NATIONAL ASSOCIATION OF TRIBAL HISTORIC PRESERVATION OFFICERS

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Sent via E-Mail

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ATNN: Draft TCP Bulletin
National Register of Historic Places
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Re: National Association of Tribal Historic Preservation Officers' Comments on the November 6, 2023, Draft Revisions of National Register Bulletin 38, *Identifying, Evaluating, and Documenting Traditional Cultural Places*

Dear Keeper Beasley:

The National Association of Tribal Historic Preservation Officers ("NATHPO") is pleased to submit the following comments on the National Park Service's ("NPS") November 6, 2023, draft revisions to National Register Bulletin 38, *Identifying, Evaluating, and Documenting Traditional Cultural Places*. NATHPO and its members previously participated in the NPS's Tribal Historic Preservation Officers ("THPO") webinar on January 26, 2023, hosted a panel discussion on the revisions with the NPS at its annual conference on February 25, 2023, and hosted its own webinar on the revisions on April 14, 2023. NATHPO also previously submitted comments on the 2022 draft on April 30, 2023, a copy of which is attached. On March 12, 2024, NATHPO held a subsequent webinar on the 2023 draft. NATHPO's comments are informed by its, its members, and its staffs' experiences with Bulletin 38 and the National Register of Historic Places ("National Register") program, comments made by attendees during the NPS's 2023 webinar, at NATHPO's 2023 conference, and at NATHPO's 2023 and 2024 webinars, as well as other comments NATHPO has received and reviewed from its members, other THPOs, Tribal Nations, and cultural resource practitioners.

NATHPO is a national, non-profit membership organization founded in 1998, comprising Tribal government officials, specifically THPOs, who implement federal and Tribal preservation laws to protect culturally important places that perpetuate Native identity, resilience, and cultural endurance. Connections to cultural heritage sustain the health and vitality of Native peoples. NATHPO's overarching purpose is to support the preservation, maintenance, and revitalization of the cultures and traditions of Native peoples of the United States. This is accomplished most importantly through the support of Tribal Historic Preservation Programs as acknowledged by

the NPS. There are currently 221 THPOs. NATHPO is a voting member of the Advisory Council on Historic Preservation ("ACHP").[1]

SPECIFIC COMMENTS

Page 6: Nominations for listing historic places typically come from "nominating authorities," namely State Historic Preservation Officers (SHPOs); Federal Preservation Officers (FPOs) for places owned and controlled by the United States Government; and Tribal Historic Preservation Officers (THPOs) for places on Tribal lands.

This statement is misleading. The National Historic Preservation Act ("NHPA") authorizes NPS-approved THPOs to "assume all or part of the functions of a State Historic Preservation Officers in accordance with [54 U.S.C. §§] 302302 and 302303 of this title, with respect to tribal land[.]"[2] Included in these functions is the responsibility to "identify and nominate eligible property to the National Register and otherwise administer applications for listing historic property on the National Register[.]"[3] Despite these statutory authorities, the NPS has never developed regulations setting forth how THPOs can nominate properties to the National Register. The NPS' regulations, codified at 36 C.F.R. Part 60 ("Part 60"), establish process only for nominations by State Historic Preservation Officers ("SHPO"),[4] Federal Preservation Officers ("FPO"),[5] joint SHPO and FPO nominations,[6] and requests for nominations submitted to SHPOs or FPOs.[7] Indeed, the NPS' regulations state that the only way for properties to be added to the National Register are by acts of Congress or executive order; declarations by the Secretary of the Interior; nominations from a SHPO; nominations by any person or local government in a state without a SHPO; and by FPOs.[8]

Despite expressly reserving two entire sections of Part 60 for future rulemaking—36 C.F.R. §§ 60.7 and 60.8—the NPS has never undertaken a rulemaking to codify a process by which THPOs can nominate properties to the National Register. This is critical, because THPOs cannot simply swap places with SHPOs and use the processes set forth in 36 C.F.R. §§ 60.6, 60.10, and 60.11. These processes are inherently anti-Tribal and antithetical to Tribal sovereignty. THPOs, and by extension Tribal Nations, cannot be expected to submit nominations to State Review Boards, constituted by individuals appointed by a state's governor with the recommendation of the SHPO, to review and opine on the adequacy and National Register eligibility of nominations submitted by THPOs, and comply with other provisions specifically developed for state agencies. More to the point, the National Register regulations do not reflect the authority of THPOs to assume the role of SHPOs.

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[1] *See* 54 U.S.C. § 304101(a)(8).
[2] *Id*. § 302702.
[3] *Id*. § 302303(b)(2).
[4] 36 C.F.R. § 60.6.
[5] *Id*. § 60.9.
[6] *Id*. § 60.10.
[7] *Id*. § 60.11.
[8] *See id*. § 60.1(b).

As currently written, the only way for Tribal Nations, THPOs, and Native Hawaiian organizations to nominate properties to the National Register is to use the request for nomination process. Just as it would be inappropriate to force a THPO to follow the procedures for SHPO nominations, it is inappropriate for Tribal Nations, THPOs, and Native Hawaiian organizations to submit to the jurisdiction of a state or federal agency and present them with enough evidence to convince these agencies that their culturally significant places are worthy of listing on the National Register.

