



SHPO Guidance on Drafting Section 106 Agreement Documents For Undertakings in Arizona



SHPO Guidance Point No. 12

INTRODUCTION

Within the Advisory Council on Historic Preservation's (ACHP) regulations (36 CFR Part 800) for implementation of Section 106 of the National Historic Preservation Act (NHPA), agreement documents (i.e., Memoranda of Agreements [MOAs] and Programmatic Agreements [PAs]) are defined as documents whose primary purpose is to record the terms and conditions negotiated during consultation to resolve the adverse effects of an undertaking upon historic properties (§ 800.6(c) and § 800.16(o)). Furthermore, the ACHP's "Guidance on Section 106 Agreement Documents" (last updated 2015; page 7) observes, "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(1) 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."

Most agreement documents consist of project-specific MOAs between two parties (the lead federal agency and the SHPO). However, PAs can also establish program alternatives to the standard 4-step Section 106 consultation process, as per § 800.14. Although much of the standard stipulations and language provided in this guidance document can be used for program PAs, the focus of this guidance is on project-specific MOAs and PAs.

This SHPO Guidance Point for Drafting Section 106 Agreement Documents builds upon the ACHP's current (2015) guidance on agreement documents, and provides sample language that has, over decades, been developed between the Arizona State Historic Preservation Office (SHPO), the ACHP, federal agencies, and consulting parties for undertakings within Arizona. While there is certainly not a "one size fits all" solution to drafting agreement documents, it is our hope that compilation of previously vetted language will assist federal agencies and their consultants in reducing the number of reviews, and concomitantly time and effort, necessary for generating these important work products of the Section 106 process.

A. General Conventions in Drafting Agreement Documents

Before getting into the specific intent and language of agreement documents, there are some general conventions that should be followed to ensure that any agreement document is consistent and easy to reference:

1. Make sure each page is adequately labeled so that there is no confusion if a page becomes separated from the document. Provide the page number, title/project name, and **date of the current version** on either the top or bottom header of **each** page of the agreement.
2. Using word processing software, ensure that each line of the **draft** document is numbered, because line numbers are helpful when referencing comments. When a final draft is produced, the line numbers can be removed.
3. Ensure that all acronyms and abbreviations are identified in the text and used consistently; spell out the first encounter with the term, and only use the abbreviation in subsequent usages. A copyedit of the document that specifically focuses on acronym usage should be made prior to submission for review by consulting parties.
4. Use statutory and regulatory terminology wherever applicable (for example, use “historic properties” rather than “cultural resources” when talking about properties that have been determined eligible for, or have been listed on, the National Register of Historic Places).
5. Remember the cold reader. Consider the inclusion of a definitions stipulation, or an attachment that defines common terms employed in the agreement (e.g., “Signatories with a lower case “s” shall consist of both Signatories and Invited Signatories;” “Days shall be defined as calendar days;” etc.).
6. In 2014, Title 16 of the United States Code (U.S.C.), which references the NHPA, was replaced with the new Title 54 code. Thus, please ensure that you are citing the new U.S.C. code for the NHPA (54 U.S.C. § 300101 *et seq.*) and Section 106 (54 U.S.C. § 306108) in agreements.
7. Use standard agreement document formatting: Stipulation headings should be identified with Roman numerals. Subheadings follow with uppercase “A,” “B,” and so on. Points underneath subheadings are indicated with numbers “1,” “2,” “3,” etc. Sub-points under these points are delineated with lowercase “a,” “b,” “c,” and so forth. The use of bullet points is not recommended, because they are not easy to cite or reference within an agreement. It is always helpful to perform a copyedit of the document that focuses specifically on stipulation hierarchy.
8. Be wary of the use of passive words such as “may” and “should,” because they are unclear and non-committal. Use “must,” “shall,” and “will” when stating roles and responsibilities.
9. When soliciting comments and edits on draft agreements, consider the use of a comment matrix to document comments received from consulting parties and how they were addressed by the agency, or reasons why they are not addressed, in the revised draft document. Comment matrices allow for easy tracking of both big picture issues and small edits, as well as their resolution.

B. Components of a Section 106 Agreement

There are four main components of a Section 106 agreement document:

- 1) Title Block,
- 2) Recitals/Preamble (or WHEREAS statements),
- 3) Stipulations, and
- 4) Signature Blocks.

Each of these four components is discussed in the following sections, along with critical considerations and example language that should be included when drafting agreement documents for projects located in Arizona. A Table of Contents is provided below to assist you with locating guidance on specific components and/or stipulations within the body of an agreement document:

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SECTION ONE

TITLE BLOCK

This section provides an overview of the Title Block for agreement documents, and includes best practices for development, including an example title. **The Title Block is critical because it identifies the undertaking and the signatories to the agreement.**

General Practices to Follow:

1. State if the document is an MOA or a PA.
2. List all of the signatories; include the ACHP if they are participating, or if it is a PA. List the lead federal agency first, followed by any other signatories, the SHPO, and the ACHP, if participating. It is not necessary to list invited signatories and concurring parties in an agreement document title; however, many agencies prefer to list Tribes, in particular, as well as other invited signatories and concurring parties. (Note: If an agency wants to list invited signatories and/or concurring parties in the title, these entities must be parties that are actually going to sign the agreement.)
3. Clearly state the full, legal name of the undertaking.
4. Use all capital letters. Do not use acronyms or abbreviations in the title.

In the following example, the Army is the lead for Section 106, the SHPO and the ACHP (in this case, the ACHP has chosen to participate) are signatories that execute the agreement, and the Bureau of Land Management (BLM) is an invited signatory.

Example language for Title Block:

***“MEMORANDUM OF AGREEMENT AMONG THE UNITED STATES ARMY
GARRISON, SUNFLOWER PROVING GROUND,
THE ARIZONA STATE HISTORIC PRESERVATION OFFICER, THE ADVISORY
COUNCIL ON HISTORIC PRESERVATION, AND THE BUREAU OF LAND
MANAGEMENT
REGARDING THE DEVELOPMENT, OPERATION, AND MAINTENANCE OF THE
PROPOSED SUNFLOWER TACTICAL RANGE, MARIGOLD COUNTY”***

SECTION TWO

RECITALS or WHEREAS STATEMENTS

This section provides an overview of the recitals or WHEREAS statements necessary for agreement documents, as well as some examples of standard WHEREAS statement language. This section is also sometimes referred to as the Preamble of the agreement. **These recitals provide information on the intent and purpose of the agreement**, and should state the facts (critical background and history of the Undertaking) that exist at the time the agreement document is developed and/or executed. Recitals generally do not summarize the processes that will be followed to identify, evaluate, avoid, minimize or mitigate adverse effects; this language occurs in the stipulations or body of the agreement (see Section Three).

