

Comments due to
Mike Berry
(mberry@uc.usbr.gov)
by Thursday,
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**DRAFT TRIBAL CONSULTATION PLAN FOR THE
GLEN CANYON DAM ADAPTIVE MANAGEMENT PROGRAM,
INCLUDING
THE PROGRAMMATIC AGREEMENT ON CULTURAL RESOURCES**

Prepared by Dean Suagee
Attorney for the Hualapai Tribe

Hobbs, Straus, Dean & Walker, LLP
2120 L St., NW, Suite 700
Washington, D.C. 20037
(202)822-8282
Fax: (202)296-8834
Email: dsuagee@hswdc.com

Submitted to
Loretta Jackson, Tribal Historic Preservation Officer
Hualapai Tribe
Department of Cultural Resources
P.O. Box 310
Peach Springs, AZ 86434

**REVISED DRAFT (Draft #10)
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INTRODUCTORY NOTE: This Draft of Tribal Consultation Plan is a work-in-progress that reflects an effort to respond to comments on the Draft Consultation Plan dated May 6, 2003, which was distributed for review and comment. That Draft was the subject of review by the Glen Canyon Dam Adaptive Management Program Strategic Plan Ad Hoc Group (SPAHG), which filed a report dated July 11, 2003. Prior to the date of the SPAHG report, comments were received from:

Grand Canyon National Park, National Park Service (GCNP)
Glen Canyon National Recreation Area, National Park Service (GCNRA)
Western Area Power Administration (WAPA)
Arizona State Historic Preservation Officer (AZ SHPO)
Colorado River Energy Distributors Association (CREDA)
Advisory Council on Historic Preservation (ACHP)

The Advisory Council on Historic Preservation (ACHP) and the Arizona State Historic Preservation Officer (AZ SHPO) are agencies that are signatories to the Programmatic Agreement on Cultural Resources regarding the Operations of Glen Canyon Dam (PA) but which are not represented on the AMWG, and as such their comments are not reflected in the SPAHG report of July 11, 2003. In June 2003, CREDA's request to become a signatory to the PA was approved by the Bureau of Reclamation (BOR), the lead agency for the PA.

In addition to written comments, Grand Canyon National Park (GCNP) prepared a version of the Consultation Plan with suggested changes. This Draft was prepared using the GCNP revision as the starting point and focusing mainly on response to the points in the SPAHG memo. This draft is not yet complete in response to the SPAHG memo; for example, the SPAHG memo calls for flow charts and a glossary section that have not yet been developed.

In response to the SPAHG memo, this draft has been substantially restructured from the previous version. This restructuring has made it difficult to be responsive to each point raised in the various comment letters and memoranda. Over the next two weeks, I will be doing more work on this draft to try to respond to the points raised by the various commenters, and I may contact some of the commenters to discuss the points that they raised on the previous draft. Persons who did file comments on the previous draft are encouraged to review this and communicate any concerns they have to me, preferable by email at: dsuagee@hswdc.com. You can also reach me by phone at (202)822-8282.

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INTRODUCTION

The Grand Canyon is a place of great religious and cultural importance for the Indian tribes of the region, including the Havasupai Tribe, Hopi Tribe, Hualapai Tribe, Kaibab Band of Paiute Indians, Navajo Nation, San Juan Southern Paiute Tribe, Shivwits Band of the Paiute Indian Tribe of Utah, and Zuni Pueblo. (The Kaibab Paiute Tribe and Shivwits Paiute Tribe participate in this Consultation Plan through the Southern Paiute Consortium.) All of these Tribes possess a wealth of traditional knowledge about the Grand Canyon and the Colorado River, knowledge derived over many generations.

The federal government has a unique relationship with Indian tribal governments: the federal government supports the right of tribes to exercise self-government and has obligations as a trustee for Indian lands and natural resources. The doctrine of the trust responsibility must be taken into account when federal agencies take actions that affect Indian trust lands and other natural resources, including actions that are subject to generally applicable federal laws, such as the National Environmental Policy Act (NEPA). In addition, tribes have rights under certain federal laws that were enacted to protect historic places and other cultural resources and the graves of their ancestors, including the National Historic Preservation Act (NHPA), Native American Graves Protection and Repatriation Act (NAGPRA), and Archaeological Resources Protection Act (ARPA). These federal laws apply to many places within the corridor of the Colorado River. These federal statutes reflect the public interest in protecting such places, but they also acknowledge that Indian tribes often regard such places as important for reasons different from those of the general public – for Indian tribes, many of the places protected by these statutes are sacred. This is acknowledged by the Bureau of Reclamation in the Final Environmental Impact Statement on the Operation of Glen Canyon Dam (March 1995) (*herein* “Final EIS” of “FEIS”): “The Colorado River, the larger landscape in which it occurs, and the resources it supports are all considered sacred by Native Americans.” Final EIS at p. 141.

In addition to the federal statutes, the reservations of two tribes, the Hualapai Tribe and the Navajo Nation, are bordered by the Colorado River within the Glen, Marble and Grand canyons, and the reservation of the Havasupai Tribe is located on a side canyon that can be accessed from the main corridor of the Colorado River. The governmental authority of these tribes must be respected by all of the stakeholders in the Glen Canyon Adaptive Management Program (AMP). This means that for activities that occur within reservation boundaries, compliance with the requirements of federal law is not enough – persons who seek to carry out activities within reservation boundaries must also comply with any applicable tribal laws. As such, tribal authority within reservation boundaries is much more than the right to be consulted, but rather the authority to prohibit activities by withholding consent or to regulate such activities by granting permission subject to certain conditions.

PART 1. SCOPE AND PURPOSE OF THE TRIBAL CONSULTATION PLAN

There are multiple reasons for federal agencies to engage in consultation with Indian tribes. This Tribal Consultation Plan (*herein* “Consultation Plan”) seeks to address many of these reasons, especially those based on the National Historic Preservation Act and the Grand Canyon Protection Act.

The Grand Canyon Protection Act (GCPA) requires the Secretary to establish and implement long-term research and monitoring programs and activities to ensure that Glen Canyon Dam is operated “in such a manner as to protect, mitigate adverse impacts to, and improve the values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established, including, but not limited to natural and cultural resources and visitor use.” Grand Canyon Protection Act (GCPA), Pub. L. No. 102-575, title XVIII, §§1802, 1805. The GCPA also expressly requires that research and long-term monitoring programs and activities be established and implemented “in consultation with” Indian tribes, as well as in consultation with the Secretary of Energy; the Governors of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming; and “the general public, including representatives of academic and scientific communities, environmental organizations, the recreation industry, and contractors for the purchase of Federal power produced at Glen Canyon Dam.” GCPA §1805(c). While the GCPA thus expressly requires consultation with the Tribes, it does not provide any explicit direction on how such consultation should be conducted, nor on how consultation with the Tribes may need to be different from consultation with the other kinds of persons and entities listed in GCPA section 1805(c).

The overall purpose of this Consultation Plan is to provide a framework in which the representatives of federal agencies engaged in the Glen Canyon AMP and in the management of cultural and natural resources within the Colorado River corridor and the representatives of tribal governments can interact in respectful and constructive ways, so that the rights and governmental status of the tribes are honored and so that the traditional knowledge of the tribes can be brought to bear in the design and implementation of the AMP. The tribes hope and expect that their traditional knowledge, when they choose to offer it, will be treated with the same kind of respect as is the knowledge derived from the efforts of western scientists engaged in the AMP. Although there are some fundamental differences between indigenous and western scientific approaches to the acquisition of knowledge, in light of common concerns for the Grand Canyon, the tribal representatives hope that ways can be found to transcend such differences.

A. Types of Consultation

This Consultation Plan explains how consultation with Indian tribes may need to be conducted differently from consultation with other stakeholders and provides direction for federal agencies on how to conduct consultation with the specific Tribes that are concerned about the impacts of the operation of Glen Canyon Dam on the natural and cultural resources in Grand Canyon and the Glen Canyon National Recreation Area downstream from the Dam. This Consultation Plan addresses consultation with tribes in three distinct but sometimes overlapping contexts: (1) the Glen Canyon Dam Adaptive Management Program (AMP), specifically the Adaptive Management Work Group, a

federal advisory committee; (2) the Programmatic Agreement on Cultural Resources regarding the Operations of Glen Canyon Dam (PA) and the Historic Preservation Plan; and (3) government-to-government consultation between federal agencies and Indian tribal governments.

[**NOTE:** The SPAHG report calls for distinguishing between two types of consultation: that “between the Secretary of the Interior and the AMP as mandated in the Grand Canyon Protection Act, and consultation between federal agencies and Tribes.” The SPAHG report also calls for making changes in the Draft so that:

“Sections that apply to the AMP and the sections that apply to the Historic Preservation Plan are clearly delineated and distinguished.”

“AMP relationships and the Programmatic Agreement relationships are distinguished.”

As consultation within the context of the AMP must be distinguished from government-to-government consultation, so consultation in the context of historic preservation also must be distinguished from government-to-government consultation. In both cases, sufficient attention by federal agencies to the concerns of tribes may reduce or avoid the need for government-to-government consultation. On the other hand, in both cases, issues may arise that tribal or federal representatives regard as giving rise to a need for government-to-government consultation. Accordingly, this Draft recognizes that consultation involving tribes and federal agencies may occur in three distinct contexts.]

While the focus of this Consultation Plan is relations between federal and tribal representatives, it may also be useful in guiding relations among the state and non-governmental representatives in the AMP and the tribal representatives.

(1) Consultation within the Adaptive Management Program

The Glen Canyon AMP has been established to guide the implementation of the Record of Decision (ROD) on the Final Environmental Impact Statement (FEIS) on the Operation of Glen Canyon Dam, in accordance with the Grand Canyon Protection Act. The Adaptive Management Work Group (AMWG) is a federal advisory committee, established pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2 that operates according to a charter issued by the Secretary. The AMWG includes representatives from concerned federal agencies, state agencies, tribes and non-governmental organizations. Members of the AMWG are appointed by the Secretary; representatives of the Hopi Tribe, Hualapai Tribe, Navajo Nation, Zuni Indian Tribe and Southern Paiute Consortium serve as members of the AMWG. As a federal advisory committee, the AMWG provides recommendations to the Secretary of the Interior’s Designee, who is the federal official that chairs the AMWG and forwards the AMWG’s recommendations to the Secretary for action. In addition to the Secretary’s Designee and the AMWG, other organizational components of the AMP include the Technical Work Group (TWG), Grand Canyon Monitoring and Research Center (GCMRC), independent review panels, and ad hoc workgroups or subcommittees. All work conducted under the

auspices of the AMWG must be considered by the AMWG before being incorporated into recommendations to the Secretary.

As a federal advisory committee, the AMWG serves as the structure for consultation by the Secretary of the Interior with all of the entities represented on the AMWG, including the tribes. The intent of this Consultation Plan is to make consultation between federal agencies and tribes within the context of the AMWG as effective as possible, while recognizing that there will also be a need for tribes to be consulted within the context of the Historic Preservation Plan and that there may also be situations in which federal agencies will need to consult with tribes on a government-to-government basis.

Part 4 of this Consultation Plan sets out protocols for consultation between federal agencies and tribes in the context of the AMP.

(2) Consultation within the Historic Preservation Plan

Three federal statutes relating to cultural resources require federal agencies to consult with tribes in certain circumstances: National Historic Preservation Act (NHPA); Native American Graves Protection and Repatriation Act (NAGPRA); and Archaeological Resources Protection Act (ARPA). Prior to the completion of the FEIS, a Programmatic Agreement (PA) on Cultural Resources was executed by the Bureau of Reclamation (BOR), Advisory Council on Historic Preservation (ACHP), National Park Service (NPS), Arizona State Historic Preservation Officer (AZ SHPO), and the following tribes: Hopi Tribe, Hualapai Tribe, Kaibab Band of Paiute Indians, Navajo Nation, Paiute Indian Tribe of Utah, and Zuni Indian Tribe. (Signatures on the PA are dated from August 12, 1993 through August 30, 1994.) This PA was executed to fulfill the responsibilities of BOR and NPS for compliance with Section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. §470f, and the implementing regulations issued by the ACHP, 36 C.F.R. part 800. While this PA is included in the FEIS (as Attachment 5), the legal responsibilities under NHPA section 106 and the ACHP regulations are distinct from the legal responsibilities imposed by the National Environmental Policy Act (NEPA), pursuant to which the FEIS was prepared. BOR is the lead agency for this PA, as the operator of Glen Canyon Dam; as the land managing agency, NPS is responsible for the management of historic properties in Glen Canyon National Recreation Area and Grand Canyon National Park. The PA recognizes that the Hualapai Tribe and Navajo Nation have governmental authority over historic properties within their respective reservations. The AZ SHPO has certain duties pursuant to the ACHP regulations, and as such is a signatory to the PA; the ACHP is a signatory by virtue of its regulatory authority over NHPA section 106. The roles of the AZ SHPO and ACHP in the PA thus distinguish this agreement from the rest of the AMP, since the AZ SHPO and ACHP are not represented in the AMWG.

The PA as signed in 1993-94 does not address two other federal cultural resource statutes that are implicated in the effects of the operation of Glen Canyon Dam on the Colorado River Corridor: the Native American Graves Protection and Repatriation Act

(NAGPRA) and the Archaeological Resources Protection Act (ARPA). Both NAGPRA and ARPA establish legal requirements distinct from NHPA. This Tribal Consultation Plan does include provisions addressing both NAGPRA and ARPA because both statutes mandate consultation between the federal government and Indian tribes and because the application of NAGPRA and ARPA to places and resources often overlaps with the application of NHPA.

(3) Government-to-Government Consultation

Indian tribes are sovereign governments. While tribes are distinct from the federal government, they do have relationships with federal agencies that are shaped by a body of federal law, including a doctrine known as the federal trust responsibility to the tribes. Part 2 of this Consultation Plan discusses some of the legal principles regarding the sovereign status of tribes and their relations with federal government. Because of their sovereign status and the nature of their relationships with the federal government, tribal and federal officials often conduct consultations with each other. Such consultations, which may be initiated by a federal agency or by a tribe, are often referred to as “government-to-government” consultations. Such consultations may be focused on federal policy initiatives for which there may be no established consultation procedures, or they may focus on specific proposals for which, while there may be established procedures, a tribe or agency may determine that there is a need to go beyond the formal requirements.

