



# *NewsMAC*

**Newsletter of the New Mexico Archeological Council**

**P.O. Box 25691  
Albuquerque, NM 87125**

## *NewsMAC Summer 2023 (2023-2)*

### **Contents**

PRESIDENT'S ADDRESS	1
ETHAN KALOSKY MEMORIAL STUDENT GRANT PROGRAM	2
NATIONAL ASSOCIATION OF THPOS COMMENTS ON DRAFT REVISIONS TO NR BULLETIN 38	3
NMAC PUBLICATIONS ORDER FORM	7
2023 NMAC CONTACTS	9

**PRESIDENT'S ADDRESS**

NMAC Members,

I'm pleased to report that NMAC has been busy with advocacy efforts, program building, and organization of our Annual Meeting that will be held on November 11th. Most importantly, NMAC has developed a new student research and travel grant to complement our existing grant program. We believe this program will help support the next generation of New Mexico's heritage professionals and we hope it will foster interest in NMAC from emerging professionals. I encourage you to read the full description of the grant program in this newsletter. Also included in this newsletter are NMAC's comments to the National Park Service on the revision of National Register Bulletin 38.

Sincerely,

Michael Spears  
NMAC President, 2023  
*mspears6@gmail.com*

## Ethan Kalosky Memorial Student Grant Program

The New Mexico Archaeological Council is pleased to announce a new grant program focused on supporting research and travel by graduate students and undergraduates studying New Mexico archaeology at New Mexico-based public universities, tribal colleges, or community colleges. The goal of this program is to support the work of emerging professionals and encourage greater diversity and inclusion within the field of archaeology.

Currently, this program will have an annual award of \$2,500. That funding will be split into two awards, up to \$1,500 grant to a graduate student/s and up to \$1,000 grant to an undergraduate student/s. Student Grant Program applications will be solicited each February and awarded by mid-March, to make awards in advance of summer fieldwork. Priority will be given to NMAC members before applications from non-members are considered.

Proposals will be more structured than NMAC's previous grant application and focus on both research and the student's broader career goals. The application will consist of three questions, a CV or resume, and a basic budget detailing how the requested funds should be spent. All applications should be endorsed by a faculty member familiar with the student's work. The application questions will be:

- (1) Please tell us about yourself, and your career goals and objectives (250 words or less)
- (2) Please tell us how you plan to use this funding (400 words or less)
- (3) How will this funding advance your career goals (200 words or less).

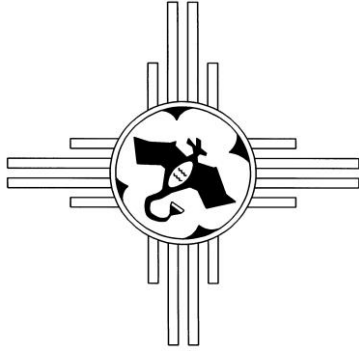
Proposals will be evaluated on both their research value and the ability to contribute to an emerging professional's career. Particular focus will be given to minority students (who are underrepresented in professional archaeology in New Mexico), those who attended high school in New Mexico, and first generation higher-education students.

Grants can support:

- Archaeological research (including travel costs and special analyses)
- Travel to present original research at a professional conference
- Travel to a professional conference as a non-presenter (**undergraduates only**)
- Costs of field school (**undergraduates only**)

Conditions of award include (1) acknowledgment of NMAC in any paper, publication, or presentation resulting from the funding and (2) preparation of a brief summary of how the funds were used for publication in NewsMAC upon project completion.





**NEW MEXICO ARCHEOLOGICAL COUNCIL**  
P.O. Box 25691, Albuquerque, NM 87125

April 30, 2023

Joy Beasley, Keeper  
ATTN: Draft TCP Bulletin Revisions  
National Register of Historic Places  
National Park Service  
1849 C Street Northwest  
Washington, DC 20240  
nr\_tcp@nps.gov

**Re: National Association of Tribal Historic Preservation Officers' Comments on the 2022 Draft Revisions to National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties**

Dear Ms. Beasley:

The New Mexico Archeological Council (NMAC) is pleased to submit the following comments on the National Park Service's 2022 draft revisions to *National Register Bulletin 38: Guidelines for Evaluating and Documenting Traditional Cultural Properties*. NMAC is a New Mexico-based nonprofit organization whose purpose is to maintain and promote the goals of professional archaeology in New Mexico.

