

**FINAL APRIL 2020
PROGRAMMATIC AGREEMENT**

**PURSUANT TO SECTION 106 OF THE
NATIONAL HISTORIC PRESERVATION ACT
REGARDING
IMPLEMENTATION OF FEDERAL-AID TRANSPORTATION
PROJECTS IN THE STATE OF ARIZONA**

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NATIONAL HISTORIC PRESERVATION
ACT
REGARDING
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PROJECTS IN THE STATE OF ARIZONA

This Programmatic Agreement (Agreement) is among the Federal Highway Administration (FHWA), the Arizona Department of Transportation (ADOT), the Arizona State Historic Preservation Officer (SHPO), the Bureau of Indian Affairs, Western Regional Office (BIA WRO), the Bureau of Land Management (BLM), the Bureau of Reclamation (Reclamation), the United States Army Corps of Engineers (USACE), the United States Forest Service, Southwest Regional Office (USFS), and the Advisory Council on Historic Preservation (ACHP).

WHEREAS, FHWA provides funding assistance to ADOT through the Federal-aid Highway Program (Program), which is subject to Section 106 of the National Historic Preservation Act of 1966 (NHPA), as amended [54 United States Code (U.S.C.) § 306108] and its implementing regulations at 36 Code of Federal Regulations (C.F.R.) Part 800 (Section 106); and

WHEREAS, Title 23 United States Code Section 326 (23 U.S.C. 326) and 23 United States Code Section 327 (23 U.S.C. 327) allow the United States Department of Transportation Secretary, acting through FHWA, to assign responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA) and other federal environmental laws to a State Department of Transportation through a memorandum of understanding (MOU); and

WHEREAS, FHWA and ADOT have entered into two MOUs, (included in this Agreement as Attachments 9 and 10 respectively), as provided for in 23 U.S.C. 326 and 23 U.S.C. 327 respectively, through which FHWA assigned and ADOT assumed FHWA's responsibilities for compliance with NEPA and Section 106; and

WHEREAS, ADOT has determined that Program-funded transportation projects are undertakings as defined at 36 C.F.R. 800.16(y), that may have an effect upon properties included in or eligible for inclusion in the National Register of Historic Places (National Register); and

WHEREAS, under the MOUs, ADOT is deemed to be the lead Federal agency for the purposes of compliance with 36 C.F.R. 800, except for projects not assigned under the 327 MOU (see attachment10); and

WHEREAS, FHWA shall be the lead Federal agency for the purposes of compliance with 36 C.F.R. Part 800 for Program-funded transportation projects not assigned under the 327 MOU (see attachment 10); and

WHEREAS, FHWA may choose to use Stipulation VIII of the Programmatic Agreement (PA)

for projects not assigned under the 327 MOU (see attachment 11); and

WHEREAS, the Division Administrator is the FHWA agency official for the Program-funded transportation projects not assigned under the 327 MOU; and

WHEREAS, FHWA provides funding assistance to ADOT through the Program, and FHWA is a signatory to this Agreement; and

WHEREAS, ADOT will administer Program-funded undertakings throughout the state of Arizona and ADOT has assumed FHWA's responsibilities for compliance with NEPA and Section 106 for all Program-funded transportation projects in Arizona pursuant to the two MOUs (see Attachments 9 and 10); therefore, ADOT is a signatory to this Agreement; and

WHEREAS, the Environmental Administrator is the ADOT agency official responsible for the Program-funded transportation projects assigned under the 326 and 327 MOUs; and

WHEREAS, in accordance with 36 C.F.R. § 800.6(a)(1), ADOT has invited the ACHP to participate in Section 106 consultation and development of this PA, and the ACHP, by letter dated October 31, 2018, has chosen to participate in the consultation pursuant to 36 C.F.R. § 800.6(a)(1)(iii);

WHEREAS, FHWA, ADOT, SHPO, BIA WRO, BLM, Reclamation, USACE, USFS, Arizona State Land Department (ASLD), Arizona State Parks & Trails (ASP&T), Gila River Indian Community, the Hualapai Tribe, and the ACHP executed an agreement on December 16, 2015 (2015 agreement) for Program-funded undertakings throughout the state of Arizona; and the 2015 agreement was executed prior to FHWA and ADOT entering into the MOU as provided for in 23 U.S.C. 326 and 23 U.S.C. 327; and

WHEREAS, ACHP, SHPO, ASLD, BLM, USFS, BIA WRO, and USACE have signed a letter indicating that they agree to continue to use the 2015 agreement for projects where ADOT has assumed responsibility for the implementation of Section 106 until this new Section 106 PA is executed and implemented; and

WHEREAS, this Agreement supersedes the 2015 agreement; and

WHEREAS, this Agreement will be considered executed upon the signatures of the FHWA, ADOT, SHPO and ACHP; and

WHEREAS, ADOT intends to utilize this Agreement to meet the Section 106 requirements for Program-funded Local Public Agency (LPA) transportation projects; and

WHEREAS, Program-funded undertaking may cross lands under the jurisdiction of a Certified Local Government (CLG); therefore, ADOT has consulted with all CLGs in the state of Arizona and invited their comments on the draft Agreement, and took any comments received into account; and

WHEREAS, ADOT has invited the CLGs to be concurring parties to this Agreement; and

WHEREAS, SHPO is authorized to enter into this Agreement pursuant to Sections 101 and 106 of NHPA, as amended, and pursuant to 36 C.F.R. § 800.2(c)(1)(i) and 36 C.F.R. § 800.6(b)(1)(i), in order to fulfill its role of advising and assisting federal agencies in carrying out their responsibilities; therefore SHPO is a signatory to this Agreement; and

WHEREAS, ADOT has an Interagency Service Agreement with SHPO in which SHPO has agreed to respond to an ADOT request for Section 106 consultation within 15 calendar days, and as such, consultations between ADOT and SHPO will be conducted within this time frame unless otherwise negotiated; and

WHEREAS, ASP&T, with assistance from ADOT, administers the Program-funded Recreational Trails Program (RTP); therefore, ADOT has invited ASP&T to be a concurring party to this Agreement; and

WHEREAS, Program-funded undertakings may cross lands managed by USFS; therefore, ADOT has invited USFS to consult in the development of this Agreement. ADOT has been designated lead federal agency for Section 106 compliance on Program-funded undertakings that cross lands managed by USFS to satisfy their collective Section 106 responsibilities for those undertakings unless, on a case-by-case basis, both agencies agree in writing that for a specific undertaking, USFS will take the lead; and

WHEREAS, Program-funded undertakings may cross lands managed by BLM; therefore, ADOT has invited BLM to consult in the development of this Agreement. ADOT has been designated lead federal agency for Section 106 compliance on Program-funded undertakings that cross lands managed by BLM to satisfy their collective Section 106 responsibilities for those undertakings; unless, on a case by case basis, both agencies agree in writing that for a specific undertaking, BLM will take the lead; and

WHEREAS, Program-funded undertakings may cross lands and structures owned or managed by Reclamation, including National Register eligible canals, ditches, and dams, which may result in effects to historic properties subject to Section 106; therefore, ADOT has invited Reclamation to consult in the development of this Agreement. ADOT has been designated lead federal agency for Section 106 compliance on Program-funded undertakings that cross lands or properties managed by Reclamation to satisfy their collective Section 106 responsibilities for those undertakings; unless, on a case-by-case basis, both agencies agree in writing that for a specific undertaking, Reclamation will take the lead; and

WHEREAS, Program-funded undertakings may cross National Register eligible dams, canals, and ditches associated with the historic Salt River Project (SRP System) that are owned by Reclamation and managed by Salt River Project Agricultural Improvement and Power District (SRP), and are included in two Section 106 Programmatic Agreements (PAs) among Reclamation, SRP, and SHPO regarding the operations and maintenance of these facilities that are part of the SRP System. Copies of the PAs are presented in Attachment 1 (Bureau of Reclamation Programmatic Agreements). The PAs are entitled:

- *“Programmatic Agreement Among the Bureau of Reclamation, Phoenix Area Office,*

Salt River Project, and the Arizona State Historic Preservation Office Regarding Historic Preservation Treatment for the Salt River Project System of Historic Dams and Associated Dam Facilities Operated and Maintained by the Salt River Project for the Bureau of Reclamation” (Reclamation PA 2009)

- *“Programmatic Agreement Among the Bureau of Reclamation, Phoenix Office, the Arizona State Historic Preservation Officer, and the Salt River Project Regarding the Historic Preservation Treatment for the Salt River Project System of Historic Main Canals, Laterals, and Associated Features Operated and Maintained by the Salt River Project for the Bureau of Reclamation” (Reclamation PA 2013); and*

WHEREAS, the SRP operates and maintains the SRP System pursuant to the contract between the United States and the Salt River Valley Water Users Association (SRVWUA), dated September 6, 1917, such obligations of said contract having been assumed by SRP pursuant to a contract dated March 22, 1937 between SRP and SRVWUA, as amended, therefore, ADOT, has invited SRP to be a concurring party to this Agreement; and

WHEREAS, ADOT Program-funded undertakings may cross waterways requiring a permit from the USACE under Section 10 of the Rivers and Harbors Act of 1899, as amended (33 U.S.C. § 403), or Section 404 of the Clean Water Act of 1972 as amended (33 U.S.C. § 1344), the issuance of which requires Section 106 review for the undertaking; therefore, ADOT has invited USACE to consult in the development of this Agreement. ADOT has been designated lead federal agency for Section 106 compliance on Program-funded undertakings that require a permit from the USACE to satisfy their collective Section 106 responsibilities for those undertakings; unless, on a case by case basis, the USACE indicates in writing that it will, for that specific undertaking, meet its Section 106 compliance requirements individually by following 36 C.F.R. Part 800 and 33 C.F.R. 325, Appendix C, as applicable; and

WHEREAS, all federally recognized Indian Tribes consulted during the preparation of this Agreement are collectively referred to herein as the “Tribes” or individually as “Tribe;” and

WHEREAS, Program-funded undertakings may cross lands held in trust by the United States for the Tribes, requiring approvals of rights-of-way (ROWs) by the BIA WRO, which would require Section 106 compliance; therefore, ADOT has invited BIA WRO to consult in the development of this Agreement. ADOT has been designated lead federal agency for Section 106 compliance on Program-funded undertakings that cross Indian trust lands by BIA WRO to satisfy their collective Section 106 responsibilities for those undertakings; unless, on a case by case basis, both agencies agree in writing that for a specific undertaking, BIA WRO will comply individually with 36 CFR Part 800 for that undertaking; and

WHEREAS, FHWA recognizes that it has a unique legal relationship with Tribes established in the Constitution of the United States, treaties, statutes, and court decisions, and therefore, consultation with a Tribe must recognize the government-to-government relationship between the federal government and the Tribes; and

WHEREAS, in accordance with the MOUs, FHWA retains responsibility for government-to-government consultation with Tribes when FHWA’s participation has been so requested by the

Tribes; and

WHEREAS, ADOT has consulted with the Tribes listed below regarding Program-funded undertakings that may affect historic properties of concern to them within Tribal lands as defined in 36 C.F.R. 800.16(x) and has invited these Tribes to be Tribal Signatories to this Agreement and they declined; and

- Ak-Chin Indian Community
- Cocopah Tribe of Arizona
- Fort McDowell Yavapai Nation
- Fort Mojave Indian Tribe (Arizona, California and Nevada)
- Havasupai Tribe of the Havasupai Reservation
- Kaibab Band of Paiute Indians of the Kaibab Indian Reservation
- Quechan Tribe of the Fort Yuma Indian Reservation
- San Juan Southern Paiute Tribe of Arizona
- Tonto Apache Tribe of Arizona
- Yavapai-Apache Nation of the Camp Verde Indian Reservation
- Yavapai-Prescott Indian Tribe of the Yavapai Reservation

WHEREAS, ADOT has consulted with the Tribes listed below, regarding Program-funded undertakings that may affect historic properties of concern to them within Tribal lands. These Tribes are certified by the National Park Service (NPS) as Tribal Historic Preservation Officers (THPOs), as provided for under Section 101(d)(2) of NHPA, and have assumed the duties of SHPO for all undertakings on lands managed by their respective Tribes. ADOT has invited these Tribes to be signatories to this Agreement and they declined; and:

- Colorado River Indian Tribes
- Gila River Indian Community
- Hopi Tribe
- Hualapai Tribe
- Navajo Nation
- Pascua Yaqui Tribe
- San Carlos Apache Tribe
- Salt River Pima-Maricopa Indian Community
- Tohono O'odham Nation
- White Mountain Apache Tribe
- Pueblo of Zuni

WHEREAS, ADOT recognizes that other Tribes may be granted THPO status during the duration of this Agreement and as such will assume the responsibilities of SHPO for all undertakings on lands managed by them; and

WHEREAS, ADOT has consulted with the Tribes listed below with ancestral ties to non-Tribal lands within the state of Arizona regarding Program-funded undertakings that may affect historic properties of concern to them and has invited these Tribes to be concurring

parties to this Agreement; and:

- Chemehuevi Indian Tribe
- Fort Sill Apache Tribe
- Mescalero Apache Tribe
- Moapa Band of Paiute Indians
- Paiute Indian Tribe of Las Vegas
- Paiute Indian Tribe of Utah
- Pueblo of Acoma
- Ute Mountain Ute Tribe

WHEREAS, if other Tribes not mentioned above are identified as having ancestral ties to Arizona, ADOT will consult with them and invite them to be concurring parties to this Agreement; and

WHEREAS, this Agreement shall not apply to Tribal lands unless the Tribes are full signatories; and

WHEREAS, any Tribe, that has Tribal land in the state of Arizona, may make a request to ADOT to become a signatory to this Agreement at the time of execution or afterwards. The process for adding signatories would require an amendment to the agreement (see Stipulation XX.A). A Tribe that becomes a signatory to this Agreement is referred to as a “Signatory Tribe,” as defined in Attachment 2 (Acronyms, Abbreviations and Definitions). Upon signing as a signatory, the terms of this Agreement will apply to Program-funded undertakings on the Signatory Tribe’s Tribal lands; and

WHEREAS, ASLD administers state trust land crossed by ADOT highway projects; therefore, ADOT has invited ASLD to be a concurring party to this Agreement; and

WHEREAS, Arizona State Museum (ASM) has been invited to participate pursuant to 36 C.F.R. § 800.(c)(2)(iii) because it administers four statutes related to state lands in the Arizona Antiquities Act (AAA), Arizona Revised Statutes (A.R.S.) § 41-841 *et seq*, and one state statute related to private lands (A.R.S. § 41-865). Under these statutes, ASM’s responsibilities include issuance of permits for archaeological investigations on state, county, and municipal lands, and administration of discovery of human remains on state, county, municipal, and privately-owned land; therefore, ADOT has invited ASM to be a concurring party to this Agreement; and

WHEREAS, ADOT shall seek and consider the views of the public in a manner that reflects the nature and complexity of each undertaking and its potential effects on historic properties and the likely interest of the public in the efforts on historic properties. ADOT shall use its procedures for public involvement under the National Environmental Policy Act (NEPA) to solicit information and concerns about historic properties from members of the public and will ensure that an appropriate level of public involvement is provided, in accordance with 36 C.F.R. § 800.2(d)(3); and

WHEREAS, for the review of specific undertakings under this Agreement, ADOT may

invite other agencies, organizations, and individuals to participate as consulting parties; and

WHEREAS, all signatories and invited signatories are collectively referred to herein as the “Signatories” or individually as “Signatory;” and

WHEREAS, the Signatories have developed this Agreement pursuant to 36 C.F.R. § 800.14(b)(2) in order to establish a program alternative for taking into account the effects of the Program on historic properties in Arizona and for affording ACHP a reasonable opportunity to comment on undertakings covered by this Agreement; and

NOW, THEREFORE, the signatories agree that this Agreement shall be carried out in accordance with the following stipulations in order to take into account the effects of the Program on historic properties in Arizona and that these stipulations shall govern compliance of the Program with Section 106.

STIPULATIONS

I. Purpose and Applicability

- A. This Agreement shall apply to all federal undertakings administered under the Program in Arizona and sets forth the process that will be met to ensure compliance under Section 106. ADOT is deemed the lead Federal agency for Program-funded undertakings assigned under the MOUs. FHWA shall be the lead Federal agency for Program-funded undertakings not assigned under the MOUs and for those types of projects described in Stipulation III.A and shall apply the Agreement’s stipulations wherever applicable.
- B. This Agreement establishes the basis for considering the effects of Program-funded undertakings on historic properties, as defined in Attachment 2, and establishes alternative procedures to implement Section 106 for the review of such undertakings by the signatories and concurring parties, as specified.
- C. Guidance documents issued by ACHP shall be used in the interpretation of this Agreement, and in overall implementation of Section 106, to the extent they are applicable and helpful.
- D. For any matter regarding Section 106 compliance not addressed in this Agreement, the provisions of 36 C.F.R. Part 800 shall apply.

II. Legal Authorities, Standards, Guidelines, and Definitions

- A. Legal authorities, standards, and guidelines relevant to this PA and its purposes include, but are not limited to:
 - 1. State assumption of responsibility for categorical exclusions (23 U.S.C. 326)

2. Surface transportation project delivery program (23 U.S.C. 327)
3. National Historic Preservation Act (54 U.S.C. § 300101 *et seq.*).
4. Protection of Historic Properties, Advisory Council on Historic Preservation (36 C.F.R. Part 800) or its successor regulation.
5. Secretary of the Interior's Standards for the Treatment of Historic Properties, July 1997, U.S. Department of the Interior, National Park Service (36 C.F.R. 68) or its successor regulation.
6. Archaeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines, September 1983, United States Department of the Interior, National Park Service (48 Federal Register [F.R.] 44716 [1983], as updated) or its successor regulation.
7. Secretary of the Interior's Professional Qualification Standards at 48 F.R. 44716 (1983), as updated.
8. National Register of Historic Places (36 C.F.R. Part 60) or its successor regulation.
9. Procedures for State, Tribal, and Local Government Historic Preservation Programs (36 C.F.R. Part 61) or its successor regulation.
10. Secretary of the Interior's Standards for Curation of Federally-owned and Administered Archaeological Collections (36 C.F.R. Part 79) or its successor regulation.
11. National Register Bulletin 15: How to Apply the National Register Criteria for Evaluation (Revised 1997).
12. National Register Bulletin 38: Guidelines for Documenting and Evaluating Traditional Cultural Properties (1990), or its successor guidelines.
13. Native American Graves Protection and Repatriation Act of 1990 (25 U.S.C. §§ 3001- 3013) (NAGPRA) and its implementing regulations at 43 C.F.R. Part 10, or its successor regulation.
14. Archaeological Resources Protection Act of 1979 (16 U.S.C. § 470) (ARPA) and its implementing regulations at 43 C.F.R. Part 7, or its successor regulation.
15. Freedom of Information Act, Records and Testimony (43 C.F.R. Part 2).
16. Executive Order No. 13007: Indian Sacred Sites (1996).

17. Executive Order No. 13175: Consultation and Coordination with Indian Tribal Governments (2000).
18. Arizona Antiquities Act (A.R.S. §§ 41-841 through 41-844 and its implementing rules, and A.R.S. § 41-865 and its implementing rules).
19. The Arizona State Museum Archaeological Site Recording Manual (December 1, 1993), or its successor guidelines.
20. State Historic Preservation Act of 1982 (A.R.S. §§ 41-861 through 41-864).
21. Standards for Inventory Documents Submitted for SHPO Review in Compliance with Historic Preservation Laws (SHPO Survey Report Standards), January, 2015 or its successor guidelines.
22. Regulations on the confidentiality of information relating to location of archaeological discoveries and places or objects included or eligible for inclusion on the Arizona Register of Historic Places (A.R.S. § 39-125).

B. For the purposes of this Agreement, the definitions provided in Attachment 2 shall apply.

III. Responsibilities of FHWA and ADOT

A. FHWA Responsibilities

1. FHWA shall retain responsibility for complying with all federal requirements pertaining to government-to-government consultation with federally recognized Tribes for all program-funded projects, and shall honor the request of any Tribe for government-to-government consultation regarding an undertaking covered by this Agreement.
2. FHWA shall retain responsibility for any undertaking that crosses or is adjacent to international boundaries as defined in the MOUs.
3. FHWA shall retain responsibility for any undertaking that crosses state boundaries as defined in the MOUs.
4. FHWA shall retain responsibility for any projects that were specifically excluded from assignment under the 327 MOU (see Attachment 10).

B. ADOT Responsibilities

1. ADOT is legally responsible for ensuring that the Program in Arizona complies with Section 106 for all undertakings with the potential to affect historic properties, and shall carry out the following steps with respect to undertakings covered by this Agreement:

- a. Establish whether there is an undertaking with the potential to affect historic properties.
 - b. Conduct inventories and identify historic properties, as needed.
 - c. Identify and solicit input from consulting parties.
 - d. Conduct Tribal consultation.
 - e. Conduct public involvement activities.
 - f. Establish the area of potential effects (APE).
 - g. Determine the National Register eligibility of properties within the APE.
 - h. Assess the effects of the undertaking.
 - i. Resolve any adverse effects to historic properties.
2. ADOT shall define each undertaking in sufficient detail so that Section 106 review can be conducted. Section 106 review should begin at the earliest stages of scoping or design.
 3. ADOT will compile and distribute a report of Section 106 compliance actions necessary for quarterly and annual reports as required under Stipulations XVII.B and XVII.C.
 4. ADOT will identify any party entitled to be consulted on an undertaking, including federal and state agencies, and local governments, and invite these parties to participate as consulting parties pursuant to 36 C.F.R. 800.2(c).
 5. ADOT will consult with the Tribes on Program-funded undertakings, unless the Tribes request government-to-government consultation directly with FHWA for any particular undertaking, as further discussed in Stipulation V.
 6. ADOT will make a reasonable and good faith effort to identify any Tribe that might attach religious and cultural significance to historic properties in the APE, whereupon ADOT will invite that Tribe to participate as a consulting party to the undertaking.
 7. ADOT shall curate archaeological materials produced under this Agreement at the ASM or another facility meeting the standards of 36 C.F.R. Part 79, and shall consult with Tribes and other consulting parties to an undertaking regarding the appropriate repository for a given collection.

IV. Professional Qualification Standards, Permitting Requirements, and Training

A. Qualification Standards:

1. ADOT shall employ staff with professional training and experience in prehistoric or historic archaeology, historic architecture, or architectural history who either meet the Professional Qualifications Standards established by the Secretary of the Interior (SOI), or who work under the supervision of a professional that meets the SOI qualifications standards (48 F.R. 44716, Sept. 1983, as updated). ADOT staff who

possess professional training and experience, as described, are referred to in this Agreement as Historic Preservation Team Member (ADOT HPT). All work performed by ADOT under the terms of this Agreement shall be conducted by an ADOT HPT. The ADOT HPT may seek advice or technical assistance from SHPO at any time on any undertaking.

2. Consultant cultural resource professionals (CRPs) with subject matter expertise in prehistoric or historic archaeology, architecture, or architectural history, may assist ADOT staff whenever undertakings are reviewed that involve types of cultural resources in their areas of expertise.
3. Section 106 documentation may be prepared by consultant CRPs who meet the SOI's Professional Qualifications Standards, or who work under the supervision of a professional who meets the SOI's Professional Qualifications Standards.
4. Consultant responsibilities do not include formally approving Section 106 documents on behalf of ADOT, making official agency determinations or findings, signing consultation letters, or otherwise functioning as an agency official for the purposes of Section 106.
5. All actions prescribed by this Agreement that include, but are not limited to, the identification, evaluation, analysis, recording, treatment, monitoring, or disposition of cultural resources, or that involve the reporting or documentation of such actions in reports, memos, or other records, shall be carried out by CRPs or ADOT HPT who meet, or work under the direct supervision of a person or persons who meets the SOI's Professional Qualifications Standards for Archaeology, Historic Architecture, Architectural History, or History, as appropriate (48 F.R. 44716, Sept. 1983, as updated).

B. Permitting Requirements

1. Archaeological investigations on lands owned or controlled by the State of Arizona or by any agency, municipality, or political subdivision of the State of Arizona, including any county or municipal corporation, will be conducted in accordance with a permit issued by the Director of ASM pursuant to A.R.S. § 41-842 of the AAA.
2. Archaeological investigations on federal land will be conducted in accordance with a permit issued by the federal land managing agency pursuant to the ARPA in compliance with 43 C.F.R. Part 7, when applicable.
3. Cultural resources investigations on Tribal lands will be conducted in accordance with permits or other approvals issued by the Tribe under Tribal law or policy, when such law or policy exists.

C. Training

1. ADOT, with the assistance of SHPO as appropriate, will provide training for ADOT personnel and ADOT HPT regarding implementation of this Agreement.
2. ADOT will prepare a guidance manual to accompany this Agreement, which will include internal procedures, memo and letter templates, and other information ADOT determines is necessary to ensure efficient compliance with the terms of this Agreement. The manual will be used as part of the training.
3. ADOT, with the assistance of SHPO as appropriate, will provide training on Section 106, Section 4(f) of the United States Department of Transportation Act (Section 4[f]), and the NEPA, to ADOT HPT, and consultant CRPs, as needed, subject to funding availability.
4. ADOT, in coordination with SHPO, will work with its consultants and LPA staff and consultants working on LPA projects to identify areas where training can improve performance under this Agreement and will work to make such training available, subject to funding availability.
5. Whenever major changes to 36 C.F.R. Part 800 become effective, ADOT HPT will participate in training on the new regulations, and update the guidance manual, as needed, within six months of new regulations taking effect.

V. Consultation with Indian Tribes

- A. FHWA shall conduct government-to-government consultation with the Tribes for any particular Program-funded undertaking if requested by the Tribes. Otherwise, ADOT shall carry out Tribal consultation as presented below.
- B. ADOT will carry out routine Section 106 consultation with Tribes, and shall consult with:
 1. Signatory Tribes for Program-funded undertakings on and off their Tribal lands in accordance with Stipulations VIII, IX, and X, as further described below.
 2. Tribes that are concurring parties to this Agreement for Program-funded undertakings on or off their Tribal lands in accordance with Stipulations VIII, IX, and X.
 3. Tribes that are not signatories or concurring parties to this Agreement in accordance with 36 CFR Part 800, or by means of a separate Tribe-specific PA with ADOT that meets the requirements of 36 CFR Part 800.
- C. ADOT will formally initiate routine Section 106 consultation with Tribes in writing. Unless a Tribe requests otherwise, formal consultation letters may be transmitted electronically.

- D. Any Tribes that might attach religious and cultural significance to historic properties in the APE shall be identified by ADOT. ADOT will invite the Tribes to be consulting parties for a given undertaking.
- E. Where the Tribe has a NPS certified THPO, ADOT shall consult with the THPO. Where the Tribe does not have a THPO, ADOT shall consult with the Tribe and SHPO.
- F. For all Signatory Tribes, when a Program-funded undertaking is on land owned by a Tribe as defined under 36 CFR § 800.16(x), ADOT will consult with the Tribe prior to finalizing any decisions that relate to the following stipulations in this Agreement:
- Screened undertakings exempted from further review (Stipulation VIII.C.1).
 - Findings of No Historic Properties Affected (Stipulation VIII.F.1.a).
 - Findings of No Adverse Effect with Standard Conditions (Stipulation VIII.F.2.a.i).
 - Changes in Scope of Project (Stipulation IX).

These stipulations do not generally require individual consultation but are instead addressed through batched consultation in a quarterly report (see Stipulation XVII.B). The purpose of consulting with a Signatory Tribe for these undertakings when the undertaking is on that Tribe's land is to ensure the Signatory Tribe is informed and has no objections prior to ADOT carrying out the stipulation. When acceptable to the Signatory Tribe, this consultation may occur informally through emails and telephone calls and documented to the project files. If the informal process is not acceptable to the Signatory Tribe, ADOT will formally consult with the Tribe, and the Tribe will have 15 calendar days to respond. If there is no response within that time period, ADOT will follow the consultation procedures in Stipulation VIII.A.1.

VI. Consultation with Federal, State, and Local Government Agencies

- A. When a Program-funded undertaking is on land owned, managed, or regulated by a federal, state, or local government agency, ADOT will consult with the appropriate agency throughout the Section 106 process in accordance with Stipulations VIII, IX and X.
- B. In addition, ADOT will coordinate with the federal, state, or local government agency on all decisions relating to the stipulations listed below, which are addressed through batched consultation in a quarterly report (see Stipulation XVII.B). The purpose of this coordination is to ensure the agency is informed and in agreement prior to ADOT carrying out the stipulation. Communication may occur informally through emails and telephone calls, and will be documented to the project file. The agency shall have 15 calendar days to respond.
- Screened undertakings exempted from further review (Stipulation VIII.C.1).

- Findings of No Historic Properties Affected (Stipulation VIII.F.1.a).
- Findings of No Adverse Effect with Standard Conditions (Stipulation VIII.F.2.a.i).
- Changes in Scope of Project (Stipulation IX).

C. When Program-funded undertakings cross dams, canals, laterals, ditches or associated facilities covered by the Reclamation PAs presented in Attachment 1, ADOT will coordinate with Reclamation and SRP on a project-specific basis to determine whether it is appropriate for ADOT to adopt stipulations of the applicable Reclamation PA in order to avoid or resolve adverse effects to facilities covered by the Reclamation PA. If ADOT adopts those stipulations of an applicable PA, implementation of those stipulations will satisfy ADOT's Section 106 responsibilities for the undertaking in regard to those facilities. ADOT shall notify consulting parties to the undertaking of this decision.

For all other SRP assets and facilities, including transmission lines, potentially impacted by a Program-funded undertaking, SRP shall be considered an organization with a demonstrated interest in the undertaking under 36 CFR 800.2(c).

VII. Participation of Other Consulting Parties and the Public

A. Consulting Parties:

1. Parties that are entitled to be consulted on an undertaking, as described in 36 CFR § 800.2(c), shall be invited to participate by ADOT. Any land-managing or regulatory agency whose land or jurisdiction may be included in a Program-funded undertaking shall be invited by ADOT to participate in the Section 106 process. Other individuals and organizations with a demonstrated interest in the undertaking may also participate as consulting parties.
2. ADOT shall invite any LPAs, including CLGs, that are applicants for federal assistance or approvals, to be consulting parties to the undertaking under 36 CFR § 800.2(c).
3. ADOT shall consider all written requests of individuals and organizations to participate as consulting parties to the undertaking. ADOT will respond to all written requests within 15 calendar days. ADOT will determine which parties should be consulting parties to the undertaking, and will consult with SHPO or THPO, as applicable, prior to denying consulting party status to any party requesting such status.

B. Public Involvement:

1. As part of the public participation process, ADOT will seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its potential effects on historic properties, the likely interest of the public in the effects on historic properties, and confidentiality concerns of the Tribes and private

individuals, as provided for under 36 C.F.R. § 800.2(d)(3).

2. ADOT will ensure that issues relating to cultural resources, as defined in Attachment 2, are incorporated into ADOT's public participation process carried out under NEPA, as far as is practicable.
3. ADOT may use the NEPA scoping process, including but not limited to hearings, meetings, and letters, to inform the public about a proposed undertaking and request comments, pursuant to 36 C.F.R. § 800.2(a)(4). When exercising this option, ADOT will make it clear to the public that comments are being requested pursuant to Section 106.

VIII. Section 106 Process

A. Consultation

1. All consultation among ADOT and SHPO and/or THPO, as applicable; federal and state land managing or regulating agencies; Tribes; and other consulting parties to an undertaking will be conducted within the review periods stipulated below. If by the end of the review period, ADOT does not receive comments from one or more of the consulting parties to the undertaking, ADOT will follow-up with the party to verify that the party has no comment. If, after a reasonable and good faith effort to reach an unresponsive consulting party, there has still been no response, ADOT will notify the party of its intent to move forward within a specified timeframe, and, if no response has been received within that timeframe, will proceed to the next step prescribed by this Agreement.

Except for screened undertakings, the consultation timeframes when using the stipulations within this Agreement, are 15 calendar days to respond. Standard Section 106 consultation is 30 calendar days to respond unless the agency has requested additional time.

2. If any agency or Tribe requires additional time for consultation, ADOT will accommodate the request whenever possible provided that the request for an extension is made within the original review period. The ADOT HPT will document the request for additional consultation time and ADOT's response to the project file.
3. For a given undertaking, ADOT may, when warranted, expedite consultation through addressing multiple steps in the Section 106 process, as presented in this Stipulation, in accordance with 36 C.F.R. § 800.3(g). ADOT will ensure that SHPO or THPO, as applicable, and any other consulting parties have an adequate opportunity to express their views pursuant to 36 C.F.R. § 800.2.

