



Forest Service  
U.S. DEPARTMENT OF AGRICULTURE

Headquarters

# Monitoring Period Report: Year 1 Forest Service National Programmatic Agreement Regarding Phasing of Large-Scale Multi-Year Undertakings (Phasing NPA)

Report of comments received during the first monitoring period (12/6/2021 – 12/6/2022), pursuant to  
Section XI.B.

**March 2023**

## Introduction

The Forest Service’s (FS) “National Programmatic Agreement Regarding Phasing of Large-scale Multi-year Projects” (Phasing NPA) was developed to better sequence compliance with Section 106 of the National Historic Preservation Act for large-scale multi-year Projects. On December 6<sup>th</sup>, 2021 the Advisory Council on Historic Preservation (ACHP), the National Conference of State Historic Preservation Officers (NCSHPO), and the Forest Service (Signatories) executed the Phasing NPA with a 2-year monitoring period (Section XI.B). Throughout the first two calendar years of the Phasing NPA (the monitoring period), the Forest Service is required to seek input and accept comments on any aspect of the Phasing NPA or its use from Signatories, State Historic Preservation Officers (SHPOs)/Tribal Historic Preservation Officers (THPOs), Tribes, consulting parties, and the public regarding the Phasing NPA. At the end of each year of the monitoring period, the FS will synthesize comments and responses and make them publicly available. An overview of the undertakings reviewed under the Phasing NPA will be provided in an upcoming annual report.

## Summary

During the first year (12/6/2021 – 12/6/2022), the FS heard from 8 parties: FS staff; ACHP; one SHPO (MT); four Tribes; and one organization. One Tribe requested a meeting and the other Tribe followed up on a previous exchange without providing comments. Of these parties, the ACHP and MT SHPO are the only parties actively participating in the implementation of the Phasing NPA and associated development of Heritage Implementation Plans (HIPs).

Based on review of the comments received in the first year of monitoring, the FS learned that there may be a need for more clarification and guidance on the following topics: Cultural Resource Stewardship Opportunities (CRSOs); timing of when FS units should initiate consultation under the Phasing NPA; how to navigate a Tribal Signatory process; agendas for kick-off meetings; and how to share HIP timeline/milestones with consulting parties. The FS also learned of improvements the FS Heritage Program can make to its HIP template.

The FS is planning to propose minor technical amendments on the following topics: allow activities at 36 CFR § 220.6(d) to qualify for use of the NPA as long as such activities have a corresponding project or case file and decision document developed under the National Environmental Policy Act (NEPA) (Section IV.C.5.); allow Forest Service to accept non-written communications from HIP consulting parties who respond to initial HIP invitations (Section V.C); and clarify the Tribal Signatory process to identify which agency official may accept a Tribal Signatory page (Section V.D). The following pages include more information on the comments received and the FS consideration of and responses to comments.



## Comments and responses

Initiation of consultation under Phasing NPA	
Comment Summary	FS Response
<p>Scope: The NPA does not address transfer of land. When property is being transferred from the USFS to another entity, the USFS should complete Section 106 before land transfers are finalized. The presence of cultural resources, however, should not hinder land transfers to descendant Indigenous communities.</p>	<p>Land transfer out of federal ownership requires Section 106. There is nothing in the Phasing NPA that prohibit a land transfer from being reviewed under the Phasing NPA, as long as the undertaking doesn't meet the disqualifying criteria.</p>
<p>Scope: In the disqualifying criteria section, the NPA cites activities listed under 36 CFR § 220.6(d) because this regulation does not require these actions that are categorically excluded under NEPA from the requirement for a project case file and decision memo. The FS can always elect to develop a project case file and decision memo even if they are not required to under this specific regulation. Therefore, this sentence may be edited to clarify that activities listed under 36 CFR § 220.6(d) may qualify as long as a NEPA decision is developed, while preserving the intent to disqualify projects that do not have a NEPA decision document.</p>	<p>After reviewing the types of activities that were disqualified by this citation, including projects with the specific goal of historic preservation and cultural resources management, the FS plans to propose this change to other Signatories as part of an amendment.</p>
<p>Timing: Consultation with Tribes should be initiated as early in project development and planning as possible to ensure early consultation and comments before the agency dedicates substantial time and resources to developing and designing a project.</p>	<p>Encouraging earlier consultation is one of the main intents of the Phasing NPA. Throughout to first year of monitoring. ACHP and FS have been tracking on projects that will serve as examples of how this is done well, and FS plans to highlight these as best practice examples as well as provide other guidance and information on how to engage early.</p>
<p>Timing: The timing of initiating consultation relative to the environmental review process appeared inconsistent and some FS staff also sought advice on when it may be too late to apply the Phasing NPA. To create more consistency and to assist FS units determine when it is appropriate to begin consultation</p>	<p>FS is considering ways to communicate that because project development is often an iterative process that can include redesign as well as new environmental analyses, including new analyses of cultural resources, there is no one answer to how to determine when it is too late to begin</p>



