

Advanced Section 106 Historic Preservation: Developing Programmatic Agreements

February 1, 2024



ONAP ER Webinar Series

- Basic ER Forms
- Aggregation
- Emergency Repairs
- Reevaluation
- Tiered Reviews
- Noise
- Endangered Species Act: Alaska



HUD EXCHANGE

Environmental Review Resources for Office of Native American Programs Projects

An environmental review is the process of reviewing a project and its potential environmental impacts to determine whether it meets federal, state, and local environmental standards. The environmental review process is required for all HUD-assisted and insured projects to ensure that the proposed project does not negatively impact the surrounding environment, and that the property site itself will not have an adverse environmental or health effect on residents. This page provides links to environmental review guidance and resources related to Office of Native American Programs (ONAP) projects.

The Office of Environment and Energy (OEE) manages the overall environmental review process for HUD. You will find an overview of HUD environmental requirements on the [Environmental Review page](#).

Trainings

Navigating Compliance with the Endangered Species Act for HUD-Assisted Projects in Alaska

This webinar presented the U.S. Fish and Wildlife Service Alaska Programmatic and National Oceanic and Atmospheric Administration (NOAA) Fisheries/National Fisheries Marine Service guidance on endangered species for HUD projects in Alaska and how to apply them in the HUD environmental review.

Date Published: November 2023

Compliance with HUD's Noise Abatement and Control Standard

This webinar presented HUD's noise standard in the context of environmental reviews for tribal projects, outlined the steps for conducting a noise assessment, and demonstrated the use of existing HUD online tools on noise abatement and control.

2024 ONAP ER Webinar Series

- Using HEROS: Guiding and Streamlining the Environmental Review Process
- **Advanced Section 106 Historic Preservation: Developing Programmatic Agreements - Today**
- Streamlining ERs through Section 7 Guidance (Endangered Species Act)
- Navigating Compliance with the Endangered Species Act – Washington PA
- Navigating Compliance with the Endangered Species Act – Oregon PA

■ Navigating Compliance with Floodplain Management

Objectives

- Briefly review the standard compliance process with the National Historic Preservation Act (Section 106)
- Introduce and discuss the use of Section 106 programmatic agreements (PA) for streamlining environmental reviews
- Discuss examples at the state and Tribal level
- Outline the steps you can take to develop a PA

National Historic Preservation Act of 1966

- Section 106 of the Act requires federal agencies to consider the impact of federal actions on historic properties
 - ✓ Regulations are under 36 CFR 800

§ 800.1 Purposes.

- (a) *Purposes of the section 106 process.* Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

HUD Environmental Review

- Section 106 applies to CEST reviews and environmental assessments (EAs)

STATUTES, EXECUTIVE ORDERS, AND REGULATIONS LISTED AT 24 CFR 50.4 & 58.5

Historic Preservation National Historic Preservation Act of 1966, particularly sections 106 and 110; 36 CFR Part 800	<div>Yes No</div> <div><input type="checkbox"/> <input type="checkbox"/></div>	
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STATUTES, EXECUTIVE ORDERS, AND REGULATIONS LISTED AT 24 CFR §50.4 & 58.5

Historic Preservation

[National Historic Preservation Act of 1966, particularly sections 106 & 110; 36 CFR Part 800]

☐ Yes ☒ No

Based on Section 106 consultation there are No Historic Properties Affected because there are no historic properties present. We consulted with our THPO. He concurred with our No Effect finding. The project is in compliance with Section 106. See attached correspondence.

