



April 30, 2023

Joy Beasley, Keeper
ATTN: Draft TCP Bulletin Revisions
National Register of Historic Places
National Park Service
1849 C Street Northwest
Washington, DC 20240
nr_tcp@nps.gov

Re: National Association of Tribal Historic Preservation Officers' Comments of the 2022 Draft Revisions to National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties

Also submitted electronically via NPS Park Planning web portal:
<https://parkplanning.nps.gov/commentForm.cfm?documentID=124454>

Dear Ms. Beasley:

The National Association of Tribal Historic Preservation Officers (“NATHPO”) is pleased to submit the following comments of the National Park Service’s 2022 draft revisions to *National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties*. NATHPO staff and members participated in the National Park Service’s (“NPS”) Tribal Historic Preservation Officers (“THPO”) webinar on January 26, 2023, hosted a panel discussion on the revisions with the NPS on February 25, 2023, at its annual conference, and hosted its own webinar on the proposed revisions on April 14, 2023. NATHPO’s comments are informed by its, its staff’s, and its members’ experiences with Bulletin 38 and the National Register of Historic Places (“National Register”) program, comments made by attendees during the NPS’s webinar, NATHPO’s conference, NATHPO’s webinar, and other comments NATHPO has received from its members, THPOs, Indian Tribes, and Section 106 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 215 THPOs. NATHPO is a voting member of the ACHP.¹

¹ 54 U.S.C. § 304101(a)(8).

Specific Comments

Page 6, Lines 5–8. The 1992 amendments to the National Historic Preservation Act (“NHPA”) established Tribal Historic Preservation Programs and authorized Indian Tribes to establish THPOs. These amendments authorized THPOs to assume the role of State Historic Preservation Officers (“SHPO”).² This includes the nomination of historic properties to the National Register.³ Despite this, the NPS has not undertaken any rulemaking to codify a process by which THPOs—not to mention Indian Tribes and Native Hawaiian organizations—may nominate historic properties to the National Register. The NPS’s regulations only provide processes for SHPO and Federal Preservation Officers to individually or concurrently nominate properties to the National Register,⁴ and for individuals and organizations to request that the appropriate SHPO or FPO nominate a property.⁵ As explained in greater detail later in these comments, NATHPO requests that the NPS undertake a rulemaking to specifically codify a process by which Indian Tribes, THPOs, and Native Hawaiian organizations can nominate historic properties directly to the National Register.

Pages 7–8, Lines 28–4. Bulletin 38 was first published in 1990. The Tribal Historic Preservation Programs and THPOs were not established until 1992.⁶

Page 10, Line 12–13. The term “special rock” comes across as dismissive to certain historic and culturally and religiously significant resources. While NATHPO understands the point the NPS is attempting to make with this example, there are better ways of phrasing it. Moreover, the NPS should take this opportunity to provide examples of TCPs that are districts or sites that do not include any built structures.

Page 11, Lines 11–15. NATHPO welcomes this change. As the draft notes, the use of the term “property” can imply a commodification of specific resources. It can also imply ownership, which may be antithetical to certain cultures. Additionally, the use of the term “property” implies that a TCP must be a discrete resource, that is small and easily bounded. This is not appropriate, so the change to the term “place” is welcomed.

Page 11, Lines 18–20. The phrase “with or without evidence of human modification” implies that a landscape or geographic feature must have been modified by humans to be considered a National Register-eligible TCP, even if that modification is not obvious to an outside observer. This should be revised to clarify that TCPs do not need to have been modified or used by humans to be listed on the National Register. National Register-eligible TCPs may be entirely natural landscapes and features. Indeed, some TCPs derive their significance to a community because it is culturally inappropriate, prohibited, or taboo to physically enter or visit the place.

Page 12, Lines 7–10. NATHPO welcomes the clarification that a TCP does not need to be in continuous use by the community that ascribes it significance for it to be eligible for inclusion on

² *Id.* § 302702.

³ *Accord id.*; *id.* § 302303(b)(2).

⁴ *See* 36 C.F.R. §§ 60.6, 60.9-60.11.

⁵ *See id.* § 60.11.

⁶ *See generally* Pub. L. No. 102-575, § 4006, 106 Stat. 4600 (1992).

the National Register. This has been a consistent point of confusion stemming from the definition of TCP. As a result, a 2012 Advisory Council on Historic Preservation (“ACHP”) handbook contrasted TCPs and properties of traditional religious and cultural significance to Indian Tribes and Native Hawaiian organizations. The ACHP stated: “Bulletin 38 has sometimes been interpreted as requiring an Indian Tribe to demonstrate continual use of a site in order for it to be considered a TCP”⁷ As the ACHP points out, this is problematic because of the forced removal of Indian Tribes from their homelands, the loss of access to certain places, and cultural norms and practices that prohibit or prescribe access. It is therefore important to see the draft language clarify that continual use is not necessary.

