

Oregon Parks and Recreation Commission

June 17, 2020

Agenda Item: #9

Action

Topic: Request to open to rulemaking – Division 50, Historic Preservation Officer

Presented by: Christine Curran, Deputy Director, Deputy State Historic Preservation Officer

Background:

In the last several years, several high-profile, controversial properties have been submitted to the State Historic Preservation Office (SHPO) for nomination to the National Register of Historic Places. These include portions of the Pilot Butte Canal, Deschutes Co.; the Eastmoreland Historic District, Portland; and the Q'alya ta Kukwis shichdii me Traditional Cultural Property Historic District, Coos Co. Each of these projects exposed discrepancies between federal and state laws and rules governing the National Register program and gaps in administrative processes. Especially controversial is counting property owners and objections to establish owner consent as required by federal regulation, specifically trusts, but also other ownership arrangements.

In early 2020, SHPO staff assembled a Rule Advisory Committee (RAC) to address key issues related to the effective administration of the federal National Register of Historic Places program. These issues included: aligning state processes with federal law, regulation, and guidance; establishing authority to accurately count owners and objections; and clarifying administrative processes, such as confidentiality, public notice, participation, and hearing procedures. Staff identified local government, trade organizations, land-use and preservation advocacy organizations, private business, state agencies, and individuals as stakeholders, including representatives from each interest on the RAC. Staff invited the Oregon Legislative Commission on Indian Services (LCIS) to appoint a tribal representative to the RAC. However, LCIS was unable to identify a participant. The agency extended invitations for Government-to-Government consultation to each of the state's nine federally-recognized tribes by letter in January 2020. To date, none of the tribes have taken this opportunity. However, staff from the Coquille Indian Tribe; Confederated Tribes of Grand Ronde; and Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians contacted the agency for further information and provided informal, preliminary comments, which were presented to the RAC and considered for incorporation into the draft rule. RAC meetings were held on January 28, February 10, and March 10, 2020. Meetings were open to the public, and all proceedings were recorded and posted on the agency website.

The RAC generally advised staff to shorten and simplify the draft rule wherever possible for the sake of administrative clarity. Based on the RAC's recommendations, staff eliminated the description of duties for the National Register program coordinator and reduced the provisions discussing confidentiality of National Register nominations under state and federal law and the definitions of "owner" and "substantive revision," among other edits. Staff also included the RAC's recommendations for mailing notice to all owners of a property nominated for listing and provided for greater collaboration between local governments and the SHPO when providing notice to property owners.

The RAC discussed the definition of "owner" at length, as well as the processes for identifying owners and submitting and counting objections, but was divided on the issue of how to count owners and objections and what documentation, if any, an owner must provide to object. Staff determined that the

federal regulations require that each owner with fee-simple interest in private real property within the boundary of a resource nominated for listing in the National Register be counted individually as an owner and that each owner has a single opportunity to object to listing no matter their ownership circumstance or intent. Staff further determined that the SHPO must ensure that the process is accessible, accurately identify owners to establish their right to object, and take necessary steps to ensure a complete tally of owners and objections. The draft rule includes requirements and processes to identify owners and document and count objections.

The RAC generally favored a stronger role for local governments in the process that would grant the chief elected official as the representative of the elected governing body the sole authority to object to listing a property in the National Register, with special considerations given to nominations for public infrastructure. Staff did not include this recommendation. Staff reviewed the text of 54 USC § 302504 and determined that the right to object to a National Register nomination is reserved for Certified Local Governments (CLG), and may not be expanded to other political subdivisions of state government. The federal law explicitly states that both the chief elected official and the local landmarks commission must provide an independent objection to halt the nomination process. Staff are also deeply concerned about identifying specific types of resources for special consideration when such considerations are not provided for in federal law or regulation and similar arguments for balancing historic preservation against other public needs is just as valid in other situations. A local jurisdiction may approve the demolition or relocation of a property listed in the National Register under state and local land-use regulations.

The RAC also recommended that the rule be revised to require the SHPO to positively support nominations to the National Register and that the National Park Service be tasked with determining next steps in the nomination process when a nomination document is returned to the SHPO for correction. Staff did not include this recommendation. Federal law and regulation provide the CLG, the State Advisory Committee on Historic Preservation, and the SHPO an independent opportunity to comment on a National Register nomination and tasks the SHPO with the responsibility of determining next steps in the nomination process. Any individual or organization that disagrees with the SHPO's decision may appeal directly to the National Park Service under the federal regulation.

Staff asked the RAC to comment on the impact of the rule revision on Oregon's small businesses. The RAC determined that the rule changes as written will have no significant fiscal impact on small business because the obligations described in the rule primarily rest on the SHPO. Staff agree with this assessment. The group also reviewed the agency outreach plan for the rulemaking process. The outreach effort will include public meetings in the Portland and Bend metro areas, Astoria, and Coos Bay. The agency will provide notice of the meetings and rulemaking through broad and specific press releases, and the agency website and various social media outlets, publications, and relevant events.

Prior Action by Commission: None.

Action Requested: Staff requests approval to open rulemaking to amend 736-050-0220 through 736-050-0260 for the Oregon Administrative Rules (OAR) governing the state administration of the Federal National Register of Historic Places program (NRHP) under the authorities of the 1966 National Historic Preservation Act, as amended, and the creation of a new rule, OAR 736-050-0270 to implement the provisions of the rule amendment. A copy of the proposed amendment is included in Attachment A. Unedited comments provided by the RAC on the proposed amendment and this report are included in Attachment B.

