

PART 1970 - ENVIRONMENTAL

Subpart H - Historic and Cultural Resources

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PART 1970 - ENVIRONMENTAL

Subpart H - Historic and Cultural Resources

§ 1970.351 Purpose and Applicability.

(a) Prior to making a decision on an application for federal financial assistance the Rural Development agencies - the Rural Business Cooperative Service (RBS), the Rural Housing Service (RHS) and the Rural Utilities service (RUS), known collectively as the Agency pursuant to § 1970.6, must comply with federal environmental statutes, regulations, and other requirements. The three primary federal environmental requirements are the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA) as amended.

(1) NEPA, ESA and NHPA are separate federal statutes and each is implemented through individual regulatory requirements.

(2) Compliance with the requirements of NEPA, ESA and NHPA enables the Agency to make decisions informed by knowledge about and understanding of impacts to the human environment.

(b) NHPA, which was enacted by Congress in 1966, and has been amended numerous times, is the centerpiece of federal historic preservation legislation. Effective December 19, 2014, NHPA was recodified in Title 54 of the United States Code (U.S.C.).

(c) Pursuant to 54 U.S.C. § 300101, NHPA establishes federal government policy with regards to historic preservation. Through this section, Congress directed the federal government "to use measures, including financial and technical assistance, to foster conditions for productive harmony between modern society and historic resources, and fulfill the social, economic, and other requirements of present and future generations."

(1) With this policy statement in NHPA, Congress recognized historic preservation as one of the many factors which must be incorporated into federal decision making.

(2) For historic properties owned, administered, or controlled by the federal government, Congress set a high standard. However, the federal government is required only to contribute to the preservation of nonfederal historic properties. This more flexible standard takes into account the lack of federal control over nonfederal properties, and as such, recognizes the limits on federal responsibility.

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Environmental Policies
and Procedures

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(d) Purpose of this guidance. Subpart H provides internal guidance to Agency national and state staff on how to comply with Section 106 of NHPA (now at 54 U.S.C § 306108), and integrate these requirements with other federal environmental mandates, particularly NEPA. Subpart H guidance and its exhibits will be the centerpiece of the Agency's historic preservation program being developed as required by 54 U.S.C. § 306102.

(e) Statutory Requirements. Section 106 of NHPA (54 U.S.C § 306108) requires that "the head of any federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, take into account the effect of the undertaking on historic properties; and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such undertaking."

(1) The geographic scope of Section 106 review is defined by § 1970.8(a).

(2) The actions listed in § 1970.8(b)(1), § 1970.8(b)(2)(i), § 1970.8(b)(2)(iii) and § 1970.8(c)(2) and (3) have been determined by the Agency to be undertakings.

(3) The actions listed in § 1970.8(b)(2)(ii), §1970.8(b)(3) and (4), and §1970.8(d) and (e) have been determined not to be undertakings by the Agency.

(4) Agency applications which do not exceed, the threshold established pursuant to § 1970.8(c)(1), are not considered undertakings, and therefore, are not subject to 36 CFR Part 800.

(f) Implementing regulations. The regulations, "Protection of Historic Properties" (36 CFR Part 800), establish the process by which the Agency satisfies the two statutory requirements of Section 106 of NHPA.

(1) These regulations, which were promulgated by the Advisory Council on Historic Preservation (ACHP), provide a framework for problem solving, not a requirement for the protection and preservation of a historic property.

§ 1970.351(f) (Con.)

(2) These regulations establish a four step compliance process, but do not mandate the outcome of that process. Therefore, a full range of possible outcomes is available from complete protection of a historic property to its destruction.

(3) Exhibit A, Section 106 Flowchart and Explanatory Material, which also can be found on the ACHP's website, <http://www.achp.gov/>, provides a summary of the primary regulatory requirements.

§ 1970.352 Responsible parties in Section 106 review- The Agency.

(a) In addition to the general responsibilities of the Agency in environmental review established pursuant to § 1970.5(a), the Agency is legally responsible for the conduct and outcome of Section 106 review (36 CFR Part 800). Accordingly, the Agency directs, and may elect to monitor, an applicant's efforts to gather information, engage nonfederal parties and recommend actions in Section 106 review under the authority of a blanket delegation issued pursuant to 36 CFR § 800.2(c)(4), and codified in § 1970.5(b)(2).

(1) Because of this legal responsibility, the Agency, with the assistance of the applicant, must maintain a comprehensive and accurate record of Section 106 review actions and decision making. Such documentation is required by 54 U.S.C. § 306114 for any undertaking that will adversely affect a history property.

(2) The Agency's compliance with NHPA and 36 CFR Part 800 is enforced through litigation. A summary of Section 106 litigation can be found in Federal Historic Preservation Case Law, 1966-2000 and its Update, 1996-2000, which are both available at the ACHP's website, <http://www.achp.gov/>.

(b) Pursuant to 54 U.S.C. § 306104, RBS, RHS and RUS each have designated a Federal Preservation Officer (FPO) who is responsible for oversight and coordination of that agency's compliance with NHPA, including Section 106. The FPO provides assistance and direction to Agency national and state staff on all aspects of the implementation of 36 CFR Part 800.

(1) In this role the FPO seeks to improve Agency compliance with Section 106 review through the issuance of guidance, and development of tools to assist Agency staff and applicants.

(2) The FPO will be involved in Section 106 review whenever:

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- (i) There is a dispute between parties or an objection that must be resolved;
- (ii) There may be an adverse effect;
- (iii) The development of a program alternative, pursuant to 36 CFR § 800.14, is proposed;
- (iv) The ACHP may participate in Section 106 review pursuant to 36 CFR § 800.2(b)(1) and (2), 36 CFR § 800.6(b)(2) or 36 CFR § 800.9;
- (v) There is an emergency as defined pursuant to 36 CFR § 800.12 and § 1970.6;
- (vi) There is a potential for a termination of consultation pursuant to 36 CFR § 800.7; and
- (vii) The National Park Service (NPS), an agency of the Department of the Interior, may participate in Section 106 review pursuant to 36 CFR § 800.10.

(c) With one exception, the Agency is the sole decision maker in Section 106 review, and as such, is the final arbiter of disputes and objections. The exception pertains to disputes regarding eligibility of buildings, sites, structures, objects and districts for listing on the National Register of Historic Places (NRHP). Such disputes are resolved by the Keeper of the NRHP in accordance with 36 CFR § 800.4(c)(2).

(d) As set forth in the Constitution, treaties, statutes and court decisions, the Federal Government has a unique relationship with Indian tribes, as defined in accordance with 36 CFR § 800.16(m), and listed by the Bureau of Indian Affairs (BIA) in the Federal Register. Because Indian tribes are legally considered dependent sovereign nations, the relationship between them and the Agency is recognized as government-to-government. This special legal relationship requires that the Agency strive to ensure that its interactions with Indian tribes and those of its applicants are conducted in a manner respectful of tribal sovereignty on and authority over tribal lands, and sensitive to the culture, needs and interests of tribal communities.

(e) Lead Agency for Section 106 Review. The opportunity for the Agency to act as the lead or a cooperating agency in NEPA review is established pursuant to § 1970.5(a)(4). In accordance with 36 CFR § 800.2(a)(2),

§ 1970.352(e) (Con.)

federal agencies are allowed to designate a lead agency when more than one federal agency is involved in Section 106 review of an undertaking, The lead agency acts on behalf of the other federal agencies fulfilling their collective responsibilities for Section 106 review.

(1) Control over an undertaking typically is an important factor in identifying a lead agency. Other factors, however, such as access to technical expertise and established local relationships, also are important considerations.

(2) There is no requirement that the same federal agency identified as the lead agency for NEPA review also be designated as the lead agency for Section 106 review. However, if the agencies are different then it is imperative that they coordinate closely in all decision making.

(3) While lead agency designation is allowed it is not required. In the event the federal agencies do not designate a lead agency, each is individually responsible for concluding Section 106 review in accordance with 36 CFR Part 800.

(4) An applicant and its consultant will refrain from using the term "lead agency" in Section 106 review documents when no federal agency has been so designated.

(5) When designated as the lead agency for Section 106 review, the Agency will seek the assistance and concurrence of the other federal agencies in all decision making. The Agency does not have the authority to make Sections 106 decisions for federal lands and the resources they contain. As the lead, the Agency is responsible essentially for managing Section 106 review with the assistance and concurrence of the other federal agencies.

(6) Although not required, the Agency should document any lead agency designation.

(i) For Categorical Exclusion (CE) or Environmental Assessment (EA) level reviews, the lead federal agency may be documented using an email or letter.

(ii) For Environmental Impact Statement (EIS) level review, formal agreement between the federal agencies to document their respective roles and responsibilities is recommended.

§ 1970.353 Historic Properties.

(a) The term historic property is defined in accordance with 36 CFR § 800.16(1)(1) and § 1970.6. Historic properties are the subject matter of Section 106 review.

(1) Eligible for inclusion in the NRHP refers to both properties formally determined as such in accordance with the regulations of the Secretary of the Interior (SOI), and those other properties determined by the Agency in accordance with 36 CFR § 800.4(c) to meet the NRHP criteria of evaluation.

(2) Listed on the NRHP means that the property has been formally included in the commemorative listing of prehistoric or historic districts, sites, buildings, structures and objects which possess the quality of significance at a national, state or local level administered by NPS.

(3) Because historic properties represent only one type of "*cultural resource*," these terms should not be used interchangeably.

(b) The quality of significance is possessed when one or more of the four criteria of evaluation apply and it possesses integrity of most or all of the following: location, design, materials, workmanship, association, setting, and feeling. The NRHP criteria for evaluation are:

(1) Criterion A - Association with events that have made a significant contribution of the broad patterns of our history; or

(2) Criterion B - Association with the lives of significant persons in the past; or

(3) Criterion C - Embodiment of the distinctive characteristics of a type, period, or method of construction or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity, such as a district or landscape, whose components may lack individual distinction; or

(4) Criterion D - Yield or may be likely to yield information important in historic or prehistory.

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(c) For Criterion D, which typically applies to archeological sites, the term, *important*, means the information will address significant gaps in our understanding of the past, or expand upon existing knowledge in a meaningful way. Accordingly, the case for *importance* should be supported and documented in Section 1096 review.

(d) Historic properties that are nationally significant and possess exceptional value or quality in commemorating or illustrating the history of the United States may be designated by the SOI as National Historic Landmarks (NHLs). Designation of a property as an NHL does not transfer ownership of that property to the NPS or any other agency of the federal government.

[1970.354-1970.400 Reserved]

Exhibits - A, B, C, D, E, F, G, H, I and J

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Section 106 Regulations Flow Chart

Section 106 Regulations Flow Chart - <http://www.achp.gov/regsflow.html>

Section 106 Regulations Flow Chart Explanatory Material -
<http://www.achp.gov/flowexplain.html>

Implementing the Delegation of Authority to Conduct Section 106 Review

Rural Development (RD) is composed of the Rural Utilities Service (RUS), the Rural Housing Service (RHS) or the Rural Business-Cooperative Service (RBS) (collectively, the Agency). Before obligating funds for an application, the Agency must comply with requirements of Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing the regulations, "Protection of Historic Properties" (36 CFR Part 800). Under this federal statutory and regulatory requirement, known as "*Section 106 review*," the Agency must take into account the effect of its undertaking on historic properties; i.e. buildings, structures, sites, objects and districts which are listed in or eligible for listing in the National Register of Historic Places (NRHP).

Pursuant to 36 CFR § 800.16(y), an undertaking is defined as a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with Federal financial assistance; and those requiring a federal permit, license or approval. The Agency has determined that the actions described in § 1970.8(b)(1), § 1970.8(b)(2)(i), § 1970.8(b)(2)(iii) and § 1970.8(c)(2) and (3) are undertakings.

In accordance with 36 CFR § 800.2(c)(4), the Agency has issued a blanket delegation authorizing its applicants to initiate and proceed through the steps of Section 106 review to a **recommended** finding of *no historic properties affected* or *no adverse effect*. This blanket delegation authority is documented in 7 CFR § 1970.5(b)(2) of the regulations, "Environmental Policies and Procedures" (7 CFR Part 1970). This regulatory delegation, which extends to all Agency applicants and their authorized representatives, supercedes all previous letter delegations (dated August 14, 2012 and July 16, 2009).

In order to satisfy the requirements of delegated authority, an Agency applicant seeks agreement with, as appropriate, Indian tribes, the State Historic Preservation Office (SHPO) and others on the effect of its proposal on historic properties. Section 106 review proceeds under this delegated authority solely on the basis of **agreement** reached between the Agency applicant, the SHPO, Indian tribes, and other participants on **recommended** actions. This blanket delegation does not empower Agency applicants or their authorized representatives to make any decisions in Section 106 review, such as a finding of effect or determination of eligibility. Rather, Agency applicants are authorized only to make recommendations to support the progress of Section 106 review. Nothing in this delegated authority changes, alters or amends the Agency's decision making authority, or the responsibility of the Agency to conclude Section 106 review.

Throughout this guidance the term Indian tribe, which is defined in 36 CFR § 800.16(m), refers only to federally-recognized Indian tribes as listed by the Bureau of Indian Affairs (BIA).

Under most circumstances, Agency applicants will work with the State Historic Preservation Office (SHPO). However, when an applicant's proposal is located on tribal lands, defined in 36 CFR § 800.16(x) as all lands within the exterior boundary of any Indian reservation and all dependent Indian communities, and that tribe has designated a Tribal Historic Preservation Officer (THPO) in accordance with Section 101(d)(2) of NHPA, the SHPO participates only under the conditions specified in 36 CFR § 800.2(c)(1)(ii). If the Indian tribe has not designated a THPO, then the SHPO participates in Section 106 review pursuant to 36 CFR § 800.2(c)(2)(i)(B).

Roles and Responsibilities: Because this blanket delegation does not abrogate the legal responsibility of the Agency for compliance with Section 106, it is incumbent that applicants proceed through the review in a manner that comports with Agency guidance and direction. Accordingly, when working under the blanket delegation, an applicant is authorized by the Agency to:

- Begin Section 106 review with the SHPO, Indian tribes and others as appropriate;
- Proceed through the steps of Section 106 review based on agreement between all participants on recommended determinations (of NRHP eligibility) and other actions; and
- Recommend a finding of *no historic properties affected or no adverse effect* as a conclusion to Section 106 review.