Accordingly, NATHPO calls upon the NPS to engage in a rulemaking to develop a process (or processes) for Tribal Nations, THPOs, and Native Hawaiian organizations to nominate properties of traditional religious and cultural importance and properties located on Tribal land to the National Register. Included in this rulemaking should be a process allowing Tribal Nations to develop their own nomination processes that substitute for the processes established by the NPS.

Page 13: Table 1. National Register Property and Resource Types, adapted from *National Register Bulletin 16A: How to Complete the National Register of Historic Places Registration Form.* These examples are not exclusive.

NATHPO appreciates the inclusion of definitions for each National Register property type and corresponding examples; however, the definitions prove problematic. The NPS has codified definitions for each of the five property types—building,[9] structure,[10] object,[11] site,[12] and district[13]—in its Part 60 regulations. It is unclear why the draft bulletin simply does not use the definitions already codified in Part 60. While most of the refashioned definitions in this table are substantially similar to the definitions in Part 60, the definition of "object" stands out.

In Part 60, the NPS defines object as: "An object is a material thing of functional, aesthetic, cultural, historic or scientific value that may be, by nature or design, moveable yet related to a specific setting or environment." In Table 1, the draft bulletin defines object as: "The term 'object' is used to distinguish from buildings and structures those constructions that are primarily artistic in nature or are relatively small in scale and simply constructed." Table 1 goes on to provide the following examples: "sculpture, monuments, boundary markers, statuary, [and] fountains[.]" NATHPO is concerned by this definition and list of examples.

First, the definition implies that objects must be built by humans by calling them "constructions" and stating that they are "small in scale and simply constructed." Nothing in the regulatory definition supports this restriction. Indeed, in other parts of the draft bulletin, the NPS specifically identifies natural features, such as a rock and a tree, as objects. Second, the

[9] *Id*. § 60.3(a).
[10] *Id*. § 60.3(p).
[11] *Id*. § 60.3(j).
[12] *Id*. § 60.3(l).
[13] *Id*. § 60.3(d).

definition implies that an object can only have artistic value, while Part 60 broadly defines objects' values as being functional, aesthetic (artistic), cultural, historic, or scientific. Finally, the list of examples is consistent with this limited view of what constitutes an object and is internally inconsistent with other examples provided throughout the bulletin.

As stated above, there is no reason that this table should use definitions that are not identical to the definitions codified at 36 C.F.R. § 60.3. Moreover, the definition provided for object is concerning to NATHPO as it could exclude certain TCPs valued by Indigenous communities from inclusion on the National Register because they are not "constructed" and are not primarily "artistic."

Page 22: "Tradition" implies the passage over time (with relatively little change) of beliefs, customs, practices, language, and other intangible aspects of culture.

NATHPO objects to the inclusion of the parenthetical "(with relatively little change)" in this definition of tradition. This addition is deeply troubling, as it belies an underlying colonialist attitude within the National Register program towards Indigenous cultures and fundamentally misunderstands the very nature of culture itself. Cultures by their very nature change, evolve, and adapt; this is an inherent aspect of culture itself. It is deeply concerning to NATHPO that the draft bulletin would suggest that a culture that has changed is no longer traditional. NATHPO, its members, and its staff have seen this exact reasoning used against Tribal Nations to assert that their places of cultural significance cannot be TCPs because those Tribal Nations' contemporary cultural practices are not exactly like they were 100 or 1000 years ago. This view perpetuates a racist and colonialist perception of Indigenous culture: that for it to be deemed "legitimate" within the eyes of the Euro-American dominate culture, it must remain static and cannot evolve—like all cultures do.

Additionally, who is arbiter of whether a tradition has changed enough to no longer be traditional? Is the NPS really going to determine that, in its view, a culture has changed too much for it to no longer be traditional? This is at odds with other parts of the draft bulletin that counsel that the community who ascribes significance to a property is the expert on the significance of that property, and that if a community says a property retains integrity, it retains integrity. These contrasting statements cannot be reconciled. The NPS should delete the parenthetical "(with relatively little change)" and leave in place the rest of the definition.

Page 22: Likewise, a living community in the context of a National Register listed or eligible TCP is typically distinct from a family.

NATHPO is concerned about the implications of this statement. The NHPA specifically states that properties of traditional religious and cultural importance to Tribal Nations and Native Hawaiian organizations may be determined eligible for inclusion on the National Register. The NHPA also defines the term Native Hawaiian organization. Thus, the term Native Hawaiian organization encompasses a broad swath of organizations. As a matter of practice, federal

agencies routinely invite specific ‘ohanas—or families, in Hawaiian—to be consulting parties as recognized Native Hawaiian organizations in the Section 106 process. These ‘ohanas may be nuclear families. Under the NHPA, they have the same statutory right to see their properties of traditional religious and cultural importance listed on the National Register as other Native Hawaiian organizations and Tribal Nations, and these properties are often recognized as TCPs. The draft bulletin’s statement that a TCP cannot be significant to only a family runs potentially counter of the statutory language of the NHPA.

