



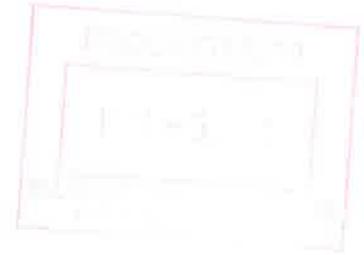
United States Department of the Interior

BUREAU OF RECLAMATION
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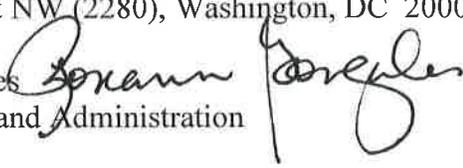
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OCT 29 2012



MEMORANDUM

To: The Keeper of the National Register of Historic Places, National Park Service,
1201 Eye Street NW (2280), Washington, DC 20005

From: Roseann Gonzales 
Director, Policy and Administration

Subject: Comments and Recommendations on the National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*

Dear Ms. Shull:

Thank you for the opportunity to provide comments and recommendations on National Register Bulletin 38 (Bulletin 38). The Bureau of Reclamation is pleased to acknowledge the importance of Bulletin 38 in providing guidance on the documentation and listing of properties in the National Register of Historic Places that are important to many American communities because of their nature as traditional cultural properties (TCP). Reclamation supports your efforts in updating Bulletin 38 and we hope our comments will benefit you in this endeavor. Attached, please find a copy of Reclamation's comments.

If you have any questions or would like to discuss Reclamation's comments or recommendations, please contact Mr. Thomas Lincoln, Federal Preservation Officer, at 303-445-3311, or tlincoln@usbr.gov.

Attachment

Comments on National Register of Historic Places (National Register) Bulletin 38
Guidelines for Evaluating and Documenting Traditional Cultural Properties
Bureau of Reclamation
October 2012

The National Park Service (NPS) has solicited comments and recommendations regarding its plan to update National Register Bulletin 38 (Bulletin 38), *Guidelines for Evaluating and Documenting Traditional Cultural Properties*. Included in the request is consideration of the proposal to develop and publish guidance related to identifying, evaluating, and documenting National Register eligible Native American landscapes.

Federal agencies and bureaus have been using the guidance provided in Bulletin 38 with success since 1990. The Bureau of Reclamation has used the guidance to list Native American traditional cultural properties (TCP) to the National Register, and to determine properties eligible for listing. Reclamation believes the guidance has served an important role in assisting with development of programs, policies, and directives that have improved our communication and coordination with Indian tribes and traditional communities and its appreciation for cultural diversity.

Issue 1: Reclamation believes Bulletin 38 would be improved with some editing and the inclusion of statements that provide clarification to its complex concepts. In addition, it would be useful for Bulletin 38 to remind those preparing National Register nomination forms that the existing guidance in other National Register Bulletins applies to TCPs. Unless the NPS is planning to change National Register Bulletin 15 - *How to Apply the National Register Criteria for Evaluation*, Bulletin 16a - *How to Complete the National Register Registration Form*, and Bulletin 16b - *How to Complete the National Register Multiple Property Documentation Form*, by adding "landscape" as a separate category of eligible property type, there is no need to change Bulletin 38. In Reclamation's experience, it would be confusing to add a new category of "landscape" when the definition of "site" in Bulletins 15 and 16 encompasses the property type. To quote Bulletin 15:

"A site can possess associative significance or information potential or both, and can be significant under any or all of the four criteria. A site need not be marked by physical remains if it is the location of a prehistoric or historic event or pattern of events and if no buildings, structures, or objects marked it at the time of the events. However, when the location of a prehistoric or historic event cannot be conclusively determined because no other cultural materials were present or survive, documentation must be carefully evaluated to determine whether the traditionally recognized or identified site is accurate. A site may be a natural *landmark* strongly associated with significant prehistoric or historic events or patterns of events, if the significance of the natural feature is well documented through scholarly research [emphasis added]."

