

Cultural and Historic Resources

Technical Working Group

White Paper

Technical Working Group Members:

Laura Berglan, Pascua Yaqui Tribe

Mary-Ellen Walsh, State Historic Preservation Office (non-voting member)

Courtney Rose, Pima County

JR Welch, Archaeology Southwest

Lee Decker, Gallagher & Kennedy

Linda Mayro, Pima County

Mark Horlings, Maricopa Audubon Society

Peter L. Steere, Tohono O'odham Nation

Robert A. Linsell, Granite Construction

Ronald Maldonado, Westland Resources

Susan B. Montgomery, Attorney, Representing Inter-Tribal Association of AZ

This white paper is solely a product of the volunteer technical work group members and should not be considered an ADEQ decision document.

Table of Contents

I.	EXECUTIVE SUMMARY	1
II.	INTRODUCTION & VISION	1
III.	CURRENT STATE OF REGULATIONS AND PROGRAMS	4
	A. Current State of the Cultural Resources Consultation Process	4
	1. Federal Consultation Process	4
	2. State Consultation Process	7
	3. Arizona Antiquities Act and Local Government Ordinances	9
IV.	TWG RECOMMENDED OPTION 1. VISION FOR ASSUMED ADEQ PROGRAM TO MAINTAIN EQUIVALENT PROTECTION	9
	A. Introduction	9
	B. Vision for Equivalent Protection	10
	1. Anticipated Process for Tribal Engagement	12
	2. Tribal Right of Appeal	13
	3. EPA Objection Process	14
V.	PROGRAM COMPARISON AND IDENTIFICATION OF GAPS OF RECOMMENDED OPTION 1	14
	A. Introduction	14
	B. Recommended Options Gaps Analysis	15
	1. Option 1 Gaps Analysis	15
VI.	TWG RECOMMENDATION	22
VII.	MINORITY DISSENT OPTIONS	22
	A. Option 2. Compliance with All Federal Laws	22
	1. Option 2: Gaps Analysis	23
	B. Option 3. Assumed ADEQ Program Which Maintains Existing State Protection.	23
	1. State Historic Preservation Act	24
	a. Applicability of State Act to State-Issued 404 Permits	24
	b. Consultation Process under the State Act	26
	2. Tribal Consultation Authorities	28

3.	Burial Protection Laws	29
4.	Existing Arizona Law Provides Protections of Cultural and Historic Resources Equivalent to the Protections Provided under the Corps' Administration of CWA Section 404.	30
5.	Option 3 Gaps Analysis	31
VIII.	STATEMENTS OF CONCERN FROM THE MAJORITY AND MINORITY REGARDING OPPOSING OPTIONS	34
A.	Majority Concerns with Options 2 and 3.	34
B.	Minority (Option 2) Concerns with Options 1 and 3.	39
C.	Minority (Option 3) Concerns with Option 1.	39
IX.	CONCLUSION	42
Appendix A –	Cultural and Historic Resources Technical Working Group Charter	44
	ROLE OF THE PANEL	44
	MEMBERSHIP	44
	LEADERSHIP	45
	MEETING FORMAT	45
	DECISIONS/CONSENSUS	45
	MEETING SCHEDULE	46
	MEETING ATTENDANCE	46
	MEDIA REQUESTS	46
	COORDINATION WITH OTHER STATES	46
	OBJECTIVES	46
	CULTURAL AND HISTORIC RESOURCES WORK GROUP OBJECTIVES	47
Appendix B –	Federal Flow Chart	49
Appendix C –	Option 1 Flow Chart	50
Appendix D –	State Flow Chart	54
Appendix E –	Definitions	55
Appendix F –	Guidelines for the State Historic Preservation Act	58
	Definitions of Terms	78

I. EXECUTIVE SUMMARY

This White Paper examines options to address Cultural and Historic Resources in the event the Arizona Department of Environmental Quality (“ADEQ”) assumes the Clean Water Act (“CWA”) Section 404 program. Three Options are examined. Option 1 is a vision for an assumed ADEQ 404 Program that maintains equivalent protections for cultural and historic resources, through the adoption of appropriate state regulations and policies and agreements designed to ensure these protections. Option 2 is a vision for an assumed ADEQ 404 Program that maintains identical protections through adoption by the State of all federal laws that currently apply to the 404 program. Option 3 envisions protection in accordance with current State laws.

This White Paper and Options were prepared for ADEQ with anticipation that it would be presented to the Tribal Working Group and State Historic Preservation Office (“SHPO”) for review and consultation¹. The majority of the Cultural and Historic Technical Working Group members recommend Option 1. While some of the group believed that Option 2 comes the closest to the ideal state of equivalent protection, the TWG concluded that this Option was not politically viable. The minority for Option 2 believes that Option 2 is both workable and desirable. The minority for Option 3 believes that Option 3 is workable and provides equivalent protection for historic and cultural resources.

II. INTRODUCTION & VISION

The Cultural and Historic Resources Technical Working Group (“TWG”) was tasked with providing recommendations to the ADEQ on the potential assumption of the CWA 404 program with respect to the protection of cultural and historic resources, including traditional cultural properties (“TCP”), sacred sites, and prehistoric and historic archeological sites, buildings, districts, structures, objects

¹ See TWG Charter (“The role of this panel, even though it may include representatives from tribes, is not intended to be a substitute for tribal consultation under ADEQ’s consultation policy.”) and ARS 41-861-864.

that are eligible for, or listed in the State/National Register of Historic Places. Protection of cultural and historic resources is a consultative process. This task, therefore, involved reviewing the current federal, state, and local processes pursuant to the National Historic Preservation Act (“NHPA”; 54 USC 306101 *et seq.*) and the Arizona State Historic Preservation Act (“State Act”; A.R.S. § 41-861 *et seq.*), and a consideration of other federal and state laws and policies to help define future ADEQ’s responsibilities for the protection of cultural and historic resources. The TWG held thirteen meetings and prepared this white paper. We understand that the Tribal Working Group will be reviewing this white paper, as well as the SHPO and may have a response.

Objectives of the TWG include identifying the specific benefits resulting from the applicable federal process, describing the benefits and problems in the current federal and Arizona State processes, and reviewing gaps between the two consultation paths and how these different paths work to avoid, minimize and, if needed, mitigate for impacts to cultural and historic resources. This paper first explores the current state of regulations that apply to projects permitted by the Army Corps of Engineers (“Corps”). It then turns to the TWG’s vision and majority recommendation for desired future conditions for cultural and historic resources protection, should the State of Arizona be granted primacy over the CWA 404 program. The final sections identify gaps between current and desired future conditions, provides recommendations on closing those gaps and sets out the two minority options. The TWG developed three options for discussion, with Option 1 being ultimately recommended by the majority of the group. Minority Options 2 and 3 are discussed at the end of this paper. Table 1 below summarizes the three options.

Table 1. Comparison of the Three Options		
	Summary of Option	Additional State Action Required to Implement Option
Option 1 – Majority Recommended Option	Provide equivalent protection that is now existing under CWA Section 404 Program	Enact certain regulations; include language for EPA involvement in MOA between EPA and State of Arizona; ADEQ to enter into MOUs/IGAs with interested Tribes to outline protocols for communication and resolution of disputes regarding identification, evaluation, and findings of effect, and resolving adverse effects.
Option 2 – Minority Dissenting Option	Continue to apply all Federal environmental laws currently applicable to CWA Section 404 Program	State Legislature would need to codify all current Federal environmental laws into State law
Option 3 – Minority Dissenting Option	Use existing State laws to ensure protection of cultural resources	None

It should be noted that this paper assumes throughout that the permitting assumed by ADEQ will not involve a federal nexus, but it is a State agency action. However, once a project receives any federal funds, licenses, or permits, such as a CWA 404 permit issued by the Corps, or if the project cannot be completed without the use of federal land it becomes a federal undertaking subject to review under Section 106 of the NHPA and other applicable federal laws, which require separate consultation with SHPO and other consulting parties. It is important, therefore, to identify any federal involvement as early as possible in the process. If multiple federal agencies are involved, the agencies will determine which agency will take the lead for Section 106 and other applicable laws. Depending on the nature and scope of the project, federal (and state) agencies may retain their individual responsibilities for government-to-government consultation with tribes.

The Arizona Antiquities Act applies to lands owned by the State, counties, municipalities, and other political subdivisions of the State. A.R.S. § 41-865 governs disturbance of human remains and funerary objects on private land. Arizona State Museum's ("ASM") State Repatriation Office oversees the discovery and repatriation of human remains discovered on private (A.R.S. § 41-865) land in Arizona. Under A.R.S. § 41-865, intentional disturbance of human remains and funerary objects is prohibited without written permission from the Museum, and unintentional disturbance must be reported to the Museum.

III. CURRENT STATE OF REGULATIONS AND PROGRAMS

A. Current State of the Cultural Resources Consultation Process

The current state of the cultural resources consultation process in Arizona is summarized below.

1. Federal Consultation Process

Generally, on a federal level, consultation regarding potential impacts to cultural and historic resources is conducted in accordance with Section 106 of the NHPA and the regulations at 36 CFR 800, which specify how each Federal agency is to consult with their state's historic preservation office ("SHPO"), tribal historic preservation offices ("THPOs"), affected Indian Tribes, and other interested and affected parties. The Corps' consultation process for Section 404 permits is governed by Section 106, its own implementing regulations at 33 C.F.R. Part 325, Appendix C, and applicable guidance. In addition to NHPA, consultation with Tribes is required pursuant (among other things) to the Army Corps of Engineers ("Corps") Tribal Consultation Policy and Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), Executive Order 13007 (Protection of American Indian Sacred Sites).

The primary goal of the NHPA, which was enacted in 1966, is to ensure the protection of non-renewable cultural resources significant to the nation's heritage. The NHPA established the National Register of Historic Places ("NRHP"), federal

and state partnerships, SHPOs, THPOs, and the Advisory Council on Historic Preservation (“ACHP”). Section 106 of the NHPA allows the ACHP to comment on federal undertakings; Section 110 outlines federal agency responsibilities to preserve and use historic properties. SHPOs are authorized to advise and assist federal and state agencies in fulfilling their historic preservation responsibilities. THPOs have similar roles when projects occur on tribal lands. Although certain tribes may not have THPOs, they do have robust Departments that engage on matters involving tribal cultural and historic resources.

Historic properties are cultural resources, including prehistoric and historical archaeological sites, buildings, structures, objects, and districts that are eligible for, or included on the NRHP based on age (at least 50 years old), criteria of significance, and aspects of integrity as defined in National Register Bulletin 15. Traditional Cultural Properties (“TCP”) are eligible for the NRHP based on associations with the cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions of a living community that are rooted in the community’s history and important in maintaining the continuing cultural identity of the community. See, e.g., National Register Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*.

The federal consultation process under the NHPA is defined in Section 106 of the NHPA (54 USC 306108; 36 CFR Part 800). For a generally illustrative flowchart, see Appendix B. The NHPA states that the head of any Federal agency having direct or indirect jurisdiction over a proposed federal or federally assisted undertaking in any State, or the head of any Federal department or independent agency having authority to license any undertaking, shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, take into account the effect of the undertaking on historic properties. SHPOs, THPOs, and tribes that have not designated THPOs are afforded opportunities to review and comment on all individual permit activities and certain general permit activities.

Section 106 specifies how federal agencies consult with SHPOs, THPOs, tribes, and other interested and affected parties. The ACHP’s Section 106 regulations

require federal agencies to identify consulting parties that have an interest in the undertaking, including tribes that claim affiliation to the area of potential effect (“APE”). The APE is the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist (36 CFR 800.16). The Corps’ permitting regulations refer to the “permit area”, defined as “those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures.” 33 C.F.R. pt. 325, app. C § (1)(g)(1). In Arizona, the Corps can define the “uplands” in a manner that includes an area that is consistent with the APE, including where tribal areas of interest are involved, such as Traditional Cultural Properties. In Arizona, identification of tribal areas of interest may be accomplished using the government-to-government (“G2G”) consultation toolkit (<https://sites.google.com/view/az-consultation-toolkit/home>), which includes areas of ancestral affiliation as defined by each of the federally recognized tribes with aboriginal ties to Arizona. The G2G toolkit also includes tribal contact information and communication protocol. Some Arizona tribes also have their own laws or policies outlining when and how they wish to be consulted on matters that affect their interests. Section 106 is an iterative and consultative process. Agencies consult with SHPO/THPO, tribes, and other consulting parties on the undertaking, on the identification of the permit area/APE on efforts to identify historic properties, and on application of the criterion of adverse effect if historic properties are present. The agency seeks SHPO concurrence on determinations of eligibility and findings of project effect generally after consultation with other consulting parties is complete.

Under NHPA, the SHPO has a 30 calendar-day period to review and comment on each consultation; if there is insufficient information and SHPO requests more information, the clock starts over. There is no mandated review period for tribes or other consulting parties, but a 30-day review period is usually requested. It is the lead federal agency’s responsibility to make a good faith effort to obtain responses before proceeding to the next step.

Once the Corps has determined whether historic properties will be affected by the undertaking, the Corps, in consultation with SHPO, Tribes, and other interested

parties, makes one of three findings for the undertaking: No Historic Properties Affected, No Adverse Effect, or Adverse Effect (see definitions in Appendix E). If there is an adverse effect to historic properties, the Corps continues consulting to avoid, minimize, mitigate adverse effects, usually requiring development of a Memorandum of Agreement (“MOA”) or Programmatic Agreement (“PA”) and the imposition of permit conditions. At this time, the Corps will notify the ACHP about the adverse effect determination and invite the ACHP to participate in the development of the MOA or PA. Whether ACHP participates generally depends on the complexity of the project and/or of specific concern to tribes. Once the agreement document is executed (by filing it with the ACHP), the project activities may proceed per the stipulations of the MOA, PA and/or 404 permit. This officially ends the Section 106 process, but the Corps will continue consultation on the results of the mitigation.

There is no mandated timeline for the development of agreement documents, and there are usually several iterations of draft documents to consider all comments and revisions. Tribal input into the agreement document often requires additional time for consultation and possible meetings with the tribal councils and cultural resource specialists for the affected tribes.

2. State Consultation Process

In 1966, the NHPA was enacted to protect cultural and historic resources by requiring federal agencies to consider the effects of their “undertakings” on historic properties. This legislation created the State Historic Preservation Officers who, housed in each state, advise and assist federal agencies in administration of their responsibilities under the Act.

In 1974, the Arizona State Legislature passed A.R.S. § 41-511 which established an Arizona Register of Historic Places and Historic Sites Review Committee. This legislation identified the following properties as qualifying for the Arizona Register: “districts, sites, buildings, structures and objects significant in this state’s history, architecture, archaeology, engineering and culture that meet criteria that the [Arizona State Parks Board] establishes or that are listed on the national register of historic places.” A.R.S. § 41-511.04(A)(9). The 1974 legislation also codified

the roles of the SHPO at the state level to “advise, assist and monitor, as appropriate, federal and state agencies and political subdivisions of this state in carrying out their historic preservation responsibilities.” *Id.* § 41-511.04(D)(4).

The responsibilities of state agencies for historic preservation were further codified in statute in 1982 with the passage of A.R.S. § 41-861-864, the State Historic Preservation Act. A.R.S. §41-861 *et seq.* establishes the framework for Agency responsibilities with regards to the State Act. It specifies, “the chief administrator of each state agency is responsible for the preservation of historic properties which are owned or controlled by the agency. Prior to acquiring, constructing or leasing buildings for purposes of carrying out agency responsibilities, each agency shall consider the use of historic properties available to the agency. Each agency shall undertake any preservation that is necessary to carry out this article in a manner consistent with the preservation of historic properties, the duties of the agency and the professional standards which the state historic preservation officer recommends. The chief administrator of a state agency may designate a full-time employee to coordinate the agency’s activities under this article.”

State agencies are required to consult with the SHPO pursuant to A.R.S. §41-864 which specifies, “the state historic preservation officer has thirty working days in which to review and comment on any plans of a state agency which involve property which is included on or may qualify for inclusion on the Arizona register of historic places, including any construction project, sale, lease or acquisition of historic properties, to ensure that the prehistorical, historical, architectural or culturally significant values will be preserved or enhanced.”

Following 2001 SHPO guidance approved by the Arizona State Parks Board, the issuance of permit by a state agency is considered to constitute an agency “plan” under the State Act (see Attachment 864-1). The SHPO has 30 working days in which to review and comment on any plans in order to ensure that the prehistorical, historical, architectural or culturally significant values will be preserved or enhanced (A.R.S. § 41-864).

Although the State Act does not require tribal consultation, A.R.S. § 41-2051 and Executive Order 2006-14, mandate State agencies to engage in tribal consultation

when an action or policy has the potential to affect tribal communities or their members. Absent direct guidance from an affected tribe, SHPO's Government-to-Government Consultation Toolkit should be used to identify those tribes that may attach cultural and religious significance to any prehistoric and historic properties and places that may be affected by the project.

3. Arizona Antiquities Act and Local Government Ordinances

The Arizona Antiquities Act, ("AAA"; A.R.S. 41-841 et seq., as amended), which predates both the NHPA and the State Act, was enacted to protect archaeological and vertebrate paleontological sites and discoveries, human remains, and funerary objects on state, county, municipal and private land. The AAA is administered by the Arizona State Museum pursuant to Arizona Board of Regents Policy 8-201. In sum, projects on state, county, and municipal land require review through ASM to identify and protect significant archaeological (and paleontological) resources.

Local government historic preservation policies and ordinances also provide for the protection of significant cultural resources based on the authority of the AAA. Pima County, for example, requires that any County project or any private project on County lands with potential to impact cultural resources must take into account and mitigate the negative effects of that project on cultural resources through avoidance, minimization, or mitigation, prior to the initiation of project construction.

IV. TWG RECOMMENDED OPTION 1. VISION FOR ASSUMED ADEQ PROGRAM TO MAINTAIN EQUIVALENT PROTECTION

A. Introduction

Under Option 1, it is envisioned that ADEQ, in the administration of the CWA 404 program, will: (a) provide a level of protection for cultural and historic resources that is equivalent to the protections afforded these resources by the Corps under

current federal laws and requirements; and (b) engage in advanced, informed, and meaningful consultation, including tribal consultation with Arizona tribes, when ADEQ 404 Activities (as defined herein) have the potential to adversely affect these cultural and historic resources. See, e.g., U.S. Army Corps of Engineers Tribal Consultation Policy and Related Documents (2013); Executive Order 13175.

Nothing in this vision is intended to preclude ADEQ from developing agreement documents, in consultation with SHPO, tribes and other consulting parties, to streamline procedures for the ADEQ 404 program vis-à-vis cultural resources, so long as such procedures result in equivalent protection for cultural and historic resources and robust tribal consultation, as described in this vision.

For purpose of the Option 1 vision, the terms “cultural resources” (which includes prehistoric and historical resources) and “consultation” shall be construed broadly, consistent with the definitions found in federal law and policy. Similarly, the term “ADEQ 404 activities,” as used in this vision, is intended to include, but not necessarily be limited to, ADEQ’s development and consideration of general permits and ADEQ’s consideration of proposed individual permits to be issued under the Clean Water Act.

B. Vision for Equivalent Protection

Under the CWA 404 Program as currently administered by the Corps and EPA, cultural and historic resources are subject to significant protections under federal law, including, but not limited to, Section 106 of the NHPA and its implementing regulations. See, e.g., 36 C.F.R. § 800; 33 C.F.R. §§ 320.4(a)(a) and 320.4(e) (implementing “public interest” requirements of Sec. 404); see also 33 C.F.R. Part 325, Appendix C.

In addition, the Corps, like other agencies and departments of the United States, also has a continuing trust responsibility to Indian tribes as well as tribal consultation obligations that apply to its 404 permitting actions, regardless of whether or not the APE is located on private or state land. See, e.g., U.S. Army Corps of Engineers Tribal Consultation Policy and Related Documents (2013); Executive Order 13175. The potential issuance of a 404 Permit by the Corps (as

a federal agency) also constitutes a “major federal action” – again, even if the APE is located on private or state land – which triggers additional considerations under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347. NEPA also enhances tribal input on the Corps’ permitting decisions and may ultimately result in greater protections for cultural and historic resources.