Prepared by: Ian P. Johnson, Associate Deputy State Historic Preservation Officer

Attachments: Attachment A – Proposed revised draft National Register Program rule
Attachment B – Comments by RAC members on proposed revisions

**Oregon Parks and Recreation Department Commission Meeting, Agenda Item #9
Attachment A – Proposed revised draft National Register Program rule**

OAR 736-050-0220, State Advisory Committee on Historic Preservation: Federal Requirements

- (1) The National Historic Preservation Act of 1966, as amended, ([16 USC §§ 470 et seq](#)) (Act), specifies basic requirements for state historic preservation programs. The requirements and responsibilities listed in the Act are incorporated into federal rule, [36 CFR § 60](#) (2012 edition), and [36 CFR § 61](#) (1998 edition), which are hereby adopted by reference into OAR 736-050-0230, OAR 736-050-0240, OAR 736-050-0250, OAR 736-050-0260, and OAR 736-050-0270.

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OAR 736-050-0230, State Advisory Committee on Historic Preservation: Definitions

The following definitions apply to OAR 736-050-0220, OAR 736-050-0240, OAR 736-050-0250, OAR 736-050-0260, and OAR 736-050-0270:

- (1) “Act” means the [National Historic Preservation Act of 1966, as amended, \(16 USC §§ 470 et seq.\)](#) that establishes the federal historic preservation program.
- (2) “Associate Deputy SHPO” means the Associate Deputy State Historic Preservation Officer who serves under the delegated authority of the Deputy State Historic Preservation Officer.
- (3) “CLG” means Certified Local Government, which is a city or county government certified by the NPS to carry out responsibilities under the Act.
- (4) “Chief elected official” has the meaning provided [in 36 CFR § 60.3\(b\)](#).
- (5) “Committee” means the State Advisory Committee on Historic Preservation appointed by the Governor as established in [ORS 358.622](#).
- (6) “Criteria for evaluation” means the National Register criteria for evaluation described in [36 CFR § 60.4](#) by which the CLG, Committee, SHPO, and NPS judge every historic resource proposed for nomination to the National Register.
- (7) “Deputy SHPO” means the Deputy State Historic Preservation Officer, who serves under the delegated authority of the State Historic Preservation Officer.
- (8) “Determination of eligibility” means a finding by the NPS that a property meets the criteria for evaluation, but is not listed in the National Register.
- (9) “Historic resource” means a building, district, object, site, or structure, as defined in [36 CFR § 60.3\(a\), \(d\), \(j\), \(l\), and \(p\)](#), and that is potentially eligible for listing in the National Register, but is not listed in the National Register.
- (10) “Historic property” means a building, district, object, site, or structure that is listed in the National Register of Historic Places.
- (11) “Local landmarks commission” means an advisory or quasi-judicial body responsible for carrying out responsibilities under the Act on behalf of a CLG.
- (12) “National Register” means the National Register of Historic Places maintained by the United States Department of the Interior and administered by the NPS, which is the national list of historic properties significant in American history, architecture, archaeology, engineering, and culture. The Oregon SHPO coordinates the National Register at the state level.
- (13) “NPS” means the National Park Service, the bureau of the United States Department of the Interior responsible for the administration of the Act.
- (14) “National Register nomination form” means the federal form as defined in [36 CFR § 60.3\(i\)](#) approved by the NPS to nominate a historic resource for listing in the National Register or to amend or substantively revise a National Register nomination form previously accepted by the NPS for an historic property.

(15) “Oregon SHPO” means the Oregon State Historic Preservation Office, an office of the Oregon Parks and Recreation Department.

(16) “Owner:”

(a) Includes “owner or owners” as defined in [36 CFR § 60.6\(k\)](#), and means:

(A) The owner of fee simple absolute or fee simple defeasible estate title to a property as shown in the property tax records of the county where the property is located, including, but not limited to, trusts, limited liability corporations, and any other legal entity that can hold fee simple absolute or fee simple defeasible title to real property within the state of Oregon;

(B) The purchaser under a land sale contract, if there is a recorded land sale contract in force for the property; or

(C) If the property is owned by the trustee of a revocable trust, the settlor of a revocable trust, except that when the trust becomes irrevocable only the trustee is the owner; and

(b) Does not include:

(A) Individuals, partnerships, corporations or public agencies holding easements or less than fee interests (including leaseholds) of any nature;

(B) The life tenant of a life estate; and

(c) Means, for a single property, building, structure, site, object, with or without secondary historic resources, or historic district with multiple owners, a majority of owners as defined in (a) and (b).

(17) “Person” means individuals, corporations, associations, firms, business trusts, estate, trusts, partnerships, limited liability companies, joint ventures, public and municipal organizations, joint stock companies, federal agencies, tribes, a public body as defined in [ORS 174.109](#), or any other legal or commercial entity.

(18) “Proponent” means the person that submits a National Register nomination form to the Oregon SHPO.

(19) “Public comment period” means the opportunity for a person to comment on the National Register nomination form submitted for review by the Committee. The public comment period begins on the date the Oregon SHPO notifies the proponent, owner, CLG, chief elected official, and tribes and ends the day that the NPS makes a final decision regarding listing a historic resource in the National Register.

(20) “SHPO” means the Director of the Oregon Parks and Recreation Department and the State Historic Preservation Officer as defined in [ORS 358.653](#).

