

Beyond Bulletin 38

Comments on the Traditional Cultural Properties Symposium

Thomas F. King

As co-author, with Patricia L. Parker, of National Register Bulletin 38 (Parker and King 1990), I am much cheered by the preceding papers. As did the symposia that produced them, they show that traditional cultural properties have become the focus of intellectual ferment in and around historic preservation. Moreover, they illustrate a kind of cross-cultural ferment that should be healthy for preservation and intercultural communication alike. In commenting on them, I do not propose to pick nits. Instead, I will focus on a few of the major issues that they raise, and offer some observations on them from my peculiar perspective.

Many of the papers point to the issuance of Bulletin 38 as a pivotal event, before which traditional cultural properties were widely ignored, after which agencies began to take them seriously. We intended for Bulletin 38 to have an impact, so it is good to learn that it apparently has caused people to sit up and take notice.

It may be worth stressing, however, that Bulletin 38 did not in any way expand or otherwise change the National Register or its criteria for inclusion. Nor did Congress, when in 1992 it added Section 101(d)(6) to the National Historic Preservation Act, explicitly stating that Native American sacred sites (a particular kind of traditional cultural property) may be determined eligible for the Register. Traditional cultural properties have been included in the Register, and determined eligible for inclusion, since the Register's earliest days. My first Section 106 case, back in 1971, involved a traditional cultural property that was included in the Register—Tahquitz Canyon in Palm Springs, California. Tahquitz happened to have archeological sites in it, but it was the canyon's role in the cultural traditions of the Cahuilla Indian people—as their origin place and as home to the spirit Tahquitz—that impressed the Advisory Council when the Corps of Engineers' plan to throw a dam across the canyon came up for review.

In the mid-1980s we observed that agencies, SHPOs, and others were becoming confused about whether and how traditional cultural properties were eligible for the Register, particularly where such properties were significant "only" to Native American groups, lacked architectural or archeological signatures, and had religious connotations. The infamous case of the San Francisco Peaks (c.f. ACHP 1985:65) was particularly persuasive in demonstrating that something had to be done. After some political pushing and pulling, Bulletin 38 was what we ended up with. Its purpose was not to make a "new" class of property eligible for the Register, but to clarify how to recognize and evaluate a class of property that always had been eligible.

Section 101(d)(6) of NHPA has exactly the same purpose. It was included in the 1992 amendments when several agencies issued guidance effectively telling the field to continue with business as usual because Bulletin 38 was merely an internal National Park Service document. I really don't understand what Charles Carroll means in his paper when he says that Section 101(d)(6)(b)'s requirement to consult with tribes is "decidedly different from guidance provided in...Bulletin 38." As I see it, Section 101(d)(6) now clearly requires consultation, and Bulletin 38 provides advice about how to do it.

Bulletin 38 does go beyond Section 101(d)(6), though, in that it deals not only with Native American religious properties but with properties of traditional cultural value to all kinds of people, and therefore promotes consultation with far more groups than just Indian tribes. I am particularly glad that Lynne Sebastian's paper stresses the fact that tribes aren't the only groups that can treasure traditional cultural properties, and that Fran Levine and Tom Merlan explicitly address consultation with Hispanic communities. In a videotape on traditional cultural properties that I recently produced for the Soil Conservation Service (King 1993), I illustrated plant-gathering areas used by South Carolina African-American basketmakers, a creek baptism site used by Anglo-American Southern Baptists, and the Sacred Grove in New York State, where Joseph Smith reputedly received the vision that led to the creation of the Latter Day Saints churches, as well as a variety of Native American properties. Although this group of papers focuses primarily on tribal properties and issues, we should always remember that traditional cultural properties are for everyone.

A number of the papers in this issue discuss the difficulties traditional groups have in responding to Euro-American systems of communication—commenting in writing, operating within particular timeframes, dealing with correspondence, addressing cultural matters in public, and so on. Tribes like the Zuni and Hopi are certainly to be commended for trying to organize institutional ways of working across the boundaries of cultural difference. The Hopi Cultural Resources Advisory Task Team and the Zuni Cultural Resources Advisory Team are fine examples of good-faith efforts by tribes to relate positively to federal agency planning.

Such tribal efforts don't relieve agencies of the responsibility to make their consultation processes relate intelligently to the cultural systems of those with whom they consult—whether those consulted are Zuni, Hopi, or anybody else. If one's consultation system doesn't allow those consulted to consult, it can hardly be characterized as a consultation system.

