

# Guidance on Section 106 Agreement Documents

Welcome to the Advisory Council on Historic Preservation's (ACHP) Guidance on Section 106 agreement documents. Section 106 agreement documents play a critical role in documenting a federal agency's commitment to carry out and conclude their responsibilities under Section 106 of the National Historic Preservation Act (NHPA). This guidance is provided to assist federal agencies, states, Indian tribes, Native Hawaiian organizations, applicants, local governments, consulting parties, and the public in developing, implementing, and concluding such agreements.

While reading all the sections in order is the best way to understand the sequence of actions and decisions that should be made to support the development of effective Section 106 agreement documents, you can use the menu below to navigate to specific topics about agreement development. Email [GADhelp@achp.gov](mailto:GADhelp@achp.gov) with any questions or comments.

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This guidance was last updated on April 19, 2015. Check back here for notices when new material has been added.

## Purpose

This guidance is designed for all Section 106 stakeholders. It is intended to help federal agencies, State and Tribal Historic Preservation Officers, Indian tribes, Native Hawaiian organizations, applicants, local governments, and other consulting parties develop clear, concise, and complete Memoranda of Agreement (MOA) and Programmatic Agreements (PA) under Section 106 of the National Historic Preservation Act (NHPA). It will also assist federal agencies, and those they consult with in the Section 106 process, in drafting, implementing, monitoring, amending, and terminating these agreements. Use of this guide can help minimize disputes regarding agreed upon measures down the line and save time that is better spent finding creative ways to avoid, minimize, or mitigate adverse effects to historic properties.

A fundamental goal of Section 106 consultation is to ensure an agency's decision on carrying out, financially assisting, licensing, or permitting an undertaking is well informed regarding effects to historic properties and the views of others regarding those effects. This guidance is a living document that will include updates and new sample agreement document stipulations to address emerging issues and needs as they arise. The ACHP welcomes suggestions on updates to this guide. Email [GADhelp@achp.gov](mailto:GADhelp@achp.gov) with any questions or comments.

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## Use of This Guidance

### Resources

- [MOA Template](#) (pdf)
- [MOA Amendment](#) (pdf)
- [Section 106 Agreement Checklist: Content](#) (pdf)
- [Section 106 Agreement Checklist: Reviewer's Guide](#) (pdf)
- [Sample Stipulations](#)
- [Sample Signatory Pages](#)

This guidance replaces earlier ACHP publications designed to assist in developing agreement documents. In 1988, the ACHP issued *Preparing Agreement Documents* (PAD). PAD was intended to provide sample stipulations for the most common kinds of mitigation measures used to resolve adverse effects to historic properties at that time. As with this guidance, sample stipulations were provided in PAD to serve as reference tools that provide a reasonable framework for documenting commitments within agreement documents.

While some of the sample stipulations offered as part of this guidance may be used as is, the ACHP encourages those developing agreements to assess each situation and agreement individually and determine the appropriate language that may be required in a particular circumstance. These stipulations are not intended to be substitutes for creative thinking should consulting parties propose new, innovative, or even better mitigation ideas that better resolve adverse effects in the public interest. This guidance also contains examples of administrative stipulations that either must be included in agreement

documents (e.g., regarding duration, amendment, and termination) or should be included in the document (e.g., regarding dispute resolution, provisions for monitoring/reporting, discoveries, emergencies, and professional qualifications and applicable standards).

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## Other Program Alternatives

This guidance does not cover the drafting of other key program alternatives such as alternate procedures, exemptions, standard treatments, or program comments as set out in the Section 106 regulations at 36 CFR § 800.14. The development of those program alternatives present challenges different, and often broader, than those posed by the development of MOAs and PAs. For guidance on those alternatives, please refer to <http://www.achp.gov/progalt/>.

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## Do You Need a Section 106 Agreement?

If an undertaking will or may adversely affect historic properties (any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places), the Section 106 regulations at 36 CFR § 800.6(b)(1)(i-iv) call for the federal agency to consult with the State and/or Tribal Historic Preservation Officer (SHPO, THPO) and other parties to negotiate and execute a Section 106 agreement document that sets out the measures the federal agency will implement to resolve those adverse effects through avoidance, minimization, or mitigation. This guide is meant to help the reader in that task.

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## MOA or PA?

MOAs are appropriate to record the agreed upon resolution for a specific undertaking with a defined beginning and conclusion, where adverse effects are understood. PAs, on the other hand, are appropriate for multiple or complex federal undertakings where 1) effects to historic properties cannot be fully determined in advance, 2) for federal agency programs, 3) for routine management activities by an agency, or 4) to tailor the standard Section 106 process to better fit in with agency management or decision making.

PAs generally fall into two types: "project PAs" and "program PAs." There are occasions where completing the Section 106 process prior to making a final decision on a particular undertaking is not practical. The regulations allow an agency to pursue a "project PA" (36 CFR § 800.14(b)(3)), rather than an MOA under certain circumstances. The most common situation where a project PA may be appropriate is when, prior to approving the undertaking, the federal agency cannot fully determine how a particular undertaking may affect historic properties or the location of historic properties and their significance and character. For instance, the agency may be required by law to make a final decision on an undertaking within a timeframe that simply cannot accommodate the standard Section 106 process, particularly



when the undertaking's area of potential effects encompasses large areas of land or when the undertaking may consist of multiple activities that could adversely affect historic properties.

A federal agency may also pursue a "program PA" (36 CFR § 800.14(b)(2)) when it wants to create a Section 106 process that differs from the standard review process and that will apply to all undertakings under a particular program. Reasons justifying program PAs include having a program that has undertakings with similar or repetitive effects on historic properties to avoid the need for a separate Section 106 review for each project (e.g., Community Development Block Grant agreements), or that relies on delegating major decision making responsibilities to non-federal parties (e.g., Federal Highway Administration delegation of certain Section 106 responsibilities to state departments of transportation). The ACHP has helped develop numerous program PAs for routine management of real property, land, and historic properties at federal facilities like military installations, national forests, national energy laboratories, and National Aeronautics and Space Administration centers.

Federal agencies should consider the views of consulting parties in deciding whether an MOA or PA is the appropriate Section 106 agreement. In addition to carefully considering the views of the SHPO for undertakings off tribal lands, it is important that the agency also consider the views of Indian tribes and Native Hawaiian organizations (NHO) regarding the development of any agreement that has implications for the treatment of historic properties of religious and cultural significance to them, on or off tribal lands. The agency should coordinate early with interested Indian tribes and NHOs in the development of such an agreement. Tribes and NHOs should have an opportunity to share their views on whether a programmatic approach allows for meaningful ongoing consultation and to participate in the drafting of consultation provisions in PAs. The consulting parties can also seek guidance at any point from ACHP staff about which kind of agreement document (MOA or PA) is most appropriate to any situation. Please refer to the discussion later in this guide regarding the roles of consulting parties in a Section 106 agreement as signatories, invited signatories, and concurring parties.

It is important to know which kind of PA you are picking and explain this choice to consulting parties. If there is a failure to reach agreement on the terms of the PA, the final resolution of the Section 106 process will likely differ depending on whether the agency is pursuing a project PA or a program PA.

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## **Is it Time to Draft a Section 106 Agreement?**

Before developing an MOA, the federal agency should make sure that it has, in accordance with the regulations, determined the undertaking's area of potential effects, made a reasonable and good faith effort to identify historic properties within the area of potential effects, determined how the undertaking may adversely affect those historic properties, and notified the ACHP of the adverse effect finding.

For many programs of the Department of Housing and Urban Development (HUD), the state or unit of general local government acts as the federal agency in carrying out Section 106. In that case, the "Responsible Entity" acts as the federal agency for purposes of Section 106.



Well before the agency begins drafting an agreement document, it should convene one or more consulting party meetings to assist it in reaching these conclusions and addressing how the undertaking may adversely affect the characteristics of historic properties. Consulting parties must include State Historic Preservation Officers (off tribal lands or on tribal lands where there is no Tribal Historic Preservation Officer designated), and/or Tribal Historic Preservation Officers or Indian tribes (on tribal lands), and can include the ACHP, Indian tribes, Native Hawaiian organizations, grantees, permittees or licensees, preservation organizations, local governments, the National Park Service (NPS), and others (see 36 CFR § 800.2 for a complete description of consulting parties and their roles under the Section 106 regulations).

