SECOND AMENDED PROGRAMMATIC AGREEMENT AMONG THE FEDERAL HIGHWAY ADMINISTRATION, THE NEW MEXICO DEPARTMENT OF TRANSPORTATION, THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND THE NEW MEXICO STATE HISTORIC PRESERVATION OFFICER REGARDING IMPLEMENTATION OF THE FEDERAL-AID HIGHWAY PROGRAM IN NEW MEXICO

WHEREAS, the Federal Highway Administration (FHWA) proposes to administer its Transportation Program in New Mexico authorized by 23 U.S.C. 101 et seq. through the New Mexico Department of Transportation (NMDOT) (23 U.S.C. 315); and

WHEREAS, FHWA: (1) has determined that undertakings under the National Transportation Act and associated Programs may have an effect upon properties included in or eligible for inclusion in the National Register of Historic Places; (2) has consulted with the Advisory Council on Historic Preservation (ACHP) and the New Mexico State Historic Preservation Officer (SHPO), pursuant to Section 800.14(b) of the regulations (36 CFR 800 as amended) implementing Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470f); and (3) wishes to insure that NMDOT will conduct its programs in a manner consistent with the intent and purposes of 36 CFR 800; and

WHEREAS, the FHWA, NMDOT, SHPO, and ACHP share a common desire to develop a flexible, programmatic approach for implementing Section 106 of NHPA that will satisfactorily take into account the effects of FHWA undertakings on historic properties, provide for appropriate tribal consultation and public participation, minimize redundant documentation, and reduce the need for case-by-case review when historic properties will not be affected or when standard protocols and treatments can be applied; and

WHEREAS, the NMDOT and SHPO agree that it is in the public's benefit to streamline reviews of state undertakings following a common, integrated process since these agencies have responsibilities to preserve, protect, and minimize harm to cultural properties under the following New Mexico acts and their implementing regulations: the Cultural Properties Act of 1969, as amended (§18-6-1 through 18-6-17, NMSA 1978; New Mexico Administrative Code (NMAC) Title 4, Chapter 10, parts 3-8, 11, 14-18); the Cultural Properties Protection Act of 1993 (§18-6A-1 through 18-6A-6, NMSA 1978; 4.10.13 NMAC); and the Prehistoric and Historic Sites Preservation Act of 1978, as amended (§18-8-1 through 18-8-8, NMSA 1978; 4.10.12 NMAC); and

WHEREAS, FHWA recognizes that it has a unique legal relationship with Indian Tribes (Tribes) set forth in the Constitution of the United States, statutes, and court decisions, and that consultation with all Tribes must, therefore, recognize the government to government relationship between the federal government and the Tribes; and

WHEREAS, the FHWA and NMDOT initiate consultation as often as quarterly, or no less than a yearly basis, on all FHWA funded NMDOT projects, as shown in the NMDOT Statewide Transportation Improvement Program (STIP), with all Federally-recognized Tribes that have identified areas in New Mexico that might have traditional, cultural, or religious significance to those Tribes, pursuant to 36 CFR 800.2 and 36 CFR 800. 14(f); and

WHEREAS, FHWA and NMDOT are committed to the design of transportation systems that: (1) achieve a safe and efficient function appropriately placed within the New Mexico context; (2) avoid, minimize and mitigate adverse effects on historical and cultural resources; (3) recognize that investment in these historic, archaeological, and cultural resources is critical to New Mexico's continued growth and prosperity; and (4) respond to the needs of New Mexico communities and Indian Tribes; and

WHEREAS, FHWA, the ACHP, SHPO, and NMDOT aspire to engage in meaningful, long-term planning for the protection of historic properties and, toward that end, desire to: (1) develop a comprehensive and efficient process for all Section 106 undertakings; (2) simplify procedural requirements to the maximum extent possible; (3) and eliminate unnecessary paperwork; and

WHEREAS, the process for evaluating historic bridges in the NMDOT system is covered by a separate programmatic agreement, *Management and Preservation of NMDOT-Owned Historic Bridges* (Historic Bridge PA), executed by the FHWA, the ACHP, the NMDOT and the SHPO in 2014; and

WHEREAS, the parties to this Second Amended Programmatic Agreement executed an earlier Agreement on December 30, 2010, entitled: *First Amended Programmatic Agreement among the Federal Highway Administration, the New Mexico Department of Transportation, the Advisory Council on Historic Preservation, and the New Mexico State Historic Preservation Officer Regarding Implementation of the Federal-Aid Highway Program in New Mexico*. This Second Amended Agreement supersedes that earlier Agreement; and

NOW THEREFORE, the FHWA, ACHP, NMDOT and SHPO hereby agree that the review of FHWA undertakings shall be administered according to the following stipulations in order to satisfy FHWA's Section 106 responsibilities and to integrate, to the maximum extent feasible, the manner in which FHWA meets its historic preservation responsibilities with its other responsibilities under Federal and State statutory or regulatory authorities and policies.

