

Appendix G
Section 106
Memorandum of
Agreement (MOA)

**MEMORANDUM OF AGREEMENT
AMONG
THE SURFACE TRANSPORTATION BOARD,
THE FEDERAL RAILROAD ADMINISTRATION,
THE ARIZONA STATE HISTORIC PRESERVATION OFFICE,
AND
ARIZONA EASTERN RAILWAY**

Regarding

**ARIZONA EASTERN RAILWAY CONSTRUCTION AND OPERATION OF THE
PROPOSED RAILROAD IN GRAHAM COUNTY, ARIZONA**

February 2, 2009

WHEREAS, the Surface Transportation Board (STB) administers the Interstate Commerce Act, as amended, and in connection with rail construction projects, is responsible for complying with the National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA), 16 United States Code (U.S.C.) § 470f; and

WHEREAS, Arizona Eastern Railway (AZER) filed a petition with the Board on August 4, 2006, in Finance Docket No. 34836 (the Undertaking) requesting an exemption from 49 U.S.C. § 10901 seeking authority to construct and operate approximately 12 miles of a new rail line, beginning at Milepost 1133.5 near Safford, Arizona, and terminating at the Phelps Dodge FreeportMcMoRan Mine (the Mine) in Graham County, Arizona. The proposed rail line would connect the Mine with an existing 113.5-mile AZER line that operates between Miami, Arizona, and Bowie, Arizona; and

WHEREAS, STB has defined the Undertaking's area of potential effects (APE) as a 500-foot-wide, approximately 12-mile corridor encompassing approximately 750 acres in Sections 5, 8, 9, 10, 14, 15, 23, 26, 35, and 36 of Township 6 South, Range 26 East, and Sections 1, 2, 11, 12, 13, 14, 23, and 24, Township 7 South, Range 26 East (Gila and Salt River Baseline and Meridian), in Graham County, Arizona, as depicted in Attachment A; and

WHEREAS, STB has determined that the Undertaking may have an adverse effect on six (6) historic properties, designated with Arizona State Museum (ASM) archaeological site numbers AZ CC:2:172(ASM), AZ CC:2:361(ASM), AZ CC:2:377(ASM), AZ CC:2:378(ASM), AZ CC:2:379(ASM), and AZ CC:2:380(ASM), which are eligible for listing in the National Register of Historic Places (NRHP), and has the potential to adversely affect four (4) sites, designated with ASM archaeological site numbers AZ CC:2:360(ASM), AZ CC:2:362(ASM), AZ CC:2:363(ASM), and AZ CC:2:364(ASM), and has consulted with the Arizona State Historic Preservation Office (SHPO) and the Advisory Council on Historic Preservation (Council) pursuant to 36 C.F.R. part 800, of the regulations implementing Section 106 of the NHPA;

WHEREAS, AZER is considering filing an application with the Federal Railroad Administration (FRA) under the Railroad Rehabilitation and Improvement Financing Program (45 U.S.C. § 821 et seq) seeking a loan to fund construction of the proposed rail line.

WHEREAS, the SHPO is authorized to enter into this Memorandum of Agreement (MOA) in order to fulfill its role of advising and assisting Federal agencies in carrying out their Section 106 responsibilities pursuant to Sections 101 and 106 of the NHPA and 36 CFR § 800.2(c)(1)(i) and 800.6(b); and

WHEREAS, the SHPO is authorized to advise and assist Federal and state agencies in carrying out their historic preservation responsibilities and cooperate with these agencies under A.R.S. § 41-511.04(D)(4); and

WHEREAS, the Council has elected not to participate in this MOA; and

WHEREAS, STB has invited AZER to participate in the MOA as an invited Signatory; and

WHEREAS, STB has consulted with and invited 10 Federally recognized Tribes¹ to participate as Concurring Parties² in accordance with 36 CFR § 800.2 (c)(2)(B)(ii), and where to date, the Hopi Tribe and the Gila River Indian Community have asked to participate in this process; and

WHEREAS, STB has invited the U.S. Army Corps of Engineers to participate in this process as a Concurring Party; and

WHEREAS, STB, as lead agency, and FRA, as cooperating agency, have prepared a Draft Environmental Assessment (EA), *Finance Docket No. 34836 Arizona Eastern Railway – Construction and Operation Exemption – In Graham County, AZ*, in which two alternatives known as the Proposed Action Alternative and the No-Action Alternative were assessed; and

WHEREAS, the EA identified the execution of the MOA and the recommendations of the Historic Properties Treatment Plan as the appropriate mitigation measure to address the impacts of the Proposed Action on historic properties and other cultural resources; and

¹ The Tribes that were consulted and asked to participate in this project include: the Ak-Chin Indian Community Council; the Salt River Pima-Maricopa Indian Community; the San Carlos Apache Tribal Council; the Hopi Tribe; the Pueblo of Zuni; the Fort Sill Apache Tribe; the Gila River Indian Community; the Tohono O'odham Nation; the Mescalero Apache Tribe; and the White Mountain Apache Tribe. Of these Tribes, the Hopi Tribe and the Gila River Indian Community have asked to participate in this process.