It should also be noted that when the permitted activity is located on federal lands, certain cultural resources may also receive increased protections or call for additional tribal consultation and involvement under the Archeological Resources Protection Act of 1979, 16 U.S.C. § 470aa-mm; the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et. seq.*; Executive Order 13007 (federal sacred sites), and other applicable laws, regulations, and policies. Finally, the existence of TCPs and sacred sites within the permitted area or APE may also implicate Native American religious practices and, in certain instances, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et. seq.*, and the American Indian Religious Freedom Act, 16 U.S.C. 1996.

Under this Option 1 vision, none of the above listed laws and policies shall be limited by ADEQ after 404 assumption when the permitted area is located on federal land or when there exists a federal nexus sufficient to trigger the application of such federal laws or policies to the 404 permit process. In addition, this vision contemplates that regardless of the location of the permitted area or APE, or the status of the applicant, ADEQ will, in the exercise of its primacy over the CWA 404 program (a) apply a level of protection for cultural and historic resources located on private or state land that is equivalent to the protections that the Corps (as a federal agency) is required to provide under its current program; and (b) engage in advanced and meaningful consultations with SHPO and affected Indian tribes at a level and on the topics that the Corps is required to consult under applicable federal laws and policies.

In furtherance of this vision, the State of Arizona and ADEQ would be required to employ qualified cultural and historic resource staff at levels necessary to ensure that ADEQ has sufficient capacity to provide the important cultural resource protections and consultation requirements described in this vision. The

development of agreement documents with SHPO and with individual tribes would facilitate ADEQ's consultation process. While processes for tribal consultation are outlined below, ADEQ and SHPO would work together to identify how ADEQ would consult with SHPO, and when such consultation is necessary.

1. Anticipated Process for Tribal Engagement

ADEQ shall engage in advanced and meaningful consultation with Arizona's 22 federally recognized Indian tribes on the direct, indirect, and cumulative impacts of ADEQ 404 Activities on cultural and historic resources consistent with Section 106 of the NHPA, A.R.S. § 41-2051, Arizona Executive Order 2006-14, and applicable policies, and in a manner designed to meet the equivalent requirements for consultation found in each of the above referenced laws, Executive Order 13175, and applicable policies.

In furtherance of this vision, ADEQ shall, with the assistance of SHPO under A.R.S. § 41-511.04, work with Arizona's 22 tribes to jointly develop guidelines for ensuring equivalent protections of cultural resources that might be potentially affected by ADEQ 404 Activities. These guidelines should be codified in Arizona's administrative code and describe the process (including Tribal consultation) that ADEQ will use to ensure that equivalent protections for cultural resources are achieved. This process may be enhanced with (but not supplanted by) ADEQ's use of an updated PIP process and PIP Map to include ADEQ Jurisdictional Determinations and pending 404 Permits. ADEQ would need to provide an overview of the PIP MAP, its uses and functions on its website and, upon request, directly to any interested Arizona tribe.

In addition to the guidelines discussed above, ADEQ should offer to enter into an individual intergovernmental agreement ("IGA") or memorandum of understanding ("MOU") with each of Arizona's 22 federally recognized tribes to set forth the terms required for Tribal consultation on ADEQ's 404 Activities. The IGA/MOU will be tailored to the individual interests and needs of each tribe and, should, at the minimum, include (as deemed appropriate by each affected tribe) maps or other resources that delineate the tribe's ancestral lands and/or areas of cultural

affiliation wherein ADEQ 404 activities will trigger ADEQ's immediate consultation obligations.

The individual IGA/MOU should also specify the types of ADEQ 404 Activities that the tribe wants to be consulted on, how frequently, and in what format. SHPO Guidance Point No. 8 and Point No. 9 should be utilized in this process. In the event ADEQ does not have an approved IGA/MOU with a particular tribe as required by this vision, ADEQ should, at the minimum, coordinate with SHPO to identify any potentially affected tribes and ADEQ must promptly engage these tribes with the assistance and guidance of SHPO.

The State of Arizona should ensure that this vision for the protection of cultural resources and tribal consultation is acknowledged in the Memorandum of Agreement ("MOA") entered into between the state and the EPA regional administrator pursuant to 40 C.F.R. § 233.13. ADEQ should expressly agree in the MOA that EPA will not waive its rights of Federal review for any State 404 permit that has the reasonable potential to adversely impact cultural resources. The MOA will also authorize and memorialize the terms for EPA's re-involvement in any State 404 permit under 33 C.F.R. § 233.50 and § 233.51(6) where the tribe(s), ADEQ, and the applicant are unable to agree on an appropriate means to avoid, minimize, or mitigate for impacts of any State 404 permit on cultural resources. In the event of EPA's re-involvement for any reason under 33 C.F.R. § 233.50, the tribes would be entitled to request entry or assistance from the Advisory Council of Historic Preservation under 36 C.F.R., Part 800 and Appendix A. (A flow chart of this anticipated process is attached to this White Paper as Appendix C.)

2. Tribal Right of Appeal

In furtherance of this vision, any tribe aggrieved under this process, should have a clearly defined right to appeal any ADEQ 404 Activity under the Uniform Administrative Appeals Procedures, Title 41, Chapter 6, Article 10, A.R.S. § 41-1092 *et seq.*, and eventually to the Superior Courts in Arizona. Nothing in this provision waives the right of an affected tribe to seek relief in federal court, if appropriate.

3. EPA Objection Process

As noted in the vision Option 1, EPA must have robust authority to re-engage in any permit if ADEQ and tribes cannot come to a consensus on how to deal with impacts to cultural and historic resources.

V. PROGRAM COMPARISON AND IDENTIFICATION OF GAPS OF RECOMMENDED OPTION 1

A. Introduction

As noted elsewhere in this White Paper, existing state laws, in particular the Arizona's State Act, A.R.S. §§ 41-861 *et seq.*, Arizona's statute for tribal consultation (A.R.S. § 41-2051), and Arizona's burial protection laws, together with implementing rules, regulations and guidance, establish certain procedures for protection of cultural and historic resources when a state agency's plans, action or assistance have the potential to affect such resources, including properties of historic or cultural significance to Indian tribes.

The State Act requires ADEQ to consult with SHPO, and under A.R.S. § 41-2051, ADEQ is also required to consult with affected tribes to ensure that measures are taken for the identification and protection of historic properties, including Traditional Cultural Properties. These laws have also been argued in this White Paper to extend to projects on private land that are funded, permitted or licensed by a state agency, including ADEQ and its issuance of Section 404 permits. Arizona's burial protection laws would also be triggered if any human remains or funerary objects were known to be present or encountered during the course of a permitted project.

The majority recommendation for Option 1 contends that the State Act does not provide equivalent protection of cultural and historical resources for several reasons, including, but not limited to: (1) the State Act does not mandate that agencies resolve adverse effects to cultural and historical resources through

execution of a legally-binding document negotiated among consulting parties; and (2) the State Act does not provide for tribal consultation, and the current state tribal consultation laws are too vague to ensure meaningful consultation with tribes.

B. Recommended Options Gaps Analysis

1. Option 1 Gaps Analysis

Table 2, presented in six parts, summarizes the gaps and options identified between ADEQ's current capabilities (*e.g.*, rules, statutes, processes, etc.) and the recommendations for an ADEQ assumed Section 404 program for Option 1 – Vision for Equivalent Protection. Because this is a new program, adopting our recommendations for Option 1 will require action by ADEQ to implement, Table 2, however, only offers options to **close gaps** that are more substantive than those requiring new draft templates (*e.g.*, applications, checklist, etc.) or the development of the MOA between the EPA and State or a potential MOU or IGA to be developed between ADEQ and interested Tribes under existing laws and authorities.

**Table 2. Summary of Gaps and Options –
Cultural and Historic Resources (Option 1)
“Equivalent Protections”**

**1. RESOLUTION OF DISPUTED IDENTIFICATION OF HISTORIC PROPERTIES,
FINDINGS OF NO HISTORIC PROPERTIES AFFECTED, OR ALTERNATIVES FOR
RESOLVING ADVERSE EFFECTS**

Summary of Recommendations	Gap in ADEQ authority, process, or existing capability
<p>ADEQ to provide protections for cultural and historic resources that are equivalent to those protections provided by the Corps for these same resources under their existing CWA 404 program for non-federal nexus projects (e.g., private party, no federal funding, no federal lands involved, no other federal permitting required),² including under the NHPA, Sec. 106 regulations (see, e.g., 36 C.F.R. §§ 800.1, 800.2(C)(2) and 800.4; 800.5, 800.6 and 800.7); the Corps’ Sec. 106 regulations (33 C.F.R., Appendix C); CWA 404 “public interest” requirements (33 C.F.R. §§ 320.4(a)(1) and 320.4(e)); and NEPA which require, among other things, that the acting agency (here ADEQ) to: (1) consult with potentially affected tribes/SHPO/THPO and, in some cases, other stakeholders, on the identification of historic properties or any finding of no adverse effect (including on cultural resources and TCPs) in the APE; and (2) provide a process for resolving differing views for the resolution of adverse effects on these topics.</p> <p>Under 36 C.F.R. §§ 800.6 and 800.7 ongoing and robust tribal, SHPO/THPO and stakeholder consultation is required in an attempt to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse</p>	<p>Currently, Sec. 106 of the NHPA, and the other applicable cultural resource laws applicable to Corps’ activities under federal law, apply to permits where the permitted area is located on state or private lands (even if there is no other federal nexus) because the Corps is the acting agency.</p> <p>If ADEQ assumes primacy, an application for an individual CWA 404 permit involving these lands will not trigger the important tribal consultation, identification and resolution of adverse effects requirements found in the current Corps’ CWA 404 program, including under Sec. 106 of the NHPA and 36 C.F.R., Part 800, though it will trigger less protective requirements under the State Act, A.R.S. §§ 41-861, <i>et seq.</i>, and in certain instances AZ Antiquities Act, A.R.S. §§ 41-841 <i>et seq.</i>, and other applicable laws (A.R.S. § 41-844 & A.R.S. § 41-865).</p> <p>If, in the non-federal nexus context, State law is the only law that applies to considerations of historic/cultural resources, the biggest potential gap stems from SHPO’s limited powers under A.R.S. § 41-863 to engage in tribal consultation and resolve adverse effects involving historic or cultural resources, which appear to be limited to documentary recordation only.</p>

² From discussions held with the Cultural and Historic TWG, it is understood that where ADEQ is asked to issue 404 permits for projects and activities on federal lands, or for projects involving federal funding or other federal permit authority, this circumstances separately trigger Section 106 of the National Historic Preservation Act and other applicable requirements of federal law.

effects on historic properties, **including through a binding PA or MOA.**

See *also* NEPA specific coordination requirements found at 36 C.F.R. §800.8.

Option to Resolve

NOTE: Revisions to State Legislation to accomplish this goal may not be required – and it would be politically unlikely – so it is disfavored as an approach unless absolutely necessary.

ADEQ should include in its CWA 404 rules for publication in the Arizona’s Administrative Code, standards that provide equivalent protections and comparable Tribal processes generally consistent with (but not more stringent than) the Corps’ current program, including but not limited to under Sec. 106 of the NHPA and 36 CF.R., Part 800, and 33 C.F.R. 325, Appendix C. These can be conformed with existing SHPO laws and requirements, whenever applicable.³

Alternatively, ADEQ could, by regulation, cross-reference and adopt Arizona’s existing process that is used for federal nexus projects for all non-federal nexus projects.

Authorities for Resolution Options:

Arizona’s Tribal Consultation Law provides authority sufficient for ADEQ to develop regulations to bridge this gap. A.R.S. § 41-2051(C)(3) provides in relevant part: “to the fullest extent possible and to the best of the agency’s ability, integrate the input generated from tribal consultation into the agency’s decision-making processes to achieve mutually acceptable solutions.” (A.R.S. § 41-2051(C)(3)). Under this authority ADEQ could issue its own rules or cross-reference SHPO requirements under Section 106 calling for robust tribal consultation on the identification of cultural resource/historic properties, any finding of no historic properties affected or no adverse effect. ADEQ could also provide a process for the development and evaluation of alternatives or modifications to the applicant’s activities sufficient to minimize or mitigate for adverse effects on historic properties, including through binding PA’s or MOA’s.

Our review of existing state statutory authorities tells us there is nothing in the authorities delegated to or limitations imposed on ADEQ or the director that would preclude this gaps resolution option. So long as the requirements are not **more** stringent than existing federal laws, they are not precluded.

Specifically, A.R.S. § 49-104(A)(16) contemplates that the department will issue permits, rules and standards, etc. that are no more strict than the “corresponding federal law that addresses the same subject matter.”

A.R.S. § 49-256.01 provides:

“For purposes of implementing the permit program established by 33 United States Code section 1344, the director may establish by rule a dredge and fill permit program

³ This Gaps analysis assumes that the actions by ADEQ to consider and issue an individual CWA 404 permit or to develop and adopt Nationwide (General) Permits involves sufficient control to trigger SHPA and other AZ cultural resource requirements.

that is consistent with and no more stringent than the clean water act dredge and fill program, including a permitting process.”

Here it is important to note that the word “program” is not defined in this Title, but presumably it includes all of the various elements of the current USACE 404 Program, including Section 106 compliance as enhanced by NEPA and the public interest evaluation requirements, Tribal consultation obligations, and related obligations.⁴

2. INVOLVING THE ADVISORY COUNCIL FOR HISTORIC PRESERVATION	
Summary of Recommendations	Gap in ADEQ authority, process, or existing capability
<p>The MOA between EPA and ADEQ will authorize and memorialize the terms for EPA’s re-involvement in any State 404 permit under 33 C.F.R. § 233.50 and § 233.51(6) where the tribe(s), ADEQ, and the applicant are unable to agree on an appropriate means to avoid, minimize, or mitigate for impacts of any State 404 permit on cultural resources. In the event of EPA’s re-involvement for any reason under 33 C.F.R. § 233.50, the tribes would be entitled to request entry or assistance from the Advisory Council of Historic Preservation under 36 C.F.R., Part 800 and Appendix A.</p> <p>The ACHP may become involved in “where the Council determines that its involvement is necessary to ensure that the purposes of section 106 and that [NHPA] are met” or upon invitation/request of the agency/consulting parties. See 36 C.F.R. § 800.2(b); see <i>also</i> 36 C.F.R., Part 800 generally.</p>	<p>Currently, under Section 106, the ACHP may participate in the Section 106 process where the APE is located on state or private lands (even if there is no other federal nexus) because the USACE is the acting agency.</p> <p>If ADEQ assumes primacy, an application for an individual CWA 404 permit involving a non-federal nexus project will not trigger Section 106 of the NHPA or the right of involvement by the ACHP in the process, including with regard to the resolution of adverse effects under 36 C.F.R. §§ 800.2(b), 800.6, 800.7, and 800.8 (provisions for coordination with NEPA).</p>

⁴ This presumption is supported by: 1) the statute’s reference to “the permit program” rather than the federal act, specific portion of the federal act, or specific federal regulations (see the Arizona Legislative Bill Drafting Manual’s General Instructions as to Form and Style); 2) the assertion by the Director of ADEQ’s Water Quality Division that “the substance of the program has to be equivalent to what the federal program requires” (see Senate Committee on Natural Resources, Energy, and Water, 2/5/2018); 3) the bill sponsor’s assertion that “we’re not taking anything away from the requirement to be approved by the EPA, what we’re doing is taking primacy under the same conditions they have now” (see Senate Committee of the Whole #1, 2/19/2018); and 4) the Chairman of the House Committee on Energy, Environment and Natural Resources’ assurance that “any substantive standard relative to the federal action that is currently employed in a 404 permit, we can’t reduce that standard” (see House Committee of the Whole #2, 4/5/2018).

Option to Resolve

Develop an ADEQ rule to be included in Arizona’s Administrative Code under the authorities listed above that would invite the ACHP to become involved in non-federal nexus projects under Section 106 in those circumstances where the EPA re-assumes jurisdiction over a permit or by invitation of an affected tribe, to the extent permitted by law. Alternatively, this could be agreed upon in the Memorandum of Understanding or Intergovernmental Agreement for ADEQ tribal engagement on the 404 program to be developed between ADEQ and any interested Indian tribe as discussed further in this Option 1 Vision.

There is nothing in Arizona law that prohibits an invitation for participation by the ACHP. To the contrary, this approach is supported by the authorities listed above, including Arizona’s consultation requirements.

3. LICENSING TIME FRAMES

Summary of Recommendations	Gap in ADEQ authority, process, or existing capability
<p>In order for ADEQ to ensure compliance with equivalent protections under NHPA, Section 106 for non-federal nexus projects, as discussed in Gaps discussion 1, ADEQ licensing time frames should be set to accommodate the consultation and resolution timeframes outlined in 36 C.F.R, Part 800.</p> <p><u>Note:</u> For Federal nexus projects, ADEQ is already required to engage SHPO and comply with the timeframes outlined in Section 106 and 36 C.F.R., Part 800, but ADEQ licensing timeframes should also take account this requirement.</p>	<p>Licensing time frames for an assumed CWA 404 program are not currently addressed by ADEQ rule or policy. The closest equivalent is the APP program since it has licensing time frames that vary depending on the complexity of the APP at issue.</p>

Option to Resolve

ADEQ will have to develop by rule suspension parameters for licensing time frames where particularly complex cultural and historic resource issues are triggered. These licensing time frames could be set to coordinate with the time periods prescribed by Section 106 regulations (36 C.F.R., Part 800). This is true for both federal nexus and non-federal nexus projects.

4. PUBLIC INTEREST EVALUATION

Summary of Recommendations	Gap in ADEQ authority, process, or existing capability
<p>ADEQ should apply a “public interest” evaluation that is currently required under the Corps’ CWA 404 program, with due consideration being given to the effect which the proposed structure or activity facilitated by the CWA 404 permit may have on values such as those associated with cultural and historic resources which are not otherwise addressed in the Sec. 404(b)(1) guidelines. See 33 C.F.R. § 320.4.</p> <p>The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process.</p>	<p>ADEQ does not presently have a public interest evaluation within the meaning of 33 C.F.R. § 320.4 in its rules or policies for any of its programs.</p>
Option to Resolve	
<p>Arizona waters are a public resource. See A.R.S. § 45-141 (“A. The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.”). It is therefore appropriate for the public interest to be considered in the ADEQ CWA Sec. 404 Program.</p> <p>A.R.S. § 49-256.01 provides: “For purposes of implementing the permit program established by 33 United States Code section 1344, the director may establish by rule a dredge and fill permit program that is consistent with and no more stringent than the clean water act dredge and fill program, including a permitting process.”</p> <p>As noted above, the word “program” is not defined in this Title, but presumably it includes all of the various elements of the current USACE 404 Program, including the USACE’s general public interest requirements set forth in § 320.4, pertaining to cultural and historic resources.</p>	

5. PROTECTION OF INFORMATION DESIGNATED BY A TRIBE AS CULTURALLY SENSITIVE OR CONFIDENTIAL	
Summary of Recommendations	Gap in ADEQ authority, process, or existing capability
<p>ADEQ should ensure equivalent protections under Section 106, NHPA and other laws to avoid the disclosure of information designated by Tribes as culturally sensitive or confidential, which would not otherwise be protected from public disclosure under the express exception to Arizona’s public record laws.</p>	<p>Currently Arizona’s public records law require the disclosure of public documents. However, A.R.S. § 39-125 provides an exception to this broad disclosure requirement:</p> <p>“Nothing in this chapter requires the disclosure of public records or other matters in the office of any officer that relate to the location of archaeological discoveries as described in section 41-841 or 41-844 or places or objects that are included on or may qualify for inclusion on the Arizona register of historic places as described in section 41-511.04, subsection A, paragraph 9. An officer may decline to release this information if the officer determines that the release of the information creates a reasonable risk of vandalism, theft or other damage to the archaeological discoveries or the places or objects that are included on or may qualify for inclusion on the register. In making a decision to disclose public records pursuant to this section, an officer may consult with the director of the Arizona state museum or the state historic preservation officer.”</p> <p>In the operation of the ADEQ CWA 404 Program, ADEQ may receive information about TCPs and cultural practices that have been determined by a Tribe to be culturally sensitive and not for public disclosure, but which may not fall under Arizona’s existing Public Record Exception found in A.R.S. § 30-125.</p>
Option to Resolve	
<p>Option to Resolve this issue is unknown and may require changes to existing public record laws.</p>	

VI. TWG RECOMMENDATION

After multiple meetings of the TWG that included robust discussions on the various options for the consideration and protection of cultural and historic resources in the assumed state with ADEQ 404 primacy, the majority of the TWG members voted to recommend that ADEQ adopt the Option 1 vision outlined in this White Paper which calls for ADEQ to apply protections for cultural and historic resources that are equivalent (but not identical) to the protections that are available for these resources under the Army Corps of Engineers' existing CWA 404 program. As set out below, the TWG has numerous concerns that Option 3 does not provide sufficient protection. After careful consideration of all options, the TWG voted to recommend the Option 1 vision. The TWG majority encourages ADEQ and the Executive Workgroup to adopt Option 1 as it moves forward in the assumption process and to work with the State Historic Preservation Office, Arizona's 22 federally recognized tribes and all affected stakeholders to ensure that the vision for Option 1 is fully implemented by ADEQ should it assume CWA 404 primacy.

