of the finding to the DT and to the EES for incorporation in the environmental documentation for the project; see [Section 30.3.4](#).
2. Historic Properties Present. If coordination with the SHPO/THPO and, if applicable, the Keeper of the NRHP confirms a finding that historic properties are present within the APE, the Historian and Archeologist document the finding in the project file and proceed with assessment of the project’s potential effects on the historic properties.

### **30.3.2.3 Assess for Effects on Historic Properties**

#### **30.3.2.3.1 Evaluate Potential for Section 4(f) Use**

The Historian and/or Archeologist determines if the potential exists for the project to involve “use” of any of the historic properties that would be subject to Section 4(f) requirements. If the Historian and/or Archeologist determines that no potential exists for Section 4(f) use, the Historian and/or Archeologist documents the basis for that determination and provides a copy of the documentation to the Environmental Engineering Section (EES) and to FHWA.

If the Historian and/or Archeologist determines potential does exist for Section 4(f) use, the Historian and/or Archeologist documents the basis for that determination and provides a copy of the documentation to EES and to FHWA. The EES and the Historian and/or Archeologist then coordinate with FHWA to evaluate potential Section 4(f) use of historic properties as the compliance process proceeds.

#### **30.3.2.3.2 Evaluate for Potential Effects**

Effects that must be evaluated for purposes of the historic and archaeological resource compliance process are those that would involve alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the NRHP.

As soon as the information is available, the Historian and Archeologist obtain preliminary project design plans and construction limits from the MDT Highways Bureau to enable a more exact

determination of the likely extent and nature of potential effects of the project on identified historic properties.

The Historian and/or Archeologist works with the appropriate project coordinator and/or engineer to evaluate the potential for effects on historic properties in the APE (e.g., direct construction and/or maintenance impacts and impacts from temporary easements, utility easements, staging and storage areas, access roads, materials sources and waste areas).

If the project could result in effects on historic properties, the Historian and/or Archeologist coordinates with the DT for the project to explore options for avoiding or minimizing the potential effects. Avoidance and/or minimization options that are reasonable and feasible are documented in the project file for subsequent consideration and incorporation in the project.

Upon completion of the evaluation of effects, the Historian and/or Archeologist prepares documentation of the results, including explanation of the basis for determining that historic properties either will or will not be affected. The Historian and/or Archeologist submits the effect determination documentation to the SHPO/THPO. One of the following will apply:

1. No Historic Properties Affected. If the effect determination documentation indicates a finding of No Historic Properties Affected, and the SHPO/THPO agrees with the finding, the Historian and Archeologist coordinate with EES to incorporate the information on the finding and results of coordination with the SHPO/THPO in the environmental documentation for the project, see [Section 30.3.4](#).

If the SHPO/THPO indicates disagreement with the No Historic Properties Affected finding, the Historian and/or Archeologist coordinates with the SHPO/THPO to attempt to negotiate a resolution of the disagreement. If the Historian and/or Archeologist succeeds in resolving the disagreement, the Historian and Archeologist coordinate with EES to incorporate the information on the finding and results of coordination with the SHPO/THPO in the environmental documentation for the project, see [Section 30.3.4](#).

2. Historic Properties Affected. If the Historian and/or Archeologist is unsuccessful in resolving SHPO/THPO disagreement with a No Historic Properties Affected finding, or if the effect determination documentation indicates a Historic Properties Affected finding, the Historian and/or Archeologist proceeds with evaluation for adverse effects.

#### **30.3.2.4 Assess for Adverse Effects on Historic Properties**

##### **30.3.2.4.1 Apply Criteria of Adverse Effect**

In consultation with the SHPO/THPO, the Historian and/or Archeologist apply the Criteria of Adverse Effect to historic properties the project will affect and document the findings in the project file.