Streamlining Environmental Reviews

- *Programmatic agreements (PAs)* can streamline consultation in environmental reviews
 - ✓ Where the 'default' process might be to undergo consultation for every project, PAs and other guidance allow certain types of projects to bypass consultation
 - ✓ The consulting parties predetermine what effects a certain type of project could have on a resource
 - ✓ Historic preservation (Section 106 consultation) can be streamlined through this mechanism



Brief Overview

SECTION 106 PROCESS

Flowchart of Basic Process

Define the undertaking and identify the area of potential effect

Project activities
Any ground disturbance

Project address or boundary
Historic districts

Identify potential consultation parties

*State/Tribal historic
preservation officer*

Other Tribes

Determine the likely effect of your project

*No historic
properties affected*

No adverse effect
Adverse effect

Send a letter to potential consulting parties

Flowchart of Basic Process

Possible actions by consulting parties

No response

Document the lack of response. Parties have 30 days from receipt of consultation package to respond.

Requests more information

Prepare the requested information and send over. 30-day timeline starts over.

Requests to consult

No specific timeline. Consult until an agreement is reached.

Responds w/ concurrence

Document and file concurrence letter(s) in the ER.

HOTEL LYRIC

c. 1924

SHEET MUSIC AND INSTRUMENTS WERE SOLD ON
THE GROUND FLOOR OF THIS BUILDING.

THIS BUILDING IS LISTED IN THE
NATIONAL REGISTER OF
HISTORIC PLACES

UPTOWN TENDERLOIN HISTORIC DISTRICT

Defining the Area of Potential Effect (APE)

- Area of Potential Effect (36 CFR 800.16[d])
 - ✓ Geographic area within which an undertaking may directly or indirectly cause changes in the character or use of historic properties
 - ✓ Is influenced by the scale and nature of the undertaking and may be different for different kinds of effects caused by the undertaking

Hungo Pavi

Chacoan Great House
Occupation AD 1000-1250s
Sacred Site

Stay on Designated Trail
Keep Off Walls
No Collecting
No Pets
Site Closed at Sunset
Report Vandalism

Identifying Historic Properties

- Review existing information on historic properties within the APE
- Seek information from consulting parties and other individuals or organizations likely to have knowledge of or concerns with historic properties in the area
- Gather information from the Tribe and other Tribes with a historic interest in the area

