

## **National Register Program Requests Comments on Identifying, Evaluating, and Documenting Traditional Cultural Properties and Native American Landscapes.**

**What constitutes a “traditional” community?** The approach described in the National Register Bulletin 38, which references a “living” community for which a property may have significant “traditional” value, works relatively well. The general definition does not need to be changed to a new concept of a “traditional community.”

**“Continuity of use” by a traditional community.** Use by a living community should not have to be continuous through time for a property to retain significance or integrity, particularly if the use is interrupted by events beyond the community’s control.

As an additional issue regarding use by a community, there are situations where the *existence* of a property is important to a community, but visitation to that place is not necessary to affirm the role the property plays in “maintaining the continuing cultural identity of the community.” It would be helpful to have additional guidance for assessing and documenting how a TCP retains its importance to the living community when physical use of the site is not possible or important. How should an agency approach documentation of this use? For example, we have asked how the knowledge of the area and its importance is communicated in the community. Are there other considerations or ways to approach this?

**Evolving uses of resources by a traditional community.** Evolving use of a resource by a living community should not exclude it from consideration as a National Register eligible property, but additional guidance on how a break in use or a change in use may affect evaluation of integrity is needed.

**Broad ethnographic landscapes.** Providing clarification on the how to define and evaluate character-defining features of a landscape that may contain or constitute a TCP (such as size, topography, view sheds, land patterns and soundscapes) would aid federal agencies in defining TCP boundaries and evaluating significance. It would help the agency to understand how much and what type of information is needed to evaluate significance and impacts to integrity. More detailed guidance on appropriate forms of mitigation at a landscape scale would also be helpful.

One recommendation would be allow for different levels or types of TCPs at different scales, and allow for different considerations for consultation, assessment of effects, and mitigation accordingly. For example, there could be a “landscape” or “location” TCP identified at a broad scale which identifies a sensitive area for the purpose of triggering additional focused consultation in the future, but which would not otherwise require the same documentation or assessment as currently described for historic properties. Another type or level of a TCP could be the “defining characteristics” TCP. This TCP level could address those specific resources within a “landscape” TCP (such as legendary sites, ceremonial areas, etc.) that could be treated as the standard “property” type for consultation, assuring that any discrete elements within the landscape TCP are consulted on and appropriately addressed.

**Property boundaries.** Additional guidance is needed regarding properties that cross multiple land jurisdictions and properties with boundaries that extend beyond defined Area of Potential Effects (APEs). There is no standard approach to defining boundaries for properties that cross

multiple land jurisdictions. Should the assessment of a TCP stop at the edge of the APE or the edge of the land over which the agency has jurisdiction/management responsibility? Should the entire TCP be assessed by the federal agency without regard for contemporary ownership boundaries? Where TCPs occur on privately held lands, do agencies have a responsibility to notify land owners about TCPs located on their property (located and determined eligible, not proposed for nomination to the Register)? What if there are confidentiality concerns raised by the affected TCP community? In some states, a federal agency determination of eligibility can trigger state law requirements on private property owners. Should this be a factor considered by the federal agency?

Bonneville recommends clarifying guidance as follows: that a federal agency should assess an entire TCP if the agency's APE includes a portion of the possible TCP, subject to the reasonable and good faith effort standard in reviewing existing information and seeking additional information. If a private landowner refuses to provide information or to provide access to the area, the federal agency may exclude the area from its determination, noting this in its eligibility determination. Private landowners who allow access or provide information should be notified of any eligibility determination (subject to the limitations of section 304 of the National Historic Preservation Act [NHPA]) (see our additional comments about confidentiality, below), but if such determinations trigger state law requirements, the federal agency shall refer the landowner to appropriate state authorities, such as the State Historic Preservation Officer (SHPO).

## **Other Comments**

**Confidentiality.** As acknowledged in the Advisory Council on Historic Preservation's (ACHP) June 1, 2012, *Native American Traditional Cultural Landscapes and the Section 106 Review Process: Questions and Answers* document, confidentiality concerns can be a particular challenge, especially when a site is still in the evaluation stage and NHPA Section 304 protections may not be available.

Bonneville recommends that the NPS identify a special consultation process for addressing confidentiality issues at the evaluation stage. The process should include the affected community, the federal agency leading the consultation, the NPS, the ACHP, and the affected SHPO or SHPOs (and Tribal Historic Preservation Officer [THPO] or THPOs as applicable). The process should have an identified timeline. The consultation process will allow the parties to resolve access to the information necessary to make a determination, and to provide for the protection of that information as appropriate, pending a formal consultation under section 304. This confidentiality consultation process should provide for rapid Section 304 determinations if a resource is preliminarily determined eligible.

For example, the parties might agree to share the documentation for review without retaining it, in order to make a preliminary finding of eligibility, and the sensitive information would be not be made public pending consultation under Section 304. If the Section 304 consultation affirms withholding, the affected community could be confident of protection and hopefully provide the documentation to the federal agency, SHPOs, etc. If the section 304 consultation does not affirm withholding, the affected community would have to determine how to proceed. Where the affected community believes that the risk is simply too great to provide the information to one or more of the determining parties (e.g., SHPO/THPO, federal agency, and potentially Keeper\*),

one option should be to agree that there can be no property identified pursuant to NHPA procedures, but that the agency taking the action can consider the area in other ways, such as flagging the area as sensitive for future undertakings and consultation.

\*The individual who has been delegated the authority by NPS to list properties and determine their eligibility for listing in the national register according to 36 CFR 60.3(f).