(21) “Substantive revision” means:

(a) A request submitted to the National Park Service to remove a still extant listed historic property from the National Register;

(b) A National Register nomination form is edited to increase or decrease the boundary of a historic resource nominated to or historic property listed in the National Register;

(c) A National Register nomination form is edited to add one or more National Register Criteria or Criteria Considerations;

(d) a National Register nomination form is edited to the extent that the SHPO finds that the revisions require additional review; or

(e) Any combination of (a), (b), (c), or (d).

(f) Does not mean adding a National Register Criteria or Criteria Consideration when the SHPO or Committee determine that the narrative portions of the National Register nomination form as written sufficiently justify the addition.

(22) “Tribe” means one or more of the nine federally-recognized Indian tribes in Oregon.

OAR 736-050-0240, State Advisory Committee on Historic Preservation: Organization and Duties

- (1) The Governor appoints committee members as described in [ORS 358.622](#).
- (2) Committee members appointed to fill unexpired terms may serve for the remainder of the term of the vacating member.
- (3) Committee members may serve no more than two consecutive terms of appointment in their own right unless the Governor approves another consecutive term. A committee member appointed under section (2) may be considered for reappointment as provided this section. A committee member may serve beyond two consecutive terms of appointment until the Governor appoints a replacement.
- (4) The SHPO must nominate a chairperson and vice chairperson to the Governor for consideration. The Governor selects the chairperson and vice chairperson for a two-year term. The chairperson and vice chairperson may serve consecutively in either role through their terms.
- (5) The chairperson conducts Committee meetings. The vice chairperson must fulfill this role when the chairperson is unavailable. The SHPO must appoint a committee member to conduct the meeting when the chairperson and vice chairperson are both unavailable.
- (6) The Committee may define additional responsibilities for the chairperson and vice chairperson.
- (7) The SHPO must request that the Governor remove committee members absent for two consecutive meetings without the prior permission of the chairperson or, in the absence of the chairperson, the vice chairperson.
- (8) The Committee must carry out the duties described under [36 CFR § 61.4\(f\)\(6\)](#) and [ORS 358.622](#); and
 - (a) Meet at least three times annually;
 - (b) Review National Register nomination forms submitted to the Committee by the SHPO for review as provided in OAR 736-050-0260;
 - (c) May participate in the review of appeals to the NPS of National Register nomination forms rejected by the SHPO or the NPS;
 - (d) Review and make recommendations to the SHPO on amendments to the Oregon State Historic Preservation Plan, and provide advice on comprehensive historic preservation planning process;
 - (e) Create advisory committees or subcommittees necessary to carry out the Committee's functions;
 - (f) Appoint committee members to serve as a representative to another body in the interest of carrying out the Committee's duties;
 - (g) Adopt standard practices to carry out the duties and business of the Committee as necessary; and
 - (h) Perform other duties as requested by the SHPO.

**OAR 736-050-0250, State Advisory Committee on Historic Preservation: Staff Activities
Relating to the National Register Program**

- (1) The SHPO may delegate authority under this division to the Deputy SHPO, the Associate Deputy SHPO, the National Register Program Coordinator, or other staff.
- (2) The SHPO must appoint a National Register Program Coordinator to administer the state's National Register of Historic Places program.
- (3) A proponent may nominate a historic resource to the National Register regardless of ownership status by submitting a complete National Register nomination form to the SHPO.
- (4) The SHPO must evaluate the National Register nomination form and provide a written response to the proponent within 60 calendar days of receipt stating whether their submittal:
 - (a) Is adequately documented;
 - (b) Is technically and professionally correct and sufficient; and
 - (c) Demonstrates that the nominated historic resource meets the National Register criteria for evaluation.
- (5) A proponent may withdraw a national register nomination form that the proponent submitted for consideration for listing in the National Register at any time during the public comment period by submitting a written withdrawal request to the SHPO.
- (6) The Oregon SHPO may keep qualifying portions of a National Register nomination form confidential and conditionally exempt from public disclosure under the conditions established in [ORS 192.345](#). SHPO staff must establish a procedure for applying the conditions of [ORS 192.355\(4\)](#) to submitted National Register nomination forms.
- (7) The Committee may keep a National Register nomination form submitted for review confidential and exempt from public disclosure in its entirety or portions of the National Register nomination form may be redacted under section 304 of the Act or [ORS 192.345](#), as applicable. SHPO staff must establish a procedure for applying the conditions of [ORS 192.355\(4\)](#) under section 304 of the Act to submitted National Register nomination forms.
- (8) The SHPO must provide a public comment period for each National Register nomination form considered by the Committee, the copy provided for public comment may be redacted as provided for under subsections (6) and (7) as applicable. The SHPO must:
 - (a) Open the public comment period not less than 30 calendar days nor more than 75 calendar days in advance of a scheduled Committee meeting.
 - (b) Include in the public comment period notice the date and location of the scheduled Committee meeting and the process for submitting comments on the National Register nomination form.
 - (c) Mail written public comment period notice to the proponent, owner, CLG, chief elected official, and tribes. The SHPO may coordinate with local governments on the format, content, and distribution of the public comment period notice.