This language is also problematic for Tribal Nations, as the NPS does not define “family.” Does family mean a nuclear family? Does it mean an extended family, and if so, by how many generations? Does it mean adopted family? Many Indigenous societies are based on kinship. Does the NPS’ definition of family exclude Tribal Nations who organize their society based on kinship? A TCP may also be significant to only a particular clan within a Tribal Nation. Would such a TCP be excluded from listing on the National Register?

NATHPO understands the general proposition that places that are important only to a single family are typically not considered TCPs or eligible for inclusion on the National Register. That said, Tribal Nations and Native Hawaiian organizations have distinct rights under the NHPA separate from the general public, including the right to see their places of traditional religious and cultural significance determined eligible for the National Register. Such places may only be significant to specific families (however that term is defined). Accordingly, the bulletin should be revised to clarify that in certain circumstances, particularly for Tribal Nations and Native Hawaiian organizations, a TCP’s significance to a single family is not necessarily disqualifying.

Page 33: A Federal agency may request of the Keeper of the National Register a Determination of Eligibility (DOE) regarding a potentially historic place affected by their proposed action[.] . . . NHPA Section 106 requires that Federal agencies take into account the effects of their undertakings on historic properties[.] . . . If the place is determined eligible by the Keeper, the Federal agency will be required to consider the effects of their actions on the place before the agency may fund, license, or pursue a project which may affect the property.

This is not an accurate statement of how the Section 106 process works and how formal determinations of eligibility are sought from the Keeper in the process. Section 106 requires federal agencies to take into account the effects of their undertakings on historic properties.[14] The ACHP has codified regulations that implement the Section 106 process at 36 C.F.R. Part 800. For the purposes of Section 106, “historic property” covers three categories of properties: (1) those formally listed on the National Register;[15] (2) those that have been previously formally determined eligible for inclusion on the National Register by the Keeper pursuant to 36 C.F.R.

[14] *See* 54 U.S.C. § 306108.
[15] 36 C.F.R. § 800.16(l)(1).

Part 61;[16] and (3) those that meet the National Register criteria, even if they have not been previously evaluated for National Register eligibility.[17]

For properties that fall into the third category, federal agencies proactively identify potential and previously unidentified historic properties and apply the National Register criteria to them to determine whether they meet the criteria and are eligible for inclusion on the National Register.[18] If the federal agency and the SHPO or THPO agree that the property meets the National Register criteria, "the property shall be considered eligible for the National Register for section 106 purposes."[19] The federal agency and SHPO or THPO can also agree that the property does not meet the criteria.[20] These are called "consensus determinations." If the federal agency and the SHPO or THPO disagree about the eligibility of the property, the federal agency is required to seek a formal determination of eligibility from the Keeper.[21] Likewise, the ACHP and the Secretary of the Interior can require the federal agency to seek a formal determination of eligibility from the Keeper irrespective of whether there is a disagreement about the property's eligibility between the federal agency and the SHPO or THPO.[22]

While the Keeper may have occasion to issue a formal determination of eligibility in the course of the Section 106 process, a formal determination of eligibility is not necessary for a federal agency to be required to take into account the effects of the undertaking on a particular historic property.

Page 37: For example, a large and naturally significant place valued by many communities typically requires more documentation than a small and locally significant place valued by a single community: the nomination for the 4,080 acre Medicine Wheel/Medicine Mountain National Historic Landmark[] . . . is 68 pages of text; by contrast, the nomination for the locally significant 57-acre Saint Augustine Catholic Church and Cemetery[] . . . is 19 pages of text.

NATHPO is concerned that this statement implies that the Keeper and NPS staff are more skeptical of the eligibility of certain types of TCPs simply because they are larger. If the nomination adequately documents the property, the length of the nomination form is irrelevant. Setting an arbitrary standard that the larger the property, the more pages it takes to adequately document it is not supported by other bulletins and the regulations. The implication from the examples given is that Tribal Nations and Native Hawaiian organizations are expected to do more work and provide greater detail when nominating their TCPs than other communities. While a larger TCP (or any historic property) may require a more detailed discussion in the "boundary justification" section of the nomination form, it does not follow that the rest of the

[16] *Id*. § 800.16(l)(1), (2).
[17] *Id*. §§ 800.4(c)(1), 800.16(l)(2).
[18] *Id*. § 800.4(c)(1).
[19] *Id*. § 800.4(c)(2).
[20] *Id*.
[21] *Id*.
[22] *Id*.

nomination form needs to be any more detailed than a nomination for any other property. The size of a property is irrelevant in determining its significance and National Register eligibility. Implying that a property's significance needs more justification simply because it is larger than others is deeply troubling and would have a disproportionate impact on Tribal Nations and Native Hawaiian organizations.

