



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

Re: Draft Revisions to National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties

Dear Ms. Beasley:

The American Cultural Resources Association (ACRA) 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*.

ACRA member firms undertake much of the legally mandated cultural resource management (CRM) studies and investigations in the United States and employ thousands of CRM professionals, including archaeologists, architectural historians, ethnographers, historians, and an increasingly diverse group of other specialists. To help guide smart, sustainable economic development and safeguard important historic and cultural heritage assets, ACRA members apply specialized research skills within a framework of federal, state, local, and/or Tribal law and facilitate an open dialog where every stakeholder has a voice.

A number of ACRA member firms are actively involved with Tribal programs, consultation, and the documentation of Traditional Cultural Places (TCPs) and other ethnographic/ethnohistoric places. Such firms need clear direction and precise language and definitions from NPS on the protocols and procedures for documentation and evaluation of TCPs, particularly with respect to who is best qualified to judge the eligibility of a TCP, and around the consultation process with traditional communities.

Our comments on the draft revisions follow.

- The draft Bulletin's section on "Engaging with Traditional Communities" – and in particular the section regarding instances where there is animosity between the community's contemporary leadership and its traditional experts – appears to be predicated on the position that TCPs may be documented over the objection of a

community. However, this fails to reflect respect of community perspective as well as proper National Register of Historic Places (NR) procedures. Although an agency has the responsibility to identify historic properties that may be affected by an undertaking, whether a TCP is identified depends entirely on the community to which significance of the place is associated. The full TCP documentation process must proceed with the support and approval of the community, and not independent of that. If the community does not want the TCP documented, then the agency has the responsibility to note the presence of a potential historic property that may be affected by the undertaking, and provide an opportunity for comment on effects and mitigation.

Federal regulations at 36 CFR 800 require federal agencies to undertake a reasonable and good faith effort to identify historic properties. Identification is not good faith if it is done over the objections of the community which ascribes significance to the TCP. Pushing through documentation without the support of the community is disrespectful and potentially damaging to the community's health and survival, as well as to the agency's relationship to that community.

- ACRA supports the draft Bulletin's use of the term "traditional cultural places" over "properties" to avoid the implications inherent in the word.

It is important to recognize that the term "property" in the original bulletin implied National Register-eligible property. The substitution of "place" removes the presumed eligibility of the TCP. The draft Bulletin implies the NPS use of place is synonymous with property, which is incorrect and should be defined more accurately in the Glossary. Not all TCPs are places, strictly speaking, further confusing the terminology. There are many TCPs identified by communities which have been rejected by or unanalyzed by agencies. They are, nonetheless, TCPs.

- ACRA supports the draft Bulletin's 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 the NR. As the Advisory Council on Historic Preservation (ACHP) has noted, past interpretations of Bulletin 38 requiring continuous use is deeply problematic due in part to the forced removal of Indian Tribes from their homelands, as well as cultural norms and practices that prohibit or prescribe access.
- The draft Bulletin states that if a place "is at least 'determined eligible [for listing in the National Register], a Federal agency will be required to consider the effects of their actions on the place before the agency may fund, license, or pursue a project which will affect the property." ACRA believes that "*will* affect the property" should be changed to "*may* affect." A 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," even when the impact is not certain.

- The draft Bulletin rightly notes that only the community that ascribes value to the place has the qualifications to identify and describe the place: it is they who are the experts on this place. While others may be responsible for writing the analysis, it is the community who is qualified to assess the place. ACRA believes that the NPS should make that point explicit throughout the Bulletin.

This is particularly true in discussions about determining the “likelihood that such places may be present” (for example, in the section on “Establishing the Level of Effort”). When and how a community becomes engaged in the identification process needs to be addressed more completely. How are communities going to be identified? Who is doing that identification? There is also an assumption in this paragraph that traditional use may have been written or talked about, when in fact, many TCPs are held close to the community and have *not* been discussed or written down.

ACRA respectfully suggests the NPS provide additional opportunities for comment on subsequent drafts before issuing a final revision.

ACRA appreciates this opportunity to comment on the draft Bulletin revisions.

Sincerely,



Amanda Stratton
Executive Director