The Agency does not authorize an applicant to proceed with Section 106 review whenever:

- Any participant in section 106 review proposes that there may be an *adverse effect*, as defined pursuant to 36 CFR § 800.5(a);
- An Indian tribe requests the involvement of the Agency; i.e. *government-to-government consultation*;
- There is a request to withhold information about the location, character or ownership of a historic property, or an Indian tribe declines to share information about the location or character of a historic property of religious and cultural significance;
- There is any disagreement of any kind between the participants in Section 106 review, including an applicant or its authorized representative;
- There is an objection filed by a Section 106 review participant, or the public about their involvement in 36 CFR Part 800;

- Any participant asserts that the Section 106 regulations have not been correctly followed, such as an allegation of foreclosure or anticipatory demolition, as defined by 36 CFR § 800.9(b) and 36 CFR § 800.9(c), respectively; and
- Any participant demands that the applicant take actions which exceed the requirements of Section 106 review, such as the payment of fees.

Since each of the above seven circumstances cannot be concluded without a decision, resolution can be reached only with the direct involvement of the Agency. Therefore, if any one of the above circumstances occurs during implementation of the blanket delegation, the applicant immediately will seek the direct participation of the Agency. Failure to do so will delay, and perhaps jeopardize the successful conclusion of Section 106 review.

Whenever one of the seven circumstances apply, an applicant for assistance from a RUS Telecommunications or Electric Program will seek the direct participation of the RUS National Office, Water and Environmental Programs, Engineering and Environmental Staff (EES). An applicant for assistance from all other Agency programs, the applicant will notify the State Environmental Coordinator (SEC) in the RD office in the state where the proposal will be constructed. Before taking any action, the SEC will seek guidance and direction, as appropriate, from EES or, for RHS and RBS programs, the Program Support Staff (PSS). Only EES and PSS possess the requisite experience in Section 106 review, and the professional training in historic preservation to appropriately resolve the above issues in a manner that would enable the Agency to address any legal challenge.

Special federal/tribal relationship: The federal government has a unique relationship with Indian tribes as set forth in the Constitution, treaties, statutes and court decisions. Because Indian tribes are considered dependent sovereign nations, this relationship is considered *government-to-government*. Given this special relationship, the responsibility of the Agency to *consult* on a *government-to-government* basis with Indian tribes may not be delegated to a nonfederal party. While allowed to initiate and proceed through Section 106 review with the SHPO, pursuant to 7 CFR §1970.5(b)(2) an applicant is not authorized to *consult* with Indian tribes on behalf of the Agency. Accordingly, applicants and their authorized representatives must refrain from characterizing their interaction with Indian tribes as *consultation* (The term consultation is a term of art in section 106 review that is defined in 36 CFR § 800.16(f)).

However, applicants are authorized to "notify," "engage," "involve," and "work with" Indian tribes under the terms of this blanket delegation as they proceed through the steps of Section 106 review. Indeed, the Agency encourages such interaction because it offers Indian tribes an opportunity to participate in Section 106 review and voice their concerns early in project planning and design. For this reason, Indian tribes typically are willing to work with applicants directly as they proceed through the steps of Section 106 review. Whenever an Indian tribes requests *consultation* or a level of interaction that is described as *government-to-government*, be it informal or formal, the Agency must become involved.

Some Indian tribes are represented in Section 106 review by a Tribal Historic Preservation Officer (THPO) designated in accordance with 54 U.S.C. § 302702. A designated THPO has assumed all or some part of the functions of a State Historic Preservation Office (SHPO) on its tribal lands.

In the event a THPO has not been formally designated the tribe will be represented by an official designee. If that official designee is a tribal leader, such as the tribal chairman or a member of the tribal council, be sure to afford that designee the respect and consideration appropriate to the leader of a sovereign nation.

Documentation Standards: While applicants and their authorized representatives are permitted to work with the SHPO, Indian tribes and other Section 106 review participants to gather the information needed to identify and evaluate historic properties, and assess effects to them, the Agency retains the legal responsibility to document its findings and determinations, and the basis for its decision making in order to conclude Section 106 review. Applicants, therefore, must document and support their Section 106 review recommendations sufficient to meet Agency standards, but are not obliged to use a format specified by a SHPO. Using the templates developed by the RD Agencies will assist applicants in satisfying sufficiency requirements.

The documentation prepared by an applicant must be sufficient to enable any Section 106 party to understand, not necessarily agree with, its recommendations. The final arbiter of sufficiency disputes is the Agency.

Exhibit H provides various templates to assist in meeting Agency standards.

Under certain conditions, information about the location, character and ownership of a historic property may be withheld by the Agency. Documentation is still considered sufficient as long as the decision regarding the information to be withheld has been made by the Agency.

In accordance with 36 CFR § 800.11(d), to support a recommended finding of *no historic properties affected*, the following documentation must be provided to the SHPO and other Section 106 review participants:

- A description of the applicant's proposal in its entirety, specifying the role of the Agency and any other federal agency which may fund, permit, license or approve the proposal, and the recommended area of potential effects (APE). Include maps identifying the location of the proposal and the recommended APE, and illustrating the geographic relationship to between known historic properties and the APE. The addition of photographs and other images greatly improves clarity; (In accordance with 36 CFR § 800.16(d), the area of potential (APE) effects is defined as the geographic area of areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.)
- A description of the actions which the applicant has taken to identify historic properties, including examination of existing documentation, information gathered from the SHPO, Indian tribes or other knowledgeable Section 106 review participants, and any study or survey conducted within the APE; and
- An explanation of the basis for the proposed finding of *no historic properties affected* that includes the NRHP status of resources identified in the APE as well as an explanation or justification for the proposed finding that is grounded in and logically consistent with other project documentation. (It is not sufficient to simply state that a right-of-way has been previously disturbed. Rather, the RD Agency applicant should explain the nature and scope of that disturbance, and why it is reasonable to expect that historic properties might have been significantly impacted by such previous action.)

Pursuant to 36 CFR § 800.11(e), in addition to the above the documentation, for a recommended finding of *no adverse effect* the applicant will include a description of the effects of the proposal on historic properties along with an explanation of why those effects are not believed to be adverse. In all cases, the views provided by the SHPO, Indian tribes and other Section 106 review participants, and as appropriate, the public, will be documented.

Timing: This blanket delegation is considered in effect because it has been issued by the Agency, and SHPOs and Indian tribes have been duly notified as required pursuant to 36 CFR § 800.2(c)(4). Therefore, approval of this blanket delegation of authority by SHPOs and Indian tribes is not required. However, some SHPOs may decline participation in Section 106 review conducted under this blanket authority because the Agency is not involved. Pursuant to 36 CFR Part 800, the SHPO does not possess the authority to refuse to work with an applicant under delegated authority. Therefore, an applicant will involve the Agency immediately whenever the SHPO refuses to participate in Section 106 review for this or any other reason in order to rectify the situation.

Pursuant to 36 CFR § 800.3(c)(4), the SHPO/THPO is permitted 30 days from receipt of an applicant's recommended determination (of NRHP eligibility) or a finding of (*no historic properties affected* or *no adverse effect*) in which to provide its concurrence or objection. When a SHPO fails to respond within 30 days, the applicant will notify the Agency. The notification will include all of the documentation submitted to the SHPO/THPO, including the finding or determination. In order to proceed with the next step in Section 106 review, the documentation submitted to the SHPO/THPO must include a recommended finding or determination, and meet the standards established by 36 CFR § 800.11(d) or (e) as determined by the Agency.

The Agency may decide to proceed to the next step in Section 106 review in the absence of receipt a timely response from any other participate in Section 106 review. The decision to do so rests exclusively with the Agency.

Concluding Section 106 Review: For applicants working under delegated authority, Section 106 review will be concluded by the Agency's decision. Accordingly, so-called *SHPO clearance* does not qualify as a concluding action.

In order to conclude Section 106 review on the basis of the agreement between an applicant, working under delegated authority, and the SHPO, Indian tribes and other participants, the Agency will document its decision using the template memorandum found in Exhibit H, Attachment 3. The Agency will submit its decision memo to the SHPO, Indian tribes and other Section 106 participants. No response from the parties is needed in order to conclude Section 106 review. When all parties agree on a recommended finding of *no historic properties affected* or *no adverse effect*, it is highly unlikely that the Agency would not support that consensus.

Any questions regarding this guidance or implementation of the blanket delegation will be directed to the Federal Preservation Officer for RUS, RBS, or RHS, as appropriate.

A Citizen's Guide to Section 106 Review

<http://www.achp.gov/docs/CitizenGuide.pdf>

Working with Indian Tribes in Section 106 Review

Introduction

As part of the federal government, the Rural Development (RD) Agencies, which include the Rural Housing Service (RHS), the Rural Business Cooperative Service (RBS), and the Rural Utilities Service (RUS) (collectively as the Agency), have a special relationship with federally recognized Indian tribes (In this guidance, the term "Indian tribe" refers solely to federally recognized tribes unless it has been modified by the term "state recognized," to refer to tribes which have been recognized by the state only.). The special role of Indian tribes in federal historic preservation is established through Chapter 3027 of the National Historic Preservation Act (NHPA), 54 U. S. C. § 300101 et seq., and the regulations (36 CFR Part 800) implementing Section 106 of the national Historic Preservation Act (NHPA) as well as the Constitution, treaties, statutes and court decisions.

As defined by 36 CFR § 800.16(m), the term **Indian tribe** refers to *an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation or village corporation, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians.* Those meeting this definition are considered to be **federally-recognized**. Federal recognition is achieved by successful completion of a statutorily defined process through the Bureau of Indian Affairs (BIA) or by an act of Congress.

As of March 2016, there were 567 Indian tribes in the United States. A list of those tribes and their leadership is published annually by the BIA (See <http://www.bia.gov/>). Because of previous federal actions the geographic distribution of these tribes by state is quite uneven. For example, California has over 100 Indian tribes within its borders, while Kentucky has none. In some states, such as Maryland, there are tribes which have been recognized at the state level only. In accordance with 36 CFR § 800.2(c)(5), such state recognized tribes may participate in Section 106 review due to their concern about effects to historic properties. However, lacking federal recognition, state recognized tribes are not entitled to the special role afforded to Indian tribes under NHPA.

The People

Today, Indian tribes are composed of individuals who have successfully met established membership criteria. Because enrollment requirements are intended to preserve the unique character and traditions of an individual tribe, membership criteria are based on shared customs, traditions, language and biological relationship. Common requirements for tribal membership are lineal descent from a person named on the tribe's base roll (A base roll is the original list of tribal members as designated in the tribe's constitution or other document specifying enrollment criteria.) or a lineal relationship to a tribal member who descended from someone named on the base roll. Each Indian tribe maintains its own enrollment records and makes the determination of membership eligibility.

In 2011, individuals identifying themselves as American Indian or Alaska Native (AI/AN) only, or in combination with one or more other races, totaled 5.1 million or 1.6% of the total U.S. population. About one half of this group identified themselves as AI/AN only. Between 2000 and 2010, the AI/AN population had increased by 1.2 million people (26.7%) compared with only a 9.7% increase in the overall population.

In 2010, only 22% of AI/AN lived in American Indian areas, including reservations, trust areas and Alaska Native Village Statistical Areas. Most of those living in these special areas identified themselves as AI/AN only. Based on the 2010 Census, the largest tribes were the Cherokee (819,105) followed by the Navajo (332,129) and the Choctaw (195,764). Given certain past federal actions, such as the Dawes Act (see below), it should not be surprisingly that most of those living in the American Indian areas did not identify themselves as AI/AN.

While each of the following 14 states claim more than 100,000 AIAN residents - California, Oklahoma, Arizona, Texas, New Mexico, Washington, North Carolina, New York, Florida, Michigan, Alaska, Colorado, Oregon and Minnesota - almost half of the AI/AN reside in the Western states. Of these, California has the largest AI/AN population at 689,320, followed by Oklahoma (502,934) and then Arizona (346,380).

In 2012, there were a total of 2, 227, 963 farms in the United States. Of these, only 56,092 or roughly 2% were owned by AI/AN who themselves represent only about 2% of U.S. farmers. About 40% of the AI/AN farms were estimated to be worth less than \$1000. Since 2007 in the U.S., there has been a general trend toward a decrease in the number of farms in all size categories. While the number of small (1 to 9 acre) farms operated by AI/AN has decreased, the opposite is true for larger farms.

According to the 2007 -2011 American Community Survey, 14.3% of the total US population reported an income below the poverty level. In 2011, the median income of AI/AN only households was \$35,192 compared with \$50, 502 for the nation as a whole. Based on these figures, it is not surprising that by race the highest poverty rate (27%) was experienced by AI/AN only households.

In fiscal year 2014, the Agency invested \$12.7 million to help Indian tribes finance essential community facilities, including schools and clinics. RUS Telecommunications Programs provided \$9.6 million in 26 Distance Learning and Telemedicine grants to entities serving tribal lands, while the RUS Electric Programs invested 17.2 million in direct loans to rural electric utilities to bring new and improved infrastructure to 10,086 AI/AN consumers, and \$6.2 million in High Energy Cost grants for tribal projects. AI/AN homeowners received 116 direct home loans totaling \$14.8 million and 961 Single Family Housing loan guarantees totaling \$133.3 million. USDA invested in 71 water and environmental projects benefitting tribal communities in which nearly 57% of the total financing of \$147.7 million was provided by RUS.

Their Culture

Culture has been defined in many different ways:

- (1) the way of life of a people that includes their traditions, practices, beliefs, shared values and rules of behavior; or
- (2) the behavior learned through social interactions that distinguishes the group from others; or
- (3) the sum total of ways of living built up by a group of human beings and transmitted from one generation to another.

The key is that culture is learned behavior, and transmitted from one generation to the next. One thing is clear, however, from the above definitions, culture is the single most powerful influence on how humans perceive the world and everything in it. While all Indian tribes share in common that they are the surviving representatives of the indigenous population of North America, individually they are different because they each possess their own culture; i.e. way of life, traditions and rules of behavior. For example, Native American structures were extremely varied in the past - teepees, hogans, pueblos, igloos, longhouse, and plank houses for example - and often were exclusive to a tribe or region. Most tribes were led by men, but the Iroquois women chose the male leaders.

Some tribes chose different chiefs or leaders for different purposes, and some of these headmen direct through consensus only. This was partly true for the Natchez who identified separate war and paramount chiefs, but the authority of the latter, known as "Great Sun," was absolute.

Not only are Indian tribes culturally different from each other, but their way of life differs from the European, African or other derived culture of the United States. For example, private landownership is a fundamental tenet of Western law. However, to many tribes "use," rather than private ownership, is the key factor. These tribes may use resources, including land, to sustain themselves, but that land and its resources are not owned by any tribal member. In another example, for the tribes of the Pacific Northwest, there are few resources as vital to subsistence, and tribal culture, as a whole, as salmon. Traditionally, many of these tribes viewed salmon as spirit beings which led lives similar to humans, dwelling in ocean villages and traveling to the rivers and bays in an "*act of voluntary sacrifice for the benefit of their human friends.*" (Vinyeta, Kristen. A Cultural snapshot: Exploring the Value of Community Photography for the Coquille Indian Tribe in a Climate Change Era." Master of Science Thesis, University of Oregon, December 2013). For the Coquille Indians, the first salmon caught would be welcomed as a distant relative - typically referred to as the Coquille's "cousin" - and then cooked and shared with all of the guests. The bones of this "cousin" were carefully treated and returned to the river with great attention because the Coquille believe that the spirit of that salmon would return to the ocean to tell the other "cousins" that the Coquilles had held them in great honor and respected the physical sacrifices that they were going to make for the tribe.