Moreover, the draft bulletin is internally inconsistent regarding this position. On Page 37, the draft bulletin provides the example of Medicine Wheel, which is 4,080 acres and its nomination form contained 68 pages of text. Elsewhere, the draft bulletin discusses Chi'Chil Biłdagoteel, and notes that it is an approximately 4,000-acre TCP listed on the National Register. NATHPO has reviewed the nomination form for Chi'Chil Biłdagoteel, which contains only 25 pages of text. According to the guidance provided on page 37, Chi'Chil Biłdagoteel would not be adequately documented, yet it is listed on the National Register.

Any implication that larger TCPs or TCPs valued by Tribal Nations or Native Hawaiian organizations need to be documented to a higher degree than other TCPs must be removed from the bulletin. Likewise, any implication that the length of a nomination is indicative of adequate documentation should be removed.

Page 41: With respect to Federally-recognized Tribes, Federal entities should initiate consultation.

This requirement is overly burdensome and needlessly patriarchal. This requirement would seemingly inject federal agency involvement into the nomination of certain TCPs where such involvement would otherwise not exist. Federal agencies (other than the NPS) are involved in the nomination of historic properties (including TCPs) only if the property is located on federal land. Such a TCP can be nominated to the National Register only by either a request for nomination submitted to the appropriate FPO pursuant to 36 C.F.R. § 60.11, or directly by the federal agency pursuant to NHPA Section 110 and 36 C.F.R. §§ 60.9 and 60.10.[23]

If a federal agency is nominating a TCP of significance to an Tribal Nation pursuant to Section 110, NATHPO expects that the agency would consult with the appropriate Tribal Nations and not proceed with the nomination if they object. If a non-Tribal (and non-federal) entity is nominating a TCP to the National Register, whether it is located on federal lands or not, NATHPO expects that the nominator would consult with the appropriate Tribal Nations and not proceed with the nomination if they object. That said, a non-federal nominator should not have to go through a "federal entity" to consult with the appropriate Tribal Nations about the nomination, especially if it is not located on federal land. It should be the nominator's affirmative duty to consult with the appropriate Tribal Nations. Requiring the nominator to go through a federal agency to initiate consultation with a Tribal Nation unnecessarily complicates the process, interjects a federal agency into a process that it may otherwise not be involved in, and implies that the Tribal Nation

[23] A SHPO may also nominate property under federal ownership or control, but the nomination must be submitted to the appropriate FPO for review, comment, and approval. *See* 36 C.F.R. § 60.6(y).

is not capable of engaging with the nominator without the federal government's supervision. While NATHPO acknowledges that federal agencies have a Nation-to-Nation and trust relationship with Tribal Nations, consultation between a non-federal nominator and a Tribal Nation does not need to be conducted as part of formal Nation-to-Nation consultation.

Under no circumstances, however, should a TCP be nominated to the National Register without the free, prior, and informed consent of the community that values that property, whether that community is a Tribal Nation, Native Hawaiian organization, or other.

Page 44: Alternatively, it may be necessary to seek knowledgeable parties outside of a community's official structure.

There are many reasons why a community, Tribal Nation, or Native Hawaiian organization might not talk to a researcher about a TCP—it may be forbidden; it may desecrate the sanctity of the place to discuss it, or even acknowledge its existence; there may be fears of looting and vandalism. If the community refuses, for whatever reason, to discuss a TCP or provide members of that community to be interviewed, the researcher should cease their work. There is never a reason to pursue the identification, documentation, and nomination of a property, especially a TCP, over the objection of the community that values that property. The draft bulletin, unfortunately, presents a nomination bias; that is, it presumes that all properties should be nominated and therefore offers suggestions to researchers to circumvent community opposition. To be clear, a TCP should never be documented, identified, evaluated, determined eligible, and nominated without the free, prior, and informed consent of the community that values it.

This statement is also inconsistent with other parts of the bulletin. On page 123, for example, the draft bulletin states: "If a traditional community chooses not to identify or discuss a place, for whatever reason, or is not interested in nominating a place for its traditional cultural significance to them, those wishes should be respected."

Page 44: If there is serious animosity within a community, or between two or more communities, about how or indeed whether a nomination should be pursued for a place, such cooperation may not be possible, and efforts to confer with traditional experts may be actively opposed. Where this happens, and it is necessary to proceed with the identification and evaluation of places—for example, where this work is being done in connection with review of a Federal undertaking[] . . . .

As stated above, there is never a reason why a property must be nominated to the National Register or even determined eligible. This statement implies that an ongoing Section 106 process may require a federal agency to determine the National Register eligibility of a traditional cultural place ("TCP"), potentially over the objections of the community. That is never the case.

While the Section 106 process is predicated on the identification of historic properties, nothing in the ACHP's Section 106 implementing regulations requires a federal agency to document,

evaluate, and potentially seek a formal determination of eligibility of a TCP over the objections of the appropriate Tribal Nation or Native Hawaiian organization. Indeed, the ACHP's regulations specifically state that the documentation and National Register evaluation of historic properties must be in in consultation with the appropriate Tribal Nations and Native Hawaiian organizations.[24] The ACHP clarifies, consultation includes, "where feasible, seeking agreement with [consulting parties] regarding matters arising in the section 106 process."[25] Additionally, federal agencies are required to "make a reasonable and good faith effort to carry out appropriate identification efforts[.]" Proceeding with an evaluation or determination of eligibility over the objection of a Tribal Nation or Native Hawaiian organization would run counter to the very purpose of the Section 106 process and would not be reasonable or done in good faith.

