

Strategy for Revision of the Programmatic Agreement Among the Bureau of Land Management, the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers

Introduction:

The Bureau of Land Management (BLM) tribal consultation outreach initiative in 2008-09 generated many important comments and recommendations for improving the BLM's tribal consultation policy and practice. These recommendations from tribes cover the broad scope of the BLM's tribal relationships. This document outlines a strategy for revision of the national Programmatic Agreement (PA) that the BLM maintains with the Advisory Council on Historic Preservation (ACHP) and National Conference of State Historic Preservation Officers (NCSHPO). The format below shows the BLM proposed PA revision strategy together with annotations or comments provided by the ACHP and the NCSHPO, or co-signatories. We welcome your comments on this document, which will be the initial framework for developing a draft revision to the PA. As the ACHP commented, "The results of government-to-government consultations are critical to inform the PA changes that will be made regarding the role of tribes. We view this outline as a starting point for that discussion."

Key Goals of Revision:

- Ensure use of appropriate terminology that is also consistent with current definitions in 36 CFR 800.16.
- Elaborate what the tribal role in the National Historic Preservation Act (NHPA) Section 106 process is, including clarification on: (1) engagement of traditional cultural practitioners; (2) coordination with the National Association of Tribal Historic Preservation Officers (NATHPO); (3) incorporation of tribal consultation actions in undertaking-related documents submitted to states; (4) development of a BLM policy for tribal payments.
 - NCSHPO: Regarding (3), individual SHPOs want to know that tribal consultation has occurred but do not want to know the specifics of consultation. NCSHPO wants to ensure that consultation is occurring early or in the planning stages of an undertaking. Some of the SHPO issues could be handled under measures to ensure accountability.
- Specify alternative compliance procedures for undertakings excepted from the normal alternative process. Address timing of consultation, resource identification, assessment, and affects resolution related to undertaking reviews.
- Incorporate a process for partnering with tribes on streamlining and other activities through individual protocols between a tribe and the BLM State Office(s). The SHPO-BLM protocols authorized by the current PA streamline BLM-SHPO consultation and do not alter the BLM's tribal consultation requirements.
- Clarify the role of consulting parties and expectations for public outreach processes, including integration of the NHPA and National Environmental Policy Act requirements.

- NCSHPO: This relates to our first comment about ensuring that consultation takes place and that it takes place early enough so that comments can be considered in the agency's decision making.
- Integrate the concept of phased Section 106 compliance into the PA to clarify how the BLM meets its compliance obligations for large-scale projects and programs.
 - NCSHPO: SHPOs agree that project specific programmatic agreements may be needed for long and complex projects.
 - ACHP: The ACHP should be invited to participate in consultation whenever the Section 106 regulatory process is proposed for modification.
- Incorporate communication processes for collaborating on Section 110 and other proactive work including coordination with state preservation plans and priorities.
- Clarify the role of the ACHP.
 - ACHP: Include that the BLM must invite the ACHP if requested to do so by a SHPO, tribe, etc.
 - NCSHPO supports the clarification of the ACHP's role.
- Include a process for using the 36 CFR Part 800 procedures as an alternative to the PA.
 - ACHP: Consider establishing criteria for when it is appropriate to proceed under the regulations. Since the ACHP has not been a party to the protocols and therefore is not bound by them, consider how the BLM will proceed when the ACHP participates.
- Review the process for development of BLM policy affecting Section 106 activities and general management, as outlined in Component 5.f of the existing PA, and clarify the role of the BLM Preservation Board.
- Establish PA monitoring milestones and processes, including periodic tribal consultation; clarification of field office certification processes; and standardized annual reports to states and PA signatories.
- Identify the roles of tribes, states, and the ACHP in BLM training programs.
- Develop a schedule for review and revision of state protocols.
 - ACHP: Revisions will bring protocols in line with the revised PA.
 - NCSHPO: Clarify who will do the reviews. Currently, individual BLM staff offices and SHPOs review individual district/field office protocols.
- Increase the efficiency of the annual reporting process by aligning with other reports.
 - ACHP: Consider how reporting could include information on cases in which the ACHP was invited to review protocols to assist signatories in evaluating trends, patterns, and issues.

Section-by-Section List of Proposed Revisions:

Preamble

- ACHP: Consider including paragraph on role of Federally-recognized Indian Tribes.

Basis for Agreement

- Revise this section to be consistent with most recent 36 CFR Part 800 regulations with regard to the definition of adverse effect and consulting parties.
 - ACHP:
 - Include role of Federally-recognized Indian Tribes throughout.
 - Change guidance to advise that archaeological data recovery constitutes an adverse effect.
- Insert new tribal section after the section on the role of states.

Components

1. Applicability

- Revise to maintain operation of the existing PA and state-specific protocols until the revised agreement is fully in effect.
- State that interactions w/tribes will follow the 36 CFR Part 800 regulations or the tribal counterpart, as applicable, and any tribe-specific protocol or agreement, until individual consultation agreements are developed under the revised PA.
 - ACHP: Clarify that protocols only allow for streamlining between the BLM and SHPO and do not afford the same streamlining with tribes or the ACHP.

2. Operation of Preservation Board

- Delete or modify subsection “a.”
- Change the composition of the Board to include four BLM line managers
- Address the tribal listening session comments on the need for mechanisms to get tribal input.
- Expand the section on conferring with outside groups to include tribal governments and associations including the NATHPO, in coordination with the BLM Tribal Coordinator.
 - NCSHPO: Include provisions for inviting NCSHPO, which has requested participation in a portion of BLM Preservation Board meetings.
 - ACHP: Clarify the process by which issues/problems are brought before the BLM Preservation Board.