VII. MINORITY DISSENT OPTIONS

A. Option 2. Compliance with All Federal Laws

Under this Option, ADEQ will continue to comply with Federal environmental laws that currently apply to the Clean Water Act 404 program. By the time ADEQ submits its application to the EPA to assume responsibility for implementing the provisions of the Clean Water Act 404 Program, there needs to be a Memorandum of Agreement ("MOA") or a Programmatic Agreement ("PA") signed by the EPA, the Governor of Arizona, the Director of the ADEQ, the Director of the SHPO, all of the tribes in Arizona that wish to sign the document, that states that the ADEQ when carrying out the regulatory provisions of the Clean Water Act 404 Program will comply with all Federal environmental laws listed below:

The Antiquities Act of 1906 / the Historic Sites Act of 1935 / the Historic Preservation Act of 1966 (as amended in 1992 and 1999) / the National Environmental Policy Act of 1969 / the Archaeological and Historic Preservation Act of 1974 / the American Indian Religious Freedom Act of 1978 / the Archaeological Resources Protection Act of 1979 / the Native American Graves Protection and Repatriation Act of 1990 / Executive Order 1153 – Protection and Enhancement of the Cultural Environment, May 13, 1971 / Executive Order 13007 – Indian Sacred Sites, May 24, 1996 / April 23, 1994 Memorandum for Heads of Executive Departments and Agencies for Government to Government Relations with Native American Tribal Governments / the Endangered Species Act of 1973 / the Migratory Bird Treaty Act / the Migratory Bird Conservation Act / the Paleontological Resources Preservation Act / the Federal Cave Resources Protection Act / the Safe Drinking Water Act / the Noise Control Act / the Solid Waste Disposal Act / the Comprehensive Environmental Response, Compensation and Liability Act / the Federal Land Policy and Management Act / the Farmland Protection Policy Act / the National Wildlife Refuge System Administration Act / the National Fish and Wildlife Act / the Fish and Wildlife Coordination Act / the Eagle Protection Act.

In addition, the ADEQ should agree to abide by the goals and provisions of the 2007 United Nations Declaration on the Rights of Indigenous People signed by the United States, Mexico and 142 other countries.

1. Option 2: Gaps Analysis

Under Option 2, the State of Arizona would be required to adopt all Federal environmental laws that currently apply to the Clean Water Act 404 program, so the Arizona State Legislature would need to codify those federal laws and the enforcement mechanisms.

B. Option 3. Assumed ADEQ Program Which Maintains Existing State Protection.

Under this Option, ADEQ would comply with existing state law regarding protection of cultural and historic resources in its implementation of the 404 program. This

Option posits that compliance with Arizona law, which includes the State Historic Preservation Act and state laws on tribal consultation and burial remains, would result in protections for cultural and historic resources that are equivalent to the protections currently secured through the Corps' administration of the 404 program. Because these Arizona laws would apply to state permits that are issued pursuant to an assumed federal program,⁵ such as ADEQ's issuance of 404 permits (including permits for projects on private land), no new legislation or agreements would be required under this Option to achieve equivalent cultural and historic resource protection.

1. State Historic Preservation Act

As explained above, the State Act establishes procedures for identifying and protecting "historic properties" in Arizona. Under SHPO's implementing regulations, "historic property" means "a building, site, district, object or structure evaluated by the [Historic Sites Review Committee, appointed by SHPO] as historically significant." A.A.C. R12-8-302. SHPO Guidance Point 9 clarifies that this definition refers to properties that are listed on or eligible for either the National or the Arizona Register of Historic Places. See SHPO, Tribal Consultations and the State Historic Preservation Act: *SHPO Guidance Point 9 1-2 (2009)*, available at <https://azstateparks.com/shpo-guidance-points>. Traditional Cultural Places associated with Indian tribes, whether located on or off tribal land, may be Register-eligible given "their association with cultural practices or beliefs of a living community that are rooted in the community's history and are important in maintaining the continuing cultural identity of the community." *Id.*

a. Applicability of State Act to State-Issued 404 Permits

Two provisions of the State Act address the measures that a state agency must take when its plans, action or assistance may affect a historic property. The scope of these provisions appears broad enough to encompass state permits issued pursuant to an assumed federal program, including ADEQ's issuance of Section

⁵ Please note that the analysis set forth in this Option 3 is limited to the context of state permits issued under an assumed federal program. Option 3 does not address the applicability of the State Act or other state laws to permits issued pursuant to state programs.

404 permits. First, under Section 41-864 state agencies must submit for SHPO's review and comment any "plans" that could affect historic properties. See A.R.S. § 41-864. An agency "plan" means "[a]ny detailed program, activity or undertaking that is worked out beforehand for the accomplishment of an objective that involves a state agency and has the potential to impact or alter a property that may be eligible for the Arizona/National Registers of Historic Places," including "[i]ssuing a permit or license." State Park Guidelines at 19, 21. As noted above, in 2016 the Arizona Attorney General's office reviewed and approved SHPO's interpretation of the State Act, including its applicability to projects on private land that could reasonably impact historic properties.

Second, Section 41-863 requires a state agency to "initiate measures, in consultation with the [SHPO] to assure that if, as a result of state action or assistance given by the agency, historic property is to be substantially altered or demolished, timely steps are taken to make appropriate documentary recordation in accordance with standards which the [SHPO] establishes." A.R.S. § 41-863. The term "state action" as used in this provision means "[a]ny state planned activity that has the potential to impact properties that are listed or eligible for the Arizona Register of Historic Places." State Park Guidelines at 23. Like the definition of an agency "plan," this is a broad definition that would appear to encompass state permits issued pursuant to an assumed federal program, including ADEQ's issuance of 404 permits on state or private land. Section 41-863 is intended to recognize that "situations arise where the imperative duties of the agency preclude the feasible physical preservation of the property," in which case a permanent record of the property "will give future generations a reasonable sense of what the property was." *Id.* at 9. The State Park Guidelines state that "appropriate documentation" should be determined during the consultation process under Section 41-864. *Id.* at 10.

In sum, the State Act requires that a state agency will consult with SHPO whenever a historic property, including a Traditional Cultural Property, may be affected by the agency's plan, action or assistance. It appears that these provisions would be triggered by issuance of state permits under an assumed federal program,

including 404 permits for projects on private land, thus triggering the requirement for SHPO consultation.

b. Consultation Process under the State Act

While the State Act does not itself detail what the SHPO consultation process should look like, SHPO guidance fleshes out this requirement. The guidance identifies five main categories of data and analysis that a state agency must compile and/or prepare and provide to SHPO. These categories may also be viewed as steps in a process. See *generally* SHPO, Standards for Inventory Documents Submitted for SHPO Review in Compliance with Historic Preservation Laws (2016) (“Inventory Standards”); SHPO, Government to Government Consultation Toolkit, available at <https://sites.google.com/view/az-consultation-toolkit/home>; SHPO Guidance Point 9; State Park Guidelines.

First, a state agency must provide a specific description of its plans, including identification of the relevant geographic area. State Park Guidelines at 15. Second, the agency must summarize its efforts to identify historic properties and evaluate whether any of these properties could be affected by the planned action. *Id.* The agency must consider direct, indirect and cumulative effects and include effects of a visual, auditory or “atmospheric” nature. Inventory Standards at 2. Third, a state agency must “evaluate the impacts” of its planned action on identified historic properties,” particularly on the characteristics that make a property eligible for listing, *i.e.*, its “[p]rehistoric, historical, architectural or culturally significant values.” State Park Guidelines at 15. The agency must then make a finding of “no historic properties affected,” “no adverse effect,” or “adverse effect.” *Id.* at 16; Inventory Standards at 2. Fourth, the agency must propose a treatment or mitigation plan to avoid or reduce any adverse impacts to historic properties. This must include a discussion of alternative actions (including avoidance) and alternative treatment or mitigation measures. The agency must explain why the proposed plan was selected. Inventory Standards at 2-3. Fifth, the agency must summarize its tribal consultation efforts, including how it identified Traditional Cultural Places, sacred sites and other traditional use areas. The agency should note which tribes participated in consultation and the types of communication that

took place (e.g., phone, letter, meetings). *Id.* at 3. On this topic, it should be noted that while the State Act itself refers only to consultation with SHPO, other state authorities (identified above and discussed further in the next section) create tribal consultation obligations for state agencies. SHPO guidance advises that consultation with Indian tribes should begin early in the planning process and states that there are “no thresholds” to the size or type of project for which tribes should be consulted. See SHPO Guidance Point No. 9 at 2-4; Government to Government Consultation Toolkit; Inventory Standards at 3.

Throughout the consultation process, SHPO will provide timely feedback or input to the state agency, in accordance with Section 41-864. SHPO will evaluate an agency’s efforts to identify historic properties and may recommend additional actions, including an archaeological survey. State Park Guidelines at 17. SHPO will also review the agency’s assessment of whether a property constitutes a “historic property.” In the event of disagreement between the agency and SHPO on this determination, “the final authority” rests with SHPO as keeper of the Arizona Register. *Id.* Additionally, SHPO will evaluate, and may agree or disagree, with an agency’s conclusion as to the nature of the impacts of its proposed action to historic properties.⁶ *Id.* Finally, SHPO will make recommendations regarding ways to avoid or minimize any adverse effects. For example, “SHPO may request that the agency consider alternatives to the proposed action or redesign some portion of the action, or conduct archaeological data recovery in advance of ground disturbing activity.” *Id.* at 17-18. Ultimately, “the final decision regarding mitigation rests with the responsible agency,” SHPO, SHPO Administrative Procedure Documentation Submitted for Review in Compliance with Historic Preservation Laws (1999). This is consistent with the fact that the State Act is primarily structured as a mandate to state agencies. See A.R.S. § 41-861. This is also

⁶ SHPO guidance does not address how to proceed where SHPO disagrees with a state agency’s conclusion that an effect is not adverse. Notably, however, under NHPA Section 106, a federal agency is not required to adopt a determination by the Advisory Council that an effect is adverse if the agency continues to disagree with that determination after consultation. See 36 C.F.R. § 800.5(b), (c). In that case, an agency is required only to “take into account the Council’s opinion in reaching a final decision on the finding [of no adverse effect]” and to document “the rationale for the decision and evidence of consideration of the Council’s opinion.” *Id.* § 800.5(c)(3)(ii)(A). Thus, even if it were determined that a state agency is not required to adopt SHPO’s view as to whether an effect is adverse, this would not result in less than equivalent protections for cultural and historic resources.

consistent with Section 106 of the NHPA. As discussed below in Section VII(B)(5) below (the “Gaps” analysis for Option 3), NHPA is also procedural in nature and leaves ultimate decision-making authority with the federal agency and not the Advisory Council or SHPO. See 36 C.F.R. § 800.7(c)(4) (entitled “Failure to Resolve Adverse Effects”).

2. Tribal Consultation Authorities

Under Executive Order 2006-14 (Consultation and Cooperation with Arizona Tribes), issued by Governor Napolitano in 2006, all executive branch agencies are required to develop and implement tribal consultation policies and designate a staff member as a principal tribal liaison. Exec. Order No. 2006-14, ¶¶ 1-2. The order describes “consultation” as follows: “to the extent practicable and permitted by law, state agencies and offices . . . seek input from appropriate elected or appointed tribal officials before undertaking any action or policy that will, or is reasonably believed to, have the potential to affect a tribal community or its members.” *Id.* ¶ 1. The order requires that agencies “to the fullest extent possible and to the best of their ability, integrate the input generated from tribal consultation into their decision-making processes to achieve mutually acceptable solutions.” *Id.* A.R.S. § 41-2051, enacted in 2016, creates the Governor’s Office on Tribal Relations and codifies the substance of Executive Order 2006-14, including the mandate for agencies to seek and integrate tribal input prior to implementing actions or policies that have the potential to affect a tribal community or its members. A.R.S. § 41-2051. The broad language of Executive Order 2006-14 and A.R.S. § 41-2051 (referring to a state “action or policy” with “potential to affect” Indian tribes) would appear to apply to state permits issued pursuant to an assumed federal program, including ADEQ’s issuance of Section 404 permits for projects on private land, where the discharge at issue could potentially affect culturally significant sites.⁷

⁷ Additionally, in 1994 ADEQ adopted its Tribal Government Policy (embodied in a Substantive Policy Statement) (amended in 1997 and 2003). See ADEQ Tribal Government Policy, *available at* <https://gotr.azgovernor.gov/gotr/tribal-consultation-policies>. The policy commits ADEQ to providing “early notification to Tribes about decisions that may affect them.” *Id.* at 2-3. This policy would appear to require ADEQ to provide “early notification” to tribes about the issuance of 404 permits involving discharges that could affect their culturally significant sites.

3. Burial Protection Laws

As explained above, the ASM administers Arizona statutes protecting human remains and funerary objects on state and private lands. See A.R.S. §§ 41-844, 41-865. A.R.S. § 41-844, part of the 1973 Arizona Antiquities Act and applicable to state land, governs the discovery of “human remains, funerary objects, sacred ceremonial objects or objects of national or tribal patrimony,” imposes reporting obligations and establishes procedures for tribal consultation and disposition of the remains or objects. *Id.* § 41-844. A.R.S. § 41-844 would not apply to projects on private land but could apply to projects operating pursuant to a state permit issued under an assumed federal program on state land.

A.R.S. § 41-865 governs disturbance of human remains and funerary objects on private land. “Human remains” refer to those of a person who died more than fifty years prior to the discovery, and “funerary objects” are objects “discovered in proximity to human remains and intentionally buried or interred” therewith. A.R.S. § 41-865(J)(2), (5). Under A.R.S. § 41-865, intentional disturbance of human remains and funerary objects is prohibited without written permission from the Museum, and unintentional disturbance must be reported to the Museum. See A.R.S. § 41-865(A), (B). The Museum Rules require “due care” in undertaking land-disturbing activities where human remains are likely to exist and that remains and funerary objects at all times be treated with “respect and dignity.” Arizona State Museum, Rules Implementing A.R.S. § 41-865 Disturbing Human Remains or Funerary Objects on Lands Other Than State Lands § 8-102(A) “Respect and dignity” is defined to include “consultation and cooperation with Groups with Religious or Cultural Affinity regarding treatment and disposition of Remains and Objects, and return of Remains and Objects to such Groups when requested.” *Id.* § 8-101(J). Based on the above, A.R.S. § 41-865 would apply to a project on private land undertaken pursuant to a permit issued by a state agency under an assumed federal program to the extent that the applicant intended to disturb known human remains or funerary objects or if remains or objects were encountered in the course of the project.

4. Existing Arizona Law Provides Protections of Cultural and Historic Resources Equivalent to the Protections Provided under the Corps' Administration of CWA Section 404.⁸

Together, Arizona's State Act and laws on tribal consultation and burial protection provide for a level of cultural and historic resource protection that is substantively equivalent to that provided through the Corps' administration of the Section 404 program. The Corps has promulgated procedures to ensure compliance with Section 106 of the NHPA, codified in Appendix C to its Section 404 regulations at 33 C.F.R. Part 325. Similar to Arizona's State Act, the Corps' Section 106 procedures require the following basic steps: definition of the permit area for review purposes; identification of any historic properties that may be affected in that area; assessment of any adverse effects to historic properties that may occur; and development of a plan to resolve adverse effects through project alternatives or modifications that could avoid, minimize and/or mitigate the adverse effects. See 36 C.F.R. pt. 325, app. C §§ 3-7; see also U.S. Army Corps of Engineers, Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800 (2005) ["Revised Interim Guidance"]. The Revised Interim Guidance also makes clear that the Corps must consult with and consider the views of state historic preservation offices and potentially affected Indian tribes throughout the steps outlined above. See Revised Interim Guidance at 1. The Corps will also consult with the Advisory Council in certain cases, see 36 C.F.R. pt. 325, app. C §§ 7-9, but will make the final decisions regarding whether to issue the permit, what conditions to prescribe, and how to address any adverse effects to cultural and historic resources, *id.* § 10. In sum, under both the NHPA and the State Act, after consultation and consideration of the views of all consulting parties, the final decision as to whether to move forward with an action and how to resolve any adverse effects remains with the responsible federal or state agency.

⁸ While the discussion in this section focuses on equivalency between the State Act and NHPA Section 106, existing Arizona law also provides equivalent protections to other federal laws mentioned under Options 1 and 2. This is discussed in Section VII(B)(5), the "Gaps" analysis for Option 3.

In sum, existing state laws, in particular the State Act, A.R.S. § 41-2051 on tribal consultation and Arizona’s burial protection laws, together with implementing rules, regulations and guidance, establish procedures for protection of cultural and historic resources when a state agency’s plans, action or assistance have the potential to affect such resources, including properties of cultural significance to an Indian tribe. The State Act and A.R.S. § 41-2051 require ADEQ to consult with SHPO and affected tribes to ensure that appropriate measures are taken for the identification and protection of historic properties, including Traditional Cultural Places. These laws appear to extend to projects on private land that are funded, permitted or licensed by a state agency under an assumed federal program, such as the CWA 404 program. Arizona’s burial protection laws would also be triggered if any human remains or funerary objects were known to be present or encountered during the course of a permitted project. The procedures required, and protections afforded, under existing Arizona laws are substantively equivalent to those followed and secured by the Corps pursuant to its regulations and guidance implementing Section 106 of the NHPA.

5. Option 3 Gaps Analysis

As discussed above under Section VII(B)(4), Arizona’s State Act provides protection for cultural and historic resources that is equivalent to the protection provided under NHPA Section 106, as currently administered by the Corps in implementing CWA Section 404. Thus, no “gaps” will exist between Section 106 and the State Act that would require any new legislation, regulations or agreements if ADEQ assumes primacy of the 404 program. To the extent that some may find a perceived gap due to the fact that the State Act does not require identified adverse effects to cultural and historic resources to be resolved, it must be reiterated that neither does the NHPA require this. As stated above, the NHPA is procedural in nature; what it requires is identification and consideration of adverse effects—not necessarily resolution. *See Monumental Task Comm., Inc. v. Foxx*, 240 F. Supp. 3d 487, 495 (E.D. La. 2017); (“Section 106 upholds the NHPA’s objectives neither by forbidding the destruction of historic sites nor by commanding their preservation, but instead by ordering the government to take into account the effect any federal undertaking might have on them. . . . It does not itself require a

particular outcome, but rather ensures that the relevant federal agency will, before approving funds or granting a license to the undertaking at issue, consider the potential impact of that undertaking on surrounding historic places.” (internal quotation marks and citations omitted)). While it may be the case that in the context of most 404 permits issued by the Corps, mutual resolution of adverse effects is reached among the applicant, the Corps, SHPO and other consulting parties, nonetheless both NHPA and the State Act leave the final decision on this matter to the responsible federal or state agency if mutual agreement is not reached.