New Mexico is a state rich with Indigenous and non-Indigenous traditional communities. Over the last 30 years, the guidance provided in the original National Register Bulletin 38 has played an important role in involving these traditional communities in historic preservation activities within the state. Thousands of traditional cultural properties (TCPs) have been identified by traditional communities during these last decades of research. Yet, the historic properties of traditional communities continue to be underrepresented in historic preservation research, and there are likely thousands more previously unidentified TCPs in New Mexico. NMAC believes that the draft revision of Bulletin 38 provides useful information and examples that will help historic preservation practitioners more broadly apply the TCP identification and evaluation processes, which we hope will continue to increase the visibility of traditional communities within historic preservation activities in New Mexico.

**Specific Comments:**

**Page 6, Lines 5–8.** The 1992 amendments to the National Historic Preservation Act (NHPA) established Tribal Historic Preservation Programs and authorized Indian Tribes to establish Tribal Historic Preservation Officers (THPOs). These amendments authorized THPOs to assume the role of State Historic Preservation Officers (SHPOs).<sup>1</sup> This includes the nomination of historic properties to the National Register.<sup>2</sup> Despite this, the NPS has not undertaken any rulemaking to codify a process by which THPOs—not to mention Indian Tribes and Native Hawaiian organizations—may nominate historic properties to the National Register. The NPS’ regulations only provide processes for SHPO and Federal Preservation Officers (FPOs) to individually or concurrently nominate properties to the National Register,<sup>3</sup> and for individuals and organizations to request that the appropriate SHPO or FPO nominate a property.<sup>4</sup> NMAC requests that NPS undertake a rulemaking to specifically codify a process by which Indian Tribes, THPOs, and Native Hawaiian organizations can nominate historic properties directly to the National Register.

**Pages 7–8, Lines 28–4.** Bulletin 38 was first published in 1990. The Tribal Historic Preservation Programs and THPOs were not established until 1992.<sup>5</sup>

**Page 10, Line 12–13.** The term “special rock” comes across as dismissive to certain historic and culturally and religiously significant resources. While NMAC understands the point NPS is attempting to make with this example, there are better ways of phrasing it. Moreover, NPS should take this opportunity to provide examples of TCPs that are districts or sites that do not include any built structures.

**Page 11, Lines 11–15.** NMAC welcomes this change. As the draft notes, the use of the term “property” can imply a commodification of specific resources. It can also imply ownership, which may be antithetical to certain cultures. Additionally, the use of the term “property” implies that a TCP must be a discrete resource that is small and easily bounded. This is not appropriate, so the change to the term “place” is welcomed.

**Page 11, Lines 18–20.** The phrase “with or without evidence of human modification” implies that a landscape or geographic feature must have been modified by humans to be considered a National Register-eligible TCP, even if that modification is not obvious to an outside observer. This should be revised to clarify that TCPs do not need to have been modified or used by humans to be listed on the National Register. National Register-eligible TCPs may be entirely natural landscapes and features. Indeed, some TCPs are considered significant to a community because it is culturally inappropriate, prohibited, or taboo to physically enter or visit the place.

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<sup>1</sup> *Id.* § 302702.

<sup>2</sup> *Accord id.*; *id.* § 302303(b)(2).

<sup>3</sup> *See* 36 C.F.R. §§ 60.6, 60.9-60.11.

<sup>4</sup> *See id.* § 60.11.

<sup>5</sup> *See generally* Pub. L. No. 102-575, § 4006, 106 Stat. 4600 (1992).

**Page 12, Lines 7–10.** NMAC welcomes the clarification that a TCP does not need to be in continuous use by the community that ascribes it significance for it to be eligible for inclusion on the National Register. This has been a consistent point of confusion stemming from the definition of TCP. As a result, a 2012 Advisory Council on Historic Preservation (“ACHP”) handbook contrasted TCPs and properties of traditional religious and cultural significance to Indian Tribes and Native Hawaiian organizations. The ACHP stated: “Bulletin 38 has sometimes been interpreted as requiring an Indian Tribe to demonstrate continual use of a site in order for it to be considered a TCP . . . .”<sup>6</sup> As the ACHP points out, this is problematic because of the forced removal of Indian Tribes from their homelands, the loss of access to certain places, and cultural norms and practices that prohibit or prescribe access. It is therefore important to see the draft language clarify that continual use is not necessary.

**Page 12, Lines 27–28.** NMAC welcomes the additional language in this draft that the community that ascribes significance to a particular TCP is the expert about that TCP. The current draft implies this, but the language is not explicit. This clarification is important. NMAC recommends, however, that this language is made even more explicit and repeated throughout the bulletin, especially in the sections on applying the National Register criteria.