This Consultation Plan has been developed with the intent of improving the effectiveness of tribal involvement in consultation pursuant to the Adaptive Management Program and pursuant to the Programmatic Agreement and Historic Preservation Plan. To the extent that this intent is realized, there may be little need for government-to-government consultation. This plan recognizes, however, that a need for government-to-government consultation may arise, as determined by either a tribe or a federal agency. In the event that government-to-government consultations do take place, this Consultation Plan includes provisions to ensure that members of the AMWG and parties to the PA are informed about the existence of such consultations and the nature of the matters discussed as they relate to the AMP and the PA/HPP.

B. Relationship of this Consultation Plan to the Adaptive Management Program

This Consultation Plan establishes processes and rules of relationships that will be followed to ensure continuing government-to-government consultation among the tribes and federal agencies involved in the Glen Canyon Dam AMP. All aspects of the AMP are included in this plan, including but not limited to the Programmatic Agreement on Cultural Resources (PA) and programs for compliance with the Endangered Species Act (ESA).

Meetings of the AMWG and TWG may serve to facilitate government-to-government consultation between federal agencies and tribal governments, but participation in such meetings by federal agency and tribal representatives does not necessarily mean that government-to-government consultation has been adequate or sufficient. To the extent that consultation does occur in the context of AMWG and/or TWG meetings, it can be, and in many instances should be, supplemented by additional meetings between federal and tribal representatives. Consultations between federal agency officials and tribal officials (or their designated employees with authority to act on their behalf) are not subject to the Federal Advisory Committee Act (FACA) where such meetings are for the purpose of “exchanging views, information, or advice relating to the management or implementation of Federal programs.” Unfunded Mandates Reform Act of 1995, 2 U.S.C. §1534.

In addition to the tribes that participate in the AMWG and TWG, the Havasupai Tribe and San Juan Southern Paiute Tribe also have interests that may be affected by activities carried out under the auspices of the AMP and/or PA. The fact that these two tribes choose not to participate in the AMWG and TWG does not relieve federal agencies of their obligations to engage in consultation with these tribes.

C. Relationship of this Consultation Plan to the Programmatic Agreement and Historic Preservation Plan

The PA stipulates the development of a Historic Preservation Plan (HPP) for the long-term management of the Grand Canyon River Corridor District and any other historic properties within the area of potential effects of the Glen Canyon Dam operations. The HPP is currently being developed. This Tribal Consultation Plan is being developed with the intent of incorporating it as a chapter in the HPP.

The PA is currently being revised to reflect certain developments since it was executed, including Amendments to the NHPA enacted in 1992 and revisions to the ACHP regulations promulgated in December 2000. Pursuant to the 1992 amendments to the NHPA, both the Hualapai Tribe and Navajo Nation have assumed the role in the section 106 process that would otherwise be performed by the AZ SHPO – each has a Tribal Historic Preservation Officer (THPO), and this must be reflected in the revised PA. In addition, the Western Area Power Administration (WAPA) and the Bureau of Indian Affairs (BIA) will become signatories, the Colorado River Energy Distributors Association (CREDA) has become a signatory, and additional signatories may also be added.

Although the FEIS refers to the PA as the “Programmatic Agreement on Cultural Resources,” it must be noted that the PA addresses compliance with NHPA section 106 and the ACHP regulations (36 CFR part 800). The PA does not address two other federal cultural resource statutes that are implicated in the effects of the operation of Glen Canyon Dam on the Colorado River Corridor: the Native American Graves Protection and Repatriation Act (NAGPRA) and the Archaeological Resources Protection Act (ARPA). (NAGPRA is not just a “cultural resources” statute – in the legislative history

the Senate Committee on Indian affairs described it as “human rights” legislation. The “Consequences” chapter of the FEIS includes NAGPRA under the heading “Indian trust assets.” FEIS, page 318.) Both NAGPRA and ARPA establish legal requirements distinct from NHPA. This Tribal Consultation Plan does include provisions addressing both NAGPRA and ARPA. Protocols for consultation with tribes for purposes of NHPA, NAGPRA and ARPA are set out in Part 5 of this Consultation Plan.

D. Settings for Consultation

[*NOTE*: The three paragraphs below have been moved from what was Part 8 and substantially reworked. The term “Settings” is used here although the previous draft used the term “contexts.” In this draft, we have used the term “types” of consultation to distinguish between consultation for the AMP and that for the PA/HPP, and in explanation of the different “types” of consultation, I used the word “contexts.”]

This Consultation Plan recognizes that consultation may occur in three different kinds of settings: (a) as part of on-going consultative relationships among the tribal parties and federal agencies; (b) within the framework of regularly-scheduled meetings as part of the AMP or the HPP; and (c) when specific actions trigger requirements for compliance with federal statutes and regulations. These three kinds of settings can be seen as a spectrum from general to specific. This Consultation Plan seeks to maximize the extent to which consultation takes place within, or in conjunction with, regularly scheduled meetings, both those for the AMP and those for the HPP. Part 4 sets out provisions for conducting consultation in the context of AMP meetings, and Part 5 sets out provisions for conducting consultation in the context of HPP meetings. In both parts, scheduled meeting scheduled are intended to foster the development of ongoing consultative relationships between each tribe and each federal agency.

In some situations, activities that affect certain kinds of resources may require consultation outside the setting of regularly scheduled meetings. The Colorado River corridor downstream of Glen Canyon Dam contains many places and resources that are important to one or more of the Tribes for a variety of reasons, including cultural, religious and/or historic reasons. Many of these places and resources are subject to the provisions of federal laws and regulations – NEPA, NHPA, NAGPRA and ARPA – that contain specific requirements for consultation with Indian tribes. The categories that are used to describe these places and resources often overlap, and some of these places and resources are subject to the provisions of two, three or all four of these statutes. Some of these places are also locations at which activities have been taken or are planned under the auspices of the AMP to carry out the policies of the Endangered Species Act (ESA).

In this Consultation Plan, when the requirements of NEPA and/or ESA apply to a matter for which some consultation with tribes is needed in addition to that which takes place in the regularly scheduled meetings, the protocols for such additional consultation are set out in Part 4. When the requirements of NHPA, NAGPRA and/or ARPA apply to a matter for which some consultation with tribes is needed in addition to that which takes

place in the regularly scheduled meetings, the protocols for such additional consultation are set out in Part 5.

E. Relationship of this Consultation Plan to Tribal Law

As noted above, activities taken under the auspices of the AMP or PA/HPP are generally subject to tribal law if conducted within reservation boundaries. This Consultation Plan does not provide detailed guidance on how to comply with tribal law. Through consultation as described in this Consultation Plan, applicable tribal laws can be identified and steps taken to ensure compliance.

PART 2. LEGAL BASICS FOR THE FEDERAL GOVERNMENT’S RELATIONS WITH THE TRIBES

[*NOTE*: The text in this part incorporates changes recommended by NPS-GCNP, and it also has been rearranged somewhat by using four headings (A. Tribal Sovereignty; B. Trust Responsibility; C. Government-to-Government Relationship; D. Tribal Territorial Jurisdiction) rather than two in the previous draft (A. Tribal Sovereignty and Trust Responsibility; and B. Government-to-Government Relationship). The new heading for Tribal Territorial Jurisdiction includes the text describing reservation boundary issues.]

Indian tribes have a special status in American law. As governments that are distinct from the federal government and the states, they are the third kind of sovereign in our federal system. In addition to governmental authority within their reservations, tribes also possess certain kinds of rights that are different from the rights of other Americans, including rights based on the Constitution of the United States, treaties and acts of Congress, Executive Orders, and court decisions. This section of the Consultation Plan briefly discusses the status of tribes in federal law, with a few references. Legal requirements for consultation in specific contexts, as established by federal statutes and regulations, are noted in Addendum B.

A. Tribal Sovereignty

“The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.” Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” §2(c), 65 Fed. Reg. 67249 (Nov. 6, 2000); *also published at* 25 U.S.C.A. §450 notes. Federal law recognizes that Indian tribes have inherent sovereignty over their members and their territory. Sovereignty means that tribes have the power to make and enforce laws and to create institutions of government. Saying that tribal sovereignty is inherent means that it comes from within the tribe itself and existed before the founding of the United States. Tribal sovereignty is not absolute, but rather is subject to certain limits established by Congress and the federal courts (although such limits are generally not relevant to this Consultation Plan). In addition to inherent sovereignty, tribes can also exercise governmental

authority delegated to them by Congress.

B. Trust Responsibility

Relations between the federal government and the tribes are shaped by a body of law that includes treaties, acts of Congress, court decisions, and Executive Orders. One of the key legal doctrines is known as the federal trust responsibility, which includes fiduciary obligations on the part of the federal government for the management of lands and natural resources held in trust for the benefit of Indian tribes and tribal members.

In addition to management of land and other trust resources, Congress has recognized that the trust responsibility “includes the protection of the sovereignty of each tribal government.” 25 U.S.C. §3601. While the Bureau of Indian Affairs (BIA) has the lead role in carrying out the trust responsibility, courts have ruled that other federal agencies also have trust obligations to Indian tribes. The “AMWG FACA Committee Guidance” for the AMP acknowledges this, saying:

“All Federal agencies have a special responsibility to Native Americans by law, including statutes, treaties, and executive orders. With the Secretary of the Interior being the trustee, Department of the Interior agencies have a special role.” Strategic Plan, Glen Canyon Dam Adaptive Management Program (Final Draft, August 17, 2001) (*herein*, “AMP Strategic Plan”), Appendix B, AMWG FACA Committee Guidance, at Appendix B-7.

C. Government-to-Government Relationship

Because tribes are governments, the relationship between the federal government and the tribes is sometimes described as “government-to-government.” This is recognized in Executive Order 13175, which states, “The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian treaty and other rights.” In the context of the operation of Glen Canyon Dam and the Adaptive Management Program, two of the tribes, the Navajo Nation and Hualapai Tribe, as noted above, have governmental authority over some of the lands and waters in the Colorado River corridor.

Although the other tribes do not have such governmental authority, they all have rights protected by federal statutes and the Constitution. Tribes are sovereign governments and they must be treated as such even when the matters at issue are beyond the reach of tribal territorial sovereignty. Moreover, tribes and federal agencies may enter into agreements through which tribes assist federal agencies in carrying out their responsibilities. In one sense, the term “government-to-government” relations is a way of reminding people that Indian tribes are different from non-governmental organizations that advocate for the interests of particular groups that comprise part of the general public.

The relationship between tribes and states can also be described as “government-to-government.” State-tribal relations, though, are different from federal-tribal relations.

For example, federal-tribal relations are subject to the federal trust responsibility, while the states have no corresponding responsibility to tribes.

D. Tribal Territorial Jurisdiction

As the Final EIS acknowledges, the Navajo Nation and the Hualapai Tribe have management responsibilities associated with Grand Canyon, and that the Navajo Nation also has such responsibilities associated with Marble and Glen canyons. FEIS, page 4. For each of these tribes, its reservation is bordered by the Colorado River, and so these two tribes have governmental authority over lands within the Colorado River corridor that may be affected by the operation of Glen Canyon Dam. DOI and the Hualapai Tribe do not agree on the precise location of the boundary of the Hualapai Reservation; similarly, DOI and the Navajo Nation do not agree on the location of the boundary of the Navajo Reservation. Neither boundary is the subject of an applicable court ruling; however, during the preparation of the FEIS a Department of the Interior solicitor opinion stated that no trust assets are present within the geographic area affected by Glen Canyon Dam operations.

It is unnecessary to resolve these disagreements prior to the adoption of this Consultation Plan. Accordingly, the Consultation Plan simply notes that there are disagreements regarding these boundaries, and, in Part 5, this Plan takes note of some of the implications of this boundary issue with respect to the impacts of Glen Canyon Dam operations and activities under the auspices of the AMP and/or PA/HPP on cultural resources and natural resources of importance to the Tribes. If a situation arises that renders it necessary or advisable to definitively resolve an issue relating to a reservation boundary, the protocols in Parts 4 and 5 of this Consultation Plan may be used for consultation regarding the resolution of such an issue.

(1) Hualapai Reservation Boundary

The Hualapai Reservation was established by Executive Order on January 4, 1883. This Executive Order places the relevant boundary on the Colorado River for a distance that has since then been determined to be 108 River miles. The Hualapai Tribe maintains that its Reservation boundary is the middle of the Colorado River. The Solicitor's Office of the Department has issued two opinions, dated February 6, 1976, and November 25, 1997, taking the position that the Reservation boundary is the high water mark on the south bank of the River. These Solicitor's opinions do not definitively resolve the matter, although these opinions are regarded by officials and staff of Department of the Interior agencies as binding on them. The "high water mark" is the line "to which high water ordinarily reaches and is not the line reached by water in unusual floods." *Bonelli Cattle Co. v. Arizona*, 495 P.2d 1312, 1314-15 (Ariz. 1972), *reversed on other grounds*, 414 U.S. 313 (1973).

Within the boundary of the Hualapai Reservation, tribal laws apply in addition to federal laws. Under tribal law, it is unlawful for any nonmember of the Tribe to be present within that part of the Reservation except as authorized by the Tribe.

(2) Navajo Nation Boundary Issues

[*Note*: Placeholder for language to be drafted by Navajo Nation, possibly including the point that the Navajo Reservation was established through a Treaty.]

(3) Havasupai Reservation Boundary

[*Note*: Although the Havasupai Reservation boundary is not within the Colorado River corridor, many people gain access to places within the Havasupai Reservation by hiking up from the River Corridor. The boundaries of the Havasupai Indian Reservation were established by the Grand Canyon National Park Enlargement Act of 1974, Pub. L. No. 93-620, 88 Stat. 2089 (codified at 16 U.S.C. §§228a to 228j). Section 10 of the Act (16 U.S.C. §228i) established the boundaries of the Havasupai Reservation by reference to a map entitled “Boundary Map, Grand Canyon National Park, cited in section 3 of the Act (16 U.S.C. §228b). In addition, section 10 of the Act authorizes “Havasupai Use Lands” within the boundary of Grand Canyon National Park.]

