

STIPULATIONS RECOMMENDED FOR ANY AGREEMENT

The ACHP's [MOA template](#) provides examples of basic administrative stipulations for every Section 106 agreement, such as a duration clause, amendment, and termination provisions. Here are additional stipulations that most users would also find helpful to include in agreement documents. Users may refer to the following example stipulations in drafting their own case-specific language.

The example stipulations in this section cover:

- Adhering to Standards and Guidelines
- Use of an Existing MOA or project PA by Other Federal Agencies to Meet their Section 106 Obligations
- Recognizing Other Federal, State, and Tribal Law Requirements
- Project Modifications and Changes
- Anti-Deficiency Act Provisions
- Communication Among the Parties to an MOA or PA
- Annual Reporting
- Annual Meeting
- Emergencies

Adhering to Standards and Guidelines:

Agreements may include a statement affirming that personnel carrying out activities related to historic properties identification, effects assessment, and mitigation will have appropriate training and experience, and/or that such activities will be carried out in accordance with applicable federal, state, tribal, or local guidelines. The Section 106 regulations (at 36 CFR § 800.4(c)(1)) acknowledge that Indian tribes and Native Hawaiian organizations (NHOs) possess “special expertise” in assessing the eligibility of historic properties that possess religious and cultural significance to them. Individuals recognized by a tribe or NHO as possessing this special expertise do not have to meet the Secretary’s qualification standards for purposes of Section 106 review.

EXAMPLE STIPULATIONS:

- I. Standards
 - a. All work carried out pursuant to this Agreement shall meet the *Secretary of the Interior’s Standards for Archaeology and Historic Preservation* (SOI’s Standards; http://www.nps.gov/history/local-law/arch_stnds_9.htm), taking into account the suggested approaches to new construction in the SOI’s Standards for Rehabilitation.
 - b. [Applicant] shall ensure that all work carried out pursuant to this Agreement shall be done by or under the direct supervision of historic preservation professionals who meet the *Secretary of the Interior’s Professional Qualifications Standards*. The [agency and applicant] shall ensure that consultants retained for services pursuant to the Agreement meet these standards.

The following is an example of a definition of qualified professional that can be used in connection with a stipulation mandating work is carried out by such a professional:

A “qualified professional” is a person who meets the relevant standards outlined in the *Archeology and Historic Preservation: Secretary of the Interior’s Standards and Guidelines [As Amended and Annotated]* (http://www.nps.gov/history/local-law/arch_stnds_9.htm).

Use of an Existing Memorandum of Agreement or Programmatic Agreement by Other Federal Agencies to Meet their Section 106 Obligations:

A Memorandum of Agreement (MOA) or project Programmatic Agreement (PA) for an undertaking that may be the subject of funding, permits, or other assistance from other federal agencies in the future, should provide that other agencies may use (i.e., adopt) such an MOA or PA to satisfy their Section 106 responsibilities for that undertaking so long as the undertaking itself remains unchanged and effects to historic properties remain unchanged. Such a stipulation will help avoid the need for duplicative reviews by other agencies. The following examples provide language that may be added to an MOA or PA for these purposes.

EXAMPLE STIPULATION:

In the event that another federal agency not initially a party to or subject to this MOA receives an application for funding/license/permit for the Undertaking as described in this MOA, that agency may fulfill its Section 106 responsibilities by stating in writing it concurs with the terms of this MOA and notifying the [original agency], SHPO, [and the ACHP if participating] that it intends to do so. Such agreement shall be evidenced by execution of (Appendix A) and filing with the ACHP, and implementation of the terms of this MOA.

Coordination with the National Environmental Policy Act (NEPA):

If the parties believe that coordination of Section 106 with NEPA should be referenced in the agreement, then the following example might be included in the preamble of the agreement.