under the Phasing NPA, the FS should clarify this topic in its supporting informational materials.

consultation. The FS has not determined yet which types of materials would serve best to communicate on this topic and will consider multiple lines of data – e.g. examples, sample timelines, etc.

## Consultation process to develop HIP

Invitations: Not all HIP consulting parties who participated in HIP consultation meetings had accepted the FS invitation through a written communication, as required by the Phasing NPA. FS should consider changing this in the NPA, to avoid confusion about HIP consulting party status and to simplify the process for parties to accept invitations.

The FS will propose an amendment to signatories to clarify that other forms of communication can be accepted as satisfying this notification, and the FS will document how HIP consulting parties accepted the invitation to consult under the Phasing NPA.

Invitations: There was a lapse of time between the moment of receiving the FS’s invitation to consult under the Phasing NPA and kick-off meeting. When extensive time passes, additional time is required to refamiliarize oneself with the details of the undertaking. Perhaps this situation could be avoided by imposing a timeline on the forest service between NPA stipulations V.B (notification and invitation of HIP consulting parties) and stipulation VI.A (first meeting among HIP consulting parties), 90 days?

After considering imposing a timeline of 90 days, the FS determined that imposing such a timeline may not be advisable for all situations where the Phasing NPA might be applied.

Certain kick-off meetings were more effective than others in ensuring all HIP consulting parties were informed about the proposed undertaking, their role, and what to expect in the Phasing NPA process. The FS should provide a framework agenda for units to consider following in kick-off meetings.

The FS is considering developing a suggested framework agenda for units to consider following in all kick-off meetings. However, it would only be a suggestion and not be mandated.

HIP consultation meetings: what frequencies are reasonable to the scope and scale of a project? This is too vague and allows too much room for failed consultation.

Through consultation and upon several consulting parties’ request, it was decided it was preferable to leave it flexible to allow local conditions to determine frequency.

Minimum review periods: 30-day reviews are not enough time for Tribes to review such important documents.

The Phasing NPA does not prohibit FS units from extending review periods on a case-by-case basis.



<p>Public notice: The Forests’ public notice of scoping for the project that did not state whether the meeting supports Section 106 or an intent to use the NPA and HIP; it is unknown if this was said in-person.</p>	<p>Public notices for scoping and associated meetings are not always used to satisfy Section 106 purposes, and FS units can elect to use separate notices and meetings to satisfy the requirement for public engagement and consultation.</p>
<p>The Forest did not send the HIP development timeline in a timely manner.</p>	<p>The timeline for HIP development should have been circulated after the kickoff meeting. The FS is considering developing more materials on this topic and may develop a suggested milestone template or other materials for Forests to consider using to facilitate the development of such timelines.</p>
<p>The Phasing NPA should state that Tribes be compensated when developing the HIP and/or training.</p>	<p>The FS considers development of the HIP to be Section 106 consultation that normally occurs without compensation. If contractor-like services are being requested, then compensation may be an appropriate option for local FS units to consider.</p>