Page 12, Lines 27–28. NATHPO welcomes the additional language in this draft that the community that ascribes significance to a particular TCP is the expert about that TCP. The current draft implies this, but the language is not explicit. This clarification is important. NATHPO recommends, however, that this language is made even more explicit and repeated throughout the bulletin, especially in the sections on applying the National Register criteria.

Page 15, Line 2. While the National Register is eponymously a register of historic *places*, there is no requirement in the NHPA or the NPS’s regulations that a historic property actually be a “place.” For example, the NPS defines “object” as “a material *thing* of functional, aesthetic, cultural, historic or scientific value that may be, by nature or design, movable yet related to a specific setting or environment.”⁸ Moreover, on page 28 of the draft bulletin, the NPS specifically notes that “[a] natural feature such as a rock or a tree” may be a TCP. Rock or trees are not necessarily places. While NATHPO understands that intangible aspects of culture cannot be listed on the National Register, the insistence that only *places* can be is incorrect and insensitive to how many cultures may view the significance of certain resources.

Page 17, Line 14. “[W]ill affect” should be changed to “*may* affect.” Section 106 review is triggered when a federal agency determines that a specific federal action is an “undertaking” and “has *the potential* to cause effects on historic properties.”⁹

Page 18, Line 28–32. While NATHPO understands the need for this bulletin to clarify that a community’s cultural traditions do not need to be validated by Western science to be valid and inform the documentation and eligibility of TCPs, the language used in this paragraph is problematic. First, it is not Indigenous communities’ “position” about where their ancestors came from or how the world was formed. Cosmology, myth, and religion are not “position[s]” that need to be proved against the “European American science’s position” about the origin of the universe or humankind. This sentiment is concerning because it is not apparent to NATHPO that such dismissive language would be used to describe Euro-American and Judeo-Christian religious beliefs, myths, and cosmologies. Moreover, NATHPO finds it highly inappropriate for this bulletin to espouse the Bering Land Bridge migration theory, even tangentially.

⁷ Advisory Council on Hist. Pres., *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* 21 (Dec. 2012).

⁸ 36 C.F.R. § 60.3(j) (emphasis added); see *Okinawa Dugong (Dugong Dugong) v. Rumsfeld*, No. C 03-4350 MHP, 2005 WL 522106 (N.D. Cal. Mar. 2, 2005).

⁹ 36 C.F.R. § 800.3(a).

Page 20, Line 7. NATHPO appreciates the inclusion of language that clarifies that information provided by the communities that ascribe significance to a TCP must be prioritized over all other sources.

Page 20, Lines 27–28. A “reasonable effort” to identify historic properties, and in particular TCPs, is not necessarily dependent upon whether they are actually present. A TCP may indeed be present, but an outside researcher may never know that because (a) it is not obvious; (b) the community is not willing to tell the researcher about it, for whatever reason; or (c) cultural practices and traditions may forbid the community to disclosing not just the TCP’s location but its existence altogether. A reasonable effort to identify historic properties must account for these possibilities.¹⁰ Likewise, a reasonable effort must respect a community’s wishes and not proceed with attempting to document TCPs if the community is unwilling or unable to discuss them.

Page 21, Line 17. Outside researchers should not come into communities to document and nominate TCPs unless the community has explicitly invited the researcher in, and the community has been fully informed about and consented to the work and the process. While the community’s participation is critical, the community’s consent to the work happening must be required.

Page 22, Lines 24–25. It is not sufficient that Tribal officials have full knowledge and cooperation in identification efforts; Indian Tribes must consent to the work before it can proceed.

Page 23, Lines 2–7. This section of the bulletin is premised on the baseline assumption that outside researchers have a right to document and nominate TCPs. The bulletin provides examples of instances where communities may be unwilling or unable to share information about TCPs and then instructs researchers to find ways of circumventing the wishes of the community by reframing questions or refocusing efforts. This is not appropriate. The documentation and nomination of TCPs must be community led. If the community is unwilling to proceed or disclose information about their TCPs, the only appropriate next step is to stop work and leave. The bulletin does suggest that in an ongoing Section 106 process, there may be a need to document historic properties notwithstanding the community’s reluctance to disclose information about them. This circumstance may certainly arise,¹¹ but it is not the place for this bulletin or the NPS to weigh in on how to proceed in such circumstances. That is an issue for the ACHP and the consulting parties, specific Indian Tribes or Native Hawaiian organizations, and the lead federal agency to resolve through consultation.