EXAMPLE STIPULATIONS:

WHEREAS, the [agency] intends to coordinate its compliance with Section 106 of the NHPA (Section 106) with the applicable requirements of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321-4347) pursuant to 40 CFR §1500-1508; and

OR

[Agency] has coordinated public participation for this [agreement] through the process set forth in the National Environmental Policy Act (NEPA); and

Recognizing Other Federal, State, and Tribal Law Requirements:

A federal agency may have to comply with multiple federal and state laws in planning and implementing an undertaking. For example, a federal agency is required to comply with the Native American Graves Protection and Repatriation Act when its actions result in the discovery of human remains, funerary objects, sacred objects, or objects of cultural patrimony on federal or tribal lands. State burial, unmarked grave, or cemetery laws may apply to human remains found on non-federal, non-tribal lands, while similar tribal laws may apply on tribal lands. If the parties believe that coordination of Section 106 with other specific applicable laws should be referenced in the agreement for clarity, then the following examples might be considered.

EXAMPLE STIPULATIONS:

If human remains are discovered at any time during the implementation of the Undertaking, the agency shall follow the provisions of the Native American Graves Protection and Repatriation Act (25 USC § 3001) and state and local laws as appropriate.

OR

Treatment of Human Remains

A. The [agency] shall coordinate its compliance with Section 106 with other applicable federal, state/tribal, and local laws and reviews as appropriate.

B. Historic and prehistoric human remains from non-federal, non-tribal lands are subject to protection under the state's burial/unmarked grave/cemetery law(s). As such, if human remains are discovered during construction, work in that portion of the project shall stop immediately. The remains shall be covered and/or protected in place in such a way that minimizes further exposure of and damage to the remains, and the [agency] shall immediately consult with the SHPO and [other relevant party]. If the remains are found to be Native American, in accordance with applicable law, a treatment plan shall be developed by [agency] and SHPO in consultation with appropriate federally recognized Indian tribes. [Agency] shall ensure that any treatment and reburial plan is fully implemented. If the remains are not Native American, the appropriate local authority shall be consulted to determine final disposition of the remains. Avoidance and preservation in place is the preferred option for treating human remains.

Project Modifications and Changes:

Even the most carefully planned project may still be subject to change or modification by the time the undertaking is to be implemented (including but not limited to changes in purpose/need for the undertaking, redesign, resolving other regulatory conflicts, changes in funding, etc.). When consulting parties have concerns about whether a particular aspect of project implementation could change after the execution of an MOA, a stipulation like the following can allow for consideration of whether modifications to the agreement may be necessary without reopening Section 106 review.

EXAMPLE STIPULATIONS:

Alterations to Project Documents

Neither the [federal agency] nor [applicant] shall alter any plan, scope of services, or other document that has been reviewed and commented on pursuant to this MOA (except to finalize documents commented on in draft form), without first affording the parties to this MOA the opportunity to review the proposed change and determine whether it shall require that this MOA be amended. If one or more such party determines that an amendment is needed, the parties to this MOA shall consult in accordance with [stipulation ___] to consider such an amendment.

OR

Changes in Project Scope

In the event of any changes to the Project scope, the following measures shall be implemented in consultation with the signatories:

- a. [Applicant and federal agency] shall assess and revise the Project APE as needed to incorporate any additional areas that have the potential to affect historic properties.
- b. [Applicant and federal agency] shall carry out additional investigations to identify historic architectural and archaeological properties that may be affected.
- c. [Applicant and federal agency] shall assess the Project's effect on any new historic properties and explore measures to avoid, minimize, or mitigate effects on these properties.

- d. [Applicant and federal agency] shall ensure the preparation of appropriate reports and documents, notify Section 106 consulting parties, including Indian tribes, or any changes in the Project's effect on historic properties, and provide an opportunity for review and comment.
- e. If a change in project scope results in additional adverse effects to historic properties, [federal agency] shall consult with all consulting parties to amend the MOA in accordance with Stipulation __ (Amendments).

OR

Upon written agreement of the signatories, Appendix A [listing, for example, undertakings requiring no further review under the terms of the PA] may be modified without formal amendment to this PA. Appendix A modifications shall be distributed to the signatories and concurring parties and appended to this PA.