Underlying this point is the fact that the federal agency is not legally required to document or identify every historic property within an undertaking's area of potential effects. If a community (including Tribal Nations and Native Hawaiian organizations) objects to the documentation of their TCP, the ACHP's implementing regulations provide enough flexibility for the federal agency to proceed with Section 106 without having identified that property and determined its National Register eligibility. Similar circumstances arise regularly when a federal agency fails to obtain permission to enter private land within the undertaking's area of potential effects to identify historic properties. Likewise, while Section 110 requires federal agencies to nominate properties under their control to the National Register, agencies retain discretion over what properties are nominated. Federal agencies can still comply with Section 110 and not nominate TCPs when a Tribal Nation or Native Hawaiian organization objects.

TCPs are important to the communities that ascribe significance to them. Accordingly, documenting and nominating TCPs must be community driven. If the community does not want their TCP documented, those wishes must be respected. There is never a reason that a TCP must be documented or nominated over the objections of the community. NATHPO does not suggest that federal agencies avoid identifying TCPs in the Section 106 process; only that in certain circumstances, it may not be appropriate to identify certain TCPs notwithstanding the purpose of Section 106.

Page 44: It may not always be possible to obtain information in a manner those being consulting might prefer; when it is not, the interviewer should clearly understand that they may be asking those interviewed to violate or adjust their cultural norms.

NATHPO objects to this language. An interviewee should never be asked to adjust how they present information to an interviewer. It is the respectful, professional, and ethical obligation of the interviewer to make those accommodations. Whether this means interviewing people at specific locations, during specific times of year, conducting the interviews in a language other than English, having a trusted community member present during or conducting the interview, or even having the interviewer not participate in the interview at all, all accommodations must be

[24] *See* 36 C.F.R. § 800.4(c)(2).
[25] *Id*. § 800.16(f).

made by the interviewer. In NATHPO's view, this is the respectful, professional, and ethical obligation of the interviewer. If it cannot be done, the interviewer must reassess their own cultural biases as well as the need for the research to continue. Moreover, requiring the interviewee to make adjustments may mean that the information the interviewer obtains is not complete.

Page 44-45: [O]ther times, they may be conducted in formal meetings or conferences, or hearing (*e.g.,* a community or Tribal council meeting or a pow wow) or in less formal settings (*e.g.,* a Native Hawaiian luau, or a neighborhood gathering at someone's house).

NATHPO recommends that the illustrative examples in this statement be deleted. It is up to the specific community, Tribal Nation, or Native Hawaiian organization to decide what settings are appropriate for such interviews to take place. By including these examples, the draft bulletin implies that it may always be appropriate to conduct interviews in these settings, when it very well may not be, or only with the community's explicit permission. NATHPO suggests adding language to this paragraph that emphasizes that the community must determine what settings are appropriate.

If the language is not revised, NATHPO makes the following comments. While powwows are certainly formal, we would not characterize them as an example of a "hearing." Moreover, while a luau is certainly not a "hearing, "meeting," or "conference," it is no less formal than a powwow. NATHPO also notes that on pages 22, 24, 30, 31, and 32, the draft bulletin uses the term "powwow," while on page 45 it uses the term "pow wow." NATHPO recommends that this be revised to "powwow." This highlights another observation: that the draft bulletin needs to be copy edited. NATHPO observed multiple instances of improper grammar, as well as the draft bulletin using inconsistent terms.

Page 53: By contrast, animals, or species of animals, do not fall within one of the types of property that may be listed on the National Register.

This statement is arbitrary and not supported by the plain text of the NHPA or the National Register regulations. Indeed, at least one federal court has held that a particular animal species was a property for purposes of the NHPA because it met the technical definition of "object."[26] Nothing in the regulatory definition of object imposes the prohibition against animals; that is a purely arbitrary policy decision made by NPS staff.

[26] *See Okinawa Dugong (Dugong Dugong) v. Rumsfeld*, No. C 03-4350 MHP, 2005 WL 522106 (N.D. Cal. Mar. 2, 2005).

Page 53: There is no size limit for historic places, including TCPs, to be listed on the National Register; that is, a place may be as small as a square foot to or as large as thousands of acres.

The "to" after "square foot" appears to be a typo and should be deleted. Substantively, too often, Tribal Nations' attempts to nominate or determine eligible large, landscape-level TCPs are opposed based on incorrect assumptions that they are too large to be listed on the National Register. While NATHPO appreciates this language, NATHPO suggests that instead of "thousands of acres," the bulletin stay "tens or hundreds of thousands of acres." For example, Nantucket Sound was formally determined eligible for inclusion on the National Register, and while no boundary was defined, it encompasses roughly 400,000 acres.