B. Initiation of the Section 106 Process

ADOT will be responsible for establishing the undertaking and initiating the Section 106 review process. An ADOT HPT will determine if the undertaking has the potential to cause effects to historic properties. Where the ADOT HPT determines there is no potential to cause effects pursuant to 36 C.F.R. § 800.3(a)(1), ADOT will have no further Section 106 obligation and ADOT shall document this finding to the project file. Where the ADOT HPT determines the undertaking does have potential to affect historic properties, the undertaking will be reviewed in accordance with Stipulations VIII.C through VIII.G below.

C. Screened Undertakings Exempted from Further Review

1. The undertakings classified in Attachment 3 (Screened Undertakings Exempted from Further Review) will require no further review under this Agreement when the requirements of Attachment 3 have been satisfactorily met and it is determined by an ADOT HPT that no historic properties will be affected by the undertaking. ADOT shall document all undertakings exempted from further review in the quarterly report, as required under Stipulation XVII.B.
2. All exempted undertakings shall be screened by an ADOT HPT in accordance with the procedures described in Attachment 3. Any undertaking that is not listed in Attachment 3, and does not meet the conditions for review as an exempted undertaking, will be reviewed through the Section 106 process as described below in Stipulation VIII.D through Stipulation VIII.G.
3. ADOT, in consultation with SHPO/THPO and the other signatories and concurring parties to this Agreement, may propose additions to the list of exempted undertakings in Attachment 3, as needed. ADOT will justify the addition in writing to the other signatories and concurring parties to this Agreement, explaining how the undertaking will not cause effects to historic properties, provided all conditions are met. Where SHPO/THPO approves, and none of the other signatories and concurring parties object, the proposed exempted undertaking will be added to Attachment 3 without formal amendment to this Agreement under Stipulation XX. ADOT will update Attachment 3 and provide copies to SHPO/THPO and the other signatories and concurring parties to this Agreement. Where SHPO/THPO does not approve, the proposed exempted undertaking will not be added to Attachment 3. Objections from other signatories or concurring parties will be addressed on a case-by-case basis. Any additions to Attachment 3 will be reported on in the annual report prepared in accordance with Stipulation XVII.C.

D. Identification of Historic Properties

1. An ADOT HPT shall determine and document the APE for undertakings covered by this Agreement in accordance with Attachment 4 (Determining the Area of Potential Effects). In establishing the APE, all direct, indirect, and cumulative effects shall be considered. At any time, ADOT may communicate with SHPO or

other consulting parties to the undertaking on determining and documenting an APE.

2. ADOT shall identify the consulting parties to the undertaking and invite them to participate in the Section 106 review in accordance with 36 C.F.R. § 800.2(c) and 36 C.F.R. § 800.3(c) through (f). An ADOT HPT will prepare or oversee preparation of invitation letters to the consulting parties.
3. ADOT shall identify historic properties that may be located within an undertaking's APE in accordance with 36 C.F.R. §§ 800.4(a)(2) through (4) and 36 C.F.R. § 800.4(b). An ADOT HPT will determine whether a new survey is appropriate.
4. If no previous inventory of the APE is available, but the ADOT HPT has reason to believe that survey of all or some of the area within the APE is unwarranted, the ADOT HPT will notify SHPO or THPO, as applicable, and the federal, state, local government, land managing or permitting agencies or Signatory Tribe with jurisdiction, if any, to provide an explanation for ADOT's position. Should one of these parties object within 15 calendar days to the decision that new inventory is not necessary, ADOT will follow Stipulation VIII.D.5 through VIII.G, as needed.
5. When a survey is warranted, ADOT will arrange for a survey to be conducted by a professional meeting the applicable qualification standards in Stipulation IV.
6. If a new survey identifies cultural resources within the APE, ADOT will ensure that a survey report meeting current SHPO and ASM reporting standards is prepared. ADOT will submit the survey report, along with National Register eligibility determinations, to the consulting parties for a 30 calendar day review in accordance with Stipulation VIII.E.
7. If a new survey is conducted and no cultural resources are identified within the APE, ADOT will ensure that a survey report meeting current SHPO and ASM reporting standards is prepared documenting the negative findings. If the survey was conducted on federal, state, or Tribal lands, ADOT will coordinate or consult with the appropriate agency, Signatory Tribe, or THPO regarding the adequacy of the report. Once the report is found adequate by ADOT and the land owner, ADOT shall issue a finding of No Historic Properties Affected, in accordance with Stipulation VIII.F.1. No further consultation will be required. These survey reports will be included as documentation in the quarterly report required under Stipulation XVII.B.
8. Identification of historic properties shall be consistent with the SOI's *Standards and Guidelines for Archaeology and Historic Preservation* (48 F.R. 44720-26). If the Program-funded undertaking is on land owned or managed by a federal or state land managing agency or Signatory Tribe, ADOT shall also follow applicable guidelines or protocols for identifying historic properties issued by the agency or Signatory Tribe.

9. ADOT shall make a reasonable and good faith effort to identify and consult with any affected Tribe to assist in identifying properties to which the Tribe may attach religious and cultural significance that may be within the APE, and shall identify any such properties in accordance with 36 C.F.R. § 800.4(b).

E. Evaluation of National Register Eligibility

1. ADOT shall evaluate the historic significance of identified cultural resources in accordance with 36 C.F.R. § 800.4(c)(1) following National Register Bulletins 15 and 38. An ADOT HPT will make the National Register evaluation. In making this evaluation, ADOT will consult with the appropriate land managing or permitting agency or Signatory Tribe when a Program-funded undertaking is on land under their respective jurisdiction, and will provide the land managing agency or Signatory Tribe with a recommendation on National Register eligibility for their concurrence.
2. During the evaluation process, ADOT shall make a reasonable and good faith effort (36 C.F.R. § 800.4(e)(1)) to identify and consult with the Tribes on the evaluation of any identified cultural resource to which they may attach religious and cultural significance.
3. When previously evaluated cultural resources are identified within an undertaking's APE, an ADOT HPT shall review those previous evaluations to assess whether the previous evaluations are still valid. Such review may require a field visit, and field visits may be made by consultant CRPs on behalf of ADOT. If the previous evaluations are not valid, the ADOT HPT will consult with the appropriate land managing or permitting agency or Signatory Tribe when a Program-funded undertaking is on land under their respective jurisdiction, and subsequently with all other consulting parties on a revised determination of eligibility.
4. ADOT shall submit determinations of National Register eligibility and supporting documentation to the consulting parties to the undertaking for review in accordance with 36 C.F.R. § 800.4(c)(2). The consulting parties will have 15 calendar days to submit their comments to ADOT.
5. If SHPO or THPO, as applicable, and the other consulting parties to the undertaking agree regarding ADOT's National Register eligibility determinations, ADOT may proceed to the next step in this Agreement. If one or more of the consulting parties to the undertaking do not agree, and the disagreement cannot be resolved, ADOT, as the responsible federal agency, will request formal determination from the Keeper of the National Register in accordance with 36 C.F.R. § 800.4(c)(2). The Keeper's determination on National Register eligibility will be final.

F. Assessment of Effects

ADOT will assess the effects of the undertaking on historic properties, taking into consideration the direct, indirect and reasonably foreseeable effects of the undertaking that may occur later in time, be farther removed in distance, or be cumulative. An ADOT HPT shall make all findings of effect as follows.

1. Finding of No Historic Properties Affected

- a. For all those undertakings not screened and exempted under Stipulation VIII.C and Attachment 3, if ADOT determines that either there are no historic properties within the APE, or historic properties are present in the project area but will not be affected by the undertaking, ADOT shall issue a finding of No Historic Properties Affected pursuant to 36 C.F.R. § 800.4(d)(1). At the time of the finding, an ADOT HPT will document the finding for the quarterly report, as required under Stipulation XVII.B.
- b. If ADOT finds there are historic properties that may be affected by the undertaking under 36 C.F.R. § 800.4(d)(2), ADOT shall make a finding of effect in accordance with Stipulation VIII.F.2 or Stipulation VIII.F.3, as applicable.

2. Finding of No Adverse Effect

For those undertakings where historic properties may be affected, ADOT shall apply the Criteria of Adverse Effect in accordance with 36 CFR § 800.5(a). If the effect of the undertaking will not be adverse, ADOT will issue a finding of No Adverse Effect in accordance with 36 C.F.R. § 800.5(b) and an ADOT HPT will document the finding. ADOT may make a finding of No Adverse Effect in one of two ways, as presented below.

a. No Adverse Effect with Standard Conditions

ADOT may make a finding of No Adverse Effect with Standard Conditions when the standard conditions presented in Attachment 5 (No Adverse Effect with Standard Conditions) to this Agreement are met. Following any consultation with Signatory Tribes or federal or state land managing agencies, as set forth in Stipulations V and VI, and with SHPO as appropriate per Attachment 5, the undertaking shall not be subject to further review under this Agreement.

- i. ADOT shall document each undertaking in which a finding of No Adverse Effect with Standard Conditions is made in the quarterly report, as required under Stipulation XVII.B.
- ii. ADOT, in consultation with SHPO and the other signatories and concurring parties to this Agreement, may propose the adoption of additional standard

conditions that have proven effective in avoiding adverse effects to historic properties. ADOT shall provide documentation supporting the proven effectiveness to SHPO or THPO, as applicable, and the other signatories and concurring parties for review. Where ADOT and SHPO or THPO, as applicable, approve, and no other parties object, the proposed standard condition will be added to Attachment 5 without formal amendment to this Agreement under Stipulation XX. ADOT will update Attachment 5 and provide copies to SHPO or THPO and the other signatories and concurring parties to this Agreement. Where SHPO or THPO, as applicable, does not approve, the proposed standard condition will not be added to Attachment 5.

- iii A finding of No Adverse Effect with Standard Conditions may be made on undertakings involving roads that are historic properties, provided that an ADOT HPT with appropriate professional qualifications, as defined in Stipulation IV, determines the undertaking will not adversely affect the road's character-defining features.

b. No Adverse Effect

When the standard conditions in Attachment 5 do not apply, ADOT will propose a finding of No Adverse Effect and will consult with SHPO or THPO, as applicable, and the other consulting parties to the undertaking pursuant to 36 C.F.R. § 800.5(c). ADOT shall request that any comments be submitted within 15 calendar days of receipt of consultation. If there are any disagreements, they will be resolved under Stipulation XIX, dispute resolution.

3. Finding of Adverse Effect

If ADOT determines that the criteria of adverse effect in 36 C.F.R. § 800.5(a)(1) are met, ADOT will issue a finding of Adverse Effect and consult further to resolve the adverse effect in accordance with Stipulation VIII.G. ADOT will coordinate with the appropriate land managing or permitting agency or Signatory Tribe when a Program-funded undertaking is on land under their respective jurisdiction prior to formal consultation with all the consulting parties to the undertaking.

G. Resolution of Adverse Effects

1. Standard Measures for Resolving Adverse Effects

- a. ADOT may propose to resolve adverse effects to certain types of historic properties by following the process in Attachment 6 (Standard Measures for Resolving Adverse Effects) as an alternative to preparing a Memorandum of Agreement (MOA) or project-specific PA.
- b. ADOT will propose the applicable standard measure for resolving adverse effects, as provided in Attachment 6, to SHPO or THPO, as applicable, and

the consulting parties to the undertaking. ADOT will provide the SHPO or THPO and the consulting parties to the undertaking with information on the undertaking, each property and its significance, the adverse effect to the property, and a justification for resolving adverse effects, as proposed, under Attachment 6 to this Agreement. ADOT will request the review parties provide their comments within 30 days.

- c. ADOT will notify ACHP of the finding of Adverse Effect and invite their participation in the resolution of adverse effects.
- d. Where SHPO or THPO, as applicable, agree in writing that resolving adverse effects under Attachment 6, as proposed, is adequate, and any party that is a land manager or permitting agency with a role in authorizing the undertaking concurs in writing, the Section 106 process is completed. ADOT will ensure that either a Historic Properties Treatment Plan (HPTP) or a proposal for Historic American Building Survey/Historic American Engineering Record (HABS/HAER) Documentation for resolving the adverse effects is prepared in accordance with Attachment 6. Where there is no agreement in writing among SHPO or THPO, as applicable, or any party that is a land managing or permitting agency with a role in authorizing the undertaking, ADOT will initiate consultation to prepare an MOA or project-specific PA following Stipulation VIII.G.2.
- e. Any consulting party to the undertaking may object to ADOT regarding the proposal to resolve the adverse effects of the undertaking through standard measures. ADOT, in consultation with SHPO or THPO, as applicable, and the land manager or permitting agency, if any, will consider the objection in determining if resolving the adverse effect of the undertaking under Attachment 6 is warranted. Should ADOT determine that resolving the adverse effects of the undertaking under Attachment 6 is not adequate, then ADOT will prepare a MOA or project-specific PA, in accordance with Stipulation VIII.G.2.
- f. ADOT shall provide draft copies of the HPTP Plan or proposal for the HABS/HAER documentation to SHPO or THPO, as applicable, and the other consulting parties to the undertaking for review and comment. The consulting parties will have 30 calendar days to provide comments on the HPTP or HABS/HAER proposal. If comments received require only minor editorial corrections, such as typos, formatting, and punctuation, ADOT will complete the HPTP or HABS/HAER proposal. If more substantive changes are required, ADOT shall provide draft copies of the revised HPTP or HABS/HAER proposal to all consulting parties to the undertaking for review and comment. The consulting parties will have 20 calendar days to provide comments on any revised drafts. ADOT, in consultation with the consulting parties to the undertaking, may modify review periods depending on the nature and complexity of the proposed treatment. ADOT will consider the comments of any party that responds within the review period(s) in completing the HPTP or HABS/HAER proposal. When the document is completed, ADOT will provide

copies of the completed HPTP or HABS/HAER proposal to all consulting parties.

- g. The results of all standard measures for resolving adverse effects will be reported. ADOT will ensure that a preliminary report of findings is completed at the end of field work and will submit the report to all consulting parties to the undertaking for review and comment. The specific requirements for the preliminary report of findings, as well as the review process and time frames will be stipulated in the HPTP or HABS/HAER proposal. ADOT will not authorize the start of construction until consultation on the preliminary report of findings has been satisfactorily completed, except as described in Stipulation VIII.G.1.h below.
 - h. ADOT may propose an in-field meeting to be held at the end of fieldwork during which the results of the fieldwork will be presented to the consulting parties. ADOT may authorize start of construction if the consulting parties attending the in-field meeting agree that the HPTP was adequately implemented and no additional field work is needed. SHPO or THPO, as applicable, and any land managing or permitting agency or Tribe with jurisdiction must also concur. ADOT will ensure that a summary of the in-field meeting and any decisions made at the meeting are included in the preliminary report of the findings required under VIII.G.1.f.
 - i. ADOT will ensure that a draft treatment report or HABS/HAER document is prepared, and will submit the draft report to all consulting parties to the undertaking for review and comment. The review process will follow the same process as in Stipulation VIII.G.1.e above.
2. Memorandum of Agreement or Project-Specific Programmatic Agreement
- a. When ADOT determines resolution of adverse effect under Attachment 6 is not adequate, or is not agreed to by the consulting parties; ADOT will consult with the consulting parties to the undertaking and prepare an MOA in accordance with 36 CFR § 800.6, or a project-specific PA in accordance with 36 C.F.R. § 800.14(b). ADOT shall invite ACHP to participate in the undertaking and the development of the agreement document, if not already participating in the undertaking. The process for preparing and reviewing the MOA or project-specific PA will be negotiated among the consulting parties to the undertaking.
 - b. If an MOA or project-specific PA is prepared, once executed, a copy shall be provided to each signatory and concurring party, and the MOA or PA will be filed with the ACHP and the consulting parties, per 36 C.F.R. § 800.6, along with the documentation specified in 36 C.F.R. § 800.11(f). This completes the Section 106 process. The measures to resolve adverse effects shall then be incorporated into the undertaking, and the undertaking may be implemented once the treatment measures have been completed according to the approved

HPTP or HABS/HAER proposal.

IX. Changes in Scope of Project

- A. Whenever the scope of a project is revised (e.g., design changes, utility relocation, addition of geotechnical investigations, addition of new ROW), including during construction, an ADOT HPT will determine whether or not the changes require modifying the APE or revising the project effect finding and inform the ADOT project manager and Environmental Planner if further review under Section 106 is required. In making this determination, the ADOT HPT will follow the steps presented below.
1. If the scope changes do not require modifying the APE and the finding of effect remains the same, then no further consultation will be required. The ADOT HPT will document this finding to the project file and the quarterly report.
 2. If the scope changes do require modifying the APE, the ADOT HPT will determine whether or not a new survey is warranted, as follows.
 - a. When the new APE has not been previously surveyed to current standards, the ADOT HPT will arrange for a survey to be conducted following the procedures in Stipulation VIII.D.
 - b. When the new APE has been previously surveyed to current standards with negative results, the ADOT HPT will document the finding to the project file and the quarterly report as provided for in Stipulation XVII.B. No additional consultation will be required.
 - c. If the new APE has not been previously surveyed to current standards, but the ADOT HPT has reason to believe that inventory of the area within the modified APE is unwarranted, the ADOT HPT will notify SHPO or THPO, as applicable, and the federal or state land managing or permitting agency or Signatory Tribe with jurisdiction, if any, to provide an explanation for ADOT's position that new survey is not warranted and the results will be documented through a scope change memo in accordance with Stipulation VIII.A.3. Should any one of the parties object within 15 calendar days to the decision that new survey is not warranted, ADOT will follow Stipulations VIII.D through VIII.G, as needed.
 3. If the scope changes do require modifying the APE, and new survey is conducted, then, depending on the survey results, ADOT will proceed as follows.
 - a. When no additional cultural resources are identified within the new APE, and the scope change will not alter the finding of effect for the undertaking, then the ADOT HPT will ensure that a survey report meeting current SHPO and ASM standards is prepared documenting the negative findings. If the survey was conducted on lands managed by a federal, state, or local government agency or Signatory Tribe with jurisdiction, ADOT will consult or coordinate with the landowner following Stipulation V or VI, as applicable regarding the adequacy of

the survey report. The finding and negative survey report will be included as documentation to the Quarterly Report. No additional consultation will be required.

- b. When additional cultural resources are identified within the new APE, and, as a result, the finding of effect for the undertaking may be altered, then ADOT will make the revisions commensurate with the nature and scope of the changed potential effects and follow the review and consultation process in Stipulation VIII, as applicable.

X. Preconstruction Geotechnical Testing

- A. Preconstruction Geotechnical Testing is a necessary component to the engineering of safe roadways, but may affect historic properties when undertaken within the boundaries of prehistoric and historic archaeological sites and traditional cultural properties (TCPs) that are listed in or eligible for listing in the National Register. ADOT will follow the applicable procedures in Stipulation VIII above for review of geotechnical testing.
- B. Geotechnical testing is conducted prior to road construction in order to collect data needed for design purposes. As such, consultation for geotechnical testing may occur before formal consultation on the undertaking or as the initial consultation on the undertaking.

XI. Protocol for Installing or Replacing Fencing and Signage

Installing or replacing fencing and signage within road ROWs is a common undertaking either as a separate task or as part of larger transportation projects. Where Program-funded undertakings involving the installation or replacement of fencing and signage occur outside the recorded limits of archaeological sites, ADOT will follow the provisions of Stipulation VIII.C and Attachment 3 (Screened Undertakings Exempted from Further Review), or VIII.F.1 (No Historic Properties Affected) as applicable. In the event that Program-funded undertakings involving the installation or replacement of fencing and signage occur within the limits of National Register listed or eligible archaeological sites, ADOT shall follow the protocol in Attachment 7 (Protocol for Installing or Replacing Fencing and Signage). If the fencing or signage project does not meet the conditions in Attachment 7, then ADOT will review the project in accordance with Stipulation VIII.

XII. Protocol for Recreational Trails Program Undertakings

FHWA provides Program funding to the states for developing and maintaining recreational trails and trail-related facilities through the RTP. The RTP is funded through the Program. In Arizona, the RTP is administered by ASP&T. ADOT provides ASP&T with environmental and cultural resource review of RTP projects under NEPA and Section 106, in consultation with SHPO. ADOT will ensure that the Section 106 requirements for RTP projects are met in accordance with the protocol in Attachment 8 (Protocol for Recreational Trails Program Undertakings) and Stipulation VIII.

XIII. Local Public Agency Projects

- A. FHWA provides financial assistance to the states for LPA transportation projects. *The Stewardship and Oversight Agreement on Project Assumption and Program Oversight by and between the Federal Highway Administration Arizona Division and the Arizona Department of Transportation* (April 9, 2015) states that Title 23 U.S.C. does not recognize local entities as direct recipients of federal funds; therefore, ADOT is responsible for ensuring that federal-aid requirements are met in accordance with the current stewardship and oversight agreement.
- B. ADOT Environmental Planning (EP) is responsible for providing guidance for the preparation of environmental documents for federal-aid projects in compliance with NEPA and other environmental laws, including Section 106.
- C. ADOT oversees the environmental review process and is responsible for ensuring that the process is applied correctly to LPA projects, and for reviewing environmental documents to ensure that they comply with environmental requirements.
- D. ADOT will ensure that the Section 106 requirements for LPA projects are met in accordance with the applicable provisions of Stipulation VIII of this Agreement.
- E. For LPA projects where ADOT has made a finding of No Adverse Effect or No Adverse Effect with Standard Conditions, ADOT will consult with SHPO and the local government agenc(ies) at the time that the finding is made and give SHPO the opportunity to request continuing consultation as design progresses. For projects with a finding of No Adverse Effect with Standard Conditions, this consultation may be conducted informally through email or telephone calls and documented for the project file and the quarterly report as required under Stipulation XVII.B.
- F. For LPA projects where the LPA is a CLG and the CLG, through consultation, has notified ADOT that they want to be notified about quarterly reported actions crossing lands under their jurisdiction, ADOT will notify the CLG of such quarterly reported actions. Those CLGs who do not notify ADOT that they want to receive notifications about quarterly reported actions crossing lands under their jurisdiction will receive no notifications on these actions. ADOT will continue to invite CLGs and all LPAs to be consulting parties, on all actions with findings of No Adverse Effect, No Adverse Effect with Standard Conditions, or Adverse Effect for LPA projects under their jurisdiction.

XIV. Post-Review Discoveries

- A. If cultural resources are encountered after the Section 106 review process detailed in Stipulation VIII has been completed, ADOT shall require the person in charge of construction to immediately cease construction within a 50 foot radius of the discovery location, secure the discovery location against further disturbance and notify ADOT. ADOT shall notify SHPO or THPO, as applicable, and any land

manager or owner.

- B. If the discovery is on state, county, or municipal land, ADOT shall also notify the Director of ASM per A.R.S. § 41-844.
- C. If the discovery is an Isolated Occurrence (IO), the ADOT HPT or CRP shall examine the area to determine whether additional in situ artifacts and/or features are identified. If, after examination of the area, the ADOT HPT or CRP determines that the artifacts/feature is an IO and not part of a larger site; the ADOT HPT or CRP will formally document the IO (photograph and description) and ADOT HPT will provide the information to the appropriate land managing or regulatory agency and SHPO. In the event that the IO is an object of cultural patrimony (e.g. ceremonial) that may be eligible for listing on the National Register, the ADOT HPT shall contact the land managing agency and Tribes and request input on the disposition of the IO and the continued construction in the vicinity of the discovery.

Any cultural resource that does not meet the definition of an archaeological site in *The Arizona State Museum Archaeological Sites Recording Manual* (1993), or its successor document will be considered an IO (except for in use historic structures which will be recorded separately) for the purposes of this Agreement. When Program-funded undertakings are located on lands managed by a federal or state agency or on Tribal lands, ADOT will follow the applicable definitions of the agency or Signatory Tribe with jurisdiction.

- D. If the discovery is an archaeological site, ADOT shall ensure that a CRP meeting the qualification standards for archaeology in Stipulation IV inspects the discovery within 24 hours noting, where possible, its nature, age, extent, condition and National Register eligibility, if it has not been previously evaluated. If the discovery is on land owned or managed by a federal or state agency or by a Tribe, ADOT will follow the landowner's definition of a site; otherwise, the ASM definition of a site will be followed in implementing this stipulation. ADOT will electronically submit an inspection summary within 48-72 hours to SHPO or THPO, as applicable; the federal or state land manager or owner; ASM, when warranted; and any Tribe that may attach religious and cultural significance to the discovery, along with a recommendation on National Register eligibility and a proposal for resolving any adverse effects, in accordance with 36 C.F.R. § 800.13(b)(3). The reviewing parties will have two business days to provide comments. ADOT shall take into account all comments received within the review period.
- E. Where there is concurrence among the land managing agency or Signatory Tribe, if any, ADOT and SHPO or THPO, as applicable, ASM when warranted, and any Tribe that may attach religious and cultural significance to the discovery, that the discovery is not National Register eligible, ADOT will document this decision and resume construction at the discovery location and notify the parties of its actions.
- F. Where there is concurrence among the land managing agency or Signatory Tribe, if any, ADOT and SHPO or THPO, as applicable, ASM when warranted, and any Tribe

that may attach religious and cultural significance to the discovery, that the discovery is National Register eligible, ADOT will carry out its proposed actions to resolve the adverse effects. ADOT shall submit a report of the actions to SHPO or THPO, the applicable land manager or Tribe, and ASM, when warranted, once the action is completed.

- G. Where there is a dispute regarding National Register eligibility among the land managing agency or Signatory Tribe, if any, ADOT and SHPO or THPO, as applicable, ASM when warranted, and any Tribe that may attach religious and cultural significance to the discovery, ADOT shall follow the procedures in Stipulation VIII.E.5. If the Keeper of the National Register determines the discovery is National Register eligible, ADOT shall follow Stipulation XIX.F. Alternatively, ADOT may treat the discovery as if it is National Register eligible and follow Stipulation XIV.F.
- H. If the post review discovery includes human remains, then ADOT will follow Stipulation XV. As general guidance, ADOT will follow the ACHP's *Policy Statement Regarding Treatment of Burial Sites, Human Remains and Funerary Objects (2007)*, unless there is project specific documentation.

XV. Treatment of Human Remains

A. Treatment on Federal Lands

Under the terms of the MOUs, FHWA has assigned and ADOT has assumed all of the US Department of Transportation Secretary's responsibilities under NEPA for environmental review, reevaluation, consultation, or other action pertaining to the review or approval of highway projects under the NAGPRA, 25 U.S.C. §§ 3001–3013; 18 U.S.C. § 1170 and its implementing regulations at 43 CFR Part 10. ADOT will comply with NAGPRA, as follows.

1. On federal land, if the discovery of human remains and/or cultural items as defined by the NAGPRA is anticipated to occur during archaeological excavation or construction, ADOT will assist the federal land managing agency to develop a Plan of Action (POA) in accordance with NAGPRA regulations 43 C.F.R. § 10.3. If the federal land managing agency has an existing POA in effect, ADOT will follow its consultation and treatment provisions, as appropriate. ADOT will notify SHPO of the discovery.
2. If a NAGPRA POA is not in effect, and human remains and/or cultural items, as defined, are encountered on federal lands either through archaeological excavation or during construction, ADOT shall require the person in charge to immediately cease within a 100-foot-radius of the discovery, take steps to protect the discovery, and promptly report the discovery to ADOT and the federal land managing agency. ADOT will immediately report the discovery to SHPO. The federal land managing agency shall then follow the provisions for inadvertent discoveries in compliance with the NAGPRA regulations at 43 C.F.R. § 10.4.

B. Treatment on Tribal Lands

1. On Tribal lands, if the discovery of human remains and/or cultural items, as defined under NAGPRA, is anticipated to occur during archaeological excavation or construction, ADOT will assist the BIA and the Tribe in preparing a NAGPRA POA, if not already developed. Where a NAGPRA POA is in effect, ADOT will follow its consultation and treatment provisions.
2. If a NAGPRA POA is not in effect, and human remains and/or cultural items, as defined under NAGPRA, are encountered on Tribal lands either through archaeological excavation or during construction, ADOT shall require the person in charge immediately cease within a 100-foot-radius of the discovery, take steps to protect the discovery, and promptly report the discovery to the Tribe and ADOT. ADOT will report the discovery to BIA. ADOT will notify SHPO only if the Signatory Tribe does not have a THPO. ADOT will follow the Tribe's laws regarding the disposition of human remains, or if such laws do not exist, will follow the provisions for inadvertent discovery in compliance with the NAGPRA regulations at 43 C.F.R. § 10.4.

C. Treatment on State, County, Municipal and Private Lands

1. On state, county, or municipal land, if the discovery of human remains is anticipated to be found during archaeological excavation or construction, ADOT shall ensure that the institution, firm, or consultant responsible for the work develops a Burial Agreement with ASM and thereafter adheres to the terms of that Burial Agreement in the event human remains, funerary objects, sacred ceremonial objects or objects of national or Tribal patrimony are encountered during the investigation.
2. If human remains, funerary objects, sacred ceremonial objects or objects of national or Tribal patrimony are discovered on state, county, or municipal lands, either through archaeological excavation or during construction, and no Burial Agreement is in place, ADOT shall require the person in charge to immediately cease within a 100- foot radius of the discovery, take steps to protect the discovery, and immediately notify ADOT. ADOT shall inform SHPO and the Director of ASM and shall follow the requirements of A.R.S. § 41-844. ADOT shall also notify the state agency or local government with jurisdiction, if any.
3. If human remains or funerary objects are discovered on private lands, ADOT shall require the person in charge of construction to immediately cease within a 100-foot- radius of the discovery, take steps to protect the discovery, and immediately notify ADOT. ADOT shall inform SHPO, the Director of ASM and the landowner and shall follow the requirements of A.R.S. § 41-865.

XVI. Emergency Situations

- A. Pursuant to 36 C.F.R. § 800.12(d), this stipulation applies only to undertakings that will be implemented within 30 calendar days *after* the disaster or emergency has been formally declared by the President, the Governor of Arizona, or a Tribal government of a Signatory Tribe in Arizona. For the purposes of this Agreement, emergencies may also be declared by ADOT's Director or the State Engineer, in consultation with the appropriate land managing agencies, if any. ADOT may request an extension of the period of applicability from ACHP prior to the expiration of the 30 days.
- B. Exempt from this Agreement are all immediate rescue and salvage operations needed to preserve life or property.
- C. ADOT shall determine whether the emergency undertaking has the potential to affect historic properties. If historic properties may be affected by the emergency undertaking, ADOT shall notify SHPO or THPO, as applicable; the appropriate land managing or regulatory agency or Signatory Tribe; ASM, if the discovery is on state, county, or municipal land; and any Tribe that might attach religious and cultural significance to the affected property and afford them an opportunity to comment within five business days of the notification.
- D. Notification shall include, to the extent such information is available: description of the nature and extent of the property or properties, an assessment of National Register eligibility of any properties, the type and extent of any damage to the property, the proposed action, any treatment measures that would take the effects into account, and a request for comments.
- E. ADOT shall provide SHPO or THPO, as applicable; any land managing or regulatory agency or Signatory Tribe, and any other consulting parties to the undertaking, a narrative report documenting the actions taken in accordance with this expedited consultation process within 60 calendar days following the initiation of expedited consultation. SHPO or THPO, and any consulting parties to the undertaking, will have 30 calendar days to provide comments, after which ADOT will complete the narrative report and provide copies to SHPO or THPO and the consulting parties.
- F. Where possible, ADOT shall ensure that such emergency actions are undertaken in a manner that does not prevent future preservation or restoration of historic properties. Where such emergency actions may affect historic buildings or structures, they shall be undertaken in a manner that is consistent with the SOI's *Standards for the Treatment of Historic Properties* wherever possible. In addition, where possible, ADOT shall ensure that such actions shall be done with on-site monitoring by the appropriate preservation professional who meets the applicable professional qualification standards in Stipulation IV.

XVII. Documentation and Reporting

A. Documentation

1. All documentation that supports findings and determinations made under this Agreement shall be consistent with 36 C.F.R. § 800.11. Documentation requirements shall also meet the SHPO Survey Report Standards, the AAA standards, and any current ASM policies as applicable.
2. Documentation prepared by LPAs, or their consultants, in support of findings and determinations made under this Agreement shall be submitted to ADOT for review and approval. ADOT shall transmit to SHPO, and other consulting parties, only documentation that ADOT has reviewed and approved.
3. All documentation prepared under this Agreement shall be kept on file at ADOT, and made available to consulting parties and the public at their request, consistent with applicable confidentiality requirements per Stipulation XX.