- (d) May publish a public comment period notice in one or more local newspapers of general circulation in the area where the historic resource is located.
 - (e) Identify owners using county property tax records obtained within 90 calendar days prior to the beginning of the public comment period.
 - (f) Take additional actions to inform the public and interested parties of the nomination of a historic resource to the National Register or substantive revision of a National Register form for a historic property if the SHPO believes that such an action is in the public interest.
 - (g) Make available to the public, proponent, owner, CLG, chief elected official, and tribes a complete copy of the National Register nomination form during the public comment period except when a portion or the entirety of the National Register nomination form is redacted as provided in sections (6) and (7).
- (9) Any person may provide comments on National Register nomination forms considered by the Committee.
- (a) The Oregon SHPO must receive written comments at least five business days before the scheduled Committee meeting. Any written comments received after this time but before the meeting will be included in the public record, but the Oregon SHPO will not provide the comments to the Committee, except as provided for CLGs in section 10.
 - (b) A person may provide written materials or oral comment to the Committee for consideration the day of the committee meeting.
 - (c) The Committee will only consider written and oral comment submitted during the public comment period that address:
 - (A) substantive requirements for complete nominations described in section (4), or
 - (B) procedural requirements under state and federal rule and law.
 - (d) All comments received in any format are public records.
- (10) A CLG may object to nominating a historic resource within their jurisdiction to the National Register or the substantive revision of a National Register nomination form for a historic property as described in [54 USC § 302504](#) (2014).
- (a) To be valid, an objection must meet the following:
 - (A) Be submitted in writing and received by SHPO within 60 calendar days of dated notice provided by the SHPO prior to the Committee meeting scheduled to consider a National Register nomination form;
 - (B) The chief elected official acting in their official capacity representing the majority opinion of the local government's legislative body recommends that the historic resource not be nominated to the National Register or that the form for a historic property substantially revised;
 - (C) The local landmarks commission recommends by majority opinion that the historic resource not be nominated to the National Register, or that the form for a historic property

substantially revised. The local landmarks commission recommendation must include a report as to whether the property meets the National Register criteria described in OAR 736-050-0250(4). The local landmarks commission may find that the historic resource is eligible for listing in the National Register but not recommend that it be nominated to the National Register; and

(D) The public has a reasonable opportunity to comment.

(b) Upon receipt of a valid objection under subsection (a), SHPO must:

(A) Remove the National Register nomination form from Committee consideration and take no further action from the date the SHPO receives the objection;

(B) Take necessary actions to close the administrative process; and

(C) Provide written notice to the proponent, owner(s), CLG, chief elected official, and tribes within 10 calendar days of the action.

(c) Any person may appeal a CLG's objection by submitting a written appeal to the Oregon SHPO within 30 calendar days after the date the SHPO received the CLG's objection. The SHPO must submit the National Register nomination form for Committee consideration at the next regularly-scheduled committee meeting.

(d) A CLG may object each time a National Register nomination form is substantively revised.

(11) State government as defined in [ORS 174.111](#) and political subdivisions of state government may comment on the National Register nomination form. State government and political subdivisions of state government may object to listing a historic resource in the National Register, but the SHPO must not count the objection toward the total number of private property owners needed to prevent the historic resource from being listed in the National Register as prohibited by the provisions of [36 CFR § 60.6\(g\)](#) (2011). As used in this section, "political subdivision" includes counties, cities, taxing districts and any other governmental unit within the state of Oregon.

(12) The SHPO must determine if the majority of owner(s) object to listing a nominated historic resource in the National Register by comparing the total number of owners identified on the property owner list to the number of notarized statements that object to listing the historic resource.

(a) The SHPO must create a property owner list that includes each owner within the boundary of a historic resource nominated for listing in the National Register using county property tax records obtained as provided in subsection (8)(d). That property owner list is the official list of property owners throughout the public comment period.

(A) The SHPO must take reasonable steps to correctly identify the total number of owners.

(B) The SHPO must assume that the property tax records provided by the county assessor are accurate when counting owners.

(C) The SHPO must include owners on the property owner list regardless of whether the owner can be contacted using the information included on the property owner list provided by the county assessor's office.

- (D) When encountering similar names, the SHPO will compare the name and mailing addresses to determine if there are one or more owners. Jane Doe and Jane S. Doe must be considered as two distinct persons when the county property tax records identify differing mailing addresses. If the mailing address is the same, the SHPO must identify these individuals as the same person.
 - (E) The SHPO must count entities, such as named trusts, corporations, partnerships, etc., as individual owners when the owner name differs in any way, even when the mailing address is the same.
 - (F) The SHPO must count a trust as a single owner when multiple trustees are named, but no trust is identified.
 - (G) The SHPO must use any adopted system of abbreviations, symbols, or other codes used by the county assessor from the county providing property tax records to identify owners when creating the property owner list.
 - (H) The SHPO must add or remove an owner from the property owner list upon submission of a notarized statement from the current property owner when the notarized statement meets the requirements of subsection (c).
- (b) At any time during the public comment period, an owner may take the following actions by submitting a notarized statement. An owner may object only once regardless of how many historic resources or what portion of a historic resource the owner owns:
- (A) Object to listing a historic resource in the National Register;
 - (B) Withdraw their own previous objection;
 - (C) Remove the previous owner from the property owner and withdraw the previous owner's objection;
 - (D) Assert ownership of a historic resource within the nominated area when the property owner list does not include the owner or property; or
 - (E) Any combination of (A), (B), (C) and (D).
- (c) To be valid notarized statements must meet the following criteria:
- (A) An owner must submit an original, notarized statement on a form provided by the SHPO;
 - (B) The notarized statement must identify private real property within the boundary of the nominated area;
 - (C) The notarized statement must clearly identify the intent of the owner as described in subsection (b);
 - (D) The owner must identify both the name they were previously known by and listed in the county property tax records and their current legal name as applicable;
 - (E) The notarized statement must clearly identify the nature of the owner's property right;

