

**SECOND AMENDED PROGRAMMATIC AGREEMENT AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION,  
THE UTAH STATE HISTORIC PRESERVATION OFFICER,  
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,  
THE UNITED STATES ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT,  
AND THE UTAH DEPARTMENT OF TRANSPORTATION  
REGARDING  
SECTION 106 IMPLEMENTATION FOR FEDERAL-AID TRANSPORTATION PROJECTS  
IN THE STATE OF UTAH**

WHEREAS, the Federal Highway Administration (FHWA), under the authority of 23 U.S.C. 101 et seq., implements the Federal-aid Highway Program (Program) in the state of Utah by funding and approving state and locally sponsored transportation projects that are administered by the Utah Department of Transportation (UDOT); and

WHEREAS, the Utah FHWA Division Administrator is the “Agency Official” responsible for ensuring that the Federal-aid Highway Program in the state of Utah complies with Section 106 of the National Historic Preservation Act (NHPA), as amended, and codified in its implementing regulations, 36 CFR Part 800, as amended (August 5, 2004); and

WHEREAS, UDOT administers Federal-aid projects throughout the State of Utah as authorized by Title 23 U.S.C. 302 and Sections 72-1-201 and 72-2-111 of the Utah Code, has participated in this consultation, and has been invited to be a signatory to this Agreement; and

WHEREAS, the responsibilities of the Utah State Historic Preservation Officer (SHPO) under Section 106 of the NHPA and 36 CFR Part 800 are to advise, assist, review, and consult with Federal agencies as they carry out their historic preservation responsibilities and to respond to Federal agencies’ requests within a specified period of time and has been invited to be a signatory to this Agreement; and

WHEREAS, the United States Army Corps of Engineers, Sacramento District (USACE) may also have an undertaking with Section 106 responsibilities because it may issue a Clean Water Act Section 404 permit for discharges of dredged or fill material into jurisdictional waters of the United States associated with an FHWA/UDOT project; and

WHEREAS, for the purpose of Section 106 compliance for all Federal undertakings pertaining to the Federal-aid Highway Program, the USACE has participated in this consultation, will recognize FHWA as the lead Federal agency, and has been invited to be a signatory to this agreement pursuant to 36 CFR 800.2(a)(2); and

WHEREAS, FHWA has determined that implementation of the Program in Utah may have an effect upon properties included in, or eligible for inclusion in, the National Register of Historic Places (NRHP), hereafter referred to as historic properties, and has consulted with the Utah State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (Council) pursuant to 36 CFR 800.14(b); and

WHEREAS, pursuant to the consultation conducted under 36 CFR 800.14(b), the signatories have developed this Programmatic Agreement (Agreement) in order to establish an efficient and effective program alternative for taking into account the effects of the Program on historic properties in Utah and for affording the Council a reasonable opportunity to comment on undertakings covered by this agreement; and

WHEREAS, FHWA has notified the public, Federal and State agencies, Certified Local Governments (CLGs), and federally recognized Indian tribes (Tribes) with ancestral lands in Utah about this Agreement, has requested their comments, and has taken any comments received into account. These Tribes include the Confederated Tribes of the Goshute Reservation, Northern Arapaho, Hopi, Eastern Shoshone Tribe of the Wind River Reservation, Navajo Nation, Northwestern Band of Shoshone Nation, Paiute Indian Tribe of Utah, San Juan Southern Paiute Tribe, Skull Valley Band of Goshute Indians, Ute Indian Tribe, Ute Mountain Ute Tribe, and White Mesa Band of Ute Mountain Ute Tribe; and

WHEREAS, this Agreement shall supersede the previous letter agreement between FHWA, SHPO, and UDOT (June 6, 1990; Delegation of Section 106 Responsibility); and

WHEREAS, the parties to this Agreement (except USACE) executed an earlier agreement on April 16, 2007, entitled *Programmatic Agreement Among the Federal Highway Administration, the Utah Department of Transportation, the Utah State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding Section 106 Implementation for Federal-Aid Transportation Projects in the State of Utah.*, which was amended on April 16, 2010. This second amendment of the Agreement replaces and supersedes the earlier Agreements in full.

NOW, THEREFORE, FHWA, SHPO, Council, USACE, and UDOT agree that the Program in Utah shall be carried out in accordance with the following stipulations in order to take into account the effects of the Program on historic properties in Utah and that these stipulations shall govern compliance of the Program with Section 106 of the NHPA until this Amended Programmatic Agreement expires or is terminated.

## STIPULATIONS

FHWA, with the assistance of UDOT, shall ensure that the following measures are carried out. To aid the signatories of this Agreement, the stipulations are organized in the following order:

- I. Applicability and Scope
- II. Definitions
- III. Professional Qualifications Standards
- IV. Responsibilities
- V. Consultation with Tribes
- VI. Participation of Other Consulting Parties and the Public
- VII. CE Delegation
- VIII. Project Review
- IX. The Section 106 Process
- X. Emergency Situations
- XI. Post-Review Discoveries
- XII. Treatment of Human Remains
- XIII. Administrative Stipulations

### I. APPLICABILITY AND SCOPE

- A. This Agreement sets forth the process by which FHWA, with the assistance of UDOT, will meet its responsibilities pursuant to Section 106 and 110 of the NHPA (16 U.S.C. 470f and 470h-2).
- B. The objective of this Agreement is to make more efficient the methods by which FHWA and UDOT review individual undertakings processed under Section 106 that may affect historic properties and to establish the process by which FHWA, SHPO, Council, USACE, and interested parties will be involved in any such review.

- C. Through this Agreement, FHWA authorizes UDOT to initiate and, in most cases, conclude consultation with SHPO and other consulting parties for purposes of compliance with Section 106 of the NHPA.
- D. UDOT has assumed responsibility for projects classified as Categorical Exclusions, pursuant to 23 U.S.C 326 and a Memorandum of Understanding (MOU) between FHWA and UDOT (Attachment 1). UDOT shall assume the responsibilities of FHWA and shall satisfy the provisions of Section 106 of the NHPA and 36 CFR 800, as well as Section 4(f) of the Department of Transportation (DOT) Act of 1966, for all projects classified as Categorical Exclusions by complying with the stipulations of this Agreement.
- E. Through this Agreement, FHWA and UDOT establish two tiers of project review, dependent upon the type of impacts to historic properties.
  - 1. Tier 1 Project Review: Tier 1 projects have the potential to affect historic properties, but following screening, may be determined to require no case-by-case review or consultation with SHPO because they result in a finding of no historic properties affected. Tier 1 undertakings must meet the criteria outlined in Stipulation VIII.A.4.
  - 2. Tier 2 Project Review: Tier 2 projects result in a finding of no adverse effect or adverse effect.
- F. FHWA retains the responsibility for government-to-government consultation with Tribes as required under 36 CFR 800.16(m). UDOT may assist FHWA if individual Tribes agree to alternate procedures.
- G. This Agreement shall not apply to undertakings that occur on or affect tribal lands as they are defined in 36 CFR 800.16(x). Tribal lands are all lands within the exterior boundaries of any Indian reservation, and all dependent Indian communities. For such undertakings, FHWA shall follow the procedures in 36 CFR Part 800.
- H. This Agreement does not supersede existing agreements currently in use in Utah by FHWA, SHPO, Council, and UDOT, except for the June 6, 1990 delegation letter (referenced above). These existing agreements remain in force and are separate from this Agreement. A list of these agreements is attached hereto as Attachment 2.
- I. Cooperating Federal agencies who recognize FHWA as the lead Federal agency for an undertaking may fulfill their obligations under Section 106 of NHPA by having FHWA act on their behalf in fulfilling their collective responsibilities (36 CFR 800.2(a)(2)), provided FHWA and UDOT follow the requirements of this Agreement and the cooperating agency's undertaking does not have the potential to cause effects to historic properties beyond those considered by FHWA and UDOT.
  - 1. FHWA and UDOT will consult with other agencies involved in the undertaking (except USACE, who is a signatory to this Agreement) to reach an agreement that FHWA is the lead Federal agency for the undertaking, and that they will accept FHWA's compliance with NHPA.
  - 2. These agencies will be considered consulting parties in the undertaking.
  - 3. All consultation with an agency regarding lead Federal agency status and compliance with Section 106 will be documented.
  - 4. The process whereby USACE meets their Section 106 compliance responsibilities on projects that need, or anticipate, a USACE permit, is outlined in Attachment 3.

## II. DEFINITIONS

- A. For purposes of this Agreement, the definitions provided in 36 CFR 800.16 (a) through (z) inclusive shall apply whenever applicable.
- B. There are three classes of action defined in the Council on Environmental Quality regulations (40 CFR 1500) that implement the National Environmental Policy Act (NEPA): Categorical Exclusion (CE), Environmental Assessment (EA), and Environmental Impact Statement (EIS).
- C. SAFETEA-LU = Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-59).