In Reclamation's experience, TCPs, regardless of their size, fit the above definition of site or they fall within the definition of either districts or multiple properties. We suggest that Bulletin 38 substantiate Bulletins 15 and 16, by stating that landscapes or other forms of TCPs should be evaluated as sites, districts, or multiple property types. Landscapes, in Reclamation's

opinion, are not a new type or category of property; thus, the concept does not require further consideration.

Recommendation #1: Reclamation's primary recommendation is that Bulletin 38 is fully functional and appropriate as written.

Issue 2: Determining the boundary of a TCP can be a source of conflict as evidenced by the "Boundaries" section in Bulletin 38 which is vague and counter to the clear instruction found in Bulletin 16a. Reclamation recognizes that defining defensible boundaries is integral to the documentation and relevance of a historic property. In addition, it seems that by definition as well as common convention, a "property" must be defined in space. While this concept is not necessarily relevant to many Native American tribes or individuals, it is a corner-stone to American culture, in particular its legal, political, and economic systems.

Recommendation #2: With respect to boundaries, Reclamation recommends that TCPs adhere to the guidance found in Bulletin 16a under Section 10 - Geographical Data, Guidelines for Selecting Boundaries, and that the "Boundaries" section in Bulletin 38 should direct the reader to Bulletin 16a.

Issue 3: The issue of applying the seven aspects of integrity to TCPs is vague in Bulletin 38, only referencing integrity of condition and integrity of relationship. Reclamation believes it is important to cross-reference Bulletin 38 with the Integrity section in Bulletin 15. Again, Reclamation suggests clear guidance is necessary and that TCPs should be evaluated following all of the criteria of integrity discussed in Bulletin 15. In Reclamation's experience, TCPs are most often eligible under Criteria a and/or b (36 CFR part 60, *National Register of Historic Places*), and, therefore, the appropriate guidance would be to follow the steps in Bulletin 15, as prescribed in the following quote:

"A basic integrity test for a property associated with an important event or person is whether a historical contemporary would recognize the property as it exists today."

Recommendation #3: Reclamation suggests that Bulletin 38 provide clear language on the application of the seven lines of integrity and reference the reader to adhere to the guidance in Bulletin 15.

Issue 4: Bulletin 38 is one of many tools the National Register Program has developed to assist in the identification, evaluation, documentation, and designation of significant properties, or historic properties, that are important to American history and the fabric of our national character. It provides useful guidance on the consideration and process of listing a TCP in the National Register. Once a historic property is listed in the National Register, or determined eligible for listing, it falls under the requirement for Federal agencies to consider adverse effects to the historic property that would be caused directly or indirectly by an undertaking (National Historic Preservation Act (NHPA), section 106; 16 U.S.C. 470 et seq., and regulation 36 CFR part 800). Section 106 is a consultative compliance requirement Federal agencies must complete when their actions adversely affect a historic property, and is most often associated with a corresponding activity required by the National Environmental Policy Act

(42 U.S.C. 4321). The usual, and expected, outcome of the section 106 process is either avoidance of the adverse effect on a historic property, or negotiated treatment that will mitigate the adverse effect. One of the concerns Reclamation has with these two processes – the values of a property that define it as a historic property and the process of determining and mitigating adverse effects on a historic property – is that their regulatory requirements are administered by different agencies, NPS and the Advisory Council on Historic Preservation (ACHP), respectively. For example, NPS and ACHP are not in conflict with the NPS definition that a historic property must be a site, building, structure, or object. By definition, a TCP is a place as long as it is bounded in space (i.e., locational certainty), thus allowing an undertaking, also defined with spatial precision, to be juxtaposed with a historic property to determine if the property will be adversely affected. However, conflict does build when boundaries are not defined, as is the case for many TCPs and Native American landscapes. Because of locational uncertainty, recognizing that often a landscape could encompass hundreds of square miles and potentially dwarf an undertaking, agencies are left with a section 106 compliance burden that could be beyond the scope of an undertaking and would be prohibitively costly.

Recommendation #4: Bulletin 38 should only reflect the certainty of terms that are defined in statute or regulation. Reclamation asserts that the concept of Native American landscape has no place in Bulletin 38, and recommends it be excluded from Bulletin 38 because of its absence in statutory or regulatory definition.