- (F) The owner must sign and date the notarized statement; and
 - (G) A notary public must confirm, or “attest,” the identity of the individual signing the notarized statement.
- (d) The SHPO must consider only the most recent valid notarized statement when determining the total number of owners on the property owner list and objections.
 - (e) The SHPO will not consider any notarized statement provided in any other manner, written or oral, or that are not valid, incomplete, or illegible.
 - (f) The legal representative of an owner may submit a notarized statement on an owner’s behalf. The representative must provide documentation demonstrating that they legally represent the owner.
 - (g) A person not listed on the property owner list created in subsection (12)(a) and submitting a notarized statement must submit documentation demonstrating that they meet the definition of owner as described in this rule, including instruments used to create legal entities under Oregon State law such as trusts, limited liability corporations, and other legal entities.
 - (h) When removing the objection of a previous owner under subsection (b), a person must submit documentation demonstrating that the previous owner no longer has an ownership interest and that they themselves meet the definition of owner as described in this rule.
 - (i) The SHPO will not recognize any person as an owner who is unable or refuses to submit documentation as required by this rule.
 - (j) The SHPO will not recognize the authority of third parties to represent the intent of an owner whom the third party does not demonstrate that they legally represent as provided in subsection (e).
 - (k) All notarized statements and accompanying documentation are public records.
 - (l) The SHPO must acknowledge persons in writing within 30 days of the receipt of their notarized statement and any accompanying documents. Acknowledgements must indicate if the notarized statement and accompanying documents are valid under subsection (c) and if not valid, describe why and how to correct the error.
 - (m) The public comment period must remain open when the Committee defers making a recommendation under the provisions of OAR 736-050-0260(10).
- (13) The SHPO may examine the property owner list and notarized statements to determine the accuracy of the property owner list and validity of notarized statements. This may occur when the SHPO determines that the reasonably possible outcome of identifying potential error(s) may change the total number of owners on the property owner list or objections to the extent that the outcome would determine if the nominated historic resource is or is not listed in the National Register.
- (a) Any person may request that the SHPO carry out an examination of the property owner list or submitted notarized statements under this section. Such a request must be in writing, and identify and document with evidence to establish one or more of the following:

- (A) Factual inaccuracy;
 - (B) Error in the manner in which SHPO prepared the property owner list; or
 - (C) Error in the tally of notarized statements.
- (b) In determining whether to undertake an examination under subsection (a), SHPO may consider whether such an examination could reasonably affect the outcome of the process.
 - (c) The SHPO must determine how best to conduct an examination under this section on a case-by-case basis based on the nature of the identified concern.
 - (d) An examination under subsection (a) is limited to the specific nature of the identified concern and does not include an evaluation of each entry in the property owner list or each submitted notarized statement unless the SHPO determines that this step is necessary.
 - (e) The SHPO may choose to re-examine the property owner list and notarized statements against current property tax assessor records, the results of a title search, and any public record and make decisions based on these sources.
 - (f) The SHPO may require that owners submit documentation to prove their ownership status or the validity of their submitted notarized statements. The SHPO will not acknowledge persons who are unable or refuse to submit documentation as required by this rule as owners for the purposes of this rule.
 - (g) The SHPO must independently verify that documents provided by third parties that do not legally represent an owner as defined in this rule and under Oregon State law are valid and are themselves sufficient evidence before editing the property owner list or confirm or refute the validity of a notarized statement. The SHPO must notify the third party and the subject person of the SHPO's determination and provide the person an opportunity to provide additional documentation to demonstrate that they are an owner as defined in OAR 736-050-0230(16).
 - (h) The SHPO may determine that a person not counted as an owner on the property owner list created under subsection (12)(a) is an owner as defined in OAR 736-050-0230(16) and correct the property owner list as described in this rule and accept the owner's notarized statement.
 - (i) The SHPO may remove a person from the property owner list or invalidate notarized statements upon completion of an examination. The SHPO must inform a person in writing within 30 days of removing a person from the property owner list or invalidating the person's submitted notarized statement and the reason the SHPO took the action. A person may appeal their removal from the property owner list by submitting documentation as described in this rule.
 - (j) An examination is complete once the SHPO determines that further identification and correction of errors will not determine if the historic resource will or will not be listed in the National Register.
- (14) The SHPO must make a copy of the National Register nomination form as provided to the NPS available to the public, subject to the provisions of sections (6) and (7). The SHPO shall provide notice of this action to proponent, owner, CLG, chief elected official, and tribes. The SHPO may provide notice to owners by public press release or other means in place of written notice.

