



STATE OF HAWAII
OFFICE OF HAWAIIAN AFFAIRS
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HRD13_6656

August 26, 2013

National Park Service
National Register of Historic Places Program
1201 Eye Street, NW (2280)
Washington, DC 20005

Re: National Register Bulletin 38 Update

Dear National Park Service-National Register of Historic Places Program:

The Office of Hawaiian Affairs (OHA) offers the following comments on your on-going effort to consider updates/revisions to National Register Bulletin 38 *Guidelines for Evaluating and Documenting Traditional Cultural Properties*. Following a brief background on our agency, we will provide general comments and specific recommendations, including the creation of a federal regulatory counterpart to the State of Hawai'i's "Criterion E," which enables the recognition of historic properties on the basis of their value to Native Hawaiians and other groups. We are also urging the National Park Service and other components of the Department of the Interior to continue to engage in meaningful dialogue with the Native Hawaiian people.

Background on the Office of Hawaiian Affairs

As a quasi-independent state agency established under the constitution and laws of the State of Hawai'i,¹ the statutory mandates for OHA include the requirements "to advise and inform federal, state, and county officials about native Hawaiian and Hawaiian programs, and coordinate federal, state, and county activities relating to native Hawaiians and Hawaiians"² and to "assess[] the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conduct[] advocacy efforts for native Hawaiians and Hawaiians."³

¹ Haw. Const. art. XII, § 5; Haw. Rev. Stat. §§ 10-1 to -16.

² Haw. Rev. Stat. §10-6(a)(4).

³ Ibid §10-3(4).

Nine publically elected Trustees establish OHA policy and direct the overall management of our trust assets. The core values and principles of our organization serve to guide our operations and activities to produce the results that address the priorities detailed in our 2010-2018 Strategic Plan to achieve our vision to Ho‘oulu Lāhui Aloha (Raise a Beloved Nation).

With our mandates to work for the betterment of the Native Hawaiian people in mind, we recognize the need for strong guidance to be available for federal, state and county agencies, and contracted consultants to support the recognition and development of protections for historic properties of traditional religious and cultural significance. For OHA, this is a very important effort as each cultural site, and the traditions and accounts associated with it, have an individual or cumulative potential to contribute to an understanding of ka ‘ike o ka po‘e kahiko (knowledge of our ancestors) and emphasize our genealogical connections to our only homeland. For the Hawaiian people, the importance of and responsibilities associated with receiving ancestral knowledge and maintaining our genealogical connections is, to a certain extent, far beyond any regulatory process defined by historic preservation laws and extends into what is the more profound realm of physical, emotional and spiritual health.

General

OHA views the publication of National Register Bulletin 38 (NRB 38) in 1990 as landmark in the sense that it began the process of expanding the consideration of historic properties beyond the models established through pattern and practice by archaeology and architecture that placed an emphasis on identifying the tangible attributes of historic properties to define significance and boundaries. NRB 38 also affords recognition to the fundamental concept that the practices and beliefs associated with a Traditional Cultural Property (TCP) are relevant to the living culture of a living people.

NRB 38 provided early guidance to consider when engaging in a consultation effort that involves the complexities, sensitivities and restrictions specific to TCP. An important concept is recognized in that the act of disclosing information relative to the traditional cultural and/or religious significance of a historic property in order to possibly protect it may in itself be a violation of certain traditional cultural responsibilities. This concept is certainly applicable in Hawai‘i, as certain ‘ohana (families) may have restrictions for disclosing ‘ike (knowledge) to non-family members. For those that face this difficult choice, the provisions within historic preservation law that provide for confidentiality may provide little comfort, as the mere act of disclosing knowledge (even to those who are required by law to protect it) is a violation of protocol that potentially erodes the significance and power of a cultural site.

As with any guidance, OHA does see value in an effort to consider updates/revisions to NRB 38 some two decades after it was published. This consideration however, should be carefully balanced with the recognition that the value of allowing the guidance that currently exists in NRB 38 to remain unchanged and allow each specific instance to move forward meaningfully may be greater than what could result from any revisions that “strengthen” the administrative process to the point where it becomes counterproductive for people and communities who are trying to preserve and protect the places of importance to us.

This balance is especially applicable to the concept of establishing boundaries for TCP. While the extent of certain historic properties (and any contributing elements) can be captured in easily defined boundaries, TCP can present more of a challenge as the elements that contribute to significance can extend across a large geographic area.

TCP Nexus to Regulatory Processes and Relationship Building

There is an importance to having guidance available that is strictly related to determining the eligibility, or assisting in the actual nomination of historic properties of traditional cultural significance for listing on the National Register of Historic Places (NRHP). OHA does not view the NRHP eligibility or nomination process as being exclusive of the larger federal regulatory process established by Section 106 of the National Historic Preservation Act (Section 106) and the National Environmental Policy Act (NEPA). While we recognize that the administration of the NRHP, Section 106 and NEPA process are the responsibilities of three different federal agencies, collaboration between these entities could certainly be seen as a positive step.⁴

When considering the true significance a TCP may hold for a people or community and whether an adverse effect to that TCP can actually be “mitigated”, an emphasis is placed on avoidance through the development of alternatives for the undertaking/action that are driven forward by the NEPA process specifically and the Section 106 process in part. The significance of TCP also speak to the need for federal agencies to engage in relationship building as a component of long range planning as opposed to attempting to resolve concerns related to a TCP within the individual consultation process for a specific undertaking.

