

Memorandum of Agreement
Among the U.S. Fish and Wildlife Service
The Advisory Council on Historic Preservation
The Arizona Game and Fish Department
The Arizona State Museum
The Pueblo of Zuni
The Acoma Pueblo
The Hopi Tribe
The Navajo Nation
Archaeological Conservancy

Regarding the Resolution of Adverse Effects to and Long-Term
Preservation of the Amity Pueblo (AZ Q:15:74[ASM]) Near the
Town of Eagar in Apache County

1. WHEREAS, the Federal Aid in Sport Fish Restoration Act (16 U.S.C. 777-777k, 64 Stat. 430) directs the U.S. Fish and Wildlife Service (Service) to provide Federal aid to States for the management and restoration of fish having “material value in connection with sport or recreation in the marine and/or fresh waters of the United States;” and
2. WHEREAS, the Service provided Sport Fish Restoration grant funds to the Arizona Game and Fish Department (AGFD) on March 21, 2011, to construct a public fishing pond and parking lot, known as Eagar Pond on state-owned land; and
3. WHEREAS, the granting of funds by the Service makes the project an undertaking (Undertaking) as defined in 36 C.F.R. § 800.16(y), and is subject to review under Section 106 (54 U.S.C. § 306108) of the National Historic Preservation Act (NHPA)(54 U.S.C. §300101 et.seq.) and its implementing regulations, “Protection of Historic Properties” (36 C.F.R. Part 800); and
4. WHEREAS, the Natural Resources Conservation Service (NRCS), on behalf of AGFD, consulted with the Arizona State Historic Preservation Office (SHPO) and SHPO concurred with a finding of “no historic properties affected” provided the project would avoid AZ Q:15:74 (ASM) by 100 feet as stated by NRCS; and
5. WHEREAS, NRCS coordinated with the Hopi Tribe, Pueblo of Zuni, and Navajo Nation; and
6. WHEREAS, NRCS had no Federal action related to the undertaking and was providing informational assistance to AGFD; and
7. WHEREAS, the Service did not initiate Section 106 consultation prior to approving funding for the pond; the Service relied on information that no effect would be expected as provided to AGFD by NRCS and SHPO;
8. WHEREAS, construction of Eagar Pond was initiated on April 27, 2011, and on May 2, 2011, following the discovery of artifacts and human bone fragments in the construction area, an NRCS archaeologist made a site visit and concluded that they were

unconsolidated fragments, previously disturbed by agricultural activity. On May 3, 2011, pursuant to state law, AGFD notified the SHPO and the Arizona State Museum's (ASM) Repatriation Coordinator that human remains and artifacts were identified; and

9. WHEREAS, construction activity continued with an AGFD observer present and the AGFD halted construction activity on May 7, 2011, due to continued exposure of bone fragments; and
10. WHEREAS, AGFD contracted with Northland Research Inc. (NRI) in 2012 to conduct a Class III cultural survey of the AGFD property, and NRI recorded and assessed impacts to the site resulting from ground disturbing activities associated with the construction of Eagar Pond, and identified and assessed the cultural resources at the site; and
11. WHEREAS, the NRI report entitled, *A Cultural Resources Survey and Assessment of the Arizona Game and Fish Department's 26 Bar Property in Eagar, Apache County, Arizona* (Cox and Marshall 2012), documented six intact, or partially intact, in-situ burials and 19 archaeological features, along with bone representing three or four more individuals, as well as tens of thousands of artifacts in disturbed contexts; and
12. WHEREAS, the Service was informed of the discovery of human remains during the Eagar Pond construction on May 11, 2012; and
13. WHEREAS, on June 29, 2012, the Service initiated consultation with the Pueblo of Zuni, Pueblo of Acoma, Hopi Tribe and Navajo Nation (hereinafter Tribes) and has invited them to be invited signatories to this agreement; and
14. WHEREAS, the Service notified the Advisory Council on Historic Preservation (ACHP) on July 19, 2012, that there was an adverse effect to historic properties resulting from the construction of Eagar Pond pursuant to 36 C.F.R. § 800.6(a)(1), and ACHP decided not to comment on the undertaking pursuant to 36 C.F.R § 800.9(b) but recommended that the Service develop a Memorandum of Agreement (MOA) to resolve adverse effects and elected to be a participant in the Section 106 consultation; and
15. WHEREAS, the Service has defined the Area of Potential Effects (APE) of this Undertaking as encompassing the construction area for direct effects (9.1 acres) with the understanding that there were unknown indirect effects to the Amity Pueblo; and
16. WHEREAS, the Service consulted with SHPO in its role of advising Federal agencies in carrying out their responsibilities under Sections 101 and 106 of the NHPA and pursuant to 36 C.F.R. § 800.2(c)(1)(i) and § 800.6(b); and
17. WHEREAS, the Service has consulted with the AGFD, the grant recipient, which will be required to implement steps set forth in the stipulations of this agreement and has compliance responsibilities under the State Historic Preservation Act (A.R.S. § 41-861 et. seq.), and the Arizona Antiquities Act (AAA: A.R.S. §41-841 et. seq.), and under the annual assurances that AGFD signs as a condition of receiving Federal grants, and had invited AGFD to be an invited Signatory to this MOA; and