Moreover, just because there is an ongoing Section 106 process which requires the identification of historic properties does not mean that the federal agency may move forward with documenting TCPs over the objections of a community. It is the community’s prerogative to decide whether the TCP is documented, not the federal agency’s. If the community has been fully informed of the risks of non-disclosure, then that should end the conversation. The ACHP’s regulations require federal agencies to undertake a reasonable and good faith effort to identify historic properties.¹² Identification is not good faith if it is done over the objections of the community that ascribes

¹⁰ *C.f. Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

¹¹ *See, e.g., id.*

¹² *See* 36 C.F.R. § 800.4(b)(1).

significance to the TCP. Moreover, the ACHP's regulations provide a process if the circumstance arises where a federal agency is unable to document certain historic properties.

Page 23, Lines 14–26. The bulletin should recognize that it may be taboo for information to be shared outside of a community. Additionally, it may be culturally prohibited to share information, or prohibited by law, with regard to Indian Tribes.

Page 26, Lines 14–24. The bulletin suggests that it “may sometimes be true” that communities invent TCPs to obstruct or influence development projects. This language is deeply concerning to NATHPO. In our, our staff's, and our members' experience, we have never seen this happen. While the bulletin states that this is not usually the case, it implies that it happens frequently enough that researchers and federal agencies should be on the look out for it. The implication of this statement is that researchers and federal agencies should not trust the information provided to them by communities about TCPs. This conflicts with previous language in the bulletin about how the communities are the experts. While it may appear to some that a TCP suddenly “appears” when a project threatens it, the reason is almost always that (a) it was not necessary to discuss or disclose the resource before; (b) that the researcher or federal agency is from outside the community and would never have been in a position to know about it before; or (c) that the legal framework of the NHPA, the National Register, and the Section 106 process are new to the community and discussing their culturally significant resources within this particular vernacular is not something they have experience with.

Page 27, Line 15. This line states that “[i]n general, the views of those who ascribe cultural value to a place should be prioritized[.]” The views of the community should always be prioritized, not just in general.

Page 29, Line 3. The bulletin needs to clarify that there is no size limit for historic properties, including TCPs, to be listed on the National Register. TCPs can be as small as a square foot to hundreds of thousands of acres, if not larger.

Page 30, Lines 14–30. The bulletin should provide other examples of historic properties that do not focus on a built environment.

Page 30, Line 30. The identification of TCPs must be done in *consultation* with the community, not in coordination.

Page 31, Lines 2–3. This discussion about time periods sometimes being irrelevant should be expanded. There needs to be clarification that it is acceptable for communities—Indian Tribes, in particular—to note on the nomination form that the period of significance begins at “time immemorial” (or something similar) and that a specific date is not necessary. We have seen pushback from SHPOs and State Review Boards to nomination forms that do not identify a specific date.

Page 31, Line 15. The bulletin notes that under Criterion B, “person” can refer to “an ancestor or spirit.” The bulletin should include that individuals who are part of folklore, myth, or other stories may also qualify.

Page 33, Lines 9–11. The Bulletin should clarify that a National Register-eligible district *per se* meets Criterion C as a significant and distinguishable entity whose components may lack individual distinction.

Page 33, Line 13. The bulletin states that “[a] TCP may be a district if it possesses a significant collection of buildings, structures, sites, or objects” This implies that the contributing resources to a district must, themselves, be listed or eligible historic properties. This is not correct. The contributing resources to a district do not, themselves, need to meet the National Register criteria or even the definitions of National Register property types.

Page 33, Lines 26–29. This needs to clarify that a TCP that contains landscape characteristics—*i.e.*, a traditional cultural landscape—may be listed on the National Register as a site and be eligible under Criterion C. Criterion C is not exclusive to districts. This also must clarify that a TCP may be a district even if all its contributing resources are natural features. This language implies that a district cannot contain only natural features, which is incorrect.

Page 34, Lines 3–4. The bulletin needs to clarify that archaeological information is not the only information that a TCP can yield to be eligible under Criterion D. That said, the application of Criterion D to TCPs is concerning, as it implies that the only value they have is their research potential. Criterion D is too often used by federal agencies to minimize the importance of TCPs and ignore their intangible values, as archaeological values are more easily mitigatable.

