# Glen Canyon Dam Adaptive Management Work Group
## Agenda Item Information
### February 3-4, 2010

Agenda Item

Report on Cultural Program

Action Requested

✓ Information item only. We will answer questions but no action is requested.

Presenters

Steve Martin, Superintendant, Grand Canyon National Park
John Hamill, Chief, Grand Canyon Monitoring and Research Center
Ann Gold, Assistant Regional Director, Bureau of Reclamation
Mike Berry, Regional Archeologist, Bureau of Reclamation

Previous Action Taken

N/A

Relevant Science

N/A

Background Information

**Resolution of Permitting Issues – Steve Martin and John Hamill**

In 2008 and 2009, the Grand Canyon Monitoring and Research Center (GCMRC) was not permitted to carry out testing of LIDAR technology on archaeological sites within Grand Canyon National Park (GRCA). GRCA has agreed to issue a permit to conduct testing of LIDAR technology on selected sites in 2010. In cooperation with GRCA, GCMRC is in the process of identifying the selected sites. An analysis of the archaeological site database will be used to help determine a representative sample of sites that would be used for pilot, dam-effects monitoring in 2011.

**Status of the Programmatic Agreement – Ann Gold**

In 1994, a Programmatic Agreement (PA) on Cultural Resources with regard to the operations of Glen Canyon Dam was signed by the Bureau of Reclamation, the Advisory Council on Historic Preservation, the National Park Service, the Arizona State Historic Preservation Officer, Havasupai Tribe, Hopi Tribe, Hualapai Tribe, Kaibab Paiute Tribe, Navajo Nation, San Juan Southern Paiute Tribe, Shivwits Paiute Tribe, and Pueblo of Zuni. Reclamation has led efforts in the past several years to develop a new PA. In July 2009, a revision was tentatively accepted, but not approved, by the PA signatories. While GCMRC was involved in discussions leading up to this draft, the agency was not included as a signatory because of unresolved issues. Since September 2009, Reclamation, GRCA, and GCMRC have discussed how to include GCMRC in the new PA, primarily addressing these two issues: (1) What is GCMRC's role in the cultural program? (2) Given that some of the research activities conducted by GCMRC are undertakings under the National Historic Preservation Act (NHPA), how can GCMRC obtain compliance coverage for these undertakings in the new PA?

**Traditional Cultural Properties – Mike Berry**
Reclamation continues to work with the tribes on designation of Traditional Cultural Properties (TCPs) affected by Glen Canyon Dam operations. Though TCPs are frequently referenced, properties do not receive official TCP designation until: a tribe documents them, the management agency (NPS) recommends them as National Register eligible, and the State Historic Preservation Officer (SHPO) and Tribal Historic Preservation Officer concur.

The Pueblo of Zuni has submitted a report to Reclamation entitled *An Ethnographic Account of Zuni Traditional Cultural Properties in the Grand Canyon.* The tribe requested that this information not be sent forward to the Arizona SHPO for concurrence. Thus, the properties in question, while of great significance to the Zuni tribe, do not have the status of TCPs. The Navajo Nation and the Hopi Tribe have prepared draft determination of eligibility (DOE) forms but, similar to the Zuni situation, these have not been submitted for SHPO concurrence.

**DOI/DOE Tribal Consultation Guide – Mike Berry**
Following the recommendation of a March 2000 PEP, work on what was then called the Tribal Consultation Plan was initiated by the Hualapai Tribe under contract to Reclamation in 2001. The Hualapai tribal attorney, Dean Suagee, took the lead in developing the plan. The plan was to be incorporated in the Historic Preservation Plan as part of the Programmatic Agreement for compliance with NHPA for Glen and Grand Canyon historic properties. It was also slated to serve as an appendix to the GCDAMP strategic plan. In August 2004, Reclamation took the lead and, working with the DOI-DOE agencies and tribes, produced a final draft in December 2008. The intent was to issue it as a guidance document to assist the agencies in meeting tribal consultation responsibilities.

# Traditional Cultural Properties

- National Historic Preservation Act.
- Historic Properties: Buildings, structures, and sites; groups of buildings, structures or sites forming historic districts; landscapes; and individual objects.
- TCPs constitute a class of historic properties.
- Historic properties are those that have been listed in or  determined eligible for inclusion in the National Register.

# TCP Process

- In consultation with tribes, identify, document and evaluate eligibility of a property as a TCP for listing in NRHP.
- Forward the documentation to the appropriate SHPO or THPO for concurrence.

# TCP Responsibility

- NPS has an ongoing responsibility under Section 110 of NHPA to identify and evaluate significance and make determinations of eligibility for Grand Canyon Nation Park.
- Reclamation, as lead agency for AMP undertakings, is charged under Section 106, with proactively identifying historic properties, including TCPs, in the area of potential effect, that may be adversely affected.

