

Draft
U.S. Forest Service
Nationwide Phasing Programmatic Agreement

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PREAMBLE

Extended droughts, insect infestation and threats of wildfire have made it necessary for the U. S. Forest Service to expand the size of forest and grassland restoration projects. With the expanded demand, the U.S. Forest Service has encountered an increase in the need to phase steps of the Section 106 process, whereby some actions are completed before the National Environmental Policy Act (NEPA) decision is signed, and other actions after. As allowed under 36 CFR 800.4(b)(2), agencies may use a phased process to conduct identification and evaluation efforts, as well as a phased approach to applying the criteria of adverse effect (36 CFR 800.5(a)(3)).

The US Forest Service recognizes that the intent of Section 106 is met when the agency documents the commitment to phase steps of the Section 106 process in a programmatic agreement, memorandum of agreement, or in a document prepared in accordance with the process for coordination with NEPA under 36 CFR 800.8.

The Forest Service also recognizes that coordination and consultation early in the project design process can result in better protection and management of historic properties. When consulting parties have an opportunity to inform project design rather than react to it later in the planning process opportunities for better management can be realized. The goal of early coordination and consultation is to define a means of directing limited resources to actions that benefit natural and cultural resources and have the highest value to consulting parties and the public.

This Programmatic Agreement serves as another tool, which sets forth a process to enhance coordination through early consultation, seek value-added outcomes from the Section 106 process, and document a phased approach to Section 106.

WHEREAS a phased process may be conducted for identification and evaluation efforts when alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted (800.4(b)(2)); and

WHEREAS this programmatic agreement may be used when effects on historic properties cannot be fully determined prior to approval of an undertaking (800.14(1)(b)); and

WHEREAS this Programmatic Agreement is optional and does not supersede previous agreements that address the treatment of historic properties and can be used in combination with current agreements; and

WHEREAS this Programmatic Agreement applies to U.S. Forest Service undertakings on Forest Service lands and non-Forest Service lands when the Forest Service is identified as the lead agency for an undertaking; and

WHEREAS the U.S. Forest Service, as a public land steward, has a multiple-use mission to manage its public lands for a variety of resources, values, products, and uses which may involve various kinds of historic properties and cultural resources; and

WHEREAS the U.S. Forest Service has consulted with the Indian tribes and the interested public regarding ways to ensure that the Forest Service's planning and management will be more fully integrated; and

WHEREAS, the U.S. Forest Service (FS), the Advisory Council of Historic Preservation (ACHP), and the National Conference of State Historic Preservation Officers (NCSHPO) have consulted pursuant to Section 106 of the NHPA and 36 CFR 800.13 of the NHPA in developing this Programmatic Agreement; and

NOW, THEREFORE, the FS, the ACHP, and the NCSHPO mutually agree that the FS, consistent with the provisions of this PA below, will meet its responsibilities under the NHPA through this agreement as provided for in 36 CFR 800.14(b), rather than by following the procedure set forth in 36 CFR 800.3 through 800.7.

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STIPULATIONS

I. Definitions

- a. All the definitions in 36 CFR 800 Subpart B are applicable.
- b. Additional definitions and terms defined in the Forest Service Heritage Manual (e.g., Phasing, Cultural Resources, Heritage Professional, etc.) will be provided in an Appendix.
- c. Types of FS programs and undertakings suitable for this agreement are included in Appendix A.