STIPULATIONS

FHWA shall ensure that the following stipulations are carried out:

I. **Applicability and Scope.** This Agreement sets forth the process by which FHWA and NMDOT will meet their respective responsibilities for undertakings pursuant to Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. § 470f).

   A. *FHWA Responsibilities.* In compliance with its responsibilities under the NHPA, FHWA remains legally responsible for all findings and determinations made under this Agreement. As a condition of its award to NMDOT of any assistance under the Federal Aid Highway Program, FHWA will ensure that NMDOT fulfills its duties as specified in this PA and applicable ACHP standards and guidelines, and the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation (36 CFR Part 61), for undertakings subject to this Agreement. NMDOT, on behalf of FHWA, shall initiate consultation on individual projects with federal and state agencies, and tribal and local governments pursuant to 36 CFR 800.2(c)(2) and (3). NMDOT, on behalf of FHWA, will

ensure that all municipal, state, Indian and federal land managers that have land included within, or adjacent to, FHWA undertakings are copied on all records. Such public or Indian land managers shall also be invited to participate in consultations regarding individual undertakings.

B. *NMDOT Responsibilities*. NMDOT will ensure that all work carried out pursuant to this agreement, whether performed by NMDOT staff or consultants, is conducted under the supervision of individuals who meet the qualifications set forth in the Secretary of the Interior's Standards and Guidelines for Professional Qualifications (36 CFR Part 61), and for projects involving state land, New Mexico professional qualifications as listed in the NMSHPO Directory. NMDOT shall continue to employ a professional cultural resource staff consisting of a Cultural Resources Coordinator and other personnel that meet these qualifications.

C. *Local Government Responsibilities*. For local assistance program projects that are federally funded, FHWA will be the lead agency and will follow standard regulations in order to comply with Section 106. For local assistance projects that have state funding only, the local government is responsible for preparing and submitting the project consultation documentation to NMDOT for review. The local government will be responsible for making any necessary revisions and forwarding documentation to SHPO and for implementing protection, preservation or mitigation measures developed pursuant to this PA.

D. *Multi-Agency Undertakings*.

1) If an undertaking will affect lands administered by several different agencies or Indian Tribes within New Mexico and FHWA is the lead agency, FHWA will follow this PA for the entire undertaking if this is acceptable to the other agencies and Indian Tribes. Each land managing agency, however, is responsible for making determinations of National Register eligibility for resources it manages. If any other agency or tribal government objects to the application of this PA to lands they administer, then FHWA along with all the other consulting parties will negotiate and adhere to provisions in a project-specific PA or other agreement, or will follow the procedures contained within 36 CFR 800.

2) Where undertakings will affect lands administered by several different agencies within New Mexico and another federal agency is the lead, consultation procedures used by the lead federal agency will be followed. Each land managing agency will be responsible for determinations of National Register eligibility for the resources it manages.

3) Where undertakings will affect lands administered by several different agencies within New Mexico without FHWA or another federal agency taking the lead, NMDOT will follow this PA for lands under their jurisdiction. The NMDOT will indicate on its transmittal to SHPO that this is a multi-agency project submitted without a federal lead.

4) For large or multi-state undertakings, an attempt will be made to develop a

single PA which will have to be negotiated and accepted by all the SHPOs and agencies involved. If this occurs, a federal lead, if possible, will be identified for multi-state undertakings.

II. **General Requirements**. FHWA shall require that NMDOT carry out the requirements of 36 CFR 800 inclusive, all applicable ACHP standards and guidelines, or the requirements set forth in this Agreement, for all FHWA undertakings. FHWA will insure that NMDOT observes the following requirements.

A. *Standards and Guidelines*. The NMDOT has additional guidelines that address NMDOT specific resources and treatment (please see NMDOT website for most recent version), that meet the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation (36 CFR Part 61) and adopt, as well as supplement, the state of New Mexico's standards for cultural resources investigations (4.10.15 NMAC, *Standards for Survey*; 4.10.16, *Standards for Excavation and Test Excavation*; and 4.10.17 NMAC, *Standards for Monitoring*). The NMDOT Guidelines serve as the basis for findings and consultations under this Agreement. The NMDOT shall ensure that all cultural resource surveys, documentation and evaluation of cultural resources, and measures to mitigate adverse effects performed by NMDOT staff and consultants, conform to the most recent version of the NMDOT Guidelines. The NMDOT shall review and revise these guidelines as needed, through consultation with FHWA and SHPO.

B. *Professional Training*. FHWA and NMDOT will collaborate with SHPO in ensuring periodic training for NMDOT personnel and their consultants to facilitate implementation of this Agreement, to increase expertise in surveys, evaluation of historic properties, preparation of historic contexts, and other historic preservation topics of mutual interest.