A. General Background Recitals

1. All recitals must begin with “**WHEREAS,**” in bold and all caps.
2. Identify the lead federal agency that has the statutory authority for the Undertaking.
3. Identify the applicant if federal permits, licenses, grants or other assistance are involved; describe the applicant’s role and responsibilities. For example, if the federal agency has delegated certain Section 106 responsibilities to the applicant, add a specific recital that states what aspects of the consultation process the applicant will be conducting.
4. Describe the Undertaking and the nature of federal involvement; state that the agreement is being developed pursuant to Section 106 of the NHPA of 1966, as amended, 54 U.S.C. 306108, and pursuant to 36 CFR Part 800, the ACHP’s regulations implementing Section 106.
5. Define the area of potential effects (APE). Provide both a written description and a map(s) of the APE as an attachment and reference the attachment(s) in the agreement. Clearly identify land jurisdictions, including private land.
6. Briefly mention the inventory efforts that have already occurred, or indicate that the inventory efforts are yet to be completed (see section below for more detail on this recital). Provide citations for the relevant survey reports. If historic properties will be adversely affected, provide a list of the properties (if long, attach as an appendix), property type and general age, their land jurisdiction, and proposed treatment (e.g., avoidance, monitoring, data recovery, etc.).
7. Provide a statement of the finding of effect for the Undertaking, as per §800.5(a). If adverse, state why it is an adverse effect in **general** terms (the Historic Property Treatment Plan or other mitigation plan will provide more detail on impacts to individual historic properties).
8. If there are multiple federal agencies involved, but they have agreed that a specific agency will be the designated lead agency for Section 106 compliance, the role of the delegating agencies should be identified as per §800.2(a)(2). Each agency should have their own separate recital that specifies that agency’s responsibility within the scope of the Undertaking, and also states that they have agreed to let the one agency take the lead for their Section 106 compliance. If an agency

does NOT agree to designate a lead federal agency, they remain individually responsible for their own compliance, and this recognition needs to be clearly stated within their WHEREAS statement.

9. Recitals may reference laws other than the NHPA and Section 106, such as, NAGPRA, state laws, etc.; however, the ACHP advises that these laws should not be discussed in detail. For example, details about how these laws will be fulfilled should not be included in Section 106 agreement documents.

10. Identify and specifically cite any other agreements that have a bearing on the subject Undertaking, or that are superseded by the agreement.

11. State how days are referenced in the agreement, e.g., “All days referred to in this agreement are calendar days, unless otherwise noted.” (Alternatively, this statement could be put in a “Definitions” stipulation or attachment to the agreement.)

A Note on the use of opening statements that precede the Preamble: It is becoming more common for opening statements to be added to the beginning of agreement documents, before the WHEREAS statements. These opening statements are often called “Preambles” and should not be confused with the ACHP’s use of the word “preamble” to refer to the recitals section. In Arizona agreements, we have seen these opening statements generally differ from recitals in that they provide an opportunity for extended statements of cultural values and affiliations, while the WHEREAS statements generally focus on the administrative background and history of the Undertaking. When including Preambles, you need to make sure that they do not contradict any statements in the recitals or stipulations; it is particularly important that they do not conflict with any of the stipulations, because the stipulations are the legally enforceable part of agreement documents.

B. More Specifics on Recitals for Identification and Evaluation Efforts

1. Briefly summarize the background of the identification and evaluation phase. Cite any relevant cultural resources surveys, ethnographic studies, built environment inventories, visual impact analyses, or other studies that were performed to help identify historic properties and/or impacts; include direct, indirect and cumulative impact considerations (e.g., visual or auditory impact studies, etc.).

2. Acknowledge if historic properties will or may be adversely affected. If a relatively small number of cultural resources will be affected, it is okay to list those sites/addresses in this recital. If there are a large number of properties, include the list as an attachment table to the agreement and include land jurisdictions (including private land), site types and their general age (e.g., prehistoric, historic, modern), their eligibility status (i.e., eligible, ineligible, unevaluated), and a brief description of the treatment needed (e.g., archaeological data recovery, eligibility testing, archival research, Historic American Building Survey documentation, etc.). Indicate whether or not the SHPO has concurred with the Determinations of Eligibility (DOEs), or if this has yet to happen (as per the stipulation on Identification and Evaluation below).

3. If it is a PA with phased identification, describe the rationale for such an approach. Please include a general description of how the identification effort will be phased. It is sometimes useful

to include language that indicates that the phased nature of the undertaking is such that the effects are unknown.

C. Recitals for Signatories and Consultation Efforts (Note: Throughout this guidance document, “AGENCY” in example language refers to the lead federal Agency for Section 106; federal agencies using this template language should replace this with their respective agency name.)

1. Introduce the signatories. **Signatories are the “major” players and have the authority to execute the agreement**, along with the lead federal agency. This recital should identify the appropriate SHPO(s) and Tribal Historic Preservation Officer(s); each entity should have a separate recital that discusses their authorities. If THPOs are involved, obtain the specific language from the Tribe that they want used for their recitals. The Arizona SHPO has two standard recitals that must be used; the required language is as follows:

WHEREAS, the SHPO is authorized to enter this agreement in order to fulfill its role of advising and assisting Federal agencies in carrying out Section 106 responsibilities under the following federal statutes: Sections 101 and 106 of the NHPA, at § 800.2(c)(1)(i), and § 800.6(b), and the SHPO is a signatory to this Agreement; and

WHEREAS, the SHPO is authorized to advise and assist the federal and state agencies in carrying out their historic preservation responsibilities and cooperate with these agencies under A.R.S. § 41-511.04(D)(4); and

Note: Agencies and/or Tribes that own or manage land within the APE should be signatories to the agreement.

2. Summarize consultation with the ACHP. This recital must state whether or not the ACHP will participate in the agreement. If available, cite the date of the ACHP’s letter transmitting their decision on whether or not they are going to participate.

3. Identify all other consulting parties (§ 800.3(f) and § 800.6(a)(2)). Briefly, but adequately, indicate their role/responsibility within the consultation process, and if they have they been invited to be signatories or concurring parties. Generally, any entity that has a role or responsibility within the scope of the undertaking should be invited to be a signatory (i.e., an invited signatory) to the agreement. Remember that invited signatories generally have the authority to amend and terminate the agreement; concurring parties do not have this authority.

Since the Arizona State Museum (ASM) is involved in many undertakings in Arizona, and has various authorities for permitting and burial consultation on state and local government lands, SHPO and ASM have provided the following language to characterize their role:

Example language for ASM’s responsibility recital:

WHEREAS, the Arizona State Museum (ASM) has been invited to participate pursuant to § 800.6 (c)(2)(iii), because it has mandated authority and responsibilities under the Arizona Antiquities Act (AAA), A.R.S. § 41-841 et seq., that apply to that portion of the Undertaking on state lands in Arizona (state, county, municipality, or other subdivision of the state), and

mandated authority and responsibilities under A.R.S. § 41-865 that apply to that portion of the Undertaking on private lands, and is an invited signatory to this Agreement; and

5. In Arizona, state agencies can use or substitute the consultation process embodied in Section 106 agreement documents to satisfy their compliance with the State Historic Preservation Act (A.R.S. 41-861 *et seq.*), as indicated below:

Example language for a state agency's substitution recital:

WHEREAS, the Undertaking crosses lands administered by the STATE AGENCY and the STATE AGENCY may use provisions of this Agreement to address the applicable requirements of the Arizona State Historic Preservation Act (A.R.S. § 41-861 et seq.) on State lands in Arizona, and the STATE AGENCY is an invited signatory to this Agreement; and

6. Include a recital that states the federal agency's plan for involving the public. State if the agency's scoping process for the National Environmental Policy Act (NEPA) will be used for the agency's public consultations, as per §800.2(d)(3). It is helpful, but not necessary, to cite dates of meetings or public notification dates.

