MEMORANDUM OF AGREEMENT AMONG THE FEDERAL EMERGENCY MANAGEMENT AGENCY, THE ILLINOIS EMERGENCY MANAGEMENT AGENCY, THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES, AND THE ILLINOIS STATE HISTORIC PRESERVATION OFFICE, REGARDING COMPLIANCE WITH SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT AS IT PERTAINS TO THE PROPOSED DEMOLITION AND RECONSTRUCTION OF THE NETTLE CREEK AQUEDUCT, MORRIS, GRUNDY COUNTY, ILLINOIS

WHEREAS, the Federal Emergency Management Agency (FEMA) of the Department of Homeland Security, pursuant to Section 406 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §5121-5206) and implementing regulations in Title 44 of the Code of Federal Regulations (44 C.F.R. Part 206), proposes to provide Federal funding through its Public Assistance Program for the proposed demolition and construction activities under FEMA disaster declaration number DR-4116-IL related to the Nettle Creek Aqueduct (Aqueduct), Project Worksheet number 1265, to the Illinois Emergency Management Agency (IEMA) as Grantee, providing funds to the Illinois Department of Natural Resources (IDNR) as Subgrantee; and

WHEREAS, the Aqueduct, a contributing historic resource in the Illinois & Michigan Canal National Heritage Corridor (I&M Canal), which is a National Historic Landmark owned in fee title by the State of Illinois and managed by the IDNR pursuant to the Illinois and Michigan Canal Land Use Act, 615 ILCS 40/0.01, was damaged during the incident period of April 16, 2013 through May 5, 2013, and thereby weakened the east abutment of the Aqueduct, resulting in failure of the abutment and the collapse of the Aqueduct; and

WHEREAS, the IDNR used contractual services to install temporary sheet piling and an earthen embankment to maintain water in the Canal prism upstream and downstream of the failed Aqueduct. These measures minimized further damage to the I&M Canal by maintaining water level in the prism; and

WHEREAS, the IDNR, rather than returning the Aqueduct to pre-disaster condition, proposes replacing the failed Aqueduct with new construction designed to alleviate future upstream flooding; and

WHEREAS, the expenditure of Federal funding for the proposed project qualifies it as an Undertaking subject to the provisions of Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA), U.S.C. Section 470(f), and its implementing regulations, 36 C.F.R. Part 800; and

WHEREAS, the Undertaking will result in the demolition of the failed Aqueduct, and FEMA has determined that the demolition activities constitute an adverse effect under Section 106 of the NHPA, and both the Illinois State Historic Preservation Office (SHPO) and the National Parks Service (NPS) have concurred in that determination and joined the consultation; and

WHEREAS, FEMA has notified the Advisory Council on Historic Preservation (ACHP) regarding its intent to prepare this Memorandum of Agreement (MOA) to satisfy its Section 106 responsibilities pursuant to 36 C.F.R. §800.6 (a)(1), and the ACHP has declined to participate pursuant to 36 C.F.R. §800.6(a)(1)(iii); and

WHEREAS, FEMA has invited IEMA and the IDNR, as the Grantee and Subgrantee receiving FEMA funds respectively, to become Signatories to this MOA; and

WHEREAS, FEMA has invited Landmarks Illinois, The National Trust for Historic Preservation, the Grundy County Historical Society, the Canal Corridor Association, and the City of Morris to join the consultation as Concurring Parties; and the Canal Corridor Association and the City of Morris have accepted; and

WHEREAS, FEMA has invited the following tribes with ancestral interests in Grundy County to join the consultation as Concurring Parties—the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas, the Citizen Potawatomi Nation (Oklahoma), Hannahville Indian Community (Michigan), the Kickapoo Tribe of Oklahoma, the Forest County Potawatomi Community of Wisconsin, the Prairie Band of Potawatomi Nation (Kansas), and the Ho–Chunk Nation (Wisconsin)—but none have responded to the invitation to consult; and

WHEREAS, the IDNR is authorized to accept, receive, expend, and administer, including by grant, agreement, or contract, those funds that are made available to the IDNR from the federal government and other public and private sources in the exercise of its statutory powers and duties pursuant to Section 805-70 of the Illinois Department of Natural Resources (Conservation) Law, 20 ILCS 805/805-70; and

WHEREAS, the IDNR is authorized to control and manage the Illinois and Michigan Canal, its feeders, basins and appurtenances, such as the Aqueduct pursuant to The Illinois and Michigan Canal Management Act, 615, ILCS 30/0.01 et seq.; and