Page 60: However, Criterion B is intended to be applied to places associated with a *specific* person—or ancestor or spirit—not a general group like "the ancestors."

NATHPO suggests additional language clarifying that a specific person may also be mythical person, such as a hero or heroine, or a person associated with stories important to a community's culture and past.

Page 66: A district derives its importance from being a unified entity, even though it is often comprised of a wide variety of resources, which may or may not be individually included on the National Register.

The draft bulletin and other NPS guidance documents should clarify that a district is *per se* eligible for inclusion on the National Register under Criterion C.

Page 66: Many TCPs are landscapes with many components—hills, springs, rock outcrops, plant communities, former habitation sites—and may be considered districts under Criterion C, although they are usually eligible under Criterion A as well, and they may be classified as sites rather than districts, particularly if they are comprised mostly of natural resources.

This statement is concerning, as it implies that a landscape-level TCP that is comprised of only natural features and contributing resources should be classified as a site instead of a district. This implication is incorrect. As the examples provided in this very sentence demonstrate, a landscape is inherently made up of many discrete components and may be eligible under Criterion C. Any property that is made up of discrete resources and eligible under the fourth clause of Criterion C is *per se* a district, as a district is "a geographic area, urban or rural, possessing a significant concentration, linkage, continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development."[27] In contrast, a site is "the location of a significant event, a prehistoric or historic occupation or activity, or a building or structure,

[27] *Id*. § 60.3(d).

whether standing, ruined, or vanished, where the location itself maintains historical or archeological value regardless of the value of any existing structure."[28]

The implication that an entirely natural landscape-level TCP should be classified as a site, as opposed to a district, undercuts the significance of the TCP to the community that values it. Sites are discrete properties, and their significance is not necessarily derived from the interrelationship of multiple and distinct resources. This distinction is critical in the context of Section 106 reviews. Since districts derive their significance from the relationship and connection between all of their contributing resources, if an undertaking adversely effects only one or a few of those contributing resources, the entire district is adversely affected.[29] In contrast, if only one or a few of the contributing resources of a site are affected by an undertaking, a federal agency could determine that the property is not adversely affected, because as a site, the significance of the property is not based on the interrelationship of those resources.

Page 70: "Information potential" is not exclusive to archaeological data; it can include continued cultural knowledge and identity. For example, the Luiseño Ancestral Origin Landscape in California (discussed at Figure 55) continues to provide important ethnographic and historic information about the Luiseño People.

NATHPO agrees that Criterion D encompasses the traditional, familial, and cultural knowledge a TCP has helped pass down and will continue to pass down. This approach to the application of Criterion D is new and the draft bulletin would benefit from an expanded discussion, along with other and more detailed examples. In fact, during its March 21, 2024, Business Meeting, the ACHP unanimously approved its Policy Statement on Indigenous Knowledge and Historic Preservation,[30] which should be used as a relevant resource on this topic, even while the ACHP continues to work on more specific implementation guidance.

Page 105: Animals, plants, and other living entities important in understanding the place are not identified as "contributing resources" but rather character-defining features.

Page 53: Rocks, trees, and other natural elements are likely to be character-defining features of a larger site rather than significant objects on their own merit.

These two statements are both incorrect and inconsistent with other parts of this draft bulletin. On page 53, the draft bulletin asserts that "[r]ocks, trees, and other natural elements . . . [are] not significant on their own merit." In the very same paragraph, however, the draft bulletin states: "A natural feature such as a rock or tree may be an eligible object if it is associated with a significant tradition or event." The draft bulletin then goes on to discuss Creek Council Tree Site (an

[28] *Id*. § 60.3(l).
[29] *See id*. § 800.5(a)(1).
[30] *See* Advisory Council on Hist. Pres., *Policy Statement on Indigenous Knowledge and Historic Preservation* (March 21, 2024), https://www.achp.gov/sites/default/files/policies/2024-03/PolicyStatementonIndigenousKnowledgeandHistoricPreservation21March2024.pdf.

individual tree) and Sleeping Buffalo Rock (an individual rock) as examples of objects that are TCPs.

While trees, rocks, and other natural features may be considered only as character-defining features in some contexts, the categorical statement that they cannot be considered contributing resources is incorrect. An individual rock or tree may possess specific cultural importance while also contributing to the broader significance of a landscape or district. Whether a particular natural feature is a contributing resource or a character-defining feature is a determination that must be made on an individual basis for each feature/resource and for each TCP being documented. Categorical statements like this are often (as is the case here) incorrect and serve only to undermine Tribal Nations' and Native Hawaiian organizations' ability to nominate their TCPs to the National Register.

Page 113: In some cases, it may be impossible to achieve agreement on a boundary, and the preparer of the nomination will find it necessary to set the boundary using their best judgment to provide a clear justification for the boundary.