C. *Heritage Preservation Initiatives*. To facilitate historic and archaeological preservation in New Mexico, NMDOT will promote progressive programs and activities of mutual interest to, and in consultation with, FHWA, SHPO, ACHP, Indian Tribes, local communities or other consulting parties. Heritage initiatives include but are not limited to publication of reports in the NMDOT Cultural Resources Technical Series; analysis and synthesis of past data accumulated through NMDOT/FHWA projects for professional or general audiences; enhanced web-based materials to promote public education initiatives; and development of treatment plans that include public education and/or special studies that advance heritage preservation.

D. *Annual Review Meetings*. On or before August 10th of each new state fiscal year, NMDOT shall meet with SHPO, or its representatives, and FHWA, to review upcoming projects (STIP),to update staff on any changes to federal or state regulations or guidance relating to work performed under this Agreement, and to evaluate the effectiveness of the Agreement. NMDOT will notify the ACHP about upcoming annual review meetings and invite ACHP participation. The ACHP may participate at its discretion.

E. *Annual Evaluation*. NMDOT, FHWA, and SHPO shall assess the effectiveness of the Agreement, and evaluate the quality of the resource identification and protection

activities carried out under the Agreement. Thereafter, evaluations shall take place annually on or before August 10th. At least 30 calendar days prior to the annual evaluation, NMDOT shall submit a report to FHWA, ACHP, and SHPO. This report shall include, but is not limited to the following:

1) descriptions of additions to Appendix A, Exempted Activities
2) areas considered so disturbed that no archeological inventory was required
3) circumstances when areas of effect were not intensively surveyed including projects covered by Categorical Exclusions and Determinations of National Environmental Policy Act Adequacy and a justification for why less than Class III survey was carried out,
4) post review discoveries,
5) the circumstances under which undertakings were approved in contradiction to the procedures contained in this PA,
6) actions taken to deal with emergency situations.
7) A discussion of any instances in which SHPO and FHWA and NMDOT disagreed on eligibility or effect.
8) The report shall also contain a narrative description of accomplishments, concerns, and recommendations regarding any changes to this Agreement or to the NMDOT Guidelines.

III. **Consultation with Indian Tribes**. The federal government has a unique legal relationship with Indian Tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with an Indian Tribe must, therefore, recognize the government-to-government relationship between the federal government and Indian Tribes. As such, FHWA shall initiate consultation or NMDOT may be authorized to initiate consultation. Upon receipt of a written request from any Indian Tribe or officially designated representative of an Indian Tribe, to consult with FHWA in lieu of, or in addition to, NMDOT, NMDOT shall forward the request to FHWA. When an Indian Tribe so requests, FHWA will consult with that Indian Tribe in coordination with NMDOT.

A. FHWA has requested that NMDOT provide assistance to FHWA in complying with Section 106 of the NHPA and the Act's revised implementing regulations as set forth in 36 CFR 800.2(c)(2), effective on August 5, 2004. These responsibilities will not be delegated to project sponsors including local governments, or NMDOT consultants.

B. FHWA and NMDOT are committed to ensuring that all Tribes with interests in New Mexico are identified and included in the consultation process. The NMDOT Environmental Development Section Native American Tribal Coordinator (NATC) will contact the Tribes identified on the list kept by the New Mexico Historic Preservation Division, listing, by county, Tribes with concerns in the state of New Mexico. The NATC will work with Tribes and the SHPO to confirm and update this list.

C. The FHWA and NMDOT shall ensure that Tribes have opportunities to identify concerns and participate as consulting parties in projects that are of interest to them. The NATC will continue to work proactively with Tribes, the SHPO, ACHP, and FHWA/NMDOT to ensure the consultation process is effective and efficient for all parties. The process by which the NATC will initiate consultation on FHWA/NMDOT

projects is detailed in Appendix B of this document. When an undertaking may affect a property identified by a Tribe as having traditional cultural or religious significance, through the process detailed in Appendix B or through other means, the NMDOT shall consult further with the Tribe.

D. The FHWA and NMDOT shall provide each Tribe with the opportunity to develop a programmatic agreement regarding the protocol for consultation among the agencies and the Tribe. The processes outlined in that programmatic agreement may supplement or replace the standard protocol included here as Appendix B.

IV. **Public Involvement.**

A. *Public Notification.* FHWA and the NMDOT Cultural Resources Coordinator shall, through opportunities afforded by the NMDOT project development process, seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking. NMDOT will develop and use NEPA public notification procedures including the opportunity for comment regarding cultural resources at Public Scoping Meetings, Public Information Meetings, and Public Hearings.