² Parties who have participated in the consultations but do not have responsibilities under the MOA may be invited to sign as concurring parties. If a party who was invited to sign or concur in the agreement declines to sign, the agreement will still go into effect once the signatories have executed the document (see 36 CFR 800.6).

NOW, THEREFORE, STB, FRA, the SHPO, and AZER (hereafter collectively, the Signatories) agree that the Undertaking shall be implemented in accordance with the following stipulations in order to take into account the effect of the Undertaking on historic properties.

STIPULATIONS

The STB shall ensure that the following stipulations are carried out, and that no excavation or disturbance of a historic property occurs within the approved five hundred feet APE boundaries prior to the following stipulations being implemented.

I. IMPLEMENTATION OF THE HISTORIC PROPERTIES TREATMENT PLAN

Prior to construction, AZER will retain qualified personnel as defined in Stipulation VIII of this Agreement. The STB will ensure that the work implemented by the qualified personnel will be conducted in compliance with the approved Historic Properties Treatment Plan (HPTP), entitled *Historic Properties Treatment Plan for Historic Properties Affected by the Proposed Arizona Eastern Railroad Extension*, dated September 26, 2008, and amended on January 6, 2009. The HPTP, which is appended to this document, specifies and directs implementation of agreed-upon mitigation measures sufficient to resolve adverse effects to the six (6) historic properties and the (4) potentially historic properties affected by the Undertaking.

II. DRAFT REPORT REVIEW

AZER will develop draft technical reports resulting from Stipulation I and distribute the reports to STB. STB will distribute the reports for review and comment to FRA, the SHPO and Concurring Parties. The reviewers shall have 20 days from receipt of the draft Preliminary Report to respond to STB with comments. The reviewers shall have 30 days from receipt of the draft Data Recovery Report to respond to STB with comments. STB shall ensure that the reports are finalized to address the comments of the reviewers. Failure to respond by any party within the comment period shall not prohibit the STB from finalizing said documents.

III. TREATMENT OF HUMAN REMAINS

Should any human remains and associated funerary objects be discovered during the implementation of cultural resources studies or during construction of the Undertaking, they will be treated pursuant to the requirements of A.R.S. § 41-865 and consistent with the Council's "Policy Statement Regarding the Treatment of Burial Sites, Human Remains and Funerary Objects."

IV. UNANTICIPATED DISCOVERY OF HISTORIC PROPERTIES

AZER shall immediately notify STB if previously unrecorded archaeological features or materials including, but not limited to human remains and associated funerary and ceremonial objects are discovered during ground-disturbing activities. In the event of a discovery, AZER shall immediately

halt those activities and take steps to ensure that the area of the discovery is protected and secured as specified in the HPTP. STB will notify all Signatories and Concurring Parties within forty-eight (48) hours of the discovery. The notification shall describe the actions proposed by the STB to resolve the adverse effects. All Signatories and Concurring Parties will respond to STB within forty-eight (48) hours of the notification. STB shall take all recommendations provided by Signatories and Concurring Parties into account. STB shall ensure the approved treatment plan is implemented by a qualified consultant, in accordance with Stipulation VIII, before AZER resumes ground-disturbing activities.

V. CURATION

AZER shall be responsible for the curation of all recovered materials and associated documentation (e.g., field notes, maps, drawings, photographs) resulting from the implementation of this MOA in accordance with 36 C.F.R. part 79 and ASM's practices and policies except where an alternative plan for disposition of human remains is provided in the HPTP or Stipulation IV.

VI. CONFIDENTIALITY

The nature and location of archaeological sites discussed in the HPTP shall be maintained as confidential, with access limited to the STB, FRA, the SHPO, and AZER involved in the planning and reviewing of the Undertaking, and qualified researchers consistent with § 304 of the NHPA.

VII. REPORT DISTRIBUTION

Except as limited by Stipulation VI, STB shall ensure that all final reports resulting from actions pursuant to this MOA are provided to the Signatories and Concurring Parties.

VIII. PROFESSIONAL QUALIFICATIONS

STB shall ensure that all historic preservation work carried out pursuant to this MOA is carried out by, or under the supervision of, a person or persons meeting the Secretary of the Interior's Professional Qualification Standards (48 F.R. 44738-44739).

IX. CONFLICT OF INTEREST

The SHPO may terminate this MOA upon finding that an Arizona State Parks employee who was significantly involved in the creation of this MOA is, within three (3) years after its execution, an employee or consultant of any other party to the MOA.

