



# SHPO Guidance for State Agencies Tribal Consultations and the State Historic Preservation Act



SHPO Guidance Point No. 9

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## INTRODUCTION

State agencies have a legal responsibility to comply with the State Historic Preservation Act (A.R.S. §41-861 through §41-864) in order to insure that historic properties (properties that are eligible or listed on the Arizona Register of Historic Places) are identified and taken into consideration at all levels of planning and development. One of the roles of the State Historic Preservation Office (SHPO) is to advise and assist state agencies in carrying out their responsibilities under the State Historic Preservation Act. In 2001, the Arizona State Parks Board adopted the SHPO Guidelines for the State Historic Preservation Act. In these guidelines, the SHPO recommended that agencies consult with Indian Tribes, “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” (Guidelines for the State Historic Preservation Act, 2001; C, II, A; page 8-9).

In 2006, the Governor issued *Executive Order 2006-14 Consultation and Cooperation with Indian Tribes*. The Executive Order directs all Executive Branch agencies to: (1) develop tribal consultation policies to guide their work and interaction with Federally-recognized Tribes in Arizona; (2) designate a staff member to assume responsibilities for the agency’s implementation of tribal consultation policy and act as the principal point of contact for tribal issues; and (3) review tribal consultation policies each year and submit an electronic report to the Governor and the Legislature. The goal of this Guidance Point is to assist state agencies in incorporating Tribal consultation, as mandated by the Governor’s Executive Order 2006-14, into State Historic Preservation Act compliance following A.R.S §41-861 through §41-864.

In this document, the term, “historic property” refers to properties that are listed on or eligible for the Arizona or National Registers of Historic Places. The requirements for both Registers include buildings, structures, objects, sites and districts significant in American history, architecture, archaeology, engineering, and culture. Register criteria of eligibility include: (A) association with an important historical event; (B) association with an important person in history; (C) distinctive design or physical characteristic; or (D) potential to provide important information about prehistory or history. Properties generally must be 50 years or older and have historic integrity. A Traditional Cultural Place (TCP)\* is a property that may be Register-eligible because of 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 (National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties; 1990; Revised 1992; 1998).

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## WHEN TO CONDUCT TRIBAL CONSULTATION

### **1) INTEGRATE TRIBAL CONSULTATION INTO LONG RANGE, AGENCY-WIDE PLANNING:**

The SHPO encourages Agencies to establish long-term working relationships, which will assist with consultation when the agency does initiate plans and projects. Agencies should initiate project specific consultation with Tribes at the earliest stage of project planning and preferably with the Agency's land use planning. State agencies that manage land usually have internal planning processes that should be expanded to include consideration of, and consultation with Tribes about, sacred sites, and other issues of concern to Indian Tribes. Traditional Cultural Places are properties that are important to the continuation of cultural practices for a tribe and may occur on or off tribal land. These properties may be listed in or eligible for both the Arizona and the National Registers of Historic Places. Under A.R.S. §41-862, these properties need to be identified and considered in agency planning under A.R.S. §41-864.

Agency planning meetings that include discussions with the Tribes can serve as the beginning of the process of consultation on proposed projects. Agencies may also submit annual work plans to Tribes, with specific projects clearly identified. Non-land managing agencies can provide Tribes with information on applicant proposals or plans. This allows Indian Tribes to identify those projects early in the planning process that are important to them for future dialogue, as well as those projects about which a given Tribe may not feel it is necessary to be consulted further.

### **2) HOLD REGULAR CONSULTATION MEETINGS WITH INDIAN TRIBES:**

It is helpful to meet regularly with Tribal representatives. The SHPO recommends that this should be done at least twice a year, but the actual schedule should be based on the needs of the individual Indian Tribes and the Agency. Some Tribes may want more frequent meetings, while other Tribes may wish to meet less often. These meetings are important and provide an opportunity for face-to-face general consultation, not just consultation based on a specific plan or project. If an Agency or an Indian Tribe cannot meet in-person on a regular basis, it is advisable for the Agency to regularly contact the Tribe by telephone or e-mail. This provides the Tribes with an on-going opportunity to express their needs and concerns.