General Comments

Both Bulletin 38 and other NPS guidance and bulletins need to clarify that for a TCP to be considered a district, it does not need to contain any man-made buildings, structures, or objects, or other evidence of human occupation and use (*e.g.*, archaeological sites, trails, culturally modified trees, rock formations, petroglyphs, pictographs, etc.) to be eligible for inclusion on the National Register as a district. An entirely natural landscape can be a district, and the district’s contributing elements can be completely natural features (*e.g.*, landforms, plant species, rocks, water bodies, animal species, viewscapes, etc.). Moreover, NPS guidance should better clarify that if a district is nominated because of its natural features, the existence of man-made buildings, structures, or objects, or other evidence of human occupation and use within the boundaries of the district do not need to be identified as contributing elements to the district. Likewise, the existence of these non-natural features within a district does not necessarily diminish the integrity and significance of the district. We have seen instances where SHPOs, State Review Boards, and members of the public and other state agencies have asserted that districts are not eligible either because they do not contain any buildings (their mistaken assumption being that a district must contain buildings) or that the existence of buildings within a district make it ineligible (this mistaken assumption being that the existence of non-contributing resources within a district negate the district’s integrity).

Both Bulletin 38 and other NPS guidance and bulletins need to clarify that size is irrelevant when considering the National Register eligibility of any historic property, including TCPs. While the draft bulletin suggests that size is not relevant, it must be made clearer throughout NPS guidance. So long as the property is adequately described and the area included in the nomination is

sufficiently documented to show how it contributes to the property's overall significance, size is irrelevant. Bulletin 38, in particular, should provide examples of extremely large TCPs that have been listed, or determined eligible for inclusion, on the National Register to illustrate this point. We have seen instances where SHPOs, State Review Boards, and members of the public and other state agencies have advocated for not listing or, even, affirmatively determining a TCP ineligible for the National Register simply because of its size. There is no basis for this position in the NHPA or the NPS's regulations.

A consistent issue with the nomination of many properties to the National Register, and TCPs in particular, is the NPS's insistence that nomination forms clearly define the historic property's boundaries. This is often impossible for TCPs, as well as culturally inappropriate. The NPS needs to address this problem and develop a process for listing historic properties, and TCPs in particular, without the need for the nomination to define the property's boundaries. There is no statutory or regulatory requirement that a boundary must be defined for a property to be listed on the National Register. Listing historic properties on the National Register without defining boundaries is consistent with ongoing NPS practice and would not cause significant issues.

For example, in 2010, the Keeper of the National Register issued a formal determination of eligibility for Nantucket Sound, in which she stated: "Additional documentation is necessary to define the precise boundaries of the district of which the Sound is a contributing part, but the district should include other eligible archaeological, historic, and traditional cultural sites and properties in proximity to the Sound."¹³ The Keeper's Determination of Eligibility for Nantucket Sound presents one possible path forward to list properties without defining boundaries. By describing the types of potentially contributing resources within a broader geographic area, a TCP could be listed without a defined boundary. This is operationally similar to how multi-property nominations work. While each individual property that meets the historic context of a multi-property nomination currently requires a boundary, the multi-property nomination may proceed without defining the precise geographic scope of nomination and without all the contributing properties being defined.

For many Indian Tribes and Native Hawaiian organizations, the only meaningful reason for listing TCPs on the National Register is to ensure that they are taken into account in future Section 106 processes. It is common practice for Section 106 processes to proceed without precise boundaries being defined for any historic property considered in the review. Section 106 practitioners, federal agencies, Indian Tribes, THPOs, SHPOs, and Native Hawaiian organizations have years of experience identifying historic properties, assessing effects, and resolving adverse effects in the Section 106 process without having defined historic properties' precise boundaries. Since consideration in the Section 106 process is, often, the only meaningful reason Indian Tribes, THPOs, and Native Hawaiian organizations have to list TCPs on the National Register, there is no need for boundaries to be defined. Moreover, as a general matter, the types of TCPs Tribes, THPOs, and Native Hawaiian organizations would list on the National Register are not the types of historic properties that would be eligible for historic preservation tax credits or be subject to state and municipal historic preservation ordinances, meaning that precise boundaries are not necessary.

¹³ Nat'l Park Serv., *Determination of Eligibility Notification: Nantucket Sound 3* (Jan. 4, 2010).

While NATHPO does not necessarily support one specific approach for resolving the issue of boundaries for TCP nominations over any other, these examples are illustrative of the fact that the NPS is perfectly capable of listing properties on the National Register and determining their National Register eligibility without needing to define precise boundaries.