**Page 15, Line 2.** While the National Register is eponymously a register of historic *places*, there is no requirement in the NHPA or the NPS’ regulations that a historic property actually be a “place.” For example, the NPS defines “object” as “a material *thing* of functional, aesthetic, cultural, historic or scientific value that may be, by nature or design, movable yet related to a specific setting or environment.”<sup>7</sup> Moreover, on page 28 of the draft bulletin, NPS specifically notes that “[a] natural feature such as a rock or a tree” may be a TCP. Rocks or trees are not necessarily places. While NMAC understands that intangible aspects of culture cannot be listed on the National Register, the insistence that only *places* can be is incorrect and insensitive to how many cultures may view the significance of certain resources.

**Page 17, Line 14.** “[W]ill affect” should be changed to “*may* affect.” Section 106 review is triggered when a federal agency determines that a specific federal action is an “undertaking” and “has *the potential* to cause effects on historic properties.”<sup>8</sup>

**Page 18, Line 28–32.** While NMAC understands the need for this bulletin to clarify that a community’s cultural traditions do not need to be validated by Western science to be valid and inform the documentation and eligibility of TCPs, the language used in this paragraph is problematic. First, it is not Indigenous communities’ “position” where their ancestors came from or how the world was formed. Cosmology, myth, and religion are not “position[s]” that need to be proved against the “European American science’s position” regarding the origin of the universe or humankind. This sentiment is concerning because it is not apparent to NMAC that such dismissive language would be used to describe Euro-American and Judeo-Christian religious beliefs, myths, and cosmologies. Moreover,

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<sup>6</sup> Advisory Council on Hist. Pres., *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* 21 (Dec. 2012).

<sup>7</sup> 36 C.F.R. § 60.3(j) (emphasis added); see *Okinawa Dugong (Dugong Dugong) v. Rumsfeld*, No. C 03-4350 MHP, 2005 WL 522106 (N.D. Cal. Mar. 2, 2005).

<sup>8</sup> 36 C.F.R. § 800.3(a).

NMAC finds it highly inappropriate for this bulletin to espouse the Bering Land Bridge migration theory, even tangentially.

**Page 20, Line 7.** NMAC appreciates the inclusion of language that clarifies that information provided by the communities that ascribe significance to a TCP must be prioritized over all other sources.

**Page 20, Lines 27–28.** A “reasonable effort” to identify historic properties, and in particular TCPs, is not necessarily dependent upon whether they are actually present. A TCP may indeed be present, but an outside researcher may never know that because (a) it is not obvious; (b) the community is not willing to tell the researcher about it, for whatever reason; or (c) cultural practices and traditions may forbid the community to disclose not just the TCP’s location but its existence altogether. A reasonable effort to identify historic properties must account for these possibilities.<sup>9</sup> Likewise, a reasonable effort must respect a community’s wishes and not proceed with attempting to document TCPs if the community is unwilling or unable to discuss them.

**Page 21, Line 17.** Outside researchers should not come into communities to document and nominate TCPs unless the community has explicitly invited the researcher in and the community has been fully informed about and consented to the work and the process. While the community’s participation is critical, the community’s consent to the work happening must be required.

**Page 22, Lines 24–25.** It is not sufficient that Tribal officials have full knowledge and cooperation in identification efforts; Indian Tribes must consent to the work before it can proceed.

**Page 23, Lines 2–7.** This section of the bulletin is premised on the baseline assumption that outside researchers have a right to document and nominate TCPs. The bulletin provides examples of instances where communities may be unwilling or unable to share information about TCPs and then instructs researchers to find ways of circumventing the wishes of the community by reframing questions or refocusing efforts. This is not appropriate. The documentation and nomination of TCPs must be community led. If the community is unwilling to proceed or disclose information about their TCPs, the only appropriate next step is to stop work and leave. The bulletin does suggest that in an ongoing Section 106 process there may be a need to document historic properties notwithstanding the community’s reluctance to disclose information about them. This circumstance may certainly arise,<sup>10</sup> but it is not the place for this bulletin or NPS to weigh in on how to proceed in such circumstances. That is an issue for the ACHP and the consulting parties, specific Indian Tribes or Native Hawaiian organizations, and the lead federal agency to resolve through consultation.