B. *Public Education.* FHWA and NMDOT, in collaboration with SHPO, shall include a public education and interpretation component in its undertakings whenever appropriate. If FHWA, NMDOT and/ or SHPO identifies a project that significantly contributes to the knowledge base of the prehistory or history of New Mexico as a result of data recovery/excavation, archival research, built environment documentation or oral history, NMDOT will share this information with the general public through outreach efforts that include but are not limited to site tours, brochures, portable exhibits, public presentations, popular publications and educational curricula modules. These efforts will be included as mitigation measures in treatment plans.

V. **Requirements for Project Review by FHWA and NMDOT.** For all FHWA undertakings reviewed pursuant to this Agreement, FHWA and NMDOT shall observe the following requirements:

A. *Exemptions.* Those categories of undertakings listed in Appendix A are exempt from further review or consultation. These include categories of undertakings for which the potential effects on historic properties are foreseeable and likely to be minimal. Appendix A may be revised or updated as needed by mutual written agreement of the FHWA, NMDOT and SHPO. Revisions will include consultation with Indian Tribes if the proposed exemptions have the potential to affect properties of traditional cultural and religious significance.

B. *Standard Review.* The FHWA and NMDOT shall carry out the review requirements of this Agreement on all classes of undertakings that have the potential to affect historic properties and are not specifically exempted from standard review (see Stipulation VI.).

These steps will be carried out in consultation with SHPO, Tribes and other consulting parties:

C. *Standard Treatment Protocols*. The FHWA and NMDOT, in consultation with the SHPO and the ACHP, may develop standard treatment or mitigation measures for certain types of properties where the mitigation approach or strategy is similar and repetitive. In such treatment protocols, the FHWA and NMDOT shall consult with Tribes if the proposed treatment has the potential to affect properties of interest to them, and with other parties that have a demonstrated interest in the class of historic properties. Upon mutual written agreement by the FHWA/NMDOT, the SHPO and ACHP, such standard treatments shall be appended to this Agreement and may be followed in lieu of standard case-by-case consultation for the specified class of properties.

D. *Schedules for Data Submission.*

1) No Historic Properties Affected (Negative Results or all effects to historic properties avoided). Inventory reports in which no cultural resources or only isolated occurrences are found, reports that document only sites found to be ineligible for listing in the National Register and reports in which all eligible historic properties are avoided to achieve a situation of No Historic Properties Affected will be submitted monthly to the SHPO.
    i) Monthly submittals shall be organized into batches so that FHWA, NMDOT, and multi-agency projects are separate. Each batch shall contain a summary that indicates whether the submittal is a FHWA project, a NMDOT project, or a multiagency project, the NMCRIS number of the report, the report title, report author, total number of archeological sites, total number of buildings or structures, and total number of acequias recorded during the project, along with a summary of the number of properties eligible, not eligible or undetermined.

2) No Adverse Effect and Adverse Effect. Inventory reports will be submitted to the SHPO as they are completed.

VI. **Standard Consultation**. For those projects not exempt from review or covered by standard treatments, FHWA and NMDOT shall implement the following process:

A. *Confidentiality*. In accordance with section 304 of the NHPA (16 USC 470 w-3), 36 CFR 800.11(c) , the FHWA and NMDOT shall withhold from public disclosure information about the location, character, or ownership of a historic property when disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious sites by practitioners.

B. *Consulting Parties*. In consultation with the SHPO, the FHWA/NMDOT will identify any other parties entitled to be consulting parties and invite them to participate in the section 106 process including, when appropriate, land managing agencies, local governments, Indian Tribes, and other individuals or organizations with a demonstrated interest in the undertaking or properties that may be affected by the

undertaking.

C. *Areas of Potential Effect (APEs).* The FHWA/NMDOT will be responsible for establishing the undertaking and defining the area of potential effect (APE). Prior to defining the APE, the NMDOT shall, on behalf of the FHWA, initiate consultation with appropriate tribal governments. The NMDOT shall identify and invite other parties (such as local governments) to participate in the consultation when appropriate. The FHWA and NMDOT shall consider the following guidance in determining APEs and may consult with SHPO on the APE of any undertaking.

1) Archaeological resources. The APE for archaeological resources will typically be limited to the highway right-of-way (existing right-of-way, and right-of-way proposed for acquisition). The APE will be extended beyond the right-of-way when necessary to evaluate the eligibility of a site or the potential effects of the undertaking on the site. In cases where a site is important in part based on its viewshed, (for example, a large pueblo that receives visitation and/or was developed for visitation), or an archaeological site with value as a traditional cultural property, the APE will be extended beyond the highway right-of-way as necessary to evaluate the eligibility of the property and the potential effects of the undertaking.

2) Historic Roads. The APE for potential historic roads-will typically extend 100 ft from the right-of-way edge so that properties and features associated with the historic road (e.g. motels, gas stations) are documented. Historic buildings and landscape features that extend beyond 100 ft, when directly associated with the historic road, will be included in the APE. The FHWA/NMDOT may deviate from this standard with agreement of the SHPO and other consulting parties.