Existing Arizona law also provides cultural and historic resource protection equivalent to that provided under other federal laws mentioned in the context of Options 1 and 2, including the American Indian Religious Freedom Act (“AIRFA”), Archaeological Resources Protection Act of 1979 (“ARPA”), Native American Graves Protection and Repatriation Act (“NAGPRA”), the Religious Freedom Restoration Act (“RFRA”) and Executive Order 13007 (on federal sacred sites). No new legislation, regulations or agreements would be required to fill any “gaps” between these laws and current Arizona law if ADEQ assumes 404 primacy. As an initial matter, many of these laws apply only to federal and Indian lands and so would not apply even to Corps-issued 404 permits on private land. Further, Arizona already has comparable laws to the federal laws mentioned, including the Free Exercise of Religion Act (A.R.S. § 41-149) (comparable to AIRFRA, RFRA and Executive Order 13007)⁹ and the Arizona Antiquities Act (comparable to NAGPRA and ARPA).¹⁰

⁹ Like RFRA, Arizona’s Free Exercise of Religion Act requires the government to show that a “substantial” (more than “trivial, technical or *de minimis*”) burden to a person’s exercise of religion is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. See A.R.S. § 41-1493.01; 42 U.S.C. § 2000bb *et seq.* The Free Exercise of Religion Act would apparently apply to burdens related to prevention of access or physical damage to religiously significant sites, concerns addressed by AIRFA, 42 U.S.C. § 1996, and Executive Order 13007, 61 Fed. Reg. 26771 (May 24, 1996). Moreover, unlike AIRFA and Executive Order 13007 (applicable to federal lands), Arizona’s statute provides an individual cause of action and allows for recovery of attorney’s fees. See A.R.S. § 41-1493.01(D).

¹⁰ Similar to NAGPRA, 25 U.S.C. § 3001 *et seq.*, and ARPA, 16 U.S.C. § 470aa *et seq.* (both applicable only on federal or Indian lands), the Arizona Antiquities Act includes protections for archaeological discoveries and procedures for tribal consultation and return of burial remains and related items to appropriate tribes. See A.R.S. §§ 41-844 to 847. The portion of the Antiquities Act that addresses protection of burial remains is discussed above in Section VII(B)(3).

One other federal statute mentioned under Options 1 and 2 is the National Environmental Policy Act (“NEPA”). While Arizona does not have an analogous statute to NEPA, courts have held, under the “functional equivalence” doctrine, that NEPA does not apply to most actions of EPA, as an agency whose central mission is to ensure full and adequate consideration of environmental issues. See, e.g., *State of Ala. ex rel. Siegelman v. U.S. E.P.A.*, 911 F.2d 499, 504 (11th Cir. 1990) (collecting cases); see also *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650 (D.C. Cir. 1973) (“[W]e see little need in requiring a NEPA statement from *an agency whose raison d’etre is the protection of the environment.*” (emphasis added)); *State of Wyo. v. Hathaway*, 525 F.2d 66, 71–72 (10th Cir. 1975) (“[A]n organization like EPA whose regulatory activities are necessarily concerned with environmental consequences need not stop in the middle of its proceedings in order to issue a separate and distinct impact statement just to be issuing it. To so require would decrease environmental protection activity rather than increase it.” (emphasis added)). Moreover, the Clean Water Act itself exempts most actions of EPA under that statute from NEPA. See 33 U.S.C. § 1371(c). Like EPA—and unlike the Corps—ADEQ’s central mission is the protection of the environment. See, e.g., A.R.S. § 49-104 (Powers and Duties of ADEQ). Thus, when ADEQ assumes 404 primacy, it will be stepping into EPA’s shoes; an agency dedicated to consideration of the environment will take over the issuance of 404 permits in Arizona from an agency that does not have such a dedicated purpose. Applying the functional equivalence doctrine, then, the fact that Arizona does not have a statutory analogue to NEPA does not lessen, or represent a point of non-equivalence, for cultural and historic resource protection.

For the reasons set forth above, ADEQ’s assumption of CWA Section 404 primacy will not result in any “gaps” in the protection of cultural and historic resources that would need to be addressed through legislative or regulatory action or through agreement.

VIII. STATEMENTS OF CONCERN FROM THE MAJORITY AND MINORITY REGARDING OPPOSING OPTIONS

This section addresses various concerns that the majority and minority options have with the various other options. The majority will first address concerns that it has with Options 2 and 3. The minority Options 2 and 3 will then address concerns that they have regarding Option 1.

A. Majority Concerns with Options 2 and 3.

The TWG discussed the Option 2 vision and the Option 3 vision for the future state of the ADEQ CWA 404 program, but neither one of these visions was deemed adequate by a majority of the TWG group. The Option 2 vision, which would call for the wholesale adoption and application of all existing federal laws, regulations and policies to the ADEQ 404 program, even in the non-federal nexus context, while viewed as a potential ideal state for the majority, was ultimately rejected by the TWG as unrealistic and politically unlikely, particularly because it would require the adoption of a myriad of federal laws by the Arizona State Legislature – something that the Legislature has viewed with extreme disdain over the years.

The Option 3 vision, which expresses the view that existing state cultural and historic resource laws already provide equivalent protection for cultural and historic resources and which concludes that no further action would be required upon ADEQ's assumption of authority under the CWA 404 program, was also rejected by the majority. The majority's decision to reject Option 3 was based on the conclusion that, at least in the context of the non-federal nexus 404 permit, existing state laws, in fact, do not provide protections that are equivalent to those protections that are currently available for cultural and historic resources under the Army Corps' 404 program, particularly when it comes to resolving potential disputes about the identification of historic or cultural resources or the resolution of adverse effects to these resources, among other issues.

As discussed in gaps analysis found in Table 2, above, the majority contends that ADEQ can legally implement a 404 program under the terms suggested by the majority and in a manner that will provide protections for historic and cultural

resources that are equivalent to those currently being implemented by the Corps today. It is not the goal of the majority to “impose federal requirements on the issuance of 404 permits” where they do not exist. See p. 37, *infra*. Rather, the majority took seriously the task set before it by ADEQ which called for the TWG to examine the current state of the law and to identify an “ideal state” from the majority’s point of view for ADEQ’s post 404 assumption in the context of cultural and historic resource protections. The majority identified the Option 1 “equivalent protection” approach. Once the ideal state was identified, ADEQ then charged the proponents of Option 1 to identify ways to bridge the gap between Arizona’s existing historic and cultural resource laws (which are insufficient) and the identified ideal state. The majority has done this.

While the “ideal state” identified by the majority called for ADEQ to provide protections for cultural and historic resources that are “equivalent” to the Corps’ current program in Arizona, the majority has made clear that this does not mean that Arizona must adopt all federal laws or regulations associated with the federal process, or that it must follow the same steps or processes that the Corps currently undertakes with regard to Section 106, NEPA, or any other applicable law, if such steps or processes are not required (for example in non-federal nexus projects).¹¹ Instead, the majority has proposed practical ways, using Arizona’s existing Tribal consultation statute (A.R.S. § 41-2051) and the authority found in the ADEQ 404 primacy statute (A.R.S. § 49-256.01) to engage Arizona Indian tribes, SHPO, and interested parties to identify cultural and historic resources within the APE and work to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate adverse effects on historic properties, including through a binding PA or MOA consistent with law.

¹¹ Recall that under the current state, when the Corps looks to issue an individual 404 permit, the Corps is required to comply with the NHPA, the Corps’ public interest review obligations, NEPA, and other applicable requirements of federal law. After ADEQ assumption, in instances where an applicant asks ADEQ to issue a 404 permit on private lands, where there is no federal funding or additional permit or approval in issue, there is arguably not a federal nexus sufficient to trigger Section 106 or the other related federal requirements. Thus, the primary focus for the majority has not been to impose federal laws on ADEQ where they do not apply, but rather to point out that there is a way under ADEQ’s existing laws and authorities for ADEQ to provide equivalent protections for historic and cultural resources in these instances.

The majority has serious concerns with the positions taken by the Option 3 minority, which call for no additional protections for cultural and historic resources upon ADEQ 404 assumption and which make no effort to identify a practical process for engaging with Indian tribes, SHPO or other affected parties on non-federal nexus 404 projects. In addition, the majority disagrees with a number of legal assertions outlined by the Option 3 minority, as discussed briefly below:

- The Option 3 minority takes a very narrow view of the authority granted to ADEQ under A.R.S. § 49-256, contending that ADEQ was granted authority by the State Legislature only to administer those discreet elements of the Corps' current program that pertain specifically to the CWA's 404(b)(1) guidelines. However, under the Corps current 404 program, an application for a CWA 404 permit also triggers, among other things: (a) Section 106 compliance; (b) multiple tribal consultations requirements under federal law; (c) SHPO and stakeholder engagement; (d) the obligation of the Corps to take a hard look at the direct, indirect, and cumulative effects of the proposed action and reasonable alternatives under NEPA; and (e) a complete public interest review, which includes consideration of the impacts to historic and cultural resources (33 C.F.R. §§ 320.4(a)(1) and 320.4(e)). Option 1, as approved by the majority, calls for ADEQ to implement a CWA 404 program which provides equivalent protections for cultural and historic resources as those currently found in the existing Corps' 404 program. This includes more than just an obligation on the part of ADEQ to conduct a narrow 404(b)(1) guidelines analysis. And, as discussed above, ADEQ has authority to do this under existing consultation requirements and the legislation that authorized ADEQ to assume primacy over the Corps' current CWA 404 program, which, calls for, *inter alia*, robust tribal consultation standards and "strict compliance" with Section 106 of the NHPA and other applicable laws. See U.S. Army Corps of Engineers Tribal Consultation Policy and Related Documents (2013) at PDF p.7, available at:

https://www.spk.usace.army.mil/Portals/12/documents/tribal_program/USA%20Native%20American%20Policy%20brochure%202013.pdf

- The minority makes the unremarkable point that the historic preservation and tribal consultation requirements of the NHPA only come into play when there is a federal undertaking “which would include the issuance of a 404 permit *by a federal agency such as the Corps...*” (italics in original). The majority agrees. This is the very reason for the gap analysis conducted by the majority in this paper. The majority has proposed legally defensible authorities and practical ways for ADEQ to engage with affected tribes, SHPO and stakeholders in these circumstances where such engagement is currently required by the Corps but would not be required for those non-federal nexus projects post assumption.
- The minority’s suggestion that NEPA’s process requirements are not part of the Corps’ current 404 program is misleading at best. There can be no reasonable dispute that NEPA applies to Corps’ activities or that the potential issuance of a CWA 404 permit is considered a “major federal action” under NEPA. See, e.g., 40 C.F.R. 1508.18(b)(4).
- The minority suggests that the public interest review requirements currently administered by the Corps under its existing 404 program (33 C.F.R. §§ 320.4(a)(1)) and 320.4(e)) are merely an artifact of the Rivers and Harbors Act and thus, should be disregarded. The majority disagrees. The public interest requirements of the Corps’ program are fully ingrained in the current process used by the Corps to examine impacts, including cumulative impacts, to historic and cultural resources. As such, the majority recommends that ADEQ examine these elements of the public interest standard and consider how these current requirements of the Corps’ 404 program can be incorporated in ADEQ’s program post assumption. The majority also rejects the minority’s suggestion that the public interest review requirements that expressly address historic and cultural resources are outside the Charter or were “never discussed” by the TWG. The TWG was established to address the very thing that the above-cited public interest evaluations are intended to address – historic and cultural resources. Moreover, draft documents presented to the TWG from the very beginning have consistently cited the public interest requirements for examining

impacts to historic and cultural resources. Had the minority wished to raise their concern about the applicability of these requirements, they could have done so at any one of the many TWG meetings.

- The minority seeks to redefine and grossly minimize the important role that tribal consultation plays in the Corps' 404 program, contending that the Corps only engages in tribal consultation with affected tribes over a narrowly delineated "permit area" as this term is defined in 33 C.F.R., Part 325, Appendix C, while ignoring the specific requirements for tribal consultation under the NHPA and its implementing regulations (36 C.F.R., Part 800),¹² as well as the Corps' broadly stated Tribal Consultation Guidelines, Executive Order 13175, and other applicable laws and requirements – all of which require that the permit area be defined consistent with the APE. This interpretation is also consistent with the understanding of the subject matter experts involved in this TWG who engage with the Corps in Arizona on cultural and historic resources issues in the course of their professional duties on virtually a daily basis.
- The minority's suggestion that pending jurisdictional determinations should not be included in ADEQ's proposed PIP map undermines the purpose of the PIP map, which the majority understands was intended to be informative to the public and help affected stakeholders, including tribes and SHPO, understand ADEQ permitting activities, including the location and types of permits pending before ADEQ. The majority appreciates ADEQ's efforts in developing the PIP map and urges ADEQ to include jurisdictional determinations on the map.

¹² Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties. See 36 C.F.R. § 800.1(a).

- The minority seeks to limit the important and mandatory role the Advisory Council of Historic Preservation (“ACHP”) has under Section 106 and 36 C.F.R., Part 800. ADEQ may not, post assumption, lawfully limit the role of the ACHP where the undertaking to be facilitated by the issuance of a CWA 404 permit has the potential to affect eligible historic or cultural resources. The majority does not disagree, however, that in the case of non-federal nexus project as described herein, the role of the ACHP may be limited, unless the EPA reassumes jurisdiction over the permit.

B. Minority (Option 2) Concerns with Options 1 and 3.

The only way to fully protect cultural resource sites, sacred sites and traditional cultural places and the ecosystems that supports the integrity of these sites and places for Clean Water Act 404 permits is to require that ADEQ comply with all federal laws. Any other option falls short of adequate protections.

C. Minority (Option 3) Concerns with Option 1.

In addition to the fact that Option 1 is not necessary because existing state law already provides for equivalent cultural and historic resource protection, the Option 3 minority has the following significant concerns with Option 1:

- Option 1 arguably violates Arizona law (A.R.S. §§ 49-104(A)(16), 49-256.01(A)) by attempting to impose, albeit indirectly, federal requirements on the issuance of 404 permits by ADEQ that would not otherwise apply under the respective federal law. For example, it attempts to argue that the Arizona Legislature’s use of the word “program” in A.R.S. § 49-256.01 effectively imports into a state-assumed program the requirements of all federal laws that would be triggered by the Corps’ issuance of a 404 permit but which, by their own terms, are not triggered by a state’s issuance of a 404 permit. Specifically, Option 1 asserts that because the Legislature did not define the word “program,” there arises a presumption that it intended for the state to develop rules or standards consistent with all federal laws that the Corps currently applies in administering the 404 program including NEPA. This presumption is unjustified. In fact, the Legislature left no doubt or ambiguity as to the intended meaning of the word “program” when it

immediately modified that word by the phrase “*established by 33 United States Code section 1344.*” See A.R.S. § 49-256.01 (emphasis added). The historic preservation and tribal consultation requirements of the NHPA are not “established by” Section 404 but only come into play when a federal “undertaking,” which would include the issuance of a 404 permit *by a federal agency such as the Corps*, triggers the NHPA on its own terms. Similarly, NEPA’s process requirements are *not* part of the program “established by” CWA Section 404 but instead only become potentially applicable when the Corps’ issuance of a 404 permit is considered a “major federal action.” Nor do the statements quoted in Option 1 from the primacy bill’s legislative history change this conclusion. Putting aside the fact that legislative history is not resorted to unless a statute’s meaning is unclear, *see, e.g., Butler Law Firm, PLC v. Higgins*, 243 Ariz. 456, 459 (2018), none of the quoted statements indicate that the “program,” “conditions,” or “substantive standard” referred to by the respective speaker were beyond the bounds of the “program,” “conditions” and “substantive standard” established by CWA Section 404. While these statements express recognition that a state-assumed program could not lessen the stringency of the CWA’s requirements, none of these statements suggests that the state would adopt—by legislation, rule or agreement or otherwise—requirements consistent with all federal laws that currently apply to the Corps’ issuance of 404 permits. In short, the Arizona Legislature’s use of the word “program” was not intended to import into state-issued permits federal laws, standards, procedures or other requirements that are not established by Section 404 but are only triggered by and incident to *federal* action.

- Option 1 recommends that ADEQ conduct a public interest review in determining whether to issue 404 permits. This issue was never discussed among our TWG as a whole. We further believe it is outside our TWG’s charter and understand that this issue has been addressed by the Permit Process Technical Working Group. For the record, since Option 1 raises the issue, we concur with the minority opinion on that issue authored by Scott Thomas of the Permit Process Technical Working Group. Specifically,

the Corps' public interest review regulation is an artifact of the Rivers and Harbors Act and is nowhere mandated by the CWA. Accordingly, it is not required "for purposes of implementing the permit program established by 33 United States Code Section 1344" and is in fact therefore outside the authority granted ADEQ under A.R.S. § 49-256.01.

- By recommending that ADEQ's jurisdictional determinations be included in ADEQ's PIP process and map, Option 1 appears to suggest that its proposed Section 106 equivalent protection requirements will apply to some extent even to ADEQ's issuance of jurisdictional determinations. However, jurisdictional determinations are not permits or permits in process. In addition, under the federal 404 permitting program the Corps' issuance of a jurisdictional determination does not trigger the Section 106 process. Consequently, Option 1 appears to be recommending something "more than" equivalent protection.
- Option 1's vision of equivalent protection suggests that tribal consultation should address all topics that the Corps is required to consult about under applicable federal laws and policies including topics presumably beyond cultural and historic resources. This results in a recommendation beyond the scope of the TWG's Charter.
- Option 1 recommends that ADEQ invite/permit the involvement of the ACHP in certain circumstances. The ACHP does not have authority under the NHPA and its own implementing regulations to review or otherwise participate in proceedings where Section 106 is not triggered (i.e., where there is no federal "undertaking" under Section 106). See 54 U.S.C. § 304108(a); 36 C.F.R. § 800.2(b). To the extent that Option 1 recommends that the ACHP become involved in the issuance of a 404 permit in any circumstances where ADEQ remains the permit-issuing agency, this would exceed the ACHP's statutory authority.
- While Option 1 refers to securing equivalent protection for cultural and historic resources to that now offered by the Corps when issuing 404

permits, neither the white paper general discussion nor Option 1 contains a sufficient discussion of the Corps' NHPA process or implementing regulations and guidance. Option 1 focuses on the generic ACHP regulations at 36 C.F.R. § 800.1 et seq. and largely ignores the more specific Corps regulations at 33 C.F.R. Part 325, Appendix C as well as the Corps' NHPA/Appendix C implementation guidance (see, e.g., *Updated Standard Operating Procedures for the U.S. Army Corps of Engineers Regulatory Program*, § 18 (Corps, Jul. 1, 2009); *Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800* (Corps, Apr. 25, 2005); *Clarification of Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800 dated April 25, 2005* (Corps, Jan. 31, 2007)). For example, the Corps' Appendix C regulations refer to the "permit area" rather than the APE and provide a detailed definition of the term "permit area." See 33 C.F.R. pt. 325, app. C §1(g). Similarly, the Corps NHPA/Appendix C implementation guidance only references the "permit area" and there are no references to the APE. Thus, the white paper's discussion of the federal consultation process arguably overstates or misrepresents the consultation process under NHPA followed by the Corps when issuing 404 permits in Arizona.

IX. CONCLUSION

The majority of the members of the TWG recommends Option 1 should ADEQ choose to move forward with the assumption of the CWA 404 Program.

Appendix A

Cultural and Historic Resources Technical Working Group Charter

Appendix B

Federal Process Flow Chart

Appendix C

Option 1 Flow Chart

Appendix D

State Flow Chart

Appendix E

Definitions

Appendix F

Guidelines for the State Historic Preservation Act

APPENDIX A – CULTURAL AND HISTORIC RESOURCES TECHNICAL WORKING GROUP CHARTER



Cultural and Historic Resources Technical Working Group Charter

The Arizona Department of Environmental Quality Water Division has formed Technical Working Groups (TWGs) to assist the Department in developing a program to assume Clean Water Act (CWA) 404 permitting for Arizona. Each TWG will operate according to this Charter.

In implementing its mission to protect and enhance public health and the environment, ADEQ strives for radical simplicity, nationally recognized technical and operational excellence, and balanced, leading-edge environmental protection. Please allow this vision to guide the workgroup's recommendations developed under this Charter.