## HIP Components

<p>APE maps: should be clear, have north arrows, legends, clearly defined geographic boundaries, and detailed topographic features, and mapped on LiDAR if available.</p>	<p>The Phasing NPA includes documentation standards consistent with 36 CFR 800.11 as well as requirements for determining the scope of identification consistent with 36 CFR 800.4.</p>
<p>Scope of identification efforts: subsurface testing methodology should be required; the Phasing NPA needs to better clarify when no field-based strategies are appropriate; predictive models are unsuccessful; pedestrian surveys should be required; survey should not be limited to the highest probability areas; surveys with Tribal Citizens should be conducted to document ancestral trees (also known as culturally modified trees) before mechanical brush clearing for areas that have not been previously cleared; Tribal monitors may be necessary</p>	<p>Consistent with 36 CFR 800.4, the Phasing NPA includes requirements for the FS to determine the scope of identification efforts in consultation with SHPOs, THPOs, Tribes, and other consulting parties. The local FS Heritage Professional uses their professional judgement to advise the Agency Official on determining what identification methods are appropriate.</p>

<p>Consideration of specific resource types: Although it is useful to maintain a list of activities likely to not impact historic sites, the list should account for impacts to trees and vegetation such as ancestral trees or culturally modified trees (CMTs).</p>	<p>Adverse effects to ancestral trees or culturally modified trees would be considered at the local FS unit proposing a project during the Section 106 review process if such resources are considered historic properties (National Register eligible or listed). Being national in scope, the Phasing NPA cannot list the universe of important cultural resources to Tribes, and local units are encouraged to coordinate with Tribes on management of resource important to them as part of the Section 106 process, including project design and consideration of Cultural Resources Stewardship Opportunities (CRSOs), which may include benefits to resources that are not National Register eligible or listed.</p>
<p>Clarification on treating as eligible: “That unevaluated properties should be treated as eligible in accordance with FSM 2363.22” needs clarification.</p>	<p>Forest Service Manual 2363.22 allows the FS to forgo evaluation of properties, as long as they are treated as eligible in terms of assessing and avoiding any adverse effects. While the FSM is publicly available, this could be addressed in an updated FAQ.</p>
<p>Timing of Identification: Completing identification and consultation before beginning Project activities is important.</p>	<p>The Phasing NPA requires that consultation and identification be completed in areas of the project before activities that could impact historic properties begin. Identification, which includes consultation, may be phased for different phases of the project.</p>
<p>Tribal concurrence: The Phasing NPA should require Tribes to concur on the final APE, finding of effects and HIP reporting process.</p>	<p>Tribal concurrence is not required by the regulations when the undertaking does not have the potential to affect historic properties on Tribal lands. However, FS and HIP consulting parties have the option to write the HIP in a manner to require Tribal concurrence on individual inventory reports and effect findings.</p>



<p>Resolution of adverse effects: Mitigation for adverse effects should also include the option for land transfers to Tribes.</p>	<p>The Phasing NPA does not prohibit any options, including land transfer, when resolving adverse effects.</p>
<p>Confidentiality: Tribes should be able to determine what information should be considered confidential, and under what conditions it can be shared.</p>	<p>Per the Phasing NPA "...the Agency Official and FS Heritage Professional shall use best efforts to protect sensitive information from disclosure as requested by HIP consulting parties to the extent permitted by federal law, including Section 304 of NHPA (54 U.S.C. 307103); Section 9 of the Archaeological Resources Protection Act (16 U.S.C. 470hh); Section 8106 of the Food, Conservation, and Energy Act of 2008 (25 U.S.C. 3056); and Section 552(b) of the Freedom of Information Act (5 U.S.C. 552)."</p>
<p>Emergency Situations: This term should be clarified with specificity to ensure cultural resources are not disturbed without Tribal consultation.</p>	<p>The Phasing NPA defers to the definition and process in 36 CFR 800.12, unless another procedure was developed. The HIP, developed by local FS units in consultation may specify when 800.12 and expedited consultation is appropriate, if needed.</p>
<p>Inadvertent discoveries: Preparing a plan for Inadvertent Discovery and Treatment of Human Remains needs to begin with Tribal consultation. Every HIP should have an inadvertent discovery and treatment of human remains plan, as there is always the potential to disturb ancestors.</p>	<p>If Project activities have a likelihood of encountering Native American human remains or funerary objects, the HIP must establish the development of a project-specific Plan of Action prior to implementing the HIP (per 43 CFR § 10.3). A Plan of Action must be completed prior to finalizing the HIP.</p>
<p>SHPO/THPO Roles: The insertion of State Historic Preservation Officers (SHPOs) in positions of authority that are not afforded by Section 106 is compounded by the lack of a corresponding recognition of Tribal Historic Preservation Officers (THPOs) as parallel authorities.</p>	<p>The Phasing NPA, as written, does not alter SHPO roles when reviewing effect findings under the Section 106 process. However, the HIP may be written in such a way that would alter SHPO responsibilities and such decisions would be made in consultation. The same applies when referring to THPOs' responsibilities for undertakings with the potential to affect historic properties on Tribal lands, which also requires that the Tribe become a Signatory to the Phasing NPA.</p>



