



Hualapai Department of Cultural Resources
P.O. Box 310
Peach Springs, Arizona 86434
Office: 928.769.2223 FAX: 928.769.2235

Transmitted by email

April 2, 2013

Mr. J. Paul Loether
National Register of Historic Places
National Park Service
1849 C Street, NW (2280)
Washington, DC 20240

RE: ***NPS Initiatives to Revise National Register Bulletin 38 and
to Develop Guidance on Native American Cultural Landscapes***

Dear Mr. Loether:

On behalf of the Hualapai Tribe, this letter offers comments on the National Park Service initiative to revise National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (hereinafter "*Bulletin 38*") and the related initiative to develop guidance on National Register eligible "traditional Native American landscapes." For convenience, we refer to both of these initiatives collectively as "the initiative." In this letter, we use the term "Native American cultural landscapes" instead of "traditional Native American landscapes."

In general, the Hualapai Tribe supports this initiative. We understand that NPS plans to conduct further consultation with tribes, and we look forward to participating in such consultation.

After the National Historic Preservation Act (NHPA) was amended in 1992, the Hualapai Tribe was one of the first tribes to establish a Tribal Historic Preservation Officer (THPO) program to perform historic preservation duties on Hualapai tribal lands, duties which had previously been performed by the Arizona State Historic Preservation Officer (SHPO). The Hualapai Tribe's concerns with historic preservation were not then, and are not now, limited to tribal lands. Indeed, a major reason for establishing a THPO program was to build the staff capacity to engage in consultation with federal agencies when proposed federal or federally-assisted undertakings would affect historic properties that hold religious and cultural importance

for the Tribe but which are not located on tribal lands. The Tribe's Reservation, which is about one million acres in size, encompasses only about one-seventh of the area that the Hualapai people inhabited prior to the establishment of the Reservation.

This letter supplements our letter on the same subject dated May 9, 2012 (copy attached), which was intended for the government-to-government consultation, rather for the public comment process.

We offer this letter for the public comment process. We note that NPS has two websites on which it has posted comments on the initiative to revise *Bulletin 38* and to develop guidance on Native American cultural landscapes: one for comments by tribes in a government-to-government context and another for comments from the public. Having reviewed the comments posted on the two sites, it appears to us that the two sets of comments do not correspond to each other very well. This may reflect the way comments were sought.

In the government-to-government context, input from tribes was sought with an open-ended announcement and a *Federal Register* notice (77 Fed. Reg. 18258 (Mar. 27, 2012)) in which NPS asked for recommendations on two points: (1) updating *Bulletin 38*; and (2) developing guidance on National Register eligible "traditional Native American landscapes." That announcement also asked for input on how to consult with tribes on these topics.

The public comment part of this initiative was announced with a *Federal Register* notice (77 Fed. Reg. 47875 (Aug. 10, 2012)), which said that NPS believes the best way to address these requests is through the provision of updated, published guidance on how to better identify and evaluate seven topics:

- What constitutes a "traditional" community?
- "Continuity of use" by a traditional community
- Evolving uses of resources by a traditional community
- Multiple lines of documentary evidence
- Broad ethnographic landscapes
- Property boundaries
- Resource integrity

Many of the posted comments address these seven topics. The *Federal Register* notice also said that, in addition to the seven topics, NPS is also seeking to identify and address any other "user-identified" TCP-related issues, as well as requesting comments and recommendations that specifically address the development of published guidance related to identifying, evaluating, and documenting National Register-eligible Native American landscapes.

In this letter we offer some recommendations on over-arching issues raised by the initiative, drawing on our experience as well as on our analysis of some of the comments that have been posted on the two websites.

With respect to the seven topics listed above, we generally agree with the comments posted by Dr. Thomas King. For example, we specifically agree with his comment about setting boundaries for a TCP. A boundary may be important for a nomination to the National Register, but it is not really important in the context of the section 106 process, in which it is the potential effects of an undertaking on a TCP that really matters, not the TCP's boundaries.

While we generally agree with Dr. King, we note that we do not share his aversion to the term "ethnographic landscape." While we agree that "cultural landscape" is a better term, ethnography is an important way to document the historic significance of a cultural landscape.

RECOMMENDATIONS

1. NPS guidance documents should reflect the understanding that historic preservation can serve tribal interests in religious freedom and cultural survival.

