Preserving America's Heritage

October 7, 2014

Mr. Juan Palma
Bureau of Land Management
Utah State Office
P.O. Box 45155
Salt Lake City, UT 84145-0155

Ref: Southern Utah Wilderness Alliance et al., v. Burke, No. 2:12cv257 DAK (D. UT 2013)

Dear Mr. Palma:

We understand that the Bureau of Land Management (BLM) will soon file briefs seeking clarification on the merits order in the above-referenced case. We are writing in the hopes that BLM can use that process to obtain clarification on two concerns we have with that merits order. The concerns relate to apparent misunderstandings about the nature of Programmatic Agreements and the "reasonable and good faith" standard for the identification of historic properties under Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, and its implementing regulations at 36 C.F.R. part 800 (Section 106).

By way of general background, the Advisory Council on Historic Preservation (ACHP) is an independent federal agency that promotes the preservation, enhancement, and sustainable use of our nation's diverse historic resources, and advises the President and the Congress on national historic preservation policy. Of more direct relevance to the matter at hand, the ACHP oversees the Section 106 process and is the agency authorized to issue the regulations implementing Section 106 in its entirety. 16 U.S.C. § 470s. Courts therefore accord substantial deference to the ACHP's interpretation of Section 106. See McMillan Park Comm'n v. National Capital Planning Comm'n, 968 F.2d 1283 (D.C. Cir. 1992); Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983); National Center for Preservation Law v. Landrieu, 496 F. Supp. 716 (D.S.C.), aff'd per curiam, 635 F.2d 324 (4th Cir. 1980); National Indian Youth Council v. Andrus, 501 F. Supp. 649 (D.N.M. 1980), aff'd, 664 F.2d 220 (10th Cir. 1981); and National Min. Ass'n v. Slater, 167 F.Supp.2d 265, 280 (D.D.C. 2001).

As stated above, the ACHP has two concerns about the merits order in the above-referenced litigation. First, in the merits order, the court relates how BLM argued that it had fulfilled its Section 106 obligations by complying with its Section 106 National Programmatic Agreement, and then appears to dismiss that argument by stating that:

> [w]hile the NHPA requires the BLM to consult with the Utah SHPO, its consultation with SHPO merely satisfies the procedural requirement of doing such a consultation. A concurrence from the SHPO does not satisfy the other procedural requirements of NHPA. There is nothing in the NHPA or Section 106 that excuses the BLM's failure to comply with the other procedures based on a concurrence from the SHPO.

We are concerned that some may interpret this part of the merits order as holding that Programmatic Agreements only satisfy an agency's Section 106 responsibilities to consult with a State Historic Preservation Officer (SHPO) and that there are other responsibilities that must be met through other means. We want to make it clear that an agency that complies with a properly executed Programmatic Agreement satisfies all of its Section 106 responsibilities for the undertakings within the scope of that agreement, rather than only those responsibilities relating to consultation with the relevant SHPO. See 36 C.F.R. § 800.3(a)(2), and 800.14(b)(2)(iii). In our view, BLM was right to rely on its National Programmatic Agreement – which, in this case, provided for the conclusion of the Section 106 process after SHPO concurrence with a no adverse effect determination – to fully comply with all of its Section 106 responsibilities regarding the route designations in the Richfield Travel Plan.

There are hundreds of Programmatic Agreements in effect at any one time across the country. Agencies correctly rely on compliance with such agreements to completely discharge all of their Section 106 responsibilities for the undertakings within their scope. The ACHP's views are provided here to document our concern that the above cited language by the court may cause agencies to erroneously conclude there are other responsibilities they need to meet separately to fully comply with Section 106 or discourage other agencies from entering into new Programmatic Agreements.

The second matter of concern to the ACHP relates to the interpretation of the Section 106 "reasonable and good faith" standard regarding the identification of historic properties. As written, the merits order could be read to imply that the "reasonable and good faith" standard in the Section 106 regulations mandates a Class III inventory of all designated routes in the Richfield planning area. However, that is not the case. The "reasonable and good faith" standard does not require such an exhaustive or 100 percent survey, particularly in a case like this involving so many acres of land. As stated in the regulations, the identification effort should be conditioned by various factors, including where effects are likely to occur and the likely impact of these effects on listed or eligible historic properties. 36 C.F.R. § 800.4(b)(1). The ACHP is committed to advising agencies on the design of appropriate inventories, as intended by the "reasonable and good faith" standard, rather than imposing unnecessary and inflexible approaches to conducting all inventories in a given region or state.

On a broader note, we believe that Section 106 responsibilities for large-scale undertakings, such as BLM's travel management planning initiatives like the one in Richfield, can be better handled through a Programmatic Agreement specific to such types of initiatives. ACHP's regulations speak to the types of undertakings that might benefit from a programmatic agreement. For instance, route designations would likely have effects to historic properties that are similar and repetitive across particular regions (36 C.F.R. § 800.14(b)(1)(i)) as well as effects on historic properties that cannot be fully determined prior to approval (36 C.F.R. § 800.14(b)(1)(ii). Accordingly, we recognize the benefit of establishing a consistent approach to Section 106 compliance for BLM's public land off-highway travel management program (36 C.F.R. § 800.14(b)(2)) and remain supportive of the BLM's Utah State Office efforts in preparing such a statewide programmatic agreement with over 70 invited consulting parties for travel and transportation management.

The ACHP looks forward to working with BLM's policy makers and cultural resource professionals on these issues. We hope this correspondence helps to clarify our position on these important legal matters. Please feel free to contact me, or our Associate General Counsel Javier Marques, if you have any questions or if you would like to discuss any of these matters further.

Sincerely,

Reid Nelson
Director
Office of Federal Agency Programs