The federal agency should start the negotiation process with an open mind. Showing up at the first meeting to resolve adverse effects with the first draft of an MOA sends the wrong signal; even if the intention was to help the parties focus on the issues to keep the process moving forward, it gives the appearance that the federal agency has already made up its mind about how to address the undertaking's adverse effects and that the agency is not interested in any ideas or solutions others may bring to the table.

Even if the agency has a complex undertaking or multiple undertakings that will be addressed through a project PA, the drafting should not begin until well after the federal agency has first identified all consulting parties and ensured they are knowledgeable about the range and scope of activities the undertaking will encompass, the range of historic properties currently known and what may still be present within the APE, and how each could be affected. Providing this context so that the consulting parties have a broad understanding of the undertaking will better allow them to provide the agency with sound and relevant advice about how to resolve adverse effects in the public interest.

If you intend to develop a program PA, before meeting consulting parties for the first time the federal agency should do the following:

- Be ready to clearly and concisely explain its program and its Section 106 challenges to the consulting parties. No consulting party knows the ins and outs of all federal programs. Some, like a SHPO, may know some details but others may not.
- Have a clear idea about why a program PA would be desirable. What are its benefits? The federal agency should be able to articulate why the standard Section 106 process is not the most effective fit for its program or a specific undertaking. For example, the agency's program may have mandatory timeframes that cannot accommodate the regular Section 106 process. It may be that complying with the normal Section 106 process for a large number of similar permits,

licenses, approvals, or grant decisions would overwhelm agency staff or other resources and create redundant busywork. Whatever the challenges involved, be ready to explain the challenge and the program PA solution in plain language to the consulting parties.

- Write a draft outline or flow chart of how your desired consultation process would work, showing how the basic aims of the Section 106 process--identification of historic properties and resolution of adverse effects to them through consultation--are being met with the proposed process. Such an outline will help you better define the challenges the agency will need to address and reasonable ways to deal with them.

Finally, regardless of what kind of agreement the federal agency intends to develop to resolve adverse effects (MOA or project PA), it is a good idea to once again consider whether there still are reasonable ways to avoid adverse effects altogether; and if not, whether there still are practicable measures that could minimize the adverse effects. Of course, sometimes the legitimate purpose and need of a project may be such that avoidance is impossible or impractical. Even so, it is a good idea to go through the exercise of considering avoidance.

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## Section 106 Agreements are Legally Binding



When a federal agency has determined that the undertaking may adversely affect historic properties or they have determined the need to develop a programmatic approach to Section 106 compliance, it evidences the completion of its Section 106 obligations to "take into account the effects of their undertaking on historic properties" and provide the ACHP a "reasonable opportunity" to comment by executing and implementing an agreement document (MOA or PA). In the rare case where the consulting parties cannot reach agreement, a required signatory may terminate consultation and request formal comments from the ACHP (see 36 CFR § 800.7).

When the Section 106 process concludes with an executed MOA or PA (either a project or program PA), such an agreement is legally binding on the agency per Section 110(l) of the NHPA. Such agreements "shall govern the undertaking and all its parts." As such, they must be written carefully and clearly so that everyone understands what they call for and the agency is able to fully carry out all legal obligations to which it has agreed.

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## Other Agreements and Ways to Comply With Section 106

### *Substitution of NEPA for Section 106*

The Section 106 regulations provide for a federal agency to formally substitute its National Environmental Policy Act (NEPA) review process to comply with Section 106 (see 36 CFR § 800.8(c)). If during the preparation of an Environmental Impact Statement (EIS), the agency finds that the proposed undertaking may adversely affect historic properties, the agency may choose either to record its commitments to resolve adverse effects to historic properties through an MOA or PA, or incorporate a description of its binding commitment to avoid, minimize, or mitigate adverse effects to historic properties in the Record of Decision (ROD). In the latter case, the agency would not need to develop a separate MOA or PA to conclude the Section 106 process: the terms in the ROD would constitute a legally binding commitment just like an MOA or PA. Note that where an agency is using the NEPA process for Section 106 purposes and is preparing an Environmental Assessment (EA), the agency would need to execute a separate MOA or PA to resolve any adverse effects and conclude the Section 106 process. [Read the NEPA/NHPA Section 106 Handbook.](#)

### *Consultation Protocol Agreements*

There is one additional type of agreement mentioned in the Section 106 regulations, at 36 CFR § 800.2(c)(2)(ii)(E). A consultation protocol is an agreement developed between the federal agency and one or more federally recognized Indian tribes or Native Hawaiian organizations (NHOs) that conditions the manner in which the agency consults with that Indian tribe or NHO for one, many, or all of its projects or programs. They are negotiated strictly between the agency and the tribe or NHO and can include provisions for confidentiality and other specific tribal or NHO concerns. The parties need only file a copy with the appropriate SHPO(s) and the ACHP; no other parties need to be involved in their negotiation. Such agreements can also go beyond the requirements of the standard Section 106 process and condition other aspects of the agency/tribal/NHO relationship (e.g., who is the point of contact, what kinds of undertakings the tribe or NHO would like to participate in consultation for, etc.). The protocol cannot, however, change or condition the role of other Section 106 participants (e.g., the SHPO, ACHP, etc.) without their consent. For more information, see <http://www.achp.gov/regs-tribes2008.pdf> and our [Native Hawaiian Consultation Handbook](#).

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## Before You Draft

Successful consultation adheres to the proper sequence of steps in the Section 106 review process. Keep in mind that the Section 106 process begins with a broad range of possibilities that are refined through consultation to reach a focused resolution. One step builds on another. If a step is taken out of sequence or skipped altogether, it is likely that the agency will have to go back and fulfill that missed responsibility (e.g., to determine the Area of Potential Effects (APE) or identify historic properties or consult about eligibility). This may cause delays and funding or resource allocation issues.

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## Timing

The Section 106 regulations address the development of an MOA only after the federal agency, through consultation with the SHPO/THPO, Indian tribes, NHOs, and other consulting parties (including applicants, local governments, and possibly the ACHP), has completed earlier steps to establish the APE, identify historic properties, assess the potential effects of its undertaking on them, and determine that its undertaking may adversely affect a historic property.

While agencies may choose to record information and recommendations relating to the resolution of adverse effects that may result from consultation *prior to* the completion of these steps, the ACHP recommends that it not present these ideas in the form of a draft MOA until these steps are complete and consultation has specifically focused on the development of an MOA. Otherwise, the agency may send the message that it has already made up its mind on appropriate steps and does not value the input that consulting parties might provide in further consultation.

When it becomes necessary to draft an MOA, the agency should work to solicit ideas, suggestions, and input from consulting parties and the public to inform the drafting process and the development of proposed measures to avoid, minimize, or mitigate the adverse effects. The MOA documents how the agency would resolve the adverse effects to historic properties. It is a best practice to record agreed-upon measures in stipulations as consultation on the development of an MOA proceeds, so all consulting parties can see and understand the progress of developing the agreement document.

In some situations, where an agency proposes to develop a PA to govern the implementation of a particular program or the resolution of adverse effects from complex project situations or multiple undertakings, the drafting process may begin earlier. Where an agency elects to start drafting the PA as consultation proceeds, for example to provide for a phased approach to the identification and evaluation of historic properties, it is important to outline the relevant issues for discussion, ensure all the consulting parties understand the intent and terms of suggested measures, and refine the outline to clarify commitments and provide necessary detail in the final document.

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## Consultation

Consultation to resolve adverse effects should be an active exchange of ideas and information between the federal agency and other Section 106 participants. As defined in 36 CFR § 800.16(f), consultation "means the process of seeking, discussing, and considering the views of other participants, and where feasible, seeking agreement." The agency should manage the consultation process to ensure the meaningful involvement of all consulting parties while working to seek agreement, where feasible, among all the parties about (1) why properties are significant, and to whom; (2) what historic properties may be affected by an undertaking; and (3) how any adverse effects to them might be avoided, minimized, or mitigated.

In order to participate effectively in the federal decision-making process, Section 106 participants must be well informed. Agencies should consider whether appropriate and relevant information has been shared with consulting parties and opportunities for broader public outreach have been explored. The agency should provide quality information in a clear, complete, and timely manner, and should make consulting parties aware of project timelines, milestones, agency obligations, limitations, and scope. This also helps guard against unrealistic expectations regarding agency responsibilities and what it can and cannot do. The agency should also ensure relevant information is shared with the public on the direction of the consultation process and disclose Section 106 determinations and decisions as they are made.