# Progress to Date

- Hopi Tribe
- Navajo Nation
- Pueblo of Zuni
- Tribal Concerns
  - Sharing of Esoteric Knowledge
  - Confidentiality

# The Future

- In reality, there are thousands of sites in the canyon that qualify as TCPs.
- Reclamation will work with the tribes to identify them and incorporate them under the NHPA umbrella.

# DOI-DOE GUIDANCE ON TRIBAL CONSULTATION
# FOR THE
# GLEN CANYON DAM ADAPTIVE MANAGEMENT PROGRAM

## Introduction

The Grand Canyon is a place of great religious and cultural importance for the Indian tribes of the region, including the Havasupai Tribe, the Hopi Tribe, the Hualapai Tribe, the Kaibab Band of Paiute Indians, the Las Vegas Tribe of Paiute Indians, the Moapa Band of Paiute Indians, the Navajo Nation, the Paiute Indian Tribe of Utah, the San Juan Southern Paiute Tribe, the Yavapai-Apache Nation, and the Pueblo of Zuni [See Table A.1, Addendum A for the full tribal names]. 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 agencies involved in the Glen Canyon Dam Adaptive Management Program (GCDAMP) that have Native American consultation responsibilities are the Bureau of Reclamation (Reclamation), the National Park Service (NPS), the United States Fish and Wildlife Service (FWS), the United States Geological Survey (USGS), the Bureau of Indian Affairs (BIA), and the Western Area Power Administration (Western) (altogether, the Agencies). The Agencies have formulated and adopted policies regarding the conduct of their respective relationships with Native American tribes. These policies are as follows: "Indian Policy of the Bureau of Reclamation" (1998), the NPS "Director's Order #71: Relationships with American Indians and Alaska Natives" (1999), the "U.S. Fish and Wildlife Service Native American Policy" (1994), the USGS "Policy on Employee Responsibility Towards American Indians and Alaska Natives" (1995), the "Department of Interior Bureau of Indian Affairs Government-to-Government Consultation Policy" (2000), and the "U.S. Department of Energy American Indian and Alaska Native Tribal Government Policy" (2000).

The Agencies shall have government-to-government consultation responsibility for federal actions conducted under the GCDAMP. However, not all of these policies provide adequate guidance for the implementation of meaningful and credible consultation for the complex challenges the GCDAMP presents. The guidance presented herein is designed to provide a nexus between the disparate Agencies' policy statements and the unique circumstances of this complex program.

The federal government has a unique relationship with Indian tribal governments. The federal government supports the right of tribes to exercise self-governance and has obligations as the 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 Indian trust assets, including actions that are subject to generally applicable federal laws, such as the National Environmental Policy Act (NEPA) and the Endangered Species Act of 1973 (ESA). In addition, tribes have rights under certain federal laws that were enacted to protect historic places, other cultural resources, and the graves of Indian tribal ancestors. These statutes include the National Historic Preservation Act of 1966 (NHPA), as amended, the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA), and the Archaeological Resources Protection Act of 1979 (ARPA).

These federal statutes apply on federal land, including Indian lands held in trust by the federal government. These federal statutes reflect the public interest in protecting such places, and 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. The sacred quality of such places is acknowledged by Reclamation in the Final Environmental Impact Statement on the Operation of Glen Canyon Dam 1995 (FEIS) wherein it is stated that, "The Colorado River, the larger landscape in which it occurs, and the resources it supports are all considered sacred by Native Americans." (FEIS: 141).

In addition to federal statutes and Secretarial Order 3206, the reservations of two tribes, the Hualapai Tribe and the Navajo Nation, are bordered by the Colorado River corridor 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 and adhered to by all of the stakeholders in the GCDAMP. Consequently, with respect to activities that occur within the reservation boundaries of these three tribes, compliance with the requirements of federal law is not sufficient. Persons who seek to carry out activities within these 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; it is the authority to prohibit activities by

withholding consent and to regulate such activities by granting permission subject to certain specific conditions.

## PART 1. SCOPE AND PURPOSE OF TRIBAL CONSULTATION GUIDANCE

The overall purpose of this document is to provide a framework in which the representatives of the Agencies and tribal governments engaged in the GCDAMP can interact in effective, respectful and constructive ways, so that the rights and governmental status of the tribes are honored and the traditional knowledge of the tribes can be brought to bear in the design and implementation of the GCDAMP. Although there are some fundamental differences between indigenous and Western scientific approaches to the acquisition of knowledge, these differences may be transcended through appropriate consultation and collaboration.

