April 10, 2019

National Park Service
1849 C Street NW
MS 7228
Washington, D.C. 20240

RE: 36 C.F.R., Parts 60 and 63; RIN 1024-AE49

Dear Sir or Madam,

I write on behalf of The Cultural Landscape Foundation (TCLF) to express strong opposition to the recently proposed revisions to regulations that govern procedures for listing properties in the National Register of Historic Places, in particular revisions to the Code of Federal Regulations, Title 36, Chapter 1, Parts 60 and 63. TCLF is a national non-profit organization whose mission is to document significant cultural landscapes throughout North American and to advocate for their stewardship. Furthermore, TCLF is a recognized authority on the *Secretary of the Interior's Standards for the Treatment of Historic Properties, with Guidelines for the Treatment of Cultural Landscapes*. As such, the organization frequently submits testimony to municipal, state, and federal agencies regarding the stewardship of historic landscapes and acts as a consulting party under the National Historic Preservation Act and the National Environmental Policy Act.

We are genuinely surprised and alarmed that, given the highly consequential nature of the proposed regulatory revisions, there is no indication in the *Federal Register* (Vol. 84, No. 41) or elsewhere that consultation was sought from within the community of state and federal experts whose work routinely involves the complex process of nominating properties to the National Register or who regularly advise on the use of the nation's historic resources. The proposed revisions themselves are replete with references to the significant role of State Historic Preservation Officers (SHPOs) in that process, for example, and yet there is no evidence that any SHPOs or Tribal Historic Preservation Officers (THPOs) were consulted. Nor is there any indication that any other relevant federal agency, such as the Advisory Council on Historic Preservation, was consulted before the proposed revisions were formulated or announced. Surely any effort to improve the pertinent procedures or to reach professional consensus about such sweeping regulatory changes should avail itself of valuable input from those parties. For this reason alone, the Department of the Interior should withdraw the proposed revisions and engage in consultation with the preservation community regarding alterations to existing regulations.

With regard to the proposed revisions, removing paragraph (y) from 36 C.F.R. Section 60.6, along with other related changes, would, in effect, establish federal agencies as the sole conduits for nominating federally owned properties to the National Register. While the implications of such a change are enormous, there is no statutory basis for the proposed revision. It can hardly be based on the implementation of Title VIII of the National Park Service Centennial Act (2016), as the National Park Service claims, because Title VIII of the Act delineates the six necessary conditions for nominations to the National Register by federal agencies; it does not mandate that federal agencies alone control the nomination of federally owned properties to the National Register. Thus the proposed revisions far exceed the intent of the legislation.

The effects of the proposed revisions would be substantial and manifold. Foremost among them, by simply declining to act, federal agencies would essentially hold a veto over any nomination of federally owned property to the Register. Yet federally owned resources are intrinsically public resources, and dispossessing the public of any voice in determining their historical or cultural significance is, therefore, a fundamentally misconceived proposition. It is also worth remembering that the federal government is the steward to more than 28 percent of all the nation's land[1]—some 640 million acres. Yet federally owned land *per se* does not enjoy any special protection and is, in fact, particularly vulnerable to activities related to natural-resource extraction. A recent study[2] indicates that 90 percent of the land under the control of the Bureau of Land Management has been made available to lease by the oil-and-gas industry alone. Removing the ability of the public, as well as state and local government officials, to engage in the process by which cultural landscapes on federal lands are nominated to the National Register significantly reduces the ability of the public to identify and protect historic resources.

Still other proposed revisions pertain to the question of owners' objections to listing their properties in the National Register, in particular the cases of historic districts in which multiple property owners have a stake in the district's listing. The language of the National Historic Preservation Act is quite clear on that question, indicating that objections by a majority of owners can defeat the listing:

> 54 U.S.C. 302105 (b): *WHEN PROPERTY SHALL NOT BE INCLUDED ON NATIONAL REGISTER OR DESIGNATED AS NATIONAL HISTORIC LANDMARK.—If the owner of any privately owned property,* ***or a majority of the owners of privately owned properties within the district in the case of a historic district****, object to inclusion or designation, the property shall not be included on the National Register or designated as a National Historic Landmark until the objection is withdrawn* [emphasis added].