3) Historic Buildings. The APE for historic buildings road improvement projects where the number of lanes or vertical change will not be increased will typically be 100 ft from the edge of the right-of-way to take into consideration the built environment and visual effects unless the undertaking may affect character-defining features or changes the setting of a listed or eligible individual property or historic district. Examples include the removal of a historic sidewalk in a historic district, the introduction of sidewalks into a historic district, or the removal of a fence or landscape feature to a historic property are changes in setting. The FHWA/NMDOT may deviate from this standard with agreement of the SHPO and other consulting parties.

4) For major investment projects that include the development of new alignments, additional traveling lanes, or significant changes in vertical or horizontal alignment, the minimum APE will normally be 500 feet from the edge of the right-of-way or as agreed to by NMDOT Environmental Development Section staff and the SHPO.

5) The APE for utility projects will be 50 feet, confined to the proposed construction area within the road ROW.

D. *Determination of the Appropriate Level of Identification.*

1) The NMDOT will be responsible for making a reasonable and good faith effort to conduct sufficient surveys and other studies necessary to identify all historic properties that may be affected by the undertaking.

2) The NMDOT on behalf of FHWA shall consult Tribes in order to determine if they have any knowledge of traditional cultural properties and other important cultural resources within the APE as described inStipulation III C and Appendix B.

3) When the NMDOT proposes to perform an intensive inventory of an undertaking's APE, no consultation with the SHPO regarding the level of inventory or extent of the survey will be required.

4) Based on existing inventory information, the NMDOT may determine that further inventory will not be necessary if previous inventory has been performed to current professional standards as defined by NMSHPO /NMDOT. Inventories more than 10 years old will be evaluated and considered for re-examination if they do not reflect current standards and knowledge levels.

5) When the NMDOT proposes to perform a sample, resource-type specific, or other less than intensive survey of the APE, the SHPO will be given an opportunity to comment on the proposed level, extent and design of inventory. The SHPO will provide comments within ten (10) calendar days of receipt of the NMDOT sample inventory design. The NMDOT will address SHPO comments in making a final determination of the design of the inventory.

E. *Determination of Eligibility.*

1) The NMDOT will evaluate levels of significance and recommend the eligibility of all properties identified in the APE for the undertaking for inclusion in the National Register of Historic Places. All cultural resources identified in the APE, including historic landscapes, cultural landscapes, and properties of religious and cultural importance to Indian Tribes, will be evaluated for their eligibility and integrity in accordance with the criteria for listing in the National Register of Historic Places. Isolated occurrences rarely meet the National Register criteria and only in exceptional situations will be evaluated for their eligibility.

2) When an undertaking has the potential to affect properties, the NMDOT shall make determinations of eligibility in consultation with the SHPO. The NMDOT may contact the SHPO concerning determinations of eligibility when assistance or additional perspectives relating to a specific eligibility determination is needed. When an undertaking may affect a property identified by an Indian Tribe as having traditional cultural or religious significance, the NMDOT shall consult

further with the Tribe on eligibility and effect.

3) Historic Bridges: the process for determinations of eligibility are covered in the separate programmatic agreement, *Management and Preservation of NMDOT-Owned Historic Bridges* (Historic Bridge PA), executed by the FHWA, the ACHP, the NMDOT and the SHPO in 2014.

4) The SHPO will monitor FHWA/NMDOT determinations of eligibility and report on the results to NMDOT, as needed, but no less than annually. NMDOT shall take SHPO comments into account on future determinations.

5) If FHWA/NMDOT and SHPO do not agree on the eligibility of a property or if the ACHP requests, the FHWA will obtain a formal determination of eligibility from the Secretary of the Interior pursuant to 36 CFR part 63.

6) The NMDOT will provide SHPO with maps clearly delineating surveyed resources and their associated National Register property boundaries on project plans and project maps. The information on these maps will be treated as confidential.

F. *Determination of Effect.* NMDOT shall provide copies of the survey or inventory report(s), related documents and effect and eligibility determinations to all consulting parties including land managing agencies, Indian Tribes and local governments, prior to submittal of effect determinations and documents to the SHPO. These parties will have up to thirty-days (30) to review and provide comments to FHWA. FHWA will take these comments into consideration in preparing future submittals to SHPO.