It is not only important to recognize that differences exist between cultures, but also to accept as valid these other ways of thinking, acting and perceiving the world. Acceptance of and respect for cultural differences is essential to effective communication and interaction between the Agency and Indian tribes in Section 106 review.

History of the Federal/Tribal Relationship

More law has been enacted for AI/AN than for any other single racial or ethnic group in America. The numerous legal principles and policies that were established in the 17th, 18th and 19th centuries still are in effect today. Therefore, in working with Indian tribes summary knowledge of their past interaction with the federal government is useful in understanding current relationships, perceptions and challenges.

The Constitution, treaties, statutes, and Supreme Court decisions form the foundation of federal Indian law and shape the parameters of the federal/tribal relationship. It is critical to recognize that a treaty is a legal agreement between sovereign nations. As such, the treaties that the United States executed with Indian tribes acknowledged and recognized those tribes' inherent sovereignty as distinct, independent nations. Accordingly, these treaties established the pattern for legal and political interaction between the United States and Indian tribes, and serve to document the history of what is known as the **government-to-government** relationship between the federal government and Indian tribes.

European Arrival and Colonial Expansion (1492-1788)

The earliest treaties with Indian tribes were signed by the first Europeans entering North America in the 1600s. The United States signed its first treaty with the Delaware in 1778. By the time Congress ended treaty making in 1871, the United States had ratified hundreds of treaties with Indian tribes. Treaties were the primary instrument through which Indian tribes ceded, or relinquished, certain lands and rights to the United States in exchange for various federal commitments that included provision for the future of their people. In these treaties, tribes also reserved for themselves certain portions of land called **reservations**. For example, the 1791 Treaty of Holston promised perpetual peace and friendship between all the citizens of the United States of America, and all the individuals composing the whole Cherokee Nation of Indians. The Cherokee Nation first acknowledged that it was under the protection of the United States, and no other sovereign, and then ceded certain described lands to the United States.

In some cases, tribes also reserved the right to hunt, fish and gather resources, and access sacred sites on their former lands. In what would become the State of Washington, the federal government negotiated eight treaties with tribes beginning in the 1850s. These treaties not only established reservations for the exclusive use of these tribes, but also reserved their right to continue traditional activities on lands beyond these reserved areas. These treaties all contain substantially similar language reserving the right to hunt, fish and conduct other traditional activities on lands off the reservations.

Because time does not diminish their legal effect, treaties executed before 1871 remain law, unless they were modified or abrogated by the passage of subsequent federal statute. It is important to remember, however, that

[t]he legal force of Indian treaties did not insure their actual enforcement. Some important treaties were negotiated but never ratified by the Senate, or ratified only after a long delay. Treaties were sometimes consummated by methods amounting to bribery, or signed by representatives of a small part of the signatory tribes. The Federal Government failed to fulfill the terms of many treaties, and was sometimes unable or unwilling to prevent States, or white people, from violating treaty rights of Indians (Felix Cohen, *Handbook of Federal Indian Law*, 50 (1982 ed.)).

All of the treaties executed between Indian tribes and the United States can be found at the following website - <http://digital.library.okstate.edu/kappler/Vol2/toc.htm>. Federal agencies, but particularly land managing agencies, need to be mindful of treaty obligations when conducting Section 106 review because of the potential for taking an action which may impact a treaty provision.

Removal and Relocation (1791-1849)

Three decisions made by the Supreme Court, known as the Marshall Trilogy, involving conflicts between the State of Georgia and the Cherokee Nation established the proposition that Indian tribes no longer possessed the ability to transfer their lands or enter treaties with any entity other than the United States, but were otherwise unchanged, distinct political entities with jurisdiction over their own territories within the United States. In *Cherokee Nation v. Georgia*, 30 U.S. 1(1831), Chief Justice Marshall held that the Constitution did not really consider Indian tribes to be foreign nations, but more as *domestic dependent* nations. Then, in *Worcester v. Georgia*, 31 U.S. 515 (1832), Marshall held that the relationship between the United States and the Cherokee Nation resembled that of a guardian to a ward, concluding that the Cherokee Nation is a *distinct community, occupying its own territory, with boundaries accurately described in which the laws of Georgia can have no force*. This latter ruling established the internal sovereignty of Indian tribes within the territories set aside for them and set the basis for understanding the powers of tribes. Together these rulings established the foundation for the federal government's **trust responsibility** to Indian tribes.

The passage of the Indian Removal Act (IRA) in 1830 enabled President Andrew Jackson to relocate the Cherokee, Choctaw, Muscogee-Creek, Chickasaw and Seminole to federal territory west of the Mississippi River, especially into the area known as "Indian Territory" (now Oklahoma; explains why today there are over 30 tribes currently residing in Oklahoma), in exchange for their ancestral homelands. Other tribes affected by the removal policy include the Lenape (Delaware), Wyandot, Shawnee and Potawatomi.

Like many of his contemporaries, President Jackson viewed the United States as a federation of sovereign states. Not surprisingly, therefore, he opposed the federal government's execution of treaties with Indian tribes as if the latter were foreign nations. To Jackson, the creation of Indian lands by treaty was a violation of state sovereignty under Article IV, Section 3 of the Constitution. On the basis of this position, Jackson decided to proceed with the relocation of southeastern Indian tribes making former Indian lands available for settlement by non-Indians despite Supreme Court decisions.

In theory, at least, the removals, known collectively as the "Trail of Tears," were to be voluntary but in practice that was not always the case. Through resistance and escape, some members of these tribes, especially the Cherokee and Seminole, were able to elude removal. While one group of Seminoles relocated west in 1834, another resisted, attacking the U.S. Army. The Creek who resisted in 1836 had to be forcibly removed by the Army to Indian Territory. In 1838, the Cherokee started out on the Trail of Tears, a long journey on foot during which thousands died. Those who eluded detection and remained in their eastern homeland, today are recognized as the Eastern Band of Cherokee Indians.

Congress formally established the Bureau of Indian Affairs (BIA) in 1834 ostensibly to assist Indian tribes. Fifteen years later, BIA was relocated from the Department of War to the Department of the Interior (DOI).

Pacification and Reservation (1849-1887)

By the 1850s, removal of eastern tribes was giving way to the reservation system which confined tribes to smaller "reserved" areas of their aboriginal territories. In 1871 a rider to an appropriations bill finally ended treaty making with Indian tribes. The end came in part because the House, which had primary authority over appropriations, had no say in their negotiations, but was responsible for dispensing funds to implement treaties. Treaties were replaced by agreements negotiated by the Executive Branch and enacted into law by Congress. While this shift was mostly symbolic, it did usher in a period whose objective was assimilation of tribes into the mainstream European derived culture.

Allotment and Assimilation (1887-1934)

In this period, federal law focused on taking lands from Indian tribes to be used by the United States for settlement, expanding federal laws into internal tribal affairs, requiring boarding school education as a means to assimilate Indian children, and, above all, allotting reserved tribal lands to individual Indian ownership.

During this period, for example, the Great Sioux Reservation, which was established for the Lakota by the Fort Laramie Treaty of 1868, included all of modern western South Dakota and Boyd County, Nebraska. This reservation remained largely intact until 1889 when Congress passed an act, just months before North and South Dakota were to be admitted to the Union, partitioning it into five smaller reservations. With this partitioning, approximately 9 million acres, about half of the former reservation, was available for public purchase.

The passage of the Dawes Act in 1887 broke up communal reservations by assigning individual parcels, or allotments, of standard size to individual tribal members. The Dawes Act and other federal actions were designed to dissolve tribal collective control of reservations and to assimilate tribal members into mainstream American society by teaching them the importance of private property and farming. The allotments, which were of small size making them economically unsound as farms, were to be held in trust by the federal government for 25 years before converting to fee simple status. With this conversion, a tribal owner was allowed to sell an allotment without federal approval. However, of the 35 million acres allotted, it has been estimated that 27 million acres were lost or sold, generally through tax sales or swindles.

As a result of the Dawes Act, about 138 million acres of reservation land was reduced to only 48 million acres by 1934. After tribal members received their allotments, the federal government declared about 55 million acres of the remaining reservation lands as surplus, i.e. no longer needed by Indians. The United States paid for about 40 million acres of this surplus, while the remaining land was opened to homesteading by Congress. Implementation of the Dawes Act created the many checkerboard reservations evident today.

The boarding school movement began after the Civil War when idealistic reformers convinced Congress that, with proper education and treatment, Indians could fully assimilate into mainstream American culture. One of the first Indian boarding schools was the Carlisle Indian School established in 1879 in Pennsylvania. Indian children sent to these boarding schools, sometimes located far away from home, were immersed in EuroAmerican culture. The strict prohibition on the use of tribal languages, dress and practices, coupled with the geographic separation from their families severed their connection with their Native American identity and culture. Today many tribes are still trying to recoup the cultural losses in language and traditional knowledge experienced during this period.

Reorganization (1934)

In 1928, the Meriam Report demonstrated how significantly the federal government had failed in meeting its goals to protect Indian tribes, and their land and resources. This and other studies spurred a short period during which the federal government shifted away from assimilation (cultural dissolution) of tribes to a policy encouraging the development of tribal governments fashioned on the United States model. The passage of the Indian Reorganization Act (IRA) in 1934, the centerpiece of this era, halted further allotments, stopped conversion of any remaining allotments to fee simple, continued indefinitely the trust status of existing allotments, and reaffirmed that tribal governments possessed inherent powers. IRA also established a mechanism for the formalization of tribal governments through written constitutions and charters.

Termination (1948-1972)

A 1943 Senate survey of Indian reservations found living conditions deplorable with residents living in extreme poverty. The federal government, most notably the BIA due to its extreme mismanagement, was found responsible for these conditions. In response, Congress decided to return to an assimilation policy to be accomplished by terminating federal recognition of tribal sovereignty and federal trusteeship over reservations, and allowing the application of state law to indigenous persons. In 1953, Congress adopted House Concurrent Resolution No. 108, which established termination as the federal government's ongoing policy

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Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States and to grant them all of the rights and prerogatives pertaining to American citizenship.

Once terminated, tribes no longer were able to govern themselves or eligible for federal support of essential services. This resolution also declared that five specifically named tribes, including the Menominee Tribe of Wisconsin, and all of the tribes in the states of California, Florida, New York and Texas were "freed from Federal supervision and control."

In the period from 1953 to 1964, the federal government terminated its recognition of 109 Indian tribes and removed approximately 2.5 million acres of trust land from protected status. Many of the terminated tribes, such as the Menominee and Confederated Tribes of the Siletz Indians, eventually successfully petitioned for the restoration of their federal recognition.

Termination did not improve, but only worsened, living conditions for Indian tribes. When it was terminated, the Menominee tribe held assets valued at over \$10 million. Within ten years, those assets had dwindled to only \$300,000. Likewise the impact of termination on the Confederated Tribes of Siletz Indians was debilitating. Tribal members lost *"their allotments through failure to pay taxes, and with no other way to come up with basic living expenses, by selling their homes and land."* (Wilkinson, Charles. *The People Are Dancing Again - The History of the Siletz Tribe of Western Oregon*, p. 305. University of Washington Press, 2012). Family after family confronted with high unemployment (over 40%) and disruption of services moved from the reservation. While not the sole cause, termination was an additional factor in what had become deplorable economic and social conditions for the tribe by the 1970s.

Self Determination (1972 - present)

With the rise of pan-Indian activism by the late 1960s, federal government policy began to shift in support of the concept of Indian self-determination. Accompanying this policy shift, mounting scholarly data demonstrating the negative impact of Indian boarding schools led to the passage of the Indian Self-Determination and Educational Assistance Act in 1975. As a consequence, many large boarding schools closed beginning in the 1980s. In 1970, President Richard Nixon asked Congress to repudiate termination as a failed policy, reaffirm the trust responsibility of the federal government to Indian tribes, and consider legislation which would enable an increase in tribal autonomy. President Ronald Reagan in 1983 followed this lead by reaffirming the *government-to-government* relationship between the federal government and Indian tribes, supporting the primary role of tribal governments in reservation affairs, and calling for special efforts to develop reservation economies. As the various Presidential Memoranda (PM) and Executive Orders (EOs) presented below demonstrate, succeeding Administrations have all reaffirmed this message.

Indian tribes and their land

Many tribes have reserved by treaty, statute, EO, or administrative procedure specific geographic areas for their designated use, even as they relinquished other lands. Reservations have been established. For the purposes of Section 106 review, pursuant to 36 CFR § 800.16(x), **tribal lands** are defined as *all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.*

Within the exterior boundary of an Indian reservation

Some of the land within the exterior boundary of an Indian reservation is held by the United States **in trust** for the benefit of an Indian tribe or individual tribal member. Between 1887 and 1934, the federal government took nearly two-thirds of reservation land from tribes without compensation. The trust process was subsequently created by the United States to help tribes regain their lands. Under the IRA, the Secretary of the Interior (SOI) may agree to place lands acquired by an Indian tribe in trust for the benefit of that tribe without the consent of the state. For example, the Oneida Nation in New York has a robust program to petition the SOI to place fee simple land purchased by the tribe into trust.

Trust land cannot be conveyed, sold, assigned or transferred without federal approval. The tribe and its members have the right of use without ownership of trust land. The use of trust land, which is subject to certain federal restrictions, but usually not state law, is governed by the tribe. The BIA is responsible for the administration and management of 55.7 million acres of land held in trust by the United States for Indian tribes. The term **fee land** refers to a parcel within an Indian reservation's exterior boundary whose title is owned in fee simple, meaning it can be sold without the approval of the federal government. Many of the fee lands owned by nontribal members were acquired as a result of Dawes Act allotment policies. Note that these lands are defined by the status of their title not the race or ethnicity of the owner. Any fee land within the exterior boundary of an Indian reservation, by definition, is considered tribal land for the purposes of Section 106 review. Finally, the term **allotted land** refers to land owned by individual Indians that is either held in trust by the federal government, or is subject to a statutory restriction on sale or other forms of alienation. Any allotted land within the exterior boundary of a reservation, by definition, is considered tribal lands for the purpose of Section 106 review.

The key is that any land lying within the exterior boundary of a reservation, regardless of whether it is trust or fee land is considered by definition tribal land for the purposes of Section 106 review.