### A. Consultation

This document explains how government-to-government consultation with Indian tribes may need to be conducted differently from consultation with other stakeholders. Furthermore, the guidance contained herein provides direction for the Agencies on how to conduct consultation with the specific tribes that are concerned about the impacts of the operation of Glen Canyon Dam and associated activities of the GCDAMP on the natural and cultural resources of Grand Canyon National Park (GRCA) and the Glen Canyon National Recreation Area (GLCA) downstream from the dam.

This document addresses government-to-government consultation with tribes in two distinct but sometimes overlapping contexts: (1) at the overall management and policy level of the GCDAMP, specifically within the Adaptive Management Work Group (AMWG) (a federal advisory committee), the Technical Work Group (TWG), and other derived ad hoc groups; and (2) when compliance with legislative mandates requires consultation due to activities conducted under the auspices of the GCDAMP.

While the focus of this guidance document is on relationships between federal and tribal representatives, it may also be useful in guiding relations among state and non-governmental representatives in the GCDAMP and the tribal representatives. Federally-recognized 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 (see Addendum A for a summary of relevant guidance). Because of their respective sovereign statuses, tribal and federal agencies often conduct consultations with one another. Such consultations, which may be initiated by a federal agency or by a tribe, are referred to as government-to-government consultations. Such consultations may focus on federal policy initiatives for which there may be no established consultation procedures, or they may focus on specific proposals for which consultation procedures are delineated by regulation.

As noted above, activities undertaken under the auspices of the GCDAMP are generally subject to both tribal and federal law if the activities in question are conducted within reservation boundaries. Through consultation, as described in this document, applicable tribal and federal laws can be identified so that steps are taken to ensure compliance.

**(1) Consultation within the GCDAMP**

The GCDAMP was established to advise the Secretary of the Interior (the Secretary) on the implementation of the Record of Decision (ROD) for the FEIS on the operation of Glen Canyon Dam, in accordance with the Grand Canyon Protection Act of 1992 (GCPA). The AMWG is a federal advisory committee, established pursuant to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, which operates according to a charter issued by the Secretary. The AMWG includes representatives from concerned federal agencies, state agencies, tribes, and non-governmental organizations. All members of the AMWG are appointed by the Secretary. Tribal entities that are members of AMWG are the Hopi Tribe, the Hualapai Tribe, the Kaibab Band of Paiute Indians, the Navajo Nation, and the Pueblo of Zuni. Federal agencies that are members of AMWG are Reclamation, BIA, FWS, NPS, and Western. In addition, USGS, through the Grand Canyon Monitoring and Research Center (GCMRC), provides scientific support to the GCDAMP. As a federal advisory committee, the AMWG provides recommendations to the Secretary for action through the Secretary's Designee (Designee). The Designee is the federal official that chairs the AMWG. In addition to the Designee, the AMWG, and GCMRC, other organizational components of the GCDAMP include the TWG, independent review panels, and ad hoc work groups or subcommittees. All work conducted under the auspices of the GCDAMP must be reviewed by the AMWG prior to

incorporation into recommendations to the Secretary.

As a federal advisory committee, the AMWG serves as the structure for consultation by the Secretary with all of the entities represented on the AMWG, including the tribes. The intent of this document is to make consultation between federal agencies and tribes within the context of the AMWG effective, while at the same time recognizing that direct consultation with the tribes on a government-to-government basis shall occur within the context of NEPA, NHPA, and other legislation and implementing regulations. This document establishes processes and rules of relationships that shall be followed to ensure continuing government-to-government consultation among the tribes and federal agencies involved in the GCDAMP. All aspects of the GCDAMP are included in this document, including, but not limited to, compliance with NHPA, NAGPRA, GCPA, ESA, and the Fish and Wildlife Coordination Act of 1934, as amended.

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 agencies and tribal representatives does not mean that government-to-government consultation is necessarily adequate or sufficient. To the extent that informal consultation does occur in the context of AMWG or TWG meetings, it can be, and in many instances should be, supplemented by formal meetings between federal and tribal officials. Consultations between federal agency officials and tribal officials (or their respective designated employees with authority to act on their behalf) differ from meetings subject to the FACA to the extent that the former focus on "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 currently participate in the GCDAMP, the Havasupai Tribe, the San Juan Southern Paiute Tribe, the Paiute Indian Tribe of Utah, the Moapa Band of Paiute Indians, the Las Vegas Tribe of Paiute Indians, the Yavapai-Apache Nation, and possibly other tribes have interests that may be affected by activities carried out under the auspices of the GCDAMP. The fact that tribes currently choose not to participate in the AMWG and TWG does not relieve federal agencies of their obligations to engage in

government-to-government consultation with these tribes when appropriate.