<p>Tribal Signatory (Section IV.D): The FS should amend the Phasing NPA and, in the interim, develop guidance clarifying how an Agency Official may be designated to accept the Tribal Signatory on behalf of the FS Chief.</p>	<p>The FS plans to propose an amendment to clarify this topic.</p>
<p>General opposition to the Phasing NPA. The FS should be improving training for personnel on, and focusing on enforcing the standards of, Section 106, rather than having developed the NPA.</p>	<p>The FS is working on developing more S106 training opportunities to FS staff. The FS considers the Phasing NPA an important tool to address forest health. It is an optional tool and there is no mandate to use it.</p>
<p>Tribal concern about phasing: In two instances during the monitoring period, the ACHP was made aware of tribal concerns that mostly involved the Phasing NPA’s allowance for the FS to reach a decision on approving the undertaking prior to determining the effects of the undertaking on historic properties. Tribes were concerned that the FS could “approve projects first and then deal with cultural resources later,” seemingly without consultation. While not the intent or purpose of the Phasing NPA, the ACHP take these concerns very seriously and recommends the FS focus on how it might improve the communication of the purpose of the Phasing NPA to Indian tribes as part of the monitoring report. Conversely, the ACHP was pleased to hear that an Indian Tribe also agreed to join the Phasing NPA as a Tribal Signatory which emphasizes the agreement’s intent to foster a broader engagement in the Section 106 consultation process and stewardship of historic properties. The ACHP encourages the FS to seek additional opportunities for the FS to communicate to Indian Tribes on the purpose of the Phasing NPA and continue to espouse its benefits for early involvement in project development.</p>	<p>The FS has been in communication with different Tribes throughout the monitoring period and will continue to communicate with Indian Tribes on the purpose of the Phasing NPA and its benefits for early involvement in project development. The FS will continue to seek and consider comments received from Tribes about the implementation of the Phasing NPA and will continue developing guidance to improve the implementation of the Phasing NPA.</p>
<p>Training materials: The role of SHPO should be elaborated in the training, “Forest Service Introduction to Section 106 of the National Historic Preservation Act”  We appreciate the other resources, particularly the “info sheet and Frequently Asked Questions”, “Flowchart”, and “HIP Sample” that have been added to the Forest Service’s website on the NPA.</p>	<p>The FS will coordinate with the ACHP to review the training and determine if changes are needed.</p>





<p>HIP template: The HIP template was used by often and appeared to be a beneficial foundation for units to start from in their consultation process. However, the “Refining the APE” section in the HIP template usually caused confusion that the FS should address by updating the HIP template.</p>	<p>The FS will consider providing an updated HIP template clarifying the section “Refining the APE.”</p>
<p>CRSOs: FS should consider developing an informational sheet focused only on CRSOs, as both HIP consulting parties and FS staff had many questions and expressed much interested in CRSOs during consultation meetings.</p>	<p>The FS will consider developing an informational sheet or handout focused only on CRSOs.</p>