Anti-Deficiency Act Provisions:

The Anti-Deficiency Act (31 U.S.C. § 1341) prohibits employees of the federal government from authorizing expenditures that exceed an amount authorized by Congress or involve an obligation for payment before money is appropriated by Congress. While not required language in any Section 106 agreement, a federal agency may consider adding an Anti-Deficiency Act stipulation to its agreement if it believes that such a reference would be a helpful reminder to the parties about its fiscal responsibilities. The following example may be used in agreement documents:

MODEL LANGUAGE: *(The ACHP recommends the following language be inserted in agreements where the parties believe there is a need to reference the Anti-Deficiency Act.)*

Anti-Deficiency Act

The [federal agency's] obligations under this [Memorandum of Agreement/Programmatic Agreement] are subject to the availability of appropriated funds, and the stipulations of this [Memorandum of Agreement/Programmatic Agreement] are subject to the provisions of the Anti-Deficiency Act. The [agency] shall make reasonable and good faith efforts to secure the necessary funds to implement this [Memorandum of Agreement/Programmatic Agreement] in its entirety. If compliance with the Anti-Deficiency Act alters or impairs the [agency's] ability to implement the stipulations of this agreement, the [agency] shall consult in accordance with the amendment and termination procedures found at Stipulations [insert stipulation numbers] of this agreement.

Communication Among the Parties to an MOA or PA:

EXAMPLE STIPULATION:

Electronic mail (email) will serve as the official correspondence method for all communications regarding this Agreement and its provisions. See Appendix A for a list of contacts and email addresses. Contact information in Appendix A may be updated as needed without an amendment to this Agreement. It is the responsibility of each signatory [add as appropriate "concurring party" or "consulting party"] to immediately inform the [federal agency] of any change in name, address, email address, or phone number of any point-of-contact. The [federal agency] will forward this information to all signatories and concurring parties by email.

Annual Reporting:

Federal agencies should keep consulting parties apprised of how an MOA/PA is being implemented. Depending on the nature of the undertaking (including complexity, duration, number of parties carrying out actions under the agreement, etc.), this can be done using annual reports or summaries on the status of the agreement.

EXAMPLE STIPULATIONS:

Annual Report. The Federal Agency shall prepare an Annual Report documenting actions carried out pursuant to this MOA. The reporting period shall be the fiscal year from October 1 to September 30. The Annual Report shall be distributed to consulting parties to this MOA.

The Annual Report shall address issues and describe actions and accomplishments over the past year, including, as applicable:

- historic property surveys and results;
- status of treatment and mitigation activities;
- ongoing and completed public education activities;
- routine activities for which no consultation occurred, pursuant to Attachment X of this MOA;
- any issues that are affecting or may affect the ability of the federal agency to continue to meet the terms of this MOA;
- any disputes and objections received, and how they were resolved;
- any additional parties who have become signatory or concurring parties to this MOA in the past year.

Annual Meeting:

Meetings of the parties to an agreement on an annual or other agreed-upon interval are often paired with reporting provisions, allowing the federal agency (and applicant, as appropriate) to demonstrate progress made toward fulfilling the terms of the agreement and discuss amendments as necessary.

EXAMPLE STIPULATIONS:

Each year, following the execution of this PA until it expires or is terminated, the federal agency shall provide all parties to this PA a summary report detailing work carried out pursuant to its terms. Such report shall include any proposed scheduling changes, any problems encountered, and any disputes or objections received in the federal agency's efforts to carry out the terms of this PA.

OR

Annual Meeting: The [agency] shall coordinate a meeting of the Signatories and Consulting Parties to be held each year in October or November, or another mutually agreed upon date, to discuss activities carried out pursuant to this Agreement during the preceding year and activities scheduled for the upcoming year.

