

Ex- FORREST SHERMAN
Section 106 Consultation Meeting #3
Washington, DC January 13, 2011

Attendees:

Louise D. Brodnitz, via conference call
ADVISORY COUNCIL ON HISTORIC PRESERVATION

Jean H. Cutler, Director and State Historic Preservation Officer, via VTC
Susan M. Zacher, Historic Structures Section Chief
Douglas C. McLearn, Chief, Archaeology and Protection Division
PENNSYLVANIA HISTORICAL AND MUSEUM COMMISSION

Tuwana Hudson Cummings, Esq.
NAVSEA Office of Counsel (SEA 00L)

Captain Pietras, Program Manager
Glen Clark, Deputy Program Manager
NAVY INACTIVE SHIPS PROGRAM (PMS 333)

Travis N. Gery, Esq., via conference call
KANTROWITZ AND PHILLIPPI, LLC.

Kurt Wagemann, President, via conference call
USS FORREST SHERMAN DD-931 FOUNDATION, INC.

Dr. Ken Strafer, Director
PROJECT ENDURING PRIDE

MINUTES:

Ms. Cummings opened the meeting by asking everyone if they had received a copy of the draft Memorandum of Agreement and reviewed the minutes of the last consultation meeting. She stated that the mitigation measures in the draft MOA were included as submitted from all parties without edit by the Navy for discussion at this meeting. Additionally, it was confirmed that neither NAVSEA, the USS Forrest Sherman Foundation nor the Pennsylvania Historical and Museum Commission have received additional public comments since last meeting.

Ms. Cummings opened the floor for comments on the draft Memorandum of Agreement. Ms. Brodnitz was the first to respond by stating that there are additional clauses that should be incorporated into the MOA. For example a discovery clause and termination clause, as well as other typical clauses. She will provide sample clauses to Ms. Cummings. Ms. Brodnitz also recommended that every stipulation in the MOA needed to have a timeframe and a responsible party clearly established. Captain Pietras commented that the mitigations were not agreed to yet in order for timeframes to be established. Ms. Brodnitz went on to comment that for Stipulation 1 of the MOA the language could be more specific as to what defines whether the financing is

firm or not and asked how will the Navy determine this. Mr. Clark responded by explaining that firm financing is defined in the Navy's Ship Donation Manual that Mr. Gery referred to during the first consultation meeting. Ms. Cummings added that portions of the Ship Donation Manual will be incorporated into the MOA as Appendix A.

Ms. Cutler suggested that each group provide their comments on the draft MOA in its entirety. She re-iterated what Ms. Brodnitz previously stated about the incorporation of the appropriate clauses, as well as making sure that the signature portion for the concurring parties was correct in case there are non-concurring parties. Ms. Cutler stated that for Stipulation 1 of the MOA, the SHPO does not think that 90 days is a reasonable timeframe to establish full firm financing. The SHPO reaffirmed her belief that one year is more reasonable to provide 100% firm financing.

