AMENDMENT TO
PROGRAMMATIC AGREEMENT AMONG THE FEDERAL HIGHWAY ADMINISTRATION, THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION, THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND THE MISSOUIR STATE HISTORIC PRESERVATION OFFICE FOR THE PHASED IDENTIFICATION AND EVALUATION OF HISTORIC PROPERTIES
(AGREEMENT)

WHEREAS, the Agreement was executed on July 24, 2014;

WHEREAS, the Agreement as it was written contains language that is unclear regarding implementation of the stipulations and could result in misinterpretation;

NOW, THEREFORE, in accordance with Stipulation V of the Agreement, the Federal Highway Administration Missouri Division Office (FHWA), the Missouri Highway Transportation Commission (MHTC), the Missouri State Historic Preservation Office (SHPO), and the Advisory Council on Historic Preservation (ACHP) agree to amend the Agreement as follows:

Amend Stipulation III so it reads as follows:

For undertakings requiring phased identification, MoDOT will complete cultural resource investigations after the ROW has been obtained, or permission to access is given, but before the Federal authorization for construction on the project is approved

SIGNATORIES:

FEDERAL HIGHWAY ADMINISTRATION:

By: _____ **Date:** 5/20/15

Title: Program Development Team Leader

THE ADVISORY COUNCIL ON HISTORIC PRESERVATION:

By: _____ **Date:** 6/12/15

Title: EXECUTIVE DIRECTOR

THE MISSOURI STATE HISTORIC PRESERVATION OFFICE:

By: Toni M. Prawl **Date:** 05/13/15

Title: Director + Deputy SHPO

MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION:

By: Kathleen P Harvey **Date:** 5-5-15

Title: Assistant Chief Engineer

Attest:

Commission Secretary

Approved as to form:

Commission Counsel

PROGRAMMATIC AGREEMENT
AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE MISSOURI STATE HISTORIC PRESERVATION OFFICE
FOR THE PHASED IDENTIFICATION AND EVALUATION OF
HISTORIC PROPERTIES

Whereas, the Missouri Division Administrator, Federal Highway Administration (FHWA), is the "Agency Official" responsible for compliance with Section 106 of the *National Historic Preservation Act of 1966* (NHPA), as amended *(16.U.S.C. 470 et seq.)* and implementing regulations *(36 CFR Part 800)* regarding the Federal Aid Highway Program (Program) in the State of Missouri; and

Whereas, the Missouri Highway and Transportation Commission (MHTC), acting through the Missouri Department of Transportation (MoDOT), in consultation and partnership with the FHWA, administers Federal-aid highway projects (undertakings) throughout the State of Missouri as authorized by Title 23, U.S.C. 470 et seq.; and

Whereas, the Missouri State Historic Preservation Officer's (SHPO) responsibilities, under Section 106 of the NHPA and 36 CFR Part 800, are to advise, assist, and consult with federal agencies as they carry out their historic preservation responsibilities and to respond to federal agencies' requests within a specified period of time; and

Whereas, FHWA has determined that certain transportation projects constitute "undertakings" which may have an effect upon properties included in, or eligible for inclusion in, the *National Register of Historic Places* (Register); and

Whereas, such undertakings commonly require the acquisition of lands for new rights-of-way (ROW), where access for completing Section 106 inventory, eligibility, and effect determinations may not be possible until after MoDOT has purchased the ROW; and

Whereas, FHWA has consulted with the SHPO and the Advisory Council on Historic Preservation (ACHP) pursuant to 36 CFR 800.14(b) to develop this Programmatic Agreement (PA) in order to establish a more effective and predictable approach for phasing the identification and evaluation of historic properties consistent with the regulations at 36 CFR Part 800; and

Whereas, MoDOT has participated in consultation and has been invited to be a signatory to this PA; and

Whereas, FHWA has consulted with Federally-recognized Indian tribes with historical ties to the state of Missouri, Certified Local Governments, and the public in developing this PA and has taken their views into account in finalizing this PA; and

Whereas, the Peoria Tribe of Indians of Oklahoma and the Ponca Tribe of Nebraska have

commented on this PA, and the Peoria Tribe has requested to be a concurring party; and

Whereas, MoDOT employs qualified professional staff and consultants capable of completing many of the steps of the Section 106 review and compliance process on behalf of the FHWA;

Now, therefore, FHWA, SHPO, ACHP, and MHTC, as signatories to this PA, agree that MODOT may use a phased process to conduct identification and evaluation efforts in accordance with the following measures for Program undertakings.

Stipulations

FHWA shall ensure that the following measures are carried out:

I. Applicability

A. This PA allows for phasing the identification and evaluation of effects to historic properties pursuant to 36 CFR 800.4(b)(2) when MoDOT is unable to gain access for the completion of cultural resources investigations prior to acquisition of new ROW needed for project development. In such cases, FHWA may use the procedures in this PA to satisfy its Section106 responsibilities for historic property identification, evaluation, and consideration of project effects.