Issue 5: The definition of a TCP is confusing. Sometimes it is interpreted to mean that the National Register eligibility of a TCP hinges only on its role in a living community and its importance in maintaining cultural identity. Thus, a TCP under this concept can be determined eligible for the National Register under a set of criteria separate from those found in 36 CFR 60.4, (*National Register of Historic Places, Criteria for Evaluation*). Reclamation recognizes that Section IV of Bulletin 38 reinforces that a TCP is eligible for the National Register only if it meets the criteria in 36 CFR 60.4; however, that instruction is absent in the definition of a TCP.

Recommendation #5: The definition of a TCP should state that a TCP is eligible for inclusion in the National Register only if it meets the criteria set forth in 36 CFR 60.4. The following language is an edited version of the definition for your consideration:

“A Traditional Cultural Property, then, can be defined generally as one that is eligible for inclusion in the National Register under the criteria set forth in 36 CFR 60.4 because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.”

Issue 6: Clearly, Bulletin 38 is guidance rather than regulation. However, often during consultations with state historic preservation offices, tribal historic preservation offices, and Indian tribes, it is not unusual to hear professed by staff in these entities that Federal agencies are required to do one thing or another because that is what it says in Bulletin 38. This is incorrect, as nothing in Bulletin 38 is required, instead it is an aid for agencies to use when documenting, determining eligibility, and nominating TCPs.

Recommendation #6: Bulletin 38 should remain guidance and language should be inserted to remove any ambiguity as to its non-mandatory nature.

Issue 7: In keeping with the theme that National Register Program guidance may be at odds with ACHP regulation and guidance, Reclamation notes the conflict caused by considerations of historic property significance, integrity, and contributing factors relative to the living world. For example, there is no question that important socio-cultural ritual practices can be influenced by non-human actors, including fish, mammals, and plants. How these actors influence, or are connected to, a historic property is problematic when such are considered contributing elements to a historic property or are used to negate boundary definitions because the living entities are mobile either as individuals or populations.

Recommendation #7: In consideration of living entities as important to socio-cultural ritual practices that are in turn substantiated by a location (for example, a designated TCP), NPS and ACHP should enter into discussions about the inclusiveness of living organisms in TCP significance, as contributing elements, and their appropriateness for section 106 considerations. Reclamation is of the opinion that living entities should not be included on National Register determinations as contributing elements, nor should they be considered integral to historic properties for section 106 purposes. Reclamation recommends that regulation and guidance developed and administered by NPS, including Bulletin 38, and ACHP should be consistent with statute and with each other. NPS should act independently of ACHP in this matter if agreement cannot be reached.

Issue 8: Reclamation recognizes it is important to identify Federal agency and tribal roles in the identification and evaluation of TCPs. Under 36 CFR part 800, Federal agencies have the responsibility to conduct a reasonable and good faith effort to identify and evaluate historic properties of traditional religious and cultural importance to Indian tribes, and they have the authority to expend funds to secure appropriate expertise to do so. Bulletin 38 highlights the tribal role in providing this expertise:

“The existence and significance of such locations often can be ascertained only through interview with knowledgeable users of the area, or through other forms of ethnographic research.”

Another example:

“It is vital to evaluate properties thought to have traditional cultural significance from the standpoint of those who may ascribe such significance to them, whatever one's own perception of them, based on one's own cultural values, may be.”

Bulletin 38 also describes a role for ethnographers and other experts in evaluating information. When it comes to resolving conflicts between sources, Bulletin 38 provides a role for experts from outside of a local community but who are familiar with it:

“Authorities consulted in most cases should include both knowledgeable parties within the group that may attribute cultural value to a property and *appropriate specialists in ethnography, sociology, history, and other relevant disciplines* [emphasis added].”

Recommendation #8: As NPS considers revising Bulletin 38, it should reiterate that outside experts do have a role in assisting agencies in the identification and evaluation of TCPs, and that Bulletin 38 has not given this role exclusively to the local communities.