1) **No Historic Properties Affected.** NMDOT shall provide a list of the No Historic Properties Affected undertakings and submit this list along with the associated reports and documents to SHPO. Monthly submittals shall be organized into batches so that FHWA, NMDOT, and multi-agency projects are separate. The list shall group the undertakings and reports as detailed below.

a. ***No properties present.*** When the agreed-upon level of survey or inventory has been completed and the survey finds only isolated manifestations or no cultural resources:

i. NMDOT shall provide a list of the "No Properties Present" undertakings and submit this list along with the associated reports and documents to SHPO including a NMCRIS Information Abstract Form (NIAF), monthly.

ii. NMDOT shall notify consulting parties, if any, including Indian Tribes, and make the documentation available for public inspection prior to approving the undertaking.

iii. NMDOT may proceed with the undertaking following approval of the inventory report by the NMDOT Cultural Resources Bureau Manager.

iv. SHPO will review monthly submittals and, when necessary, provide comments to NMDOT on any disagreements on

effect. NMDOT shall take these comments into account on future submittals.

b. ***No eligible properties present.*** When the agreed-upon level of survey or inventory has been completed and no eligible properties are identified during the survey, NMDOT shall document the finding as "No Eligible Properties Present".
   i. NMDOT shall provide a list of "no historic properties affected" undertakings and submit this list along with the associated reports and documents to SHPO including a NMCRIS Information Abstract Form (NIAF), Laboratory of Anthropology (LA) site forms, Historic Cultural Properties Inventory (HCPI) forms monthly.
   ii. NMDOT may proceed with the undertaking following approval of the inventory report by the NMDOT Cultural Resources Coordinator.
   iii. SHPO will review monthly submittals, and provide comments to NMDOT on any disagreements on eligibility or effect. NMDOT shall take these comments into account on future submittals.

c. ***Eligible properties present but not affected.*** When the agreed-upon level of survey has been completed and eligible or unevaluated properties are present in the APE but are not affected by the undertaking, the NMDOT shall document the finding as " Eligible or Unevaluated Properties Present".
   i. NMDOT shall include these undertaking on the monthly list of "no historic properties affected" undertakings and submit this list along with the associated survey report, NIAF, LA and HCPI forms, and other associated documents or records to SHPO.
   ii. NMDOT may proceed with the undertaking following approval of the inventory report by the NMDOT Cultural Resources Bureau Manager.
   iii. SHPO will review monthly submittals and, when necessary, provide comments to NMDOT on any disagreements on eligibility or effect. NMDOT shall take these comments into account on future submittals.

d. ***Historic Bridges.*** The process for determinations of effect are covered by the 2014 Historic Bridges PA.

2) **Historic Properties Affected.** If the NMDOT determines that one or more historic properties may be affected by an undertaking, the NMDOT shall apply the criteria of adverse effect, 36 CFR Part 800.5(a)(1) to determine if the effect will be adverse.

   a. ***No Adverse Effect Finding.*** If the NMDOT determines that the

undertaking will not have an adverse effect on historic properties, it will notify SHPO and other consulting parties in writing. SHPO shall have twenty-one (21) calendar days from receipt of the NMDOT finding and supporting documentation. If the SHPO concurs with the finding, NMDOT may proceed with the undertaking, provided no other consulting party objects to the finding within 30 calendar days from receipt. If the SHPO objects to the NMDOT finding, SHPO will indicate the reasons for disagreement. The NMDOT, SHPO and any other consulting parties will consult further to resolve this matter, either by identifying new project alternatives that may result in a finding of no adverse effect on historic properties. If the SHPO or another consulting party continues to disagree with the finding, NMDOT, FHWA and SHPO will attempt to resolve the disagreement. If the objection cannot be resolved, the FHWA shall seek the views of the ACHP to resolve the objection.

b. ***Finding of Adverse Effect.*** If the FHWA/NMDOT finds that the undertaking will have an adverse effect on historic properties, the FHWA shall notify the ACHP and resolve adverse effects following the procedures in 36 CFR 800.6. For historic bridges, findings and resolution of adverse effects shall follow the 2014 Historic Bridges PA, unless the signatories agree to follow the procedures in 36 CFR 800.6 in lieu of the Historic Bridges PA.

VII. **Documentation**. Documentation assembled by the NMDOT Cultural Resources Bureau Manager, NMDOT staff, or consultants, to support findings under this Agreement shall be consistent with 36 CFR 800.11 and conform to the standards and guidelines in Stipulation II.A.

A. Scoping reports, corridor studies, environmental documents, and alternative alignment studies shall be included in the documentation, as appropriate.

B. NMDOT shall provide to SHPO copies of all identification, evaluation, treatment and data recovery reports, survey forms, digital survey information, and other relevant resource information as they are generated. All documentation will meet the standards of the New Mexico Cultural Resources Information System (NMCRIS).

C. Archaeology Planning and Research. FHWA and NMDOT shall provide for archaeological planning and research that includes, but is not limited to, appropriate care, access, and interpretation of data collections recovered from the above undertakings.

FHWA and NMDOT, in consultation with SHPO, will partner with other organizations that maintain or are responsible for New Mexico collections to assess needs, identify alternative solutions, and implement the most appropriate collections care, research, and interpretation program for New Mexico.

D. Curation. Archaeological research centers (curation facility) shall meet the federal curation standards set forth by the US Department of the Interior in 36 CFR 79.

