



FEIS APPENDIX C - SECTION 106 CONSULTATION AND PROGRAMMATIC AGREEMENT

October 2021



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ARIZONA DIVISION

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<http://www.fhwa.dot.gov/azdiv/index.htm>

November 20, 2020

In Reply Refer To:

410-A(BFI)
TRACS No. 410 PM 0.0 P9100 05P
Sonoran Corridor Tier 1 EIS
Continuing Section 106 Consultation
Revised Draft Tier 1-level Programmatic Agreement and
Draft Environmental Impact Statement

Ms. Kathryn Leonard, State Historic Preservation Officer
1100 West Washington Street
Phoenix, Arizona 85007

SHPO-2017-0664

Dear Ms. Leonard:

The Federal Highway Administration (FHWA) and the Arizona Department of Transportation (ADOT) are preparing a Tier 1 Environmental Impact Statement (EIS) for the Sonoran Corridor, pursuant to the National Environmental Policy Act (NEPA). The corridor study area is located between Interstate 19 (I-19) and Interstate 10 (I-10), south of the Tucson International Airport, in Pima County, Arizona. The proposed Sonoran Corridor is a federal undertaking subject to Section 106 of the National Historic Preservation Act of 1966, as amended, and its implementing regulations (Title 36, Code of Federal Regulations Part 800). FHWA is the federal lead agency and ADOT is the local project sponsor for the Tier 1 EIS under NEPA.

Consulting parties for the project include ADOT, the Ak-Chin Indian Community, Arizona Board of Regents, Arizona Department of Corrections, Arizona State Land Department, Arizona State Museum (ASM), Arizona State Historic Preservation Office (SHPO), Bureau of Indian Affairs (BIA; Western Regional Office), Bureau of Land Management (BLM; Tucson Field Office), City of South Tucson, City of Tucson, Federal Aviation Administration (FAA), FHWA, Gila River Indian Community (GRIC), Hopi Tribe, Mescalero Apache Tribe, National Park Service (Anza Trail Administrative Office), Pascua Yaqui Tribe, Pima County, Pima County Regional Flood Control District, Salt River Pima-Maricopa Indian Community, Tohono O'odham Nation (Four Southern Tribes lead), Tonto Apache Tribe, Town of Sahuarita, Tucson Airport Authority (TAA), the UNS Energy Corporation / Tucson Electric Power, U.S. Army Corps of Engineers, U.S. Forest Service (Coronado National Forest), Trico Electric Cooperative, Union Pacific Railroad, Western Area Power Administration, and Yavapai-Apache Nation. The Advisory Council on Historic Preservation (ACHP), San Carlos Apache Tribe, U.S. Fish and Wildlife Service, and White Mountain Apache Tribe have declined to participate in further Section 106 consultation.

Previous consultation described the undertaking, discussed corridor alternatives, identified consulting parties, explained methodological processes, distributed cultural resource reports, and

circulated a draft programmatic agreement for review. FHWA and ADOT are continuing consultation at this time to inform consulting parties of release of the Draft Tier 1 EIS for public review, and to provide a revised Draft Programmatic Agreement for review.

The Notice of Availability (NOA) for the Draft Tier 1 EIS was published in the Federal Register on November 6, 2020, and has a review and comment period that ends on January 8, 2021. The Draft Tier 1 EIS is available for your review and can be found at:

<https://azdot.gov/planning/transportation-studies/sonoran-corridor-tier-1-environmental-impact-statement/draft>

Comments on the Draft Tier 1 EIS can be sent to:

- At the Public Hearing or the Virtual Public Engagement event
- Online: www.azdot.gov/sonorancorridor
- Phone: 855.712.8530 (bilingual)
- Email: sonorancorridor@azdot.gov
- USPS Mail: ADOT Communications
c/o Joanna Bradley
1221 South Second Avenue
Tucson, AZ 85713

A Public Hearing will be held to provide project information and accept formal comments on the Draft Tier 1 EIS. Date and location of the Public Hearing is provided below. Because of public health concerns and government requirements, attendance will be limited to provide for adequate social distancing. Participants must pre-register to reserve time to attend the Public Hearing in person. Please sign up at <https://tinyurl.com/SonCor> or call (520) 327-6077 (bilingual) to reserve a time slot to attend the Public Hearing.

PUBLIC HEARING

Tuesday, December 1, 2020, 5p.m.–8 p.m.

DoubleTree Suites – Tucson International Airport
Ballroom Royale
7051 South Tucson Boulevard
Tucson, AZ 85756

In addition, you can participate in the Virtual Public Engagement event either online or by phone. The Virtual Public Engagement event supplements the Public Hearing, and it provides another opportunity for you to give official, recorded comments on the Draft Tier 1 EIS. To participate in the Virtual Public Engagement event, click on the online access link or call the phone access number provided below.

VIRTUAL PUBLIC ENGAGEMENT EVENT

Thursday, December 3, 2020, 5p.m. – 8p.m.

– **Online Access:** bit.ly/SCEIS2020 (or you can use the full [Webex link](#))

- Meeting Number (Access code): 146 242 8979
- Event Password: SCEIS2020

– **Phone Access:** 1 (408) 418-9388

- Meeting Number (Access code): 146 242 8979

Because future, individual Tier 2 projects have the potential to adversely affect historic properties, FHWA and ADOT are developing a Tier 1-level programmatic agreement. On July 24, 2020, FHWA and ADOT distributed a draft programmatic agreement to all consulting parties (Petty [FHWA] to Jacobs [SHPO] et al., July 24, 2020). Responses were received from ASM, BIA, FAA, GRIC, Pima County, SHPO, and TAA. Comments have been addressed, and substantive changes are synopsized in Table 1 (see Enclosure). The revised agreement, entitled *Programmatic Agreement among Federal Highway Administration Arizona Department of Transportation Arizona State Historic Preservation Officer Regarding the Sonoran Corridor Project, Interstate 19 to Interstate 10, South of Tucson International Airport* (the PA), is enclosed here for your final review.

As part of the Section 106 public involvement, the draft PA was included in Appendix E of the Draft Tier 1 EIS. The final PA will be sent out for signatures once the public review and comment period on the Draft Tier 1 EIS has concluded. The final PA will be executed prior to issuance of the combined Final Tier 1 EIS / ROD document. Note that participating in the development or signing of the PA does not imply agreement with the future Final Tier 1 EIS / ROD document that will be issued by FHWA at the conclusion of this study.

Please review the enclosures and information provided in this letter. If you have any questions or concerns, please contact Tremaine Wilson, FHWA Civil Rights/Realty Specialist, by phone at (602) 382-8970 or e-mail Tremaine.Wilson@dot.gov; or Will Russell, ADOT Cultural Resources Program, by phone at (602) 712-6233 or by email at WRussell3@azdot.gov. If you have no further comment regarding the PA, please advise as to whether you intend to sign.

Sincerely,

Karla S. Petty
Division Administrator

TREMAINE
LUMUSS WILSON

Digitally signed by TREMAINE
LUMUSS WILSON
Date: 2020.11.19 16:19:15 -07'00'

By: Tremaine L. Wilson
Civil Rights/Realty Specialist

Signature for SHPO Concurrence
410-A(BFI)

Date

4

☐ Intend to sign the PA

☐ Do not intend to sign the PA

Enclosures

ecc:

Dr. David Jacobs, Compliance Specialist, SHPO, DJacobs@azstateparks.gov (w/enclosures)

TWilson

WRussell



ARIZONA DIVISION

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May 11, 2021

In Reply Refer To:

410-A(BFI)
TRACS No. 410 PM 0.0 P9100 05P
Sonoran Corridor Tier 1 EIS
Continuing Section 106 Consultation
Draft Tier 1 Programmatic Agreement for Final Review

Ms. Kathryn Leonard, State Historic Preservation Officer
1100 West Washington Street
Phoenix, Arizona 85007

SHPO-2017-0664

Dear Ms. Leonard:

The Federal Highway Administration (FHWA) and the Arizona Department of Transportation (ADOT) are preparing a Tier 1 Environmental Impact Statement (EIS) for the Sonoran Corridor, pursuant to the National Environmental Policy Act (NEPA). The corridor study area is located between Interstate 19 (I-19) and Interstate 10 (I-10), south of the Tucson International Airport, in Pima County, Arizona. The proposed Sonoran Corridor is a federal undertaking subject to Section 106 (54 U.S. Code [USC] § 306108) of the National Historic Preservation Act of 1966, as amended (54 USC 300301, *et seq.*), and its implementing regulations (36 Code of Federal Regulations [CFR] Part 800).

23 USC §§ 326 and 327 allow the U.S. Department of Transportation Secretary, acting through FHWA, to assign responsibilities for compliance with NEPA and other federal environmental laws to a state department of transportation through a memorandum of understanding (MOU); and FHWA and ADOT have entered into two MOUs, a 326 MOU and 327 MOU. FHWA did not assign and ADOT did not assume FHWA's responsibilities for compliance with NEPA and Section 106, pursuant to 23 USC § 327, for the Sonoran Corridor Tier 1 EIS. For the Sonoran Corridor Tier 1 EIS, FHWA is the federal lead agency and ADOT is the local project sponsor under NEPA. For all subsequent Tier 2 projects, ADOT has assumed FHWA's responsibilities for NEPA and Section 106 compliance pursuant to the 326 MOU and 327 MOU.

Consulting parties for the Tier 1 EIS include ADOT, the Ak-Chin Indian Community, Arizona Board of Regents, Arizona Department of Corrections, Arizona State Land Department, Arizona State Museum (ASM), Arizona State Historic Preservation Office (SHPO), Bureau of Indian Affairs (BIA; Western Regional Office), Bureau of Land Management (Tucson Field Office), City of South Tucson, City of Tucson, Federal Aviation Administration (Phoenix Airports District), FHWA, Gila River Indian Community, Hopi Tribe, Mescalero Apache Tribe, National Park Service (Anza Trail Administrative Office), Pascua Yaqui Tribe, Pima County, Pima

County Regional Flood Control District, Salt River Pima-Maricopa Indian Community, Tohono O'odham Nation (Four Southern Tribes lead), Tonto Apache Tribe, Town of Sahuarita, Tucson Airport Authority, Tucson Electric Power (a UNS Energy Corporation), U.S. Army Corps of Engineers, U.S. Forest Service (Coronado National Forest), Trico Electric Cooperative, Union Pacific Railroad, Western Area Power Administration, and Yavapai-Apache Nation. The Advisory Council on Historic Preservation, San Carlos Apache Tribe, U.S. Fish and Wildlife Service, and White Mountain Apache Tribe have declined to participate in further Section 106 consultation.

Previous consultation described the undertaking, discussed corridor alternatives, identified consulting parties, explained methodological processes, and distributed cultural resource reports. Because future, individual Tier 2 projects have the potential to adversely affect historic properties, FHWA and ADOT have developed, in consultation with the above parties, a Tier 1 programmatic agreement (PA) pursuant to 36 CFR §§ 800.6 and 800.14(b). A PA outline was distributed in March of 2020, and a PA draft in July of the same year. Comments were received from ASM, BIA, Pima County, and SHPO. These were addressed, and a revised draft was distributed in November of 2020. Additional comments were received from SHPO. Most of these were non-substantive, such as typographical errors and structural suggestions. The revised draft PA is now ready for your *final* review (see enclosed). The following substantive comments were included and have been addressed:

Comment	Resolution or Response
Question: Do the 2,000-foot-wide build corridor alternatives constitute the Tier 1 undertaking's area of potential effects (APE).	Because no build corridor alternative has been selected – in fact, the no-build alternative has yet to be eliminated from consideration – FHWA and ADOT feel it is premature to define an APE, <i>per se</i> . The combined build corridors constitute the “project area.”
Comment: The preamble should include a description of public involvement.	A recital has been added, describing the strategy taken to invite and consider public involvement.
Comment: The final recital should indicate that the Signatories agree that the stipulations consider the effects of and will govern Tier 2 projects. This arrangement does not include Invited Signatories or Concurring Parties.	The recital has been revised to indicate that the described agreement is between FHWA and SHPO alone.
Comment: During Tier 2 studies, ADOT should <i>consult</i> with regard to findings of project effect, rather than informing parties of the outcome afterward.	Revised to clarify that ADOT shall consult with consulting parties regarding the findings of Tier 2 project effects (Stipulation IV.G.4—6 and 8).
Comment: Tribal perspectives incorporated into Tier 2 historic property treatment plans (HPTPs) should be safeguarded.	Revised to indicate that such information may be restricted or redacted, as appropriate (Stipulations IV.H.2.h and V).

Comment	Resolution or Response
Comment: Historic resources of the built environment should be evaluated by persons meeting the Secretary of the Interior's (SOI's) standards for historian or architectural historian.	This requirement was included in the draft provided. With respect, no change was made (Stipulation IV.C.3).
Comment: Tier 1 land jurisdictions are unclear. Perhaps a recital clarifying such jurisdictions could be added.	Recitals have been added or clarified to indicate various agency jurisdictional involvements (Preamble).
Comment: The meaning of "Signatory Tribe" is unclear.	The term is no longer used.
Comment: The discussion of post-review discoveries of human remains was unclear.	The discussion has been revised for clarity (Stipulation IV.H.2).
Question: If consulting parties wish later to become parties to the PA, would their role be limited to that of full Signatories, or could they request to become Invited Signatories or Concurring Parties?	This level of specificity has been removed, and changes in party status are implicitly included under Stipulation VI.
Comment: Concurring Parties cannot initiate PA termination.	This has been amended to indicate that PA termination can be initiated only by Signatories and Invited Signatories (Stipulation VIII).
Comment: If a Tier 2 project is suspended or terminated, a specific completion plan should be developed, rather than relying on the HPTP.	This has been revised to indicate that a specific plan will be developed and consulted upon (Stipulation IV.K.1).
Comment: An annual report of PA-related activities be provided to SHPO.	ADOT has agreed to provide an annual report to any Signatory, Invited Signatory, or Concurring Party that submits a request (Stipulation XIII).
Comment: SHPO needs to review and concur with ADOT's identification and evaluation of historic properties.	Although this had been noted, language has been added to clarify (Stipulation IV.D.3).
Comment: Draft amendments to the Tier 1 PA must be developed by FHWA, in response to concerns brought forward.	Clarifying language has been added (Stipulation VI.A).