Issue 9: The basis of Bulletin 38 is a process for the management of TCPs. As such, it includes ideas about what makes individual TCPs significant and worthy of listing in the National Register. Included in this might be both individual social perception as well as collective social perception, concepts that may place individual aspects of importance and significance at odds with collective, or community, ideas of a property’s significance. This, in turn, may be problematic for government analysis which substantiates collective interpretation in order to manage a property for collective benefit; management for the individual is contrary to government (i.e., collective) policy and regulation. Thus, the government’s implementation of a management practice on a TCP may disregard the semiotics of personal knowledge and individual perception of social settings, relationships, and cultural modalities. Culture is “sensed” by individuals who ultimately are the drivers of culture (i.e., the keepers of knowledge, sacred or not, and cultural projection and action). The same applies to ethnographers and their role in cultural interpretation.

Cultural dialog for the ethnographer is mostly about academic analysis leading to interpretation. For the cultural participant it is a much deeper dialog involving deeper sensual participation at the subconscious level. Bulletin 38 gets at the basic concepts of place and human practice in space and how to codify the significance of a place based on a role a culture identifies for the place, including its role in cultural definitions, relationships, structure, perceptions, and ideology. These various roles – participant, societal unit, academics, and government – must be articulated as it is important to identify them and distinguish differences the actors project.

Recommendation #9a: In order to make a TCP relevant, proponents of the TCP should include as much detail as possible as to why the TCP and its various features are culturally significant to them. The Bulletin 38 update must recognize the commitment and participation of all involved parties, and not single out Federal agencies as having to “accept” a TCP determination by proponents. All involved parties, Federal agencies and proponents, should be reminded in Bulletin 38 of the role they play and how important it is to participate fully and with integrity to ensure a complete understanding of the TCP.

Recommendation #9b: The Bulletin 38 update should include language that stresses the need for land managing agencies to be proactive in identifying TCPs by conducting baseline studies, including the use of extant ethnographic and ethnohistoric resources (e.g., Indian Lands Commission studies) to identify TCPs on lands they manage.

Recommendation #9c: The Bulletin 38 update should include language stressing the need for coordination among Federal, State, and local land managing agencies and private

landowners that would be affected when a tribe, agency, or other entity is considering designating an area a TCP.

Recommendation #9d: The Bulletin 38 update should encourage use of a National Register Multiple Properties nomination format to identify and list specific locations of importance within a TCP or Native American landscape in lieu of a single property format that would necessitate bounding an area that might encompass hundreds or thousands of square miles.

Recommendation #9e: Under the existing regulations addressing the listing of sites and districts in the National Register, permission must be obtained to list a historic property from the various land managing agencies and private individuals whose lands/property would be affected by the listing. NPS should clarify in Bulletin 38 how this requirement would be met when a TCP or Native American landscape encompasses thousands of square miles.

Recommendation #9f: It is important that Bulletin 38 recognize that activities occurring on tribal lands are the purview of the sovereign Indian tribe to direct. Language should be included stating that all decisions regarding TCPs located on tribal lands are made by the sovereign tribal government.

Following are comments specific to language in Bulletin 38 for your consideration in clarifying selected passages.

Issue 10: Page 4, Ethnography, Ethnohistory, Ethnocentrism, last paragraph – The tone of this paragraph is presupposing that Federal agencies are biased against a group assertion about the significance of a TCP. While this may have occurred, it is disingenuous to single out Federal agencies as being biased and potentially discriminatory toward Native Americans. It is important for Bulletin 38 to be current in its theoretical ethnographic principles, thus it should reflect the current post-modern critique which recognizes and counters ethnographic bias rather than a linear materialist perspective which often finds a convenient social actor to pronounce as biased. Bias is inherent in these types of studies, and a well-trained ethnographer understands this when conducting cultural research, documentation, and analysis and makes corrections accordingly, in a professional and forthright manner.

Recommendation #10a: The language in the Ethnography, Ethnohistory, and Ethnocentrism section of Bulletin 38 should be more balanced to recognize all forms of bias not just those ascribed to Federal agencies and by association professional anthropologists employed by those agencies as biased. The point is well taken, but the delivery is inappropriate.

Recommendation #10b: Page 15, end of third paragraph – Please consider the following edit “... To exclude from the National Register a property of cultural and historical importance to such a group, because its significance tends to be expressed in terms that to the Euroamerican observer appear to be “religious” is may be considered ethnocentric.” in the extreme.