### **III. PROFESSIONAL QUALIFICATIONS STANDARDS**

All actions prescribed by this Agreement that involve the identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meets the Secretary of the Interior's Professional Qualifications Standards (published in 48 FR 44738-44739) and who has been permitted (for archaeology only) by the state of Utah in accordance with U.C.A. 9-8-305 and its implementing rules, and who meets permit requirements of other agencies as appropriate. However, nothing in this stipulation may be interpreted to preclude FHWA or UDOT or any agent or contractor thereof from using the services of persons who do not meet these qualifications standards, providing their activities are conducted under the direct supervision of a person who does meet the standards.

UDOT shall employ personnel trained, experienced, and qualified in the fields of archaeology, history, and architectural history (as defined in 36 CFR 61, Appendix A). They are designated as professionally qualified staff (PQS). Except on such occasions when FHWA elects to consult directly with SHPO or Council, all consultation with SHPO under this Agreement, and decisions made under Tier I, shall be performed by the UDOT PQS. All consultation on behalf of UDOT and FHWA shall be performed by the UDOT PQS.

### **IV. RESPONSIBILITIES**

The following section identifies the responsibilities of FHWA and of UDOT in complying with the terms of this Agreement. These responsibilities are listed in more detail in Attachment 4.

#### **A. FHWA Responsibilities**

1. Consistent with the requirements of 36 CFR 800.2(a) and 800.2(c)(4), FHWA remains legally responsible for ensuring that the terms of this Agreement are carried out and for all findings and determinations made pursuant to this Agreement by UDOT under the authority of FHWA, except where such responsibility has been delegated to UDOT in accordance with the MOU in Attachment 1. At any point in the Section 106 process, FHWA may inquire as to the status of any undertaking carried out under the authority of this Agreement and may participate directly in any undertaking at its discretion.
2. FHWA retains the responsibility for government-to-government consultation with Tribes as defined in 36 CFR 800.16(m). UDOT may assist FHWA in consultation if the individual Tribes agree to alternate procedures.

#### **B. UDOT Responsibilities**

Under the authority of FHWA, UDOT may carry out the following steps with respect to undertakings covered by this Agreement. Each PQS shall be responsible for ensuring that the following activities are carried out (Attachment 4). This list is not inclusive of all responsibilities of UDOT under this Agreement.

1. Determine whether the proposed federal action is an undertaking as defined in 36 CFR 800.16(y).
2. Determine under 36 CFR 800.3(a) whether the undertaking is a type of activity that has the potential to cause effects on historic properties
3. Determine under 36 CFR 800.3(c) and (d) whether the undertaking may occur on or has the potential to affect historic properties on tribal lands as they are defined in 36 CFR 800.16(x).

4. Solicit public comment and involvement, in accordance with 36 CFR 800.3(e) and UDOT's public involvement procedures.
5. Except as identified in Stipulation V, identify additional consulting parties, including Tribes, as described in 36 CFR 800.3, and invite them to participate in the undertakings covered by this Agreement.
6. Determine and document the scope of identification efforts and level of effort, as described in 36 CFR 800.4 (a) and (b), including the undertaking's area of potential effects (APE). SHPO consultation on the APE will not be required on routine projects (defined as those projects classified as a CE). For undertakings that are non-routine or those with the potential for substantial indirect and/or cumulative effects (EAs and EISs), SHPO shall be consulted in writing.
7. Determine boundaries for historic properties.
8. Determine the eligibility of properties within the APE for listing on the NRHP.
9. Determine whether historic properties may be affected by the undertaking. Assess effects by applying the criteria of adverse effects as described in 36 CFR 800.5(a)(1)
10. In consultation with FHWA, USACE (if a permitted undertaking, and the adverse effects are on historic properties in the USACE jurisdictional APE), SHPO, and Council (if it has chosen to participate), resolve adverse effects through the development, circulation, and execution of a Memorandum of Agreement (MOA), if appropriate.
11. Ensure conformance with the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation; The Advisory Council on Historic Preservation – Section 106 Archaeology Guidance; UDOT's Guidelines for Identifying, Recording, and Evaluating Archaeological and Paleontological Resources, and UDOT's Environmental Manual of Instruction, and any successors to those guidelines; and applicable guidelines and procedures of land-managing agencies whose lands may be affected by the undertaking.
12. The UDOT PQS shall submit to the Utah Division of State History (UDSH) copies of all fieldwork reports, Intermountain Antiquities Computer Site (IMACS) forms, Reconnaissance Level Survey (RLS) forms, Intensive Level Survey (ILS) forms, and any other relevant documents. If a project qualifies as a Tier 1 project, these materials will be submitted quarterly in accordance with Stipulation VIII.C
13. Ensure curation of archaeological materials produced under this Agreement at a facility meeting the standards of 36 CFR 79 and U.C.A. 53B-17-603, as appropriate.

## **V. CONSULTATION WITH TRIBES**

- A. FHWA shall retain ultimate responsibility for complying with all federal requirements pertaining to government-to-government consultation with Tribes. Notwithstanding any other provision of this stipulation, FHWA shall honor the request of any Tribe for government-to-government consultation regarding an undertaking covered by this Agreement.
- B. In accordance with 36 CFR 800.3(f)(2), any Tribes that might attach religious and cultural significance to historic properties in the area of potential effects shall be identified by UDOT and invited by FHWA to be consulting parties.
- C. UDOT shall ensure that consultation with Tribes is initiated early in the project planning process to identify cultural, confidentiality, or other concerns and to allow adequate time for consideration.
- D. UDOT shall ensure that consultation continues with Tribes throughout the Section 106 review process prescribed by this Agreement whenever such tribes express a concern about an undertaking or about historic properties that may be affected by an undertaking.
- E. UDOT may assist FHWA in consultation if the individual Tribes agree to alternate procedures.
- F. Tribal consultation shall be done in accordance with 36 CFR Part 800, except where separate agreements have been executed with Tribes (Attachment 2).

## **VI. PARTICIPATION OF OTHER CONSULTING PARTIES AND THE PUBLIC**

### **A. Consulting Parties**

1. Consulting parties shall be identified pursuant to, and their participation in undertakings covered under this Agreement shall be governed by, 36 CFR 800.2(c)(5) and 800.3(f). Other individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties. Other parties entitled to be consulting parties shall be invited by UDOT to participate in the Section 106 process. Any land-managing agency whose land may be affected by an undertaking shall be invited by UDOT to participate in the Section 106 process.
2. UDOT shall invite any local governments (including Certified Local Governments, or CLGs) or applicants that are entitled to be consulting parties under 36 CFR 800.2(c). UDOT shall consider all written requests of individuals and organizations to participate as consulting parties and determine, in consultation with FHWA, which should be consulting parties for the undertaking.

### **B. Public Involvement**

1. Public involvement in planning and implementing undertakings covered by this Agreement shall be governed by FHWA's and UDOT's environmental compliance procedures. UDOT's Public Involvement Policy and UDOT's Manual of Instruction will provide guidance for identifying, informing, and involving the public. FHWA's Technical Advisory (T6640.8A, October 30, 1987) and similar and subsequent guidance documents will also be used. Public involvement and the release of information hereunder shall be consistent with 36 CFR 800.2(d), 800.3(e), and 800.11(c)(1) and (3).
2. The UDOT shall continue to 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, and the likely interest of the public in the effects on historic properties, to remain consistent with the intent of 36 CFR Part 800, as amended.
3. For those actions that do not routinely require public review and comment (e.g., certain activities classified as a CE), appropriate public involvement should be based on the specifics of the situation and commensurate with the type and location of historic properties, and the undertaking's potential impacts on them.
4. The UDOT shall make FHWA, SHPO, and the USACE aware of any and all public controversy as it relates to the historic properties potentially affected by the proposed undertaking, including properties of religious and/or cultural significance to the Tribes.

## **VII. CE DELEGATION**

- A. UDOT, under Section 6004 of SAFETEA-LU, has assumed responsibility, authority, and liability for projects classified as Categorical Exclusions pursuant to the MOU in Attachment 1 of this Agreement. UDOT shall be deemed to be a Federal agency for those undertakings for the duration of this delegation.
- B. UDOT shall satisfy the provisions of Section 106 of the NHPA, 36 CFR 800, and Section 4(f) of the DOT Act of 1966 by complying with the stipulations of this Agreement.
- C. FHWA shall retain responsibility for government-to-government consultation with Tribes as defined in 36 CFR 800.16(m).
  - a. If UDOT resolves any project-specific Tribal issues or concerns, FHWA's role in the environmental process shall be limited to carrying out the government-to-government consultation process.
  - b. If FHWA determines through consultation with a Tribe, or a Tribe indicates to FHWA, that the proposed resolution of Tribal issues or concerns by UDOT is not adequate and requires government-to-government consultation to resolve, FHWA shall reassume

responsibility for Section 106 for that project while continuing to comply with the stipulations of this Agreement.

- D. FHWA may monitor UDOT's processing of any project. If FHWA has reason to believe that UDOT's performance does not satisfy the terms and conditions of the MOU in Attachment 1, it may intervene to identify the problem. If the problem cannot be resolved to the satisfaction of FHWA, FHWA may reassume responsibility for Section 106 for that project, according to the provisions of the MOU in Attachment 1.
- E. Although FHWA will not normally be involved in these undertakings, FHWA must monitor and assess quality assurance of the assumption by UDOT of Section 106 responsibilities. In furtherance of those obligations, FHWA may elect to attend meetings between UDOT and another agency, and may submit comments to UDOT and the other agency, if FHWA determines that an issue between UDOT and the other agency has broad or unique policy implications for the administration of the state or national program.