- (15) The NPS may correct a submitted National Register nomination form, require that the SHPO correct a submitted National Register nomination form, or deny listing a historic resource in the National Register.
- (a) The NPS may correct a submitted National Register form and list the historic resource in the National Register.
 - (b) The SHPO must notify the Committee, proponent, owner(s), CLG, chief elected official, and tribes that the NPS returned the National Register nomination form, the reasons for the return, and whether the SHPO will resubmit the National Register nomination form to the Committee or the NPS.
 - (A) The SHPO may resubmit National Register nomination forms not requiring substantial revisions to the NPS without Committee review.
 - (B) The SHPO may choose to resubmit a National Register nomination form returned by the NPS for amendment or substantive revision by the SHPO or denied listing in the National Register to the Committee. The SHPO must address the reasons the NPS returned the National Register nomination form before resubmission to the committee.
 - (c) The SHPO may require that the proponent complete identified revisions before resubmission of the National Register nomination form to the Committee or the NPS or the SHPO may complete needed revisions itself.
 - (d) If a historic resource is not listed in the National Register within two years from the date the NPS first returns the National Register nomination for correction the SHPO must decide whether to resubmit the National Register nomination form to the Committee or the NPS as described in this rule or end the National Register nomination process. If the SHPO does not resubmit a National Register nomination form to the Committee or the NPS as described in this rule, the public comment period and the nomination process are ended. The SHPO must consult with the proponent and consider their opinion before making a final decision. A written decision shall be provided to the proponent, owner, CLG, chief elected official, and tribes. The SHPO may provide notice to owners by public press release or other means.
 - (e) The SHPO must complete the following to continue with the National Register process after the NPS returns a National Register form:
 - (A) Review the National Register form as described in OAR 736-050-0250(4).
 - (B) If the SHPO determines that the National Register nomination form requires substantive revision or if it is in the public interest the public comment period must close and the nomination process must stop. A proponent may revise the National Register nomination form and submit the form as a new nomination during a regular deadline for a future committee meeting as described in this rule;
 - (C) Provide a public comment period notice as described in OAR 736-050-0250(c)(d)(f) and (g);
 - (D) Create a new property owner list as described in section (12); and

- (f) Compare notarized statements received throughout the public comment period and remove those persons not on the property owner list created in section (15)(f)(C). The SHPO must not tally the notarized statements from persons removed from the property owner list in this manner. The SHPO must notify persons removed in this manner in writing using their last indicated mailing address on the original property owner list created during the public comment period for the prior submission. A person may appeal their removal from the property owner list by submitting documentation as described in this rule. Owners may submit notarized documents as described in section 12.
- (16) The SHPO must consider the Committee's comments and recommendation and comments received during the public comment period when making an independent recommendation under the provisions of [36 CFR § 60.6\(o\) and \(p\)](#) regarding the eligibility of an historic resource for listing in the National Register.
- (17) The SHPO may make a recommendation to the NPS contrary to the Committee's recommendation. The SHPO must inform the Committee if making a recommendation to the NPS contrary to the Committee's recommendation at the next committee meeting.
- (18) The SHPO may petition the NPS to take the following actions without review by the Committee. The SHPO must notify the Committee of these actions at the Committee's next meeting:
- (a) Petition the NPS to remove a razed historic property from the National Register;
 - (b) Amend National Register nomination forms for a historic property when the amendments are not substantive revisions;
 - (c) Change the contributing status of an individual historic property within a historic district listed in the National Register;
 - (d) Change the contributing status of a secondary historic property, such as a garage, shed, or other small-scale building, structure, object or site that in the opinion of the SHPO does not qualify for listing in the National Register on its own merit included within the boundary of historic property; or
 - (e) Any combination of (a), (b), (c) and (d).
- (19) Any person may appeal directly to the NPS any SHPO decision regarding the nomination of historic resources to the National Register or amendments to National Register forms for historic properties under the provisions of [36 CFR § 60.12](#).
- (20) The SHPO may refer a nomination submitted pursuant to section (3) to the Office of Administrative Hearings for a contested case hearing as provided in [ORS 183.413 to 183.425, 183.440 to 18.452, 183.457, 183.460 to 183.470](#). The proponent shall be a party to any contested case. The SHPO shall designate the scope of issues that may be addressed in the contested case, which may include:
- (a) The determination of whether a majority of owners objects as provided in section (12); and
 - (b) The determination of the accuracy of the property owner list and validity of notarized statements as provided in section (13).

OAR 736-050-0260 State Advisory Committee on Historic Preservation: Committee Procedures for Review and Approval of Nominations to the National Register

- (1) The Committee must review all National Register nomination forms except for those prepared under OAR 736-050-0250(18).
- (2) The Committee must make a recommendation to the SHPO whether the National Register nomination form meets the following criteria:
 - (a) All procedural requirements are met;
 - (b) The National Register nomination form is adequately documented;
 - (c) The National Register nomination form is technically and professionally correct and sufficient;
and
 - (d) The National Register nomination form demonstrates that the nominated historic resource meets the National Register criteria for evaluation.
- (3) Neither the SHPO nor the Committee chairperson or vice chairperson will consider a National Register nomination form submitted after the opening of the public comment period.
- (4) The owner(s) and chief elected official may waive the CLG comment opportunity described in OAR 736-050-0250(10) in writing at least 15 calendar days before the scheduled meeting to allow the Committee to review a National Register nomination form.
- (5) Committee members must disclose actual and potential conflicts of interest in accordance with state law.
- (6) Committee members will not recuse themselves for a potential conflict of interest.
- (7) The Committee retains a quorum to conduct business if by the removal of committee members for declared actual conflicts of interest the Committee falls below five present voting committee members.
- (8) For each historic resource nominated to the National Register, the National Register Program Coordinator must present the Committee a summary of:
 - (a) The argument presented in the National Register nomination form, and
 - (b) Public comment received prior to the Committee meeting pursuant to OAR 736-050-0250(9)(a).
- (9) The chairperson must call for comments from the proponent(s), opponents, and other interested parties present following the National Register Program Coordinator's presentation. The total time allowed for comments must be determined by the chairperson or by procedures adopted by the Committee.
- (10) The SHPO, Deputy SHPO, Associate DSHPO, and Oregon SHPO staff may participate in committee discussions, but are not voting committee members.

