UTAH DEPARTMENT OF TRANSPORTATION
ENVIRONMENTAL SERVICES

Annual Monitoring Report

Section 106 and U.C.A. 9-8-404
Programmatic Agreements

Betsy Skinner, UDOT Cultural Resource Program Manager

December 10, 2009

Pursuant to the April 2007, executed Section 106 Programmatic Agreement: Implementation for Federal-Aid Transportation Projects in the State of Utah, Section XIII. Administrative Stipulations, B. Monitoring Implementation of this Agreement, the Utah Department of Transportation is required to submit the following Annual Monitoring Report to the Federal Highway Administration, Utah State Historic Preservation Officer and the Advisory Council on Historic Preservation to assist the signatory parties with: (1) accurately assessing the degree to which the agreement and its manner of implementation constitute an effective program alternative under 36 CFR Part 800, (2) to determine whether the agreement should remain in effect, and (3) , to recommend whether and how the agreement should be improved through appropriate amendment

Pursuant to the March 2008, executed Programmatic Agreement for Implementation of U.C.A. 9-8-404 for State-Funded Transportation Projects in Utah, Section III, the Utah Department of Transportation is required to submit the following annual report to the State Historic Preservation Officer to assist the signatory parties with (1) accurately assessing the degree to which the agreement and its manner of implementation constitute an effective program alternative under U.C.A. 9-8-404, (2) to determine whether the agreement should remain in effect, and (3), to recommend whether and how the agreement should be improved through appropriate amendment

EXECUTIVE SUMMARY

This report summarizes activities carried out under, and documents the effectiveness of, the *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* and the *Programmatic Agreement Between the Utah Department of Transportation and the Utah State Historic Preservation Officer Regarding Implementation of U.C.A. 9-8-404 for State-Funded Transportation Projects in Utah*. It covers actions for which Section 106 and 404 consultation was concluded between October 1, 2008 to September 30, 2009 (FY2009), in accordance with stipulations XIII.B.1. and XIII.B.2 of the 106 PA and stipulation III of the 404 PA. PA actions or projects that were "in progress" with determinations or findings still pending as of September 30 are not reflected in this report; the results of those consultations will be reported in subsequent reports, once Section 106 has been completed.

The Utah Department of Transportation (UDOT) processed 181 Federal-aid projects and 65 state-funded projects in FY2009 (October 1, 2008 to September 30, 2009). Of these, 20 required external review by the SHPO (Tier 2 projects). Thirteen (13) projects had a finding of no adverse effect, and 7 resulted in an adverse effect finding.

Now in its second year of implementation, the findings of this report demonstrate that the PAs continue to be effective environmental streamlining tools by improving project delivery while ensuring that effects to cultural resources as a result of Federal-aid highway and state-funded projects are appropriately taken into account during project planning.

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INTRODUCTION

The *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* (106 PA) went into effect on April 16, 2007, streamlining the Utah Department of Transportation (UDOT) procedures under Section 106 of the National Historic Preservation Act (NHPA).

The *Programmatic Agreement Between the Utah Department of Transportation and the Utah State Historic Preservation Officer Regarding Implementation of U.C.A. 9-8-404 for State-Funded Transportation Projects in Utah* (404 PA), went into effect on March 19, 2008, streamlining the UDOT procedures under U.C.A. 9-8-404, the Utah Antiquities Act.

This report summarizes activities carried out under, and documents the effectiveness of, the 106 PA and the 404 PA. It covers actions for which Section 106 and 404 consultation was concluded between October 1, 2008 and September 30, 2009 (FY2009), in accordance with stipulations XIII.B.1. and XIII.B.2 of the 106 PA and stipulation III of the 404 PA. PA actions or projects that were "in progress" with determinations or findings still pending as of September 30 are not reflected in this report; the results of those consultations will be reported in subsequent reports, once Section 106 has been completed.

BACKGROUND

Section 106 of the National Historic Preservation Act (NHPA) requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. "The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning" (36 CFR §800.1(a)). The implementing regulations, 36 CFR Part 800, define the process for how Federal agencies meet these statutory responsibilities. "The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties" (36 CFR §800.1(a)).

The regulations (36 CFR §800.14) allow for the development of program alternatives by the Federal agency. The FHWA implements the Federal-aid Highway Program (FAHP) by funding and approving state and locally sponsored transportation projects that are administered by UDOT. The Utah FHWA Division Administrator is the "Agency Official" responsible for ensuring that this Program complies with Section 106 of NHPA, as amended, and its implementing regulations, 36 CFR Part 800, as amended. For those projects processed as Categorical Exclusions (CEs) that have been delegated to UDOT, the UDOT Executive Director is the "Agency Official" responsible for ensuring that the Federal-aid Highway Program complies with Section 106.

Section 404 (Agency Responsibilities) of Chapter 8 (History Development) of Title 9 (Community and Culture Development) of the Utah Code Annotated (U.C.A) states that "Before expending any state funds or approving any undertaking, each agency shall (i) take into account the effect of the expenditure or undertaking on any historic property; and (ii) unless exempted by agreement between the agency and the state historic preservation officer, provide the state historic preservation officer with a written evaluation of the expenditure's or undertaking's effect on the historic property" (U.C.A. 9-8-404(1)(a)). UDOT administers the state-funded transportation program in the state of Utah and is responsible for ensuring that the Department is in compliance with U.C.A. 9-8-404. UDOT has not developed administrative rules for implementing the statute. This Programmatic Agreement between UDOT and SHPO outlines the process used to implement U.C.A. 9-8-404. It essentially mirrors the Section 106 process as outlined in the PA for Federal-aid transportation projects.

The primary goal of the 106 PA is to streamline the Section 106 process. This is accomplished through the following measures:

- FHWA authorizes UDOT to initiate, and in most cases, conclude consultation with the SHPO and other consulting parties. FHWA retains the responsibility to consult with Tribes and is still responsible for Section 106 compliance.
- Two tiers of project review are established, based on the type of impacts to historic properties: Tier 1 projects are those that result in a finding of no historic properties affected, and do not require case-by-case review by the SHPO (following appropriate screening by UDOT; see Attachment 4 the PA); Tier 2 projects are those that result in a finding of no adverse effect or adverse effect, and require case-by-case review by the SHPO. Determinations of eligibility, findings of effect, and cultural resource reports for projects that qualify as Tier 1 are submitted to the SHPO on a quarterly basis.
- Under Section 6004 of SAFETEA-LU (Pub. L. 109-59), UDOT has assumed FHWA responsibility for projects classified as Categorical Exclusions (CEs) (effective June 30, 2008; Attachment 1 of PA). Under this delegation, UDOT has also assumed the responsibilities of FHWA for complying with Section 106 and 36 CFR Part 800 (except for tribal consultation). The PA defines the process for UDOT acting as FHWA for Section 106.

As in the 106 PA, two tiers of project review are established in the 404 PA, based on the type of impacts to historic properties: Tier 1 projects are those that result in a finding of no historic properties affected, and will not require case-by-case review by the SHPO (following appropriate screening by UDOT); Tier 2 projects are those that result in a finding of no adverse effect or adverse effect, and require case-by-case review by the SHPO. Determinations of eligibility, findings of effect, and cultural resource reports for projects that qualify as Tier 1 are submitted to the SHPO on a quarterly basis. All other provisions of the 106 PA are included in the 404 PA, except that FHWA and the Council are not involved. Tribal consultation is initiated by UDOT and is done at the discretion of the UDOT Professionally Qualified Staff (PQS), depending on the nature and scope of the undertaking. In general, projects of a type for which consultation would be initiated under the 106 PA would also be initiated under the 404 PA.

The UDOT has divided the state of Utah into four regions: Region 1 includes Box Elder, Cache, Davis, Weber, Morgan, and Rich counties; Region 2 includes Tooele, Salt Lake, and Summit counties; Region 3 includes Juab, Utah, Wasatch, Duchesne, and Daggett counties; and Region 4 includes Millard, Beaver, Iron, Washington, Sanpete, Sevier, Piute, Wayne, Garfield, Kane, Carbon, Emery, Grand, and San Juan counties. Regions 1, 2 and 3 each have an archaeologist, and Region 4 has two archaeologists because the region is so large. In addition, the UDOT headquarters in Salt Lake City has one architectural historian and the Cultural Resource Program Manager.