Ms. Zacher referenced sections 2c, d, e and f which is the Navy's proposal to allow existing ship museums to remove material from the ship and the Foundation's proposal to have the Navy remove equipment and material from the ex-FORREST SHERMAN for transfer to the Foundation. Further, Ms. Zacher asked questions such as, "How would the Navy resolve a dispute if two parties were to request the same items from the ship? What is acceptable to the Navy?" Captain Pietras answered by explaining that if there is an established museum that would like a piece of the ship they would use normal Navy procedures to apply for these parts. Ms. Cutler followed this answer with the question: If there are two societies that want the same material, who would qualify to get it? Mr. Clark replied by explaining that it rarely happens that artifacts are requested by two parties and that the established donation process would determine who provides the best proposal to receive the material. Ms. Brodnitz requested a point of clarification on this subject by asking if there were no outside parties that had the facilities to take the artifacts, would the Navy curate those items. Mr. Clark had previously spoken to the Navy Curator about this subject. The Curator does not have a requirement for these items. They have very little money to keep these items. Unless the foundation will fund the removal of these items the Curator cannot take them. Mr. Clark then added that as far as the materials that the Foundation noted for mitigation were concerned, the Navy would allow them to be put on public display at no cost to the government, and that the no cost to the government provision is established by Federal statute. The other items that had been previously removed from the ship approximately thirty years ago will continue to be maintained as they currently are in the Navy Curator's warehouse at Cheatham Annex, Yorktown, VA because no other organization has requested them. The items are typical Curator artifacts removed when ships are decommissioned. Mr. Gery added that he would like to include a provision that the items already being preserved should continue to be preserved since the ship has historical value. Mr. Clark responded by stating that there are currently no plans to dispose of that material. The Navy Curator would continue to maintain them, but Mr. Clark is unsure about the storage timeframe. This question would have to be answered by the Curator. Following Mr. Clark's clarification, Ms. Cutler commented that the Navy currently has museums housing collections with de-accession policies procedures and that the public should be notified if there were to be a change in the current Naval curatorial policies. Ms. Cutler went on to say that this would give anyone an opportunity, in the future, to access the artifacts if de-accession were to occur. Any museum would have to show that they have a permanent home for the artifacts.

The next comment was made by Mr. Gery. He referred to Stipulation 1 of the MOA and stated that 90 days is not a reasonable amount of time for the foundation to provide proof of full firm financing and that two years in Navy's current policy is reasonable. The Foundation would be willing to go with the SHPO's recommendation of one year. Mr. Gery also felt that the MOA needed technical help and felt that time limitations for items to be carried out needed to be established and questioned what the ramifications would be if the mitigations were not met by the responsible parties.

The Navy comments pertaining to the draft MOA were first discussed by Mr. Clark who stated that the Navy does not agree with the one year timeframe, proposed by the USS FORREST SHERMAN Foundation and the SHPO, in Stipulation 1. He went on to add that the ex-FORREST SHERMAN had been available for donation for nine years and within that time the Foundation has not demonstrated their viability to obtain firm financing. Regarding Stipulation 2a, The Navy still has to comply with the law that provides that material donations be at no cost to the government, including drawings. Mr. Clark further explained that material can be available for public display at no cost to the government and that the Foundation must demonstrate that the material would be accessible to the public. Ms. Cutler then asked: Is the internet considered public display? Additionally, Ms. Zacher asked what the law stated and does the Navy get first right of refusal and then they can go elsewhere? To answer both questions Mr. Clark provided that Title 10, United States Code (U.S.C.) Section 2572, and Title 10, U.S.C. Section 7545 provide definitions of eligible recipients for material donations, and that transfers be conducted at no cost to the government. At this point, Ms. Brodnitz recommended that the entire United States Code document be referenced in the MOA and to state the specific codes. She felt that extraction of the text into the MOA may leave room for omissions that may be material to the document. Ms. Brodnitz also recommended establishing a timeframe for the Foundation to prove that they have a permanent facility for display of the documents. Captain Pietras pointed out that the MOA currently says that the Foundation has 90 days to put documents on display, however the Navy is amenable to change the timeframe. Mr. Gery was concerned at this point that the two statutes that Mr. Clark quoted may not specifically state that it has to be no cost to the government an example being for shipping. Mr. Clark then quoted the actual language from 10 U.S.C. Section 2572 and 10 U.S.C. Section 7545 to confirm that material donation statutes require that such transfers be conducted at no cost to the government.

Ms. Zacher inquired about the process of removing artifacts from the ship. Ms. Zacher asked about the ship and its relation to Title 10 U.S.C. Section 2572. Mr. Clark clarified that the documents referenced in Stipulation 2a of the MOA are documents that are not onboard the ship. Ms. Zacher then had a question about parts (d) and (e) included in Stipulation 2 of the MOA. Ms. Cummings stated that Title 10, Section 2572 only applies to documents, historical artifacts, and condemned or obsolete combat material and Title 10, Section 7545 covers captured, condemned, or obsolete ordnance material and combat or shipboard material. Captain Pietras then added that the donee has to pay for removal, storage and transportation of the material to their site and that the same thing would apply to the donation of a ship.