As we have already mentioned in this letter, the potential restrictions associated with disclosing information specific to the traditional cultural or religious significance of a historic property can place consulting parties in a difficult situation. This again calls for the need for the identification, documentation, evaluation and overall discussion with people and communities on TCP to occur as early as possible so that there is adequate time to conduct appropriate consultation and alternatives to a proposed undertaking/action can be identified. In Hawai‘i, it has been an all too common occurrence for federal agencies to attempt consultation with Native Hawaiian organizations (NHO) when the NEPA process for a given action has already been completed. At such a point, the opportunity for a discussion on alternatives and significant redesign within the Section 106 process to avoid impacts to a TCP is extremely limited, unless the federal agency is willing to explore another project alternative under NEPA. In this scenario, it is obviously difficult for NHO to be encouraged to participate in a “meaningful” consultation process to disclose information relative to the traditional and religious significance of a historic property.

In Hawai‘i, the larger discussion of whether the adverse effects (direct and indirect) of an undertaking on any cultural site can ever be truly “mitigated” is contemporary to the consideration of possible updates/revisions to NRB 38. This larger discussion inevitably

⁴ An existing example of such collaboration is the March 2013 publication by the Advisory Council on Historic Preservation and Council on Environmental Quality providing guidance on integrating Section 106 and NEPA.

emerges during any individual Section 106 consultation effort that involves effects to cultural sites. For some NHO, the loss of any cultural site, regardless of whether it is assigned the TCP “layer”, is unacceptable. Certain adverse effects (*e.g.*, introduction of audible, visual and atmospheric elements) defined in Section 106 regulations that are generally considered “indirect” for certain historic property types, can have an equally destructive effect on TCP as physical destruction would. Furthermore, standard mitigation measures such as “data recovery”, which might be adequate for certain types of historic properties, are not acceptable for TCP. This again speaks to the need for relationship building between federal agencies and the people and communities within a long-range planning process to avoid effects to TCP rather than attempt to mitigate them.

Amendment to National Register Federal Program Regulations

Although outside of the immediate scope of revisions to NRB 38, OHA believes that consideration should be afforded to amending 36 CFR Part 60 in order to establish a fifth criterion for evaluation for NRHP eligibility.

Under Hawai‘i state law, the evaluation of significance for historic properties follows the first four NRHP criteria and a fifth key additional “Criterion E” for historic properties that:

*Have an important value to the native Hawaiian people or to another ethnic group of the state due to associations with cultural practices once carried out, or still carried out, at the property or due to traditional beliefs, events or oral accounts- these associations being important to the group’s history and cultural identity.*⁵

As a state agency dedicated to supporting the living culture of Hawai‘i’s first people, we have found that this fifth criterion gives the state flexibility that is otherwise lacking in the criteria shared in the federal regulations. Just as the TCP concept goes beyond manmade structures to acknowledge the historic nature of landscapes, Criterion E enables our state to recognize the historic nature of places based on their value to Native Hawaiians and other groups. It also provides flexibility to recognized properties that indigenous people may honor by limiting their use. To paraphrase one cultural practitioner, “For some of our most sacred places, we honor them not by overuse, but by leaving them be.”

We believe that a similar standard would benefit the nation as a whole. We look forward to discussing the possibility of such an amendment further.

Conclusion

OHA sincerely appreciates that the NRHP Program Chief, Mr. Paul Loether made the effort to come to Hawai‘i to conduct in person meetings with NHO on possible updates/revisions to NRB 38. We were pleased to be of assistance in making logistical arrangements for these meetings and informing our people of the opportunity. We hope the site visits we were able to

⁵ See Haw. Admin. R. §§13-275(6)(b) and 13-284(6)(b).

arrange were helpful in contributing to an understanding that traditional cultural and religious sites certainly have a relevance to the Native Hawaiian people and that the kuleana (responsibilities) associated with them continues to be perpetuated from generation to generation. Of the dozens of cultural practitioners and NHO representatives who attended Mr. Loether's listening sessions, many repeatedly remarked that about how limited their interaction had been with federal historic preservation agencies, and how much they felt that the lack of communication compounded friction between the federal government and Native Hawaiians. We strongly recommend that that NHRP, NPS and the U.S. Department of the Interior (DOI) capitalize on the progress that Mr. Loether made by continuing to engage and educate Native Hawaiian cultural practitioners and NHO representatives. As DOI acknowledges in its tribal consultation plan, consultation should occur "in a manner that demonstrates a meaningful commitment and ensures continuity in the process." DOI and its respective components should meet the same standard when engaging with the indigenous people of Hawai'i.

Thank you for the opportunity to provide comments. Should you have any questions, please contact Keola Lindsey at 594-0244 or keolal@oha.org.

'O wau iho nō me ka 'oia'i'o,



Kamana'opono M. Crabbe, Ph.D.
Ka Pouhana, Chief Executive Officer

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