[*NOTE*: The text that was part 3 in Draft #9 has been moved to Addendum A in Draft #10, with changes suggested by NPS GCNP.]

PART 3. CONSULTATION WITH TRIBES: GENERAL PROVISIONS

[*NOTE*: This part, “Part 3. Consultation with Tribes: General Provisions,” combines text from several different parts of the previous draft, including: 4. Definition of “Consultation” for this Plan, 5. Goals and Expectations of Consultation, and 6. Principles for Consultation with Tribes. This draft uses headings A, B, and C corresponding to the captions of parts 4, 5, and 6 in the previous draft. The text incorporates responses to some of the comments, but is otherwise largely unchanged.]

This Part contains provisions that are generally applicable to consultation with tribes in the context of both the AMP and the HPP, as well as in government-to-government consultation. More specific protocols for consultation in the context of the AMP are set out in Part 4, and protocols for the HPP are set out in Part 5. Both Parts 4 and 5 include some provisions relating to government-to-government consultation.

A. Definition of “Consultation” for this Plan

There is no standard definition of “consultation,” although it generally does mean more than simply providing information about what an agency is planning to do and allowing concerned people to comment. Rather, “consultation” generally means that there must be two-way communication. In the context of the PA and AMP, much of the consultation with tribes concerns places and resources that qualify for treatment as

historic properties under NHPA, and so it appears appropriate to quote the definition of “consultation” from the guidelines issued by the National Park Service for federal agencies in carrying out historic preservation programs, a definition that is also incorporated into the regulations of the Advisory Council on Historic Preservation for the NHPA Section 106 consultation process:

“Consultation means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed. Consultation is built upon the exchange of ideas, not simply providing information.”

63 Fed. Reg. 20504 (Apr. 24, 1998).

This general meaning of “consultation” is subject to specific requirements established pursuant to legal authorities that apply in certain circumstances. Requirements of the three major federal cultural resources statutes are discussed in Addendum B of this Consultation Plan.

While consultation means more than simply providing information, it does not mean that the parties being consulted have the power to stop a federal agency action by withholding consent. As the AMWG FACA Guidance notes (with specific reference to consultation under NHPA), “the ultimate decision on how to proceed rests with the Secretary of the Interior and the federal agencies delegated the responsibility for management of the resources.” AMP Strategic Plan, at Appendix B-8.

In some instances another federal agency or a non-federal entity may have the legal authority to stop a proposed action. (For example, in the context of the AMP and HPP there may be instances in which the consent of either the Navajo Nation or the Hualapai Tribe is legally required for a federal action to proceed, that is, if the action would occur within the boundaries of either Tribe’s reservation. In such cases, the requirement for tribal consent is distinct from requirements to engage in consultation.)

In cases in which consultation does not lead to an agreement, it may end when it becomes clear that an agreement will not be reached. In some situations, even though a tribe does not have legal authority to prevent an agency from going forward with a proposed action, consultation may nevertheless persuade the agency official to decide not to proceed, perhaps because to do so would jeopardize the ongoing consultative relationship between the agency and the tribe. In any matter in which a tribe has made recommendations and the federal agency decision-maker has not accepted the tribe’s recommendations, the agency shall advise the tribe that its recommendations have not been accepted and provide reasons for rejecting such recommendations.

B. Goals and Expectations of Consultation

The federal agencies involved in the AMP and PA/HPP are well aware of the cultural and religious importance to the concerned Tribes of historic and cultural resources within the Colorado River corridor, and the Tribes rightfully expect that their

concerns will be taken seriously by these agencies.

(1) Adaptive Management Program

The Tribes expect that the agencies and organizations that are represented on the AMWG and TWG will interact with tribal representatives in ways that reflect awareness of the governmental status of tribes and that demonstrate respect for traditional tribal knowledge and religious beliefs. The Tribes expect that other stakeholders agencies and organizations engaged in the AMP, AMWG and TWG will seek and consider tribal input on the entire range of issues, not just cultural resources and not just formally recognized traditional cultural properties. With respect to cultural resources and specifically the subset of cultural resources legally defined as traditional cultural properties that are eligible to the National Register, the Tribes expect that federal agency activities affecting these resources will be carried out in accordance with the PA and HPP. The Tribes also expect that other agencies and organizations will keep in mind that many places within the Colorado River corridor are sites at which cultural resources are located but which have not been documented as eligible traditional cultural properties such. In addition, the Tribes regard the term “cultural resources” as including a broad range of places and things, often including biological communities and geological features that have cultural and/or religious significance, regardless of whether physical manifestations of human activity are present at a place. Such places are resources of tribal concern, whether or not they are may be eligible for the National Register of Historic Places as traditional cultural properties. Such places may also be Sacred Sites subject to accommodation of tribal religious practices under Executive Order 13007. The Tribes expect to be consulted about proposed actions that might affect these places or resources.

[*NOTE*: Should we add a statement here on what others expect of the Tribes in consultation, or is it enough to have a section later on the responsibilities of tribal representatives?]

(2) Historic Preservation Plan

The Tribes expect that federal agency activities affecting cultural resources within Grand Canyon National Park, Glen Canyon National Recreation Area, the Hualapai Reservation and the Navajo Reservation will be conducted in accordance with the Programmatic Agreement (PA) and Historic Preservation Plan (HPP). To the extent that specific cultural resources issues are not addressed in the PA and/or HPP, the Tribes expect that all parties will comply with applicable federal and tribal laws and will engage in meaningful consultation with concerned Tribes, as provided in this Consultation Plan, before taking any action that might affect cultural resources, especially traditional cultural properties.

C. Principles for Consultation with Tribes

The following general principles¹ can be used to guide consultation in a variety of contexts, including consultation pursuant to Parts 4 and 5 of this Plan. The specific requirements noted in Appendix B also apply to certain kinds of matters, in addition to these general principles.

(1) Know the Tribes, the Agencies and the Stakeholders

As a prerequisite for effective consultation, the representatives of each of the federal agencies engaged in the AMP and/or the PA and HPP must have a basic level of understanding about the concerned tribes. Knowledge about the tribes will also promote more constructive communication among tribes and non-federal entities. Tribal representatives should ensure that federal representatives have relevant information about their tribes.

Likewise, consultation will generally be more effective if tribal representatives have a clear understanding of each federal agency's mission and programs. Federal representatives should ensure that tribal representatives have relevant information about their agencies. Tribal representatives should have a working knowledge about each federal agency and should not hesitate to ask federal representatives for explanatory information when needed.

[*NOTE*: should we add a sentence about stakeholder groups?]

(2) Know the Legal Requirements

Another prerequisite to effective consultation, especially in the context of cultural resources, is that federal agency representatives know the legal requirements that may apply. While these requirements are summarized in Addendum B of this Consultation Plan, to develop a working knowledge of these requirements generally requires participation in training programs.

(3) Build On-Going Consultative Relationships with the Tribes

Consultation on specific matters will tend to be more constructive if conducted within the framework of an ongoing government-to-government relationship. Consultation puts demands on tribes as well as on agencies, and such relationships can help tribes and agencies decide how to most effectively allocate their resources among the specific matters for which consultation may be appropriate. Accordingly, this Consultation Plan establishes a framework for ongoing consultation.

(4) Institutionalize Consultation and Collaboration Procedures

Consultation is more effective when there are established protocols for the specific kinds of contexts in which consultation may occur. This Consultation Plan sets out these protocols in Parts 4 and 5.

(5) Contact Tribes Early and Allow Sufficient Time

As a general rule, agencies should contact tribes as soon as there is enough information so that consultation will be constructive and so that changes to a proposed agency action can be more easily accommodated based on tribal concerns. The protocols specified in Parts 4 and 5 provide some guidance for specific contexts.

(6) Establish Training Programs for All Agency Staff

Consultation will be more constructive if agency staff have participated in appropriate training programs. Tribal representatives are not responsible for educating agency personnel on their responsibilities in consultation.

(7) Maintain Honesty and Integrity

Honesty and integrity are essential. If agency representatives cannot respond immediately to tribal concerns, they must acknowledge such concerns and ensure that they are addressed at a future date. When tribal recommendations are not accepted, agencies must inform tribal representatives and provide reasons for not accepting tribal recommendations.

[*NOTE*: One commenter asked how? In writing or orally?]

(8) View consultation as Integral

A federal agency should see relations with tribal governments as an integral part of its mission, with an understanding that consultation is essential to maintaining constructive relations with tribal governments, and not just as a procedural requirement. By regarding consultation as integral, agencies can use consultation as a non-adversarial opportunity to develop consensus solutions or otherwise find common ground.

D. Responsibilities of Tribal Representatives

[NEW DRAFT LANGUAGE]

Tribal representatives are responsible for keeping the officials of their tribal governments informed regarding the AMP and HPP. For any matter that is on the agenda of an AMG or TWG meeting for which a vote is likely to be taken, tribal representatives should generally be prepared to vote. For any matter that requires a tribal representative to report back to tribal officials before taking a position, the tribal representative is responsible for reporting back to the other parties within an agreed time frame. In any case in which direct consultation between federal agency representatives and tribal officials other than the tribal representative is necessary, the tribal representative will help to make the arrangements for such consultation.

E. Other Stakeholders' Interests and Expectations

[NEW DRAFT LANGUAGE]

Stakeholder organizations that are represented on the AMWG and/or TWG have an interest in the AMWG and TWG meetings serving the purpose of providing recommendations to the Secretary. As such, they have an interest in AMWG and TWG meetings providing adequate opportunities for consultation between federal agencies and tribes so that the need for consultation outside of such meetings is reduced. Whenever consultation between tribes and federal agencies takes place outside of AMWG or TWG meetings, stakeholder groups and governmental agencies that are not directly involved in the consultation have an interest in being informed regarding the topics of consultation, particularly if the consultation considered matters that are scheduled to come before the AMWG or TWG for recommendations to the Secretary.

[*NOTE:* Part 7 from the previous draft has been cut from the main document and moved to Addendum B, with certain revisions in response to comments.]

PART 4. CONSULTATION PROTOCOLS FOR THE ADAPTIVE MANAGEMENT PROGRAM

Consultation among federal agencies and tribes on matters relating the AMP will be conducted during regularly scheduled AMWG and TWG meetings and in separate meetings between one or more federal agencies and one or more tribes held in conjunction with AMWG and TWG meetings. The agencies and the tribes are committed to working to make such meetings serve the purposes of consultation. It is recognized, however, that there are likely to be instances in which consultation will need to take place outside of such regularly scheduled meetings, such as when issues arise that have not been anticipated in an annual workplan. A consultation meeting may also be necessary to maintain, or rebuild, the relationship between an agency and a tribe.

A. Regularly-Scheduled Meetings

The discussion of issues in regularly scheduled meetings of the AMP constitutes a step in the consultation process, but additional government-to-government-consultation may become necessary, particularly for specific federal actions or proposals. Representatives of the agencies and organizations engaged in the AMP should understand that meetings of the AMWG and TWG are alien environments for tribal representatives, in the way in which discussions are held and with respect to the attitudes conveyed regarding traditional tribal knowledge. In addition, tribal representatives sometimes find it hard to participate in AMWG and TWG meetings because of the behavior patterns of some non-Indian representatives, which tribal representatives regard as inappropriately assertive and aggressive, and sometimes confrontational. Accordingly, tribal representatives may need to engage federal agency representatives in consultative discussions both before and after AMWG and TWG meetings.

[NOTE: The following section is mostly new text in accordance with the SPAHG memo; the provisions regarding the PA have been moved to what is now Part 5.]

(1) Annual Meeting of All Agencies and All Tribes. An annual meeting will be held of all federal agencies involved in the AMP and all Tribes for review of the draft work plan for the coming year. After the meeting, if necessary, separate meetings will be held between one or more agencies and one or more tribes. This meeting will be integrated into the annual calendar such that changes in the work plan can be made in response to concerns raised in the consultation.

[NOTE: The SPAHG memo says that “explicit time limits” should be included. I am not clear on what is wanted in the way of time limits: notice before the meeting? time limits for the meeting and/or the possible follow-up meetings? Time limits for tribes to put their concerns in writing after the meeting?]

(2) Annual TWG Consultation Meeting. During an annual TWG meeting in which the upcoming year’s workplan is discussed, tribal representatives will have the opportunity to identify issues that will require consultation. This meeting may be combined with the meeting in item (1), the Annual Meeting of All Agencies and All Tribes, as long as sufficient time is allowed in the schedule for any follow up meetings that prove to be necessary.

(3) Annual Meeting of GCMRC and All Tribes. There will be one annual meeting of GCMRC and all of the Tribes. The scheduling of this meeting will be set by GCMRC after communication with the Tribes.

(4) Unanticipated Issues. When an issue arises that has not been anticipated in an annual workplan, the agency initiating the issue will notify all of the Tribes and offer to consult before the AMWG or TWG meeting at which the issue will be discussed. When a project is brought to the AMP from outside the AMP and the AMP has no control over the schedule for addressing the issue, the chair of the AMWG will bring the matter to the attention of each of the tribal representatives and will determine, through communication with tribal representatives, whether a special consultation meeting on the matter will be needed or whether consultation in conjunction with an AMWG or TWG meeting will be adequate.

(5) Consultation in Conjunction with All AMWG and TWG Meetings. Before each AMWG and TWG meeting, the Bureau of Reclamation will offer to meet with tribal representatives as a group to review the agenda in order to facilitate participation in the meetings. Bureau of Reclamation may ask any other federal agency to participate in a pre-meeting session if the agency is involved in an agenda item that tribal representatives want to discuss. During each AMWG and TWG meeting, the chair will ask tribal representatives if any agenda item or issue raised will require consultation. If practicable, the relevant federal agencies and tribal representatives will meet in during the AMWG or TWG meeting (when

the AMWG or TWG meeting is in recess) or immediately after the meeting adjourns to begin consultation.

(6) Consultation in Ad Hoc Groups. Consultation between tribes and federal agencies may take place within an ad hoc group established by the AMWG or TWG for any purpose. An ad hoc group may be established for the purpose of facilitating consultation.