18. WHEREAS, in consultation with the SHPO and the Tribes, the Service has determined that Amity Pueblo, AZ Q:15:74 (ASM), may yield a variety of data which could reflect on the historic development of the Zuni people and how humans dealt with a variety of social, cultural, environmental, and spiritual issues and is eligible to be listed in the National Register of Historic Places (NRHP) under Criterion D; and
19. WHEREAS, in consultation with the SHPO and Tribes, the Service has determined that Amity Pueblo is important as a traditional cultural property as it reflects historic Tribal migrations to find the Middle Place (criterion A) and was created and occupied by Zuni ancestors, who still reside there spiritually (criterion B) and is eligible to be listed in the NRHP under Criteria A and B; and
20. WHEREAS, pursuant to 36 C.F.R. § 800.6(c), the purpose of this MOA is to mitigate the adverse effects to the NRHP-eligible property that resulted from the implementation of the Undertaking while taking into consideration the associative values that make the property eligible under Criteria A and B, and the scientific information potential that makes it eligible under Criterion D; and
21. WHEREAS, the NRCS, in its informal role of providing the initial survey, on-site monitoring and advice during construction stages, participated in this later consultation and the Service has invited the NRCS to be an invited signatory party to this MOA and NRCS has declined to participate in this MOA; and
22. WHEREAS, ASM has mandated responsibilities for permitting and human remains consultation under the Arizona Antiquities Act, which applies to State lands, and the Service has invited ASM to be an invited Signatory to this MOA; and
23. WHEREAS, the Society for American Archaeology (SAA) has expressed interest in this undertaking, and pursuant to 36 C.F.R. § 800.6(c)(2), the Service has invited SAA to be a consulting party and to concur with this MOA; and
24. WHEREAS, the consulting parties met in Pinetop on April 2, 2014, and AGFD distributed a draft work plan, “Phase One Mitigation Plan for Amity Pueblo, AZ Q:15:74 (ASM) on the 26 Bar Property Near Eagar, Apache County, Arizona, (Cox, Hutira, Hohmann, and Francis 2014); and
25. WHEREAS, at that same meeting ASM’s Repatriation Coordinator distributed “Steps for Mitigation of Disturbance at Amity Pueblo (AZ: Q:15:74 [ASM]) and “A Proposal for Field Mitigation of Disturbance at the Amity Pueblo (AZ:Q:15:74[ASM]),” also referred to as the five phase work plan; and
26. WHEREAS, at the April 2, 2014, meeting AGFD advised it would 1) amend NRI’s draft work plan for the collection of surface bone to include cataloging, locating, and photographing the 19 damaged archeological features; and a test screening of the berm to estimate the level of effort and cost necessary to screen all of the soil, 2) issue a Notice to Proceed to a contractor within 3 weeks of the meeting of April 2, 2014, to implement the revised work plan, 3) contact ASM’s Repatriation Coordinator prior to beginning work to make provisions for temporary storage of any recovered human remains, 4) invite the Tribes to the site when work begins and provide a written schedule of when the contractor will be

on site, 5) remain engaged with the group of concerned parties over the long term to develop an MOA and the proposed five phase work plan with the group; and 6) seek the means, along with the rest of the parties, to accomplish further mitigation; and