- (11) The Committee must take one of the following actions when considering a National Register nomination form based on the Committee's deliberations and comments received during the public comment:
- (a) Recommend that the SHPO find that the National Register nomination form meets the criteria in subsections (1)(a)-(d) as presented to the Committee with no revisions;
 - (b) Recommend that the SHPO find that the National Register nomination form meets the criteria in subsections (1)(a)-(d) after making less than substantive revisions to the National Register nomination form; or
 - (c) Defer making a recommendation until a future committee meeting to allow the proponent to make revision(s) or for any other reason deemed appropriate by the Committee related to the criteria in subsections (1)(a)-(d).
 - (d) Recommend that the SHPO find that the National Register nomination form does not meet the criteria in subsections (1)(a)-(d). The Committee must provide reasons for the recommendation. The Committee may re-consider a recommendation at a later meeting after the SHPO determines that the proponent resolved the Committee's objections.
- (12) The Committee must defer making a recommendation until a future committee meeting if the National Register nomination form requires substantive revisions.
- (13) The Committee may provide courtesy comments on National Register nomination forms submitted to the SHPO for historic resources on lands held in trust by the United States of America on behalf of a tribe or an individual allotment held by a tribal member or administered by a U.S. federal agency. SHPO staff must establish a procedure for applying the conditions of this subsection.

OAR 736-050-0270 State Advisory Committee on Preservation: Incorporation of Publications by Reference and Effective Date of Rule

- (1) The publication(s) referred to or incorporated by reference in this OAR 736-050-0220 through OAR 736-050-0270 are available from the Oregon State Historic Preservation Office, Oregon Parks and Recreation Department.
- (2) This Division adopts by reference the following publications of the National Park Service: “The National Register of Historic Places Regulations (36 CFR Part 60): A Brief History and Annotated Guide,” August 2012; “Historic Preservation Fund Grant Manual,” June 2007; National Register Bulletin 15, “How to Apply the National Register Criteria for Evaluation,” 1995 revision; National Register Bulletin 16A, “How to Complete the National Register Form,” 1997; National Register Bulletin 16B, “How to Complete the National Register Multiple Documentation Form,” 1999 revision; and National Register Bulletin 21 and 12, “Defining Boundaries for National Register Properties,” 1997 revision.
- (3) OAR 736-050-0220 through OAR 736-050-0270 are effective upon filing of the rule with the Secretary of State.
- (4) OAR 736-050-0260(15)(d) and 736-050-0260(15)(e)(B) are not applicable to National Register forms submitted before the effective date of this Division.

Attachment B

Comments by RAC members on proposed revisions

1. Peter Gutowsky, Deschutes County Planning Manager, Association of Oregon Counties and George Kramer, private consultant, Kramer & Company, Ashland
2. Mary Kyle McCurdy, Deputy Director, 1000 Friends of Oregon

May 19, 2020

Oregon Parks and Recreation Commission
725 NE Summer Street, Suite C
Salem, OR 97301

Re: National Register Rule Amendments

Chair Cal Mukumoto:

As members of the National Register program Rule Advisory Committee tasked with reviewing the state rules for the administration of the federal National Register of Historic Places program in Oregon, we offer the following revision to the draft. Specifically, OAR 736-050-0250(10):

When the chief elected official, speaking on behalf of the elected body, provides written objections to SHPO stating local utilities or infrastructure necessary for the local community's public interest are impacted by a historic resource, the SHPO must remove the historic resource from consideration for listing in the National Register or the consideration of a substantive revision for a National Register nomination form for a property listed in the National Register and take no further action from the date the SHPO receives written objections from the chief elected official. The SHPO may take necessary administrative actions to close the nomination process. The SHPO must notify in writing the proponent, owner(s), CLG, chief elected official, and federally-recognized Indian tribes within the state of Oregon within 10 calendar days of removing the historic resource from consideration.

The reason for the revision is as follows:

1. There is a gaping hole in the existing and proposed federal rules that continue to allow someone to weaponize the National nomination process against holders of linear easements with utilities/infrastructure.
2. Local utility infrastructure is already subject to review by the State Historic Preservation Office (SHPO) under Section 106 review.
3. SHPO was directed by the federal government to develop rules that address the federal system for nominating properties to the National Register of Historic Places by taking into consideration Oregon's unique land use system and peculiarities. This is the opportunity to ensure holders of linear easements with utilities/infrastructure are not impacted by hostile nominations that seek to prevent upgrades under the auspices of historic preservation.
4. The intent of the federal rules for nominating properties to the National Register of Historic Places is for Certified Local Governments to receive formal input from their landmarks commissions but allow elected officials to object and remove a nomination if warranted. Existing federal rules require a landmarks commission AND the elected officials to both object in writing to a nomination. Even if this happens, an applicant has 30 days to appeal that action directly to the State Advisory Committee on Historic Preservation.

5. Historic Landmarks Commissions are appointed by local elected officials. They are an advisory body. Existing federal rules give a landmarks commission the ability to veto an elected body's position by supporting a National nomination. When that happens, even if an elected body objects, the application is still formally considered by the State Advisory Committee on Historic Preservation. This is unprecedented. For local historic nominations in Oregon, a landmark commission makes a recommendation to the elected body, who then determines after a public hearing whether a local comprehensive plan should be amended or not. The federal process should match local historic nominations.