To satisfy public involvement requirements under Section 106 of the NHPA, pursuant to 36 CFR § 800.2(d)(3), FHWA used the NEPA public review period of the Tier 1 Draft EIS between November 6, 2020 to January 8, 2021. The Draft PA was included in Appendix E of the Tier 1 Draft EIS. In the letter dated November 20, 2020, Section 106 consulting parties were informed of release of the Tier 1 Draft EIS, and were invited to provide comments on the Tier 1 Draft EIS. In addition, Section 106 consulting parties were invited to participate in both the public hearing and the virtual public engagement event on December 1 and December 3, 2020, respectively. Furthermore, in accordance with 23 USC § 139(n)(2) and 49 USC § 304(a)(b), FHWA will be

issuing a combined Tier 1 Final EIS and Record of Decision (ROD) document for the Sonoran Corridor Tier 1 project. Completion of the combined Tier 1 Final EIS/ROD document is anticipated for the fall of 2021. Lastly, Alternative 7 has been identified as the Preferred Alternative for the Sonoran Corridor Tier 1 project (see Attachment A, enclosed). The Preferred Alternative was identified in the Tier 1 Draft EIS, which will be reaffirmed in the Tier 1 Final EIS.

Please review the enclosures and the information provided in this letter. In conclusion, the final draft PA and its five attachments are enclosed here for your final review. If you are satisfied with the revisions and find the draft acceptable, please indicate your concurrence by signing below and returning this letter no later than June 15, 2021. If you have any additional comments, questions, or concerns on the Final PA, please contact Tremaine Wilson, FHWA Civil Rights/Realty Specialist, by phone at (602) 382-8970 or e-mail Tremaine.Wilson@dot.gov; or Will Russell, ADOT Cultural Resources Program, by phone at (602) 712-6233 or by email at WRussell3@azdot.gov.

Sincerely,

Karla S. Petty
Division Administrator

TREMAINE LUMUSS
WILSON

Digitally signed by TREMAINE LUMUSS
WILSON
Date: 2021.05.06 15:16:52 -07'00'

By: Tremaine L. Wilson
Civil Rights/Realty Specialist

Signature for SHPO Concurrence
410-A(BFI)

Date

Enclosures

ecc:

Dr. David Jacobs, Compliance Specialist, SHPO, DJacobs@azstateparks.gov (w/enclosures)
TWilson
WRussell



ARIZONA DIVISION

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July 16, 2021

In Reply Refer To:

410-A(BFI)
TRACS No. 410 PM 0.0 P9100 05P
Sonoran Corridor Tier 1 EIS
Continuing Section 106 Consultation
Draft Tier 1 Programmatic Agreement for Final Review

Ms. Kathryn Leonard, State Historic Preservation Officer
1100 West Washington Street
Phoenix, Arizona 85007

SHPO-2017-0664

Dear Ms. Leonard:

The Federal Highway Administration (FHWA) and the Arizona Department of Transportation (ADOT) are preparing a Tier 1 Environmental Impact Statement (EIS) for the Sonoran Corridor, pursuant to the National Environmental Policy Act (NEPA). The corridor study area is located between Interstate 19 (I-19) and Interstate 10 (I-10), south of the Tucson International Airport, in Pima County, Arizona. The proposed Sonoran Corridor is a federal undertaking subject to Section 106 (54 U.S. Code [USC] § 306108) of the National Historic Preservation Act of 1966, as amended (54 USC 300301, *et seq.*), and its implementing regulations (36 Code of Federal Regulations [CFR] Part 800).

23 USC §§ 326 and 327 allow the U.S. Department of Transportation Secretary, acting through FHWA, to assign responsibilities for compliance with NEPA and other federal environmental laws to a state department of transportation through a memorandum of understanding (MOU); and FHWA and ADOT have entered into two: a 326 MOU and 327 MOU. FHWA did not assign, and ADOT did not assume, FHWA's responsibilities for compliance with NEPA and Section 106, pursuant to 23 USC § 327, for the Sonoran Corridor Tier 1 EIS. For the Sonoran Corridor Tier 1 EIS, FHWA is the federal lead agency and ADOT is the local project sponsor under NEPA. For all subsequent Tier 2 projects, ADOT has assumed FHWA's responsibilities for NEPA and Section 106 compliance pursuant to the 326 MOU and 327 MOU.

Consulting parties for the Tier 1 EIS include ADOT, the Ak-Chin Indian Community, Arizona Board of Regents, Arizona Department of Corrections, Arizona State Land Department, Arizona State Museum (ASM), Arizona State Historic Preservation Office (SHPO), Bureau of Indian Affairs (BIA; Western Regional Office), Bureau of Land Management (Tucson Field Office), City of South Tucson, City of Tucson, Federal Aviation Administration (Phoenix Airports District), FHWA, Gila River Indian Community, Hopi Tribe, Mescalero Apache Tribe, National Park Service (Anza Trail Administrative Office), Pascua Yaqui Tribe, Pima County, Pima County Regional Flood Control District, Salt River Pima-Maricopa Indian Community, Tohono O'odham Nation (Four Southern Tribes lead), Tonto Apache Tribe, Town of Sahuarita, Tucson Airport Authority, Tucson Electric Power (a UNS Energy Corporation), U.S. Army Corps of Engineers, U.S. Forest Service (Coronado National Forest), Trico Electric Cooperative, Union Pacific Railroad, Western Area Power Administration, and Yavapai-Apache Nation. The Advisory Council on Historic Preservation (ACHP), San Carlos Apache Tribe, U.S. Fish and

Wildlife Service, and White Mountain Apache Tribe have declined to participate in further Section 106 consultation.

Previous consultation described the undertaking, discussed corridor alternatives, identified consulting parties, explained methodological processes, and distributed cultural resource reports. Because future, individual Tier 2 projects have the potential to adversely affect historic properties, FHWA and ADOT have developed, in consultation with the above parties, a Tier 1 programmatic agreement (PA) pursuant to 36 CFR §§ 800.6 and 800.14(b). A PA outline was distributed in March of 2020, and a PA draft in July of the same year. Comments were received from ASM, BIA, Pima County, and SHPO. These were addressed, and a revised draft was distributed in November of 2020. Additional comments were received from SHPO and addressed, and the amended draft was circulated on May 11, 2021. Additional comments were subsequently received from the Tohono O’odham Nation, ACHP, and SHPO. As described below, these comments have also been addressed. The resulting document is enclosed here. FHWA and ADOT invite you to consider signing.

Comment	Resolution or Response
The Tohono O’odham Nation should be a required Signatory to the Tier 1 PA because one of the build alternative corridors crosses the Nation’s lands.	At a joint meeting between the Tohono O’odham Nation, FHWA, ADOT, ACHP, and SHPO on June 22, 2021, it was agreed that it would be most appropriate for the Nation to be an Invited Signatory to the Tier 1 PA. This status has been updated in the PA’s preamble.
The Tohono O’odham Nation should be a required Signatory to any subsequent Tier 2 agreement documents for Tier 2 segments that cross the Nation’s land.	FHWA and ADOT are in agreement. To further clarify this approach, Stipulation IV.H.1.d has been added, reading: <i>“If any future Tier 2 project crosses Tohono O’odham Nation land, the Tohono O’odham Nation shall be a Signatory to the project-specific PA or MOA or concur in writing with the use of Attachment 6 to the statewide PA in lieu thereof.”</i>
Future Tier 2 agreements may conflict with the Tier 1 PA.	Stipulation II.C has been added, reading: <i>“Should Tier 2 agreement documents be developed pursuant to Stipulation IV.H.1 (below), no elements thereof shall conflict with or supersede this Agreement.”</i> Likewise, Stipulation IV.H.1.a has been revised to include: <i>“No Tier 2 agreement document shall conflict with or supersede this Agreement.”</i>
SHPO and/or an applicable Tribal Historic Preservation Officer (THPO) must concur with ADOT’s determinations of National Register of Historic Places (NRHP) eligibility during Tier 2 projects.	Stipulation IV.D.3.c has been added, reading: <i>“All determinations of NRHP eligibility made by ADOT during Tier 2 shall not be considered final unless and until ADOT receives concurrence from SHPO and/or THPO, as appropriate.”</i>

Comment	Resolution or Response
SHPO and/or an applicable THPO must concur with ADOT's findings of Tier 2 project effect.	Stipulation IV.G.9 has been added, reading: <i>"Any findings of Tier 2 project effect made by ADOT shall not be considered final unless and until ADOT receives concurrence from SHPO and/or THPO, as appropriate."</i>
Consulting parties that are not Signatories to the Tier 1 PA but which may have jurisdictional responsibilities during Tier 2 may not be afforded the opportunity to participate as required Signatories in future Tier 2 agreement documents.	Stipulation IV.H.1.e has been added, reading: <i>"For any project-specific MOA or PA developed during Tier 2, all public agencies owning or managing lands within the Tier 2 project's APE and/or having permitting jurisdiction or historic property preservation responsibilities within the Tier 2 project's APE shall be Invited Signatories to the applicable Tier 2 Section 106 agreement document."</i>

Please review the enclosed PA and its five attachments. If you are satisfied with the revised PA, please indicate your concurrence by signing below. We also invite your agency or community to consider signing the PA as well. Please return your signed letter and/or PA signature page no later than August 22, 2021. If you have any questions or concerns on the Final PA, please contact Tremaine Wilson, FHWA Civil Rights/Realty Specialist, by phone at (602) 382-8970 or e-mail Tremaine.Wilson@dot.gov; or Will Russell, ADOT Cultural Resources Program Manager for Major Projects, by phone at (480)536-4747 or by email at WRussell3@azdot.gov.

Sincerely,

Karla S. Petty
Division Administrator

TREMAINE LUMUSS
WILSON

Digitally signed by TREMAINE LUMUSS
WILSON
Date: 2021.07.15 12:34:03 -07'00'

By: Tremaine L. Wilson
Civil Rights/Realty Specialist

Signature for SHPO Concurrence
410-A(BFI)

Date

Enclosures

ccc:

Dr. David Jacobs, Compliance Specialist, SHPO, DJacobs@azstateparks.gov (w/enclosures)
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ARIZONA DIVISION

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September 17, 2021

In Reply Refer To:

410-A(BFI)
TRACS No. 410 PM 0.0 P9100 05P
Sonoran Corridor Tier 1 EIS
Continuing Section 106 Consultation
Executed Tier 1 Programmatic Agreement

Ms. Kathryn Leonard, State Historic Preservation Officer
1100 West Washington Street
Phoenix, Arizona 85007

SHPO-2017-0664

Dear Ms. Leonard:

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Consulting parties for the Tier 1 EIS include ADOT, the Ak-Chin Indian Community, Arizona Board of Regents, Arizona Department of Corrections, Arizona State Land Department, Arizona State Museum, Arizona State Historic Preservation Office (SHPO), Bureau of Indian Affairs, Bureau of Land Management, City of South Tucson, City of Tucson, Federal Aviation Administration (FAA; Phoenix Airports District), FHWA, Gila River Indian Community, Hopi Tribe, Mescalero Apache Tribe, National Park Service (Juan Bautista de Anza National Historic Trail Administrative Office), Pascua Yaqui Tribe, Pima County, Pima County Regional Flood Control District, Salt River Pima-Maricopa Indian Community, Tohono O'odham Nation (Four Southern Tribes lead), Tonto Apache Tribe, Town of Sahuarita, Tucson Airport Authority, Tucson Electric Power, U.S. Army Corps of Engineers, Trico Electric Cooperative, Union Pacific Railroad, Western Area Power Administration, and Yavapai-Apache Nation.

The Advisory Council on Historic Preservation (ACHP), Fort Sill Apache Tribe, San Carlos Apache Tribe, U.S. Fish and Wildlife Service, U.S. Forest Service (Coronado National Forest), and White Mountain Apache Tribe were previously engaged as consulting parties but have since declined further participation.

Previous consultation described the undertaking, discussed corridor alternatives, identified consulting parties, explained methodological processes, and distributed cultural resource reports. Because future, individual Tier 2 projects have the potential to adversely affect historic properties, FHWA and ADOT have developed, in consultation with the above parties, a Tier 1 programmatic agreement (PA) pursuant to 36 CFR §§ 800.6 and 800.14(b). A Tier 1 PA outline was distributed in March of 2020, and a Tier 1 PA draft in July of the same year. Subsequent revisions were made to the Tier 1 PA in response to comments received, and amended drafts of the Tier 1 PA were distributed in November of 2020 and May of 2021. A final Tier 1 PA was distributed on July 16, 2021 for review and signature.

