

Section 106 Agreement Documents

Mark W. Rollins

Archaeologist

Alaska State Historic Preservation Office/ Office of
History and Archaeology

(907)-269-8722

Mark.Rollins@Alaska.gov



Section 106 of the National Historic Preservation Act (NHPA)

(54 U.S.C. § 306108)

- ▶ 36 CFR PART 800 are the regulations for 106
- ▶ Purpose: the act requires federal agencies to take into account the effects of their undertakings on historic properties and afford the council a reasonable opportunity to comment
- ▶ Goal: to identify historic properties and seek ways to **avoid, minimize, or mitigate** adverse effects
- ▶ Timing: the agency **MUST** complete 106 prior to approval or expenditure of Federal funds on the undertaking
- ▶ Agreements: document a federal agency's commitment to carry out and conclude their responsibilities under 106 of the NHPA



Types of Agreements

- ▶ Memorandum of Agreement (MOA)
- ▶ Programmatic Agreement (PA)
 - ▶ Project Specific
 - ▶ Program
 - ▶ Prototype
 - ▶ Nationwide
- ▶ Memorandum of Understanding (MOU)



MOAs

(36 CFR 800.6(c)(1))

- ▶ Used when undertaking has a clear beginning and end
- ▶ Adverse effects are clear and understood
- ▶ Records agreed upon resolution to adverse effects by consulting parties
- ▶ Remember that there is flexibility in the application of MOAs

PA's

(36 CFR 800.14(b))

- ▶ Program PA's- govern a particular program
 - ▶ DOT&PF/ FHWA 106 PA for the Federal-Aid Highway Program in AK
- ▶ Project PA's- multiple or complex Federal undertakings
 - ▶ Sterling Hwy MP 45-60 PA
- ▶ When do I need a PA?
 - ▶ When effects are similar and repetitive or regional in scope
 - ▶ Effects cannot be fully determined
 - ▶ Federal delegation of responsibilities under 106
 - ▶ For routine management activities at Federal facilities

07/23/2

ACHP Model Two-Party MOA Template:

MEMORANDUM OF AGREEMENT

BETWEEN [insert Agency]

AND THE

[insert name of State or Tribe] ["STATE" or "TRIBAL"] HISTORIC PRESERVATION OFFICER

REGARDING THE [insert project name and location]

WHEREAS, the [Agency] ([insert Agency abbreviation]) plans to ["carry out" or "fund" or "approve"/"license"/"permit" or other appropriate verb] the [insert project name] (undertaking) pursuant to the [insert name of the substantive statute authorizing the federal agency involvement in the undertaking], [insert legal cite for that statute]; and

WHEREAS, the undertaking consists of [insert a brief explanation of the undertaking]; and

WHEREAS, [Agency abbreviation] has defined the undertaking's area of potential effects (APE) as [insert written description and/or "described in Attachment XXX"]; and

WHEREAS, [Agency abbreviation] has determined that the undertaking may have an adverse effect on [insert name of historic property(ies)], which ["is" or "are"] ["listed in" or "eligible for listing in"] the National Register of Historic Places, and has consulted with the [insert name of State or Tribe] ["State" or "Tribal"] Historic Preservation Officer ("SHPO" or "THPO") pursuant to 36 CFR Part 800, the regulations implementing Section 106 of the National Historic Preservation Act (54 U.S.C. § 306108); and

WHEREAS, [Agency abbreviation] has consulted with the [insert name of Indian tribe(s) or Native Hawaiian organization(s)], for which [insert name of historic property(ies)] ["has" or "have"] religious and cultural significance, [Insert this whereas clause if appropriate]; and

WHEREAS, [Agency abbreviation] has consulted with [insert names of other consulting parties, if any] regarding the effects of the undertaking on historic properties and has invited them to sign this MOA as a ["invited signatory(ies)" or "concurring party(ies)"]; and

WHEREAS, in accordance with 36 CFR § 800.6(a)(1), [Agency abbreviation] has notified the Advisory Council on Historic Preservation (ACHP) of its adverse effect determination with specified documentation, and the ACHP has chosen *not* to participate in the consultation pursuant to 36 CFR § 800.6(a)(1)(iii); and

Drafting an MOA

- ▶ ACHP MOA template available on website
- ▶ Agreements are Legally Binding per Section 110(1) of NHPA
 - ▶ It “shall govern the undertaking and all its parts”
- ▶ Needs to be written clearly so all parties understand and the agency is able to fulfill their legal responsibilities
- ▶ Be consistent with defined terms
- ▶ Try not to bring in terminology from other statutes, e.g. NEPA
- ▶ Write for the cold reader



Format



NOW, THEREFORE, [Agency abbreviation] and the ["SHPO" or "THPO"] agree that the undertaking shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on historic properties.

