Allyson Brooks Ph.D., Director
State Historic Preservation Officer

March 28, 2019

National Park Service
1849 C Street NW
MS 7228
Washington, DC 20240

RE: National Park Service 36CFR Parts 60 & 63 Proposed Rule
RIN (1024-AE49)

To Whom It May Concern:

On behalf of the Washington State Department of Archaeology & Historic Preservation (DAHP), I appreciate this opportunity to comment on the National Park Service's proposal to revise the regulations governing the listing of properties in the National Register of Historic Places—36 CFR 60 and 63.

Washington DAHP believes the proposed rule exceeds the statutory authority provided under the National Historic Preservation Act of 1966. Additionally, the objective of the proposed rule, particularly with regard to the percent of land ownership, remains unclear to our agency. In general, the proposed rule will be impossible for State Historic Preservation Officers to implement. Further, we strenuously object to the finding that tribal consultation was not required as there is no effect on tribes. Rather than implement this proposed rule, we believe the National Parks Service (NPS) should focus on rules that are unclear such as 36 CFR 63.4, which references the Keeper of the National Record of Historic Places visiting sites before making a concurrence determination. Eliminating or revising this requirement to reflect current practice ensures maintenance of decision timelines under the Section 106 process, 36 CFR Part 800. We also contend that instead of these proposed rules, the Department of Interior, using their expert staff, should clarify eligibility requirements to the National Register of Historic Places. Bulletin 38 on Traditional Cultural Places was set to be clarified for years yet this was never accomplished. This type of guidance would be far more effective in assisting the federal process than having rules that negate public participation.

We are greatly concerned with the process by which this proposal was developed, as there is no evidence the Department of Interior sought input from NPS career staff, State Historic Preservation Officers (SHPOs), or Tribal Historic Preservation Officers (THPOs) before releasing this proposed rule. Given the critical role that the nation's state and tribal historic preservation offices play in the successful and efficient execution of the National Register of Historic Places Program, we believe that a robust discussion during the development of the proposed rule could have led to a proposal that achieved shared goals of streamlining and improved performance.

Majority Concurrence

Washington DAHP strongly opposes the proposed change to the process for the listing of historic districts that requires majority concurrence. The federal statute could not be clearer: It is "one property, one vote." The laws states that in the boundaries of a proposed historic district, "a majority of the owners of the individual properties within a district in the case of a historic district, shall be given the opportunity (including a reasonable period of time) to concur in, or object to, the nomination of the property for inclusion or designation." *54 USC 302105.*

The proposed rule creates a new method and standard, by which a "majority of the owners of the land area of the property" must also serve in calculating agreement. This is not stipulated in the statute and appears to lack a legal basis.

Given the wide range of methods by which local governments across the nation provide property information, the calculation of actual percentages of land ownership will be a mathematical nightmare prone to error, confusion, and endless appeal, debate, and revisions since land parcels may be sub-plated and re-platted. The new proposed rule will require, for a replicable and accurate calculation, a robust Geographic Information System (GIS) to process parcel data and aggregate the resulting geospatial data to calculate and tally percentage owners of the total area. Not all SHPOs or THPOs have the GIS infrastructure and staff to accomplish this task.

Making the proposal even more complex, while some local governments have digitized their parcel data, there is no guarantee the information is current. Further, it is not clear how state historic preservation offices are expected to manage the required calculations when a local entity is still dependent on paper maps.

For urban areas, there is no guidance on how state historic preservation offices are expected to manage the calculation of condominiums in proposed historic districts. These are multi-story buildings containing strata-titles of varying square footage.

In our past 50 years of developing, nominating, and listing over 200 historic districts encompassing approximately 1531 individual and contributing historic properties, all totaling 13,636, we have found that the tried and true legal standard of "one property, one vote" in historic district nominations has stood the test of time.

The proposed method of privileging large landowners over smaller landowners within a potential historic district violates the historic "one person, one vote" statutory language. It establishes a tiered advantaged ranking anathema to democratic values. There has never been a time in American history where voting rights were dependent on the size of one's property. This is a pre-Civil War or feudal method of allowing privilege to supersede equality based on personal wealth or preference.