We acknowledge that historic preservation has intrinsic value. One reason for supporting the development of our THPO program has been to preserve and document our Tribe's history in relationship to particular places that possess historic significance. However, while we do recognize the value of historic preservation, we did not establish a THPO program just to preserve historic places. Rather, our reasons for establishing a THPO program are grounded in the realization that the section 106 process is the primary procedural mechanism under federal law that tribes can use to advocate for the preservation of places that have ongoing religious and cultural importance. Many such places can be shown to be eligible for the National Register, but such places tend to be overlooked unless tribes become proactively engaged in the section 106 process. It is largely because of the opportunities presented by the section 106 process and the NHPA Amendments of 1992, that the Hualapai Tribe established a THPO program – to build the capacity to advocate for the preservation of places that matter for the Hualapai Tribe.

Acknowledging that the NHPA is a procedural law, we believe that there is a critical need to make the NHPA process work better, a need that should be seen against the background of the lack of substantive protection for American Indian religious freedom in U.S. law. Religious freedom is a fundamental right enshrined in the First Amendment to the U.S. Constitution and in international human rights law, yet U.S. law does not protect American Indian religious practices that are tied to particular places, including places on federal lands. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *see generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 14.03[2][c] (2012 ed.). During a period of about half a century, from the 1880s until 1934, federal policy sought to suppress traditional tribal religions, and, although quite some time has passed since that policy was abandoned, the legacy of that era is still with us today. Since the enactment of the American Indian Religious Freedom Act (AIRFA) of 1978 (Pub. L. No. 95-341; 92 Stat. 469; codified in part at 42 U.S.C. § 1996), federal law has proclaimed that it is:

the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

This statutory language is reinforced, with respect to federal lands by Executive Order 13007, Indian Sacred Sites (May 24, 1996, 61 Fed. Reg. 26771; reprinted at 42 U.S.C. § 1996). Neither AIRFA nor Executive Order 13007, however, provides for a right of action in federal court to seek judicial enforcement. The lack of judicially enforceable rights relating to tribal sacred places is a problem that cries out for a remedy. A real remedy must be more than a procedural right to be consulted. In the absence of such a remedy, however, we need to make the procedural rights that tribes have pursuant to the NHPA work better. Not just better consultation – better outcomes as a result of better consultation. We hope that the NPS initiative to revise its guidance documents actually does contribute to making the process work better, including the achievement of better outcomes.

We note that, in the time that has passed since NPS announced this initiative to update *Bulletin 38*, an interagency working group with representatives of four federal departments and the Advisory Council on Historic Preservation (ACHP) has launched an initiative on protecting tribal sacred places. That initiative has included the release of two documents: (1) Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (Dec. 5, 2012) (herein “MOU”)¹ and (2) Action Plan to Implement the Memorandum of Understanding Regarding Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites (Mar. 5, 2013) (herein “Action Plan”).² The four federal departments that are engaged in that interagency initiative, in addition to the ACHP, are the Departments of Defense, Interior, Agriculture and Energy. The Department of the Interior, of course, is the Department that includes NPS, and, as such, we assume that, in moving forward with the NPS initiative to update *Bulletin 38* and develop guidance on Native American cultural landscapes, NPS will be informed by, and contribute to, the interagency initiative on the protection of Indian sacred sites. In particular, we note that the Action Plan calls for the review of existing federal guidance documents, identification of gaps, and drafting guidance to fill the gaps. *Bulletin 38*, of course, is a key existing federal guidance document. The new guidance document that we call for in recommendation 2 would be intended to fill a gap.

Efforts by tribes and practitioners of traditional religion and culture can be seen in the context of the worldwide movement for the recognition of the human rights of indigenous peoples, as manifested in the adoption in 2007 of the United Nations Declaration on the Rights of Indigenous Peoples (U.N. Declaration).³ Our letter of May 9, 2012, noted numerous

¹ Available at www.achp.gov/docs/SacredSites-MOU_121205.pdf.

² Available at www.doi.gov/news/upload/SS-MOU-Action-Plan-March-5-2013.pdf.

³ United Nations Declaration on the Rights of Indigenous Peoples, U.N. document A/61/L.67 (7 Sept. 2007), available at www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. When the U.N. Declaration was adopted by the U.N. General Assembly in September 2007, the United States voted against it, but since then, in December 2010, the United States has formally endorsed the Declaration. U.S. Department of State: Announcement of U.S. Support

provisions of the U.N. Declaration that are relevant to the preservation of places that hold tribal religious and cultural importance. Guidance issued by NPS can help to make historic preservation, as practiced in the United States, consistent with the rights proclaimed in the U.N. Declaration.

2. NPS should develop a guidance document that is focused on the kinds of historic properties with respect to which tribes have a statutory right to be included in the section 106 consultation process, that is, historic properties that are of “traditional religious and cultural significance” to a tribe.