VIII. **Agency Contacts and Review Schedules.**

A. FHWA, NMDOT and SHPO will each designate one person as their agency contact to coordinate projects and schedule priorities. The NMDOT and SHPO shall also designate an alternate contact person who can fulfill the same responsibility when the primary contact person is not available.

B. Review of all NMDOT submittals shall be completed within twenty-one (21) calendar days. For project-specific reviews, and after receipt of the FHWA/NMDOT findings and all of the supporting documentation, the SHPO will review NMDOT determinations of eligibility and effect, and provide written comments to the NMDOT within twenty-one (21) calendar days for projects other than exempted, or those qualifying for programmatic no historic properties affected determinations. NMDOT may ask for occasional emergency expedited reviews that will take less than twenty-one (21) days.

C. The SHPO shall contact the NMDOT as early as possible in the review process if circumstances prevent completion of a specific consultation within the agreed upon schedule. SHPO and the NMDOT shall develop a new schedule that accommodates the specific project complexity and situation.

IX. **Emergency Situations.**

A. FHWA shall address its historic preservation responsibilities in accordance with 36 CFR 800.12 emergencies and disasters involving immediate rescue and salvage operations conducted to preserve life or property such as necessitated by natural disaster or other catastrophic event.

B. When responding to a disaster or emergency declared by the President or governor, or to immediate threats to life or property, the FHWA will take emergency actions as needed for public safety, and will initiate consultation with the SHPO, ACHP, Native American tribal and local governments on potential effects to historic properties. Due to the emergency nature of the proposed undertakings, consultations will be expedited to 7 days.

D. Corrective measures initiated within 30 days after the disaster or emergency has been formally declared by state or federal officials, shall utilize the review process described in Section III, but with a shortened timeframe for participation by the SHPO, consulting parties, and the general public as time permits. Written notification of the emergency action being considered shall be provided to the SHPO, the legislative body of the Municipality and the Municipal Planning Commission. The notice shall be clearly and prominently marked as an emergency notification, and shall include a brief description of the significance of the resources involved, the nature and anticipated

effect of the emergency action on the resource(s), and the anticipated timeframe available for comment.

E. Notification will be similarly provided to the general public in a box ad in a newspaper of general circulation in the area. NMDOT is encouraged to also communicate with consulting parties by telephone.

X. **Discovery**.

A. If previously unidentified historic properties are discovered after NMDOT has completed its review under this Agreement, construction in the vicinity of the discovery will stop immediately. The project engineer or manager will immediately contact the NMDOT Cultural Resource Bureau Manager who will in turn contact the SHPO and any Indian Tribe that may ascribe traditional cultural and religious significance to the discovered property. No further construction will proceed until the requirements of 36 CFR 800.13 have been satisfied. FHWA and NMDOT will consult with SHPO to record, document and evaluate National Register eligibility of the discovery and design a plan for avoiding or mitigating adverse effects on an eligible property.

B. In accordance with state laws that protect unmarked human burials, if human remains are discovered during construction, that portion of the project will stop immediately. The remains will be respectfully covered and the NMDOT Bureau Manager will immediately notify the FHWA and SHPO.

1) If the human remains are from federal or Indian lands and determined to be Native American, the FHWA and federal land manager or Tribe of jurisdiction will consult with the proper tribal representatives per the Native American Graves Protection and Repatriation Act (NAGPRA, 25 USC 3001).

2) If the human remains are from state or private lands, the Cultural Properties Act (§18-6-11.2, NMSA 1978) will apply and the NMDOT will immediately notify local law enforcement with jurisdiction and the Office of the Medical Investigator, and will follow the consultation process detailed in 4.10.11 NMAC for both Native American remains and non-Native American remains.

XII. **Dispute Resolution**. Should any party to this Agreement object in writing within 30 calendar days to any actions proposed pursuant to this agreement, FHWA, NMDOT, SHPO, and the objecting party shall consult to resolve the objection. If the objection cannot be resolved, FHWA/NMDOT shall forward all documentation relevant to the dispute to the ACHP and request comment from the ACHP pursuant to 36 CFR 800.6(b). Within thirty (30) working days after receipt of the pertinent documentation, the ACHP shall either: Provide the FHWA with recommendations to take into account in reaching a final decision regarding the dispute; or Notify the FHWA that the ACHP will comment in accordance with 36 CFR Section 800.7(c) and proceed to comment. Any ACHP comment provided in response to such a request will be taken into account by FHWA and NMDOT in accordance with 36 CFR 800.6(c)(2) with reference only to the subject of the dispute. The responsibility of NMDOT, FHWA, and HPD to carry out all actions under this agreement, other than those that are the

subject of the dispute, will remain unchanged.

XIII. **Amendment**. Any party to this Agreement may request that it be amended, whereupon the parties will consult to consider the amendment.