Consultation

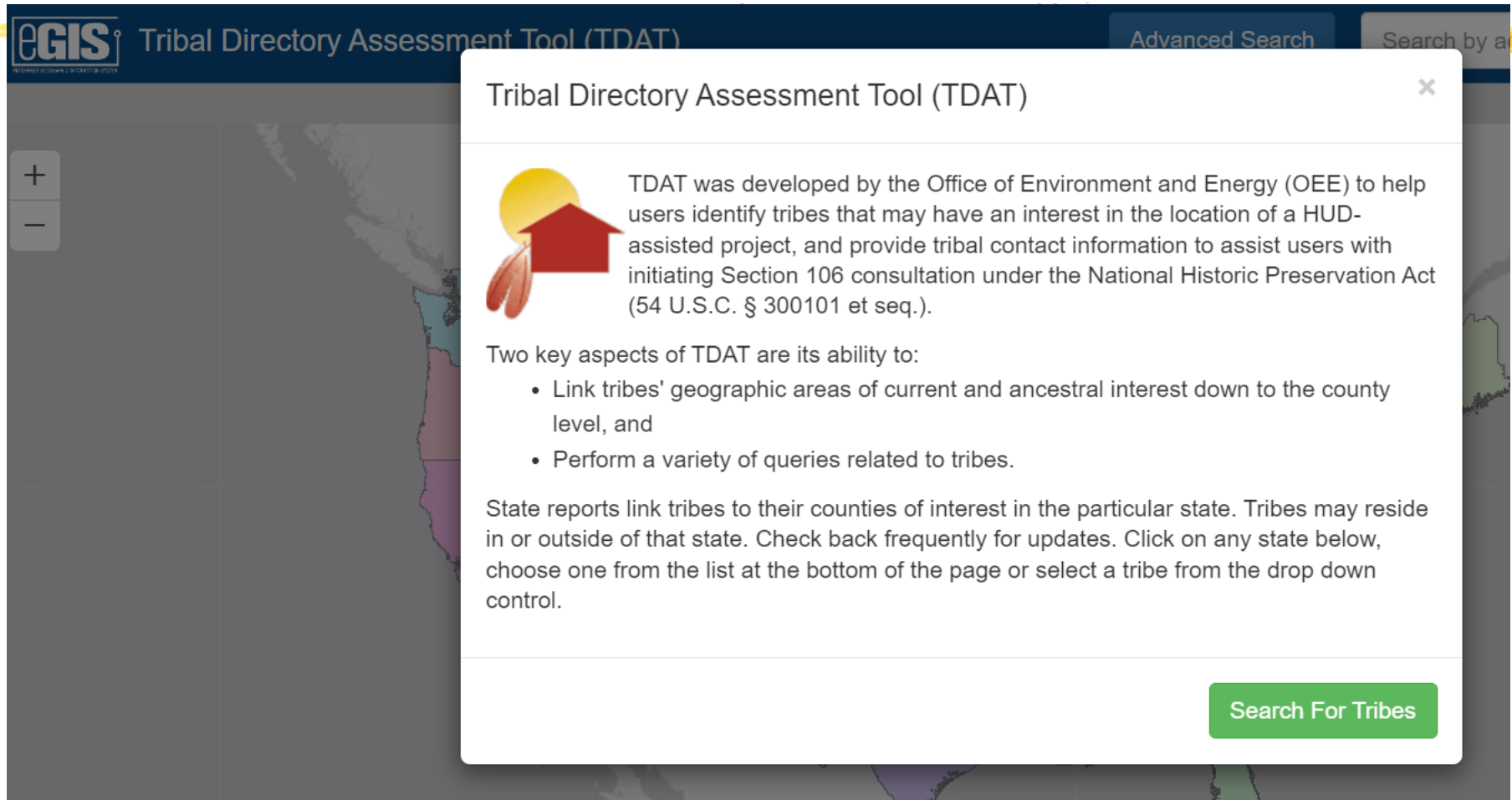
- Consult for all CEST-/EA-level projects
 - ✓ With SHPO on fee simple land
 - ✓ With THPO (if the Tribe has one) for tribal land
 - If the Tribe has no THPO, then consult with both the SHPO and the Tribe
 - ✓ With other Tribes if there is ground disturbance
- Send a letter describing the project and project location
 - ✓ Include a map of the project and photos
 - ✓ Include the year any structures were built
 - Include your effect finding

Identify Consulting Parties

As per 36 CFR 800.3(f):

- State/Tribal historic preservation officer (SHPO/THPO)
- Involve local governments
- Involve Tribes and Native Hawaiian organizations
- Consider written requests to be consulting parties

Tribal Directory Assessment Tool



Tribal Directory Assessment Tool (TDAT)

TDAT was developed by the Office of Environment and Energy (OEE) to help users identify tribes that may have an interest in the location of a HUD-assisted project, and provide tribal contact information to assist users with initiating Section 106 consultation under the National Historic Preservation Act (54 U.S.C. § 300101 et seq.).

Two key aspects of TDAT are its ability to:

- Link tribes' geographic areas of current and ancestral interest down to the county level, and
- Perform a variety of queries related to tribes.

State reports link tribes to their counties of interest in the particular state. Tribes may reside in or outside of that state. Check back frequently for updates. Click on any state below, choose one from the list at the bottom of the page or select a tribe from the drop down control.

[Search For Tribes](#)

<https://egis.hud.gov/tdat/>

Tribal Directory Assessment Tool

ment tool (TDAT) Advanced Search Search

Search For Tribes

Option 1: Search by Address

451 7th Street S.W., Washington, DC 20410

Option 2: Select a Tribe

---Select One---

Option 3: Select by State/County

---Select One---

Close

Tribal Directory Assessment Tool

Option 3: Select by State/County

South Dakota

Select One or More Counties (hold shift to select more than one):

- Aurora
- Beadle
- Bennett
- Bon Homme
- Brookings
- Brown
- Brule
- Buffalo
- Butte
- Campbell
- Charles Mix**
- Clark
- Clay

[Get All Tribes for South Dakota](#) [Submit Search](#)

[Close](#)

Tribal Directory Assessment Tool



Tribal Directory Assessment Tool (TDAT)

Advanced Search

Search by address...