TRAINING

An initial training for the UDOT PQS was held on the 106 PA after it was executed. Quarterly meetings are held with the PQS to discuss cultural resource issues and/or receive training. When a new PQS is hired, he/she is sent to Section 106 training, usually given by the Advisory Council on Historic Preservation (ACHP).

Recommendation: additional training and refresher workshops are needed to help the regions stay consistent and to keep each PQS up to date on new processes and requirements.

PROFESSIONAL QUALIFICATIONS STANDARDS

UDOT has provided a Cultural Resource Program Manager who submits the quarterly reports after reviewing them for appropriateness, evaluating whether or not the PQS staff is properly taking into account the effects of projects on cultural resources, and determining that there is no loss in quality of work. All actions taken by UDOT under the authority of the PAs have been carried out by or under the direct supervision of a person who meets the Secretary of the Interior's Professional Standards, as published in 48 FR 44738-44739, and who has been permitted (for archeology only) by the State of Utah pursuant to U.C.A 9-8-305 and its implementing rules. In addition, UDOT has provided for a full-time Architectural Historian who serves all four (4) UDOT regions.

No concerns or amendments have been identified.

CONSULTATION WITH TRIBES

UDOT staff has made good-faith efforts to identify and include tribal governments who have demonstrated an interest in participating as a consulting party. FHWA and UDOT have executed three (3) programmatic agreements (Agreements) with tribal governments documenting alternative procedures for consultation under Section 106, and are in the process of executing additional agreements. Each of the three executed Agreements authorizes UDOT to consult with the Tribe on any matter pertaining to the Agreements, although FHWA remains responsible and will honor any request by a tribe for government-to-government consultation not withstanding any provisions of the Agreements. The executed Agreements are with the following tribal governments:

- Confederated Tribes of the Goshute Indian Reservation, executed on July 29, 2008

- Cedar Band of Paiute Indians, executed on Sept. 29, 2008
- Indian Peaks Band of Paiute Indians, executed on Sept. 29, 2008

Tribal consultation under the 404 PA, although initiated at the discretion of the UDOT PQS, is generally done for the same type of projects for which consultation would be initiated under the 106 PA.

A tracking form has been developed that documents on which projects consultation was done and describes tribal responses, concerns, and resolution of concerns. The form also lists those projects for which consultation was not conducted and why it was not (generally exempted by the tribal PA).

The Tribal PAs are an effective streamlining tool by improving project delivery while ensuring that effects to cultural resources as a result of Federal-aid Highway projects are appropriately taken into account. A time savings by UDOT of 30 days per project is realized on exempted projects that do not require tribal notification. The tribes also realize time savings because they do not have to review notifications on every project. The PAs ensure that the Tribes are provided opportunities to participate fully in the Section 106 consultation process.

Recommendation: continue to work towards developing agreements with other tribes to streamline the Section 106 process

PARTICIPATION OF OTHER CONSULTING PARTIES AND THE PUBLIC

UDOT staff has made good-faith efforts to identify and include representatives of local governments and individuals and organizations with a demonstrated interest in undertakings. UDOT seeks and considers the views of the public. The public is provided with information about the undertaking and its effects on historic properties, generally through public meetings held in conjunction with NEPA, but also through presentations at city council meetings, historical society meetings, and notices of adverse effect. For projects that will affect historic buildings, representatives of the Certified Local Government (CLG) are often consulting parties, but sometimes it is difficult to engage them.

During FY2009, the UDOT architectural historian has acrively notified local preservation organizations, primarily CLGs, of potential impacts of UDOT projects to eligible properties, and solicited their comments. Her efforts have increased the awareness of Section 106 and the role of communities in the consultation process among the volunteers who serve on local preservation commissions and the planners who serve the CLGs. The architectural historian's efforts resulted in greater CLG participation in communities in which UDOT plans to construct significant projects with adverse effects, including Logan, Provo, Orem, Taylorsville, and South Jordan. Depending on the project impact and the interest expressed by historic preservation representatives, the mitigation of adverse effects will further long-term historic preservation goals of these communities.

Recommendation: For certain projects that affect historic buildings, the PQS should continue to expend more effort in engaging CLGs, especially in the resolution of adverse effects.

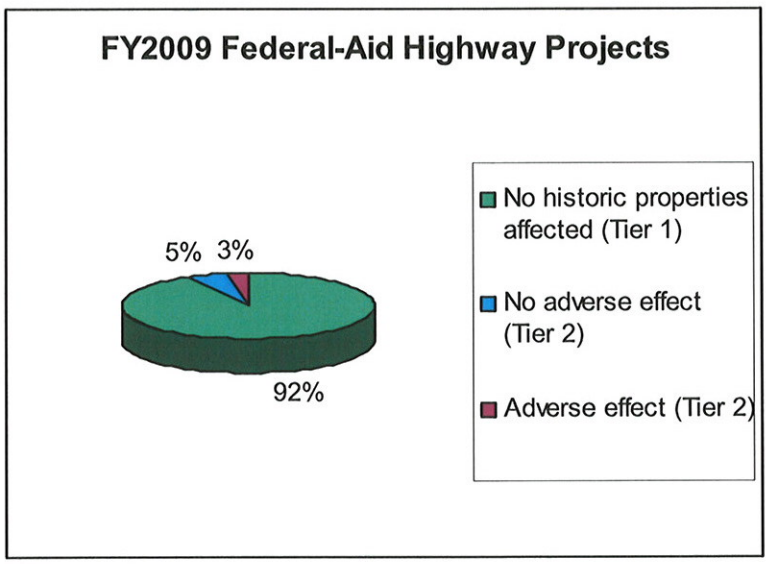
CE DELEGATION

Under Section 6004 of SAFETEA-LU (Pub. L. 109-59), UDOT has assumed FHWA responsibility for projects classified as Categorical Exclusions (CEs) (MOU, effective June 30, 2008). Under this delegation, UDOT has also assumed the responsibilities of FHWA for complying with Section 106 and 36 CFR Part 800 (except for tribal consultation).

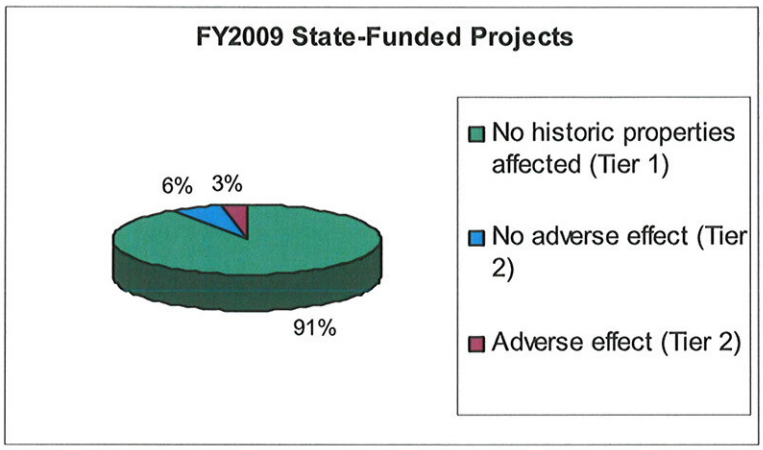
No concerns or amendments have been identified.

PROJECT REVIEW

According to data provided by the UDOT Regions, between October 1, 2008 and September 30, 2009, UDOT processed approximately 181 Federal-aid Highway projects (FAHP). As depicted in the figure below, a majority of the projects (167) were exempted from further review after appropriate screening by the PQS (Tier 1 projects: No Historic Properties Affected). Fourteen (14) projects required external review by the SHPO (Tier 2 projects). Of the Tier 2 projects, nine (9) projects resulted in effect findings of No Adverse Effect and five (5) resulted in effect findings of Adverse Effect. A copy of the tracking form used to track projects is included as Appendix A of this report.