B. Special Meetings for Consultation.

While consultation in conjunction with AMWG or TWG meetings, as provided in subsection 4.A above, is intended to be the standard practice, in some cases such consultation may not be adequate. In such cases, special consultation meetings may be held. Such meetings will be scheduled for the convenience of the federal agency and tribal representatives involved, with the intent of accomplishing the consultation expeditiously and in a way that contributes to the work of the AMWG and TWG.

C. Generally Applicable Provisions for Consultation in Meetings

(1) Meeting Agendas. When the AMWG Chair, TWG Chair, or other official responsible for the agenda of a meeting knows in advance that tribal consultation is expected for any given agenda item, or as a separate agenda item, this will be included in the pre-meeting agenda. When, in response to a pre-meeting agenda, a tribal representative asks that a topic on the agenda include time for consultation with tribes, either within the meeting or separately but in conjunction with the meeting, a revised agenda will be prepared, which will be circulated prior to the meeting

(2) Notification. For the purpose of providing notice to tribes of upcoming meetings, notice within the time frames prescribed by AMWG operating procedures will generally be adequate. Officials responsible for providing notice are encouraged to communicate with tribes before notice is provided in order to include tribal consultation items in the agenda if possible. Such early notice will also facilitate the circulation of a revised agenda prior to a meeting, if necessary in response to a tribal request.

[**NOTE:** Is it necessary to set a time limit for a tribal representative to request that a consultation item be listed on the agenda? Since item (5) says (in response to SPAHG comment memo) says that, in each meeting, the chair will ask tribal representatives if any agenda item requires consultation? I don't think it's necessary, but rather than it's enough to encourage raising these issues early enough to get them on the agenda but not to require it.]

(3) Scheduling Conflicts. The Parties understand that there may be individual tribal or federal activities that may make it difficult for the officially

designated or alternative tribal or federal agency representative to attend a given meeting. All AMP stakeholders will attempt to avoid scheduling conflicts and to maximize tribal participation in all meetings of tribal interest.

(4) Reporting to other members of the AMWG and TWG. Whenever a matter before the AMWG, TWG or an ad hoc group is the subject of consultation between tribal and federal representatives that is takes place outside of the AMWG, TWG or ad hoc group meeting, the results of such consultation will be reported to the full AMWG, TWG or ad hoc group, provided that confidential information shall not be disclosed.

D. Consultation for Specific Proposed Actions

[*NOTE:* This text was moved from part 9 of the previous draft and edited to limit references to the HPP.]

A variety of activities taken by parties engaged in the AMP may result in effects on places and resources subject to this Consultation Plan. The kinds of actions listed in this section generally require consultation with tribes. It is the intent of this Consultation Plan that, as much as practicable, consultation regarding any of these kinds of actions will be conducted in conjunction with regular meetings pursuant to section A of this Part, and to the extent such consultation is not practical, shall be conducted in special meetings pursuant to section B of this Part, except as provided in subsections (2) and (3) of this section.

(1) Kinds of Federal Actions that Trigger Consultation under These Protocols

(a) Any action for which the Federal agency determines that documentation must be prepared for purposes of compliance with the National Environmental Policy Act (NEPA) requires consultation under these Protocols, whether the level of documentation is an EIS or an EA. The extent to which consultation will be required for actions treated as categorical exclusions will be subject to discussions in meetings pursuant to Sections A and B of this Part.

(b) A federal project, activity, or program that is not specifically addressed in the HPP may be considered an undertaking meeting the definition at 36 CFR 800.16(y) – unless determined by the federal agency not to be an “undertaking” pursuant to Part 5.

(c) Actions taken as part of program for monitoring or restoration of endangered species require consultation under these Protocols, unless through consultation under Sections A and B of this Part, a decision has been reached that consultation is unnecessary for the specific action or category of actions.

(d) Any other action that is funded, approved, or promoted by the AMP is considered to be a federal action (because any such action must be either approved, licensed, permitted or funded by a federal agency, e.g., BOR, GCMRC, NPS). This specifically includes research, monitoring and management actions carried out by GCMRC or funded by GCMRC.

(e) Any AMP-funded river trip.

(2) Consultation for Proposed Actions Subject to NEPA Documentation

[*NOTE*: This was moved from Part 9 of the previous Draft, and revised a little, both to make it fit here and in response to comments.]

For any proposed federal action for which the responsible federal agency determines that a NEPA document will be prepared, whether the document is an EIS or an EA, the agency shall provide notice to each of the Tribes at least as early as the “purpose and need” phase of the preparation of the NEPA document. Upon request of a Tribe, the agency will consult with the Tribe regarding their concerns and possible involvement in the preparation and/or review of the NEPA document. This includes actions taken for the protection and recovery of species listed under the Endangered Species Act (ESA) when such actions require NEPA documents.

(3) Consultation pursuant to the Historic Preservation Plan

When a proposed action is also an undertaking subject to the National Historic Preservation Act (NHPA) with the potential to affect historic properties or other cultural resources, the proposal will be brought to the attention of the signatories to the Programmatic Agreement. This may be accomplished by notifying the Bureau of Reclamation, as the lead agency for the PA, which will be responsible for providing notice to the parties to the PA that are not represented in the AMWG or TWG. Any such matter may be discussed in a meeting of the AMWG or TWG, but will not be resolved until it has been considered by the parties to the PA. Consultation with tribal representatives will generally be accomplished as provided in Part 5 of this Consultation Plan.

PART 5. CONSULTATION PROTOCOLS FOR THE HISTORIC PRESERVATION PLAN

This Part of the Consultation Plan is concerned with historic properties and other cultural resources that are addressed in the Historic Preservation Plan. The categories that are used to describe the kinds of places and resources that are the subject of this Part of the Consultation Plan often overlap. Accordingly, an explanation of the categories used is necessary.

A. Explanation of Categories of Places and Resources

Briefly, in addition to “historic properties” as defined in NHPA, this Part also addresses places and resources that are subject to the Native American Graves Protection and Repatriation Act (NAGPRA), the Archaeological Resources Protection Act (ARPA), and Executive Order 13007 on Indian Sacred Sites. (For summary information on the requirements of each of these legal authorities, see Appendix B.)

The Final EIS used three basic categories to classify “cultural resources”: “archaeological sites,” “isolated occurrences,” and “Native American traditional cultural properties and resources.” The EIS includes some discussion of human remains and other “cultural items” covered by NAGPRA (“funerary objects,” “sacred objects,” and “objects of cultural patrimony”), and says, “Potential impacts to human remains and objects are addressed in the PA on Cultural Resources and the accompanying monitoring and remedial action plan.” Final EIS, p. 318. The PA on Cultural Resources, however, does not expressly address human remains and cultural items covered by NAGPRA.

[*NOTE*: One commenter suggested updating the discussion that follows to refer to the Traditional Cultural Property surveys being done with each Tribe.

The “Final Draft Information Needs” for the AMWG and TWG (Dec. 14, 2001) (*herein* “INs Document”) uses a somewhat different approach to classification. As discussed under Goal 11, “Preserve, protect, manage and treat cultural resources for the inspiration and benefit of past, present and future generations,” the INs Document uses two categories: “historic properties” and “traditionally important resources.” The term “historic properties” as used in the INs Document means properties that are eligible for the National Register and includes both archaeological sites and traditional cultural properties. The term “traditionally important resources” is used to describe resources that are not “historic properties” (in the sense of being eligible for the National Register), but are nevertheless important resources to the tribes and therefore important resources for consideration under the AMP. The INs Document also uses the term “traditional cultural resources,” to include both of the categories “historic properties” and “traditionally important resources.” Like the Final EIS, the INs Document does not expressly address human remains and cultural items covered by NAGPRA, but rather focuses mainly on compliance with NHPA, NEPA, and ESA.

The INs Document identifies a number of information needs relating to these places and resources and the effects of dam operations and other activities on these places and resources. Some of the listed Information Needs are particularly relevant for the organization of this section of this Consultation Plan, including Research Information Needs 11.12c and 11.1.2d:

“Identify AMP activities that affect National Register eligible sites.”

“Identify NPS permitted activities that affect National Register eligible sites.”

One inference that can be drawn from these Information Needs is that neither NPS nor the other parties that are engaged in the AMP have a comprehensive understanding of the range of activities and natural processes that may affect historic properties in the River Corridor. Under Management Objective 11.2 – “Preserve resource integrity and cultural resource values of traditionally important resources within the Colorado River Ecosystem” – the INs Document lists five information needs, some of which raise rather sweeping implications about the need to know more about how AMP activities may affect these resources. Similarly, Effects Information Need 11.3. says, “Determine if and how experimental flows and other AMP actions restrict tribal access [to traditional cultural resources].” Moreover, Management Objective 11.3 says:

“Protect and maintain physical access to traditional cultural resources through meaningful consultation on AMP activities that might restrict or block physical access by Native American religious and traditional practitioners.”

This objective recognizes that consultation is essential for the other stakeholders in the AMP to understand how AMP activities may affect resources that are important to the Tribes for cultural and religious reasons.

In light of the breadth of the identified needs for information, both in terms of the nature of the places and resources of concern to the Tribes and the range of activities that may affect these places and resources, the basic approach taken in this Part is to use categories that correspond to the federal cultural resource laws. Using these categories, the Protocols in this Part move from broad categories to more narrow ones. In one sense, the categories become narrower because the characteristics that define such places and resources operate to exclude places and resources that do not fit. In another sense, the categories become narrower because the protective regimes established by the federal laws only apply if certain actions are taken. The order used in this Part is not intended to convey a sense of hierarchy in that any given requirement is more important than another – rather, proceeding from general to specific simply seems more pragmatic. In general, the progression is:

- (1) NHPA (historic property) inquiry;
- (2) NAGPRA (human remains and/or “cultural items”) inquiry;
- (3) ARPA (archaeological resources) inquiry;
- (4) Executive Order 13007 (sacred sites) inquiry and American Indian Religious Freedom Act.

B. Actions Subject to Consultation Pursuant to This Part

[*NOTE:* Most of the text that was here has been moved to part 4, section D. What is here now, and relevant for Part 5, has been substantially rewritten.]

Most actions carried out within the general framework of the AMP will be subject to consultation as provided in Part 4. Actions with the potential to affect historic properties other cultural resources will be subject to consultation under this Part, unless as a result of consultation under Part 4 all of the tribal representatives determine that there is no need for consultation with them under this Part. Such a determination by tribal representatives does not relieve the federal agency with responsibility for the proposed action from its obligations to consult with other signatories to the PA that are not represented in the AMWG.

A federal project, activity, or program that is not specifically addressed in the HPP may be considered an undertaking meeting the definition at 36 CFR 800.16(y) – unless determined by the federal agency not to be an “undertaking” after consultation pursuant to this Part.

C. Meetings for the Historic Preservation Plan

There will be at least one meeting per year of representatives of all of the entities that are parties to the PA. Additional meetings will be held if the members of this group determine that a meeting is necessary or if the AMWG requests the PA group to meet to facilitate consultation on a proposed undertaking that is under consideration by the AMWG. Meetings will be scheduled, and notice will be provided, by the Bureau of Reclamation after communication with PA signatories to determine the necessity for a meeting and the agenda item(s) to be discussed. Special efforts will be made to accommodate the Advisory Council on Historic Preservation and the AZ SHPO (which are not members of the AMWG).

In general, meetings of this work group are considered to be an important part of the consultation process. Nevertheless, these meetings should not be considered to be sufficient for the purposes of consultation on any specific matter unless the concerned parties are in agreement that no further consultation is necessary.

D. Protocols for Categories of Places and Resources

The order of discussion in this section follows that set out in earlier in this part, with subheadings corresponding to each major category of consultation. Under these subheadings, the protocols are set out, designated with lower case letters. In order to reduce the potential for confusion in referring to these protocols, the system of designation is sequential – the designation runs from (a) through (g) without regard to the sub-headings, so that there is only one “protocol (a)” and so on. (For some of the protocols, though, there are several steps.)

[**NOTE:** The letter designations have changed from the previous draft as a result of moving the section on NEPA consultation (which was Protocol (a)) to what is now Part 4. A number of wording changes have been made, mostly in response to suggestions from

NPS-GCNP, some in response to other commenters. The level of detail has generally been kept the same as in the previous draft. The SPAHG memo included two recommendations for changes that are relevant:

“Sections that apply to the AMP and the sections that apply to the Historic Preservation Plan are clearly delineated and distinguished.”

“More detail is included on the protocols and less detail on NHPA and NAGPRA.”

In re-working the Plan to separate AMP consultation from HHP consultation, some additional detail has been added in Part 4 on AMP consultation. Since HPP Consultation is now separated into Part 5, and since the commenters who are signatories to the PA generally did not object to level of detail in this part of the previous draft, I have kept the level of detail pretty much what it was.]

(1) Historic Properties – NHPA Consultation

Protocol (a) – Actions that are specifically addressed in the Historic Preservation Plan (HPP). For any action that is specifically addressed in the HPP, compliance with the terms of the HPP will constitute consultation for purposes of this Consultation Plan.

Protocol (b) – Undertakings that are not specifically addressed in the Historic Preservation Plan (HPP). For any proposed undertaking that is not specifically addressed in the HPP, consultation with the Tribes shall include at least the following steps:

(b-1) Provide notice to the Tribes, with information. Notice to the tribes shall be provided to the contact person specified in Addendum ____, in the manner(s) so specified (e.g., email, fax, phone, and letter). To the extent practicable, notice shall also be provided to the Tribe’s representatives in the context of regularly scheduled meetings of the AMWG, the TWG, and the PA work group (pursuant to Part 4). Notice to the Tribes shall include:

- a written description of the proposed action (including identification of the federal agencies and other entities involved in the action);
- the location of the proposed action (including a tentative delineation of the area of potential effects);
- a preliminary determination of whether the action would affect historic properties and, if so, the nature of likely effects on known properties; and
- the tentative dates on which the action is planned to occur.

To the extent practicable, the notice will be provided to the Tribes as least sixty (60) days prior to this tentative date. If the proposed action is subject to time constraints, the notice will explain these constraints and inform the Tribes that a response must be

received by a certain date if the Tribe chooses to engage in consultation regarding the proposed action.²

(b-2) Tribal request for consultation. If a Tribe responds to the notice by requesting consultation, the responsible federal agency will engage in consultation with tribal representatives. Such consultation will include face-to-face meetings if the Tribe so requests, but may also include communication by phone, email and other means.