Moreover, just because there is an ongoing Section 106 process which requires the identification of historic properties does not mean that the federal agency may move forward with documenting TCPs over the objections of a community. It is the community’s prerogative to decide whether the TCP is documented, not the federal agency’s. If the community has been fully informed of the risks of non-disclosure, then that should end the conversation. The ACHP’s regulations require federal agencies to

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<sup>9</sup> *C.f. Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

<sup>10</sup> *See, e.g., id.*

undertake a reasonable and good faith effort to identify historic properties.<sup>11</sup> Identification is not good faith if it is done over the objections of the community that ascribes significance to the TCP. Moreover, the ACHP's regulations provide a process if the circumstance arises where a federal agency is unable to document certain historic properties.

**Page 23, Lines 14–26.** The bulletin should recognize that it may be taboo for information to be shared outside of a community. Additionally, it may be culturally prohibited or prohibited by law to share information with regard to Indian Tribes.

**Page 26, Lines 14–24.** The bulletin suggests that it “may sometimes be true” that communities invent TCPs to obstruct or influence development projects. This language is deeply concerning to NMAC. In our, our staff's, and our members' experience, we have never seen this happen. While the bulletin states that this is not usually the case, it implies that it happens frequently enough that researchers and federal agencies should be on the lookout for it. The implication of this statement is that researchers and federal agencies should not trust the information provided to them by communities about TCPs. This conflicts with previous language in the bulletin about how the communities are the experts. While it may appear to some that a TCP suddenly “appears” when a project threatens it, the reason is almost always that (a) it was not previously necessary to discuss or disclose the resource; (b) that the researcher or federal agency is from outside the community and would never have been in a position to know about it before; or (c) that the legal framework of the NHPA, the National Register, and the Section 106 process are new to the community and discussing their culturally significant resources within this particular vernacular is not something they have experience with.

**Page 27, Line 15.** This line states that “[i]n general, the views of those who ascribe cultural value to a place should be prioritized[.]” The views of the community should always be prioritized, not just in general.

**Page 29, Line 3.** The bulletin needs to clarify that there is no size limit for historic properties, including TCPs, to be listed on the National Register. TCPs can be as small as a square foot to as large as hundreds of thousands of acres, if not larger.

**Page 30, Lines 14–30.** The bulletin should provide other examples of historic properties that do not focus on a built environment.

**Page 30, Line 30.** The identification of TCPs must be done in *consultation* with the community, not in coordination.

**Page 31, Lines 2–3.** This discussion about time periods sometimes being irrelevant should be expanded. There needs to be clarification that it is acceptable for communities—Indian Tribes, in particular—to note on the nomination form that the period of significance begins at “time immemorial” (or something similar) and that a specific date is not necessary. We have seen pushback from SHPOs and State Review Boards to nomination forms that do not identify a specific date.

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<sup>11</sup> See 36 C.F.R. § 800.4(b)(1).



**Page 31, Line 15.** The bulletin notes that under Criterion B, “person” can refer to “an ancestor or spirit.” The bulletin should include that individuals who are part of folklore, myth, or other stories may also qualify.

**Page 33, Lines 9–11.** The Bulletin should clarify that a National Register-eligible district *per se* meets Criterion C as a significant and distinguishable entity whose components may lack individual distinction.

**Page 33, Line 13.** The bulletin states that “[a] TCP may be a district if it possesses a significant collection of buildings, structures, sites, or objects...” This implies that the contributing resources to a district must, themselves, be listed or eligible historic properties. This is not correct. The contributing resources to a district do not, themselves, need to meet the National Register criteria or even the definitions of National Register property types.

**Page 33, Lines 26–29.** This needs to clarify that a TCP that contains landscape characteristics—*i.e.*, a traditional cultural landscape—may be listed on the National Register as a site and be eligible under Criterion C. Criterion C is not exclusive to districts. This also must clarify that a TCP may be a district even if all its contributing resources are natural features. This language implies that a district cannot contain only natural features, which is incorrect.

**Page 34, Lines 3–4.** The bulletin needs to clarify that archeological information is not the only information that a TCP can yield to be eligible under Criterion D. That said, the application of Criterion D to TCPs is concerning, as it implies that the only value they have is their research potential. Criterion D is too often used by federal agencies to minimize the importance of TCPs and ignore their intangible values, as archeological values are more easily mitigatable.

NMAC appreciates the opportunity to submit these comments and engage with NPS during the initial development of this draft bulletin.

Sincerely,

Michael Spears  
New Mexico Archeological Council President, 2023

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- promote archaeological research within New Mexico and disseminate knowledge arising from that research
- promote awareness of New Mexico's cultural resources among public agencies, corporations, and members of the public.
- encourage the legal protection of cultural resources, and encourage high standards for professional archaeology

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