

## **Advisory Council on Historic Preservation Prototype Programmatic Agreement Guidance**

### **Introduction**

Prototype Programmatic Agreements (prototype agreements) are a type of program alternative that the Advisory Council on Historic Preservation (ACHP) can designate to assist federal agencies in their efforts to comply with the requirements of Section 106 of the National Historic Preservation Act (16 U.S.C. § 470f) and its implementing regulations (36 CFR Part 800). Prototype agreements may be used for the same type of program or undertaking in more than one case or area, and typically establish efficiencies and protocols for implementing these undertakings. This guidance applies to prototype agreements designated by the ACHP as a federal agency program alternative under the Section 106 regulations.

Section 800.14(b)(4) of the Section 106 regulations establishes the process by which the ACHP can designate a prototype agreement for use by a federal agency. For purposes of this guidance, a “prototype agreement” means any agreement designated by the ACHP as such, including the ACHP letter that formalizes the designation and authorizes departures from the specifically approved text of the agreement. The term “subsequent agreements” refers to those agreements that are later developed and executed by federal agencies and State Historic Preservation Officers (SHPOs)/Tribal Historic Preservation Officers (THPOs)<sup>1</sup> in accordance with a prototype agreement.

The following list of “Frequently Asked Questions” provides additional information about the process for developing prototype agreements, the involvement of interested parties, and other important components to be considered when exploring the use of a prototype agreement as a program alternative.

### **Questions & Answers**

1- How are prototype agreements different from other program alternatives?

While a prototype agreement and a standard Programmatic Agreement (PA) both govern the implementation of a particular program or address adverse effects on complex, multiple undertakings and share a similar format, once a prototype agreement is designated by the ACHP agencies may proceed to develop and execute it with the relevant SHPO/THPO without involving the ACHP further. Agencies can use the prototype agreement exactly as approved for subsequent agreements or modify the language to meet their particular needs so long as they stay within the broad parameters established by the ACHP for the prototype agreement. Unlike the execution of a standard PA, the designation of a prototype agreement does not immediately satisfy Section 106 for a particular undertaking; rather, the designated prototype agreement guides the development of subsequent agreements that a federal agency executes and implements.

2- What are the benefits of using a prototype agreement?

The benefits of a prototype agreement include expediting the review of the majority of routine activities with limited potential to affect historic properties; providing predictability in the treatment of historic properties through the use of a template agreement that can be readily executed to evidence Section 106

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<sup>1</sup> When a Section 106 agreement covers undertakings occurring on or affecting tribal lands, the Section 106 regulations give the same rights to execute such an agreement to a tribe that has not assumed SHPO functions under Section 101(d)(2) of the National Historic Preservation Act as that given to a “THPO” that has assumed those functions. See 36 CFR §§ 800.2(c)(2)(i)(B) and 800.14(b)(4). Thus, reference in the regulations and this guidance to the execution of agreements by a “THPO” following a prototype agreement imply the same right to execute for non-101(d)(2) tribes when the agreement covers undertakings occurring on or affecting their tribal lands.

compliance; and allowing the federal agency and SHPO/THPO to execute such agreements without ACHP involvement.

A prototype agreement can provide for predictability in costs, time, and outcomes, as well as the flexibility to address specific situations and conditions. Once a prototype agreement has been designated by the ACHP, the consultation to develop subsequent agreements may be more focused on the application of the program within a geographical location or specific condition. The agency can, after appropriate consultation with stakeholders, include language in the subsequent agreement that addresses similar actions in multiple geographical areas. Consistency within a federal agency's program can also be enhanced by using a prototype agreement. When a similar action is interpreted in separate, independent PAs in multiple jurisdictions, the processes to develop, and the outcomes of each, will likely vary significantly. Alternatively, the use of a prototype can provide a template that provides for greater consistency throughout the cultural resource management program of the agency and can foster common expectations in costs, time, and outcome.

The use of a prototype agreement is voluntary and only becomes binding on an agency when the agency develops and executes a subsequent agreement with the relevant SHPO/THPO. Individual agency offices, units, or installations may elect to utilize the prototype to develop and execute their own subsequent agreement. A prototype agreement can be used nationally, regionally, or statewide, and can streamline and clarify the process for developing subsequent agreements, thus providing significant savings in staff time and funding for programs.