**(2) Consultation required for compliance in regulatory contexts**

**Cultural Resource Compliance:** Four federal statutes relating to cultural resources require federal agencies to consult with tribes under certain circumstances: NEPA, NHPA, NAGPRA, and ARPA. Consultation under two of these statutes, NEPA and NHPA, initially occurred during the development of the FEIS. This consultation focused specifically on the EIS process, creation of an adaptive management program, and compliance with Section 106 and 110 of NHPA with respect to the impacts of Glen Canyon Dam operations. Even before completion of the FEIS, compliance with NHPA was chartered through the development of a 1994 programmatic agreement (the 1994 PA) to address the effects of the operations of Glen Canyon Dam on historic properties. The 1994 PA was executed by Reclamation, the Advisory Council on Historic Preservation (ACHP), NPS, Arizona State Historic Preservation Officer (AZSHPO), and the following tribes: Hopi Tribe, Hualapai Tribe, Kaibab Band of Paiute Indians, Navajo Nation, Paiute Indian Tribe of Utah, and the Pueblo of Zuni (signatures on the 1994 PA are dated from August 12, 1993 through August 30, 1994). The 1994 PA was executed specifically to fulfill the responsibilities of Reclamation and NPS for compliance with Sections 106 and 110, respectively, of the NHPA, 16 U.S.C. §470f and §470h-2, and the implementing regulations issued by the ACHP, 36 C.F.R. part 800. As the operator of the Glen Canyon Dam, Reclamation is the lead agency for the 1994 PA. As the land managing agency, NPS is responsible for the management of historic properties in GLCA and GRCA. The 1994 PA recognizes that the Hualapai Tribe and Navajo Nation have governmental authority over historic properties within their respective reservations. The AZSHPO has certain duties pursuant to NHPA and its implementing regulations. As such, the AZSHPO is a signatory to the PA. The ACHP is a signatory by virtue of its advisory status with respect to NHPA. Finally, the roles of the AZSHPO and ACHP are specific to the 1994 PA, thus distinguishing this agreement from the rest of the GCDAMP. This obtains because NHPA is the sole regulatory authority under which the AZSHPO and ACHP operate.

The 1994 PA, as signed in 1993-94, does not address two additional federal cultural resource statutes, NAGPRA and ARPA, which are implicated by virtue of the effects of the operation of Glen Canyon Dam on the Colorado River Corridor. Both NAGPRA and ARPA establish legal

requirements distinct from NHPA. The 1994 PA does not include provisions addressing NAGPRA and ARPA because both statutes mandate consultation between the appropriate federal land manager (GLCA, GRCA or BIA) and the tribes. Further, NPS has executed a Memorandum of Agreement (MOA) "Regarding Collections, Inadvertent Discovery, and Intentional Excavation of Native American Human Remains, Funerary Objects, Sacred Objects, and Objects of Cultural Patrimony at Grand Canyon National Park, Arizona" for disposition of NAGPRA materials recovered from GRCA-managed lands. Materials recovered from tribal lands or from GLCA fall under the provisions of that MOA if the tribe in question is a signatory to the MOA. Materials recovered from lands of tribes that are not signatories to the MOA shall be managed following NAGPRA procedures as specified at 43 CFR 10.

While the 1994 PA is included as Attachment 5 in the FEIS, the legal responsibilities under NHPA, Section 106, are distinct from the legal responsibilities imposed by NEPA, pursuant to which the FEIS was prepared. Further, the 1994 PA, because it predated completion of the FEIS, does not address the formation and implementation of the GCDAMP or the actions that the GCDAMP recommends. The consultation required by the 1994 PA was specific to the activities known at the time and did not attempt to anticipate the direction or recommendations that would ultimately be developed by the GCDAMP. Consequently, the GCDAMP requires additional consultation for activities developed under the GCDAMP and that require compliance under the above legislation. It is the responsibility of the respective designated lead federal agencies for any given action to ascertain the applicability of these statutes to any projects they may initiate. The 1994 PA is in the process of significant revision in order to address the issues discussed in this paragraph. The revised PA will be reissued during FY 2009.

**ESA Compliance**

Per Secretarial Order #3206 (June 5, 1997), "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the ESA." Secretarial Order #3206 provides guidance for clarifying responsibilities of the agencies, bureaus, and offices of the Department of the Interior (DOI), when actions taken under the authority of the ESA and the implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights. To achieve the objectives of Secretarial Order #3206, all agencies, bureaus, and offices within the DOI shall be responsible for ensuring that the

following principles are followed:

Principle 1. The DOI shall work directly with Indian tribes on a government-to-government basis to promote healthy ecosystems.

Principle 2. The DOI shall recognize that Indian lands are not subject to the same controls as federal public lands.

Principle 3. The DOI shall assist Indian tribes in developing and expanding tribal programs so that healthy ecosystems are promoted and conservation restrictions are unnecessary.

Principle 4. The DOI shall be sensitive to Indian culture, religion, and spirituality.