We believe the above language provides sufficient public protection through the federal Section 106 process incorporated into the National Historic Preservation Act of 1966 and addresses the problems that result from Oregon's land use practices that allow individual properties with a utility easement to impact necessary public utility improvements. We encourage you to adopt this language as part of the revised rule

Sincerely,



Peter Gutowsky, AICP
Deschutes County Planning Manager



George Kramer
Kramer & Company



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May 19, 2020

To: Ian Johnson, SHPO Associate Deputy State Historic Preservation Officer
Ian.Johnson@oregon.gov

From: Mary Kyle McCurdy, Deputy Director

Re: Draft historic resources administrative rules, OAR chapter 736, division 50.

Thank you for the opportunity to comment on the draft rules for OAR chapter 736, division 50. As a member of the Rulemaking Advisory Committee (RAC), we would like to thank the staff and RAC chair for the well-run meetings.

These comments are preliminary, and we might add to or revise them as this process continues. The short timeframe in which to make them on this draft means that we were not able to consult with all those we would have liked to, and which we will do as these move forward. We understand there will be a full public comment period in the later summer or fall.

OAR 736-050-0230(9)

This first part of this subsection defines “historic resource” consistent with the cited CFR, but the second clause is not in the cited CFR and so should be defined, in particular, the term “potentially eligible.”

OAR 736-050-0230(16)(a)

The CFR citation is incorrect; it should be 36 CFR 60.3(k).

OAR 736-050-0250(7)

This subsection states that that “SHPO staff must establish a procedure for applying the conditions of ORS 192.355(4)...” We recommend setting a date by which that procedure will be adopted.

736-050-0250(8)(a)

A 30-day public comment period may not be adequate to allow for a CLG to review a National Register nomination form. A minimum 60-day public comment period would be preferable.

736-050-0250(8)(c)

We are glad to see and support the addition of the provision that SHPO must mail written notice to every property owner of a proposed historic resources, including to those in a proposed historic district.

736-050-0250(8)(e)

For consistency with other sections, consider changing (e) to be based on the Committee meeting date (i.e. “150 days prior to the Committee meeting”)

736-050-0250(10)(a)(A)

We find this language - “within 60 calendar days of dated notice provided by the SHPO prior to the Committee meeting scheduled” – is confusing as to when written comments from a CLG must be submitted to SHPO. And, it might be too limiting. The timing considered in (a) should be identical to that provided for all public comments (i.e. at any time between a CLG being notified of a property’s nomination and the date of the Committee meeting). Without affording maximum opportunity for a CLG to object, there will not be adequate time to schedule hearings, solicit public input, and draft objection letters. Please review the specific language in 54 USC § 302504 (b) which provides for a 60-day review window for CLGs.

736-050-0250(10)(A) and (B)

As noted by the SHPO staff in their accompanying memo, the RAC favored a stronger role for the chief local official of the jurisdiction in which a historic resource nomination is located, such that the elected body would have the sole authority to object or recommend a listing to SHPO.

However, the draft rule provides that the objection of a locally elected body (city council, county commission) is valid only if its landmarks commission agrees with the objection. If the local elected body objects to, but the local landmarks commission approves, the nomination, then the nomination will go forward to the state level.

We recommend that the rules provide that a local landmarks commission operate as any other local advisory body and make a recommendation to the elected body for it to make the final decision. A variation on this could be that if the entity making the nomination is also the owner, then the application need go only to the landmarks commission for consideration. However, if the nominating entity is not the owner, or not all owners have signed on to the nomination, then it goes to the landmarks commission for a recommendation and then to the local elected body for the final determination.

We find the staff rationale for the structure it proposes flawed. Staff states that it is concerned with “identifying specific types of resources for special consideration when such considerations are not provided for in federal law or regulation and similar arguments for balancing historic preservation against other public needs is just as valid in other situations.” However:

- One cannot invoke federal and “balancing” without acknowledging that if this was only about federal law, designation as an historic resource on the National Register of Historic Places would be purely honorary, and the owner could alter or destroy the resource without any hinderance. However, in Oregon, there are restrictions on resources listed on the National Register because of other state statutory and administrative rule provisions.¹
- The proposed structure, in which a landmarks commission would essentially have the final say, when there are multiple owners and/or lack of agreement among owners is exactly when the elected leaders of a jurisdiction should balance competing public policies in making a conclusion on the merits of the proposal.

OAR 736-050-250(12)(c)(D)

This subsection states that “The owner must identify both the name they were previously known by and listed in the county property tax records and their current legal name as applicable.” What is the purpose of this? Must they list every name they might have been listed as at any time on any property tax records in the county? Many property owners might not even know or remember how their name is listed for property they might have bought, say, two decades ago. In that time they might have gotten married or divorced, changed the ownership to a different form (LLC, trust, etc...). This seems unreasonably burdensome.

OAR 736-050-250(13)

We recommend this slight change:

“This may occur when the SHPO determines that the reasonably possible outcome of identifying potential error(s) may change the total number of owners on the property owner list or objections to the extent that the outcome ~~w~~could determine if the nominated historic resource is or is not listed in the National Register.”

OAR 736-050-250(15)(d)

This subsection states that “...SHPO must decide whether to resubmit the National Register nomination form to the Committee or the NPS” What criteria would SHPO use for that determination? The draft rule also states that SHPO will “consult with the proponent,” but that consultation should also include any opponents and the local government(s) and/or state agencies impacted.

OAR 736-050-0260(16)

Please review the word “not” to ensure intent.

¹ ORS 197.772; OAR 660- 023-0200.