(b-3) Conduct consultation. If a tribe requests consultation the responsible federal agency will initiate the consultation process. The main objectives of this consultation will be to fulfill the requirements of the consultation process set out in the regulations of the Advisory Council on Historic Preservation, 36 C.F.R. part 800, including identification and evaluation of historic properties, assessment of effects, and resolution of adverse effects. Because actions subject to this Consultation Plan take place in a context in which a substantial amount of historic preservation work has already occurred, it may be appropriate for some steps in the standard Section 106 process to be abbreviated. Whether or not any of the standard steps are abbreviated, this consultation shall include at least the following components:

- determine the federal agencies, tribes and other entities that should be invited to participate in the consultation;
- determine the extent to which existing information about historic properties (National Register listed or eligible) is adequate, including –
 - whether known historic properties are adequately documented or whether there are characteristics of a property that are not adequately documented for purposes of determining effects (e.g., a historic property that has been determined eligible as an archaeological site that is also a traditional cultural property but which has not been documented as such);
 - the likelihood that there are places that would be affected by the action that are eligible for the National Register but which have not been identified or evaluated (e.g., archaeological sites, TCPs).
- determine the likelihood that there are places or resources that are subject to NAGPRA, E.O. 13007, or ARPA, or that are important to one or more of the Tribes for religious or cultural reasons, even though they may not be eligible for the National Register or there may not be enough information to make a determination of eligibility; and
- determine whether there are particular needs for confidentiality regarding the place or resources at issue.

(b-4) Consultation for undertakings affecting reservation lands or disputed status lands. For undertakings that affecting reservation lands of either of the tribes that has an approved THPO program, the THPO will perform the functions that would otherwise be performed by the SHPO. If the tribe has, with ACHP approval, established

its own procedures in lieu of the ACHP regulations, such procedures shall be followed. For undertakings affecting places on lands for which the reservation status is subject to dispute, the THPO and SHPO will have equivalent status for purposes of the section 106 process.³

(b-5) Outcome of consultation. Consultation will seek to achieve consensus on how to proceed with respect to the resolution of adverse effects of the proposed action on historic properties and/or other places or resources that are important to one or more Tribes for religious and/or cultural reasons.

- The stipulations for resolving adverse effects shall be recorded in a Memorandum of Agreement (MOA) as defined at 36 CFR 800.6(2)(c). For any proposed undertaking that may have adverse effects on historic properties, for an MOA to be valid under this Consultation Plan it must be signed by responsible federal agency, any concerned Tribe(s), and the AZ SHPO or, if effects would occur within the boundaries of the Hualapai or Navajo Reservation, the appropriate THPO. For any proposed action with effects on lands for which the reservation status is subject to dispute, both the THPO and the SHPO will be required signatories for an MOA.
- If the proposed action would affect historic properties and it does not result in a consensus MOA, any Tribe that objects to the proposed action may request the ACHP to become engaged in the consultation.

(2) Cultural Items Protected by NAGPRA

NAGPRA and its implementing regulations (43 CFR 10) apply to the determination of custody of Native American human remains or other “cultural items” (associated funerary objects, unassociated funerary objects, sacred objects, objects of cultural patrimony) that are excavated intentionally from Federal or tribal lands after 1990 or that are discovered inadvertently on Federal or tribal lands after 1990.

Protocol (c) – Inadvertent discoveries.

(c-1) Notice of discovery. In any situation in which activities conducted under the auspices of the AMP or the PA and HPP result in the discovery of Native American human remains and/or other cultural items meeting the definitions in 43 CFR §10.2, the person in charge of the activity will ensure that notice is provided as required by the statute. The notice shall be provided immediately by telephone and followed up with written confirmation. 43 C.F.R. §10.4(b).

- Notice of any such discovery shall be provided to NPS with respect to lands managed by the NPS, and with respect to tribal lands, to the responsible Indian tribal official.
- In all cases in which the NPS or Indian tribal official receives such notice, they **NPS** shall notify by telephone, with written confirmation, all of the tribes that

are likely to be culturally affiliated with the inadvertently discovered human remains or cultural items, and the Indian tribes which aboriginally occupied the area, and any other Indian tribe this is reasonably known to have a cultural relationship to the human remains or cultural item.

- For any discovery that is within an area subject to disagreement over the location of a Reservation boundary, NPS or the Indian tribal official shall notify the tribe that asserts that the location is within its Reservation and shall also notify the tribes that are likely to be culturally affiliated, and the Indian tribes which aboriginally occupied the area, and any other Indian tribe this is reasonably known to have a cultural relationship to the human remains or cultural item..
- Notice to tribes that are likely to be culturally affiliated will advise those tribes whether the location of the discovery is within a Reservation or within an area that a tribe asserts is within its Reservation.⁴

(c-2) Ceasing activity and protection measures. If the inadvertent discovery was caused by AMP or PA/HPP authorized activities (in the sense that the activities caused the partial disinterment of human remains or cultural items subject to NAGPRA, rather than in the sense that AMP or PA/HPP activities simply put people in a place to discover a disinterment caused by the actions of others or by natural causes or by operation of Glen Canyon Dam), then the official(s) in charge of the activity that resulted in the discovery will stop the activity in the area of the discovery. In any case, the person(s) in charge of the activities that led to the discovery will make a reasonable effort to secure and protect the human remains and/or cultural items discovered.⁵

(c-3) NPS responsibilities for discoveries on federal lands. NPS will be responsible for ensuring that the requirements of the NAGPRA regulations are met, including:

- Certifying the receipt of notice;
- Taking immediate steps, if necessary, to further secure and protect the inadvertently discovered human remains and/or cultural items;
- Ensuring that all of the Tribes receive telephone notice of the discovery, with written confirmation;
- Inviting all of the Tribes to participate in consultation regarding the inadvertent discovery, pursuant to §10.5 of the NAGPRA regulations, and managing any such consultation that does take place;
- Ensuring that, if a decision is made that the human remains and/or cultural items must be excavated or removed, the requirements of §10.3(b) of the NAGPRA regulations will be followed (i.e. treatment as intentional excavation, addressed in Protocol (e), below; and
- Ensuring that, if the human remains and/or cultural items are excavated or otherwise removed, the disposition of these items will be carried out consistently with §10.6 of the NAGPRA regulations.

(c-4) Responsibilities of tribal officials for tribal lands. For any inadvertent discovery on tribal lands (i.e., lands within the boundaries of a Reservation), the tribal official designated in Addendum __ shall be responsible for ensuring that the requirements of the NAGPRA regulations are met, including:

- Certifying the receipt of notice;
- Taking immediate steps, if necessary, to further secure and protect the inadvertently discovered human remains and/or cultural items;
- Ensuring that, if a decision is made that the human remains and/or cultural items must be excavated or removed, the requirements of §10.3(b) of the NAGPRA regulations will be followed (i.e. treatment as intentional excavation, addressed in Protocol (e), below); and
- Ensuring that, if the human remains and/or cultural items are excavated or otherwise removed, the disposition of these items will be carried out consistently with §10.6 of the NAGPRA regulations.

(c-5) Discoveries on lands for which reservation status is subject to disagreement. Discoveries on such lands will be treated as federal lands for purposes of the responsibilities of NPS, until the point at which a decision is made on whether the human remains and/or cultural items must be excavated or removed. NPS will consult with the tribe that asserts that the land is within its reservation regarding immediate steps that may be necessary to further secure and protect the discovered human remains and/or cultural items, and the tribe may share the responsibility for taking such steps. In the event that NPS determines that the human remains and/or cultural items must be excavated or removed, or the tribe that asserts that the land is within its reservation makes such a determination, Protocol (d-4) will apply.

(c-6) Resumption of activity. If the inadvertent discovery was caused by AMP or PA/HPP authorized activities, the activity may resume thirty (30) days after the certification of the receipt of notice (by NPS or the tribal official), if the activity is otherwise lawful. With respect to NPS lands, the activity may also resume if NPS and the culturally affiliated Tribe(s) or other tribes meeting the priorities of control have executed a written, binding agreement that incorporates a NAGPRA Plan of Action for the excavation or removal of the human remains and/or cultural items, as authorized by §10.4(d)(2) of the NAGPRA regulations.

Protocol (d) – Intentional Excavations.

In any case in which the inadvertent discovery of human remains and/or cultural items leads to a decision that the human remains and/or cultural items must be removed from the ground, such removal shall be treated as an intentional excavation, subject to §10.3 of the NAGPRA regulations. Any other planned activity that may result in the excavation of human remains and/or cultural items from NPS lands is also subject to the intentional excavation provisions of the NAGPRA regulations.

(d-1) Applicability of ARPA permit regulations. NAGPRA requires the issuance of a permit pursuant to the Archaeological Resources Protection Act (ARPA) prior to the intentional excavation of any human remains and/or cultural items. NAGPRA requires that, prior to the issuance of an ARPA permit for federal lands, the federal agency must consult with concerned Indian tribes; with respect to tribal lands, consent of the governing tribe is required, and the Tribe itself is exempt from the permit requirement. With respect to federal lands, the ARPA regulations provide that “Persons carrying out official agency duties under the Federal land manager’s direction, associated with the management of archaeological resources” are not required to obtain a permit. 43 C.F.R. §7.5(c). (The Federal land manager, however, is nevertheless responsible for ensuring that the requirements of §§7.7, 7.8 and 7.9 of the ARPA regulations are met.) Accordingly:

- For any intentional excavation on NPS land, NPS will be responsible for ensuring that the applicable requirements of the ARPA regulations and the NAGPRA regulations will be met, even though an ARPA permit may not be required.
- For any intentional excavation on tribal lands, the BIA will be responsible for determining if an ARPA permit is required, the BIA will also be responsible for issuing any such permit; each Tribe will determine whether its laws require a tribal permit;

(d-2) Consultation for excavations on federal lands. Prior to the issuance of a permit for the excavation of human remains and/or cultural items subject to NAGPRA, NPS will be responsible for ensuring that consultation with the Tribes is carried out pursuant to §10.5 of the NAGPRA regulations. Any Tribe that is, or is likely to be, culturally affiliated with the human remains and/or cultural items at issue, has a right to be invited to participate in this consultation. §10.5(a)(2). Additionally, any Indian tribe that has a demonstrated cultural relationship with the specific human remains or cultural items that are discovered must be consulted, following 43 CFR 10.5(3). Consultation is concluded with a “written plan of action” which includes the items listed in §10.5(e). A written plan of action for intentional excavation must include the specific information used to determine custody pursuant to 43 CFR 10.6.⁶ (In the event that the tribes and NPS enter into a comprehensive agreement pursuant to §10.5(f), the terms of such an comprehensive agreement may supersede these protocols.)

Since compliance with NAGPRA does not relieve the federal agency of its responsibilities for compliance with NHPA section 106, consultation with the Tribes for purposes of NAGPRA compliance will include a review of information relevant to compliance with NHPA and a determination, by the federal official, of whether the activity requires further action for compliance with NHPA (which will generally be conducted in accordance with Protocol (b) or (c)).

(d-3) Consent for excavations on tribal lands. For any excavation on tribal lands (i.e., within the boundaries of any Reservation), consent of the governing Tribe is

required. In any such case, the governing Tribe will determine which tribal laws apply and what the requirements of those tribal laws are. The BIA will determine if an ARPA permit is required, and, if so, will be the permit-issuing agency.

(d-4) Excavations on lands for which reservation status is subject to disagreement. In the event that an intentional excavation is planned for land subject to disagreement regarding its status as within an Indian reservation (generally circumstances described in protocol (d-5), NPS and the tribe will consult on whether it is necessary or advisable to reach a definitive resolution of the underlying boundary issue prior to excavation or removal. NPS will also consult with the other tribes that are likely to be culturally affiliated or that have a demonstrated cultural relationship with the human remains and/or cultural items. If an agreement on how to proceed is reached among NPS and all the consulting tribes, that agreement will govern the particular excavation or removal; such an agreement may specifically provide that it does not resolve the underlying boundary issue. If the tribe that asserts reservation status determines that the underlying boundary issue must be resolved, the excavation or removal will not take place until the tribe has had a reasonable opportunity to seek resolution of the issue by a tribunal with jurisdiction.

(d-5) Disposition of human remains and/or cultural items from Federal lands. For any human remains and/or cultural items that are excavated or removed from NPS lands, NPS will be responsible for ensuring that the ultimate disposition is consistent with NAGPRA and its implementing regulations, including the provisions for determining priority of custody.

(d-6) Disposition of human remains and/or cultural items from tribal lands. For any human remains and/or cultural items that are excavated or removed from tribal lands, NAGPRA provides that the right of custodial control is vested in the governing tribe (unless there are known lineal descendants). In any such case, a Tribe that asserts a claim of cultural affiliation with the human remains and/or cultural items may ask the governing Tribe to release the human remains and/or cultural items to its custody. How to respond to any such request is strictly a matter for the governing Tribe to decide.

(d-7) Treatment, care and handling of Native American cultural items. Treatment, care, and handling of Native American cultural items found during intentional excavation shall be in accordance with the site-specific data recovery plan, and as stipulated in a Memorandum of Agreement executed among the consulting parties, including the relevant tribes according to both section 106 of NHPA and NAGPRA and its implementing regulations.

(3) Sites Protected by ARPA – Archaeological Resources

ARPA applies to “archaeological resources,” which is defined to mean “any material remains of human life or activities which are at least 100 years of age, and which are of archaeological interest.” 16 U.S.C. §470bb(1); 43 C.F.R. §7.3(a). The term “archaeological resources” includes human remains and cultural items protected by

NAGPRA, provided that such items or more than 100 years of age and possess archaeological interest. (Moreover, since an ARPA permit is required for the excavation or removal of human remains and/or cultural items covered by NAGPRA, the 100 years of age and archaeological interest factors are not really relevant.) There are, however, many kinds of archaeological resources that are not covered by NAGPRA.