The ACHP has developed several guidance documents to assist federal agencies and consulting parties in understanding their roles and responsibilities in the [Section 106 process](#). When consulting on

controversial or complex undertakings, an agency may also consider utilizing alternate dispute resolution (ADR) principles or facilitation. For more information on ADR, visit [www.adr.gov](http://www.adr.gov) and [www.udall.gov/](http://www.udall.gov/).

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## Involving the Public

The views of the public are essential to informed federal decision making in the Section 106 process. The regulations implementing Section 106 call for the federal agency official to actively seek and consider the views of the public as the Section 106 review process moves forward. MOAs and PAs are public documents that in some cases are provided to the public for review and comment prior to execution. In other cases, the MOA or PA may call for the agency to provide for public review and comment on specific items or plans. The regulations (36 CFR § 800.2(d)) ask that the agency consider several factors in determining the level of public involvement: 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.



The regulations also say that the agency may use its NEPA procedures for public involvement so long as they provide adequate opportunities for public involvement at appropriate steps in the process. Best practices for public involvement include hosting meetings that are open to the public, and providing information about the agency's plans through newspaper articles, Web sites, radio announcements, and social media.

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## Drafting

### Who Prepares the MOA or PA?

The federal agency is responsible for preparing the MOA or PA. Because an MOA or PA sets out how a federal agency will address the adverse effects to historic properties caused by its undertaking, it is important that their professional staff or cultural resource management (CRM) contractors take responsibility for drafting agreement documents while engaging the consulting parties throughout consultation. SHPOs and THPOs often assist the agency in making sure the correct language is used and all necessary provisions are in the agreement. ACHP staff is also available to advise on the development of agreement documents, whether or not it is formally participating in the consultation.

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### Parts of a Section 106 Agreement

Section 106 agreements should follow a [standard format](#). This includes the division of the document into a title, preamble, stipulations, and signatures. Each one of these parts has a specific function to perform and should be clear, complete, and distinct.

The **title** identifies the undertaking and the signatories to the agreement. It will also indicate whether the document is a Memorandum of Agreement or a Programmatic Agreement.

The **preamble** notes the statutory authority for the undertaking; introduces the signatories; provides relevant background facts about the project, activity, or program; briefly describes the Section 106 consultation process; identifies the consulting parties; and includes any additional contextual information that may be necessary for a reader to understand the intent and purpose of the agreement.

The **stipulations** form the heart of the agreement by detailing each of the avoidance, minimization, or mitigation measures the federal agency has agreed to ensure are implemented. Following these substantive stipulations, agreement documents contain several administrative stipulations to cover what happens when the undertaking changes or is modified, when disputes arise, when new historic properties are discovered, and how long the federal agency will take to ensure the stipulations are carried out. These administrative stipulations are included in the [ACHP's Template MOA](#).

A rule of thumb on how to frame "whereas" clauses in the preamble versus "stipulations" in the body of the agreement is that "whereas clauses" should state facts that exist at the time the agreement document is executed, and "stipulations" should denote actions the agency commits to ensuring are carried out in the future, after the agreement document is executed.

Agreement documents always end with an affirmation clause and a signature block that formalizes the commitment of the agency and other parties to the terms of the agreement.

The accompanying checklists will help those drafting or reviewing Section 106 agreements ensure they follow the customary format and include these necessary provisions.

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## Understanding the Content Checklist

Linked to this guidance are two agreement document checklists, each containing a series of questions to help ensure the final document contains the necessary information to be fully implemented. The checklists include references to other useful stipulations that may be appropriate in many agreement documents. The following discussion of the first checklist, "[Section 106 Agreement Checklist: Content](#)" provides more information about each item and how it applies to Section 106 agreement development and implementation.

### ***TITLE***

- *Are all the signatories named in the title? Is/Are the undertaking(s) named in the title?*

All signatories (e.g., the federal agency or agencies, SHPO/THPO, and the ACHP, if participating) should be referenced in the title block, as should the full name of the undertaking. These vital facts of the consultation identify the necessary parties and the project for future reference. Who can or should be a signatory, invited signatory, or concurring party, and their respective rights, is discussed below.

### ***PREAMBLE***

The preamble provides information about the undertaking, the regulatory authority for the agreement, the participants in the consultation process and their roles as relevant to the undertaking and the terms of the agreement, what historic properties are affected and how, and the federal agency's findings and determinations. This information documents the federal agency's Section 106 compliance effort and should be written to allow a cold reader to understand the context for the stipulations to follow. Preambles can run from half a page to several pages, depending on the contextual information that needs to be presented. A series of questions in the checklist elicit information about the facts of the consultation that should be provided in the form of "whereas" clauses to make up the preamble. Each of these questions might be answered in separate "whereas" clauses.

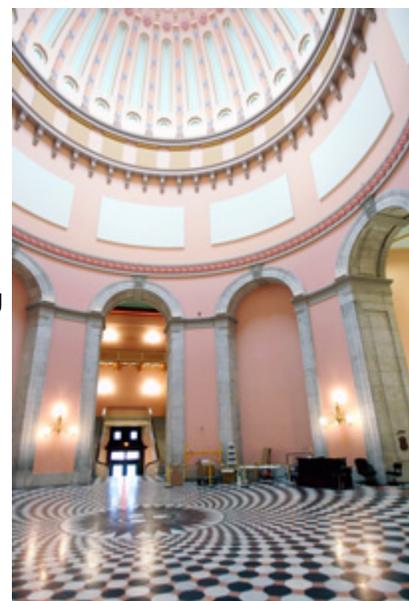
**Identify the agency.** Because Section 106 places a statutory obligation on federal agencies, it is imperative for the responsible federal agency to be identified clearly in the agreement's title, preamble, introduction to the stipulations and concluding clause, as well as anywhere else in the document that it is appropriate. If more than one federal agency is involved in an undertaking, the agencies may designate a lead agency to collectively fulfill their individual responsibilities under Section 106. In its preamble, the agreement should document designation of the lead agency and identify the nature of involvement of all federal agencies, not just that of the lead agency.

**Undertaking.** The preamble should clearly establish the project or program (the undertaking), the nature of the federal involvement and/or whether it constitutes assistance, issuance of a license or permit, or other approval. It is useful to list the statutory authority(ies) that provide the legal basis for the federal agency's involvement. The name and description of the undertaking in the Section 106 agreement should be consistent throughout the agreement, and as used in other contexts, for example in documentation prepared to meet the requirements of NEPA or informational Web sites. Project numbers or titles and dates of plans can be included to further identify the specific undertaking or program. In a PA, the preamble should also describe why the federal agency decided a programmatic approach is appropriate to the circumstances of the project or program.

**Area of Potential Effects.** The undertaking's area of potential effects should be clearly identified in the preamble so that all parties understand the scope of the Section 106 review and the relevant area(s) under consideration. A map of the area of potential effects is often helpful and can be provided as an appendix.

**Historic properties.** Listing the known historic properties in the preamble or stipulations (or in an appendix if the list is extensive) sets the framework for assessing the undertaking's effects, and prevents future misunderstandings or disagreements about what is covered in the MOA or PA. Some agreement documents provide the specific locations of affected historic properties, but in certain situations presenting such information about a historic property's location, character, or ownership might risk harm to the property, result in an invasion of privacy, or impede its use by traditional religious practitioners. In such situations, an agency should consider withholding the sensitive information from public disclosure in accordance with Section 304 of the NHPA and 36 CFR § 800.11(c). Publication of the precise location of an archaeological site, or Traditional Cultural Property (TCP), generally should be avoided to safeguard against vandalism or inappropriate access.

**Phased identification.** The Section 106 regulations specifically provide for phased identification of historic properties when circumstances may impede the completion of identification and evaluation efforts prior to project approval. Federal agencies are encouraged to analyze the needs of the project or program and the complexities that may be encountered in completing the identification process in developing a tailored approach for identification and evaluation



that satisfies the underlying intent of the regulations. Many linear projects, for example, may depend on acquiring access rights to land before a survey can be conducted, or multiple corridors or land parcels may be under consideration before narrowing the focus to a few or a single option. In cases where an agreement document includes provisions for phased identification, the agency is precluded from listing known historic properties within the preamble.