ROLE OF THE PANEL

The panel will meet regularly to review and discuss the assigned objectives. In addition, the TWG will:

- Provide monthly updates on work status to the CWA 404 Executive Committee.
- Report and seek additional input on work products at regularly scheduled stakeholder meetings.
- Provide a white paper with final recommendations by December 20, 2018.
- Once the group has completed the white paper it will be disbanded.

The TWG is a voluntary working group which will make recommendations to the CWA 404 Executive Committee. Neither the group nor individual members will be asked to make decisions on behalf of ADEQ.

MEMBERSHIP

Members of the TWG were chosen from more than 115 stakeholders who voluntarily applied to assist ADEQ in developing the CWA 404 Program. Membership selections were made by ADEQ based on the technical areas of expertise, geographic and special interest diversity and willingness to participate.

This is a voluntary advisory working group. Members are expected to treat each other with mutual courtesy, respect and dignity. If either the ADEQ Water Quality Director or

the chair are concerned about the commitment, behavior, or performance of a workgroup member, the two shall consult to determine appropriate action, which may include replacement of the member. Members may withdraw at any time.

LEADERSHIP

ADEQ selected a Chair from the stakeholder applicants. The Chair will be responsible for providing updates to the CWA 404 Executive Committee and working with ADEQ contracted staff to prepare meeting agendas. At the first meeting, TWG members will select a Vice Chair to lead the group in the absence of the Chair.

Meetings may be facilitated by the Chair or the TWG may use a third-party facilitator to assist in keeping the meetings on track to enable the Chair to participate more fully in technical discussions. Summary meeting notes will be prepared by ADEQ contracted staff.

The Chair is responsible for the following:

- Establishing a workgroup timeline
- Moving the discussion forward to keep the agenda on time
- Ensuring that the workgroup remains productive
- Ensuring that all sides of an issue are explored, including hidden or unpopular aspects
- Encourage participation
- Assist the workgroup in reaching consensus and articulating issues where consensus is not possible
- Assist workgroup members in preparing the deliverables
- Ensure that workgroup deadlines are met, and the final report is delivered to ADEQ on schedule

MEETING FORMAT

The format of the meetings will be determined by the TWG members. Technical support and information will be provided as needed by ADEQ staff. Only TWG members will be notified of work group meetings. These are working meetings and will not include an open call for public comment. Stakeholder meetings will be held in the fall so that all stakeholders and public can receive updates on work group discussions and provide additional input. Also, TWG agendas and meeting notes will be posted on the ADEQ website.

DECISIONS/CONSENSUS

Ideally, the workgroup will be able to operate on a consensus basis. If a consensus cannot be reached, to move forward, decision will be by a quorum of 50% + 1 of the members (which may include telephonic attendance).

For the sake of the record and to make certain that ADEQ fully understands all sides of the issue, the chair will ensure that the dissenting voters provide a written explanation of

the reasons for disagreement. These explanations will be included in the final deliverable of the workgroup.

MEETING SCHEDULE

At the first TWG meeting, the members will establish a meeting schedule sufficient to complete the objectives by the stated deadline. ADEQ will provide contracted staff to assist in scheduling meetings, preparing agendas and meeting notes, and communication with members. Meeting space will be available at ADEQ. As needed ADEQ will provide WebEx and conference calls for TWG meetings.

MEETING ATTENDANCE

ADEQ recognizes and appreciates that workgroup members are experts in their field and are volunteering their valuable time. It is expected that workgroup members will participate in good faith throughout the process. Members should make every effort to attend all meetings in person or electronically. Members represent their affiliations and bring their special expertise to the table. Full participation is needed to ensure all affiliations and expertise are represented, all viewpoints are voiced, and decisions are reached by consensus to the maximum extent possible. Members may send a “proxy” if they are unable to attend a meeting. The member must fully brief the proxy prior to the meeting. The proxy may not ask the TWG to reconsider a previous decision or open new discussions on previous issues. Members who are unable to participate on a consistent basis may be asked to relinquish their position on the TWG.

MEDIA REQUESTS

The Technical Working Group chair and members may refer any media requests regarding ADEQ’s assumption of CWA § 404 or the workgroup process to ADEQ’s Public Information Officer, Erin Jordan, should they choose. Each workgroup member agrees that if contacted by the media or any organization to answer questions or asked to speak at an event, they will not present themselves as representing ADEQ in any way. Contact information for Erin Jordan is as follows:

Phone: 602-771-2215
Email: Jordan.Erin@azdeq.gov

COORDINATION WITH OTHER STATES

ADEQ hopes that workgroup members will research programs in other states as a part of their analyses. If there are questions that workgroup members must ask these states (e.g. New Jersey or Michigan), please confer with ADEQ staff to coordinate communication with said states.

OBJECTIVES

The Technical Working Group will conduct meetings and work collaboratively to accomplish the following objectives.

CULTURAL AND HISTORIC RESOURCES WORK GROUP OBJECTIVES

Questions:

- What is the current state?
 - What are the specific benefits and problems of the current state process?
 - What specific benefits result from the National Historic Preservation Act (NHPA) process in Arizona?
 - What mechanisms or conditions in the NHPA Memorandums of Agreement (MOAs), or other specific federal requirements, allow for those benefits?
- What is the ideal future state for documenting/protecting cultural and historic sites under ADEQ's permitting program, and why this is the ideal future state?
- Note: Future state recommendations should provide equivalent protection of WOTUS as the existing Corps program.
- Identify the gaps between the current state and the ideal future state.
- Provide gap closure options to enact the future state (i.e., what entities involved, what agreements, rules, other law may be necessary to enact future state– Note: this does not contemplate modifying federal law)
- Why are each the best options?
- What are the potential obstacles to implementing each gap plan options?
- In addition to the descriptions, please provide a flow chart or other visual representation of each of the above, if possible.

Recommended Structure:

- Introduction
- Description of current state (including positives and negatives)
- Description of ideal future program under the State/elements (& why is this ideal?)
- Identify and explain the gaps between current state and future state Arizona program
- Identify and explain gap closure options (including explanations and why they're good options)
 - Brief intro description
- Table summary of options
 - Separate headings for each option to discuss each fully, including benefits and drawbacks
 - E.g., Option XYZ
 - Description
 - Benefits of Option XYZ (also perhaps compared to other options)
 - Drawbacks/obstacles to each gap option (also perhaps compared to other options)

(Please provide visual representations of the above, where helpful for understanding, especially regarding process.)

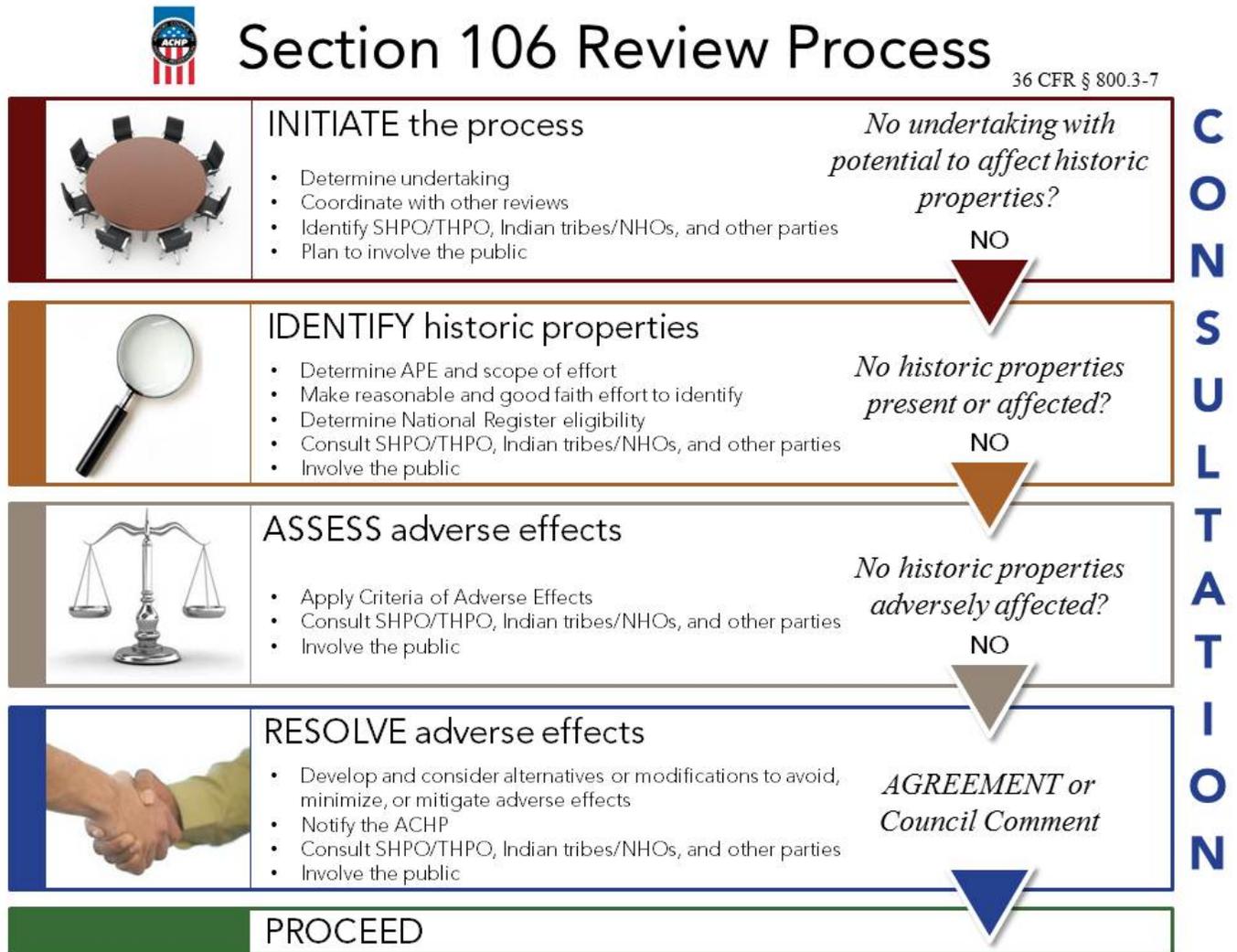
Please consider and discuss the following items in your workgroup deliberations:

- General Considerations:
 - Methods for a smooth transition to the State program
 - Ensuring quality environmental protection in a timely manner

- Ensuring clarity, predictability, and certainty for all parties
 - Tools, resources, & processes ADEQ needs to execute the future state (resources in house [e.g. computer programs, information access] &/or externally [e.g. State Historic Preservation Office (SHPO)])
 - Tools or information ADEQ needs from permittees
 - Tools or resources permittees need from ADEQ
 - New Jersey, Michigan, and Florida processes as NJ and MI are the only two states that have assumed the program, and Florida is close to assuming and has done analyses regarding NHPA
 - Federal nexus project scope – would it always align with 404 project scope? If federal nexus, is the NHPA analysis always going to apply to 404 project area? (e.g. project on forest service land v. some other federal project nexus)
 - General Permits and Individual permits
 - Future Corps and EPA involvement
 - How to ensure adequate environmental review when NEPA is not required
- Specific Considerations:
 - Risks to the environment and cultural/historic resources
 - Risks of disruption to the permit approval/disapproval process of Federal Indian Trust Responsibilities
 - Historical and cultural sites that we have in Arizona
 - National Historic Preservation Act (NHPA) (16 U.S.C. 470 et seq.), specifically section 106
 - NEPA and NHPA implementing and related rules, including: 36 CFR Part 63; 33 CFR Part 325, Appendix B & C; 33 CFR § 320.4; 33 CFR Part 230; and 40 CFR § 1500 et seq.
 - Differences between the scope of review and data requirements between NHPA/NEPA cultural resource requirements and 404(b)(1) requirements in 40 CFR 230.54
 - Limits on state authority (including A.R.S. § 41-1030 and § 41-1001.01)
 - Other state laws and authority including:
 - Arizona Antiquities Act (1973, amended 1981):
 - A.R.S. § 41-841 – 846 (Arizona State Museum) (pertains to lands owned or controlled by the state)
 - Burial Protection Statutes (1990):
 - A.R.S. § 41-865 (private lands) and A.R.S. §41-844 (state, county, city lands) (have been incorporated into 106 MOAs with the Corps)
 - State Historic Preservation Act (1982):
 - A.R.S. § 41-861 – 864 (SHPO) (have been incorporated into 106 MOAs with the Corps)
 - A.R.S. § 41-2051(C) and ADEQ's ensuing Tribal Consultation Policy

APPENDIX B – FEDERAL FLOW CHART

Section 106 Review Process Flowchart

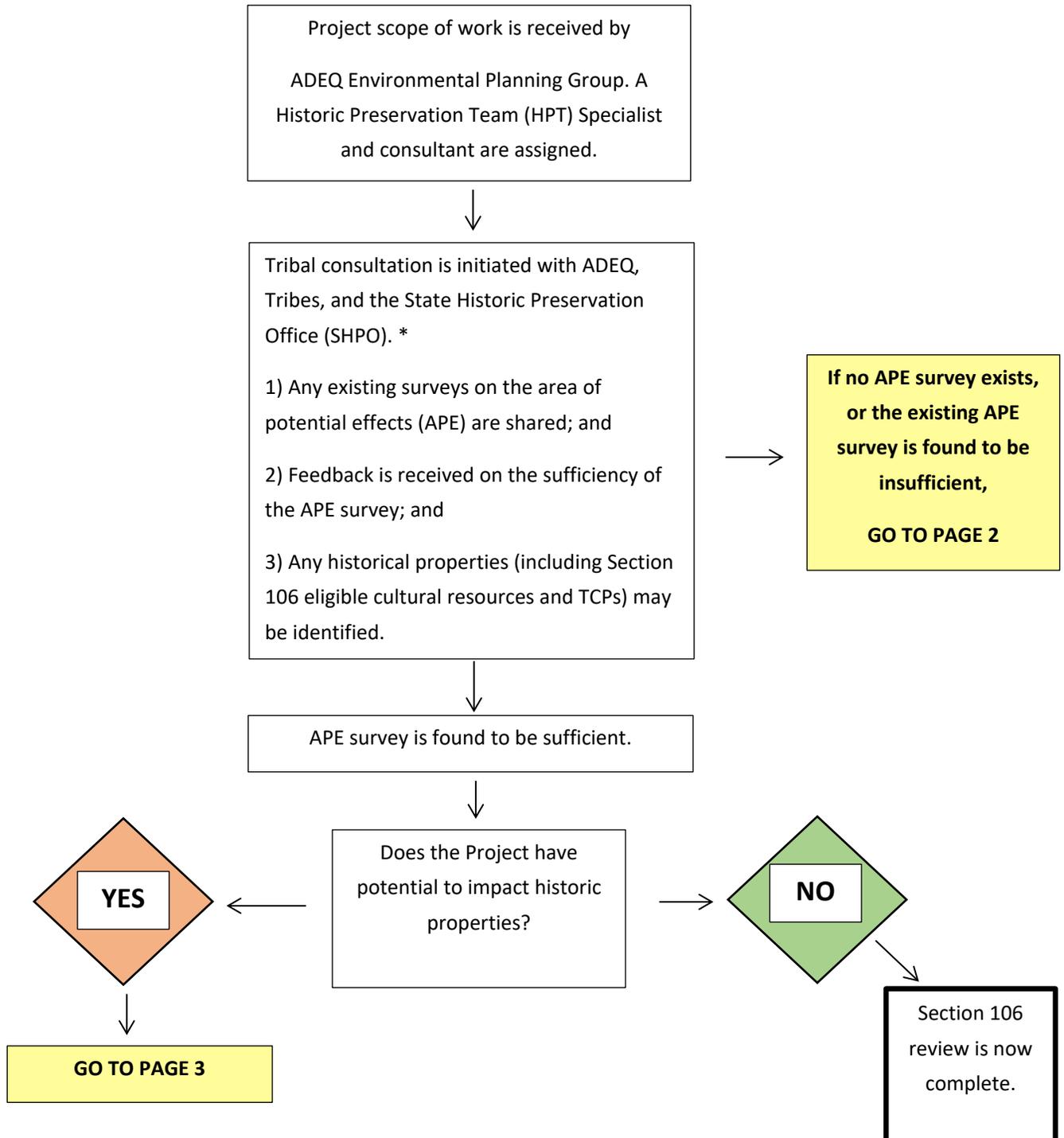


Source: <https://www.achp.gov/digital-library-section-106-landing/section-106-review-process-flowchart>

