Response to Comments Regarding the Section 106 Process of NHPA
For the Proposed Florence Copper Project Production Test Facility
October 16, 2015

The Gila River Indian Community (GRIC or the Community), the Hopi Tribe, and the Town of Florence submitted comments during the public comment period on the EPA's Draft Class III Underground Injection Control (UIC) Area Permit (Draft Permit) and the Section 106 process of National Historic Preservation Act (NHPA) for the Proposed Florence Copper Project Production Test Facility (PTF). EPA summarizes these comments and our responses that address the Section 106 process, including the Draft Historic Properties Treatment Plan dated June 30, 2014 and the Memorandum of Agreement dated July 2014.

The Town of Florence asserted that the July 2014 Draft Memorandum of Agreement did not address the issues raised by the Town in their February 21, 2014 correspondence to EPA, so the Town re-submitted the correspondence for EPA's reconsideration. The comments provided in Attachment "B" of the Town's February 21, 2014 letter under the heading Environmental are outside the scope of Section 106 of NHPA, and therefore, are not addressed in this document.

GRIC Comments dated April 13, 2015

1. **Comment:** The Gila River Indian Community requested that no ground disturbance occur in connection with the proposed PTF until all litigation of the Project is resolved. The Community made this request to prevent unnecessary adverse effects to historic properties. As such, the Community requested that EPA amend Page 3 of the draft MOA to include the following language: "Whereas, GRIC has apprised the EPA that it opposes any ground disturbance associated with implementation of the project until after all litigation on this project is resolved in order to prevent unnecessary permanent and direct adverse effects to historic properties." The Community also requested that EPA include language in the MOA stipulating that the Historic Property Treatment Plan ("HPTP" or "Treatment Plan") must be finalized and accepted *before* the MOA is signed. In addition, the Community commented that the HPTP should address the entire Florence Copper property boundary and all adverse effects on the historic properties and include language on how the HPTP will be implemented.

   EPA Response: EPA must complete the Section 106 consultation prior to making a final UIC permit decision to comply with the requirements of Section 106 of NHPA. For the UIC permitting process, EPA follows the applicable procedural requirements for decision-making pursuant to 40 CFR Part 124. Pursuant to 40 CFR § 124.15(b)(2), a final permit decision becomes effective 30 days after the service of notice of the decision unless review is requested of the permit under the appeal process at 40 CFR §124.19. Ground disturbance activities regulated by the UIC permit would only be allowed to proceed after the UIC permit is effective, pursuant to the administrative review processes in 40 CFR Part 124. However, ground disturbance activities that are outside the scope of the activities detailed in the UIC Draft Permit would not be regulated by EPA.

   The addition of language in the MOA to note the HPTP will be finalized before the MOA is signed is not necessary as EPA will finalize the HPTP before forwarding the MOA for signatures. The HPTP addresses the undertaking, which is the proposed PTF and documents all potential adverse effects on the historic properties in the area of potential effects (APE) of the proposed PTF. EPA believes sufficient language is included in the MOA regarding HPTP implementation.

2. **Comment:** Draft MOA Fourth Whereas clause, Page 1. Request that EPA include in the draft MOA the following language in red: "Whereas, the EPA has consulted with the following parties (the Consulting Parties) . . .

   EPA Response: EPA made this change.

3. **Comment:** Draft MOA Third Whereas clause, Page 2. Request that EPA amend the draft MOA with the following additions and deletions in red: "Whereas, the GRIC has identified the "Escalante Ruin" (AZ U:15:3(ASM)) as a resource having ~~traditional~~ religious and cultural significance; and EPA has completed a consensus Determination of Eligibility under Criterion A of 36 C.F.R. 60.4 for its Traditional Cultural Value with concurrence from the SHPO to treat the site as a Traditional Cultural Property ~~for purposes of this consultation~~; and …

   EPA Response: EPA made this change.