At this point the parties argued about the purpose of the meeting. Mr. Gery stated that they were there because of the historical nature of the ship. Captain Pietras pointed out that removing the proposed parts of the ship is a major undertaking and expense. At this point Mr. Clark steered

the conversation back to donation of the documents. He stated that the Navy has them physically and that the Navy would be happy to donate the documents to the donee to post online. Ms. Brodnitz wanted to clarify a point concerning donation of the documents: Does this process have any provisions that the donee needs to have sufficient facilities to accept the documents? Mr. Clark explained that the law requires that they be available for public display.

Ms. Cutler expressed concern about the regulations regarding mitigation measures and clarified for the participants that mitigation is supposed to be in proportion to the loss of the ship. They have not reached that point yet. She does not feel that the Navy removing the ships numbers and the letters is giving to the public the same as the loss of the ship. At this point, Ms. Brodnitz pointed out that there are no set rules for mitigation. It is based on the agreements of the parties.

At this point, Mr. Clark re-iterates that donation by law is at no cost to the government. It would take an act of Congress to change that and the Navy does not have the authority to waive a statutory requirement. Ms. Cutler continued, stating that the Foundation also has to have the capability to properly preserve the documents in perpetuity. The parties discussed other ways to make the documents accessible to the public.

Mr. Gery stressed that the Foundation is attempting to obtain the entire ship and now we are talking about a ship that has historical value, therefore, the agency has the responsibility to propose mitigations. Ms. Cummings then added that the Navy has proposed mitigations and has asked for suggestions of other mitigations for inclusion in the MOA. Ms. Cummings reiterated that they cannot change the statute to incur costs and that the Navy proposed what they could do for mitigation measures. HAER documentation (originally proposed by Ms. Zacher at a previous consultation meeting) was not the only mitigation that the Navy put forward. Ms. Brodnitz then added that there are a whole range of creative mitigations that can be considered. There is no reason why donation is the only one considered and offered. Captain Pietras then stated that the Navy has the paper documents, can prepare a Historic American Engineering Record, and allow existing ship museums to remove artifacts from the ship. The ship does not disappear forever. Mr. Strafer thinks that the Foundation is looking for a precedent of the physical attributes of the ex-FORREST SHERMAN. He offered that for the ex-Olympia they had to look at the ex- Maine for physical attributes. Therefore, parts of the ship were brought up from the water, salvaged and donated to Pennsylvania and other states. He then suggested that the participants look at how that was done and ask the Navy to put in the RFP that they will negotiate with the dismantling yard for the Foundation to be able to come in to the yard to collect the major components of the hull. Mr. Strafer then suggested that they take a look at how the Radford is being prepared for reefing and noted that it is a major undertaking. Mr. Clark suggested that the Navy would include this as a condition to the scrapping contract for the ship. The contractor would cut out the hull numbers and ship's name so that the Foundation could come and pick them up provided that they have a place to display them.

Ms. Cutler then asked who would fund the cost of the HAERS recordation. Mr. Clark answered that it was a Navy cost since it is a Navy product to provide to the national archives. In reference to Stipulations 2d and 2e, Mr. Clark then repeated that the Navy could write the removal of the hull numbers and ship's name plate into the scrapping contract. The contractor would remove these items as part of the ship dismantling process, then the Foundation would have to transport

the salvaged items to the Foundation's location for public display. For this to happen, the Foundation must put in a material donation application. Ms. Zacher was concerned that the Foundation needs to receive reasonable notice and reasonable time to remove the salvaged items. Captain Pietras then proposed a material donation contract be set-up before the Navy enters into a contract with the scrap yard for dismantling the ex-FORREST SHERMAN. Mr. Clark advised that it typically takes a year to scrap a ship, and if the Foundation did not pick up the material by the time that the scrapping was complete, then the contractor could scrap it as well and proposed that the Navy would give the Foundation at least a 30 day timeframe for this. Mr. Gery stated that he is now lost. Captain Pietras provided clarification on the stipulation that would allow a qualified donee 30 days to pick up the salvaged hull components at the scrap yard.