WHEREAS, the IDNR published a public notice in the Morris Daily Herald on March 25, 2014, notifying the public of the consultation, and a member of the community, Donald Matteson, whose property borders that of the I&M Canal near the Aqueduct, has joined the consultation as a Concurring Party; and

WHEREAS, as used in this MOA, the term "Consulting Parties" refers to both Signatories and Concurring Parties. As established in 36 C.F.R. § 800.2(c), "consulting parties" include the SHPO; Indian Tribes; representatives of local governments; applicants for Federal assistance, permits, licenses, and other approvals; and certain individuals and organizations with a demonstrated interest in the Undertaking due to the nature of their legal or economic relation to the Undertaking or affected property, or their

concern with the Undertaking's effects on historic properties. As provided in 36 C.F.R § 800.6(c)(3), FEMA may invite all consulting parties to concur in the MOA; and

NOW, THEREFORE, FEMA, IEMA, IDNR, and SHPO (Signatories) agree that the undertaking will be implemented in accordance with the following stipulations to ensure that potential effects on Historic Properties, as defined in 36 C.F.R. §800.16, are taken into account.

STIPULATIONS

To the extent of its legal authority, and in coordination with IEMA, IDNR and SHPO, FEMA shall require that the following measures be implemented:

I. Architectural Recordation

A. Prior to being dismantled, IDNR shall see that the existing Aqueduct shall be recorded through photography, field sketches, construction/alteration chronology and bibliography meeting the standards of the Illinois Historic American Engineering Record (ILHAER) guidelines. The report shall utilize the ILHAER documentation outline format.

B. IDNR shall submit a draft of the ILHAER documentation to SHPO and shall receive written approval from the SHPO prior to initiation of demolition activities.

C. FEMA shall be notified of the submission and approval of the recordation by IDNR and SHPO, respectively.

II. Demolition

A. Prior to demolition, the IDNR shall use contractual services to identify and indicate what portions of the concrete on the Aqueduct are to be retained for future testing.

B. The east abutment and east wing walls of the Aqueduct shall be carefully dismantled under the supervision of an architect, architectural historian, or other similarly qualified professional meeting the Secretary of the Interior (SOI) Professional Qualifications or with demonstrated ability. This contractor shall have demonstrated experience in application of the SOI Standards for the Treatment of Historic Properties (SOI Standards) as set forth in 36 C.F.R. §68.

C. All stonework and those identified concrete sections, as specified below in III.B, removed from the aqueduct site shall be stored in a secure area to prevent theft or vandalism.

III. Design and Construction

A. The new Aqueduct, incorporating salvaged historic materials, shall be designed and constructed in consultation with the SHPO to ensure it will meet the SOI Standards.

B. Samples of concrete identified by IDNR and secured during demolition of the Aqueduct shall be analyzed so that the concrete may be replicated for texture, color, and aggregate composition in the replacement structure so as to match the historic concrete.

C. The IDNR shall consult with SHPO on the review of all design plans and specifications through each phase of the design process. If hydrology studies indicate that the west abutment needs to be moved to alleviate upstream flooding, all signatory parties will be notified for further consultation.

D. FEMA shall be notified of the submission and approval of the construction plans by IDNR and SHPO, respectively.

IV. Unexpected Discoveries

A. **Human Remains**: In the case of an unanticipated discovery of human remains or burials during demolition or construction activities, IDNR shall halt construction, secure the area, notify the Signatories, and follow the provisions of the Illinois Human Skeletal Remains Protection Act (20 ILCS 3440/1 *et seq.*, 17 Ill. Admin. Code §§ 4170.100 *et seq.*).

B. **Historic Properties**: In the event of an unanticipated discovery of Historic Properties during demolition or construction activities, the IDNR shall halt construction, secure the area, and consult with FEMA, SHPO and NPS for the purposes of Section 106 pursuant to 36 C.F.R. § 800.13(c).

V. Dispute Resolution

A. FEMA shall consider objections to any plans, specifications, or actions provided for review pursuant to this MOA by any Signatory, and notify all Consulting Parties of the objection.

B. FEMA shall consult further with the objecting party and any Consulting Parties, as appropriate, to seek resolution of the objection.

C. If FEMA determines after 30 days that objections raised cannot be resolved, FEMA shall forward all documentation relevant to the dispute to the ACHP, including FEMA's proposed resolution of the dispute, and request that the ACHP provide comment in accordance with section D and F below

D. After receipt of all pertinent documentation, within 30 days the ACHP may:

1. Advise FEMA that it concurs with FEMA's proposed resolution of the dispute; or

2. Provide FEMA with comments or recommendations, which FEMA shall take into account in reaching a final decision regarding the dispute.