Example: ***WHEREAS, the AGENCY has used and coordinated the NEPA public participation requirements to assist the agency in satisfying the public involvement requirements under Section 106 of the NHPA pursuant to § 800.2(d)(3); and***

7. Identify whether the agency intends to coordinate (not substitute) its NEPA compliance with Section 106.

Example: ***WHEREAS, the AGENCY intends to coordinate its compliance with Section 106 with the applicable requirements of the National Environmental Policy Act (NEPA) (42 U.S.C. 4321-4347) pursuant to § 800.8 and 40 CFR § 1500-1508; and***

8. Summarize the agency's tribal consultation efforts. Clearly identify the Tribes that were consulted and indicate if the agency has invited the Tribes to be invited signatories or concurring parties. List the Tribes that were invited in each case. If known, state if a Tribe has agreed to participate in (i.e., sign) the agreement.

9. If tribal land is involved, the following language may be included:

Example: ***WHEREAS, this Agreement is only applicable on Tribal lands (defined at 36 CFR § 800.16(x)) where the applicable Tribe or THPO has signed the Agreement; and***

10. Statements of position: It is becoming more common in agreement documents to have recitals that contain statements by consulting parties on their perspectives regarding an Undertaking; this is especially common among consulting parties that oppose the project as a whole, or some part of it. It is acceptable for these statements to be included in the recitals, but it is ultimately the lead agency's decision as to their inclusion.

D. End Recitals

End the recital section with the following language:

“NOW THEREFORE, the AGENCY, the SHPO, and the ACHP agree that this [MOA or PA] shall be implemented in accordance with the following stipulations in order to take into account the effects of the undertaking on historic properties.”

This section should only reference the entities that are required to sign -- i.e., the lead federal agency, the SHPO, the ACHP (if participating), and any other signatories required to execute the agreement.

SECTION THREE

STIPULATIONS

This section provides helpful suggestions for stipulations that form the substance of an agreement document and are the legally binding parts of an MOA or PA. **The stipulations spell out the agreed-upon process that the agency will undertake to resolve adverse effects from the undertaking to historic properties within the APE.** The ACHP advises that all information on the proposed process(es) (e.g., consultation protocols to be used, inventories to be conducted, etc.) to resolve adverse effects should be included in the stipulations; there should be very little overlap in topics between the recitals and the stipulations.

After the agreement is executed, these stipulations are to be implemented as negotiated and agreed upon by the signatories to the agreement. Included in this section are some examples of common stipulations, as well as standard language for the administrative stipulations required by the ACHP. You will note that the subject matter of many of these stipulations is first introduced in recitals in the WHEREAS section; however, the purpose of these mirroring stipulations is to discuss these topics in further detail.

Keep in mind that the stipulations should define the Section 106 review and consultation process that the lead federal agency will follow. Although there is no set order or priority for these stipulations, we recommend the following order, because it presents a logical flow that mirrors the regulatory 4-step Section 106 process: 1. Initiation of the Section 106 consultation process; 2. Identification of historic properties; 3. Assessment of adverse effects; and, 4. Resolution of adverse effects. Each stipulation will be discussed in more detail in the sections that follow.

A. Definitions

It is always helpful for the first stipulation to be a list of *definitions* used throughout the agreement; although this stipulation is optional, we highly recommend its use, because such a list can be useful in ensuring all parties interpret the language in the same way, especially cold readers or readers that are unfamiliar with the Section 106 process and lingo. (Note: If the list of terms is long, it should be presented in an attached Appendix.) The following language can be used to introduce your Undertaking's pertinent definitions:

Example: *The following definitions and associated acronyms are used within this Agreement: (and then provide your list)*

B. Roles and Responsibilities

We recommend that the next stipulation explain in detail the various *roles and responsibilities of the consulting parties*, starting with the lead federal agency. While this stipulation may not always be needed, such as in a simple two-party MOA (i.e., an MOA that involves just the lead federal agency and the SHPO, with no other signatories), it can be especially helpful if there are multiple land owners, multiple government agencies, and/or other consulting parties that have a responsibility within the Section 106 process embodied in the agreement. This

stipulation should provide more detail than the descriptions that were briefly mentioned in the WHEREAS statements:

Example of lead agency role: *The signatories agree that AGENCY X is the lead agency for administering and implementing this PA. These responsibilities include but are not limited to consulting and coordinating with the consulting parties; conducting Government-to-Government consultation with the Tribes; ensuring that all signatories and invited signatories carry out their responsibilities; overseeing all cultural resource work including any additional cultural resources inventory work, drafting and implementing the HPTP; assembling all submissions to the consulting parties, including the additional cultural resources inventory reports (if needed), the HPTP, and the preliminary and final data recovery reports; and seeking SHPO/THPO concurrence with all agency compliance decisions.*

C. Area of Potential Effects

The next stipulation should *describe the APE* in detail as it relates to the Undertaking, including all ancillary infrastructure/developments (e.g., access roads, staging areas, parking lots, etc.). The APE description should include a discussion of indirect and cumulative effects, as well as direct effects. The direct, indirect and cumulative APE should be described individually, including dimensions. Attachments can be provided for lengthy detailed descriptions of the Undertaking/APE, along with a map(s).

Example: *Direct effects: The APE for direct effects during construction will include all areas likely to be affected by construction activities. This APE includes the access roads and staging areas and will be (give size and depth of the proposed development(s)).*

Indirect effects: The APE for indirect effects may include areas visible and within X miles of any project component (including access roads) or to the visual horizon, whichever is closer, or where consultation identifies a need to expand this APE in certain locations.

Cumulative effects: The APE for cumulative effects shall be the same as that for direct and indirect effects combined.

D. Professional Qualifications and Permits

Federal agencies are required to use qualified historic preservation professionals that meet the Secretary of Interior's standards, as per Section 112(a)(1)(A) of the NHPA and § 800.2(a)(1) of the implementing regulations. These statutes must be clearly cited. It should also be stated that appropriate federal permits (e.g., those pursuant to the Archaeological Resources Protection Act for work on federal lands) will be obtained.

If the project occurs on state, city, or county land, archaeological professionals must be permitted under the Arizona Antiquities Act (AAA). It should also be stated that appropriate permits will be obtained from the ASM:

Example language for ASM permits: *The Project Proponent shall ensure that its cultural resources contractor obtains an AAA Permit from the ASM prior to conducting archaeological activities on state, city or county lands pursuant to A.R.S. § 41-841 et. seq.*

E. Identification of Historic Properties

This stipulation should provide a description of the activities that have already been accomplished, or that will be conducted, to identify historic properties, including properties of religious and cultural significance to Tribes or other traditional groups. These activities should also be mentioned briefly in the recitals, but need to be elaborated in more detail in this stipulation. The sample language provided below is for a phased undertaking in which inventories have yet to be conducted, and is just one example of how this information could be portrayed in an agreement -- it is not set in stone!

Example: *A cultural resources inventory to identify historic properties shall be conducted and will include:*

A Class I Inventory of all previously recorded prehistoric and historic period cultural resources within X miles of the APE. In addition to reviewing AZSITE and all relevant land manager databases and maps, as per the SHPO's Report Standards (revised 2016), historical maps including 15-minute topographic maps, General Land Office maps and survey notes, Sanborn Maps (if available) and other archival sources will be reviewed to identify properties that are over 45 years old that may be affected by the Undertaking.

A Class III, Intensive Field Inventory of the direct effects APE. A Class III Inventory of the APE will be conducted. All previously recorded cultural resources within the direct effects APE will be re-visited with the associated records updated and revised, if appropriate, including NRHP eligibility recommendations and determinations. Previously recorded cultural resources and newly recorded cultural resources whose boundaries lie partially within the APE will be fully recorded, to the extent practical, regardless of surface ownership.