## **VIII. PROJECT REVIEW**

### **A. Tier 1 Project Review**

- 1. Tier 1 undertakings are those undertakings that have the potential to affect historic properties, but following appropriate screening, may be determined to require no further review or consultation under this Agreement. FHWA retains ultimate authority, responsibility, and liability, unless the project is processed under Stipulation VII. Pursuant to consultation with the other signatories to this Agreement, FHWA has identified undertakings that meet certain criteria and that will be addressed in accordance with Attachment 5 to this Agreement. The undertakings classified in this Attachment as Tier 1 undertakings do not require case-by-case review by SHPO, but may be reviewed by SHPO in a quarterly report under this Agreement when the steps set forth in the Attachment have been satisfactorily completed and when UDOT determines that no condition of the undertaking necessitates further review pursuant to this Agreement.
- 2. The PQS is responsible for screening undertakings to determine if those individual undertakings require further consideration, or if they may be determined not to require further review or consultation under the terms of this Agreement. The UDOT PQS may consult at any time, either formally or informally, with SHPO on any undertaking.
- 3. The PQS shall include the identification of all known storage, disposal, or borrow areas, and construction easements and staging areas, prior to the screening process. If additional project areas are added to a screened undertaking, the undertaking must be re-screened.
- 4. The criteria for determining if an undertaking requires no further review and consultation beyond the screening assessment and documentation of decision making by UDOT, are as follows:
  - a. Has no known public controversy based on historic preservation issues; and
  - b. Has one of the following effect findings:
    - i. No Historic Properties Affected: No cultural resources present, as determined by UDOT PQS; or
    - ii. No Historic Properties Affected: No historic properties (i.e., eligible for the National Register) present, as determined by UDOT PQS; or
    - iii. No Historic Properties Affected: Historic properties are present, but are completely avoided by the undertaking and there is no or negligible potential for adverse indirect effects, as determined by UDOT PQS.
- 5. If a cultural resource inventory is conducted under this stipulation, any cultural resource reports generated from the survey shall be submitted to the UDSH quarterly for filing, in accordance with Stipulation VIII.C.

6. The UDOT Standard Specification 01355, Part 3.8, Discovery of Historical, Archaeological, or Paleontological Objects, Features, Sites, or Human Remains (Attachment 6), applies to all UDOT projects and will be referenced in all environmental documents (CEs, EAs, EISs).
7. The requirements for reporting on the projects that qualify and are processed as Tier 1 undertakings will be in accordance with Attachment 5.
8. The PQS will ensure that the documentation in Attachment 5 is included in the appropriate environmental document and project file. For Tier I undertakings, to document compliance in USACE decisions, UDOT shall notify USACE by submittal of screening form in permit application.
9. UDOT administratively completes Section 106 activities, but FHWA retains authority, responsibility, and liability for all actions, findings, and determinations, unless the project is classified as a CE pursuant to the MOU in Attachment 1.

## **B. Tier 2 Project Review**

Tier 2 projects are all other projects not processed as Tier 1 projects (i.e., projects that result in a finding of no adverse effect or adverse effect). UDOT administratively completes Section 106 activities, but FHWA retains authority, responsibility, and liability for all actions, findings, and determinations, unless the project is classified as a CE pursuant to the MOU in Attachment 1.

## **C. Quarterly Reports**

1. On a quarterly basis (no later than January 15, April 15, July 15, and October 15), the UDOT Region PQS shall submit to the UDOT Central PQS a list of all projects that were processed as screened undertakings (Tier 1) (Attachment 5) in that quarter. The Central PQS will compile a complete list of Tier 1 projects for submission to FHWA, SHPO, and USACE within 30 days from the end of the quarter (submitted by January 31, April 30, July 31, and October 31).
2. This list shall include the county, project name and number, type of undertaking, level of effort, consultation measures, description of any archaeological sites, buildings, or structures, and a map showing the distribution by county of the projects throughout the state. The list will also indicate which projects require a USACE permit.
3. All cultural resource reports, site forms, and other documentation for undertakings completed during the quarter, will be submitted to the UDSH by UDOT.
4. UDOT will provide the list to FHWA, SHPO, and USACE, who will review it for compliance with this Agreement. If there are objections regarding the manner in which the terms of this Agreement are being carried out, the parties to this agreement will proceed in accordance with Stipulation XIII.C

## **IX. THE SECTION 106 PROCESS**

For all undertakings reviewed pursuant to this Agreement, UDOT shall use the following process:

### **A. Initiation of the Section 106 Process**

1. Establish the undertaking, determine if the undertaking is a type of activity that has the potential to cause effects on historic properties, determine if the undertaking will occur on Tribal lands, or if the undertaking will require consultation with USACE. Coordination with USACE should be conducted early the Section 106 process in order to determine if a permit is required.
2. If UDOT determines that the undertaking is one with no potential to cause effects, UDOT will document this decision in the project record and Section 106 is complete. Otherwise, continue the process.
3. Identify the appropriate SHPO.
4. Identify consulting parties, including Tribes, as appropriate, during the early stages of Section 106 review. If UDOT wishes to consult with SHPO on the identification of consulting parties, SHPO shall

have 15 days to respond or concur. If SHPO does not respond within that time period, UDOT may assume that SHPO has no objections and may proceed.

5. Develop planning to involve the public, Tribes, USACE, and other consulting parties.
6. Begin consultation with consulting parties subject to limitations specified in Stipulation V.

## **B. Identification of Historic Properties**

1. Pursuant to 36 CFR 800.4(a), UDOT shall determine the scope of identification efforts, including determining and documenting the undertaking's area of potential effects (APE), as defined at 36 CFR 800.16(d) and Attachment 7. If UDOT wishes to consult with SHPO and the USACE (to ensure scope and APE cover USACE's permit area) on the scope of the identification efforts and the definition of the APE, SHPO shall have 15 days to respond or concur. If SHPO does not respond within that time period, UDOT may assume that SHPO has no objections and may proceed.
2. Pursuant to 36 CFR 800.4(b), UDOT shall ensure the identification of historic properties that may be affected by an undertaking and gather information to evaluate the eligibility and integrity of these properties for listing in the NRHP.
3. Information shall be obtained through cultural resource surveys or other appropriate methods.
4. Identification of historic properties shall follow the Secretary of the Interior's Standards and Guidelines for Identification (48 FR 44720-23), and should be consistent with guidance issued by SHPO, FHWA, UDOT, and USACE, and any other guidance, methodologies, agreements, or protocols that FHWA, UDOT, USACE, and SHPO agree should be used to identify properties, including those of other land-managing agencies.
5. If no historic properties are found to be present in the APE, the project will be processed as a Tier 1, in accordance with Stipulation VIII.A.

## **C. Evaluating Historic Significance**

1. UDOT shall evaluate the historic significance of identified properties in accordance with 36 CFR 800.4(c), and shall make appropriate findings regarding eligibility. Where historic property boundaries have not previously been established, the PQS will identify boundaries, following standards set forth in National Register Bulletin 21, *Defining Boundaries for National Register Properties*. UDOT shall consult with SHPO on the outcome of identification and evaluation of historic resources.
2. For undertakings that have properties that are determined by the PQS to be not eligible for inclusion in the NRHP, the project will be processed as a Tier 1, in accordance with Stipulation VIII.A.
3. UDOT may simultaneously request SHPO concurrence on findings of inventory, eligibility, and effect covered by 36 CFR 800.3 through 800.6, provided other consulting parties and the public are afforded an adequate opportunity to express their views pursuant to 36 CFR 800.2(d).
  - a. If SHPO fails to comment on any findings contained in a submission within 30 calendar days of receipt, UDOT may assume they have no objection and proceed to the next step in the consultation process pursuant to 36 CFR 800.3(c)(4).
  - b. For purposes of Section 4(f) (36 CFR 774), if SHPO does not respond to a request for concurrence in the determination of no adverse effect within 30 days, the non-response together with the written agreement in Attachment 8 will be considered written concurrence in the Section 106 determination that will be the basis of the *de minimis* impact finding by FHWA
4. Agreements regarding the NRHP eligibility of properties evaluated hereunder, and any disagreements pertaining thereto, shall be governed by 36 CFR 800.4(c)(2), except that in the event of a disagreement, UDOT shall first consult with the disagreeing party to resolve the disagreement.
  - a. If the disagreement cannot be resolved through informal consultation, UDOT shall notify FHWA (unless the project is processed under Stipulation VII), whereupon UDOT, FHWA, SHPO, and

any consulting party shall consult to resolve the disagreement in accordance with a time frame specified by FHWA.

- b. If the disagreement is not resolved, FHWA (unless the project is processed under Stipulation VII) shall refer the issue to the Keeper of the National Register to obtain a determination of eligibility.