The Tier 1 PA was executed on August 24, 2021 by Signatories FHWA and SHPO. The Tier 1 PA also has been signed by Invited Signatory ADOT and Concurring Parties BIA, FAA (Phoenix Airports District), Pima County, Pima County Regional Flood Control District, Town of Sahuarita, Tucson Airport Authority, and City of Tucson. A copy of the executed Tier 1 PA is enclosed here for your records. The executed Tier 1 PA was filed with the ACHP on September 8, 2021, thereby fulfilling FHWA's Section 106 responsibilities pursuant to 36 CFR § 800.6(b)(iv).

FHWA and ADOT would like to take this opportunity to thank all of the consulting parties for their cooperation and collaborative input during the development of the Tier 1 PA. If you have any questions or concerns, please contact Tremaine Wilson, FHWA Civil Rights/Realty Specialist, by phone at (602) 382-8970 or e-mail Tremaine.Wilson@dot.gov; or Will Russell, ADOT Senior Archaeologist, Major Projects, by phone at (480) 536-4747 or by email at WRussell3@azdot.gov.

Sincerely,

Karla S. Petty
Division Administrator

TREMAINE LUMUSS
WILSON
By: Tremaine L. Wilson
Civil Rights/Realty Specialist

Digitally signed by TREMAINE
LUMUSS WILSON
Date: 2021.09.09 15:51:05 -07'00'

Enclosure

ecc:

Ms. Mary-Ellen Walsh, Cultural Resources Compliance Manager, SHPO, MWalsh@azstateparks.gov
(w/enclosure)

Dr. David Jacobs, Compliance Specialist, SHPO, DJacobs@azstateparks.gov (w/enclosure)

TWilson

WRussell



September 9, 2021

Will G. Russell, PhD, RPA
Senior Archaeologist, Major Projects
Arizona Department of Transportation
Environmental Planning
205 S. 17th Ave., MD EMO2, Ste. WS 2463
Phoenix, AZ 85007

Ref: *Proposed Sonoran Corridor Tier 1 EIS*
Pima County, Arizona
ACHP Project Number: 15577

Dear Dr. Russell

On September 8, 2021, the Advisory Council on Historic Preservation (ACHP) received a copy of the executed Section 106 agreement document (Agreement) for the referenced undertaking. In accordance with 36 CFR 800.6(b)(1)(iv) of the ACHP's regulations, the ACHP acknowledges receipt of the Agreement. The filing of the Agreement and implementation of its terms fulfills the requirements of Section 106 of the National Historic Preservation Act and the ACHP's regulations.

We appreciate receiving a copy of this Agreement for our records. Please ensure that all consulting parties are provided a copy of the executed Agreement in accordance with 36 CFR 800.6(c)(9). If you have any questions or require additional assistance, please contact Ms. Emily Choi at (202) 517-0207 or by e-mail at echoi@achp.gov and reference the ACHP Project Number above.

Sincerely,

LaShavio Johnson
Historic Preservation Technician
Office of Federal Agency Programs

PROGRAMMATIC AGREEMENT
AMONG THE
FEDERAL HIGHWAY ADMINISTRATION
AND
ARIZONA STATE HISTORIC PRESERVATION OFFICER
REGARDING
THE SONORAN CORRIDOR PROJECT, INTERSTATE 19 TO INTERSTATE 10, SOUTH OF
TUCSON INTERNATIONAL AIRPORT
PROJECT NO. 410-A(BFI), TRACS NO. 410 PM 0.0 P9100 05P
PIMA COUNTY, ARIZONA

WHEREAS, the Federal Highway Administration (FHWA) provides funding assistance to the Arizona Department of Transportation (ADOT) through the Federal-aid Highway Program (hereafter, *the Program*), which is subject to Section 106 (54 United States Code [USC] § 306108) of the National Historic Preservation Act of 1966 (NHPA), as amended (54 USC § 300301, *et seq.*) and its implementing regulations at 36 Code of Federal Regulations (CFR) Part 800; and

WHEREAS, the FHWA is preparing a Tier 1 Environmental Impact Statement (EIS) to evaluate build corridor alternatives for the proposed development of the Sonoran Corridor highway between Interstate 19 (I-19) and Interstate 10 (I-10), south of the Tucson International Airport Pima County, Arizona (see Attachment A), with a 19-year planning and implementation horizon; and

WHEREAS, the preparation of this Tier 1 EIS is federally-funded and thus constitutes an undertaking pursuant to 36 Code of Federal Regulations (CFR) § 800.16(y), and is hereafter referred to as the *Undertaking*; and

WHEREAS, 23 USC §§ 326 and 327 allow the U.S. Department of Transportation Secretary, acting through FHWA, to assign responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA; 42 USC § 4321, *et seq.*) 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 programmatic agreement (hereafter, *the Agreement*) as Attachments B and C, respectively, as provided for in

23 USC §§ 326 and 327, respectively, through which FHWA assigned, and ADOT assumed, FHWA's responsibilities for compliance with NEPA and Section 106 for all Program-funded transportation projects in the state of Arizona; and

WHEREAS, FHWA did not assign and ADOT did not assume FHWA's responsibilities for compliance with NEPA and Section 106, pursuant to 23 USC § 327, for all or portions of three federal undertakings (see Attachment D), one of which is the Sonoran Corridor Tier 1 EIS; and

WHEREAS, under the 326 and 327 MOUs, ADOT is deemed to be the responsible federal agency for the purpose of compliance with 36 CFR Part 800, except for projects not assigned under the 23 USC § 327 MOU (see Attachment D); and

WHEREAS, FHWA remains the responsible federal agency for the purpose of compliance with 36 CFR Part 800 for any Program-funded transportation projects exempted from assignment pursuant to the 23 USC § 327 MOU (see Attachment D), including the Sonoran Corridor Tier I EIS; and

WHEREAS, the FHWA Division Administrator is the FHWA agency official for Program-funded transportation projects not assigned under the 23 USC § 327 MOU, including the Sonoran Corridor Tier 1 EIS; and

WHEREAS, the *Programmatic Agreement Pursuant to Section 106 of the National Historic Preservation Act Regarding Implementation of Federal-Aid Transportation Projects in the State of Arizona* (hereafter, *Statewide PA*) was executed on September 23, 2020 by FHWA, ADOT, the Arizona State Historic Preservation Office (SHPO), and the Advisory Council on Historic Preservation (ACHP); and

WHEREAS, the Statewide PA was developed pursuant to 36 CFR § 800.14(b)(2) in order to establish a programmatic alternative for taking into account the effects of repetitive, recurring, and/or minor undertakings funded by the Program and will thus be applicable to some of this Undertaking's Tier 2 projects; and

WHEREAS, FHWA has developed this Agreement for the Sonoran Corridor Tier 1 EIS to define and outline how individual Tier 2 projects would be carried out, to detail environmental commitments, and to satisfy the requirements of Section 106, pursuant to 36 CFR §§ 800.14(b)(1)(i) and (ii); and

WHEREAS, upon completion of the Sonoran Corridor Tier 1 EIS, FHWA may select a build corridor alternative, approximately 2,000 feet wide, for designation and development of the Sonoran Corridor highway; and

WHEREAS, if a build corridor alternative is selected, subsequent phased design, assessment of environmental impacts pursuant to NEPA, and construction of specific Tier 2 projects to implement the Undertaking during the 19-year planning horizon could involve the use of existing roadways with or without upgrades, and/or the construction of new segments of highway; and

WHEREAS, the ADOT Environmental Administrator is the ADOT agency official for Program-funded transportation projects assigned under the 23 USC § 326 and 23 USC § 327 MOUs, including the Tier 2 projects described in this Agreement; and

WHEREAS, ADOT is responsible for compliance with NEPA and Section 106 for all Tier 2 projects, which would be studied and constructed as multiple, separate undertakings over the 19-year planning horizon; and

WHEREAS, all historic properties, including sites, places, or landscapes of religious and cultural significance to Native American tribes that may be affected by this Undertaking have not yet been identified; and

WHEREAS, the Undertaking may have an adverse effect on historic properties pursuant to 36 CFR § 800.5(a)(2)(i); and

WHEREAS, SHPO is authorized to enter into this Agreement in order to fulfill its role of advising and assisting federal agencies in carrying out their responsibilities pursuant to Sections 101 (54 USC §§ 302303[b][5], [6], and [9][A]) and 106 of the NHPA, 36 CFR §§ 800.2(c)(1)(i), and 800.6(b)(1)(i), and SHPO is a Signatory to this Agreement; and

WHEREAS, FHWA notified ACHP of the potential for adverse effects resulting from the Undertaking, pursuant to 36 CFR § 800.6(b)(2), and invited the ACHP to participate in this Agreement, and the ACHP declined the invitation in a letter dated June 22, 2020; and

WHEREAS, ADOT is the Undertaking sponsor and FHWA has invited ADOT to sign the Agreement as an Invited Signatory; and

WHEREAS, ADOT, as the Undertaking sponsor, must comply with Arizona’s State Historic Preservation Act, and ADOT’s participation in this Agreement as an Invited Signatory satisfies compliance with Arizona Revised Statutes (ARS) Title 41 §§ 861—864; and

WHEREAS, FHWA consulted with the following federal agencies: the Bureau of Indian Affairs (BIA): Western Regional Office; Bureau of Land Management (BLM): Tucson Field Office; Federal Aviation Administration (FAA): Phoenix Airports District Office; National Park Service (NPS): Juan Bautista de Anza National Historic Trail(JUBA); U.S. Army Corps of Engineers; U.S. Fish and Wildlife Service; U.S. Forest Service: Coronado National Forest; and the Western Area Power Administration (WAPA) pursuant to 36 CFR § 800.2(c)4, and these agencies have been invited to be Concurring Parties to this Agreement; and

WHEREAS, FAA, WAPA, and NPS (JUBA), in letters dated April 2, March 31, and June 11, 2020, respectively, requested to participate in the development of this Agreement; and

WHEREAS, the U.S. Fish and Wildlife Service, in a letter dated July 5, 2019, has declined to participate in further consultation; and

WHEREAS, FHWA has consulted with and invited the following Native American tribes (hereafter, *the Tribes*) that may attach religious or cultural importance to affected properties (pursuant to 36 CFR §§ 800.2[c][2][ii][A]—[F]) to be concurring parties to this Agreement: Ak-Chin Indian Community, Gila River Indian Community, Hopi Tribe, Mescalero Apache Tribe, Pascua Yaqui Tribe, Salt River Pima-Maricopa Indian Community, San Carlos Apache Tribe, Tonto Apache Tribe, White Mountain Apache Tribe, and Yavapai-Apache Nation; and

WHEREAS, the Tohono O’odham Nation has requested to be an Invited Signatory to this Agreement because one of the build corridor alternatives crosses tribal land, and FHWA has invited the Tohono O’odham Nation to sign this Agreement as an Invited Signatory; and

WHEREAS, if any future Tier 2 project crosses Tohono O’odham Nation land, the Tohono O’odham Nation would be a Signatory to a project-specific programmatic agreement or memorandum of agreement; and

WHEREAS, the Tohono O’odham Nation’s Tribal Historic Preservation Office (THPO) has agreed to assume Section 106 responsibilities for any portion of the Undertaking or constituent Tier 2 projects that cross Tohono O’odham lands, pursuant to Sections 101(d)(2) and 101(b)(3) of the NHPA; and

WHEREAS, the White Mountain Apache Tribe, in a letter dated November 30, 2018, declined further consultation, deferring to the Ak-chin Indian Community, Gila River Indian Community, Salt River Pima-Maricopa Indian Community, and Tohono O’odham Nation; and

WHEREAS, the San Carlos Apache Tribe, in letters dated July 5 and 8, 2019, declined further consultation, deferring to the Tohono O’odham Nation; and

WHEREAS, Tribal participation in this Agreement does not constitute approval of the outcome of the Tier 1 EIS; and

WHEREAS, no provision of this Agreement shall be construed by any of the Signatories, Invited Signatories, Concurring Parties, or consulting parties as abridging or debilitating any sovereign powers of individual tribes, affecting the trustee-beneficiary relationship between the Secretary of Interior and the Tribes, or interfering with the government-to-government relationship between the United States and the Tribes, and

WHEREAS, FHWA’s responsibilities for government-to-government consultation with the Tribes, as defined at 36 CFR § 800.16(m), are not assigned to or assumed by ADOT under this Agreement; and

WHEREAS, FHWA and ADOT implemented consultation with all Tribal representatives who expressed interest in this Undertaking, and accepted all shared information concerning properties of traditional, religious, and cultural importance, and FHWA has employed this information to avoid impacts from the Tier 1 review to such properties; and

WHEREAS, FHWA has consulted, pursuant to 36 CFR § 800.2(c)(3), with the following state agencies: Arizona Board of Regents, Arizona Department of Corrections (ADOC), and Arizona State Land Department, and has invited them to sign this Agreement as Concurring Parties; and

WHEREAS, FHWA has consulted, pursuant to 36 CFR § 800.2(c)(3), with the following municipalities: City of Tucson, City of South Tucson, and Town of Sahuarita, and has invited them to sign this Agreement as Concurring Parties; and

WHEREAS, the Town Sahuarita, in a letter dated March 25, 2020, has requested to participate in this Agreement; and

WHEREAS, FHWA has consulted, pursuant to 36 CFR § 800.2(c)(3), with the following county agencies: Pima County and Pima County Regional Flood Control District; and

WHEREAS, FHWA has consulted, pursuant to 36 CFR § 800.2(c)(5) with Trico Electric Cooperative, Tucson Airport Authority, Tucson Electric Power (a UNS Energy Corporation),

and Union Pacific Railroad, and has invited them to sign this Agreement as Concurring Parties; and