3- What types of undertakings are best suited for a prototype agreement?

Multiple undertakings that are similar and repetitive actions, potentially with similar, anticipated effects to historic properties, are most suitable for this program alternative.

4- Who can request a prototype agreement?

A federal agency head or the lead agency official can request the ACHP to designate a prototype agreement. The ACHP may also designate a prototype agreement on its own initiative. This initial consultation is integral to the success of the development and implementation of this program alternative.

5- What should the federal agency do prior to requesting a prototype agreement?

The federal agency should first discuss the use of this program alternative with the appropriate ACHP staff in order to fully examine the range of program alternatives that might be available for the agency's program or series of undertakings. It may be that a prototype agreement is not the appropriate tool for the undertakings under consideration. Once an agency has determined, in consultation with the ACHP, that a prototype agreement would fit its needs, a discussion between the agency official responsible for developing the agreement and potential agency users should occur. This early planning exercise is essential to fully examine the utility of the prototype and how the undertaking will be served by this program alternative.

6- What are the federal agency's responsibilities in the prototype agreement process?

Although the regulations do not specify the role for federal agencies in the prototype agreement process, agency staff should meet with ACHP staff to discuss the needs of the agency before formally requesting the development of a prototype agreement. Generally, developing a prototype agreement will mirror the process for developing a PA for complex or multiple undertakings. If the ACHP moves forward on the agency's request, the ACHP will ask the agency to arrange for consultation and public involvement appropriate to the subject matter and scope of the proposed prototype agreement. The requesting agency is expected to take the lead in drafting the prototype agreement, working with the ACHP and consulting

with stakeholders on the agreement content. Stakeholders might include the National Conference of State Historic Preservation Officers (NCSHPO), the National Association of Tribal Historic Preservation Officers (NATHPO), SHPOs/THPOs, Indian tribes, and Native Hawaiian organizations (NHOs). The federal agency is also encouraged to seek input from within their agency, especially agency staff members who work on projects to be covered by the prototype agreement.

7- What are the ACHP's responsibilities in the prototype agreement process?

While the federal agency leads the development of the draft prototype agreement, including all necessary consultation and public involvement, the ACHP is available to provide guidance and technical assistance during the process. Once the draft prototype agreement has been developed, the ACHP may designate it as a prototype agreement. In the letter designating the prototype, the ACHP explains how the agency is authorized to depart from the specifically approved text of the agreement while still being able to use such a changed agreement as a designated prototype agreement. The federal agency may then develop and execute subsequent agreements with appropriate SHPOs/THPOs, Indian tribes, and NHOs, and other stakeholders, and those agreements shall become final without the need for ACHP participation in consultation or signature.

8- How are SHPOs and THPOs involved in the prototype agreement process?

After requesting a prototype agreement, the federal agency should consult with NCSHPO and individual THPOs that may have an interest in the effects of the subject undertakings or program on historic properties. The agency should also consult with NATHPO, if appropriate, to seek their advice on the consultation process. Initial consultation with NCSHPO, NATHPO, and the ACHP should assist the agency in identifying individual SHPOs and THPOs, Indian tribes, and NHOs whose views and input should be sought while developing the prototype agreement and determining the document's content and scope. The ACHP may assist the federal agency in coordinating consultation with individual SHPOs, THPOs, Indian tribes, and NHOs through such methods as teleconferences and broadcast electronic mail messages. Once a prototype agreement has been designated for use by the ACHP, the federal agency may develop and execute subsequent agreements with appropriate SHPOs/THPOs, Indian tribes, and NHOs, and other stakeholders, and the agreement shall become final without the need for ACHP participation in consultation or ACHP signature.

9- How are Indian tribes and NHOs involved in the prototype agreement process?

Indian tribes and NHOs have a role when a proposed prototype agreement may affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or NHO, regardless of their location. In these occasions, the federal agency must consult with the affected Indian tribes and NHOs, and consider their views in the development of the prototype agreement.

10- How are other stakeholders involved in the prototype agreement process?

When a federal agency requests the use of a prototype agreement, the federal agency should identify other interested stakeholders who will be included in the consultation process for the development of the prototype agreement, and identify strategies to conduct outreach to these additional stakeholders. For example, agencies should consider seeking the views of the National Trust for Historic Preservation (NTHP), local governments, applicants, other preservation groups, the National Park Service (for instance, when the subject undertakings or program may affect National Historic Landmarks), and related industries and professional organizations that would have an interest in the effects to historic properties caused by the undertakings or programs covered by the prototype agreement. The federal agency should identify strategies for effective consultation and public participation to seek stakeholders' views, including conducting teleconferences, hosting public meetings, and broadcasting electronic messages.