3. Revision of “Cultural Resource Management” Procedures

- Insert a new component on BLM compliance procedures including phased identification for large-scale projects and programs and the relationship between the PA, protocols, manuals, handbook, and 36 CFR Part 800 regulations.
- Update the list of existing manuals to be consistent with the current numbering system.
- State that the BLM will update the manuals consistent with the provisions in the 36 CFR Part 800 regulations regarding consulting parties and the definition of adverse effect.
- State that the BLM will broaden 8120 beyond cultural resources authorities by reference or inclusion, and incorporate new reburial policy.

- ACHP:
 - Consider establishing consistent method of notifying the public of potential adverse effects and efforts to avoid or mitigate them.
 - Item 'e' conveys key tribal consultation principles and seems out of place in the section headed Revisions of "Cultural Resource Management" Procedures.
 - Where possible, spell out the procedures rather than referring to the manuals.

4. Thresholds for Council Review

- Incorporate a mechanism that allows tribes and consulting parties to request the Council's review.
 - ACHP: Clarify that upon request from any consulting party, the BLM must invite the Council to participate.
- Incorporate a reference to the criteria the Council uses in determining participation.
- Add National Historic Trails to component B2.

5. Cooperation and Enhanced Communication

- Section a.
 - Expand the distribution list for documents to include the NCSHPO.
 - Add a commitment to post documents on the BLM web site.
- Section b.
 - Revise this section into two sections, one for states and a new one for tribes.
 - NCSHPO: Clarify the intent of this revision to allow for the development of separate BLM-state and BLM-tribe protocols.
 - ACHP: Clarify the role of tribal consultation and the ACHP in protocol revisions.
 - Revise to commit BLM state directors to meet within 6 months to initiate discussions with SHPOs and interested tribes on protocol revision and development.
 - NCSHPO: Clarify whether the public will also be involved, the distinction between development as opposed to revision, and the responsibilities of states that have protocols that are relatively new (such as California) and others that are close to revision (Nevada) that appear in conformance with the 2004 regulations.
 - Revise to include consultation with tribes and the public on protocols.
 - NCSHPO: Identify a process for consultation.
- Section c.
 - Address the reporting process to make it more consistent with existing reporting requirements.
 - ACHP: Send annual reports to all signatories and provide them to the public. Make the BLM Washington Office responsible for providing annual reports.

- Section d.
 - Add tribes and public; delete the reference to the Preservation Board.
- Section e.
 - Update the section to keep current agreements with tribes in place.
 - ACHP: Establish the PA as the minimum standard that cannot be reduced/limited in protocols. Clarify that streamlining only applies to SHPO, and not tribes or ACHP consultations.
- Section f.
 - Clarify the role of the BLM Washington Office.
 - NCSHPO: This part of the PA deals with the BLM's interaction with the ACHP. The existing PA requires the BLM to forward relevant information to the ACHP (Component 5(f)) to determine if briefing and consultation are necessary. The NCSHPO requests the same consideration in determining whether or not it would like to comment on major policy initiatives, prospects for regulation, proposals for organizational change, and long range planning and regional planning schedules. Since the execution of the agreement. SHPOs note that many of these policy changes (grazing, leasing) have a major impact on historic properties in western states and SHPOs have not been involved in any of the discussions or policy drafts.
 - ACHP: Clarify procedures that will be followed. Add "issues affecting multiple tribes" to list.

6. Training Program

- Update this section to reflect current needs.
 - ACHP: Consider training opportunities for revised PA and including tribes.
- Address the role of tribes.
 - NCSHPO: SHPOs currently are invited to participate in the training program. This invitation should be made explicit in individual state protocols.

7. Professional Development

- State that names and qualifications will be posted on the web consistent with law and policy.
 - NCSHPO: Ensure that SHPOs have names of those who are qualified and have taken training in the use of a particular state protocol. Updates should be posted on the web site or sent to the SHPO as individuals leave or join a district or field office.
- Revise to align with the BLM Preservation Board's capabilities regarding access to information and influence over personnel decisions.

8. State Office Certification and Decertification

- Section a.
 - Delete because this clause related to initial certification of BLM state offices.
- Section b.
 - Revise to align with the BLM Preservation Board's authority.
 - ACHP: Additional details on process needed, including the role of signatories.
 - Incorporate the role of tribes.
 - NCSHPO: SHPOs currently have a role and wish to maintain the ability to request reviews of particular programs and to participate in those reviews.
 - Revise the distribution of the report consistent with the BLM-NCSHPO task force recommendations.
- Section e.
 - ACHP: Clarify what steps are necessary to regain certification.

9. Accountability Measures

- Section a.
 - Revise so that this process is integrated with other reporting requirements.
 - NCSHPO: There is a need for the BLM to make apparent the reasoning employed in its decision making. For example, SHPOs want to know that consultation has taken place. Many SHPOs would like to know what undertakings are taking place at a given time because we lack staff to become involved in all the planning processes across the state. One of the solutions proposed to this particular NCSHPO task force issue would be to use electronic project tracking databases that start with a needs assessment form. There may be other ways of tracking a project from beginning to end that don't necessarily cause a SHPO to become involved but that provide information. SHPOs also want to know how the BLM has used tribal or other public comments in reaching its decisions on determinations of effect and eligibility.
 - ACHP: Consolidate all information about annual reports in one place; currently in Section 5 and 9.