Menu ▾

← Back to search

Export To Excel

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Contact Information for Tribes with Interests in Charles Mix County, South Dakota

Tribal Name		County Name				
+	Apache Tribe of Oklahoma	Charles Mix				
+	Cheyenne and Arapaho Tribes, Oklahoma	Charles Mix				
=	Fort Belknap Indian Community of the Fort Belknap Reservation of Montana	Charles Mix				
Contact Name	Title	Mailing Address	Work Phone	Fax Number	Email Address	URL
Jeffery (Jeff) Stiffarm	President	656 Agency Main Street, Harlem, MT - 59526	(406) 353-2205	(406) 353-2797	jeffery.stiffarm@ftbelknap.org	http://www.ftbelknap.org/
Michael Blackwolf	THPO	656 Agency Main Street, Harlem, MT - 59526	406-353-2295	406-353-2240	mblackwolf@ftbelknap.org	http://www.ftbelknap.org/
+	Ponca Tribe of Nebraska	Charles Mix				
+	Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota	Charles Mix				
+	Yankton Sioux Tribe of South Dakota	Charles Mix				

1 - 6 of 6 results

« < 1 > » 10 ▾

Export To Excel

Print the Current Page

Types of Potential Effects

- **No historic properties affected** – no historic properties or resources exist in the APE; or the type of activity will not affect historic properties
- **No adverse effect on historic properties** – there is a historic property or archaeological/cultural resource, but the project will be modified to avoid adverse effects
- **Adverse effect** – there is a historic property or archaeological/cultural resource, and the project would create an adverse effect
 - ✓ Consult to modify project to avoid, minimize, or mitigate adverse effect; requires a Memorandum of Agreement among parties



Consultation Outcomes

- Receive a response from the SHPO/THPO + Tribes concurring with your 'no historic properties affected' finding
- No response received after 30-40 days
 - ✓ (SHPOs will always respond, so contact them if you don't receive a response)
- Receive a response from the SHPO/THPO/Tribes asking for more information
 - ✓ 30-day clock resets once you submit the additional documentation

Implications of Section 106

Consultation on HUD ERs

- Preparing even a simple consultation letter, mailing it, and waiting for the response can take 30-45 days
- Therefore, the HUD environmental review even for a simple single-family rehabilitation project can take around two months to do
- It is important to make sure that you include all necessary information in your consultation package to reduce follow-up requests for more information

Audience Poll

- Your project involves new construction of one house and extension of utility lines. What is the area of potential effect (APE) for this project?
 - a) Footprint of the house
 - b) Property boundaries
 - c) Infrastructure lines
 - d) A + C
 - e) B + C





Streamlining the Environmental Review Process

SECTION 106 PROGRAMMATIC AGREEMENTS



Streamlining Tools

- Programmatic agreements (PAs)
 - ✓ Such documents outline specific types of activities that do not have an effect on historic properties
 - ✓ Define when consultation is or isn't necessary
 - ✓ Take the guesswork out and leverage the historic preservation officers' expertise on historic preservation

Section 106 Programmatic Agreements (PAs)

- Programmatic agreements (PAs) can be negotiated between any of the following:
 - ✓ HUD and the SHPO
 - ✓ The Responsible Entity (Tribe) and the SHPO
 - ✓ The Responsible Entity (Tribe) and the THPO
 - ✓ HUD and the THPO
- PAs outline what types of activities will *not* have an effect on historic properties or archaeological/cultural resources; these activities then do not need to undergo further consultation
- ✓ Speeds up the environmental review