NATHPO notes that there is no statutory or regulatory requirement for the NPS to insist on requiring boundaries on National Register nominations. As the draft bulletin notes, defining a boundary is often antithetical to a community's cultural understanding of the significance of the TCP, or it is literally impossible. Since this restriction is not based on any statutory or regulatory requirement and appears to be an arbitrary policy decision by the NPS, the NPS must work with Tribal Nations and Native Hawaiian organizations to develop a process to list properties on the National Register without defined boundaries. Developing such a process is not impossible, as the NPS already lists multi-property nominations which inherently lack a defined boundary. Moreover, when the NPS formally determined Nantucket Sound eligible for inclusion on the National Register, it stated that it was "part of a district with boundaries that have not been precisely defined."[31] NATHPO is not suggesting any one particular approach to resolving this issue; instead, NATHPO encourages the NPS to engage in meaningful consultation with Tribal Nations and Native Hawaiian organizations to address this issue.

Page 124: A "consensus determination" most often occurs in the context of a Section 106 consultation.

NATHPO is unaware of any other context in which a "consensus determination" occurs.

[31] Nat'l Park Serv., *Determination of Eligibility Notification: Nantucket Sound* 4 (Jan. 4, 2010).

Page 124: A "Keeper determination of eligibility" most often occurs when a private owner objects (or majority of private owners, in the case of a district, object) to the listing of their property in the National Register or when a State Historic Preservation Officer and/or Tribal Historic Preservation Officer and a Federal agency disagree as to whether a property meets the criteria for listing.

This statement should clarify that a determination of eligibility based on the SHPO's or THPO's and federal agency's disagreement occurs in the Section 106 process. Additionally, federal agencies are required to seek determination of eligibility from the Keeper in the Section 106 process at the request of the ACHP or the Secretary of the Interior.[32]

Page 125: Federally recognized Tribe As of this writing in 2023, the U.S. government officially recognizes 574 Indian Tribes in the contiguous 48 states and Alaska. These Federally-recognized Tribes are eligible for funding and services from the Bureau of Indian Affairs, either directly or through contracts, grants, or compacts. The most current list of Federally-recognized Tribes is available on the website of the Bureau of Indian Affairs.

Page 125: Native American Tribe The term "Native American Tribe" as used in this Bulletin means an Indian Tribe as defined in the NHPA, 54 U.S.C. § 300309.

The definition of "Federally recognized Tribe" appears to be derived from the Federally Recognized Indian Tribe List Act ("List Act"), which defines "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe."[33] The definition of "Native American Tribe" is tied specifically to the NHPA, which defines "Indian tribe" as: "an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation (as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."[34] While these definitions are similar, they are not the same. The NHPA's definition includes Alaska Native Claims Settlement Act ("ANCSA") corporations within its definition,[35] which are not included in the List Act definition and not included on the Bureau of Indian Affairs' annual list of federally recognized Tribal Nations.

NATHPO appreciates the draft bulletin's attempt to draw a distinction between "federally recognized Tribe" and "Native American Tribe," as reflected in the statutory language discussed above, particularly because the NHPA's definition is broader than the List Act's definition; yet the defined terms used in the draft bulletin are too similar and not consistent with the statutory definitions. In order to avoid confusion between these terms, NATHPO suggests the following revisions.

[32] 36 C.F.R. § 800.4(c)(2).
[33] 54 U.S.C. § 5130(2).
[34] 54 U.S.C. § 300309.
[35] *See Yellen v. Confederated Tribes of Chehalis Reservation*, 141 S. Ct. 2434 (2021).

The term "Federally recognized Tribe" should be replaced with the term "Federally recognized Tribal Nation." The definition should use the statutory language in the List Act and cite the List Act in the definition. The definition of "Indian tribe" used by the NPS in its Native American Graves Protection and Repatriation Act regulations is a good example.[36]

The term "Native American Tribe" should be replaced with the term "Indian Tribe" to be consistent with the term used in the NHPA. The definition should use the statutory language in the NHPA and cite the NHPA. The definition of "Indian tribe" used by the ACHP in its Section 106 implementing regulations is a good example.[37] An additional statement clarifying the differences between the two definitions would be beneficial, particularly that while ANCSA corporations are included in the definition of "Indian tribe," they are not sovereign Tribal governments, like Federally recognized Tribal Nations.

NATHPO also recommends that upon finalizing these terms, that the draft bulletin is copy edited to ensure that the correct terms are used consistently throughout the document.

Page 125: Native Hawaiian Organization The term "Native Hawaiian Organization" means any organization that is composed primarily of Native Hawaiians and that assists in the social, cultural, and educational development of Native Hawaiians in that community.

Native Hawaiian organization is a term that is explicitly defined in the NHPA.[38] NATHPO suggests that the draft bulletin use the NHPA's statutory definition and cite the NHPA.

Page 126: Tribal Historic Preservation Officer (THPO) A THPO is an official appointed by Tribal leadership to officially represent the Tribe's interests regarding sites of historic and religious significance to the Tribe. Some Tribes have an agreement with the NPS to take the lead on Historic Preservation Officer responsibilities on Tribal lands as defined in the NHPA, and some do not. However, all Tribes retain the same consultation rights in a Section 106 action. Tribes do not need an agreement with the NPS to appoint a THPO. A current listing of THPOs may be found on the website of the National Association of Tribal Historic Preservation Officers (NATHPO).