For convenience, we refer to this proposed new guidance document as *Bulletin TRCI*, which stands for “traditional religious and cultural importance.” The quoted language is from section 101(d)(6) of the NHPA as amended, which, as codified at 16 U.S.C. § 470a(d)(6), provides:⁴

(A) Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.

(B) In carrying out its responsibilities under section 470f of this title, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A).

We suggest *Bulletin TRCI* not as a substitute for *Bulletin 38* but, rather, as a complementary guidance document. We think that *Bulletin 38* should continue to be a guidance document on TCPs, updated and revised to reflect recommendations made later in this letter. See Recommendations 3 and 4. The new document that we suggest would include guidance on Native American cultural landscapes, but would also include other kinds of historic properties that hold tribal religious and cultural significance. As noted in the Interagency Action Plan on Indian Sacred Sites, there are kinds of places other than TCPs that tribes hold sacred, including geological features, bodies of water, archaeological sites, burial locations, and stone and earth structures.

Our basic reason in support of this suggestion is that the category of traditional cultural property is but one kind of place that may be both “of traditional religious and cultural importance” to a tribe and eligible for the National Register. While many of the places that tribes seek to protect are TCPs, some are not, and the guidance documents issued by NPS should make it clear that the duty of federal agencies to consult with tribes in the section 106 process is not limited to addressing TCPs.

for the United Nations Declaration on the Rights of Indigenous Peoples (Dec. 16, 2010), www.state.gov/r/pa/prs/ps/2010/12/153027.htm.

⁴ NHPA subsection 101(d)(6)(C), which not reproduced above, addresses consultation by the State Historic Preservation Officer for Hawaii with Native Hawaiian organizations. In this letter, we take no position regarding how NPS guidance documents should address the concerns of Native Hawaiian organizations.

We do not intend to suggest that it is not important for federal agencies to consult with tribes regarding TCPs. To the contrary, we believe that consultation regarding TCPs is critically important. The very existence of *Bulletin 38* has been a major factor in tribes becoming engaged in the historic preservation movement. Tribal concerns, however, are not limited to TCPs. NPS guidance should help federal agencies to understand and fulfill their statutory duty to consult with tribes in the section 106 process whenever a proposed undertaking might affect a historic property that holds “religious and cultural significance” for an Indian tribe.

3. NPS should issue an updated and revised *Bulletin 38*; the revisions need not be extensive and should reflect an acknowledgement that *Bulletin 38* has proven to be an important guidance document, while also drawing on lessons learned in the more than two decades since it was first released.

Much of the content of *Bulletin 38* still provides valid and useful guidance. We think it is important for *Bulletin 38* to continue to acknowledge that TCPs may be important for communities other than tribes.

In some ways, however, *Bulletin 38* should be updated. It should incorporate accurate references to the NHPA as amended, especially the 1992 amendments, and the current version of the ACHP regulations implementing the 1992 amendments. For example, the revised *Bulletin 38* should include references to: (a) the statutory language confirming that places of “traditional religious and cultural importance” to a tribe may be eligible for the National Register; (b) the duty to consult with tribes in the section 106 process; and (c) the roles performed by THPOs. The bibliographic sources should also be updated. We also suggest that the examples of TCPs be updated, with an emphasis on examples that might be considered “best practices” in preservation.

In addition to these general suggestions, we have one specific recommendation for the revision of *Bulletin 38*: the definition of TCP in *Bulletin 38* should be revised so that a place can be considered a TCP regardless of whether it is eligible for the National Register. This would be consistent with practice of the Hualapai Tribe. The comment letter from Department of Veterans Affairs, dated January 10, 2013, suggests a revised definition that we would find acceptable.

4. Both the revised *Bulletin 38* and the suggested *Bulletin TRCI* should emphasize consultation with tribes early in the section 106 process and the use of appropriate methods for eliciting relevant information from tribal elders and others who possess knowledge of tribal traditions.

The failure of some federal agencies to fulfill their duty to consult with tribes is one of the biggest problems with the section 106 process. Although the ACHP regulations require federal agencies to consult with tribes at the outset and throughout the section 106 process, in our experience, the record is mixed. Some agencies tend to frequently make a good faith effort and some frequently do not.

What is needed is a change in the “culture” of historic preservation, as practiced in the section 106 process, especially with respect to properties that have not been previously identified and evaluated. It has long been the common practice at the identification step to emphasize archaeological sites, and the effort to identify TCPs and other places of tribal concern is often left undone until fairly late in the planning process for an undertaking.