Dependent Indian communities

In a 1913 decision, *United States v. Sandoval*, 231 U.S. 28, the Supreme Court held that the New Mexico Pueblos, which hold their land in fee simple, are ***dependent Indian communities***. A later Supreme Court decision, *United States v. Candelaria*, 271 U.S. 432 (1926), found that the Pueblo tribes could not sell their land without the consent of the federal government. Then in 1998, the Supreme Court decided that the term *dependent Indian communities* refers to lands that have been set aside by the federal government for the use of Indians, and are under federal superintendence. Therefore, even though, the New Mexico Pueblos hold their lands in fee simple as a result of the historic Spanish land grants, their lands are considered tribal lands pursuant to 36 CFR § 800.16(x) because they represent a dependent Indian community.

Even though trust or allotted land might be located outside of a reservation boundary, its special status and restrictions remain unchanged. Because it is subject to federal superintendence, and statutory restriction on sale or other forms of alienation, any trust or allotted land lying outside of the exterior bounds of an Indian reservation is to be considered as a dependent Indian community, thereby meeting the definition of tribal lands for the purposes of Section 106 review. Fee land outside of reservation boundary is not considered tribal lands because of its location and the lack of federal superintendence and statutory restriction.

Another category of lands, ***restricted lands***, refers to those lands held in fee simple by tribal members that are encumbered by certain title restrictions. As a result, these lands have some characteristics of both trust and fee lands. Restricted lands within the exterior boundary of an Indian reservation are considered tribal lands by the Agency. The Agency will treat restricted land outside of the exterior bounds of a reservation as tribal lands for the purposes of Section 106 review because they are subject to legal restrictions against alienation and encumbrance.

Other Lands

Finally, the term ***ceded land*** refers to land located within a reservation's former boundaries (meaning the original size of the reservation was subsequently reduced) or within a tribe's aboriginal territory (prior to the establishment of any reservation) that has been ceded or relinquished by the tribe, usually by treaty. For example, the Yakama Nation resides on a 1.2 million acre reservation in the southern part of Washington. However, by treaty dated 1855 the Yakama retained rights to hunt and fish in 12 million acres, covering nine counties, considered "ancestral land."

According to the Yakama, any enrolled tribal member has the right to hunt, fish, and gather other food, medicine or ceremonial supplies in open and unclaimed lands within the ceded area.

Ceded land does not meet the definition of tribal land, but for the purposes of Section 106 review, the presence of ceded lands demonstrates that access to lands and resources important to a tribe is not limited by the reservation boundary. Therefore, it would be reasonable to anticipate that the interest of the Yakama Nation, for example, in participating in Section 106 review extends to the full 12 million acres of ceded lands.

Indian Country

Although the term, *Indian country*, is not used in Section 106 review it is a significant legal term, established by 18 U.S.C. § 1151 that refers to the lands set aside for federally recognized Indian tribes. It includes all land, including fee land, within the limits of a reservation, dependent Indian communities, Indian allotments and trust land. Generally, designation of land as "Indian country" means that a tribe and the federal government possess jurisdiction within its bounds and, with some exceptions, the states are excluded.

Any question about the status of land and the impact of that status on Section 106 review will be submitted to the RUS, RBS, RHS Federal Preservation Officer (FPO) for resolution.

Special Circumstances

Alaska: There are over 220 Indian tribes in Alaska, but only one reservation. With passage of the Alaska Native Claims Settlement Act of 1971 (ANCSA), two of the three reservations existing at that time in the state were eliminated. In addition under ANCSA, Alaska Natives gained title to 44 million acres land they had used historically. The federal government then paid \$962.5 million in compensation to Alaska Natives, thereby, extinguishing aboriginal title to all other lands within the state. Under ANCSA, this compensation was used to fund Alaska Native regional and village corporations, which invest the money for the profit of Alaska Native shareholders. Unlike in the lower 48 states, Alaska Natives' lands were not taken into trust by the federal government, but the argument has been made that these lands should be considered dependent Indian communities.

Oklahoma: As noted above, in the 1830s, several tribes, including the Chickasaw and Choctaw, whose territory was located east of the Mississippi River were relocated to Oklahoma Territory and Indian Territory. These tribes occupied lands with legally established boundaries. However, in preparation for Oklahoma statehood in 1907, the federal government used the allotment process to dismantle these relocated tribes' collective tribal landholdings. In addition, Congress all tribal governments within what would become the state of Oklahoma were dissolved. An effort was made to rectify the situation in 1936, but state sovereignty prevented full reinstatement of tribal authority. In the 1990s, several statutes, including the Omnibus Budget Reconciliation Act of 1993 as amended and the Taxpayer relief Act of 1997, establish that the term "Indian reservation" includes the "former Indian reservations in Oklahoma." This latter term is defined as *only lands within the jurisdictional area of an Oklahoma Indian tribe (as determined by the Secretary of the Interior) that are recognized by such Secretary as an area eligible for trust land status under 25 CFR Part 151.*

National Historic Preservation Act and other laws relating to Indian tribes

Since 1990, various legal requirements, including NHPA and 36 CFR Part 800, and Presidential policies affirmed the federal government's recognition of an Indian tribe's right to self-determination and inherent sovereignty on its lands. The following discussion summarizes the major objectives of these mandates and policies, and describes how they impact Section 106 review.

National Historic Preservation Act (NHPA)

In 1992, the NHPA was amended to establish a role for Indian tribes in federal historic preservation. Specifically, the 1992 amendments expanded the number of Presidentially-appointed members of the Advisory Council on Historic Preservation (ACHP) to include a member of an Indian tribe or Native Hawaiian organization (NHO). In addition, NHPA was amended to provide a greater role for Indian tribes and NHOs in the federal historic preservation program. For example, the amendments established that Indian tribes may assume State Historic Preservation Office (SHPO) functions on their tribal lands. Under this provision, the role of Tribal Historic Preservation office (THPO) was created. As of December 31, 2015, out of 567 tribes, 158 of them had THPO programs that had been recognized by the National Park Service (NPS) in accordance with 54 U.S.C. § 302702.

While the statutory requirements of Section 106 were not changed, some amendments to NHPA did significantly affect Section 106 review (36 CFR Part 8000 procedures). For example, the amendments establish that properties of traditional religious and cultural importance to an Indian tribe may be determined to be eligible for inclusion in the National Register of Historic Places, and require federal agencies, in carrying out Section 106 review, to consult with any Indian tribe that attaches religious and cultural significance to such properties. After several years of delay the Section 106 regulations were finally modified in 2000 to accommodate these amendments.

Native American Graves Protection and Repatriation Act (NAGPRA)

NAGPRA, 25 U.S.C. 3001 et seq., which became law in 1990, is implemented by the regulations at 43 CFR Part 10. NAGPRA establishes (1) establishes a process that requires federal agencies and museums, which receive federal funding, to repatriate Native American cultural items, i.e., human remains, funerary objects, sacred objects and objects of cultural patrimony to lineal descendants and cultural affiliated Indian tribes and NHOs; (2) procedures for the planned excavation and inadvertent discovery of Native American cultural items on federal and tribal lands; and (3) penalties for the illegal trafficking in Native American cultural items.

Under NAGPRA, *tribal lands* means all lands which are within the exterior boundary of any Indian reservation including, but not limited to allotments held in trust or subject to a restriction on alienation by the United States; or comprise dependent Indian communities, as recognized pursuant to 18 U.S.C. 1151; or are administered for the benefit of Native Hawaiians pursuant to the Hawaiian Homes Commission Act of 1920 and section 4 of the Hawaiian Statehood Admission Act (Public Law 86-3 73 Stat. 6). Note that, unlike the Section 106 regulations, the definition of tribal lands under NAGPRA includes certain lands in the State of Hawaii.

NAGPRA applies only when a proposal being considered for funding by the Agency will be constructed on federal or tribal lands, and only to that part of the proposal to be constructed on such lands. When the proposal will be constructed on federal lands, the land managing agency is responsible for compliance with NAGPRA. On tribal lands, BIA is responsible for compliance with NAGPRA. Because it is more prescriptive, NAGPRA, not Section 106, will dictate how Native American cultural items will be treated. Note that NAGPRA compliance does not provide for the participation of the SHPO.

If no access to tribal or federal lands is needed for the Agency assisted proposal, then NAGPRA is not applicable. Many tribes believe that NAGPRA has universal applicability, but that interpretation is not correct. Any dispute about the applicability of NAGPRA will be resolved by the FPO for RBS, RHS or RUS as appropriate.

Executive Order 13007

EO 13007, "Indian Sacred Sites," (1996) is focused on sacred sites, not sacred objects. Under this EO, federal agencies are directed, to the extent practicable, permitted by law and consistent with agency functions to accommodate tribal access to and ceremonial use of sacred sites by Indian religious practitioners, and to avoid adversely affecting the physical integrity of such sites. Implementation of this EO is restricted to federal lands. As with NAGPRA, a proposal considered by the Agency would be subject to this EO only if it requires access to federal land.

On December 6, 2012, the Departments of Agriculture, Energy, Interior and Defense signed a Memorandum of Understanding (MOU) with the ACHP to improve the protection of tribal sacred sites pursuant to EO 13007. Among other things, the MOU requires the participants to determine interagency measures to protect Indian sacred sites in accordance with EO 13007; establishes a framework for consultation with tribes; creates a training program for federal employees; and provides for the development of guidance on the management and treatment of Indian sacred sites. Implementation of this MOU will impact any proposal assisted by the Agency that will require access to federal lands.

Executive Order 13175

In the spirit of Self -Determination, EO 12875, "*Enhancing the Intergovernmental Partnership*" (1993) asked federal agencies to establish regular and meaningful consultation and collaboration with State, local and tribal governments on federal matters that significantly or uniquely affect these communities. The EO asked federal agencies to implement actions affecting tribal rights or trust resources in a knowledgeable and sensitive manner, respectful of tribal sovereignty. In order to do so, federal agencies must, among other things, operate within a government-to-government relationship and consult with Indian tribes before taking actions. One year later, the PM titled, "*Government-to-Government Relations with Native American Tribal Governments*," asserted the unique legal relationship of the federal government with tribal governments, as set forth in the Constitution, treaties, statutes and court decisions.

Over the next 20 years, these policies have been restated and reaffirmed by successive Administrations with the objective to build more effective working relationships with Indian tribes that reflect respect for the right of self-determination by sovereign tribal governments. Signed in 1998, EO 13084, "*Consultation and Coordination with Tribal Governments*," again affirmed the unique legal relationship existing between the federal government and Indian tribes, but also acknowledged that tribes have the right to self-government as domestic dependent nations who exercise inherent sovereign powers over their members and territory.

EO 13084 directed that a federal agency's policy formulation significantly or uniquely affecting tribal governments is to be guided by principles of respect for tribal self-government and sovereignty, treaty and other rights, and for the responsibilities arising from the unique relationship between federal and tribal governments. In addition, this EO directed agencies to put in place an effective process so tribal officials and other representatives can provide meaningful and timely input in the development of policies. This specific direction to federal agencies was carried over into EO 13175, *Consultation and Coordination with Indian Tribal Governments* (2000), which superseded EO 13084.

Like its predecessor, EO 13175 recognizes the unique legal relationship between the federal government and Indian tribes, the federal government's trust responsibility toward Indian tribes as dependent domestic nations, and Indian tribes' right to self-government and to exercise sovereignty over their communities and lands as fundamental principles in formulating and implementing federal policy. The primary objectives of the EO are to establish regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications (Pursuant to EO 13175, policies with tribal implications "refers to regulations, legislative comments or proposed legislation and other policy statement or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes.") to strengthen the government-to-government relationship with Indian tribes; and to reduce the imposition of unfunded mandates upon Indian tribes.

This EO differs from previous policies in that it directs federal agencies to develop procedures to implement its objectives. In March 2008, USDA issued Departmental Regulation (DR) 1340-007 (This DR superseded and replaced USDA DR 1340-006 of October 16, 1992.),

"Policies on American Indians and Alaska Natives," whose stated purpose was to set forth policy on government-to-government tribal relations, and to provide guidance on implementing EO 13175. This DR lacked specificity about the fundamental principles governing the relationship between federal and tribal governments, and the nature of consultation between the federal government and Indian tribes. Accordingly, in September 2008, USDA issued DR 1350-001, "Tribal Consultation," to provide greater clarity on these issues. The next year President Obama reaffirmed the principles of EO 13175 along with the federal government's commitment to regular and meaningful consultation and collaboration with tribes. In so doing, he directed federal agencies to develop an action plan showing how the policies and directives of EO 13175 will be implemented.

In response to this directive, USDA issued DR 1350-002, "Tribal Consultation, Coordination, and Collaboration," on January 18, 2013 to complement and improve the clarity of DRs 1340-007 and 1350-001. This DR establishes detailed procedures for conducting consultation on policy actions which may have tribal implications and defines the most formal type of government-to-government consultation which is reserved for the highest level agency and departmental actions. In addition to issuing this DR, in response to EO 13175, USDA established the Office of Tribal Relations (OTR) within the Office of the Secretary as the single point of contact for tribal issues. OTR is responsible for government-to-government relations at the highest and most formal level between USDA and tribal nations, and works to ensure that relevant programs and policies are efficient, and easy to understand, access, and are developed in consultation with the AI/AN they will impact.

DR 1350-002 establishes guidelines for the highest and most formal level of interaction regarding rulemaking and policy actions. It does not dictate the level of effort needed when working with Indian tribes in Section 106 review of project level activities. However, when conducting Section 106 review the Agency should be guided by the broad fundamental principles - the government-to-government relationship, recognition of the right to self-determination, respect for tribal sovereignty, the commitment to meaningful (good faith) consultation - shared by these DRs.

This discussion is meant to provide Agency staff with a summary outline of the past interaction between the federal government and Indian tribes so that they might better understand current relationships, perspectives and challenges. Actions taken today by the Agency cannot completely undo or alter the inequities of prior federal and tribal interactions, but patience, respect, objectivity and honesty can and do make a difference when working with Indian tribes.

ACHP Section 106 Archaeology Guidance

Exhibit E in PDF format only.