The tendency of agencies to treat consultation as a rote exercise in notification-and-response was one of the factors that motivated us to write Bulletin 38. As one of many examples: a National Forest I visited during the drafting process lay along a river where a local Indian tribe carries out annual rituals designed to renew the world and hold it together—rituals that demand natural conditions for their performance. The Forest's managers insisted that they were performing their duty to consult the tribe by sending postcards to the Tribal Council notifying them of impending timber sales. The same officials were frustrated by the fact that after failing to respond to these postcards, the tribe got upset when logging opera-

tions interfered with their ritual sites and activities. In Bulletin 38 we tried to make the point that agencies need to make good-faith efforts to work with tribes—with their world-views, time-frames, and modes of communication—rather than to try to impose their own systems on the tribes. The detailed, carefully organized consultation carried out around the Fence Lake Mine project, discussed in detail by Judy Brunson Hadley and Richard Hart in this issue, is a fine example of such consultation.

On the other hand, there are limits to how far tribes—and others—can expect agencies to go in adjusting their consultation systems to local modes of communication. The anger that oozes out of Judy Brunson's paper reflects the legitimate frustration of a project proponent who simply cannot figure out, from one moment to the next, what the rules of the consultation process are.

I recently found myself with my foot at least half-shoved into Brunson's shoe, trying to help the General Services Administration deal with a traditional cultural property issue of truly monumental proportions—the case of the African Burial Ground in New York City (c.f. Harrington 1993). One of the issues in this case, involving a colonial-era burial ground of enslaved African-Americans on the site of an under-construction federal office building, was the extent to which the City's—and country's—African-American community had been consulted during the planning process. At the time I became involved, after the burial ground's discovery, GSA had begun meeting with local preservation officials and the office of the Mayor to figure out what to do. The Mayor himself was and is African-American; his representative in the meetings was African-American, and GSA's understanding at the time was that the Mayor's office represented the African-American community. I tried to articulate this position in a meeting with the Advisory Council—represented by Charlene Dwin Vaughn, the Council's one and only African-American preservation professional, a respected colleague and friend—and found myself riveted with one of Charlene's best “oh, you idiot” looks.

“Tom,” she said succinctly; “you would never take that position if this were an Indian tribe.”

Luckily for me, the political process soon overtook the consultation process on the African Burial Ground, and I didn't have to confront the issue, but it still troubles me. It is certainly true that in an Indian tribe, an agency cannot assume that the Tribal Council represents the concerns of its traditional people. One of the cases that influenced us in writing Bulletin 38 was one in which a Tribal Council itself, on the northern Plains, was sued by a group of traditionalists for permitting oil and gas exploration in an area used by the traditionalists for medicine gathering. It certainly followed that GSA should not assume that the Mayor's office spoke for New York's African-American community.

Yet if New York City were an Indian tribe, and if GSA were meeting with the tribal government about the burial ground it had encountered, and had no reason to think that the tribal government did not represent the community's traditionalists, how much more in-depth seeking out and consulting with traditionalists should one—would I—expect the agency to carry out? Indeed, given the principle of tribal sovereignty (or, in the case of New York City, the principle of local home rule), how much

second-guessing of the tribal (or local) government would it be legitimate for the federal agency to do? In the African Burial Ground case, the African-American community reached a pretty clear consensus that GSA's consultation had been inadequate, and had the political clout to force a change of direction. There's something important to be learned from this experience, but I continue to grapple with exactly what it is.

This puzzlement leads me to smile—a bit wanly—at Brunson's criticism of Bulletin 38's failure to “set forth well-defined methodologies for how to proceed,” and of the Advisory Council for providing “almost no consistent guidance” about traditional cultural properties. I can understand her frustration, and even share it, but I think the shadowland quality of consultation about traditional cultural properties reflects the nature of the beast, and our relative inexperience in dealing with it. We didn't include “well-defined methodologies” in Bulletin 38 because we didn't know what they might be, because we strongly suspected that they would vary widely from area to area and group to group, and because we didn't feel that it was appropriate (even if it had been possible) for Washington to try to dictate what such methodologies might be. As the African Burial Ground case illustrates, a lot of people and agencies are groping toward definition of such methodologies. The papers in this issue show that progress is being made.