The Criteria of Adverse Effect, as set forth in 36 CFR 800.5(a)(1), are as follows:

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

*association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the NRHP. 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.*

As described in 36 CFR 800.5(a)(2), examples of adverse effects on historic properties include, but are not limited to, the following:

- physical destruction of or damage to all or part of the property;
- alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of disabled access that is not consistent with the Secretary of the Interior's standards for the treatment of historic properties (36 CFR 68) and applicable guidelines;
- removal of the property from its historic location;
- change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;
- introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;
- neglect of a property that causes its deterioration, except where neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian Tribe or Native Hawaiian organization; and
- 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.

#### 30.3.2.4.2 No Adverse Effect

If consultation for application of the Criteria of Adverse Effect results in a finding of No Adverse Effect, the Historian and/or Archeologist coordinates with FHWA to determine applicability of Section 4(f) to affected properties. If Section 4(f) applies, see [Section 30.3.3](#).

The Historian and/or Archeologist also coordinates with EES to incorporate information regarding the No Adverse Effect finding in the environmental documentation for the project, see [Section 30.3.4](#).

#### 30.3.2.4.3 Adverse Effect

If consultation for application of the Criteria of Adverse Effect results in an Adverse Effect finding, the Historian and/or Archeologist continues coordination and consultation to attempt to resolve the adverse effect.

### 30.3.2.5 Consult/Coordinate to Resolve Adverse Effects

#### 30.3.2.5.1 Continue Consultation

The Historian and/or Archeologist consults with the SHPO/THPO, other consulting parties, interested persons and, as appropriate, the ACHP to evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties. As a part of this effort, the Historian and/or Archeologist makes information on the Adverse Effect Finding available to the EES, FHWA and the public and provides an opportunity for all parties to share their views on revolving the adverse effects. One of the following will apply:

1. Adverse Effects Resolved. If the additional consultation results in the identification of measures agreed upon by all consulting parties to resolve the project's adverse effects, the Historian and/or Archeologist prepares a Memorandum of Agreement (MOA) to record the agreed terms and conditions for the measures to be implemented to avoid, minimize or mitigate the project's adverse effects. The MOA is prepared for signature by MDT, FHWA, SHPO/THPO and, as appropriate, the ACHP and other consulting parties (e.g., affected property owners).

The Historian and/or Archeologist, in consultation with EES and FHWA, prepares a mitigation plan for inclusion in the MOA to document the actions necessary for implementing the measures to avoid, minimize and mitigate the undertaking's adverse effects on historic properties.

The Historian and/or Archeologist submits the MOA to the Environmental Services Bureau Chief to forward to the Director of MDT with a recommendation for signature. The Director signs the MOA for MDT.

After signature by the MDT Director, the Historian and/or Archeologist transmits the MOA to the SHPO/THPO and FHWA Division with a recommendation for signature. FHWA transmits the MOA to the ACHP for signature, if necessary, or for compliance with the requirement in 36 CFR 800.6(b)(1)(iv) "*Resolution without the Council.*"

The Historian and/or Archeologist coordinates with FHWA to determine applicability of Section 4(f) to affected properties. If Section 4(f) applies, see [Section 30.3.3](#).

The Historian and/or Archeologist also coordinates with EES to incorporate information regarding the MOA in the environmental documentation for the project, see [Section 30.3.4](#).

2. Adverse Effects Not Resolved. If additional consultation does not resolve the adverse effects, the Historian and/or Archeologist follows the procedures in 36 CFR 800.7 "Failure to Resolve Adverse Effects" for termination of consultation.

The Historian and/or Archeologist coordinates with FHWA to determine applicability of Section 4(f) to affected properties. If Section 4(f) applies, see [Section 30.3.3](#).

The Historian and/or Archeologist also coordinates with EES to incorporate information regarding the adverse effects and efforts to resolve them in the environmental documentation for the project, see [Section 30.3.4](#).