ACHP Policy on Affordable Housing and Historic Preservation

<https://www.gpo.gov/fdsys/pkg/FR-2007-02-15/pdf/07-703.pdf>

Model Memorandum of Agreement and Checklist

MEMORANDUM OF AGREEMENT

BETWEEN [insert Agency]

AND THE

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

REGARDING THE [insert project's name and location]

WHEREAS, [insert name of the Agency(ies) and/or other parties actually carrying out the project that is the subject of the MOA] plans to [explain what the project entails and its location] (Project); and

WHEREAS, the [Agency] ([insert Agency abbreviation]) plans to ["carry out" or "fund" or "issue an approval/license/permit for" (or other appropriate verb)] the Project pursuant to the [insert name and legal cite of the substantive statute authorizing the Agency's (ies') involvement in the undertaking], thereby making the Project an undertaking subject to review under Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, and its implementing regulations, 36 C.F.R. part 800; and

WHEREAS, [Agency abbreviation] has defined the undertaking's area of potential effect (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 and/or Tribe] ["State" or "Tribal"] Historic Preservation Officer ([insert "SHPO" or "THPO"]) pursuant to 36 C.F.R. part 800; and**

**** WHEREAS [Agency abbreviation] has consulted with the [insert name of Tribe(s) or Native Hawaiian Organization(s)], for which [insert name of historic property(ies)] ["has" or "have"] religious and cultural significance, and has invited the [Tribe(s) or Native Hawaiian Organization(s)] to sign this Memorandum of Agreement (MOA) as an ["invited signatory" or "concurring party"]; 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 ["invited signatory(ies)" or "concurring party(ies)"]; and

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

NOW, THEREFORE, [Agency abbreviation] and the ["SHPO" and/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 be null and void if its stipulations are not carried out within five (5) years [or specify other appropriate time period] from the date of its execution. At such time, and prior to work continuing on the undertaking, [Agency abbreviation] shall either (a) execute a MOA pursuant to 36 C.F.R. § 800.6, or (b) request, take into account, and respond to the comments of the ACHP under 36 C.F.R. § 800.7. 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. [Agency abbreviation] shall notify the signatories as to the course of action it will pursue.

V. POST-REVIEW DISCOVERIES

If potential historic properties are discovered or unanticipated effects on historic properties found, [Agency abbreviation] shall implement the discovery plan included as Attachment [insert number of Attachment] of this MOA.

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 desired] a summary report detailing work carried out 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 accordingly. Prior to reaching such a final decision, [Agency abbreviation] shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories and concurring parties to the MOA, and provide them and the ACHP with a copy of such written response.

C. [Agency abbreviation]'s responsibility to carry out all other actions subject to the terms of this MOA that are not the subject of the dispute remain unchanged.

VIII. AMENDMENTS

This MOA may be amended when such an amendment is agreed to in writing by all signatories. The amendment will be effective on the date it is signed by all of the signatories and filed with the ACHP.

IX. TERMINATION

If any signatory to this MOA determines that its terms will not or cannot be carried out, that party shall immediately consult with the other parties to attempt to develop an amendment per Stipulation VIII, above. If within thirty (30) days (or another time period agreed to by all signatories) an amendment cannot be reached, any signatory may terminate the MOA upon written notification to the other signatories. Once the MOA is terminated, and prior to work continuing on the undertaking, [Agency abbreviation] must either (a) execute an MOA 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. [Agency abbreviation] shall notify the signatories as to the course of action it will pursue.

EXECUTION of this MOA by the [Agency abbreviation] and ["S" or "T"]HPO and implementation of its terms evidence that [Agency abbreviation] has taken into account the effects of this undertaking on historic properties and afforded the ACHP an opportunity to comment.****

SIGNATORIES:

[insert federal agency name]

[insert federal agency official name and title] Date
[insert name of State or Tribe] ["State" or "Tribal"] Historic
Preservation Officer

[insert name and title] Date

INVITED SIGNATORIES:

[insert invited signatory name]

[insert name and title] Date

CONCURRING PARTIES:

[insert name of concurring party]

_____ Date

[insert name and title]

Notes:

* When the undertaking is on or affects tribal lands, the term "THPO" refers to the representative of the tribe designated under Section 101(d)(2) of the National Historic Preservation Act (NHPA) or, in the absence of a Section 101(d)(2) designee, to the official representative identified by the tribe. When an Indian tribe lacks a representative designated under Section 101(d)(2) of NHPA, the State Historic Preservation Officer is also a signatory to the agreement along with that tribe.

** Insert this whereas clause as appropriate.

*** This stipulation assumes that the term "signatory" has been defined in the MOA to include both signatories and invited signatories.

**** The Agency must submit a copy of the executed MOA, along with the documentation that is specified in 36 CFR § 800.11(f) to the ACHP prior to approving the undertaking in order to meet the requirements of Section 106 and 36 CFR § 800.6(b)(1)(iv).

The MOA and PA Drafting Checklist

The following checklist is a tool designed to help enhance the clarity and completeness of Section 106 agreements. It is not intended as guidance on how to carry out consultation when negotiating Section 106 agreements or as a checklist for the procedural steps that must be followed in order to comply with the regulation (36 CFR Part 800) implementing Section 106.

PROJECT NAME: _____

1. Is the responsible Federal agency clearly identified? If a Federal agency has been delegated the role of "lead agency," does the agreement state this fact and identify the agencies that delegated this task?
2. Is the undertaking and nature of the Federal involvement clearly described?
3. Have all known historic properties affected by the undertaking been clearly identified? When identification is phased, does the MOA/PA establish a process to identify and evaluate historic properties in the future?
4. Have all consulting parties been listed with their role as signatory, invited signatory or concurring party identified?
5. Have all shorthand references been identified and used consistently throughout the MOA/PA?
6. Does the MOA/PA cover the entire undertaking and all of its effects?
7. Does the MOA/PA include all the agreed-upon provisions?
8. Does the stipulation section open with a statement affirming that the Federal agency shall ensure that the terms of the MOA/PA are implemented?
9. Does the MOA/PA assign each duty to a signatory or concurring party?
10. Are the terms used in the MOA/PA consistent with statutory and regulatory definitions?
11. Does the MOA/PA establish a time frame for the completion of each mitigation measure?

12. The following administrative provisions are included as needed:

<i>Professional Qualifications</i>	<i>Reporting</i>	<i>Emergency Provisions</i>
<i>Discoveries/Unexpected Effects</i>	<i>Dispute Resolution</i>	<i>Amendment</i>
<i>Termination</i>	<i>Duration/Sunset</i>	

Understanding the Checklist

Is the responsible Federal agency clearly identified? If a federal agency has been delegated the role of "lead agency," does the agreement state this fact and identify the agencies that delegated this task?

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

Is the undertaking and nature of the Federal involvement clearly described?

The name of the undertaking should be identified in the agreement's title and preamble. In addition, the preamble should clearly establish whether the Federal involvement constitutes assistance, issuance of a license or permits, or other approval. In describing the undertaking, it is useful to list the statutory authority(ies) that provide the legal basis for the Federal agency's involvement. The name and description of the undertaking in the Section 106 agreement should be consistent with its designation in other contexts, particularly with that in the documentation prepared to meet the requirements under the National Environmental Policy Act. Project numbers or titles and dates of plans can be included to further identify the undertaking or program.

Have all known historic properties affected by the undertaking been clearly identified? When identification is phased, does the MOA/PA establish a process to identify and evaluate historic properties in the future?

Listing all known historic properties in the preamble, stipulations, or an appendix assists all parties, especially those not involved in some or all of the consultation, in understanding the scope of Section 106 review, and prevents future misunderstandings or disagreements. It is advisable to include a specific location for an affected historic property either by using an address or attached map. Although, in certain circumstances, publication of the precise location of a historic property, especially when it is an archeological site, should be avoided to safeguard against vandalism or inappropriate access.

The ACHP regulations specifically recognize situations where phased identification is appropriate because circumstances can sometimes impede the completion of identification and evaluation efforts prior to the conclusion of Section 106 review. Consulting parties are encouraged to analyze the needs of the project or program and the complexities that may be encountered in identifying the properties in the area of potential effect in developing a tailored and streamlined process for identification and evaluation that satisfies the underlying intent of the ACHP's regulations.

Have all consulting parties been listed with their role as signatory, invited signatory or concurring party identified?

The involvement and role of all consulting parties must be clearly documented, since their functions and authorities with regard to the execution, amendment and termination of agreements differ as delineated in the Section 106 regulations. See 36 C.F.R. §§ 800.6(c) and 800.14(b)(2)(iii).

Have all shorthand references been identified and used consistently throughout the MOA/PA?

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

Does the MOA/PA cover the entire undertaking and all of its effects?

The ACHP regulations provide that an MOA/PA that has been executed and implemented in accordance with 36 CFR Part 800 evidences the Federal agency official's compliance with section 106 and governs the undertaking, and all of its parts and all of its effects. If an undertaking is modified after the MOA/PA is executed and there is any question about changes to its scope and effects on historic properties, the parties should consult to determine if an amendment is appropriate.

Does the MOA/PA include all the agreed-upon provisions?

The responsible Federal agency has no obligation under Section 106 to perform actions or request another party to perform actions that are not included in the MOA/PA. It is, therefore, essential that an executed MOA/PA include all the mitigation measures that have been agreed upon under the auspices of Section 106.

Does the stipulation section open with a statement affirming that the Federal agency shall ensure that the terms of the MOA/PA are implemented?

Section 106 places statutory obligations on Federal agencies. Ultimately, the primary legal purpose of Section 106 agreements is to allow Federal agencies to evidence their compliance with Section 106. Accordingly, the stipulation section of MOAs and PAs, that sets forth the specific measures to be implemented, must be introduced by a clear statement that the Federal agency is the entity with the obligation to ensure that such measures will be carried out.

Does the MOA/PA assign each duty to a signatory or concurring party?

Parties have no obligation to fulfill requirements set out in an MOA/PA unless they have signed the agreement. Therefore, the failure of the Federal agency to obtain the signature of parties that have been assigned duties under the agreement could compromise the successful implementation of the agreement. Accordingly, the Federal agency should ensure that all parties with obligations assigned under the terms of a MOA/PA have executed that agreement.

Sometimes agreements are quite explicit about the measures that will be carried out, but fail to clearly assign the duty to implement such measures to a specific party or parties. For example, an agreement may state: "Prior to its demolition, Building X will be documented in accordance with HABS/HAER standards." While this statement specifies the action, it fails to identify the responsible party. Changing the statement in the following manner identifies both the responsible party and the specific action: "Prior to its demolition, the Department of the Navy will document Building X in accordance with HABS/HAER standards." Forgetting to specify the party obligated to implement each measure could lead to confusion and disagreement over responsibility, and may delay the agreement's completion.

Are the terms used in the MOA/PA consistent with statutory and regulatory definitions?

Because MOAs/PAs are executed to satisfy the requirements of NHPA and Section 106, they should rely on the terms and definitions provided by this statute and its implementing regulations. See 16 U.S.C. §470w and 36 C.F.R § 800.16 For example, use of the term "cultural resources" should be avoided because the scope of Section 106 and the ACHP's regulations are centers on "historic properties," as defined in the statute and regulation. It is helpful, particularly for those who did not develop but may have to implement the terms of an agreement, to explicitly state in the MOA/PA that it incorporates the definitions included in NHPA and 36 CFR Part 800.

Does the MOA/PA establish a time frame for the completion of each mitigation measure?

A time frame for the completion of each measure contained in the agreement must be included so the parties can monitor its progress. Time frames should also be established for parties that are reviewing and commenting on any document produced to fulfill the terms of the MOA/PA. Ambiguous time frames can create confusion and lead to project delays.

Administrative provisions are included as needed, such as:

<i>Professional Qualifications Provisions</i>	<i>Reporting</i>	<i>Emergency</i>
<i>Discoveries/Unexpected Effects</i>	<i>Dispute Resolution</i>	<i>Amendment</i>
<i>Termination</i>	<i>Duration/Sunset</i>	

According to the ACHP's regulations, agreements must include provisions for duration (sunset), amendments and termination, and should include provisions for reporting on implementation and discoveries. In addition to these important provisions, experience has shown that stipulations covering dispute resolution and emergencies as well as those that establish professional qualifications also minimize misunderstanding and facilitate the smooth implementation of an agreement's terms. The ACHP has developed language for each of these administrative provisions that can serve as a guide to their development.

Some definitions

Advisory Council on Historic Preservation (ACHP), established under Title II of the National Historic Preservation Act (NHPA), is an independent Federal agency that (1) advises the President and Congress on historic preservation matters; (2) oversees the process established by the regulations (36 CFR Part 800) implementing Section 106 of NHPA; (3) reviews Federal agencies' historic preservation programs and policies; (4) provides education and training; and (5) encourages public interest and participation in historic preservation.

Concurring Parties are those consulting parties that have been invited by the Federal agency to concur in a Section 106 agreement. A party concurs in a Section 106 agreement by affixing his or her signature to the agreement. The refusal of any concurring party to sign an agreement does not prevent that Section 106 agreement from going into effect. (See Invited Signatory Party)

Consulting Parties are those parties with whom the Federal agency consults when it takes into account the effects of its undertaking on historic properties. Pursuant to the ACHP's regulations, the Federal agency must invite the following parties to consult - (1) SHPO; (2) Indian tribes if the undertaking occurs on or affects tribal lands, or if the tribe may attach religious and cultural significance to historic properties; (3) Native Hawaiian organizations if they may attach religious and cultural significance to historic properties; (4) Local governments; (5) Applicants; (6) the ACHP when there may be an adverse effect and other special cases; and (6) the Department of the Interior, National Park Service when a National Historic Landmark (NHL) may be affected. The Federal agency may also invite other parties, such as local historical societies or adjacent property owners, to participate in consultation.

Historic Properties are any prehistoric or historic districts, sites, buildings, structures or objects included in or eligible for inclusion in the National Register of Historic Places. This term includes artifacts, records and remains that are related to and located within such properties. The term also includes properties of religious and cultural significance to an Indian tribe or Native Hawaiian Organization that meet the National Register criteria [36 CFR § 800.16(1)].

Indian Tribe refers to an Indian tribe, band or nation or other organized group or community, including a native village, regional corporation, or village corporation as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians [36 CFR § 800.16(m)].

Invited Signatory is a consulting party who has been invited by the Federal agency to be a signatory party to a Section 106 agreement. Pursuant to 36 CFR § 800.6(c)(2), invited signatories have the right to seek amendment or termination of a Section 106 agreement, but their signature is not required for the agreement to be considered fully executed.

Memorandum of Agreement (MOA) is a legally binding document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking on historic properties when agreement can be reached. It governs the undertaking and all of its parts, specifies agreed upon alternatives and/or mitigation, and identifies those parties responsible for the implementation of its terms. As such, it commits a Federal agency to carry out the undertaking in accordance with its terms. The execution of a MOA and its implementation evidences that a Federal agency has met its obligations under Section 106.

National Historic Preservation Act (NHPA) was passed by Congress in 1966 with the intent that "*the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.*" The many sections of NHPA, as amended over the years, establish Federal policy to foster productive harmony between modern society and historic properties, to provide preservation leadership, to administer historic properties in a spirit of stewardship and to assist preservation efforts of State and local government, Indian tribes, Native Hawaiian organizations and the private sector. Section 106 is one of the major components of the NHPA.