27. WHEREAS, at the April 2, 2014, meeting AGFD, Tribes, and ASM agreed that human remains would be reburied within Arizona Game and Fish Commission-owned land that contains AZ Q:15:74 (ASM), but not within the boundary of AZ Q:15:74 (ASM); and
28. WHEREAS, AGFD contracted with NRI to collect surface artifacts and human remains, assess archaeological features that had been exposed by the construction activities, and excavate test units in the berms to acquire baseline information for future work and those tasks were completed and documented in the draft report entitled “Phase One Mitigation at the Amity Pueblo, AZ Q:15.74 (ASM) on the 26 Bar Property Near Eagar, Apache County Arizona, Technical Report 14-27, September 24, 2014” (Baston, Cox, Hohmann, Hutira, and Swidler, September 25, 2014) (NRI Report), and
29. WHEREAS, AGFD intends to use its compliance with the steps set forth in this MOA to satisfy its obligations under the Arizona Antiquities Act and State Historic Preservation Act; and
30. WHEREAS, AGFD has already spent \$126,300 in remediation efforts at the site, fencing the site, conducting damage assessments, property appraisal, surveys, and the surface collection, completing Phase I; and
31. WHEREAS, the Service and AGFD have committed additional funding to complete Phase II as outlined in this MOA; and
32. WHEREAS, by letter dated January 22, 2016, the Arizona SHPO terminated consultation to resolve adverse effects for this undertaking pursuant to 36 C.F.R. § 800.7(a) because it did not agree with the level of analysis proposed for recovered artifacts; and
33. WHEREAS, the FWS and the ACHP have decided to execute this MOA without the SHPO’s involvement pursuant to 36 C.F.R § 800.7(a)(2); and

NOW THEREFORE, the Service and the ACHP agree that the undertaking shall be implemented in accordance with the following stipulations in order to take into account the effect of the undertaking on historic properties. .

STIPULATIONS

The Service shall ensure that the following measures are carried out:

I. Fieldwork and Documentation for Recovery of Disturbed Human Remains and Associated Archaeological Material

A. Goals of the Fieldwork: AGFD will carry out / sponsor appropriate fieldwork for the recovery of disturbed human remains and associated archaeological material from the berm and spoil piles at the Eagar Pond construction site. The human remains and associated archaeological material will be treated as burial remains and associated funerary objects and repatriated to the tribes for

reburial on the Eagar Pond tract according to an agreement to be developed among the consulting tribes and AGFD under the guidance of Arizona State Museum (ASM).

(1) Throughout the consultation, the central concern of the tribes has been that the human remains and associated material culture be repatriated and reburied as soon as possible.

(2) The major goal of fieldwork and documentation is the recovery, repatriation, and reburial of disturbed human remains and associated archaeological remains as efficiently as possible.

B. Following execution of this MOA, AGFD or its qualified archaeological consultant will develop and submit a permit application as appropriate and develop and implement an associated work plan for the necessary fieldwork and analysis for recovery and appropriate documentation of human remains and associated archaeological materials from disturbed contexts. The work plan will include the following:

(1) the goals of the field work and analysis, as referenced above, and research questions that might be addressed by the identification and analysis of diagnostics and samples of archaeological remains in the mixed assemblage from disturbed contexts;

(2) the field/laboratory analysis methods to be used, with an explanation of their relevance to the primary goal of the field work and any associated research questions;

(3) the protocol for the treatment of human remains, including methods and procedures for inventory;

(4) the disposition of human remains and associated archaeological materials prior to repatriation and reburial;

(5) the disposition and curation of records in accordance with A.R.S. §41-844;

(6) a process for draft report preparation, review by consulting parties, and finalization.

C. Fieldwork will include screening of the soil matrix from the berm and spoil pile as described in the NRI report using a front-end loader and a mechanical ¼ inch screen.

(1) A qualified and Arizona Antiquities Act Act-permitted archaeologist will supervise the recovery of artifacts and human remains from the berm and spoil pile.

(2) Field crews will include osteologists, faunal specialists, and archaeologists.

(3) All recovered materials will be treated with dignity, care, and respect at all times.