B. Quarterly Reporting

1. On a quarterly basis, following the state of Arizona's fiscal year, ADOT shall compile and submit to the signatories and concurring parties to this Agreement a list of undertakings exempted from individual consultation as provided for under Stipulations VIII.C.1, VIII.D.7, VIII.F.1.a, VIII.F.2.a.i, IX.A.1, IX.A.2.b, IX.A.3.a, XI.A.1, and XIII.E of this Agreement. The list will be prepared no later than four weeks after the end of each quarter (September 30, December 31, March 31, and June 30). This list shall include, but is not limited to, the following items for each undertaking, as applicable:
 - a. The undertaking name and project numbers.
 - b. A description of the undertaking.
 - c. A map showing the undertaking's location.
 - d. The number of acres for new survey.
 - e. The applicable exemption.
 - f. The applicable finding of No Historic Properties Affected.
 - g. The applicable finding of No Adverse Effect with Standard Conditions.
 - h. Scope changes.

C. Annual Report and Meeting

1. ADOT shall compile an annual report for submission to the signatories and concurring parties to this Agreement. ADOT will consult at the end of the calendar year with the signatories on the format and content of the report.
2. ADOT's letter transmitting the annual report to the signatories will ask the signatories if they would like to hold a meeting to review the performance of this Agreement. This meeting may be with an individual signatory or multiple or all

signatories.

3. ADOT shall post the annual report on its website so that the annual report is available for public inspection at the time it is submitted to the signatories and concurring parties.

XVIII. Confidentiality

- A. Pursuant to 36 C.F.R. §800.4(b), ADOT, as the responsible federal agency, is required to take into account any confidentiality concerns raised by the Tribes or other consulting parties to the undertaking about the nature and location of any historic properties identified in the implementation of this Agreement. Under 36 C.F.R. § 800.11(c), ADOT as a recipient of funding through the Program, may withhold from public disclosure certain information pursuant to Section 304 of NHPA (54 U.S.C. § 307103). Section 304 allows ADOT, in consultation with the SOI, to withhold the location, character, or ownership of a historic property if ADOT determines that disclosure may: 1) cause a significant invasion of privacy; 2) risk harm to the historic property; or 3) impede the use of a traditional religious site by practitioners.
- B. For any Program-funded undertaking on federal land, including land held in trust for Signatory Tribes by the United States, information about the nature and location of archaeological resources may be withheld by the federal land managing agency under Section 9 of the ARPA (16 U.S.C. § 470hh) and its implementing regulations (43 C.F.R. § 7.18), subject to any limitations therein.
- C. For any Program-funded undertaking on lands owned or controlled by the state of Arizona, the state may withhold information that relates to the location of archaeological discoveries, as described in A.R.S. § 41-841 or A.R.S. § 41-844, and A.R.S. § 39-125, or places or objects that are included on or may qualify for inclusion on the Arizona Register of Historic Places as described in A.R.S. 41-511.04, subsection A, paragraph 9.
- D. Other restrictions on the public release of culturally sensitive information relating to cultural resources discovered on a Signatory Tribe's Tribal lands may apply pursuant to Tribal law and policy. ADOT will consult with any Signatory Tribe that raises confidentiality issues to ensure compliance with any applicable tribal law or policy restricting the release of culturally sensitive information about cultural resources found on the Signatory Tribe's land, as needed.
- E. Pursuant to this stipulation, the signatories and concurring parties agree to appropriately safeguard and control the distribution of any confidential information they may receive as a result of their participation in this Agreement. Such safeguarded information is exempt from disclosure under the Freedom of Information Act (5 U.S.C. § 552).

XIX. Dispute Resolution

- A. All signatories and concurring parties to this Agreement shall strive to address and resolve disagreements informally.
- B. In the event that informal resolution cannot be achieved, any signatory or concurring party to this Agreement may object in writing to ADOT regarding any action carried out or proposed with respect to implementation of this Agreement. ADOT shall notify SHPO and within 10 calendar days, initiate consultation with the objecting party to resolve the objection.
- C. If after initiating such consultation with the objecting party ADOT determines that the objection cannot be resolved through consultation, ADOT, as the responsible federal agency, shall forward all documentation relevant to the objection to ACHP, including the agency's proposed response to the objection.
- D. Within 30 calendar days after receipt of all pertinent documentation, ACHP shall exercise one of the following options:
 - 1. Advise ADOT that ACHP concurs with the agency's proposed response to the objection, whereupon ADOT will respond to the objection accordingly; or
 - 2. Provide ADOT with its advisory opinion, which the agency shall take into account in reaching a final decision regarding its response to the objection; or
 - 3. Notify ADOT that the objection will be referred for comment pursuant to 36 C.F.R. § 800.7(a)(4), and proceed to refer the objection and comment.
- E. ADOT, as the responsible federal agency, shall take the resulting comment into account in accordance with 36 C.F.R. § 800.7(c)(4), with reference only to the subject of the dispute. ADOT shall notify all signatories and concurring parties of its decision with regard to the dispute.
- F. ADOT's responsibility to ensure that all actions under this Agreement that are not the subject of the dispute are carried out will remain unchanged.
- G. At any time during the implementation of the terms of this Agreement, should any member of the public raise an objection in writing pertaining to such implementation to any signatory party of this Agreement, that signatory shall immediately notify ADOT. ADOT shall immediately notify the other signatories in writing of that objection. Any signatory may choose to comment on the objection to ADOT. ADOT shall provide a 30 day comment period for objections. ADOT shall consider the objection, and in reaching its decision, ADOT will take all comments from the other parties into account. Within 15 days following closure of the comment period, ADOT will render a decision regarding that objection and respond to the objecting party. ADOT's decision regarding resolution of the objection will

be final. Following the issuance of its final decision, ADOT may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

XX. Amendments

Any signatory to this Agreement may request that it be amended, whereupon the signatories will consult to reach a consensus on the proposed amendment. ADOT will seek input from the concurring parties on any proposed amendments. Any amendment to this Agreement must be signed by all signatories. ADOT will provide copies of the amendment to the concurring parties.

XXI. Withdrawal

Any Signatory Tribe may withdraw from this Agreement. In the case of withdrawal from this Agreement by a Signatory Tribe, ADOT shall comply with 36 C.F.R. Part 800, subpart B, for all Program-funded undertakings on or affecting lands or historic properties on the withdrawing Tribe's Tribal lands, in lieu of this Agreement. For all Program-funded undertakings off the withdrawing Tribe's Tribal lands, ADOT shall consult with the Tribe pursuant to 36 C.F.R. Part 800, subpart B, in lieu of this Agreement. Withdrawal from this Agreement by a Signatory Tribe does not terminate the Agreement for the remaining signatories and concurring parties.

XXII. Termination

- A. Any signatory or invited signatory that may decide to terminate the agreement, shall consult in writing with the other signatories to determine whether the agreement can be amended to address concerns. If amending the agreement is not appropriate the agency shall continue consultation with other signatories regarding whether termination of the agreement is warranted or whether individual withdrawal is more appropriate.
- B. If the FHWA, ADOT, SHPO, ACHP, or an Invited Signatory determines that it wants to terminate this Agreement, the signatory shall provide a thirty (30) day notification to the other signatories in writing to explain the reasons for proposing termination, and consult with the other parties to seek an amendment to the Agreement pursuant to Stipulation XX.
- C. Should such consultation result in an amendment to the Agreement avoiding termination, the signatories shall proceed to amend the Agreement in accordance with Stipulation XX and carry out its provisions as amended.
- D. Termination of the Agreement by a Signatory Tribe or state land managing agency shall only apply to the lands under their respective jurisdiction. In such case, ADOT

shall comply with 36 C.F.R. § 800(B), for all undertakings on or affecting lands within the terminating Signatory Tribe's Tribal lands, or the terminating agency's lands within the scope of this Agreement. For Program-funded undertakings off the terminating Tribe's Tribal lands, ADOT shall consult with the Tribe pursuant to 36 C.F.R. § 800 (B), in lieu of this Agreement.

- E. Should ACHP, ADOT, FHWA, SHPO or invited signatory terminate this Agreement, either individually or collectively, the Agreement will be terminated in its entirety. Upon termination of this Agreement in its entirety, and prior to continuing work on an undertaking, ADOT must either a) execute a PA pursuant to 36 C.F.R. § 800.6 or b) request, take into account, and respond to comment of the ACHP under 36 C.F.R. § 800.7. ADOT shall notify the signatories as to the course of action it will pursue.
- F. Otherwise, FHWA and ADOT shall comply with 36 C.F.R. § 800(B) with respect to each individual undertaking that would otherwise be reviewed under this Agreement.

XXIII. Duration

This Agreement shall remain in effect for a period of 10 years after the date it takes effect, unless terminated prior to that time. At least one year prior to the expiration date, ADOT will inform the signatories and shall consult to determine if the Agreement should be allowed to expire or whether it should be extended. This Agreement may be extended for an additional term, the length of which is to be agreed to by the signatories. The extension shall be codified through an amendment to this Agreement in accordance with Stipulation XX. Where there is no agreement by all the signatories, the Agreement will not be extended and it will expire.

XXIV. Counterparts

This Agreement may be executed in counterparts, each separately and together constituting one and the same document. Execution and delivery of this Agreement by facsimile or electronic mail shall be sufficient for all purposes and shall be binding on any party to this Agreement.

Execution of this Agreement by the FHWA, ADOT, SHPO and ACHP and implementation of its terms are evidence that ADOT has taken into account the effects of Program-funded undertakings on historic properties and afforded the ACHP an opportunity to comment.

SIGNATORY PAGE
PROGRAMMATIC AGREEMENT
PURSUANT TO SECTION 106 OF THE
NATIONAL HISTORIC PRESERVATION ACT
REGARDING
IMPLEMENTATION OF FEDERAL-AID TRANSPORTATION
PROJECTS IN THE STATE OF ARIZONA

FEDERAL HIGHWAY ADMINISTRATION

KARLA SNYDER
PETTY

Digitally signed by KARLA
SNYDER PETTY
Date: 2020.05.28 18:07:54 -07'00'

Karla S. Petty
Arizona Division Administrator

Date May 28, 2020

SIGNATORY PAGE
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PROJECTS IN THE STATE OF ARIZONA

ARIZONA DEPARTMENT OF TRANSPORTATION



Dallas Hammit
Deputy Director/State Engineer

Date 4/30/2020

SIGNATORY PAGE
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PROJECTS IN THE STATE OF ARIZONA

ARIZONA STATE HISTORIC PRESERVATION OFFICE



Kathryn Leonard
State Historic Preservation Officer

Date September 16, 2020

SIGNATORY PAGE
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PROJECTS IN THE STATE OF ARIZONA

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Aimee Jorjani

Aimee Jorjani
Chairman

Date 9/23/20

INVITED SIGNATORY PAGE
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IMPLEMENTATION OF FEDERAL-AID TRANSPORTATION
PROJECTS IN THE STATE OF ARIZONA

RODNEY Digitally signed by
MCVEY RODNEY MCVEY
Date: 2020.05.14
11:20:00 -07'00'

By _____

Title _____

Date _____

INVITED SIGNATORY PAGE
PROGRAMMATIC AGREEMENT
PURSUANT TO SECTION 106 OF THE
NATIONAL HISTORIC PRESERVATION ACT
REGARDING
IMPLEMENTATION OF FEDERAL-AID TRANSPORTATION
PROJECTS IN THE STATE OF ARIZONA

By RAYMOND SUAZO Digitally signed by RAYMOND SUAZO
Date: 2020.06.08 10:00:35 -07'00'
Raymond Suazo
State Director,
Title Bureau of Land Management Arizona

Date _____

INVITED SIGNATORY PAGE
PROGRAMMATIC AGREEMENT
PURSUANT TO SECTION 106 OF THE
NATIONAL HISTORIC PRESERVATION ACT
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PROJECTS IN THE STATE OF ARIZONA

By  Digitally signed by
CASTANON.DAVID.J.1231966150
Date: 2020.05.01 11:28:08 -07'00'

David J Castanon

Title Chief, Regulatory Division, US Army Corps of Engineers, Los Angeles District

Date May 1, 2020

INVITED SIGNATORY PAGE
PROGRAMMATIC AGREEMENT
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By Elaine Kolman

Title Acting Regional Director

Date 5/1/2020

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By David Atkins

Title Commissioner

Date 6/9/2020

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PROJECTS IN THE STATE OF ARIZONA

By  _____

Title Director, Arizona State Museum _____

Date 10 June 2020 _____

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IMPLEMENTATION OF FEDERAL-AID TRANSPORTATION
PROJECTS IN THE STATE OF ARIZONA

By  _____

Title Deputy Director, Arizona State Parks & Trails

Date 5/7/2020

C-64-20-192-M-a

CONCURRING PARTY PAGE

PROGRAMMATIC AGREEMENT

PURSUANT TO SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT REGARDING IMPLEMENTATION OF FEDERAL-AID TRANSPORTATION PROJECTS IN THE STATE OF ARIZONA

MARICOPA COUNTY

Recommended by:

DocuSigned by: Jennifer Toth 6/11/2020
Jennifer Toth, P.E. Date
Transportation Director

Approved and Accepted by:

Clint Hickman JUN 24 2020
Clint Hickman, Chairman Date
Board of Supervisors

Attest by:

Jeanne McCauley JUN 24 2020
Clerk of the Board Date

APPROVAL OF DEPUTY COUNTY ATTORNEY

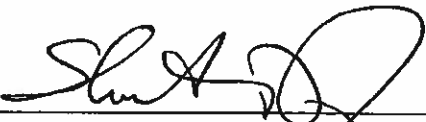
I hereby state that I have reviewed the proposed Programmatic Agreement and declare the Agreement to be in proper form and within the powers and authority granted to the Parties by their respective governing bodies under the laws of the State of Arizona.

DocuSigned by: Chad McBrada 6/11/2020
Deputy County Attorney Date

CONCURRING PARTY PAGE

PROGRAMMATIC AGREEMENT

**PURSUANT TO SECTION 106 OF THE
NATIONAL HISTORIC PRESERVATION ACT
REGARDING
IMPLEMENTATION OF FEDERAL-AID TRANSPORTATION
PROJECTS IN THE STATE OF ARIZONA**

By 

Title Acting TOWN MANAGER

Date 5/20/2020

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By C. Huckelberry 5/21/20
C.H. Huckelberry

Title County Administrator

Date May 21, 2020

CONCURRING PARTY PAGE
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By 
Kelley J. Barr, Esq
Salt River Project Agricultural Improvement and Power District
Associate General Manager,
Title Chief Strategy, Corporate Services and Sustainability Executive

Date May 5, 2020

CONCURRING PARTY PAGE

PROGRAMMATIC AGREEMENT

**PURSUANT TO SECTION 106 OF THE
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By *Sheldra J. Moriarty*

Title Mayor, City of Sedona, Arizona

Date July 28, 2020

CONCURRING PARTY PAGE
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PROJECTS IN THE STATE OF ARIZONA

By  _____

Title City Manager _____

Date 5/20/2020 _____

Programmatic Agreement for Federal-Aid Transportation Projects in Arizona

Attachment 1: Bureau of Reclamation Programmatic Agreements

- *“Programmatic Agreement Among The Bureau of Reclamation, Phoenix Area Office, Salt River Project, and the Arizona State Historic Preservation Office Regarding Historic Preservation Treatment for the Salt River Project System of Historic Dams and Associated Dam Facilities Operated and Maintained by the Salt River Project for the Bureau of Reclamation (2009)”*
- *“Programmatic Agreement Among the Bureau of Reclamation, Phoenix Area Office, The Arizona State Historic Preservation Officer and Salt River Project Regarding Historic Preservation Treatment for the Salt River Project System of Historic Main Canals, Laterals, and Associated Features Operated and Maintained by the Salt River Project for the Bureau of Reclamation (2013)”*

PROGRAMMATIC AGREEMENT

**AMONG
THE BUREAU OF RECLAMATION, PHOENIX AREA OFFICE,
SALT RIVER PROJECT, AND THE ARIZONA STATE
HISTORIC PRESERVATION OFFICE**

REGARDING

**HISTORIC PRESERVATION TREATMENT FOR THE SALT RIVER PROJECT
SYSTEM OF HISTORIC DAMS AND ASSOCIATED DAM
FACILITIES OPERATED AND MAINTAINED BY THE SALT RIVER PROJECT
FOR THE BUREAU OF RECLAMATION**

WHEREAS, the Bureau of Reclamation (Reclamation), as the lead Federal agency, has determined that modifications and system upgrades to the Salt River Project (SRP) system of dams and associated dam facilities resulting from required operation, maintenance, and replacement (OM&R) will have continued similar and repetitive effects upon the dams and associated facilities; and

WHEREAS, the Salt River Project Agricultural Improvement and Power District operates and maintains the dams and associated facilities pursuant to the contract between the United States and the Salt River Valley Waters Users Association (SRVWUA), dated September 6, 1917, such obligations of said contract having been assumed by SRP pursuant to a contract dated March 22, 1937, between SRP and SRVWUA, as amended, and SRP has participated in consultation and is a signatory to this Programmatic Agreement (Agreement); and

WHEREAS, this Agreement is concerned solely with that portion of the SRP system of dams and associated dam facilities that is owned by the United States or for which the United States has obtained easements, and this system includes seven dams: Theodore Roosevelt, Horse Mesa, Mormon Flat, Stewart Mountain, and Granite Reef Diversion Dams on the Salt River, and Horseshoe and Bartlett Dams on the Verde River; and

WHEREAS, Horse Mesa, Mormon Flat, Stewart Mountain, and Granite Reef Diversion Dams on the Salt River and Horseshoe and Bartlett Dams on the Verde River have been determined eligible for listing on the National Register of Historic Places, and safety of dam modifications to Theodore Roosevelt Dam have altered it so significantly that it is no longer considered eligible for listing on the National Register,

WHEREAS, previous safety of dam modifications to the above-mentioned dams required that Reclamation complete Historic American Engineering Records (HAER) documentation for Theodore Roosevelt, Horse Mesa, Mormon Flat, Stewart Mountain, Granite Reef Diversion, Horseshoe, and Bartlett Dams; and

WHEREAS, the other major complementary parts of the SRP system, consisting of nine main canals (the Arizona, South, Consolidated, Eastern, Grand, Tempe, Western, Highline, and Crosscut); approximately 1,200 miles of secondary and tertiary laterals, most of which, but not all, are owned by the United States or for which the United States has easements; and associated facilities (the Fire Pond Pump House, Indian Bend Pump Ditch, Old Crosscut Ditch, the San

Francisco Lateral) have also been determined eligible for listing on the National Register of Historic Places and are covered under a 2001 Programmatic Agreement between Reclamation, the Advisory Council on Historic Preservation (Council), the Arizona State Historic Preservation Office (SHPO), and SRP; and

WHEREAS, the Council has declined an invitation by Reclamation to participate in this Agreement; and

WHEREAS, the parties agree that consultation on future similar and repetitive O&MR undertakings affecting the dams would benefit from the flexibility provided for under 36 CFR Part C, Section 800.14(b)(1)(i), and wish to enter into this Agreement in order to facilitate those consultations;

WHEREAS, this Agreement is not a contract under Federal procurement guidelines; and

WHEREAS, the State of Arizona and the Arizona SHPO have certain stipulations that must be part of any Agreement signed by the State;

NOW, THEREFORE, SRP, the SHPO, and Reclamation agree that HAER documentation has been completed and has been agreed upon as adequate mitigation for OM&R activities at the dams and their associated facilities. No additional consultation shall be required for OM&R undertakings affecting these features except for certain cases that affect the exterior appearance of the dams and associated facilities, as noted below.

STIPULATIONS

I. Standard and Routine OM&R Activities

SRP shall continue to conduct routine OM&R of the interior portions of the dams and associated facilities without Section 106 consultation with Reclamation and the SHPO. Certain routine OM&R activities (Attachment 1) on the exterior areas of the dams and associated facilities can also be done without consultation with Reclamation and SHPO.

- A. Associated facilities include, but are not necessarily limited to, powerhouses, various buildings used for storage, offices, workshops, living quarters, and so forth, including any facilities that may be abandoned and no longer in use.
- B. Attachment 1 is not an inclusive list. Other routine and standard OM&R items may be added after consultation with SHPO.

II. Other than Standard and Routine OM&R Activities

When an OM&R action not specifically listed in Attachment 1 is proposed for the exterior area of a dam or associated facility, SRP shall consult with Reclamation. If both SRP and Reclamation, after careful evaluation of the proposed OM&R action, determine that it will have no adverse effect to the visual integrity of the dam or associated facility, SRP may proceed with the OM&R action without SHPO consultation.

assumes SHPO concurrence, and the undertaking may occur with identified avoidance measures.

- C. Avoidance of archaeological properties will ordinarily be understood to require retention of such properties in place and their protection against intentional and inadvertent damage resulting directly or indirectly from the undertaking.
- D. When significant archaeological properties may be adversely affected by OM&R or other activities, Reclamation will consult with the SHPO pursuant to 36 CFR 800.

VI. Educational Awareness Program

SRP currently offers classes to new and current employees on the historical significance of the SRP dam and canal system and its importance to the development of the Salt River Valley. These classes are presented on an occasional basis by staff from SRP Research Archives and Environmental Planning. SRP shall develop and implement a plan for continuing these educational classes on a regular basis that will continue for the duration of this Agreement.

- A. With the implementation of this Agreement, Reclamation shall take the lead, with assistance from SRP, to prepare documentation formally nominating the SRP dam and canal system to the National Register of Historic Places. The nomination will focus on the history of water management and the significant contributions the system has made to the agricultural and economic development of the Salt River Valley. Once formally listed on the National Register, Register plaques can be used at each of the dams and the main SRP headquarters building as part of the education awareness program.
- B. Nomination of the SRP system to the National Register shall in no way impede the OM&R of the SRP system. This Agreement (as well as the 2001 SRP Canals and Laterals Programmatic Agreement) provides adequate stipulations for mitigation of adverse effects from OM&R activities that ensure safe and efficient operation of the system of dams and canals.

VII. Amendments to the Agreement

Any signatory to this Agreement may request that it be amended, whereupon the parties will consult in accordance with 36 CFR 800.14(b) to consider such amendment. Where no consensus can be reached, the Agreement will not be amended.

VIII. Dispute Resolution

- A. Should any party to this Agreement object in writing to Reclamation regarding the manner in which the terms of this Agreement are carried out, Reclamation shall consult with the objecting party to resolve the objection. If Reclamation determines that the objection cannot be resolved, Reclamation shall request the assistance of the Council and shall forward all documentation relevant to the objection to the Council. Within 30 calendar days after receipt of all pertinent documentation, the Council will either:

- A. At the beginning of each calendar year, Reclamation will submit to SHPO, for review and comment, a list of OM&R actions that were determined to have no adverse effect.

III. OM&R Activities Requiring Section 106 Consultation

When an OM&R action not specifically listed in Attachment I has been determined by SRP and Reclamation to constitute either a questionable or a definite impact that would affect the visual integrity of a dam or associated facility, Reclamation will consult with SHPO. SHPO has 30 calendar days in which to review the proposed action and suggest possible alternative mitigation measures that may not have been considered by SRP and Reclamation but that could meet some or all of the OM&R needs without adversely impacting visual integrity. If no reasonable mitigation alternative is identified, or if the proposed mitigation alternative proves to substantially increase (10% or more) project cost, SRP may proceed with the original OM&R action.

- A. SRP shall notify Reclamation early in the planning process when it anticipates any OM&R effort that may result in significant visual effects to a dam or related facility.

IV. Emergencies and threats to safety and health

During emergency situations, or in situations when employee or public safety or health is threatened, SRP can take all appropriate actions necessary to mitigate the threat. If the actions adversely affected the visual integrity of the dam or associated facilities, SRP shall document the nature the actions and their effect as soon as practical and notify Reclamation. Reclamation shall consult with SHPO as per 36 CFR 800.

V. Reclamation shall continue to consult with the SHPO as follows:

When an OM&R undertaking is planned that may affect lands adjacent to a dam or dam facility, and these lands not have been previously surveyed for cultural resources, Reclamation will ensure that this land is surveyed for archaeological properties and carry out the following review steps:

- A. When no archaeological properties are found as a result of Class III cultural resources survey of an undertaking's area of potential effect, Reclamation shall provide written documentation to the SHPO of the survey, survey results, and its finding that no historic properties are present in the area of potential effects, and SRP may proceed with its undertaking without SHPO comment.
- B. Occasionally, as a result of previous consultation between the SHPO and Reclamation, archaeological properties within an undertaking's area of potential effect have already been determined to be eligible for the National Register of Historic Places. If such National Register-eligible properties will be avoided by project activities, Reclamation shall provide documentation of the survey or previous consultation and proposed avoidance measures to SHPO. The SHPO shall have 15 calendar days from date of receipt within which to object to Reclamation's finding of no adverse effect. If the SHPO objects to the determination, Reclamation shall comply with 36 CFR Part 800.6. If the SHPO does not respond within 15 calendar days from date of receipt, Reclamation

1. Concur with Reclamation's proposed response to the objection, whereupon Reclamation may proceed with its action in accordance with the agreed-upon response; or
 2. Provide Reclamation with recommendations which Reclamation shall take into account in reaching a final decision regarding the dispute; or
 3. Notify Reclamation that the objection will be referred for comment pursuant to 36 CFR Sec. 800.7(a)(4). Thereafter, the Council shall comment, and Reclamation shall respond in accordance with 36 CFR Sec. 800.7(c)(4).
- B. Should the Council not exercise one of the foregoing options within 30 calendar days of receipt of all pertinent documentation, Reclamation may assume that the Council concurs with its proposed response to the objection, advise the objecting party of that response, and proceed with its action in a manner consistent with that response.

IX. Duration

This Agreement shall remain in effect, unless amended or terminated, for a period of 20 years, at which time this Agreement is null and void unless the parties agree to an extension. If there is no extension, Reclamation shall comply with Section 106 in accordance with 36 CFR Part 800, which may include development, execution, and implementation of a new Agreement or similar document.

X. Termination

Reclamation, SRP, or the SHPO may terminate this Agreement by providing 30-calendar-days' written notice to the other parties, provided that the parties consult during that period to seek agreement on amendments or other actions that would avoid termination. In the event of termination, Reclamation will comply with 36 CFR 800.3 through 800.7 with regard to individual undertakings covered by this Agreement or with regard to all remaining actions under this Agreement.

XI. Failure to Carry Out Terms of the Agreement

In the event that the terms of this Agreement are not carried out, Reclamation shall comply with 36 CFR 800.3 through 800.7 with regard to individual actions covered by this Agreement or with another applicable Agreement.

XII. State of Arizona Contracting Requirements

A. Equal Opportunity/Nondiscrimination

The parties agree to comply with Chapter 9, title 41, Arizona Revised Statutes (Civil rights), Arizona Executive Orders 75-5 and 99-4, and any other Federal or State laws relating to equal opportunity and nondiscrimination, including the Americans with Disabilities Act.

B. Conflict of Interest.

This Agreement is subject to cancellation by the State under A.R.S. § 38-511 if any person significantly involved in the Agreement on behalf of the State is an employee or consultant of the contractor at any time while the Agreement or any extension of the Agreement is in effect.

C. Nonavailability of Funds

This Agreement shall be subject to available funding, and nothing in this Agreement shall bind the State and Federal parties to expenditures in excess of funds appropriated and allocated for the purposes outlined in this Agreement.

D. Records

The parties agree that this Agreement does not involve the furnishing of goods, equipment, labor, materials, or services to the State of Arizona or any of its agencies, boards, commissions, or departments. and therefore that A.R.S. §§35-214 and 35-215 do not apply.

E. Arbitration

The parties agree to utilize any arbitration that is required under applicable court rules.

U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION

By: Carol Lynn Erwin Date: 1/20/2009
Carol Lynn Erwin, Area Manager

SALT RIVER PROJECT

By: Richard M. Hayslip Date: 2/17/09
Richard M. Hayslip, Associate General Manager,
Environmental, HR, Land/PPC, Risk Management,
and Telecom

ARIZONA STATE HISTORIC PRESERVATION OFFICER

By: James Garrison Date: 2/23/09
James Garrison
Arizona State Historic Preservation Officer

Attachment 1

Following are routine and standard OM&R activities carried out by SRP under its agreement with Reclamation for managing and operating the dams and related facilities. The list is not inclusive; other OM&R items may be added as needed, once agreed to by the Signatories:

- Road maintenance activities, including dragging or grading road surface, application of surfacing materials, and installation and maintenance of drainage structures.
- Maintenance of logbooms and/or barrel booms in forebay and tailrace.
- Maintenance and/or replacement of signage.
- Maintenance and/or replacement of lighting at dam and plant areas.
- Protective coating maintenance at gates, fences, guardrails, spillway gates and operations equipment, penstocks, piping and valves, hardware, equipment cabinets, security devices, doors and windows, fuel tanks, cranes and hoists, platforms and stairs, walkways, buildings and other facilities. Colors shall be in-kind except where required for warning or safety purposes.
- Concrete repairs to dams, powerhouses, spillways, and related structures, including injection grouting of cracks and lift lines and replacement-in-kind of damaged or missing concrete.
- Operational testing of spillway gates, engine/generators, outlet valves, hoists, cranes, and other equipment.
- Maintenance and/or replacement of overhead power facilities including electrical transmission and distribution lines, poles and structures, transformers, switches, and related equipment.
- Maintenance and/or replacement of domestic water systems including storage tanks, pipelines, valves, and related equipment.
- Maintenance and/or replacement of transformers, breakers, and other electrical equipment.
- Roof maintenance and/or replacement at spillway towers, powerhouses, and associated buildings or facilities. Colors shall be in-kind to match existing where possible.
- Helipad and emergency landing area maintenance and safety upgrades.
- Door and window repairs shall be in-kind to match existing where possible.

- Maintenance, addition, and/or replacement of communications equipment including towers, structures, microwave dishes, antennas, cabling, and associated equipment.
- Maintenance and/or replacement of security devices including gates, cameras, fences, motion detectors, call boxes, and related equipment.
- Maintenance, recoating and/or replacement of seepage monitoring piping systems, collection facilities, weirs, and related equipment.
- Cleanup and removal of debris including vegetation, rock falls, and storm damage.