**Parties.** The involvement and role of the signatories, invited signatories, and concurring parties should be clearly documented in the Preamble section, since the roles they will play with regard to the execution, amendment, and termination of the agreement will differ (see 36 CFR § 800.6(c)). Additionally, the Preamble section should reference the public outreach that was done in the Section 106 review process.

**Commitments.** Preambles should conclude with a "now, therefore" statement that specifies all the signatories agree to the measures in the document and concludes by stating the purpose of the agreement--to take into account the effect of the undertaking on historic properties--in accordance with the statutory language of Section 106 of the NHPA. Boilerplate language for this clause is provided in the [ACHP's Template MOA](#).

## ***STIPULATIONS***

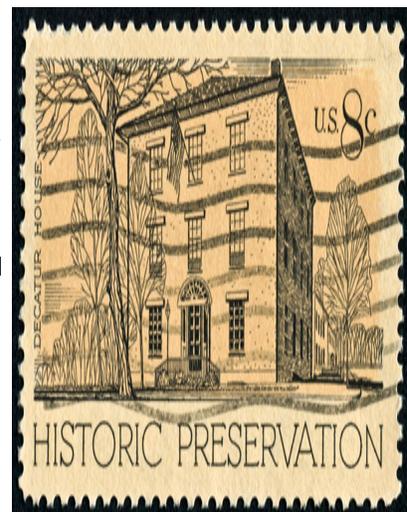
- *Are the stipulations preceded by a clear statement that the "federal agency (or agencies) shall ensure that these terms are carried out?"*

Check the [ACHP's Template MOA](#) for boilerplate language and general stipulation organization. Section 106 places statutory obligations on federal agencies; Section 110(l) of the NHPA states that where a Section 106 agreement has been executed with respect to an undertaking, such agreement shall govern the undertaking and all of its parts. The purpose of this preceding statement is to make clear that the federal agency, as the entity responsible for complying with Section 106, is the party responsible for ensuring the terms of the MOA or PA are carried out (even if other parties are assigned specific responsibilities or actions in the stipulations).

A link to [substantive stipulations](#) is provided within this guidance. These will vary depending on the nature of the undertaking, the historic properties adversely affected, and agreed-upon mitigation. Administrative stipulations, some of which must be in all agreements, are addressed below.

- *Are procedures for responding to the unanticipated discovery of historic properties or inadvertent adverse effects to identified historic properties included?*

According to the Section 106 regulations, at 36 CFR §800.6(c)(6), where the signatories agree it is appropriate, Section 106 agreements should include provisions to address the subsequent discovery or identification of additional historic properties affected by the undertaking. Discovery provisions establish an expedited timeframe for notification and response procedures in the event a previously unidentified historic property or unanticipated effects are found during project implementation. They address one of the major "what ifs" involved in implementation of an undertaking by averting confusion and delay when something is found, particularly when the discovery involves human remains. Since the regulations do not mandate that every historic property be identified during the four-step process, a good discovery provision is like an insurance policy for the MOA or PA. If such provisions are not included in the agreement, discoveries would be handled in accordance with 36 CFR § 800.13(b).



- *Are procedures for responding to emergency situations included?*

Emergencies may arise during the implementation of any undertaking. The Section 106 regulations include emergency provisions at 36 CFR §800.12. The regulations define an emergency undertaking as an essential and immediate response to a disaster or emergency declared by the President, a tribal government, or the governor of a state or another immediate threat to life or property. Section 800.12(c) of the regulations extends in most circumstances the provisions of Section 800.12(a) and (b) to those disasters and emergencies declared by local governments responsible for Section 106 compliance under the Department of Housing and Urban Development's (HUD) environmental regulations at 24 CFR Part 58. When consulting parties agree that it is appropriate, Section 106 agreements can establish procedures to expedite consultation or otherwise take historic properties into account during operations responding to emergencies and disasters. The ACHP encourages agencies to include such provisions in PAs wherever potentially applicable.

- *Is the need for confidentiality of sensitive information identified where appropriate?*

If the federal agency has determined that certain information should be withheld from public disclosure in a Section 106 review because the release of information about a historic property's location, character, or ownership might risk harm to the property, result in an invasion of privacy, or impede the use of a traditional religious site by practitioners in accordance with 36 CFR § 800.11(c) and Section 304 of the NHPA, then measures to ensure confidentiality would be referenced in the Section 106 agreement stipulations.

- *Has the use of qualified professionals been stipulated where appropriate?*

Federal agencies have an obligation, established in Section 112(a)(1)(A) of the NHPA and 36 CFR § 800.2(a)(1), to demonstrate responsibility in the care of historic properties by using professionals qualified to carry out work in preservation disciplines. The parties to an agreement may agree to restate these responsibilities as a stipulation.

- *If archaeological data recovery is stipulated, is a data recovery plan attached or referenced in the agreement?*

Data recovery is often a common mitigation measure for historic archaeological properties stipulated in Section 106 agreements. Data recovery stipulations should include specific research questions, a requirement that work is carried out or supervised by an archaeologist with appropriate qualifications, and other measures to ensure the work is achievable and yields benefit for the public. For more information on data recovery plans, see the [ACHP's online Archaeological Guidance](#).

The plan, if already developed, may be referenced in the stipulation. If the plan will be developed after the agreement is executed, the agreement should include a process for consultation to develop and finalize the plan. The stipulations should include a commitment to implement the plan as agreed upon or to reinstate consultation on its terms.

- *Are procedures for public involvement included for any ongoing reviews carried out according to the agreement's terms?*

The public should be informed about the progress of agreement implementation, commensurate with the public interest in its implementation. As appropriate, they may be given the opportunity to provide views to the federal agency regarding subsequent reviews stipulated in a Section 106 agreement, particularly those in which evaluations of historic properties, assessment of effects to historic properties, or the development of treatment measures will occur. These provisions are especially important in a PA that sets forth an ongoing process for the implementation of a program or multiple undertakings.

- *Are procedures for monitoring and reporting on agreement implementation included as appropriate to the project?*

Monitoring and reporting provisions offer the federal agency and consulting parties the opportunity to periodically assess progress in fulfillment of the stipulations. Intervals and methods of reporting should be determined through consultation. The regulations encourage the use of such provisions at 36 CFR § 800.6(c)(4).

- *If other federal funds, permits, or licenses may be used or required for the undertaking in the future, is an "other federal involvement" stipulation included?*

In the event additional federal permits, licenses, or funding are required, or have the potential to be required, for the undertaking in the future and there is no change to the undertaking, a stipulation providing for this situation can allow another federal agency to join in a Section 106 agreement. This allows that agency to meet its own Section 106 obligations while reducing delays and duplicative reviews. For an example, see the [Sample Stipulations](#) section.

- *Is a dispute resolution procedure included?*

All Section 106 agreements should include a dispute resolution stipulation to adjudicate disputes over stipulation meaning, responsibility, or performance. Boilerplate language for a dispute resolution provision is included in the [Template MOA](#). Although it includes referral of unresolved disputes to the ACHP, inclusion of the ACHP in this manner does not always require the ACHP's signature on the MOA or PA. Such a role is consistent with the ACHP's oversight of the Section 106 process and does not obligate the agency to specific actions.

- *Are provisions for amendment and termination of the agreement included?*

Per 36 CFR § 800.6(c)(7) and (8), all agreements must include provisions for amendment and termination. These two stipulations are tools for managing changes that arise during agreement implementation, and for terminating the agreement if a signatory determines that its terms cannot be met for any reason and the signatories cannot agree to an amendment.

- *Is the agreement's duration specified?*

Per 36 CFR § 800.6(c)(5), agreements must include duration provisions. The term of the agreement should allow adequate time for completion of all the stipulations and the undertaking. If not an actual date, it should be a fixed point in time that a cold reader could understand, such as "five years from the date of execution" or "one month after the date the fieldwork is completed." The term of an agreement can only be reconsidered and extended, if necessary, through an amendment. *It is important to note here that once an agreement expires, it cannot be amended to extend its life--a new agreement must be negotiated. Parties should ensure that the duration agreed to is realistic and achievable; if in doubt, the parties should provide for a longer duration period.*

- *Is compliance with the Anti-Deficiency Act recognized where appropriate?*

Federal agencies make commitments in Section 106 agreements based upon best knowledge of available funding. However, circumstances beyond agencies' control can sometimes affect their ability to fulfill those commitments. In this situation, language referencing the Anti-Deficiency Act can be useful in affirming the agency's responsibility to seek alternatives. The [Sample Stipulations](#) provide model language.

