

BLM Issues Notice of Intent to Revise National Programmatic Agreement

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Insight — December 30, 2009

Yesterday the Bureau of Land Management (“BLM”) announced its intent to revise its 1997 National Programmatic Agreement (“National PA”)¹ with the Advisory Council on Historic Preservation (“ACHP”) and the National Conference of State Historic Preservation Officers (“NCSHPO”).² This alert outlines the contents of the notice and the deadline for filing comments by January 28, 2010.

BLM's National PA authorizes the BLM to follow an alternative process for meeting its responsibilities under section 106 of the National Historic Preservation Act of 1966 (“NHPA”)³ and the Act's implementing regulations.⁴ The development of an alternative process for compliance is permitted under 36 C.F.R. § 800.14, and the terms of a programmatic agreement are intended to be a substitute for the ACHP's section 106 regulations.⁵ Accordingly, BLM's National PA governs the section 106 compliance process for every undertaking over which BLM has authority as the lead agency.

In 1999, 2001, and 2004, the ACHP made several amendments to its section 106 regulations, but these amendments were not reflected in BLM's National PA, as the National PA predated the amendments. Specifically, for the section 106 process, the amended regulations introduced and defined the roles of Indian tribes, defined and recognized the role of a project applicant, and clarified the public participation process.⁶ The BLM executed an addendum to the National PA in February 2009, which tacitly recognized the potential conflict between the ACHP's regulations and the National PA and the need to revise the National PA.⁷

The Notice of Intent formally initiates the public notification process for revising the BLM's National PA. The Notice states that the primary purpose for revising the National PA is to make the section 106 process more efficient and to strengthen the partnership between BLM, the states, and Indian tribes. Accordingly, the BLM seeks comments clarifying the roles of consulting parties and public outreach; developing a schedule for review and revision of state protocol agreements implementing the National PA; providing guidance on when new alternative procedures require ACHP involvement; including a process for using the ACHP's 36 C.F.R. Part 800 procedures as an alternative to the National PA; and integrating the concept of phased section 106 compliance for large-scale projects and programs.⁸

In addition, the BLM, ACHP, its Native American Advisory Group, the National Congress of American Indians and others believe that Indian tribes would benefit from playing a greater role in the National PA. The BLM invited Indian tribes to share their ideas on how the National PA could improve tribal consultation, and the Notice seeks public comment on that same subject.⁹ The BLM also seeks comments on the incorporation of a process to partner with tribes through individual protocol agreements between an Indian tribe and the BLM state office(s).¹⁰

The proposed revisions to BLM's 1997 National PA will mean significant changes in the ways in which BLM currently complies with its section 106 responsibilities. BLM is accepting written comments to help inform the PA revision process until January 28, 2010.

For additional information regarding the proposed revisions to BLM's National PA or for assistance submitting comments, please contact Melissa Meirink at 303-295-8354 or mcmeirink@hollandhart.com.

1. A copy of the 1997 National PA may be accessed [here](#).
2. 74 Fed. Reg. 68,862 (Dec. 29, 2009).
3. 16 U.S.C. §§ 470 *et seq.*
4. 36 C.F.R. Part 800.
5. 36 C.F.R. §§ 800.14(b) and 800.14(b)(2)(iii).
6. See 64 Fed. Reg. 27,044 (May 18, 1999).
7. A copy of the 2009 National PA Addendum may be accessed [here](#).
8. See 74 Fed. Reg. 68,862, 68,863 (Dec. 29, 2009).
9. See *id.*
10. See *id.*

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