PROGRAMMATIC AGREEMENT

Among

**THE BUREAU OF RECLAMATION, PHOENIX AREA OFFICE, THE ARIZONA STATE
HISTORIC PRESERVATION OFFICER AND SALT RIVER PROJECT**

Regarding

**HISTORIC PRESERVATION TREATMENT FOR THE SALT RIVER PROJECT
SYSTEM OF HISTORIC MAIN CANALS, LATERALS AND ASSOCIATED
FEATURES OPERATED AND MAINTAINED BY THE SALT RIVER PROJECT
FOR THE BUREAU OF RECLAMATION**

WHEREAS, the Bureau of Reclamation (Reclamation), as the lead Federal agency, has determined that modifications and system upgrades to the Salt River Project (SRP) system of main canals, laterals, and associated features resulting from required operation and maintenance (O & M) and from continued pressures from urban development in and around the greater Phoenix, Arizona, metropolitan area will have continued effects upon the system and associated features and facilities; and

WHEREAS, SRP operates and maintains the canal and lateral system and associated features and facilities pursuant to the contract between the United States and the Salt River Valley Water Users Association (SRVWUA), dated September 6, 1917, such obligations of said contract having been assumed by SRP pursuant to a contract dated March 22, 1937, between SRP and SRVWUA, as amended, and SRP has participated in consultation and is a signatory to this Programmatic Agreement (PA); and

WHEREAS, this Agreement is concerned solely with that portion of the SRP system that is owned by the United States or for which the United States has obtained easements, and this system includes nine main canals (the Arizona, South, Consolidated, Eastern, Grand, Tempe, Western, Highline, and Arizona Crosscut), approximately 900 miles of secondary and tertiary laterals, most of which, but not all, are owned by the United States or for which the United States has easements, and associated facilities (the Old Cross Cut Canal, Fire Pond Pump House, Indian Bend Pump, and the San Francisco Lateral); and

WHEREAS, the Arizona Canal crosses the Salt River Pima-Maricopa Indian Community (SRPMIC), the SRPMIC has participated in consultation and has been invited to concur in this PA; and

WHEREAS, the Arizona, South, Eastern, Grand, Tempe, Western, and Highline canals, the San Francisco Lateral, and the Old Crosscut Canal have been determined eligible under criterion A for listing on the National Register of Historic Places (NRHP), and

WHEREAS, under a 1989 Memorandum of Agreement between Reclamation and the Arizona State Historic Preservation Officer (SHPO), to which SRP and the Arizona Department of Transportation concurred, Historic American Engineering Records (HAER) documentation was determined to be adequate mitigation for any and all present and future adverse impacts to the Tempe, Western, and Grand canals, the Fire Pond Pump House, and the Indian Bend Pump and Old Crosscut Canal. The HAER documentation for these properties has been completed and, in addition, SRP has completed HAER documentation for the Highline, Arizona, and South Canals, the San Francisco Lateral, and the Eastern Canal and is completing HAER documentation for the Consolidated and Arizona Crosscut canals; and

WHEREAS, SRP has identified piped laterals in downtown Glendale and the Little Maricopa Ditch (T2N, R3E, Centerline of Sections 31, 32, 33 and 34 along Oak Street) in Phoenix, AZ as the first two laterals to be piped in the Salt River Valley. If either of these two piped laterals is to be replaced in the future they will be reviewed for National Register eligibility. The rest of the piped laterals are not considered eligible; and

WHEREAS, the following mitigation measures as identified in the 2001 *Programmatic Agreement Among the Bureau of Reclamation, Phoenix Area Office, the Advisory Council on Historic Preservation, the Arizona State Historic Preservation Office, and Salt River Project, Regarding Historic Preservation Treatment for the Salt River Project System of Historic Main Canals, Laterals, and Associated Features Operated and Maintained by the Salt River Project for the Bureau of Reclamation (2001 PA)* have been completed:

- A. A lateral canal context study was completed by Salt River Project historian and archivist Shelly Dudley entitled: *A Historical Study of the SRP Distribution System*.
- B. Reclamation funded a PhD dissertation entitled: *Mixing Water and Culture: Making the Canal Landscape in Phoenix* by Alfred Simon and accepted by the SHPO as a context study for the main canals.
- C. Both documents were distributed to 24 historical museums, libraries, Federal and state agencies and city historic preservation offices.
- D. An inventory of all 123 miles of the remaining SRP open lateral canals was completed by the Bureau of Reclamation and reported in: *Open Lateral Canal Inventory, Salt River Project, Maricopa County, Arizona* (Report BOR-PXAO, ICRS-2012-21). This report detailed the survey and 27 miles of lateral canals identified for preservation.
- E. Twenty-Four interpretive signs were designed, manufactured and installed along SRP canals throughout the Phoenix metropolitan area.
- F. Interpretive programs on the SRP system have been developed and presented at Arizona Archaeology Expos, archaeology and history conferences, the Arizona Centennial, and a website was developed explaining Reclamation and SRP history; programs are planned to continue.
- G. Reclamation consulted with various valley cities on the history of canals and laterals in their communities and preservation of those features. Reclamation will continue to discuss and solicit information from Valley cities regarding interpretive programs and preservation concerns; programs are planned to continue.
- H. HAER documentation for all SRP main canals has been completed except for the Arizona Crosscut and Consolidated canals. These will be completed by SRP in the near future.
- I. Reclamation has surveyed and identified archaeological sites and historic properties, including standing structures along the main canal right-of-ways.

WHEREAS, the SHPO has concurred with Reclamation that the HAER documentation and completed stipulations under the 2001 PA constitutes adequate mitigation for present and future adverse effects to the subject properties; and

WHEREAS, the Advisory Council for Historic Preservation (Council), an original signatory, has declined to participate in the revision of this PA; and

NOW, THEREFORE, Reclamation, the SHPO, and SRP agree that the measures listed above are adequate mitigation for the main and lateral canals except as specifically identified below.

STIPULATIONS

I. Education and Preservation Program:

- A. Reclamation and SRP will seek opportunities to develop educational materials that explain and illustrate the history and significance of the canal system. Costs for public education will be shared equally by Reclamation and SRP with educational components designed and produced in consultation with each other. Educational materials may include signage on the main canals, educational materials for schools, exhibits, brochures and museum partnerships.
- B. Reclamation and SRP will continue to protect preserved laterals that have been determined worthy of preservation as identified in the lateral inventory report (BOR-PXAO-ICRS-2012-21).

II. Lateral Canal Survey and Consultation Process:

- A. If an undertaking is planned that may affect an SRP-operated lateral within a local, state, or nationally designated historic district, SRP shall notify Reclamation as soon as possible. Reclamation, in consultation with SRP, the SHPO, the involved municipality, and the interested public, shall comply with 36 CFR Part 800.
- B. If an undertaking is planned that may affect a lateral not identified for preservation or within a designated historic district, Reclamation will survey that lateral for historic properties and carry out the following:
 - 1. When no historic properties are found as a result of Class III cultural resources survey of an undertaking's area of potential effects, Reclamation shall provide written documentation of the survey results and its finding that no historic properties are affected and proceed with the undertaking. Findings will be submitted to the SHPO in an annual report no later than Jan 15th of the following year as identified in Stipulation VI. For undertakings on lands within the boundaries of the SRPMIC, Reclamation shall also consult with the SRPMIC.
 - 2. Occasionally, as a result of previous consultation between the SHPO and Reclamation, historic properties within an undertaking's area of potential effect have been determined to be eligible for the NRHP. If such eligible properties will be avoided by project activities, Reclamation shall provide documentation of the survey and avoidance measures to the SHPO as a part of the annual report. For undertakings within the boundaries of the SRPMIC, Reclamation shall also consult with the SRPMIC.

3. Avoidance of direct and indirect effects on historic properties will ordinarily be understood to require retention of such properties in place and their protection against intentional and inadvertent damage resulting directly or indirectly from the undertaking.
 4. When historic properties may be adversely affected where Federal authority exists, Reclamation will consult with the SHPO, SRPMIC, Native American Tribes, and other consulting parties pursuant to 36 CFR 800.
 5. Reclamation will continue to consult with interested Native American Tribes
- C. For undertakings affecting laterals not identified in the list prepared jointly by Reclamation and SRP as outlined in Reclamation report BOR-PXAO-2012-21, Reclamation need only consult regarding historic properties and canal or lateral contributions to designated historic districts.
- D. When circumstances may force the piping of a preserved lateral, the following procedures will be implemented:
1. All proposals to pipe a preserved lateral begin with project design features to maintain those ditches open and in place. Proposed alternatives will be discussed with the SHPO. If the ditch still cannot be left open, the following steps will be completed:
 - A. Reclamation completes a cultural resources survey for the area of potential effect.
 - B. An initial report is submitted to the SHPO for review and consultation.
 - C. Public meetings are held with affected neighborhoods, communities and interested citizens.
 - D. Mitigation measures are developed in discussion with the SHPO and the community.
 - E. The project proponent incurs all costs for survey, public meetings and mitigation as well as any SRP and Reclamation administrative costs.

III. Main Canal Consultation Process:

- A. Areas within the SRP system have received local, state, or national designations as historic districts; other areas may receive this designation in the future. These historic districts may include areas around SRP main canals. If an undertaking is planned that may adversely affect an SRP main canal within a local, state, or nationally designated historic district, Reclamation will follow the same review process as for laterals outlined under Stipulation II. D.
- B. Reclamation will continue to consult regarding undertakings affecting historic properties identified on the main canals in accordance with 36 CFR Part 800.

IV. Consultation with SRPMIC and Indian Tribes

Reclamation shall consult with SRPMIC for all undertakings on lands within the boundaries of the SRPMIC. In addition, for undertakings affecting historic properties of importance to Native American Tribes, Reclamation shall consult with those Tribes that may attach religious and cultural significance to such properties.

V. Post-Review Discoveries of Historic Properties

Should Reclamation discover an unexpected cultural resource after completion of the review process outlined in this PA for which no discovery plan is in place, Reclamation will consult with the SHPO and affected Tribes to determine eligibility and a treatment plan for the cultural resource. If Reclamation and the SHPO are unable to agree on a treatment plan for the discovered historic property, Reclamation shall consult with the Council pursuant to 36 CFR 800.6(b) (2). For historic properties discovered within the boundaries of the SRPMIC, Reclamation also will consult with the SRPMIC.

VI. Annual Reports

Reclamation shall provide an annual report to the SHPO. This document will list all reports from the past year when a No Historic Properties Affected determination was made. The report will include project locations, project numbers, a listing of Register ineligible and eligible sites that were encountered and other supplementary information such as annual accomplishments and issues or concerns.

VII. Amendments to the PA

Any Signatory to this PA may request that it be amended, whereupon the parties will consult in accordance with 36 CFR 800.14(b) to consider such amendment.

VIII. Dispute Resolution

- A. Should any Signatory to this PA object in writing to Reclamation regarding the manner in which the terms of this PA are carried out, or to any documentation or plan prepared in accordance with and subject to this Agreement, Reclamation shall consult with the objecting party to address the objection. If resolution is not reached, Reclamation shall forward documentation relevant to the objection to the Council, including Reclamation's proposed response to the objection. Within 30 days after receipt of all pertinent documentation, the Council may exercise one of the following options:
1. Concur with Reclamation's proposed response to the objection, whereupon Reclamation may proceed with its action in accordance with the agreed-upon response; or
 2. Provide Reclamation with recommendations, which Reclamation shall take into account in reaching a final decision regarding its response to the objection. Upon reaching its final decision, Reclamation will notify the objecting party and the Council of its final decision and proceed with its action; or
 3. Notify Reclamation that the objection will be referred for comment pursuant to 36 CFR Sec. 800.7(a) (4). Thereafter, the Council shall comment and Reclamation shall respond in accordance with 36 CFR Sec. 800.7(c).
- B. Should the Council not exercise one of the foregoing options within 30 days of receipt of all pertinent documentation, Reclamation may assume that the Council concurs with its proposed response to the objection, advise the objecting party of that response, and proceed with its action in a manner consistent with that response.

- C. At any time during the implementation of this Agreement, should an objection be raised by a member of the public, Reclamation shall immediately notify the other signatories in writing of the objection and take the objection into account. Reclamation shall render a decision regarding the objection, taking into account the views of the signatories to the Agreement.

XI. Duration

This Agreement shall remain in effect, unless amended or terminated, ending on December 31, 2030, at which time this Agreement is null and void. Thereafter, Reclamation shall comply with 36 CFR Part 800 which may include development, execution, and implementation of another Programmatic Agreement or similar document.

X. Termination

Any Signatory may terminate this Agreement by providing 30 days written notice to the other signatories provided that the parties consult during that period to seek agreement on amendments or other actions that would avoid termination.

XI. Failure to Carry Out Terms of the Agreement

In the event that the terms of this Agreement are not carried out, Reclamation shall comply with 36 CFR Part 800 with regard to individual actions covered by this Agreement or with another applicable Programmatic Agreement.


U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION

By:  Date: 11/4/2013
Randy Chandler, Phoenix Area Officer, Area Manager

SALT RIVER PROJECT

By:  Date: 10/29/2013
John Sullivan, Associate General Manager and Chief Resources Executive, Resource Management

ARIZONA STATE HISTORIC PRESERVATION OFFICER

By:  Date: 11/4/13
James Garrison
Arizona State Historic Preservation Officer

CONCUR:

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY

By: _____
Diane Enos, President

Date: _____

**Programmatic Agreement for Federal-Aid Transportation Projects in Arizona
Attachment 2: Acronyms, Abbreviations and Definitions**

A. Acronyms and Abbreviations

AAA	Arizona Antiquities Act
ACHP	Advisory Council on Historic Preservation
ADA	Americans with Disability Act
ADOT	Arizona Department of Transportation
ADOT HPT	ADOT Historic Preservation Team (cultural resources staff)
AGFD	Arizona Game & Fish Department
Agreement	Programmatic Agreement (with reference to this Programmatic Agreement)
APE	Area of Potential Effects
ARPA	Archaeological Resources Protection Act
ARS	Arizona Revised Statutes
ASLD	Arizona State Land Department
ASM	Arizona State Museum
ASPT	Arizona State Parks & Trails
BIA WRO	Bureau of Indian Affairs, Western Regional Office
BLM	Bureau of Land Management
CE	Categorical Exclusion
CFR	Code of Federal Regulations
CLG	Certified Local Government
CRP	Cultural Resources Professional
EP	ADOT Environmental Planning
FHWA	Federal Highway Administration
HABS	Historic American Building Survey
HAER	Historic American Engineering Record
HPTP	Historic Properties Treatment Plan
IO	Isolated Occurrence
LPA	Local Public Agency
MOA	Memorandum of Agreement
MOU	Memorandum of Understanding
NAE-SC	No Adverse Effect with Standard Conditions
NAGPRA	Native American Graves Protection and Repatriation Act
National Register	National Register of Historic Places
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NPS	National Park Service
PA	Programmatic Agreement (with reference to Programmatic Agreements other than this Agreement)
POA	Plan of Action
Program	Federal-aid Highway Program

Reclamation	Bureau of Reclamation
ROW(s)	Right(s)-of-way
RTP	Recreational Trails Program
Section 106	Section 106 of the National Historic Preservation Act and its implementing regulations at 36 CFR Part 800
SHPO	State Historic Preservation Officer
SOI	Secretary of the Interior
SRP	Salt River Project
SRP System	Salt River Project System
TCE	Temporary construction easement
TCPs	Traditional cultural properties
THPO	Tribal Historic Preservation Officer
USACE	United States Army Corps of Engineers
USC	United States Code
USFS	United States Forest Service, Southwest Regional Office

B. Definitions

1. 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 (National Register) 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 Code of Federal Regulations [CFR] §800.5(a)(1)).
2. Advisory Council on Historic Preservation (ACHP) is an independent federal agency established pursuant to section 201 of National Historic Preservation Act (NHPA). 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.
3. Archaeological Site generally means any material remains of past human life or activities in history or prehistory, which are of archaeological interest including, but not be limited to: pottery, basketry, bottles, weapons, projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items that are of human design, manufacture, possession, or use. Specific archaeological site definitions will follow appropriate land-managing agency guidelines.
4. Area of Potential Effects (APE) means the geographic area(s) within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist. 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 (36 CFR §800.16(d)). The APE must include all areas of direct, indirect, and reasonably foreseeable cumulative effects including, but not limited to, staging areas, temporary construction easements (TCEs), access roads, utility corridors, etc.

5. Buildings function primarily to provide shelter for human activity.
6. Concurring Parties are those interested parties who may be asked to sign an Memorandum of Agreement (MOA) or Programmatic Agreement (PA) but do not have the rights to amend or terminate the MOA or PA.
7. Consulting Parties have consultative roles in the Section 106 process and include the State Historic Preservation Officer (SHPO); Tribal Historic Preservation Officer (THPO) or THPOs; Indian tribes; land managing agencies, local governments; applicants for federal assistance, permits, licenses or other approvals; and, any party with a demonstrated legal or economic relation to the undertaking, or concern with the undertaking's effect on historic properties (36 CFR §800.2(c)). Consulting parties may be invited to be concurring parties or signatories to a MOA or PA.
8. Cultural Resources are prehistoric and historic districts, sites, buildings, structures, objects, cultural landscapes, sacred sites, and traditional cultural properties. Within the broad range of cultural resources are those that have recognized significance, which are called historic properties, as defined below.
9. Cultural Resources Inventory refers to the study of an area to identify the cultural resources that are, or may be, present. This term is inclusive of Class I, Class II, and Class III surveys. Class I means a literature/records overview. Class II means a sample inventory conducted in the field at less than 100% survey coverage. Class III means an intensive inventory conducted in the field at 100% survey coverage, as defined by SHPO (See SHPO Survey Report Standards, or its successor document).
10. Effect on an historic property occurs when an undertaking may alter characteristics of the property that may qualify it for inclusion in the National Register (36 CFR §800.16(i)).
11. Environmental Planner is an employee of ADOT Environmental Planning whose responsibilities include overseeing environmental review, the development and completion of environmental documents, and ensuring delivery of projects.
12. Historic Property is any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register. This term includes artifacts, records, and remains that are related to and located within such properties. The phrase "eligible for inclusion in the National Register" means properties formally determined as such by the Secretary of the Interior or by a federal agency in consultation with SHPO. Properties that have been determined eligible for inclusion are accorded the same protections as properties listed in the National Register (36 CFR §800.16(1)(1)).
13. National Register of Historic Places (National Register) is the official list of districts, sites, buildings, structures, and objects 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).

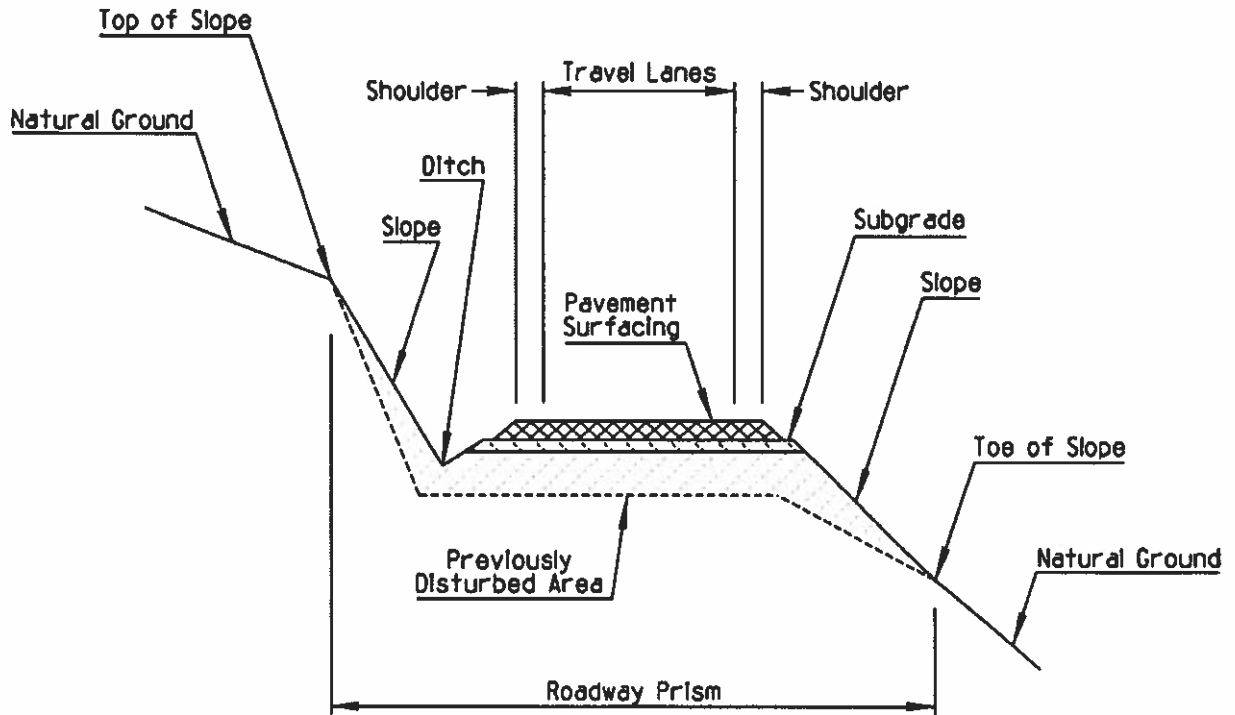
14. No Adverse Effect means that the undertaking will not alter any of the characteristics of an historic property that qualify it as National Register eligible by diminishing its historic integrity (see 36 CFR §800.5(b)).
15. No Historic Properties Affected means there are no cultural resources in the APE, there are cultural resources in the APE but none are determined to be National Register eligible, or there are historic properties in the APE but none will be affected by the undertaking.
16. Previously Disturbed refers to areas where previous construction, or other activities by human or natural agents, has physically altered soils within the three-dimensional APE to the point where there is no potential for an archaeologically significant property to remain, as determined by an ADOT HPT. These areas include, but are not limited to, the entire roadway prism, as defined in this Attachment, and depicted in Figure 1 below.
17. Project Manager refers to an ADOT employee who has the responsibility for ensuring that all project development steps are followed, and for leading and coordinating work efforts as required for the successful completion of all work tasks to meet the project objectives. The project manager has responsibility for the project scope, schedule and budget, and for monitoring project on project activities.
18. Right-of-way (ROW) is the land utilized by a DOT or LPA for the purposes of transportation, which contains the traveled portion of a roadway and associated facilities, such as road shoulders, turnouts, medians, and rest areas, as well as the adjacent land required for routine maintenance of the roadway and associated facilities. A road ROW may be owned by the DOT or LPA, or it may be an easement that is granted by another landowner to the DOT or LPA for the operation and maintenance of the roadway. DOT ROW boundaries are typically demarcated by a fence that is maintained by the DOT. Portions of the ROW between the roadway prism and the fence may not be previously disturbed as defined in this Attachment.
19. Roadbed is the graded portion of a highway within top and side slopes, prepared as a foundation for the pavement structure and shoulders, as depicted in Figure 1.
20. Roadway Prism means the three-dimensional area of a roadway from the top of slope to the toe of slope that has been previously disturbed by roadway construction and as depicted in Figure 1. This also includes bridges, drainage culverts, walls, ditches, road surfaces, road shoulders, and road fills.

21. Shoulder is the paved or unpaved portion of the roadway contiguous with the travel lanes for accommodation of stopped vehicles, for emergency use and for lateral support of base and surface courses, as depicted in Figure 1.
22. Signatories or Signatory are parties who assume obligations under an MOA or PA. Signatories have the ability to terminate or agree to amend an MOA or PA. The term includes invited signatories, but does not include others who sign the MOA or PA as concurring parties.
23. Signatory Tribe means any land holding Tribe of Arizona that has signed this Agreement as a full signatory, including Tribes with a National Park Service certified Tribal Historic Preservation Officer (see below) and those not currently certified.
24. Significance is the term used to indicate a cultural resource's eligibility for the National Register according to the criteria in 36 CFR §60.4.
25. State Historic Preservation Officer (SHPO) is the official appointed or designated by the Governor pursuant to Section 101(b)(1) of NHPA to administer the State historic preservation program (36 CFR §800.16(v)).
26. Structures are not designed principally to shelter human activity but to perform other necessary functions (e.g., bridges, dams, canals, roads, railroads).
27. Subgrade is the roadbed materials beneath the pavement structure.
28. Tribal Lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities (36 CFR § 800.16(x)). Within the scope of this Agreement, the NHPA definition is identical to the Native American Graves Protection and Repatriation Act (NAGPRA) definition, 25 U.S.C. §3001(15).
29. Tribal Historic Preservation Officer (THPO) is an individual designated by an Indian tribe to administer the tribal historic preservation program, through appointment by the tribe's chief governing authority or as a tribal ordinance may otherwise provide (NHPA Section 101(d)(2)(B)). On Tribal lands, a THPO, representing the Tribe, may assume the duties of the SHPO, in whole or in part, as certified by the National Park Service (36 CFR §800.16(w)).
30. Traditional Cultural Property (TCP), as defined in National Register Bulletin 38, is a property that is listed in, or is 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 maintaining the continuing cultural identity of the community (see National Park Service Bulletin 38 cited in Stipulation II). Traditional Cultural Properties are referred to in 36 CFR Part 800 as properties of

religious and cultural significance, which may be historic properties as defined in 36 CFR §800.16(1)(l)).

31. **Undertaking** is a project, activity, or program funded in whole 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 financial assistance; (3) and, those requiring a federal permit, license, or approval (36 CFR § 800.16(y)).

Figure 1: Illustration of Roadway Prism



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Attachment 3: Screened Undertakings Exempted from Further Review

Screened undertakings, limited to those listed in the tables below, are classes of undertakings that, under certain conditions, will not cause effects to historic properties, and with appropriate screening, may be determined by an ADOT Historic Preservation Team (ADOT HPT) to be exempt from further Section 106 review under this Agreement.

- A. This Attachment applies when all the general conditions listed below are met, *and*, any task-specific conditions are also met. The screening process, which will be conducted by a ADOT HPT, may include one or more of the following:
 - 1. Literature/records review to determine potential for involvement of historic properties.
 - 2. Field check of project area.
 - 3. Reviewing detailed project plans.
 - 4. Contacting Tribes, land managing agencies, local historical societies, or other potential consulting parties who may have information or concerns.
 - 5. Reviewing aerial photographs, historic maps, or as-built records.
 - 6. Reviewing right-of-way, assessment parcel, or ownership data.

- B. Based on the outcome of the screening process, the ADOT HPT may determine that individual undertakings are exempt from further review. When a Program-funded undertaking is on Tribal or federal land, ADOT will coordinate or consult with the appropriate Signatory Tribe or agency in accordance with Stipulations V or VI, as applicable.

- C. If the ADOT HPT determines that an undertaking is exempted from further review, the ADOT HPT will prepare a memo to the ADOT Environmental Planner (EP) for inclusion in the project file to document completion of the Section 106 process for applicable classes of screened undertakings and no further review will be necessary. All screened undertakings will be summarized in a quarterly report, as required in Stipulation XVII.B.

- D. If the ADOT HPT determines that the undertaking may affect historic properties, additional Section 106 review will be required following the steps outlined in Stipulation VIII of this Agreement.

ROADWAYS	
General Conditions	Specific Conditions
<ol style="list-style-type: none"> 1. The undertaking is limited to the existing right-of-way. 2. The undertaking is limited to areas that have been previously disturbed, as defined in Attachment 2; or, the undertaking is limited to areas that have been previously inventoried to current standards for historic properties with negative results. 3. The undertaking is not located within or adjacent to a historic property, or a National Register of Historic Places (National Register) listed historic district, or a National Historic Landmark, or a traditional cultural property (TCP), except for historic roads as described in #4 below. 4. The undertaking may be carried out on roads that are historic properties provided that an ADOT HPT determines the undertaking will have no effect to the property's character defining features. 5. The undertaking has no known public or Tribal controversy based on historic preservation issues. 	
General Maintenance and Repairs	
Vegetation control, including mowing, burning, cutting and spraying of noxious weeds.	
Routine roadway and roadside maintenance and repair activities within existing interchanges, medians, and adjacent frontage roads.	
Pavement Resurfacing, Restoration, and Replacement	
Restore, rehabilitate, and/or resurface existing pavement including sealcoats, chipseal, milling, grooving, patching, etc.	Does not extend beyond the existing roadway prism.
Pavement reconstruction, resurfacing, placement of sealcoats and chipseals, and/or crack filling.	Does not extend beyond the existing roadway prism.
Roadway rehabilitation and reconstruction that may include construction of turning lanes, parking lots, auxiliary lanes and shoulder widening.	
Lane Additions and Widening	
Widening of existing road including minor changes in road alignment.	Additions limited to less than one lane width (12 feet).
Shoulders	
Paving or widening existing shoulders.	
Adding new shoulders.	

ROADWAYS	
Intersection/Interchange Improvements	
Intersection improvements including construction of turn and auxiliary lanes, minor realignment of on/off ramps, channelization, signage, pavement markings, etc.	
Placement of fill material on the side slopes of intersection crossroads and access for purposes of flattening these slopes to meet safety criteria.	
Roadway Safety	
Removal of hazardous waste, traffic accident cleanup, objects on the roadway.	
Emergency repairs to maintain integrity of bridges and roadways.	
Storm damage repairs and debris cleanup and removal.	
Installation, repair, or replacement of fencing including highway fencing, wildlife fencing, vandal fencing, etc.	
Installation of or repairs to guardrails, median barriers, safety barriers, guideposts, glare screens, etc.	
Installation, removal, replacement of roadway markings such as painted stripes, raised pavement markers, rumble strips, sensors, traffic impact attenuators, etc.	
Clear zone safety improvements including removal of rock fall and fixed objects.	Does not include roadside memorials.
Construction in areas of continuous slides, rock removal within the exiting rights-of-way, installation of rock fall containment systems.	

GEOTECHNICAL TESTING	
General Conditions	Specific Conditions
<ol style="list-style-type: none"> 1. The undertaking may be conducted within or outside the existing right-of-way, as needed; 2. The undertaking is not located within or adjacent to a historic property, or a National Register listed historic district, or a National Historic Landmark or a TCP, except for historic roads. The exempted undertakings may be carried out on or adjacent to roads that are historic properties provided that an ADOT HPT determines the exempted undertaking will have no effect to the property's character defining features. 3. The undertaking is limited to areas that have been previously disturbed, as defined in Attachment 2; or, the undertaking is limited to areas that have been previously inventoried to current standards for historic properties with negative results. 4. The undertaking has no known public or Tribal controversy based on historic preservation issues. 	
<p>Engineering tests, including seismic, geologic, hazardous materials testing, drill samples, geotechnical boreholes that involve drilling, boring or trenching.</p>	

SIGNAGE, LIGHTING AND SIGNALIZATION	
General Conditions	Specific Conditions
<ol style="list-style-type: none"> 1. The undertaking is limited to the existing right-of-way. 2. The undertaking is limited to areas that have been previously disturbed, as defined in Attachment 2, or the undertaking is limited to areas that have been previously inventoried to current standards for historic properties with negative results. 3. The undertaking has no known public or Tribal controversy based on historic preservation issues. 4. The undertaking may be carried out on roads that are historic properties provided that an ADOT HPT determines the undertaking will have no effect to the property's character defining features. 	
Installation, repairs, replacement, and maintenance of highway signs including directional, safety and operational signs, mile marker signs, right-of-way markers, dynamic message signs, etc.	
Installation, replacement, upgrade to, or addition of lighting to roads, highways and intersections.	
Installation, repair, or replacement of traffic signalization and control systems.	

ROADWAY MONITORING AND SURVEILLANCE	
General Conditions	Specific Conditions
<ol style="list-style-type: none"> 1. The undertaking is limited to the existing right-of-way. 2. The undertaking is limited to areas that have been previously disturbed, as defined in Attachment 2; or, the undertaking is limited to areas that have been previously inventoried to current standards for historic properties with negative results. 3. The undertaking has no known public controversy based on historic preservation issues. 4. The undertaking may be carried out on roads that are historic properties provided that an ADOT HPT determines the undertaking will have no effect to the property's character defining features. 	
<p>Installation of highway monitoring systems including cameras, radio systems, metering equipment, traffic loop detectors, Intelligent Transportation Systems (ITS).</p>	

EROSION CONTROL	
General Conditions	Specific Conditions
<ol style="list-style-type: none"> 1. The undertaking is limited to the existing right-of-way. 2. The undertaking is limited to areas that have been previously disturbed, as defined in Attachment 2; or, the undertaking is limited to areas that have been previously inventoried to current standards for historic properties with negative results. 3. The undertaking will not result in indirect effects to historic properties in other parts of the existing road right-of-way or areas outside of the existing road right-of-way. 4. The undertaking has no known public or Tribal controversy based on historic preservation issues. 	
<p>Erosion control measures including slide and slope corrections, placement of rip rap, scour control measures, and emergency erosion control measures.</p>	

LANDSCAPING	
General Conditions	Specific Conditions
<ol style="list-style-type: none"> 1. The undertaking is limited to the existing right-of-way. 2. The undertaking is limited to areas that have been previously disturbed as defined in Attachment 2; or, the undertaking is limited to areas that have been previously inventoried to current standards for historic properties with negative results. 3. The undertaking will not result in indirect effects to historic properties in other parts of the existing road right-of-way or areas outside of the existing road right-of-way. 4. The undertaking has no known public or Tribal controversy based on historic preservation issues. 	
Installation, replacement, maintenance or removal of landscaping.	

CULVERT, DITCHES, AND DRAINAGE SYSTEMS	
General Conditions	Specific Conditions
<ol style="list-style-type: none"> 1. The undertaking is limited to the existing right-of-way. 2. The undertaking is limited to areas that have been previously disturbed, as defined in Attachment 2; or, the undertaking is limited to areas that have been previously inventoried to current standards for historic properties with negative results; or the undertaking is limited to the active floodplain. 3. The undertaking has no known public controversy based on historic preservation issues. 4. The undertaking may be carried out on roads that are historic properties provided that an ADOT HPT determines the undertaking will have no effect to the property's character defining features. 	

