History Colorado – Office of Archaeology and Historic Preservation
Comments on proposed rule changes for National Register, National Park Service
RIN 1024-AE49

Implementation of 2016 Amendments to NHPA

Contrary to assertion in the provided background, the 2016 Amendment to the NHPA did not seek to create a specific and singular process for nominations of Federal lands that superseded the established rules, but rather sought to clarify when the Secretary of Interior could accept a Federal-property nomination directly from Federal agencies and ensure that State Historic Preservation Officers (SHPOs) commented upon such nominations.

The actual language of the 2016 Amendment does not support the proposed rule changes, which are internally inconsistent and misleading, effectively allowing Federal agencies to circumvent both National Register nominations (see comments on §60.10 below) or Determinations of Eligibility (see comments on §63.4 below) for properties under their control. Furthermore, appeals for a Federal agency's failure to nominate would become impossible, placing the actions by Federal agencies beyond any sort of public review or process (§60.12 below). In addition, seemingly small changes to the process itself would become unworkable for SHPOs.

It is important to note that the intent of the National Historic Preservation Act, including its amendments, is to create a process requiring Federal agencies to take into account how their actions affect the public lands and the cultural resources upon them that they are entrusted with managing, while also taking into account concerns of state and local officials and the general public. This is of particular interest for Western states such as Colorado, where Federal ownership accounts for much of Western land and Federal management affects a large and diverse group of citizens.

Owner Objections

The proposed rule changes would significantly alter the owner objection process, requiring that SHPOs calculate not only the number of owners in a nomination boundary, but the apportionment of land area to those owners. If owners of a majority of land area object, in addition to or in place of a majority of owners, the nomination cannot result in a listing. This undermines the democratic process of one "vote" for each owner, and will very likely reduce the number of historic properties, particularly districts, from being successfully listed. Furthermore, this proposed rule change does not actually carry out the intent of the National Historic Preservation Act, which is the basis for regulations. See comments on §60.6 (g) below.

The question of whether the requirement for notarized owner objections should be removed raises other concerns. We cannot think of another way to verify that a person submitting an objection is an actual owner within the nomination boundary. Removing this requirement would further undermine the owner comment and objection process and open the door to fraud.

Comments on specific revisions

Some of the proposed changes help clarify or remove outdated information and are not concerning. However, many of the changes fundamentally change the procedures and rules and are commented on below:

§60.6
(e) – the proposed inserted language should be further clarified to read "Multiple Property Submission under a Multiple Property Documentation Form cover document."

***
(g) – by inserting "owners of majority of land area" as another means of counting owner objections,

- the process of nominating a property or district is unnecessarily complicated by requiring an (undefined) calculation of land area and raises many concerns and questions left unanswered:
    - what is the unit of measurement? At the very least, certain units (square feet, acreage, etc.) will be more appropriate than others based on the character of a nominated area, resulting in either a universally applied unit that does not fit all cases, or inconsistencies in land area calculation.
    - to what degree of accuracy is the calculation required (e.g., decimal point, etc.)?
    - In instances when a single property in a nominated district is owned by multiple owners, among whom some object and others do not – what portion of the property ownership is to be accorded to each owner for purposes of counting land area in the district? This may have the effect of giving objecting owners "more say" than non-objecting owners.

- The proposed change furthermore gives undue advantage to an owner that owns a larger parcel and/or multiple parcels to object and substantially weakens the democratic process of one vote for each owner, giving more power to those with larger assets.

- Furthermore, focus on "majority of land area" undermines the objective framework for selecting the boundary for a nomination, namely, meeting the criteria for evaluation and having an adequate level of historic integrity.

- This change will very likely result in less National Register listings for districts, which afford owners opportunities for incentives (e.g., rehabilitation tax credits, grant eligibility) but does not place restrictions on the property.

- The proposed revision ignores the fact that National Register listing does not place any restrictions on property owners and gives further credence to misconceptions that it does.