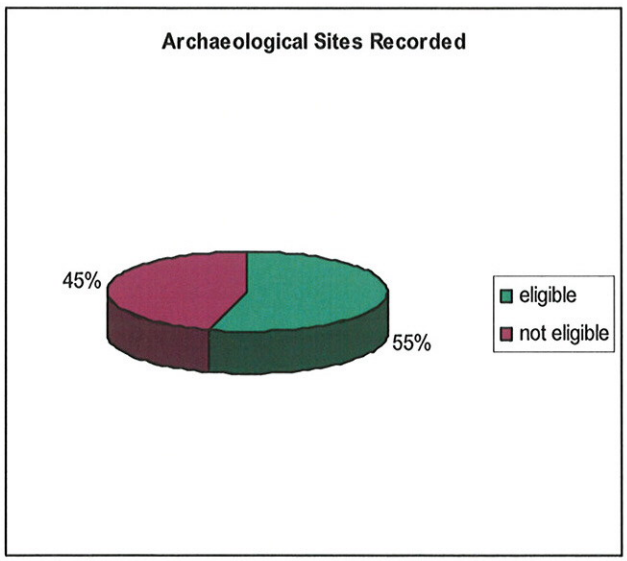
According to data provided by the Regions, UDOT processed approximately sixty-five (65) state-funded highway projects during the reporting period (October 1, 2008 to September 30, 2009). The majority of these (59) were exempted from further review after appropriate screening by the PQS (Tier 1 projects; No Historic Properties Affected). Six (6) projects required external review by the SHPO (Tier 2 projects). Of the Tier 2 projects, four (4) projects resulted in effect findings of No Adverse Effect and two (2) resulted in effect findings of Adverse Effect.

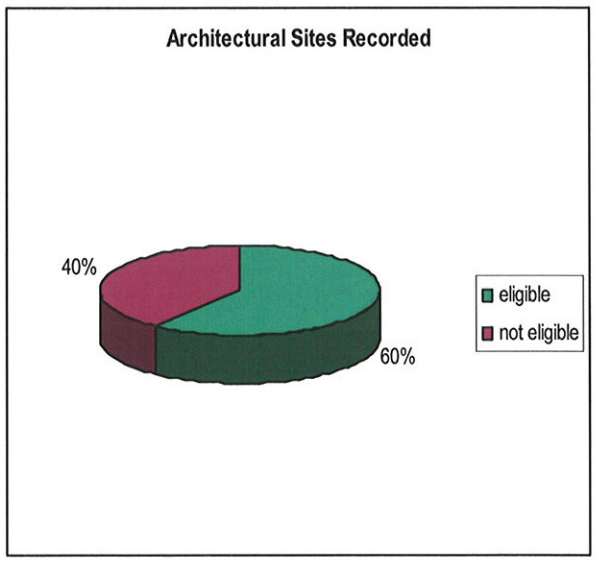


One hundred seventy-five (175) Federal-aid Highway projects were processed as Categorical Exclusions. Out of those, all but 2 qualified for delegation to UDOT, thus giving UDOT the authority and responsibility for Section 106 compliance. UDOT staff processed 3 projects as Environmental Impact Statements (EIS), 1 as an Environmental Assessment (EA), and 2 projects where other agencies were the lead for the environmental documents.

Fifty-six (56) state-funded projects were processed as state environmental studies, requiring compliance under 9-8-404. No environmental document was completed for 9 projects (encroachment permits), but compliance with 9-8-404 was completed.

A total of 220 archaeological sites and 379 architectural properties were recorded during FY2009 (on both FAHP and state-funded projects). Of the archaeological sites, 120 were determined eligible for the National Register of Historic Places (NRHP). Of the architectural properties, 228 were determined eligible for the NRHP.





As can be seen in the above figures, the majority of the sites recorded, both archaeological and architectural, were determined eligible. The vast majority of project determinations were no

historic properties affected (92 percent for FAHP and 91 percent for state-funded projects) indicating that UDOT was successful in avoiding historic properties in all but a few cases.

NO ADVERSE EFFECT FINDINGS

UDOT recommended in the FY2008 report that projects with no adverse effect findings be included in Tier 1 projects. Although the number of projects in FY2009 with these findings is very small (5 percent for FAHP and 6 percent for state-funded projects), in FY2008 it was much larger (13 percent and 24 percent respectively). At the FY2008 Annual Meeting UDOT agreed to track the consultation on these projects to determine how often the SHPO disagreed with the finding. There was only one instance in FY2009 where a disagreement occurred. The project was the Pioneer Crossing in Utah County where a driveway was proposed for realignment. SHPO staff believed it to be an adverse effect, but the UDOT architectural historian found it to be a no adverse effect. After consultation, the final finding was no adverse effect.

There were no disagreements about eligibility for projects with no adverse effect findings. There was discussion about eligibility on some properties for some projects processed as a Tier 1, but UDOT takes a conservative position when determining eligibility. Even if UDOT determined a property not eligible and SHPO believed it was eligible, all of these historic properties were avoided by the projects and no harm was done. Any future projects would reevaluate the properties and the eligibility could be changed.

As stated in the FY2008 report, the SHPO's staff would be comfortable with "No Adverse Effect" findings being included in the Tier 1 project review category, "as long as UDOT is able to maintain the highly qualified cultural resources staff it has now, and is able to provide this staff with training, support for continuing education and development, and can ensure that their workload does not become unmanageable".

Although there has been some turnover in UDOT PQS (UDOT is in the process of filling two positions), UDOT believes that it can maintain qualified staff. Training will become a priority in the coming year to ensure that the quality of the compliance work does not suffer.

Recommendation: the PA be amended to include no adverse effect findings in Tier 1 projects.

POST-REVIEW DISCOVERIES

There was one instance of a post-review discovery or inadvertent effect to historic properties in FY2009. The project was the Southern Parkway in Washington County. A number of stained soil features were found during geotechnical investigations prior to construction of the roadway. In consultation with the SHPO, UDOT assumed the site to be eligible for the National Register and prepared a post-review discovery plan for data recovery excavations. Data recovery has not yet occurred, but will take place before construction begins.

Recommendation: there is still some confusion over the notification and review process when a discovery is made. Efforts will be made to clarify this process.

ADMINISTRATIVE STIPULATIONS

The data provided by the regions suggest that all documentation supports the findings and determinations made under the Agreements and is consistent with 36 CFR 800.11 and has been processed in accordance with the UDOT Guidelines for Archeological Survey and Testing.

No concerns or amendments have been identified.

MONITORING IMPLEMENTATION

A notice of availability for public inspection (Appendix B) will be issued to interested parties and published in the two statewide newspapers. A copy of this report will provided to FHWA, Utah SHPO and the Council 30 days before the Annual Monitoring Meeting.

The Annual Monitoring Meeting with the signatories has been scheduled for January 26, 2010 to discuss the findings and to offer the opportunity for the signatory parties to propose amendments to the PA.

Amendments to the PA have been made based on recommendations made in the FY2008 report. A copy of the amendments, shown in "track changes" is attached to this report in Appendix C.

ESTIMATED TIME & COST SAVINGS

This authorization did not substantially change UDOT's workload or affect FHWA review times because UDOT had been operating in a similar framework for many years.

For the Tier I projects, UDOT saved a maximum of 30 days per project by not having to request SHPO concurrence. This provision also saves SHPO staff time in not having to review documentation for projects that are not affecting historic properties. By eliminating routine projects and those that do not affect historic properties from SHPO review, SHPO staff is able to concentrate on the limited number of projects that will adversely affect historic properties.

Additional time savings could be realized by including projects with findings of no adverse effect as Tier 1 projects, although projects with these findings make up a small proportion of the projects processed.

PUBLIC OBJECTIONS

No public objections have been communicated to UDOT or FHWA.

INADVERTENT EFFECTS OR FORECLOSURE

There have been two instances in the past year where the Section 106 has not quite been followed, but they did not result in inadvertent effects or foreclosures. The first instance was on the 6200 South and Redwood Road project in Salt Lake City. The ACHP was not notified of the adverse effect finding before the MOA was prepared. As soon as it was discovered (5 days after

the MOA was signed), the materials required under 36 § CFR 800.11(e) were submitted to the ACHP. The ACHP determined that there was no need to re-open consultation and they did not wish to participate in consultation.

The second instance was on the SR-10, Emery to Muddy Creek project in Emery County. This project was one of the state projects that were put on hold in August, 2008 because of the economic downturn. In early 2009 the project was re-activated, advertised, and the construction contract awarded before data recovery had been conducted. This was due to a breakdown in communications between the Project Manager and the environmental staff. Fortunately, construction had not begun when the oversight was discovered, data recovery was completed, and there were no construction impacts to the sites.

Recommendations: Better use of the checklist of the steps required in Section 106 consultation (provided with the initial PA training) would minimize the first type of error. Improved communication among the various team members and checking the mitigation commitments database before construction advertisement may have prevented the second instance.

