NATHPO
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July 8, 2019

Joy Beasley, Keeper of the National Register of Historic Places
Acting Associate Director of Cultural Resources, Partnerships, and Science
Department of the Interior
1849 C Street NW, MS 7228
Washington DC 20240

Re: National Park Service (NPS) Regulation Identifier Number 1024-AE49

Ms. Beasley:

Thank you for the opportunity to submit comments again on the Proposed Rule governing the listing of properties on the National Register of Historic Places. The National Association of Tribal Historic Preservation Officers (NATHPO) is a nonprofit organization whose members are the Tribal government officials (Tribal Historic Preservation Officers, or THPOs) and their staff who carry out the national historic preservation program as delegates of the Secretary of the Interior on tribal land, pursuant to the National Historic Preservation Act of 1966, as amended (NHPA). NATHPO serves as a communications vehicle among THPOs, SHPOs, federal agencies and other organizations. It also educates the public and elected officials about the national historic preservation program, legislation, policies and regulations. There are explanations of the roles and responsibilities of our members in the text of the NHPA.

As the entity representing a key constituency who will be substantially impacted by the changes proposed, we have several objections and concerns. The proposed revisions to Title 36 of the Code of Federal Regulations, Parts 60 and 63, governing the listing of properties in the National Register of Historic Places (NRHP), will of course have substantial direct effects on tribes. We appreciate DOI's reconsideration of its initial determination to the contrary, and that consultation was not required. Acknowledgement of potential effects and of the obligation to consult is a step in the right direction. However, the "consultation" offered (as described in the Federal Register Notice of May 24, 2019), in the form of one group meeting and one group teleconference, is hardly meaningful and robust government-to-government consultation in good faith.

<u>Incorrect Interpretation of the NHPA and Amendments</u>

Part of the proposed rule is ostensibly based on language amending the National Historic Preservation Act (NHPA) that was included in the National Parks Centennial Act (2016). The proposed rule offers significant changes to the NRHP and goes far beyond the amendment, and indeed directly contradicts

the letter and spirit of the NHPA, proposing changes that would inappropriately and negatively impact the role of the Keeper of the NRHP, State Historic Preservation Officers (SHPOs), Indian tribes, historic properties and the public interest.

The proposed rule takes several steps to create a federal pocket veto, introducing an opportunity for political motivations or interests contrary to historic preservation to control the National Register process, originally intended to protect public interests. The underlying justification for the changes is logically flawed and contrived. The proposed rule states, "the 2016 amendments to the NHPA inserted a new subsection (c) into 54 U.S.C. 302104 that sets forth a specific process for Federal agencies to directly submit nominations of properties for inclusion in the National Register." On the contrary, any reader can see that these 6 pre-conditions are clearly intended to ensure an opportunity for SHPO and local review and comment, and Keeper consideration and public notice of them. DOI's interpretation of this section of the amendment is directly opposed to its intent.

The first step in this process is the removal of provisions 36 CFR 60.6(y) and 36 CFR 60.9(h), which would serve to eliminate both the opportunity for SHPOs to nominate properties and for anyone to appeal to the Keeper. The second step is revising 36 CFR 63.4(c) "to clarify that the Keeper may only determine the eligibility of properties for listing in the National Register after consultation with and a request from the appropriate SHPO and concerned Federal agency." The purpose of the original provision was to allow the Keeper to make an eligibility determination outside of the nomination process for listing in the NRHP, particularly in the Section 106 review process to assist in the protection of historic resources. Requiring a request from a federal agency for an eligibility determination would intrude on the Keeper's responsibilities and introduce confusion and delay in the Section 106 process. The NPS has the audacity to claim that "this change is consistent with the 2016 Amendments and other provisions in the NHPA that dictate the roles and responsibilities of SHPOs and FPOs," when this is demonstrably false.

Finally, the proposed rule falsely interprets 54 U.S.C. 302104(d)(2), unchanged by the 2016 Amendments, to finish eliminating the appeal process and solidify the federal pocket veto. The original language states that, "any person or local government may appeal to the Secretary . . . the failure of a nominating authority to nominate a property in accordance with this chapter." Laughably, the proposed rule would "clarify that the Keeper cannot hear an appeal of a Federal agency's failure to nominate a property unless all of the conditions precedent listed in 54 U.S.C. 302104(c) are met, including a requirement that the FPO forwards the nomination to the Keeper." So federal agencies inappropriately become the sole gatekeepers for nominating federal properties, and all other parties are stripped of their ability to appeal an agency's failure to nominate. This would effectively block the Keeper from opining on consensus determinations in the NHPA Section 106 process without agency approval, changing the Keeper's role in a way the NPS does not have the authority to do.