Tribes may request Field visits during historic property identification efforts (A.R.S. §41-862) or when a historic property will be impacted by an agency plan, project, or action (A.R.S. §41-863; §41-864). The SHPO recommends that agencies comply with these requests and plan meetings with sensitivity for Tribal ceremonial schedules and any special needs of Tribal Elders.

### **3) FOR PROJECT-SPECIFIC CONSULTATIONS, BEGIN CONSULTATION EARLY:**

It is critical that consultation occur at the beginning of project planning so that the Agency can determine what level (i.e., type and frequency) of consultation will be necessary. In this way, it will not be discovered in the middle of a project that Tribal consultation has not occurred. At that point, it is rare that meaningful consultation can occur, the trust relationship between the Indian Tribe and the Agency may be damaged, and options for project redesign may be limited. If an agency has sent a letter to a Tribe about an agency plan, project or action and has not received a response from the Tribe, the Agency should follow-up with additional letters, phone calls, requests for meetings.

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## HOW TO CONDUCT TRIBAL CONSULTATION

### **1) DEVELOP INTERGOVERNMENTAL AGREEMENTS (IGA) OR CONSULTATION PROTOCOLS WITH INDIVIDUAL TRIBAL GOVERNMENTS:**

The SHPO recommends that Agencies and Indian Tribes jointly develop a set of consultation guidelines, which may be included in a cooperative agreement. This can be particularly helpful for Agencies that will need to consult with Tribes frequently in carrying out Agency responsibilities. Many Agencies have written procedures for consulting with Tribes, but guidelines or consultation protocols can also be spelled out in an Intergovernmental Agreement that is negotiated between the Agency and a given Indian Tribe.

The Intergovernmental Agreement (IGA) or consultation protocol can be tailored to individual Tribal interests and needs, specifying the types of planning and projects on which the Tribe wants to be consulted, how frequently, and in what format. Since both Agencies and Indian Tribes are inundated with paperwork, these IGAs can structure the consultation dialogue in a streamlined fashion, as appropriate. The IGA can also discuss the identification and evaluation of TCPs and may include issues related to compliance with Arizona's Burial Laws (A.R.S. §41-865; §41-844). IGAs can also allow for flexibility, as needed by an Agency, given the nature of certain projects. For example, some projects may involve loss of life if they are not undertaken immediately, such as fire suppression activities. Thus, the IGA can articulate an agreement on how Tribes and the Agency would like to see these types of situations handled before they actually happen. It is important that IGAs be regularly reevaluated and update, in consultation with the Tribal government. The Agency needs to provide a copy of the IGA to the SHPO for reference by the SHPO in the review of agency plans under A.R.S. §41-864.

### **2) ROLE OF THE STATE HISTORIC PRESERVATION OFFICE (SHPO)**

Under the State Historic Preservation Act A.R.S. §41-861 through 864, the SHPO advises and assists state agencies in their responsibilities to identify, nominate, document and preserve historic properties. The SHPO also comments on state agency plans that involve historic properties. Under the Arizona State Parks Law (A.R.S. §41-511.04, the duties of the State Historic Preservation Officer includes: "Advise, assist and monitor, as appropriate, federal and state agencies and political subdivisions of the state in carrying out their historic preservation responsibilities and cooperate with federal and 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." Based on these statutes, the SHPO will assist and advise agencies in their identification and preservation of historic properties that have significance to Arizona Tribes, including properties that are listed on or eligible for the Arizona Register of Historic Places because of their association with Tribal cultural practices (Traditional Cultural Properties or Places).