Native Hawaiian organization means any organization which serves and represents the interests of Native Hawaiians; has as a primary and stated purpose the provision of services to Native Hawaiians; and has demonstrated expertise in aspects of historic preservation that are significant to Native Hawaiians [36 CFR § 800.16(s)(1)].

Native Hawaiian means any individual who is descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii [36 CFR § 800.16(s)(2)]

Program Alternatives are tailored approaches to Section 106 review of an undertaking, a group of undertakings or a program that substitute for all or part of the ACHP's regulations. Program alternatives include programmatic agreements (PA), alternate procedures, exempt categories, standard treatments and program comments. The ACHP may decline to participate in a PA for a specific undertaking. However, all other program alternatives go into effect when they are agreed to by the ACHP [36 CFR § 800.14]

Programmatic Agreement (PA) is one of several program alternatives [36 CFR § 800.14] available for use by a Federal agency. There are two kinds of PAs - (1) those used to govern the implementation of a particular agency program (program PA), and (2) those developed to resolve adverse effects for complex projects or multiple undertakings, or when effects on historic properties cannot be fully determined, or when non-federal parties are delegated major decision making responsibilities, or where routine management activities are undertaken at Federal installations or facilities, or where other circumstances warrant a departure from the normal Section 106 process (project PA). Program PAs take effect when executed by the Federal agency, SHPO and/or Indian tribe(s), the National Conference of State Historic Preservation Officers (when nationwide in scope), and the ACHP. In developing project PAs, the Federal agency follows the same consultation procedures it would use developing a MOA, which means that the ACHP may elect not to participate in consultation. In that case, the PA takes effect when signed by the Federal agency and SHPO and/or Indian tribe(s).

Section 106 of the National Historic Preservation Act mandates that the head of any Federal agency "... shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.... [1] take into account the effect of the undertaking on any district, site, building, structure or object that is included in or eligible for inclusion in the National Register...[and]...[2] afford the Advisory Council on Historic Preservation...a reasonable opportunity to comment with regard to such undertaking." The ACHP's regulations (36 CFR Part 800) have been developed to implement this specific section of the NHPA.

Signatory party is identified by the ACHP's regulations as the Federal agency, the SHPO, Indian tribes on tribal lands and the ACHP, if participating. Signatory parties have the sole authority to execute, amend or terminate a Section 106 agreement. The Section 106 agreement does not take effect until it has been executed by all of the signatory parties [36 CFR § 800.6(c)(1)].

State Historic Preservation Officer (SHPO) means the official appointed or designated pursuant to Section 101(b)(1) of NHPA to administer the State historic preservation program or a representative designated to act for the State historic preservation officer. The SHPO advises and assists Federal agencies in carrying out their Section 106 responsibilities, and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are taken into consideration at all levels of planning and development.

Termination of consultation may occur when, after consulting to resolve adverse effects, pursuant to 36 CFR § 800.6(b), the Federal agency, the SHPO and/or an Indian tribe or the ACHP (if participating) may determine that further consultation will not be productive. The process for termination is laid out in 36 CFR § 800.7 of the ACHP's regulations. In the event of a termination of consultation, the ACHP (not its staff) provides its comment to the head of the Federal agency which must consider that comment before making a final decision on the undertaking. When the SHPO has terminated consultation, the ACHP may elect to execute a MOA with the Federal agency without the SHPO rather than providing its comments.

Tribal Historic Preservation Officer (THPO) means the tribal official appointed by the tribe's governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for the purposes of Section 106 compliance on tribal lands in accordance with Section 101(d)(2) of NHPA. For these tribes, the THPO must be consulted in lieu of the SHPO for undertakings occurring on or affecting tribal lands. However, there are certain instances when the SHPO may still participate in consultation on tribal lands [36 CFR § 800.3(c)].

Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

Undertaking means a project, activity or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

Written Notification must be provided to the ACHP, pursuant to 36 CFR § 800.6(a)(1), when a Federal agency determines that its undertaking will adversely affect historic properties.

Initiate Consultation with the SHPO Template

[#1]

[#2]

RE: Notification of Intent to Initiate Section 106 Review
[#3]

Dear [Insert SHPO Contact Name]:

[Insert Name of Applicant] [#4] financial assistance from the [Identify the RD Agency] under its [Identify the applicable Agency Program] for [Insert the project name or designation]. [#5] as shown on the enclosed map [Enclose a map showing the general location of the project or construction work plan activities]. [#6].

If [Identify the RD Agency] elects to fund the [Project OR construction work plan projects], it will become [an undertaking OR they will become undertakings] subject to review under Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108, and its implementing regulations, 36 CFR Part 800. Pursuant to 36 CFR § 800.2(c)(4), and 7 CFR § 1970.5(b)(2) of the regulations, "Environmental Policies and Procedures" (7 CFR Part 1970), [Identify the RD Agency] has issued a blanket delegation for its applicants to initiate and proceed through Section 106 review. In accordance with this blanket delegation, [Name of applicant] is initiating Section 106 review on behalf of [Identify the RD Agency]. In delegating this authority, [Identify the RD Agency] is advocating for the direct interaction between its borrowers and the State Historic Preservation Office (SHPO). [Identify the RD Agency] believes this interaction, prior to direct agency involvement, will support and encourage the consideration of impacts to historic properties earlier in project planning.

[Name of Borrower] proposes that the area of potential effects (APE) for the referenced project consists of [#7] as shown on the enclosed map [#8]. The geographic scope of the APE will not be final until a determination is made by RUS pursuant to 36 CFR § 800.4(a)(1).

RD Instruction 1970-H
Exhibit H
Attachment H-1
Page 2

At the direction of [Identify the RD Agency], [Insert the name of the borrower] has notified and is seeking information about possibly affected historic properties in the APE from the following Indian tribes - [Insert names of tribes notified about the project(s)].

Please review the [project OR construction work plan projects] and enclosed maps. After completing your review, please provide [Insert name of Borrower] with your recommendation(s) about whether or not study of the APE is needed to identify affected historic properties. If you recommend study, please explain the nature and scope of the proposed investigation specifically in reference to those factors identified in 36 CFR § 800.4(b)(1).

Submit your recommendations within thirty (30) days of your receipt of this request to [Insert Borrower or consultant contact name, phone number and email address]. If no timely response is received, [Insert the name of the Borrower] will notify RUS so the federal agency may determine how to proceed with Section 106 review in accordance with 36 CFR § 800.3(b)(4). Should you have any questions, please contact [Insert Borrower or consultant contact name].

Sincerely,
Enclosures
cc:
[#9]

Guidance for completing the template

#1 Insert date

Do not forget to date this correspondence because it is essential in determining when the 30 day review period has ended. If it is not too costly, please consider obtaining a delivery receipt for this notification.

#2

Insert SHPO Contact Name, Title and Address.

#3

Identify the Project, Applicant and Project Location by County and State

#4 Select "is seeking" or "plans to seek"

Select "is seeking" whenever the borrower has filed an application with RUS for assistance. It matters only that the application is with Agency, NOT whether or not the Agency has approved it for consideration.

Select "plans to seek" whenever the application for assistance has NOT yet been filed with the Agency. If this is the case, then you may elect in the heading to designate this notice as a "Pre-Application Notification."

#5 Insert a Complete Project Description

Insert a more detailed complete description of the project or construction work plan projects. All elements of the proposed construction must be included, especially those which will cause any digging, excavation or other ground disturbance. For Telecom and Electric projects, include the design specifications, the scope of the ground disturbance, a description of the ROW/easement ownership, establish whether or not new or existing ROW or easements will be used, establish whether or not the construction will occur in or out of municipal boundaries, estimate the number of miles to be buried versus aerial, and if aerial, the prediction about the need for new and/or replacement poles. Do not forget to include work and staging areas, laydown yards and access roads. If no ancillary facilities such as these are needed, then include that statement in the description. For Water Programs, establish whether or not construction will occur in existing trenches, in predisturbed areas, within the footprint of an existing facility, or in or out of municipal boundaries.

Also, please name the towns and counties where construction will occur. Describe any construction which will be more than 20 feet tall and therefore might intrude upon an important setting or obstruct an important vista.

#6 Describe the Project Purpose and Need

Explain in one or two sentences the purpose and need for the project or construction work plan projects. This explanation, which must be consistent with the language in the ER or EA when that level of NEPA documentation is needed, helps establish the public benefit of the project.

#7 Describe the area of potential effects (APE)

Describe the geographic area(s) which might be impacted by the project construction activities. The APE is not restricted to areas where construction will occur but also includes locations from which a constructive element greater than 20 feet tall might be seen. An applicant, tribe or SHPO can only make recommendations about the scope of the APE. RUS makes the final determination. Therefore, get it right the first time - When in doubt, seek guidance from EES.

#8 Enclose maps

Enclose one or several maps showing the area in which the construction activities will occur and the proposed location of the various constructive components. Use a USGS 7.5 series maps or something similar which shows the terrain in which the construction will occur. This can be augmented by other types of maps which show other project details. Staking sheets or maps with that level of detail are not necessary.

#9 Copy SEC or EES reviewer via email

Finding of Effect Template to SHPO/THPO

[#1]

[#2]

RE: [#3]

Dear [Insert SHPO Contact Name or Name of THPO or Official Tribal Designee]:

[Insert Name of Applicant] [#4] financial assistance from the [Identify the RD Agency] under its [Identify applicable Agency Program] for [Insert the project name or designation]. [#5]. [#6]. The area of potential effects (APE) for the referenced project consists of [#7] as shown on the enclosed map [#8]. If [Identify the RD Agency] elects to fund the [Project OR construction work plan projects], it will become [an undertaking OR they will become undertakings] subject to review under Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108, and its implementing regulations, 36 CFR Part 800.

At the direction of RUS, on [Insert date of notice], [Insert the name of the Applicant] notified the following Indian tribes about the [Insert project name (s)]: [Insert names of Indian tribes notified about the project(s)]. [#9]. Describe the response to the notification by tribe and how any requests have been addressed. Be sure to indicate if no response was received].

The enclosed document [or report] titled, [Insert report title and date issued] describes the results of the [survey or investigation] of the area of potential effects (APE). [#10] [#11]. Based on the findings of the [report or document name] [insert report issue date], [Insert Applicant name] recommends that a finding of [no adverse effect or no historic properties affected #12] is appropriate for the referenced project.

Pursuant to 36 CFR § 800.2(c)(4), and 7 CFR § 1970.5(b)(2) of the regulations, "Environmental Policies and Procedures" (7 CFR Part 1970), [Identify the RD Agency] has issued a blanket delegation for its applicants to initiate and proceed through Section 106 review.

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In accordance with this delegation, [Identify the RD Agency] may proceed to conclude review based on the [Insert state if SHPO letter, or THPO or Official Tribal Designee] concurrence in a finding of effect as recommended by [Insert name of Applicant].

Accordingly, the [Insert Applicant name] is submitting a recommended finding of [*no adverse effect or no historic properties affected #12*] and supporting documentation for review and consideration by the [Insert State if SHPO, or THPO or Official Tribal Designee]. Please provide your concurrence or objection within thirty days of your receipt of this recommended finding. In accordance with 36 CFR § 800.3(c)(4), RUS will proceed to the next step in review if the [Insert name of Applicant] does not receive a response from you within thirty days. Please direct any questions you may have to [Insert contact information].

Sincerely,
Enclosures
cc:
[#13]

Guidance for completing the template

#1 Insert date

Do not forget to date this correspondence because it is essential in determining when the 30 day review period has ended. If it is not too costly, please consider obtaining a delivery receipt for this notification.

#2 Insert Contact Information

Insert SHPO Contact Name, Title and Address OR Identify Tribal Historic Preservation Officer (THPO), or, in the absence of a THPO, the Official Tribal Designee, Title and Address

The addressee will be the THPO designated pursuant to Section 101(d)(2) of the National Historic Preservation Act. In the absence of a THPO, the tribe should have identified an official designee for Section 106 review. Please note that if this notification is directed to "Whom It May Concern," it is not legally sufficient.

#3 Identify the Project, Applicant, and Project Location by County and State

#4 Select "is seeking" or "plans to seek"

Select "is seeking" whenever the applicant has filed an application with RUS for assistance. It matters only that the application is with the Agency, NOT whether or not the Agency has approved it for consideration.

Select "plans to seek" whenever the application for assistance has NOT yet been filed with the Agency. If this is the case, then you may elect in the heading to designate this notice as a "Pre-Application Notification."

#5 Insert a Complete Project Description

Insert a more detailed complete description of the project or construction work plan projects. All elements of the proposed construction must be included, especially those which will cause any digging, excavation or other ground disturbance. For Telecom and Electric projects, include the design specifications, the scope of the ground disturbance, a description of the ROW/easement ownership, establish whether or not new or existing ROW or easements will be used, establish whether or not the construction will occur in or out of municipal boundaries, estimate the number of miles to be buried versus aerial, and if aerial, the prediction about the need for new and/or replacement poles.

Do not forget to include work and staging areas, laydown yards and access roads. If no ancillary facilities such as these are needed, then include that statement in the description. For Water Programs, establish whether or not construction will occur in existing trenches, in predisturbed areas, within the footprint of an existing facility, or in or out of municipal boundaries. Also, please name the towns and counties where construction will occur. Describe any construction which will be more than 20 feet tall and therefore might intrude upon an important setting or obstruct an important vista.

#6 Describe the Project Purpose and Need

Explain in one or two sentences the purpose and need for the project or construction work plan projects. This explanation, which must be consistent with the language in the ER or EA when that level of NEPA documentation is needed, helps establish the public benefit of the project.

#7 Describe the area of potential effects (APE)

Describe the geographic area(s) which might be impacted by the project construction activities. The APE is not restricted to areas where construction will occur but also includes locations from which a constructive element greater than 20 feet tall might be seen. A borrower, tribe or SHPO can only make recommendations about the scope of the APE. RUS makes the final determination. Therefore, get it right the first time - When in doubt, seek guidance from EES.

#8 Enclose maps

Enclose one or several maps showing the area in which the construction activities will occur and the proposed location of the various constructive components. Use a USGS 7.5 series maps or something similar which shows the terrain in which the construction will occur. This can be augmented by other types of maps which show other project details. Staking sheets or maps with that level of detail are not necessary.

#9 Describe the response of tribes.

Describe response to the notification by tribe(s) and how any requests have been addressed. Be sure to indicate if no response was received.

#10 Describe what was found in the survey or investigation.

Include National Register eligibility or listing and the recommendations regarding treatment and effects.

#11 Describe any conditions to which the borrower is willing to commit.

For instance, boring under a railroad or site with a known depth.

