

December 10, 2002

H. Bryan Mitchell
Heritage Preservation Services
National Park Service
1849 C Street, NW (2255)
Washington DC 20240

Re: Comments on Draft Regulations 36 CFR Part 61.8 Tribal Programs

Dear Mr. Mitchell:

The National Association of Tribal Historic Preservation Officers (NATHPO) commends the National Park Service's efforts to develop long awaited and much needed regulations that provide guidance to Tribes interested in assuming SHPO responsibilities. NATHPO also commends the NPS for conducting national public meetings on regulations of extreme importance to tribal governments.

The NPS stated in the proposed regulations that "building an effective working relationship" with tribal governments is one NPS objective. This laudable goal is very important, but in fact, these regulations by their nature should be to advance tribal and federal historic preservation goals. These rules must recognize this central goal.

The NATHPO board of directors respectfully submits the following recommendations and general comments to the proposed regulations, which accompany a detailed document that is a line-by-line edit, addition, and strikeout on the published NPS proposed regulations.

Recommendation 1: That NPS establish an obligatory review of the published, Final Rule on Part 61.8 within three years of implementation. Each and every Tribe exists with a unique cultural and governmental history. The 1992 amendments ushered in a new era of historic preservation in the official partnership of tribal to federal government. As more and more Tribes create and operate THPO programs, there will undoubtedly be circumstances for which Part 61.8 will not provide enough guidance, contradictory guidance or interpretations that will lead to tribal discrimination. It would be contrary to the intent of Congress to allow the very set of regulations that implement the 1992 amendments to also be the vehicle by which the federal – tribal partnership results in federal discrimination. To avoid this potential problem NPS should impose an obligatory review of Part 61.8 implementation within three years of its final adoption.

Recommendation 2: That NPS consider the unique situation of Alaska Tribes and Tribal Corporations and conduct a consultation meeting in Alaska. NPS should conduct at least one specific and targeted public meeting with Alaska Native tribal governments to ensure that NPS does not exclude this entire community from participating in the National Historic Preservation Act, and the benefits available to states and other tribes. Nothing in the Act suggests that Congress intended to exclude Alaska Tribes from full participation.

Recommendation 3: That the NPS conduct a Tribal Historic Preservation Office consultation meeting specifically targeting the comments of existing THPOs. As you stated during the Washington, DC, public meeting, the NPS offered meetings to the general public, and that the meetings in Montana, Washington, Arizona, Nevada, New Mexico, North Dakota, Oklahoma, Wisconsin, and Washington-DC, were not official tribal government-to-government consultation meetings. NATHPO believes that such consultations are required by Section 101(d)(i)(c) of the Act.

Recommendation 4: That the NPS make substantial changes to the August 12, 2002, draft and republish for comment for an additional comment period of time.

Overall, General Comments

- A. Avoid all references to “us” and “you.” Such first person plural references unnecessarily personalize a preexisting dichotomy and are needlessly confusing. Simply replace where appropriate with “NPS” and “Tribe.”
- B. Delete or further define the phrases “to the extent feasible” [(b)(3) and (b)(6)] “same authority and discretion” [(a)], “effective working relationship” [(c)(1)], “adequate” and “adequate and qualified” [(g)(1)(i) and (ii) and (iii)]. Each of these areas would be better clarified by simply adding the clause “in accordance with the principles of Federal Indian law.”
- C. Define or delete the phrase “Qualified Tribes” [(b)(4)]. If qualified means federally recognized then state “federally recognized.” If qualification hinges on having “tribal lands” then the NPS must codify this in a second publishing of these amended regulations or in the Final Rule. The recent NPS decision to allow THPO eligibility for trust lands outside reservation boundaries (or outside “tribal lands”) should also be defined as “qualified.” Tribes without tribal lands, without any lands, or with only corporate lands or fee lands, should also be included as “qualified.”
- D. The National Historic Preservation Act does not establish any thresholds that would exclude non-THPO tribal preservation programs and was written with the intent that all tribal governments would have an opportunity to participate in this national program. Therefore a “current preservation program” need not exist in order for a Tribal 61.8 application to merit NPS consideration. The imposition of an additional exclusionary requirement is inconsistent with the Act and must be deleted. Also, NATHPO disagrees with your policy statement made in Phoenix, Arizona, that the NPS interpretation of the Act is that the THPO program is “not intended to create programs when none previously existed.”
- E. It is not the place of the NPS, nor does the law require, that NPS determine minimum requirements of THPO staff professional qualifications. Tribal employment decisions are a matter of tribal employment systems.

- F. The law does not require that a Tribal Historic Preservation Review Board be similar to a State Historic Preservation Review Board. Therefore the wording “adequate and qualified” [(g)(1)(ii)] is not appropriate. Delete the entire sub-paragraph (g)(1)(ii).
- G. Delete (g)(1)(iii) in entirety. The law does not explicitly require these within Section 101(b)(2) or Section 101(d)(2). Consultation with other Tribes, with the SHPO, and with the general public are matters of each tribe’s individually sanctioned tribal sovereignty and therefore should not be a matter of NPS concern.
- H. Mention of a THPO application is lacking from the overall regulations and needs to be incorporated in a manner that is helpful and that includes timelines and deadlines.
- I. The published proposed timeline and application steps need to be checked for accuracy and clarity. What happens if the NPS misses one of their deadlines?
- J. Tribal governments are still burdened by the lack of a NPS tribal consultation policy. Without such knowledge and guidance, tribal governments are not allowed to understand how their comments and recommendations are interpreted. This important oversight is long overdue and we urge you to address this need and concern as soon as possible.

While NATHPO commends NPS for its efforts to conduct national public meetings, it is understood that NPS tribal consultation efforts are not yet completed. The federal canons of tribal consultation process require mailing, phoning, and face to face meetings. To this end NATHPO is poised to assist NPS in facilitating an all-THPO Tribal meeting as a means of initiating tribal face-to-face requirements.

Attached please find a copy of NATHPO’s line-by-line edits and strikeouts. Thank you for the opportunity to comment on this important set of regulations.

Sincerely,

Alan S. Downer, Chairman

Attachment:

cc: NATHPO Members
D. Bambi Kraus, NATHPO President
Fran S. Mainella, NPS Director
Don Murphy, NPS Deputy Director
Randy Jones, NPS Deputy Director
Katherine Stevenson, NPS Associate Director