B. Conditions for the early acquisition of new ROW prior to the completion of the concluding phase of identification and evaluation:
   1. MoDOT will phase the identification of historic properties following the procedures in Stipulations II and III below;
   2. MoDOT will ensure that no construction or activities that could affect historic properties occur until all Section 106 review and consultation have been completed and FHWA has issued a decision to proceed with the undertaking; and
   3. Acquisition of ROW will not limit FHWA's later consideration of reasonable alternatives for the project or otherwise prevent FHWA from making an impartial decision as to whether or not to proceed with an alternative that adversely affects one or more historic properties.

C. This PA applies to projects of any National Environmental Policy Act (NEPA) class of action, whether Environmental Impact Statement, Environmental Assessment, or Categorical Exclusion.

D. This process may be used only for activities funded under the Federal Aid Highway Program which are administered by MoDOT.

E. Except as specifically provided in Stipulations II and III below, FHWA will comply with the requirements of 36 CFR Part 800.3 – 800.6 for all undertakings covered by this PA. To the maximum extent possible, FHWA, with the assistance of MoDOT, will integrate historic properties preservation planning and management decisions with other policy and program requirements (such as those of NEPA) consistent with

the NHPA. FHWA is committed to involving consulting parties and the public in the Section 106 process through direct contact to consulting parties and the use of the DOT's existing NEPA and project public notification procedures.

II. Initial Phase for Identification and Evaluation of Historic Properties

MoDOT shall carry out the identification and evaluation of historic properties as part of its Section 106 review process in accordance with 36 CFR 800.4. Pursuant to 36 CFR 800.4(b)(2), a phased process may be applied under any of the following conditions:

- when access to the property is restricted to prevent a standard Section 106 investigation;
- large or complex projects where multiple alternatives are under consideration; or
- when the area of potential effects cannot be fully determined until later in project development for the location of elements of the project (e.g., bridge piers, storm water detention facilities, etc.) typically included as part of final design and permitting.

A. For the initial phase for identification of historic properties, MoDOT will:
   1. Determine the undertaking's area of potential effects (APE) as defined in 36 CFR 800.16(d).
   2. Prepare or cause to be prepared, a literature review, a reconnaissance survey, and/or an archaeological predictive model or archaeological sensitivity study, as appropriate. Reconnaissance surveys, archaeological predictive models or sensitivity studies will establish the likely presence of historic properties within each alternative under consideration or within each inaccessible area, and will be documented in accordance with Stipulation II.B.
   3. Notify FHWA of the identification of any historic properties and archaeological sites with more than minimal value for preservation in place.
   4. Consult with the consulting parties, individuals, and organizations likely to have knowledge of, or concerns with, cultural resources in the area, review existing information on cultural resources within the APE and seek information from Indian tribes who may ascribe traditional religious and cultural significance to historic properties in the APE.
   5. To the extent possible, identify preliminary project effects pursuant to 36 CFR 800.5 based on information from accessible parcels.

B. Upon completion of II.A, MoDOT will send a letter notifying the SHPO, with copies to consulting parties, if any, that it has completed the initial phase for identification and evaluation, and that Section 106 review for the project will be completed using the phased process contained in this PA. The notification will include the following documentation:
   1. A brief summary of the project's scope and that this project requires the application of this PA for phased identification and evaluation.
   2. An identification of the following:
      a. consulting parties,
      b. area of potential effect, and

c. any concerns or controversy on matters related to historic properties identified through consultation or public involvement.

3. Register eligibility recommendations for all identified properties (including buildings and bridges) within the APE.
4. If possible, any preliminary effect recommendations for the project and, if appropriate, effect findings for any individual historic properties.
5. Identification of the potential for any archeological properties that might have importance chiefly for other than what can be learned from data recovery and have more than minimal value for preservation in place.
6. A description of any archaeological or architectural surveys that will be completed after ROW acquisition, or access to the property, on currently inaccessible parcels.

C. The SHPO will have 15 calendar days from receipt to review the Stipulation II(B) letter and to respond with any comments or concerns about proceeding according to this PA. If SHPO fails to respond within 15 days from the receipt of the Stipulation II(B) letter, MoDOT may assume SHPO has no objections and may proceed to acquire needed ROW. Any concerns raised by other consulting parties shall be taken into account by MoDOT and FHWA in completing the requirements of Stipulation III below.

III. Concluding Phase for Identification and Evaluation of Historic Properties

For undertakings requiring phased identification, MoDOT will complete cultural resource investigations after the ROW has been obtained, or permission to access is given, but prior to project approval and authorization for construction on the project to proceed.

