Programmatic Agreements

36 CFR 800.14 (b) Programmatic agreements.

The Council and the agency official may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.
36 CFR 800.14 (b) (1) Use of programmatic agreements.

A programmatic agreement may be used:
(i) similar and repetitive or are multi-State or regional;
(ii) cannot be fully determined prior to approval;
(iii) nonfederal parties are delegated major decision making;
(iv) routine management activities at Federal installations, facilities, or other land management units;
or
(v) other circumstances warrant a departure section 106.
Programmatic Agreement for Mining and Exploration within the Tosawihi Quarries

- Underground mine
- Above ground exploration
- Directional core drilling
- Road construction
- Substation, power line & facilities construction
- Negotiated by BLM and Mining Company
- Without legal review
PA for Mining and Exploration

• Annual Exploration Plan
• Areas of Proposed Surface Disturbance
• Identification
• Evaluation, Effects and Treatment
• Authorization to Proceed

• Also – cultural training, discovery situations, consultation timelines, ongoing tribal consultation, dispute resolution and more.
Issues for Discussion

1) Section 106 vs. Programmatic Agreement

2) Identification, Evaluation, Effects & Treatment

3) What does the Programmatic Agreement Apply To?

4) Tribal Monitors

5) Dispute Resolution and Enforcement
Programmatic Agreements are Bad

- These days everything is phased implementation.
- Agencies used to enforce the law.
- Tie hands before projects are known.
- Used to obtain early procedural commitments.
- Planning and projects proceed before impacts known.
- Hard to undo, redo and enforce.

Programmatic Agreements are Good

- Ongoing assessment.
- Force consultation.
- Develop and obtain information.
- Build relationships.
- Opportunities for dispute resolution.
Identification, Evaluation, Effects & Treatment

- The heart of the Section 106 process.
- Refer out to the Section 106 Regulations.
- Does PA provide enough time?
- Watch out for streamlining.
- Will 10 year old Class III Surveys be used and did those include tribal consultation?
- Newly designated Historic Properties?
- Use of smaller buffer zones.
- Treatment via Excavation?
Identification, Evaluation, Effects & Treatment
What Does the PA Apply To?

• Definition of Project.
• Definition of Areas of Potential Effect

• Entire project or parts?
• Historic properties designated when Record of Decision issued or ongoing?
Tribal Monitors

• Required by Programmatic Agreement?
• Separate contract mining company or cultural resources contractor?
• Contractors or employees?
• Notice and scheduling.
• Meet up times and locations.
• Time sheets and payment for work.
• Safety equipment.
• Use to gather information.
Dispute Resolution and Enforcement

Appendix E: Cultural Resource Avoidance Protocol and Staking
Dispute Resolution and Enforcement
Dispute Resolution and Enforcement

• PA is a contract between BLM and Mining Company.
• PA is only enforceable by BLM.
• ACHP Dispute Resolution can be helpful.
• Negotiate for a stay of project activities during dispute resolution.
• If BLM will not enforce, go to federal court to get compliance with NHPA and Section 106.
• PA can provide a presumption of compliance.
Negotiating and Enforcing Programmatic Agreements

Discussion

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