XIV. **Right to Terminate**. Any party to this Agreement may terminate it by providing thirty (30) calendar days written notice to the other parties, provided that the parties will consult during the period before termination to seek agreement on amendments or other action that would avoid termination. In the event of termination, the FHWA shall comply with 36 CFR 800 with regard to the individual undertakings covered by this Agreement.

XV. **Duration**. This Agreement will be in effect for five years from the date of execution [2019] and may be renewed for an additional five years [2024] upon written agreement by all signatories.

Execution and implementation of this Agreement evidences that the FHWA and NMDOT have outlined a procedure for completing its Section 106 responsibilities for all individual undertakings of the Federal-aid Highway Program in New Mexico.

J. Don Martinez
Division Administrator, FHWA, New Mexico Division

10/23/14
Date

Tom Church
Cabinet Secretary, New Mexico Dept. of Transportation

10/31/14
Date

John M. Fowler
Executive Director, Advisory Council on Historic Preservation

12/5/14
Date

Dr. Jeff Pappas
New Mexico State Historic Preservation Officer

11/6/14
Date

APPENDIX A: List of Exempted Activities

The following types of undertakings are activities in which NMDOT routinely utilizes Federal Aid highway funds. These projects generally do not affect historic properties. They are limited to the activities specified, and are not part of a project within, or adjacent to, a historic property or historic district. These types of activities are exempt from the review procedures in Stipulation VI of the Agreement:

A. Planning studies, research studies, professional services, or other administrative projects that do not include any construction activity.

B. Pavement milling, overlay, chip seal, or rehabilitation on existing roads when the typical section is not increased to include new shoulders or travel lanes.

C. Chemical surfacing treatments applied to roads to protect or preserve existing pavement.

D. Installation of traffic signs, interpretive signs, traffic signals, traffic signal interconnect systems, or overhead lighting on existing roads.

E. Stockpiling road construction and pavement surfacing material at existing stockpile locations that are not located on historic properties included in or eligible for inclusion in the National Register of Historic Places.

F. Routine maintenance of existing roads, guardrail, drainage structures, drainage ditches, fences, and bridges that does not include changes in the alignment or typical section of the roadway or include changes in the location or extent of drainage structures and ditches.

G. Roadway striping, pavement marking, and vehicle monitoring equipment installation.

J. Safety projects at existing railroad crossings that do not involve new ground disturbance.

K. Landscape projects located within limits of construction areas described in previously completed consultations.

APPENDIX B: NMDOT Tribal Consultation Process

In 2010 NMDOT and FHWA developed a process for Tribal consultation in order to:

1) Invite Tribes to consult on projects early in the Section 106 process;
2) Provide the opportunity for Tribes to identify specific projects for which they have particular concern, and for which they want additional information or consultation;
3) Allow Tribes to complete consultation on groups or types of projects where they may have no cultural concerns;
4) Provide the opportunity for face-to-face communication on a quarterly or as needed or requested basis, for detailed discussion on projects or issues of concern.

NMDOT Tribal consultation for projects is implemented as often as quarterly, but no less than once a year. It uses the Statewide Transportation Improvement Program (STIP), which is the known and public list of proposed federally funded (and some state funded) transportation projects. It is created through the formal statewide transportation project planning process.

- To initiate the Tribal consultation, NMDOT gives a detailed table of projects to each Tribe that has identified traditional interests in the state of New Mexico. The table includes all projects located in counties where specific Tribal interests have been identified relating to Traditional Cultural Properties, ancestral history, and/or specific cultural activities and areas of significance to the Tribe.
- The projects listed in each table are those with potential to cause effects on historic properties, beyond simple pavement preservation (re-paving) projects. The table contains a brief description of the nature and location of each project and also identifies the lead agency and production date. Signature and date lines complete the list and allow for authentication of the tribal representatives response and general written comment. The list is accompanied by a cover letter and GIS maps of the project locations.
- The NMDOT sends the consultation packet with a return receipt card, and requests a response within 45 days after receipt. The NMDOT attempts to contact each Tribe by telephone and/or email within 30 days after mailing the packets, in order to provide the opportunity to discuss the project list, the consultation process, and specific projects, and to arrange face-to-face meetings if desired.
- Tribes use the list to specify projects they would like more information on, and those on which they do not want to consult further. FHWA/NMDOT follows standard Section 106 consultation protocols for those projects the Tribe marks for further consultation, and considers consultation concluded for those the Tribe is not interested in.

Since NMDOT began using this protocol, the response from Tribes has been overwhelmingly positive. The protocol is based on early, proactive communication, and concisely and clearly conveys the information Tribes need to identify issues that may be of importance to them. It also helps FHWA/NMDOT project development by streamlining one aspect of compliance with the NHPA for many projects, and allows the Tribes and the agencies to focus on the projects that are of greatest interest.