4. **Comment:** Draft MOA Page 3. Request that EPA include in the draft MOA a Whereas Clause with the following language: "Whereas, the Tribes have apprised the EPA, SHPO, and other consulting parties of their opposition to the Project, and the legislative council of the GRIC has set forth a resolution in opposition to the project because the project would significantly impact, destroy, or alter cultural and archaeological sites containing cultural resources and sacred objects of the O'odham, would permanently and negatively alter the cultural and natural landscapes of the area, and would cause adverse effects on TCPs, including the Escalante Ruin, which is of particular religious and cultural significance to the Tribes; and" …

   EPA Response: Prior to the public notice, EPA incorporated in the July 2014 Draft MOA a Whereas clause, top of page 3, to document the Community's opposition to the potential adverse effects on the Escalante Ruin. EPA believes that the existing summary statement is sufficient and the additional description of the Community's opposition to this proposed project will not add new information necessary for this agreement and completion of the Section 106 process. EPA recognizes this opposition and the Community's position is also captured in official comments submitted on the Draft Permit.

5. **Comment**: Draft MOA Section I.A., Page 3. Request that EPA amend the draft MOA with the following language in red: "… as directed in accordance with the Treatment Plan, which shall be part of, and thus subject to the requirements of, this MOA."

   Draft MOA Section II.B., Page 5. Request that EPA amend the draft MOA with the following additions and deletion in red as follows: ". . . do not require ~~an~~ any further amendment to this MOA."

   EPA Response: The MOA documents the terms and conditions agreed upon to resolve the adverse effects of the undertaking. The MOA specifically stipulates the resolution of impacts on historic properties will be carried out through the avoidance, minimization and mitigation measures detailed in the Treatment Plan. The MOA also details procedures to revise or modify the Treatment Plan, if necessary during implementation and required reporting of implementation of the Treatment Plan. EPA believes the MOA as currently drafted is adequate and addition of the requested language is unnecessary to ensure implementation of the Treatment Plan under the MOA.

6. **Comment:** Draft MOA Section I.B, Page 4. Request that EPA amend the draft MOA with the following addition in red: ". . . formal avoidance and minimization measures as set forth in the Treatment Plan. Other than this expected ground disturbance, FC and all other PTF activities shall avoid the Escalante Ruin (AZ:15:3[ASM])."

EPA Response: The only expected impact to the Escalante Ruin is the ground disturbance to properly plug and abandon one corehole within the historic property boundary, however the facility operations include vehicle movement along Hoffmeyer Way within the boundaries of the historic property and nearby operations along Largo Road. FC has agreed to avoidance and minimization measures for the Escalante Ruin in the implementation of the Treatment plan, such as regular monitoring and flagging the boundary of the site, and FC has committed to avoidance of the fenced compound. Because the operations will not remain completely outside the historic property boundaries, the Treatment plan describes avoidance measures to address the potential for indirect or cumulative effects to the Escalante Ruin. Therefore, the proposed language is not consistent with the Treatment plan description, which was designed to resolve potential indirect adverse effects to the Escalante Ruin. For additional clarification, EPA added the following language to Section I.B., page 4 of the MOA, "FC will completely avoid the fenced compound of the Escalante Ruin."

7. **Comment:** Draft MOA Section III, Page 5. Request that EPA amend the draft MOA with the following sentence: "EPA shall provide notice to the Consulting Parties of any request for such information prior to making that information available to the public."

   EPA Response: EPA made this change.

8. **Comment:** Draft MOA Section IV.A.1., Page 5. Request that EPA amend the draft MOA with the addition in red as follows: " . . . how the comments were considered and FC's responses for review."

   EPA Response: EPA made this change.

9. **Comment:** Draft MOA Section V.A., Page 6. Request that EPA include in the draft MOA the following language in red: ". . . SHPO any newly discovered properties with the potential to be historic properties or any inadvertent effects..."

   EPA Response: The regulation at 36 CFR §800.13 for post review discovery procedures cited in this section of the draft MOA applies to historic properties previously unidentified. Therefore, for clarification, EPA inserted the citation for the historic property definition, that is "as defined by 36 CFR § 800.16(l)(1)."

10. **Comment:** Page 6, Section VII.A. Request that EPA include in the draft MOA the following language in red: ". . . the implementation of the Treatment Plan and the MOA."