WHEREAS, FHWA has consulted, pursuant to 36 CFR § 800.6(c)(2)(iii), with the Arizona State Museum (ASM), and ASM has been invited to participate because it has mandated authority and responsibilities under the Arizona Antiquities Act (AAA; ARS Title 41 § 841 *et seq.*) that apply to that portion of the Undertaking on municipal, county, and state lands in Arizona and mandated authority and responsibilities under ARS Title 41 § 865 that apply to that portion of the Undertaking on private lands, and FHWA has invited ASM to sign this Agreement as an Invited Signatory; and

WHEREAS, FHWA has utilized the NEPA public participation requirements to coordinate and assist in satisfying the public involvement requirements under Section 106 of the NHPA, pursuant to 36 CFR § 800.2(d)(3), augmenting the NEPA process as necessary to ensure compliance with Section 106; and

WHEREAS, FHWA completed a Class I cultural resource inventory for the Sonoran Corridor Tier 1 review, as reported in *Class I Cultural Resources Inventory for the Sonoran Corridor Tier 1 Environmental Impact Statement Evaluation, Pima County, Arizona* (Langan et al. 2020). SHPO and the Tohono O’odham Nation Tribal Historic Preservation Office (THPO) subsequently concurred with the adequacy of this report, which identified known historic properties listed in or eligible for listing in the National Register of Historic Places (NRHP), as well as cultural resources that are unevaluated for NRHP eligibility, and these historic properties and unevaluated cultural resources could be adversely affected by the Undertaking; and

WHEREAS, FHWA provided the results of the Class I inventory to the consulting parties to this Undertaking for their review and comment, and FHWA has considered these comments in the EIS decision-making process; and

WHEREAS, FHWA and ADOT understand and acknowledge that while federal agencies are obligated to assess archaeological sites from a purely Western, science-based perspective, ancestral places hold additional and non-quantifiable significance, especially for descendant communities; and

WHEREAS, the Undertaking may cause adverse effects to archaeological sites that have been or may be determined eligible for the NRHP pursuant to 36 CFR § 60.4(d) but which hold significance to descendant tribes for reasons other than or in addition to data potential, and that FHWA and ADOT have acknowledged such significance; and

WHEREAS, FHWA and ADOT understand and acknowledge that while archaeological sites determined NRHP-eligible pursuant to 36 CFR § 60.4(d) derive their statutory significance from their data potential, and “mitigation” in the Western sense may include data recovery efforts, such efforts are not universally interpreted or accepted as wholly or partially mitigating; and

WHEREAS, definitions in this Agreement conform with those at 36 CFR § 800.16 unless otherwise specified; and

WHEREAS, the term “cultural resources,” as used in this Agreement, means locations, landscapes, sites, districts, features, and objects that were made, modified, or used by humans over 50 years ago; and

WHEREAS, FHWA and SHPO are individual signatories and collectively Signatories; and

NOW, THEREFORE, the Signatories agree that development of the Undertaking shall be implemented in accordance with the following stipulations in order to determine effects and resolve any adverse effects of the Undertaking on historic properties during Tier 2, and these stipulations will govern the Undertaking and all of its phases until the Agreement expires or is terminated.

STIPULATIONS

FHWA and ADOT will ensure that the following stipulations are carried out:

I. FHWA ROLES AND RESPONSIBILITIES

- A.** FHWA shall be responsible for Section 106 compliance associated with the Sonoran Corridor Tier 1 review, as such responsibility has not been assigned to or assumed by ADOT pursuant to 23 USC § 327 (see Attachment D).
- B.** FHWA shall implement the stipulations of this Agreement throughout the Sonoran Corridor Tier 1 review.
- C.** FHWA shall retain responsibility for conducting formal government-to-government consultation with federally-recognized Indian Tribes.

II. ADOT ROLES AND RESPONSIBILITIES

- A.** ADOT shall notify all consulting parties of the roles of ADOT and FHWA for:
 - 1.** The Sonoran Corridor Tier 1 review, in which case the notice shall indicate that ADOT has not assumed FHWA’s responsibilities for Section 106 compliance pursuant to the 23 USC § 327 MOU (see Attachment C), and

2. All subsequent Tier 2 projects, in which case the notice shall indicate that ADOT has assumed FHWA's responsibilities for Section 106 compliance pursuant to the 23 USC § 326 MOU (see Attachment B) or 23 USC § 327 MOU (see Attachment C).
- B. ADOT shall be responsible for implementing the stipulations of this Agreement for all Sonoran Corridor Tier 2 projects, for which they have assumed FHWA's Section 106 responsibilities, pursuant to 23 USC §§ 326 and 327.
 - C. Should Tier 2 agreement documents be developed pursuant to Stipulation IV.H.1 (below), no elements thereof shall conflict with this Agreement.
 - D. ADOT, following the conditions of the 326 and 327 MOUs, shall conduct Section 106 consultation with the Tribes on behalf of FHWA. However:
 1. FHWA will retain all government-to-government responsibilities; and
 2. If a consulting tribe is not satisfied with ADOT's level of consultation on behalf of FHWA, the tribe shall notify FHWA of their dissatisfaction. FHWA shall then directly engage the dissatisfied tribe in government-to-government consultation. All other elements of Section 106 consultation during Tier 2 shall be the responsibility of ADOT, pursuant to 23 USC §§ 326 and 327 and their attendant MOUs. This includes tribal consultation, on behalf of FHWA, with tribes other than those having expressed dissatisfaction.

III. THE TIER 1 REVIEW

- A. FHWA is responsible for implementing those terms of this Agreement which pertain to the Tier 1 portion of this Undertaking, including, but not limited to:
 1. Distribution of revised cultural resources reports, if necessary
 2. Coordinating the approval of the Final Tier 1 EIS
 3. Distribution of the Final Tier 1 EIS
 4. Development of the Record of Decision.
- B. Pursuant to 36 CFR §§ 800.4(b)(2) and 800.5(a)(3), the tiered approach to Section 106 compliance follows a phased strategy for identifying historic properties, including archaeological resources, historic built environment resources, and properties of religious and cultural significance to the Tribes, which are listed in or eligible for listing in the NRHP, and thereafter evaluating effects upon such resources. The Tier 1 phase of this strategy relied upon existing data (e.g., prior Class III surveys, Class I inventories, archival research, evaluations), and projected findings. The Tier 1 phase did not include new survey or assessment specific to this Undertaking.
- C. FHWA shall continue to use the NEPA public participation requirements to coordinate and assist in satisfying the public involvement requirements under Section 106 of the NHPA, pursuant to 36 CFR § 800.2(d)(3), augmenting the NEPA process as necessary to ensure compliance with Section 106.

IV. TIER 2 PROJECTS

All Tier 2 *projects* shall remain subject to the terms of this Agreement. During Tier 2 projects, ADOT shall:

A. Identify and Engage Consulting Parties

In accordance with 36 CFR §§ 800.2(c)(3)—(5) and 800.3(f), ADOT shall, for all Tier 2 projects subject to this Agreement, invite and facilitate Section 106 consultation with the following consulting parties:

1. Such parties may include, but are not limited to, public agencies with historic preservation responsibilities or jurisdiction, relevant advocacy groups, or other entities with a vested interest in the historic properties within Tier 2 project areas, and which may want to review reports and findings for projects within their respective jurisdictions.
2. ADOT shall conduct consultation on behalf of FHWA with the appropriate Indian tribes. Notwithstanding Stipulation IV.A.6, such consultation shall be undertaken simultaneously and in identical fashion with Section 106 consultation between ADOT and other consulting parties. Tribal consultation shall include:
 - a. Tribes with jurisdictional authority over all or part of the Tier 2 project area; and
 - b. Any tribe not described in Stipulation IV.A.2.a that is listed in ADOT's Historic Preservation Team (HPT) Portal database as having previously expressed a desire to be consulted with for the project area; and
 - c. Any tribe not described in Stipulations IV.A.2.a—b that expresses or has expressed interest in the project, project area, or resources within the project area; and
 - d. The Tohono O'odham Nation, Gila River Indian Community, Ak-Chin Indian Community, and Salt River Pima-Maricopa Indian Community (collectively, *the Four Southern Tribes*), should any of the Four Southern Tribes satisfy Stipulations IV.A.2.a—c; and
 - e. Any tribe not described in Stipulations IV.A.2.a—d that is recommended for consultation by another consulting party; and
 - f. Any tribe not described in Stipulations IV.A.2.a—e to which a consulting tribe defers; and
 - g. Any tribe not described in Stipulations IV.A.2.a—f that ADOT or FHWA feels would be appropriate to invite.
3. ADOT's tribal consultation shall continue unless and until that tribe informs ADOT, in writing, that:
 - a. They no longer wish to participate in consultation for that particular Tier 2 project; or

- b. They wish to defer to another tribe for that particular Tier 2 project; or
 - c. They wish to participate in government-to-government consultation directly with FHWA. FHWA shall then directly engage the dissatisfied tribe in government-to-government consultation. All other elements of Section 106 consultation during Tier 2 shall be the responsibility of ADOT, pursuant to 23 USC §§ 326 and 327 and their attendant MOUs. This includes tribal consultation, on behalf of FHWA, with tribes other than those having expressed dissatisfaction.
4. ADOT's efforts to identify the appropriate consulting parties for individual Tier 2 projects shall be in consultation with the SHPO and/or THPO, as appropriate.
5. ADOT shall submit to SHPO a list of consulting parties, a summary of preceding consultation, and a summary of any preceding, substantive comments.
- a. SHPO shall provide comments, including recommendations for additional parties, to ADOT within 35 calendar days.
 - b. Upon receipt of SHPO's comments, ADOT shall revise the list of consulting parties, as necessary, and resubmit to SHPO.
6. In accordance with Executive Order (EO) 11593 (*Protection and Enhancement of Cultural Resources*) and EO 13007 (*Indian Sacred Sites*), and pursuant to the terms of the 23 USC §§ 326 and 327 MOUs (Attachments B and C, respectively), FHWA shall retain responsibility for conducting formal government-to-government consultation with federally-recognized Indian Tribes (see Stipulations I.C, II.D, and IV.A.2).
7. ADOT shall provide all consulting parties with the following for a 35-calendar-day review and comment period, thus providing an opportunity to provide input concerning the design and construction of Tier 2 projects, as they relate to cultural resources:
- a. Information on existing cultural resource inventories
 - b. Information on known historic properties
 - c. Locations where new cultural surveys are planned
 - d. Information on the assessment of project effects
 - e. Information on the resolution of adverse effects, should such exist
 - f. Plans, related documents, and digital spatial data, as warranted and appropriate, pertaining to Tier 2 projects.
8. In addition, ADOT shall coordinate public involvement as follows:

- a. ADOT shall satisfy the public involvement requirements under Section 106 of the NHPA pursuant to 36 CFR § 800.2(d)(3) and in coordination with the NEPA public participation requirements (40 CFR § 6.203).
- b. Public involvement in the planning and implementation of Tier 2 projects subject to this Agreement shall be governed by ADOT's Public Involvement Plan and, as appropriate, any advice or guidance documents offered by consulting parties.
- c. Consistent with Section 106, the public and consulting parties will have an opportunity to comment and voice concerns with regard to resources identified during Tier 2 inventories. Such input may be gathered during public meetings or by way an ADOT project-specific website.
- d. Public meetings held pursuant to NEPA (*to wit* 40 CFR § 6.203) shall present, in general terms, historic properties within the APE, findings of effect, and treatment of historic properties subject to adverse effects, in accordance with 36 CFR § 800.2(d)(3). Such meetings will be held in communities local to each Tier 2 segment. Interested groups and individuals will be invited to comment on proposed treatments. Those with demonstrated interest in the Undertaking as a whole or Tier 2 project in particular may be invited to participate as Section 106 consulting parties and/or Concurring Parties to individual Tier 2 agreements developed to resolve adverse effects upon historic properties pursuant to 36 CFR §§ 800.6 and 800.14(b).
- e. ADOT shall consider written requests from individuals and organizations to participate as consulting parties in the development of measures to avoid, minimize, or mitigate adverse effects upon historic properties and unevaluated cultural resources.
- f. ADOT shall take into account all comments received from the public. Pursuant to 36 CFR §§ 800.11(e)—(g), public comments shall be considered in:
 - (1) Efforts to identify and evaluate historic properties, and
 - (2) Documentation of project effects upon historic properties, and
 - (3) Agreement documents developed for individual Tier 2 projects pursuant to 36 CFR §§ 800.6 and 800.14(b).

B. Define the Area of Potential Effects

1. An appropriate *area of potential effects* (APE) for each Tier 2 project shall be established by ADOT, in consultation with SHPO and/or THPO, as appropriate and other consulting parties. The defining of each Tier 2 APE shall take into account *direct*, *indirect*, and *cumulative* effects, pursuant to

- 36 CFR § 800.4(1). ADOT shall provide consulting parties a 35 calendar day review period to comment on the APE for each undertaking.
2. Throughout the Tier 2 design process, ADOT shall determine whether revisions to a Tier 2 project or the undertaking as a whole will require modification of the APE.
3. If a Tier 2 APE requires modification, ADOT shall:
- a. Define an appropriate, revised APE, in consultation with SHPO and/or THPO, as appropriate, and relevant land-managing agencies.
 - b. Inform all consulting parties of the revised APE within 35 calendar days of its establishment.