Even if all the concerns raised above are fully addressed, Indian Tribes, THPOs, and Native Hawaiian organizations would still have significant issues with the National Register program. 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 Indian Tribes 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, Indian Tribes' and Native Hawaiian organizations' expertise is consistently questioned and challenged by State Review Boards, SHPOs, the public, and the NPS itself. This leads to the other major problem with the nomination process: the lack of a Tribal-, THPO-, and Native Hawaiian organization-specific nomination process and guidance.

The 1992 amendments to the NHPA established Tribal Historic Preservation Programs and THPOs, who may assume the role of SHPO, including nominating property to the National Register.¹⁴ Moreover, the 1992 amendments specifically recognize that historic properties of traditional religious and cultural significance to Indian Tribes and Native Hawaiian organizations may be eligible for inclusion on the National Register.¹⁵ Since the 1992 amendments were enacted, the NPS has not undertaken any rulemaking that codified a process by which THPOs specifically, and Indian Tribes and Native Hawaiian organizations generally, can directly nominate historic properties to the National Register, nor has it amended its National Register regulations to specifically account for the nomination of property of traditional religious and cultural significance.

Currently, Indian Tribes, THPOs, and Native Hawaiian organizations cannot independently nominate historic properties to the National Register. Instead, they must submit requests for nominations to the appropriate SHPO or FPO.¹⁶ In so doing, the Indian Tribe or Native Hawaiian organization must submit to the jurisdiction of a state or the federal government, and present them

¹⁴ 54 U.S.C. §§ 302701-302706.

¹⁵ *Id.* § 302706(a).

¹⁶ *See* 36 C.F.R. § 60.11.

with enough evidence to convince these agencies that their culturally significant places are worth listing on the National Register. It is unacceptable and antithetical to the federal government's trust relationship to Indian Tribes and Native Hawaiians¹⁷ and to the purpose of the 1992 amendments to continue to require Indian Tribes and Native Hawaiian organizations to go before politically appointed state bodies and officers in order to secure the recognition that their own places are National Register-eligible. To this end, NATHPO calls upon the NPS to engage in a rulemaking to establish an independent process for Indian Tribes, THPOs, and Native Hawaiian organizations to nominate historic properties directly to the National Register without needing to submit a request for nomination to the SHPO or FPO. Indeed, the National Register regulations at 36 C.F.R. Part 60 have sections "reserved" for future use.¹⁸

In this same vein, the NPS should develop Tribal- and Native Hawaiian organization-specific guidance (such as a new National Register bulletin) for documenting and evaluating the National Register eligibility of properties of traditional religious and cultural significance, as well as a new National Register criterion applicably only to such properties.¹⁹ The 1992 amendments make clear that only Indian Tribes and Native Hawaiian organizations, as defined in the NHPA, 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 Indian Tribes and Native Hawaiian organizations. 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 Indian Tribes and Native Hawaiian organizations.

Indian Tribes are sovereign governments that possess a unique political relationship with the United States government. The United States government has a trust relationship with Indian Tribes and Native Hawaiian organizations. Out of these unique relationships, the Congress has specifically legislated to ensure that places of traditional religious and cultural importance to only Indian Tribes and Native Hawaiian organizations are specifically eligible for inclusion on the National Register. It is therefore inappropriate to treat Indian Tribes and Native Hawaiian organizations the same as any other traditional community. As one participant in NATHPO's April 14 webinar stated, requiring Indian Tribes to use the same bulletin as any other community creates a "false equivalency" between Indian Tribes and other communities. To remedy this, NATHPO urges the NPS to develop a new National Register bulletin and new National Register criterion that apply specifically to properties of traditional religious and cultural significance to Indian Tribes and Native Hawaiian organizations, and that can be used only by Indian Tribes, THPOs, and Native Hawaiian organizations.

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

¹⁷ See *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) ("[The United States] has charged itself with moral obligations of the highest responsibility and trust."); 43 C.F.R. § 50.1 (noting "[t]he special political and trust relationship that exists between the United States and the Native Hawaiian community, as recognized by Congress[]").

¹⁸ See 36 C.F.R. §§ 60.7-60.8.

¹⁹ See, e.g., 43 C.F.R. § 2653.5(d).

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 or 202-628-8476.

Sincerely,

A handwritten signature in black ink that reads "Valerie J. Grussing". The signature is written in a cursive style with a large, prominent 'V' at the beginning.

Valerie J. Grussing, PhD
Executive Director

c.c. Sherry Frear <sherry_frear@nps.gov>
Dorothy FireCloud <dorothy_firecloud@nps.gov>
Wesley Furlong, JD <wfurlong@narf.org>