## 11- What are the stages involved in the development and use of the prototype agreement?

The general stages involved in the development and use of the prototype agreement are the following:

- (1) Initiate a discussion with the ACHP about the program or series of undertakings that would be subject to the prototype agreement. Through this initial discussion, the federal agency and the ACHP can review the benefits and challenges to the proposal. The federal agency should then formally notify the ACHP, NCSHPO or relevant SHPO(s), THPO(s), Indian tribes and/or NHOs that might attach religious and cultural significance to historic properties that may be affected by the agency's program or series of undertakings. The agency should also identify and notify other stakeholders that should be brought early into the process, such as the NTHP, local governments, applicants, community and industry organizations.
- (2) Establish a plan for consultation with the ACHP, NCSHPO or relevant SHPO(s), NATHPO, THPOs, individual Indian tribes, and NHOs, if the prototype agreement will be used in Hawaii. The length of time this consultation process may take will vary, and will depend on the nature of the program or series of undertakings, the potential effects to historic properties, and the level of public interest and controversy.
- (3) Draft the prototype agreement in consultation with the consulting parties. The draft prototype agreement should include such administrative provisions as reporting, duration, discoveries, amendments, and termination.
- (4) Finalize the draft prototype agreement and submit the final version to the ACHP for approval. The ACHP, upon approving the prototype agreement, will designate it as a prototype agreement, and transmit the designated prototype agreement to the agency and consulting parties with an explanation about how agencies are authorized to depart from the specifically approved text of the agreement while still being able to use such an altered agreement as a designated prototype agreement. Subsequent agreements following the prototype agreement need to be executed by the federal agency and relevant SHPO/THPO to go into effect.
- (5) Implement the prototype agreement at the state or regional level through the development and implementation of subsequent PAs. The federal agency coordinating the development of the prototype agreement should be prepared to provide guidance and technical assistance to the individual agency units, offices, parks, forests, installations, or other divisions to implement the PA.
- (6) File subsequent agreements following the prototype agreement with the ACHP.

## 12- How does the federal agency utilize a prototype agreement once designated by the ACHP?

Once a prototype agreement is designated by the ACHP, the federal agency may develop and execute subsequent agreements following the prototype without ACHP participation in the consultation or signature on the final agreements. The agency must consult with the relevant SHPOs, THPOs, Indian tribes, NHOs, and other interested parties in developing these subsequent agreements. The agency must also ensure subsequent agreements conform to the terms of the designated prototype and must file all executed subsequent agreements with the ACHP.

## 13- How are consulting parties and the public involved in the development of subsequent agreements?

To implement the prototype agreement, the federal agency will develop subsequent agreements that follow the prototype agreement. While the ACHP does not need to be formally involved in the consultation, and does not need to be a signatory to these agreements, other consulting parties, including

the relevant SHPOs, THPOs, Indian tribes, NHOs, local governments, applicants, and other interested parties, must be notified and consulted as they would in the standard process to develop a PA under 36 CFR § 800.14(b). The agency should also plan for public participation as appropriate depending on the nature and complexity of the undertaking(s) covered by the subsequent agreement, the effects to historic properties, confidentiality concerns, and the relationship of the federal involvement to the undertaking(s).

14- Once a prototype agreement is designated, does the ACHP monitor its implementation?

Yes. Once a prototype agreement is designated, the ACHP monitors its implementation by continuing to provide technical assistance as needed to the federal agency during the implementation stages, continuing communication with SHPOs, THPOs, and other stakeholders, reviewing progress reports and tracking successes and challenges in implementation and use, and participating in dispute resolution under the subsequent agreements as needed. For that reason, it is essential that the agency build appropriate mechanisms into the prototype agreement to periodically report on its implementation to the ACHP. The ACHP will post all prototype agreements and related information on its publicly accessible Web site.

15- Can the ACHP amend or remove a prototype agreement from designation status?