(4) AGFD shall provide consulting parties notice of the start of each berm and spoil pile excavation field session via telephone and e-mail, and notify consulting parties upon the completion of each field session.

(5) The work plan will include specific provisions for coordination among AGFD and the tribes to facilitate tribal monitoring of the fieldwork.

D. Identification and Documentation of the human remains and associated archaeological remains will focus on characterization of the remains for reburial purposes and recovery of general information about the mixed assemblage from disturbed contexts, including:

(1) Identification of bone or bone fragment as human or faunal (animal) (if possible);

(2) Identification of each human element by bone type (if possible) plus determination if multiple bone fragments from a single individual are present in close association (if possible);

(3) Separation of human remains by sex and age groups (to the extent possible);

(4) Identification of faunal bone to general taxon and element when possible;

(5) Differentiation between modern bone materials (such as horse and cow) and prehistoric bone (where possible);

(6) Identification of diagnostics and analysis of samples of other archaeological remains as appropriate to characterize the mixed assemblage from disturbed contexts.

E. Disposition of Human Remains and Associated Archaeological Materials prior to Repatriation and Reburial

(1) All human remains and associated funerary materials will be housed at the Arizona State Museum until they are reinterred.

F. Treatment of disturbed / exposed features: All features identified in the NRI report and “Interim Report Phase One Mitigation at Amity Pueblo AZ Q:15:74(ASM) on the 26 Bar Property Near Eagar, Apache County, Arizona,” within the entire disturbed area have been stabilized as appropriate and will be covered with clean fill dirt and hydro-seeded to prevent further damage from erosion, animals, and humans.

G. Testing of Proposed Locations for Re-burial

(1) In consultation with the Tribes, ASM, and AGFD will follow appropriate procedures to test proposed re-burial locations within the Eagar Pond tract to ensure that no intact archaeological deposits will be impacted.

H. Reporting

(1) The work plan will specify development of a report detailing the results of the fieldwork and analysis. (2) A preliminary report on the fieldwork and analysis will be developed within six (6) months of completion of the fieldwork and provided to consulting parties for review and comment for a period of 30 days.

(3) All timely comments will be considered by AGFD and the Service and addressed in a revised document, as appropriate. Consulting parties will have 30 days to review and comment on the revised document(s).

II. Development and Implementation of a Re-Burial Agreement

A. ASM will develop an agreement, in consultation with the consulting tribes and AGFD, regarding the treatment, repatriation, and reburial of the human remains and associated funerary objects.

B. ASM will initiate the consultation to develop a Repatriation/Re-burial Plan following receipt of a permit application and work plan referenced in Stipulation I. Development of the Re-burial Plan normally takes approximately 60 days.

C. AGFD will implement the terms of the Re-burial Agreement in partnership with the tribes and ASM following completion of the field work and analysis specified in Stipulation I.

III. Transfer of the Land to the Archaeological Conservancy

A. Upon completion of the steps set forth in Stipulations I and II above, the AGFD, with authorization of the Arizona Game and Fish Commission and the Governor, will transfer the Commission owned 71.04 acres to the Archaeological Conservancy provided said transfer is authorized by Arizona law.

B. To the extent lawfully permitted, AGFD will work with the Archaeological Conservancy and the consulting tribes to develop a long- term protection and management plan for the 26-Bar Property, which will include provisions for routine monitoring as well as access to the land by the consulting tribes.

C. If the transfer is not achieved, the Service and AGFD will consult with consulting parties regarding disposition of the 71.04 acres and long-term preservation and protection of the site.

IV. Development of Educational Video

A. In recognition of the adverse effects to those Native American traditional values that make the Amity Pueblo eligible to the National Register under criteria A and B, AGFD will consult with the Pueblo of Zuni and the other affiliated Tribes for the purpose of developing an educational video *that documents*:

- (1) *The* traditional and historical association of the affiliated Tribes to Amity Pueblo and
- (2) how the adverse effects to this historic property negatively impacted the tribal people, both collectively and individually.

B. This educational video will emphasize the importance of early and effective consultation with Native American Tribes, through compliance with historic preservation legislation, as a means of avoiding unintentional disturbances of cultural/historic sites, such as happened at the Amity Pueblo, in the future.