For TCPs and other places of tribal religious and cultural importance, the practice of delaying the effort to identify previously unevaluated properties just does not work. For such places, avoidance of adverse effects is generally much preferred over mitigation. In many cases, mitigation is simply not acceptable. Furthermore, ethnographic inquiry can be a time-consuming and drawn-out process. The elicitation of comprehensive and relevant information often occurs over the course of many conversations with persons who hold knowledge of tribal traditions. It is very often an iterative process that requires an adequate time frame.

Ultimately, we need to change the culture of the section 106 process and make early and meaningful consultation the standard practice. In dealing with this problem, it is of critical importance that *Bulletin 38* calls for the use of research techniques such as ethnography and similar disciplines. It is also important for *Bulletin 38* to include professional qualifications for ethnographers. Agencies need to be reminded that the ACHP regulations includes language in 36 C.F.R. § 800.4 calling for the use of the Secretary's standards and guidelines for identification. A change in practice is more likely to come about sooner rather than later if NPS emphasizes such connections between its guidance documents and the ACHP regulations.

Our letter of May 9, 2012, included recommendations for facilitating contracts and other agreements for the preparation of ethnographic studies by tribes. We continue to believe it is important for NPS guidance to facilitate such studies by tribes, including model agreements that provide for compensation to tribes for their services.

With specific reference to professional qualifications in ethnography, we suggest that, in Appendix II of *Bulletin 38*, the word “usually” be clarified by adding a statement that supervised experience may substitute for a graduate degree.

We note that *Bulletin 38* includes a section on determining eligibility for the National Register as well as a section on preparing nominations. We think that eligibility is generally more important than nominations, because the section 106 process is the main arena in which matters involving TCPs arise. Thus, we recommend that the suggested *Bulletin TRCI* emphasize eligibility over nominations. This is also desirable from the standpoint of protecting the confidentiality of sensitive information, as simply evaluating a TCP as Register eligible, and achieving concurrence, does not necessitate making information public the way that an actual nomination does.

We note another facet of changing the culture of the section 106 process: in our experience it typically takes much more effort to make the case that a TCP is eligible than it does for an archaeological site. This probably reflects a relatively long-standing practice of managing archaeological sites, resulting in a certain level of familiarity and comfort on the part of agencies, along with more clear-cut mitigation strategies (e.g., avoidance or data recovery). TCPs often

involve more esoteric knowledge and less well-defined spatial and temporal parameters for agencies to manage, and may present more daunting management challenges. With more inclusive guidance, however, these challenges may be overcome.

With respect to eligibility, guidance should explain how to document that a landscape may be eligible, including as a district of many interconnected sites and features (or, alternatively, develop language that circumvents prior terms that were originally created, for the most part, to address historic architectural manifestations).

Guidance on eligibility should also cover how to evaluate the full range of characteristics that invest a property with historic significance, so that effects can be adequately assessed. This must allow for certain kinds of sensitive information to be withheld from disclosure. The issue of confidentiality is addressed in recommendation 6.

5. Both the revised *Bulletin 38* and the suggested *Bulletin TRCI* should incorporate recognition of the rights of tribes, as indigenous peoples, in their cultural heritage.

As mentioned earlier, our letter of May 9, 2012 noted numerous provisions of the U.N. Declaration are relevant to the preservation of places that hold tribal religious and cultural importance. One provision that we did not cite in that letter is Article 31, which provides:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. *They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.*
(Emphasis added.)

We think this is particularly relevant for contracts and other agreements through which tribes conduct ethnographic studies and such. As we said in our letter of May 9, 2012, NPS guidance should include sample contract clauses that would preserve tribal rights in intellectual property relating to cultural heritage. We note that the Interagency Action Plan on Indian sacred sites includes a point on developing model contracting mechanisms.

6. NPS and ACHP should collaborate with each other, and consult with tribes, to determine whether it would be advisable for NPS to issue a guidance document, or a regulation, on the use of NHPA section 304 to preserve the confidentiality of information about historic properties that hold religious and cultural importance for a tribe.

The recognition of tribal rights in intellectual property relating to cultural heritage might also be useful in dealing with issues relating to confidentiality of sensitive information. We

addressed confidentiality in our letter of May 9, 2012. For convenience, we have reproduced a passage from that letter here:

NHPA section 304 authorizes federal agencies to withhold information from disclosure in certain circumstances. 16 U.S.C. § 470w-3. This section of the statute provides:

(a) Authority to withhold from disclosure

The head of a Federal agency or other public official receiving grant assistance pursuant to this subchapter, after consultation with the Secretary, shall withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may—

- (1) cause a significant invasion of privacy;
- (2) risk harm to the historic resources; or
- (3) impede the use of a traditional religious site by practitioners.