II. Staff Standards

- a. The following roles and associated responsibilities are provided for successful implementation of the process outlined in this agreement.
 - i. Agency Official. Agency officials are given decision making authority under the NHPA. They include Regional Foresters, Deputy Regional Foresters, Forest Supervisors, Deputy Forest Supervisors, District Rangers, Deputy District Rangers, and the Chief. The agency official shall:
 1. Ensure that Heritage Professionals are engaged in the planning process at the beginning of project development so that historic properties are considered in project planning and design.
 2. Invite Tribes, SHPO, and others to participate in group meetings that the Forest Service has already established. If no group is convened, ensure that the SHPO, tribes and other parties are informed and invited to consult as required under 36CFR 800.3.
 - ii. Forest Service Heritage Professionals (e.g., Forest Heritage Program Leader, Regional Heritage Program Leader).
 1. A GS-170 historian, GS-190 anthropologist, or GS-193 archaeologist shall be responsible for facilitating this guidance and making recommendations to agency officials (see FSM 2360.5).
- b. Qualifications
 - i. At a minimum, Heritage Professionals shall meet Office of Personnel Management [§ 3061312 (a)(1)(B)] standards (FSM 2360).

c. Training

- i. WO Heritage will develop training materials regarding the implementation of this agreement.
- ii. Forest Service Heritage staff and Line Officers shall receive training in the use and implementation of this Agreement, as an alternative to standard Section 106 procedures prior to using this PA, as needed on an annual basis.

III. Applicability

- a. When alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted a phased process may be conducted for identification and evaluation efforts (800.4(b)(2)).
- b. When effects on historic properties cannot be fully determined prior to approval of an undertaking. (800.14(1)(b)).
- c. In coordination with Heritage Professionals, the agency official will decide if the process outlined in the PA best suits the undertaking (see Appendix A for examples).

IV. Initiate the Phased Process

- a. When a project suitable for phasing under this PA has been identified (see Appendix A for examples), the agency official, as facilitated by Heritage Program staff, will contact potential NHPA consulting parties (i.e., SHPO, THPO, tribes, and interested parties) early in the project planning process, prior to public notification and any public or stakeholder meetings.
 - i. If NEPA public engagement will not occur, NHPA consulting parties will be invited to work on the development of the Heritage Implementation Plan (see Section V. below) when a project suitable for phasing has been identified.
- b. The agency official shall invite parties to consult on the proposed project and encourage them to be partners in shaping the project planning, design, and outcomes. Consultation should begin when the purpose of and need for the proposed action as well as the widest possible range of alternatives are under consideration (800.8 (a)(2)).
- c. A letter (see Appendix C for template) will be sent with an initial package of

information to consulting parties. The package should be submitted prior to NEPA public engagement and include information about the proposed project available at this stage, including:

- i. A summary of the proposed project and a map of the potential analysis area.
 - ii. A cultural resource overview of the potential analysis area including a brief cultural history, summary of past investigations, known cultural resources, research questions, and any other information the Heritage Program staff believes is relevant to help focus a reasonable and good faith effort to identify and address historic properties.
- d. Regardless of level of NEPA analysis, the FS must maintain a record of consultation from the initiation period up to the formalization of the HIP.

V. Create the Heritage Implementation Plan (HIP) with Consulting Parties

- a. Over the course of consultation, but prior to signing a NEPA decision (e.g. DM, DN, or ROD), the Heritage Professional shall facilitate the completion of the HIP in consultation with SHPOs, THPOs, tribes, and other consulting parties.
 - i. When agency officials host meetings with stakeholders as part of the NEPA review process, they shall invite Heritage Program staff and NHPA consulting parties, including tribes, SHPO(s), THPO(s), historic commissions, etc.
 - ii. The agency official shall still engage NHPA consulting parties early in the planning process to consult on the development of a HIP.
 - iii. At these meetings, or through ensuing correspondence, SHPO, tribes, and others will have the opportunity to contribute to project planning and design, the development of a focused reasonable and good faith effort to identify historic properties, the development of a phased approach to Section 106, and any other details that will be captured in the HIP that will ultimately be included in the NEPA analysis document and referenced in the NEPA decision document (e.g., DM, DN, or ROD).
 - iv. The agency official shall offer consultation opportunities on a government-to-government basis for consulting tribes, regardless of their level of participation in larger consulting groups. For the purposes of this agreement, consultation is limited to historic properties of cultural and religious importance to tribes. Other topics of interests to tribes shall be consulted on outside of the realm of this agreement.