### **3) RECOGNIZE THAT THERE ARE NO THRESHOLDS TO TRIBAL DIALOGUE:**

SHPO is often asked if there are thresholds, or specific types or sizes of projects, for which Tribes want to be consulted. We have observed that there is no definitive answer to this question, as even a very small project (such as a one-acre cell tower) could be located on a Traditional Cultural Place or have visual or auditory intrusion into a property that has traditional value to a Tribe. An Intergovernmental Agreement or consultation protocol could be used to streamline procedures by specifying the types of projects and plans for which an Indian Tribe wants to be consulted.

**4) IDENTIFY ONE PERSON TO ACT AS THE AGENCY’S LIAISON WITH THE TRIBES:**

When an Agency has only one contact person that works with Tribes throughout the consultation, more meaningful dialogue can result, as the effort is potentially less confusing and/or redundant for both the Tribes and the Agency. Executive Order 2006-14 directs agencies to identify an Agency Tribal Liaison. The State Historic Preservation Act (A.R.S. §41-861) states that the Agency may designate a full time employee to coordinate the Agency’s historic preservation activities. If an Agency has a designated employee who coordinates the Agency’s historic preservation activities for the State Historic Preservation Act, this employee may be designated the Tribal liaison responsible for coordinating Tribal consultation for historic preservation projects and planning.

If an Agency uses an applicant or a private consultant to initiate consultation with the Tribes on their behalf, the Agency should manage the process carefully from the onset to insure the consideration of Tribal views are the maintenance of a trust relationships between the Agency and the Tribes.

**5) DETERMINE WHICH TRIBES THE AGENCY NEEDS TO CONSULT:**

Consultation should occur with Tribes that claims cultural affiliation with an area involved in an Agency plan or project. Agencies may reference tribal affinity maps, which are available from the state burial coordinator at the Arizona State Museum (ASM), or guidance about which tribes should be consulted. The SHPO also maintains copies of these maps. Agencies may also obtain information from the National Park Service’s NAGPRA website ([www.cr.nps.gov/nagpra/documents/claimsmap.htm](http://www.cr.nps.gov/nagpra/documents/claimsmap.htm)) and access a map of judicially established Indian Lands based on information provided by the Indian Claims Commission. The SHPO maintains a listing of tribal leadership, Tribal Historic Preservation Officers (THPOs), and cultural resource department contacts, which is available to agencies. With regard to whom to contact within a Tribe, the SHPO recommends that all correspondence go to both the elected official and the cultural resources coordinator. The Arizona Commission on Indian Affairs’ website has contact information for Tribal officials (<http://www.indianaffairs.state.az.us>). It is helpful if appropriate Tribal contacts are spelled out in an IGA or consultation protocol between the Agency and the Tribe.

**6) DOCUMENT ALL TRIBAL CONSULTATION EFFORTS:**

For purposes of Agency reviews under A.R.S. §41-864, all consultation with Tribes on Agency’s plans, projects, or actions, needs to be documented and a summary of the results of that consultation needs to be included with the information submitted to SHPO for review and comment. Agencies should document their Tribal consultations in writing so that they can provide SHPO with a record of these efforts. This documentation should minimally consist of the name of the Tribe, the name of the Tribal contact, the date of the contact, the type of contact (letter, e-mail, phone call, meeting, field visit, etc.), the purpose of the contact, and the result of the contact (i.e., a summary of any Tribal response). Tribal consultation documentation may consist of maps, paper records, recordings, photographs, locational information, and other data that should be maintained as confidential in accordance with A.R.S. §39-125 and Tribal wishes.