## **D. Finding of Effect**

### **1. No Historic Properties Affected**

- a. If UDOT finds that either there are no historic properties present or there are historic properties present within the APE, but the undertaking will have no effect on them as defined in 36 CFR 800.16(i), UDOT shall make a finding of no historic properties affected (36 CFR 800.4(d)(1).
- b. As defined in Stipulation VIII.A.4., a finding of no historic properties affected does not lead to a *de minimis* impact finding under Section 4(f).
- c. For projects processed as Tier 1 undertakings, the findings will be documented in the quarterly reports, and documentation submitted quarterly to FHWA, SHPO, and USACE.
- d. UDOT shall notify all consulting parties, and make the documentation available for public inspection, consistent with the confidentiality provisions of 36 CFR 800.11(c), prior to approving the undertaking.

### **2. No Adverse Effect**

- a. UDOT shall make a formal finding of no adverse effect if none of the undertaking's anticipated effects meet the Criteria of Adverse Effect under 36 CFR 800.5(a)(1), or if UDOT modifies the undertaking or imposes conditions that will avoid adverse effects to historic properties.
- b. UDOT shall submit its finding of effect (FOE) and supporting documentation to all consulting parties for comment, and will request SHPO concurrence on the finding.
- c. UDOT may consult at any time, either formally or informally, with SHPO regarding application of the criteria.
- d. If SHPO, or another consulting party, objects within 30 days of receipt of a UDOT finding of no adverse effect, UDOT will notify FHWA, unless the project is being processed under Stipulation VII. FHWA will either consult to resolve the objection or request the Council to review the finding pursuant to 36 CFR 800.5(c)(2).
- e. If the project is processed under Stipulation VII, UDOT will either resolve the objection or will request the ACHP to review the finding pursuant to 36 CFR 800.5(c)(2).
- f. UDOT shall maintain a record of the finding and provide information on the finding to all consulting parties and the public on request, consistent with the confidentiality provisions of 36 CFR 800.11(c), prior to approving the undertaking.

### **3. Adverse Effect**

- a. Where adverse effects, as defined by the Criteria of Adverse Effect set forth in 36 CFR 800.5(a), cannot be avoided, UDOT shall make a finding of adverse effect.
- b. Prior to any finding of adverse effect, FHWA or UDOT shall consult with Tribes that ascribe traditional cultural and religious significance to affected historic properties, and may consult either formally or informally with SHPO regarding application of the criteria of adverse effect.

### **4. Resolution of Adverse Effect**

- a. When a finding of adverse effect has been made by UDOT, the UDOT shall, in consultation with FHWA (unless the project is processed under Stipulation VII), SHPO, USACE (if this is a

permitted undertaking and the adverse effect is on a historic property within USACE jurisdictional APE), and other consulting parties, evaluate alternatives or modifications to the project that would avoid, minimize, or mitigate adverse effects on historic properties. UDOT shall propose measures to resolve adverse effects, to be documented in a memorandum of agreement (MOA) or other appropriate agreement document.

- b. UDOT shall make information available to the public, including the documentation specified in 36 CFR 800.11(e), subject to the confidentiality provisions of 36 CFR 800.11(c).
- c. UDOT shall provide an opportunity for members of the public to express their views on resolving adverse effects of the project through UDOT's public involvement procedures.
- d. UDOT will also notify the public of the adverse effect by publishing a notice in statewide or local newspapers, providing notice in a project newsletter, providing information at a public meeting, or other manner appropriate to the scope and complexity of the project (consistent with the intent of Stipulation VI.B of this Agreement).
- e. UDOT will notify the Council of the finding, pursuant to 36 CFR 800.6(a)(1), and that UDOT will be preparing a MOA to resolve adverse effects. UDOT will provide supporting documentation in accordance with 36 CFR 800.11(e), and determine Council participation pursuant to 36 CFR 800.6(a)(1).
  - i. The Council shall advise the agency and the consulting parties whether it will participate within 15 days of receipt of notice.
- f. After consideration of the views of all consulting parties and the public, if UDOT, FHWA (unless the project is processed under Stipulation VII), SHPO, USACE (if this is a permitted undertaking and the adverse effect is on a historic property within USACE jurisdictional APE), and Council (if it has chosen to participate [pursuant to 36 CFR 800 Appendix A]) agree on how the adverse effects will be resolved, they shall execute an MOA, pursuant to 36 CFR 800.6(c).
- g. A copy of the MOA shall be provided to each signatory, invited signatory, and concurring parties, as well as the Council (if they are not a signatory).
- h. Once finalized, the measures to resolve adverse effects shall be incorporated into the undertaking, and the undertaking may be implemented.
- i. If the UDOT determines that an undertaking may adversely affect a National Historic Landmark, UDOT will notify FHWA, who shall request SHPO, Council, and Secretary of the Interior, as well as any other consulting parties, to participate in consultation to resolve any adverse effects, pursuant to 36 CFR 800.10.

## **E. Resolving Objections**

1. If FHWA, SHPO, and UDOT are unable to agree on measures to resolve the adverse effects of an undertaking pursuant to this stipulation, they shall invite the Council to participate in the resolution process pursuant to 36 CFR 800.6(b)(2).
2. If the parties fail to agree to measures to resolve the adverse effects, FHWA, SHPO, or the Council may terminate consultation pursuant to 36 CFR 800.7(a). Upon termination, the signatories shall comply with the remaining requirements of 36 CFR 800.7.

## **X. EMERGENCY SITUATIONS**

- A. For the purposes of this Agreement, emergencies are defined as occurrences that require emergency highway system/facility repairs that are necessary to 1) protect the life, safety, or health of the public; 2) minimize the extent of damage to the highway system/facilities; 3) protect remaining highway facilities; or 4) restore essential traffic.
  1. These repairs can occur regardless of funding category, and regardless of declarations made by federal, state, or local agencies.

2. If the emergency repair project could affect historic properties, UDOT shall notify SHPO, FHWA, USACE (if a permitted undertaking), and Tribes within 24 hours. SHPO and any Tribe that may attach religious and cultural significance to historic properties likely to be affected will have 72 hours to respond.
3. For projects where the repair must be made within the first 30 days of the occurrence of the event that caused the emergency or the declaration of the emergency by an appropriate authority, the processing of environmental documentation will happen concurrently or after the fact. In these cases, UDOT will comply with the procedures in Stipulation IX of this Agreement to the extent possible, but the reviews will likely be conducted after the emergency work is completed.
4. For projects taking longer than 30 days for repair, UDOT will comply with the procedures in Stipulation IX.
5. Written notification of an emergency action shall be provided to SHPO. The notice shall be clearly and prominently marked as an emergency notification, and shall include an explanation of how the action meets the requirements for emergency as defined herein. The notice shall also include a brief description of the eligibility and/or significance of the resource(s) involved, the nature, effect, and anticipated effect of the emergency action on the resource(s), and the anticipated time frame available for comment.

## **XI. POST-REVIEW DISCOVERIES**

### **A. Planning for Subsequent Discoveries**

When UDOT's identification efforts in accordance with Stipulation IX.B indicate that historic properties are likely to be discovered during implementation of an undertaking, UDOT shall include in any environmental document a plan for discovery of such properties. Implementation of the plan as originally proposed, or modified as necessary owing to the nature and extent of the properties discovered, will be in accordance with 36 CFR 800.4-6.

### **B. Discoveries Without Prior Planning**

1. If previously unidentified archaeological or historic properties, or unanticipated effects, are discovered after UDOT has completed its review under this Agreement, that portion of the project will stop immediately, in accordance with UDOT Standard Specification 01355, Part 3.8 (Attachment 6).
2. No further construction in the area of discovery will proceed until the requirements of 36 CFR 800.13 have been satisfied, including consultation with Tribes that may attach traditional cultural and religious significance to the discovered property.
3. UDOT will notify SHPO, FHWA, USACE (if a permitted undertaking), and the Tribes within 48 hours of the discovery with a description of the discovery, and the actions that are proposed to document the discovery, evaluate NRHP eligibility of the property, and determine the project's effect on the property if the discovery is determined eligible.
4. If there will be an adverse effect to the property, UDOT will consult with SHPO, FHWA, USACE (if a permitted undertaking), and the Tribes to design a plan for avoiding, minimizing, or mitigating adverse effects on the eligible property.
5. If neither SHPO nor a Tribe files an objection within 72 hours to UDOT's plan for addressing the discovery or resolving adverse effects, UDOT may carry out the requirements of 36 CFR 800.13 on behalf of FHWA, and the Council does not need to be notified.
6. UDOT will provide SHPO, FHWA, USACE (if a permitted undertaking), and the Tribes a copy of the treatment plan and the report of the actions when they are completed.

## **XII. TREATMENT OF HUMAN REMAINS**

Native American remains and any funerary objects, sacred objects, or objects of cultural patrimony (cultural objects) found within the APE shall be treated pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990 (25 U.S.C. 3001 *et seq.* and its implementing regulations (43 CFR 10, as amended) or the Utah Native American Graves Protection and Repatriation Act (Utah NAGPRA) of 1992 (U.C.A. 9-9-401, *et seq.*, and its implementing Rule R230-1, depending on land ownership (BLM, Forest Service, SITLA, UDOT, private, etc.).