Protocol (e) – Archaeological resources on Federal lands

NPS is responsible for ensuring that any excavation or other removal of archaeological resources from NPS lands is conducted in accordance with ARPA and its implementing regulations. Since it is often difficult to determine if human remains and/or cultural items covered by NAGPRA are present at a site prior to excavation, NPS will proceed on the assumption that such NAGPRA-protected resources are likely to be present. Accordingly, all planned ground disturbing activities will require a written NAGPRA plan of action.

Protocol (f) – Archaeological resources on tribal lands.

BIA is responsible for determining if ARPA applies to the excavation or removal of archaeological resources for land within the boundaries of the Hualapai or Navajo Reservation. BIA is similarly responsible for issuing any ARPA permit that is required, and for ensuring compliance with the requirements of ARPA and its implementing regulations. An ARPA permit requires the consent of the Tribe with jurisdiction over the reservation. As noted in section F of Part 7 of this Consultation Plan, tribal laws regulate the excavation of archaeological resources within the Hualapai and Navajo Reservations. In any case in which the BIA is considering the issuance of an ARPA permit, in the context of that permit process the relevant Tribe will have an opportunity to determine whether tribal laws apply to any such excavation or removal.

(4) Sacred Sites subject to AIRFA and Executive Order 13007

Protocol (g) – Indian sacred sites.

AIRFA establishes federal policy of protecting the right of Indian people to conduct traditional religious practices at sites that hold religious importance, a policy that is reinforced by Executive Order 13007 with respect to Indian sacred sites on federal lands. If any proposed action or on-going activity may result in adverse impacts on an Indian sacred site, as defined in Executive Order No. 13007, the concerned Tribe(s) and federal agency(ies) may initiate (or continue) consultation pursuant to the NHPA consultation provisions of these Protocols (Protocols (b) and (c)). In the alternative, the Tribes and federal agency(ies) may engage in consultation to accommodate tribal access to and use of the sacred site without exploring issues relating to whether the site is eligible for the National Register and in compliance with E.O. 13007. It may be possible for adequate accommodation to be realized without engaging in NHPA consultation. This does not relieve the Federal agency of its responsibilities under NHPA; rather, sacred sites consultation under this subsection should inform the Federal agency's

conduct in carrying out NHPA consultation. (For example, a sacred site may be potentially eligible for the National Register as a TCP, but if adequate accommodation can be realized without using the NHPA process, the concerned Tribe may decide not to provide the information that would be needed for evaluating National Register eligibility.)

PART 6. MISCELLANEOUS PROVISIONS

[**NOTE:** After cuts in response to comments, the remaining parts are all rather short, and so I have combined what's left into one part with three section headings.]

A. Confidentiality

The Parties recognize that inherent contradictions may arise between mandates for dissemination of information into the public domain and tribal traditions or restrictions on dissemination and control of knowledge or information. With respect to information relating to the location or character of a traditional cultural property, the agencies are authorized under section 9 of the Archaeological Resources Protection Act, 16 U.S.C. §470hh, and under section 304 of the National Historic Preservation Act, 16 U.S.C. 470w-3, to withhold information from disclosure in certain circumstances. The Tribes recognize, however, that these statutory provisions are less than completely satisfactory for preserving the confidentiality of information that the Tribes regard as sensitive. The Tribes and Federal agencies will consult regarding ways to preserve the confidentiality of sensitive information.

Accordingly, the Tribes will generally confine their discussions of sensitive matters to consultation meetings with Federal agency representatives. Federal agency representatives will assist tribal representatives in limiting the scope of information revealed so that the objectives of the federal statutes can be fulfilled without need for specific information about religious practices; Tribes will not reveal more information about religious practices than is necessary to determine the *historic* significance of places and to assess the nature of effects on such places.

In the context of meetings of the AMWG, TWG and other AMP groups, the Tribes are asked only to provide information to the Agencies or other AMP stakeholders when that information is not privileged or restricted and subject to the agencies need to know to make informed decisions. The Tribes understand that information provided in such AMP meetings will be treated by other stakeholders as unrestricted. Conversely, the Agencies are asked to disseminate information or knowledge to the Tribes and the general public in compliance with the Government in the Sunshine Act, the Federal Acquisition Regulation, and the Presidential Memorandum on Openness and Confidentiality (Oct. 14, 1993).

B. Funding of Tribal Participation and Consultation

Tribes are funded under separate cooperative agreements with the agencies to ensure government-to-government consultation occurs. Accordingly, issues relating to funding are not addressed in this Consultation Plan. Parties engaged in the AMP and parties to the PA/HPP should be aware that the funding needs of the Tribes are not static – funding that may have been adequate in the early years of the AMP may no longer be sufficient. In the Strategic Plan for the Adaptive Management Program (Final Draft, August 17, 2001), the AMWG FACA Committee Guidance (Appendix B), says: “Certainly the direct impacts of the dam operations on the Native American trust resources within the park units can and should be funded from hydropower revenues, but such impacts outside the boundaries of the river corridor in the park units must be studied using other appropriated funds.”

C. Measuring and Tracking Consultation

In the experience of tribal representatives, Federal agencies seem to have impressions about the effectiveness of consultation that differ from the impressions of the Tribes. Accordingly, it is important to establish a mechanism to evaluate the effectiveness of consultation from both sides. Each Federal agency and each Tribe will document what they consider to be an unsatisfactory or somewhat unsatisfactory consultation process. This evaluation should focus on the satisfactoriness of the process, rather than the outcome, but the parties may also choose to record comments regarding outcomes. When one or the other party considers consultation unsatisfactory, they will document this in a letter or report to the other party and discuss ways to improve the next exchange of information.

Within sixty (60) days of the end of each fiscal year, the Tribes and Federal agencies will exchange reports. These reports shall be discussed in consultation meetings pursuant to Part 4 and Part 5.

¹ Much of the language in this section is adapted from a document published by the National Environmental Justice Advisory Council (NEJAC), entitled *GUIDE ON CONSULTATION AND COLLABORATION WITH INDIAN TRIBAL GOVERNMENTS AND THE PUBLIC PARTICIPATION OF INDIGENOUS GROUPS AND TRIBAL MEMBERS IN ENVIRONMENTAL DECISION MAKING* (Nov. 2000), (hereinafter *NEJAC Guide*) available for download on the website of the EPA Office of Environmental Justice, at www.epa.gov/compliance/environmentaljustice/index.html. (Click on NEJAC, then Subcommittees, then Indigenous Peoples.) The final sentence (calling for telling a tribe if its recommendations have not be accepted) is adapted from the BIA “Government-to-Government Consultation Policy (Dec. 13, 2000), adopted pursuant to Executive Order 13175, Consultation and Coordination with Indian Tribal Governments (Nov. 6, 2000). This final

sentence states a point that was raised by several tribal representatives in the meetings we have had working on this Consultation Plan.

The main reason for drawing on the *NEJAC Guide* rather than the BIA policy is that the focus of the BIA policy is generally not appropriate for this Consultation Plan, in that the BIA Policy is designed to facilitate consultation with tribes on major policy issues, issues that may be addressed through rule-making and/or legislation. In the context of this Consultation Plan, we are more concerned with ensuring that federal agencies act in accordance with existing laws and regulations.

² Time frames will vary depending on the nature of the proposed action. If consultation has been effective under part 4 and/or section 5.C, and if the HPP is in fact developed and implemented, the number of proposed actions subject to this protocol may be relatively small. In any case, federal agencies should be aware that, if the proposed action would adversely affect one or more historic properties, 60 days is not likely to be sufficient to resolve the adverse effects; if there are no adverse effects, however, it may be long enough to conclude the section 106 process.

³ Under the ACHP regulations, if the undertaking would affect reservation lands, the THPO is the required party and the federal agency decides, in consultation with the THPO, which other parties should be included. §800.3(f)(3); see also §800.2(c)(A). If the undertaking only affects places outside reservation boundaries, each Tribe has a right to be a consulting party (which the Federal agency cannot deny), §800.3(f)(2); each Tribe may be an invited signatory to an MOA, with the same rights as the required signatories, but the decision whether to invite such a Tribe is up to the Federal agency official, §800.6(c)(2).

The language in protocol (b-4) and corresponding language in (b-5) call for the THPO and SHPO to have essentially the same role in the process for lands for which the reservation status is subject to dispute.

⁴ This is a point at which it might be more expeditious to rely on NPS to provide notice to the tribes rather than have the leader of the group making the discovery be responsible for determine where the discovery is with respect to disputed boundary lines. If the discovery is, in fact, within the boundaries of a Reservation, the tribe on whose reservation the site is located is not obligated to provide notice to other tribes. Rather, NAGPRA provides that, for human remains and cultural items found on “tribal lands,” the tribe has rights of ownership or control (unless, with respect to human remains and associated funerary objects, there are known lineal descendants). 25 U.S.C. §3002(a)(2)(A). Since the tribe on whose tribal lands the discovery is made has the right to take custody, such a tribe also has the discretion to transfer custody to a different tribe in the event that the latter tribe is culturally affiliated with the items and the tribe within whose reservation the discovery was made is not culturally affiliated. This is entirely within the discretion of the tribe on whose tribal lands the discovery was made, and the tribe is under no legal obligation to give notice to any tribe(s) that may be culturally affiliated. Under the previous version of this protocol, NPS would have assumed the burden of providing notice to potentially culturally affiliated tribes. If the discovery is undisputedly within a reservation, a tribe with a claim of cultural affiliation can ask the tribe on whose reservation the discovery is made can exercise discretion and allow the tribe making the claim to take custody.

In the event that human remains are discovered in a place with respect to which there is a disagreement on whether it is reservation land or NPS land, a tribe with a claim of cultural affiliation (i.e., other than the tribe whose reservation boundary is at issue) may have a legal right

to take custody if the land is determined to be federal land. (Whether such a claim amounts to a legal right would, of course, depend on NPS determining that such a tribe's claim of cultural affiliation is stronger than any other tribe's claim.) In such a case, the tribes may be able to resolve the disposition of the items covered by NAGPRA without resolving the underlying issue of the reservation boundary, or they may determine that the boundary issue must be resolved before the NAGPRA issue can be resolved. This protocol acknowledges the possibility of such a case arising and ensures notice to tribes with a stake in the outcome. It does not attempt to resolve the underlying boundary issue.

⁵ This language is adapted from the regulations. 43 C.F.R. §10.4(c). In meetings of tribal representatives, there has been some discussion of the possibility of providing some guidance on what steps would be considered “a reasonable effort” to protect the discovered items, but at this point no such guidance is provided.

⁶ The NAGPRA regulations require a determination of cultural affiliation as part of the plan of action that concludes consultation. 10.4(c)(2) (intentional excavations); 10.5(e)(2) (inadvertent discoveries). NAGPRA requires that consultation with tribes take place prior to excavation of human remains and/or cultural items on federal lands, 25 U.S.C. §3002(c)(2), a requirement incorporated into the regulations at 43 C.F.R. §10.3(b)(4). (This requirement applies whether the excavation/removal begins as an intentional project or an inadvertent discovery, because, in the case of an inadvertent discovery, if the decision is made by the federal official that the human remains and/or cultural items will be excavated or removed, the requirements for intentional excavations apply. 43 C.F.R. §10.4(d)(1)(v).) In addition to this legal requirement, it is important to determine cultural affiliation prior to excavation/removal so that the religious and cultural practices of the culturally affiliated tribe can be accommodated during excavation/removal. Notwithstanding the legal requirements, in some instances, a definitive determination of cultural affiliation may not be possible prior to excavation; similarly, excavation/removal may yield information that indicates that a determination of cultural affiliation made prior to excavation/removal may have been incorrect. This protocol does not propose a solution for such a situation. This issue may be subject to consultation under the protocols in part 5.

ADDENDUM A

BACKGROUND ON TRIBAL GOVERNMENT INVOLVEMENT REGARDING THE OPERATION OF GLEN CANYON DAM

A. Tribal Roles in the Environmental Impact Statement (EIS)

In 1991, the Bureau of Reclamation and the Hopi Tribe, Hualapai Tribe, Navajo Nation, Southern Paiute Consortium, and Pueblo of Zuni entered into cooperative agreements to facilitate tribal involvement and input into the Glen Canyon Environmental Studies Program. Tribal involvement focused on identification of historic properties and resources of tribal concern necessary for incorporation into the *Operation of Glen Canyon Dam Final Environmental Impact Statement* (FEIS).

In 1992, the Bureau of Reclamation recognized that making a decision on the operation of Glen Canyon Dam based on the FEIS would constitute an undertaking as defined by Section 106 of the National Historic Preservation Act. Section 106 of NHPA requires Federal agencies to take into account the effects of their undertakings on historic properties (i.e., properties eligible for or listed on the National Register of Historic Places) and to afford the Advisory Council on Historic Preservation an opportunity to comment on such undertakings. Section 106 also requires consultation with Indian tribes and other interested parties that might have concerns with the effects of the undertaking (in this case the operation of Glen Canyon Dam) on historic properties.

B. Tribal Roles in the Programmatic Agreement (PA)

The Tribes participated in the Section 106 process with respect to identification and evaluation of historic properties that lie within the area of potential effects of Glen Canyon Dam operation. By August of 1994, the Advisory Council on Historic Preservation, the Bureau of Reclamation, the Arizona State Historic Preservation Officer, the National Park Service, the Hopi Tribe, Hualapai Tribe, Kaibab Band of Paiute Indians, Navajo Nation, Paiute Indian Tribe of Utah for the Shivwits Paiute Band, and the Pueblo of Zuni signed a Programmatic Agreement on Cultural Resources (PA). The PA stipulates completion of identification and evaluation of historic properties affected by dam operations; development of an interim plan for monitoring effects of dam operations on eligible properties and performing remedial actions to address effects of ongoing damage to historic properties; and incorporation of results of identification, evaluation, monitoring and remedial actions into a Historic Preservation Plan for the long-term management and mitigation of historic properties within the area of potential effects of dam operations, an area defined by the maximum possible discharge from the dam, 256,000 cubic feet per second flow.

From the signing of the PA through October 1997 when a Record of Decision was signed by the Secretary of the Interior, the Tribes continued to identify resources and to determine where and how dam operations were likely to adversely affect those resources.