Developing a Section 106 PA

- Invite the Advisory Council on Historic Preservation (ACHP) to participate
 - ✓ They will provide an answer within 15 days
- Identify and involve consulting parties
- Provide documentation (36 CFR 800.11(e))
- Involve the public

Developing a Section 106 PA

- Providing documentation (36 CFR 800.11(e))
 - ✓ A description of all the likely undertakings (activities) to occur
 - ✓ A description of the actions taken to identify historic properties and a list of such properties
 - ✓ A description of the possible effects on historic properties
 - ✓ A description of the types of adverse effects that might occur as a result of the activities
 - ✓ Copies/summaries of the view provided by the consulting parties or public



Guidance on Agreement Documents: Drafting

Who Prepares the MOA or PA?

The federal agency is responsible for preparing the MOA or PA. Because an MOA or PA sets out how a federal agency will address the adverse effects to historic properties caused by its undertaking, it is important that their professional staff or cultural resource management (CRM) contractors take responsibility for drafting agreement documents while engaging the consulting parties throughout consultation. SHPOs and THPOs often assist the agency in making sure the correct language is used and all necessary provisions are in the agreement. ACHP staff is also available to advise on the development of agreement documents, whether or not it is formally participating in the consultation.

Parts of a Section 106 Agreement

Section 106 agreements should follow a standard format. This includes the division of the document into a title, preamble, stipulations, and signatures. Each one of these parts has a specific function to perform and should be clear, complete, and distinct.



Template PA

■ **MEMORANDUM OF AGREEMENT**
PROGRAMMATIC AGREEMENT
BETWEEN [insert Agency]

AND THE

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

REGARDING THE [insert project name and location]
■ **[program/activity]**

[program/activities]

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

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

[programs/activities]

Knowledge Check

- An environmental review for rehabilitation of a homeowner-occupied home says the following:

Historic Preservation National Historic Preservation Act of 1966, particularly sections 106 and 110; 36 CFR Part 800	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>	No effect. This project involves only interior rehabilitation of a home that is less than 45 years old. This project <u>is in compliance with</u> the NHPA.
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- Is this compliance determination valid?

a) Yes

b) No



Section 106 Programmatic Agreements

CASE STUDIES

Alaska SHPO and HUD PA

- A programmatic agreement is in place for HUD projects over the entire state of Alaska
 - ✓ Tribes can sign on to the PA to use it
- The following activities would not require further consultation:
 - ✓ Rehabilitation on homes less than 45 years old
 - ✓ Certain types of interior rehabilitation
- The Tribe must send an annual report to the SHPO and Advisory Council on Historic Preservation on what projects it cleared through the PA



Alaska SHPO Programmatic Agreement

https://www.hud.gov/sites/dfiles/PIH/documents/Alaska_Programmatic_Agreement_2016.pdf

DISCUSSION



PA between a Tribe and SHPO

EXAMPLE

PA between a Tribe and SHPO

WHEREAS, the [TDHE] frequently undertakes activities that include, but are not limited to, acquisition, land-banking, leasing, repair, rehabilitation, improvement, demolition, conversion and new construction of residential and non-residential properties, structures and facilities, each of which is considered to be an “undertaking” (“Undertaking”) as defined pursuant to 36 C.F.R. 800.16(y); and

WHEREAS, the SHPO and the Tribe have determined that certain Undertakings funded by HUD and its numerous programs have limited potential to affect historic properties and have consulted with the State Historic Preservation Officer (“SHPO”) pursuant to 36 C.F.R. 800.14 of the regulations guiding the implementation of Section 106; and

PA between a Tribe and SHPO

1. General Exemptions

- A. *Refinancing*** without any demolition, rehabilitation or construction.
- B. *Leasing*** without any demolition, rehabilitation or construction.
- C. *Acquisition of real property*** where there is no reasonably foreseeable plan to rehabilitate, repair, improve or demolish the building(s)

- The activities above undertaken by the TDHE do not need to undergo consultation with this SHPO

PA between a Tribe and SHPO

1. Specifically Exempted Undertakings

The following specific ***Undertakings on existing residential and non-residential buildings***, structures or facilities ***that are less than 45 years old are exempt***, (Units that are 50 years and older are not included in this Programmatic Agreement) including (Non-Routine Maintenance) demolition and rehabilitation, but not including new construction.