## **XIII. ADMINISTRATIVE STIPULATIONS**

### **A. Documentation**

1. All documentation that supports findings and determinations made under this Agreement shall be consistent with 36 CFR 800.11 and shall be in accordance with the UDOT Guidelines for Archaeological Survey and Testing, and its subsequent revisions or editions, with attachments to this Agreement, and with applicable guidelines and procedures of land-managing agencies that have jurisdiction over the land involved in the undertaking.
2. Documentation prepared by local agencies or their consultants in support of such findings shall be submitted to UDOT for review and approval by the UDOT PQS. UDOT shall transmit all documentation cited herein to SHPO as stipulated by this Agreement. UDOT shall not transmit to FHWA or SHPO any documentation that has not been reviewed and approved by the UDOT PQS.
3. All documentation prepared under this Agreement shall be kept on file at UDOT and made available to consulting parties and the public as stipulated by the Agreement, consistent with applicable confidentiality requirements [as described in 36 CFR 800.11(c)].
4. The UDOT PQS shall submit to the UDSH copies of all fieldwork reports, Intermountain Antiquities Computer Site (IMACS) forms, Reconnaissance Level Survey (RLS) forms, Intensive Level Survey (ILS) forms, and any other relevant documents as soon as possible (and no later than 2 years) after completion of the work, unless an agreement between UDOT and UDSH states a different period.
5. For projects processed as Tier 1 projects, reports and forms will be submitted on a quarterly basis, in accordance with Stipulation VIII.C.

### **B. Monitoring Implementation of this Agreement**

1. FHWA, SHPO, USACE, and Council may review activities carried out pursuant to this Agreement. UDOT shall facilitate this review by compiling specific categories of information to document the effectiveness of the Agreement and by making this information available on an annual basis to FHWA, SHPO, USACE, and Council in the form of a written report. Categories of information can include, but are not limited to, a summary of actions taken under the Agreement, including all findings and determinations, accomplishments, estimated time and cost savings, public objections, and inadvertent effects or foreclosures. The range and type of information included by UDOT in the written report and the manner in which this information is organized and presented must be such that it facilitates the ability of the reviewing parties to assess accurately the degree to which the Agreement and its manner of implementation constitute an efficient and effective program alternative under 36 CFR 800, and to determine whether this Agreement should remain in effect, and if so, whether and how it should be improved through appropriate amendment.
2. UDOT shall prepare the written report of these findings annually following execution of the Agreement. The initial report shall be prepared following completion of the first full Federal fiscal year under this Agreement. UDOT shall submit the annual reports to FHWA, SHPO, USACE, and Council no later than three (3) months following the end of the Federal fiscal year (September 30).

3. UDOT, FHWA, USACE, and SHPO will meet annually to evaluate the Agreement, to suggest revisions to its provisions, and to evaluate the quality of the resource identification and protection activities carried out under the Agreement. Prior to any such meetings, the Council will be notified at least 30 days in advance, and may participate at its discretion. Thirty days prior to the annual evaluation, UDOT shall submit the report of the previous year's activities to FHWA, SHPO, USACE, and Council.
4. UDOT shall provide notice to the public that the annual report herein prescribed is available for public inspection and ensure that potentially interested members of the public are made aware of its availability and that the public may comment to signatory parties on the report. FHWA and UDOT, in consultation with SHPO, USACE, and Council, shall identify the specific recipients of the public notice herein described.
5. At the request of any other signatory party to this Agreement, FHWA shall ensure that one or more meetings are held to facilitate review of, and comment on, the report to address questions and issues, or to resolve adverse comments.
6. In conjunction with the review of the reports prepared by UDOT pursuant to this Stipulation, the signatory parties shall consult to review the overall effectiveness and benefits of the Agreement, determine if its requirements are being met, decide if amendments to the Agreement are warranted, review the reporting format and categories for adequacy, and identify any other actions that may be needed in order to take into account the effects of the Program on historic properties in Utah.
7. If any signatory party determines that a UDOT Region (there are four) is not meeting its responsibilities under this Agreement, measures will be taken to resolve the concerns with the UDOT PQS, and the UDOT Central PQS if appropriate.

### **C. Resolving Objections to Implementation of this Agreement**

1. Should any signatory party object in writing to UDOT or FHWA regarding the manner in which the terms of this Agreement are carried out, FHWA will immediately notify the other signatory parties of the objection and proceed to consult with the objecting party to resolve the objection. FHWA will honor the request of any signatory party to participate in the consultation and will take any comments provided by such parties into account. FHWA shall establish a reasonable time frame for such consultations.
2. If the objection is resolved through consultation, FHWA may authorize the disputed action to proceed in accordance with the terms of such resolution.
3. If after initiating such consultation, FHWA determines that the objection cannot be resolved through consultation, FHWA, with the cooperation of UDOT, shall forward all documentation relevant to the objection to the Council and other signatory parties, including FHWA's proposed response to the objection. Within 30 days after receipt of all pertinent documentation, Council shall exercise one of the following options:
  - a. Advise FHWA that Council concurs in FHWA's proposed response to the objection, whereupon FHWA will respond to the objection accordingly; or
  - b. Provide FHWA with recommendations, which FHWA shall take into account in reaching a final decision regarding its response to the objection; or
  - c. Notify FHWA that the objection will be referred for comment pursuant to 36 CFR 800.7(a)(4) and proceed to refer the objection and comment. In this event, FHWA shall ensure that the Agency Official is prepared to take the resulting comments into account in accordance with 36 CFR 800.7(c)(4).
4. Should Council not exercise one of the foregoing options within 30 days after receipt of all pertinent documentation, FHWA may assume Council's concurrence in its proposed response to the objection.
5. FHWA shall take into account any Council recommendation or comment and any comments from the other signatory parties to this Agreement in reaching a final decision regarding the objection.

FHWA's responsibility to carry out all actions under this Agreement that are not the subject of the objection shall remain unchanged.

6. FHWA shall provide all other signatory parties to this Agreement with a written copy of its final decision regarding any objection addressed pursuant to this Stipulation.
7. FHWA may authorize any action subject to objection under this Stipulation to proceed, provided the objection has been resolved in accordance with the terms of this Stipulation.
8. At any time during implementation of the terms of this Agreement, should any member of the public raise an objection in writing pertaining to such implementation to any signatory party to this Agreement, that signatory party shall immediately notify FHWA. FHWA shall immediately notify the other signatory parties in writing of the objection. Any signatory party may choose to comment on the objection to FHWA. FHWA shall establish a reasonable time frame for this comment period. FHWA shall consider the objection, and in reaching its decision, FHWA will take all comments from the other signatory parties into account. Within 15 days following closure of the comment period, FHWA will render a decision regarding the objection and respond to the objecting party. FHWA will promptly notify the other signatory parties of its decision in writing, including a copy of the response to the objecting party. FHWA's decision regarding resolution of the objection will be final. Following the issuance of its final decision, FHWA may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

#### **D. Amendment**

1. Any signatory party to this Agreement may at any time propose amendments, whereupon all signatory parties shall consult to consider such amendment. This Agreement may be amended only upon written concurrence of all signatory parties.
2. Each attachment to this Agreement may be individually amended through consultation of the signatory parties without requiring amendment of the Agreement, unless the signatory parties through such consultation decide otherwise.

#### **E. Termination**

1. Any signatory party may terminate this agreement. If this Agreement is not amended as provided for in Stipulation XIII.D, or if any signatory party proposes termination of this Agreement for other reasons, the party proposing termination shall notify the other signatory parties in writing, explain the reasons for proposing termination, and consult with the other parties for no more than 30 days to seek alternatives to termination.
2. Should such consultation result in an agreement on an alternative to termination, the signatory parties shall proceed in accordance with that agreement.
3. Should such consultation fail, the signatory party proposing termination may terminate this Agreement by promptly notifying the other parties in writing.
4. Should this Agreement be terminated, FHWA would carry out the requirements of 36 CFR Part 800 for individual undertakings, as stated in Stipulation XIII.D.5.
5. Beginning with the date of termination, FHWA shall ensure that until and unless a new Agreement is executed for the actions covered by this Agreement, such undertakings shall be reviewed individually in accordance with 36 CFR 800.4-800.6.
6. If this Agreement is terminated and UDOT has assumed Section 106 compliance responsibility in accordance with the MOU in Attachment 1, UDOT shall comply with 36 CFR 800.4 through 800.6.

#### **F. Confidentiality**

All parties to this Agreement acknowledge that information about historic properties, potential historic properties, or properties considered historic for purposes of this Agreement are or may be subject to the

provisions of Section 304 of NHPA., Section 304 allows UDOT to withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if UDOT determines that disclosure may 1) cause a significant invasion of privacy; 2) risk harm to the historic resource; or 3) impede the use of a traditional religious site by practitioners. Having so acknowledged, all parties to this Agreement will ensure that all actions and documentation prescribed by this Agreement are, where necessary, consistent with the requirements of Section 304 of the NHPA.

