April 1, 2019

Re: NPS Proposed Rule to revise regulations governing the listing of properties in the National Register of Historic Places, and resulting implications on Tribes and areas significant to Tribes

The National Park Service is seeking to revise Title 36 of the Code of Federal Regulations, Parts 60 and 63, governing the listing of properties in the National Register of Historic Places (NRHP). This proposed rule, published in the Federal Register on March 1, 2019 with a public comment period ending April 30, 2019, proposes significant changes to the NRHP. Part of the proposed rule is ostensibly based on language amending the National Historic Preservation Act (NHPA) that was included in the National Parks Centennial Act (2016).

The proposed rule goes far beyond the amendment and indeed contradicts the intent of the NHPA, proposing changes that would inappropriately and negatively impact the role of the Keeper of the NRHP, State Historic Preservation Officers (SHPOs), Indian tribes, historic properties and the public interest. Two proposed provisions are especially problematic:

1. The proposed rule specifies that the Keeper may only determine the eligibility of properties for listing in the NRHP upon a request from the relevant Federal agency. This could allow federal agencies to effectively block the Keeper from opining on consensus determinations in the NHPA Section 106 process without agency approval, changing the Keeper’s role in a way the NPS does not have the authority to do. Thus, if a federal agency were not supportive of a designation, it could simply choose not to act. This inaction would prevent the National Register nomination from moving forward, effectively creating a federal pocket veto.

   The proposed rule also inappropriately conflates the two steps in the NRHP process: determination of eligibility and listing. The Keeper is charged with determining eligibility of all properties, based on historical facts alone, and is the only independent party with the professional and legal responsibility to do so. The decision to list an eligible property in the NRHP may become politicized (e.g., based on ownership), so shifting the eligibility decision point from the Keeper to federal agencies creates a prime opportunity for political motivations to drive a process originally designed to protect public interests.

2. The proposed rule “provide(s) that a property shall not be listed in the National Register if objections are received from either (i) a majority of the land owners, as existing regulations provide; or (ii) owners of a majority of the land area of the property.” Part (ii) was not included in the original
language or amendments to the NHPA, and places the full onus on the SHPO “to ensure the accuracy of the owner and objector count prior to submitting a nomination to the Keeper.” This is clearly intended to give veto power to a large ranch or mine owner or energy developer with an interest in a proposed historic district or landscape.

The proposed changes have serious implications for tribes. Agencies are already challenged by identification of properties of religious and cultural significance to tribes. A new requirement for agencies to request an eligibility determination from the Keeper (especially where states, tribes, and others may have reached consensus) would impact tribes’ ability to participate in consultations, especially off tribal land, where many culturally important sites are located. This may also affect how/whether a property’s tribal significance is considered. Agencies unreceptive to tribal perspectives would be able to circumvent established policies and processes for consultation to identify sites and mitigate effects. They could also demand additional justification from tribes for eligibility determinations, implicating potentially sensitive information.

The federal pocket veto could also create significant delays and uncertainty in the Section 106 review process – the antithesis of the stated goal of streamlining. This provision would prevent parties other than the federal agency from submitting National Register nominations (or appeals) for federal properties. Accordingly, if there are differences of opinion on whether a federal property is National Register-eligible, the proposed regulations would provide no mechanism for resolving that disagreement, because the federal agency could prevent the issue from being referred to the Keeper.

Further, giving undue weight to the opinions of land and private property owners poses an existential threat to properties of religious and cultural significance to tribes. Placing the burden on SHPOs to evaluate whether owners of a majority of the land area support a nomination is not feasible and is contrary to the statutory language of the NHPA. This provision is above all contrary to the fundamental principles of American democracy, where citizens who have more property or wealth do not get to out-vote the majority. Importantly, both proposed changes preclude the requirement for federal government-to-government consultation with Indian Tribes (E.O. 13175).

DOI has determined that this proposed rule will have no direct effects on tribes, and therefore no consultation is required. This claim is outrageous and fails to recognize that tribes often have substantial traditional cultural and ancestral connections to federal lands, and the proposed changes would adversely affect tribes’ ability to protect sacred and significant cultural sites. Of course, these changes will have substantial and direct effects tribes. Failure of DOI to consult with tribes on the rulemaking implicates tribes’ relationship with the department, abrogates the department’s trust responsibilities to tribes, and impinges on tribal sovereignty.

The current DOI Policy on Consultation with Indian Tribes (implementing E.O. 13175) requires government-to-government consultation between Tribal Officials and Departmental officials on departmental actions with tribal implications, defined as, “any Departmental regulation, rulemaking, policy, guidance, legislative proposal ... that may have a substantial direct effect on an Indian Tribe on matters including, but not limited to:

1. Tribal cultural practices, lands, resources, or access to traditional areas of cultural or religious importance on federally managed lands;
2. The ability of an Indian Tribe to govern or provide services to its members;
3. An **Indian Tribe’s formal relationship with the Department**; or
4. The consideration of the **Department’s trust responsibilities to Indian Tribes**.” [emphasis added]

This action is a rulemaking with substantial direct effects on tribal cultural practices, lands, resources, or access to significant areas, both on federally managed lands and off. Current tribal ownership and management of land/properties has little relationship to areas of tribal significance (due to past and current policies and practices of the federal government) and the NHPA requires the federal government to consult with tribes on areas significant to them, regardless of location. For DOI to claim otherwise in this case is inaccurate, disingenuous, and contrary to numerous federal statutes, orders, and policies. Furthermore, failure to consult implicates tribes’ relationship with the department and abrogates the department’s trust responsibilities to tribes.

The National Association of Tribal Historic Preservation Officers (NATHPO), its members, stakeholders, and partners, request two things: an extension of the public comment period, and acknowledgement that tribal consultation is required under federal and DOI policy and will be initiated by DOI before this rulemaking proceeds further. A public comment period does not constitute government-to-government consultation and will not be considered as such by the sovereign Indian Nations to whom DOI holds trust responsibilities.