X. EQUAL OPPORTUNITY AND NONDISCRIMINATION

The Signatories agree to comply with all applicable federal and state laws relating to equal opportunity and nondiscrimination.

XI. NONAVAILABILITY OF FUNDS

This MOA shall be subject to available funding, and nothing in this MOA shall bind the State of Arizona to expenditures in excess of funds authorized and appropriated for the purposes outlined in this MOA.

XII. DISPUTE RESOLUTION

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

- A. Forward all documentation relevant to the dispute, including the STB's proposed resolution, to the Council. The Council shall provide STB with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, STB shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the Council, Signatories, and Concurring Parties, and provide them with a copy of this written response. STB will then proceed according to its final decision.
- B. If the Council does not provide its advice regarding the dispute within the thirty (30) day time period, STB may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, STB shall prepare a written response that takes into account any timely comments regarding the dispute from the Signatories and Concurring Parties to the MOA, and provide them and the Council with a copy of such written response.
- C. STB's responsibility to carry out all other actions subject to the terms of this MOA that are not the subject of the dispute remain unchanged.

XIII. ALTERNATIVE DISPUTE RESOLUTION

The Signatories agree to consider use of alternative dispute-resolution procedures authorized by statutes, regulations, and court rules, including, but not limited to, 5 U.S.C. 575 and A.R.S. § 12-1518, where appropriate.

XIV. RECORD RETENTION

All books, accounts, reports, files, and other records of the SHPO and the regulatory project files and technical reports of the STB relating to this MOA which are, and determined releasable under the

Freedom of Information Act shall be subject, at all reasonable times, to inspection and audit by the State of Arizona for five (5) years after completion of the project.

XV. AMENDMENT OF THIS AGREEMENT

STB, FRA, the SHPO, or AZER may request that this MOA be amended according to 36 C.F.R. § 800.6(c)(7). Any amendment will be effective on the date an amended agreement is signed by the Signatories. The STB will ensure that a copy of any executed agreement is filed with the Council.

XVI. TERMINATION

In the event the Signatories determine the terms of the MOA cannot be or are not being carried out, the Signatories shall consult to seek amendment of the MOA. If the MOA is not amended, the STB or the SHPO may terminate it pursuant to 36 CFR 800.6(c)(8). The STB will either execute an MOA under 36 CFR 800.6(c)(1) or request the comments of the Council pursuant to 36 CFR 800.7(a).

XVII. DURATION

This MOA shall remain in effect for ten (10) years from the date of its execution by the Signatories, at which time the Board will notify the parties within three months of its impending expiration and request to extend it for a specific time period. All signatories must respond affirmatively prior to the expiration for the MOA to remain in effect.

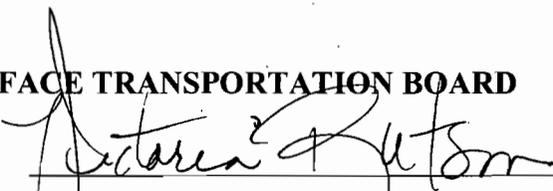
XVIII. EFFECTIVE DATE

This MOA shall become effective after the date of the last Signatory signature and subsequent filing of the MOA with the Council.

IN WITNESS WHEREOF, execution of this MOA by the SHPO, STB, FRA, and AZER and subsequent implementation of its terms, evidence that the STB has taken into account the effects of the Undertaking on historic properties and that the STB has satisfied its responsibilities under Section 106 of the NHPA and applicable implementing regulations.

SIGNATORY PARTIES:

SURFACE TRANSPORTATION BOARD

By: 
Name: Victoria Rutson
Title: Chief, Section of Environmental Analysis

Date: Feb. 2, 2009

FEDERAL RAILROAD ADMINISTRATION

By: Mark E. Yachimetz Date: 2/9/09
Name: Mark E. Yachimetz
Title: Associate Administrator Railroad Dev.

ARIZONA STATE HISTORIC PRESERVATION OFFICE

By: James Garrison Date: 3/10/09
Name: James Garrison
Title: Arizona State Historic Preservation Officer

ARIZONA EASTERN RAILWAY

By: Jeffrey J. Barker Date: 2/24/09
Name: JEFFREY J. BARKER
Title: VICE PRESIDENT - SPECIAL PROJECTS

CONCURRING PARTIES:

GILA RIVER INDIAN COMMUNITY

By: _____ Date: _____
Name: _____
Title: _____

HOPI TRIBE

By: _____ Date: _____
Name: _____
Title: _____

U.S. ARMY CORPS OF ENGINEERS

By: _____ Date: _____

Name: David J. Castanon

Title: Chief, Regulatory Division