



**TWG: Cultural**

**Meeting: #4**   **Date:** October 18, 2018   **Time:** 1:30-3:30 p.m.

**Attendees:**

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|--|--|
| <input checked="" type="checkbox"/> Laura Berglan, Pascua Yaqui Tribe                | <input checked="" type="checkbox"/> Susan Montgomery, Attorney representing Inter-Tribal Assoc. of Arizona |
| <input checked="" type="checkbox"/> Lee Decker, Gallagher & Kennedy                  | <input type="checkbox"/> Courtney Rose, Pima County  |
| <input checked="" type="checkbox"/> Mark Horlings, Maricopa Audubon Society          | <input type="checkbox"/> Peter Steere, Tohono O'odham Nation   |
| <input type="checkbox"/> Robert Linsell, Granite Construction Company, Inc.          | <input checked="" type="checkbox"/> Mary-Ellen Walsh, State Historic Preservation Office                   |
| <input checked="" type="checkbox"/> <i>Ronald Maldonado, WestLand Resources, Inc</i> | <input type="checkbox"/> JR Welch, Archaeology Southwest   |
| <input type="checkbox"/> Linda Mayro, Pima County                                    | <input checked="" type="checkbox"/> <i>Alana Hake, Gallagher &amp; Kennedy</i>                             |

**Staff Support:**

- David Lelsz, ADEQ                       Len Drago, ADEQ                       Kelly Cairo, GCI

**Discussion Items:**

- Laura is now serving as the chair. Previous Chair Steve Glass resigned from the group due to family commitments. Mary-Ellen agreed serve as vice chair.
  - Susan agreed to attend the chairs conference call Oct. 25, 1 p.m.
  - Kathryn Leonard, SHPO, will join the group. Mary-Ellen has kept her apprised of activities.

**Notes**

- Action item: Lee and Susan will provide revised notes by 10/22/18. Kelly will reissue the notes.
- Need to know if we are doing Section 106 or not. David can bring this question to Heidi. Lee said that if a state assumes primacy, the resulting permits are not considered a federal action.

**Previous Task Assignments**

- Heidi, Andy, David, Lee, Susan, and Trevor Baggioire met to discuss consultation.
  - Lee reported that Alana Hake researched the state historic preservation act, burial statutes, and tribal consultation executive order. There is much SHPO guidance and a requirement for a state agency to consult with SHPO and tribes. Remedies are limited to the State's Administrative Procedures Act. Pima County has implemented a robust program. Pending vetting this research with his client, Freeport McMoRan, Lee will share the information with attorneys, Susan and Laura, then the TWG.
  - The goal of this research is to attempt to answer the question of how far the State's laws, including the Antiquities Act, A.R.S. 41-841 et. seq go in protecting cultural resources compared to the existing requirements of Section 106 of the NHPA and its associated requirements under federal law (which for purposes of discussions, the group referred to this as the best practicable state vs. "ideal state." Additional discussion will be needed regarding whether the various interests, including ADEQ, agree as to the pervasiveness of these laws. Need to check whether a private applicant on private lands would also be included under the existing State requirements. SHPO guidance and Attorney General review suggest that consultation at the state level may occur under the Arizona laws, such

as the Antiquities Act, but there remains confusion as to whether this would be the case after assumption for an individual 404 permit issued to a private party on private lands.

## Required Information

- Is the state's potential issuance of a 404 permit sufficient to trigger SHPO requirements under A.R.S. 41-844 re: Duty to Report Discoveries, particularly if the permit is being issued to a private party acting on private lands?
- What is the remedy if a party is aggrieved by the permit? Does the appeal process include the Arizona Uniform Administrative Code or the Water Board?
- What if ADEQ fails to provide notice to or request consultation with an affected party on a pending individual 404 application – inadequate contact?
  - Susan suggested that ADEQ could offer to enter into Agreements with individual Tribes regarding whether the Tribe wished to be notified/consulted regarding 404 permitting in specified areas of the State. She explained that Tribes may have interests in cultural resources well beyond their existing reservations, given historic occupancy in the region.
  - Possible value in administrative codification. GIS-based notice system. Tribe must have some legal recourse similar to under existing federal law and authorities.
- Anything in act that prevents state assumption? Or that would enhance director's role?