IMPLEMENTATION OF RECOMMENDATIONS FROM FY2008

- Recommendation: Although no major changes to the PA are recommended, UDOT does propose some minor changes in wording for clarification
    - *The minor wording changes to the PA have been made as recommended in the FY2008 report*
- Recommendation: Develop a standard operating procedure to clarify the processing of a Memorandum of Agreement or Programmatic Agreement to address adverse effects
    - *The order for signatures for an MOA is as follows: UDOT and other invited signatories and concurring parties, SHPO, FHWA*
- Recommendation: Develop template language for MOAs and PAs
    - *The ACHP has developed a template for an MOA that is to be used*
- Recommendation: UDOT Regions should track both Tier I and Tier II findings in a consistent manner
    - *A tracking form was developed to track all projects, both Tier 1 and Tier 2 (Appendix A)*
- Recommendation: Document consultations that occur over the telephone
    - *Consultations conducted by telephone are documented with a phone log (each region maintains their own log)*
- Recommendation: Provide additional training on the determination of the APE and develop statewide procedures
    - *UDOT has recently completed an environmental Manual of Instruction. Chapter 6M is the Cultural Resources section, and covers determination of the APE*
- Recommendation: Make more of an effort to engage consulting parties, particularly CLGs
    - *UDOT has been more proactive in engaging consulting parties, particularly on MOAs. Even if potential consulting parties do not respond to a project notification or provide comments on the determinations of eligibility and finding*

of effect, they are contacted again and brought into the resolution of adverse effects process if the PQS determines that they need to be included.

- Recommendation: Provide additional training to reduce inconsistencies among regions
  - *Quarterly meetings are held with the PQS to discuss issues and to provide training*
  - *A training is planned for the PQS for January 26, 2010. By then, UDOT will have added two more PQS. This training will be provided by the Cultural Resource Program Manager and the Architectural Historian and will focus on issues that have come up during the past year.*
  - *Training for the new PQS will occur, and there will be periodic refresher workshops*
- Recommendation: Work towards including findings of no adverse effect in the Tier 1 project review
  - *UDOT has conducted informal consultations and has determined that there is agreement between the SHPO and the UDOT PQS in the majority of the cases*

One of the recommendations from FY2008 was to provide staff additional training/clarification on procedures associated with a discovery. This has not been accomplished to date. There was one discovery in FY2009 and there was some confusion about the notification and review process. Procedures for handling a discovery will be developed in FY2009. UDOT did develop the following template language to be inserted in MOAs:

> In accordance with Stipulation XI.B of the 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, and pursuant to 36 CFR 800.13(b), the UDOT and the FHWA are providing for the protection, evaluation, and treatment of any historic property discovered prior to or during construction. Should a discovery occur, construction will stop immediately and the FHWA and the UDOT will consult with the SHPO, Native American tribes, and any other identified interested parties, toward developing and implementing an appropriate treatment plan prior to resuming construction. If neither the SHPO nor a Tribe files an objection within 72 hours to UDOT's plan for addressing the discovery, UDOT may carry out the requirements of 36 CFR 800.13 on behalf of FHWA, and the Council does not need to be notified.

RECOMMENDATIONS FROM FY2009

- Hold additional training and refresher workshops to help the regions stay consistent and to keep each PQS up to date on new processes and requirements.
- Continue to work towards developing agreements with other tribes to streamline the Section 106 process
- For certain projects that affect historic buildings, PQS should expend more effort in engaging CLGs, especially in the resolution of adverse effects

- Amend the PA to include no adverse effect findings in Tier 1 projects. This has been made in the PA in Attachment C
- Better use of the checklist of the steps required in Section 106 consultation (provided with the initial PA training) would minimize omitting steps in the process
- Improved communication among the various team members and checking the mitigation commitments database before construction advertisement may help prevent awarding construction contracts before mitigation has occurred
- There is still some confusion over the notification and review process when a discovery is made. Efforts will be made to clarify this process.

ANNUAL MONITORING REPORT ASSESSMENT AND RECOMMENDATIONS

The PAs continue to accomplish the goals of the signatory agencies, as evidenced by the results of this annual report. It has improved project delivery by resulting in considerable project cost and time savings for UDOT. It has also succeeded in reducing the workload of the SHPO staff in that fewer UDOT projects required external review.

UDOT finds that the PAs remain an efficient and effective program alternative for taking into account effects of the Federal-aid Highway Program on historic properties and for affording the ACHP a reasonable opportunity to comments on undertakings covered by the PAs. UDOT recommends that the PA remain in effect.

APPENDIX A: Project Tracking Form

Section 106 and U.C.A. 9-8-404 Projects for PA Annual Reports (September 30, 2008 to September 30, 2009)

Federal or State	Project Number	Project Name	PIN	Region	NEPA Document Type	Antiquities Project Number	Sites: Total #/type (historic architecture (ha) or archaeology (a))	Sites: Eligible #/type (historic architecture (ha) or archaeology (a))	Finding of Effect: No Effect (Tier 1)	Finding of Effect: No Adverse Effect	Finding of Effect: Adverse Effect	Comments

APPENDIX B: Public Notice of Availability

NOTICE TO THE PUBLIC
OF THE AVAILABILITY OF THE ANNUAL MONITORING REPORT
FOR IMPLEMENTATION OF THE SECTION 106 AND U.C.A. 9-8-404
PROGRAMMATIC AGREEMENTS

The Utah Department of Transportation (UDOT) is providing notice to the public that the annual monitoring report on the implementation of the Section 106 Programmatic Agreement (106 PA) titled *Programmatic Agreement Among the Federal Highway Administration, the Utah State Historic Preservation Officer, and the Advisory Council on Historic Preservation* and the U.C.A. 9-8-404 Programmatic Agreement (404 PA) titled *Programmatic Agreement Between the Utah Department of Transportation and the Utah State Historic Preservation Officer Regarding Implementation of U.C.A. 9-8-404 for State-Funded Transportation Projects in Utah* is available for public inspection. This document covers the Federal fiscal year 2009 (FY2009) between October 1, 2008 and September 30, 2009.

Interested members of the public may comment to the signatory parties to the PAs .Any person or group wishing to submit comments regarding this report may do so in writing. The public comment period is thirty days; comments are due by January 25, 2010. Comments should be directed to the following people:

Edward Woolford, FHWA Environmental Program Manager (Section 106 PA only)
Federal Highway Administration - Utah Division Office
2520 West 4700 South, Suite 9A
Salt Lake City, UT 84118

Betsy Skinner, UDOT Environmental Manager
Utah Department of Transportation
Calvin Rampton Complex
4501 South 2700 West
Box 148450
Salt Lake City, UT 84114

Wilson Martin, State Historic Preservation Officer
Utah Division of State History
300 Rio Grande
Salt Lake City, UT 84101

Carol Legard, Historic Preservation Specialist (Section 106 PA only)
Advisory Council on Historic Preservation
1100 Pennsylvania Ave, NW, Suite 803
Washington, DC 20004

At any time during regular office hours, the Annual Monitoring Report will be available for public inspection during regular business hours at the UDOT Calvin Rampton Complex, Salt Lake City.

APPENDIX C: Draft Amended Section 106 PA

**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

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; 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

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 Confederate Tribes of Goshute Reservations, Fort Washakie Arapaho, Hopi, Fort Washakie Shoshone, 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, White Mesa Ute Tribe; and

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WHEREAS, UDOT has participated in the consultation and has been invited to be a signatory to this Agreement; and

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

NOW, THEREFORE, FHWA, the SHPO, the Council, 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 Agreement expires or is terminated.

STIPULATIONS

The FHWA, with the assistance of UDOT, shall ensure that the following measures are carried out. To aid the signatories of this PA, 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 the 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 (who retains ultimate Section 106 responsibility, except where such responsibility has been delegated to UDOT in accordance with the MOU in Attachment 1), the Council, the SHPO, and interested parties will be involved in any such review.

C. Through this PA, FHWA authorizes UDOT to initiate and, in most cases, conclude consultation with the 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 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 by complying with the stipulations of this Agreement.

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E. Through this PA, 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 specified in Attachment 4, may be determined to require no case-by-case review or consultation with the SHPO because they result in a finding of no historic properties affected or no adverse effect. 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 adverse effect.

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F. The FHWA retains the responsibility to consult with Tribes as required under 36 CFR 800, as amended. 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 supercede existing agreements currently in use in Utah by the 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 according to 36 CFR 800.2(a)(2), provided that 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.