APPENDIX C – OPTION 1 FLOW CHART

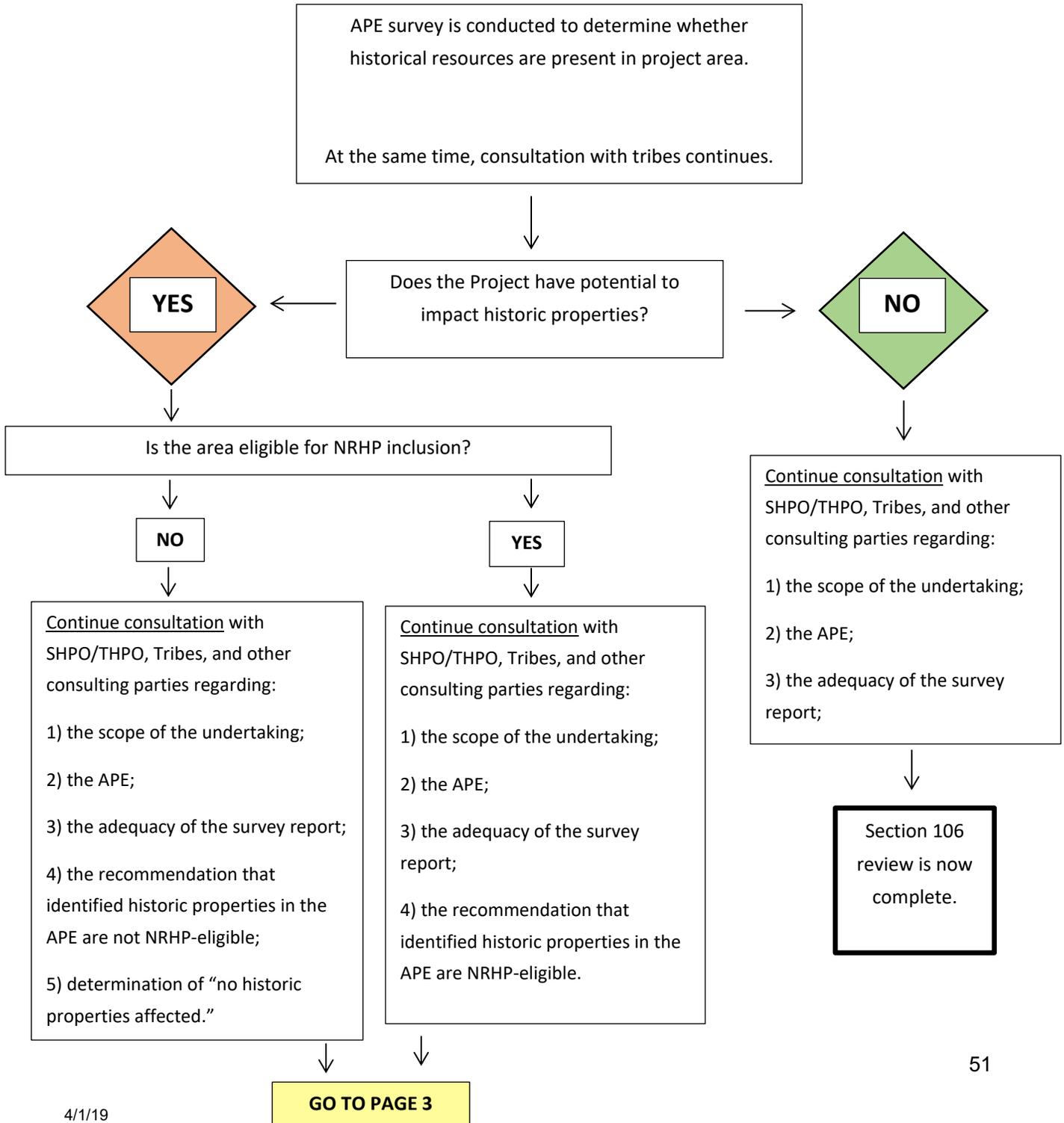
Section 106 Consultation Process

1. Initiate Tribal Consultation When There is an ADEQ 404 Activity



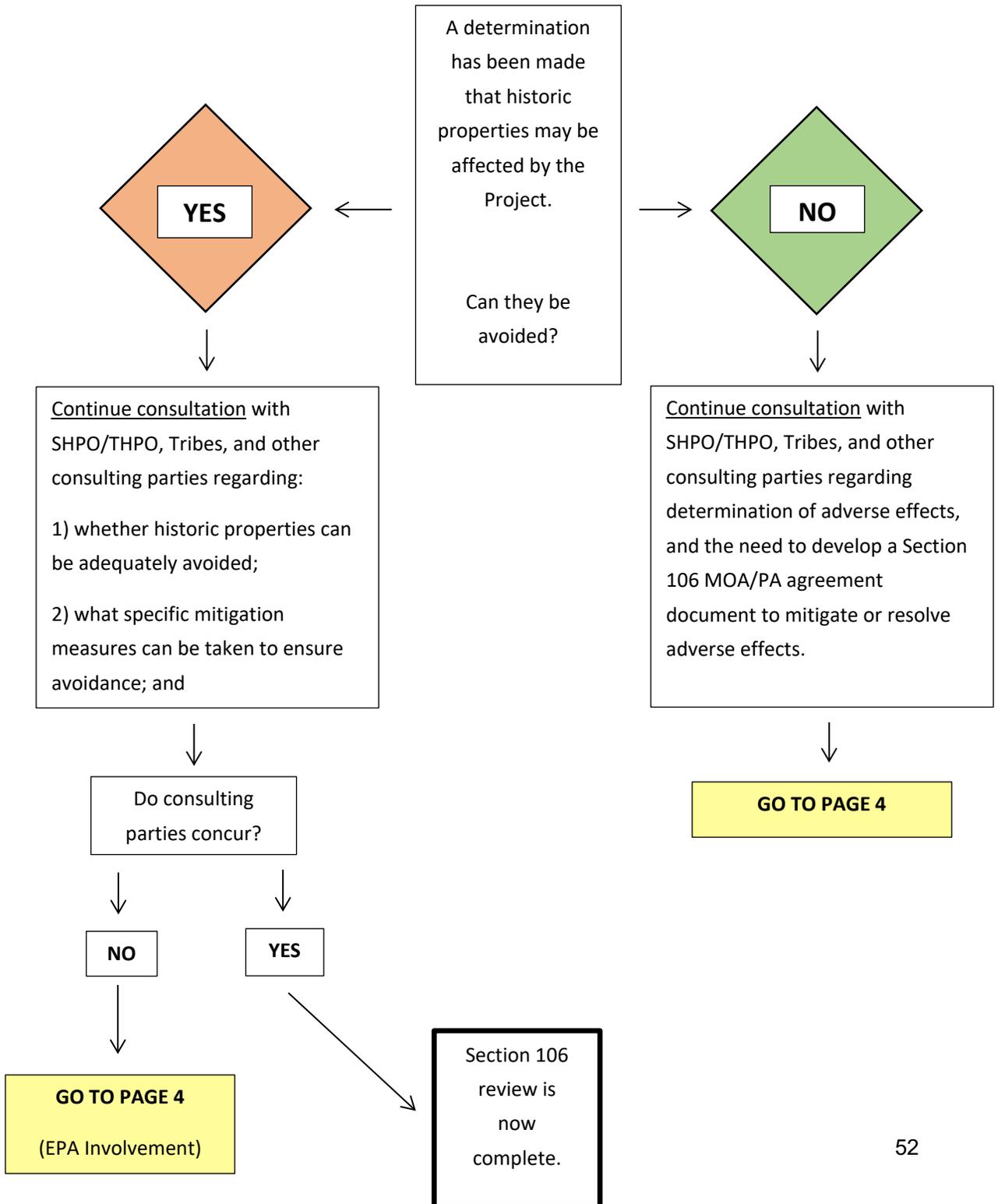
Section 106 Consultation Process

2. APE Survey Required



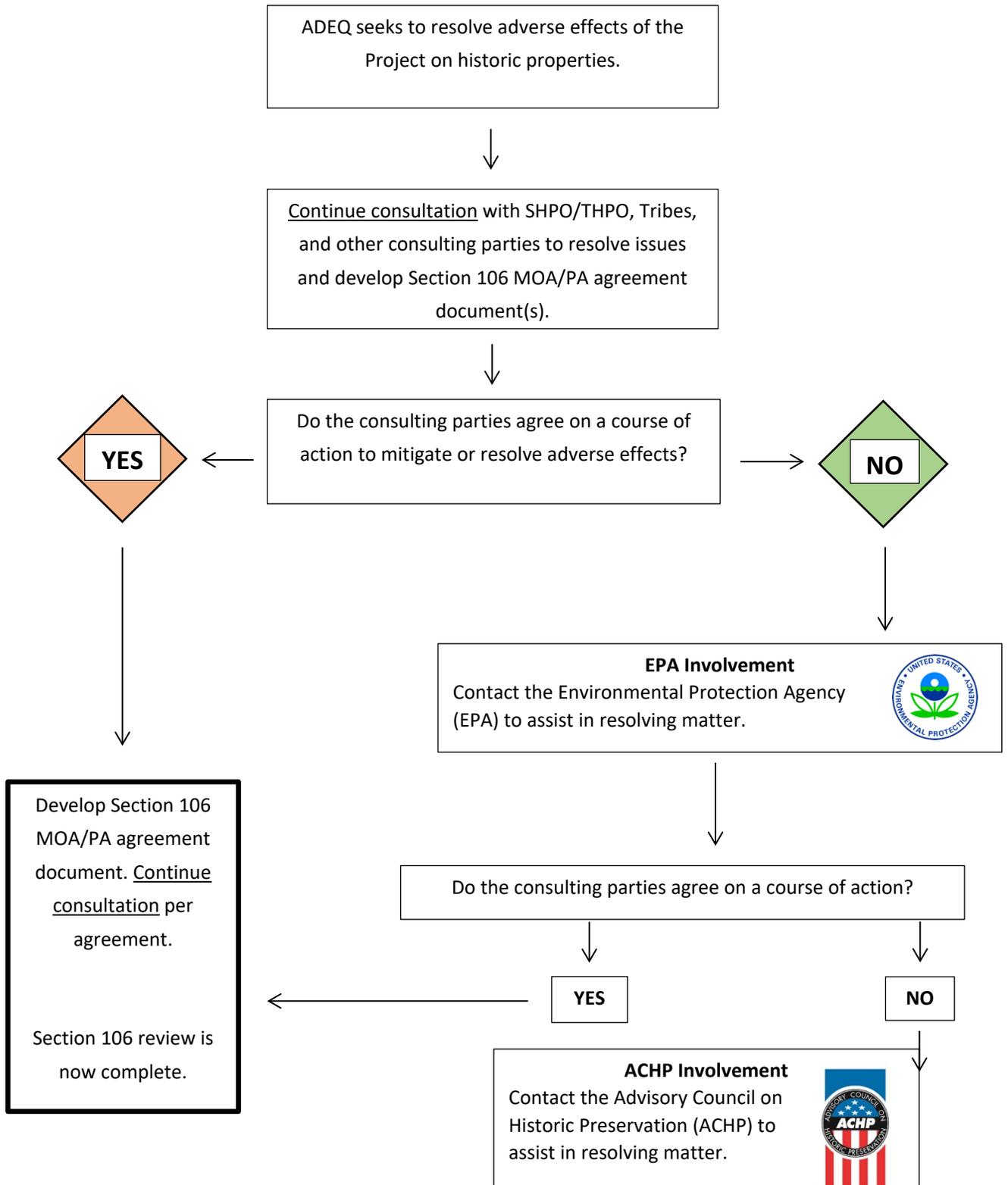
Section 106 Consultation Process

3. Historic Properties May Be Affected



Section 106 Consultation Process

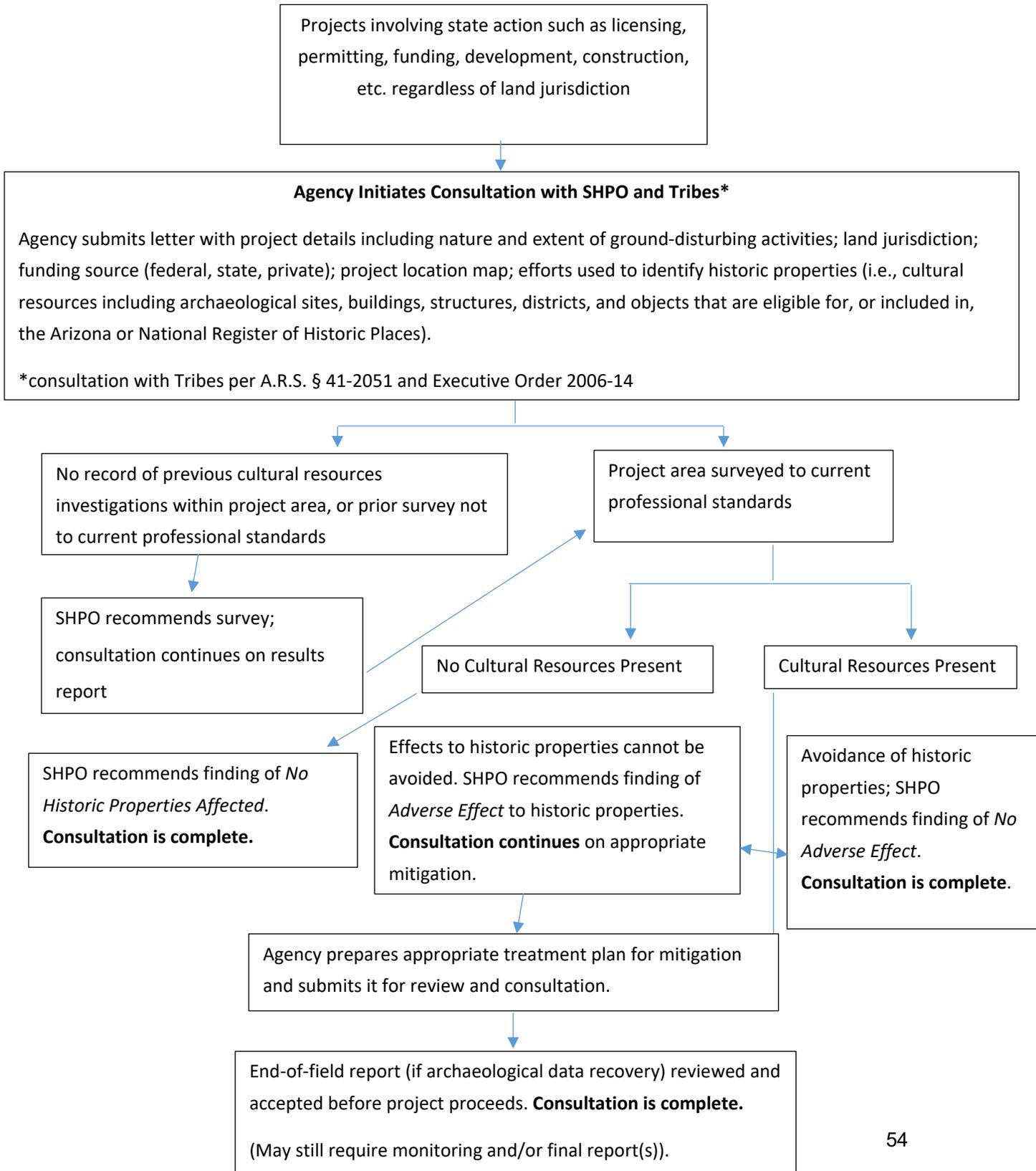
4. Mitigating or Resolving Adverse Effects to Historic Properties



APPENDIX D – STATE FLOW CHART

STATE HISTORIC PRESERVATION ACT CONSULTATION FLOW CHART

(assumes no agreement with SHPO in place to streamline reviews and batch consultation)



APPENDIX E – DEFINITIONS

Adverse Effect occurs when an undertaking may alter, directly or indirectly, any of the characteristics that qualify a historic property for inclusion in the National Register of Historic Places in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling or association (see criteria of adverse effect at 36 CFR § 800.5(a)(1)) (see also criteria of adverse effect at 33 C.F.R. pt. 325, app. C § (15)).

Advisory Council on Historic Preservation (ACHP) is an independent federal agency established under the National Historic Preservation Act. Under Section 106 of the NHPA, the ACHP must be afforded an opportunity to comment on federal, federally assisted, or federally-licensed undertakings that may affect historic properties.

Archaeological site (following Arizona state standards) means any material remains of past human life or activities that are at least 50 years old; does not include in-use historical buildings or structures.

Area of potential effects means the geographic area(s) within which an undertaking may cause changes in the character or use of historic properties, if present. The APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking. The APE must include all areas of direct, indirect, and reasonably foreseeable cumulative effects.

Arizona Register of Historic Places is a list of Arizona's historic properties worthy of preservation and serves as an official record of Arizona's historic districts, sites, buildings, structures, and objects of national, state, and/or local significance in the fields of history, archaeology, architecture, engineering, and culture. The criteria for listing in the Arizona Register parallels the National Register (as defined below); historic properties eligible for, or listed in, the National Register are automatically eligible for or listed in the State Register.

Arizona State Historic Preservation Act (State Act) states that the historical and cultural foundations of this state should be preserved as a living part our community life and development (A.R.S. § 41-861 et seq). The statute applies to all state agencies and requires state agencies to establish a program to locate, inventory, and nominate historic properties to the Arizona Register of Historic Places (41-862); maintain records related to historic properties (§41-863); and consult with the SHPO (§41-864).

Cultural resources are prehistoric and historic districts, archaeological sites, buildings, structures, objects, cultural landscapes, sacred sites, and traditional cultural properties. The term "cultural resources" is a more general term than historic properties, and does not qualify significance or whether a resource is Register-eligible.

Historic properties are cultural resources, as defined above, that have recognized significance and are eligible for, or listed in, the National Register of Historic Places.

Memorandum of Agreement is a legally binding document among one or more federal agencies, SHPO, and consulting parties, developed to resolve the adverse effects of an undertaking on historic properties. MOAs are appropriate to record the agreed upon resolution for a specific undertaking with a defined beginning and conclusion, where adverse effects have been identified for all historic properties.

National Historic Preservation Act sets the federal policy for historic preservation, including Section 106, the process for identifying, documenting, and evaluating historic properties and considering the effect of agency undertakings on historic properties (54 USC 306108).

National Register of Historic Places is the official list of historic properties significant in American history, architecture, archaeology, engineering and culture maintained by the Keeper of the National Register on behalf of the Secretary of the Interior (36 CFR Part 60).

No Adverse Effect means that the undertaking will not alter any of the characteristics of an historic property that qualify it as National Register eligible (36 CFR § 800.5(b)).

No Effect means that there are no cultural resources in the APE or permit area; there are cultural resources in the APE or permit area but none are determined to be National Register eligible; or there are historic properties in the APE or permit area but none will be affected by the undertaking.

Permit Area under the Corps' Section 106 regulations means those areas comprising waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures (36 C.F.R. pt. 325, app. C § 1(g)(1)). The Corps regulation set forth three tests that must all be satisfied for an activity undertaken outside the waters of the United States to be included within the permit area (see 36 C.F.R. pt. 325, app. C § 1(g)(1)-(4)).

Programmatic Agreement (PA) is a legally binding document among one or more federal agencies, SHPO, and others developed to minimize or reduce the effects of an undertaking on historic properties. PAs are appropriate for multiple or complex federal undertakings where (1) effects to historic properties cannot be fully determined in advance, (2) a document is necessary to articulate a process of Section 106 compliance for a particular federal agency program, (3) management activities are repetitive or routine and can be accommodated by a single, streamlined process.

Section 106 of the NHPA requires federal agencies to consider the effects of their undertakings on historic properties. Undertakings include projects carried out by the agency, or projects subject to agency funding, permit, license or approval. Section 106 provides for the ACHP, SHPO, tribes and other interested parties an opportunity to consult on these matters before a final decision is made.

State Historic Preservation Officer (SHPO) is the official appointed or designated by the Governor pursuant to Section 101(b)(1) of the NHPA to administer the State historic preservation program (36 CFR § 800.16(v)). The SHPO is afforded the opportunity to review and comment on all State plans and federal undertakings, pursuant to the State Historic Preservation Act, A.R.S. 41-861 et seq., and 54 USC 306101 et seq., the National Historic Preservation Act.

Tribal Historic Preservation Officer is the designated official to direct a program approved by the National Park Service, and assumes some or all of the functions of SHPOs on tribal land.

Traditional Cultural Property, as defined in National Register Bulletin 38, is a property that is listed or eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that are (1) rooted in that community's history; and (2) important in maintain the continuing cultural identity of the community.

Undertaking is a project, activity, or program funded in whose or in part under the direct or indirect jurisdiction of a federal agency including (1) those carried out by or on behalf of the agency; (2) those carried out with federal assistance; (3) and those requiring a federal permit, license or approval (36 CFR §800.16(y)).

APPENDIX F – GUIDELINES FOR THE STATE HISTORIC PRESERVATION ACT

GUIDELINES FOR THE STATE HISTORIC PRESERVATION ACT

Introduction

The State Historic Preservation Act (SHPA) states that the “historical and cultural foundations of this state should be preserved as a living part of our community life and development “ (A.R.S. §41-861 et seq.). The attached Guidelines for the State Historic Preservation Act are intended to assist state agencies in the implementation of the SHPA, and should not be construed as a substitute for state agencies’ discretion in applying the Act, or as a limitation on the applicability of the Act. Any person or entity charged with the interpretation of the Act shall take into consideration the policy of the Act and shall construe any provision of the Act to favor “a spirit of stewardship” for the state’s historical and archaeological resources “for the inspiration and benefit of present and future generations” (A.R.S. §41-861 et seq.).

The State Historic Preservation Office (SHPO) with input from state agencies, advisory committees and commissions, tribal preservation offices and preservation professionals developed the enclosed *Guidelines*. The process of developing the *Guidelines* began at the SHPO, based on the result of the State Trust Land Legislative Study Committee that recommended in part establishing one set of interagency standards for recording and treating cultural resources. *Draft Guidelines* were circulated for review and comment in December of 1997. The SHPO made modifications to the original draft based on the comments received. A workshop on the *Guidelines* was held on May 12, 1999. Over 150 participants including state agency officials, tribal representatives, and preservation consultants attended the workshop. The *Guidelines* were amended as appropriate to reflect comments and suggestions from workshop participants. The Arizona State Parks Board approved these *Guidelines* on January 18, 2001. Today these *Guidelines* are intended to assist state agencies in the compliance process. SHPO and the State Parks Board continue to encourage your feedback on the *Guidelines for the State Historic Preservation Act* so this document will be as helpful as possible.

A.R.S. §41-861

Agency Responsibilities

“The chief administrator of each state agency is responsible for the preservation of historic properties which are owned or controlled by the agency. Prior to acquiring, constructing or leasing buildings for the purposes of carrying out agency responsibilities, each agency shall consider the use of historic properties available to the agency. Each agency shall undertake any preservation that is necessary to carry out this article in a manner consistent with the preservation of historic properties, the duties of the agency and the professional standards, which the state historic preservation officer recommends. The chief administrator of a state agency may designate a full-time employee to coordinate the agency’s activities under this article.”

Applicability: This article applies to chief administrators of any state agency that owns, acquires, leases, manages, or controls properties.