Identification of Properties of Religious and Cultural Significance within the APE. As part of its identification efforts, the AGENCY has consulted with Tribes whose aboriginal territories included portions of the Undertaking area or who have previously expressed interest in projects within the APE. [State the results of this consultation, such as any traditional cultural properties or sacred sites identified by the Tribes.] The AGENCY shall continue to consult with Tribes regarding properties of traditional religious and cultural importance that might be affected by the Undertaking, and shall provide opportunities for review and comment on draft and final versions of the Class III Inventory Report. The consultation process will remain open for any Tribe that expresses a desire to participate.

Note: This stipulation can also contain language that commits the agency to undertake an Ethnographic Study in order to aid in the identification stage of the Section 106 process for the undertaking.

F. Evaluation of Historic Properties

This section should address how historic properties have been, or will be, evaluated for National Register of Historic Places (NRHP) eligibility.

Example: *All cultural resources identified during the Class III inventory, and through Tribal consultation, will be evaluated for their eligibility for listing in the NRHP by the AGENCY, in consultation with the consulting parties. The AGENCY shall submit the draft inventory report to the consulting parties for a 30-day review and comment period. All comments received during this period will be considered by the AGENCY, and a revised draft inventory report will be produced, as necessary. The revised draft report will be submitted to the consulting parties for a 20-day review period. If the AGENCY does not receive a response from a consulting party during these review periods, the AGENCY will make a good faith effort to contact the party by e-mail and telephone. If, after a reasonable and good faith effort to reach an unresponsive party, there has still been no response, the AGENCY will proceed to the next step prescribed by this Agreement.*

[Note: Lack of comment from a consulting party cannot be assumed to be concurrence.]

If the SHPO/THPO, the land managing agency or any Tribe disagrees with the AGENCY's determination of eligibility, the AGENCY shall consult with the SHPO/THPO, the land managing agency, and/or Tribe to resolve the objection. If a resolution cannot be agreed upon, the AGENCY shall forward the required documentation to the Keeper of the National Register for a formal determination of eligibility.

G. Project Finding of Effect and Avoiding, Minimizing, or Mitigating Adverse Effects

Although already briefly mentioned in the recitals, this stipulation should reiterate the agency's Finding of Effect (usually a finding of Adverse Effect) and state how they are going to resolve the adverse effect (i.e., avoidance, minimization, and/or mitigation) to historic properties through the process embodied in the agreement. It is possible to have an undertaking where identification of historic properties has not been completed, and thus potential effects are not known. As the Section 106 regulations (36 CFR § 800.14) state, these types of projects are best addressed with PAs. The sample language below works for both MOAs and PAs.

Example: Avoidance: The AGENCY shall, if possible, avoid adverse effects to all types of historic properties, with input from consulting parties. Avoidance measures for historic properties may include (but are not limited to) redesigning project developments, fencing of sites during construction, monitoring of construction near site areas within a buffer zone, or placing infrastructure outside of site boundaries. A Monitoring and Discovery Plan (see Historic Properties Treatment Plan [HPTP] section below) will be in place to ensure avoidance during all phases of the project (e.g., construction, operation, maintenance, and decommissioning, if applicable).

Example: Minimization or Mitigation: Where avoidance is not possible, the AGENCY shall minimize or mitigate adverse effects to historic properties through the development and implementation of an HPTP. The HPTP will be developed in consultation with the parties to the agreement (see Stipulation XYZ regarding development of the HPTP), and will specify a program of measures to minimize (if applicable) and/or mitigate adverse effects. The AGENCY shall ensure that the HPTP is consistent with the Secretary of the Interior's Standards and Guidelines for Archaeological Documentation (48 FR 44734-44737), and the Arizona Antiquities Act (if the project is on state, city or county land).

H. Historic Properties Treatment Plans (HPTP)

While the agreement document outlines the process for how the project will proceed with the resolution of adverse effects to historic properties, inclusion of all the details of these processes would make the agreement lengthy and cumbersome. Details regarding treatment (resolution of adverse effects) are best captured in the formulation of a separate document: the HPTP.

However, it is critical that the HPTP stipulation in the agreement be thorough, so as to provide for its agreed-upon contents and a plan for review and approval. At a minimum, HPTPs should include the following components that may be articulated in the HPTP stipulation of the agreement document. Below, for ease of reference, we provide language listing the minimal components for an HPTP:

The HPTP shall minimally include:

- ***The results of previous research relevant to the Undertaking and a research design that discusses the questions to be addressed through eligibility testing, data recovery, archival research, analysis and interpretation, with an explanation of their relevance and importance;***
- ***The process for interfacing the results of eligibility testing and the resultant determinations of eligibility with the relevant data recovery methodology;***

- *The results of Tribal consultation regarding the incorporation of Tribal perspectives into the culture history, research design, data recovery/methodology, analysis, and interpretation;*
- *The properties or portions of properties where eligibility testing or data recovery is to be carried out, and any property or portion of property that would be affected by the Undertaking without treatment, and a rationale for dealing with affected properties or portions (e.g., discussion of the sampling strategy, avoidance, etc.);*
- *If the data recovery is to be phased, a discussion of the transition between Phase I and Phase II including timeframes for review of preliminary reports and field visits/consultations;*
- *The archival, field, and laboratory methods to be used, with an explanation of their relevance to the research questions;*
- *Specification of the level of effort (in text and portrayed on site maps) to be expended on the treatment of the sites, including treatment locations and methods of sampling, sample size, and procedures for selection of specific sample units;*
- *The methods to be used in the management and dissemination of the resultant data to the professional community and the public, including a proposed schedule for Undertaking tasks, and a schedule for the submittal of draft and final reports (Preliminary Data Recovery Reports and Data Recovery Reports) to consulting parties for review and comment;*
- *A discussion of permits and personnel qualifications for archaeological crews;*
- *A provision for cultural and archaeological sensitivity training for construction personnel, and an outline of topics to be covered in sensitivity trainings, including Tribal participation, if possible, in leading the trainings;*
- *The proposed disposition and curation of recovered materials and records in accordance with relevant state and federal laws (cite the specific laws);*
- *A Monitoring and Discovery Plan (MDP) with procedures for monitoring, evaluating, and treating discoveries of unexpected or newly identified cultural resources during construction of the Undertaking, including the consultation process and timelines with appropriate consulting parties.*
[Note: If historic properties will be avoided by activities associated with the Undertaking, but could be threatened after construction by operation, maintenance, and/or decommissioning of the Undertaking, then the MDP

should include a program for the long-term monitoring of these historic properties;

- *A protocol for the treatment of human remains, in the event that such remains are discovered, describing methods and procedures for the recovery, treatment, and disposition of Human Remains, Associated/Unassociated Funerary Objects, and Objects of Cultural Patrimony (as per relevant state/federal laws).* [Note: If NAGPRA applies, a Native American Graves Protection and Repatriation (NAGPRA) Plan of Action may be appended to the HPTP, and should be discussed briefly in this section of the HPTP; if the state burial laws apply to the Undertaking (i.e., on state, city, county or private land), a burial agreement issued by ASM may be attached, if available];
- *A strategy for a public outreach program with the goal of disseminating information to the general public about the results (either ongoing or post-data recovery) of the cultural resources investigations;*
- *A project suspension/termination statement that stipulates the procedures to be followed if the project is halted during data recovery for any reason. This statement shall include the steps to be taken in order to complete any data recovery or other treatment measures that are in progress at the time of project termination; a brief discussion shall also be included that outlines how analysis, interpretation, reporting, and curation of remains obtained during treatment measures at all historic properties will be completed if the project is terminated prior to completion of the archaeological investigations.*
- *A proposed schedule for the Undertaking tasks, and a schedule for the submittal of draft and final reports (preliminary data recovery reports and data recovery reports) to consulting parties for review and comment.*

NOTE: HPTPs can also address resolution of effects to built environment properties and other properties eligible under NRHP criteria A, B, C. In addition, although currently less common, HPTPs can provide for alternative (non-data recovery) mitigation of adverse effects to historic properties eligible under criterion D.

