

E1-16256
FD-34836
DTW

**MEMORANDUM OF AGREEMENT
BETWEEN
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**

October 2008

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 effect (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 will have an adverse effect on ten (10) historic properties, designated with Arizona State Museum (ASM) archaeological numbers [2] Z CC:2:172 (ASM), AZ CC:2: 360 (ASM), AZ CC:2:361 (ASM), AZ CC:2:362 (ASM), AZ CC:2:363 (ASM), AZ CC:2:364 (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 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; [3] [4]

Summary of Comments on FRAs Comments on the MOA 12-5-08.pdf

Page: 1

Sequence number: 1
Author: wendy.messenger
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why are these 10 sites not discussed in the 4f section of the Draft EA (no historical sites are mentioned in the section. There isn't really enough information as to the type of adverse effect in the cultural section of the DEA for FRA to make adequate determinations of 4f responsibilities (have avoidance alternatives been considered?))

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T (next clause)
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 new rails 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 consulted with and invited 10¹ Federally² 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 (hereafter collectively, the Concurring Parties); 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 the⁴ Federal Railroad Administration (FRA)³ 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 development of an MOA as the appropriate mitigation measure to address the impacts of the Proposed Action on historic properties and other cultural resources; and

6 STIPULATIONS **5**

The STB shall ensure that no excavation or construction of a historic property occurs within the approved 500-foot APE boundaries prior to the following stipulations being implemented.

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).

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Author: wendy.messenger
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 Stimulations should be moved to AFTER last WHEREAS clause, before Section I. Implementation...

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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.

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. The HPTP, which is appended to this report, consists of a statement of the archaeological fieldwork and analysis that will be carried out at the 10 historic properties affected by the Undertaking.

II. DRAFT REPORT REVIEW

AZER will submit draft technical reports resulting from Stipulation I to STB. STB will distribute the reports for review and comment to FRA, the SHPO, and Concurring Parties ~~per Stipulation VII.~~ 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 Native American 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." STB shall ensure that construction and data recovery excavations do not occur prior to such requirements being satisfied.

IV. UNANTICIPATED DISCOVERY OF HISTORIC PROPERTIES

AZER shall immediately notify STB if a previously unrecorded historic property is 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 shall ensure the procedures for an unexpected discovery of a historic property outlined in 36 C.F.R. § 800.13 are carried out. Pursuant to 36 C.F.R. § 800.13, the STB will notify FRA, the SHPO, and the 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. The SHPO shall respond within forty-eight (48) hours of the notification. The STB also shall ask the

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to implement the Historic Properties Treatment Plan (HPTP)

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Concurring Parties to respond within forty-eight (48) hours of the notification pursuant to 36 C.F.R. § 800.13. STB shall take their recommendations into account pursuant to 36 C.F.R. § 800.13(b). 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 in consultation with STB and the SHPO, 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, and the SHPO 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 FRA, the SHPO, Concurring Parties, and other interested persons.

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, ~~at any time the MOA is in effect but no later than~~ ¹three (3) years after its execution, an employee or consultant of any other party to the MOA.

X. EQUAL OPPORTUNITY AND NONDISCRIMINATION


The Signatories and Concurring Parties 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 ²state to ³

Page: 4

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Author: wendy.messenger
Subject: Note
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 "State" is not defined in this MOA - they are not a signing party. Need to be more specific with what is meant by "state" - governors office, agencies, etc.

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Author: wendy.messenger
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expenditures in excess of funds authorized and appropriated for the purposes outlined in this MOA.

XII. DISPUTE RESOLUTION

Should the SHPO object to the manner in which the terms of this MOA are implemented, the STB will consult with the SHPO to resolve the objection. If STB determines that the objection cannot be resolved, the STB shall forward all documentation relevant to the dispute, including the STB's proposed resolution to the Council for its assistance in resolving the dispute. In the event the Council provides timely advice and comments, the STB, prior to reaching a final decision on the dispute, shall prepare a written response that takes into account the recommendation or comments provided by the Council pertaining to the subject of the dispute, and provide the Council a copy of this written response. STB's responsibility to implement all stipulations of this MOA that are not the subject of the dispute shall remain unchanged.