Several of the papers allude to a procedural and conceptual disconnect between Section 106 review and compliance with the National Environmental Policy Act (NEPA). Alan Downer and Alexandra Roberts identify this disconnect as a major impediment to dealing effectively with traditional cultural properties under Section 106. Under NEPA, agencies analyze a range of alternative approaches to a given undertaking, early in project planning. Downer and Roberts accurately identify this stage of planning as the best time for consultation about effects on traditional cultural properties. Section 106, it seems, tends to be dealt with later in planning, when the agency is pretty well fixed on a preferred alternative. At this point there may be nothing left to consult about but whether to go forward with the project at all, and if so, how to “mitigate” effects.

Charles Carroll is correct in saying that I promote initiating compliance with Section 106 early in the NEPA process, and carrying the two review processes to completion in unison. This would seemingly obviate the problem that Downer and Roberts highlight. Carroll also points out, however, that to consummate Section 106 review before NEPA compliance is completed could easily be taken to prejudice the NEPA decision.

How can we resolve this conundrum? We should resolve it, not only for the benefit of traditional cultural properties, but because only by resolving it can we get historic properties of all kinds considered early in planning, when a wide range of alternatives are still open.

I believe that the NEPA-106 disconnect is largely an artifact of the Section 106 regulations. 36 CFR Part 800 prescribes a rather rigid, step-by-step procedure in which one first identifies properties that may be historic, then evaluates them against the National Register Criteria to determine whether they ARE historic, then determines

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effects, then determines if the effects are adverse, and finally consults to resolve those that are adverse. Some of these steps can be compressed, but one way or another they all have to be addressed. They are perfectly logical steps to go through, but the requirement to go through them in sequence—and specifically to go through property-by-property evaluation before assessing effects—is, I believe, what creates the disconnect with NEPA.

In order to complete Section 106 review—indeed in order even to move very far along in the process—an agency has to identify specific properties that may be historic, and then apply the National Register Criteria to each to determine whether it really is historic. This is generally understood to require on-the-ground surveys of various kinds, as well as background research and consultation with the SHPO and others. This can be expensive work, and of course it requires access to lands within the area of potential effect (APE). An agency is unlikely to be willing—if it is even able—to do such fieldwork at the early stages of planning, with respect to a wide range of optional sites or project designs. As a result, they put it off, and hence put off Section 106 review, until a preferred alternative is selected and access to the APE has been arranged.

I hasten to add that sometimes it's perfectly feasible to do surveys early on, particularly where what's being considered is a relatively small, simple project with a few alternative configurations. I should also say that we did, to some extent, anticipate the early survey problem in writing the 1986 regulations, and included some words designed to give agencies flexibility. For example, the regulations don't require that ALL historic properties subject to effect be identified; they don't include this requirement because we anticipated that some agencies might use predictive modeling and sample surveys as their bases for identifying historic properties. The regulations also don't define a standard for documenting the basis for judging something to be eligible for the National Register; if the agency and SHPO want to decide that a property is eligible based on faith alone, with little or no field inspection, the regulations don't prohibit this. But in practice, the tendency has been for SHPOs to promote, and for agencies to conduct, detailed field surveys and detailed documentation of properties before determining eligibility and moving on with the process. There are logical reasons for this tendency, but one of its effects has been to create a situation in which agencies wait until late in the NEPA process—when options have been significantly narrowed, even down to a single preferred alternative—before beginning consultation under Section 106. As Downer and Roberts suggest, this is often too late for consultation to be effective.

Can we rewire Section 106 and NEPA across the disconnect? I think so, and now is a good time to try, since the Advisory Council will be rewriting the regulations in response to the 1992 NHPA amendments. I think the Council should seriously consider creating a Section 106 process that is explicitly linked to NEPA review. Such a process should provide for consultation about the effects of multiple alternatives, early in planning an undertaking. This consultation would be a part of the process of identifying both properties and effects, coupled with

background research and perhaps sample field survey where feasible. It might result in a Memorandum of Agreement or its equivalent about how to proceed with selecting a preferred alternative, and how then to complete identification, effect determination, and resolution of adverse effects.

The trick in writing regulations embodying such a process would be to make the really important parts of the 106 process—negotiation and execution of binding agreements—work early enough in the planning process to enable the consulting parties to address a reasonably wide range of alternatives, while later in the process retaining for them the ability to identify and negotiate specific solutions to particular adverse effects. I think it could be done, and that it would not only make it easier to consult about traditional cultural properties, but facilitate and otherwise improve the way we deal with all kinds of historic properties.