C. Identify and Evaluate Historic Properties

1. ADOT shall take adequate and appropriate measures to identify cultural resources within each Tier 2 APE, and to prepare required and appropriate documentation.
2. Traditional cultural properties (TCPs) are eligible for inclusion in the NRHP pursuant to 36 CFR § 60.4 and have a demonstrable association with the cultural practices, traditions, beliefs, lifeways, arts, crafts, or social institutions of a living community. TCPs are rooted in a traditional community's history and are important in maintaining the continuing cultural identity of the community.
 - a. TCPs will be identified through consultation with traditional communities having jurisdiction over, an ongoing connection with, or traditional affiliation with the APE.
 - b. The identification, documentation, and evaluation of TCPs shall be undertaken in accordance with National Register Bulletin 38 (*Guidelines for Evaluating and Documenting Traditional Cultural Properties*).
 - c. All documentation of TCPs shall be protected in accordance with Stipulation V, below.
3. The identification and evaluation of cultural resources shall be completed by individuals meeting the Secretary of the Interior's *Professional Qualification Standards* for the disciplines of archaeology, architectural history, or history, as appropriate, pursuant to 48 Federal Register (FR) 190:44716—44742, Section 112(a)(1)(A) (36 CFR § 800.2[a][1]) of the NHPA, and 36 CFR § 61.1(c).
4. Methods of identification and levels of effort shall be consistent with the Secretary of the Interior's standards for the identification and evaluation of cultural resources, pursuant to 48 FR 190:44720—44726.

5. Methods of documentation shall be consistent with the Secretary of the Interior's standards for archaeological documentation, pursuant to 48 FR 190:44734—44737, and all applicable standards, guidance, and instructions set forth by ASM, SHPO, and ACHP.

6. For each Tier 2 project, the process, efforts, and results of identifying cultural resources shall be documented in one or more technical reports, as follows:

a. An "archaeological report," pertaining to archaeological sites, features, objects, and districts (*sensu* 36 CFR § 800.16[l][1] and National Register Bulletin [NRB] 36), including historic, in-use structures (HIS). As defined in ASM's *Policy and Procedures Regarding Historical Sites and Features*, HIS are elements of historic infrastructure that remain in use. Common examples include roads, pipelines, telephone lines, and canals that are over 50 years in age. The HIS classification does not include historic buildings.

(1) Archaeological reports may include or consist of *Class I inventory reports*, being comprehensive summaries of previously-conducted cultural resource surveys and the results thereof, or *Class III survey reports*, which document new pedestrian surveys within the Tier 2 APE and the results thereof.

(2) The identification and recording of archaeological materials shall be conducted by a qualified archaeologist who meets or exceeds the standards set forth in Stipulation IV.C.3, above, or who is working under the direct supervision thereof.

(3) The recording of HIS shall utilize the SHPO HIS form (HISF), appended to the archaeological report.

(4) The identification and recording of HIS shall be conducted by:

i. A qualified historic architect or architectural historian (*sensu* Stipulation IV.C.3), or

ii. A qualified archaeologist (*sensu* Stipulation IV.C.3) or archaeological professional working under the direct supervision thereof, providing that the completed SHPO HIS form is reviewed and approved by a qualified architectural historian or historic architect (*sensu* Stipulation IV.C.3) prior to submission.

b. An "historic built environment report," pertaining to historic architectural properties and historic districts (*sensu* 36 CFR

§§ 800.5 and 36 CFR § 65.3[d]). The identification and recording of historic architectural properties and historic districts shall be conducted by a qualified architectural historian or historic architect who meets or exceeds the standards set forth in Stipulation IV.C.3.

- c. For small Tier 2 projects, ADOT may compile both archaeological and built-environment data in a single report. The identification and recording of such resources shall be conducted by qualified professionals in accordance with Stipulation IV.C.3.
- d. Each report shall identify those cultural resources within the Tier 2 APE that have been identified as historic properties, as defined at 36 CFR § 800.16(l)(1), as well as unevaluated cultural resources (see Stipulations IV.D.1.c, IV.E.2.c[1], and IV.G.2, below).
- e. Draft versions of each report shall be distributed to all consulting parties for a 35-calendar-day review and comment period. During this period, consulting parties may submit questions or comments to ADOT, in writing.
 - (1) Feedback received during the review and comment period will be considered by ADOT and, as appropriate, incorporated into a revised version of the report.
 - (2) If no comments or questions are received, ADOT will notify all consulting parties that the distributed report shall be considered final.
 - (3) If only non-substantive comments are received, these will be addressed, as appropriate, and the revised report will be forwarded to the consulting parties for their records.
 - (4) If substantive comments are received, ADOT will address these, as appropriate, and thereafter submit the revised report to all consulting parties for another 35-calendar-day review and comment period. In the accompanying correspondence, ADOT shall summarize the substantive comments received and the actions taken. If substantive comments did not lead to changes, ADOT shall explain why no changes were made.

7. As appropriate and necessary, the above methods and criteria may be modified for individual Tier 2 projects, in consultation with consulting parties and in accordance with current professional standards, applicable statutes, and established guidance from SHPO and ACHP. ADOT shall notify consulting parties of any such modification.

D. Evaluate the Significance of Cultural Resources

- 1. Upon receipt and review of all relevant data and in consultation with consulting parties, ADOT shall assess each identified cultural resource's eligibility for listing in the NRHP pursuant to 36 CFR § 60.4 and NRB 15

(*How to Apply the National Register Criteria for Evaluation*). Available determinations of eligibility are:

- a. “Eligible,” meaning the resource is eligible for listing in the NRHP pursuant to 36 CFR § 60.4
- b. “Not eligible,” meaning the resource is not eligible for listing in the NRHP pursuant to 36 CFR § 60.4
- c. “Unevaluated,” meaning the resource has not been evaluated for NRHP eligibility or cannot be evaluated based on available data. Unless and until adequate evaluation is possible, unevaluated resources shall be treated as eligible for the purpose of Section 106 consultation and the implementation of this Agreement.

2. ADOT determinations of NRHP eligibility shall be made by individuals meeting the Secretary of the Interior’s Professional Qualification Standards for the discipline of archaeology, pursuant to 48 FR 190:44716—44742, Section 112(a)(1)(A) (36 CFR § 800.2[a][1]) of the NHPA, and 36 CFR § 61.1(c).

3. Disagreement with Determinations of NRHP Eligibility

- a. Should SHPO or THPO, as applicable, object to, disagree with, or fail to concur with ADOT’s determination of NRHP eligibility during the review and comment period described above:
 - (1) ADOT shall notify all consulting parties of the objection or disagreement, in writing, outlining the process for seeking resolution (see below).
 - (2) ADOT shall take the objection or disagreement into account and make good faith efforts to coordinate and consult with the objecting party to reach a mutually agreeable determination, in accordance with Stipulation VII (*Dispute Resolution*). This consultation shall last no more than 35 calendar days. ADOT shall document all such consultation and forward such documentation, including results, to all consulting parties within 14 calendar days of disagreement-specific consultation ending.
 - (3) If the disagreement cannot be remedied through consultation, ADOT shall forward their determination of eligibility and all relevant documentation to the Keeper of the National Register (Keeper) for resolution in accordance with 36 CFR § 800.4(c)(2).
 - (4) ADOT shall notify all consulting parties that the matter has been forwarded to the Keeper for consideration.
 - (5) If ADOT receives input from the Keeper within 30 calendar days of submitting the appropriate information,

ADOT shall consider said input prior to making a final decision.

- (6) ADOT shall render a final decision regarding the disputed determination of eligibility within 14 calendar days of either (a) receiving input from the Keeper, or (b) the end of the 30-calendar-day consideration period afforded to the Keeper, if the Keeper does not respond.
 - (7) ADOT shall notify all consulting parties, and the Keeper, of its final decision, and thereafter proceed accordingly.
- b. Should a member of the public or a consulting party other than SHPO or THPO, as applicable, object to or disagree with ADOT's determination of NRHP eligibility during the review and comment period described above:
- (1) ADOT shall take the objection or disagreement into account and make good faith efforts to coordinate and consult with the objecting party to discuss and, if appropriate, reassess ADOT's determination.
 - (2) If the disagreement cannot be remedied through good faith coordination, and assuming no objection has been received from SHPO or THPO, as applicable, ADOT shall make its final determination and proceed accordingly. The disagreement and ultimate outcome shall be conveyed to all consulting parties during the course of subsequent consultation.
- c. All determinations of NRHP eligibility made by ADOT during Tier 2 shall not be considered final unless and until ADOT receives concurrence from SHPO and/or THPO, as appropriate.
- d. If questions, recommendations, objections, or proposed changes are received after the close of the final review period, ADOT shall make good faith efforts to respond and address these. However, ADOT shall have no obligation to reconsider or alter the determinations of NRHP eligibility.

E. Provide Documentation

- 1. ADOT shall submit drafts of archaeological reports and historic built environment reports (see Stipulation IV.C.6, above) generated during the course of Tier 2 projects to all consulting parties for a 35-calendar-day review and comment period.
- 2. The distribution of reports shall be accompanied by a Section 106 consultation letter from ADOT. This letter shall provide or identify, at minimum:

- a. Historic properties within the Tier 2 APE that are listed in the NRHP.
 - b. Previous determinations of NRHP eligibility and, if available, details regarding concurrence from SHPO or THPO.
 - c. References for documents, interviews, studies, or other sources used to assess NRHP eligibility for newly-recorded resources or those previously known but not previously evaluated.
 - (1) Known archaeological properties that cannot be evaluated prior to approval of an undertaking will be presumed and treated as NRHP eligible.
 - (2) Where archaeological testing to determine NRHP eligibility is feasible and deemed necessary, project-specific memoranda of agreement (MOAs) or project-specific programmatic agreements (PAs) (hereafter collectively referred to as *Tier 2 Agreement Documents*; see Stipulation IV.H.1, below) may include a provision for historic property treatment plans (HPTs) that include archaeological testing or the use of a combined archaeological testing and data recovery program (i.e., *phased data recovery*).
 - d. Newly-developed determinations of NRHP eligibility or ineligibility (see Stipulation IV.D), the criteria under which any determinations of eligibility were made, pursuant to 36 CFR § 60.4, and justification for any such determinations.
 - e. Any statutory exemptions to further Section 106 consideration, if applicable (e.g., *Section 106 Exemption Regarding Effects to the Interstate Highway System, Exemption Regarding Historic Preservation Review Process for Projects Involving Historic Natural Gas Pipelines*).
 - f. Planned or potential measures to overcome obstacles to assessing eligibility (e.g., archaeological testing).
 - g. ADOT's determination of project effect upon historic properties (see Stipulation IV.G, below)
3. Upon receipt of distributed reports and accompanying letter(s), consulting parties may pose questions, request changes, provide recommendations, or raise concerns within the ensuing 35-calendar-day review period. Such responses shall be made in writing. The protocol for addressing such responses shall follow that set forth in Stipulation IV.D.3, above.
4. If any consulting party requests additional information or a re-evaluation of a resource's NRHP eligibility, ADOT shall, as appropriate:
- a. Provide requested information

- b. Consider and address concerns
 - c. Reconsider or reevaluate determinations of eligibility
 - d. Revise the report(s) in question
- 5.If, following the review and comment period, ADOT makes only non-substantive revisions to the report(s), the revised report(s) will be sent to all consulting parties for their records.
 - 6.If, following the review and comment period, ADOT makes substantive changes to the report(s), the revised report(s) will be sent to all consulting parties for another 35-day review and comment period.
 - 7.The above-described process of distribution, review, revision, and consultation shall repeat, as necessary, until such time as no substantive revisions are necessary.
 - 8.At such time as no objections or requests for substantive revision are received by ADOT, within the original or subsequent review period, ADOT shall send the final report(s) to all consulting parties for their records.
 - 9.If questions, recommendations, objections, or proposed changes are received after the close of the final review period, ADOT shall make good faith efforts to respond and address these. However, ADOT shall have no obligation to reconsider or alter the determinations of report adequacy.
 - 10.If, after the distribution of the final report(s), there are changes to the Tier 2 APE or Tier 2 project that introduce additional cultural resources other than those previously determined NRHP-ineligible or which are statutorily exempt from Section 106 evaluation, or if new information is received that suggests the presence or potential presence of additional cultural resources within the APE, supplemental reports will be prepared, as necessary, and distributed to all consulting parties for a 35-calendar-day review and comment period. The consultation process for such supplemental reports shall follow that described above in Stipulation IV.E.1—9.

F. Phased Identification and Unanticipated Discoveries

- 1.The phased identification of historic properties, pursuant to 36 CFR § 800.4(b)(2), may involve situations wherein cultural resource inventories cannot identify all cultural resources that are present because:
 - a. Buried deposits may have no accompanying surface manifestation but are encountered during construction; or
 - b. Construction proceeds prior to the acquisition of all new rights-of-way or easement; or
 - c. Changes in the scope of work, design, or project area introduce the need for additional survey; or

- d. Cultural resources become greater than 50 years of age subsequent to the last inventory.
2. In such cases, subsequent Tier 2 agreement documents developed pursuant to 36 CFR §§ 800.6 and 800.14(b) will include a provision for the implementation of post-review identification and evaluation efforts, as applicable to the particular Tier 2 project.