Principle 5. The DOI shall make available to Indian tribes information related to tribal trust resources and Indian lands, and, to facilitate the mutual exchange of information, shall strive to protect sensitive tribal information from public disclosure.

The FWS is identified within the Appendix of Secretarial Order #3206 as having the lead role in administering the ESA in this geographic area. In addition, the FWS shall offer and provide technical assistance and information for the development of tribal conservation and management plans to promote the maintenance, restoration, and enhancement of the ecosystems on which sensitive species, as identified by the ESA (including candidate, proposed, and listed species), depend. Such cooperation may include intergovernmental agreements to enable Indian tribes to more fully participate in conservation programs under the ESA.

The FWS shall, upon the request of an Indian tribe or the BIA, cooperatively review and assess tribal conservation measures for sensitive species (including candidate, proposed, and listed species), which may be included in tribal conservation resource management plans. The FWS will communicate to the tribal government its desired conservation goals and objectives, as well as any technical advice or suggestions for the modification of any proposed plan to enhance its benefits for the conservation of sensitive species (including candidate, proposed, and listed species). In keeping with FWS initiatives to promote voluntary conservation partnerships for listed species and the ecosystems upon which they depend, the FWS shall consult on a government-to-government basis with the affected tribe to determine and provide appropriate assurances that would otherwise be provided to a non-Indian group.

The FWS shall coordinate with affected tribes in order to fulfill FWS trust responsibilities and encourage meaningful tribal participation in the following ESA programs: candidate conservation, listing process, Section 7 consultation, habitat conservation planning, recovery, and law enforcement

## PART 2. CONSULTATION: GENERAL PROVISIONS

This Part contains provisions that are generally applicable to consultation with tribes in the context of the GCDAMP and all applicable laws.

### A. Definition of Consultation

For present purposes, consultation is defined as the process of seeking, discussing, and considering the views of others, and seeking agreement with them. It is built upon the exchange of ideas, not simply providing information.

While consultation means more than mere notification, it does not mean that the parties being consulted have the power to stop a federal agency action by withholding consent. It is the goal of consultation to exchange ideas that result in a mutually acceptable resolution or solution to issues.

### B. Principles for Consultation

The following general principles shall be used to guide consultation.

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

As a prerequisite for effective consultation, the representatives of parties engaged in the GCDAMP and the PA (and subsequent revisions) must have a basic level of understanding

about their respective concerns. This knowledge will provide for constructive communication among all involved parties.

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

### (2) Know the Legal Requirements

Another prerequisite to effective consultation is that federal agency and tribal representatives know the legal requirements that may apply. Although these requirements are summarized in Addendum B of this document, a working knowledge of these requirements generally calls for participation in training programs, preferably in joint training settings.

### (3) Build Ongoing Consultative Relationships

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 allocate their resources most effectively among the specific matters for which consultation may be appropriate. Accordingly, this document establishes a framework for ongoing consultation.

### (4) Establish Contact Early and Allow Sufficient Time

Participation in the GCDAMP process requires timely notification and response on the part of all involved parties. Tribal and agency representatives have a responsibility to identify and respond to concerns early in the GCDAMP process. If agency representatives cannot respond immediately to tribal concerns, they must acknowledge the existence of such

concerns and ensure that these concerns are addressed at a future date. Likewise, if tribal representatives cannot respond immediately, they must acknowledge the existence of such concerns in a similar manner. Identified concerns regarding notification and response times should be forwarded to all appropriate parties including the Designee.

#### (5) View Consultation as Integral

Federal agencies recognize that relations with tribal governments are an integral part of the agencies' mission, understanding that consultation is essential to maintaining constructive relations with tribal governments, and is not just a procedural requirement. By regarding consultation as integral, both agencies and tribes can use consultation as an opportunity to develop consensus solutions or otherwise find common ground.

### C. Responsibilities of Tribal Representatives

Tribal representatives are responsible for keeping the officials of their tribal governments informed regarding the GCDAMP, so that the tribes' AMWG representatives can speak on behalf of their leadership. This should be facilitated by a formal tribal resolution or letter of designation. For any matter that is on the agenda of an AMWG 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 or voting, the tribal representative is responsible for reporting back to the other AMWG or TWG parties within an agreed-upon time frame. In any situation that requires direct consultation between federal agency representatives and tribal officials other than the tribal representative, the tribal representative will help make the arrangements for such consultation.