- *Is compliance with other federal laws, such as the Native American Graves Protection and Repatriation Act (NAGPRA) and the Archeological Resources Protection Act, and state laws, including state burial laws, acknowledged where appropriate?*

Federal agencies often must comply with several federal and state laws for a single undertaking. While a Section 106 agreement document has limited authority and purpose as provided in the NHPA and 36 CFR Part 800, an agency should work to coordinate its compliance with multiple cultural resource requirements, and this coordination may be referenced or acknowledged in an agreement where relevant to the Section 106 process. For example, when a federal agency's actions are directed by its compliance with another law, such as actions following the discovery of human remains on federal land in accordance with NAGPRA, it would be helpful to note such compliance in the discovery provisions of a Section 106 agreement. *However, Section 106 agreements are solely for documenting an agency's compliance with Section 106 of the NHPA, and cannot modify or require an agency's compliance with other laws.* As such, Section 106 agreement documents should not provide for an agency's compliance with other statutes. In some circumstances, resolution measures embodied in a Section 106 agreement document may be used to evidence the minimization of harm to historic properties consistent with the goals of Section 4(f) of the Department of Transportation Act. The [Sample Stipulations](#) provide example language.



When working on non-federal, non-tribal lands, state or local laws may apply. MOAs and PAs should, for reference purposes only, indicate such statutes where they may be applicable. For example an MOA could cite state unmarked burial or cemetery laws that may apply should human remains be encountered.

- *Does the stipulations section conclude with an affirmation statement consistent with the template MOA?*

The stipulations section should end with a statement affirming that by carrying out the terms of the MOA or PA, the federal agency will meet its responsibilities under Section 106 of the NHPA to "take into account" the undertaking's effects on historic properties, and afford the ACHP a "reasonable opportunity" to comment on the undertaking. The statement follows the statutory language to demonstrate fulfillment of the agency's responsibilities under Section 106 of the NHPA.

### ***Sample Stipulations***

[Click to view](#) the sample stipulations.

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## **Reviewing**



Preparing complete Section 106 agreement documents is critical because even the very best consultation effort can be undermined if agreed-upon actions are not recorded clearly and accurately in the stipulations section. The Section 106 agreement document should be straightforward and concise and use plain language wherever possible. A cold reader should be able to understand when, how, and by whom the stipulations will be implemented. Development of an agreement should also be coordinated with the appropriate parties at the right time to avoid late challenges or procedural missteps that could threaten the agency's ability to demonstrate compliance with Section 106. In addition, agencies may find it helpful to have staff responsible for the implementation of the agreement (especially if those staff were not involved in the agreement's development) review its terms to be certain its meaning is clear.

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## Understanding the Reviewer's Guide Checklist

[This second checklist](#) is designed to ensure that the MOA or PA is complete, comprehensive, and can be understood by the cold reader or others who may be called upon to implement the agreement at a later date.

- *Are all acronyms and abbreviations identified and used consistently?*

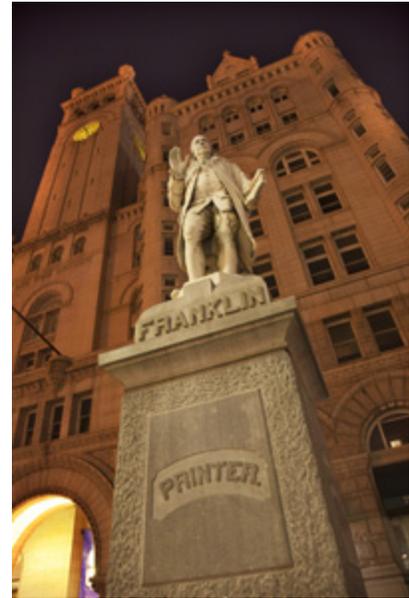
To make an agreement more readable and concise, acronyms or shorthand references may be used for the names of parties, statutes, or other terms that appear repeatedly throughout the Section 106 agreement. When this is done, the full name of the party or statute or the full definition of the term should be spelled out completely the first time it is used in the agreement, followed by the shorthand reference in parentheses. The shorthand reference then may be used in the remainder of the agreement, but special care should be taken to ensure its use is consistent. Only one shorthand reference should be used for a given party, statute, or other term. If there are numerous acronyms used it may be helpful to spell them out in an appendix.

- *Are all of the provisions agreed upon during consultation included?*

A Section 106 agreement that has been executed and implemented in accordance with 36 CFR Part 800 evidences the federal agency's compliance with Section 106 and governs the undertaking and all of its parts. The responsible federal agency has no obligation under Section 106 for the subject undertaking to perform actions or request another party to perform actions that are not included in the agreement. It is, therefore, essential that an executed Section 106 agreement include all the measures that have been agreed to by consulting parties for the entire undertaking. Using an outline that tracks and records decisions as consultation proceeds is one way to ensure nothing is left out of the final document.

- *Do the stipulations clearly identify who is responsible for carrying out each measure?*

Section 106 agreement documents should clearly identify the responsible party for each action. Sometimes agreements are explicit about the measures that will be carried out but fail to clearly assign the duty to implement such measures to a specific party or parties. For example, an agreement may state: "Prior to its demolition, Building X will be documented in accordance with Historic American Buildings Survey (HABS) standards." While this statement specifies the action, it fails to identify who will carry it out. Changing the statement in the following manner identifies both the responsible party and the specific action: "Prior to its demolition, the Department of the Navy will document Building X in accordance with HABS standards." Specifying the party assigned to implement each measure should help avoid confusion and disagreement and any delay in the agreement's completion and implementation that may result from disputes or misunderstandings.



- *Do all tasks have clear timeframes for initiation and completion?*

While many agreements simply state that all the stipulations will be carried out by a certain date, the individual stipulations can also contain their own specific timetable. This allows the consulting parties to monitor progress and ensure stipulations are sequenced properly and are being completed.

- *Have all terms and references been used correctly and consistent with regulatory definitions?*

Because Section 106 agreements are executed to satisfy the requirements of Section 106 of the NHPA, they should rely on the terms and definitions provided by this statute and Section 106's implementing regulations (see 16 U.S.C. § 470w and 36 CFR § 800.16). For example, use of the term "cultural resources" should be avoided because the scope of Section 106 is limited to "historic properties," as defined in the statute and regulation. While not necessary, it may be helpful to state in the agreement that it incorporates the definitions included in the NHPA and 36 CFR Part 800. In circumstances where an agency is substituting NEPA compliance for its Section 106 responsibilities, agencies may need to address cultural resources as part of their effort to comply with NEPA; however, stipulations that are



included within a ROD to evidence satisfaction of Section 106 responsibilities should clearly apply only to historic properties.

- *Are all stipulations written in the active voice?*

Include simple, straightforward statements with a clear subject and verb. When using active voice, the subject of the sentence performs the action (e.g., "the federal agency *will record* the building to HABS standards"). Because the stipulations of a Section 106 agreement assign responsibilities for certain measures and commit parties to identified actions, it is important to clearly state those responsibilities and commitments. Avoiding wordy, passive voice sentences (e.g., "the building *will be recorded*") makes the terms of the agreement easier to understand. Using active voice in an agreement helps answer the above questions and provides a construct to insert timeframes.

- *Is the process for post-review decision making described in a complete, logical, and organized way?*

To help ensure the expectations of all parties are met where a Section 106 agreement provides for post-review decision making, it is important to clearly delineate how and when subsequent steps will be taken. The agreement document should be written to allow cold readers, consulting parties, and future participants to understand how the process will work sequentially in keeping with the regulations. For instance, you should not stipulate how post-review adverse effects will be resolved before the procedure for phased identification is explained.

- *Are all attachments and appendices cited in the agreement included?*

Where the Section 106 agreement cites or references an attachment or appendix, it is imperative that the actual attachment or appendix be appended to the agreement document. References to all such attached materials should be consistent and clear so that the associated material is able to be easily located. In some cases, lengthy lists of historic properties, of consulting parties, or definitions used in the agreement are placed in an appendix so as not to interrupt the flow of the document. Similarly, attachments that are not referenced in the agreement document or are not supportive of its implementation should not be included.