VI. HIP Format & Components

The HIP will describe the phased process that will be used to meet the intent of Section 106 (see Appendix B for template). At a minimum the HIP will include:

- a. Delineation of the area of potential effect (APE).
 - i. When identifying the APE consulting parties shall begin with the NEPA analysis area. The agency may then refine the APE based upon characteristics of the undertaking, consulting party feedback, and the results of existing information.
- b. Strategy to accomplish a reasonable and good faith effort to identify historic properties.
 - i. The agency official shall commit to making a reasonable and good faith effort to carry out appropriate identification efforts in the project area of potential effect. This effort should focus on those areas or cultural resource types within the area of potential effect that are deemed of most interest by the agency and consulting parties. The level of effort should also be commensurate with the scale of the undertaking, the resources at risk, and current management capacity and direction.
 - ii. The Forest Service Heritage Professional shall use background research and results of past studies to determine the adequacy of previous field survey, if present. Heritage Professionals shall reference guidance provided in FSH 2309.12, Chapter 32, section 11 (Date Approved 04/14/2015) and ACHP Guidance, *Meeting the "Reasonable and Good Faith" Identification Standard in Section 106 Review*.
 - iii. Consulting parties are encouraged to prioritize areas for targeted cultural resource field survey by taking into consideration the desired outcomes for historic properties. Consulting parties should prioritize the use of new technology such as LiDAR and other forms of remote sensing in locating historic properties.
 - iv. Where project activities overlap with areas chosen for cultural resource field inventory (e.g., field survey or LiDAR application), the inventory shall be completed and reported upon before implementing the project activities.
- c. Procedures to address potential adverse effects.
- d. Any reporting requirements as phased steps of Section 106 are completed.
- e. An inadvertent discovery protocol specific to the project area.

- f. A protocol to address confidentiality concerns.
- g. Cultural Resource Stewardship Opportunities, if any identified:
 - i. Cultural Resource Stewardship Opportunities are opportunities for responsible stewardship activities that recognize, preserve, protect, enhance, and use cultural resources for the greatest public benefit (FSM 2360.2).
 - ii. The Heritage Professional shall facilitate consultation with the agency official, tribes, SHPO(s), THPO(s) and other parties to inform the design of the project. As consulting parties work with other stakeholders, they shall propose activities to benefit historic properties in the project area. This effort shall focus on enhancement of historic properties and landscapes, development of historic contexts, identifying opportunities for interpretation, traditional cultural property studies, and other alternatives. To encourage value-added outcomes from the consultation process, select activities should be incorporated into the proposed action alternative.

VII. Formalize the Heritage Implementation Plan

- a. Provide consulting parties 30 days to comment on the final draft of the HIP. Comment period will begin upon transmittal of the draft HIP to consulting parties.
- b. The agency official will consider comments prior to the agency's final acceptance of the HIP.
 - i. If consulting parties do not agree with the proposed HIP, the Regional Heritage Program Leader and Regional Forester will review the HIP.
 - 1. In consultation with the Regional Heritage Program Leader and Regional Forester, the agency official will consider modifying the HIP based on concerns raised by consulting parties.
 - 2. The agency official will address in a letter to consulting parties how each concern raised was addressed and demonstrate how the actions outlined in the HIP are the outcomes of consultation.
 - ii. Agency official will sign the final HIP and, taking into consideration confidentiality concerns¹, include it in the NEPA document [Environmental Impact Statement (EIS), Environmental Analysis (EA), or

¹ Confidential information may be used to inform project design and alternatives; however, some sensitive information may need to be withheld from public view.

Categorical Exclusion (CE)] as an appendix.

- iii. Agency Official will send the final, signed copy of the HIP to consulting parties and include a copy in the administrative record.