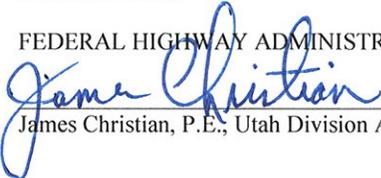
**G. Duration of Agreement**

This Agreement shall remain in effect for a period of ten years after the date it takes effect, unless it is terminated prior to that time. Six months prior to the conclusion of the ten year period, UDOT will notify all parties in writing. If there are no objections from consulting parties, the term of the Agreement will automatically be extended for an additional ten years. If any party objects to extending the Agreement, or proposes amendments, UDOT will consult with the parties to consider amendments or other actions to avoid termination.

Execution of this Agreement by the FHWA, SHPO, Council, USACE, and UDOT, and implementation of its terms evidence that FHWA and USACE have taken into account the effects of the Program and its individual undertakings on historic properties, afforded the Council an opportunity to comment, and has complied with Section 106 of the NHPA and 36 CFR 800 for the Program and its individual undertakings.

**SIGNATORIES**

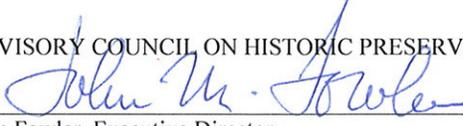
FEDERAL HIGHWAY ADMINISTRATION

  
James Christian, P.E., Utah Division Administrator May 15, 2013  
Date

UTAH STATE HISTORIC PRESERVATION OFFICER

  
Kristen Rogers-Iversen, Interim Division Director May 21, 2013  
Date

ADVISORY COUNCIL ON HISTORIC PRESERVATION

  
John Fowler, Executive Director 6/3/13  
Date

UNITED STATES ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT

  
Michael S. Jewell, Chief, Regulatory Division 1 May 2013  
Date

**INVITED SIGNATORY**

UTAH DEPARTMENT OF TRANSPORTATION

  
Executive Director 5/20/13  
Date

**ATTACHMENT 1**

**MEMORANDUM OF UNDERSTANDING FOR CE DELEGATION**

23 U.S.C. 326 CE Assignment MOU: FHWA, Utah Division, and the Utah Department of Transportation—Renewed Memorandum of Understanding between the Federal Highway Administration, Utah Division, and the Utah Department of Transportation for State Assumption of Responsibility for Categories Exclusions (June 30, 2011) ([MOU CE Delegation](#))

## ATTACHMENT 2

### EXISTING AGREEMENTS

1. Programmatic Agreement between the UDOT and the Utah State Historic Preservation Officer Regarding Implementation of U.C.A. 9-8-404 for State Funded Transportation Projects in Utah ([State PA](#)) (March 19, 2008)
2. Memorandum of Understanding Between the Utah Department of Transportation and the Utah Geological Survey Concerning Agency Responsibilities Pursuant to U.C.A. 79-3-508 ([UGS MOU](#)) (March 25, 2010)
3. Programmatic Agreement Among the Federal Highway Administration, the Utah Department of Transportation and the Confederated Tribes of the Goshute Indian Reservation Regarding Coordination and Consultation on Federal-Aid Highway Projects in Utah in Accordance with the National Historic Preservation Act Section 106 Process and 36 CFR Part 800 ([Goshute PA](#)) (July 29, 2008)
4. Programmatic Agreement Among the Federal Highway Administration, the Utah Department of Transportation, The Paiute Indian Tribe of Utah, and the Cedar Band of Paiute Indians Regarding Coordination and Consultation on Federal-Aid Highway Projects in Utah in Accordance with the National Historic Preservation Act Section 106 Process and 36 CFR Part 800 ([Cedar Band PA](#)) (September 29, 2008)
5. Programmatic Agreement Among the Federal Highway Administration, the Utah Department of Transportation, The Paiute Indian Tribe of Utah, and the Indian Peaks Band of Paiute Indians Regarding Coordination and Consultation on Federal-Aid Highway Projects in Utah in Accordance with the National Historic Preservation Act Section 106 Process and 36 CFR Part 800 ([Indian Peaks PA](#)) (September 29, 2008)
6. Programmatic Agreement Among the Federal Highway Administration, the Utah Department of Transportation, and the Shivwits Band of the Paiute Indian Tribe of Utah Regarding Coordination and Consultation on Federal-Aid Highway Projects in Utah in Accordance with the National Historic Preservation Act Section 106 Process and 36 CFR Part 800 ([Shivwits PA](#)) (March 15, 2011)
7. Agreement to Share Protected Records Between Governmental Entities (Division of State History and Utah Department of Transportation) (August 21, 2007)
8. Interlocal Cooperation Agreement Between Utah Department of Transportation and Utah Division of State History for Assistance with Human Remains Discoveries (October 11, 2011)

## ATTACHMENT 3

### USACE COMPLIANCE WITH SECTION 106

There are three types of permits that are issued by the United States Army Corps of Engineers (USACE) for Utah Department of Transportation (UDOT) projects: 1) Individual permits; 2) Nationwide permits (usually NWP14); and 3) Programmatic General Permit 40, or PGP40 (Utah Joint Stream Alteration permits). Issuance of a permit in connection with a FHWA/UDOT project is the undertaking for which USACE is responsible for ensuring compliance with Section 106 of the National Historic Preservation Act (NHPA). Thus, USACE compliance responsibilities are limited to the jurisdictional area of potential effects (APE) or Permit Area (USACE Guidelines for Compliance with Section 106 of the National Historic Preservation Act, February 25, 2011) The process outlined below will be used, in addition to the process outlined in the PA, on those projects for which a USACE permit is needed, or anticipated.

Pursuant to 33 CFR 325, Appendix B.8(c), “If another agency is the lead agency as set forth by the CEQ regulations (40 CFR 1501.5 and 1501.6(a) and 1508.16), the district engineer will coordinate with that agency as a cooperating agency under 40 CFR 1501.6(b) and 1508.5 to insure that agency's resulting EIS may be adopted by the Corps for purposes of exercising its regulatory authority.” This also applies to Section 106 compliance: “If more than one Federal agency is involved in an undertaking, some or all the agencies may designate a lead Federal agency, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under Section 106” (36 CFR 800.2(a)(2)).

As a signatory to this Agreement, USACE has designated FHWA as the lead Federal agency for purposes of Section 106 compliance and will serve as a cooperating agency on all Federal-aid projects that may require a permit from USACE. The process to allow USACE to adopt FHWA’s Section 106 consultation by having FHWA act on their behalf in fulfilling their collective responsibilities under Section 106 is as follows:

- Invite USACE to project team meetings
- Early coordination on the draft scope of the project and the APE
  - For EAs and EISs, USACE will be copied on the Section 106 APE consultation letter to SHPO and will be invited to any APE consultation meetings.
    - UDOT will request that USACE defines their jurisdictional APE/Permit Area based on available information of aquatic resource locations; USACE will ensure that the UDOT-defined APE encompasses the USACE-defined jurisdictional APE/Permit Area.
    - USACE will have 15 days to respond or concur with the APE. If they do not respond within that time period, UDOT may assume USACE has no objections and that the UDOT-defined APE encompasses the USACE-defined jurisdictional APE/Permit Area, and may proceed.
  - For CEs, except for the exempted projects listed below, a description of the project and the proposed APE will be sent to USACE by UDOT at the same time project notifications are sent to other potential consulting parties.
    - UDOT will request that USACE define their jurisdictional APE/Permit Area; USACE will ensure that the UDOT-defined APE encompasses the USACE-defined jurisdictional APE/Permit Area.
    - USACE will have 15 days to respond or concur with the APE. If they do not respond within that time period, UDOT may assume USACE has no objections

and that the UDOT-defined APE encompasses the USACE-defined jurisdictional APE/Permit Area, and may proceed.

- USACE will be copied on all correspondence to and from Native American Tribes
- Tier 1 projects
  - USACE will accept the Tier 1 quarterly submittals through the process defined in this PA and will not require further SHPO consultation on each individual project. UDOT will include a copy of the Tier 1 Screening Form with all permit applications.
- Tier 2 projects
  - USACE will be copied on the determination of eligibility and finding of effect (DOE-FOE) letter to SHPO submitted by UDOT.
  - The DOE-FOE or FOE will describe the effects on historic properties within the USACE-defined jurisdictional APE/Permit Area.
  - UDOT will request USACE concurrence on the determinations and findings within the USACE-defined jurisdictional APE/Permit Area.
    - If USACE fails to comment on any findings contained in a submission within 30 calendar days of receipt, UDOT may assume they have no objection and proceed to the next step in the consultation process pursuant to 36 CFR 800.3(c)(4).
- Memorandums of Agreement (MOAs)
  - USACE will be a signatory on all MOAs with adverse effects within their jurisdictional APE/Permit Area.
- On projects with a USACE permit, the discovery process will include the USACE if within their jurisdictional APE/Permit Area.

UDOT has identified certain activity types that do not require a USACE permit and qualify for an exemption from USACE coordination. These activities tend to be pavement or maintenance related and are limited to the roadway prism. Identification of which projects are exempted types of activities will be added to the Tier 1 tracking form and submitted quarterly to FHWA, SHPO, and USACE. The list of types of activities exempted is as follows:

#### A. Pavement Related

1. Resurfacing the existing roadway within the roadway prism (toe of slope to top of cut) without other geometric changes. Work includes removing existing pavement surface by rotomilling or grinding, placing new pavement surface overlay using a variety of material types, and/or replacing concrete pavement panels. Existing subbase and original ground remains under the roadway.
2. Sidewalk, curb and gutter, and pedestrian access ramp replacement and/or installation within the roadway prism and not including additional excavation outside existing disturbed area. Disturbance is less than 2 feet below existing surface. Mostly done in urban, residential, or developed/disturbed areas.