- a. The [applicant] shall prepare a summary of activities as they relate to compliance with the stipulations of this Agreement, and shall distribute it to all parties to this Agreement at least fifteen (15) days prior to the Annual Meeting. The summary report shall include the following:
 - i. A description of the past year's effort and anticipated upcoming efforts for identification, evaluation, mitigation, and protection of historic properties;
 - ii. An evaluation of the progress of mitigation activities, including data recovery as well as creative or compensatory mitigation;

- iii. A description of any known or expected changes to the Undertaking.
- b. The [agency] shall evaluate the effectiveness of this Agreement and whether any amendments or changes are needed based on applicant's progress reports or project modifications and provide its evaluation to Signatories prior to the Annual Meeting.
- c. The meeting shall be held in a location agreed upon by consensus of the Signatories, and parties may participate by telephone if they so desire. The agency shall distribute minutes of the meeting to all Signatories and Consulting Parties within two weeks of the meeting.

Emergencies:

The regulations implementing Section 106 provide an expedited review process for disaster and emergency response actions generally (see 36 CFR § 800.12(b)). Depending on the nature of the undertaking or program that would be subject to an MOA or PA, however, it may be appropriate to include specific provisions in the agreement to address a disaster or emergency that may arise during the implementation of an undertaking and affect the federal agency's ability to carry out the agreement's terms.

The Unified Federal Environmental and Historic Preservation Review (UFR) Process provides federal, state, tribal, and local agencies an opportunity to unify and expedite reviews for disaster recovery projects. As such, these types of stipulations are particularly appropriate, and recommended, for MOAs and PAs regarding disaster review projects. For non-disaster specific program PAs, the ACHP recommends parties consider including stipulations to address emergency situations as a best practice.

EXAMPLE STIPULATIONS:

Emergency Situations

Should an emergency situation occur which represents an imminent threat to public health or safety, or creates a hazardous condition, the [agency] shall immediately notify the SHPO and the ACHP of the condition which has initiated the situation and the measures taken to respond to the emergency or hazardous condition. Should the SHPO or the ACHP desire to provide technical assistance to the [agency], they shall submit comments within seven (7) calendar days from notification, if the nature of the emergency or hazardous condition allows for such coordination.

OR

Emergency Actions

A. Emergency actions are those actions deemed necessary by the [agency] as an immediate and direct response to an emergency situation, which is a disaster or emergency declared by the President, tribal government, or the governor of the state, or other immediate threats to life or property. Emergency actions under this Agreement are only those implemented within thirty (30) calendar days from the initiation of the emergency situation.

B. If the emergency action has the potential to affect historic properties, the [agency] shall notify the SHPO, interested Indian tribes, and other parties as appropriate prior to undertaking the action, when feasible. As part of the notification, the [agency] shall provide a plan to address the emergency. The SHPO and other parties shall have seven (7) calendar days to review and comment on the plan to address the emergency. If the SHPO and other parties do not comment or object to the plan within the review period, the [agency] shall implement the proposed plan.

C. If the [agency] is unable to consult with the SHPO and other parties prior to carrying out emergency actions, the [agency] shall notify the SHPO and other parties as appropriate within forty-eight (48) hours after the initiation of the emergency action. This notification shall include a description of the emergency action taken, the effects of the action(s) to historic properties, and, where appropriate, any further proposed measures to avoid, minimize, or mitigate potential adverse effects to historic properties. The SHPO and other parties shall have seven (7) calendar days to review and comment on the proposal where further action is required to address the emergency. If the SHPO and other parties do not object to the plan within the review period, the [agency] shall implement the proposed plan.

D. Where possible, the [agency] shall ensure that such emergency actions shall be undertaken in a manner that does not foreclose future preservation or restoration of historic properties. Where such emergency actions may affect historic buildings, they shall be undertaken in a manner that is consistent with the *Secretary of the Interior's Standards for the Treatment of Historic Properties*. (<http://www.nps.gov/tps/standards.htm>). In addition, where possible, the [agency] shall ensure that such actions shall be done with on-site monitoring by the appropriate preservation professional who meets, at a minimum, the Professional Qualifications Standards in his or her field of expertise.

E. Where the SHPO and/or any other party has reason to believe that a historic property may be adversely affected by an emergency action, the party shall submit a request to the [agency] to review and comment on that action.

F. Immediate rescue and salvage operations conducted to preserve life or property are exempt from these and all other provisions of this Agreement.