E. If the ACHP does not provide FEMA with written comments or recommendations within 30 days, FEMA may assume that the ACHP does not object to FEMA's recommended approach and FEMA shall proceed accordingly.

F. Any recommendation or comment provided by the ACHP shall pertain only to the subject of the dispute. The responsibility of the Signatories to implement all actions pursuant to this MOA that are not subject to the dispute will remain unchanged.

G. The IDNR's work on the Undertaking activities unrelated to the objection may proceed while the objection is being reviewed and resolved.

H. FEMA shall notify all Consulting Parties of the resolution of the dispute within 15 days of determining a resolution.

VI. Anticipatory Actions

Pursuant to Section 110(k) of the NHPA, FEMA shall not grant assistance to IDNR who, with intent to avoid the requirements of this MOA or Section 106, has intentionally, significantly, adversely affected a Historic Property to which the assistance would relate, or having legal power to prevent it, allowed such significant adverse effect to occur. If mitigating measures are identified by FEMA, after consulting with ACHP, FEMA may determine that circumstances justify granting such assistance despite the adverse effect created or permitted by IDNR In such cases, FEMA will complete consultation for the Undertaking pursuant to 36 C.F.R. § 800.9(c)(2).

VII. Implementation, Duration, Amendment, Termination and Severability

A. All time designations are in calendar days.

B. This MOA may be executed in counterparts, with a separate page for each Signatory and Concurring Party. FEMA will ensure that each party is provided with a complete copy of the signed MOA. This MOA will become effective on the last date of signature of this MOA by the Signatories.

C. FEMA will file a copy of the signed MOA with the ACHP.

D. The Signatories may, by mutual signed agreement, extend or amend this MOA.

E. This MOA shall remain in effect from the date of execution for five years or until:

1. It is terminated pursuant to Paragraph VII. H below, or
2. The MOA is extended as provided for in Paragraph VII.D above.

F. If any Signatory to the MOA determines that the MOA cannot be fulfilled or that an amendment to this MOA must be made, the Signatories will consult to amend the MOA.

G. Once signed and in the possession of a "public body" as defined in Section 2 of the Illinois Freedom of Information Act, 5 ILCS 140/2(a), this MOA becomes a "public record", as defined in 5 ILCS 140/2(c), and is subject to the Illinois Freedom of Information Act, 5 ILCS 140/1 et seq.

H. Termination

1. Any Signatory may terminate this MOA by providing 30 days written notice to the other parties, provided that the parties consult during this period to seek amendments or other actions that would prevent termination.
2. This MOA may be terminated by the implementation of a subsequent agreement that explicitly terminates or supersedes this MOA.

I. In the event any provision of this MOA shall be deemed contrary to or in violation of any applicable existing law or regulation in the State of Illinois or the United States of America, only the conflicting provision(s) shall be deemed null and void, and the remaining provisions of the MOA shall remain in effect.

J. Execution of this MOA by the Signatories and implementation by FEMA is evidence that FEMA has taken into account the effects of this Undertaking on Historic Properties, has afforded ACHP a reasonable opportunity to comment, and has satisfied its Section 106 responsibilities.

K. Pursuant to 36 C.F.R. § 800.6(c)(3), the refusal of any party invited to concur in the MOA does not invalidate the MOA.

SIGNATORY:
FEDERAL EMERGENCY MANAGEMENT AGENCY

By: _____ Date: 6/23/2014

Janet Odeshoo
Acting Regional Administrator, Region V

SIGNATORY:
ILLINOIS DEPARTMENT OF NATURAL RESOURCES

By: _____ Date: 6-19-14

Marc Miller
Director, Illinois Department of Natural Resources

By: n/a Date: n/a

Jeffrey P. Smith
Chief Legal Counsel, Illinois Department of Natural Resources

APPROVED FOR EXECUTION
Date: 6/19/2014
Legal Counsel: Yang

SIGNATORY:
ILLINOIS EMERGENCY MANAGEMENT AGENCY

By: _____ Date: 6/18/14

Jonathon Monken
Director, Illinois Emergency Management Agency

SIGNATORY:
ILLINOIS HISTORIC PRESERVATION OFFICE,
ILLINOIS HISTORIC PRESERVATION AGENCY

By: _____ Date: June 11, 2014

Anne E. Haaker
Deputy Historic Preservation Officer
Illinois Historic Preservation Agency