- *Are spelling, grammar usage, page numbering, section numbering, etc. accurate and consistent?*

It is important for the Section 106 agreement to be well drafted without these minor errors whenever possible to avoid potential confusion or misunderstanding.

- *Can a cold reader understand the agreement and what it requires?*

The Section 106 agreement governs the undertaking and all of its parts. Many undertakings may take months or years to complete, and the agreement should be able to be clearly interpreted and implemented throughout its duration. Because new parties may become involved in actions identified in the Section 106 agreement, or other changes may take place while the agreement is in effect, the agreement should be written in such a way that a cold reader (e.g., someone who did not participate in the drafting of the agreement) can understand its terms and intent.

- *Are the signature blocks for signatories, invited signatories, and concurring parties clearly separated or designated on the signature page(s)?*

As discussed in detail below, signatories, invited signatories, and concurring parties have different rights in regard to executing, amending, and terminating the Section 106 agreement. As such, their status should be clearly identified in the signature blocks.

- *Are all parties assigned responsibilities in the agreement signatories or invited signatories?*

Parties have no obligation to fulfill requirements set out in a Section 106 agreement unless they have signed the agreement as a signatory or invited signatory (unless a separate document -- for instance, a permit condition -- imposes such an obligation). The failure of the federal agency to obtain the signature of parties that have been assigned duties under the agreement could compromise the successful implementation of the agreement. Accordingly, the federal agency should ensure all parties with obligations assigned under the terms of an agreement have signed that agreement in the appropriate role.

- *Does the duration of the agreement allow adequate time for project implementation and the completion of all stipulations?*

While every Section 106 agreement must include a duration stipulation, there is no set standard for how long that duration must extend. The federal agency should assess the undertaking, its requirements, and all responsibilities assigned under the agreement to determine the agreement's appropriate duration. A federal agency's Section 106 compliance is likely to be incomplete where an agreement expires before an undertaking is finished or the agreement's terms are fully met. While an active agreement can be amended to extend its duration, an expired agreement cannot be amended.

- *Do others in the agency support commitments made in the agreement?*

The regulations require the federal "agency official" to sign an MOA or PA. This individual is described in the regulations as someone who has "jurisdiction over an undertaking [and] takes legal and financial responsibility for Section 106 compliance..." (36 CFR § 800.2(a)) that can commit the federal agency to take certain action for a specific undertaking as a result of Section 106 compliance. Prior to committing his/her agency to certain actions during consultation or through the execution of an agreement, the agency official should ensure that others within the agency who may have a substantial policy, program, or financial interest in these commitments support them. When an agency backs away from commitments made during consultation or changes course without explanation because others in the agency have declined to support them, it may undermine the trust consulting parties put in the agency's negotiations and cause delays.

- *If the agreement is executed in counterparts, does each signature page include the title of the agreement?*

Federal agencies may elect to execute Section 106 agreements in counterparts, meaning that each signatory, invited signatory, and concurring party may sign and date a separate signature page concurrently or sequentially that are then attached together to make up a single agreement with all signatures. Should an agency decide to do so, each page should include the complete title of the agreement so there is no ambiguity about what document that party is signing. The federal agency should then compile all the signatures and send a complete copy of the document to all the consulting parties, and the ACHP.

- *If the ACHP is participating in the consultation, have all the other signatories signed the agreement before the agency forwards the document to the ACHP for signature?*

It is the ACHP's practice to sign Section 106 agreements after all other signatories have signed the document. The agency should also have the signature(s) of those invited signatory(ies) that are assigned responsibilities under the agreement before presenting the document to the ACHP for signature. As the party who generally oversees the Section 106 process, the ACHP takes this approach to ensure that the signatory parties concur with the terms of the agreement and that all parties assigned responsibilities under the agreement have committed to fulfilling those actions. "Responsibilities" means the assignment of duties that must be performed by that party, rather than mere rights to do something (e.g., rights to

review a design). Once all the signatories have signed, the agreement is executed and it goes into effect; at this time the agency can then circulate it for consulting parties' signatures. In some cases, the federal agency may request the signatures of the concurring parties prior to requesting the ACHP's signature.

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## Filing and Distribution

After an agreement has been executed, the agency should take further steps to ensure it is properly filed and distributed.

- In accordance with 36 CFR § 800.6(b)(1)(iv), the federal agency must forward a copy of the executed Section 106 agreement, along with the documentation specified in 36 CFR § 800.11(f), to the ACHP prior to approving the undertaking. The agency's responsibilities under the Section 106 regulations are not satisfied without this filing. The ACHP retains a copy of the fully executed Section 106 agreement and typically sends a courtesy letter of acknowledgment to the responsible federal agency upon filing.
- In accordance with 36 CFR § 800.6(c)(9), the federal agency must provide each consulting party with a copy of the executed agreement.
- Excepting information that may be withheld from public disclosure pursuant to 36 CFR § 800.11(c), the federal agency should make a copy of the executed agreement available to the public in accordance with 36 CFR § 800.2(d). All parties should be aware that the ACHP may make agreement documents that it signs publicly available.

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## Executing Agreement Documents



An MOA or PA is a legally binding document that commits an agency both by statute and by federal regulation to carry out the undertaking in accordance with the terms of the agreement in satisfaction of its responsibilities under Section 106. The MOA or PA serves three main purposes: (1) to specify the alternatives or mitigation agreed to by the signatories; (2) to identify who is responsible for carrying out the specified measures; and (3) to serve, along with its implementation, as evidence of the agency's compliance with Section 106 of the NHPA.

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## Signatory Status

Parties who may sign a MOA or PA fall into one of three categories: (1) signatories; (2) invited signatories; and (3) concurring parties.

**Signatory:** In accordance with 36 CFR § 800.6(c)(1), a signatory has the sole authority to execute, amend, or terminate the agreement. The federal agency and the SHPO/THPO are signatories; the ACHP is a signatory as well when it has participated in consultation for the agreement and in all program PAs. Except as described below, their signature is almost always required for the agreement to go into effect. A THPO or other tribal representative is a required signatory to a Section 106 agreement only when an undertaking may occur on, or affect historic properties on, tribal lands. Once all of the signatories have signed the agreement, it is executed and goes into effect.

**Federal agency:** The federal agency official, as defined by 36 CFR § 800.2(a), is the person who signs the agreement on behalf of the agency. A federal agency is not required to sign a Section 106 agreement for an undertaking where, pursuant to 36 CFR § 800.2(a)(2), another federal agency has agreed to act as "lead agency" on its behalf. In such an instance, the lead agency signs the Section 106 agreement on behalf of the non-lead agency to fulfill their collective responsibilities for the undertaking. Where the agencies have chosen to designate one agency as lead for the purposes of Section 106 review, the ACHP strongly encourages the agencies to evidence this lead agency agreement in writing since the lead federal agency is being given the authority to potentially commit other agencies to a course of action. The existence of such lead agency agreements should be noted in the preamble of the Section 106 agreement. If the non-lead federal agency has specific duties in the MOA or PA, they should be an invited signatory to the agreement.

**SHPO/THPO:** The SHPO/THPO or their designee is usually the individual who signs the agreement on behalf of the SHPO's office or the THPO's office. When the subject undertaking of an agreement will occur on or affect historic properties on tribal lands and there is no THPO designated under Section 101(d)(2) of the NHPA, a representative designated by the tribe shall sign the agreement as a signatory in addition to the SHPO.

**ACHP:** If the ACHP participates in the consultation to develop the agreement, it also signs the MOA or PA as a signatory. When the ACHP is participating in consultation, usually the executive director of the ACHP is the individual who signs the agreement on behalf of the ACHP. In certain situations, the chairman of the ACHP may sign the agreement for the ACHP.