#### B. Maintenance Related

1. Pavement repairs within the roadway prism including pothole repairs, joint repairs, pavement patching, soft spot repairs, crack sealing of roads, rumble strips, and pavement marking, striping, and messaging where the construction does not disturb original ground.

2. Bridge maintenance and other structure repairs where work is limited to the structure, including deck and joint repairs, sealing, painting, approach slab work, and barrier/railing upgrades or replacement.

#### C. Signing Related

1. Installation and replacement of signs within the roadway prism, including replacement of existing signs in-kind and/or any sign that does not disturb original ground. Signs include traffic signs, information signs, mile markers, and other delineators.
2. Other signs within the roadway prism that include installation of driven foundation posts 6” or less in diameter for signs, or drilled shaft foundations generally to a maximum diameter of 36.”

#### D. Roadside Safety Related

1. Install, repair, replace or upgrade existing guardrail, impact attenuators, and/or crash cushions on highways within the roadway prism where construction does not disturb original ground.
2. Install or replace center median or shoulder barriers on highways within the roadway prism where construction does not disturb original ground. Includes barriers of concrete, cable, or similar material type.

#### E. Traffic Monitoring Related

1. Install, replace, and upgrade traffic signal and lighting poles, located entirely in uplands. Includes street lighting poles.
2. Install highway monitoring systems including loop detectors (or other types of sensors), cameras, radio systems, ATMS systems, and variable message signs (with the exception of towers) where construction does not disturb original ground, located entirely in uplands.

#### F. Other Project Types

1. Any project, not specifically mentioned above, where all proposed work will take place on existing roadways within roadway prism (toe of slope to top of cut).
2. Streetscape improvements, including benches, decorative lighting, textured crosswalks, transit shelters, community signage, and containerized plantings where the construction does not disturb original ground.
3. Rehabilitation of historic structures where construction is limited to the structure.
4. Rehabilitation of historic transportation equipment such as railroad locomotives and rail cars.
5. Purchase of scenic easements or abandoned rail corridors where no construction activity is planned. Resale of scenic easements is not part of this agreement.

**ATTACHMENT 4**

**RESPONSIBILITIES**

**TIER 1 AND TIER 2 PROJECTS**

<b>Stipulation No.</b>	<b>Activity</b>	<b>FHWA</b>	<b>UDOT PQS</b>	<b>USACE</b>	<b>Consultant<sup>1</sup></b>	<b>Comments</b>
IV.A	Ensure compliance with the terms of Agreement	X				
IV.B.1 & IX.8	Determine undertaking		X			
IV.B.2 & IX.A	Determine if type of undertaking has potential to cause effects		X			
IV.B.3 & IX.A	Determine if undertaking has potential to affect historic properties on tribal lands		X			
V.A & IX.A.C	Initial consultation with Tribes	X				Unless Tribes have agreed to consultation with UDOT PQS
V.E	Subsequent consultation with Tribes	X				Unless Tribes agree to alternate procedures
IV.B.6 & IX.A	Identify and invite consulting parties		X		X	
IV.B. 5	Solicit public comment		X		X	
IV.B.7 & IX.B	Determine scope and level of effort; if field survey is needed		X			
IV.B and IX.B	Determine APE		X	X		
IX.B	Conduct literature search		X		X	
IX.B	Conduct field survey		X		X	
VII.A	Determine if project qualifies for Tier 1 review process		X			
IV.B. and IX.C	Determine historic property boundaries		X		X	
N/A	Recommendations of eligibility				X	
IV.B.9 & IX.C	Determine eligibility		X			
N/A	Draft DOE <sup>2</sup>		X		X	May be combined with FOE
IX.C	Submit DOE to SHPO and consulting parties		X			
IX.C	Resolve disagreements on eligibility, including notifying the Keeper of the National Register	X				
IX.D	Determine effect		X			

Stipulation No.	Activity	FHWA	UDOT PQS	USACE	Consultant <sup>1</sup>	Comments
N/A	Draft FOE <sup>3</sup>		X		X	
IX.D	Submit FOE to SHPO and consulting parties		X			May be combined with DOE
IX.D	Consult to resolve adverse effects		X			
IX.D	Resolve disagreements on effect and request Council comment	X				
IX.D	Notify public of adverse effect		X		X	
IX.D	Draft MOA <sup>4</sup> or Treatment Plan		X		X	
IX.D	Execute MOA or Finalize Treatment Plan		X			
IX.D	Distribute executed MOA or final Treatment Plan to consulting parties		X			
IX.D	Send executed MOA and supporting documentation to Council		X			
IX.D	Carry out stipulations in MOA or Treatment Plan		X		X	
XI.B.	Notify FHWA, USACE, SHPO, Council, Tribes of discovery		X			
XI.B.	Develop treatment plan for discovery		X		X	
XI.B	Consultation on discovery		X			
XI.B	Data recovery of discovery		X		X	
XIII.B	Monitor implementation of Agreement	X				
XIII.C	Resolving objections to implementation of Agreement	X				

<sup>1</sup> At the request and under the direction of the UDOT PQS

<sup>2</sup> Determination of Eligibility

<sup>3</sup> Finding of Effect

<sup>4</sup> Memorandum of Agreement

### DELEGATED CEs

Stipulation No.	Activity	FHWA	UDOT PQS	USACE	Consultant <sup>1</sup>	Comments
IV.A	Ensure compliance with the terms of Agreement	X				
IV.B.1 & IX.8	Determine undertaking		X			
IV.B.2 & IX.A	Determine if type of undertaking has potential to cause effects		X			
IV.B.3 & IX.A	Determine if undertaking has potential to affect historic properties on tribal lands		X			
V.A & IX.A.C	Initial consultation with Tribes	X				Unless Tribes have agreed to consultation with UDOT PQS
V.E	Subsequent consultation with Tribes	X				Unless Tribes agree to alternate procedures
IV.B.6 & IX.A	Identify and invite consulting parties		X		X	
IV.B. 5	Solicit public comment		X		X	
IV.B.7 & IX.B	Determine scope and level of effort; if field survey is needed		X			
IV.B and IX.B	Determine APE		X	X		
IX.B	Conduct literature search		X		X	
IX.B	Conduct field survey		X		X	
VII.A	Determine if project qualifies for Tier 1 review process		X			
IV.B. and IX.C	Determine historic property boundaries		X		X	
N/A	Recommendations of eligibility				X	
IV.B.9 & IX.C	Determine eligibility		X			
N/A	Draft DOE <sup>2</sup>		X		X	May be combined with FOE
IX.C	Submit DOE to SHPO and consulting parties		X			
IX.C	Resolve disagreements on eligibility, including notifying the Keeper of the National Register		X			
IX.D	Determine effect		X			
N/A	Draft FOE <sup>3</sup>		X		X	
IX.D	Submit FOE to SHPO and consulting parties		X			May be combined with DOE
IX.D	Consult to resolve adverse effects		X			
IX.D	Resolve disagreements on effect and		X			

Stipulation No.	Activity	FHWA	UDOT PQS	USACE	Consultant <sup>1</sup>	Comments
	request Council comment					
IX.D	Notify public of adverse effect		X		X	
IX.D	Draft MOA <sup>4</sup> or Treatment Plan		X		X	
IX.D	Execute MOA or finalize Treatment Plan		X			
IX.D	Distribute executed MOA or final Treatment to consulting parties		X			
IX.D	Send executed MOA and supporting documentation to Council		X			
IX.D	Carry out stipulations in MOA or Treatment Plan		X		X	
XI.B.	Notify FHWA, USACE, SHPO, Council, Tribes of discovery		X			
XI.B.	Develop treatment plan for discovery		X		X	
XI.B	Consultation on discovery		X			
XI.B	Data recovery of discovery		X		X	
XIII.B	Monitor implementation of Agreement	X				
XIII.C	Resolving objections to implementation of Agreement	X				

<sup>1</sup> At the request and under the direction of the UDOT PQS

<sup>2</sup> Determination of Eligibility

<sup>3</sup> Finding of Effect

<sup>4</sup> Memorandum of Agreement

## ATTACHMENT 5

### SCREENED UNDERTAKINGS: TIER 1 REVIEW PROCESS

#### **The Screening Process**

The determination that an undertaking is exempt from further review or consultation will be made by the PQS, although some of the activities included in the screening may be done by qualified consultants, as specified in Stipulation IV.B.

The screening process may include one or more of the following procedures. The process is not limited to the procedures below, nor are all these procedures required for all undertakings. Screening should be appropriate to the specific complexity, scale, and location of the undertaking.