A second major change that is especially problematic is the provision "that a property shall not be listed in the National Register if objections are received from either (i) a majority of the land owners, as existing regulations provide; or (ii) owners of a majority of the land area of the property." Part (ii) was not included in the original language or amendments to the NHPA, and places the full onus on the SHPO to ensure the accuracy of the owner and objector count. It is unstated and unclear what problems with

the current system this is intended to address, although that can be extrapolated since it would effectively give veto power to a large ranch or mine owner or energy developer with an interest in a proposed historic district or landscape.

Tribal Implications of Proposed Changes

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

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

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

Tribal Consultation

DOI had initially determined that this proposed rule would have no substantial direct effects on tribes, and therefore no consultation was required. This claim fails to recognize that tribes often have substantial traditional cultural and ancestral connections to federal lands, and the proposed changes would adversely affect tribes' ability to protect sacred and significant cultural sites. Failure of DOI to consult with tribes on the rulemaking implicates tribes' relationship with the department, abrogates the department's trust responsibilities to tribes, and impinges on tribal sovereignty. We appreciate that DOI recognized this and changed its position. In our previous letter to you, we cited the sections of the current DOI Policy on Consultation with Indian Tribes (implementing E.O. 13175) regarding *when* government-to-government consultation is required on departmental actions with tribal implications.

We are now compelled to cite sections of the Policy defining *what* government-to-government consultation entails.

Some of the 573 federally recognized tribes have their own consultation policy and protocols; ideally DOI would honor these and consult with tribes accordingly. Additionally, both the Advisory Council on Historic Preservation (ACHP) and NATHPO have published guidelines and best practices for tribal consultation. Failing that, DOI should, at a minimum, follow its own Policy on Consultation with Indian Tribes. Here are three key differences between the DOI policy stipulations and what is actually happening in this case. The DOI Policy states:

1. "Appropriate Departmental officials are those individuals who are knowledgeable about the matters at hand, are authorized to speak for the Department, and exercise delegated authority in the disposition and implementation of an agency action." You have stated that Secretary Bernhardt is the ultimate decision-maker on the proposed rule. He is therefore the official who should participate in consultations with Tribal leaders.

2. "Consultation is a deliberative process that aims to create effective collaboration and informed Federal decision-making. Consultation is built upon government-to-government exchange of information and promotes enhanced communication that emphasizes trust, respect, and shared responsibility." You have heard unwaveringly from tribes that these things are not happening here, yet the rulemaking process seems to be proceeding along the same course.

3. "Adequate notice entails providing a description of the topic(s) to be discussed, a timeline of the process, and possible outcomes. Notification of a consultation should include sufficient detail of the topic to be discussed to allow Tribal leaders an opportunity to fully engage in the consultation. The notice should also give Tribal leaders the opportunity to provide feedback prior to the consultation." It is common practice for agencies to send "Dear Tribal Leaders" letters containing this information *before* an Advance Notice of Proposed Rulemaking, rather than release a bombshell Proposed Rule with no targeted tribal correspondence, which seems to be on an administrative fast track to becoming a Final Rule.

The National Association of Tribal Historic Preservation Officers (NATHPO), its members, stakeholders, and partners, request two things. First, meaningful and robust government-to-government consultation conducted in good faith according to established best practices. One group meeting and one group teleconference do not meet these standards, and will not be considered as such by the sovereign Indian Nations to whom DOI holds trust responsibilities. Second, this consultation should focus on *whether* the rulemaking should proceed at all.

The stated intent that the proposed changes would bring the regulations in alignment with the 2016 amendments is demonstrably false. The unstated intent is easily extrapolated, which is directly contrary to the letter and spirit of the NHPA and the amendments, the protection of historic properties and the public interest. Regardless, you now have extensive comments and letters from tribes describing the effective outcomes of the changes – intended or unintended, and DOI is obligated to incorporate this

input as it follows established policies and practices for upholding its trust responsibilities to Indian Tribes. This includes Secretary Bernhardt meeting face-to-face with Tribal leaders.

Sincerely,

Valerie J. Grussing, PhD
Executive Director

Cc: David Bernhardt, Secretary, DOI
Tara Sweeney, Assistant Secretary for Indian Affairs, DOI
Robert Wallace, Assistant Secretary for Fish, Wildlife, and Parks, DOI
Ryan Hambleton, Deputy Assistant Secretary for Fish and Wildlife and Parks, DOI