TRIBAL CONSULTATION PLAN FOR THE GLEN CANYON DAM ADAPTIVE MANAGEMENT PROGRAM

INCLUDING THE PROGRAMMATIC AGREEMENT ON CULTURAL RESOURCES

TRIBAL CONSULTATION PLAN

- Draft #9, January 30, 2003
- Developed by a group of tribal staff representing six of the tribes that have been engaged in the AMP – Hopi, Hualapai, Kaibab Paiute, Navajo, Shivwits Paiute, and Zuni – with input from the Bureau of Reclamation
- Hualapai Tribe has performed the lead role to date

TRIBAL CONSULTATION PLAN

- Primary draftsman, as attorney for the Hualapai Tribe –

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TRIBAL CONSULTATION PLAN

- "The Grand Canyon is a place of great religious and cultural importance for Indian tribes of the region. ... All of these tribes possess a wealth of traditional knowledge about the Grand Canyon and the Colorado River, knowledge derived over many generations."

TRIBAL CONSULTATION PLAN

- Two basic purposes –

1. Adaptive Management Program, to be incorporated into the Strategic Plan

2. Programmatic Agreement on Cultural Resources, to be a chapter in the Historic Preservation Plan

Programmatic Agreement on Cultural Resources

- Parties to the PA that are not engaged in the AMP –

Arizona State Historic Preservation Officer (AZ SHPO)

Advisory Council on Historic Preservation

Programmatic Agreement on Cultural Resources (PA)

- Concluded in 1993 (signatures dated from July 93 through April 94)
- Legal context – outcome of consultation process under section 106 of National Historic Preservation Act (NHPA) for proposal to change the way in which Glen Canyon Dam is operated
- PA is included in the Final EIS

TRIBAL CONSULTATION PLAN – Outline

- 13 parts, 50 pages (including 3 pages of endnotes)
- Part 1 – Scope and Purpose
- Part 2 – Legal Basics for Federal Government's Relations with Tribes
- Part 3 – Background on Tribal Government Involvement in Operations of Glen Canyon Dam

TRIBAL CONSULTATION PLAN – Outline (continued)

- Part 4 – Definition of "Consultation" for this Plan
- Part 5 – Goals and Expectations
- Part 6 – Principles for Consultation with Tribes
- Part 7 – Legal Requirements for Certain Kinds of Consultation

TRIBAL CONSULTATION PLAN – Outline (continued)

- Part 8 – Protocols for Different Types of Consultation
  A – Ongoing Consultative Relationships
  B – Consultation in Scheduled Meetings
- Part 9 – Protocols for Compliance on Specific Issues
  A – Place, Resource, Action Categories
  B – Actions subject to this Plan
  C – Protocols for Categories of Places and Resources

TRIBAL CONSULTATION PLAN – Outline (continued)

- Part 10 – Confidentiality
- Part 11 – Funding of Tribal Participation and Consultation
- Part 12 – Measuring and Tracking Consultation
- Part 13 – Dispute Resolution

TRIBAL CONSULTATION PLAN – A Little More Detail

- Part 1 – Scope and Purpose of the Plan

  A – Relationship of the Plan to the Adaptive Management Program (AMP)

  B – Relationship of the Plan to the PA and Historic Preservation Plan (HPP)

  C – Relationship of the Plan to Tribal Law

TRIBAL CONSULTATION PLAN – A Little More Detail

- Part 2 – Legal Basics for Federal Government's Relations with Tribes

  A – Tribal Sovereignty and Trust Responsibility
  Boundary Issues –
  Hualapai, Navajo, Havasupai

  B – Government-to-Government Relations

TRIBAL CONSULTATION PLAN – A Little More Detail

- Part 3 - Background on Tribal Government Involvement regarding the Operations of Glen Canyon Dam
  A – Tribal Roles in the EIS
  B – Tribal Roles in the PA
  C – Tribal Interests Reflected in the FEIS
  D – Tribal Roles in the AMP
  E – Tribal Commentaries on Experiences with Consultation

TRIBAL CONSULTATION PLAN – A Little More Detail

- Part 4 – Definition of "Consultation" for this Plan
  Two-way communication
  "... process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement ... built upon the exchange of ideas, not simply providing information."
  - NPS guidance for federal preservation programs

TRIBAL CONSULTATION PLAN – A Little More Detail

- Part 5 – Goals and Expectations
  Adaptive Management Program
  awareness of governmental status
  respect for traditional knowledge and religious beliefs

Many cultural resource sites have not been documented as such

Biological communities and geological features have cultural and/or religious importance

TRIBAL CONSULTATION PLAN – A Little More Detail

- Part 5 –Goals and Expectations
  PA and Historic Preservation Plan

  Federal agencies will comply with the PA and HPP

  For matters not addressed in PA and HPP, comply with applicable federal and tribal laws and consult with tribes (per this Plan)

TRIBAL CONSULTATION PLAN – A Little More Detail

- Part 6 – Principles for Consultation with Tribes
  A. Know the Tribes
  B. Know the Legal Requirements
  C. Build On-going Consultative Relationships with Tribes
  D. Institutionalize Consultation and Collaboration Procedures

TRIBAL CONSULTATION PLAN – A Little More Detail

- Part 6 – Principles for Consultation with Tribes (continued)
  - E. Contact Tribes Early and Allow Enough Time
  - F. Establish Training Programs for Staff
  - G. Maintain Honesty and Integrity
  - H. View Consultation as Integral