Resources of tribal concern included historic properties as defined by NHPA, places where Native American graves and/or other cultural items covered by NAGPRA are located, as well as sacred sites as defined by Executive Order 13007, and natural resources not specifically covered by particular laws, regulations, or Executive Orders. These categories of resources may overlap. Historic properties as defined by NHPA mean sites, districts or objects that are listed on or eligible for the National Register of Historic Places. Places where Native American graves are discovered may be determined eligible for the National Register, although the Criteria Considerations state that cemeteries, graves, and properties owned or used for religious purposes shall not ordinarily be considered eligible for the National Register. Many sacred sites as defined in Executive Order 13007 may be eligible for the National Register, but the concerned Tribe(s) may choose not to have such sites documented for purposes of eligibility determinations; in some cases, the concerned Tribe(s) may not object to such documentation, but for various reasons such documentation may not have been prepared yet. Similarly, places where there are natural resources that do not appear to be protected by specific laws, regulations or Executive Orders may be eligible for the National Register as traditional cultural properties, but documentation needed for eligibility determinations may be lacking.

C. Tribal Interests Reflected in the Final EIS

The Final EIS addresses the concerns of the Tribes in two sections on cultural resources (one in Chapter III Affected Environment, pp. 140-146, and one in Chapter IV Environmental Consequences, pp. 260-271) and in a section on Indian trust assets (in Chapter IV Environmental Consequences, pp. 318-319). For the most part, the discussion of tribal interests in the EIS focuses on cultural resources, although the section on tribal trust assets does acknowledge that Native American human remains and cultural items are protected by NAGPRA, which recognizes that the tribe that is culturally affiliated with such items located on federal lands has rights of “ownership or control.”

The Final EIS uses two basic categories to classify “cultural resources”: “archaeological sites” and “Native American traditional cultural properties and resources,” recognizing that there is some overlap between these categories. Final EIS, pp. 260-261. In addition to these two categories, the Final EIS also mentions “isolated occurrences,” which are described in the Final EIS as “findings of artifacts or other remains located apart from an archaeological site.” The 489 “isolated occurrences” noted in the Final EIS were determined categorically ineligible to the National Register of Historic Places.

The Final EIS states that 475 archaeological sites have been documented in the Colorado River corridor between Glen Canyon Dam and Separation Canyon. Of these, 323 sites have been determined eligible for the National Register of Historic Places as contributing elements to the Grand Canyon River Corridor Historic District through a consensus determination of eligibility consultation process with the AZ SHPO. The remaining sites were either considered not eligible for the National Register, or were not

evaluated because they are outside the area of potential effects of dam operations. Most of these sites represent prehistoric and historic use by Indian people. (Some 71 sites, or components of sites, represent historic use by Anglo-Americans.) In addition, the final EIS notes that, including the areas outside of the River Corridor, over the years more than 2,600 sites have been documented in Grand Canyon and more than 2,300 sites have been documented in Glen Canyon.

In addition to “archaeological sites,” the Final EIS discusses the category of “traditional cultural properties and resources.” Traditional cultural properties (TCPs) are places that are eligible for the National Register if they are affiliated with a living community, such as an Indian tribe, and “are rooted in the living community’s history and important in maintaining the community’s cultural identity.” Final EIS, p. 261, *citing* NATIONAL REGISTER BULLETIN NO. 38: GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES. Places may be considered TCPs regardless of whether they contain archaeological remains. As stated in the Final EIS:

“The Colorado River, its tributaries, the canyons through which it flows, the canyon rims, and the mountains and plateaus that surround them form a sacred landscape that is culturally significant to the Indian Tribes with ties to the Grand Canyon. Within this landscape are specific places, ranging from archaeological sites to mineral collection areas, considered important for a variety of reasons by each tribe. The locations of these traditional cultural properties are sometimes closely held secrets, and it is often with reluctance that tribes reveal specific sites.”

The Final EIS also says, “Virtually all prehistoric sites are affiliated with contemporary Indian tribes, often more than one group due to multiple traditions or multiple uses of many sites found along the Colorado River.” Final EIS, p. 261. “Traditional cultural properties can include specific plant gathering areas, landforms, springs, prayer offering locations (shrines), archaeological sites, ancestral burials, mineral deposits, and other resource collection sites.” Final EIS, p. 261. Some kinds of resources can be obtained at many different locations. With regard to these “traditional resources,” the Final EIS says that:

“because they are not place-specific or because they encompass large areas as cultural landscapes, [they] are not eligible for the National Register. Their importance to Native Americans, however, is not lessened because of the way current cultural preservation law is defined. In addition, many of them are governed by the National Park Service (NPS) management policies that require all cultural landscapes to be treated as cultural resources, regardless of the type or level of significance.” Final EIS, p. 261.

The information in the Final EIS regarding TCPs is less specific than for archaeological sites, for a variety of reasons, including the reluctance of the Tribes to reveal sensitive information about TCPs and the difficulties inherent in defining

boundaries for specific TCPs within a landscape that the Tribes regard as a single TCP occurrences” within the River Corridor by the Tribes is ongoing. Final EIS, p. 261.

D. Tribal Roles in the Adaptive Management Program (AMP)

In 1997, the Adaptive Management Work Group or AMWG was chartered to provide advice and recommendations to the Secretary of the Interior relative to Glen Canyon dam operations. According to the AMWG Charter, members of the AMWG are appointed by the Secretary of the Interior and include one representative from the Hopi Tribe, Hualapai Tribe, Navajo Nation, San Juan Southern Paiute, Southern Paiute Consortium, and Pueblo of Zuni. Tribal members are appointed based on input and recommendations from the respective tribal governments. The first official meeting of the AMWG was held on September 10-11, 1997, and meetings have been held twice or more per year ever since.

From 1997 through 1999, the participation of the Tribes in the meetings of the AMWG and in the overall Adaptive Management Program (including the Programmatic Agreement (PA) on cultural resources) was funded through a cooperative agreements with the Grand Canyon Monitoring and Research Center (GCMRC). The objectives specified by these agreements were to have the Tribes assist in the monitoring and research necessary to assess impacts or effects of the Secretary’s actions in the operation of Glen Canyon Dam on resources of tribal concern.

In 1999, the cooperative agreements with the GCMRC were terminated and new agreements were issued between the Tribes and the Bureau of Reclamation. The purpose of this change in administration of the agreements was to more formally recognize the continuing government-to-government relationship and communication over Reclamation’s operation of Glen Canyon Dam. Reclamation’s administration of the agreements was designed to ensure the Tribes have a continuing voice in dam operations and in any planning or actions necessary to minimize harm to resources of concern to the Tribes that are affected by dam operations. These agreements remain in place today.

E. Tribal Commentaries on Experiences with Consultation

In the context of the AMP, while the tribes are represented in the AMWG and TWG, tribal representatives are less than completely satisfied with their involvement in either group. Tribal representatives have the impression that both groups are driven by the interests of western science and that tribal concerns grounded in tribal religious and cultural beliefs are not afforded appropriate respect, consideration, and appreciation. The tribes tend to understand cultural resources as a broad concept that includes not only the physical remains of past human activity but also the living things and places that have ongoing cultural importance, while other participants in the AMP seem to regard cultural resources as a narrower concept. Tribal representatives also have the impression that some of the other participants in the AMWG and TWG convey a lack of understanding of the status of tribes as sovereign governments. In addition, when tribal representatives do

voice their concerns in the AMWG and TWG meetings, and otherwise provide input for the AMP, the tribes are not routinely informed regarding how their input was considered and, if tribal recommendations are not accepted the reasoning for such decisions. Consequently, although tribal representatives are members of the AMWG and TWG, they generally do not regard their participation as government-to-government consultation.

In the context of the PA, consultation between tribes and the federal agencies has occurred. The federal officials engaged in this consultation have specific responsibilities for carrying out the federal cultural resources statutes, and they are aware of their obligations to consult with the Tribes. Tribal representatives, however, generally believe there is a need to improve the quality and effectiveness of this consultation because, from their perspectives, even if they do reach agreement on certain issues during consultation meetings, the federal agencies sometimes do not abide by the agreements reached.

ADDENDUM B

LEGAL REQUIREMENTS FOR CERTAIN KINDS OF CONSULTATION

As noted in Part 1 of this Consultation Plan, the Grand Canyon Protection Act (GCPA) requires the Secretary to establish and implement long-term research and monitoring programs and activities to ensure that Glen Canyon Dam is operated “in such a manner as to protect, mitigate adverse impacts to, and improve the values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established, including, but not limited to natural and cultural resources and visitor use.” The GCPA also expressly requires that long-term research and monitoring programs and activities be established and implemented “in consultation with” Indian tribes, as well as in consultation with others. GCPA §1805(c). The GCPA does not provide explicit direction on how consultation with the Tribes should be conducted.

The Record of Decision (ROD) for the operation of Glen Canyon Dam, which was based on the FEIS, includes a number of environmental and monitoring commitments. The regulations of the Council on Environmental Quality (CEQ) implementing the National Environmental Policy Act (NEPA) require the implementation of these commitments, since they are part of the ROD. See 40 C.F.R. §1505.3. Commitment number 2 in the ROD, captioned “Monitoring and Protection of Cultural Resources,” provides, in part, “Reclamation and the National Park Service, in consultation with Native American Tribes, will develop and implement a long-term monitoring program for these sites [i.e., ‘prehistoric and historic sites and Native American traditional use and sacred sites.’]. Any necessary mitigation will be carried out according to a programmatic agreement written in compliance with the National Historic Preservation Act.” The ROD itself does not specify how this consultation will be carried out. One of the key documents prepared for carrying out the commitments in the ROD, the “Final Draft Information Needs” document for the AMWG and TWG (Dec. 14, 2001), explicitly provides for consultation in Management Objective 11.3, which says:

Protect and maintain physical access to traditional cultural resources through meaningful consultation on AMP activities that might restrict or block physical access by Native American religious and traditional practitioners.

Moreover, Management Objectives 11.1 and 11.2 specify a number of information needs that implicitly require consultation with the Tribes (since meeting these information needs generally requires consultation with the Tribes). The Information Needs document does not specify how consultation will be accomplished.

There are several federal statutes, however, that do establish explicit requirements for consultation with tribes, in some cases through statutory language and in some cases through implementing regulations. NEPA is triggered by a proposed federal agency action, and the CEQ implementing regulations require agencies to invite tribes to become involved. Both NHPA and NAGPRA establish consultation requirements. ARPA establishes a requirement to provide notice to tribes. The regulations implementing the

National Environmental Policy act (NEPA) include requirements to seek involvement of Indian tribes. Secretarial Order No. 3206, “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act” (June 5, 1997), sets out certain requirements for consultation with tribes in the implementation of the Endangered Species Act (ESA). The order of presentation in this Part of the Consultation Plan does not indicate anything about the relative importance of these legal requirements. Rather the order of the federal requirements is generally from the most inclusive to the most specific.

In addition, within the Navajo and Hualapai Reservations, the respective tribal governments have legal authority as an aspect of inherent tribal sovereignty, and tribal laws also apply. Requirements under tribal law are briefly noted after the discussion of federal requirements.

A. NEPA Consultation

NEPA, 42 U.S.C. §§4321 – 4370d, requires the preparation of an environmental impact statement (EIS) for any proposed federal action that would significantly affect the quality of the human environment. This requirement is implemented through regulations issued by the President’s Council on Environmental Quality (CEQ). 40 C.F.R. parts 1500 – 1508. When an EIS is prepared, the CEQ regulations include provisions requiring the lead federal agency to invite affected Indian tribes to become involved in the EIS process at several points, including: scoping, §1501.7; providing notice of public hearings, meetings and the availability of NEPA documents, §1506.6(b)(3); and commenting on a draft EIS, §1503.1(a)(2). In addition, a tribe may become a cooperating agency for the preparation of an EIS, §§1501.6, 1508.5. As noted earlier, cooperating agencies in the preparation of the EIS on the Operation of Glen Canyon Dam included the Hopi Tribe, Hualapai Tribe, Navajo Nation, San Juan Southern Paiute Tribe, Southern Paiute Consortium, and Zuni Pueblo.

Under the CEQ regulations, a federal agency can prepare a less detailed NEPA document known as an environmental assessment (EA) in order to determine whether an EIS is required. The key question an EA seeks to answer is whether the impacts of a proposed action will be “significant.” If so, an EIS is required; if not, then the responsible federal official signs a “finding of no significant impact” (FONSI). In addition to the decision whether to prepare an EIS, an EA may also be used to identify mitigation measures so that adverse environmental impacts may be avoided or the intensity of such impacts reduced.–The CEQ regulations provide very little guidance on the preparation of an EA; as such, the basic legal requirements to seek involvement of tribes regarding EAs is the section requiring notice of hearings, meetings and the availability of NEPA documents. §1506.6(b) (3). An EA is often used, however, to help identify other legal review and consultation requirements that may apply to a proposed federal action, and several of these other requirements do have explicit requirements to consult with tribes. Accordingly, it is generally advisable for federal agencies preparing

EAs on proposed actions seek involvement by tribes that may be concerned regarding the possible impacts of a proposed action.

Federal actions that are treated as categorical exclusions for purposes of the NEPA process may nevertheless have impacts on places and resources that are important to the tribes. The use of categorical exclusions will be subject to discussions among federal agencies and tribes in consultation meetings specified in the protocols in part 8, if a tribe or federal agency chooses to put this topic on the agenda for such a meeting.

B. NHPA Consultation.

Pursuant to NHPA section 106, consultation is triggered by a proposal for a federal or federally-assisted undertaking that may affect properties that are listed on or eligible for the National Register of Historic Places. 16 U.S.C. §470f. Under the regulations issued by the Advisory Council on Historic Preservation (ACHP), 36 C.F.R. part 800, the federal agency with authority over the undertaking has a lead role in carrying out the process, along with the state historic preservation officer (SHPO) or the tribal historic preservation officer (THPO) if the undertaking occurs within the boundaries of a reservation and the tribe has taken over the duties of an SHPO as authorized by section 101(d) of the statute. For undertakings that would affect properties within the boundaries of the Navajo Reservation or the Hualapai Reservation, both the Navajo Nation and the Hualapai Tribe have assumed the THPO role. The ACHP generally does not become involved in the review of specific undertakings, but retains the authority to do so.