G. Assessment Of Effects

1. If historic properties (*sensu* 36 CFR § 800.16[l][1]) are identified within a Tier 2 APE, ADOT shall apply the criteria of adverse effects in accordance with 36 CFR § 800.5.
2. For the purpose of this Agreement, the Tier 1 review, and all subsequent Tier 2 projects, cultural resources that have not been evaluated for NRHP eligibility shall be presumed to be and treated as eligible until such time as they can be and have been evaluated.
3. Following the application of these criteria, ADOT shall make a determination of project effects upon historic properties. The following findings of effect are available:
 - a. “*No historic properties affected*,” pursuant to 36 CFR § 800.4(d)(1), indicates that either:
 - (1) The Tier 2 APE has been adequately surveyed and found to contain no historic properties, or
 - (2) The Tier 2 project’s scope of work is such that completion of the project will have no effect on historic properties.
 - b. “*No adverse effect*,” pursuant to 36 CFR § 800.5(b), indicates that:
 - (1) The Tier 2 APE has been adequately surveyed and was found to contain historic properties or cultural resources unevaluated for NRHP eligibility; and
 - (2) The Tier 2 project’s scope of work is such that completion of the project would not adversely affect qualifying characteristics of a historic property that make it eligible for listing in the NRHP *or* any characteristics of an unevaluated resource that *might* make it NRHP-eligible. The absence of adverse effects may be inherent to project design or result from changes thereto (e.g., avoidance).
 - c. “*Adverse effect*,” pursuant to 36 CFR § 800.5(d)(2), indicates that:
 - (1) The Tier 2 APE is known to include an historic property *or* cultural resource unevaluated for NRHP eligibility, *and*
 - (2) The Tier 2 project’s scope of work is such that ADOT knows, or has reason to believe, that completion of the project would have or could be reasonably anticipated to

have an adverse effect on the qualifying characteristic of the historic property making it NRHP-eligible.

4. ADOT shall share its finding of effect for each Tier 2 project through Section 106 consultation letters, with all consulting parties, including the ACHP. This consultation letter shall include, at minimum:

- a. ADOT's finding of Tier 2 project effect.
- b. A descriptive justification for the finding of effect.
- c. If a finding of "adverse effect" is deemed appropriate for the project, ADOT shall:
 - (1) Identify all historic properties that would be adversely affected, or unevaluated cultural resources that could be adversely affected and
 - (2) Propose means through which adverse effects might be avoided, minimized, or mitigated.

5. The distribution of ADOT's finding of project effect will initiate a 35-calendar-day review and comment period.

- a. Consultation regarding ADOT's finding of project effect may occur alongside consultation pertaining to the definition of a Tier 2 APE (Stipulation IV.B), the identification of cultural resources (Stipulation IV.C), the evaluation of NRHP eligibility (Stipulation IV.D), and the distribution of cultural resource reports (Stipulation IV.E).
- b. Consultation regarding ADOT's finding of project effect shall follow the process described above, in Stipulations IV.E.1—9.

6. Pursuant to 36 CFR § 800.10 and Section 110(f) of the NHPA, ADOT shall notify the Secretary of the Interior (represented by the National Park Service's [NPS'] Intermountain Regional Program Coordinator) when any Tier 2 project may adversely affect a National Historic Landmark (NHL), and ADOT shall invite the NPS to participate as a consulting party and Concurring Party.

7. When the effects of a Tier 2 project do not satisfy the *Criteria of Adverse Effect* (36 CFR § 800.5[a][I]), ADOT may determine that there are "no historic properties affected" or "no adverse effects" upon historic properties within the Tier 2 APE, pursuant to 36 CFR §§ 800.5(b) or 800.4(d)(1). Such determination may likewise be appropriate if the project can be modified to avoid adverse effects, or if conditions agreed upon by SHPO or THPO, as applicable, are imposed to avoid adverse effects, such as rehabilitation consistent with the Secretary of the Interior's *Standards for the Treatment of Historic Properties* (36 CFR Part 68) and applicable guidelines.

- 8.If questions, recommendations, objections, or proposed changes are received after the close of the final review period, ADOT shall make good faith efforts to respond and address these. However, ADOT shall have no obligation to reconsider or alter the finding of effect.
- 9.Any findings of Tier 2 project effect made by ADOT shall not be considered final unless and until ADOT receives concurrence from SHPO and/or THPO, as appropriate.

H. Treatment Of Historic Properties

1.Tier 2 Section 106 Agreement Documents

- a. In accordance with 36 CFR §§ 800.6 and 800.14(b), ADOT shall develop or implement an appropriate Tier 2 Section 106 agreement document for all Tier 2 projects wherein ADOT determines there may be an adverse effect upon historic properties *or* wherein phased identification (see Stipulation IV.F) is necessary and adverse effects may be incurred. Such agreement documents may consist of a project-specific memorandum of agreement (MOA), project-specific programmatic agreement (PA), or the use of an existing PA (see Stipulation IV.H.1.b, below). No Tier 2 agreement document shall conflict with this Agreement.
- b. As applicable and appropriate, ADOT may utilize *Attachment 6* (see Attachment F to this Agreement) of the *Programmatic Agreement Pursuant to Section 106 of the National Historic Preservation Act Regarding Implementation of Federal-Aid Transportation Projects in the State of Arizona* (hereafter, the *statewide PA*, executed September 23, 2020 by FHWA, SHPO, and ADOT) *in lieu* of a project-specific MOA or PA.
 - (1) The use of Attachment 6 to the statewide PA *in lieu* of a project-specific MOA or PA requires that each of the following agrees to such use:
 - i. ADOT
 - ii. SHPO
 - iii. ACHP (unless ACHP has declined participation for that particular project)
 - iv. Land-owning or land-managing public agencies with jurisdictional authority over the Tier 2 APE or segments thereof.
 - v. Tribes with land within the Tier 2 APE or segments thereof.
 - vi. The Bureau of Indian Affairs, if the Tier 2 APE intersects with Tribal lands (*sensu* 36 CFR §§ 800.3[c][1] and 800.16[x]).

- (2) The use of Attachment 6 to the statewide PA *in lieu* of a project-specific MOA or PA must correspond with the development and implementation of a project-specific historic property treatment plan (HPTP) tailored to the historic properties within the Tier 2 APE that are subject to adverse effects.
 - (3) For all Tier 2 projects where ADOT has determined, pursuant to Stipulation IV.G.3.c, that historic properties would or would likely be adversely affected, ADOT shall notify ACHP in writing of said determination and invite ACHP to participate in the development of a project-specific MOA or PA, pursuant to 36 CFR § 800.6(a)(1)(i)(c), or concur with the use of Attachment 6 to the statewide PA *in lieu* of a project-specific MOA or PA.
- c. If a project-specific MOA or PA is developed by ADOT, it shall:
- (1) Identify, consider, and direct measures to ensure, to the extent possible, maximum avoidance, minimization, and protective measures for historic properties within the Tier 2 APE. Such measures shall include, but are not limited to, preservation in place, project design changes, archaeological testing, modification of determinations, and response to unanticipated discoveries.
 - (2) Include or make reference to a project-specific HPTP (see Stipulation IV.H.2, below).
 - (3) Describe reporting standards in relation to the project-specific HPTP.
- d. If any future Tier 2 project crosses Tohono O’odham Nation land, the Tohono O’odham Nation shall be a Signatory to the project-specific PA or MOA or concur in writing with the use of Attachment 6 to the statewide PA *in lieu* thereof.
- e. For any project-specific MOA or PA developed during Tier 2, all public agencies owning or managing lands within the Tier 2 project’s APE and/or having permitting jurisdiction or historic property preservation responsibilities within the Tier 2 project’s APE shall be Invited Signatories to the applicable Tier 2 Section 106 agreement document.
- f. Pursuant to 36 CFR §§ 800.11(e)—(g), views of the public will be considered and included in individual Tier 2 MOAs or PAs, as practicable and appropriate.
- g. Upon review, execution, and implementation of the project-specific MOA or PA, or the implementation of Attachment 6 to the

statewide PA *in lieu* thereof, compliance with Section 106 will be considered concluded for the respective Tier 2 project.

2. Historic Property Treatment Plans (HPTPs)

- a. For each Tier 2 project wherein ADOT has identified the potential for adverse effects upon historic properties, ADOT shall develop an appropriate HPTP in consultation with all consulting parties.
- b. The HPTP will take into consideration the concerns of all consulting parties in determining the measures to be implemented.
- c. The consulting process through which the HPTP is developed shall indicate that the HPTP will be incorporated into the project-specific MOA or project-specific PA, or used in tandem with Attachment 6 of the Statewide PA, in which case Attachment 6 shall be appended.
- d. The Tier 2 HPTP will provide detailed descriptions of treatment measures for historic properties that would or would likely be affected by the project, along with measures to be taken to protect historic properties and to avoid further adverse effects thereupon.
- e. The Tier 2 HPTP will provide detailed descriptions of protection measures for archaeological resources and resources of importance to the Tribes for reasons of religious or cultural affinity, including but not limited to:
 - (1) Compliance with the Native American Graves Protection and Repatriation Act of 1990 (25 USC § 3001 *et seq.*)
 - (2) Compliance with those portions of the Arizona State Historic Preservation Act and Arizona Antiquities Act as they pertain to graves and human remains (*to wit* ARS Title 41 §§ 841.A, 844, and 865
 - (3) Coordination with the Tribes and affected Native American cultural organizations
- f. The HPTP shall conform to the principles of ACHP's *Treatment of Archaeological Properties: A Handbook (Parts I and II)*, the Secretary of the Interior's *Standards and Guidelines for Archeology and Historic Preservation* (48 FR 44716—44742), and other relevant guidance.
- g. ADOT shall take appropriate measures to safeguard sensitive information received from Native American sources during the development of the HPTP. Such measures shall include, but not be limited to, restricting access and redaction, as appropriate.
- h. The HPTP will include, at minimum, the content outlined in Attachment E (HPTP *Minimum Elements*).

3.HPTP Review

a. Consulting Party Review

- (1) ADOT shall provide a draft HPTP to all consulting parties for a 35-calendar-day review and comment period.
- (2) Based on comments received, the HPTP will be revised if necessary and resubmitted for a subsequent 14-calendar-day review and comment period.
- (3) If consulting parties fail to provide comments within the above-referenced periods, ADOT shall contact the non-responsive party and confirm that no response is forthcoming. If the non-responsive party declines to provide comments or cannot be contacted, ADOT may proceed with the finalization and implementation of the HPTP.
- (4) The HPTP can be amended by ADOT without amending the project-specific MOA, project-specific PA, or Attachment 6 to the statewide PA.
- (5) Disputes concerning the HPTP will be addressed in accordance with the terms of Stipulation VII (*Dispute Resolution*).

4.HPTP Implementation

- a. The HPTP shall be implemented *after* the execution of a project-specific MOA, the execution of a project-specific PA, or the above-described concurrence to utilize Attachment 6 to the statewide PA.
- b. The HPTP shall be implemented *before* the commencement of construction activities.
- c. Depending upon the nature of the treatment described in the HPTP, the treatment may not be completed until after construction is completed.
- d. Termination of a Tier 2 project after initiation of the HPTP will require completion of any work in progress (see Stipulation IV.K, below) and the HPTP's amendment, as described below. Amendments to the HPTP will be incorporated by written agreement among the Signatories and Invited Signatories to the project-specific MOA or project-specific PA or, if Attachment 6 of the statewide PA is used *in lieu* of such instruments, those parties described in Stipulation IV.H.1.b(1).
- e. *Dispute Resolution*

- (1) Those parties involved in the development and implementation of the HPTP will seek agreement on the treatment prescribed in the project-specific MOA or project-specific PA or Attachment 6 of the statewide PA, as applicable, and the HPTP.
- (2) If such parties are unable to agree on the appropriate resolution of adverse effects, ADOT shall follow those procedures outlined in Stipulation VII (Dispute Resolution).

I. Professional Qualification Standards

For each Tier 2 project, ADOT shall ensure that activities carried out under the terms and provisions of this Agreement shall be performed by or under the direct supervision of persons meeting the Secretary of the Interior's Professional Qualifications Standards (48 FR 44738-9), Section 112(a)(1)(A) of the NHPA, 36 CFR § 800.2(a)(1), and terms of any permits issued for archaeological investigations.

J. Permitting and Curation

1. Any Tier 2 archaeological investigation on federal lands will be conducted in accordance with a permit issued by the applicable federal land managing agency in accordance with the Archaeological Resources Protection Act (ARPA; 16 USC §§ 470aa—mm).
2. Any Tier 2 archaeological investigations on municipal, county, and state lands will be conducted in accordance with an AAA permit issued by ASM pursuant to ARS Title 41 § 842.
3. All materials and records resulting from Tier 2 archaeological investigations shall be curated in accordance with 36 CFR Part 79 and any applicable tribal or federal land managing agency's direction or policy.

K. Suspension or Termination of Tier 2 Projects

1. If any Tier 2 project is suspended or terminated for any reason:
 - a. ADOT shall notify the consulting parties of the suspension or termination in writing.
 - b. In-process mitigation will be completed in conformance with the appropriate plan and to the extent applicable, in accordance with Stipulations IV.K.2—4, below. This includes avoidance, minimization, and mitigation efforts designed to reduce or eliminate adverse effects to historic properties.
 - (1) ADOT shall ensure that any in-process data recovery fieldwork is completed and that all analysis, interpretation, reporting, curation of artifacts, and repatriation of remains is completed within one year of project suspension or termination.