(b) Access determination

When the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to subsection (a) of this section, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purpose of carrying out this subchapter.

(c) Consultation with Council

When the information in question has been developed in the course of an agency's compliance with section 470f or 470h-2(f) of this title [NHPA sections 106 and 110(f)], the Secretary shall consult with the Council in reaching determinations under subsections (a) and (b) of this section.

The stated grounds for withholding information from disclosure can serve the purposes of protecting tribal sacred places that are also historic properties, and to protect the interests of traditional practitioners with respect to such places. From a tribal perspective, a major problem with section 304 is that power to decide whether to invoke this authority is vested in the federal agency, after consulting with NPS.⁵ If the matter arises in the context of the section 106 process, then the federal agency must also consult with the ACHP. There is no role for the tribal agency (or other entity) that provided the information that is the subject of a request for disclosure, unless it is explicitly stipulated in a Memorandum of Agreement or similar document. There should be a more uniform provision that is broadly applicable.

⁵ The term “Secretary” is defined in NHPA section 301(11) as “the Secretary of the Interior acting through the Director of the National Park Service except where otherwise specified.” 16 U.S.C. § 470w (11).

One option for a tribal agency to safeguard confidentiality would be to keep sensitive information within the control of the tribal agency, i.e., not give it to the federal agency in the first place. At the step in the section 106 process of identifying and evaluating historic properties, it may not be necessary to reveal such information. If the contract provides that the tribal agency owns the intermediate work products, then the THPO can make this judgment. In the event that contract language gives a consulting firm a claim to intellectual property rights in such work products, such a claim should not be allowed to override the judgment of the THPO.

Sometimes, however, the option of not providing information is not realistic, because unless information is provided it is likely that a sacred place will be damaged or destroyed. This is one of the more difficult areas for decision making for the THPO or tribal agency – how much information should be divulged to protect sacred places and when to divulge it – since once it becomes public it will remain so.

Another option – for any situation in which the sensitive information is developed by a tribal agency through an agreement with a federal agency or a contract with a consulting firm – would be to specify up-front that, if the federal agency receives a request for disclosure, the agency will consult with the tribe and, if so requested by the tribe and if any of the three grounds for disclosure applies, then the federal agency will withhold. Since this is an option, if the parties are willing to invest the effort to negotiate such terms, we think that ACHP and NPS should provide some leadership on this issue.

Based on that reasoning, our May 2012 letter recommended that NPS and ACHP collaborate with each other, and consult with tribes, to determine whether it would be advisable for NPS to issue a guidance document, or a regulation, on the use of NHPA section 304 to preserve the confidentiality of information about historic properties that hold religious and cultural importance for a tribe. We reiterate this recommendation in this letter.

7. NPS should, in consultation with tribes, consider revising the regulations governing the criteria of eligibility for the National Register, 36 C.F.R. part 60, and determinations of eligibility for the National Register, 36 C.F.R. part 63.

We suggested this in our letter of May 9, 2012. For convenience, we have reproduced a passage from that letter here:

Neither part 60 nor part 63 has been revised since long before the NHPA Amendments of 1992 and the advent of THPO programs. (Part 60 was most recently amended in 1983, part 63 in 1981.) While we are not at this time making any specific recommendations for either part 60 or part 63, we suggest that both parts be reviewed to determine whether amendments would be appropriate to account for:

- (a) the nature of historic properties that hold religious and cultural importance for a tribe;
- (b) the role of THPO programs in advocating for the preservation of such historic properties, including those that are not on tribal lands;
- (c) the use of TEK [traditional ecological knowledge] at appropriate points in determinations of eligibility and nominations; and
- (d) the importance of tribal views in evaluating the integrity of historic places of religious and cultural importance for a tribe, in light of changes that have occurred

The history of each and every Indian tribe is an important part of the history of America. The increasing involvement of tribes in historic preservation in the two decades since the enactment of the NHPA Amendments of 1992 has made abundantly clear that tribal peoples have important contributions to make to the historic preservation movement. The cause of historic preservation would be enriched in many ways by revisiting the criteria of eligibility in light of input from tribal preservationists.

Thank you for your consideration of these comments and recommendations. We look forward to participating in further consultation on this matter.

Sincerely,



Loretta Jackson-Kelly, Director and THPO
Hualapai Department of Cultural Resources

Enclosure

cc: Sherry J. Counts, Chairperson
Hualapai Tribal Council

Dean B. Suagee, Esq.