C. The video will be reviewed by the Tribes, the Service, and ACHP prior to finalization.

(1) The consulting parties will have 30-days to review and comment on the video.

(2)The Service will approve final version after taking into account any comments from tribes, SHPO, and ACHP

D. Once this educational video is finalized, it can be effectively utilized by the Service and the AGFD as an employee cultural sensitivity training tool. The Service will consult with the tribes regarding appropriate distribution and use of the video.

V. PROFESSIONAL QUALIFICATIONS

All archaeological work conducted pursuant to this MOA shall be carried out by, or under the direct supervision of a person or persons who meet the qualifications of the Secretary of the Interior for Archaeology and Historic Preservation under 36 C.F.R. Part 61. The supervisor also must be listed as the Principal Investigator or Project Director on the Arizona Antiquities Act permit issued for archaeological work conducted under this MOA.

VI. CONFIDENTIALTY

All parties to this MOA acknowledge that information about the location, character, or ownership of historic properties may be subject to the provisions of the NHPA Section 304 and 36 C.F.R. 800.11(c) relating to the disclosure of sensitive information, and having so acknowledged, will ensure that all actions and documentation prescribed by this MOA are, where necessary, consistent with the requirements of the NHPA Section 304, 36 C.F.R. 800.11(c) and 5 U.S.C. 552, as amended (Freedom of Information Act), A.R.S. § 39-125, and other applicable state and federal laws.

VII. ANNUAL REVIEW AND REPORTING

On or before December 5 of each year until the terms of this MOA have been fulfilled, AGFD shall prepare an annual report and submit it to all consulting parties. The annual report will provide a summary of any work conducted at the Amity Pueblo site that year, as well as the results of routine monitoring for protection. The report will also summarize how the applicable terms of the MOA are being implemented. An annual report will also be provided even if no work was conducted and that report will include the reason that no work was conducted.

- A. The consulting parties shall review the annual report and provide comments to the Service within 30 calendar days of their receipt.
- B. At the request of any consulting party to this MOA, at any time, a meeting or meetings shall be held to facilitate review and comment, to resolve questions, or to resolve adverse effects. The Service shall provide consulting parties with multiple options for meeting dates, and shall notify consulting parties of the final meeting date at least 14 calendar days prior to the agreed upon date.
- C. At a minimum, the Service or the Conservancy will initiate an annual meeting to occur after consulting parties have had 30 calendar days to review and comment on the annual report. After the terms of this MOA are completed, the Service may hold meetings for the consulting parties as needed and/or requested by the consulting parties.

VIII. DISPUTE RESOLUTION

Should any consulting party to this MOA object at any time to any actions proposed or the manner in which the terms of this MOA are implemented, the Service shall consult with such party to resolve the objection, and shall notify the signatories of the objection. If the Service determines that such objection cannot be resolved, the Service will:

- A. Forward all documentation relevant to the dispute, including the Service's proposed resolution, to ACHP. The ACHP shall provide the Service with its advice on the resolution of the objection within 30 calendar days of receiving adequate documentation. Prior to reaching a final decision on the dispute, the Service shall prepare a written response that takes into account any timely advice or comments regarding the dispute from ACHP, signatories, and consulting parties, and provide them with a copy of this written response. The Service will then proceed according to its final decision.
- B. If ACHP does not provide its advice regarding the dispute within the 30 calendar day time period, the Service may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, the Service shall prepare a written response that takes into account any timely comments regarding the dispute from the consulting parties to the MOA, and provide them and ACHP with a copy of such written response.

- C. The Service's responsibilities to carry out all other actions subject to the terms of this MOA that are not the subject of the dispute remain unchanged.
- D. Resolution of a dispute cannot change, alter, or amend this MOA without the written approval of all signatories.
- E. If a dispute is not resolved as set forth in this section, the Signatories agree to engage in any other alternative dispute resolution procedures authorized by their statutes, regulation, and court rules, but not limited to 5 U.S.C. § 575 and A.R.S. § 12-1518.

IX. DURATION

In accordance with Section 36 C.F.R. 800.6 (c) (5), this MOA will be null and void if its stipulations have not been carried out within ten years from the date of its execution. At such time the Service shall either (a) execute an MOA pursuant to 36 C.F.R. 800.6(c), or (b) request, take into account, and respond to the comments of the ACHP under 36 C.F.R. 800.7. The Service shall notify the signatories as to the course of action it will pursue.