The issue of whether ancestral archeological sites are or are not ipso facto traditional cultural properties was addressed by a number of the papers when they were presented, and looms as an even larger issue in the published papers. In some papers, in fact—for example, Richard Hart's—it looms so large that I have to worry a bit about whether traditional cultural properties that are not archeological sites, or associated with such sites, are being fully attended to.

Be this as it may, the two points of view are defined succinctly by Lynne Sebastian on the one hand and the Hopi team on the other. Sebastian's position, articulated in her paper and noted in a number of editor's footnotes, is that "if there are no practices involving a place, no beliefs concerning that place, and no mention of the place in the oral history of the community, it is not a traditional cultural property." The Hopi position, shared by the Zuni, is that "every ancestral archeological site is also a traditional cultural property," whether it figures explicitly in the community's oral history or not.

In reading the papers, my initial tendency was to lean in Sebastian's direction. After all, what makes a traditional cultural property a traditional cultural property is its function in the continuing cultural life of a community. Sebastian's position, as I understand it, is that if the existence of a property isn't at least vaguely known by traditionalists, it can't possibly have a function. This seems sensible, at first blush.

Reading Andrew Othole's and Roger Anyon's paper, however, I found myself persuaded that Sebastian—and I—have conceived of "function" too narrowly.

Expressing their "dismay" at the position that fieldwork to identify traditional cultural properties is not necessary "if the tribe does not know of any existing traditional cultural properties in a project area," Othole and Anyon go on to describe a situation in which the tribe has only general knowledge of traditional cultural properties in an area but can, they imply, recognize one when they see one on the ground. Sebastian comments in a footnote that in this case, the general knowledge would be sufficient to trigger fieldwork. This seems to resolve the immediate case in point, but not the larger issue. I presume that the Zuni would take the position that even if the oral history says nothing at all about an area, it is still necessary for knowledgeable people who can recognize traditional cultural properties—or identify the traditional

values that may be present in an archeological site—to visit the area and see what can be seen.

Why? Because, I surmise, Othole and Anyon would define a property as having a function in a community's cultural life if its simple existence, known or unknown, is important to the community. Upon reflection, this position seems at least as plausible as Sebastian's.

One can imagine—and most of us who have worked with traditional knowledge holders have probably experienced—cases in which the knowledge-bearer, viewing a rock or a spring, a hill or a ruined structure, makes a previously unmade connection, recognizes a characteristic that matches some template in the mind, that enables him or her to connect the place with a tradition, a practice, a belief, a piece of the group's cultural history. At this point the knowledge holder recognizes the property as one that is important in the cultural life of the community, just as an archeologist, coming on a previously unidentified site, can recognize it as having research value.

The contrast between Sebastian's perception and that of the Zuni reminded me of an experience I had early in the national struggle over reburial and repatriation of human remains. I was talking with Jan Hammil, leader of American Indians Against Desecration. I piously told her how we at the Advisory Council felt that in figuring out what to do with human remains, a balance had to be struck between the interests of science and the interests of descendants, if descendants could be identified.

"What about the interests of the dead?" Jan asked.

"Huh?" I replied, or words to that effect.

In the next few minutes, Jan explained—with the eloquence of a patient teacher trying to help a particularly slow student—that the issue in treatment of the ancestral dead was not the rights of the descendants, but the rights of the dead themselves, toward whom the living bear responsibility. Thus the question of whether a group can trace genetic or cultural descent from a dead person whose remains must be dealt with is in the eyes of many tribes quite irrelevant. The living are responsible for the dead, and the dead—often seen not as being really "dead" but as transformed, and still powerful—must be treated with respect.

In just the same way, it seems to me that what the Zuni and Hopi are saying is that traditional cultural properties must be respected for their own sakes—regardless of whether they are referred to specifically in oral history. It follows that legitimate traditional cultural properties can legitimately be identified through field inspection by knowledgeable people in the absence of specific association with known traditions, and that whole classes of properties—such as ancestral archeological sites—can be categorically identified as traditional cultural properties.

How do we square this with Bulletin 38 and the National Register Criteria? Without great difficulty, actually.

Bulletin 38 defines a traditional cultural property as one that is eligible for the Register "because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community" (Parker and King 1990:1). It doesn't say how property-specific that association must be. If a community traditionally believes that rocks point-

ed toward the sky are places of communication between this world and the spirit world, and if belief in communication between these worlds is important in maintaining the community's identity, the fact that its members may not know of any pointed rocks in a given area doesn't make such rocks, when discovered in the area, any less recognizable to the community's elders as places of inter-world communication, which automatically have cultural significance. In the same way, if a community believes that the places where its ancestors lived must be respected in order to respect the ancestors—or perhaps because such places retain the power of the ancestors—and if this belief is important to the community's cultural integrity, then the archeological remains of any ancestral living place surely comprise a traditional cultural property for that community, regardless of whether the community's oral history specifically mentions that particular site.