This is particularly problematic when the largest landowner in an area is a federal agency. The proposed rule gives the federal government "veto" power over the desire of private landowners and other parties, such as tribes, in the historic district nomination process by holding a nomination in abeyance. A federal agency can arbitrarily refuse to forward a nomination to the Keeper of the National Register and in doing so, prevent a listing. It seems to violate the American tenet that our government is "of the people, by the people and for the people". The federal government functions for the people of the United States, not the other way around.

Tribal Consultation

We strenuously disagree with the statement by the National Park Service that the proposed rule does not require tribal consultation because the rule will not have a substantial effect on Indian Tribes.

Clearly, this proposed rule, giving a federal agency "veto" authority over proposed nominations of traditional cultural properties, strikes at the heart of tribal sovereignty. The proposed process allows a federal agency to effectively block the will and desire of the public and concerned tribal governments. The application of the proposed rules to historic districts that are traditional cultural places nullifies recognizing and honoring those places.

Appeals

The new proposed rules are unclear as to federal properties in proposed historic districts. If there is a federal courthouse in a proposed district is the FPO still required to forward the nomination as opposed to the normal procedure through the state review board? This is unclear in the proposed rules. Is there a right of appeal if the federal agency owner of a building in a district opposes a district nomination?

Overall, the right of the public to appeal a federal agency's refusal to forward a nomination to the Keeper of the National Register appears to have been eliminated. This removes the due process measures that are inherent in the existing rules and statutory structure consistent with U.S. Constitutional principles. All citizens have a property interest in federally held lands and structures and therefore have a right to be heard in regard to both actions and inactions of the federal government.

Site Visitation – 36 CFR 63.4

Finally, in the interest in being proactive and finding common ground to improve process, we support modifications to 36 CFR 63.4, which discusses having the Keeper visit a property in a Determination of Eligibility concurrence. Eliminating, or revising this requirement to clarify its meaning, would be a helpful rule change. We realize the visitation requirement has never been enforced, however, should it be implemented it could have a devastating effect on the Section 106 process. The Department of Interior would need to ensure that the Keeper has the budget and availability to travel anywhere in the United States and territories to personally inspect an entity that may or may not be eligible to the National Register of Historic Places. We suggest changing 36 CFR 63.4 to reflect actual practice or eliminate this unnecessary rule completely.

On December 5, 2018, I was part of a panel discussing the National Register of Historic Places and Section 106 process at the American Mining and Exploration Association's annual meeting. It was clear during the panel discussions that the industry wanted more clarity and predictability in both the National Register process and the Section 106 process. The proposed rules will actually make the process more nebulous, difficult to implement, and will produce the exact opposite effect.

Instead of moving forward on the proposed rule, we believe that Interior would be much better served by clarifying eligibility requirements to the National Register of Historic Places. For example, the following discussions have been occurring between State Historic Preservation Officers in the American West:

1. State Historic Preservation Officers in western states have been discussing the listing of large scale cultural landscapes. Will the Department list culturally significant landscapes as historic properties regardless of whether they contain archaeological sites, or historic properties, structures or objects?

2. Native American tribes often identify water bodies as culturally significant sites that represent their cultural affiliation to a broader landscape. Washington recognized the importance of water as part of our state's history when we proposed the Washington National Maritime Heritage Area. The National Park Service determined Nantucket Sound to be eligible to the National Register of Historic Places. Is the Department willing to list water bodies (e.g. Nantucket Sound or river systems) as historic properties on the National Register of Historic Places? Can they be listed alone or can they only be considered as contributing properties along with other historic properties as part of a broader landscape?

In order to assist with clarifying the National Register process Interior should focus on providing substantive guidance on applying the National Register criteria. The proposed rule does not clarify eligibility to the National Register, and would create an undue lengthy process that will be of concern to all stakeholders involved in both the National Register and 36 CFR Part 800.

These rules should not be codified as currently proposed.

We completely agree with the need for clarification and predictability. We suggest you convene a group of experts to assist you with developing an alternate set of rules that everyone understands, and can be implemented efficiently and expeditiously. I would be more than happy to be a part of that group.

Please contact me at 360.586.3066 or at Allyson.brooks@dahp.wa.gov if you have any questions.

Sincerely,

Allyson Brooks

Dr. Allyson Brooks, Ph.D., Director
State Historic Preservation Officer

cc: Washington State THPOs
Erik Hein, Executive Director, NCSHPO