This statement is not quite accurate and NATHPO recommends crystal clarity to help minimize the confusion and lack of understanding that already exists regarding this unnecessarily complex system. NATHPO suggests the following revised language:

A THPO is an official appointed by Tribal leadership to officially represent the Tribe's interests regarding sites of historic and religious significance to the Tribe. For federally recognized Tribes with Tribal or trust lands (therefore not including Native Hawaiian organizations or Alaska Native Claims Settlement Act corporations, according to statutory requirements), THPOs—with an approved NPS application and agreement—assume responsibilities of the SHPO on Tribal land, as defined in the NHPA. They are the decision-maker and signatory for undertakings and

[36] *See* 43 C.F.R. § 10.2.
[37] *See* 36 C.F.R. § 800.16(m).
[38] *See* 54 U.S.C. § 300314.

National Register nominations and determinations of eligibility on Tribal land. They should also be consulted for undertakings and National Register nominations and determinations of eligibility on Tribal ancestral lands. All Tribes, however, retain the same consultation rights under Section 106. Tribes do not need an agreement with the NPS to appoint a THPO, but without an NPS-approved application and agreement, they do not assume the SHPO's responsibilities for undertakings and National Register nominations and determinations of eligibility on Tribal land. A current listing of all NPS-approved THPOs may be found on National Association of Tribal Historic Preservation Officers' website, as well as the NPS THPO Program's website.

General Comments

Many of NATHPO's comments highlight a refrain that NATHPO members have repeatedly stated: that the National Register program is inherently problematic for Tribal Nations, THPOs, and Native Hawaiian organizations. The National Register was not designed to accommodate or recognize places of historic and cultural significance to Indian Tribes and Native Hawaiian organizations. While attempts have been made to address this—such as the initial publication of Bulletin 38 and the 1992 amendments to the NHPA—the National Register program is still problematic. In order to utilize the National Register, it has been described by a number of NATHPO members as attempting to fit a square peg into a round hole. The cultural and historic perspectives espoused by the National Register and the NHPA are, often, simply incompatible with Indigenous historic and cultural perspectives. Likewise, the actual nomination process is exceedingly burdensome and troubling for many Tribal Nations and Native Hawaiian organizations.

NPS guidance, including the current version of Bulletin 38 and this revised draft, repeatedly state the community that ascribes significance to a TCP is the expert. Notwithstanding this, it has been our experience that the level of documentation needed to list a TCP on the National Register is often overly burdensome and sometimes impossible to meet. Despite being described as the experts, the types of documentation required by the National Register program prioritize non-Indigenous expertise and ways of knowing. Moreover, Tribal Nations' and Native Hawaiian organizations' expertise is consistently questioned and challenged by State Review Boards, SHPOs, the public, and the NPS itself.

In addition to the need for Tribal Nation-, THPO-, and Native Hawaiian organization-specific nomination procedures discussed above, NATHPO members have recommended that the NPS develop a Tribal Nation- and Native Hawaiian organization-specific National Register bulletin for documenting and evaluating places of traditional religious and cultural importance, as well as a new National Register criteria specific to these types of properties. The 1992 amendments make clear that only Tribal Nations and Native Hawaiian organizations can nominate and seek determinations of eligibility for such properties. The only NPS guidance that is somewhat relevant to the documentation and evaluation of such properties is Bulletin 38. But as both the current and revised draft versions explicitly state that any traditional community can nominate their own TCPs to the National Register, not just Tribal Nations and Native Hawaiians. While NATHPO has no objection to non-Tribal and non-Native Hawaiian communities nominating their TCPs to the

National Register, these communities are not similarly situated to Tribal Nations and Native Hawaiian organizations.

The United States government has a trust relationship with Tribal Nations and Native Hawaiians. Out of these unique relationships, the Congress has specifically legislated to ensure that places of traditional religious and cultural importance to only Tribal Nations and Native Hawaiian organizations are specifically eligible for inclusion on the National Register. It is therefore seen by some as inappropriate to treat Tribal Nations and Native Hawaiian organizations the same as any other traditional community. NATHPO has heard criticism of Bulletin 38 that by applying to all traditional communities, it creates a "false equivalency" between federally recognized, sovereign Tribal Nations and other traditional communities.

NATHPO does not have immediate recommended solutions to addressing these concerns. Instead, NATHPO believes that the NPS needs to engage in meaningful consultation with Tribal Nations and Native Hawaiian organizations about structural changes and fixes to the National Register program as a whole.

Conclusion

NATHPO appreciates the opportunity to submit these comments and engage with the NPS during the initial development of this draft bulletin. We look forward to the NPS continuing to engage in consultation with Indian Country as it moves forward with revisions to Bulletin 38 and considers NATHPO's recommendations. If you have any questions about these comments, please do not hesitate to contact me at valerie@nathpo.org and our attorney, Wesley James Furlong at wfurlong@narf.org.

Sincerely,

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