#12 Choose only *no adverse effect or no historic properties affected*

No adverse effect means there are historic properties in the project area but they will not be impacted by the project; **no historic properties affected** means there are no historic properties found or likely to be found in the project area.

#13 Copy SEC or EES reviewer via email

Section 106 Conclusion Memo

To: [SHPO and other Section 106 review participants]
Copy: [Another Federal agency if RUS is lead]
From: [EES staff]
Date: [.....]
RE: [Finding of No Historic Properties Affected or No Adverse Effect]
[Project Name]
[Project Location]

Under [Identify the RD Agency program and legal authority], the [Identify the RD Agency] is considering funding an application from [Identify the Applicant] to construct [Project description, include location information and map as supporting documentation] (Project). [Identify the RD Agency] has determined that this Project is an undertaking subject to review under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 300101 et seq., and its implementing regulations, 36 CFR Part 800 (Section 106 review).

{If there is another federal agency involved and a lead agency has been established use the following language - The [Identify the Applicant] will seek assistance from or access to land managed by [Identify the other federal agency], thereby making the Project an undertaking for that federal agency as well. [Identify the RD Agency] and [Identify the other federal agency] have agreed that, pursuant to 36 CFR § 800.2(a)(2), [Identify the RD Agency] will be the lead agency for Section 106 review. }

In accordance with 36 CFR § 800.2(c)(4), and 7 CFR § 1970.5(b)(2) of the regulations, "Environmental Policies and Procedures" (7 CFR Part 1970), [Identify the RD Agency] has issued a blanket delegation for its applicants to initiate and proceed through Section 106 review. Under this delegation, RUS may conclude Section 106 review on the basis of an agreement reached between [Identify the Applicant], [Insert name of State] State Historic Preservation Office (SHPO) and other consulting parties on the recommended finding of effect.

Based on review of the project documentation provided by [Identify the Applicant], [Identify the RD Agency] has determined that a finding of [Choose one - no historic properties affected or no adverse effect] is appropriate for this undertaking. This finding will conclude Section 106 review as it agrees with the recommendations of the [Identify the Applicant, SHPO and the date of concurrence as well as that of any other consulting parties].

[If there are any conditions to which the Applicant and SHPO agreed to support the finding of no adverse effect, they need to be described here with a commitment on the part of the Agency to their implementation.]. [Identify the RD Agency] will include an inadvertent discovery provision, developed in accordance with 36 CFR § 800.13(b) and (c), as a condition of obligation in order to address any historic properties which might be inadvertently discovered or affected during project construction.

Should you have any questions, please contact [Identify EES staff contact information].

Telecommunications Program Tribal Notification Template

[#1]
[#2]
[#3]

RE: [#4] Notification of Intent to Initiate Section 106 Review
[#5]

Dear [Name of THPO or Official Tribal Designee]:

The Rural Utilities Service (RUS), one of three agencies comprising USDA Rural Development, is authorized under the Rural Electrification Act of 1936, as amended, to provide federal financial assistance for the construction, improvement and expansions of telecommunications infrastructure, including broadband, in eligible rural communities in the United States. [Name of Borrower] [#6] financial assistance from RUS for [#7]. [#8].

If RUS elects to fund this application, it will become an undertaking subject to review under Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108, and its implementing regulations, 36 CFR Part 800. Pursuant to 7 CFR § 1970.5(b)(2) of the regulations, "Environmental Policies and Procedures" (7 CFR Part 1970), RUS has issued a blanket delegation to its borrowers to initiate and proceed through Section 106 review. In accordance with this blanket delegation, [Name of Borrower] is initiating Section 106 review on behalf of RUS. In delegating this authority, RUS is advocating for the direct interaction between its Telecommunications Program borrowers and Indian tribes. RUS believes this interaction, prior to direct agency involvement, will support and encourage the consideration of impacts to historic properties of importance to Indian tribes earlier in project planning.

[Name of Borrower] proposes that the area of potential effects (APE) for the referenced project consists of [#9] as shown on the enclosed map [#10] The geographic scope of the APE will not be final until a determination is made by RUS pursuant to 36 CFR § 800.4(a)(1). The APE does not include any tribal lands as defined pursuant to 36 CFR § 800.16(x). [#11]

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[Name of Borrower] is notifying you about the referenced project because of the possible interest of the [Name of Indian Tribe] in [Insert County Name(s)]. Should the [Name of Indian Tribe] elect to participate in Section 106 review of the referenced project, please notify me in writing via letter or email as soon as possible at the following addresses - [Insert your mailing and email addresses].

Please include with your affirmative response, a description of any specific historic properties or important tribal resources in the APE and your recommendations about the level of effort needed to identify additional historic properties which might be affected by the referenced project. [Name of Borrower] will respect the confidentiality of the information which you provide to the fullest extent possible.

If at any time you wish to share your interests, recommendations and concerns directly with RUS, as the agency responsible for conducting Section 106 review, or to request that RUS participate directly in Section 106 review, please notify me at once, preferably via email. However, you may contact RUS directly. If you wish to do so, please submit your request to [Insert EES Manager Name and Contact Information].

Please submit your response to me by [Insert date 30 days from expected date of receipt]. During this time period, I will follow-up to ensure your receipt of this notification and to identify any constraints which might delay your timely response. [Name of Borrower] has been advised by RUS to proceed to the next step in Section 106 review if you fail to provide a timely response. Should you have any questions or require additional information you may contact me at [Insert contact information].

Sincerely,
Enclosures
cc:
[#12]

Guidance for completing the template

#1 Applicability of Template

The template is not applicable to the construction of telecommunications towers and collocations which will carry spectrum regulated by the Federal Communications Commission (FCC). S. 106 review of towers and collocations carrying FCC regulated spectrum is concluded using FCC procedures.

The template is not applicable to the construction of electric distribution, transmission and generation facilities which will be documented at the Categorical Exclusion (CatEx) or Environmental Assessment (EA) level.

#2 Insert date

Do not forget to date this correspondence because it is essential in determining when the 30 day review period has ended. If it is not too costly, please consider obtaining a delivery receipt for this notification.

#3 Identify Tribal Historic Preservation Officer (THPO), or, in the absence of a THPO, the Official Tribal Designee, Title and Address

The addressee will be the THPO designated pursuant to Section 101(d)(2) of the National Historic Preservation Act. In the absence of a THPO, the tribe should have identified an official designee for Section 106 review. Please note that if this notification is directed to "Whom It May Concern," it is not legally sufficient.

#4 Notification of Intent to Initiate Section 106 Review

Do not designate this letter as a "Pre-Application Notification." It can be confusing and send the wrong message to parties outside of RUS. Therefore, its use is discouraged.

#5 Identify the Project, Borrower and Project Location by County and State

Clearly designate what is being submitted for review. Typically, it will be a loan design project. This is a very important because an incorrect decision at this point could cause significant delays in completing the review. Get it right the first time - When in doubt, seek guidance from EES.

#6 Select "is seeking" or "plans to seek"

Select "is seeking" whenever the borrower has filed an application with RUS for assistance. It matters only that the application is with RUS, NOT whether or not RUS has approved it for consideration.

Select "plans to seek" whenever the application for assistance has NOT yet been filed with RUS. If this is the case, then you may elect in the heading to designate this notice as a "Pre-Application Notification."

#7 Insert a Complete Project Description

All elements of the proposed construction must be included, especially those which will cause any digging, excavation or other ground disturbance. Include the design specifications, the scope of the ground disturbance, a description of the ROW/easement ownership, establish whether or not new or existing ROW or easements will be used, establish whether or not the construction will occur in or out of municipal boundaries, estimate the number of miles to be buried versus aerial, and if aerial, the prediction about the need for new and/or replacement poles. Do not forget to include work and staging areas, laydown yards and access roads. If no ancillary facilities such as these are needed, then include that statement in the description. Also, please name the towns and counties where construction will occur. Also, describe any construction which will be more than 20 feet tall and therefore might intrude upon an important setting or obstruct an important vista.

#8 Describe the Project Purpose and Need

This explanation, which must be consistent with the language in the ER or EA when that level of NEPA documentation is needed, helps establish for the tribe the public benefit of the project.

#9 Describe the area of potential effects (APE)

Describe the geographic area(s) which might be impacted by the project construction activities. The APE is not restricted to areas where construction will occur but also includes locations from which a constructive element greater than 20 feet tall might be seen. A borrower and tribe can only make recommendations about the scope of the APE. RUS makes the final determination. Therefore, get it right the first time - When in doubt, seek guidance from EES.

#10 Enclose maps

Enclose one or several maps showing the area in which the construction activities will occur and the proposed location of the various constructive components. Use a USGS 7.5 series maps or something similar which shows the terrain in which the construction will occur. This can be augmented by other types of maps which show other project details. Staking sheets or maps with that level of detail are not necessary.

#11 Confirm that tribal lands are not involved

Under Section 106 tribal lands are defined "as all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities. Confirm that the APE does not contain any tribal lands. In the event that tribal lands will be crossed or involved work with your EES contact to engage the Tribe.

#12 Insert name and email address of appropriate EES contact

Preparing Section 106 Agreement Documents

Purpose of this guidance:

To provide basic general guidance to assist Rural development Agency staff in understanding Section 106 agreement documents.

Contents:

- Basic information about Section 106 review, and agreement structure and organization, including definitions;
- Frequently asked questions;
- A checklist to be used in preparing or reviewing agreements;
- An electronic model agreement that emphasizes a clear logically organized presentation and is consistent with the substantive requirements of 36 CFR Part 800; and
- Sample mitigation and treatment measures that are meant to help users get started in developing agreements, not to limit resolution to stock solutions or discourage creativity.

For further assistance please contact the Federal Preservation Officer (FPO) for the applicable Rural Development agency.

A quick look at the Section 106 process:

- Section 106 of the National Historic Preservation Act (NHPA) directs federal agencies to take into account the effects of their undertakings on historic properties and to provide the ACHP with a reasonable opportunity to comment on such undertakings. The ACHP has issued the regulations (36 CFR Part 800), most recently amended in 2004, that establish how Federal agencies shall implement Section 106.
- Pursuant to 36 CFR part 800, federal agencies consult with the State Historic Preservation Officer (SHPO), Indian tribes, sometimes the Advisory Council on Historic Preservation (ACHP), and other consulting parties in an effort to reach agreement on ways to avoid, minimize or mitigate adverse effects on historic properties. Once agreed upon, such measures are embodied in a Section 106 agreement.
- Before the Section 106 agreement can be executed, however, the federal agency must provide written notification of the adverse effect so that the ACHP can determine if it will participate in consultation.
- In most cases when there is an adverse effect, the Section 106 process is concluded by the federal agency through execution and implementation of a Memorandum of Agreement (MOA).
- In some cases, however, such as those where all the information about historic properties or effects to them cannot be fully determined prior to approval of an undertaking or where circumstances warrant a departure from the normal Section 106 process, the use of a Programmatic Agreement (PA) for the specific undertaking may be appropriate.
- Proper execution and implementation of the terms of an MOA or PA evidence that the federal agency has fulfilled its responsibilities under Section 106 and its implementing regulations. Accordingly, an executed MOA or PA indicates that the federal agency has taken the effects of the undertaking into account, and has afforded the ACHP a reasonable opportunity to comment. As such, Section 106 agreements allow a federal agency to withstand legal challenges about its compliance. These agreements, therefore, should be drafted with care.
- For the agreement to take effect, MOAs and PAs must be signed by the appropriate signatory parties. However, signature by any of the consulting parties invited by the federal agency to concur in the agreement, known as concurring parties, is not mandatory for the agreement to take effect.

What are Section 106 agreements?

- Section 106 agreements are legally enforceable and obligate the signatories to carry out its terms.
- As a legally binding document, an MOA records the terms and conditions agreed upon to resolve the adverse effects of an undertaking on historic properties. As such, it commits a federal agency to carry out the undertaking in accordance with its terms.
- The MOA:
 - Records the outcome of consultation regarding adverse effects when agreement can be reached;
 - Governs the undertaking and all of its parts;
 - Specifies agreed upon alternatives and/or mitigation and/or acceptance of loss; and
 - Identifies parties responsible for implementation.
- A Programmatic Agreement (PA) may be used
 - to govern the implementation of a particular agency program (program PA); or
 - to resolve adverse effects from certain complex or multiple undertakings; or
 - when effects on historic properties cannot be fully determined; or
 - when nonfederal parties are delegated major decision making responsibilities; or
 - where routine management activities are undertaken at Federal installations or facilities; or
 - where other circumstances warrant a departure from the normal Section 106 process.
- Timing: While the terms of a Section 106 agreement can be negotiated in as little as thirty (30) days, it typically takes longer. Usually, PAs require significantly more time and resources before they can be concluded. This should not be a surprise because, by their very nature, PAs address complex and difficult preservation challenges.
- Duration: An MOA or project PA remains in effect until all of its terms have been implemented, or until it is terminated pursuant to a termination stipulation included in the Section 106 agreement, or until the end of its effective life as established by a duration stipulation (Sunset Clause) included in the Section 106 agreement.

Who signs Section 106 agreements?

- A federal agency must provide all consulting parties with an equal opportunity to participate in the development of an MOA or PA. However, when it comes to signing Section 106 agreements not all consulting parties are equal.
 - Signatory parties have sole authority to execute, amend or terminate the Section 106 agreement. Signatories include
 - the federal agency(ies);
 - the SHPO;
 - the National Conference of State Historic Preservation Officers (NCSHPO) only when the PA addresses a federal agency program that is nationwide in scope;
 - Indian tribes when the undertaking occurs on or affects tribal lands), and
 - the ACHP when it elects to participate).
 - For a Section 106 agreement to be considered valid it must be executed by each of the applicable Signatory Parties.
 - A federal agency may invite other consulting parties, such as an Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to historic properties located off tribal lands or an applicant who assumes a responsibility under the Section 106 agreement, to be an Invited Signatory.
 - Invited Signatories have the right to seek amendment or termination of MOAs and project PAs, but their refusal to sign does not invalidate the Section 106 agreement.
 - A federal agency may invite remaining consulting parties to sign the Section 106 agreement as Concurring Parties. However, the refusal of a Concurring Party to sign does not invalidate the Section 106 agreement.
 - The federal agency is not required to invite every consulting party to sign the MOA or project PA.

What are the parts of Section 106 agreements?

MOAs and PAs consist of five primary parts.