### 30.3.3 Coordinate for Section 4(f) Compliance

The Historian and/or Archeologist coordinates with the EES to determine documentation requirements for any historic properties determined to be subject to Section 4(f). The following applies:

1. De minimis Impact. If 23 USC 138 “*De minimis* Impact” is applicable, the EES documents the finding in accordance with applicable FHWA guidance and the Section 4(f) regulations in 23 CFR 774.
2. Programmatic Section 4(f) Evaluation. If the *De minimis* Impact finding is not applicable, Section 4(f) involvement may be covered by a Programmatic Section 4(f) Evaluation (e.g., for Historic Bridges, Minor Involvement with Historic Sites, Net Benefit to a Section 4(f) Resource). The EES prepares documentation for the Section 4(f) involvement in accordance with the provisions of the applicable programmatic evaluation.
3. Full Section 4(f) Evaluation. If neither the *De minimis* Impact finding nor a programmatic evaluation are applicable, the EES documents the Section 4(f) involvement with a Full Section 4(f) Evaluation.

See [Chapter 15](#) for further guidance on Section 4(f).

### 30.3.4 Document Impacts for NEPA/MEPA

For each project alternative considered, the Historian and/or Archeologist coordinates with the EES to ensure the environmental documentation includes information on:

- the methodologies used in identifying historic, archaeological and cultural resources; and
- the identified historic and archaeological resources included in or determined eligible for inclusion in the NRHP, including any archaeological resources that warrant preservation in place, and the impact of project alternatives on those resources.

The Historian and Archeologist also ensure the environmental documentation indicates these resources have been evaluated and addressed in accordance with all applicable Federal and State laws, regulations and guidance.

The Historian and/or Archeologist ensures that information discussing effects on historic, archaeological and cultural resources is available at public involvement activities for proposed projects. The Historian and/or Archeologist also participates in public involvement activities to ensure public concerns or questions regarding historic, archaeological and cultural resources are appropriately considered and addressed.

If new issues are raised or information is provided regarding historic, archaeological or cultural resources and/or the project’s effects on those resources, the Historian and Archeologist follow up with the EES to ensure the issues and information are appropriately reflected in the environmental documentation for the project.

See [Chapters 11](#) “Preparing Environmental Documentation,” [12](#) “Categorical Exclusion,” [13](#) “Environmental Assessment/FONSI” and [14](#) “Environmental Impact Statement/ROD” for further



guidance on environmental documentation procedures. See [Chapter 16 ‘Public Involvement’](#) for further guidance on public involvement procedures.

### **30.3.5 Ensure Completeness of Project File**

The Historian and Archeologist ensure the project file includes all appropriate supporting documentation for the historic and archaeological resource compliance process as applied to the project. This includes, at a minimum, the following:

- PFR Report;
- documentation of the APE;
- documentation on the use of term consultants;
- background research information;
- documentation on any Tribal lands or issues involved and any associated coordination with Tribal officials;
- results of field surveys;
- documentation of response to any paleontological sites or human skeletal remains identified in the APE;
- Cultural Resource Report (CRR);
- copies of correspondence submitting CRR to FHWA and SHPO/THPO;
- SHPO/THPO response to CRR;
- copies of Section 106 effect determinations and findings, any executed MOA and related correspondence; and
- NEPA/MEPA documentation on historic, archaeological and cultural resource issues.

### **30.3.6 Implement Mitigation and Commitments**

The Historian and/or Archeologist coordinates with the DT to ensure that all avoidance stipulations, as well as other compliance commitments (e.g., minimization and mitigation measures) are clearly reflected and explained in the project contract documents (i.e., construction plans, *Standard Specifications*, Special Provisions). To the extent possible, the Historian and/or Archeologist and DT should prepare the contract documents using the *MDT Standard Specifications* to minimize the need for special provisions.

During and after the project’s construction, the Historian and Archeologist monitor the activities to ensure adequate fulfillment of avoidance stipulations and other compliance commitments, including timely completion of agreed-to mitigation reports, documents, etc.