Purpose: The purpose of this statute is to cause chief administrators of state agencies (and their respective agencies) to consider the current and potential adaptive re-use of historic properties (definition on page 23) that are listed on or eligible for the Arizona Register of Historic Places when planning or carrying out their programs. Chief administrators of state agencies (and their respective agencies) are also charged to preserve the integrity of eligible or listed properties under state ownership or control. The preservation of these properties is important because they embody Arizona’s “vital legacy of cultural, educational, aesthetic, inspirational, economic and energy” heritage (A.R.S. §41-861 et seq.). State agencies provide an example for the “public and private preservation and utilization of all usable elements of this state’s historic built environment” by considering the use of historic properties, including those properties not owned by the State, in carrying out their duties (A.R.S. §41-861 et seq.). Through adaptive reuse, the historic built environment is “preserved as a living part of our community life and development,” and provides “historical and cultural foundations...in order to give a sense of orientation” to the people of Arizona (A.R.S. §41-861 et seq.).

Responsibility: Chief administrators of state agencies (and their respective agencies) are responsible for the preservation of historic properties that they own or control. Preserving historic properties includes identifying, evaluating, recording, and documenting the properties and applying the appropriate preservation treatments (stabilization, rehabilitation, protection, restoration, and/or maintenance). The process of acquiring, protecting, managing, rehabilitating, restoring, stabilizing, and/or maintaining properties, provides an example of “stewardship for the inspiration and benefit of present and future generations” (A.R.S. §41-861 et seq., General Provisions, Legislative Findings; Legislative Intent). State agencies shall carry out these responsibilities consistent with professional standards (see Tabs 3, 4, and 5) and the duties of the agency. The State Historic Preservation Officer (SHPO) will provide advice and assistance in carrying out these preservation activities (see A.R.S. §41511.04). An agency does not need to create a new position for a “preservation officer,” but may assign those duties to an existing full-time position. The “preservation officer” should attend training provided by the SHPO on preservation legislation, guidelines, policies, and standards. The SHPO recommends (but does not require) that the “preservation officer” have a background in archaeology,

history, architecture, architectural history, or historic preservation. In order to carry out the responsibilities of the statute, the chief administrator of each state agency shall, within the fiscal ability of the agency:

- I. Identify Arizona Register eligible properties that are owned or under the control of the agency (see A.R.S. §41-862). The SHPO will assist state agency administrators or their designees in determinations of Arizona Register eligibility for state owned or controlled properties.
 - A. Consultants hired by the agency to assist in the identification and evaluation of state owned or controlled properties should meet the following standards for Professional Qualifications:
 1. Identification and evaluation of archaeological resources - Consultants must meet requirements for an Arizona State Museum's archaeological permit to carry out archaeological work on state land (Chapter 8, Arizona State Museum, Arizona Board of Regents, R 8-101 through 8 - 207, Section A implementing §41-865 (B), Rules implementing A.R.S. §15-1631 and A.R.S. §41-841, et seq. of the Arizona Antiquities Act). The SHPO recommends that consultants meet the *Secretary of Interior's Professional Qualification Standard for Archaeology* (Tab 2). If the identification and evaluation is being carried out as part of a project having federal involvement, the Secretary of Interior's Standards are required.
 2. Identification and evaluation of all other historic period properties (not archaeological) - Consultants should meet the appropriate *Secretary of Interior's Professional Qualification Standards* (Tab 2).
 - B. Identification and evaluation efforts should follow the *Secretary of Interior's Standards and Guidelines for Identification and Evaluation* (Tab 2) and the State Historic Preservation Office *Standards for Conducting and Reporting Cultural Resources on State Land* (Tab 4).
- II. Identify, with recommendations of the SHPO, the preservation treatment(s) that are appropriate for identified Register-eligible properties. Preservation treatment include:
 - A. Stabilization – The act or process of applying measures to re-establish weather resistance and the structural stability of unsafe or deteriorated property while maintaining the essential form of the property, as it presently exists.
 - B. Rehabilitation – The act or process of returning a property to a state of utility through repair or alteration, which makes possible an efficient contemporary use while preserving those portions or features of the property that are significant to its historical, architectural, and cultural values.

- C. Maintenance – The act or process of applying measures to sustain the existing form, integrity, and material of a building or structure, and the existing form and vegetation of the site.
 - D. Restoration – The act or process of accurately recovering the form and details of a property and its setting as it appeared at a particular time by removing later work or replacing missing elements.
- III. Evaluate the current use of historic properties to ensure that the activities and use of the property are not causing damage beyond normal wear and tear or accelerated deterioration of the property or properties.
 - IV. Ensure that historic properties being used by the agency remain in use to the extent possible. Agencies shall consider all options for continued use of a property prior to discontinuing the active use of a historic building.
 - V. Identify program activities that could take place in historic properties owned or controlled by the agency.
 - VI. Identify historic properties under the ownership or control of the agency that are not currently in use, are underutilized, or are being used in a way that is damaging to the property. Evaluate each property, its adaptive reuse potential, and pursue ways to preserve the historic property through adaptive reuse or protective measures.
 - VII. Whenever a new activity or program is planned, consider, to the maximum extent possible, ways in which historic properties (including those not owned or controlled by the agency) may be utilized and integrate this use into the program activity or design.
 - VIII. Give thorough consideration to the use and reuse of historic properties (including those not owned or controlled by the agency) for agency programs as alternatives to the construction, acquisition, or leasing of new facilities and to the demolition of historic properties (including those not owned or controlled by the agency).
 - IX. Designate an agency employee to coordinate the identification, evaluation, and preservation planning for historic properties that are owned or controlled by the state agency.
 - A. The designee should (but is not required to) have a background in archaeology, history, architecture, architectural history, or historic preservation.
 - B. Designees should attend training provided by the SHPO on preservation legislation, guidelines, policies and standards.

NOTE: State agencies may apply for Heritage Fund matching grants to assist in the evaluation, stabilization, adaptive reuse planning, and rehabilitation of historic properties under their ownership or control.

A.R.S. §41-862 Program

“In cooperation with the state historic preservation officer, each state agency shall establish a program to locate, inventory and nominate to the Arizona register of historic places all properties under the agency’s ownership or control that appear to meet the criteria for inclusion on the register. Each state agency shall exercise caution to assure that the property is not inadvertently transferred, sold, demolished, substantially altered or allowed to deteriorate significantly. The Arizona historical advisory commission shall include the performance of state agencies in initiating and satisfying the programmatic management of historic properties in its annual report to the legislature and the governor as provided in ARS §41-1352.”

Applicability: The statute applies to all state agencies.

Purpose: The purpose of this statute is to cause state agencies to 1) identify, document, and nominate historic properties that are eligible for the Arizona Register of Historic Places, 2) to exercise caution to assure that the preservation of state owned or controlled historic properties are not inadvertently transferred, sold, leased, demolished, substantially altered or allowed to deteriorate significantly, and 3) make the legislature aware of agency performance under this act.

Responsibility: Each state agency “shall establish a program to locate, inventory and nominate historic properties,” and “shall exercise caution” with regards to the care and disposition of historic properties under their ownership or control.

In order to carry out the responsibilities of the statute, each agency should:

- I. Develop a program, in consultation with the SHPO, for locating, inventorying, and nominating Arizona Register eligible historic properties that are under their ownership or control.
 - A. Outline a program to locate (identify) historic properties under agency ownership or control.
 1. Locate, within the agency’s records, properties under agency jurisdiction (owned, leased, managed, or controlled, including lands, buildings, structures, or archaeological sites).
 2. Identification of historic properties often will include contracting with a preservation consultant (see *Secretary of Interior’s Professional Qualifications Standards* in Tab 2, *SHPO Standards for Conducting and Reporting Cultural Resource Surveys on State Laws* (Tab 4) and Arizona State Museum archaeological permit application and requirements (Chapter 8, Arizona State Museum, Arizona Board of Regents, R 8-101 through 8 - 207, Section A implementing A.R.S. §41-865 (B), Rules

implementing A.R.S. §15-1631 and A.R.S. §41-841, et seq. Arizona Antiquities Act).

3. Historic properties under agency ownership or control should be identified using methods recommended by the State Historic Preservation Office [*SHPO Standards for Conducting and Reporting Cultural Resource Surveys on State Land* (Tab 4)], and be consistent with the *Secretary of Interior's Standards and Guidelines for Identification* (Tab 2)
 4. Establish priorities for the identification, inventory, and nomination of historic properties, based on:
 - a. When properties will be affected by agency activities, e.g. when properties are being considered for sale, lease, demolition, construction, alteration, or acquisition.
 - b. Where there is a high likelihood for threats to properties, such as vandalism or deterioration.
- B. Submitting to and Maintaining Inventory of Properties. The agency should record and submit documentation of identified historic properties to the SHPO for determinations of eligibility for the Arizona Register of Historic Places and for entry in the statewide inventory of properties. Property documentation and recordation includes:
1. Completing *State of Arizona Historic Property Inventory Forms* for buildings, structures, and objects that are 50 years or older and under agency control or ownership and submitting forms to the SHPO for formal eligibility determinations. The SHPO may seek advice from the Historic Sites Review Committee on issues of eligibility. As the official Keeper of the Arizona Register of Historic Places (Arizona Administrative Code, R12-8 206), the SHPO is the final authority on eligibility for the Arizona Register of Historic Places.
 2. Submitting archaeological survey reports to the SHPO for formal determinations of eligibility. Agencies should complete and submit to the SHPO the inventory forms for the statewide inventory system (AZSITE) unless an Arizona State Museum Permit requires submittal of the AZSITE Forms to the Arizona State Museum. By virtue of the AZSITE Consortium Intergovernmental Agreement, the State Historic Preservation Office and Arizona State Museum are among a number of agencies and institutions participating in and maintaining a shared statewide inventory of archaeological sites. Participants in the agreement will share maintenance, data entry, and access responsibilities. Specific guidance for state agencies regarding data entry and submittal of AZSITE Forms will be provided with the forms.

3. Maintaining, in cooperation with the SHPO, an updated inventory of properties located by the identification program to be used in management, which will include a list of properties evaluated, information on properties not yet evaluated, and general background data. The agency may utilize AZSITE as their official inventory.
- C. Nomination to the Arizona Register of Historic Places. Agencies shall nominate properties found to be eligible for the Arizona Register of Historic Places by:
1. Completing appropriate nomination forms and submitting them to the State Historic Preservation Office.
 - a. The National Register of Historic Places Form is the official form used to register properties for the Arizona Register of Historic Places. Forms and instructional guidance are available from the SHPO.
 - b. Nominations are reviewed by the Arizona Historic Sites Review Committee (HSRC) and presented at a public meeting for comment (see A.R.S. §41-1352). The HSRC may recommend the nomination for listing on the Arizona Register as submitted or may request revisions.
 - c. Once a nomination of a property(s) has been accepted by HSRC for listing on the Arizona Register of Historic Places, the property owner may request that the nomination be forwarded to the Keeper of the National Register for consideration for listing on the National Register of Historic Places.
- II. Develop a system to integrate identification, inventory, and nomination into the agency's overall program and other agency systems for property management, land use, and project planning.
- A. When the agency is involved in overall land use and urban planning, in assisting, in carrying out projects, in building or other property management activities, the agency should consult with the SHPO and other knowledgeable parties, such as the Arizona State Museum, appropriate land managers, Certified Local Governments, and Tribal Historic Preservation Offices, to determine:
1. Whether historic properties are known or expected to occur within the area that may be subject to direct or indirect effect by the project
 2. The kinds of further identification and evaluation efforts that may be appropriate.

- A. Integrate the agency's management inventory with its program of property management, land use planning, and project planning in order to identify opportunities for the effective use and preservation of historic properties, identify potential conflicts between the preservation of historic properties and the implementation of agency mission requirements and other legislative mandates, and to identify areas where information is insufficient to make planning decisions about historic properties, suggesting the need for further study.
 - B. Provide a schedule and guidelines for the continuing evaluation, maintenance, curation, stabilization, and rehabilitation of the property or properties in a manner that will ensure the continued historic integrity of the property. Any evaluation, maintenance, stabilization, or rehabilitation should meet the *Secretary of Interior's Standards for Rehabilitation* (Tab 3) and other standards recommended by the SHPO.
 - C. Prior to the lease, exchange, or sale of a historic property that is under:
 - 1. The agency's chief administrator or designee shall consult with the SHPO to identify the most appropriate strategies to insure long-term protection and preservation of the property.
 - 2. State agencies responsible for historic properties under their ownership or control may enter into contracts for the management of such properties, provided that the agency has consulted with the SHPO and the contract contains terms and conditions deemed by the agency's chief administrator or designee to be appropriate and necessary to protect the historic property and ensure its preservation.
 - 3. When state agencies are unable to insure the long-term preservation of a property due to lease, exchange, or sale, the agency shall consult with the SHPO to determine the appropriate level of documentation needed to preserve information about the property. The agency shall insure that documentation is completed prior to the sale, lease or exchange of the property.
- III. The Arizona Historical Advisory Commission (AHAC) shall include the performance of state agencies in initiating and satisfying the programmatic management of historic properties in its annual report to the legislature and the governor, which is submitted annually on September 30.
- A. Each state agency will report on its preservation planning and management activities annually to the Arizona Historical Advisory Commission by August 31.

- B. The SHPO shall annually prepare a report on statewide preservation activities. The report will be submitted to the Arizona Historical Advisory Commission by August 31 each year and will include a summary of the State Historic Preservation Office's activities in the areas of National and Arizona Register of Historic Places, statewide planning, the review of state and federal projects for compliance with state and federal legislation, state and federal historic preservation grant programs, the statewide inventory, state survey efforts, state and federal preservation tax incentive programs, the Certified Local Government Program, and public historic preservation outreach and education programs.

A.R.S. §41-863 Records

Each agency shall initiate measures, in consultation with the state historic preservation officer, to assure that if, as a result of state action or assistance given by the agency, historic property is to be substantially altered or demolished, timely steps are taken to make appropriate documentary recordation in accordance with standards which the state historic preservation officer establishes. The agency shall deposit the records with the department of library, archives and public records and with the state historic preservation officer for future use and reference.

Applicability: The statute applies to all state agencies whose actions or assistance results in the substantial alteration or demolition of a historic property, whether such property is on state land or non-state land, whether the property is under the direct ownership or control of the agency, or where the property is not under state control but where the effect on the property would not occur but for the state's action or assistance; to the SHPO; and to the Arizona State Library, Archives, and Public Records.

Purpose: While most aspects of the SHPA follow the legislature's intent that positive efforts be made to "foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony," A.R.S. §41-861 anticipates that this goal may not always be feasible. As stated in that section, the preservation of resources must be "consistent with the preservation of historic properties, the duties of the agency and professional standards which the state historic preservation officer recommends." While §41-862 provides that the agency exercise caution to assure that the historic character of a particular property is not inadvertently harmed, situations may arise where the imperative duties of the agency preclude the feasible physical preservation of the property. In such instances, one way to ensure that the property can continue to contribute to "our community life and development" is to create a permanent record of the property, which will give future generations a reasonable sense of what the property was.

Responsibilities: The three parties named in A.R.S. §41-863 have both distinct and related responsibilities.

The agency responsibilities:

1. Identify when, as a result of state action or assistance given by the agency, a historic property is to be substantially altered or demolished. Consultation between the agency and the SHPO is specified at this point and can be directed to answer the question of what constitutes a substantial alteration. In general, the SHPO will recommend recordation when the change in the property is of such a degree that it will no longer be eligible for listing in the Arizona Register of Historic Places.
2. Initiate measures to assure that timely steps are taken to make appropriate documentary recordation. In this regard "appropriate" is defined by the

standards set by the SHPO. “Timely steps” is taken by the SHPO to imply that recordation is made before the agency’s action or assistance has actually affected the property.

3. Deposit duplicate copies of the records with the SHPO and the Arizona State Library, Archives and Public Records.

The SHPO responsibilities:

1. Consult with the agency to determine when recordation is needed.
2. Establish appropriate standards for recordation.
3. Archive the records and make them available for future use and reference.

The Arizona State Library, Archives and Public Records responsibilities:

1. Archive its copy of the records and make them available for future use and reference.

In order to carry out the responsibilities of this statute, each agency shall:

- I. Determine the need for documentary recordation. A.R.S. §41-863 specifies consultation between the agency and the SHPO. Consultation is best achieved through the process specified under A.R.S. §41-864 for review of agency plans. Recordation is called for when the comment of the SHPO on an agency plan is that the agency’s action or assistance will substantially alter or demolish the property. If, in the agency’s opinion, the imperative duties of the agency preclude as unfeasible any course of action other than that resulting in the substantial alteration or demolition, then the agency shall initiate timely steps to make appropriate documentary recordation.
- II. Obtain Appropriate Documentation. The kind and level of recordation necessary will be determined in consultation with the SHPO and will be based on standards set by the SHPO and the Secretary of the Interior’s Standards (Secretary of the Interior’s Standards for Architectural and Engineering Documentation, for Archaeological Documentation, and for Historical Documentation (Tab 2), Arizona SHPO’s State Historic Preservation Act Documentation Standards for Historic Properties, Standards for Conducting and Reporting Cultural Resource Surveys on State Land (Tab 4), SHPO’s Standards for Documentation of Archaeological Properties on State Land and for State Projects (currently in draft form see Tab 4), SHPO Administrative Procedure – Documentation Submitted for Review in Compliance with Preservation Laws (Tab 6) and Arizona State Museum’s Antiquity Act permitting requirements (Chapter 8, Arizona State Museum, Arizona Board of Regents, R 8-101 through 8 - 207, Section A implementing A.R.S. §41-865 and Section B, Rules implementing

A.R.S. §15-1631 and A.R.S. §41-841 et seq. Arizona Antiquities Act). The level and kind of documentation required will vary depending on the nature of the property, its relative significance within identified historic contexts, and the nature of the undertaking's effect on the property

- A. The SHPO has documentation standards for typical architectural recordation (Tab 4). These standards are intended for standing buildings, structures, and objects and differ substantially from recordation for archaeological properties. It is possible that, in cases where a property is of exceptional merit or importance in Arizona history, the SHPO may request additional documentation material.
- B. Depending upon the type of archaeological site and the impacts that will affect it, archaeological data recovery may range from simple recordation to extensive excavations. All archaeological data recovery should be conducted by qualified professional archaeologists (see *Secretary of Interior's Professional Qualifications Standards*; Arizona State Museum's Antiquity Act permit application and requirements, Chapter 8, Arizona State Museum, Arizona Board of Regents, Rules 8-101 through 8 - 207, Section A implementing §41-865 and Section B, Rules implementing A.R.S. §15-1631 and A.R.S. §41-841, et seq. of the Arizona Antiquities Act and Professional Qualifications for Cultural Resource Surveys in *Standards for Conducting and Reporting Cultural Resource Surveys on State Land*).
 - 1. For sites that consist of only surface remains, appropriate data recovery would include, but is not limited to, mapping, photographing, text description, artifact and sample collection and analysis, and report write-up. For more complex sites with subsurface components, archaeologists may need to conduct extensive excavations, to be followed with detailed laboratory analysis of the artifacts and samples collected from the site. Archaeological documentation of the fieldwork will usually result in analytical reports that contain descriptive and synthesis sections, maps, and photographs. The appropriate level of data recovery determined in consultation with the SHPO (see also Arizona State Museum Antiquity Act permitting review requirements), and will depend upon the type of archaeological site that is going to be affected and the nature of impacts from a project.
 - 2. Project-specific permits from the Arizona State Museum are required for excavations on lands owned or controlled by a state agency, city or county (A.R.S. §41-865, R 8-101 through 8 - 207 and Rules implementing A.R.S. §15-1631 and A.R.S. §41-841, et seq. Arizona Antiquities Act). As per the permit requirements, artifact collections and documentation records will need to be curated in an approved state repository.

C. Historic records including oral histories and ethno-historic records are important and often necessary forms of documentary information on historic properties. This information should not be overlooked when documenting the significance and integrity of a property to determine Arizona Register eligibility and for documenting properties already determined eligible for the Register. Such documentation will normally be in the form of text reports, photographs, audiotapes and transcripts, and/or videotapes.

III. Undertake Documentation. As it is the agency's planned action or assistance that is affecting the property, it is the responsibility of the agency to produce the appropriate documentary record of the property. As a condition to its action or assistance, the agency may require benefiting non-state parties to undertake the work.

The agency must still ensure that the documentary record meets the specifications of the SHPO.