<p>Repair, rehabilitation, and replacement of minor drainage features, including culverts, pipes, intake/outtake features, drainage ditches and rundowns</p>	<p>Limited to within the highway right-of-way where no new ground disturbance will occur. Replacement to take place in the same general location(s) as existing. This exemption does not apply to Civilian Conservation Corps or Works Project</p>
<p>Improving existing drainage system elements; reestablishment of existing ditches to original width; stream stabilization and restoration.</p>	<p>Limited to the active channel. Access to the work site to be limited to areas that have been previously disturbed, as defined in Attachment 2, or previously inventoried to current standards for historic properties with negative results.</p>

BRIDGES	
General Conditions	Specific Conditions
<ol style="list-style-type: none"> 1. The undertaking is limited to the existing right-of-way. 2. The undertaking is limited to areas that have been previously disturbed, as defined in Attachment 2; or, the undertaking is limited to areas that have been previously inventoried to current standards for historic properties with negative results; or the undertaking is limited to the active channel and or floodplain. 3. The undertaking has no known public controversy based on historic preservation issues. 4. The undertakings may be carried out on roads that are historic properties provided that an ADOT HPT determines the undertaking will have no effect to the property's character defining features. 	
<p>Replacement, reconstruction, rehabilitation, relocation, and structural alterations.</p> <p style="text-align: center;">3-8</p>	<p>Applies only to bridges that are not National Register eligible.</p>

UTILITIES	
General Conditions	Specific Conditions
<ol style="list-style-type: none"> 1. The undertaking is limited to areas that have been previously disturbed, as defined in Attachment 2; or, the undertaking is limited to areas that have been previously inventoried to current standards for historic properties with negative results. 2. The undertaking has no known public or Tribal controversy based on historic preservation issues. 3. The undertaking may be carried out on roads that are historic properties provided that an ADOT HPT determines the undertaking will have no effect to the property's character defining features. 	
Potholing for utilities.	
Installation, relocation, replacement, or repair of underground utilities including conduits, fiber optic cables, pipelines, etc.	

RAILROADS	
General Conditions	Specific Conditions
<ol style="list-style-type: none"> 1. The undertaking is limited to the existing road right-of-way. 2. The undertaking will not affect any character defining features of a larger railroad related historic property or historic district. 3. The undertaking is limited to areas that have been previously disturbed, as defined in Attachment 2; or, the undertaking is limited to areas that have been previously inventoried to current standards for historic properties with negative results. 4. The undertaking has no known public or Tribal controversy based on historic preservation issues. 5. The undertaking may be carried out on roads that are historic properties provided that an ADOT HPT determines the undertaking will have no effect to the property's character defining features. 	
Installation, removal, replacement, reconstruction, or alterations to railroad crossings including surfaces, gates, signals, warning signs, flashing lights, etc.	
Maintenance, repair and replacement of railroad tracks, rail beds, ties, circuitry.	

MISCELLANEOUS	
General Conditions	Specific Conditions
<ol style="list-style-type: none"> 1. The undertaking is not located within or adjacent to a historic property, or a National Register listed historic district, or a National Historic Landmark or a TCP, except for historic roads. The exempted undertakings may be carried out on or adjacent to roads that are historic properties provided that an ADOT HPT determines the exempted undertaking will have no effect to the property's character defining features. 2. The undertaking is limited to areas that have been previously disturbed, as defined in Attachment 2; or, the undertaking is limited to areas that have been previously inventoried to current standards for historic properties with negative results. 3. The undertaking has no known public or Tribal controversy based on historic preservation issues. 	
General	
Development of construction staging and temporary use areas for stockpiling equipment, gravels, and waste materials.	Limited to existing ROW
Construction of wetland mitigation areas, wetlands testing and delineation, wetlands enhancement activities.	Limited to existing ROW
Activities occurring entirely within stream channels, not including terraces and cutbanks.	
Activities that involve less than one square meter of cumulative ground disturbance.	Limited to existing ROW
Land Acquisition and Disposal	
Disposal or transfer of excess properties.	Limited to parcels that do not contain historic properties.
Right-of-way activities such as hardship acquisition; advanced acquisition; or acquisition of scenic or conservation easements.	Limited to parcels that do not contain historic properties.
Noise Barriers	
Installation of noise barriers or retaining walls and other noise reduction measures.	Limited to existing ROW
ADOT Owned Properties	
Construction or improvements to existing rest areas, chain control, park and ride lots, weigh stations, etc., where no new right-of-way is acquired.	

Restoration, rehabilitation, reconstruction of building and structures.	Limited to buildings and structures that are not National or State Register eligible.
Construction of bus transfer structures and information panels	
Curb, gutter, and sidewalk	
Installation, replacement, or repair of curbs and gutters; sidewalk improvements.	Limited to sidewalks that are not contributors to National or State Register-eligible properties.
Streetscapes	
Streetscape improvements including installation or removal of benches, boulders, garbage receptacles, signage, lighting, landscaping, and pavers.	Not within a historic property, historic district, National Historic Landmark, or TCP, other than the Historic State Highway System. Limited to existing ROW of facility being improved.
Americans with Disabilities Act (ADA) Compliance	
Installation of and improvements to ADA-compliant features.	Not within a historic property, historic district, National Historic Landmark, or TCP, other than the Historic State Highway System.
Bicycle, Recreational, Pedestrian Trails	
Construction, rehabilitation, and widening of existing bicycle and pedestrian trails, walkways and amenities.	
Transit facilities	
Modernization of transit facilities within existing property boundaries including roadway resurfacing, installation of bus shelters, pullouts, park and ride facilities, bike racks, benches, etc.	Not within a historic property, historic district, National Historic Landmark, or TCP.

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Attachment 4: Defining the Area of Potential Effects (APE)

In accordance with the Stipulation VIII.D.1 of this Agreement, Arizona Department of Transportation (ADOT) will establish the Area of Potential Effects (APE) for Program-funded undertakings. When the guidelines below are followed, specific consultation with the State Historic Preservation Officer (SHPO), and any other consulting parties, to define the APE will not be necessary, although ADOT may consult with SHPO when needed for particularly large or complex undertakings, when the undertaking may be controversial in nature, or for other circumstances. However, when a Program-funded undertaking is on Tribal, federal or state land, ADOT will consult or coordinate with the appropriate Signatory Tribe or agency in accordance with Stipulations V or VI, as applicable, in determining the APE. The ADOT Historic Preservation Team (ADOT HPT) and ADOT Project Manager are jointly responsible for defining the APE or redefining the APE.

Defining the APE

- A. Defining the APE depends on an undertaking's potential to affect historic properties. Effects to be considered may include, but are not limited to, physical damage or destruction of all or part of a property; physical alterations; moving or realigning a historic property; isolating a property from its setting; visual, audible, or atmospheric intrusions; shadow effects; vibrations; and change in access or use.
- B. An APE delineates the boundaries within which it can be reasonably expected that a proposed undertaking has the potential to affect historic properties, should any be present. It may be the right-of-way itself or an area either larger or smaller than the right-of-way, depending on the scope and design of the undertaking.
- C. In defining the APE, ADOT will address direct, indirect, reasonably foreseeable, and cumulative effects, when warranted. Indirect effects may extend beyond the right-of-way to encompass visual, audible, or atmospheric intrusions; vibrations from construction activities; reasonably foreseeable economic impacts that may adversely affect historic properties; or change in access or use. ADOT will carefully consider defining an indirect APE, particularly for potential audible and visual effects, taking into account proximity and use of adjoining properties, the surrounding topography, and other aspects of a property's setting
- D. For archaeological properties, an APE is typically established based on an undertaking's potential for direct effects from ground-disturbing activities. On occasion, archaeological sites may also have qualities that could be affected indirectly. Buildings, structures, objects, districts, and sites including traditional cultural properties (TCPs) are more likely

to be subject to indirect, as well as direct effects. ADOT will consider these factors in defining the appropriate APE for the undertaking.

- E. In defining the APE, ADOT will consider the undertaking's potential effects on a historic property as a whole, including the reasonably anticipated or known boundaries of archaeological sites.

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Attachment 5: No Adverse Effect with Standard Conditions

This attachment identifies conditions that when met can be used to make a finding of “No Adverse Effect with Standard Conditions” in accordance with Stipulation VIII.F.2.a of this Agreement. When a Program-funded undertaking is on Tribal land, or lands managed by federal or state agencies, Arizona Department of Transportation (ADOT) will consult with the appropriate Signatory Tribe or agency in accordance with Stipulations V or VI, as applicable, in making a finding of No Adverse Effect with Standard Conditions. ADOT may make a finding of “No Adverse Effect with Standard Conditions” in accordance with Stipulation VIII.F.2.a, provided that all of the following conditions are met and have been approved by an ADOT Historic Preservation Team (HPT).

Standard Conditions for Avoiding Archaeological Sites, Buildings, and Structures

The following standard conditions for a finding of No Adverse Effect are designed to protect archaeological sites, as well as buildings and structures, within the area of potential effects (APE) from the effects of project activities through avoidance. Avoidance is typically achieved using one or more of the following measures to protect properties from direct physical damage: fencing, flagging, or signing, and may involve monitoring, as needed.

ADOT HPT will propose specific avoidance measures and secure the necessary internal review and commitments to ensure the avoidance measures are practicable and agreed to by both ADOT staff responsible for design and ADOT District personnel.

ADOT HPT will work with ADOT Environmental Planners and Project Managers, and with consultants as appropriate, to ensure that:

- A. The scope and design of the undertaking are sufficiently developed and detailed to ensure that the property will be protected from all adverse effects.
- B. Adequate information is available to accurately delineate the boundary of the archaeological site or the building or structure in relation to the anticipated project impacts and to identify contributing features of the site. This information may be obtained from literature review, surface survey, historical research, and/or consultation with Tribes and land managing agencies.
- C. Specific avoidance measures are developed and undergo the necessary internal review to ensure the avoidance measures are practicable and agreed to by both ADOT staff responsible for design and ADOT District personnel.
- D. All protection measures are defined (e.g., signing, staking, fencing, monitoring

provisions) and included in the final National Environmental Policy Act (NEPA) document or categorical exclusion, contract provisions, construction plans, and/or other documents as appropriate.

- E. A clear chain of command is established identifying specific tasks, responsibilities and contact information for each ADOT or LPA staff, consultant, or other party in the chain.

Archaeological sites that can be protected by the avoidance measures may be considered eligible for inclusion in the National Register of Historic Places (National Register) for the purposes of the undertaking without subsurface excavation and/or surface collection. Buildings and structures may also be considered National Register eligible for the purposes of the undertaking without evaluation.

Standard Conditions for Undertakings within the Boundaries of Data-Recovered Archaeological Sites

This standard condition applies to undertakings occurring within a previously data-recovered archaeological site. To use this standard condition, the ADOT HPT will review the data recovery report and any associated records, to ensure that:

- A. The data recovery was conducted to current standards.
- B. The entire portion of the site that is within the project APE has been fully data-recovered.
- C. There must be written concurrence from the SHPO and any land manager or permitting agency with a role in authorizing the undertaking, or Tribe if the archaeological site is on Tribal land, that the data recovery was adequately completed.
- D. Prior to the decision to use this standard condition, the ADOT HPT will coordinate with the SHPO or appropriate land managing or permitting agency, or consult with a Tribe if the archaeological site is on Tribal Land, to obtain their concurrence on the use of this standard condition.

This standard condition cannot be used if human remains were present within the archaeological site at the time of the data recovery. In addition, this standard condition cannot be used if there is the potential for human remains within the archaeological site, even if no human remains were present during the data recovery. The ADOT HPT will assess the potential for human remains in coordination with the SHPO and appropriate land-managing agency, and through consultation with a Tribe if the archaeological site is on Tribal land.

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Attachment 6: Standard Measures for Resolving Adverse Effects

Arizona Department of Transportation (ADOT) may propose and carry out standard measures for resolving adverse effects to specific categories of historic properties in accordance with Stipulation VIII.G.1 of this Agreement. The following standard measures will apply to archaeological sites, or to historic buildings and structures, as presented below.

- A. Standard measures for resolving adverse effects to archaeological sites through data recovery. ADOT will ensure that a Historic Properties Treatment Plan (HPTP) is prepared that includes, but is not limited to, the following:
1. Discussion of the National Register of Historic Places (National Register) significance of the properties.
 2. Research design and questions that are directly pertinent to those data sets that qualify the property for inclusion in the National Register under Criterion D.
 3. Results of previous research relevant to the property type.
 4. Proposed data needs and proposed methods and techniques to acquire the data, including any special studies.
 5. Field methods and techniques that will cost-effectively address the property's structure and content in the context of the defined research questions and the property's stratigraphic and geomorphic context.
 6. Assumptions about the number and types of features expected and a proposed sampling strategy.
 7. Site-specific maps portraying the proposed data recovery (i.e., proposed trench or test unit placement).
 8. Laboratory processing and analyses, with justification of their relevance to the property and its research values.
 9. Methods and techniques used in artifact, data, and other record management.
 10. Provisions for ongoing Tribal consultation, monitoring, and coordination, if Tribal values or concerns are known or suspected.
 11. Provisions for Tribal perspectives in the preparation of research designs, data recovery plans and reports.

12. Qualifications of key personnel.
 13. Disposition, including curation, of recovered materials and records resulting from implementation of the data recovery plan.
 14. All required permits.
 15. Report preparation schedule.
 16. A Monitoring and Discovery Plan including provisions and procedures for evaluating and treating discoveries of unexpected finds during the course of the project in accordance with Stipulation XIV of this Agreement.
 17. Explicit provisions for disseminating research findings to professional peers in a timely manner.
 18. Plan for public involvement and educational or interpretive programs, focusing particularly on the community or communities that may have interest in the results.
- B. Standard measures for resolving adverse effects to historic buildings and structures through Historic Americans Buildings Survey/Historic American Engineering Record (HABS/HAER) documentation. Information included in the consultation proposing to conduct HABS/HAER documentation will include, but is not limited to, the following:
1. A description of each building or structure, its National Register significance, and its character defining features.
 2. A discussion of relevant research questions and recording objectives in relation to the type and significance of the property.
 3. The proposed level of HABS/HAER documentation and a justification for this documentation in relation to the anticipated adverse effects.
 4. A description of methods to be used in collecting data needed to achieve the research and recording objectives.
 5. Qualifications of key personnel.
 6. A report preparation schedule.
 7. A proposal for development of a public benefit document or other appropriate measures for public presentation.
- C. Standards and Guidelines

1. All archaeological data recovery will be conducted following:
 - a. Archaeology and Historic Preservation: Secretary of the Interior's Standards and Guidelines, September 1983, U.S. Department of the Interior, National Park Service (48 Federal Register 44716, as updated) or its successor regulation.
 - b. Arizona Antiquities Act standards, for archaeological investigations on state, county, and municipal lands in Arizona.
2. All HABS/HAER documentation will be conducted following:
 - a. The Secretary of the Interior's Standards for Architectural and Engineering Documentation.
 - b. Secretary of the Interior's Standards for the Treatment of Historic Properties, July 1997, U.S. Department of the Interior, National Park Service (36 Code of Federal Regulations Part 68) or its successor regulation.

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Attachment 7: Protocol for Installing or Replacing Fencing and signage

- A. Arizona Department of Transportation (ADOT) shall ensure that the procedures presented below are followed during installation or replacement of fencing and signage within the defined limits of eligible or unevaluated archaeological sites located in the area of potential effects (APE). The following procedures only apply to signage requiring posthole excavation no larger than 12 inches in diameter.
1. This protocol will serve as a standard monitoring plan for the installation or replacement of signage and fencing. The primary purpose of the monitoring is to guide the specific placement of the signage or the fencing to minimize the potential impacts to archaeological sites by careful and thoughtful placement of ground disturbing activities, based on surface indications and any other available information about the site. With the use of Attachment 7, the ADOT Historic Preservation Team (ADOT HPT) may determine that the fencing or signage installation or replacement will not adversely affect the archaeological site.
 2. No monitor will be required for installation or replacement of fences and signs within the boundary of sites determined not eligible for listing on the National Register of Historic Places (NRHP).
 3. No monitor will be required for installation or replacement of fences and signs within portions of National Register eligible sites that have been mitigated by archaeological data recovery, except for sites where human remains have previously been identified.
 4. Vegetation removal must be cut with hand tools at or above ground level.
 5. Every effort will be made to reuse existing holes for new posts or to place them as close as possible to the original post placement so that disturbance to the site may be limited.
 6. No new gates, cattle guards, or other similar fence-related structures will be built within site boundaries.
 7. H-brace and corner braces will be located outside the site boundaries wherever possible.
 8. Rubber tired construction vehicles will be allowed within site boundaries in dry conditions in areas where they will not damage the site.
- B. Qualifications for Archaeological Monitors

1. The archaeological monitor must meet the Professional Qualifications Standards in Stipulation IV.
2. Archaeological monitoring will be conducted under appropriate state and federal archaeological permits based on land jurisdiction.

C. Consultation Process and Project Documentation

1. Attachment 7 will serve as the monitoring and discovery plan that will be supplemented with a project specific addendum. The project specific addendum will be sent to SHPO and any land managing or permitting agency or Signatory Tribe with jurisdiction for a 10 calendar day review.
2. The project specific addendum will contain the following information:
 - a. APE and land jurisdiction depicted on a USGS 7.5 minute topographic map.
 - b. Brief description of the project (fence installation, etc.), including any equipment needed to complete the work.
 - c. Description of the archaeological site that is within the project APE including: a brief historic context summary, history of recordation of the site, any documentation on site eligibility, and whether the site has been previously subjected to data recovery.
 - d. Further discussion of the archaeological site to include details regarding specific type of site (e.g. artifact scatter, habitation site), known artifact types present (e.g. shell, ceramics), known or suspected features and their location relative to the undertaking, and whether there are known human remains for the site.
 - e. Details on the integrity of the site.
 - f. Map of archaeological site depicting location of the undertaking within the site, and any features or artifact scatters present within the APE.
3. After completion of the monitoring, the monitor will provide a brief report of the results of the monitoring. The report will detail the following:
 - a. If the site(s) are located on state, county, or municipal lands in Arizona, the format of the report will follow the rules for implementing the Arizona Antiquity Act (ARS § 41-841 *et seq.*)

- b. Site information and location of monitoring within site.
- c. Dates of monitoring.
- d. Type of activity monitored.
- e. Any new information on the site gained during monitoring (e.g., erosion or other site integrity issues or new features noted).
- f. Photographs of the new signage or fencing within the site boundaries.

4. Site records shall be updated in AZSITE and/or other relevant databases.

D. Monitoring Procedures

1. Non-burial features

- a. When possible, the monitor shall guide the placement of signs or fence posts away from defined features or particularly dense artifact scatters visible on the surface.
- b. Sign or fence post installation may proceed when artifacts are present on the surface.
- c. Given the minimal impacts anticipated from installation of signage or fencing, if previously unrecorded non-burial features are encountered, they will not be excavated.
 - i. If new features are identified, they will be documented through mapping, photographs, and written descriptions.
 - ii. If unique or exotic artifacts are identified, they will be analyzed in the field and documented in a monitoring report. Artifacts will not be collected.

2. Installation and removal of T-posts

- a. Installation of a sign on a T-post, or installation of T-posts as fencing components within the boundaries of an eligible or unevaluated archaeological site will not require a monitor in cases where a recent (within three years) survey conducted to current standards has determined that there are no surface features within the APE for the installation of T-posts.

- b. In cases where existing survey reports do not meet the conditions listed above, a field check by a CRP with the appropriate expertise within six months prior to construction may be conducted to determine whether or not surface features are present in the APE.
 - c. If surface features are present in the APE, a monitor will be required to guide the placement of T-posts away from the features.
 - d. Removal of T-posts that were installed in non-feature contexts may take place without a monitor present provided that the removal is done with a post-puller or other tool that results in no additional ground disturbance. If such a tool is not available, a monitor is required during post removal.
3. If human remains or mortuary items are identified during the installation of signage or fencing, the monitor shall follow Stipulation XV.

Programmatic Agreement for Federal-Aid Transportation Projects in Arizona

Attachment 8: Protocol for Recreational Trails Program Undertakings

- A. Arizona Department of Transportation (ADOT) will ensure that the Section 106 requirements for Recreational Trails Program (RTP) projects are met as follows.
1. Arizona State Parks & Trails (ASP&T) receives applications for RTP grants in January of each year. ASP&T reviews grant applications and recommends projects for funding, beginning in April, with applications being approved and forwarded to ADOT throughout the calendar year.
 2. For those projects that are recommended for funding, ASP&T will forward the grant packet and all environmental related documents, including any cultural resources surveys or other cultural resources documentation relating to the project, to ADOT for review.
 3. When ADOT receives the grant packet and environmental documents, ADOT will work with the applicant to ensure all appropriate documents are present and sufficient. ADOT will then initiate Section 106 consultation and follow Stipulation VIII in this Agreement, where applicable.
 4. Upon completion of the Section 106 requirements, ADOT will complete the documentation required under the National Environmental Policy Act (NEPA).
 5. ADOT will assist ASP&T in drafting and/or updating their grants manual to accurately describe the Section 106 review process for these federally funded grants and will include a timeline from the receipt of the application to the award of the funding.
- B. ADOT, in cooperation with ASP&T, shall ensure that the requirements of this Agreement are met prior to approving construction for any RTP project.

Programmatic Agreement for Federal-Aid Transportation Projects in Arizona

Attachment 9: 326 MOU

- *“Memorandum of Understanding Between Federal Highway Administration, Arizona Division and the Arizona Department of Transportation: State Assumption of Responsibility for Categorical Exclusions” (326 MOU)*

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FHWA, Arizona Division and the Arizona Department of Transportation

MEMORANDUM OF UNDERSTANDING
between
Federal Highway Administration, Arizona
Division and the
Arizona Department of Transportation

State Assumption of Responsibility for Categorical Exclusions

THIS MEMORANDUM OF UNDERSTANDING (“MOU”) made and entered into 3rd day of January, 2018, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION (“FHWA”) and the STATE of Arizona, acting by and through its DEPARTMENT OF TRANSPORTATION (“State”), hereby provides as follows:

WITNESSETH:

Whereas, Section 326 of amended Chapter 3 of Title 23, United States Code (23 U.S.C. § 326) allows the Secretary of the United States Department of Transportation (“DOT Secretary”), to assign, and a State to assume, responsibility for determining whether certain designated activities are included within classes of action that are categorically excluded from requirements for environmental assessments or environmental impact statements pursuant to regulations promulgated by the Council on Environmental Quality under part 1500 of title 40, Code of Federal Regulations (“CFR”) (as in effect on October 1, 2003); and

Whereas, if a State assumes such responsibility for making categorical exclusion (“CE”) determinations under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (“NEPA”), the DOT Secretary also may assign and the State may assume all or part of certain Federal responsibilities for environmental review, consultation, or other related actions required; and

Whereas, on July 7, 2015 FHWA and the State executed the *Programmatic Agreement (PCE Agreement) Regarding the Determination and Approval of Categorical Exclusion Actions for Federal –Aid Highway Projects* and intend to terminate this agreement upon the execution of this MOU; and

Whereas, on October 24, 2017, the FHWA published a notice of the availability of the proposed Section 326 MOU in the Federal Register and provided a thirty (30) day opportunity for comment in the USDOT Docket Management System FHWA-2017-0044; and

Whereas, on October 24, 2017, the State published the proposed a notice of availability of the Section 326 MOU on its website at <https://www.azdot.gov/business/environmental-planning> and provided a 30-day opportunity for comment; and

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Whereas, the State and the FHWA have considered the comments received; and

Whereas, the DOT Secretary, acting by and through FHWA, has determined that specific designated activities are CEs and that it will assign specific responsibilities with respect to CEs to the State in accordance with this MOU; and

Whereas, the State wishes to assume such Federal agency responsibilities in accordance with this MOU and applicable law;

Now, therefore, FHWA and the State agree as follows:

STIPULATIONS

- I. CATEGORICAL EXCLUSION RESPONSIBILITIES ASSIGNED TO THE STATE BY FHWA**
- A. For the projects covered by this MOU, FHWA hereby assigns, and the State hereby assumes, subject to the terms and conditions set forth in 23 U.S.C. § 326 and this MOU, the responsibility for determining whether a proposed Federal-aid action is within a category of action that has been designated as a CE by the DOT Secretary, as specified in Stipulation I(B), and meets the definition of a CE as provided in 40 CFR 1508.4 (as in effect on October 1, 2003) and 23 CFR 771.117. This assignment applies only to projects for which the Arizona Department of Transportation is the direct recipient of Federal-aid highway program funding or is the project sponsor or cosponsor for a project requiring approval by the FHWA-Arizona Division Office. This assignment does not apply to responsibilities carried out by other modal administrations of the US Department of Transportation (USDOT) or the Office of the Secretary.**
- B. This assignment pertains only to the designated activities described in this Stipulation I(B).**
- 1. The assignment includes the following:**
- a. Activities listed in 23 CFR 771.117(c);**
- b. The example activities listed in 23 CFR 771.117(d); and**
- 2. Any activities added through FHWA rulemaking to those listed in 23 CFR 771.117(c) or example activities listed in 23 CFR 771.117(d) after the date of the execution of this MOU.**
- C. This MOU transfers to the State all responsibility for processing the CEs designated in Stipulation I(B) of this MOU, including any necessary CE approval actions. The State shall process all proposed projects that are CE candidates (CE projects), and any required reevaluations of CEs under 23 CFR 771.129 for CE projects not completed prior to the date of this MOU, in**

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accordance with the provisions of this MOU. With respect to matters covered by and subject to the terms of this MOU, this MOU supersedes any existing programmatic agreement that is solely between the State and FHWA concerning CEs in Stipulation I(B).

- D. The State, when acting pursuant to 23 U.S.C. § 326 and this MOU, holds assigned authority to make environmental decisions and commitments pertaining to only the individual proposed projects and activities within the scope of 23 U.S.C. § 326 and this MOU. No action by the State shall bind FHWA to future action of any kind. No determination or agreement made by the State with respect to mitigation or other activities shall constitute a precedent for future determinations, agreements, or actions in the Federal-aid highway program unless FHWA consents, in writing, to such commitment.
- E. Prior to approving any CE determination the State shall ensure and document that for any proposed project the design concept, scope, and funding are consistent with the current State Transportation Improvement Program (STIP), Transportation Improvement Program (TIP), and Regional Transportation Plan (RTP) as applicable.

II. OTHER FHWA RESPONSIBILITIES ASSIGNED TO THE STATE AND RESPONSIBILITIES RESERVED BY FHWA

- A. For projects covered by this MOU, FHWA hereby assigns, and the State hereby assumes, the following FHWA responsibilities for environmental review, consultation, or other related actions required under Federal laws and Executive Orders applicable to CE projects: See Appendix A for a description of the environmental responsibilities assigned to the State by the FHWA for proposed projects subject to this MOU. This assignment includes the transfer to the State of the obligation to fulfill the assigned environmental responsibilities associated with any proposed projects meeting the criteria in Stipulation I(B) that were determined to be CEs prior to the effective date of this MOU but the project has not been completed. Such projects are included in the term "proposed projects" in this MOU.
- B. The FHWA reserves any responsibility for any environmental review, consultation, or other related action that is not expressly assigned under this MOU, including:
 - 1. All government-to-government consultation with Indian tribes as defined in 36 CFR 800.16(m). Notice from the State to an Indian tribe advising the Indian tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. If the State adequately resolves any project-specific Indian tribe issues or concerns, then FHWA's role in the environmental process shall be limited to carrying out the government-to-government consultation process. FHWA, according to the terms of this MOU, shall initiate government-to-government

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consultation for an assigned project with any Indian tribe who directly contacts FHWA (via written or oral communication) to make such a request and identifies one or more highway projects in that request. If FHWA determines through consultation with an Indian tribe, or an Indian tribe indicates to FHWA, that the proposed resolution of tribal issues or concerns by the State is not adequate, then Stipulation III(C) applies. This MOU is not intended to abrogate, or prevent future entry into, any written agreement among the State, FHWA, and an Indian tribe under which the tribe agrees to permit the State to administer government-to-government consultation activities for FHWA. However, such agreements are administrative in nature and do not relieve FHWA of its legal responsibility for government-to-government consultation.

2. Review and approval of individual section 4(f) evaluations until such time ADOT staff complete Section 4(f) and legal sufficiency training. When such training has been completed, FHWA shall notify ADOT that the responsibility for review and approval of individual Section 4(f) evaluations is assigned. This modification shall not be deemed an amendment under Stipulation VIII.
- C. The State and FHWA will develop and document procedures for carrying out FHWA responsibilities retained by FHWA under Stipulation II(B), including how any FHWA decisions will be communicated to the State for inclusion in the State's decision-making under Stipulations I and II(A). The procedures will ensure that:
1. The State provides to FHWA any information necessary in order for FHWA to carry out its consultation, evaluation, or decision-making for Stipulation II(B) activities;
 2. The FHWA provides the State with a documented decision and any related information used for Stipulation II(B) decisions and needed by the State in order for the State to evaluate the project and make its decision whether the project qualifies as a CE; and
 3. As part of any request for FHWA authorization for funding or other action, the State will provide to FHWA evidence that the CE processing and any other environmental responsibilities assigned under this agreement have been completed in accordance with this MOU. This evidence demonstrates that (1) all NEPA review and compliance requirements have been met, (2) that the CE determination remains valid, and (3) that the scope of work of the project has not changed and that the project incorporates all environmental commitments, 23 CFR 771.109(d).
- D. The State agrees that its execution of environmental review, reevaluation, consultation, and other related responsibilities for CEs assigned under this MOU are subject to the same existing and future procedural and substantive

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requirements as if those responsibilities were carried out by FHWA. This includes, but is not limited to the responsibilities of FHWA under interagency agreements such as programmatic agreements, memoranda of understanding, memoranda of agreement, and other similar documents that relate to the environmental review process for CE projects. If such interagency agreements are between the State and FHWA only, then the assignment occurs automatically upon the signing of this MOU for projects covered by this MOU. If the interagency agreement involves signatories other than FHWA and the State, then, within six months after the effective date of this MOU, FHWA and the State will work to obtain any necessary consents or amendments (see Appendix B). Such actions include:

1. Consulting with the other parties to obtain written consent to the continuation of the interagency agreement in its existing form, but with the substitution through assignment of the State for FHWA with respect to interagency agreement provisions applicable to CE projects;
 2. Negotiating with the other parties to amend the interagency agreement as needed so that the interagency agreement continues but that the State assumes FHWA's responsibilities with respect to CE projects.
 3. If a third party does not agree to the assignment or amendment of the interagency agreement, then to the extent permitted by applicable law and regulation, the State must carry out the assigned environmental review, consultation, or other related activity in accordance with applicable laws and regulations but without the benefit of the provisions of the interagency agreement.
- E. The State shall carry out the assigned consultation, review and coordination activities in a timely and proactive manner. The State shall make all reasonable and good faith efforts to identify and resolve conflicts with Federal agencies, State and local agencies, Indian tribes as defined in 36 CFR 800.16(m), and the public during the consultation and review process.

III. ACTIONS, CONDITIONS, OR DETERMINATIONS THAT EXCLUDE DESIGNATED ACTIVITIES FROM ASSIGNMENT OF RESPONSIBILITIES

- A. Notwithstanding any other provision of this MOU, any activity that does not satisfy the criteria for the CE categories described in Stipulation I(B) is excluded from this assignment. Exclusion also may occur at any time during the environmental process if the State determines that the project fails to meet the CE criteria. The provisions of Stipulation IV(C) apply to such cases. These determinations are subject to FHWA review.
- B. Because the State assumes responsibility for environmental processing of the CEs designated in this MOU, FHWA no longer will be responsible for

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conducting the environmental review, consultation or other related actions assigned under this MOU (see Stipulation XI). However, in furtherance of its stewardship and oversight responsibilities, FHWA will evaluate the State's environmental processing of any project if FHWA has any reason to believe that the State's performance with respect to the project does not satisfy the terms and conditions of this MOU. The scope of the evaluation will be commensurate with the potential problem. If FHWA subsequently determines that the State's performance does not satisfy the terms and conditions of this MOU, then FHWA will take action to resolve the problem. Such action may include action to facilitate the State's compliance with the MOU, or action to exclude the project from assignment under this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.

- C. If a project-related concern or issue is raised in the coordination of project review with an Indian tribe, as defined in 36 CFR 800.16(m), and either the Indian tribe or FHWA determines that the issue or concern will not be satisfactorily resolved by the State, then FHWA may reassume responsibility for processing the project or an individual responsibility assumed by the State. The FHWA shall notify the State that the project will be excluded from this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.