^do not need to undergo further SHPO review.

A. Site Work

- 1) Streets, Driveways, Alleys and Parking Areas Repair of existing concrete and asphalt surfaces and parking areas that are not being enlarged.
- 2) Curbs, Gutters, Sidewalks and Retaining Walls Repair of existing concrete asphalt surfaces or replacement or repair of brick, rock or stone materials for curbs, gutters, sidewalks and retaining walls.

PA between a Tribe and SHPO



- 3) Site Improvements Repair or replacement of fences, landscaping and steps not attached to a building
- 4) Below-Ground Utilities Modifications to existing buried water, sewer, natural gas, electric or telecommunications conduits where no above-ground structures are involved and the ground at the site where such modifications will occur has already been substantially disturbed, including previously disturbed utility corridors or road rights-of-way.
- 5) Above-Ground Utilities Repair or replacement of existing wires, anchors, crossarms and other miscellaneous hardware on existing overhead transmission lines, but not including pole replacement or the replacement of water towers.
- 6) Park and Playground Equipment Installation, repair or replacement of park and playground equipment, but not restrooms or public service maintenance facilities of any other park buildings

PA between a Tribe and SHPO

B. Exterior Rehabilitation

- 1) Foundations Below-grade repair of brick or stone foundations, but not including the application of weatherproofing or sealers.
- 2) Windows and Doors Repairs, including caulking and weather stripping of existing window and door frames, and the installation of single-pane, clear glass in existing sashes and doors, and the replacement of glazing.
- 3) Storm Windows and Doors Installation of exterior storm windows and doors that conform to the shape and size of the existing windows and doors.
- 4) Walls and Siding Removal and replacement of wall or siding material with like material or similar durable construction material.
- 5) Porch Elements Minor repair or replacement of deteriorated porch elements that match existing components.
- 6) Roofing Repair or replacement of roof sheeting, flashing, gutters, soffits and downspouts with any type of roofing material while retaining the existing roof pitch and configuration.

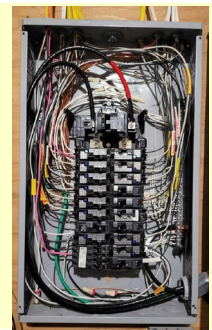
PA between a Tribe and SHPO

- 7) Awnings Repair and replacement of awnings.
- 8) Mechanical Systems Replacement of mechanical systems
- 9) Lighting Repair or replacement of light fixtures and the installation of decorative and security lights.
- 10) Mothballing Securing or “mothballing” a structure by boarding over window and door openings, making temporary roof repairs and/or ventilating a building.
- 11) Accessibility Ramps Installing temporary ramps that do not irreversibly impact porches and railings.

PA between a Tribe and SHPO

C. Interior Rehabilitation

- 1) Mechanical systems Repair or replacement of plumbing, heating, air conditioning and ventilation (HVAC) systems, electrical wiring and fire protection systems provided that no structural alterations are made
- 2) Insulation Installation of non-spray insulation in walls, ceilings and attics
- 3) Basement Floors Installation or repair of concrete basement floors in an existing basement
- 4) Surface treatments Repair or replacement of interior surface treatments such as flooring, walls, ceilings and woodwork with paint or other materials.
- 5) Asbestos Abatement Abatement or mitigation of asbestos-containing materials that does not involve the removal of ornamental features.