A. In the concluding phase of identification and evaluation MoDOT shall complete the needed identification and evaluation as proposed in the Initial Phase notification letter, taking into account any input received from SHPO and other consulting parties.
B. MoDOT will prepare a final report of its efforts to identify and evaluate historic properties in the APE, including any properties identified during the initial phase of identification. MoDOT will transmit the final inventory report and determination of effect for the undertaking to the FHWA, SHPO, and consulting parties.
C. Based on the results of identification, FHWA will conclude Section 106 review for the undertaking in accordance with 36 CFR 800.4-800.6.

IV. Guidelines, Standards, and Regulations

MoDOT will ensure that cultural resources work carried out under the term of this PA are conducted by, or under the direct supervision of an individual or individuals that meet the Secretary of the Interior's Qualifications Standards for Historic Preservation. In addition, the following standards, guidelines and regulations will be applied to all cultural resources work:

- *Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation: Identification (1983);*

- *36 CFR 800: Protection of Historic Properties*
- SHPO's *Guidelines for Phase I Archaeological Surveys and Reports.*
- The ACHP's *Consultation with Indian tribes in the Section 106 Review Process: A Handbook.* (2012).

V. Amendment

Any party to this PA may request that it be amended, whereupon the parties will consult to consider such an amendment. Amendments to this PA will require review by all signatories. This PA may only be amended upon the written agreement of the FHWA, MHTC, SHPO, and the ACHP.

VI. Termination

Any party to this PA may terminate it by providing 30-calendar days notice in writing to the other parties, provided that the parties will consult during the period prior to termination to seek agreement on amendments and other actions that would avoid termination. In the event of termination, the FHWA will comply with 36 CFR 800.3 through 36 CFR 800.6 with regard to individual undertakings covered by this PA.

VII. Dispute Resolution

Should the SHPO or ACHP object within 30 days to any documentation submitted or actions proposed pursuant to this PA, the FHWA will ensure that the MoDOT consults with the objecting party to resolve the objections. If the objection cannot be resolved, the FHWA will comply in accordance with 36 CFR 800.4 through 36 CFR 800.6. FHWA's responsibility to comply with the stipulations of the PA for all other projects that are not the subject of the dispute will remain unchanged. When requested by any consulting party, the ACHP will consider FHWA's findings under this PA. The provisions of 36 CFR 800.9(a) on public requests to the ACHP will apply.

VIII. Duration

This PA will have an initial term of five (5) years from the date of the last signature and will be renewable. MHTC, acting through MoDOT, will coordinate a meeting of the signatories to periodically review implementation of the terms of this PA: one (1) year after the date of execution and at 2 year intervals after the initial review for the initial 5 year term. If no amendments are proposed and the signatories do not object, written lack of objection by the signatories will be the basis for the PA to remain in effect for the next period of five (5) years until it is superseded or is terminated according to Stipulation VI.

VIII. Execution and Implementation

The execution of this PA and implementation of its terms evidences that the FHWA has afforded the ACHP a reasonable opportunity to comment on the use of a phased approach to identification and evaluation for the Federal-Aid Highway Program in Missouri, and

that the FHWA has taken into account the effects of this Program on historic properties.

This PA is binding upon the signatories hereto not as individuals, but solely in their capacities as officials of their respective organizations, and acknowledges proper action of the (MHTC, SHPO, FHWA, ACHP) to enter into the same.

Signed:

FEDERAL HIGHWAY ADMINISTRATION:

By: _____ **Date:** 7/10/2014

Title: Assistant Division Administrator

THE ADVISORY COUNCIL ON HISTORIC PRESERVATION:

By: John M. Fowler **Date:** 7/29/14

Title: John M. Fowler, Executive Director

THE MISSOURI STATE HISTORIC PRESERVATION OFFICE:

By: _____ **Date:** 6/24/14

Title: DSHPO

MISSOURI HIGHWAYS AND TRANSPORTATION COMMISSION:

By: Pat Harvey **Date:** 6-19-14

Title: Assistant Chief Engineer

Attest:

_____

Commission Secretary

Approved as to form:

_____

Commission Counsel

Concur:

PEORIA TRIBE OF INDIANS OF OKLAHOMA

By: _____ **Date:** _____

Title: _____

MoDOT Project Development Milestones	Standard Section 106 Milestones	Phased Section 106 Milestones
Conceptual Stage	Initiate the Section 106 Process	Initiate the Section 106 Process
Preliminary Design Stage	Identify Historic Properties	Identify Historic Properties
Right-of-Way Plans Stage	Determine Effects	Initial Submittal to SHPO*
		Complete Identification & Determine Effects
	Attempt to Avoid Adverse Effects	Attempt to Avoid Adverse Effects
	Submit Section 106 finding to SHPO*	Submit Section 106 finding to SHPO*
Final Design Stage	Mitigate Adverse Effects	Mitigate Adverse Effects
Construction		

*An agreement document to mitigate known adverse effects to a historic property can be negotiated at these stages