Yes. The ACHP can amend a prototype agreement after consultation with the relevant federal agency, NCSHPO, and relevant THPOs, Indian tribes, or NHOs. The ACHP will notify the federal agency of any such amendments to the designated prototype agreement and recommend the agency notify all stakeholders and consulting parties of the amended agreement.

If the ACHP determines that the terms of the prototype agreement cannot or are not being carried out, or there is another compelling reason to do so, it can revoke the designation status of a prototype agreement. The ACHP will not revoke the designation of the prototype agreement without consultation with the relevant agency and NCSHPO or the relevant SHPO(s) and THPO(s) to seek resolution to the issue.

Should the prototype agreement be amended or revoked, those subsequent agreements already executed at the time of the amendment or revocation will remain in effect and unchanged. They may be amended or terminated on their own terms. Where an agency is interested in developing and executing an agreement that follows the text of an already revoked prototype agreement, it must involve the ACHP and comply with the standard process as outlined in 36 CFR § 800.14(b)(2) or (3), as applicable.

**Prototype Agreement Process**

<b>Requirements</b>	<b>ACHP Recommendations</b>
<i>Early Planning</i>	<p><i>Early Planning</i></p> <p>Agency should assess its program needs</p> <ul style="list-style-type: none"> <li>• available funding for program implementation</li> <li>• nature of program</li> <li>• identify participants/stakeholders</li> <li>• environmental coordination strategy</li> <li>• structure of the program</li> <li>• desired duration of the agreement</li> <li>• desired efficiencies</li> <li>• value of prototype agreement to preservation partners and public</li> </ul>

	<p>Agency should meet with the ACHP staff to determine if a prototype agreement is the appropriate program alternative to utilize considering the nature of the agency undertaking or program.</p> <p>In coordination with agency cultural resources staff members and organizational leadership, agency should determine the responsible staff members, tasks, and schedule.</p>
<p><u>Consultation</u></p> <p>Agency notifies NCSHPO, and relevant SHPOs, THPOs, Indian tribes, NHOs, and initiates consultation.</p> <p>Agency identifies other consulting parties, including intertribal organizations, preservation partners, local governments, and other interested parties. They may be engaged through:</p> <ul style="list-style-type: none"> <li>• teleconferences.</li> <li>• consultation meetings.</li> </ul> <p>Agency consults to create a draft prototype agreement. Agency conducts public outreach.</p>	<p><u>Consultation</u></p> <p>Agency should develop a consultation and public outreach strategy, in coordination with the ACHP and NCSHPO and NATHPO, as appropriate, to determine the approach and scope of consultation and public outreach as appropriate to the project or program.</p> <p>Agency should first develop a preliminary draft outline of the prototype agreement through consultation with the consulting parties in order to try to reach agreement on the overall desired direction of the agreement before delving into detailed drafting.</p> <p>Agency should provide opportunities for public review and comment on the draft documents.</p>
<p><u>Designation</u></p> <p>The ACHP designates prototype agreement.</p> <ul style="list-style-type: none"> <li>• letter from the ACHP to agency, including purpose of designation and an explanation of how agencies are authorized to depart from the specifically approved text of the agreement while still being able to use such a changed agreement as a designated prototype agreement.</li> </ul>	<p><u>Designation</u></p> <p>Agency should coordinate with the ACHP to determine the appropriate scope of the outreach efforts. Agency conducts outreach to consulting parties and the public:</p> <ul style="list-style-type: none"> <li>• publicize designation</li> <li>• notify internal groups/organization</li> <li>• notify consulting parties</li> </ul> <p>ACHP may also notify SHPOs; THPOs; national, state, and local preservation partners; Indian tribes; and NHOs of the designation, as appropriate.</p>
<p><u>Implementation</u></p> <p>Agency develops subsequent agreements using the prototype agreement.</p> <p>Agency executes the subsequent agreements with the relevant SHPO/THPO.</p> <p>Agency files executed, subsequent agreements with the ACHP.</p>	<p><u>Implementation</u></p> <p>Agency should provide adequate notice to all program participants and provide internal guidance on the use of the prototype agreement and the development of the subsequent agreements.</p> <p>The ACHP may provide assistance in development of subsequent agreements to agency participants and/or the SHPO/THPO, Indian tribes, NHOs, and other consulting</p>

	<p>parties, if needed.</p> <p>Agency and the ACHP monitor the implementation and use of the prototype agreement.</p>
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