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

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professionally qualified staff (PQS). Except on such occasions when the FHWA elects to consult directly with the SHPO or the Council, all consultation with the SHPO under this Agreement, and decisions made under Tier I, shall be performed by UDOT PQS. All consultation on behalf of UDOT and the 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 3.

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). FHWA may ask UDOT to assist 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 3). 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, SHPO shall be consulted.
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)

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10. In consultation with FHWA, the SHPO, and the 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, UDOT's Consultant Guidelines for Identifying, Recording, and Evaluating Archaeological and Paleontological Resources (2009), UDOT's Consultant Guidelines for Documenting and Evaluating Architectural Resources (2009), 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 Forms (IMACS), 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 PA at a facility meeting the standards of 36 CFR 79 and U.C.A. 53B-17-603, as appropriate.

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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. FHWA may ask UDOT to assist 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)

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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

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consider all written requests of individuals and organizations to participate as consulting parties and determine 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 Handbook 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, through opportunities afforded by the current UDOT Public Involvement Procedures, 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 Categorical Exclusions), 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 and SHPO 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 full responsibility, authority, and liability for projects classified as Categorical Exclusions pursuant to the MOU in Attachment 1 of this Programmatic Agreement). UDOT shall be deemed to be a Federal agency for those undertakings.

B. UDOT shall satisfy the provisions of Section 106 of the NHPA and 36 CFR 800 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, the 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, the 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 the 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 assignment 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

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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

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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 4 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 the 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 the SHPO on any undertaking.
3. The PQS shall include the identification of mandatory storage, disposal, or borrow areas and construction easements, 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 sites 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; or
      iv. No Adverse Effect: Effects do not meet the criteria of adverse effect, or the undertaking is modified or conditions are imposed to avoid adverse effects, as determined by UDOT PQS.

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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 1.13, Discovery Of Historical, Archaeological, or Paleontological Objects, Features, Sites, Human Remains, or Migratory Avian Species (Attachment 5), will be included 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 4.
8. The PQS will ensure that the documentation in Attachment 4 is included in the appropriate NEPA document and project file.

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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 Categorical Exclusion 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 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 Categorical Exclusion pursuant to the MOU in Attachment 1.

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C. Quarterly Reports

1. On a quarterly basis (no later than December 1, March 1, June 1, and September 1), UDOT's Regional PQS shall submit to the Central PQS a list of all projects that were processed as screened undertakings (Tier 1) (Attachment 4) in that quarter. The Central PQS will compile a complete list of Tier 1 projects for submission to FHWA and the SHPO by the end of the quarter (December 31, March 31, June 30, and September 30).
2. This list shall include the county, project name and number, type of undertaking, level of effort, consultation measures, and a map showing the location of each project. In addition, all cultural resource reports, site forms, and other documentation for undertakings completed during the quarter, will be submitted to the UDSH.
3. This list will be provided to FHWA and the SHPO, who will review it for compliance with this Agreement, and if there are objections regarding the manner in which the terms of this Agreement are being carried out, 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, and determine if the undertaking will occur on Tribal lands;
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. Develop planning to involve the public;
4. Identify the appropriate SHPO.
5. Identify consulting parties, including Tribes, as appropriate, during the early stages of Section 106 review. If UDOT wishes to consult with the SHPO on the identification of consulting parties, the 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.
6. Begin consultation with consulting parties subject to limitations specified in Stipulation V.

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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 6. If UDOT wishes to consult with SHPO on the scope of the identification efforts and the definition of the APE, the 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.

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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 National Register of Historic Places (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 SHPO guidance, FHWA guidance, UDOT Guidance, and any other guidance, methodologies, agreements, or protocols that FHWA, UDOT, and the 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 may identify recommended boundaries, following standards set forth in National Register Bulletin 21, *Defining Boundaries for National Register Properties*. UDOT shall consult with the 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 the SHPO fails to comment on the multiple 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).
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, the 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. For projects processed as Tier 1 undertakings, the findings will be documented in the quarterly reports, and documentation submitted quarterly to SHPO.

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c. 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. For projects processed as Tier 1 undertakings, the findings will be documented in the quarterly reports, and documentation submitted quarterly to SHPO.

c. UDOT may consult at any time, either formally or informally, with the SHPO regarding application of the criteria.

d. 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 undertakjng.

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), the SHPO, 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 MOA.

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 Process.

d. UDOT will also notify the public of the adverse effect by, at a minimum, publishing the notice in the two statewide newspapers and requesting comments.

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, the SHPO, and the 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 a memorandum of agreement (MOA), pursuant to 36 CFR 800.6(c).

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g. A copy of the MOA shall be provided to each signatory, invited signatory, and concurring signatory, as well as the Council (if not participating).
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 the SHPO, the 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.

C. Resolving Objections

1. If FHWA, the 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, the 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 the SHPO, the FHWA, and Tribes within 24 hours. The 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 the 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

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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 1.13 (Attachment 5).
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 consult with SHPO and Tribes, as appropriate, to record, document, and evaluate NRHP eligibility of the property and the project's effect on the property, and to design a plan for avoiding, minimizing, or mitigating adverse effects on the eligible property.
4. If neither the SHPO nor a Tribe files an objection within 72 hours to UDOT's plan for addressing the discovery, UDOT may carry out the requirements of 36 CFR 800.13 on behalf of FHWA, and the Council does not need to be notified.

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XII. TREATMENT OF HUMAN REMAINS

A. 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.

B. FHWA does not have any NAGPRA responsibilities because it neither owns lands in the State of Utah nor does it act as a museum as it is defined in NAGPRA. UDOT may be subject to NAGPRA if it acts as a museum, as defined in NAGPRA.

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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 may be affected by 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 the SHPO as stipulated by this Agreement. UDOT shall not transmit to FHWA or the 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 Forms (IMACS), Reconnaissance Level Survey (RLS) forms Intensive Level Survey (ILS) forms, and any other relevant documents as soon as possible

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(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.A.

B. **Monitoring Implementation of this Agreement**

1. FHWA, the SHPO, 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, the SHPO, 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, the SHPO, and Council no later than three (3) months following the end of the Federal fiscal year (September 30).
3. UDOT, FHWA, 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 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, 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 the SHPO 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 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

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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. The 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 subjects 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 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 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.

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E. **Termination**

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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 (10) years after the date it takes effect, unless it is terminated prior to that time. Ninety days 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.

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Execution and implementation of this agreement evidence that FHWA has delegated certain Section 106 responsibilities to UDOT, and has afforded Council a reasonable opportunity to comment on the Program and its individual undertakings in Utah; that FHWA has taken into account the effects of the program and its individual undertakings on historic properties, and that FHWA has complied with Section 106 of the NHPA and 36 CFR 800 for the Program and its individual undertakings.

SIGNATORIES

FEDERAL HIGHWAY ADMINISTRATION

By: _____ Date: _____
James Christian, Utah Division Administrator

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ADVISORY COUNCIL ON HISTORIC PRESERVATION

By: _____ Date: _____
John Fowler, Executive Director

UTAH STATE HISTORIC PRESERVATION OFFICER

By: _____ Date: _____
Wilson Martin, USHPO

INVITED SIGNATORY

UTAH DEPARTMENT OF TRANSPORTATION

By: _____ Date: _____
John Njord, Executive Director

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ATTACHMENT 1

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MEMORANDUM OF UNDERSTANDING FOR CE DELEGATION

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MEMORANDUM OF UNDERSTANDING

State Assumption of Responsibility for Categorical Exclusions

23 USC §326

Federal Highway Administration
2520 West 4700 South, Suite 9A
Salt Lake City, Utah 84003

Utah Department of Transportation
4501 South 2700 West
Salt Lake City, Utah 84119

July 1, 2008

MEMORANDUM OF UNDERSTANDING
between
Federal Highway Administration, Utah Division
and the
Utah Department of Transportation

State Assumption of Responsibility for Categorical Exclusions

THIS MEMORANDUM OF UNDERSTANDING ("MOU") made and entered into this 30th day of June 2008, by and between the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION ("FHWA") and the STATE of Utah, acting by and through its DEPARTMENT OF TRANSPORTATION ("State"), hereby provides as follows:

WITNESSETH:

Whereas, Section 6004(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (P.L. 109-059) (SAFETEA-LU), codified as Section 326 of amended Chapter 3 of title 23, United States Code (23 U.S.C. 326) allows the Secretary of the United States Department of Transportation (USDOT Secretary), to assign, and a State to assume, responsibility for determining whether certain designated activities are included within classes of action that are categorically excluded from requirements for environmental assessments or environmental impact statements pursuant to regulations promulgated by the Council on Environmental Quality under part 1500 of title 40, Code of Federal Regulations (CFR) (as in effect on October 1, 2003); and

Whereas, if a State assumes such responsibility for making categorical exclusion (CE) determinations under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq. (NEPA), the USDOT Secretary also may assign and the State may assume all or part of certain Federal responsibilities for environmental review, consultation, or other related actions required; and

Whereas, on April 10, 2008, the FHWA published a notice of the availability of the proposed MOU in the Federal Register and provided a 45-day opportunity for comment; and

Whereas, on April 11, 2008, the State published a notice of the availability of the proposed MOU in the Salt Lake Tribune and Deseret News and provided a 45-day opportunity for comment; and

Whereas, the State and the FHWA have considered the comments received; and

Whereas, the USDOT Secretary, acting by and through the FHWA, has decided to assign specific responsibilities with respect to designated CE's to the State in accordance with this MOU; and

Whereas, the State wishes to assume such Federal agency responsibilities in accordance with this MOU and applicable law;

Now, therefore, the FHWA and the State agree as follows:

STIPULATIONS

I. CATEGORICAL EXCLUSION RESPONSIBILITIES ASSIGNED TO THE STATE BY FHWA

A. For the proposed projects covered by this MOU, the FHWA hereby assigns, and the State hereby assumes, subject to the terms and conditions set forth in 23 USC §326 and this MOU, the responsibility for determining whether a proposed Federal-aid action is within a category of action that has been designated as a CE by the USDOT Secretary, as specified in Stipulation I(B), and meets the definition of a CE as provided in 40 CFR 1508.4 (as in effect on October 1, 2003) and 23 CFR 771.117(a) and (b).

B. This assignment pertains only to the designated activities described in this Stipulation I(B). The assignment includes the following:

1. Activities listed in 23 CFR 771.117 (c); and

2. The example activities listed in 23 CFR 771.117(d).

3. Additional actions listed in Appendix A: none.

C. This MOU transfers to the State all responsibility for processing the CEs designated in Stipulation I(B) of this MOU, including any necessary CE approval actions. The State shall process all proposed projects that are CE candidates (CE projects), and any required reevaluations of CEs under 23 CFR 771.129 for all CE projects not completed prior to the date of this MOU, in accordance with the provisions of this MOU. With respect to matters covered by and subject to the terms of this MOU, this MOU supersedes any existing programmatic agreement that is solely between the State and the FHWA concerning CEs. Such programmatic agreement remains in effect with respect to matters not covered in this MOU until said programmatic agreement is terminated, or superseded, by subsequent agreement(s) between the State and FHWA or by law. A CE project that is excluded from this MOU, but is within the scope of a programmatic CE agreement between the FHWA and the State, may be processed pursuant to such programmatic agreement so long as that agreement remains in effect.

D. The State, when acting pursuant to 23 USC §326 and this MOU, holds assigned authority to make only decisions and commitments pertaining to the individual proposed projects and activities within the scope of §326 and this MOU. No action by the State shall bind the FHWA to future action of any kind. No determination or agreement made by the State with respect to mitigation or

other activities shall constitute a precedent for future determinations, agreements, or actions in the Federal-aid Highway Program unless the FHWA consents, in writing, to such commitment.

II. OTHER FHWA RESPONSIBILITIES ASSIGNED TO THE STATE

A. For proposed projects covered by this MOU, the FHWA hereby assigns, and the State hereby assumes, the following FHWA responsibilities for environmental review, consultation, or other related actions required under Federal laws and Executive Orders applicable to CE projects: See Appendix B for a description of the environmental responsibilities assigned to the State by the FHWA for proposed projects subject to this MOU. This assignment includes transfer to the State of the obligation to fulfill the assigned environmental responsibilities on any proposed projects meeting the criteria in Stipulation I(B) 1 and 2 that were determined to be categorically excluded by FHWA prior to the effective date of this MOU but that have not been completed as of the effective date of the MOU. Such projects are included in the term "proposed projects" in this MOU.

B. The FHWA reserves any responsibility for any environmental review, consultation, or other related action that is not expressly assigned under this MOU, including:

1. All government-to-government consultation with Indian tribes as defined in 36 CFR 800.16(m). Notice from the State to an Indian tribe advising the tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. If the State adequately resolves any project-specific tribal issues or concerns, then the FHWA's role in the environmental process shall be limited to carrying out the government-to-government consultation process. If FHWA determines through consultation with a tribe, or a tribe indicates to the FHWA, that the proposed resolution of tribal issues or concerns by the State is not adequate, then Stipulation III(C) applies. This MOU is not intended to abrogate, or prevent future entry into, any written agreement among the State, the FHWA, and a tribe under which the tribe agrees to permit the State to administer government-to-government consultation activities for the FHWA. However, such agreements are administrative in nature and do not relieve the FHWA of its legal responsibility for government-to-government consultation.

2. The State and FHWA will ensure that:

   a) The State provides to the FHWA any information necessary in order for the FHWA to carry out its consultation, evaluation, or decision-making for Stipulation II(B)(1) activities;

   b) The FHWA provides the State with a documented decision and any related information used for Stipulation II(B)(1) decisions and needed

by the State in order for the State to evaluate the proposed project and make its decision whether the proposed project qualifies as a CE.

c) As part of any request for FHWA authorization for funding or other action, the State will provide to the FHWA evidence that the CE process and any other environmental responsibilities assigned under this agreement have been completed in accordance with this MOU.

C. The State agrees that its execution of environmental review, reevaluation, consultation, and other related responsibilities for CE projects assigned under this MOU are subject to the same existing and future procedural and substantive requirements as if those responsibilities were carried out by the FHWA. This includes, without limitation, the responsibilities of the FHWA under interagency agreements such as programmatic agreements, memoranda of understanding, memoranda of agreement, and other similar documents that relate to the environmental review process for CE projects. This includes the interagency agreements listed in Appendix C of this MOU. If such interagency agreements are between the State and the FHWA only, then the assignment occurs automatically upon the signing of this MOU for proposed projects covered by this MOU. If the interagency agreement involves signatories other than the FHWA and the State, then the FHWA and the State will work to obtain any necessary consents or amendments. Such actions include:

1. Consulting with the other parties to obtain written consent to the continuation of the interagency agreement in its existing form, but with the substitution through assignment of the State for the FHWA with respect to interagency agreement provisions applicable to CE projects;

2. Negotiating with the other parties to amend the interagency agreement as needed so that the interagency agreement continues but that the State assumes the FHWA's responsibilities with respect to the assigned CE projects.

3. If a third party does not agree to the assignment or amendment of the interagency agreement, then to the extent permitted by applicable law and regulation, the State must carry out the assigned environmental review, consultation, or other related activity in accordance with applicable laws and regulations but without the benefit of the provisions of the interagency agreement.

D. The State shall carry out the assigned consultation, review and coordination activities in a timely and proactive manner. The State shall make all reasonable and good faith efforts to identify and resolve conflicts with Federal agencies, state and local agencies, Indian tribes as defined in 36 CFR 800.16(m), and the public during the consultation and review process.

III. ACTIONS, CONDITIONS, OR DETERMINATIONS THAT EXCLUDE DESIGNATED ACTIVITIES FROM ASSIGNMENT OF RESPOSIBILITIES

A. Notwithstanding any other provision of this MOU, any activity that does not satisfy the criteria for the CE categories described in Stipulation I(B) is excluded from this assignment. Exclusion also may occur at any time during the environmental process if the State determines that the project fails to meet the CE criteria. The provisions of Stipulation IV(C) apply to such cases.

B. Because the State assumes responsibility for environmental processing of the CEs designated in this MOU, the FHWA no longer will be responsible for conducting the environmental review, consultation or other related actions assigned under this MOU (see Stipulation XI). However, in furtherance of its stewardship and oversight responsibilities, the FHWA will evaluate the State's environmental processing of any project if the FHWA has any reason to believe that the State's performance with respect to the project does not satisfy the terms and conditions of this MOU. The scope of the evaluation will be commensurate with the potential problem. If the FHWA subsequently determines that the State's performance does not satisfy the terms and conditions of this MOU, then the FHWA will take action to resolve the problem. Such action may include action to facilitate the State's compliance with the MOU, or action to exclude the project from assignment under this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.