IV. Create Records Repositories. Documentary recordation shall be deposited by the agency with the SHPO and with the Arizona State Library, Archives and Public Records.

A. Documentation includes, but is not limited to: Preliminary and final archaeological and architectural project reports, maps, photographs; architectural and engineering drawings, photographs, and plans; planning documents; project consultation letters, photographs, agreements, and covenants; Arizona and National Register of Historic Places forms, photographs and correspondence; survey forms and photographs; building assessments and other planning documents; ethnographic and ethnohistoric reports, transcripts, audio tapes, videotapes.

A.R.S. § 41-864 Review of Agency Plans

“The state historic preservation officer has thirty working days in which to review and comment on any plans of a state agency which involve property which is included or may qualify for inclusion on the Arizona register of historic places, including any construction project, sale, lease or acquisition of historic properties, to ensure that the pre-historical, historical, architectural or culturally significant values will be preserved or enhanced.”

Applicability: The statute applies to the SHPO and all state agencies that are directly or indirectly involved in planning any action that involves a property or properties included on or eligible for inclusion on the Arizona Register of Historic Places. Properties covered in the statute are those properties that are already listed on the Arizona Register of Historic Places, properties formally determined eligible for listing, and properties not formally determined eligible for listing but that meet the criteria for listing on the Arizona Register.

Purpose: The stated purpose of the statute is “to ensure that prehistorical, historical, and architectural and culturally significant values will be preserved and enhanced” also referred to collectively as their historic values or historic significance. While A.R.S. §41-861 holds the chief administrator of each agency “responsible for the preservation of historic properties which are owned or controlled by the agency,” this section provides for review of agency plans by the SHPO. Through this consultation, the impacts of agency plans on historic properties are evaluated and the historic significance of those properties preserved.

Responsibility: The statute directs the SHPO to review and comment on agency plans within thirty (30) working days. State agencies are responsible for submitting their plans and seeking consultation with the SHPO on their plans, including but not limited to, construction projects, sales, leases, and acquisitions. SHPO reviews those plans to ensure: (1) that their impacts on historic properties are considered, and (2) that the significance of those properties is preserved or enhanced. The SHPO is also statutorily required to: maintain an inventory of historic properties; advise, assist and monitor state agencies and political subdivisions of the state in carrying out their historic preservation responsibilities, and to cooperate with state agencies, political subdivisions of the state, and other persons to ensure that historic properties are taken into consideration at all levels of planning and development [A.R.S. § 41-511.04(c)]. Reviewing and commenting on agency plans is one of the ways SHPO carries out these responsibilities.

- I. **Staff.** The SHPO may designate staff, who are employees of the State of Arizona and meet the Secretary of Interior’s Professionals Qualification Standards (Tab 2), to assist in carrying out stated duties as defined in both Arizona statutes and the National Historic Preservation Act of 1966, as amended. The use of the term State Historic Preservation Officer (SHPO) refers to the officer or the designated staff unless otherwise indicated.

Historic preservation has evolved as an interdisciplinary field involving professionals from the disciplines of architecture, history, architectural history, prehistoric archaeology and historic archaeology, all of which are represented in the SHPO. Professionals from the disciplines of folklore, cultural anthropology, curation, conservation, landscape architecture and city planning may also have valuable input on historic preservation issues.

The SHPO staff can provide state agencies with technical assistance in their efforts to meet their duties under the SHPA. All State Agencies' designated staff should work closely with SHPO staff concerning the identification, eligibility, and management of historic properties under their control. If an agency has professional staff in one of the above disciplines, their assignment as the "designated staff" is encouraged, but any agency staff dealing with environmental compliance issues can serve as SHPO liaison. SHPO will have specific training opportunities for agency staff to learn about both the compliance process and the goals of historic preservation.

- II. Consultation Opportunities During the Development of Agency Plans. Any action planned by a state agency, involving construction or ground disturbance that has the potential to impact historic properties that eligible or listed on the Arizona Register, should be informally discussed with and later formally reviewed by the SHPO. Initial consultation with the SHPO should occur while alternatives are still being discussed and options pursued. The goal of early consultation should be to develop a proactive partnership between the SHPO and the agency, so that the concerns of historic preservation are included as a part of the agency's planning process.

Because the preservation of significant historic resources is now a concern shared by many agencies and the public, the number of actions having a negative impact on historic properties has been greatly reduced. The majority of agency actions do not affect historic properties. The management of historic properties through adaptive reuse allows agencies to meet their needs and fulfill their duties, while preserving significant character-defining aspects of eligible historic properties.

The interdisciplinary staff of the SHPO is available to assist agencies during the development of their action plans. Taking advantage of this technical assistance is one-way agencies can better integrate historic preservation concerns into on-going planning processes. The early involvement of SHPO in agency plans makes the formal review of these plans much more streamlined and less reactionary.

- III. The Review Process. The review process outlined below integrates the responsibilities of agencies and the SHPO under A.R.S. §41-864. It specifies agency deliverables (that is, the kinds of information that the SHPO needs to receive in order to complete its review), includes guidance on identifying and evaluating

historic properties, assessing the potential effects of agency plans on these properties, and suggesting strategies to avoid, minimize, or otherwise address adverse impacts on historic properties. It also outlines the issues that SHPO should be expected to address in its comments.

A. Streamlining the Review Process. The review process is normally carried out on a specific project-by-project basis; however, intergovernmental or programmatic agreements may be developed for large, complex projects, for a class of projects that would normally require numerous individual reviews, or for an agency program. Many projects or actions involve more than one state agency, as well as one or more federal agencies. For example, the Arizona Department of Transportation and the Federal Highway Administration are often involved in highway construction that crosses multiple jurisdictions. In such instances, it is useful to identify at the beginning of the process all agencies that have jurisdiction over or other involvement with any part of the action, through funding, permitting, licensing, issuing a right-of-way. In this way, the requirements of all agencies pursuant to the State Historic Preservation Act and/or Section 106 of the National Historic Preservation Act may be fulfilled by a single consultation. All involved agencies should be signatories to any agreement developed.

B. Agency deliverables. Agencies are advised to assemble the documentation described below and submit it to the SHPO for review and comment. As noted above, the SHPO is available to assist the agency in accomplishing each step, and agencies are encouraged to consult, informally or formally, with the SHPO early in and throughout this process.

1. Step 1 - Describe agency plans

What action is the agency planning? (Examples: sale of land or renovation of a building). This description should be as specific as possible and should include a legal description of the property affected, and a summary of the proposed action (for example, replacement of roof, constructing a new facility, or granting a right-of-way).

Historic properties outside the area within which specific agency actions may be planned can be affected by that action, so a critical component of Step 1 is determining the geographic area or areas within which an agency's plans may cause changes in the character or use of historic properties, if such properties exist. The area affected by an agency plan may not be contiguous and may include, but are not limited to the following examples of ancillary project areas: alternative project sites or construction corridors; locations from which borrow materials might be obtained; areas where access might be provided to archaeological sites, resulting in their disturbance by artifact seekers; project staging areas;

areas where visual or audible changes could occur; and areas where the project could result in modified traffic patterns that might affect the livability or commercial viability of historic districts.

Attachment 864-1 provides a list of agency plans that have been and should be reviewed by the SHPO; however, this list is not exhaustive.

Are there historic properties “involved” *in the agency’s* planned action? The state agency identifies and evaluates Arizona Register listed or eligible properties in the area of potential effect for the undertaking. Section 41-862 requires the agency to exercise caution to assure that historic properties are not inadvertently “sold, demolished, substantially altered or allowed to deteriorate.” In order to comply with that section, it may be necessary to conduct an archaeological survey in an area to be impacted by a proposed action, to conduct research into the age and significance of an existing building, or otherwise investigate the possibility that historic properties exist in the area described in Step 1. The results of any such efforts should be included in the information provided to the SHPO. See Attachment 864- for a discussion of identification efforts.

3. Step 3 - Assessing effects

If historic properties have been identified in the area described in Step 1, the agency should evaluate the impacts of its planned actions on those properties. That is, will the proposed activity cause any change (harmful or beneficial) to the characteristics that qualify the property for Register listing. Agencies should use the following criteria in evaluating potential impacts.

Will the activity result in:

- Destruction, damage, or alteration to all or part of a property
- Isolation from or alteration of the property’s surrounding environment.
- Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting.
- Neglect or abandonment of a property, resulting in its deterioration or destruction.
- Transfer, lease, or sale of the property.

Application of these criteria may result in three possible findings:

1. Preservation of the historic property’s “prehistoric, historical, architectural or culturally significant values” or historic significance. That is, the agency’s planned action will not affect those characteristics that qualify it for inclusion on the Register.

2. Enhancement of the property’s “prehistoric, historical, architectural or culturally significant values.” Some agency plans not only will preserve a historic property, but also will enhance it. That is, the effect of the planned action will be beneficial. An example of a beneficial effect is rehabilitation of a historic building in accordance with the standards recommended by the SHPO pursuant to §41-861. [Note: these standards are the *Secretary of the Interior’s Standards for Rehabilitation*, Tabs 2 & 3).
3. Harm to or an adverse effect on the historic property. If the agency finds that a historic property will be adversely impacted by the planned action, then in accordance with A.R.S. §41-861, the agency should find ways to avoid reduce the harm or mitigate the harmful effects to the historic property. An example of such a strategy is archaeological data recovery in advance of ground-disturbing activity. Other strategies for avoiding or reducing harm to historic properties are listed in Attachment 864-3.

Once the agency has evaluated the effects of its actions on historic properties and has considered ways to minimize or avoid harm to these properties, the findings should be included in the plans provided to the SHPO for review.

C. SHPO Review of Agency Plans. The SHPO has thirty (30) working days from receipt of these deliverables to review and comment on the effect of agency plans on historic properties. SHPO comments may address any or all of the following areas:

1. Plans. If SHPO is unclear about the agency’s plans as described, it may request additional information.
2. Identification and Evaluation of Historic Properties. SHPO will review the agency’s submittal information on historic properties, as well as the efforts made to collect that information. SHPO may recommend additional efforts to locate historic properties in the area. For example, if an agency’s plans call for development of previously undeveloped property, and the area in question has not been systematically surveyed, the SHPO may recommend that a survey be conducted. [Note: recommended efforts to identify historic properties that may be affected by agency actions are discussed under A.R.S. §41-862 above.]

If a historic property is identified by the agency, SHPO will also review the agency’s assessment of the property’s eligibility for inclusion on the Arizona Register. If the agency and the SHPO agree that the property is not eligible, then it need not be considered in agency planning. If the

agency and the SHPO agree that the property is eligible, the effect of agency actions on that property must be considered. If the agency and the SHPO disagree on the eligibility determination, the final authority regarding determinations of eligibility rests with the SHPO. If time permits, and the agency agrees, the SHPO may seek the advice of the Historic Sites Review Committee; as provided in Arizona Administrative Code R12-8-206, the SHPO is the keeper of the Arizona Register and is responsible for determining whether or not a property is eligible for listing.

3. Assessing Effects. After reviewing the information provided by the agency on the project's effect on eligible or listed properties, the SHPO may agree or disagree with the agency's assessment of the potential impact of the proposed action on historic properties. If historic properties will be affected, the SHPO comments will focus on ways to minimize or eliminate harm to the historic significance of those properties. Those comments may vary considerably, depending on the nature of agency plans. For example, the SHPO may request that the agency consider alternatives to the proposed action or redesign some portion of the action, or conduct archaeological data recovery in advance of ground disturbing activity.

As a part of this consultation, the SHPO may request that the agency seek input from other parties. This section requires consultation between the agency and the SHPO, however under some circumstances, when other agencies, tribes, local governments or the general public may be directly affected or involved in the agency plan, these parties should be invited to participate. Agencies are encouraged to seek public comment and participation in their planning process.

Interested parties may include representatives of Indian tribes or groups; Certified Local Governments; municipal governments, other state agencies, as well as applicants for or holders of grants, permits, or leases that have the potential to impact or alter properties that may be eligible for the Arizona Register of Historic Places.

Attachment 864-1

The following is a list of agency plans or actions that should be submitted to SHPO for review:

- New construction
- Renovation of buildings or structures
- Making Americans with Disabilities Act modifications
- Sale or lease of real property
- Granting a right-of-way or easement
- Issuing a permit or license
- Vacating or demolishing existing buildings or structures
- Infrastructure development

Attachment 864-2

Typical identification efforts include:

- Archaeological survey
- Literature search
- Building assessment
- Consultation with Native American tribes or groups
- Ethnographic research
- Consultation with the interested public (including local historical societies or commissions)

Attachment 864-3

Mitigation approaches include:

- Documentation that will archivally preserves the importance of the property. Documentation usually involves collecting historical information and photographs, preparing drawings and taking photographs. The specific types, numbers and sizes of documentation are resource specific.
- Meeting Rehabilitation Standards that preserves the character defining elements of the property. A project may be authorized to proceed if, upon consultation with the SHPO, the parties determine the project adheres to the *Secretary of the Interior's Standards for Rehabilitation*.
- Conducting archaeological data recovery performed under a scientific research design and preparation of final data recovery report that provides documentation of the archaeological property.
- Application of a Preservation Covenant that places restrictions on the sale or lease of a property.

DEFINITIONS OF TERMS

Acquisition - The act or process of acquiring fee title or interest other than fee title of real property, including acquisition of development rights or a remainder interest.

Act - The State Historic Preservation Act

Archaeological Resources - Ruins and material remains from past human activities or cultures from the Paleo-Indian, Archaic, Prehistoric or Historic periods.

Arizona Register of Historic Places - The Arizona Register of Historic Places is a list of Arizona's historic properties worthy of preservation and serves as an official record of Arizona's historic districts, sites, buildings, structures, and objects of national, state and/or local significance in the fields of history, archaeology, architecture, engineering and culture. The register is for use as a planning tool by federal, state and local governments, private groups, and citizens.

Chief Administrator - The head or designee of any Arizona state agency, responsible for compliance with the Arizona Historic Preservation Act.

Comprehensive Historic Preservation Planning - The organization of preservation information into a logical sequence pertaining to the identification, evaluation, registration and treatment of historic properties, and the setting of priorities for accomplishing preservation activities.

Criteria of Eligibility for the Arizona Register of Historic Places – Established by Rule and appearing in the Administrative Code R12-8-206 as follows:

“The quality of significance in Arizona history, architecture, archaeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

1. That are associated with events that have made a significant contribution to the broad patterns of our history (Criterion A); or
2. That are associated with the lives of significant persons in our past (Criterion B); or
3. That embody the distinctive characteristics of a type, period, or method of construction or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction (Criterion C); or
4. That yields, or may be likely to yield, important information related to prehistory or history (Criterion D).

5. Generally, properties must be 50 years or older to be considered eligible for the Arizona Register of Historic Places. Properties that are less than 50 years old may be considered eligible under circumstances where they are an integral part of a district which is 50 years or older and meets eligibility criteria or the property has exceptional importance.”

The criteria of eligibility for the Arizona Register of Historic Places are the same as the criteria of eligibility for the National Register of Historic Places. For more detailed explanation of the criteria refer to the National Register Bulletin, *How to Apply the National Register Criteria for Evaluation*, published in 1990 revised in 1991, incorporated herein by reference and on file with the Office of the Secretary of State and the Arizona State Parks Board.

Cultural Resources – Structures, properties, and objects from the past that constitute both our national and local heritage, including historic buildings and prehistoric and historic archaeological remains.

Historic Context - A unit created for planning purposes that groups information about historic properties based on a shared theme, specific time period, and geographic area.

Historic Property (also Historic Resource) - District, site, building, structure, or object significant in Arizona’s history, architecture, engineering, archaeology, or culture at the national, state, or local level that are listed on or eligible for the Arizona Register of Historic Places, as defined in Arizona Administrative Code R12-8-206 or the National Register of Historic Places, established and maintained under the National Historic Preservation Act, as amended (16 U.S.C.A.470 et seq.).

Integrity - The authenticity of a property’s historic identity, evidenced by the survival of physical characteristics that existed during the property’s historic or prehistoric period of significance. Integrity is the ability of the property to convey its significance.

Intensive Survey - A systematic, detailed pedestrian examination of an area designed to identify all potentially eligible historic properties and to gather sufficient data about these properties to make a determination of eligibility for the Arizona Register of Historic Places or the National Register of Historic Places.

Inventory - The documentation of historic properties and the maintenance of that documentation in a database.

Maintenance - The act or process of applying measures to sustain the existing form, integrity, and material of a building or structure, and the existing form and vegetation of the site. It may include stabilization work, where necessary, as well as ongoing maintenance of the historic building material.

Management Inventory - An organized compilation of information on properties that have been evaluated for eligibility to the Arizona and National Registers of Historic Places.

Plan(s) of a State Agency/Agency Plan(s) - Any detailed program, activity or undertaking that is worked out beforehand for the accomplishment of an objective that involves a state agency and has the potential to impact or alter a property that may be eligible for the Arizona/National Registers of Historic Places.

Preservation - The act or process of applying measures necessary to sustain the existing form, integrity, and materials of a historic property. Preservation measures include identification, evaluation, recordation, documentation, acquisition, protection, management, rehabilitation, restoration, stabilization, maintenance, or any combination of the foregoing activities.

Professional Standards - The Secretary of Interior's Standards for Professionals working in the fields of archaeology, architecture, history, and architectural history (originally published in 1977, revised in 1990 as part of the Department of the Interior regulations 36 CFR Part 67, Historic Preservation Certifications). The Secretary of Interior's Standards are applicable for federal projects and are used by the State Historic Preservation Office. The Arizona State Museum's standards for professional archaeologists are utilized in their permitting of archaeologists for state projects.

Reconnaissance Survey - A pedestrian examination of all or part of an area to make generalizations about the types and distributions of properties that may be present and potentially eligible for the Arizona Register of Historic Places.

Register/Arizona Register - Refers to the Arizona Register of Historic Places (see Criteria of Eligibility for the Arizona Register of Historic Places).

Register Eligible/Arizona Register Eligible - Properties that are eligible for listing on the Arizona Register of Historic Places.

Rehabilitation - The act or process of returning a property to a state of utility through repair or alteration which makes possible an efficient contemporary use while preserving those portions or features of the property which are significant to its historical, architectural, and cultural values.

Restoration - The act or process of accurately recovering the form and details of a property and its setting as it appeared at a particular time by removing later work or replacing missing elements.

Sample Survey - A pedestrian survey of a representative sample of lands within a given area in order to generate or test predictions about the types and distribution of historic properties.

Secretary of Interior's Standards - The Secretary of Interior's Standards and Guidelines for Archaeology and Historic Preservation (48 Federal Register 44716).

Significance (Historic) - The importance of a property to the history, architecture, archaeology, engineering or culture of a community, state, or nation. It is achieved by the following criteria of significance: (a) association with events that have made a significant contribution to the broad patterns of our history; (b) association with the lives of persons significant in our past; (c) embodies the distinctive characteristic of a type, period, or method of construction, or represents the work of a master, or possesses high artist values, or represents a significant and distinguishable entity whose components may lack individual distinction; and/or (d) have yielded or have the potential to yield important information.

Stabilization - The act or process of applying measures to re-establish weather resistance and the structural stability of unsafe or deteriorated property while maintaining the essential form of the property, as it presently exists.

State Action - Any state planned activity that has the potential to impact properties that are listed or eligible for the Arizona Register of Historic Places.

State Agency – Any board, commission, department, officer or other administrative unit of this state, including the agency head or agency employees or other persons directly or indirectly purporting to act on behalf or under the authority of the agency head, whether created under the constitution or by enactment of the legislature. Agency does not include the legislature, the courts, or the governor. Agency does not include political subdivisions of this state or any of the administrative units of a political subdivision, but it does include any board, commission, department, officer or other administrative unit created or appointed by joint or concerted action of an agency and one or more political subdivisions of this state or any of its units. (A.R.S. § 41-1001)

State Control - Authority or ability of the state to regulate, direct, or have influence over.

State Historic Preservation Officer - The state official designated by the Governor of Arizona to administer the State Historic Preservation program in the state.

Survey - An activity with the purpose of locating, identifying, and evaluating properties that are eligible for the Arizona Register of Historic Places.