- (2) For mitigation other than data recovery, ADOT shall, in consultation with SHPO and/or THPO, as applicable, and relevant land-managing agencies, develop and implement a plan for completion of the mitigation within one year of the suspension or termination.
- c. ADOT shall ensure that completed reports are submitted for review as described in Stipulation IV.E, above.
- 2. ADOT's obligations under this Agreement are subject to the availability of appropriated funds from state and federal sources. ADOT shall make reasonable and good faith efforts to secure the necessary funds to implement all Tier 2 aspects of this Agreement.
- 3. If inadequate funding *impairs* ADOT's ability to implement the stipulations of this Agreement, the Signatories and Invited Signatories shall consult in accordance with Stipulation VI, below, in order to amend this Agreement.
- 4. If inadequate funding *prevents* ADOT from implementing the stipulations of this Agreement, ADOT may terminate the Agreement in accordance with Stipulation VIII.A, below.

V. CONFIDENTIALITY

- A. SHPO and federal agencies managing federal lands may withhold information about the location, character, or ownership of an historic property provided the requirements of Section 304 (54 USC § 307103) of the NHPA and 36 CFR § 800.11(c) are met.
- B. Federal agencies managing federal lands may withhold information about the nature and location of archaeological resources pursuant to Section 9(a) (16 USC §§ 470cc[d] and 470hh) of the ARPA and its implementing regulation (43 CFR § 7.18).
- C. State agencies managing lands owned or controlled by the State of Arizona may withhold information related to the location of archaeological discoveries pursuant to 41 ARS § 841 and 39 ARS § 125, or places or objects included in or which may qualify for inclusion in the Arizona Register of Historic Places pursuant to 41 ARS § 511.04.A.9.
- D. Pursuant to this stipulation, the Signatories, Invited 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 USC § 552) as provided by Section 304 of the NHPA and Section 9(a) of the ARPA.

VI. AMENDMENTS

- A. In accordance with 36 CFR §§ 800.6(c)(1), (2), and (7), any Signatory or Invited Signatory that determines that the terms of this Agreement will not or cannot be

carried out or that an amendment to its terms is needed, that party shall immediately notify FHWA in writing, proposing an amendment. FHWA shall thereafter draft an amendment reflecting the proposal and forward said draft to the Signatories, Invited Signatories, and Concurring Parties to this Agreement.

- B. The Signatories and Invited Signatories to this Agreement will consult for a period not to exceed 35 calendar days to review and consider the proposed amendment.
- C. If, after taking into account any comments received from the Signatories and Invited Signatories to this Agreement, the Signatories and Invited Signatories to this Agreement concur that the proposed amendment is appropriate, FHWA shall facilitate the signing of the amendment by the Signatories and Invited Signatories and, should they so choose, the Concurring Parties.
- D. The amendment will be effective on the date a copy is signed by all Signatories and Invited Signatories. FHWA shall file any amendments with the ACHP and provide copies of the amendments to the Concurring Parties for their records.
- E. If a proposed amendment is substantive in nature, FHWA shall include all consulting parties in the process described above (Stipulations VI.A—D). Input from consulting parties other than Signatories and Invited Signatories to this Agreement shall be taken into account during consideration of the proposed amendment. Consulting parties other than Signatories and Invited Signatories to this Agreement need not concur with the proposed amendment in order for it to be executed.

VII. DISPUTE RESOLUTION

- A. Should any Signatory, Invited Signatory, or Concurring Party to this Agreement, consulting party to this Undertaking, or member of the public object to any action, plan, or report provided for review during Tier 1 and pursuant to the terms of this Agreement alone, FHWA shall consult with the objecting party to resolve the objection.
 - 1. Such objection must be received within 30 calendar days of the offensive action, plan, or receipt of report.
 - 2. The objection and reasons for an objection must be specifically documented in writing.
 - 3. If the objection cannot be resolved, FHWA shall notify the Signatories, Invited Signatories, and Concurring Parties to this Agreement of the objection and shall thereafter:
 - a. Forward all documentation relevant to the dispute to the ACHP in accordance with 36 CFR § 800.2(b)(2). Any comment provided by the ACHP, and all comments from the consulting parties to this Agreement, will be taken into account by FHWA in reaching a final decision regarding the dispute.

- b. If the ACHP does not provide any comments regarding the dispute within 30 calendar days of receiving adequate documentation, FHWA may render a decision regarding the dispute. In reaching its decision, FHWA will take into account all written comments regarding the dispute from the consulting parties to the Agreement.
- c. FHWA will notify all consulting parties of its decision in writing before implementing that portion of the Undertaking subject to dispute under this stipulation. FHWA's decision will be a final agency decision.

4. It is the responsibility of FHWA to carry out all other actions subject to the terms of this Agreement that are not the subject of the dispute.

VIII. TERMINATION

- A. Should ADOT terminate this Agreement due to insufficiency of funds, pursuant to Stipulation IV.K.4, they shall notify the Signatories and Invited Signatories in writing, citing Stipulations IV.K.4 and VIII.A, and providing explanation as to why available funding cannot sustain compliance with this Agreement. This Agreement would thereafter be terminated in its entirety.
- B. Should any Signatory or Invited Signatory to this Agreement elect to terminate this Agreement for reasons other than insufficiency of funds:
 - 1. The party proposing termination shall provide written notice to the other Signatories, Invited Signatories, and Concurring Parties, providing reason for the proposed termination.
 - 2. The Signatories, Invited Signatories, and Concurring Parties shall consult for a period no less than 35 calendar days to seek agreement on amendments (see Stipulation VI, above) or other actions that would avoid termination.
 - 3. Should such consultation result in an agreement or an alternative to termination, the Signatories, Invited Signatories, and Concurring Parties shall proceed in accordance with that approach.
 - 4. If a Signatory or Invited Signatory individually terminates their participation in the Agreement, the Agreement is terminated in its entirety and FHWA and ADOT shall thereafter comply with 36 CFR §§ 800.4—6 during Tier 2 projects.
- C. Should this Agreement be terminated for any reason, ADOT shall retain Tier 2 responsibilities for Section 106 compliance. The subsequent treatment of adverse effects to historic properties would proceed in accordance with 36 CFR Part 800 or through the development and implementation of a new agreement document pursuant to 36 CFR §§ 800.6 and 800.14(b).

IX. AGREEMENT REVIEW

Following the execution of this Agreement and until such time as all stipulations herein are implemented or the Agreement expires or is terminated, ADOT shall no later than January 30

of each year, prepare and provide to all Signatories, Invited Signatories, Concurring Parties, and consulting parties, a synopsis of work undertaken pursuant to the Agreement's terms during the preceding 12 months should such be requested by a Signatory, Invited Signatory, or Concurring Party. Any Signatory or Invited Signatory to this Agreement may request a meeting of Signatories, Invited Signatories, and Concurring Parties to review the effectiveness and application of this Agreement.

X. DURATION OF AGREEMENT

This Agreement shall be null and void if its terms are not carried out by the end of 2040, unless the signatories agree in writing to an extension for carrying out its terms.

XI. COUNTERPART SIGNATURES

This Agreement may be executed in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

The execution of this Agreement by FHWA and SHPO, and its subsequent filing with the ACHP, is evidence that FHWA has afforded ACHP an opportunity to comment on the Undertaking and its effects on historic properties, and that FHWA has taken into account the effects of the Undertaking on historic properties.

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SIGNATORIES

Federal Highway Administration

Signature: TREMAINE LUMUSS
WILSON  Digitally signed by TREMAINE LUMUSS WILSON
Date: 2021.08.20 10:43:28 -07'00' Date: 08/20/2021_____

Printed Name: Tremaine L. Wilson_____ Title: Civil Rights/Realty Specialist_____

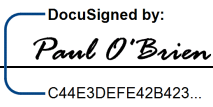
Arizona State Historic Preservation Office

Signature:  Date: August 24, 2021

Printed Name: Kathryn Leonard Title: State Historic Preservation Officer

INVITED SIGNATORIES

Arizona Department of Transportation

Signature:  Date: 8/19/2021
C44E3DEF42B423...

Printed Name: Paul O'Brien Title: Environmental Planning Administrator


CONCURRING PARTY

Bureau of Indian Affairs, Western Regional Office

Signature: **RODNEY MCVEY** Digitally signed by RODNEY MCVEY
Date: 2021.07.27 09:00:07'00'

Printed Name: _____ Title: _____

Federal Aviation Administration

Signature: **MICHAEL N WILLIAMS**  Digitally signed by MICHAEL N WILLIAMS
Date: 2021.07.27 08:22:55 -07'00' Date: _____

Printed Name: Mike N. Williams Title: Phoenix Airports District Office Manager

Pima County

Signature: C. Huckelberry Date: 7/28/21

Printed Name: Chuck Huckelberry Title: County Administrator

Pima County Regional Flood Control District

Signature: C. Huckelberry Date: 7/28/21


Printed Name: Chuck Huckelberry Title: County Administrator

Town of Sahuarita

Signature: Anna Casadei, AICP Digitally signed by Anna Casadei, AICP
DN: cn=Anna Casadei, AICP, o=Town of
Sahuarita, ou,
email=acasadei@sahuaritaaz.gov, c=US
Date: 2021.07.21 12:13:02 -0700 Date: 7/21/2021

Printed Name: Anna Casadei Title: Planning and Building Director

Tucson Airport Authority

Signature:  Date: 8/16/21

Printed Name: Michael Smejtal Title: VP of Planning & Engineering

City of Tucson

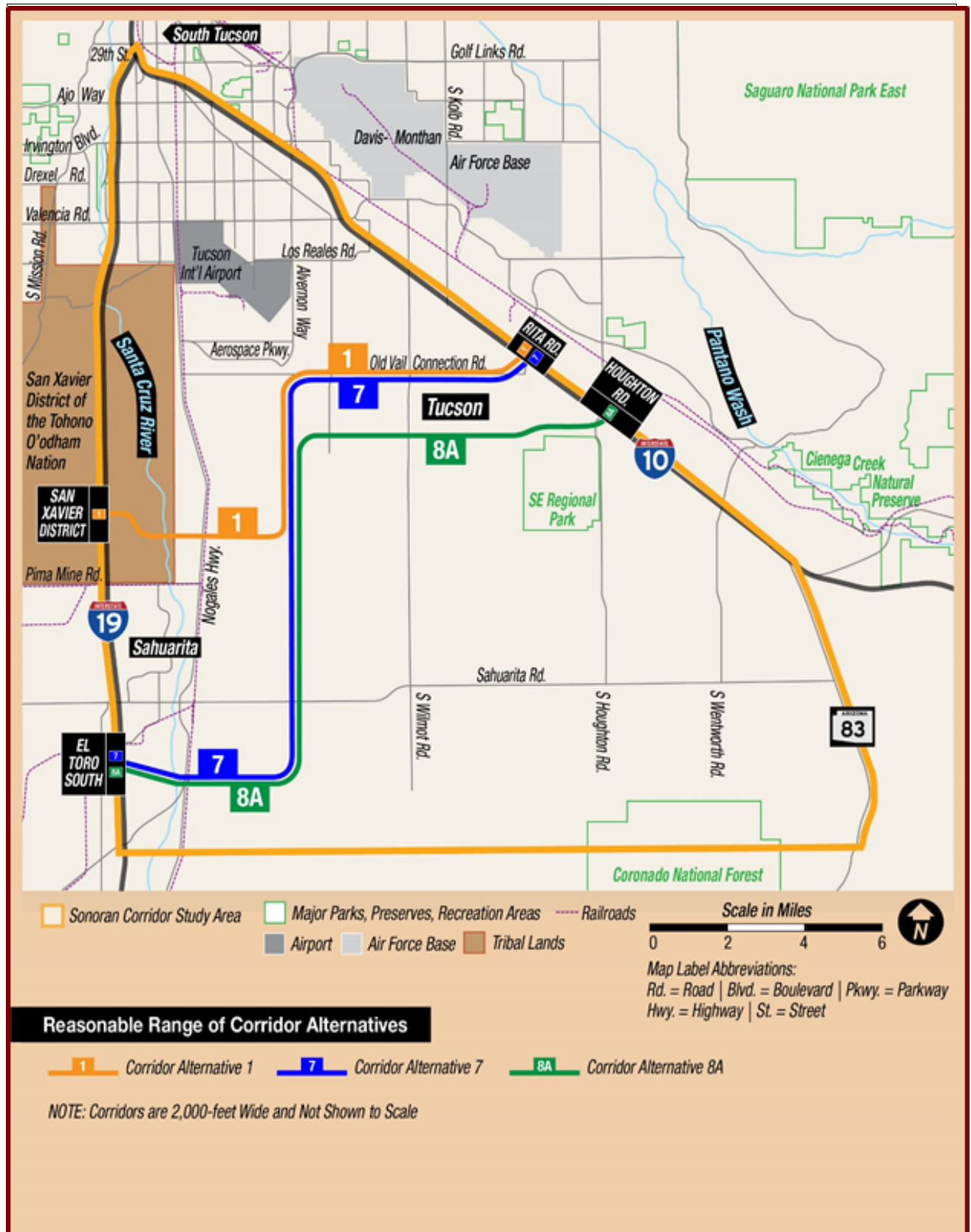
Signature: _____

Date: _____

Printed Name: _____

Title: _____

Attachment A: Tier 1 EIS corridor alternatives



**23 U.S.C. § 326 CE Assignment MOU
FHWA, Arizona Division and the Arizona Department of Transportation**

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

State Assumption of Responsibility for Categorical Exclusions

THIS FIRST RENEWED MEMORANDUM OF UNDERSTANDING (“MOU”) made and entered into on January 4, 2021, 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 January 3, 2018, the FHWA and the State executed a MOU assigning responsibilities to the State pursuant to 23 U.S.C. 326 for a three-year period, expiring on January 3, 2021 (“Original Section 326 MOU”); and

Whereas, on April 16, 2019, the FHWA and the State executed a new MOU assigning certain responsibilities to the State under the Surface Transportation Project Delivery Program, 23 U.S.C. § 327 (“Section 327 MOU”), which is separate from and does not supersede the assignment of authority for CEs under the Section 326 MOU;

Whereas, the Section 327 MOU expressly assigns FHWA’s responsibilities for NEPA and certain other environmental laws to ADOT with respect to specified “highway projects,” including among others: “highway projects qualifying for CEs within the State of Arizona that are proposed to be funded with Title 23 funds or that otherwise require FHWA approvals, and that do not qualify for assignment of responsibilities pursuant to the Section 326 MOU;”

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Whereas, FHWA and the State seek to extend the existing assignment of responsibilities to the State for an additional three-year period, pursuant to a new MOU (“First Renewed Section 326 MOU” or “MOU”);

Whereas, on October 28, 2020, the FHWA published a notice of the availability of the proposed First Renewed Section 326 MOU in the Federal Register and provided a thirty (30) day opportunity for comment in the USDOT Docket Management System FHWA-2020-0022; and

Whereas, on December 3, 2020, the State published the proposed a notice of availability of the First Renewed Section 326 MOU on its website at <https://azdot.gov/business/environmental-planning/ce-assignment-and-nepa-assignment> and provided a thirty (30) day opportunity for comment; and

Whereas, the State and the FHWA have considered the comments received on the First Renewed Section 326 MOU and the State’s overall performance in the Program evaluated through ADOT self-assessments and FHWA monitoring as required by 23 U.S.C. 326(c)(5); 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 “highway project” is within the 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 1508.1(d) (as in effect on September 14, 2020) and 23 CFR 771.117(a) and (b). “Highway project” means any undertaking that is eligible for financial assistance under title 23 U.S.C. and for which the Federal Highway Administration has primary responsibility. For further details see 23 CFR 773.103. For the purposes of this MOU, “highway project” includes eligible preventative maintenance activities. 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

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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 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,

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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 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.
- C. The State and FHWA will develop and document procedures for carrying out FHWA responsibilities retained by FHWA under Stipulation II(B), including how FHWA will communicate any decisions 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

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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 State processed the CE and any other environmental responsibilities assigned under this agreement 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 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 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.

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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.
- B. Because the State assumes responsibility for environmental processing of the CEs designated in this MOU, FHWA no longer will be responsible for 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

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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. FHWA will post official DOT and FHWA guidance and policies relating to environmental review matters online at its website, or will send such guidance and policies to the State electronically or in hard copy.
 3. After the effective date of this MOU, the FHWA will use its best efforts to ensure that it communicates to the State any new or revised FHWA policies and guidance that are final and applicable to the State's performance under this MOU 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, FHWA may send such material 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 it communicates to FHWA any proposed new or revised State laws, regulations, policies, or guidance that are applicable to the State's performance under this MOU so that FHWA may 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:

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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' 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 4, 2021, 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; and
 2. Proceed with documentation and review of the project under the appropriate NEPA procedures in accordance with the Section 327 MOU.

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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, 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 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 a staff member, or a consultant, who meets the Professional Qualifications Standards reviews and approves all documentation required under 36 CFR 800.11.

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.

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- 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, 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 12 months (January 1 through December 31), within 15 business days after the end of each 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. The State shall develop a self-assessment report summarizing its performance under this MOU every 12 months. 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). After the State submits 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

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State staff to evaluate the State's performance under this MOU. These reviews may be coordinated with the review of the State's report under Stipulation IV(F)(2). The FHWA anticipates that, under normal circumstances, it will base its evaluation of the State's performance on a modified version of a typical FHWA CE process review (to view FHWA guidance on how monitoring should occur visit <https://www.fhwa.dot.gov/hep/guidance/6004stateassumpt.cfm>).

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 January 3, 2018 execution of the Original Section 326 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

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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 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 shall notify FHWA and USDOJ 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

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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.
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:

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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
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 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

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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-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

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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 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://azdot.gov/business/environmental-planning/ce-assignment-and-nepa-assignment>) 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

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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.

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

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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;
 - 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

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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.

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

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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.
 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.

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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:

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

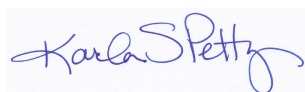
U.S. Department of Justice:

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

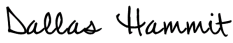


1/4/2021

Karla S. Petty,
Division Administrator,
Arizona Division Office

Date

STATE OF ARIZONA

DocuSigned by:

703C619B1CAF4CB...

1/4/2021

Dallas Hammit,
Deputy Director for Transportation/State Engineer,
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 requirements 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 774

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

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Land and Water Conservation Fund (LWCF), Pub. L. 88-578, 78 Stat. 897 (known as 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, USACE, USFS, ASLD, ASP, ASM, ACHP

Effective Date: September 23, 2020

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: September 20, 2017

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 10, 2020

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: February 24, 2020

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Appendix C

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



MARK BRNOVICH
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
NEPA 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

#6581697

**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.

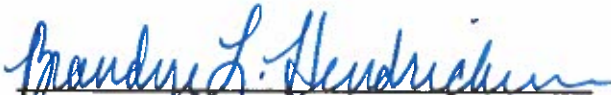
STATE OF ARIZONA



John S. Halikowski
Director
Arizona Department of Transportation

Dated: 4/16/2019

FEDERAL HIGHWAY ADMINISTRATION



Brandye L. Hendrickson
Deputy Administrator
Federal Highway Administration

Dated: 4/16/2019

Attachment D:

**Undertakings Not Assigned to ADOT Pursuant to the ADOT and FHWA 23 USC §§ 326 and 327 MOUs
(see 327 MOU § 3.3.2)**

Project:	Interstate 11 Tier 1 EIS
Federal Project No.:	999-M(161)
ADOT TRACS No.:	999 SW 0 M5180 01P

Project:	South Mountain Freeway
Federal Project No.:	NH-202-D(ADY)
ADOT TRACS No.:	202L MA 054 H5764 01C

Project:	Sonoran Corridor Tier 1 EIS
Federal Project No.:	410-A(BFI)
ADOT TRACS No.:	410 PM 0.0 P9100 05P

Attachment E: Historic Property Treatment Plan Minimum Elements

Pursuant to Stipulation III.H.2.g of this Agreement, all Tier 2 historic property treatment plans (HPTPs) shall include, but not be limited to, the following elements:

1. The establishment of environmentally sensitive use areas.
2. The implementation of preconstruction archaeological excavation.
3. Preservation-in-place, avoidance, minimization efforts.
4. Specification of all historic properties (*sensu* 36 Code of Federal Regulations [CFR] 800.16[l][1]) to be affected by the project, including:
 - a. The criterion or criteria under which said properties have been listed in or deemed eligible for listing in the National Register of Historic Places (NRHP), pursuant to 36 CFR § 60.4; and
 - b. The scale and nature of anticipated effects upon said properties, taking into account direct, indirect, and cumulative aspects; and
 - c. A summary of past recordings, research, evaluation, and treatment of said properties.
5. Specification of all cultural resources to be affected by the project that have not been evaluated for their NRHP eligibility, including:
 - a. The scale and nature of anticipated effects upon said resources, taking into account direct, indirect, and cumulative aspects; and
 - b. A summary of past recordings, research, evaluative efforts, and treatment of said resources.
6. A detailed description of:
 - a. The treatment(s) proposed to resolve adverse effects to historic properties, portions of historic properties, unevaluated cultural resources, or portions thereof; and
 - b. The rationale for the choice of proposed treatment(s); and
 - c. Consideration given to the property or resource's setting, including but not limited to:
 - i. Viewshed; and
 - ii. Ambient noise; and
 - iii. Atmospheric conditions; and
 - iv. Vibration; and
 - v. Ambiance created by, contributed to, or associated with the property or resource; and
 - vi. Any and all qualities or characteristics that contribute to the property or resource's significance in general or NRHP eligibility in particular.
7. A statement of ADOT's intent to recover a reasonable sample of intact archaeological deposits from NRHP-eligible sites (or those which have not been evaluated for their NRHP eligibility) that the agency determines, through the process set forth in Stipulation III.G of this Agreement (*Assessment of Effects*), may be adversely affected by the implementation of the Tier 2 project.
8. Provisions for the creation and dissemination, to the professional community and general public, of informative materials based on the results of the proposed treatment.
 - a. All such materials shall conform to the terms and conditions of the:
 - i. Archaeological Resources Protection Act (ARPA; 16 U.S. Code [USC] §§ 470aa—mm)
 - ii. Executive Order 13007, "Sacred Sites" (61 Federal Register 26771)
 - iii. Freedom of Information Act (5 USC § 552)

- b. Notwithstanding the provisions of:
 - i. Section 304 (54 USC § 307103) of the NHPA (54 USC 300301, *et seq.*)
 - ii. Section 9(a) of ARPA (16 USC §§ 470cc[d] and 470hh) and its implementing regulation (43 CFR § 7.18)
 - iii. 36 CFR § 800.11(c)
 - iv. Arizona Revised Statutes Title 39 § 125
 - v. Stipulation III.K of this Agreement
- 9. A monitoring and discovery plan (MDP) which shall include procedures for:
 - a. Monitoring construction activities; and
 - b. Evaluating unanticipated archaeological discoveries; and
 - c. Treating unanticipated archaeological discoveries or newly-identified historic properties; and
 - d. Communication between ADOT, the Arizona State Museum (ASM), State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO), and/or public agencies with jurisdiction over the discovery location, as appropriate; and
 - e. Consultation with consulting parties in general and consulting tribes in particular, pursuant to such discoveries.
- 10. Permits and authorizations that either have been obtained, will be necessary, or may be necessary in order to implement the HPTP and Stipulation III.H of this Agreement. This list shall indicate:
 - a. The statutes mandating such permits or authorizations; and
 - b. The conditions or circumstances under which such permit or authorization is or may be required; and
 - c. The issuing agency, identifying number, date of issuance, and duration of authority; and
 - d. The current status of application or procurement; and
 - e. The schedule for procurement of permits or authorizations to be sought; and
- 11. Appropriate research issues and questions to be addressed through the recovery of data, accompanied by:
 - i. The rationale for the consideration of such issues and questions
 - ii. Past research efforts bearing upon these issues and questions
 - iii. An historic context, or contexts to guide the focus of the research
 - iv. An explanation of why it is in the public interest to address those research issues
 - v. The data needed to adequately approach the issues and answer the questions
 - vi. How collected data will be used to address the issues and questions
 - vii. The process whereby the research issues and questions may be refined to reflect the information gathered during the implementation of Stipulation III.H of this Agreement (*Treatment of Historic Properties*).
- 12. The methods to be used in fieldwork and analyses, including an explanation of why such methods are feasible, appropriate, and relevant to the research issues and questions.
- 13. The methods to be used for data management, security, and dissemination.
- 14. The procedures by which recovered materials and records will be curated, taking into account the expressed wishes of consulting Tribes, the Secretary of the Interior's standards for curation (36 CFR Part 79), and policies and guidance from ASM and the agencies or tribes having jurisdiction of the site's location.
- 15. A schedule for providing consulting parties with periodic updates on the implementation of the HPTP.

16. A protocol for the treatment of human remains, in the event that such remains are discovered, describing methods and procedures for the recovery, analysis, treatment, and disposition of human remains, associated funerary objects, and objects of cultural patrimony. This protocol will:
 - a. Reflect concerns and/or conditions identified as a result of consultations among parties to this Agreement, including Native American tribes; and
 - b. Will be consistent with the ASM burial agreement for state lands; and
 - c. Will be consistent with the Native American Graves Protection and Repatriation Act (NAGPRA; 25 USC § 3001 *et seq.*) for federal or tribal lands
17. A proposed schedule for project tasks, including a schedule for the submission of preliminary and final archaeological reports, including draft and revised editions, to all consulting parties.
18. A consultation protocol relative to phased data recovery, if necessary.
19. A public involvement plan that includes benefits to the public.
20. Minimum qualifications for all persons implementing the HPTP (e.g., excavators, monitors, historic architects, architectural historians, laboratory analysts, report preparers) and supervisory personnel.
21. Opportunities for members of consulting Native American tribes and representatives from consulting agencies to visit the site prior to, during, and/or after data collection efforts.
22. Protocols for the development and implementation, in coordination with consulting Native American tribes, of cultural sensitivity training, including a comprehensive list of occupational categories subject to attendance.
23. A curation agreement which ensures that:
 - i. All materials (other than Native American human remains and grave-associated objects) and records collected or produced during the implementation of the HPTP on public or Tribal lands will be maintained in accordance with 36 CFR Part 79.
 - ii. All materials (other than Native American human remains and grave-associated objects) recovered during the implementation of the HPTP on privately owned lands will be maintained in accordance with 36 CFR 79 until their analysis is completed, and thereafter returned to their owners.
 - iii. Native American human remains and grave-associated objects encountered during the implementation of the HPTP will be:
 1. Treated with respect and in accordance with the expressed wishes of consulting Native American tribes
 2. Cared for in accordance with 36 CFR Part 79, notwithstanding any reasonable departures requested by consulting Native American tribes
 3. Repatriated, as efficiently as possible, in accordance with NAGPRA.

Programmatic Agreement for Federal-Aid Transportation Projects in Arizona

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.