### D. Responsibilities of Federal Agency Representatives

The Agencies involved in the GCDAMP and PA are aware of the tribes' diverse concerns that are associated with the Colorado River corridor. 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 stakeholders, agencies, and organizations engaged in the GCDAMP will seek and consider tribal input on the entire range of issues, not just cultural resources. With respect to cultural resources, specifically the subset of cultural resources defined as Traditional Cultural Properties (TCPs) that are eligible for nomination to the National Register of Historic Places (NRHP), the activities of the Agencies that affect these resources shall be carried out in accordance with the NHPA section 106 process (as currently specified in the PA). The Agencies and organizations will keep in mind that many places within the Colorado River corridor are sites where cultural resources are located, but which have not been documented as eligible TCPs. 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 these places. Such places are resources of tribal concern, whether or not they may be eligible for the NRHP as TCPs. These places may also be sacred sites subject to accommodation of tribal practices under Executive Order 13007. The tribes will be consulted about proposed actions that might affect these places or resources.

### E. Other Stakeholders' Interests and Expectations

Stakeholder organizations that are represented in the GCDAMP provide recommendations through the Designee. As such, they have an interest in 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 the GCDAMP meetings, and the consultation concerns matters that are scheduled to come before the AMWG for recommendations to the Secretary, stakeholder groups and governmental agencies not directly involved in the consultation nevertheless have an interest in being informed about the general topics of consultation. However, the specific content of the consultation shall not be released without permission of the tribe.

## PART 3. CONSULTATION PROTOCOLS FOR THE GCDAMP

Consultation among federal agencies and tribes on matters relating the GCDAMP may either be conducted during regularly scheduled AMWG and TWG meetings or in separate meetings between one or more federal agencies and one or more tribes when held in conjunction with AMWG and TWG meetings. The agencies and the tribes are committed to make such meetings serve the purposes of consultation. All of the parties recognize, however, that instances may arise when consultation needs to take place outside of such regularly scheduled meetings as, for example, when issues arise that had not been anticipated in an annual work plan. A consultation meeting may also be necessary to maintain the collaborative relationship between an agency and a tribe at times when AMWG or TWG are not scheduled to meet.

### A. Meetings

The discussion of issues in regularly scheduled meetings of the GCDAMP constitutes a step in the consultation process, but additional government-to-government consultation may become necessary, particularly for specific federal actions or proposals. Accordingly, tribal and federal agency representatives may need to engage in consultative discussions both before and after GCDAMP meetings.

**(1) Consultation in Conjunction with All AMWG and TWG Meetings**.

Prior to each AMWG meeting, the DOI-DOE agency representatives will be available to meet, either in person or through a conference call, with tribal representatives as a group to review the agenda in order to facilitate participation in the meetings. The Designee, if available, will participate in this pre-AMWG meeting. Other federal agencies may be asked to participate in pre-AMWG meeting sessions 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 additional consultation. If

additional consultation is needed, the relevant federal agencies and tribal representatives will schedule a mutually convenient time to meet for further consultation, with mutual commitments to allow consultation matters to progress through the AMP process to avoid inappropriate delay.

**(2) Annual Meeting of All Agencies and All Tribes.**

An annual meeting will be held that includes all federal agencies involved in the GCDAMP and all tribes. The purpose of the annual meeting is to review the draft work plan for the coming year. The focus of the meeting will be discussion of the specifics of the GCDAMP work plan in order to identify potential issues or conflicts between proposed project locations, methodologies, or other aspects of proposed work that might impact TCPs or other traditional tribal values associated with Grand Canyon. It may be necessary to schedule additional meetings with individual tribes to discuss culturally sensitive topics that cannot be discussed within a group setting. If necessary, separate meetings will be held between one or more agencies and one or more tribes following the annual meeting.

The annual meeting will be integrated into the annual calendar so that changes in the GCDAMP work plan can be made in response to concerns raised in the consultation. In the interests of logistics, this meeting may be held in conjunction with a regularly-scheduled AMWG and/or TWG meeting.

**(3) Meetings for the PA**

There will be at least one meeting per year of representatives of all of the parties to the PA for the purpose of discussing the progress achieved during the preceding year and discussing work planned for the coming year towards fulfilling the terms of the PA. Additional meetings will be held if the members of this group determine that such meetings are necessary. Additional meetings will be scheduled and notice will be provided by Reclamation after communication with PA signatories to determine the necessity for a meeting and the agenda item(s) to be discussed.

Meetings of this group are considered to be a necessary but not sufficient part of the consultation process. The annual work plan for mitigation of adverse effect to historic properties will be presented in detail at this annual meeting and Reclamation, as lead agency for the PA, will request the assistance of tribal representatives in arranging formal government-to-

government consultation with tribal councils.

**(4) Unanticipated Issues**.

When an issue arises that has not been anticipated in the GCDAMP annual work plan, the agency and/or tribe initiating the issue will notify all interested entities and offer to consult before the AMWG or TWG meeting at which the issue will be discussed.

**(5) Additional Meetings for Consultation.**

If additional consultation meetings are needed for any GCDAMP topic or issue, such meetings will be scheduled at mutually acceptable times.