The HPTP stipulation must also clearly state if the HPTP is going to be finalized at the time of execution of the agreement document (sometimes, HPTPs are finalized in consultation with consulting parties before an agency begins working on an agreement document). If the HPTP has already gone through the review and comment process with the consulting parties, then the Final HPTP should be attached to the agreement and referenced in this stipulation. If the HPTP has not been finalized prior to execution of the agreement, a review and comment process and timeline for the HPTP must be included in this stipulation.

To reiterate the above, this stipulation also needs to provide a review and comment process and timeline for all relevant work products associated with the HPTP (i.e., Preliminary Data Recovery and Data Recovery or other treatment reports). Alternatively, report review processes and timelines can be specified in stipulations provided in a Review and Comment Process section.

I. Review and Comment Process

This stipulation provides a general statement of the review and comment process and timeline. This stipulation is to be used if the review processes and timelines for the various reports and/or other consultation efforts have NOT been specified in other individual stipulations. For instance, the example provided in the Identification stipulation above for reviewing inventory reports has included a review process and timeline. An alternative would be to have a separate Review Process stipulation as discussed below.

The standard statutory review process and timeline for DOEs and findings of effect is 30 days for SHPOs and THPOs, as per § 800.3(c)(4). However, the execution of an agreement document provides the opportunity to articulate timelines for other reviews (such as preliminary field reports, results of phased data recovery, etc.). It also provides an opportunity for consulting parties to articulate review times that are either shorter or longer than the standard 30 days.

The review stipulation also contains a statement that provides a standard protocol for lead agency attempts to reach unresponsive consulting parties. It is important to remember that the Section 106 regulations do NOT allow an Agency to assume concurrence if a party does not respond within the allotted period of time. Thus, an agency cannot assume that lack of response from a consulting party means that the party “concur” with whatever document/report is being reviewed. Agencies should be proactive and make a good faith effort to contact non-responsive parties to ensure that they have actually received the document submitted for review, etc. Our recommended language for articulating what shall be considered “reasonable and good faith” efforts to contact unresponsive parties is provided below:

Example: The AGENCY will submit all documentation related to the Undertaking (e.g., survey reports, DOEs, findings of effect, HPTPs, data recovery reports, etc.) to the consulting parties for review and comment within 30 calendar days of receipt. If a party does not comment on a submittal during this time period, the AGENCY will follow-up by telephone or e-mail with the party. If, after such reasonable and good faith efforts to reach an unresponsive consulting party, there has still been no response, the AGENCY will proceed to the next step prescribed by this agreement.

If a review timeline is going to be shorter (or longer) than the statutorily provided 30 days, an alternative review process should be discussed under the specific stipulation where the document/work product is referenced. For example, the review of a preliminary data recovery report by the consulting parties is typically expedited to 10 or 15 days, and this provision for a shorter-than-usual review time would be specified under the stipulation dealing with preliminary data recovery reports. Always include time frames and schedules for major project milestones.

Note: It is critical that the lead agency ensure that the review documents, processes and timelines in the HPTP match those articulated in the agreement. This is a common inconsistency that is often overlooked, but is critical to ensure full compliance with the Section 106 process as articulated in the agreement document.

J. Tribal Consultation

The SHPO recommends that each agreement document have a robust stipulation on how the lead federal agency is going to ensure that consultation with the Native American Tribes that may attach religious or cultural importance to affected properties continues throughout the life of the Undertaking. Because government-to-government consultation is defined differently by each Tribe, and because every Undertaking is different, we are not offering standard language to use in this stipulation; however, we suggest that the Tribal Consultation stipulation in your agreement clearly state that consultation to identify, evaluate, document, and mitigate adverse impacts to properties of religious and cultural significance and Traditional Cultural Places has, or will occur, as part of the Section 106 process. Be specific on the manner by which Tribes have been or will be consulted for the identification and evaluation of Traditional Cultural Places, sacred sites, traditional use areas, and other properties of cultural and religious significance. Explicitly state if and when ethnographic studies will be employed to aid in tribal identification and evaluation efforts; these types of studies are most beneficial if used in the identification phase of an undertaking, rather than as mitigation of adverse effects to tribally sensitive places.

This stipulation should acknowledge the important role that Tribes play in this process, and should, minimally, articulate how and when Tribes will be consulted. Tribal input on the language for this stipulation is absolutely necessary. We have found that those Tribal consultation stipulations that seem to work the best in agreements are those that Tribes had an integral role in drafting.

K. Communication Among Parties to an MOA or PA (Optional, but recommended)

Although optional, it is beneficial to specify the primary method of communication that is acceptable to all consulting parties during the implementation of the agreement, so that all parties understand, and agree to, the stated communication protocols.

Example: Electronic mail (e-mail) may serve as the official correspondence method for all communications regarding this Agreement and its provisions. See Appendix XYZ for a list of contacts and e-mail addresses. Contact information in Appendix XYZ may be updated as needed without an amendment to this Agreement. It is the responsibility of each consulting party to immediately inform the AGENCY of any change in name, email address, or phone number for any point-of-contact. The AGENCY will forward this information to all consulting parties by e-mail.

L. Construction Variance Review Process

Because variance requests may be necessary in the midst of construction activities, stipulations may be considered that provide for expedited review by the consulting parties in the event that additional inventory is necessary to identify heretofore unknown historic properties that may be affected by the Undertaking. In general, this stipulation usually provides for compressed review and consultation timeframes in order to minimize disruption of construction activities. Expedited review timelines should be agreed upon by all parties to ensure that they are reasonable (e.g., three to five working/business days, not 24 hours). It should be made clear that concurrence by SHPO/THPO, any land managing entity, and any permitting agency (e.g., ASM) on the adequacy, findings, and eligibility determinations of additional survey reports is necessary prior to authorization of construction variances. NOTE: Internal agency processes for issuing project variances differ, and the language that follows is merely an example.

*Example (Note: this sample language includes a streamlining protocol involving use of the Arizona SHPO's Survey Report Summary Form [SRSF} and expedited review for negative surveys): **All construction needs cannot be anticipated in advance, and areas required for additional work space (e.g., access roads, ancillary facilities, reroutes, etc.) may be identified at any time following the acceptance of the Inventory Report(s) by the consulting parties. If any newly identified construction needs would result in ground disturbing activities outside of the surveyed areas identified in the Inventory Report, the Proponent will request a variance review from the AGENCY, after having the variance APE surveyed for cultural resources by a qualified professional.***

If no cultural resources or properties of cultural or religious significance to Tribes are present within the variance APE, the results of the Class I and Class III inventories will be reported on the SHPO Survey Report Summary Form (SRSF) prior to any variance issuance or use for project-related activities. The AGENCY will provide an expedited review of the variance request, not to exceed five (5) working days following receipt, and will provide the Proponent with written recommendations regarding the variance issuance via electronic mail.