**Invited signatory:** In accordance with 36 CFR § 800.6(c)(2), an invited signatory, upon signing, has the authority to amend and terminate the agreement. The agency official may invite additional parties to sign the agreement, such as an Indian tribe or NHO who attaches religious and cultural significance to historic properties affected by the undertaking (off tribal lands), or any party that assumes a responsibility under the agreement. The refusal of an invited signatory to sign the agreement does not prevent the agreement from being executed; however, an agreement cannot impose a duty or responsibility on a party that has not signed it. When an Indian tribe or NHO is asked to be an invited signatory to an agreement for which the undertaking will not occur on or affect historic properties on tribal lands, the THPO or a representative designated by the tribe or NHO, as the case may be, can sign the agreement on behalf of the tribe or NHO. The ACHP notes and accepts that some tribes may decline to sign agreement documents in principle but may participate in development of the agreement. Such decisions are within the rights of Indian tribes, and the ACHP recommends that agencies understand and accept such decisions.

Applicants are frequently asked to be invited signatories due to the responsibilities assigned to them under the agreement. In some instances, an agency may be able to condition the terms of its assistance or permit to an applicant as a means of compelling the applicant to take certain actions under a Section 106 agreement even if the applicant declines to sign the agreement. Federal agencies determine whether to invite additional signatories to sign the agreement and should weigh the decision carefully, since an

invited signatory who actually signs an agreement has the same ability to amend or terminate the agreement as other signatories. Asking parties to be invited signatories to a Section 106 agreement can evidence a higher level of commitment to success in the agreement's implementation as well as continued engagement and partnership in the process.

**Concurring party:** In accordance with 36 CFR § 800.6(c)(3), a concurring party is a consulting party invited to concur in the agreement document but who does not have the authority to amend or terminate the agreement. Like an invited signatory's signature, a concurring party signature is not required to execute the agreement; a concurring signature is essentially an endorsement of the agreement. Thus, the refusal to sign by any party asked to concur in the agreement does not prevent the agreement from being executed. Whether any or all other consulting parties are invited to concur in an agreement is at the federal agency's sole discretion. Extending the offer to sign an agreement as a concurring party may be an effective way of recognizing the assistance and support that a party has provided for the actions being evidenced in the agreement and encouraging their ongoing support.

The individual who signs the agreement on behalf of any invited signatory or concurring party should be one with approval authority for any responsibilities or duties assumed under the agreement, or authority to represent the broad interests of their organization, as the case may be. The signature page of the agreement document should identify and differentiate the signatories, invited signatories, and concurring parties.

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## Execution

To execute an agreement, the federal agency and the SHPO/THPO (and the ACHP if participating, and in all program PAs) sign and date the agreement. Once so signed, the agreement is executed. The federal agency can seek the signatures of any invited signatories and concurring parties, but such an agreement is already executed and in effect. Pursuant to

36 CFR § 800.6(b)(1)(iv), the agency official must submit a copy of the executed agreement, along with the documentation specified in 36 CFR § 800.11(f), to the ACHP prior to approving the undertaking. The ACHP does not need to receive an original copy of the agreement; a scanned PDF or mailed copy is sufficient provided its text, all signatures, and any attachments (e.g., exhibits, appendices -- in color if necessary) are clear. The agency official should also send copies of the fully executed agreement to all the consulting parties.



When the ACHP is participating in the consultation process, it should be the last signatory to sign the agreement. The federal agency should sign the agreement first, and seek the signature of the SHPO/THPO, and invited signatories who will be assuming responsibilities under the agreement prior to sending it to the ACHP for execution. After the ACHP signs, the agreement is in effect, and the agency can then circulate it for the signatures of those invited signatories who do not have responsibilities under the agreement and concurring parties. While the ACHP prefers to receive the original document, in some situations it may advise that an electronically mailed PDF or mailed hard copy with the other signatures will suffice. The agency should work with the ACHP staff contact regarding the form and transmittal of the signature copy. Once the ACHP, agency, and SHPO/THPO have signed the agreement, it is executed.

The ACHP will retain a copy of the signed agreement for its records. The process for executing PAs is the same as the process for executing MOAs.

Once the federal agency has a fully executed Section 106 agreement in place, in addition to providing copies to all the consulting parties, it should make this information available to the public, subject to the confidentiality provisions in 36 CFR § 800.11(c). The agency must then ensure the undertaking is carried out in accordance with the terms of the agreement.

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## **Advisory Comments**

In some situations, the ACHP may determine it is appropriate to provide additional advisory comments about an undertaking for which an agreement will be executed. In this situation, the ACHP shall provide its comments to the agency official in writing when it executes the agreement. In such circumstances, the ACHP will typically ask that the agency official ensure all consulting parties are provided with the ACHP's comments.

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## **Signing Agreements in Counterpart**

Section 106 agreement documents may be executed in counterparts; i.e., each signatory, invited signatory, and concurring party may sign and date a separate signature page concurrently or sequentially that are then attached together to make up a single agreement with all signatures. In this situation, each separate signature page should include the complete title of the agreement so there is no ambiguity about what document the party is signing. For an example of a properly formatted counterpart signature page, [click here](#).

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## **Amendments**

If an MOA or PA needs to be amended, the changes are recorded in a format that looks just like the [MOA format](#). Amendments are executed in the same manner as the original agreement. Once an invited signatory signs the original Section 106 agreement, that invited signatory must also sign the corresponding amendment to make it effective. Therefore, the same signatories and invited signatories sign the amended agreement, and a fully executed copy is filed by the agency (with any attachments, exhibits, appendices -- in color if necessary) with the ACHP.

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## **Failure to Agree**

In the vast majority of circumstances the parties are able to reach agreement. Should they be unable to reach an agreement on appropriate mitigation for a MOA or project PA, there are certain alternative courses of action. If the SHPO terminates consultation, then the agency and the ACHP can consult and may execute an agreement without the SHPO. If a THPO or Indian tribe terminates consultation regarding an undertaking occurring on or affecting tribal lands, the agency and the ACHP cannot execute an agreement, and the ACHP shall comment pursuant to 36 CFR § 800.7.

Where the agency and the SHPO/THPO cannot agree on the terms of the agreement, the agency official shall request the ACHP to join the consultation (if it is not already participating) and provide to the ACHP the documentation specified in 36 CFR § 800.11(g). If the ACHP decides to join the consultation, the agency shall proceed to consult further with the SHPO/THPO, ACHP, and any other consulting parties to reach agreement. If the ACHP elects not to join the consultation, it shall notify the agency and proceed to comment in accordance with 36 CFR § 800.7(c).

Where the ACHP is already participating in the consultation and the agency terminates consultation, the head of the agency or the assistant secretary or other officer with major department-wide or agency-wide responsibilities shall request the ACHP comment pursuant to 36 CFR § 800.7(c), and shall notify all consulting parties of this request.

If the ACHP terminates consultation, the ACHP shall notify the agency official, the agency's Federal Preservation Officer (FPO), and all consulting parties and proceed to comment in accordance with 36 CFR § 800.7(c). The ACHP may consult with the agency's FPO prior to terminating consultation to seek to resolve issues concerning the undertaking and its effects on historic properties. Further, when the ACHP issues formal comments, they represent the comments of its Presidentially and statutorily designated members, not the staff.

When the consulting parties cannot reach agreement on the terms of a program PA, the agency must use the standard Section 106 process for each individual undertaking that would have been covered by the program PA.

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## Agreement Implementation



## Agency Commitments and Consequences

Once a Section 106 agreement is executed and filed with the ACHP, the federal agency (and/or applicant) is able to implement the undertaking and it may now approve the expenditure of federal funds on the undertaking or issue a license or permit for the undertaking. Pursuant to Section 110(l) of the NHPA, and 36 CFR § 800.6(c), an executed and implemented MOA or project PA evidences the agency official's compliance with Section 106 and governs the undertaking and all of its parts. The agency official

shall ensure that the undertaking is carried out in accordance with the terms of the agreement. Similarly, an agency's compliance with the procedures established by a programmatic agreement for agency programs developed and executed in accordance with 36 CFR § 800.14(b)(2) satisfies the agency's Section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated.

The federal agency must ensure the terms of the Section 106 agreement are met. While actions may be assigned to other signatories in the agreement, including applicants, SHPOs, THPOs, tribes, and NHOs, the responsibility for Section 106 compliance remains with the federal agency. Therefore, the agency should oversee or monitor the progress that is made to fulfill the agreement's stipulations, even in those circumstances where the majority or all of the stipulations are being carried out by other parties, such as an applicant. With this in mind, the agency should avoid commitments it cannot or is unlikely to complete, or cannot ensure that others complete, when drafting the agreement. In addition to resulting in non-compliance with Section 106, breaking such commitments can interject mistrust and uncertainty into long-term working relationships.