But can a property that has not specifically figured in anybody's traditional history meet any of the National Register Criteria? I don't see why not. If the community believes that its ancestors came down to this world from another along the spires of pointed rocks, surely a newly discovered pointed rock may be taken to be associated with this traditionally important event, and thus be eligible under Criterion A. If the community reveres its traditional ancestors, surely their living sites can be eligible under Criterion B—and so on.

Finally, it seems to me that arguing against recognizing things like ancestral archeological sites as traditional cultural properties, like many arguments about eligibility for the Register, is kind of beside the point. If the Zuni and Hopi ascribe cultural value to all ancestral archeological sites, they are going to insist that this value be recognized and respected, whether agencies want to call the sites traditional cultural properties or not. Agencies don't have to preserve all traditional cultural properties any more than they have to preserve all examples of any other kind of historic property; all that recognizing something as a traditional cultural property causes to happen is consultation with the group that ascribes value to it, which as Sebastian points out, would happen in the Section 106 process anyway.

Some people argue, and doubtless legitimately believe, that impacts on traditional cultural properties cannot be mitigated, and this argument is doubtless pretty scary to agencies and SHPOs, but it has little or nothing to do with eligibility for the National Register and treatment under Section 106. Recognizing a place as eligible for the National Register, as a traditional cultural property or as anything else, does not in any way change its significance, or the fervor with which people will fight for its protection. It merely gives everyone a fairly orderly arena—the Section 106 process—in which to fight. Section 106 does not and should not confer absolute protection on any kind of property. It merely requires that the significance and value of a property be systematically considered in planning, in consultation with those who value it. A group that believes that impacts on a traditional cultural property, like the Department of the Interior in its fervent beliefs about battlefields and National Historic Landmarks, may prevail in the Section 106 process and achieve perfect protection, or it may not.

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Success depends on negotiating skills, the character of the case, and luck. Or perhaps—who knows?—on the power of the place.

When Pat Parker and I were drafting National Register Bulletin 38, I remember a conversation in which one of us said: "Boy, this is either going to drive people absolutely crazy, or stimulate some really good thinking."

The first proposition has been repeatedly verified over the years. It is a pleasure, reviewing the papers included in this issue, to see the second coming true as well. There is a great deal about how to handle traditional cultural properties that remains to be figured out, but the papers in this issue are evidence that intelligent people, from a diversity of cultural backgrounds, are working diligently and in good faith to do just that.

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Thomas King is a consultant in historic preservation, and previously oversaw Section 106 review for the Advisory Council on Historic Preservation.

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anthropology, see Daniel R. Gross, *Discovering Anthropology*, (Mountainview: Mayfield Publishing, 1992), pp. 68-71.

¹¹ An annual Catholic Ritual Calendar is published each year by the Archdiocese of Chicago. The calendar is available through Liturgy Training Publications, 1800 North Hermitage Avenue, Chicago, IL 60622-1101. It is a fascinating "emic" view of the ritual cycle of the church and the instructions for community and individual behavior throughout the year.

¹² Stanley Crawford, author of a eloquent chronicle of his year as *mayordomo* of a northern New Mexico ditch, clearly recognized that he was chosen to be the ditch boss precisely because he had not been in the community long enough to have kinship ties, or other social obligations, that might interfere with his ability to collect annual fees from delinquent members. See, Crawford's *Mayordomo; Chronicle of a Northern New Mexico Acequia*. (Albuquerque: University of New Mexico Press, 1988).

¹³ Charles L. Briggs, Learning how to ask; A sociolinguistic appraisal of the role of the interview in social science research, *Studies in the Social and Cultural Foundations of Language, No. 1*. (Cambridge: Cambridge University Press, 1986), examines the complex social relationship and communicative processes that underlie interviews in cross-cultural social science research.

¹⁴ The publication of traditional histories based on archeology, oral traditions and oral history is becoming more common in American Indian communities, black communities and Hispanic communities. See for example, Kurt Dongoske, Leigh Jenkins and T.J. Ferguson, "Understanding the Past Through Hopi Oral History," *Native Peoples: The Arts and Lifeways*, pp. 24-31 (Winter, 1993).



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