STIPULATIONS

[Agency abbreviation] shall ensure that the following measures are carried out:

[I.-III. (Or whatever number of stipulations is necessary) Insert negotiated measures to avoid, minimize, or mitigate the adverse effects on historic properties.]

IV. DURATION

This MOA will expire if its terms are not carried out within five (5) years [or specify other appropriate time period] from the date of its execution. Prior to such time, [Agency abbreviation] may consult with the other signatories to reconsider the terms of the MOA and amend it in accordance with Stipulation VIII below.

V. POST-REVIEW DISCOVERIES

If properties are discovered that may be historically significant or unanticipated effects on historic properties found, the [Agency abbreviation] shall implement the discovery plan included as attachment [insert number of attachment] of this MOA. [Insert this stipulation if there is an indication that historic properties are likely to be discovered during implementation of the undertaking.]

VI. MONITORING AND REPORTING

Each [insert a specific time period] following the execution of this MOA until it expires or is terminated, [Agency abbreviation] shall provide all parties to this MOA ["and the ACHP" if appropriate] a summary report detailing work undertaken pursuant to its terms. Such report shall include any scheduling changes proposed, any problems encountered, and any disputes and objections received in [Agency abbreviation]'s efforts to carry out the terms of this MOA.

VII. DISPUTE RESOLUTION

Should any signatory * or concurring party to this MOA object at any time to any actions proposed or the manner in which the terms of this MOA are implemented, [Agency abbreviation] shall consult with such party to resolve the objection. If [Agency abbreviation] determines that such objection cannot be resolved, [Agency abbreviation] will:

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

B. If the ACHP does not provide its advice regarding the dispute within the thirty (30) day time period, [Agency abbreviation] may make a final decision on the dispute and proceed

Format Notes

- ▶ **Title-** IDs undertaking, required signatories, and indicate if it's a MOA or PA
- ▶ **Preamble-** consists of facts in Whereas Clauses, notes statutory authority for undertaking, introduces consulting parties and signatories, provides RELEVANT background facts, describes 106 process leading up to document, and any additional context for reader to understand the intent of agreement
- ▶ **Stipulations-**consists of actions and administration provisions, it's the body/heart of the agreement. Contains details about avoidance, minimization, and last mitigation measures. Last of all, is administrative language like Duration, Dispute Resolution, Amendments, and Termination clauses.
- ▶ **Signatures-** Required/invited/concurring -
- ▶ **Required** are the Federal Agency, SHPO/or THPO, and ACHP if participating. The agency must notify the ACHP of an adverse effect finding and invite them to participate in consultation on an agreement. ACHP often declines but they can be pulled in at anytime if needed. Required Signatories have authority to **Execute**, amend or terminate an agreement.
- ▶ **Invited-** should include any party with a responsibility in the agreement and may include an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties. Invited signatories have the same rights with regard to seeking amendment or termination.
- ▶ **Concurring-**any consulting party can be invited to sign as a concurring party. Refusal by concurring party does not invalidate the MOA.
- ▶ **Appendices-** can be anything from an APE map to an inadvertent discovery plan. You may not need appendices if it's a simple MOA. Often times, people will duplicate info between body and appendices. No need to repeat yourself, remember clear and concise. Agencies use their documents in different ways, so sometimes repetition is appropriate and the organization of information may vary based on the audience. This can all be agreed upon in consultation and through draft reviews.