**B. Generally Applicable Provisions for Consultation in Meetings**

**(1) Meeting Agendas.**

When the Designee, 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 preliminary agenda. When, in response to a preliminary agenda, a tribal representative notifies the Designee or TWG Chair that a topic on the agenda should include time for consultation with tribes, either within the meeting or separately but in conjunction with the meeting, a revised agenda will be prepared and circulated prior to the meeting if time allows.

**(2) Notification.**

For the purpose of providing notice to the designated GCDAMP tribal representatives 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.

**(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 GCDAMP stakeholders will attempt to avoid scheduling conflicts and 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, but which 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.

## PART 4. CONSULTATION PROTOCOLS SPECIFIC TO THE PROGRAMMATIC AGREEMENT

Most actions carried out within the general framework of the GCDAMP will be subject to consultation as provided in Part 3. The provisions of Part 4 only address consultations as they relate to the PA. The PA was executed to fulfill the responsibilities of Reclamation and NPS for compliance with Sections 106 and 110, respectively, of the NHPA, 16 U.S.C. §470f, and the implementing regulations issued by the ACHP, 36 C.F.R. part 800, specific to the effects of operating Glen Canyon Dam. This portion of the document has been prepared pursuant to the requirements of the PA.

### A. PA Tribal Consultation Process

Reclamation shall maintain an Administrative Record of consultation conducted under the PA. The consultation process to be employed is as follows:

1) During the first quarter of the fiscal year and prior to the initiation of mitigative actions, Reclamation will notify all tribes that have an interest in Grand Canyon resources, by

certified mail, regarding the proposed actions.

2) The letter will be sent to the leadership of each tribe with a copy sent to the THPO or tribal cultural representative.
3) The letter will request a response from each tribe regarding the appropriate level of consultation within 30 days of receipt.
4) The letters will be followed by one or more phone calls by Reclamation to the leadership, the THPO or tribal cultural representative. Reclamation and tribal response letters, as well as the time, date, and content of the phone calls, will become part of the Administrative Record.
5) Reclamation will, based on the tribal responses, make all necessary arrangements to consult with tribal leadership and THPOs or cultural representatives. The level of consultation may range from a letter of concurrence from a given tribe to face-to-face meetings between Reclamation and tribal councils. Minutes from such meetings will become a part of the Administrative Record.
6) Concerns expressed by the tribes will be given due consideration and may result in modification of proposed federal actions.

**B. PA Activities Requiring Consultation**

All activities that occur under the PA pertain only to National Register eligible properties. Resources considered to be significant to the tribes that are not considered National Register-eligible are discussed in other sections of this document. Under the provisions of the PA, specific activities require consultation with the affiliated tribes and signatories. Any action referenced in this document that takes place on either Hualapai or Navajo tribal lands requires consultation with each tribe's THPO. Mitigative actions will be proposed when monitoring identifies adverse impacts to historic properties. The type of mitigative action(s) will be based on the recommendations provided in relevant monitoring reports, in consultation with the tribes and NPS. Any site-specific mitigation plan developed through the PA program will be provided to all the PA signatories prior to implementation for review and comment.

The following actions are examples that may necessitate specific consultation before implementation:

• Redirection or removal of existing trails if the action affects historic properties
• Development of public interpretation.
• Closing site to the public.
• Taking no action based on traditional cultural values.
• Construction of checkdams.
• Vegetatation, de-vegetation or re-vegetation of areas.
• Stabilization of banks with rock armor or similar techniques.
• Stabilization of structures.
• Conducting subsurface testing and/or partial data recovery.
• Conducting complete data recovery.

Any of these actions will require a written plan of appropriate scope to detail the proposal for the action. Consultation on any action will occur in the form of review and comment on reports and discussion during consultation meetings specific to any such actions. At a minimum, 30 days will be allotted for review and comment of all written reports.

## PART 5. MISCELLANEOUS PROVISIONS

### A. Confidentiality

The federal agencies and tribes recognize that inherent contradictions may arise between mandates for dissemination of information to 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 historic properties, including TCPs, federal agencies are authorized under Section 9 of ARPA, 16 U.S.C. §470hh, and under Section 304 of the NHPA, 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 shall 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 culturally sensitive practices. Tribes will not reveal more information about these 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 and TWG, the tribes are asked only to provide information to the agencies or other GCDAMP 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 GCDAMP 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 Regulations, and the Presidential Memorandum on Openness and Confidentiality (Oct. 14, 1993).

### B. Funding of Tribal Participation

Tribes are funded under separate sole source contracts with Reclamation to ensure availability of funding for participation in the GCDAMP. Accordingly, issues relating to funding are not addressed in this document.