If cultural resources or properties of cultural or religious significance to Tribes are present within the variance APE, the Proponent's archaeologist will prepare a Variance Inventory Report, and submit it via electronic mail to the AGENCY; the AGENCY will make Determinations of Eligibility (DOEs) and submit the Variance Inventory Report to the consulting parties for review and comment. The consulting parties will provide an expedited review within five (5) working days or less. If no objections to the DOEs and the proposed variance are received at the end of the 5-day period, the AGENCY shall provide the Proponent's archaeologist with written approval of the variance via electronic mail. If objections are received, additional consultation regarding the variance will ensue in accordance with the dispute resolution process found in [reference the Dispute Resolution stipulation here].

M. Authorization of Construction

This stipulation is extremely important because it makes clear the sequencing of mitigation measures and approvals to consulting parties, especially Project Proponents. It also allows construction to start (once so authorized) in portions of the APE where there are no historic properties, or where historic properties will be avoided, as per the HPTP.

Example: Upon the AGENCY's acceptance of the final Inventory Report, the AGENCY, at its discretion and pending compliance with all other applicable laws and regulations, may authorize the Proponent to begin construction on lands under any ownership or jurisdiction, subject to the appropriate jurisdiction's right-of-entry and ROW requirements, where there are no historic properties present.

Upon the AGENCY's acceptance of the final HPTP, the AGENCY, at its discretion and pending compliance with all other applicable laws and regulations, may authorize the Proponent to begin construction on lands under any ownership or jurisdiction, subject to the appropriate jurisdiction's right-of-entry and ROW requirements, where all effects to historic properties and unevaluated cultural resources will be avoided as per agreed-upon measures described in the approved HPTP.

Following acceptance by the consulting parties of the Preliminary Data Recovery Report summarizing treatment that has occurred at each site, the AGENCY, at its discretion and pending compliance with all other applicable laws and regulations, may authorize the Proponent to begin construction on lands under any ownership or jurisdiction, subject to the appropriate jurisdiction's right-of-entry and ROW requirements.

N. Confidentiality

Most confidentiality statements pertain to the release of information considered sensitive to Tribes. However, these statements can, and should, also address the protection of site location, character, and ownership. Both the Section 106 regulations (§ 800.11(c)) and Section 304 of the NHPA address circumstances in which withholding of sensitive information may be appropriate. At the state level, A.R.S. § 39-125 directs the heads of state agencies to consider withholding site locational information if its disclosure has the potential to harm cultural resources. The Keeper of the National Register within the NPS handles Section 304 consultation and is the appropriate point of contact for questions relating to the applicability of Section 304 to an undertaking. If the information being sought in a Freedom of Information Act (FOIA) request was developed in compliance with Section 106, the Keeper will consult with the ACHP to reach a decision on withholding information from the subject request.

Some general language that can be used in a Confidentiality stipulation is provided below:

Example: To the maximum extent allowed by federal and state law, the AGENCY will maintain confidentiality of sensitive information regarding historic

properties that could be damaged through looting or disturbance, and/or to help protect a historic property to which a Tribe attaches religious or cultural significance. However, any documents or records the AGENCY has in its possession are subject to the Freedom of Information Act (FOIA) (5 U.S.C. 552 et. seq.) and its exemptions, as applicable. The AGENCY shall evaluate whether a FOIA request for records or documents would involve a sensitive historic property, or a historic property to which a Tribe attaches religious or cultural significance, and if such documents contain information that the AGENCY is authorized to withhold from disclosure by other statutes including the Section 304 of the NHPA, as well as the Archaeological Resources Protection Act. If this is the case, then the AGENCY will consult with the Keeper and the ACHP regarding withholding the sensitive information. If a Tribally sensitive property is involved, the AGENCY will also consult with the relevant Tribe prior to making a determination in response to a FOIA request.

Note: Often this stipulation is located in the early provisions of an agreement.

O. Public Participation

We recommend that the following stipulation be added to agreement documents, because it elaborates upon the WHEREAS statement on public consultation that is required under Section 106 of the NHPA. Note: This stipulation provides for consultation on the undertaking as a whole and is different from the public outreach efforts that should be part of a mitigation program (see Section H above on HPTP components).

Example: *The AGENCY shall seek and consider the views of the public in a manner that reflects the nature and complexity of the Undertaking and its potential effects on historic properties, as well as the likely interest of the public in the effects on historic properties. The AGENCY shall use its procedures for public involvement under the National Environmental Policy Act (NEPA) to solicit information and concerns about historic properties from members of the public. The AGENCY will ensure that an appropriate level of public involvement is provided, in accordance with § 800.2(d)(2). The AGENCY shall ensure public access to findings made pursuant to this Agreement, consistent with Section 304 of NHPA and Section 9 of the ARPA, and will consider comments or objections by members of the public in a timely manner.*

P. Emergencies

The Section 106 regulations (§ 800.12) address emergency situations and provide an opportunity for agencies to develop procedures to take historic properties into consideration during undertakings that respond to disaster or emergencies declared by the President, Tribal government, and/or the Governor of a State. Accordingly, the inclusion of a stipulation to establish procedures to expedite consultation during emergency/disaster response situations can be agreed upon by the Consulting Parties if it is appropriate to the Undertaking; however, this stipulation may not be applicable to every Undertaking, and thus need not be included in every agreement document.

Example (ACHP language): *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/THPO 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/THPO 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.*

Q. Curation

This stipulation must state where the project records, artifacts, and samples recovered from the undertaking will be curated, if it is known. If the designated curation facility is not known, the commitment must be made in this stipulation to curate at a repository that meets the federal standards per 36 CFR Part 79, as well as following ASM's policies for remains obtained from state, city or county lands. Note: Materials from state, county or city lands do not have to be curated at ASM; they may be curated at repositories approved by ASM.

Example: *The AGENCY shall ensure that all artifacts, samples and records resulting from the mitigation program are curated in accordance with 36 CFR Part 79, except as determined through consultations with Tribes carried out in accordance with federal and state laws pertaining to the treatment and disposition of Native American Human Remains, Associated/Unassociated Funerary Objects, and Objects of Cultural Patrimony.*

If artifacts, samples and records resulting from investigations on lands owned, controlled or operated by the State of Arizona are to be curated at the ASM, ASM's standards and guidelines will be followed. If these items will not be curated at ASM, the repository must be approved by ASM.

R. Annual Review of Agreement, Annual Report, and Annual Meeting

These stipulations are important because they provide a process for evaluating the implementation and effectiveness of the agreement document, as well as informing consulting parties about the current status of the mitigation program. This process gives consulting parties an opportunity to provide comments on how the Section 106 process is being conducted. Annual review is especially important for undertakings that span multiple years. However, even if an undertaking is anticipated to only last a year or two, we recommend use of this stipulation in order to allow consulting parties to monitor and comment on the progress of an undertaking.