    EPA Response: EPA made this change. EPA agrees that this is appropriate to report on implementation of the MOA, pursuant to 36 CFR § 800.6(c)(4).

11. **Comment:** Draft MOA Section VIII.A, Page 7. Request that EPA include in the draft MOA the following language in red: "If any Consulting Party to this MOA objects in writing to EPA . . ."

    EPA Response: EPA made this change.

12. **Comment:** Draft MOA Section IX, Page 7. Request that EPA amend the draft MOA with the following language in red: " . . . whereupon EPA shall consult with the other parties and Consulting Parties to this MOA . . ."

    EPA Response: EPA made this change to consult all Consulting Parties if an amendment to the MOA is proposed.

13. **Comment:** Draft MOA Section X, Page 8. Request that EPA amend the draft MOA with the following additions in red: ". . . or if the SHPO or ACHP determines that the MOA, including the Treatment Plan, is not being property implemented or followed and dispute resolution . . ."

    EPA Response: Section X outlines termination provisions that apply to the MOA, pursuant to 36 CFR § 800.6(c)(8), not to the Treatment Plan. Termination of the MOA is considered as a last resort, where dispute resolution and other options have failed.

14. **Comment:** Draft MOA Section X.B, Page 8. Request that EPA include in the draft MOA the following language in red: ". . . The signatory proposing to terminate this MOA shall notify all parties, including Consulting Parties, to this agreement. . ."

    EPA Response: EPA made this change.

15. **Comment:** Draft MOA Section XI, Page 8. Request that EPA amend the draft MOA with the following additions and deletions in red: "This MOA shall expire upon completion of ~~seven years from the date of its execution. Should the FC PTF~~ the undertaking, including rinsing operations, plugging and abandonment of wells, and post-closure monitoring. ~~not be complete, or~~ If any signatory wishes to extend the duration of the MOA, they may propose an amendment to the MOA in accordance with Stipulation IX prior to its expiration. In no event, however, shall this MOA be amended to include, address or authorize any further in-situ copper recovery on FC's property beyond the PTF operation."

    EPA Response: EPA made the requested changes, except for the last sentence: "In no event, however, shall this MOA be amended to include, address or authorize any further in-situ copper recovery on FC's property beyond the PTF operation." This additional language is unnecessary, as the MOA is already specifically limited to the PTF operation as described by the Whereas clause on page 3 of the MOA, stating that any further in-situ copper recovery on FC's property would require an additional UIC permit application and federal permit action and, if such an application is submitted, EPA would initiate consultation pursuant to Section 106 under NHPA for a new undertaking.

16. **Comment:** Request that EPA add the following Stipulation under the MOA:

    "Prior to the occurrence of any ground disturbing activities, FC will coordinate with the GRIC, through its Tribal Historic Preservation Office (GRIC-THPO), to develop and implement cultural sensitivity training, which shall be attended by FC personnel and contractors that will be responsible for constructing the project. Further, prior to the occurrence of any ground disturbing activities, and as needed or requested by FC, FC personnel shall attend a cultural sensitivity orientation to be conducted by the GRIC-THPO and staff."

    EPA Response: The draft MOA includes a Whereas clause stating that FC will coordinate with GRIC to develop and implement cultural sensitivity training. In addition, as described in the draft HPTP, all Archaeological Monitors performing the work under the HPTP will meet or exceed the ASM and Secretary of the Interior's Professional Qualifications Standards for Archaeology 48 FR 44738-9, and all field assistants will be experienced in identifying and recording regional archaeological features and remains. The Environmental Plan for PTF Construction in Appendix E of the MOA also requires training regarding on-site specific procedures for contractors working in and around sensitive archaeological areas. Given these existing provisions, EPA does not believe the additional Stipulation is necessary.

Hopi Tribe Comments dated December 15, 2014

17. **Comment:** The Hopi Tribe re-submitted prior correspondence to EPA regarding the draft Treatment Plan and reiterated that with the density of historic sites at the location of the proposed project, it is predictable that subsurface features that are not evident on the surface exist outside the site boundaries.