IV. STATE PERFORMANCE REQUIREMENTS

- A. Compliance with governing laws, regulations and MOU. The State shall make all determinations under this MOU in accordance with 23 CFR 771.117(a) and (b) and succeeding regulations. All actions by the State in carrying out its responsibilities under this MOU shall comply with, and be consistent with, the coordination provisions of Stipulation II and all applicable Federal laws, regulations, Executive Orders, policies, and formal guidance. The State also shall comply with State and local laws to the extent applicable.
1. Failure to meet the requirements of Stipulation IV(A) is grounds for a decision by FHWA to terminate this MOU pursuant to Stipulation IX(A) if FHWA determines, after good-faith consultation with the State, that there is an irreconcilable material conflict between a provision of State law, regulation, policy, or guidance and applicable Federal law, regulation, policy, or guidance, and FHWA reasonably determines that such conflict is preventing the State from meeting its Stipulation IV(A) obligations. The grounds for such decision may include, but are not limited to, the mere existence of the conflict (i.e., on its face) and/or the effect of the conflict on the State's decision(s) on proposed CE project(s) (i.e., as applied).
 2. Official DOT and FHWA formal guidance and policies relating to environmental review matters are posted online at FHWA's website or sent to the State electronically or in hard copy.
 3. After the effective date of this MOU, the FHWA will use its best efforts to

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ensure that any new or revised FHWA policies and guidance that are final and applicable to the State's performance under this MOU are communicated to the State within ten (10) calendar days of issuance. Delivery may be accomplished by e-mail, mail, by publication in the *Federal Register*, or by means of a publicly available online posting including at the sites noted above. If communicated to the State by e-mail or mail, such material may be sent either to the party specified in this MOU to receive notices, or to the Arizona Department of Transportation Environmental Planning Administrator.

4. In the event that a new or revised FHWA policy or guidance is not made available to the State as described in the preceding paragraph, and if the State had no actual knowledge of such policy or guidance, then a failure by the State to comply with such Federal policy or guidance will not be a basis for termination under this MOU.
 5. The State will work with all other appropriate Federal agencies concerning the laws, guidance, and policies relating to any Federal laws that such other agencies administer.
 6. In order to minimize the likelihood of a conflict as described in Stipulation IV(A)(1) above, after the effective date of this MOU the State will use its best efforts to ensure that any proposed new or revised State laws, regulations, policies, or guidance that are applicable to the State's performance under this MOU are communicated to FHWA for review and comment before they become final. Delivery may be accomplished by e-mail, mail, or personal delivery. If communicated to FHWA by e-mail or mail, such material may be sent to the party specified in this MOU to receive notices for FHWA.
- B. Processing projects assigned under the MOU: State identification, documentation, and review of effects. For projects and other activities assigned under Stipulations I(A)-(B) that the State determines are included in the classes of CE assigned to the State under this MOU, the State shall:
1. Institute and maintain the process to identify and review the environmental effects of the proposed project.
 2. Carry out the other environmental responsibilities that are assigned under this MOU, as necessary or appropriate for the activity;
 3. Document in the project file the CE findings and completion of all applicable FHWA responsibilities assigned under Stipulations I and II;
 4. For CE's other than those designated in 23 CFR 771.117(c), carry out a review of proposed CE determinations, including consideration of the environmental analysis and project file documentation, prior to the States'

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approval of the CE determination. The process shall include, at a minimum, review of the documentation and proposed determination by a competent reviewer who is not a preparer of the CE documentation.

5. Document its approval of the determination using, at a minimum, the printed name, title, and date of the State official approving the determination;
6. Include the following determination statement when documenting the CE findings:

“The State has determined that this project has no significant impact(s) on the environment and that there are no unusual circumstances as described in 23 CFR 771.117(b). As such, the project is categorically excluded from the requirements to prepare an environmental assessment or environmental impact statement under NEPA. The State has been assigned, and hereby certifies that it has carried out, the responsibility to make this determination pursuant to 23 U.S.C. § 326 and a Memorandum of Understanding dated January 3, 2018, executed between FHWA and the State.”

7. Document in the project file the specific categorically excluded activity, the CE finding, including the determination that the project has no significant impact(s) on the environment, there are no unusual circumstances (23 CFR 771.117(b)), and completion of all applicable FHWA responsibilities assigned under Stipulations I and II.

C. Excluded projects and CE activities not assigned: determination and documentation. For projects that are candidates for CE classification but that the State determines should be excluded from processing under this assignment, the State shall:

1. Document the exclusion findings in the project file, including the reason for the finding;
2. Notify FHWA; and
3. Work with the FHWA, now as the responsible party under NEPA, and proceed with review and documentation of the project under the appropriate NEPA procedures.

D. Required State resources, qualifications, expertise, standards, and training. The State must maintain adequate organizational and staff capability and expertise to effectively carry out the responsibilities assigned to it under this MOU. This includes, without limitation:

1. Using appropriate technical and managerial expertise to perform the functions required under this MOU and applicable laws, regulations,

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policy, and guidance;

- a. Devoting adequate financial and staff resources to carry out the responsibilities assumed by the State; and
 - b. Demonstrating, in a consistent manner, the capacity to perform the State's responsibilities under the MOU and applicable Federal law.
2. The State agrees that it shall maintain on its staff or through consultant services all of the environmental and other technical expertise needed to carry out its responsibilities under this MOU and 23 U.S.C. § 326. Without limiting the foregoing, when carrying out the requirements of Section 106 of the National Historic Preservation Act, as amended, the State shall comply with 36 CFR 800.2(a)(1). All actions that involve the identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meet the Secretary of the Interior's Professional Qualifications Standards (published at 48 FR 44738-44739). The State shall ensure that all documentation required under 36 CFR 800.11 is reviewed and approved by a staff member or consultant who meets the Professional Qualifications Standards.

E. State quality control.

1. The State agrees to carry out regular quality control activities to ensure that its CE determinations are made in accordance with applicable law and this MOU.
2. At a minimum, the State shall monitor its processes relating to project determinations, environmental analysis, and project file documentation, and check for errors and omissions. The State shall take corrective action as needed. The State shall document its quality control activities and any needed corrective actions taken.
3. If the State implements training to meet the capability requirements of this MOU or as a corrective action, the State shall be responsible for the training. The State shall provide notice of formal training to FHWA.

F. MOU performance monitoring and quality assurance. The FHWA and the State shall cooperate in monitoring performance under this MOU and each party shall modify its practices as needed to assure quality performance by the State and FHWA. Monitoring will include consideration of the technical competency and organizational capacity of the State, as well as the State's performance of its CE processing functions. Performance considerations will include, without limitation, the quality and consistency of the State's project determinations,

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adequacy and capability of the resources applied by the State, and the quality and consistency of the State's administration of its responsibilities under this MOU. In support of the monitoring efforts:

1. The State shall submit to FHWA a list of the CE determinations and Section 4(f) determinations that the State approved during the previous 6 months (January 1 through June 30, and July 1 through December 31), within 15 business days after the end of each semi-annual reporting period. Reduction in reporting frequency, and any revocation of such reduction by FHWA, shall not be deemed an amendment under Stipulation VIII.
2. State shall submit to the FHWA (via electronic copy) a self-assessment report summarizing its performance under this MOU at least 30 days prior to a scheduled monitoring review by FHWA. The report will identify any areas where improvement is needed and what measures the State is taking to implement those improvements. The report will include actions taken by the State as part of its quality control efforts under stipulation IV(E). Following submission of the report to the FHWA (electronic or in hard copy). The State shall schedule a follow-up meeting with FHWA at which the parties will discuss the report, the State's performance of this MOU, and the FHWA's monitoring activities.
3. The State shall maintain electronic project records and general administrative records pertaining to its MOU responsibilities and the projects processed hereunder. The records shall be available for inspection by the FHWA at any time during normal business hours. The State shall provide the FHWA with electronic copies of any documents the FHWA may request within five business days. The State shall retain those records, including all letters and comments received from governmental agencies, the public, and others about the performance of activities assigned under this MOU, for a period of no less than three (3) years after completion of project construction. This 3-year retention provision does not relieve the State of its project or program recordkeeping responsibilities under 2 CFR 200.300 or any other applicable laws, regulations, or policies.
4. The State shall ensure that project records are available to the public consistent with requirements applicable to Federal agencies under 5 U.S.C. § 552 (the Freedom of Information Act (FOIA), as amended in 2002) and NEPA.
5. The FHWA periodically shall review the State's records and may interview State staff to evaluate the State's performance under this MOU. FHWA shall conduct one review within 6 months of the execution of this agreement, and may be coordinated with the review of the State's report under Stipulation IV(F)(2). The FHWA anticipates that under normal circumstances, its evaluation of the State's performance will be based on a modified version of a typical FHWA CE process review (to view FHWA guidance on how

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monitoring should occur visit

<http://www.fhwa.dot.gov/hep/6004stateassumpt.htm>). Modifications to the CE process review will include incorporation of measures specific to the responsibilities assigned to the State pursuant to 23 U.S.C. §326, and will include performance measurements of compliance and timeliness. However, the FHWA reserves the right to determine in its sole discretion the frequency, scope, and procedures used for monitoring activities. The State, by its execution of this MOU acknowledges that it is familiar with the FHWA CE Process Review procedures and with the expected modifications that will be adopted for the purpose of monitoring the State's MOU performance.

6. Nothing in this Stipulation shall prevent FHWA from undertaking other monitoring actions, including audits, with respect to the State's performance of the MOU. The FHWA, in its sole discretion, may require the State to perform such other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with this MOU, 23 U.S.C. § 326, and other applicable Federal laws and regulations. Such requirement shall not be deemed an amendment under Stipulation VIII.
 7. The State agrees to cooperate with FHWA in all quality assurance activities.
- G. **State liability.** The State agrees that it is solely responsible and solely liable for complying with and carrying out this MOU, for the performance of all assigned responsibilities as provided by applicable law and for any decisions, actions, or approvals by the State, per 23 U.S.C. § 326(b)(2). The FHWA shall have no responsibility or liability for the performance of responsibilities assigned to the State, including without limitation any decision or approval made by the State. Where the State exercises any assigned authority on a proposed project which FHWA determined to be a CE prior to the execution of this MOU, the State assumes sole environmental review responsibility and liability for any subsequent substantive environmental review action it takes on that project.
- H. **Litigation.**
1. Nothing in this MOU affects the United States Department of Justice's (hereinafter "USDOJ") authority to litigate claims, including the authority to approve a settlement on behalf of the United States if either FHWA or another agency of the United States is named in such litigation, or if the United States intervenes. In the event FHWA or any other Federal agency is named in litigation related to matters under this MOU, or the United States intervenes in the litigation, the State agrees to coordinate with FHWA and any USDOJ or Federal agency attorneys in the defense of that action.
 2. The State shall defend all claims brought against the State in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, the State shall provide qualified and competent legal counsel, including outside counsel if necessary. The State shall provide the defense at

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its own expense, subject to 23 U.S.C. 326(f) concerning Federal-aid participation in attorney's fees for outside counsel hired by the State. The State shall be responsible for opposing party's attorney's fees and court costs if a court awards those costs to an opposing party, or in the event those costs are part of a settlement agreement.

3. The State will notify the FHWA's Arizona Division Office and USDOJ's Assistant Attorney General for the Environment and Natural Resources Division, within seven (7) calendar days of the State's Legal Division's receipt of service of process of any complaint, concerning discharge of any responsibility assumed under this MOU. The State's notification to the FHWA and USDOJ shall be made prior to its response to the complaint. In addition, the State shall notify FHWA's Arizona Division Office within seven (7) calendar days of receipt of any notice of intent to sue concerning its discharge of any responsibility assumed under this MOU.
4. The State will provide FHWA's Arizona Division Office and USDOJ copies of any motions, pleadings briefs, or other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. The State will provide such copies to the FHWA and DOJ within seven (7) calendar days of service of any document, or in the case of any documents filed by or on behalf of the State, within seven (7) calendar days of the date of filing.
5. The State will notify the FHWA's Arizona Division Office and USDOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and USDOJ with a reasonable amount of time of at least ten (10) calendar days, to be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. The State will not execute any settlement agreement until: (1) FHWA and USDOJ have provided comments on the proposed settlement; (2) FHWA and USDOJ have indicated that they will not provide comments on the proposed settlement; or (3) the review period has expired, whichever occurs first.
6. Within seven (7) calendar days of receipt by the State, the State will provide notice to FHWA's Arizona Division Office and USDOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities the State has assumed under this MOU. The State shall notify FHWA's Arizona Division Office and USDOJ within five (5) days of filing a notice of appeal of a court decision. The State shall confer with FHWA and USDOJ regarding the appeal at least forty-five (45) calendar days before filing an appeal brief in the case.
7. The State hereby consents to intervention by FHWA in any action or proceeding arising out of, or relating to, the State's discharge of any responsibility assigned to the State under this MOU.

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8. The State's notification to FHWA and USDOJ in subparts IV(H)(3)-(6) shall be made by electronic mail to FHWA_assignment_lit@dot.gov and NRSDOT.enrd@doj.gov, unless otherwise specified by FHWA and USDOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, as identified in subpart IV(H)(4), the State may opt to either send the materials to the email addresses identified above, send hardcopies to the mail address below, or add to the distribution list in the court's electronic filing system (e.g., PACER) the following two email addresses: FHWA_assignment_lit@dot.gov and efile_nrs.enrd@usdoj.gov. FHWA and USDOJ's comments under subparts IV(H)(5)-(6) shall be made by electronic mail to FHWA.Arizona@dot.gov unless otherwise specified by the State. In the event that regular mail is determined necessary, mail should be sent by overnight mail service to:

For USDOJ: Assistant Attorney General for the Environment and Natural Resources Division at 950 Pennsylvania Avenue, NW, Room 2143, Washington, DC 20530.

For FHWA: Division Administrator, FHWA Arizona Division, 4000 N. Central Avenue, Suite 1500, Phoenix, Arizona 85012-3500

For ADOT: Environmental Planning Administrator, Arizona Department of Transportation, 1611 W. Jackson St., MD EM02, Phoenix, AZ 85007

- I. **Federal Register.** While the MOU is in effect, if any CE project or program documents are required to be published in the *Federal Register*, such as a notice of final agency action under 23 U.S.C. § 139(l), the State shall transmit such document to the FHWA's Division Office and the FHWA will publish such document in the *Federal Register* on behalf of the State. The State is responsible for the expenses associated with the publishing of such documents in the *Federal Register*, in accordance with guidance issued by the FHWA.
- J. **Participation in Resource Agency Reports.** The State agrees to provide data and information requested by the FHWA Office of Project Development and Environmental Review and resource agencies, with a cc to the FHWA Arizona Division, for the preparation of national reports to the extent that the information relates to determinations, findings, and proceedings associated with projects processed under this MOU. Such reports include but are not limited to:
1. Archeology Report requested by the National Park Service;
 2. Endangered Species Act Expenditure Reports requested by the United States Fish and Wildlife Service and the National Marine Fisheries Service;
 3. NEPA Litigation Reports requested by the Council on Environmental Quality; and

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4. Environmental Conflict Resolution reports requested by the Council on Environmental Quality.

V. STATE CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

- A. The State hereby certifies that it has the necessary legal authority and the capacity to:
 1. Accept the assignment under this MOU;
 2. Carry out all of the responsibilities assigned to the State; and
 3. Agree to and perform all terms and conditions of the assignment as contained in this MOU and in 23 U.S.C. § 326.
- B. The State consents to and accepts the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary that the State assumes under this MOU and 23 U.S.C. § 326. The State understands and agrees that this consent constitutes a waiver of the State's immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of addressing the compliance, discharge, and enforcement of matters arising out of this MOU and carrying out the USDOT Secretary's responsibilities that that State assumes pursuant to this MOU and 23 U.S.C. § 326. This consent to Federal court jurisdiction shall remain valid after termination of the MOU, or re-assumption of the USDOT Secretary's responsibilities by the FHWA, for any act or omission by the State relating to its compliance, discharge, or enforcement of any responsibility under this MOU or 23 U.S.C. § 326. A valid, binding, and sufficient waiver of the State's sovereign immunity must be in effect at all times that the State acts under the authority of this MOU.

As provided by Arizona Revised Statutes (A.R.S.) § 28-334, Arizona waives its immunity under the Eleventh Amendment of the U.S. Constitution. If this waiver is withdrawn, then the State's authority to participate in this MOU will end and this MOU will terminate automatically subject to applicable survival and transitional provisions of this MOU.
- C. In accordance with 23 U.S.C. § 326(e), the State agrees that it shall be deemed to be a Federal agency for the purposes of the Federal law(s) under which the State exercises any responsibilities pursuant to this MOU and 23 U.S.C. § 326.
- D. The State may not assign or delegate its rights or responsibilities under this MOU to any other agency, political subdivision, or entity, or to any private individual or entity. Without limiting the foregoing, the State understands and agrees that it must retain the environmental decision-making responsibilities assigned to it under this MOU and may not assign or delegate such decision-

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making responsibilities to consultants or others.

- E. With respect to the public availability of any document or record under the terms of this MOU or the State's open records law, A.R.S. § 39-101 et seq., the State certifies that the laws of the State provide that any decision regarding the release or public availability of a document or record may be legally challenged or reviewed in the courts of the State.
- F. The State certifies that the persons signing this MOU and providing certifications are duly authorized to do so and have the legal authority to:
 - 1. Enter into this MOU on behalf of the State;
 - 2. Make the certifications set forth in this MOU; and
 - 3. Bind the State to the terms and conditions contained in this MOU.
- G. The State further certifies that, in enacting the Arizona Revised Statutes, Chapter 2, Article 2, Section 28-334, the State has waived the State's Eleventh Amendment rights and consented to Federal court jurisdiction with regard to the compliance, discharge and enforcement of any responsibility of the USDOT Secretary that the State assumes under this MOU and 23 U.S.C 326.
- H. The State's Attorney General, by issuing an opinion letter that is addressed to the FHWA Administrator and attached to this MOU, has made the requisite certifications as the State's Chief Legal Officer. A copy of the opinion letter is attached to this MOU as Appendix C.

VI. PUBLIC NOTICE AND COMMENT

- A. The execution of this MOU, and of any amendment or renewal, requires prior public notice and an opportunity for comment.
- B. The State shall publish notice of the availability of this MOU, and any proposed amendment or renewal, for public review and comment and information regarding access to the USDOT Docket Management System on its website.
- C. The FHWA Arizona Division Office shall publish in the Federal Register a notice of availability of this MOU and any proposed amendment or renewal of this MOU, for public review and a thirty (30) calendar day comment period. This notice will expressly request comments on any types of activities proposed for assignment under Stipulation I(B), will include a statement of the public availability of supporting documentation for any assignment under Stipulation I(B), and advise the public about how to learn about FHWA's final decision on the proposed MOU, including how to obtain a copy of any resulting final MOU. The FHWA will establish a docket in the USDOT Docket Management System

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to receive comments.

- D. The State and the FHWA shall consider comments provided by the respondents to the public notices before finalizing the MOU, or any proposed amendment or renewal agreement. Upon completion of the decision-making process, the FHWA shall publish a notice in the *Federal Register* that announces the agency's decision and the execution of the MOU. The notice also will inform the public of the availability in the USDOT Docket Management System of a brief summary of the results of the decision-making process and a copy of any final MOU executed by the State and the FHWA, whether initial, amended, or renewed. The notice also will advise where the final MOU is available on the State's website.
- E. The State agrees that at all times that this MOU is in effect, the State will post on its website (<https://www.azdot.gov/business/environmental-planning>) a notice of the availability to the public, upon request, of copies of the State's biannual reports of CE determinations prepared pursuant to Stipulation IV(F)(1), the State's performance reports prepared pursuant to Stipulation IV(F)(2), and the FHWA performance monitoring reports prepared pursuant to Stipulation IV(F)(5). The FHWA will arrange for the posting of a similar notice on the FHWA's website or create a link from the FHWA's site to the State's site.

VII. INITIAL TERM AND RENEWAL

- A. This MOU shall have a term of three (3) years, beginning on the date of the last signature.
- B. This MOU is renewable for additional terms of three (3) years each if the State requests renewal and the FHWA determines that the State has satisfactorily carried out the provisions of this MOU. In considering any renewal of this MOU, the FHWA will evaluate the effectiveness of the MOU and its overall impact on the environmental review process. The FHWA may decide not to renew the MOU if the FHWA determines that the operation of the MOU has substantial adverse effects on the environmental review process. Such evaluation may include consideration of any effects from the assumption by the State of only some, but less than all, of the FHWA's environmental review, consultation, or other related responsibilities as listed in Stipulation II.
- C. At least six (6) months prior to the end of the initial term and of any renewed term of this MOU, the State and the FHWA shall meet to discuss the results of the monitoring and consider any amendments to this MOU. This meeting may be combined with a meeting to discuss performance under the monitoring provisions in Stipulation IV(F)(2) and (F)(5) of this MOU.
- D. If the parties do not renew the MOU, then it shall expire at the end of the term then in effect. The provisions of Stipulation X(A)(4), and X(C)-(E) shall apply.

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VIII. AMENDMENTS

- A. Any party to this MOU may request that it be amended, or administratively modified to reflect non-substantive changes, whereupon the parties shall consult to consider such an amendment. Public notice and comment is not required for the parties to agree to a technical non-substantive change.

- B. If, after the required public notice and comment, the parties agree to amend the MOU, then the FHWA and the State may execute an amendment with new signatures and dates of the signatures. The term of the MOU shall remain unchanged unless otherwise expressly stated in the amended MOU. Any amendment that extends the term of the MOU shall be treated as a renewal and the FHWA must make the determinations required for a renewal under Stipulation VII.

IX. TERMINATION

A. Termination by the FHWA

- 1. As provided at 23 U.S.C. 326(d)(1), FHWA may terminate the State's participation in the Program, in whole or in part, at any time subject to the procedural requirements in 23 U.S.C. 326 and subpart IX(A)(2) below, if:
 - a. FHWA determines that the State is not adequately carrying out the responsibilities assigned to the State under this MOU;
 - b. FHWA provides to the State a written notification of its determination;
 - c. FHWA provides the State a period of at least one-hundred twenty (120) calendar days to take corrective action to comply with this MOU;
 - d. If requested by the Governor of the State, FHWA provides a detailed description of each responsibility in need of corrective action regarding any inadequacy identified by FHWA; and
 - e. After the notification and after the expiration of the 120-day period provided under this provision, the State fails to take satisfactory corrective action as determined by FHWA.

- 2. Failure to adequately carry out the responsibilities may include, but not be limited to:
 - a. Persistent neglect of, or noncompliance with, any Federal laws, regulations, and policies;
 - b. Failure to cooperate with FHWA in conducting an audit or any oversight or monitoring activity;

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- c. Failure to secure or maintain adequate personnel and financial resources to carry out the responsibilities assumed;
 - d. Substantial noncompliance with this MOU; or
 - e. Persistent failure to adequately consult, coordinate, and/or take the concerns of other Federal agencies, as well as SHPOs/THPOs, into account in carrying out the responsibilities assumed.
3. If FHWA terminates one or more of the State's responsibilities under this MOU in accordance with 23 U.S.C. 326, FHWA shall provide written notice of that termination to the State, and such notice that specify the date on which the termination becomes effective. Upon that effective date, any responsibilities identified to be terminated in the notice that have been assumed by the State of this MOU will transfer to FHWA.

B. Termination by the State

1. The State may terminate its participation in the Program, in whole or in part, at any time by providing to FHWA a notice at least ninety (90) calendar days prior to the date that the State seeks to terminate its participation in this Program, and subject to such terms and conditions as FHWA may provide.
2. The Arizona Legislature and Governor may, at any time, terminate the State's authority granted to participate in this Program. In the event, FHWA and the State will develop a plan to transition the responsibilities that the State has assumed back to FHWA so as to minimize disruption to projects, minimize confusion to the public, and minimize burdens to other affected Federal, State, and local agencies. The plan will be approved by both FHWA and the State.
3. Any such withdrawal of assignment which FHWA and the State have agreed to under a transition plan will not be subject to the procedures or limitations provided for in subpart IX of this MOU and will be valid as agreed to in the transition plan.

C. Validity of the State Actions

1. Any environmental approvals made by the State pursuant to the responsibilities the State has assumed under this MOU will remain valid after termination of the State's participation in the MOU or withdrawal of assignment by FHWA. As among the USDOT Secretary, FHWA and the State, the State will remain solely liable and solely responsible for any environmental approvals it makes pursuant to any of the responsibilities it has assumed while participating in the Program.

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X. PROCEDURES FOR TERMINATION AND FHWA-INITIATED PROJECT EXCLUSIONS

- A. Except as provided in Stipulation X(B) below, the process for termination under Stipulation IX(A)-IX(B), and for exclusion of a project from the MOU assignment by the FHWA under Stipulation III(B)-III(C), is as follows:
1. The party wishing to initiate the termination or exclusion shall provide to the other party a written notice of intent. The notice should identify the proposed action and explain the reason(s) for the proposed action.
 2. Following the notice, the parties shall have a thirty (30) calendar-day period during which the FHWA and the State shall consult on amendments or other actions that would avoid termination or exclusion. By agreement, the parties may extend this consultation period, provided that such extension may not exceed the term of the MOU.
 3. Following the consultation period, any termination or exclusion by FHWA shall be effective as of a date thirty (30) calendar days after the date of either a post-consultation agreement between the State and FHWA or the date of the State's receipt of a FHWA notice of final determination of termination or exclusion. In the event of termination initiated by the State, the termination shall be effective ninety (90) calendar days after the date of FHWA's receipt of the State's termination notice. All responsibilities covered by the termination or exclusion shall revert to the FHWA as of that effective date.
 4. In the event of termination or exclusion, the State and the FHWA agree to cooperate to make the transfer of responsibilities back to the FHWA effective in as orderly and administratively efficient manner as possible. The State will promptly provide FHWA any documents, records and other project-related material needed for FHWA to proceed with processing any affected project. Appropriate NEPA procedures, including those under any applicable programmatic CE agreement, shall apply to the subsequent processing of projects.
- B. The FHWA, in its sole discretion, may exclude a project from this MOU pursuant to Stipulation III(B)-III(C), without the thirty (30) calendar day consultation or final notice periods, if the FHWA determines that:
1. The State is not performing in accordance with this assignment; and
 2. Extreme conditions exist that justify immediate exclusion or termination and transfer back to the FHWA of the responsibilities covered by the exclusion or termination.

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3. In such cases, the FHWA shall notify the State in writing of its determination and action, and specify the reason for the action.
- C. The State's liability for its acts and omissions under this MOU, and the provisions of Stipulation V, shall survive the MOU. This survival clause includes, without limitation, the provisions of Stipulations IV (G)-IV(H) relating to liability and litigation.
 - D. Exclusion actions, and any decision not to renew, do not require public notice and comment.
 - E. Termination or other action by the FHWA in accordance with the provisions of this MOU does not limit or otherwise affect the FHWA's ability to seek any other remedy or to take action under other provisions of applicable law, including without limitation any appropriate remedies as provided in 23 CFR 1.36.

XI. STATE EXECUTION OF ASSIGNED RESPONSIBILITIES WITHOUT FHWA INVOLVEMENT

- A. The FHWA will not provide any project-level assistance to the State in carrying out any of the responsibilities assigned under this MOU. "Project-level assistance" includes advice, consultation, or document review with respect to the discharge of such responsibility for a particular highway project. However, "project-level assistance" does not include discussions concerning issues addressed in prior projects, legal interpretations of any applicable law contained in titles 23 or 49 of the United States Code, legal interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance. If a need for project-level assistance is identified as a result of the government-to-government consultation process described in Stipulation II(B)(1), then the FHWA shall reassume responsibility for the project as provided in Stipulation III(C).
- B. The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving the State's consultation or coordination with another Federal, State, or local agency with respect to the State's discharge of any of the responsibilities the State has assumed under this MOU for any particular highway project. However, the FHWA holds both monitoring and quality assurance obligations under this MOU and general oversight and stewardship obligations under the Federal-aid Highway Program. In furtherance of those obligations, the FHWA may elect to attend meetings between the State and other Federal agencies. Prior to attending such meetings, the FHWA will make a reasonable and diligent effort to give the State notice.

In rare or extreme circumstances and based on its observations, the FHWA may submit comments to the State and the other Federal agency if the FHWA determines such comment is necessary and in the Federal interest because:

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1. The FHWA reasonably believes that the State is not in compliance with this MOU; or
2. The FHWA determines that an issue between the State and the other Federal agency has broad or unique policy implications for the administration of the national Federal-aid Highway Program.

XII. NOTICES

Any notice to either party may be given electronically so long as a paper original of the notice also is delivered to the party. The effective date of the notice shall be the date of delivery of the paper original. Paper notices shall be delivered as follows:

State of Arizona:

ADOT Director
Arizona Department of Transportation
206 S. 17th Ave
Mail Drop 100A
Phoenix, AZ 85007

Federal Highway Administration:

Division Administrator
4000 North Central Avenue,
Suite 1500
Phoenix, AZ 85012

U.S. Department of Justice:

Office of the Assistant Attorney General
Environment and Natural Resources Division
950 Pennsylvania Avenue, NW
Room 2143
Washington, D.C. 20530

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Execution of this MOU and implementation of its terms by the State formally evidence that the parties have reviewed this MOU and determined that it complies with the laws, regulations and policies applicable to the FHWA and the State. Accordingly, this MOU is approved and is effective upon the date of the last signature below.

FEDERAL HIGHWAY ADMINISTRATION


Karla S. Petty, Division Administrator
Arizona Division Office


Date

STATE OF ARIZONA


Dallas Hammit, State Engineer and Deputy
Director for Transportation,
Arizona Department of Transportation


Date

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Appendix A

List of FHWA Responsibilities Assigned

Air Quality

Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q. *Including determinations for project-level conformity if required for the project.*

Noise

Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918
Compliance with the noise regulations in 23 CFR part 772 (except approval of the State noise policy in accordance with 23 CFR 772.7)

Wildlife

Section 7 of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544, and 1536
Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661–667d
Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712

Historic and Cultural Resources

Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 306108
Archeological Resources Protection Act of 1979, 16 U.S.C. 470aa, et seq.
Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. § 138 and 49 U.S.C. § 303; 23 CFR part 77 Title 54, Chapter 3125—Preservation of Historical and Archeological Data, 54 U.S.C. §§ 312501-312508
Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013; 18 U.S.C. § 1170

Social and Economic Impacts

American Indian Religious Freedom Act, 42 U.S.C. § 1996¹
Farmland Protection Policy Act (FPPA), 7 U.S.C. §§ 4201–4209

Water Resources and Wetlands

Clean Water Act, 33 U.S.C. §§ 1251–1377.
Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f–300j–6
Rivers and Harbors Act of 1899, 33 U.S.C. § 403
Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287
Emergency Wetlands Resources Act, 16 U.S.C. §§ 3921, 3931
Flood Disaster Protection Act, 42 U.S.C. 4001–4128
FHWA wetland and natural habitat mitigation regulations, 23 CFR part 777

Parklands

Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. § 138 and 49 U.S.C. 303; and 23 CFR part 774
Land and Water Conservation Fund (LWCF), Pub. L. 88-578, 78 Stat. 897 (known as

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Section 6(f))

Hazardous Materials

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675

Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. §§ 9671 – 9675

Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k

Land

Landscaping and Scenic Enhancement (Wildflowers), 23 U.S.C. § 319

Executive Orders Relating to Highway Projects

E.O. 11990, Protection of Wetlands

E.O. 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 C.F.R. sections 650.113 and 650.115)

E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations

E.O. 11593, Protection and Enhancement of Cultural Resources¹

E.O. 13007, Indian Sacred Sites¹

E.O. 13112, Invasive Species

FHWA-Specific

Planning and Environmental Linkages, 23 U.S.C. § 168, except for those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135

Programmatic Mitigation Plans, 23 U.S.C. § 169 except for those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135

Note:

¹Under these laws and Executive Orders, FHWA will retain responsibility for conducting formal government-to-government consultations with federally recognized Indian tribes. The State will continue to handle routine consultations with the tribes and understands that a tribe has the right to direct consultation with FHWA upon request. The State may also assist FHWA with formal consultations, with the consent of a tribe, but FHWA remains responsible that this consultation occurs.