Recommendation #10c: Reclamation recommends that the anthropological concepts argued in Bulletin 38 be updated from their materialist perspective to the current postmodern critique found in American anthropology.

Issue 11: Page 4, Evaluation, Consideration, and Protection, last paragraph – The example that a TCP may be less valuable to a group/community than a proposed development project is well taken. But another relevant real world scenario should be added to this discussion for completeness. Experience has shown that on occasion a group is so passionate about a TCP that it will not agree to any mitigative compromise even though the project would bring clear benefit to the community and individuals. In such cases the group invokes what it hopes will be a project veto even though section 106 does not allow for this, only an agency can negotiate away this right. Agencies need to be prepared for, and the public aware of, this scenario as a real possibility.

Recommendation #11a: For balance, please add an example where a group's political authority supports a TCP designation when members of the group/community oppose it, and recommendations how Federal agencies might proceed with compliance and the potential development.

Issue 12: Describing the setting of a TCP often is a challenge because ongoing visual, auditory, and atmospheric encroachments onto the property. The extant version of Bulletin 38 correctly informs individuals preparing National Register nomination of TCSs to be aware of these issues and to discuss those qualities that contribute to a property's significance. However, Reclamation believes it is inappropriate for Bulletin 38 to discuss eligibility determinations for historic properties. Eligibility determinations are regulated by 36 CFR part 800 and the ACHP while National Register nominations are regulated by 36 CFR part 60 and NPS.

Recommendation #12: Page 21, Describing the Setting, last paragraph – Discussion of visual, auditory, and atmospheric setting as contributing to a property's significance are important considerations, and Bulletin 38 should be edited to reflect that these attributes should be included in a National Register discussion if applicable. Reclamation further recommends that all references to "eligibility determinations" should be removed from this section of Bulletin 38.

Issue 13: Much of the preceding discussion highlights the need for qualified ethnographers or cultural anthropologists to be involved in the section 106 process. NHPA recognizes properties of traditional religious and cultural importance to Indian tribes as a legitimate historic property type just like archaeological sites and buildings. If an agency needs to identify or evaluate archaeological sites or buildings, it is relatively easy to find archaeologists, historians, and architectural historians qualified to assist in identifying and evaluating these resources. The situation is different with TCPs. Even though the NHPA officially recognizes properties of traditional religious and cultural importance to Indian tribes, sometimes it is difficult to find qualified individuals who could help Federal agencies make culturally sensitive determinations

regarding TCPs. Part of the problem is that no one has established qualification standards for experts who address TCPs.

Recommendation #13: NPS should consider facilitating the hiring of ethnographers and cultural anthropologists by building on the information in Appendix II of Bulletin 38 to create qualification standards for ethnographers or cultural anthropologists in much the same way that “professional archaeologist” has been defined in 36 CFR part 61, Appendix A. Alternatively, NPS could work with the Office of Personnel Management to recognize that ethnography and cultural anthropology are legitimate fields that deserve their own qualification standards separate from the General Anthropology series (0190) in the same way that Archeology (0193) has its own qualifications. The qualifications should emphasize not only educational background, but also experience in the region in which one is working because it takes a long time to establish the personal contacts and develop the trust that are crucial to ethnography. These standards should emphasize not only academic qualifications and community ties, but also experience in applying regulation 36 CFR part 800 to real world situations.

Issue 14: During some recent consultations, tribes have asked Reclamation to identify and evaluate TCPs that extend onto private land near Federal reservoirs. Places that some believe are crucial to traditional lifeways have passed entirely into private ownership, and access has been restricted. From the perspective of the private land owners, there is a concern that if their land is recognized as containing a TCP (or any other kind of cultural resource), Federal, state, or local agencies will significantly encumber their use of their land.

Recommendation #14: NPS should consider including a statement in Bulletin 38 clearly stating that Federal agencies have no control over eligibility determinations, or management responsibility, of TCPs located on private land even though the same TCP may be partially located on public land. In addition, it would be appropriate for NPS to provide guidance on how to develop agreements between private land owners and Federal agencies that would allow for the inclusion of privately held TCPs in a National Register determination or nomination.