    EPA Response: EPA completed reasonable identification efforts, pursuant to 36 CFR § 800.4, within the Area of Potential Effects that may be affected by the proposed project. However, because previously unidentified features may still exist at the site, both the HPTP and MOA contain post-review discovery provisions (based on 36 CFR § 800.13) to address any potential historic properties identified as the project is implemented.

18. **Comment:** The Tribe considers the MOA and Treatment Plan for the Phase I pilot study segmenting of adverse effects in violation of the National Historic Preservation Act because the Treatment Plan is substantially different from the Blanket Treatment Plan that was drafted for the commercial scale project, and substantially different from the Arizona State Museum Burial Agreement, Case 2012-012.

    EPA Response: The undertaking for purposes of NHPA Section 106 consultation, defined at 36 CFR § 800.16(y) and subject to a federal permit, is the proposed PTF. All activities that are part of this undertaking, from construction to closure of the proposed project, are included in the current NHPA Section 106 review. Therefore, EPA is not segmenting adverse effects of this undertaking for purposes of the NHPA Section 106 process.

    Regarding the Burial Agreement, this document was written with a different introduction because it was completed prior to the applicant's decision to separate the proposed PTF and commercial operations into two distinct projects rather than one project with two phases. Regardless of when it was completed, the Burial Agreement remains consistent with the undertaking's APE covering the entire Florence Copper property. Moreover, the Arizona State Museum Burial Agreement was completed in compliance with the applicable Arizona Revised Statute and is an appropriate treatment element of the HPTP to resolve adverse effects from the proposed ground disturbing PTF activities.

19. **Comment:** The Tribe supports the comments contained in letters to EPA from the State Historic Preservation Office, Casa Grande Ruins National Monument, and the Gila River Indian Community, including comments regarding the significance of the Escalante Community, the area of potential effect, and the use of large amounts of sulfuric acid. The Tribe also concurs with the GRIC regarding the significance of the Escalante Ruin as a Traditional Cultural Property and comments that the associated sites in the Escalante Community are contributing elements of the Traditional Cultural Property landscape.

    EPA Response: EPA's NHPA consultation and analysis determined that the undertaking may result in direct effects to seven documented historic properties within a larger cluster of 59 prehistoric Hohokam sites known variously as the Escalante Mound Group or the Escalante Community. Of these, the GRIC has provided information regarding the Escalante Ruin, AZ U:15:3(ASM), to identify it as a Traditional Cultural Property. In consideration of the information submitted to date, EPA does not have a sufficient basis to determine broader inclusion of additional historic properties of the Escalante Community as contributing elements of a Traditional Cultural Property landscape. In

addition, any potential adverse impacts to the elements already identified as historic properties in the broader Escalante Community will be resolved through existing procedures in the HPTP.

20. **Comment:** The Tribe expressed concern that the integrity and traditional use of the Traditional Cultural Property will be incompatible with the use of sulfuric acid, the noise and adverse visual effects from the wells and that the existence of the proposed injection wells can be expected to diminish the Traditional Cultural Property's integrity through loss of feeling and association.

    EPA Response: The HPTP documents potential indirect or cumulative adverse effects from the PTF on historic properties and contains avoidance, minimization, and mitigation measures to resolve potential impacts, pursuant to the requirements of Section 106 of the NHPA. Based on information provided to EPA, the Agency considers any potential indirect or cumulative effects to surrounding historic properties from the use of sulfuric acid unlikely. Also, the Environmental Plan in Appendix E of the HPTP has spill and noise control plans that are expected to minimize potential impacts during construction activities.

    During consultation, visual or audible elements surrounding the Escalante Ruins were not identified as characteristics contributing to its significance as a TCP. However, the recommended avoidance and monitoring measures in the draft HPTP will minimize potential indirect visual impacts from construction activities.

21. **Comment:** The Tribe believes significant sites and Native American Traditional Cultural Properties should not be destroyed for profit by private enterprise and agencies should protect and preserve these significant resources and Traditional Cultural Properties. The Tribe also agrees with the National Park Service recommendation that the proponent should conduct a full environmental review pursuant to the National Environmental Policy Act.