VIII. Implementation of the HIP

- a. Agency official and Heritage Staff will review the NEPA decision document and HIP as phased project implementation begins.
- b. Activities outlined in the HIP will be implemented before the undertaking is completed.
- c. If the project area changes, the Heritage Professional will notify the Agency Official and consulting parties of the change and how it has affected the HIP.

IX. Annual Reporting

- a. Every fiscal year, Heritage Professionals are responsible for entering into the database of record any undertaking initiated under this PA.
- b. At the end of every fiscal year the WO or Regional Heritage Program Manager will generate an annual report. The annual report will be a list of undertakings initiated and listed as “in progress/open” in the database. The report will include the name of the undertaking, the state(s), and Forest(s) where the undertaking is located. The report will include a narrative and evaluation of the performance of this PA.
- c. A copy of the annual report will be sent to all Forest Supervisors on Forests where the PA was used.
- d. A copy of the annual report will be made available to ACHP, SHPO, THPO, Tribes, or any other consulting party upon request.

X. Inadvertent Effects and Unanticipated Discoveries

- a. There is the potential for encountering previously unrecorded properties or for affecting properties in an unanticipated manner during the course of these projects. Previously unrecorded properties that are encountered during the course of a project shall be documented and protected in the same manner as other eligible properties. If the FS determines that a property has been damaged, the FS shall halt all activities that could result in further damage to the property and shall notify the appropriate SHPO concerning proposed actions to resolve adverse

effects. The SHPO shall respond within 48 hours of notification. The FS shall carry out the agreed-upon actions.

XI. Discovery and Treatment of Human Remains

- a. If human remains, funerary objects, sacred objects, or objects of cultural patrimony are discovered, the provisions set forth in existing MOUs between the FS and tribes will be followed.
- b. If human remains, funerary objects, sacred objects, or objects of cultural patrimony are discovered, and no existing MOUs between the FS and tribes are in place, the provisions of NAGPRA (25 USC 3002(d)) and NAGPRA regulations (43 CFR 10) shall be followed. All work in the immediate vicinity of the discovery shall stop, and the FS shall take all reasonable steps necessary for the protection of the remains and objects.

XII. Dispute Resolution

- a. Disputes raised during the finalization of the HIP will be resolved per VII.b.i..
- b. Excluding objections raised during the finalization of the HIP, should any signatory to this Programmatic Agreement object to stipulations provided herein, the signatories will meet to attempt to resolve the objection. If a signatory determines that such objection cannot be resolved, FS will:
 - i. Forward all documentation relevant to the dispute, including the FS's proposed resolution, to the other signatories. The signatories shall provide FS with their response to the FS's proposed resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, FS shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the signatories and provide them with a copy of this written response. FS will then proceed according to its final decision.
 - ii. If the signatories do not provide their advice regarding the dispute within the thirty (30) day time period, FS may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, FS shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories to the agreement and provide them with a copy of such written response.
- c. FS 's responsibility to carry out all other actions subject to the terms of this agreement that are not the subject of the dispute remain unchanged.

XIII. Amendments

- a. Appendices. Upon written agreement of the Signatory Parties, to be documented in formal correspondence, any appendix to this Agreement may be modified without formal amendment to this Agreement. Modifications shall be distributed to the Signatory Parties and concurring parties and appended to this Agreement.
- b. HIP. Any consulting party involved in the design of the HIP can propose minor technical revisions to the HIP that would correct errors or clarify the intent of stipulations. Such minor technical revisions will go into effect upon written agreement by the agency official in consultation with the Heritage Program Manager. The Forest will notify all consulting parties regarding adopted revisions within thirty (30) days of their adoption.
- c. Body of Agreement. This Agreement may be amended when such an amendment is agreed to in writing by all Signatory Parties. The amendment will be effective on the date a copy signed by all of the Signatory Parties is filed with the ACHP.