X. AMENDMENTS

Any Signatory to this MOA may propose to the Service in writing that the MOA be amended pursuant to 36 C.F.R. 800.6(c)(7), whereupon the Service shall consult with the other parties to this MOA to consider such an amendment. This MOA may be amended when such an amendment is agreed to in writing by all signatories. The amendment will be effective on the date a copy is signed by all of the signatories and filed with the ACHP. The Service will send a copy of the amended MOA to all consulting parties.

XI. TERMINATION

If any Signatory to this MOA determines that its terms will not or cannot be carried out, that party shall immediately consult with the other parties to attempt to develop an amendment per Stipulation X, above. If within 30 calendar days an amendment cannot be reached, any Signatory may terminate the MOA upon written notification to the other signatories. In the event of termination, the Service will either (a) execute another MOA pursuant to 36 C.F.R. 800.14 (b)(3), or (b) request, take into account, and respond to the comments of the ACHP under 36 C.F.R. 800.7. The Service shall notify the consulting parties as to the course of action it will pursue.

XII. AVAILABLE FUNDS

This MOA shall be subject to available funding and nothing in this agreement shall bind any party to expenditures in excess of funds appropriated and allocated for the purposes of this MOA.

XIII. CONFLICT OF INTEREST

The State may terminate this MOA upon finding that a State employee that was significantly involved in the creation of this MOA is, at the time of the agreement is in effect, but not later than three years after its execution, an employee or consultant to any other party of the MOA. (A.R.S. 38-511)

XIV. Execution of the MOA

For purposes of this MOA, facsimile and electronic signatures of authorized representatives of the Parties, including such signatures in counterparts, are acceptable.

Execution of this MOA by the Service and the ACHP and implementation of its terms evidence that Service has taken into account the effects of this undertaking on historic properties and afforded the ACHP an opportunity to comment.

--END--

Memorandum of Agreement Regarding the Mitigation of Adverse Effects to, and Long-Term Preservation of the Amity Pueblo (AZ Q:15:74[ASM]) near the town of Eagar in Apache County

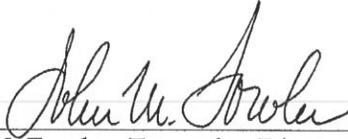
SIGNATORIES



Benjamin Tuggle, Southwest Regional Director
U.S. Fish and Wildlife Service

4/20/2016
Date

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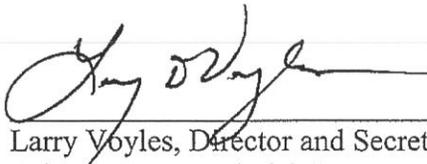
John M. Fowler, Executive Director
Advisory Council on Historic Preservation

4/26/16

Date

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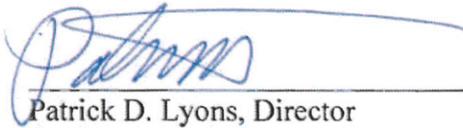
INVITED SIGNATORIES



Larry Voyles, Director and Secretary to the Commission
Arizona Game and Fish Department

3/28/16
Date

Memorandum of Agreement Regarding the Mitigation of Adverse Effects to, and Long-Term Preservation of the Amity Pueblo (AZ Q:15:74[ASM]) near the town of Eagar in Apache County



Patrick D. Lyons, Director
Arizona State Museum

19 April 16

Date

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Val R. Panteah Sr., Governor
Pueblo of Zuni

3/30/16

Date

Memorandum of Agreement Regarding the Mitigation of Adverse Effects to, and Long-Term Preservation of the Amity Pueblo (AZ Q:15:74[ASM]) near the town of Eagar in Apache County



Kurt Riley, Governor
Pueblo of Acoma

April 8, 2016
Date

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Herman G. Honanie, Chairman
Hopi Tribe

Date

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Russell Begaye, President
Navajo Nation

Date

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James B. Walker, Southwest Regional Director
The Archaeological Conservancy

3/29/2016
Date

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CONCURRING PARTY

Diane Gifford-Gonzalez, President
Society for American Archaeology

Date