***

(n) – see comments above on revisions to (g) to include "owners of majority of land area."

(o) (4) – unclear what is meant by the inserted text "The State Historic Preservation Officer must identify the applicable criteria and indicate the property's level of significance." Since the nomination form requires that these are indicated above the SHPO signature, to avoid confusion or the appearance that an additional step is required, the inserted text should further include the following at the end of the sentence: "as provided for on the nomination form."

(r) – see comments above on revisions to (g) and (n) to include "owners of majority of land area."

(s) – see comments above on revisions to (g), (n), and (r) to include "owners of majority of land area."

(v) – see comments above on revisions to (g), (n), (r), and (s) to include "owners of majority of land area."

(y) – by removing this paragraph, which provides for SHPOs to nominate Federal property with a process for FPO review and comment, in combination with changes to §60.9, 60.10, and 60.12, the regulations are effectively changed so that nominations of Federal land can only be submitted by Federal agencies, which is a misinterpretation both of the NHPA and the 2016 Amendment.

§60.9

(i)(as revised) – by removing the text "Nominations will be included in the National Register within 45 days of receipt by the Keeper or designee unless the Keeper disapproves such nomination or an appeal is filed," a timetable for the Keeper's approval is removed, yet SHPOs must still comment and respond within a 45-day timetable or else be considered as not supporting the nomination.

§60.10

(a) – by requiring that concurrent nominations satisfy the procedural requirements of §60.9, conflict is created with §60.10 (b) and §60.9 (f) [or (g) per proposed revisions], which states that §60.6 procedures shall be followed for concurrent nominations:

- The SHPO cannot reasonably respond within the 45-day period of §60.9 and simultaneously notify private owners and put the nomination for submission to the State Review Board per §60.6. In order to meet the requirements of §60.6 and provide adequate information to the public as to the timeline for preparing a nomination, Review Board meeting dates are scheduled several years in advance.

(d) - see comments above on revisions to §60.6 (g), (n), (r), (s), and (v) to include “owners of majority of land area.”

§60.12

(b)(iv) – In order to appeal the “failure of a Federal Preservation Officer to nominate [a] property” [emphasis added], this paragraph requires that the FPO “has forwarded the nomination to the Keeper” – thereby creating a circular process wherein a condition must be met which would effectively negate the need to appeal in the first place, making such an appeal impossible. This is an internally inconsistent, ineffectual, and misleading rule that allows FPOs to opt out of the nomination process entirely, which goes against the National Historic Preservation Act (NHPA), and the 2016 Amendment to the NHPA. Contrary to assertions in the background provided for the proposed rule changes, the 2016 Amendment language does not require such a rule and does not give federal agencies new leeway to opt out of the nomination process.

(c) – see comment on (b)(iv) above; applying this requirement to concurrent State and Federal nominations has the same effect of creating a circular, internally inconsistent appeals process that is useless and thereby misleading by giving the impression that such an appeal is possible.

§60.13

(d) – see comments above on revisions to §60.6 (g), (n), (r), (s), and (v) and §60.10 (d) to include “owners of majority of land area.”

§63.4

(a) – the asserted reason for changing this paragraph as given in the published background is that the 2016 Amendment requires that procedural requirements be met in order for a Federal nomination to be accepted; however, a determination of eligibility (DOE) is not the same as acceptance of a nomination, and the original text for §63.4 allows that a DOE can be made by the Keeper even if a nomination is not accepted, as long as “sufficient information exists to establish the significance of a property and its eligibility in the National Register.” The proposed change that the Keeper will not make DOEs on nominations that are not accepted for technical, professional, or procedural deficiencies fundamentally goes against the original purpose of this paragraph and is not required by the 2016 Amendment.

(c) – the proposed change removes ability for the Keeper to make a DOE unless requested by a Federal agency and furthermore removes ability to reverse DOEs made by a Federal agency or State Historic Preservation Officer.