



February 4, 2021

The Honorable Deb Haaland  
1237 Longworth House Office Building  
Washington, DC 20515

Dear Secretary-designate Haaland:

The American Cultural Resources Association (ACRA) congratulates you on your historic nomination as the 53rd Secretary of the Interior. We are confident that under your leadership, the Department of the Interior will ensure that all Americans benefit from our nation's natural and cultural resources.

We are writing to bring your attention to a Secretarial Order issued in December that imperils our ability to protect historic and cultural resources and urge you to rescind this order once you are confirmed.

ACRA member firms undertake much of the CRM studies and investigations mandated by the National Historic Preservation Act (NHPA) and employ thousands of CRM professionals, including archaeologists, architectural historians, historians, and an increasingly diverse group of other specialists. Using free market business practices, ACRA firms deploy skilled teams to serve clients and communities while fulfilling ethical, professional, and legal commitments to cultural resources and the public. Their work empowers communities with a voice in development and regulatory processes.

In December, former Secretary Bernhardt issued Secretarial Order 3389, Coordinating and Clarifying National Historic Preservation Act Section 106 Reviews. Although the stated intention of this Order is to “coordinate and clarify reviews under Section 106 of the National Historic Preservation Act (NHPA) ... by more fully coordinating the Section 106 process and the review process under the National Environmental Policy Act (NEPA),” ACRA is deeply concerned that the directive will not achieve the desired objectives for the following reasons.

***The Order establishes arbitrary time limits on Section 106 processes.***

Order 3389 requires Department of Interior bureaus and agencies to use the substitution procedures set forth at 36 C.F.R. § 800.8(c) to comply with Section 106, with certain exceptions, for any undertaking for which an Environmental Impact Statement (EIS) is necessary to satisfy the requirements of NEPA.

ACRA is generally supportive of that approach as it can reduce costs and time. However, the requirement that Section 106 compliance for undertakings that rely upon an Environmental Assessment or a Categorical Exclusion to satisfy NEPA need to be completed in 180 days or less – and require approval by an Assistant Secretary if they exceed the timeline by more than three months - will place unnecessary hurdles in the way of the Section 106 process.

Projects subject to NEPA and Sec. 106 reviews vary greatly in complexity; more complex projects generally require more time for the Section 106 consultation process with public stakeholders, especially if they are controversial. Mandating a one-size-fits-all time limit as the Secretary's Order does fails to take into account the unique circumstances of each project.

Furthermore, the requirement that Assistant Secretaries approve activities that exceed the 180-day target by more than three months may create project delays in getting that approval and thereby increase project costs.

***The Order will discourage alternative mitigation.***

Order 3389 recognizes that the preservation of historic properties is not preeminent; that historic properties can be destroyed, provided that the Section 106 process has been followed correctly. Section 106 does not require a "...net preservation benefit or net public benefit." Consequently, the process "...does not serve as an independent authority to require offsite compensatory mitigation."

Directive b. (2) defines offsite compensatory mitigation as "...a project proponent's activities, monetary payments, or in-kind contributions to conduct offsite actions that are intended to offset adverse impacts or effects of a proposed action onsite." In common parlance, this type of mitigation is referred to as "alternative mitigation." Because off-site compensatory mitigation is not explicitly required under the NHPA, the Order discourages its use, even though 36 C.F.R. §800 distinguishes between alternatives and mitigation measures. The Order disavows such measures that do not directly lessen adverse effects of an undertaking on historic properties.

However, offsite mitigation or other forms of alternative mitigation are perfectly acceptable so long as the State Historic Preservation Officer or Tribal Historic Preservation Officer, the Advisory Council on Historic Preservation, and the Bureau or Agency agree. There is nothing in the NHPA that requires mitigation to be on-site; in fact, off-site mitigation can often reduce the cost and time required for mitigation and, given budgetary constraints and depending upon the project and historic property, agencies are increasingly considering alternative mitigation measures.

By disavowing such measures, the Order will make it more difficult for Department bureaus and offices to use alternative mitigation measures as a tool to balance preservation and development needs.

***BLM reviews of programmatic agreements will cause unnecessary delays.***

The Order specifies that the Bureau of Land Management (BLM) is to formally review the Nationwide Programmatic Agreement with the Advisory Council along with state-level agreements to ensure they are in conformance with the Order. Such agreements have been developed to foreshorten the Section 106 process, whether that be for projects or programs. ACRA is concerned that, if agreements are not in conformance, they will have to be renegotiated to bring them into compliance. This will cause delays and will be inordinately expensive as offices will then have to resort to the standard Section 106 process for each project or program activity.

While ACRA members agree that the Section 106 process can always be improved upon, we are concerned that Order 3386 makes changes to the process that will harm the process, delaying projects, increasing costs and threatening our ability to preserve and protect cultural assets. For the reasons listed above, we urge you to rescind Secretarial Order 3386.

ACRA and its members look forward to working with you to ensure that the Department continues to serve as a collaborative partner with states, tribes, and the CRM industry as we work to preserve our heritage while building back better.

Sincerely,



Nathan Boyless  
President