PA between a Tribe and SHPO

- Other components of this PA
 - ✓ Discoveries and unforeseen effects
 - ✓ Dispute resolution
 - ✓ How to amend the PA
 - ✓ How to terminate the PA
 - ✓ Terms of the PA
 - 5 year upon signing, with an option for renewal in the last 6 months
 - ✓ Signed by the SHPO, Tribal Chairman, and Executive Director of the TDHE



Section 106 Programmatic Agreements

WHAT CAN YOU DO?

Negotiate a PA – With Whom?

If your projects mostly involve...	Negotiate a PA with...
Fee simple land	SHPO
Tribal land, but the Tribe does not have a THPO	SHPO
Tribal land when the Tribe has a THPO	THPO
Ground disturbance	Other Tribes/THPOs

Negotiate a PA – What Activities?

- Send the consulting party a list of the common activities your housing division or TDHE engages in.
- Provide information on your housing stock (year built, architectural styles, features, modifications, etc.)
- Through consultation, the SHPO/THPO may agree to a list of activities that would have no effect on historic properties
 - ✓ This list will vary depending on your region
- Work together to draft a programmatic agreement.
- This process can take several months

Tips/Reminders

- In your environmental reviews, be more specific than just saying “rehab” when describing your projects
 - ✓ Make sure that the scope of work matches what’s listed in the PA if you’re clearing the project using the PA
- If your project does NOT fit within the scope of the PA, then you need to consult on the individual project

Tips/Reminders

- Even with a PA, if your project involves multiple funding agencies, be sure to check with them if your PA can be used or if Section 106 consultation must be pursued
 - ✓ Other agencies may require their own Section 106 clearance – or at least correspondence with the SHPO confirming the effects finding
- If another Responsible Entity/grantee already has a PA in place with the same SHPO, you can ask the SHPO about adopting it or adapting it to your program.

Tips/Reminders

- Even with a PA between your Tribe and the SHPO, other Tribes will need to be consulted if your project involves ground disturbance



Tips/Reminders

- Keep the PA simple!
 - ✓ Think about your staff capacity/expertise
 - ✓ If you reference the Secretary of the Interior's Standards, know what that means and what you're agreeing to.
 - Incorporate a reference to HUD's maintenance memo to clarify that the SHPO/THPO does not need to be contacted for maintenance activities
 - Involve all appropriate parties at the start
 - Remember to follow any reporting requirements
- Include this in your ER policies and procedures in case of staff turnover

Knowledge Check

Your project is rehab of 10 homeowner-occupied units, all between 20-40 years old, on fee simple land. No ground disturbance will occur. There is a PA in place stating that further SHPO review is unnecessary for rehab on buildings less than 45 years old. What do you do next?

- a) Document that the homes meet the criteria to be covered by the PA, document the year built, and include a copy of the PA in the environmental review.
- b) Consult with the SHPO. Consultation is always required.
- c) Consult with other Tribes. The PA does not represent other Tribes with a historic interest in the county.

Conclusion

- Section 106 compliance (historic preservation) is always required for CEST- and EA-level projects
- Developing a programmatic agreement with your SHPO or THPO requires upfront work but can result in future efficiency for your environmental reviews
- Contact your SHPO/THPO and HUD to ask about developing a PA for your housing programs

Resources

- <https://www.hudexchange.info/environmental-review/historic-preservation/section-106-agreements/>
 - ✓ Section 106 Agreements Database
 - ✓ HUD Memo on Section 106 Agreements
 - ✓ Advisory Council on Historic Preservation Guidance and Checklist
 - ✓ Samples and Template PAs
- <https://www.hudexchange.info/programs/environmental-review/ties-toolkit/introduction/>
- https://www.achp.gov/drafting_section_106_agreements

Drafting Section 106 PAs

Have Questions? Contact HUD!

<https://www.hud.gov/codetalk>

<https://www.hudexchange.info/programs/environmental-review/>

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ONAP Offices and Tribal Contacts



- Headquarters
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- Southwest
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- Southern Plains
- Eastern Woodlands
- Hawaii