TRIBAL CONSULTATION PLAN – A Little More Detail

- Part 7 – Legal Requirements for Consultation
  - A. NEPA – some requirements in the CEQ regulations for EISs, very little guidance for EAs – seeking involvement of concerned tribes is generally advisable

Use of Categorical Exclusions may be subject of consultation

Part 7 – Legal Requirements for Consultation

- National Historic Preservation Act
  Statutory Right to be consulting party when federal actions affect off-reservation historic properties with religious & cultural significance – NHPS §101(d)(6)
- Advisory Council's regulations, 36 CFR 800
- Two tribes – Hualapai and Navajo – have approved THPO programs (have taken over SHPO functions) within reservation boundaries

Part 7 – Legal Requirements for Consultation

- Native American Graves Protection and Repatriation Act (NAGPRA)
  Notice and consultation for inadvertent discovery of human remains and "cultural items" (funerary objects, sacred objects, object of cultural patrimony)
- Right of custodial control vests in tribe with cultural affiliation
- Within Rez boundaries, tribal control

Part 7 – Legal Requirements for Consultation

- Archaeological Resources Protection Act (ARPA)
  Notice prior to excavation of archaeological resources on federal lands
  Tribal consent on "Indian lands"
- Endangered Species Act (ESA)
  Secretarial Order #3206 (1997)

Part 7 – Legal Requirements for Consultation

- Tribal Law
  Three reservations within the Canyon – Havasupai, Hualapai and Navajo – that can be accessed from the River.
- Hualapai and Navajo include lands within the Colorado River corridor (tribal positions – Interior disagrees regarding boundary location)

Part 8 – Protocols for Different Types of Consultation

- A. On-Going Consultative Relationships
  - Annual meeting of all federal agencies and all tribes.
  - Four meetings/year of GCMRC and tribes
  - Annual meeting of all tribes
  - Annual meeting of each agency with each tribe (at tribal offices every other year)
  - Annual meeting of parties to the PA

Part 8 – Protocols for Different Types of Consultation

- B. Consultation in Regularly-Scheduled Meetings
  - AMWG meetings
  - TWG meetings
  - AMWG and TWG work groups
  - PA work group

Such meetings are generally not sufficient for consultation, but may be steps in consultation process.

Part 9 – Protocols for Consultation for Compliance on Specific Issues

- A. Categories of Places/Resources and Actions
  General to specific
  - NEPA (environmental impacts)
  - NHPA (historic places)
  - NAGPRA (human remains, cultural items)
  - ARPA (archaeological resources)
  - Sacred sites and religious practices

Part 9 – Protocols for Consultation for Compliance on Specific Issues

- B. Kinds of Federal Actions that Trigger consultation under the Plan
  - actions subject to NEPA documents
  - actions not addressed in the HPP are treated as "undertakings" for NHPA
  - endangered species actions
  - actions funded, approved or promoted by AMP
  - any river trip (requires NPS permission)

Part 9 – Protocols for Consultation for Compliance on Specific Issues

- C. Categories of Places and Resources
  (a) NEPA
  (b) and (c) NHPA (historic properties)
  (d) NAGPRA (human remains, cultural items) – inadvertent discoveries
  (e) NAGPRA – intentional excavations
  (f) and (g) archaeological resources
  (h) sacred sites

Part 9 – Protocols for Consultation for Compliance on Specific Issues

- NHPA consultation – protocol (c)
  (c-1) Provide notice with information
  (c-2) Tribal request for consultation
  (c-3) Conduct consultation – may be a short form of 36 CFR part 800 – minimum requirements set out
  (c-4) Reservation or disputed status lands
  (c-5) Outcome – generally an MOA, a tribe that object may ask ACHP to engage

Part 9 – Protocols for Consultation for Compliance on Specific Issues

- Protocol (d) – NAGPRA inadvertent discoveries
  (d-1) Notice of discovery
  (d-2) Cease activity and protection measures
  (d-3) NPS responsibilities for federal lands
  (d-4) Tribal responsibilities on tribal lands
  (d-5) Reservation status of lands disputed
  (d-6) Resumption of activity

Part 9 – Protocols for Consultation for Compliance on Specific Issues

- Protocol (e) – NAGPRA intentional excavations
  (e-1) Applicability of ARPA permit rules
  (e-2) Excavations on federal lands
  (e-3) Tribal consent on tribal lands
  (e-4) Reservation status subject to dispute
  (e-5) Disposition of items from fed land
  (e-6) Disposition of items from tribal land

Part 10 - Confidentiality

- Contradictions between mandates for dissemination of information and tribal traditions, particularly regarding religious information
- Authority in NHPA and ARPA to withhold information from disclosure not adequate
- No real resolution – just recognition of a problem.

Part 11 – Funding of Tribal Participation and Consultation

- Federal funding to tribes is through separate cooperative agreements – issues regarding funding are not addressed in the Tribal Consultation Plan

Part 12 – Measuring and Tracking Consultation

- An initial approach – each federal agency and each tribe is to record the number of consultation events that occur, including dates.
  Each tribe and agency to evaluate how satisfactory each event was with a four-point scale, focusing on process.
  Each tribe and agency to exchange reports and discuss in regular meetings.

Part 13 – Dispute Resolution

- AMP activities – options for the Secretary's designee –
  - Express concurrence with a party's objection
  - Provide recommendations
  - Engage a mediator or other third party
- Objecting party can file a minority report.