## Permits

- David reviewed Corps permit work and touch time. There are typically 270 permits per year that Arizona would assume. Corps indicated they believe fewer than 1 percent of nationwide general permits that they issue require ESA and Cultural and Historic work.
- Mary-Ellen said that the Corps currently relies on SHPO for most cultural and historic reviews.
- David suggested that the TWG recommend the technical talent that a state assumption team would require. Mary-Ellen said that ADEQ will need an archeologist and tribal liaison.
- Susan pointed out that the notice to tribes could be included on reissuance of nationwide permits. For all pending permits, ADEQ could also have a feature with a spreadsheet like the current "permits in process" used for APPs and AZPDES, allowing easier access to information on pending permits, as opposed to a public records request. This is not a substitute for notice and consultation with tribes, but could be a useful tool.

## Tribal Consultation Work Group

- Len reported that ADEQ will begin a Tribal Consultation Work Group.
- Is the concept of MOAs more a part of the new Tribal Working Group? What are they working on that this TWG is not addressing?
  - Susan said that the Corps also is required to consult with tribes based on potential effects to Tribal resources and water rights on the Reservation resulting upstream activities occurring off tribal land. She asked if this was being handled in the new Tribal Consultation Workgroup.
- Tribal leader letter is scheduled to be sent Oct. 22. ADEQ anticipates the Tribal TWG to begin within one month. Simultaneous work will occur on active consultation and TWG activities.
- Group asked when would Tribal Consultation Workgroup be formed?

## White Paper

- Susan stated her client does not support ADEQ assumption, but asked if it would be appropriate to present the white paper to the Tribal TWG for completing the gaps.
- Is the Tribal TWG informed more by executive order in the state statute or ADEQ taking over the 404 process? Based on feedback from the Tribal Listening Session, there was concern that voiced that ADEQ should not issue 404 permits on tribal land. ADEQ has made clear this is not the intent of state assumption.
- The TWG agreed that the recommended white paper structure is compatible with TWG discussion and direction.
- There was discussion regarding the “ideal” state.
  - Ideal state may have a lot of variation in the view of each individual Tribe. TWG discussed idea that at this point, concept of an “ideal state” doesn’t really work. TWG is using existing federal process under 106 and applicable laws as the metric to measure the gap between what ADEQ can do under existing state law and what Tribes would, at minimum, like to see if assumption takes place.
  - Mark recommended presenting a viable process to get ADEQ to where it would like to be. A manageable level of protection.
  - Would like clear metrics.
  - A statement should be included that essentially explains: While there is no such thing as an ideal state, this is the closest we can get. Need to annotate that every tribe will have a different opinion.
  - The group agreed that if the ideal state is a workable state they can likely come to consensus. Timing issues are likely to be important, and a challenge.
- Mark noted that if the TWG believes legislation is necessary, it should be stated in the white paper. Susan agreed, noting that the TWG should not assume legislative action will be easy, and may not be enacted.

## **Assignments and Action Items:**

- All: Comment on previous documents 106 flow chart.
- All: Review Consultation Process Flow Chart/Power Point on the Google Drive.
- Lee and Susan to provide revised notes by 10/22/18. (Done.) Kelly to reissue the notes.
- Pending approval, Lee to provide consultation research documents to Laura, Susan, Mary-Ellen; then TWG members
- Mary-Ellen to review table regarding state/private land question check with Kathryn Leonard.
- Kelly to see Tricia Balluff regarding previous coordination on cultural resources.
- David to follow up on required information.

## **Next Meeting Agenda:**

- Review Consultation Process Flow Chart/Power Point on the Google Drive
  - Does it describe the current state as we know it?
  - Does it describe an idealized future state?
- Review list of applicable laws on Google Drive

- Laura recommended that next steps include identifying the current process, how to improve the current process, and when and where section 106 consultation should occur.
- Kelly to report out on larger concerns regarding consultation with the Permit Process group. Suggestion is to urge them to look at how the consultation process and cultural and historic process fit with the overall process.
- Upcoming meetings:
  - Nov. 1, 1-3 p.m., ADOA, 400 West Congress St., Tucson (room tba).
  - Nov. 15, 1:30-3:30 p.m., ADEQ, 1110 W. Washington St., Phoenix, Rm. 5100B.