C. If a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 CFR 800.16(m), and either the Indian tribe or the FHWA determines that the issue or concern will not be satisfactorily resolved by the State, then the FHWA shall reassume responsibility for processing the project. The FHWA shall notify the State that the project will be excluded from this MOU. The provisions of Stipulation X(A)-X(E) apply to such FHWA-initiated exclusion.

IV. STATE PERFORMANCE REQUIREMENTS

A. Compliance with governing laws, regulations and MOU. The State shall make all determinations under this MOU in accordance with 23 CFR 771.117(a) and (b) and succeeding regulations. All actions by the State in carrying out its responsibilities under this MOU shall comply with, and be consistent with, the coordination provisions of Stipulation II and all applicable Federal laws, regulations, policies, and guidance. The State also shall comply with State and local laws to the extent applicable.

1. Official USDOT and FHWA formal guidance and policies relating to environmental review matters are posted online at FHWA's website (currently at http://www.fhwa.dot.gov/hep/legreg.htm), contained in the FHWA *Environmental Guidebook* (currently at http://environment.fhwa.dot.gov/guidebook/index.asp), or sent to the State electronically or in hard copy.

2. After the effective date of this MOU, the FHWA will use its best efforts to ensure that any new or revised FHWA policies and guidance that are final and applicable to the State's performance under this MOU are communicated to the State within 10 days of issuance. Delivery may be accomplished by e-mail, mail, by publication in the *Federal Register*, or by means of a publicly available online posting including at the sites noted above. If communicated to the State by e-mail or mail, such material may be sent either to the party specified in this MOU to receive notices, or to the UDOT Director of Environmental Services.

3. In the event that a new or revised FHWA policy or guidance is not made available to the State as described in the preceding paragraph, and if the State had no actual knowledge of such policy or guidance, then a failure by the State to comply with such Federal policy or guidance will not be a basis for termination under this MOU.

4. The State will work with all other appropriate Federal agencies concerning the laws, guidance, and policies relating to any Federal laws that such other agencies administer.

B. Processing proposed projects assigned under the MOU: State identification, documentation, and review of effects. For proposed projects and other activities assigned under this MOU that the State determines are included in the classes of CE assigned to the State under this MOU, the State shall:

1. Institute a process to identify and review the environmental effects of the proposed project.

2. For CEs other than those designated in 23 CFR 771.117(c), carry out a review of proposed CE determinations, including consideration of the environmental analysis and project file documentation, prior to the State's approval of the CE determination. The process shall include, at a minimum, review of the documentation and proposed determination by a competent reviewer who is not a preparer of the CE documentation. The reviewer may make a recommendation to the State's decision-maker about whether the project meets CE criteria or, if appropriately authorized, the reviewer may make the CE decision.

3. Carry out the other environmental responsibilities that are assigned under this MOU, as necessary or appropriate for the activity.

4. Document its approval of the determination, specifying the assigned CE that applies to the proposed project and including, at a minimum, the printed name, title, and date of the State official approving the determination.

5. Include the following determination statement when documenting the CE findings:

"The State has determined that this project has no significant impacts on the environment and that the project is categorically excluded from the requirements to prepare an environmental assessment or environmental impact statement under the National Environmental Policy Act. The State has been assigned, and hereby certifies that it has carried out, the responsibility to make this determination pursuant to Chapter 3 of title 23, United States Code, Section 326 and a Memorandum of Understanding dated June 30, 2008, executed between the FHWA and the State."

6. Document in the project file the specific categorically excluded activity, the CE findings including the determination that there are no unusual circumstances (23 CFR 771.117(b)), and completion of all applicable FHWA responsibilities assigned under Stipulations I and II.

C. Excluded projects: determination and documentation. For proposed projects that are candidates for CE classification but that the State determines should be excluded from processing under this assignment, the State shall:

1. Document the exclusion findings in the project file, including the reason for the finding;

2. Notify the FHWA; and

3. Working with the FHWA as the responsible party under NEPA, proceed with review and documentation of the project under the appropriate NEPA procedures (including those under a programmatic CE agreement, if applicable).

D. Required State resources, qualifications, expertise, standards, and training.

1. The State must maintain adequate organizational and staff capability and expertise to effectively carry out the responsibilities assigned to it under this MOU. This includes, without limitation:

   a) Using appropriate technical and managerial expertise to perform the functions required under this MOU and applicable laws, regulations, policy, and guidance;

   b) Devoting adequate financial and staff resources to carry out the responsibilities assumed by the State; and

   c) Demonstrating, in a consistent manner, the capacity to perform the State's responsibilities under the MOU and applicable Federal law.

2. The State agrees that it shall maintain on its staff or through consultant services all of the environmental and other technical expertise needed to carry out its responsibilities under this MOU and 23 USC §326. Without limiting the foregoing, when carrying out the requirements of Section 106 of the National Historic Preservation Act, as amended, the State shall comply with 36 CFR 800.2(a)(1). All actions 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 meet the Secretary of Interior's Professional Qualifications Standards (published at 48 FR 44738-44739). The State shall ensure that all documentation required under 36 CFR 800.11 is reviewed and approved by a staff member or consultant who meets the Professional Qualifications Standards. Additionally, the State shall ensure that it is familiar with and capable of carrying out the requirements of Section 4(f) of the Department of Transportation Act of 1966, as amended, including but not limited to the preparation of Section 4(f) evaluations and the performance of legal sufficiency reviews by an adequately trained attorney(s) required under 23 CFR 771.135(k).

E. State quality control.

1. The State agrees to carry out regular quality control activities to ensure that its CE determinations are made in accordance with applicable law and this MOU (to view UDOT's environmental policy and manual visit http://www.udot.utah.gov/go/environmental).

2. At a minimum, the State shall monitor its processes relating to project determinations, environmental analysis, and project file documentation, and check for errors and omissions. The State shall take corrective action as needed.

3. If the State implements training to meet the capability requirements of this MOU or as a corrective action, the State shall be responsible for the training. The State shall provide notice of the training to the FHWA.

F. MOU performance monitoring and quality assurance. The FHWA and the State shall cooperate in monitoring performance under this MOU and each party shall modify its practices as needed to assure quality performance by the State and the FHWA. Monitoring by the FHWA and the State will include consideration of the technical competency and organizational capacity of the State, as well as the State's performance of its CE processing functions. Performance considerations will include, without limitation, the quality and consistency of the State's project determinations, adequacy and capability of the resources applied by the State, and the quality and consistency of the State's administration of its responsibilities under this MOU. In support of the monitoring efforts:

1. Within 15 business days after the end of each fiscal quarter, the State shall submit to the FHWA a list of the CE determinations that the State approved that fiscal quarter. The State shall deliver the list to the FHWA, or make it available by means of FHWA access to a report in the State's project management system. At any time after the State's completion of the first four (4) fiscal quarters of its performance under this MOU, based on the State's satisfactory performance of this MOU, the FHWA may reduce the

frequency of this reporting requirement; provided that in no event will the reporting frequency be less than once each year. Such reduction in reporting frequency, and any revocation of such reduction by the FHWA, shall not be deemed an amendment under Stipulation VIII.

2. The State shall submit to the FHWA (electronically or in hard copy) a report summarizing its performance under the MOU at the conclusion of the 18th month and 30th month of the MOU. The report will identify any areas where improvement is needed and what measures the State is taking to implement those measures. The report will include actions taken by the State as part of its quality control efforts under Stipulation IV. Following the submission of a report, the State shall schedule a follow-up meeting with the FHWA at which the parties will discuss the report, the State's performance of the MOU, and the FHWA's monitoring activities. If the MOU is renewed, the reports will be due at the conclusion of the 15th and 30th months unless otherwise provided by the parties in the renewed MOU.

3. The State shall maintain electronic and paper project records and general administrative records pertaining to its MOU responsibilities and the proposed projects processed hereunder. The records shall be available for inspection by the FHWA at any time. The State shall provide the FHWA with copies of any documents the FHWA may request. The State shall retain those records, including all letters and comments received from governmental agencies, the public, and others about the performance of activities delegated under this MOU, for a period of no less than three (3) years after completion of project construction. This 3-year retention provision does not relieve the State of its project or program recordkeeping responsibilities under 49 CFR 18.42 or any other applicable laws, regulations, or policies.