### C. Measuring and Tracking Consultation

It is important to establish a mechanism to evaluate the effectiveness of consultation from both sides. Review of yearly consultation efforts will occur during the annual meeting between federal agencies and tribes engaged in this program to determine effectiveness for all parties. For federal agencies, documentation of consultation will occur as part of the formal Administrative Record for the program activities. Tribes are also encouraged to maintain analogous records. This process will provide an opportunity to air and resolve any perceived differences and to improve communications for mutual benefit.

## ADDENDUM A

## LEGAL BASIS FOR THE FEDERAL GOVERNMENT'S RELATIONS WITH THE TRIBES

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 guidance 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.

The federally recognized tribes with a demonstrable affiliation or interest in Glen and Grand Canyon resources are listed in Table A.1 along with the shortened naming convention used in the body of this document.

Table A.1. Federally Recognized Tribes and Textual Naming Conventions

| | **Federally Recognized Tribal Name** | **Name Used in Text** |
|---|---|---|
| 1 | The Havasupai Tribe of the Havasupai Indian Reservation, Arizona | Havasupai Tribe |
| 2 | The Hopi Tribe of Arizona | Hopi Tribe |
| 3 | The Hualapai Indian Tribe of the Hualapai Indian Reservation, Arizona | Hualapai Tribe |
| 4 | The Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona | Kaibab Band of Paiute Indians |
| 5 | The Las Vegas Tribe of Paiute Indians of the Las Vegas Indian Colony, Nevada | Las Vegas Tribe of Paiute Indians |
| 6 | The Moapa Band of Paiute Indians of the Moapa River Indian Reservation, Nevada | Moapa Band of Paiute Indians |

| | | |
|---|---|---|
| 7 | The Navajo Nation of Arizona, New Mexico and Utah | Navajo Nation |
| 8 | The Paiute Indian Tribe of Utah | Paiute Indian Tribe of Utah |
| 9 | The San Juan Southern Paiute Tribe of Arizona | San Juan Southern Paiute Tribe |
| 10 | The Yavapai-Apache Nation of the Camp Verde Indian Reservation, Arizona | Yavapai-Apache Nation |
| 11 | The Zuni Tribe of the Zuni Indian Reservation, New Mexico. | Pueblo of Zuni |

### 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. 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 GCDAMP 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*, "GCDAMP 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 have governmental authority over some of the lands and waters in the Colorado River ecosystem.

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.

It is unnecessary to resolve these disagreements prior to the adoption of this consultation guidance. Accordingly, this document simply notes that there are disagreements regarding these boundaries. If a situation arises that renders it necessary or advisable to definitively resolve an issue relating to a reservation boundary, this guidance document 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 on 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. 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.

**(3) Havasupai Reservation Boundary**

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 1975, 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.

## ADDENDUM B
## LEGAL REQUIREMENTS FOR CONSULTATION

As noted in this consultation guidance document, the 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 GCDAMP 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 of 1973 (ESA). The order of presentation, here, 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 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, and San Juan Southern Paiute Tribe, Kaibab Band of Paiute Indians, 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 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. 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. 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 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 GCDAMP, the signatories to the PA recognize the need to develop an updated, revised PA/MOA.

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) [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 lead 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.

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 guidance document addresses the graves protection provisions of NAGPRA, rather than the repatriation provisions. The graves protection and disposition provisions of NAGPRA apply to Native American 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 lineal descendants and, if such lineal descendents cannot be ascertained, 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. Situations may arise in which the resolution of the boundary issue may be necessary.

**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 NAGRPA regulations.

### E. Endangered Species Act

The Endangered Species Act of 1973 (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 polices 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, four of which in particular are relevant to this consultation guidance document.

Principle 1 states, "…Whenever the agencies, bureaus, and offices of the Departments are aware that their actions planned under the Act may impact tribal trust resources, the exercise of tribal rights, or Indian lands, they shall consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable…."

Principle 3 states, "…The (FWS) shall take affirmative steps to assist Indian tribes in developing and expanding tribal programs that promote healthy ecosystems….(FWS) shall offer and provide such scientific and technical assistance and information as may be available for the development of tribal conservation and management plans to promote the maintenance, restoration, enhancement and health of the ecosystems upon which sensitive species (including candidate, proposed, and listed species) depend, including the

cooperative identification of appropriate management measures to address concerns for such species and their habitats."

Principle 4 states, "FWS shall take into consideration the impacts of their actions under the Act on Indian use of listed species for cultural and religious purposes .... When appropriate, (FWS) may issue guidelines to accommodate Indian access to, and traditional uses of, listed species, and to address unique circumstances that may exist when administering the Act."

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."

Tribal concerns regarding activities taken pursuant to the ESA may 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.

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."

**F. Tribal Laws**

Tribal laws may impose requirements that go beyond consultation, including requirements for tribal consent or permission. This document does not attempt to offer a comprehensive discussion of applicable tribal laws, but rather provides only summary information. Through consultation pursuant to the protocols proposed in this document, 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. 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).