Example: *The consulting parties shall evaluate the implementation and operation of this Agreement on an annual basis. There shall be an annual meeting among the consulting parties on or near the anniversary date of the execution of this Agreement to review the progress and effectiveness of this Agreement. The AGENCY is responsible for setting up this meeting, in coordination with all the consulting parties.*

- *Prior to the annual meeting, the AGENCY will provide consulting parties with an annual letter report (Annual Report) to review the progress under this Agreement and under the approved HPTP. The Annual Report will include an update on project schedule, status, and any ongoing cultural resources monitoring or mitigation activities, discovery situations, proposed future actions, or outstanding tasks to be completed under this Agreement or the HPTP. Consulting parties will have 30 calendar days to review the Annual Report and provide comments to the AGENCY, who will then consult the comments to develop the agenda for the annual meeting.*
- *The Annual Report shall address issues and describe actions and accomplishments over the past year, as well as plans for the coming year, as appropriate, and shall minimally include the following components:*
 - 1) *historic property surveys and results;*
 - 2) *status of mitigation activities;*
 - 3) *ongoing and completed public education activities;*
 - 4) *any issues that are affecting or may affect the ability of the federal agency to continue to meet the terms of this Agreement;*
 - 5) *any disputes and objections received, and how they were resolved;*
 - 6) *any additional parties who have become signatories or concurring parties to this Agreement in the past year; and*
 - 7) *proposed plans for next year's activities.*
- *Within 14 days after the annual meeting, the AGENCY will summarize the meeting, including proposed action items and how they are to be addressed, in a letter to consulting parties. Consulting parties will have 20 days to review and comment on the meeting notes and, if necessary, provide the Agency with any edits to the meeting notes. If changes are needed, the AGENCY will produce revised meeting notes within 30 days of receipt of comments, and will provide the final notes to the consulting parties.*
- *Evaluation of the implementation of this Agreement may also include in-person meetings or conference calls among consulting parties, and suggestions for possible modifications or amendments to this Agreement. If possible, all consulting parties should be included in these consultations.*

S. Post-Review Discoveries

If historic properties are discovered, or unanticipated effects on historic properties are found after the Section 106 process has been completed, this stipulation sets forth a process for addressing these discoveries.

Example: If new cultural resources are discovered, or if unanticipated effects on historic properties are identified, the AGENCY shall implement the project-specific Monitoring and Discovery Plan (MDP) that is part of the HPTP.

NOTE: It is possible that a specific project would not have an HPTP, but could have an MDP. In such a case, the MDP should be attached to the agreement document as an Appendix.

General procedures to be used for discoveries should be summarized in this stipulation, and should generally follow the project-specific MDP that is part of the HPTP; in other words, the discovery processes and timelines in the HPTP and the agreement must be consistent. Often, agreements will have separate discovery stipulations for human remains/funerary objects (mortuary contexts) versus non-mortuary materials; this is a good option, as separate stipulations can provide clear guidance on the procedures to be followed for these different types of contexts, materials, and consultations.

Example: Should a discovery of archaeological or historical materials not covered under NAGPRA or the Arizona State Burial Laws occur, the AGENCY and the Project Proponent will follow procedures detailed in the MDP of the HPTP. The AGENCY will require that any cultural resources discovered during construction or other ground-disturbing activities be protected immediately in accordance with all applicable laws. The proponent will cease all ground disturbing activities within X feet (X meters) of any discovery, and will notify the AGENCY of the discovery within 24 hours. The AGENCY will notify the SHPO and appropriate consulting parties (e.g., the land manager) of the discovery.

Notification/reporting and treatment of unanticipated archaeological or historical discoveries on state, city or county or private lands will comply with Arizona Revised Statutes § 41-841 - 844 et seq. Any such discoveries will be reported to the Director of the ASM and the SHPO.

The AGENCY will consult with all of the consulting parties on the eligibility of newly discovered cultural resources. If eligible, the AGENCY will ensure that treatment measures follow the final HPTP, as well as the review processes and timelines for all reports as embodied in this agreement document.

Example for Human Remains/Funerary Objects stipulation:

Unanticipated discoveries of cultural items covered under NAGPRA (i.e., human remains, funerary objects, sacred objects, and objects of cultural patrimony) are the sole responsibility of the AGENCY. If human remains or NAGPRA cultural items as described in 43 C.F.R. 10 are discovered, the protocol for the treatment of human remains and NAGPRA cultural items found in the HPTP will be followed. The human remains and NAGPRA cultural items will be treated according to the protocols described in the NAGPRA Plan of Action (POA) that is included in the HPTP. All construction within X feet of the discovery will cease, and the AGENCY will be notified

immediately by telephone, followed by written confirmation within 24 hours. The AGENCY will then notify the SHPO of the discovery.

Unanticipated discoveries of human remains on state, city, county, or private lands must comply with A.R.S. § 41-844 and § 41-865, respectively, and any discoveries of human remains on these lands must be reported to the Director of the Arizona State Museum. The AGENCY will notify the SHPO of the discovery.

T. ACHP Administrative Stipulations: Dispute Resolution, Amendments, Termination, Duration of Agreement, and Anti-Deficiency Act

The language for the following stipulations is standard, legal boilerplate that governs all agreement documents. Most of this language has been developed by, and is available through, the ACHP. These stipulations are required in every agreement document.

Dispute Resolution:

Example: Should any signatory or concurring party to this Agreement object at any time to any actions proposed or the manner in which the terms of this Agreement are implemented, the AGENCY shall consult with such party to resolve the objection, and shall notify the SHPO and consulting parties of the objection. If the AGENCY determines that such objection cannot be resolved, the AGENCY will:

Forward all documentation relevant to the dispute, including the AGENCY'S proposed resolution, to the ACHP. The ACHP shall provide the AGENCY with its opinion on the resolution of the objection within 30 days of receiving adequate documentation. Prior to reaching a final decision on the dispute, the AGENCY shall prepare a written response that takes into account any timely opinion or comments regarding the dispute from the ACHP, signatories and concurring parties, and provide them with a copy of this written response. The AGENCY will then proceed according to its final decision.

If the ACHP does not provide comments regarding the dispute within the 30-day time period, the AGENCY may make a final decision on the dispute and proceed accordingly. Prior to reaching a final decision, the AGENCY shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories and concurring parties to the Agreement, and provide them and the ACHP with a copy of such written response.

The responsibilities of the AGENCY to carry out all other actions subject to the terms of this Agreement that are not the subject of the dispute remain unchanged.

At any time during implementation of the measures stipulated in this Agreement, should an objection pertaining to this Agreement or the effect of an undertaking on historic properties be raised by a member of the public, the AGENCY shall notify the parties to this Agreement and take the objection into account, consulting with the objector and with relevant parties to this Agreement to resolve the objection.

Amendments:

Example: *This Agreement may be amended when such an amendment is agreed to in writing by all signatories. Any signatory to this Agreement may propose an amendment in writing to the AGENCY.*

The AGENCY shall consult with the signatories to this Agreement to consider the proposed amendment. If there is agreement among all signatories, the document shall be amended accordingly and the amendment will be effective on the date a copy signed by all of the signatories is filed with the ACHP. The AGENCY shall provide all consulting parties with a copy of the executed amendment.

NOTE: For an amendment to be executed, all signatories that signed the agreement must also sign the amendment.

Termination:

Example: *If any signatory to this Agreement determines that its terms will not or cannot be carried out, that party shall immediately consult with the other signatories to attempt to develop an amendment per Stipulation XYZ. If, within thirty (30) days (or another time period agreed to by all signatories), an amendment cannot be reached, any signatory may terminate the Agreement upon written notification to the other signatories.*

Once the Agreement is terminated, and prior to work continuing on the Undertaking, the AGENCY must either (a) execute an Agreement pursuant to 36 CFR § 800.6 or (b) request, take into account, and respond to the comments of the ACHP under 36 CFR § 800.7. The AGENCY shall notify the signatories as to the course of action it will pursue.

Note: If the lead agency desires that invited signatories have the ability to terminate their participation in the Agreement, but not terminate the Agreement in its entirety, the following language can be used:

Termination of the Agreement by an invited signatory shall only apply to the lands under their respective jurisdiction. In such case, the AGENCY shall comply with 36 CFR Part 800, subpart B, for all undertakings on or affecting the terminating signatory's lands within the scope of this Agreement.