The proposed revisions to 36 C.F.R. 60.6 and 60.10 would, however, fundamentally alter the intent of the legislation by mandating that a property shall not be listed in the Register if the "owners of a majority of *the land area* of the property" [emphasis added] object to the listing. This would be yet another consequential change, both in practice and in principle: the original statutory language guarantees that each owner within a given district has an equal say regardless of the size of their property; in effect, one owner, one vote. The proposed revisions would privilege the interests and opinions of those who own larger parcels within a given district, such that a single property owner could defeat a listing over the objections of scores of other owners. The Department of the Interior has provided no rationale for such a substantive change, nor has it explained what impacts the change is likely to have.

Also of great concern are the proposed revisions to 36 C.F.R. 63.4, paragraph (c), where the current regulatory language is as follows:

> 36 C.F.R. 63.4 (c): *If necessary to assist in the protection of historic resources, the Keeper, upon consultation with the appropriate State Historic Preservation*

[1] See Vincent, C.H., Hanson, L. and C. Argueta, "Federal Land Ownership: Overview and Data," a report by the Congressional Research Service; R42346 (March 2017).
[2] See "Open for Business: How public lands management favors the oil and gas industry," a report by the Wilderness Society (2017).

> *Officer and concerned Federal agency, if any, may determine properties to be eligible for listing in the National Register under the Criteria established by 36 CFR part 60 and shall publish such determinations in the Federal Register. Such determinations* ***may be made without a specific request from the Federal agency or, in effect, may reverse findings on eligibility made by a Federal agency and State Historic Preservation Officer.*** *Such determinations will be made after an investigation and an onsite inspection of the property in question* [emphasis added].

According to the proposed revisions, paragraph (c) would include new language 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, if any [emphasis added]." But such new language is hardly a clarification. It is, rather, a dramatic change that would allow federal agencies to block the Keeper from issuing a determination of eligibility regarding federal properties. This has a direct bearing on the proper implementation of Section 106 of the National Historic Preservation Act, which is triggered when the undertakings of federal agencies may adversely affect historic resources that are listed in, *or are eligible for listing in*, the National Register of Historic Places. In other words, federally owned, National Register-eligible properties would no longer be guaranteed the protection of Section 106 reviews. Moreover, the Keeper of the Register would no longer serve as a check on federal agencies in situations in which it is the actions of the agencies themselves that may imperil historic resources. Determining whether federal properties are eligible to be listed in the Register is, in both concept and practice, a good-faith effort to ensure that the public interest is served. It is unclear how that interest would be better served in any way by these regulatory changes.

Taken together, the recently proposed revisions to 36 C.F.R., Parts 60 and 63 represent a breathtaking shift in the processes of nominating properties to the National Register of Historic Places and determining their eligibility to be so listed. These changes would significantly reduce public involvement in that process and diminish the impact of those who do become involved. As "the official list of the Nation's historic places worthy of preservation," the National Register is in many ways a shared statement of our national values. The proposed changes collectively amount to a statement of altogether different values, a cynical and undemocratic revision by which those who own more property are privileged over those who own less, in which the public's voice in matters of public resources will have been quieted, and in which the fate of those resources would be increasingly determined by an administrative apparatus in dialogue with itself. As the founder of an organization dedicated to the stewardship of the nation's cultural landscapes, and as the former coordinator of the National Park Service Historic Landscape Initiative, I regard these proposed revisions as nothing less than a grave assault on the core of the National Historic Preservation Act. This proposed rulemaking should be withdrawn immediately.

Sincerely,

Charles A. Birnbaum, FASLA, FAAR
President + CEO
The Cultural Landscape Foundation