XIII. ALTERNATIVE DISPUTE RESOLUTION

The Signatories agree to ~~engage in any~~ 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, ~~but only in circumstances where the Federal government consents to litigation in state court.~~ ¹²

XIV. RECORD RETENTION

All books, accounts, reports, files, and other records of the ³SHPO and the regulatory project files and technical reports of the STB relating to this MOA ⁵and which are determined releasable under the Freedom of Information ⁶Act shall be subject, at all reasonable times, to inspection and audit by the ⁹State for ¹⁰(5) years after the ⁸termination of this MOA.

XV. AMENDMENT OF THIS AGREEMENT

STB, FRA, and ¹¹the SHPO may request that this MOA be amended according to 36 C.F.R. § 800.6(c)(7). Any amendment shall be effective on the date an amended agreement is signed by the Signatories. The STB shall ensure that a copy of any executed agreement is filed with the Council.

XVI. TERMINATION

If any of the Signatories to this MOA determine that its terms will not or cannot be carried out, that party shall immediately consult with the other Signatories to attempt to develop an amendment per Stipulation XV. If within thirty (30) days an amendment cannot be reached, the Signatories may terminate the MOA upon written notification to all other Signatories. Once the MOA is terminated, and prior to work continuing on the Undertaking, the STB shall either (a) execute an MOA pursuant to 36 C.F.R. § 800.6, or (b) request, take into account, and respond to the comments of the Council under 36 C.F.R. § 800.7. The STB shall notify FRA, the SHPO, AZER, and Concurring Parties as to the course of action it will pursue.

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Author: wendy.messenger
Subject: Comment on Text
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T termination or the completion of the project? certainly not just termination. Does this fit with federal records retention schedules?

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Sequence number: 10
Author: wendy.messenger
Subject: Note
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 Same issue with "state" as previously stated

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Author: wendy.messenger
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Comments from page 5 continued on next page

expenditures in excess of funds authorized and appropriated for the purposes outlined in this MOA.

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Author: wendy.messenger
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y - Signatory (singular)

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a new

XVII. DURATION

This MOA will be null and void if its terms are not carried out within ten (10) years from the date of its execution. At such time, and prior to work continuing on the Undertaking, the STB shall either (a) execute an MOA pursuant to 36 C.F.R. § 800.6, or (b) request, take into account, and respond to the comments of the Council under 36 C.F.R. § 800.7. Prior to such time, STB may consult with FRA and the SHPO to reconsider the terms of the MOA and amend it in accordance with Stipulation XV. The STB shall notify FRA, the SHPO, AZER, and Concurring Parties as to the course of action it will pursue.

XVIII. EFFECTIVE DATE

This MOA shall become effective on the date of the last signature by the Signatories ³¹² and Concurring Parties.

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: _____ Date: _____
Name: Victoria Rutson
Title: Chief, Section of Environmental Analysis

FEDERAL RAILROAD ADMINISTRATION

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

ARIZONA STATE HISTORIC PRESERVATION OFFICE

By: _____ Date: _____
Name: James Garrison
Title: Arizona State Historic Preservation Officer

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Author: wendy.messenger
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concurring parties should not hold up the execution (see footnote #2) - and is not consistent with statement below regarding the execution

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ARIZONA EASTERN RAILWAY

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

CONCURRING PARTIES:

GILA RIVER INDIAN COMMUNITY

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

HOPI TRIBE

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

U.S. ARMY CORPS OF ENGINEERS

By: _____ Date: _____
Name: David J. Castanon Date: _____
Title: Chief, Regulatory Division Date: _____

This page contains no comments