Mr. Clark continued to address the Navy's comments and moved to Stipulation 2f. He informed the participants that the Navy Curator items were removed when the ship decommissioned 30 years ago and are located in a warehouse in Cheatham Annex, Williamsburg, VA. The inventory list had been provided to the consulting parties at a previous consultation meeting. The Navy Curator has made the material available for loan, for the past 30 years. This process is different from material donation. The Curator has a loan program called the Navy Artifact Loan Program. Mr. Clark went on to say that the Foundation must apply to the Curator for this material, which is not under NAVSEA's control. Ms. Cutler asked if it would be a long term loan. Mr. Clark replied that the loans are long term for the most part and that the Navy still owns the material. An annual report is required to be sent to the Curator reporting on the condition of the loaned material. They have to be maintained to the satisfaction of the Curator and if they are not, the Curator can recall the items. Mr. Clark also offered that there is an artifact loan webpage containing the Curator's policies and application process. Mr. Gery pointed out that Captain Pietras and Mr. Clark are acting on behalf of the Navy, and not just NAVSEA. Ms. Cummings clarified that they are not disputing that. But that there are separate sets of Navy policies that need to be understood by all parties. Captain Pietras then pointed out that the Foundation can apply to the Navy Curator for the ex-FORREST SHERMAN artifacts right now, that it has nothing to do with this MOA. Mr. Gery suggested that it can be a provision of the MOA. Captain Pietras followed up by saying that the Curator's artifacts are separate and must be applied for. Captain Pietras further explained that the material that was identified are not items on the ship. Ms. Brodnitz added that if a non-profit is successful in getting a ship donated, then they would most likely also want the curatorial items. She then posed the question: How do we protect all of the ships and their items in this way? Mr. Clark pointed out that it is up to the requesting party to define what exactly they want. Ms. Cutler then stated that she is inclined to agree with Captain Pietras as far as policies for loans not being related to mitigations. They are available now for the terms of the loan. It can happen at any time. They are not related to the MOA.

Mr. Clark then started to discuss Stipulation 2c. He let the participants know that the Navy does an open house every year for vessels struck from the NVR, generally occurring every April in Philadelphia. They would like to do this with the ex-FORREST SHERMAN this April 2011. Ms. Cutler thought that the idea of an open house seemed chaotic, and asked more about the process. Mr. Clark stated that there is a clear process established for this, and that the ship museums are familiar with the configurations of the ships and know what they are looking for. Normally they are interested in items of similar vintage material to what they already hold in their possession. Mr. Clark then clarified that there is one government escort assigned to every