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Appendix B

**List of ADOT Programmatic Agreements/Memoranda of Understanding
Statewide Agreements**

**Programmatic Agreement between the Arizona Department of Transportation, Federal Highway Administration, the Arizona State Historic Preservation Officer, the Bureau of Indian Affairs, the Bureau of Land Management, the Bureau of Reclamation, the United States Army Corps of Engineers, the United States Forest Service, the Arizona State Land Department, Arizona State Parks, the Arizona State Museum, the Gila River Indian Community, the Hualapai Tribe and the Advisory Council on Historic Preservation.
Signatories: ADOT, FHWA, SHPO, BIA, BLM, BOR, Corps, USFS, ASLD, ASP, ASM, GRIC, Hualapai, ACHP
Effective Date: December 15, 2015**

**Memorandum of Agreement between the Arizona Department of Transportation, Federal Highway Administration, Arizona Division, and the United States Army Corps of Engineers Los Angeles District Concerning Funding for the Department if the Army Corps Permit Process on Priority Federal-Aid Highway Projects
Signatories: ADOT, FHWA, CORPS
Effective Date: March 18, 2013**

**Memorandum of Agreement between the Arizona Department of Transportation, the Federal Highway Administration, Arizona Division, and the United States Fish and Wildlife Service
Signatories: ADOT, FHWA, USFWS
Effective Date: June 16, 2015**

**Memorandum of Understanding between the Arizona Department of Transportation, the Federal Highway Administration, Arizona Division, and the Bureau of Land Management, Arizona
Signatories: ADOT, FHWA, BLM
Effective Date: September 2, 2008**

**Memorandum of Understanding Among the Arizona Department of Transportation, the Federal Highway Administration, Arizona Division, and the USDA Forest Service, Southwestern Region Regarding the Construction, Operation and Maintenance of Highways in Arizona Crossing National Forest System Lands
Signatories: ADOT, USFS, FHWA
Effective Date: September 2, 2008**

List of related Agreements/Memoranda of Understanding

**U.S. Environmental Protection Agency Region IX, U.S. Department of Transportation, Federal Highway Administration Arizona Division, Memorandum of Understanding, Sole Source Aquifer Review pursuant to Section 1424 (e) Of the Safe Drinking Water Act
Signatories: FHWA, EPA
Effective Date: November 27, 2002**

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Appendix C

**Arizona Attorney General Letter of Opinion
Dated November 7, 2017**



MARA BRNDVICH
Attorney General

Office of the Attorney General
State of Arizona

November 7, 2017

Brandye Hendrickson
Acting Administrator
Federal Highway Administration
1200 New Jersey Ave., SE
Washington, DC 20590

Subject: Certification from State Attorney General required by FHWA for assignment of NHPA and other responsibilities to ADOT (23 U.S.C. §§ 326 & 327)

Dear Ms. Hendrickson:

Pursuant to the authority provided by the Moving Ahead for Progress in the 21st Century Act or "MAP-21," and specifically 23 U.S.C. § 327 as amended by MAP-21, the Arizona Department of Transportation ("ADOT") has advised this Office that it is submitting an application to the Federal Highway Administration ("FHWA") for assignment of responsibilities for compliance with the National Environmental Policy Act ("NEPA") and other federal environmental laws for federal-aid highway projects ("NEPA Assignment"). On September 16, 2014, FHWA published rules setting forth the requirements for such applications.¹ FHWA's rules specify that a state's application for NEPA Assignment must include certain certifications by the State's Attorney General or other state official legally empowered by state law to issue legal opinions that bind the state.²

ADOT and FHWA plan to enter into a Memorandum of Understanding ("MOU") regarding the assignment of the federal environmental review responsibilities after a public review of the application. ADOT and FHWA also plan to enter into a separate MOU for the assignment of authority to make categorical exclusion determinations under 23 U.S.C. § 326 ("CE Assignment"). The purpose of this letter is to provide the certifications required by FHWA to accompany ADOT's application for NEPA Assignment as well as to enter into MOU's for both NEPA Assignment and CE Assignment.

The Attorney General serves as the chief legal officer of the state.³ In my official capacity as Attorney General of the State of Arizona, I hereby certify the following:

- As stated in A.R.S. § 28-334(C)(1), ADOT is legally authorized by state law to assume the responsibilities of the United States Department of Transportation with respect to duties

¹ 79 Fed. Reg. 55,381 (Sept. 16, 2014)

² 23 C.F.R. § 773.109(a)(6)-(7)

³ A.R.S. § 41-192

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under NEPA and any other federal environmental law pertaining to review or approval of a highway project in this state.

- The Legislature enacted A.R.S. § 28-334(C)(2), providing, “[s]overeign immunity from civil suit in federal court is waived consistent with 23 United States Code §§ 326 and 327 and limited to the compliance, discharge or enforcement of a responsibility assumed by... [ADOT]... under this paragraph.” The State’s waiver is made consistent with 23 U.S.C. § 327, which states: “[t]he United States district courts shall have exclusive jurisdiction over any civil action against a State for failure to carry out any responsibility of the State under this section.”
- The Arizona Public Records Law (A.R.S. § 39-101 *et seq*) is comparable to 5 U.S.C. § 552 (the Freedom of Information Act), including providing that any decision regarding the public availability of a document under state law is reviewable by a court of competent jurisdiction.

Sincerely,



Mark Brnovich
Attorney General

05381697

Programmatic Agreement for Federal-Aid Transportation Projects in Arizona

Attachment 10: 327 MOU

- *“Memorandum of Understanding Between the Federal Highway Administration and the Arizona Department of Transportation Concerning the State of Arizona’s Participation in the Surface Transportation Project Delivery Program Pursuant to 23 U.S.C. 327” (327 MOU)*

**MEMORANDUM OF UNDERSTANDING BETWEEN
THE FEDERAL HIGHWAY ADMINISTRATION AND THE
ARIZONA DEPARTMENT OF TRANSPORTATION CONCERNING THE
STATE OF ARIZONA'S PARTICIPATION IN THE SURFACE TRANSPORTATION PROJECT
DELIVERY PROGRAM PURSUANT TO 23 U.S.C. 327**

THIS MEMORANDUM OF UNDERSTANDING (MOU) entered into by and between the FEDERAL HIGHWAY ADMINISTRATION (FHWA), an administration in the UNITED STATES DEPARTMENT OF TRANSPORTATION (DOT), and the STATE OF ARIZONA, acting by and through its ARIZONA DEPARTMENT OF TRANSPORTATION (ADOT), hereby provides as follows:

WITNESSETH

Whereas, Section 327 of Title 23 of the United States Code (U.S.C.) establishes the Surface Transportation Project Delivery Program (Program) that allows the Secretary of the United States Department of Transportation (DOT Secretary) to assign and States to assume the DOT Secretary's responsibilities under the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq. (NEPA), and all or part of the DOT Secretary's responsibilities for environmental review, consultation, or other actions required by Federal environmental law with respect to highway, public transportation, railroad, and multimodal projects within the State; and

Whereas, 23 U.S.C. 327(b)(2) requires a State to submit an application in order to participate in the Program; and

Whereas, on June 29, 2018, prior to submittal of its application to FHWA, ADOT published notice of, and solicited public comment on, its draft application to participate in the Program as required by 23 U.S.C. 327(b)(3), and addressed the comments received as appropriate; and

Whereas, Arizona Revised Statutes (A.R.S.) § 28-334(C) authorizes ADOT to participate in the Program; and

Whereas, on November 16, 2018, the State of Arizona acting by and through ADOT, submitted an application to FHWA with respect to highway projects in the State of Arizona ; and

Whereas, on February 11, 2019, FHWA published a notice in the *Federal Register* providing an opportunity for comment on its preliminary decision to approve ADOT's application and solicited the views of other appropriate Federal agencies concerning ADOT's application as required by 23 U.S.C. 327(b)(5); and

Whereas, the DOT Secretary, acting by and through FHWA pursuant to 49 CFR 1.85(a)(3), has determined that ADOT's application meets the requirements of 23 U.S.C. 327 with respect to the Federal environmental laws and highway projects identified in this MOU.

Now, therefore, FHWA and ADOT agree as follows:

PART 1. PURPOSE OF MEMORANDUM OF UNDERSTANDING

1.1 Purpose

- 1.1.1 This MOU officially approves ADOT's application to participate in the Program and is the written agreement required by 23 U.S.C. 327(a)(2)(A) and (c) under which the DOT Secretary may assign, and ADOT may assume, the responsibilities of the DOT Secretary for Federal environmental laws with respect to one or more highway projects within the State of Arizona.
- 1.1.2 FHWA's decision to execute this MOU is based upon the information, representations, and commitments contained in ADOT's November 16, 2018, application. As such, this MOU incorporates the application. To the extent there is any conflict between this MOU and the application, this MOU shall control.
- 1.1.3 This MOU shall be effective upon the date of the final signature (Effective Date).
- 1.1.4 This MOU does not supersede the existing MOU between FHWA and ADOT under which FHWA assigned its responsibilities to ADOT, pursuant to 23 U.S.C. 326, for determining whether certain projects qualify for Categorical Exclusions ("CE") and assigned certain other responsibilities for those projects ("Section 326 MOU"). The FHWA and ADOT initially executed the Section 326 MOU on January 3, 2018.
- 1.1.5 Pursuant to 23 U.S.C. 327(c)(3)(B) and 327(c)(3)(C), and subpart 4.3 of this MOU, third parties may challenge ADOT's action in carrying out environmental review responsibilities assigned under this MOU. Otherwise, this MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the State of Arizona, its departments, agencies, or entities, its officers, employees, or agents. This MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the United States, its departments, agencies, or entities, its officers, employees, or agents.

PART 2. [RESERVED]

PART 3. ASSIGNMENTS AND ASSUMPTIONS OF RESPONSIBILITY

3.1 Assignments and Assumptions of NEPA Responsibilities

- 3.1.1 Pursuant to 23 U.S.C. 327(a)(2)(A), on the Effective Date of this MOU, FHWA assigns, and ADOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the DOT Secretary's responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321, et seq., with respect to the highway projects specified under subpart 3.3. This includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for Federal-aid highway projects such as 23 U.S.C. 139, 40 CFR parts 1500—1508, DOT Order 5610.1C, and 23 CFR part 771, as applicable.
- 3.1.2 On the cover page of each Environmental Assessment (EA), Finding of No Significant Impact (FONSI), Environmental Impact Statement (EIS), and Record of Decision (ROD) prepared under the authority granted by this MOU, and for memoranda corresponding to any CE determination it makes, ADOT shall insert the following language in a way that is conspicuous to the reader:

The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by ADOT pursuant to 23 U.S.C. 327 and a MOU dated 04/16/2019 and executed by FHWA and ADOT.

3.1.3 ADOT shall disclose to the public, Tribes and agencies, as part of Agency outreach and public involvement procedures, including any Notice of Intent or scoping meeting notice, the disclosure in subpart 3.1.2 above.

3.2 Assignments and Assumptions of Responsibilities to Comply with Federal Environmental Laws Other Than NEPA

3.2.1 Pursuant to 23 U.S.C. 327(a)(2)(B), on the Effective Date of this MOU, FHWA assigns and ADOT assumes, subject to the terms and conditions set forth in this MOU, all of the DOT Secretary's responsibilities under NEPA for environmental review, reevaluation, consultation, or other action pertaining to the review or approval of highway projects specified under subpart 3.3 of this MOU, required under the following Federal environmental laws:

Air Quality

- Clean Air Act, 42 U.S.C. 7401—7671q, with the exception of project level conformity determinations

Executive Orders (E.O.) Relating to Highway Projects

- E.O. 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 CFR parts 650.113 and 650.115)
- E.O. 11990, Protection of Wetlands
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 13112, Invasive Species, as amended by E.O. 13751, Safeguarding the Nation from the Impacts of Invasive Species
- E.O. 13807 Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure

FHWA-Specific

- Efficient Project Reviews for Environmental Decision Making, 23 U.S.C. 139
- Environmental Impact and Related Procedures, 23 CFR part 771
- Planning and Environmental Linkages, 23 U.S.C. 168, with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135
- Programmatic Mitigation Plans, 23 U.S.C. 169, with the exception of those FHWA responsibilities associated with 23 U.S.C. 134 and 135

Hazardous Materials Management

- Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601—9675

- Resource Conservation and Recovery Act, 42 U.S.C. 6901—6992k
- Superfund Amendments and Reauthorization Act, 42 U.S.C. 9671—9675

Historic and Cultural Resources

- Archeological and Historic Preservation Act of 1974, as amended, 54 U.S.C. 312501—312508
- Archeological Resources Protection Act of 1979, 16 U.S.C. 470(aa)—(mm)
- Native American Grave Protection and Repatriation Act, 25 U.S.C. 3001—3013; 18 U.S.C. 1170
- Section 106 of the National Historic Preservation Act of 1966, as amended, 54 U.S.C. 306101 et seq.
- 23 U.S.C. 138 and Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 303 and implementing regulations at 23 CFR part 774

Noise

- Compliance with the noise regulations in 23 CFR part 772
- Noise Control Act of 1972, 42 U.S.C. 4901—4918

Parklands and Other Special Land Uses

- Land and Water Conservation Fund Act, 54 U.S.C. 200302—200310
- Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. 138, 49 U.S.C. 303 and implementing regulations at 23 CFR part 774

Social and Economic Impacts

- American Indian Religious Freedom Act, 42 U.S.C. 1996
- Farmland Protection Policy Act (FPPA), 7 U.S.C. 4201—4209

Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. 1251-1387 (Sections 319 and 401, 402, 404 and 408)
- Emergency Wetlands Resources Act, 16 U.S.C. 3901 and 3921
- FHWA wetland and natural habitat mitigation regulations, 23 CFR part 777
- Flood Disaster Protection Act, 42 U.S.C. 4001—4130
- Rivers and Harbors Act of 1899, 33 U.S.C. 403
- Safe Drinking Water Act, 42 U.S.C. 300f—300j-26
- Wetlands Mitigation, 23 U.S.C. 119(g) and 133(b)(14)
- Wild and Scenic Rivers Act, 16 U.S.C. 1271—1287

Wildlife

- Fish and Wildlife Coordination Act, 16 U.S.C. 661—667d

- Migratory Bird Treaty Act, 16 U.S.C. 703—712
- Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d)
- Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531-1544

3.2.2 In accordance with 23 U.S.C. 327(a)(2)(D), any FHWA environmental review responsibility not explicitly listed above and assumed by ADOT shall remain the responsibility of FHWA unless the responsibility is added by written agreement of the parties through the amendment process established in Part 14 of this MOU and pursuant to 23 CFR 773.113(b). This provision shall not be interpreted to abrogate ADOT's responsibilities to comply with the requirements of any Federal environmental laws that apply directly to ADOT independent of FHWA's involvement (through Federal assistance or approval).

3.2.3 The DOT Secretary's responsibilities for government-to-government consultation with Indian tribes, as defined in 36 CFR 800.16(m), are not assigned to or assumed by ADOT under this MOU. The FHWA remains responsible for government-to-government consultation, including initiation of government-to-government consultation consistent with E.O. 13175 - Consultation and Coordination with Indian Tribal Governments, unless otherwise agreed as described below. A notice from ADOT to an Indian tribe advising the tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. If a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 CFR 800.16(m), and is related to NEPA or another Federal law for which ADOT has assumed responsibilities under this MOU, and either the Indian tribe or FHWA determines that the issue or concern will not be satisfactorily resolved by ADOT, then FHWA may withdraw the assignment of all or part of the responsibilities for processing the project. In this case, the provisions of subpart 9.1 of this MOU concerning FHWA initiated withdrawal of an assigned project or part of an assigned project will apply.

This MOU is not intended to abrogate, or prevent future entry into, an agreement among ADOT, FHWA, and a Tribe under which the Tribe agrees to allow ADOT to consult for highway projects in Arizona. However, such agreements are administrative in nature and do not relieve FHWA of its legal responsibility for government-to-government consultation.

3.2.4 Nothing in this MOU shall be construed to permit ADOT's assumption of the DOT Secretary's responsibilities for conformity determinations required by Section 176 of the Clean Air Act (42 U.S.C. 7506) or any responsibility under 23 U.S.C. 134 or 135, or under 49 U.S.C. 5303 or 5304.

3.2.5 The assignment under this part does not alter the scope and terms of Section 326 MOU signed on January 3, 2018, between ADOT and FHWA. As applicable ADOT will conduct all environmental reviews authorized under the terms of that MOU.

3.2.6 Included in each consultation letter that is submitted with any biological evaluation or assessment, historic properties or cultural resources report, Section 4(f) evaluation, or other analyses prepared under the authority granted by this MOU, ADOT shall insert the following language in a way that is conspicuous to the reader or include in a project record:

The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried out by ADOT pursuant to 23 U.S.C. 327 and a MOU dated 04/16/2019 and executed by FHWA and ADOT.

- 3.2.7** ADOT shall disclose to the public, Tribes and agencies, as part of Agency outreach and public involvement procedures, the disclosure in subpart 3.2.6 of this MOU.
- 3.2.8** ADOT will continue to adhere to the original terms of Biological Opinions, Memoranda of Agreement, Programmatic Agreements, other agreements with terms, and conditions, and any other commitments that were the result of the environmental review process and consultations prior to the execution of this MOU as long as these terms are not amended or revised. Any revisions or amendments to these agreements made after the Effective Date of this MOU would be ADOT's responsibility. ADOT agrees to assume FHWA's environmental review role and responsibilities as identified in existing interagency agreements among ADOT, FHWA, and other Federal or State agencies, and/or negotiate new agreements, if needed. ADOT agrees to assume FHWA's responsibilities of ongoing consultations as of the Effective Date of this MOU.
- 3.2.9** ADOT will not make any determination that an action constitutes a constructive use of a publicly owned park, public recreation area, wildlife refuge, waterfowl refuge, or historic site under 49 U.S.C. 303 / 23 U.S.C. 138 [Section 4(f)] without first consulting with FHWA and obtaining FHWA's approval of such determination.

3.3 Highway Projects

- 3.3.1** Except as provided in subpart 3.3.2 of this MOU or otherwise specified in this subpart, the assignments and assumptions of the DOT Secretary's responsibilities under subparts 3.1 and 3.2 of this MOU shall apply to the environmental review, consultation, or any other action pertaining to the environmental review or approval of the following classes of highway projects located within the State of Arizona. The definition of "highway project" is found at 23 CFR 773.103, and for purposes of this MOU, "highway project" includes eligible preventative maintenance activities. ADOT shall conduct any reevaluation required by 23 CFR 771.129 for projects for which construction is not completed prior to the date of this MOU in accordance with the provisions of this MOU. Prior to approving any CE determination, finding of no significant impact FONSI, final EIS, or final EIS/ROD, ADOT shall ensure and document that for any proposed project the design concept, scope, and funding are consistent with the current Transportation Improvement Program (TIP), Regional Transportation Plan (RTP), or Metropolitan Transportation Plan (MTP), as applicable.
- A.** All Class I, or EIS projects, that are funded by FHWA or require FHWA approvals. This assignment does not include the environmental review associated with the development and approval of the Draft EIS, Final EIS, and ROD for the following projects:
- a.** South Mountain Freeway
 - b.** Interstate 11 (I-11) Corridor Tier 1 EIS, Nogales to Wickenburg
 - c.** Sonoran Corridor Tier 1 Environmental Impact Statement
- B.** All Class II, or CE projects, that are funded by FHWA or require FHWA approvals, and that do not qualify for assignment of responsibilities pursuant to ADOT's Section 326 MOU.
- C.** All Class III, or EA projects, that are funded by FHWA or require FHWA approvals. This assignment does not include the environmental review associated with the development and approval of the EA and FONSI for the following project:
- a.** State Route 303; I-10 to SR 30
- D.** Projects funded by other Federal agencies [or projects without any Federal funding] that also require FHWA approvals. For these projects, ADOT would not assume the NEPA responsibilities of other Federal agencies. However, ADOT may use or adopt

another Federal agency's NEPA analysis or documents consistent with 40 CFR parts 1500—1508, current law, and DOT and FHWA regulations, policies, and guidance.

- E. Except the South Mountain Freeway, projects excluded under this section will be retained by FHWA until the expiration of the statute of limitations period with respect to projects for which a limitation of claims notice will be issued under 23 U.S.C. 139(l), or until the completion of the NEPA process with respect to projects for which such notice will not be issued. ADOT agrees to be responsible for any re-evaluations needed under 23 CFR 771.129 or other environmental reviews needed for such projects thereafter. FHWA will retain responsibility for the South Mountain Freeway EIS until the project is complete.

3.3.2 The following are specifically excluded from the list in subpart 3.3.1 of highway projects:

- A. Any Federal Lands Highway projects authorized under 23 U.S.C. 202, 203, 204, and FAST Act Section 1123, unless such projects will be designed and constructed by ADOT.
- B. Any project that crosses or is adjacent to international boundaries. For purposes of this MOU, a project is considered "adjacent to international boundaries" if it requires the issuance of a new or the modification of an existing, Presidential Permit by the U.S. Department of State.
- C. Any highway project that crosses State boundaries.
- D. Projects advanced by direct recipients of Federal-aid Highway funds other than ADOT, including but not limited to:
 - 1. Transportation Investment Generating Economic Recovery (TIGER) and Better Utilizing Investments to Leverage Development (BUILD) discretionary grants and other competitive grant programs; and
 - 2. Transportation Infrastructure Finance and Innovation Act (TIFIA) Credit Program.

3.4 Limitations

- 3.4.1 As provided at 23 U.S.C. 327(e), ADOT shall be solely responsible and solely liable for carrying out, in lieu of and without further approval by FHWA, all of the responsibilities it has assumed under this MOU.
- 3.4.2 As provided at 23 U.S.C. 327(a)(2)(D), any highway project or responsibility of the DOT Secretary that is not explicitly assumed by ADOT under subpart 3.3.1 of this MOU remains the responsibility of the DOT Secretary.

PART 4. CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

4.1 Certifications

4.1.1 ADOT hereby makes the following certifications:

- A. ADOT has the legal authority to accept all the assumptions of responsibility identified in this MOU;
- B. ADOT has the legal authority to take all actions necessary to carry out all of the responsibilities it has assumed under this MOU;
- C. ADOT has the legal authority to execute this MOU;
- D. The State of Arizona has laws in effect that are comparable to the Freedom of Information Act (FOIA) at 5 U.S.C. 552, and those laws are found in the Arizona Public Records Law (A.R.S. § 39-101 *et seq*); and

- E. The Arizona Public Records Law provides that any decision regarding the public availability of a document under that Act is reviewable by an Arizona court of competent jurisdiction.

4.2 State Commitment of Resources

4.2.1 As required by 23 U.S.C. 327(c)(3)(D), ADOT will maintain the financial resources necessary to carry out the responsibilities it is assuming. ADOT asserts, and FHWA agrees, that the summary of financial resources contained in ADOT's application, dated November 16, 2018, appears to be adequate for this purpose. Should FHWA determine, after consultation with ADOT, that ADOT's financial resources are inadequate to carry out the DOT Secretary's responsibilities, ADOT will take appropriate action to obtain the additional financial resources needed to carry out these responsibilities. If ADOT is unable to obtain the necessary additional financial resources, ADOT shall inform FHWA, and this MOU will be amended to assign only the responsibilities that are commensurate with ADOT's financial resources.

4.2.2 Similarly, ADOT has and will maintain adequate organizational and staff capability, including competent and qualified consultants where necessary or desirable, to effectively carry out the responsibilities it has assumed under this MOU. This includes, without limitation:

- A. Using appropriate environmental, technical, legal, and managerial expertise;
- B. Devoting adequate staff resources; and
- C. Demonstrating, in a consistent manner, the capacity to perform ADOT's assumed responsibilities under this MOU and applicable Federal laws.

Should FHWA determine, after consultation with ADOT, that ADOT's organizational and staff capability is inadequate to carry out the DOT Secretary's responsibilities, ADOT will take appropriate action to obtain adequate organizational and staff capability to carry out these responsibilities. If ADOT is unable to obtain adequate organizational and staff capability, ADOT shall inform FHWA, and the MOU will be amended to assign only the responsibilities that are commensurate with ADOT's available organizational and staff capability. Should ADOT choose to meet these requirements, in whole or in part, with consultant services, including outside counsel, ADOT shall maintain on its staff an adequate number of trained and qualified personnel, including counsel provided by the State of Arizona Office of Attorney General, to oversee the consulting work.

4.2.3 When carrying out the requirements of Section 106 of the National Historic Preservation Act (NHPA), as amended, ADOT staff (including consultants) shall comply with 36 CFR 800.2(a)(1). All actions that involve identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation (including 36 CFR 800.11) of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meet the Secretary of the Interior's Professional Qualifications Standards (36 CFR part 61, Appendix A). ADOT shall ensure that all documentation required under 36 CFR 800.11 is reviewed and approved by a staff member or consultant who meets the Professional Qualifications Standards.

4.2.4 As part of its commitment of resources, ADOT will continue to develop, implement and update its manuals and procedures which are not subject to FHWA review or approval, to support appropriate environmental analysis and decision-making under NEPA and associated laws and regulations. ADOT recognizes it is solely responsible for the

manuals and procedures for compliance with responsibilities assigned in this MOU and for establishing policy and guidance to implement its program.

4.3 Federal Court Jurisdiction

- 4.3.1 As required under 23 U.S.C. 327(c)(3)(B), and authorized by Arizona Statute § 28-334(C), ADOT hereby expressly consents, on behalf of the State of Arizona, to accept the jurisdiction of the Federal courts in cases that involve the compliance, discharge, and enforcement of any responsibility of the DOT Secretary assumed by ADOT under Part 3 of this MOU. The consent to Federal court jurisdiction shall remain valid after termination of this MOU, or FHWA's withdrawal of assignment of the DOT Secretary's responsibilities, for any decision or approval made by ADOT pursuant to an assumption of responsibility under this MOU. ADOT understands and agrees that, in accordance with 23 U.S.C. 327(d)(1), the United States district court shall have exclusive jurisdiction over any civil action against the State of Arizona alleging a failure to carry out any responsibility assumed under this MOU, which constitutes a limited waiver of the State of Arizona's immunity under the Eleventh Amendment to the U.S. Constitution.

PART 5. APPLICABILITY OF FEDERAL LAW

5.1 Procedural and Substantive Requirements

- 5.1.1 As provided at 23 U.S.C. 327(a)(2)(C), in assuming the DOT Secretary's responsibilities under this MOU, ADOT shall be subject to the same procedural and substantive requirements that apply to the DOT Secretary in carrying out these responsibilities. Such procedural and substantive requirements include, but are not limited to, Federal statutes and regulations; Executive Orders issued by the President of the United States; DOT Orders; Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500—1508); FHWA Orders, guidance, and policy issued by CEQ, Office of Management and Budget (OMB), DOT, or FHWA (e.g., Guidance Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects); and any applicable Federal court decisions, and, subject to subpart 5.1.4 of this MOU, interagency agreements, and other similar documents that relate to the environmental review process, (e.g., 2015 Red Book - Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects). Official DOT and FHWA guidance and policies relating to environmental review are posted on FHWA's Website, contained in the FHWA Environmental Guidebook, published in the *Federal Register*, or sent to ADOT electronically or in hard copy.

ADOT has reviewed the 2014 MOA between the U.S. Coast Guard (USCG) and FHWA and understands that by accepting FHWA's NEPA responsibilities, it also agrees to perform FHWA's obligations set forth in the MOU between DOT and USCG and the MOA between FHWA and USCG.

- 5.1.2 The FHWA will use its best efforts to ensure that any new or revised Federal policy or guidance, which are final and applicable to FHWA's responsibilities under NEPA and other laws that are assumed by ADOT under this MOU, are communicated to ADOT within 10 business days of issuance. Delivery may be accomplished by e-mail, Web posting (with e-mail or mail to ADOT notifying of Web posting), mail, or publication in the *Federal Register* (with e-mail or mail to ADOT notifying of publication). If communicated to ADOT by e-mail or mail, such material will be sent to ADOT's Environmental Planning Administrator. When FHWA is considering changes to the Program or changes that may or will impact ADOT's assumed responsibilities or resources, FHWA shall seek input from ADOT. In the event a new or revised FHWA policy or guidance is not made available to

ADOT as described in this subpart, and if ADOT had no knowledge of such policy or guidance, then a failure by ADOT to comply with such Federal policy or guidance will not be a basis for termination of this MOU or a negative audit finding under this MOU.

- 5.1.3 ADOT will coordinate with Federal resource agencies concerning applicable laws, formal guidance, and policies that such other Federal agencies are responsible for administering with respect to ADOT's highway projects and the assumption of responsibilities under this MOU.

Within six (6) months of the Effective Date of this MOU, ADOT will work with FHWA and the resource agencies to modify existing interagency agreements. Such actions may include:

- A. Obtaining written consent to the continuation of an interagency agreement in its existing form, but with the substitution of ADOT for FHWA; or
- B. Amending an interagency agreement as needed so that the interagency agreement continues but that ADOT assumes FHWA's responsibilities.

If an affected agency does not agree to modify an interagency agreement then, to the extent permitted by applicable law and regulation, ADOT will carry out the assumed environmental review, consultation, or other related activity in accordance with applicable laws and regulations but without the benefit of the provisions of the interagency agreement.

- 5.1.4 ADOT may enter into an interagency agreement with a Federal, State, Tribal, or local agency regarding appropriate processes and procedures to carry out the project-specific responsibilities assumed under this MOU. Although FHWA is not required to be a signatory, such an interagency agreement must conform with all provisions of this MOU, especially subpart 5.2.1.
- 5.1.5 Upon termination of this MOU, ADOT and FHWA shall contact the Federal resource agency to determine whether any interagency agreement should be amended or reinstated as appropriate.

5.2 Rulemaking

- 5.2.1 As provided under 23 U.S.C. 327(f), nothing in this MOU allows ADOT to assume any rulemaking authority of the DOT Secretary. In addition, ADOT may not establish policy and guidance on behalf of the DOT Secretary or FHWA for highway projects covered in this MOU. ADOT's authority to establish State regulations, policy, and guidance concerning the State environmental review of State highway projects shall not supersede applicable Federal environmental review regulations, formal policy, or guidance established by or applicable to the DOT Secretary or FHWA.
- 5.2.2 Nothing in this MOU prevents ADOT from commenting on any *Federal Register* notice for any matter, including Notices of Proposed Rulemaking and other public notices.

5.3 Effect of Assumption

- 5.3.1 For purposes of carrying out the responsibilities assumed under this MOU, and subject to the limitations contained in 23 U.S.C. 327 and this MOU, ADOT shall be deemed to be acting as FHWA with respect to the environmental review, consultation, and other related actions required under those responsibilities.

5.4 Other Federal Agencies

- 5.4.1 As provided under 23 U.S.C. 327(a)(2)(E), nothing in this MOU preempts or interferes with any power, jurisdiction, responsibility, or authority of any Federal agency other than DOT (including FHWA), under applicable statutes and regulations with respect to a highway project.

PART 6. LITIGATION

6.1 Responsibility and Liability

- 6.1.1 As provided in 23 U.S.C. 327(e), ADOT will be solely liable and solely responsible for carrying out the responsibilities assumed under this MOU, in lieu of and without further approval of the DOT Secretary. The FHWA and DOT will have no responsibility or liability for the performance of the responsibilities assumed by ADOT, including any decision or approval made by ADOT while participating in the Program.

6.2 Litigation

- 6.2.1 Nothing in this MOU affects the U.S. Department of Justice's (DOJ) authority to litigate claims, including the authority to approve a settlement on behalf of the United States, if either FHWA or another agency of the United States is named in such litigation or if the United States intervenes pursuant to 23 U.S.C. 327(d)(3). In the event FHWA or any other Federal agency is named in litigation related to matters under this MOU or the United States intervenes in the litigation, ADOT will coordinate with FHWA and any DOJ or Federal agency attorneys in the defense of that action.
- 6.2.2 ADOT shall defend all claims brought in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, ADOT will provide qualified and competent legal counsel, including outside counsel if necessary. ADOT will provide the defense at its own expense, subject to 23 U.S.C. 327(a)(2)(G) concerning Federal-aid participation in attorney's fees for ADOT's counsel. ADOT will be responsible for opposing party's attorney's fees and court costs if a court awards those costs to an opposing party, or in the event those costs are part of a settlement agreement, subject to allocation of responsibility between ADOT and any co-defendant Federal agency.
- 6.2.3 ADOT will notify the FHWA's Arizona Division Office and DOJ's Assistant Attorney General for the Environment and Natural Resources Division, within seven (7) calendar days of ADOT's receipt of service of process of any complaint, concerning its discharge of any responsibility assumed under this MOU. ADOT's notification to FHWA and DOJ shall be made prior to its response to the complaint. In addition, ADOT shall notify the FHWA's Arizona Division Office within seven (7) calendar days of receipt of any notice of intent to sue concerning its discharge of any responsibility assumed under this MOU.
- 6.2.4 ADOT will provide the FHWA's Arizona Division Office and DOJ copies of any motions, pleadings, briefs, and other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. ADOT will provide such copies to the FHWA and DOJ within seven (7) calendar days of receipt of service of any document or, in the case of any documents filed by or on behalf of ADOT, within seven (7) calendar days of the date of filing.
- 6.2.5 ADOT will notify the FHWA's Arizona Division Office and DOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and DOJ with a reasonable amount of time of at least ten (10) calendar days, to be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. ADOT will not execute any settlement agreement until: (1) FHWA and DOJ have provided comments on the proposed settlement; (2) indicated that they will

not provide comments on the proposed settlement; or (3) the review period has expired, whichever occurs first.