If a tribe attaches religious and cultural importance to a historic property, then the tribe has a statutory right to be a consulting party, regardless of the ownership status of the land on which the potentially affected historic property is located. 16 U.S.C. §470a (d) (6). This statutory requirement to consult with tribes was enacted in the NHPA Amendments of 1992. The standard process through which such consultation takes place is set out in the ACHP regulations. 36 C.F.R. part 800. The ACHP regulations were issued in revised final form in December 2000, to implement the 1992 NHPA Amendments. (The revised regulations had not yet been issued when the EIS was prepared on Glen Canyon Dam operations.) The revised regulations include numerous provisions to ensure that Federal agencies make reasonable and good faith efforts to engage tribes in section 106 consultation, including: identifying participants in the section 106 process, §800.2(c)(2); initiation of the section 106 process, §800.3(c) (identification of the appropriate SHPO/THPO); §800.3(d) (consultation on tribal lands); identification of historic properties, §800.4 (numerous provisions); assessment of adverse effects, §800.5(a), (c)(2)(ii) (participation as THPOs and as tribes with concerns regarding off-reservation places); resolution of adverse effects, §800.6 (participation as THPOs and as consulting parties); coordination with NEPA, §800.6 (several specific requirements for involvement of tribes); federal agency program alternatives, §800.14(b) (consultation with tribes when developing programmatic agreements). In addition, the presence of issues of concern to Indian tribes is one of the criteria that the Advisory

Council on Historic Preservation will consider in deciding whether to become directly involved in the section 106 process for a particular proposed action. Appendix A to Part 800.

The standard process may be modified through the adoption of a programmatic agreement (PA), as was done in the decision based on the Final EIS for the operation of Glen Canyon Dam. In light of the extensive changes in the ACHP regulations since the PA was signed, as well as in recognition of developments in the implementation of the AMP, the signatories to the PA recognize the need to develop an updated, revised PA.

Issues previously noted regarding the location of the boundaries of the Hualapai and Navajo Reservations have implications for NHPA consultation regarding proposed federal undertakings on lands where the location of the reservation boundary is subject to disagreement. Briefly, since both the Hualapai Tribe and Navajo Nation have approved THPO programs, the role of the Arizona SHPO in the section 106 process for federal undertakings within reservation boundaries is limited. As prescribed in the ACHP regulations, the federal agency “shall consult with the THPO in lieu of the SHPO regarding undertakings occurring on or affecting historic properties on tribal lands.” 36 C.F.R. §§800.2(c) (2) (i) (A), 800.3(c) (1).

If an Indian tribe has assumed the functions of the SHPO in the section 106 process for undertakings on tribal lands, the SHPO “shall participate as a consulting party if the undertaking occurs on tribal lands but affects historic properties off tribal lands, if requested in accordance with §800.3(c)(1) [pursuant to which the owners of land within a reservation not held in trust for the tribe or owned by a tribal member can ask the SHPO to participate in the section 106 process], or if the Indian tribe agrees to include the SHPO pursuant to §800.3(f) (3).[36 C.F.R. §800.2(c) (1) (ii) (reformatted)].

If a tribe other than the tribe within whose lands a historic property is located attached religious and cultural significance to such a property, the federal agency has a legal obligation to consult with the tribe for whom the property holds religious and cultural significance, “regardless of the location of the historic property.” 36 C.F.R. §§800.2(c) (2) (ii), 800.3(f) (2). Accordingly, disagreements over the location of the reservation boundaries do not affect the right of a tribe that attaches religious and cultural importance to a historic property to be a consulting party. Such disagreements, however, may affect the role of the SHPO. This issue is addressed in the protocols in part 9 of this Consultation Plan.

In addition to the specific procedural requirements of NHPA and the implementing regulations issued by the Advisory Council, Federal agency actions should also abide by the policy statement set forth in the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. §1996, and by Executive Order 13007, Indian Sacred Sites (May 24, 1996), published at 61 Fed. Reg. 26771; also published at 42 U.S.C.A. §1996 notes.

C. NAGPRA Consultation.

The Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§3001-3013, 18 U.S.C. § 1170, recognizes that Native Americans (including Native Hawaiians) regard the physical remains of their ancestors, funerary offerings and other kinds of cultural items as holding great religious and cultural significance. NAGPRA includes provisions for the repatriation of Native American human remains and other cultural items from museums and federal agencies to tribes, and for the protection of Native American human remains and other cultural items located on (or embedded within) federal lands and tribal lands. This Consultation Plan addresses the graves protection provisions of NAGPRA, rather than the repatriation provisions. The graves protection and disposition provisions of NAGPRA apply to Native American human remains and other “cultural items”-located on federal lands and within the boundaries of Indian reservations. 25 U.S.C. §3002. For purposes of NAGPRA, the term “cultural items” includes funerary objects, sacred objects, and objects of cultural patrimony. The statutory requirements are implemented through regulations issued by the National Park Service (NPS). 43 C.F.R. part 10.

It is important for all agencies and organizations to understand that Native American human remains and cultural items covered by NAGPRA hold religious significance for the tribes. With respect to human remains and cultural items that are excavated or removed from federal lands after 1990, NAGPRA recognizes the rights of tribes to take custody of these items based on the priority of custody specified at 43 CFR §10.6. For human remains and cultural items excavated or removed from “tribal lands” (i.e., lands within reservation boundaries), NAGPRA recognizes rights of ownership or control in the tribe “on whose lands such objects or remains were discovered.” 25 U.S.C. §3002.

NAGPRA’s graves protection provisions apply in two different contexts: intentional excavations and inadvertent discoveries. 43 C.F.R. §§10.3, 10.4. In the event of an inadvertent discovery, the regulations require immediate notification, in the case of federal lands, to the federal land manager (in this case the National Park Service), or, in the case of tribal lands, to the responsible tribal official. The regulations also require the cessation of the activity that resulted in the inadvertent discovery.

For discoveries on *federal lands*, the federal land manager must notify all the Indian tribes that are likely to be culturally affiliated with the remains or other cultural items. If, as a result of an inadvertent discovery on federal lands, a decision is made to remove the human remains and/or cultural items from the ground, the removal is treated as intentional excavation. 43 C.F.R. §10.4(d) (v). Intentional excavation requires a permit issued pursuant to the Archaeological Resources Protection Act (ARPA). In the case of either an inadvertent discovery or intentional excavation, NAGPRA requires consultation with tribes that are likely to be lineal descendants, on whose tribal lands the cultural items are discovered, from whose aboriginal lands the planned activity will occur or where the inadvertent discovery is made, or to those tribes likely to be culturally

affiliated with the human remains and/or cultural items, or who have a demonstrated cultural relationship with the cultural items. 43 C.F.R. §10.5. If the cultural items must be removed from the ground, then NAGPRA provides a system for determining who has rights of ownership or custodial control over the human remains or cultural items. Briefly, in the case of human remains and associated funerary objects, the lineal descendants, if known, have the highest priority right of ownership or control. For items found on federal lands, where there are no known lineal descendants, the tribe with the strongest claim of cultural affiliation has the right of ownership or control. *See* 43 C.F.R. §10.6.

For human remains and cultural items excavated or removed from *tribal lands*, the right of custody is different from that for federal lands. Known lineal descendants have the highest priority right for human remains and associated funerary objects (as they do on federal lands). If there are no known lineal descendants, and for other kinds of cultural items covered by NAGPRA, the tribe with ownership or jurisdiction over the lands has the right of ownership or control. Such a tribe could consider a request from another tribe asserting a stronger claim of cultural affiliation, but the tribe on whose tribal lands the human remains or cultural items were found has no legal obligation to do so. In addition, such items can only be lawfully removed from the ground pursuant to a permit issued under ARPA (or by the tribe itself, which is exempt from the ARPA permit requirement, or by a tribal member pursuant to tribal law), and such a permit can only be issued if the tribe with jurisdiction over the tribal lands give its consent. 25 U.S.C. §3002(c) (2).

Accordingly, issues previously noted regarding the location of the boundaries of the Hualapai and Navajo Reservations have implications for the application of NAGPRA in the event of a discovery of human remains and/or cultural items on lands where the location of the reservation boundary is in dispute. With respect to the Hualapai Reservation, the likelihood of inadvertent discoveries in area subject to disagreement may be relatively slight, given that the lands subject to disagreement are below the high water line and, as such, have historically been subject to erosion by the River. With respect to the Navajo Reservation, the implications of this disagreement affect a larger amount of land. The protocols in part 9 acknowledge that a situation may arise in which the resolution of the boundary issue may be necessary.

The NAGPRA regulations encourage federal land managing agencies to enter into “comprehensive agreements” with tribes that are affiliated with human remains and/or cultural items that are likely to be discovered on or excavated from federal lands. 43 C.F.R. §10.5(f). Such agreements can address all federal agency land management activities that could result in inadvertent discoveries or intentional excavations. Such an agreement does not exist, and this Consultation Plan does not constitute such an agreement. In conjunction with carrying out this Consultation Plan, the tribes and NPS may determine that it would be desirable to develop such a comprehensive agreement.

D. ARPA Consultation

The Archaeological Resources Protection Act (ARPA) applies to “archaeological resources” located on federal lands and “Indian lands” (held in trust or subject to federal restrictions). 16 U.S.C. §§470aa – 470mm; regulations at 43 C.F.R. part 7. ARPA imposes criminal and civil penalties for removing, excavating, damaging or destroying such “archaeological resources,” a term that includes human remains and the kinds of “cultural items” covered by NAGPRA (if such items are “of archaeological interest” and at least 100 years of age). Although ARPA does treat human remains as “archaeological resources,” NAGPRA changed the implications of this term by establishing the right of custodial control in lineal descendants and culturally affiliated tribes.

ARPA imposes a permit requirement for the lawful excavation of such resources. If a permit might result in harm to or destruction of a site that an Indian tribe considers as holding religious and cultural importance, then the federal land manager must notify the tribe prior to the issuance of a permit. If items subject to such a permit are human remains or cultural items covered by NAGPRA, then the federal land manager must consult with tribes pursuant to the NAGPRA regulations.

E. Endangered Species Act

The Endangered Species Act (ESA), 16 U.S.C. §1531 *et seq.*, does not include specific statutory requirements to engage tribes in consultation. In recognition of the fact that actions taken by the Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively the “Services”) under the ESA sometimes run into conflicts with tribal rights under treaties and statutes, or with federal obligations under the trust responsibility to tribes, the Secretaries of Interior and Commerce have issued a joint Secretarial Order to establish policies and procedures to attempt to reconciliation of such conflicts. Secretarial Order # 3206, Subject: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997).

This Secretarial Order includes statements of principles, one of which in particular is relevant to this Consultation Plan. Principle 5 states, “The Departments shall be sensitive to Indian culture, religion and spirituality.” The text following the statement of this principle says, in part:

“The Departments shall take into consideration the impacts of their actions and policies under the Act on Indian use of listed species for cultural and religious purposes. The Departments shall avoid or minimize, to the extent practicable, adverse impacts upon the noncommercial use of listed sacred plants and animals in medicinal treatments and in the expression of cultural and religious beliefs by Indian tribes.”

In the context of this Consultation Plan, tribal concerns regarding activities taken pursuant to the ESA overlap with tribal concerns about historic places (including

traditional cultural properties) and other resources that are important for religious and/or cultural reasons. From the perspectives of the Tribes, the consultation requirements of the federal cultural resources statutes, especially the procedural requirements of NHPA consultation can be adequate, in some situations, to ensure that tribal concerns regarding the ESA, if federal agency ESA activities affect places that are recognized as eligible for the National Register of Historic Places.

In cases in which specific plant or animal species, or the places at which they are found, do not meet the criteria for consideration under the NHPA, these plant or animal species may nevertheless be important to one or more of the Tribes for cultural and/or religious reasons. Under the Secretarial Order, particularly Principle 5, the FWS has a responsibility to consult with the Tribes regarding actions under ESA to determine the nature of tribal religious and/or cultural concerns and how to respond to such concerns.

[Note by NPS-GCNP: NPS suggested language be added concerning Tribes' responsibilities for consultation with the FWS on actions that trigger Section 7 or Section 9 of ESA, and expressing the belief that the BIA often, if not always, serves as the federal agency that represents tribes in these matters.]

In addition, for activities within Reservation boundaries, the Secretarial Order, in Principles 1 and 2, recognizes tribal authority over tribal lands and that Indian lands not federal public lands. Moreover, the text following Principle 1 explicitly states,

“Except when determined necessary for investigative or prosecutorial law enforcement activities, or when otherwise provided in a federal-tribal agreement, the Departments, to the maximum extent practicable, shall obtain permission from tribes before knowingly entering Indian reservations and tribally-owned fee lands for purposes of ESA-related activities, and shall communicate as necessary with the appropriate tribal officials.” (Emphasis added.)

F. Tribal Laws

Tribal laws may impose requirements that go beyond consultation, including requirements for tribal consent or permission. This Consultation Plan does not attempt to offer a comprehensive discussion of applicable tribal laws, but rather provides only summary information. Through consultation pursuant to the protocols in part 8 of this Consultation Plan, NPS and each of the tribes whose reservations include land within the Grand Canyon will address the possibility of using stipulations in permits issued by NPS to ensure compliance with tribal laws.

(1) Hualapai Laws. The Hualapai Tribe has established a general permit requirement for any nonmember to be present within the part of the Hualapai Reservation that is not open to the public. All portions of the Reservation that can be accessed through the Colorado River are subject to this permit requirement.

With respect to cultural resources, a specific permit program has been authorized in the Hualapai Cultural Heritage Resources Ordinance (HCHRO), section 305. This permit program has not yet been implemented. Accordingly, permits for the excavation and removal of archaeological resources, and for human remains and cultural items covered by NAGPRA, are issued by the BIA, subject to tribal consent. The requirement for an ARPA permit does not apply to tribal employees engaged in properly authorized official business. 16 U.S.C. §470cc (g) (2); HCHRO §306.

(2) Navajo Laws

[**Note:** This section should be drafted by Navajo Nation representatives.]

(3) Havasupai Laws

[**Note:** Possible addition of a section on Havasupai laws. Although outside the River Corridor, the Havasupai Reservation is frequently accessed from the River, and the NPS permit system could be used to inform permit holders regarding tribal laws.]