five ship museum representatives. The ship museums bring their own tools and labor. A DD Form 1149 documents the transfer of the material. Ms. Cutler then asked if the material taken off of the ship are character defining to the type of ship; for example a door, chair or knob, etc. She also asked if photographs are taken before the removal of the items for the HAER report. Further, she asked whether the ship museums take consoles or anything changing the configuration? Mr. Clark then spoke to the state of the ex-FORREST SHERMAN by saying that the ship had been heavily stripped already and was heavily demilitarized and deteriorated. He further explained that a lot of material is already missing from the ship. Mr. Clark went on to add that for the open house policy, the Navy does not take photographs beforehand. Ms. Cutler and Ms. Zacher then discussed what the Navy could do before the open house. Ms. Zacher specifically asked whether the HAER report would be supplemented with the historic photos before the ship is dismantled. Ms. Cutler wanted to know if the Navy has historic photos of the ship from when it was commissioned. Mr. Clark answered that they would have to ask the national archives. At this point, Mr. Strafer pointed out that there are sister ships to the ex-FORREST SHERMAN in existence and that they can be photographed. Ms. Zacher believes it's necessary to have specific photos for a certain time period. Ms. Cutler asked for more time to rethink Stipulation 2b, specifically, how can the ship be accurately documented? She felt that additional time was needed to make the stipulation meaningful. Ms. Cutler further asked what level of the HAER report the Navy planned to prepare? Mr. Clark answered that the Navy is not ready to address the level of the HAER documentation yet and took the opportunity to read the National Park Service Guidelines for Architectural and Engineering Documentation, which states that the goal of HAER documentation is *"to provide architects, engineers, scholars, preservationists, and interested members of the public with comprehensive information on the historical, architectural, technological, or cultural significance of a building, site, structure, object or landscape"*. He then noted that the Keeper's 19 August 2010 decision that ex-FORREST SHERMAN is eligible for listing in the National Register stated in its conclusions that *"the bulk of the Forrest Sherman's historic fabric and features remain more than intact enough for the ship for them to clearly embody the distinctive characteristics of a type, period and method of construction of her class."* He then informed the participants that the Navy has prepared a document to compare the four existing ships in the FORREST SHERMAN class which demonstrate that the ex-FORREST SHERMAN is most highly comparable in configuration to the ex-TURNER JOY. He went on to state that the ex-TURNER JOY is in superior condition and that if the HAER documentation was to be prepared for the class, then it would be more effective for it to be done on the ex-TURNER JOY. Mr. Clark felt that its superior material condition better represents the distinctive characteristics of a type, period, and method of construction for the class. Ms. Cutler thought that it was a good idea. Mr. Clark then added while his office has numerous photos of ex-TURNER JOY, it is waiting on additional photos of the ex-TURNER JOY for a side-by-side comparison of each of the four ships of the class. Ms. Cutler felt that the comparison report sounded interesting and easy to understand to a civilian. Captain Pietras stated that the Navy would get the photos within the next couple of weeks and forward them to everyone.

Further comments on Stipulation 2b were that Ms. Cutler felt that they needed to re-work the language in that section.

Mr. Gery felt that the time limit on putting together the application in Stipulation 1 is a travesty. Captain Pietras then asked what timeline would be good for the Foundation. Mr. Gery responded that they are doing everything that they possibly can to raise funds. It is not possible to raise the funds in 90 days, but one year. Captain Pietras asked if the funds had increased since the ship had been listed as historically eligible and could they make it a two part proposal concerning the financing in Stipulation 1. Captain Pietras then proposed that the Foundation show 25% progress in 90 days, meaning that they have the 50% firm financing and a berth commitment. Then the Navy will give the Foundation one year from day one of the 90 days to raise the remaining funds. Mr. Gery then suggested six months for either 50% financing or a berth commitment since they felt that the 90 days is unrealistic. Ms. Cutler then suggested six months for the Foundation to show 50% firm financing and a berth commitment. Mr. Clark wanted to clarify how much money was considered firm financing? It is his opinion that it would take more than 10 million dollars to restore the ship and establish a museum, based on the experience of other ship museums. What is the monetary goal? Mr. Gery interjected that they had sent the report stating this. In reference to the report sent by the Foundation, Mr. Clark asked if the State of Delaware is going to be the donee, why wasn't the State here? Captain Pietras then stated that he would like to make a proposal of 25% firm financing based on current estimate of 10 million dollars at 3 months and a berth commitment. At 6 months 50% firm financing and berth commitment as well as an updated report on what is needed, then a deadline of 1 year for the remaining 100%. Captain Pietras further stated that failure to meet any one of the time stipulations would permit the Navy to move forward with dismantling the ship. Mr. Clark then pointed out that the Navy has come halfway and the Foundation has not. Ms. Cummings affirmed that allowing the Foundation to show 50% of the financing at 6 months is meeting the Foundation halfway. Ms. Cutler also confirmed that it is the opinion of the SHPO that the Navy's counter-offer is fair and reasonable. Ms. Brodnitz concurred with the SHPO, but pointed out that they had not heard back from the Foundation. Mr. Gery then stated that the Foundation could not agree to this proposal. It is Mr. Strafer's opinion that the 6 month fundraising cycle is a very important factor. Ms. Cutler then added that the Foundation needs to put a fundraising strategy together and agreed with Mr. Strafer that there is a fund-raising cycle that needs to be addressed. There is a discussion on fundraising for urgent issues such as this. Ms. Cummings pointed out that the Navy is only asking that the Foundation show the Navy 25% firm financing in 90 days. Ms. Cutler then asked if it would count for the Foundation to have letters of commitment at the 90 day mark. Mr. Clark answered yes, as long as the letters were substantiated and that the Foundation must show proof of the pledge. Mr. Gery said that they are going to work as quickly as they can, but they feel that they need the 6 months.