- Literature search (Class 1) or records review (UDSH database, UDOT records, other agency files, etc.) to determine potential for involvement of historic properties
- Field review of project area, including survey if necessary
- Consultation with Tribes who may attach religious or cultural significance to properties within the project area, as appropriate for the scope of the undertaking.
- Consultation with certified local governments, local historic societies, or knowledgeable informants, as appropriate for the scope of the undertaking
- Review of aerial photographs, UDOT photologs, historic maps, or as-built records
- Review of right-of-way, assessment parcel, or ownership data
- Review of detailed project plans

Based on the outcome of the screening process, the PQS may determine that individual undertakings require no further review and consultation. Documentation of the screening must be completed using the Tier 1 Screening Form which will be included in the appropriate environmental document. The Tier 1 Screening Form and supporting documentation will be submitted to the SHPO quarterly.

## TIER 1 SCREENING FORM

**PIN:**  
**Project Number:**  
**Project Name:**  
**City:**  
**County:**  
**Project Description:**

### Screening Process

Screened undertakings are those that have the potential to affect historic properties, but following appropriate screening, may be determined by UDOT Professionally Qualified Staff to require no further review or consultation under this Agreement. The screening process may include one or more of the following tasks and should be appropriate to the complexity, scale, and location of the undertaking.

**Antiquities Project Number:**

### Literature Review

- Class I literature search (date completed and by whom):
- Records review (i.e. UDSH, UDOT, BLM, etc.):
- Project plans
- As-built project plans
- Aerial photographs:
- Historic Maps:
- Topographic Maps:
- ROW/Ownership/Parcel Data:
- Other:

**Description of search results:**

### Field Review

- Pedestrian survey (Class III) (survey interval):
- Field review other than Class III (reconnaissance, windshield, etc.):
- Other:
- None

**Description of survey results** (If no field survey was conducted, describe why not):

### Supporting Documentation

If a cultural resource inventory is conducted under this stipulation, any reports and/or forms generated from the survey shall be submitted quarterly to the Utah Division of State History (UDSH) for filing.

**Title of report:**

**Consultation**

- Utah SHPO (including APE consultation):
- Certified Local Government (CLG):
- Tribes:
- Knowledgeable Informants:
- State/Federal Agencies:
- Other:
- None:

**Description of consultation efforts** (If no consultation was done, explain why not):

- Controversy based on historic preservation issues? If yes, consultation with SHPO and UDOT Central Environmental is required. Additional consultation with FHWA may be required.

**Finding of Effect**

Based on the screening process it is my professional determination that the subject undertaking will result in the following effect finding:

- No Historic Properties Affected: no cultural resources present
- No Historic Properties Affected: cultural resources present but none eligible
- No Historic Properties Affected: historic properties present, but are completely avoided by the undertaking and the potential for substantial indirect effects is very low

**Description of impacts:**

Based on the outcome of the screening process, this undertaking requires no further review and consultation. Documentation of the screening will be included in the following:

- Project Files
- Quarterly Report
- Environmental Document:

**Additional Information**

**Screening Completed By**

Name:

Title:

Date:

## ATTACHMENT 6

### SECTION 01355 - ENVIRONMENTAL COMPLIANCE PART 3.8 - DISCOVERY OF HISTORICAL, ARCHAEOLOGICAL, OR PALEONTOLOGICAL OBJECTS, FEATURES, SITES, OR HUMAN REMAINS

- A. Immediately suspend construction operations in the vicinity (minimum 100-ft buffer around the perimeter) of the discovery if a suspected historic, archaeological, or paleontological item, feature, or site is encountered, or if suspected human remains are encountered.
- B. Verbally notify the Engineer of the nature and exact location of the findings.
- C. The Engineer contacts the UDOT Region staff archaeologist, who will assess the nature of the discovery and determine the necessary course of action.
- D. Protect the discovered objects or features and provide written confirmation of the discovery to the Engineer within two calendar days.
- E. The Engineer keeps the Contractor informed concerning the status of the restriction.
  - 1. The time necessary for the Department to handle the discovered item, feature, or site is variable, dependent on the nature and condition of the discovery.
  - 2. The Engineer will provide written confirmation when work may resume in the area.

Should a discovery occur, UDOT will consult with SHPO/THPO, Tribes (as appropriate), and USACE (if permit action is involved and discovery is within the USACE jurisdictional APE) in accordance with 36 CFR 800.13(b)(3) and this Agreement toward developing and implementing an appropriate treatment plan prior to resuming construction.

## ATTACHMENT 7

### DELINEATION OF AREA OF POTENTIAL EFFECTS (APE)

In accordance with Stipulations IV.B. and IX.B., UDOT will establish the area of potential effects (APE) for undertakings covered by this Agreement. The UDOT PQS, in consultation with the project manager, is responsible for describing and establishing an APE.

When the guidelines below are followed, specific consultation with SHPO regarding APE and level of effort will typically not be necessary. Consultation with SHPO may be needed for large and complex undertakings, when there are issues of access for inventory and evaluation, when there are concerns over delineating whole properties, or when there is public controversy such as potential for litigation, concerns expressed by outside parties, or issues related to Native American consultation.

As defined in 36 CFR 800.16(d), an APE is “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.” An APE therefore depends on an undertaking’s potential for effects. Effects to be considered may include, but are not limited to, physical damage or destruction of all or part of a property; physical alterations; moving or realigning a historic property, isolating a property from its setting; visual, audible, or atmospheric intrusions; shadow effects; vibrations; and change in access or use.

An APE delineates the boundaries within which it can be reasonably expected that a proposed undertaking has the potential to affect historic properties, should any be present. It may be the right-of-way itself, or an area either more or less than the right-of-way, depending on the scope and design of the undertaking.

An APE may extend well beyond the right-of-way. It must include all construction easements, such as slope and drainage easements, stormwater detention basins, off-site biological mitigation sites requiring ground disturbance, and mandatory borrow and disposal sites. It may include project-related activity areas such as utility relocations, access roads, equipment storage areas, or conservation or scenic easements.

An APE addresses indirect effects when warranted. Indirect effects may extend beyond the right-of-way to encompass visual, audible, or atmospheric intrusions; shadow effects; vibrations from construction activities; or change in access or use. Delineation of an indirect APE must be considered carefully, particularly for potential audible and visual effects, taking into account proximity and use of adjoining properties, the surrounding topography, and other aspects of a property’s setting.

1. Noise: When considering potential noise effects, there must be a reasonable basis for predicting an effect based on an increase over existing noise level. Noise effects should be considered when a project would result in a new through lane or a substantial change in vertical or horizontal alignment.
2. Visual: Highways on new alignments, multi-level structures, or elevated roadways are considered to have potential for visual effects if they could be out of character with or intrude upon a historic property or isolate it from its setting. Projects for improvement or expansion of existing transportation facilities that will not substantially deviate from existing alignment or profile are not expected to involve visual impacts. If circumstances indicate potential for visual effects, consultation with SHPO may be warranted.

Different APEs may be established for archaeological and built properties:

1. For archaeological properties, an APE is typically established based on an undertaking's potential for direct effects from ground-disturbing activities. On occasion, archaeological sites may also have qualities that could be affected indirectly.
2. Buildings, structures, objects, districts, traditional cultural properties, and cultural landscapes are more likely to be subject to indirect, as well as direct, effects; thus an APE for the built and cultural environment is usually broader than an archaeological APE in order to include the potential for such effects. For instance, the first row of potential properties beyond the right-of-way may be subject to such effects, and thus be included in an indirect APE when warranted.

In delineating the APE, consideration must always be given to the undertaking's potential effects on a historic property as a whole. If any part of a property may be affected, the APE will generally encompass the entire property, including the reasonably anticipated or known boundaries of archaeological sites. However, it is rarely necessary to extend an APE to include entire large districts or landscapes, large rural parcels, extensive functional systems, or long linear features, if potential effects on the whole would clearly be negligible.

The guiding principle on delineating an APE is that it should be commensurate with, and provide for, an appropriate level of effort to take into account an undertaking's potential for effects on historic properties.

While an APE will generally encompass an entire property, physical intrusion such as testing of archaeological sites must be focused on areas subject to reasonably foreseeable effects of the undertaking, and should be guided by a project- or site-specific research design. Areas of an archaeological site that are unlikely to be affected by an undertaking should not be tested unless compelling reasons to conduct such testing are provided in the research design.

Whenever an undertaking is revised (e.g., design changes, utility relocations, or additional off-site mitigation areas), UDOT PQS will determine if the changes require modifying the APE. If an APE proves to be inadequate, UDOT is responsible for informing consulting parties in a timely manner of needed changes. The APE shall be revised commensurate with the nature and scope of the changed potential effects.

In order to encourage consideration of historic properties early in the planning a design of an undertaking, UDOT PQS may designate a study area of use in conducting cultural resource studies until an APE can be delineated. A study area should encompass all land that could potentially be included in the final APE. Establishing a study area is especially pertinent to those undertakings subject to a phased identification and evaluation process.

## **ATTACHMENT 8**

### **SECTION 4(F) *DE MINIMIS* AGREEMENT**

Section 4(f) De Minimis Determination; Pursuant to SAFETEA-LU Section 6009  
In Conjunction with Section 106 Programmatic Agreement Among the Federal Highway Administration,  
the Advisory Council on Historic Preservation, the Utah State Historic Preservation Officer, and  
the Utah Department of Transportation (July 19, 2007) ([Section 4\(f\) agreement](#))