6.2.6 Within seven (7) calendar days of receipt by ADOT, ADOT will provide notice to FHWA's Arizona Division Office and DOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities ADOT has assumed under this MOU. ADOT shall notify FHWA's Arizona Division Office and DOJ within five (5) calendar days of filing a notice of appeal of a court decision. ADOT shall confer with FHWA and DOJ regarding the appeal at least forty-five (45) calendar days before filing its initial brief on the merits of the appeal.

6.2.7 ADOT's notifications to FHWA and DOJ in subparts 6.2.3, 6.2.4, 6.2.5, and 6.2.6 shall be made by electronic mail to FHWA_assignment_lit@dot.gov, and NRS.DOT.enrd@usdoj.gov, unless otherwise specified by FHWA and DOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, as identified in subpart 6.2.4, ADOT may opt to either send the materials to the email addresses identified above, send hardcopies to the mail address below, or add to the distribution list in the court's electronic filing system (e.g., PACER) the following two email addresses: FHWA_assignment_lit@dot.gov and efile_nrs.enrd@usdoj.gov. The FHWA and DOJ's comments under subpart 6.2.5 and 6.2.6 shall be made by electronic mail to NEPA_Assignment@azdot.gov unless otherwise specified by ADOT. In the event that regular mail is determined necessary, mail should be sent by overnight mail service to:

For DOJ: Assistant Attorney General for the Environment and Natural Resources Division at 950 Pennsylvania Avenue, NW, Room 2143, Washington, DC, 20530.

For FHWA: Division Administrator, Federal Highway Administration – Arizona Division 4000 N. Central Avenue, Suite 1500 Phoenix, Arizona 85012-3500.

For ADOT: Environmental Planning Administrator, Arizona Department of Transportation, 1611 West Jackson St. MD EM04, Phoenix AZ 8507

6.3 Conflict Resolution

6.3.1 In discharging any of the DOT Secretary's responsibilities under this MOU, ADOT agrees to comply with any applicable requirements of DOT and FHWA statute, regulation, guidance, or policy regarding conflict resolution. This includes compliance with the DOT Secretary's responsibilities for issue resolution under 23 U.S.C. 139(h) with the exception of the DOT Secretary's responsibilities under 23 U.S.C. 139(h)(7) regarding financial penalties.

6.3.2 ADOT agrees to follow 40 CFR part 1504 in the event of pre-decision referrals to CEQ for Federal actions determined to be environmentally unsatisfactory. ADOT also agrees to coordinate and work with CEQ on matters brought to CEQ with regards to the environmental review responsibilities for Federal highway projects ADOT has assumed under this MOU.

PART 7. INVOLVEMENT WITH OTHER AGENCIES

7.1 Coordination

7.1.1 ADOT agrees to seek early and appropriate coordination with all applicable Federal, State, and local agencies in carrying out any of the responsibilities for highway projects assumed under this MOU.

7.2 Processes and Procedures

7.2.1 ADOT will ensure that it has appropriate processes and procedures in place that provide for proactive and timely consultation, coordination, and communication with applicable Federal agencies in order to carry out the responsibilities assumed under this MOU, including the submission of all EISs together with comments and responses to the Environmental Protection Agency (EPA) as required by 40 CFR 1506.9 and for EPA's review as required by section 309 of the Clean Air Act, 42 U.S.C. 7609. These processes and procedures shall be documented. Documentation may be a formally executed interagency agreement or other format as appropriate.

PART 8. INVOLVEMENT WITH FHWA

8.1 Generally

8.1.1 Except as specifically provided otherwise in this MOU, FHWA will not provide project-level assistance to ADOT in carrying out the responsibilities it has assumed under this MOU. Project-level assistance includes advice, consultation, or review of draft documents. However, project-level assistance does not include: process or program-level assistance as described in subpart 8.1.5 of this MOU, including discussions concerning issues addressed in prior projects, interpretations of applicable law contained in Title 23 U.S.C. or Title 49 U.S.C., interpretations of any FHWA or DOT regulation, or interpretations of FHWA or DOT policies or guidance.

8.1.2 The FHWA will not intervene, broker, act as intermediary, or otherwise be involved in any issue involving ADOT's consultation or coordination with other Federal resource agencies with respect to ADOT's discharge of any of the responsibilities assumed under this MOU for any particular highway project. However, FHWA may attend meetings between ADOT and other Federal agencies. Further, FHWA may submit comments to ADOT and the other Federal agency in the following extraordinary circumstances:

A. FHWA reasonably believes that ADOT is not in compliance with this MOU;

B. FHWA determines that an issue between ADOT and the other Federal agency concerns an emerging national policy issue under consideration by the DOT.

The FHWA will notify both ADOT and the relevant Federal agency prior to attending any meetings between ADOT and such other Federal agency.

8.1.3 Other Federal agencies may raise concerns regarding compliance with this MOU by ADOT and may communicate these concerns to FHWA. The FHWA will review the concerns and any information provided to FHWA by such other Federal agency. If FHWA determines the concern has merit, FHWA shall inform ADOT Environmental Planning Administrator. ADOT will review the concerns and any information provided to FHWA, and work with the other Federal agency to resolve the concern. If the concern remains unresolved, FHWA will notify ADOT and will work with both ADOT and the other Federal agency to resolve the issue and, if necessary, take appropriate action to ensure compliance with this MOU.

- 8.1.4** At ADOT's request, FHWA may assist ADOT in evaluating its environmental program and developing or modifying any of its processes or procedures to carry out the responsibilities it has assumed under this MOU, including, but not limited to, emerging national policy issues and those processes and procedures concerning ADOT's consultation, coordination, and communication with other Federal agencies.
- 8.1.5** Communications between ADOT and FHWA regarding the administration of the responsibilities assigned and assumed under this MOU, and other process and program-level communications described in subparts 8.1.2 and 8.1.5 of this MOU, are normally considered intra-agency communications for the purpose of deliberative process privileges under the Freedom of Information. ADOT and FHWA shall promptly notify each other of requests for public records regarding the administration of the Program in Arizona.
- 8.1.6** For active projects where ADOT is assuming responsibilities from FHWA under this MOU, FHWA shall allow ADOT access to its project files and arrange for copies to be provided upon request by ADOT.
- 8.1.7** ADOT's obligations and responsibilities under 23 CFR 1.5 are not altered in any way by executing this MOU.
- 8.2 MOU Monitoring and Oversight**
- 8.2.1** FHWA will provide necessary and appropriate monitoring and oversight of ADOT's compliance with this MOU. The FHWA's monitoring and oversight activities in years one through four of this MOU's term will primarily consist of an annual audit as provided at 23 U.S.C. 327(g) and Part 11 of this MOU, and evaluating attainment of the performance measures listed in Part 10 of this MOU. After the fourth year of ADOT's participation in the Program, FHWA will monitor ADOT's compliance with the MOU including the provision by ADOT of financial resources to carry out the MOU as provided at 23 U.S.C. 327(h). The FHWA's monitoring and oversight may also include submitting requests for information to ADOT and other relevant Federal agencies, verifying ADOT's financial and personnel resources dedicated to carrying out the responsibilities assumed, and reviewing documents and other information.
- 8.2.2** Pursuant to 23 U.S.C. 327(c)(4), ADOT is responsible for providing FHWA any information FHWA reasonably considers necessary to ensure that ADOT is adequately carrying out the responsibilities assigned. When requesting information subject to section 327(c)(4), FHWA will provide the request to ADOT in writing, and the request will identify with reasonable specificity the information required. FHWA will also indicate in the request a deadline for the information to be provided. ADOT will, in good faith, work to ensure the information requested is provided by the deadline. ADOT's response to an information request under this paragraph will include, where appropriate, making relevant employees and consultants available at their work location (including via an in-person meeting, teleconference, videoconference or other electronic means as may be available).
- 8.2.3** ADOT shall make project files and general administrative files pertaining to the discharge of the responsibilities it has assumed under this MOU reasonably available for inspection by FHWA at the files' locations upon reasonable notice, which is not less than five business days. These files shall include, but are not limited to, letters and comments received from governmental agencies, the public, and others with respect to ADOT's discharge of the responsibilities assumed under this MOU.

- 8.2.4 In carrying out the responsibilities assumed under this MOU, ADOT agrees to carry out regular quality control and quality assurance (QA/QC) reviews to ensure that the assumed responsibilities are being conducted in accordance with applicable law and this MOU. At a minimum, ADOT's QA/QC process will include the review and monitoring of its processes and performance relating to project decisions, completion of environmental analysis, project file documentation, checking for errors and omissions, and legal sufficiency reviews, and taking appropriate corrective action as needed. Within three (3) months of the Effective Date of this MOU, ADOT shall finalize a QA/QC process that satisfies the requirements in this subpart. In developing and implementing the QA/QC process, ADOT shall consult with the FHWA Arizona Division Office. ADOT agrees to cooperate with FHWA to consider recommendations FHWA may have made with respect to its QA/QC process.
- 8.2.5 ADOT shall perform annual self-assessments of its QA/QC process and performance to determine if its process is working as intended. If any process areas are identified as needing improvement, ADOT will take appropriate and timely corrective actions to address such areas. At least one month prior to the date of a scheduled FHWA audit ADOT will transmit a summary of its most recent self-assessment to FHWA Arizona Division Office. The summary will include a description of the scope of the self-assessment conducted and the areas reviewed, a description of the process followed in conducting the self-assessment, a list of the areas identified as needing improvement, any corrective actions that have been or will be implemented, a statement from ADOT's Environmental Planning Administrator concerning whether the processes are ensuring that the responsibilities ADOT has assumed under this MOU are being carried out in accordance with this MOU and all applicable Federal laws and policies, and a summary of ADOT's progress toward attaining the performance measures listed in Part 10 of this MOU.
- 8.2.6 Upon the Effective Date of this MOU, ADOT will maintain a list of NEPA approvals and decisions (CE, EA, FONSI, DEIS, FEIS, FEIS/ROD, ROD) and Section 4(f) approvals it makes under this MOU. ADOT will provide an updated list to FHWA Arizona Division every six (6) months (January 1 through June 30, and July 1 through December 31).

8.3 Records Retention

- 8.3.1 ADOT will retain project files, and files pertaining to the discharge of its responsibilities under this MOU in accordance with 2 CFR 200.333.
- 8.3.2 State public records are maintained pursuant to state law and published retention schedules. For the following record types, ADOT will ensure that the applicable retention schedules reflect the following minimum retention periods and records are maintained in the following manner:
- A. **FHWA-ADOT Environment Correspondence Files:** Correspondence between FHWA and ADOT relative to the interpretation, administration, and execution of this MOU and the environmental aspects of the Federal-aid Highway Program, as established in 8.1.2 and 8.1.5, shall be maintained by ADOT for a period of six (6) years after the resolution of the particular issue or after the guidance has been superseded. After six (6) years ADOT will follow the State records retention/disposition schedule for these records.
 - B. **National Environmental Policy Act (NEPA) and Related Documents:** For a period of 8 years after approval of the final construction voucher ADOT shall

maintain Final NEPA Documents (Draft EISs, Final EISs, Supplemental EISs, RODs, EAs, FONSI, CE documentation and determinations), supporting materials documentation supporting the Sec. 139 environmental review process [e.g., coordination plans that include project schedules, evidence of opportunities for public/agency input in the purpose and need and alternatives], scoping documents, public and agency comments; meeting minutes; Notices of Intent (NOI's), Public Involvement Plans, public meeting summaries, public hearing certifications and transcripts, mitigation reports/tracking, technical reports; correspondence; studies and reports; references; errata sheets; and reevaluation documents); NEPA Reference Documents (written statements and supporting documents needed for reference); and official documents and correspondence related to reviews under other environmental requirements (e.g., ESA, CWA, Section 4(f), Section 106). After 8 years ADOT will follow the State records retention/disposition schedule for these records, except that ADOT will permanently store the above referenced records for Significant Transportation Projects as they are defined in Order No. 1224.1B.

C. **Environmental Impact Statements - Other Agencies:** Files containing reviews and comments furnished by ADOT to other Federal agencies following reviews of an EIS for which another Federal agency is the lead agency shall be maintained by ADOT for a period of 5 years. After 5 years, ADOT may destroy these files when no longer needed.

D. **Noise Barriers:** ADOT agrees to maintain the necessary information to comply with 23 CFR 772.13(f) regarding noise abatement measures reporting. ADOT shall maintain this information for a period of 4 years after the end of the Federal fiscal year in which the project file is closed.

8.3.3 In the case of a conflict between FHWA Records Disposition Manual, FHWA Order 1324.1B, ADOT Records Management Policy, Retention and Disposal Schedule, ADOT will work to update the State retention schedule such that the more stringent retention requirements are met.

8.4 Federal Register

8.4.1 For any documents that are required to be published in the *Federal Register*, such as the NOI under 23 CFR 771.123(a) and Notice of Final Agency Action under 23 U.S.C. 139(l)(2), ADOT shall transmit such document to FHWA's Arizona Division Office, with a request for publication in the *Federal Register* on behalf of ADOT. The FHWA's Arizona Division Office will promptly submit such document to be published in the *Federal Register* on behalf of ADOT. If requested, ADOT shall reimburse FHWA for costs associated with publishing such documents in the *Federal Register* (excluding FHWA's overhead).

8.5 Participation in Resource Agency Reports

8.5.1 ADOT agrees to provide data and information requested by FHWA and resource agencies for the preparation of national reports to the extent that the information relates to determinations, findings, and proceedings associated with projects processed under this MOU. Such reports include but are not limited to:

- A. Information on the completion of and duration to complete all NEPA classes of action (EIS, EA, CE);
- B. Archeology Reports requested by the National Park Service;

- C. Endangered Species Act Expenditure Reports requested by the U.S. Fish & Wildlife Service and National Marine Fisheries Service;
- D. Project schedules and other project information for nationwide infrastructure transparency initiatives;
- E. Project status and information for EAs and EISs for use on the searchable Website maintained under section 41003(b) of the FAST Act [Fixing America's Surface Transportation Act, 42 U.S.C. 4370m-2(b) and 23 U.S.C. 139(o)] (Federal Permitting Dashboard) to be submitted in accordance with current and any future reporting standard issued by DOT pursuant to such provisions;
- F. NEPA Litigation Reports requested by CEQ;
- G. Environmental Conflict Resolution reports requested by the Office of Management and Budget and CEQ; and
- H. Noise abatement measure reporting.

8.6 Conformity Determinations

- 8.6.1 Pursuant to 23 U.S.C. 327(a)(2)(B)(iv)(II), for any project requiring a project-level conformity determination under the Clean Air Act and its implementing regulations, FHWA's Arizona Division Office will document the project level conformity determination within a reasonable timeframe. The FHWA's Arizona Division Office will restrict its review to only that data, analyses, applicable comments and responses, and other relevant documentation that enable FHWA to make the project-level conformity determination.

8.7 Certification of NEPA Compliance

- 8.7.1 For projects funded by FHWA, ADOT shall ensure that a certification is included with each NEPA approval specifying that ADOT has fully carried out all responsibilities assumed under this MOU in accordance with this MOU and all applicable Federal laws, regulations, Executive Orders, and policies. ADOT shall ensure that this certification is made prior to the execution of any future Federal-aid approval or action. ADOT shall include the certification in its request for authority to proceed to final design, right-of-way acquisition, or construction. ADOT agrees to provide FHWA access to NEPA approvals and certifications.

8.8 Enforcement

- 8.8.1 Should FHWA determine that ADOT is not in compliance with this MOU, then FHWA shall take appropriate action to ensure ADOT's compliance, including appropriate remedies provided at 23 CFR 1.36 for violations of or failure to comply with Federal law or regulations at 23 CFR with respect to a project, withdrawing assignment of any responsibilities that have been assumed as provided in Part 9 of this MOU, or terminating ADOT's participation in the NEPA Assignment Program as provided in Part 13 of this MOU.

PART 9. WITHDRAWAL OF ASSIGNED RESPONSIBILITIES

9.1 FHWA-Initiated Withdrawal of Assigned Projects

- 9.1.1 The FHWA may, at any time, withdraw the assignment of all or part of the DOT Secretary's responsibilities that have been assumed by ADOT under this MOU for any highway project or highway projects upon FHWA's determination that:

- A. With respect to such project or projects, ADOT is not in compliance with a material term of this MOU or applicable Federal laws or policies, and ADOT has not taken sufficient corrective action to the satisfaction of FHWA;
 - B. The highway project or highway projects involve significant or unique national policy interests for which ADOT's assumption of the DOT Secretary's responsibilities would be inappropriate; or
 - C. ADOT cannot satisfactorily resolve an issue or concern raised in government-to-government consultation process, as provided in subpart 3.2.3.
- 9.1.2 Upon the FHWA's determination to withdraw assignment of the DOT Secretary's responsibilities under subpart 9.1.1, FHWA will informally notify ADOT of FHWA's determination. After informally notifying ADOT of its determination, FHWA will provide ADOT written notice of its determination including the reasons for its determination. Upon receipt of this notice, ADOT may submit any comments that would resolve the compliance concern or objections to FHWA within 30 calendar days, unless FHWA agrees to an extended period of time. Upon receipt of ADOT's comments or objections, FHWA will make a final determination within 30 calendar days, unless extended by FHWA for cause, and notify ADOT of its decision. In making its determination, FHWA will consider ADOT's comments or objections, the effect the withdrawal of assignment will have on the Program, the amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.
- 9.1.3 The FHWA shall withdraw assignment of the responsibilities ADOT has assumed for any highway project when the preferred alternative that is identified in the CEs, EA, or FEIS is a highway project or part of a program that is specifically excluded in subpart 3.3.2. In such case, subpart 9.1.2 of this MOU shall not apply.

9.2 ADOT-Initiated Withdrawal of Assignment of Projects

- 9.2.1 ADOT may, at any time, provide FHWA with notice of its intent to withdraw a highway project assumed under this MOU.
- 9.2.2 Upon ADOT's decision to request FHWA withdraw the assignment of the DOT Secretary's responsibilities under subpart 9.2.1, ADOT shall informally notify FHWA of its desire for FHWA to withdraw assignment of its responsibilities. After informally notifying FHWA of its desire, ADOT will provide FHWA written notice of its desire, including the reasons for wanting FHWA to withdraw assignment of the responsibilities. Upon receipt of this notice, FHWA will have 30 calendar days, unless extended by FHWA for cause, to determine whether it will withdraw assignment of the responsibilities requested. In making its determination, FHWA will consider the reasons ADOT desires FHWA to withdraw assignment of the responsibilities, the effect the withdrawal of assignment will have on the Program, amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.

PART 10. PERFORMANCE MEASURES

10.1 General

- 10.1.1 Both FHWA and ADOT have determined it is desirable to mutually establish a set of performance measures to consider ADOT's administration of the responsibilities assumed under this MOU.

10.1.2 ADOT's attainment of the performance measures indicated in this part of the MOU will be considered by FHWA during audits, as required by 23 U.S.C. 327(g).

10.1.3 ADOT shall collect and maintain all necessary and appropriate data related to the attainment of performance measures. In collecting this data, ADOT shall monitor its progress toward meeting the performance measures and include its progress in the self-assessment summary described in subpart 8.2.5 of this MOU.

10.2 Performance Measures

10.2.1 The performance measures applicable to ADOT in carrying out the responsibilities it has assumed under this MOU are as follows:

A. Compliance with NEPA, FHWA NEPA regulations, and other Federal environmental statutes and regulations:

- i. Maintain documented compliance with procedures and processes set forth in this MOU for the environmental responsibilities assumed under the Program.
- ii. Maintain documented compliance with requirements of all applicable Federal statutes and regulations for which responsibility is assumed (e.g., Section 106 of the NHPA, Section 7 of the ESA, etc.).

B. QA/QC for NEPA decisions:

- i. Maintain and apply internal quality control and assurance measures and processes, including a record of:
 - a. Legal sufficiency determinations made by counsel; this shall include the legal sufficiency reviews of Notices of Intent and Notices of Final Agency Action as required by law, policy, or guidance;
 - b. Compliance with FHWA's and ADOT's environmental document content standards and procedures, including those related to QA/QC; and,
 - c. Completeness and adequacy of documentation of project records for projects done under the Program.

C. Relationships with agencies and the general public:

- i. Maintain communication among ADOT, Federal and State resource agencies, and the public from the effective date of assumption of responsibilities under this MOU.
- ii. Maintain effective responsiveness to substantive comments received from the public, agencies, and interest groups on NEPA documents and environmental concerns.
- iii. Maintain effective NEPA conflict resolution processes whenever appropriate.

D. Increased efficiency and timeliness in completion of the NEPA process:

- i. Compare time of completion of environmental document approvals before and after assumption of responsibilities under this MOU.
- ii. Report actual time to completion for key interagency consultations (e.g., Section 7 biological opinions, Section 106 resolution of adverse effects)

PART 11. AUDITS

11.1 General

- 11.1.1 As required at 23 U.S.C. 327(g), FHWA will conduct audits of ADOT's discharge of the responsibilities it has assumed under this MOU. During the first four (4) years, audits will be the primary mechanism used by FHWA to oversee ADOT's compliance with this MOU, ensure compliance with applicable Federal laws and policies, evaluate ADOT's progress toward achieving the performance measures identified in Part 10, and collect information needed for the DOT Secretary's annual report to Congress.

Pursuant to 23 U.S.C. 327(g)(3), each audit carried out under this MOU shall be carried out by an audit team, consisting of members designated by FHWA in consultation with ADOT. Such consultation shall include a reasonable opportunity for ADOT to review and provide comments on the proposed members of the audit team.

- 11.1.2 Pursuant to 23 U.S.C. 327(c)(4), ADOT is responsible for providing FHWA any information FHWA reasonably considers necessary to ensure that ADOT is adequately carrying out the responsibilities assigned. ADOT will make documents and records available for review by FHWA in conducting audits and shall provide FHWA with copies of any such documents and records as may be requested by FHWA pursuant to the process identified in subpart 8.2.3. In general, all documents and records will be made available to FHWA at their normal place of repository. However, ADOT will work with FHWA to provide documents through e-mail, CD-ROM or mail to the extent it does not create an undue burden.
- 11.1.3 ADOT agrees to cooperate with FHWA in conducting audits, including providing access to all necessary information, making all employees available to answer questions (including consultants hired for the purpose of carrying out the DOT Secretary's responsibilities), and providing all requested information (including making employees available) to FHWA in a timely manner. Employees will be made available either in-person at their normal place of business or by telephone, at the discretion of FHWA.
- 11.1.4 ADOT and FHWA Arizona Division Office will each designate an audit coordinator who will be responsible for coordinating audit schedules, requests for information, and arranging audit meetings.
- 11.1.5 Such FHWA audits will include, but not be limited to, consideration of ADOT's technical competency and organizational capacity, adequacy of the financial resources committed by ADOT to administer the responsibilities assumed, quality control and quality assurance process, attainment of performance measures, compliance with this MOU's requirements, and compliance with applicable Federal laws and policies in administering the responsibilities assumed.

11.2 Scheduling

- 11.2.1 As provided at 23 U.S.C. 327(g), FHWA will conduct an annual audit during each of the first (4) four years after the Effective Date. After the fourth year of ADOT's participation in the Program, FHWA will monitor ADOT's compliance with the MOU, including the provision by ADOT of financial resources to carry out the MOU, but will not conduct additional audits under this Part. In the event the frequency of the audits is modified by amendments to 23 U.S.C. 327(g), the frequency established by the statutory amendments will control and apply to this subpart.
- 11.2.2 For each annual audit, the designated audit coordinators for FHWA and ADOT will work to establish a general audit schedule within 180 calendar days of the Effective Date or anniversary date of this MOU. The general audit schedule will include the dates that

FHWA will conduct the audit. To the maximum extent practicable, the general audit schedule will identify all employees (including consultants) and documents and other records that ADOT will make available, as requested by FHWA in support of the audit. With respect to documents and other records, FHWA agrees to be as specific as possible, although a general description of the types of documents will be acceptable. The general schedule will include the time period for completing an annual audit from initiation to completion (including public comment and responses to those comments), which shall not exceed 180 calendar days, unless modified by amendments to 23 U.S.C. 327(g).

- 11.2.3 ADOT's audit coordinator shall make reasonable efforts to ensure all identified employees (including consultants) are available to FHWA during the specified dates on the general audit schedule. ADOT will also ensure necessary documents and records are made reasonably available to FHWA as needed during the general audit schedule.
- 11.2.4 After the general audit schedule is established, the audit coordinators shall work to establish specific audit schedules at least two (2) weeks prior to the scheduled audit. The specific audit schedule shall include the dates, times, and place for which FHWA will talk to ADOT's employees (including consultants) and review of documents and records.
- 11.2.5 To the maximum extent practicable, the specific audit schedule will identify all employees (including consultants) and documents and other records that ADOT will make available to FHWA during the audit. Should FHWA determine that it needs access to an employee, document or other record that is not identified in the specific audit schedule, ADOT will make reasonable efforts to produce such employee, document or other record on the specified dates.

11.3 Other Agency Involvement

- 11.3.1 The FHWA may invite other Federal or State agencies or Tribes as deemed appropriate to assist FHWA in conducting an audit under this MOU by sitting in on interviews, reviewing documents obtained by FHWA, and making recommendations to FHWA. The FHWA's audit coordinator will advise ADOT's audit coordinator of FHWA's intent to include other Federal or State agencies and the proposed role of such agencies in the audit team. If FHWA invites another Federal or State agency to participate in the audit team, the agency will be placed on the general and specific audit schedules. ADOT will have a reasonable opportunity to review and comment on any proposed additional member of the audit team.

11.4 Audit Report and Findings

- 11.4.1 Upon completing each audit, FHWA will transmit to ADOT a draft of the audit report and allow ADOT a period of 14 calendar days within which to submit written comments to FHWA. The FHWA will grant any reasonable request by ADOT to extend its deadline to respond in writing to a draft audit report not to exceed a total review period of 30 calendar days. The FHWA will review the comments provided by ADOT and revise the draft audit report as may be appropriate. ADOT and FHWA may also meet and discuss the draft report and ADOT's comments. If ADOT anticipates an additional meeting will be beneficial, ADOT will notify FHWA audit coordinator prior to providing its written comments so that such meeting may be timely scheduled. The FHWA will then prepare the draft audit report for public comment.

- 11.4.2 As required by 23 U.S.C. 327(g)(2), FHWA will make the draft audit report available for public comment. In carrying out this requirement, FHWA will, after receipt and incorporation of ADOT comments as provided in subpart 11.4.1, publish the audit report in the *Federal Register* and allow a comment period of 30 calendar days. The FHWA will then address and respond to the public comments by incorporating the comments and response into the final audit report. The final audit report will be published in the *Federal Register* not later than 60 calendar days after the comment period closes.

PART 12. TRAINING

- 12.1 ADOT may request and, subject to FHWA's resource availability, FHWA will provide training with respect to the responsibilities being assigned to ADOT under this MOU. Such training may be provided to ADOT by either FHWA or another Federal agency or other parties, as appropriate. ADOT may also conduct its own training for staff and consultants.
- 12.2 ADOT will continue to implement training necessary to meet its environmental obligations. Prior to or within six (6) months of the effective date of the MOU, ADOT will update its training program to reflect the responsibilities assumed under the Program and this MOU. FHWA will remain available to provide assistance in the assessment of training needs and development of training program elements; however, ADOT will be solely responsible for the development and implementation of its training program.

PART 13. TERM, TERMINATION AND RENEWAL

13.1 Term

- 13.1.1 This MOU has a term of five (5) years from the Effective Date.

13.2 Termination by FHWA

- 13.2.1 As provided by 23 U.S.C. 327(j)(1), FHWA may terminate ADOT's participation in the Program, in whole or in part, at any time subject to the procedural requirements in 23 U.S.C. 327 and subpart 13.2.2 of this MOU. Termination may be based on ADOT's failure to adequately carry out its responsibilities under this MOU including, but not limited to:
- A. persistent neglect of, or noncompliance with Federal laws, regulations, and policies;
 - B. failure to address deficiencies identified during the audit or monitoring process;
 - C. failure to secure or maintain adequate personnel and/or financial resources to carry out the responsibilities assumed;
 - D. intentional non-compliance with this MOU; or
 - E. persistent failure to adequately consult, coordinate, or account for the concerns of appropriate Federal, State, Tribal, and local agencies with oversight, consulting, or coordination responsibilities under Federal environmental laws and regulations.

- 13.2.2 If FHWA determines that ADOT is not adequately carrying out the responsibilities assigned to ADOT, then FHWA may:
- A. provide ADOT written notification of its non-compliance determination detailing a description of each responsibility in need of corrective action regarding an inadequacy identified, and
 - B. provide ADOT a period of not less than 120 calendar days to take such corrective action as the FHWA determines is necessary to comply with this MOU.
- 13.2.3 If ADOT, after notification and the 120 calendar day period, fails to take satisfactory corrective action, as determined by FHWA, subject to administrative/judicial review, FHWA shall provide notice to ADOT of its determination of termination. Any responsibilities identified to be terminated in the notice that have been assumed by ADOT under this MOU shall transfer to FHWA.

13.3 Termination by ADOT

- 13.3.1 ADOT may terminate its participation in the Program, in whole or in part, at any time by providing FHWA notice of its intent at least 90 calendar days prior to the date that ADOT seeks to terminate and subject to such terms and conditions as FHWA may provide. In that event, FHWA and ADOT may develop a plan to transition the responsibilities that ADOT has assumed back to FHWA so as to minimize disruption to projects, minimize confusion to the public, and minimize burdens to other affected Federal, State, and local agencies.
- 13.3.2 Any termination of assignment agreed to under a transition plan shall not be subject to the procedures or limitations provided for in Part 9 of this MOU and shall be valid as agreed to in the transition plan.

13.4 Validity of ADOT Actions

- 13.4.1 Any environmental approvals made by ADOT pursuant to the responsibilities ADOT has assumed under this MOU shall remain valid after termination of ADOT's participation in the Program or withdrawal of assignment by FHWA. ADOT shall remain solely liable and solely responsible for any environmental approvals it makes pursuant to any of the responsibilities it has assumed while participating in the Program.

13.5 Renewal

- 13.5.1 This MOU is renewable in accordance with 23 U.S.C. 327 and implementing regulations, in effect at the time of the renewal. ADOT and FHWA agree to initiate the renewal process at least 12 months prior to the expiration of this MOU.

PART 14. AMENDMENTS

14.1 Generally

- 14.1.1 All parts of this MOU may be amended at any time upon mutual agreement by both FHWA and ADOT, pursuant to 23 CFR 773.113(b).

14.2 Additional Projects, Classes of Projects and Environmental Review Responsibilities

- 14.2.1 The FHWA may assign, and ADOT may assume, responsibility for additional projects and additional environmental review responsibilities beyond those identified in Part 3 of this MOU, by executing an amendment to this MOU.**
- 14.2.2 If ADOT decides to request amendment of this MOU to add or withdraw responsibility for projects or classes of projects, or environmental review responsibilities beyond those identified in Part 3 of this MOU, such request shall be treated as an amendment to ADOT's original application that was submitted to FHWA pursuant to 23 U.S.C. 327(b) and 23 CFR 773.113(b). In developing the application supplement, ADOT shall identify the projects, classes of projects, and environmental review responsibilities it wishes to assume or withdraw and make any appropriate adjustments to the information contained in ADOT's original application, including verification of personnel and financial resources.**

IN WITNESS THEREOF, the parties hereto have caused this MOU to be duly executed in duplicate as of the date of the last signature written below.

STATE OF ARIZONA



John S. Hallikowski
Director
Arizona Department of Transportation

Dated: 4/16/2019

FEDERAL HIGHWAY ADMINISTRATION



Brandy L. Hendrickson
Deputy Administrator
Federal Highway Administration

Dated: 4/16/2019