



Preserving America's Heritage

## **Types of Agreement Documents in Section 106: What They Are and When They Should Be Used**

### ***Introduction***

There can be some confusion about agreements among Section 106 participants. The ACHP offers this guidance to clarify the different types of agreements mentioned in the ACHP's regulations at 36 CFR Part 800 and when it is appropriate to use them.

### ***Types of Agreements***

There are three different types of agreements that may be relevant in a Section 106 review. Two of those agreements, Memoranda of Agreement (MOAs) and Programmatic Agreements (PAs), conclude and/or tailor the Section 106 process to a specific undertaking or program. The other type of agreement, consultation agreements, specifies how a federal agency and Indian tribe or Native Hawaiian organization (NHO) shall consult and how the Indian tribe or NHO will participate in the agency's Section 106 review process. MOAs and PAs operate very differently from consultation agreements. They are also developed via a different process. It is important for federal agencies, Indian tribes, NHOs, and other participants in the Section 106 review process to understand how and why an agreement may be used.

### ***MOAs and PAs***

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), NHOs, 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.

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

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character.<sup>1</sup> 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.<sup>2</sup>

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 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 NHOs regarding the development of any agreement that has implications for the treatment of historic properties of religious and cultural significance to them. 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.

### ***Executing an MOA or PA***

The required signatories to execute an MOA or PA are the federal agency, the SHPO/THPO (if on tribal lands), and the ACHP (if participating). Outside the situations described below, no other parties may be required signatories to an MOA or PA.

### ***On Tribal Lands***

Where an undertaking would occur on or affect historic properties located on tribal lands, the required signatories are the federal agency, the SHPO (only in certain circumstances<sup>3</sup>), the THPO (or designated tribal official if the tribe has not assumed THPO duties), and the ACHP (if participating). In this situation, the MOA or PA cannot be executed unless it is signed by the THPO or Indian tribe (where there is no designated THPO). An Indian tribe that has not assumed THPO duties may notify the agency in writing

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1 Note that 36 CFR §§ 800.4(b)(2) and 800.5(a)(3) allow an agency to phase its identification and evaluation of historic properties and assessment of effects if specifically provided in an MOA or a PA.

2 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, Veterans Affairs Medical Centers, and National Aeronautics and Space Administration centers.

3 Those circumstances are (1) where part of the undertaking would occur on or affect historic properties located off of tribal lands; (2) where the undertaking would occur on or affect historic properties located on tribal lands but there is no designated THPO for that tribe; or (3) if the Indian tribe agrees to include the SHPO pursuant to 36 CFR § 800.3(f)(3). Further, Section 101(d)(2)(D)(iii) of the NHPA authorizes owners of properties on tribal lands which are neither owned by a member of the tribe or held in trust by the Secretary of the Interior for the benefit of the tribe to request the SHPO to participate in the Section 106 process in addition to the THPO (54 U.S.C. § 302702(4)(C); 36 CFR § 800.3(c)(1)).

that it is waiving its rights to execute an MOA for undertakings on its tribal lands (36 CFR § 800.2(c)(2)(ii)(F)). Required signatories have the ability to amend or terminate the agreement.

#### *Off Tribal Lands*

Where an undertaking would not occur on or affect historic properties located on tribal lands, the required signatories to an MOA or PA are the federal agency, the SHPO, and the ACHP (if participating). A THPO, Indian tribe, or NHO may be asked to sign as an invited signatory in this situation, and in particular, should be if assigned any responsibilities under the terms of the agreement. Federal agencies are also encouraged to invite Indian tribes or NHOs that attach religious and cultural significance to affected historic properties to sign the MOA or PA as invited signatories. The refusal of any invited signatory to sign an MOA or PA does not prevent it from being executed. Once an invited signatory signs an MOA or PA, it has the same ability to amend or terminate the agreement as the required signatories. Indian tribes and NHOs may also be asked to sign the MOA or PA as concurring parties. Concurring parties do not have the ability to amend or terminate the agreement.

#### ***Concluding Section 106 Review***

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 (see Section 110(1) of the NHPA (54 U.S.C. § 306114)). Such an agreement “shall govern the undertaking and all its parts.” As such, the agreement must be written carefully and clearly so that everyone understands what it calls for and the agency is able to fully carry out all legal obligations to which it has agreed.

In the rare case where the consulting parties cannot reach agreement on an MOA, a required signatory may terminate consultation and request formal comments from the ACHP (see 36 CFR § 800.7). 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.

#### ***Consultation Agreements between Federal Agencies and Indian Tribes or NHOs***

The Section 106 regulations at 36 CFR § 800.2(c)(2)(ii)(E) provide for the development of agreements between federal agencies and Indian tribes or NHOs to tailor how consultation between those parties may be carried out. Such agreements are often not project-specific but instead are usually more general and are focused on the relationship between the agency and the Indian tribe or NHO. This type of agreement can cover all aspects of the consultation process with the tribe or NHO and could grant an Indian tribe or NHO additional rights to participate or concur in agency decisions in the Section 106 process beyond those specified in the regulations. A number of federal agencies have entered into such agreements with Indian tribes as a means not only to ensure that consultation would be carried out to the satisfaction of both parties but also as a workload management tool. Agreements can outline the areas of a state or region in which an Indian tribe or NHO has an interest or the types of undertakings that might not require consultation with the Indian tribe or NHO. Determining the types of undertakings and the potential geographic project areas on which an Indian tribe or NHO wants to be consulted, and how that consultation will take place can lead to tremendous efficiencies for both the federal agency and the Indian tribe or NHO.

The only restriction on the scope of such agreements is that the role of other parties in the Section 106 review process may not be modified without their consent. These consultation agreements differ from MOAs and PAs as they do not address the full range of the agency’s consultation responsibilities with other parties nor do they modify or conclude the agency’s Section 106 compliance. Consultation agreements are a tool to help the agency and the Indian tribe or NHO work better together in the Section 106 context. They can establish protocols for carrying out tribal or NHO consultation, including how the agency will address tribal or NHO concerns about confidentiality of sensitive information.

The negotiation process to develop an agreement with an Indian tribe or NHO does not require participation by any other parties outside of the agency (there may be other entities within the agency, such as the agency's office of legal counsel that must participate). Agreements between a federal agency and an Indian tribe are, in fact, between two sovereigns. Therefore, unless the Indian tribe agrees, it would be inappropriate to invite another party to participate in the development of the agreement. The agency is required to file the completed agreements with the appropriate SHPO and the ACHP, which can help eliminate questions about tribal or NHO consultation when either the SHPO or the ACHP is reviewing a proposed undertaking.

A common misunderstanding is that such agreements are required before an agency and an Indian tribe or NHO can enter into Section 106 consultation for individual undertakings. In fact, consultation agreements are not required but are, instead, meant to facilitate effective and meaningful consultation.

### ***Effect of Consultation Agreements***

When a federal agency and Indian tribe or NHO complete a consultation agreement pursuant to 36 CFR § 800.2(c)(2)(ii)(E), that agreement governs how the agency shall consult with that tribe or NHO for all undertakings subject to its terms. While it does not otherwise modify the agency's responsibilities under Section 106 to consult with other parties, make findings or determinations, or resolve adverse effects, it does dictate how the agency will meet its responsibility under 36 CFR § 800.2(c)(2)(ii), as well as its responsibilities elsewhere in the regulations to consult with that Indian tribe or NHO. Meeting the terms of a consultation agreement fulfills the agency's Section 106 responsibility in that regard.

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