    EPA Response: Pursuant to 40 CFR § 144.4**,** EPA is required to follow the procedures and implement the requirements of Section 106 of the National Historic Preservation Act and regulations at 36 CFR Part 800. The Act and its implementing regulations charge the Agency with evaluating the impact of federally permitted projects on historic properties and minimizing potential harm and damage to any identified historic properties. Further, the Agency is required to implement these requirements in cooperation with the SHPO, and in consultation, as appropriate, with the ACHP and other interested parties. In the case of the present undertaking, EPA followed the procedures and implemented the requirements of the NHPA. These actions led to the development of an MOA among responsible and interested parties and an HPTP that will assure compliance with the Act and will guide specific efforts to avoid, minimize or mitigate potential adverse effects on historic properties.

    Regarding the recommendation that EPA conduct a full environmental review pursuant to the National Environmental Policy Act (NEPA), federally issued Underground Injection Control (UIC) permits are not subject to the Environmental Impact Statement (EIS) provisions of section 102(2)(C) of NEPA (see 40 CFR § 124.9(b)(6)), nor are they subject to an alternatives analysis under section 102(2)(E) of NEPA due to a functional equivalence analysis. This analysis applies where compliance with other environmental laws requires environmental analysis similar to NEPA. EPA's review and evaluation of the UIC permit application emphasizes environmental protection under the Safe Drinking Water Act similar to a review under NEPA. In addition, the UIC program requires compliance with other Federal laws, pursuant to 40 CFR § 144.4, and contains public participation requirements in 40 CFR Part 124 similar to those found under NEPA.

Town of Florence Comments dated April 10, 2015

22. **Comment:** The Town comments that there remain potential injury to natural and cultural resources from the PTF and because the high level of controversy involving this permit application, the Town continues to request that EPA prepare an environmental assessment (EA) or environmental impact statement (EIS) to best consider the potential impacts to natural and cultural resources as required by NEPA.

    EPA Response: Please see the response to Comment 21 above.

23. **Comment:** The Town expresses concern that the infrastructure improvements, transportation, monitoring and closure activities may have potential effect on the larger Curis Arizona private land property, thus it is of great concern to the Town that these effects are not properly addressed within the MOA in regard to conformance with local regulations. In addition, the Town proposes that certain stipulations and Attachment "A" be included within the MOA. The Town notes that the infrastructure improvements, transportation, monitoring, and closure activities involve construction-related and operational activities on private land yet there has been no attempt by Curis to address local regulations via the Development Code of the Town of Florence, as required by 36 CFR 800.4. This conformance is required for the entire area outside of the Arizona State Land parcel, and, in particular, the 8.34 acres proposed for the Production Test Facility within the Town of Florence.

    EPA Response: The requirement at 36 CFR 800.4 is a provision of the NHPA implementing regulations pertaining to the identification of historic properties. Section 800.4(b)(1) makes reference to agency officials' consideration of "other applicable professional, State, tribal, and local laws, standards, and guidelines." However, this language pertains to a description of the level of effort required by agency officials to identify historic properties within the area of potential effects; it is not intended, as the commenter suggests, to require an operator to comply with all local regulations as a condition of NHPA compliance. EPA conducted an appropriate level of effort to identify historic properties as required by 36 CFR § 800.4, in consultation with the SHPO and other parties.

    Regarding the request that EPA include certain Stipulations and Attachment "A" in the MOA, EPA considered these comments when they were submitted with the Town's February 21, 2014 letter. EPA has already included an assessment of adverse effects, steps for resolution of these potential effects, and construction monitoring in the Section 106 review process as documented in the Draft HPTP, dated June 30, 2014. Physical barriers, flagging, and monitoring are all included in the Draft HPTP to avoid and minimize any potential adverse effects to historic properties. In addition, the draft HPTP includes an Environmental Plan in Appendix E for PTF construction, which specifies methods to control, eliminate and/or minimize potential contamination to surrounding historic properties. EPA does not agree with the commenter that additional stipulations or Attachment "A" are necessary to include in the MOA.