**7) DETERMINE APPROPRIATE TIME SCHEDULE FOR CONSULTATION AND TRIBAL RESPONSES:**

Under A.R.S. §41-864, the SHPO has 30 working days to review and comment on agency plans. The SHPO suggests providing the Tribes at least this same amount of time to review and comment on agency plans, actions, and projects that may have an effect on historical properties that are important to the Tribes. The SHPO often hears Agencies state that it takes too long for Tribes to

respond to their requests for information, especially during the identification stage of an undertaking. As a result of multiple TCP workshops that the SHPO held with Arizona Tribes in the 1990s, Tribes indicated that they need at least 60-90 days to review and comment on submittals. The usual 30 working days deadline that applies to SHPO may be a difficult timeline for some Tribes. Many Indian Tribes require additional review time because of limited cultural resource staff available to review and comment on numerous federal and state plans and project. In addition, some Tribes may need to send their comments through their Tribal Councils, a process that requires additional time. Meaningful consultation requires participation of the Agency and the Tribe. Tribes need to be as timely as possible in their responses to Agency's consultation in order to insure that Tribal concerns regarding cultural resources have adequate and early consideration in the project planning. Initiating Tribal consultation early in Agency planning is beneficial in allocation enough time to accommodate Tribal needs for review and comment on projects.

#### **8) CONFIDENTIALITY OF RECORDS:**

Under A.R.S §41-863, documentary records of historical properties are deposited with the SHPO. These records include archaeological survey and data recovery reports, ethnohistoric studies, and ethnographic studies. Archaeological reports contain sensitive archaeological locational information that is protected under A.R.S. §39-125. These reports should be marked as confidential and maintained accordingly. Archaeological reports sent the SHPO as part of state agencies' compliance with A.R.S. §41-861 through §41-864 are restricted and only made available at the SHPO to qualified archaeologists using the records for cultural resources regulatory reviews and/or scientific research. At the request of a number of Tribes, the SHPO requires evidence of Tribal permission to release archaeological reports with information on Tribal lands.

Reports and information compiled for Agency plan and project reviews that contain sensitive information about Traditional Cultural Places and cultural practices also require special restriction on distribution. These reports usually contain extremely sensitive information and should also be marked confidential and restricted. The SHPO restricts these reports and does not release them without permission from the Tribe or Tribes for which the TCP has significance. We encourage Agencies to establish procedures and policies, in consultation with Tribes, for the use and restriction of both archaeological reports and reports that contain sensitive cultural information in compliance with A.R.S. §39-125 and Tribal needs.

#### **9) COORDINATION WITH THE FEDERAL NATIONAL HISTORIC PRESERVATION ACT, SECTION 106 PROCESS:**

The Arizona State Historic Preservation Act is modeled after and is similar to the National Historic Preservation Act of 1966, but the State Act has less comprehensive procedures and requirements. If a State Agency has a plan, project, action, or activity that has federal involvement that requires compliance with Section 106 of the National Historic Preservation Act, we strongly recommend completing the requirements of A.R.S. §41-864 through participation in the Federal Section 106 process (36 CFR Part 800). The SHPO recommends this course of action for the following reasons: (1) the reduction of time and effort required for redundant parallel review processes; (2) the federal regulations accommodate multiple state and federal agency participation in Section 106; (3) completion of the Section 106 review process includes all review requirements specified under the State Act; (4) Tribal consultation requirements are mandated under Section 106 are more comprehensive than the requirements of the State Historic Preservation Act.

## CONCLUSION

Tribal consultation can be seen as a dialogue that has a beginning, but does not have a definitive end, as it represents a formal, continuing relationship between the Tribe and the Agency. Ideally, consultation should be continuous and a part of the Agency's internal management and planning framework. Tribal consultation should not just be project-specific. It is best to establish a meaningful working relationship with a Tribe first, independent from a specific project. One of the best ways to accomplish this goal is to develop formal consultation agreements (such as IGAs or protocols) with individual Tribes that contain a mutually meaningful framework for consultation on cultural resources that are important to them.

\* The National Register of Historic Places refers to properties having traditional cultural values as "Traditional Cultural Properties." In a series of workshops held in Arizona in the early 1990s, the Arizona Tribes preferred the use of the term "Traditional Cultural Places."

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