XIV. Termination

- a. Any signatory to this agreement may terminate it by providing 90 days notice to the other signatory, provided that the signatory will meet during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, all state-specific FS-SHPO protocols developed under the authority of this agreement will be terminated, and the FS will comply with Section 106 through the process in 36 CFR 800.3 through 800.7, or 36 CFR 800.8(c), or an applicable program alternative under 36 CFR 800.14
- b. This agreement has no expiration date and will be applicable until terminated by any signatory as defined under XIV.a.

Appendix A

Undertakings

To improve the condition of NFS lands, the agency routinely implements large projects² which may impact historic properties through the use of equipment, fire, and chemicals to manage vegetation, improve water quality, and mitigate impacts of natural disasters. In addition to vegetation projects, the USFS authorizes or implements projects that provide public access, management of natural resources, and grazing.

With an emphasis on increasing the scope and scale of projects and associated analyses, the USFS has encountered an increase in the need to phase Section 106. As allowed under 36 CFR 800.4(b)(2), agencies may use a phased process to conduct identification and evaluation efforts, as well as a phased approach to applying the criteria of adverse effect (36 CFR 800.5(a)(3)). These undertakings can include but are not limited to:

- Forest Health/Watershed Improvement (e.g., removing trees via timber sales, timber salvage, hazard tree removal and associated activities)
- Ecocultural Restoration (e.g. enhanced raw materials for medicinal and traditional practices and associated activities)
- Historic Landscape Restoration and Interpretation (e.g. restoring historic properties and their setting and associated activities)
- Planting Trees (e.g., site preparation and planting of seedlings, mechanical or by hand and associated activities)
- Hazardous fuel reduction through mechanical treatments (e.g., thinning of small trees and brush, reduction of ladder fuels, reconfiguration of heavy fuel concentrations and associated activities)
- Range (e.g., grazing, range improvements and associated activities)
- Public land access (e.g., road and trail maintenance, decommissioning, development and associated activities)
- Wildlife (e.g., habitat improvements, brushing and mowing, installation of nest boxes, fences, water features and associated activities)
- Erosion control (e.g., placement of waddles, water bars and associated activities)
- Stream channel restoration (e.g., dredging, culverts, rechanneling, bank stabilization and associated activities)
- Non-native invasive species removal (e.g., weed spraying, cutting, pulling and associated activities)
- Wildfire (e.g., fighting fire and associated activities)
- Post-disaster Recovery Efforts (e.g., road reconstruction, timber salvage, facility repair and associated activities)
- Facility Maintenance (e.g., campgrounds, trail heads, toilets, administrative buildings, bridges and associated activities)
- Special Use Permits (e.g., cabin access, outfitter and guides, ski areas, reservoirs and associated activities)

² The word “project” is used interchangeably with “undertaking” in this document, both terms are meant to describe an undertaking as defined in 36 CFR 800.16(y).

Appendix B
Heritage Implementation Plan (HIP) Template

Heritage Implementation Plan (HIP) for
[Insert name of undertaking]

Primary Author and Title *[Insert Heritage Professional]*
Agency Official *[Insert Line Officer who is also Responsible Official for the NEPA]*

Date *[Insert date that that HIP is finalized and ready for administrative record]*

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I. Undertaking Description

A. Description of Area of Potential Effects (APE)

B. Describe and show map of the final APE as developed in consultation.

C. Summary of Existing Information in the APE

II. Forest Service Commitments to Meet Comply with Section 106³

A. Cultural Resource Stewardship Opportunities

Describe agreed upon Cultural Resource Stewardship Opportunities, if any.

Description of “Opportunity A”

- Timing of when this will be completed.
- Any reporting on outcome to SHPO, THPO, tribes, or consulting parties.

Description of “Opportunity B”

- Timing of when this will be completed.
- Any reporting on outcome to SHPO, THPO, tribes, or consulting parties.

Etc.