Part One: Agreement Title

- Identifies the signatories including the responsible Federal agency(ies)
- Identifies the undertaking and its location

Part Two: Preamble

The Whereas clauses (Preamble) establish the context within which the MOA or PA has been developed. In setting that context, the preamble should

- Identify the undertaking and its location
- Recognize the federal agency 's finding of adverse effect made in consultation with the SHPO/THPO, the affected historic properties and the NHPA as the relevant legal authority
- Identify the role of the ACHP in consultation
- Identify the role of signatory parties, where more than one federal agency is involved in the undertaking
- Identify the invited signatory parties, and acknowledge their opportunity to consult and sign the agreement, as appropriate
- Identify the concurring parties, and acknowledge their opportunity to consult and concur in the agreement
- Specify coordination with any other legal authorities
- Provide relevant definitions

The preamble closes with a "**Now, Therefore**" clause which acknowledges the agreement between signatory parties that the stipulations of the MOA or PA satisfy the purposes of Section 106.

Part Three: Stipulations

The Stipulations section of an MOA or PA is introduced with a statement through which the federal agency ensure implementation of the terms of the agreement.

Examples of typical treatment stipulations include:

1. Recordation of Historic Properties that will be Substantially Altered or Demolished
 - Recordation of historic buildings or structures
 - Recordation of archeological sites
 - Curation and dissemination of documentation, materials and data
2. Treatment of Historic Properties In-Place
 - Interim protection of a historic property
 - Mothballing of a historic building or structure
 - Marketing a historic property, including alternative uses of demolition funds
 - In-place preservation of archeological sites
 - Section 111 leases, exchanges, and management contracts
 - Transfer of historic properties to non-Federal parties

Examples of standard administrative provisions include:

1. Discoveries
2. Dispute resolution
3. Monitoring implementation of the terms of an agreement and reporting
4. Duration/Sunset Clause
5. Amendments
6. Termination

Part Four: Execution clause

The Execution clause acknowledges that in executing and implementing the terms of the agreement, the responsible Federal agency has fulfilled its responsibilities under Section 106

Part Five: Signatures

The MOA or PA should conclude with the A section for the signatures of the signatory parties, invited signatory parties and concurring parties.

Signatory parties are the

- Rural Development Agency National Office
- SHPO
- Indian Tribe [only if the undertaking occurs on or affects tribal lands]

- ACHP [only if the ACHP has decided to participate in consultation pursuant to 36 CFR § 800.6(a)]
- National Conference of State Historic Preservation Officers [only for PAs of nationwide scope]

Invited Signatory Parties, who sign as such at the invitation of the responsible federal agency, may include any of the following:

- An Indian tribe [for ex. when a historic property of religious and cultural significance to an Indian tribe and located off of tribal lands is involved]
- A Native Hawaiian Organization [for ex. when a historic property of religious and cultural significance to a Native Hawaiian Organization is involved]
- An applicant for Federal assistance, permits, licenses and other approvals
- A representative of the local government
- Any party that will implement measures under the terms of the agreement

Concurring parties may include any of the following:

- An Indian tribe [for ex. when a historic property of religious and cultural significance to an Indian tribe and located off of tribal lands is involved]
- A Native Hawaiian Organization [for ex. when a historic property of religious and cultural significance to a Native Hawaiian Organization is involved]An applicant for Federal assistance, permits, licenses and other approvals
- A representative of the local government
- Any party that will implement any measures under the terms of the agreement
- Other consulting parties

Other frequently asked questions

What is the meaning of a Memorandum of Agreement (MOA) or a Programmatic Agreement (PA)?

What is the meaning of an MOA or PA?

Are MOAs and PAs legal documents?

How long does it take to negotiate the terms of an MOA or PA?

Who must be involved in developing a MOA or PA?

When does an MOA or PA go into effect?

When is an Indian tribe a signatory to an MOA or PA?

Can a federal agency execute an MOA without the SHPO?

Can a Federal agency execute an MOA without an Indian Tribe?

Can a Federal agency execute an MOA without a Native Hawaiian organization?

What happens if agreement cannot be reached?

Under what circumstances are MOAs or PAs amended?

How are the terms of an MOA or PA amended?

How long is an MOA or PA in effect?

Where can examples of MOAs and PAs that have been executed be found?

What is the meaning of a Memorandum of Agreement (MOA) or a Programmatic Agreement (PA)?

Execution of a MOA or PA and implementation of its terms evidences that a federal agency has fulfilled its responsibilities under Section 106 of the NHPA and its implementing regulations (36 CFR Part 800). Accordingly, a MOA or a PA demonstrates that the federal agency has taken the effects of its undertaking into account, and has afforded the ACHP a reasonable opportunity to comment. These are the two requirements of Section 106.

Are MOAs and PAs legal documents?

Yes, the courts have determined that Section 106 agreements are legally enforceable. A federal agency, as a signatory to a Section 106 agreement, is obligated to implement its terms.

How long does it take to negotiate the terms of an MOA or PA?

It depends. Where adverse effects are limited and direct, negotiating an agreement may take as little as one month. Typically, however, it takes longer. Usually, PAs require a significantly greater expenditure of time and resources in order to be concluded. This should not be a surprise because, by their very nature, PAs address complex and difficult preservation challenges [36 CFR § 800.14(b)].

Who must be involved in developing an MOA or PA?

A federal agency must provide all consulting parties with an opportunity to participate in the development of Section 106 agreements, whether those consulting parties are signatory parties or concurring parties. The Federal agency must provide the opportunity for participation, but a consulting party determines just how actively he or she will become involved.

When does an MOA or PA go into effect?

A Section 106 agreement goes into effect when it has been signed (or executed) by all of the signatory parties- the federal agency, the SHPO and/or an Indian tribe (whenever the undertaking occurs on or affects tribal lands), NCSHPO (for program PAs of nationwide scope) and the ACHP (if participating). When it has been signed by all of the signatory parties, the agreement goes into effect, even if the concurring parties choose not to sign it.

When is an Indian tribe a signatory to an MOA or PA?

An Indian tribe must be a signatory to a MOA or PA whenever the undertaking occurs on or affects tribal lands. However, a Federal agency may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a Section 106 agreement.

Can a Federal agency execute an MOA without the State Historic Preservation Office (SHPO)?

Yes. If the SHPO has terminated consultation in accordance with 36 CFR § 800.7(a)(2), the federal agency and the ACHP may agree to execute the MOA for the undertaking without the SHPO. Although it can happen, this is an extremely rare occurrence.

Such is not the case when the undertaking occurs on or affects tribal land and the Indian tribe terminates consultation in accordance with 36 CFR §800.7(a)(3). In that case the ACHP must provide its comments to the head of the federal agency pursuant to 36 CFR § 800.7(c).

Can a Federal agency execute an MOA without an Indian Tribe?

Yes. First, when an undertaking occurs off or does not affect tribal lands, a federal agency may execute an MOA without the signature of an Indian tribe. Second, in accordance with 36 CFR § 800.2(c)(2)(ii)(F), if an Indian tribe has not assumed SHPO responsibilities under 54 U.S.C. § 302702, that tribe may elect to waive its right to be a signatory to a MOA when the project occurs on or affects tribal lands. The Indian tribe may provide written notification to the federal agency that it is waiving its rights to execute a MOA. Use of the waiver offers an Indian tribe the ability, short of terminating consultation, to allow a MOA to be executed without condoning it with the tribe's signature. When an undertaking occurs on or affects tribal lands and the Indian tribe terminates consultation in accordance with 36 CFR § 800.7(a)(3), then the federal agency may not execute a MOA, but must seek the comments of the ACHP (not its staff) pursuant to 36 CFR § 800.7(c) .

Can a Federal agency execute an MOA without the signature of a Native Hawaiian organization?

Yes, a federal agency may execute a MOA without the signature of a Native Hawaiian organization that it has invited to sign the agreement.

What happens if agreement cannot be reached?

If the signatories cannot reach agreement on how to mitigate the adverse effect, then one of them may terminate section 106 review. When that happens, Section 106 review may be concluded with a MOA between the federal agency and the ACHP when the SHPO terminates consultation, or with the ACHP (not its staff) providing comments to the head of the federal agency, in accordance with 36 CFR § 800.7(c). Fortunately, this is not a frequent occurrence. When signatories do not execute a program PA because they cannot agree about its terms, then the federal agency must continue to comply with 36 CFR Part 800 for the individual undertakings of that program.

Under what circumstances are MOAs or PAs amended?

Agreement documents are typically amended when (1) the nature of the undertaking changes; (2) unanticipated effects are identified after the agreement is concluded; (3) the originally agreed upon measures have become insufficient to address the preservation problems involved; (4) implementation of the agreement's stipulations turns out to be unexpectedly expensive or otherwise infeasible; (5) a change in approach, such as revision to the research questions in an archeological data recovery plan, is warranted based on professional concerns; or (6) a considerable amount of time has elapsed between execution of the agreement and its implementation, during which concepts of historic significance and appropriate treatment may change.

How are the terms of an MOA or PA amended?

If after executing an MOA or PA that includes an Amendment stipulation, the federal agency and the other signatories agree that circumstances warrant its revision, the parties will consult to develop the amendment according to that stipulation. Amendments typically are negotiated in the same manner as original agreements; that is where possible, through consultation among the original consulting parties.

How long is an MOA or PA in effect?

A MOA or PA remains in effect until all of its terms have been implemented, or until it is terminated (if a Termination stipulation is included in the MOA or PA), or until the end of its effective life as established by a Duration stipulation (Sunset Clause) included in the MOA or PA.

Where can examples of MOAs and PAs that have been executed be found?

Sample formats of a MOA, amended MOA and PA are included as Exhibit I. Examples of specific Section 106 agreements may also be requested from the FPO for the applicable Rural Development agency.

Helpful Resources Related to Historic Preservation

Advisory Council on Historic Preservation (ACHP)

- 36 CFR Part 800: <http://www.achp.gov/regs.html>
- ACHP Archaeology Guidance: <http://www.achp.gov/archguide/>
- ACHP Case Digest—Protecting Historic Properties: Section 106 in Action
www.achp.gov/casedigest.html
- ACHP Federal Agency Historic Preservation Programs and Officers:
<http://www.achp.gov/fpolist.html>
- ACHP Staff Directory: www.achp.gov/staff.html
- ACHP Office of Native American Affairs: <http://www.achp.gov/nap.html>
- Federal Historic Preservation Case Law, 1966-2000: www.achp.gov/pubs-caselaw.html
- Historic Preservation and the Recovery Act:
<http://www.achp.gov/recovery/index.html>
- National Historic Preservation Act of 1966, As Amended:
www.achp.gov/nhpa.html
- Protecting Historic Properties: A Citizen's Guide to Section 106
Review: www.achp.gov/pubs-citizensguide.html
- National Historic Preservation Program: <http://www.achp.gov/nhpp.html>
- Section 106 User's Guide: www.achp.gov/usersguide.html
- Useful Resources on the Web: <http://www.achp.gov/106course-resources.html>

Council on Environmental Quality (CEQ)

- Council on Environmental Quality:
<https://www.whitehouse.gov/administration/eop/ceq>

Civil War Trust:

- <http://www.civilwar.org/>

Environmental Protection Agency (EPA)

- The National Environmental Policy Act (NEPA): <http://www2.epa.gov/nepa>

Library of Congress

- Indian Land Cessions in the United States, 1784-1894:
<http://www.memory.loc.gov/ammem/amlaw/lwss-ilc.html>

National Association of State Archaeologists

- <http://archaeology.uiowa.edu/national-association-state-archaeologists-nasa-membership>

National Association of Tribal Historic Preservation Officers

- www.nathpo.org/map.html.

National Conference of State Historic Preservation Offices (NCSHPO)

- National Conference of State Historic Preservation Offices:
<http://www.ncshpo.org/index.htm>.
- State Historic Preservation Officer (SHPO) Directory:
<http://www.ncshpo.org/shpodirectory.shtml>

National Conservation Easement Database

- <http://conservationeasement.us/>

National Trust for Historic Preservation

- <http://www.preservationnation.org/>

The U.S. Fish and Wildlife Service (FWS)

- Endangered Species Act: <http://www.fws.gov/endangered/laws-policies/regulations-and-policies.html>
- Migratory Bird Program:
<http://www.fws.gov/migratorybirds/CurrentBirdIssues/Hazards/towers/comt-ow.html>

The National Park Service (NPS)

- American Battlefield Protection Program:
<http://www.nps.gov/abpp/rev1812.htm>
- Antiquities Act of 1906:
<http://www.nps.gov/archeology/tools/Laws/antact.htm>
- Archeological and Historic Preservation Act:
<http://www.nps.gov/archeology/tools/Laws/ahpa.htm>
- Archaeological Resources Protection Act of 1979 (ARPA):
<http://www.nps.gov/archeology/tools/Laws/arpa.htm>
- Federal Historic Preservation Laws, Regulations, and Orders:
<http://www.nps.gov/history/laws.htm>

- Federal Preservation Institute: <http://www.nps.gov/fpi/Section110.html>
- Heritage Documentation Programs Regional Contacts: <http://www.nps.gov/hdp/regions.htm>
- Historic Sites Act of 1935: <http://www.nps.gov/history/local-law/hsact35.htm>
- National Historic Landmarks Program: <http://www.nps.gov/nhl/>
- National Register of Historic Places: <http://www.nps.gov/nr/>
- National Register Publications: www.cr.nps.gov/nr/publications
- Native American Consultation Database: <http://grantsdev.cr.nps.gov/Nagpra/NACD/>
- Native American Graves Protection and Repatriation Act (NAGPRA): <http://www.nps.gov/archeology/tools/laws/nagpra.htm>
- Nomenclature of Park System Areas: <http://www.nps.gov/parkhistory/hisnps/NPSHistory/nomenclature.html>
- Secretary of the Interior's Standards for Rehabilitation: <http://www.nps.gov/tps/standards/rehabilitation/rehab/index.htm>
- Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation: www.cr.nps.gov/local-law/arch_stnds_0.htm

United States Code (U.S.C.)

- American Indian Religious Freedom Act (AIRFA): <http://www.gpo.gov/fdsys/granule/USCODE-2010-title42/USCODE-2010-title42-chap21-subchapI-sec1996/content-detail.html>

U.S. Department of the Interior (DOI)

Office of Native Hawaiian Relations

- Office of Native Hawaiian Relations: <http://www.doi.gov/ohr/index.cfm>

U.S. Federal Communication Commission (FCC)

- Nationwide Programmatic Agreement for Review of Effects on Historic Properties for Certain Undertakings (2004): <http://wireless.fcc.gov/siting/npa/FCC-04-222A3.pdf>
- Tower Construction Notifications (TCNS): http://wireless.fcc.gov/outreach/index.htm?job=tower_notification
- Understanding the FCC Nationwide Programmatic Agreement Exclusions: http://www.eca-usa.com/files/ECA-NPA%20Mailer_Part1_022613.pdf
- U.S. Federal Communications Commission Nationwide Programmatic Agreement: <https://www.fcc.gov/encyclopedia/tower-and-antenna-siting>

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