Ms. Brodnitz felt that the real issue is that the Navy and the Foundation are at an impasse, and further explained that the Navy must feel that they have done all that they could since this is their undertaking at the conclusion of this consultation.

Further comments were made by Mr. Clark and Mr. Strafer. Regarding substantiation, Mr. Clark offered that this is regular policy and went on to point out that the Navy has not seen any progress from the Foundation in 9 years and that the Navy cannot wait another 364 days to find out that the Foundation has made no progress again. He feels that the Foundation has to show that they have a business plan for others to donate to them. Mr. Strafer went on to add that the effort for raising the funds is based on the Foundation having a berthing site. The Foundation is

in a quandary with no ship and no berthing site. Mr. Gery then stated that the Foundation is trying to get the berthing location in Delaware. The State of Delaware does not care about urgency and that is why they need 6 months.

Captain Pietras shifted the dialogue. He stated that it is the Navy's action to write up a revised MOA with what had been discussed at the meeting based on the consensus of the Navy, the SHPO, and the ACHP. The next step would be to get signatures so they can move forward if everyone agrees with the final draft MOA. Ms. Cummings pointed out that the Foundation was not in agreement to move forward for another draft of the MOA, she then asked Louise to explain the signatory process to the other consulting parties. Ms. Brodnitz explained that only "required signatories" were needed to sign the MOA. (i.e., parties who have responsibilities for compliance pursuant to the MOA.) The other parties can be invited, but it is not mandatory that they sign. At any time the signatories have the right not to sign. Ms. Cummings asked if the most recent proposal that Captain Pietras offered is reasonable to the SHPO. The SHPO agreed that it is reasonable.

Ms. Cutler stated that the MOA should be revised to incorporate the changes that were discussed during the meeting. Ms. Brodnitz advised that the MOA should be written to say any non-profit organization. The Foundation that they are currently speaking with does not have a lock on the offer, so the MOA should be amended to allow any non-profit to satisfy the conditions set-forth in the MOA. Ms. Cummings agreed to incorporate the changes that were discussed at the meeting, along with the new timeframe that Captain Pietras has proposed for stipulation 1 and send it out via email to the participants. Ms. Brodnitz will provide the additional clauses to Ms. Cummings by Monday, January 17, 2011. Ms. Cummings will have a revised MOA by the end of next week. The SHPO concurred with the plan ahead.

Ms. Cummings then asked if anyone had other concerns to address. Captain Pietras stated that the Navy had their take away actions and bid everyone farewell and thanked them for participating. It was agreed upon for the signatories to have their comments back to Ms. Cummings regarding the revised MOA by January, 26, 2011. Mr. Gery will provide his comments by February 1, 2011. If a future meeting is required, it will occur on February 4th at 1pm.