B. Field Survey

- Locations (attach maps of where survey will be conducted if known at time of HIP; if unknown, state this and articulate how you will work internally to ensure field surveys are conducted once locations identified).
- Timing of Field Surveys (i.e., before ground disturbing activities).
- Methods (i.e., pedestrian, drones, aerial, LiDAR, GPR, etc.).
- How to evaluate cultural resources found during survey (i.e., NRHP criteria, or something new developed with consulting parties).
- List agreed upon site protection measures, if any.
- Describe how & when to report findings and determination of effect to SHPO, THPO, and consulting parties.

³ NOTE: If consulting parties already have protocols in place, informally or in a formal Programmatic Agreement, they may insert (in whole or in part) those protocols into the HIP and attach the HIP to the NEPA document. Signature of Agency Official on final HIP is still required.

- Review time-lines for inventory reports (e.g., 30-days, 10-days, no review times needed if nothing found, etc.) Can be negotiated by parties.
- Protocols in the PA under stipulations VII. Inadvertent Effects and Unanticipated Discoveries and VIII. Discovery and Treatment of Human Remains will be followed unless consulting parties include different protocols in the HIP.

III. List of Parties who consulted on the Development of this Heritage Implementation Plan.

DRAFT

Signature (Agency Official),
Date

Appendix C
Invitation Letter Templates

A. Invitation to Consult Letter Template for Tribe

Subject: Request to Participate

Dear Chairman XXXXX:

The U.S. Forest Service (FS) would like to invite you to participate in the development of the XXXXX Project under the provisions of the National Phasing Programmatic Agreement. As a landscape-scale project, the purpose of the project is to XXXXXXXX.

[We do not have a proposed action for this project yet, which is anticipated in XX.] Enclosed you will find a map and a brief cultural resource overview of the potential analysis area.

We anticipate the proposed action will be released to the public *[for comment]* in XXX. You are receiving this information before it is distributed to the public. The FS is committed to government-to-government consultation on projects that could have an impact on federally recognized Indian Tribes. Your insights and knowledge would be helpful in the development stage of the project before National Environment Policy Act (NEPA) notification process begins. Therefore, under NEPA and the National Historic Preservation Act (NHPA), the FS invites you to engage and consult prior to public notification *[and the formal public comment period]* for the project. Tribes will have the opportunity to submit comments throughout this process, in addition to the opportunity for consultation.

Please let us know whether you are interested within 30 days of receiving this letter. You can respond by letter, email, or phone. Please address hardcopy replies to the *[Line Officer]* at XXXXXXX. Please write "XXXX" in the subject line. You can also contact any of the Heritage Program Managers or Tribal Relations Coordinators.

We would be very interested in working with you, or your staff, to help us craft the proposed action in the next few months.

Sincerely,

[Line Officer]

Enclosures (hardcopy)

CC: *[THPOS, Environmental Coordinators, etc.]*

B. Invitation to Consult Letter Template for SHPOs and other interested consulting parties

Subject: Request to Participate

Dear XXXXX:

The U.S. Forest Service (FS) would like to invite you to participate in the development of the XXXXX Project. As a landscape-scale project, the purpose of the project is to XXXXXXXX.

(We do not have a proposed action for this project yet, which is anticipated in XX.) Enclosed you will find a map and a brief cultural resource overview of the potential analysis area.

We anticipate the proposed action will be released to the public [*for comment*] in XXXX. You are receiving this information before it is distributed to the public. Your insights and knowledge would be helpful in the development stage of the project before National Environment Policy Act (NEPA) notification process begins. Therefore, under NEPA and the National Historic Preservation Act (NHPA), the FS invites you to engage and consult prior to public notification [*and the formal public comment period*] for the project.

Please respond within 30 days of receiving this letter. You can respond by letter, email, or phone. Please address hardcopy replies to the [*Line Officers*] at XXXXXXXX. Please write “XXXX” in the subject line. You can also contact the Heritage Program Manager, [*Name, Contact Information*].

We would be very interested in working with you, or your staff, to help us craft the proposed action in the next few months.

Sincerely,

[Line Officer]

Enclosures (hardcopy)

CC: