

PROGRAMMATIC AGREEMENT
AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,
AND THE ARIZONA STATE HISTORIC PRESERVATION OFFICER,
REGARDING
INTERSTATE 11, NOGALES TO WICKENBURG, ARIZONA,
SANTA CRUZ, PIMA, PINAL, MARICOPA, AND YAVAPAI COUNTIES, 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 Interstate 11 (I-11) between Nogales and Wickenburg, Arizona (see Attachment A, *I-11 Build Corridor Alternatives*), a federally-funded project in Santa Cruz, Pima, Pinal, Maricopa, and Yavapai counties, Arizona, with a 40-year planning and implementation horizon (hereafter, *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 I-11 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 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 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, SHPO, and 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 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, the area of potential effects (APE) for this Undertaking is defined as the combination of each 2,000-foot-wide build corridor alternatives, as shown in Attachment A, and this APE may be refined during Tier 2 if a build corridor alternative is selected; and

WHEREAS, upon completion of the Tier 1 EIS, FHWA may select a build corridor alternative, approximately 2,000 feet wide, for designation and development of I-11 between Nogales and Wickenburg, Arizona; 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 40-year planning horizon, could involve the use of co-located highways with or without upgrades, and/or the construction of new segments of interstate 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 40-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, the Arizona State Historic Preservation Office (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 the Advisory Council on Historic Preservation (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 accepted the invitation on August 14, 2018 and is a Signatory to this Agreement; 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, BIA: San Carlos Irrigation Project, Bureau of Land Management (BLM): Arizona State Office, BLM: Hassayampa Field Office, BLM: Lower Sonoran Field Office, BLM: Tucson Field Office, Bureau of Reclamation, U.S. Forest Service: Coronado National Forest, Federal Aviation Administration (FAA): West Coast Headquarters, FAA: Phoenix Airports District Office, Federal Railroad Administration, National Park Service: Saguaro National Park, U.S. Army Corps of Engineers, U.S. Air Force (USAF): Davis-Monthan Air Force Base (AFB), USAF: Luke AFB, U.S. Customs and Border Protection, U.S. Fish and Wildlife Service, and Western Area Power Administration, pursuant to 36 CFR § 800.2(c)4, and these agencies have been invited to be Concurring Parties to this Agreement; and

WHEREAS, the Federal Railroad Administration and U.S. Fish and Wildlife Service have declined to participate in 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, Chemehuevi Indian Tribe, Cocopah Indian Tribe, Colorado River

Indian Tribes, Fort McDowell Yavapai Nation, Fort Mojave Indian Tribe, Fort Yuma Quechan Tribe, Gila River Indian Community, Havasupai Tribe, Hopi Tribe, Hualapai Tribe, Kaibab Band of Paiute Indians, Moapa Band of Paiute Indians, Navajo Nation, Pascua Yaqui Tribe, Pueblo of Zuni, Salt River Pima-Maricopa Indian Community, San Carlos Apache Tribe, San Juan Southern Paiute Tribe, Tohono O'odham Nation, Tonto Apache Tribe, White Mountain Apache Tribe, Yavapai-Apache Nation, and Yavapai-Prescott Indian Tribe; 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 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 Pueblo of Zuni and the Yavapai-Prescott Indian Tribe have requested the opportunity to participate in the development of this Agreement, and FHWA has invited these tribes to sign this Agreement as Concurring Parties; and

WHEREAS, the Hopi Tribe has requested the opportunity to participate in development of this Agreement and wishes to continue consultation, but does not wish to be a party to the Agreement; and

WHEREAS, the Colorado River Indian Tribes have declined participation in this Agreement but maintain the ability to participate in future negotiations, comment on drafts of future Tier 2 agreement documents, and continue to participate in consultation; and

WHEREAS, the Hualapai Tribe and Navajo Nation have declined participation in this Agreement, but want to continue to participate in consultation; and

WHEREAS, the Cocopah Indian Tribe, Kaibab Band of Paiute Indians, and San Carlos Apache Tribe have declined to participate in consultation, deferring to Tribes nearer to the Undertaking; and

WHEREAS, the White Mountain Apache Tribe has declined participation in both the Agreement and further consultation; 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 Air National Guard, Arizona Department of Corrections (ADOC), Arizona Department of Emergency and Military Affairs / Army National Guard, Arizona Game and Fish Department, Arizona State Land Department, and Arizona State Parks and Trails, and has invited them to sign this Agreement as Concurring Parties; and

WHEREAS, ADOC has declined to participate in this Agreement or consultation; and

WHEREAS, FHWA has consulted, pursuant to 36 CFR § 800.2(c)(3), with the following municipalities: City of Buckeye, City of Casa Grande, City of Eloy, City of Goodyear, City of Maricopa, City of Nogales, City of South Tucson, City of Surprise, City of Tucson, Town of Gila Bend, Town of Marana, Town of Oro Valley, Town of Sahuarita, and Town of Wickenburg, and has invited them to sign this Agreement as Concurring Parties; and

WHEREAS, the Town of Oro Valley has declined to participate in this Agreement or consultation; and

WHEREAS, FHWA has consulted, pursuant to 36 CFR § 800.2(c)(3), with the following county agencies: Flood Control District of Maricopa County, Maricopa County Department of Transportation, Pima County, Pima County Regional Flood Control District, Pinal County, Pinal County Flood Control District, Santa Cruz County, Santa Cruz County Flood Control District, Yavapai County, and Yavapai County Flood Control District, and has invited them to sign this Agreement as Concurring Parties; and

WHEREAS, the Pima County Regional Flood Control District, Pinal County Flood Control District, and Yavapai County Flood Control District have declined to participate in this Agreement or consultation; and

WHEREAS, FHWA has consulted, pursuant to 36 CFR § 800.2(c)(5) with Archaeology Southwest, Arizona Public Service, Burlington Northern Santa Fe Railway, Buckeye Water Conservation and Drainage District, Central Arizona Irrigation and Drainage District, Central

Arizona Water Conservation District, Cortaro-Marana Irrigation District, Green Reservoir Flood Control District, Maricopa Flood Control District, Maricopa-Stanfield Irrigation and Drainage District, Roosevelt Irrigation District, Roosevelt Water Conservation District, Salt River Project, Silverbell Irrigation and Drainage District, Trico Electric Cooperative, Tucson Electric Power (a UNS Energy Corporation), Tucson Historic Preservation Foundation, and Union Pacific Railroad, and has invited them to sign this Agreement as Concurring Parties; and

WHEREAS, Archaeology Southwest, the Central Arizona Water Conservation District, Green Reservoir Flood Control District, Roosevelt Irrigation District, and Tucson Electric Power have declined participation in this Agreement, but wish to continue to participate in consultation; and

WHEREAS, the Roosevelt Water Conservation District has declined to participate in this Agreement or consultation; 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 Class I cultural resource inventories for the Tier 1 review, as reported in *Class I Overview for Tier 1 Planning of Interstate 11, Nogales to Wickenburg, Arizona: Archaeological Sites and Historic Structures* (Mitchell et al. 2018), *Class I Overview for Tier 1 Planning of Interstate 11, Nogales to Wickenburg, Arizona: Historic Districts and Buildings* (Ryden et al. 2018), *Class I Overview for Tier 1 Planning of Interstate 11, Nogales to Wickenburg, Arizona: Archaeological Sites and Historic Structures Supplement* (Aguila et al. 2020), and *Class I Overview for Tier 1 Planning of Interstate 11, Nogales to Wickenburg, Arizona: Historic Districts and Buildings Supplement* (Ryden and Ryden 2020). SHPO subsequently concurred with the adequacy of these reports, 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 inventories 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, the Tumacácori Museum, a component of the Tumacácori National Monument and Tumacácori National Historic Park, has been designated a National Historic Landmark,

administered by the National Park Service, and the legal boundary of this property intersects with each of the build corridor alternatives under consideration; 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. FHWA and ADOT have acknowledged such significance and agree that one such site, AZ T:14:115(ASM), warrants preservation in place. Site AZ T:14:115(ASM), known colloquially as the Rainbow Valley Petroglyph Site, is a prehistoric Huhugam site with artifact caches, trail segments, and petroglyphs. It is considered culturally significant to the Salt River Pima-Maricopa Indian Community, Ak-chin Indian Community, and Tohono O’odham Nation. In a letter dated June 2, 2021, the Gila River Indian Community identified the site as a traditional cultural property, *sensu* National Register Bulletin 38 (*Guidelines for Evaluating and Documenting Traditional Cultural Properties*). ADOT has committed to the avoidance of adverse effects upon AZ T:14:115(ASM), in association with this Undertaking; and

WHEREAS, the Undertaking may cause effects to historic canals which have been or may be determined eligible for listing in the NRHP pursuant to 36 CFR §§ 60.4(a), (b), and/or (c). FHWA and ADOT have acknowledged the important roles played by such canals in state and local history, and agree that these structures may warrant preservation in place. Thus, ADOT has committed to the avoidance of adverse effects upon such canals, in association with this Undertaking, and in such instances as the consulting party or parties with jurisdiction over said structures request avoidance; 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, 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, FHWA, ACHP, 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, 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 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 Tier 1 review.
- C. 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 II.D, and IV.a.6).

II. ADOT ROLES AND RESPONSIBILITIES

- A. ADOT shall notify all consulting parties of the roles of ADOT and FHWA for:
 - 1. The I-11 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 I-11 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 engage in government-to-government consultation with the tribe in question pursuant to 23 USC § 326, sections II.B—C of the 326 MOU, 23 USC § 327, and section 3.2.3 of the 327 MOU. All other

elements of Section 106 consultation during Tier 2 shall be the responsibility of ADOT.

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. (Herein, “cultural resources” means locations, landscapes, sites, districts, features, and objects that were made, modified, or used by humans and which are over 50 years in age).
 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(3)—(5) and 800.3(f), ADOT shall, for all Tier 2 projects subject to this Agreement, invite and facilitate Section 106 consultation with 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 demonstrated 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, at which time ADOT will inform FHWA. FHWA shall then engage in government-to-government consultation responsibilities with the tribe in question pursuant to 23 USC § 326, sections II.B—C of the 326 MOU, 23 USC § 327, and section 3.2.3 of the 327 MOU. All other elements of Section 106 consultation during Tier 2 shall be the responsibility of ADOT.

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 ACHP and 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. 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.
7. 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 environmental compliance procedures 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 of ADOT's project-specific website: I11Study.com.
 - 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[1][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 *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. ADOT may compile both archaeological and built-environment data in a single report if:
- (1) The single report constitutes a Survey Report Summary Form (SRSF) completed in accordance with SHPO’s Guidance Point 10 (*Use and Submittal of the Survey Report Summary Form*); or
 - (2) The single report is not an SRSF but describes an inventory wherein:
 - i. No cultural resources are encountered; or
 - ii. Only isolated occurrences (IOs) are encountered; or
 - iii. Only HIS are encountered; or
 - iv. Only IOs and HIS are encountered; or
 - v. Fewer than five cultural resources are encountered, not including IOs and HIS; or
 - vi. The inventoried area is 10 acres or less; or

- vii. Upon written but informal concurrence from SHPO or THPO, as applicable, land-managing agencies with jurisdiction over the inventoried area, and ASM.
- 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 (HPTPs) 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—8.

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[1][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 a Section 106 consultation letter, 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—8.
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][1]), 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.
 - (4) If Attachment 6 to the statewide PA is implemented *in lieu* of a project-specific MOA or PA, and if there is discordance between Attachment 6 and this Agreement, then the stipulations of this Agreement shall be followed.
- 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 shall be Signatories to the applicable Tier 2 Section 106 agreement document.
- f. For any project-specific MOA or PA developed during Tier 2, all public agencies with permitting jurisdiction or historic property preservation responsibilities, other than those described in Stipulation IV.H.1.e, shall be invited to participate in the

applicable Tier 2 Section 106 agreement document as an Invited Signatory.

- g. 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.
- h. 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. 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. All Tier 2 projects shall respect the commitment to avoid adverse effects to AZ T:14:115(ASM), known colloquially as the Rainbow Valley Petroglyph Site.
- f. All Tier 2 projects shall respect the commitment to avoid adverse effects to historic canals that are listed in or determined eligible for the NRHP pursuant to criteria A, B, or C (36 CFR §§ 60.4[a], [b], or [c]), if so requested by a consulting party having lawful jurisdiction. Avoidance, in such cases, shall be by means of spanning the historic properties in their entirety.
- g. *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.
- L. If inadequate funding prevents ADOT from implementing the stipulations of this Agreement, ADOT may terminate the Agreement in accordance with Stipulation VIII.A, below. ADOT would be subject to the provisions of Section 106 of the NHPA, as amended, and its implementing regulations for any I-11 Tier 2 project initiated thereafter.

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 specified in paragraphs A—C of this stipulation that they may receive as a result of their participation in this Agreement. Such information is presumed 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)(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—C). 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 objectionable 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. ADOT would be subject to Section 106 of the NHPA, as amended, and its implementing regulations for any I-11 Tier 2 project initiated thereafter.
- 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, ACHP, and SHPO, its concurrent signing by ADOT, 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, that FHWA has taken into account the effects of the Undertaking on historic properties during Tier 1, and that ADOT has taken into account the effects of the Undertaking on historic properties during Tier 2.

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SIGNATORIES

Federal Highway Administration

Signature: _____ Date: _____

Printed Name: _____ Title: _____

Arizona State Historic Preservation Office

Signature: _____ Date: _____

Printed Name: Kathryn Leonard _____ Title: State Historic Preservation Officer _____

Advisory Council on Historic Preservation

Signature: _____ Date: _____

Printed Name: Reid J. Nelson _____ Title: Acting Executive Director

INVITED SIGNATORY

Arizona Department of Transportation

Signature: _____ Date: _____

Printed Name: _____ Title: _____

INVITED SIGNATORY

Tohono O'Odham Nation

Signature: _____ Date: _____

Printed Name: _____ Title: _____

INVITED SIGNATORY

Arizona State Museum

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Ak-Chin Indian Community

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Archaeology Southwest

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Arizona Public Service

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Arizona Air National Guard

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Arizona Game and Fish Department

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Arizona State Land Department

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Arizona State Parks and Trails

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

BNSF Railroad Company

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Buckeye Water Conservation and Drainage District

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Bureau of Indian Affairs, San Carlos Irrigation Project

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Bureau of Indian Affairs, Western Region

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Bureau of Land Management, Arizona State Office

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Bureau of Land Management, Hassayampa Field Office

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Bureau of Land Management, Lower Sonoran Field Office

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Bureau of Land Management, Tucson Field Office

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Bureau of Reclamation

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Central Arizona Irrigation and Drainage District

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Chemehuevi Indian Tribe

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

City of Buckeye

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

City of Casa Grande

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

City of Eloy

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

City of Goodyear

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

City of Maricopa

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

City of Nogales

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

City of South Tucson

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

City of Surprise

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

City of Tucson

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Cortaro-Marana Irrigation District

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Federal Aviation Administration, Phoenix Airports District Office

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Federal Aviation Administration, West Coast Headquarters

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Flood Control District of Maricopa County

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Fort McDowell Yavapai Nation

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Fort Mojave Indian Tribe

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Fort Yuma-Quechan Tribe

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Gila River Indian Community

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Havasupai Tribe

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Maricopa County Department of Transportation

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Maricopa Flood Control District

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Maricopa-Stanfield Irrigation and Drainage District

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Moapa Band of Paiute Indians

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

National Park Service, Saguaro National Park

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Pascua Yaqui Tribe

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Pima County

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Pinal County

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Pueblo of Zuni

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Salt River Pima-Maricopa Indian Community

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Salt River Project

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

San Juan Southern Paiute Tribe

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Santa Cruz County

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Santa Cruz County Flood Control District

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Silverbell Irrigation and Drainage District

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Tonto Apache Tribe

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Town of Gila Bend

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Town of Marana

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Town of Sahuarita

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Town of Wickenburg

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Trico Electric Cooperative

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Tucson Historic Preservation Foundation

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Union Pacific Railroad

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

U.S. Air Force, Davis-Monthan Air Force Base

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

U.S. Air Force, Luke Air Force Base

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

U.S. Army Corps of Engineers

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

U.S. Customs and Border Protection

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

U.S. Forest Service, Coronado National Forest

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Western Area Power Administration

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Yavapai-Apache Nation

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Yavapai County

Signature: _____ Date: _____

Printed Name: _____ Title: _____

CONCURRING PARTY

Yavapai-Prescott Indian Tribe

Signature: _____ Date: _____

Printed Name: _____ Title: _____

Attachment C: 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 (April 16, 2019)