Duration or Sunset Clause:

There are no set rules for how long agreement documents should stay in effect. The sunset date is established by the agency, and different agencies have preferred durations for their agreements. In general, though, the duration depends upon the type of undertaking (e.g., phased undertakings have longer durations) or other circumstances such as project schedule.

Example: This Agreement will expire if its terms are not carried out within XX years from the date of its execution. At least six months prior to the end of the Sunset date, if the Undertaking will be continuing beyond the Sunset date, the signatories shall consult to determine if an extension of the Agreement's duration is warranted. If it is decided that an extension is needed, the signatories shall consult to determine whether this Agreement remains satisfactory or if its terms need to be updated.

If there is consensus that the Agreement be updated or extended, the AGENCY will revise the Agreement as needed, pursuant to the Amendment stipulation (Stipulation XYZ), and consult with all signatories and concurring parties on the proposed changes.

The updated Agreement amendment will be signed and executed by all signatories prior to the expiration date. The AGENCY will ensure that copies of the executed amendment are provided to all consulting parties.

Anti-Deficiency Act:

This stipulation addresses the regulation under the Anti-Deficiency Act (31 USC § 1341) that prohibits employees of the federal government from authorizing expenditures that exceed an amount authorized by Congress, or that involve an obligation for payment before money is appropriated from Congress.

Example (ACHP language): The AGENCY'S obligations under this Agreement are subject to the availability of funds and the stipulations of this Agreement are subject to the provisions of the Anti-Deficiency Act (31 USC 1341). The AGENCY will make reasonable and good faith efforts to secure the necessary funds to implement this 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 will consult with the SHPO and ACHP in accordance with the amendment and termination procedures in Stipulations XYZ and ABC.

U. Counterpart Signatures:

To expedite execution, agreements may be signed in counterparts; in this process, each party can sign and date a separate signature page concurrently. This provision must be stated as a separate stipulation in the agreement document (see below). The individual signature pages are

then attached to the agreement. (The agency should make sure that each counterpart page states the complete title of the agreement.)

Example: *This MOA may be executed in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.*

Note: When executing agreements through counterpart signatures, the AGENCY still needs to follow the process outlined under “**Signatories**” with regard to the sequencing of the SHPO and ACHP signatures (see Section 4 of this Guidance Point).

V. Ending Execution Statement

All agreements must end with a statement indicating that, once the agreement is executed, the lead agency will implement its terms. In so doing, the Agency will have complied with the Section 106 regulations.

Example (ACHP language): *Execution of this Agreement by the AGENCY and the SHPO/THPO, and the ACHP (only if participating), and implementation of its terms evidence that the AGENCY has taken into account the effects of the Undertaking on historic properties and has afforded the ACHP an opportunity to comment.*

SECTION 4

SIGNATURE BLOCKS

The signature pages should be clearly demarcated with three headings: 1) Signatories, 2) Invited Signatories, and 3) Concurring Parties.

A. Signatories

The lead federal agency and the SHPO are mandatory signatories for execution of an agreement document. The ACHP's signature, if they have decided to participate in the agreement, or if the agreement is a Program PA, is also mandatory.

B. Invited signatories

Any party with a role or responsibility within the body of the agreement should be invited to sign the agreement. Also, any signatory (signatories and invited signatories) that signs the agreement has the ability to amend and/or terminate the agreement. Should an invited signatory decline to sign, it will not prevent the agreement from being executed. However, if an invited signatory does not wish to sign the agreement, it is best if that party is not given any responsibilities within the process embodied in the agreement.

We recommend that agencies give invited signatories a certain timeframe to sign before the agreement is forwarded to the SHPO and the ACHP for execution. If they miss the deadline, these parties can always sign after the agreement is executed, if they so choose. Please be aware that both the ACHP and the SHPO will typically want to know if the invited signatories are going to sign, so the agreement document should be submitted to the SHPO and the ACHP for signature after the invited signatories have signed it. Additionally, the ACHP usually wants to know if the SHPO is going to sign an agreement; as such, the document generally should be submitted to the ACHP **after** the SHPO has signed.

Recently, Tribes have been requesting to be included as invited signatories to agreements. The SHPO encourages federal agencies to include the Tribes in this capacity, as permitted by agency policy. However, the decision to include Tribes as invited signatories when there are no specific responsibilities for said Tribes under the Agreement is the agency's decision. The ACHP (2015) advises that asking consulting parties to be invited signatories "can evidence a higher level of commitment to success in the agreement's implementation as well as continued engagement and partnership in the process."

C. Concurring parties

Although refusal of a concurring party to sign the agreement does not prevent it from being executed, concurring parties' signatures demonstrate that the party endorses the agreement. Concurring party signatures may reflect acceptance of the protocol in the agreement, but should not be construed as reflecting an endorsement of the **Undertaking**. It is an agency's decision if they wish to invite a given consulting party to concur in the agreement; however, the ACHP (2015) states that: "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.”

Note: In addition to providing signature lines for the handwritten signatures, we recommend providing a “Name:” line so that the person can also print their name. This is helpful in case someone’s signature is not legible to all parties.

Note regarding Tribal signatures: Prior to having the SHPO sign the document, the SHPO will want to know which Tribes are going to sign and which are not. For those that are not going to sign, the SHPO would like to know why – i.e., do they oppose the project, or do they not normally sign agreements? Thus, we recommend that the Agency provide a Tribal Consultation Matrix for SHPO review in order to understand the Agency’s tribal consultation efforts. Appendix A provides a list of the components for a Tribal Consultation Matrix; we recommend that agencies include these components in their matrices in order to thoroughly document their tribal consultation efforts for the SHPO and the ACHP.

SUMMARY

As part of an Agency's compliance with the NHPA, the importance of a consistent, well-drafted Section 106 agreement document cannot be understated. These critical documents reflect the agreed-upon processes reached in negotiations among consulting parties to resolve adverse effects to historic properties. Agreement documents are legal documents that codify the completion of the Section 106 process and direct future minimization and/or mitigation activities to resolve adverse effects to historic properties that may or will result from a proposed Undertaking. MOAs and PAs can also provide clear and decisive management actions (e.g., short or long-term monitoring programs) to promote avoidance of historic properties by various components of the Undertaking.

This guidance document was designed to provide direction regarding the development of Section 106 agreement documents within the state of Arizona. Merging guidance from the Advisory Council on Historic Preservation with real world experience from federal undertakings within Arizona, this document has been produced as a resource for federal archaeologists and consulting contractors tasked with the development and/or review of Section 106 agreement documents. If, at any time, questions arise about the drafting of agreements, please do not hesitate to contact SHPO compliance staff for assistance.

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REFERENCES CITED

2015 Advisory Council on Historic Preservation's Guidance on Section 106 Agreement Documents, <http://www.achp.gov/agreementdocguidance.html>.

Appendix A: Tribal Consultation Matrix Guidance

- 1) Tribe & contacts (names) consulted;
- 2) Date of consultation;
- 3) Type of consultation (i.e., formal letter, telephone call, e-mail, face-to-face meeting, etc.);
- 4) Response(s) received (by name and date);
- 5) Content of response(s) (briefly summarize the comments);
- 6) Agency's response back to Tribe (briefly summarize the Agency's response to the comments received, along with date of Agency's response);
- 7) Agency follow-up attempts (names and dates of follow-up consultations), if no responses received;
- 8) Statement of whether or not the Tribe will sign the Agreement ("yes," "no," or "unknown;" and
- 9) For Tribes not signing, summarize reason, if known.