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## **SHPO, THPO/Indian Tribe, and ACHP Roles in Monitoring Agreements**



An agreement should not assign responsibilities to parties that are not signatories or invited signatories. In addition to the federal agency, signatories such as the SHPO, THPO, and the ACHP may have certain duties under an agreement, including reviewing documentation or other deliverables. As the agency responsible for administering the Section 106 process, the ACHP typically has a unique role in the dispute resolution process in Section 106 agreements. Where an entity that is not a signatory by right pursuant to 36 CFR § 800.6(c)(1) is asked to take an action in a Section 106 agreement beyond simply being allowed the opportunity to review and comment, the federal agency should invite that party to become an invited signatory (36 CFR § 800.6(c)(2)(iii)). For instance, when an Indian tribe is asked to monitor construction activities or participate in an archaeological investigation off tribal lands as a mitigation measure, the agency should invite that tribe to be an invited signatory to the agreement. Concurring parties, who sign an agreement document simply to demonstrate their concurrence with its terms and who lack the authority to amend or terminate the agreement, should not be assigned responsibilities in the agreement. However, a consulting party's signature on an agreement document, whether as a signatory party or a concurring party, is not required for the agency to provide that party an ongoing or future opportunity to consult.

In setting forth the responsibilities of parties other than the federal agency, it is important to remember that, where relevant, agreement documents should provide for the review of documents or action plans by SHPOs, THPOs, and others as appropriate. These stipulations should be worded in such a way so that the SHPOs, THPOs, and others provide comments to the agency within a specified time period (often 30 days), with the agency then considering the comments before moving forward. The agreement generally should not provide for any SHPO/THPO or other tribal official "approval" or "concurrence;" however, in certain situations, the agency may determine that such approval or concurrence is appropriate (e.g., design review). In the Section 106 regulations, the ACHP, SHPO, THPO, and other consulting parties advise and assist the federal agency; Section 106 does not give them the authority to dictate an outcome to a federal agency.

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## **Reporting and Interim Reviews**

An agency should consider providing occasional reports to consulting parties on the implementation of an agreement (see 36 CFR § 800.6(c)(4)). In certain agreements, such as program PAs, periodic and regular reporting may be more relevant and important. The timing, content, structure, and distribution of reports may be negotiated during the drafting of an agreement. There is no single approach to reporting; the agency should consider how the information may be used and how it can be best presented to ensure the report has maximum utility. The parties should consider whether the report is intended to serve as a tracking mechanism for the implementation of an agreement, or to provide quality control in a final report at the completion of an agreement. The report should identify openly and honestly any implementation challenges that may have been experienced and if necessary, discuss the possibility of an amendment to the agreement to address those challenges. In some cases, a meeting among the consulting parties may take the place of reporting, or may be used to follow up, support, or discuss a report.

***Tracking and oversight.*** The federal agency should take the primary responsibility to track the progress toward completion of a Section 106 agreement; however, the SHPO and/or THPO are also encouraged to take active roles in monitoring its progress. For example, SHPOs and THPOs may recommend annual meetings with federal agencies wherein they assess the status of all ongoing Section 106 consultations and the implementation of existing agreement documents.

The ACHP itself currently uses a software tracking system to record and follow the progress of Section 106 cases and the implementation of agreement documents. This software can send ACHP staff pre-programmed reminders about project milestones and record updates about the implementation of an agreement. It is important for the federal agency to establish regular review points and provide for ongoing outreach to consulting parties for the duration of an agreement. It is also important for the other parties to the agreement to keep track of these review points and participate in relevant discussions whenever possible.

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## Amendments

Sometimes it is not possible for an agency or other parties to an agreement to carry out all of the stipulations as recorded within the original agreement timeframe. A federal agency may elect not to pursue the proposed undertaking, it may decide ultimately to deny a permit, or it may otherwise need to change the scope, direction, or components of a proposed undertaking. Project changes might also necessitate a different approach to avoidance, minimization, and mitigation measures. If an MOA or PA needs to be changed, including a change to extend the duration of the agreement, the changes are recorded in an amendment that looks similar to the [MOA format](#). The title block of the amendment should include "Amendment to" along with the original agreement title. A best practice is to identify in the amendment's preamble how the new, updated agreement will be referenced in all future project documentation, such as, "Memorandum of Agreement among Agency X and the Y State Historic Preservation Officer for the Large Construction Project, as amended March 20, 2014 (Large Project MOA, as amended 3/20/14)." Amendments are executed in the same manner as the original agreement. In other words, the same signatories and invited signatories sign, and a fully-executed copy is filed with the ACHP.

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## Closing Out an Agreement

There are occasions when the terms of an agreement are no longer in force. In those cases, a federal agency may decide to issue a formal notice as a means of closing out the agreement. Note that this is different from terminating an agreement, which may occur when the terms of the agreement are not being or cannot be carried out. See [Terminating an Agreement](#) below.

If a federal agency executes a Section 106 agreement, but then decides to not carry out, assist, or permit the proposed undertaking prior to any physical work actually beginning, it may no longer have any Section 106 responsibilities for that undertaking. In this case, the federal agency may elect to vacate the agreement by sending written notice to all consulting parties of the change in circumstances and its decision to vacate the agreement. If work related to the undertaking has already begun in some manner, for example, archaeological survey was started or initial ground disturbance occurred, the federal agency cannot vacate the Section 106 agreement and instead, must amend its terms to provide for the changed circumstances.

When all of the terms of an agreement have been carried out and the agreement has expired in accordance with its duration clause, the federal agency should send written notice to the other signatories and consulting parties, informing them to that effect. While not required by the regulations, this written notice advises the parties that the agency believes it has met its Section 106 obligations, thereby providing evidence of formal closure of the process. It also allows the parties to raise any questions they may have about the adequacy of the agency's efforts.

A notice of completion also provides the agency an opportunity to seek the views of the signatories and other consulting parties on the effectiveness of the agreement in resolving the adverse effects and addressing the agency's needs and requirements. The ability to reflect on the process and identify lessons learned and best practices could be invaluable to the agency in moving forward and refining its approach to future Section 106 reviews.

If the terms of an agreement have been met but the agreement remains in effect due to a longer duration clause, the agency should consider amending the agreement to alter its duration clause, recognize the work completed, and provide for the completion of its Section 106 responsibilities.

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## **Terminating an Agreement**

A signatory or invited signatory (who has signed the agreement) may terminate the agreement. An agreement may be terminated because its terms cannot be met. Terminating an agreement is a step that should not be treated lightly. Prior to terminating an agreement because its terms cannot be carried out, the signatories should consult to determine whether an amendment to the agreement might be feasible and appropriate. Once an agreement is terminated and before continuing with the undertaking, the responsible federal agency must either enter into a new Section 106 agreement for the specific undertaking or project, or request and consider the comments of the ACHP pursuant to 36 CFR § 800.7. Should a programmatic agreement for an agency program or for multiple undertakings be terminated, the agency must comply with 36 CFR §§ 800.3-800.7 for each individual undertaking that was covered by the agreement.

*Once an agreement expires pursuant to its duration provision, it cannot be extended or amended.* If the agreement expires before the undertaking or mitigation measures have been completed, the federal agency must reinitiate consultation to develop a new agreement to resolve the adverse effects from the undertaking. The new agreement may acknowledge, incorporate, or continue already agreed upon measures.

A Section 106 agreement is a legally binding document. The failure of an agency to fulfill its terms is a violation of federal law and may ultimately lead to litigation and court enforced actions. Prior to that point, where an agency cannot meet certain obligations in the agreement or disagreements arise among the signatories about the implementation of its terms, the agency should utilize the dispute resolution, amendment, or termination provisions.

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## **For More Information:**

For more information or if you have questions regarding this guidance, email [GADhelp@achp.gov](mailto:GADhelp@achp.gov).

- [ACHP Web page](#)
- [Section 106 assistance for users](#)
- [Training \(Advanced Section 106 and webinars\)](#)
- [OFAP assignments; policy teams](#)
- [ONAA consultation handbooks](#)
- Other: [NCSHPO](#); [NATHPO](#); [FPOs- Federal agency contacts on ACHP website](#)

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