Avoid, Minimize, or Mitigate

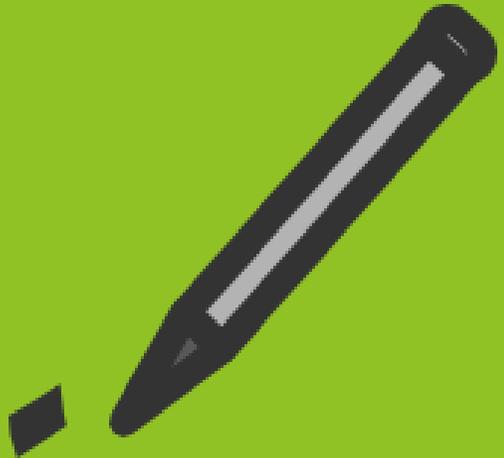
- ▶ The first few Stipulations should address negotiated measures
- ▶ Avoidance can range from design changes in a project to alternative builds
- ▶ Minimization can range from calming measures for increased traffic to visual and noise buffers, like vegetation and barriers
- ▶ Mitigation most and it should focus on the historic property being affected.
 - ▶ Who's doing what and when ?
- ▶ Mitigation examples: date recovery and analysis, site interpretation, HABS/HAER, educational materials, field schools, publications and presentations, nominations to the National Register, off site mitigation, mitigation banks



Other Good Stuff

- ▶ Duration- often 5 years
- ▶ Post-Review Discoveries
 - ▶ clause included if it is likely the undertaking will have a discovery
- ▶ Monitoring and Reporting
 - ▶ This can be simple or complex
- ▶ Dispute resolution, Amendments, and Termination
 - ▶ Usually use standard language
- ▶ Signatories
 - ▶ Required
 - ▶ Invited
 - ▶ Concurring

Santa



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APPENDICES

▶ EXAMPLES:

- ▶ Acronyms and Abbreviations
- ▶ APE Map
- ▶ Programmatic Allowances for Streamlined Review
- ▶ Program Forms (PA)
- ▶ Delegation of Authority Process
- ▶ Qualifications and Training
- ▶ Archaeological Monitoring and Discovery Plan
- ▶ Cultural Resources Management Plan (CRMP)
- ▶ Emergency Situations
- ▶ Agency Policy
- ▶ Discovery of Human Remains
- ▶ Curation Agreement
- ▶ Amendment Log



Are We Done Yet?

- ▶ The 106 process is complete once the Federal agency has filed the executed agreement with the ACHP
- ▶ Submit copy of MOA, along with documentation specified in section 800.11(f), prior to approving the undertaking in order to meet the requirements of Section 106



Preserving America's Heritage

Advisory Council on Historic Preservation Electronic Section 106 Documentation Submittal System (e106) Form *MS Word format*

Send to: e106@achp.gov

nation

ederal agency (If multiple agencies, state them all and indicate whether one is the lead

f Transportation and Public Facilities acting as FHWA under a 327 agreement

/project (Include project/permit/application number if applicable):

56, Moose Creek Crossing.

te city(s), county(s), state(s), land ownership, and whether it would
s located on tribal lands):

a, in the Matanuska Susitna Borough. Project would purchase
s are located on private lands including lands owned by an
a Inc.

\ contact person for this undertaking, including

Best Practices

When in Doubt
Consult it Out

Lead Agency
or contractor
DRAFTS

Whereas
Clauses are
facts

Stipulations
are **actions**

Don't get
lost
in the process

ACHP
Template
with required
language

You won't
please
everyone

Be a **leader**

Set review
timelines and
goals for the
group

Have a **point
person** for the
agreement

Include all
**provisions
agreed upon**
in consultation

Resources

- ▶ ACHP Website
 - ▶ <https://www.achp.gov/initiatives/guidance-agreement-documents>
 - ▶ <https://www.achp.gov/digital-library-section-106-landing/prototype-programmatic-agreement-guidance>
 - ▶ <https://www.achp.gov/protecting-historic-properties/List%20of%20Agreements/Nationwide>
- ▶ NPS Website, Standards for the treatment of historic properties
 - ▶ <https://www.nps.gov/tps/standards.htm>
- ▶ Alaska SHPO/ OHA Website
 - ▶ <http://dnr.alaska.gov/parks/oha/>
- ▶ Alaska DOT&PF website
 - ▶ <http://www.dot.alaska.gov/stwddes/desenviron/resources/historicproperties.shtm>
- ▶ Questions?