4. The State shall ensure that project records are available to the public consistent with requirements applicable to Federal agencies under 5 U.S.C. 552 (the Freedom of Information Act, as amended in 2002) and NEPA.

5. The FHWA periodically shall review the State's records and may interview State staff or others to evaluate the State's performance under this MOU. Such reviews will occur no less than every 15 months, and may be coordinated with the review of the State's report under Stipulation IV(F)(2). The FHWA anticipates that, under normal circumstances, its evaluation of the State's performance will be based on a modified version of a typical FHWA CE process review (For additional information on FHWA guidance on monitoring, go to: http://www.fhwa.dot.gov/hep/6004stateassumpt.htm). Modifications to the CE process review will include incorporation of measures specific to the responsibilities assigned to the State pursuant to 23 U.S.C. 326, and will include performance measurements of quality and time. However, the FHWA reserves the right to determine in its sole discretion the frequency, scope, and procedures used for monitoring activities. The State, by its execution of this MOU acknowledges that it is familiar with the FHWA CE process review procedures and with the

expected modifications that will be adopted for the purpose of monitoring the State's MOU performance.

6. Nothing in this Stipulation shall prevent the FHWA from undertaking other monitoring actions, including audits, with respect to the State's performance of the MOU. The FHWA, in its sole discretion, may require the State to perform such other quality assurance activities, including other types of monitoring, as may be reasonably required to ensure compliance with this MOU, 23 USC §326, and other applicable Federal laws and regulations. Such requirement shall not be deemed an amendment under Stipulation VIII.

7. The State agrees to cooperate with the FHWA in all quality assurance activities.

G. State liability. The State agrees that it is solely responsible and solely liable for complying with and carrying out this MOU, for the performance of all assigned responsibilities as provided by applicable law and for any decisions, actions, or approvals by the State. The FHWA shall have no responsibility or liability for the performance of responsibilities assigned to the State, including without limitation any decision or approval made by the State. Where a State exercises any assigned authority on a proposed project, the State assumes sole responsibility and liability for NEPA on that project. The exercise of any assigned authority on a proposed project satisfies the condition set forth in Utah Code 72-1-207(5)(b)(iv) and the State thereby assumes with respect to such proposed project all liability relating to NEPA and other assigned environmental responsibilities.

H. Litigation. This section assumes that the FHWA will not be named as a party in litigation brought in connection with the State's discharge of its responsibilities under this MOU. If either the FHWA or another agency of the United States is named in such litigation, however, nothing in this MOU affects the United States Department of Justice's authority to litigate such claims, including the authority to approve a settlement, on behalf of the United States.

1. The State shall defend, at its own expense, all claims brought in connection with its discharge of any responsibility assigned to the State.

2. The State shall notify the FHWA of any notice of claim the State receives prior to initiation of litigation, which notice is given in connection with the State's acts or omissions pursuant to this MOU. The State shall provide the FHWA with a copy of any such notice of claim within 7 calendar days after the State's receipt of the notice.

3. In the event of litigation, the State shall provide qualified legal counsel, including outside counsel if necessary. The State will notify the FHWA's Division Office and the U.S. Department of Justice, through its Office of the Assistant Attorney General, Environment and Natural Resources Division, ("DOJ"), within 7 calendar days of the receipt of service of process, of any complaint concerning its discharge of any responsibility assumed under this

MOU. The State's notification to the FHWA and DOJ shall be made prior to its response to the complaint. The State agrees to provide the FHWA's Division Office and DOJ with copies of the complaint and any motions, pleadings, briefs, and other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. The State will deliver such copies to the FHWA and DOJ via express mail or delivery service within 7 calendar days of the service or receipt of any document or, in the case of any documents filed by or on behalf of the State, within 7 calendar days of the date of filing.

4. The State agrees to notify FHWA's Division Office and DOJ of the State's decision to settle any lawsuit concerning its discharge of any responsibility assumed under this MOU prior to settling the case, and shall provide the FHWA and DOJ with a reasonable amount of time to review, and comment on, the proposed settlement. The State agrees not to enter into any litigation settlement agreement that affects the interpretation or application of any Federal law without FHWA and DOJ consent.

5. For either litigation or pre-litigation settlement agreements, the lack of FHWA approval of such settlement is grounds for FHWA denial of Federal-aid eligibility for any State claims for reimbursement of costs arising out of or relating to the settlement agreement.

6. The State hereby consents to intervention by the FHWA in any action or proceeding arising out of, or relating to the State's discharge of any responsibility assigned to the State under this MOU.

7. If the FHWA re-assumes responsibility for processing a project and makes the final CE determination for the project, then the FHWA shall be responsible for defending that CE determination in the event of a challenge to actions the FHWA takes after re-assumption. This shall include the final CE determination. Nothing in this paragraph shall relieve the State of its liability for acts or omissions prior to the FHWA's re-assumption of responsibility for processing the project.

I. Federal Register. While the MOU is in effect, if any CE project or program documents are required to be published in the *Federal Register*, such as a notice of final agency action under 23 U.S.C. §139(l), the State shall transmit such document to the FHWA's Division Office and the FHWA will publish such document in the *Federal Register* on behalf of the State. The State is responsible for the expenses associated with the publishing of such documents in the *Federal Register*, in accordance with guidance issued by the FHWA.

V. STATE CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

A. The State hereby certifies that it has the necessary legal authority and the capacity to:

1. Accept the assignment under this MOU;

2. Carry out all of the responsibilities assigned to the State; and

3. Agree to and perform all terms and conditions of the assignment as contained in this MOU and in 23 USC §326.

B. The State consents to and accepts the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary that the State assumes under this MOU and 23 USC §326. The State understands and agrees that this consent constitutes a waiver of the State's immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of addressing matters arising out of this MOU and carrying out the USDOT Secretary's responsibilities that that State assumes pursuant to this MOU and 23 USC §326. This consent to Federal court jurisdiction shall remain valid after termination of the MOU, or re-assumption of the USDOT Secretary's responsibilities by the FHWA, for any act or omission by the State relating to its compliance, discharge, or enforcement of any responsibility under this MOU or 23 USC §326.

1. As provided by Utah Code 72-1-207, Utah waives its immunity under the Eleventh Amendment. If this waiver is withdrawn then the States' authority to participate in this MOU will end and this MOU will terminate automatically subject to applicable survival and transitional provisions of this MOU.

C. In accordance with 23 USC §326(e), the State agrees that it shall be deemed to be a Federal agency for the purposes of the Federal law(s) under which the State exercises any responsibilities pursuant to this MOU and 23 USC §326.

D. The State may not assign or delegate its rights or responsibilities under this MOU to any other agency, political subdivision, or entity, or to any private individual or entity. Without limiting the foregoing, the State understands and agrees that it must retain the environmental decision-making responsibilities assigned to it under this MOU and may not assign or delegate such decision-making responsibilities to consultants or others.

E. With respect to the public availability of any document or record under the terms of this MOU or the State's open records law, Utah GRAMA Law 63-2 et seq., the State certifies that the laws of the State provide that any decision regarding the release or public availability of a document or record may be legally challenged or reviewed in the courts of the State.

F. The State certifies that the person signing this MOU is duly authorized to do so and has the legal authority to:

1. Waive the State's Eleventh Amendment rights pursuant to the authority in Utah Code 72-1-207.

2. Consent to Federal court jurisdiction as specified above;

3. Enter into this MOU on behalf of the State;

4. Make the certifications set forth in this MOU; and

5. Bind the State to the terms and conditions contained in this MOU.

G. The Utah State Attorney General, by signing this MOU, certifies that the foregoing is true and that upon execution of this MOU the certifications, terms, and conditions of the MOU will be legally binding and enforceable obligations of the State. A copy of the opinion letter required under Utah Code 72-1-207(5)(b)(ii) is attached to this MOU as Appendix D.

VI. PUBLIC NOTICE AND COMMENT

A. The execution of this MOU, and of any amendment or renewal, requires prior public notice and an opportunity for comment.

B. The State shall publish notice of the availability of the initial MOU, and any proposed amendment or renewal, for public review and comment in one or more newspapers of statewide circulation.

C. The FHWA Division Office shall publish in the Federal Register a notice of availability of the initial proposed MOU, and any proposed amendment or renewal, for public review and a 45-day comment period. The notice will expressly request comments on any types of activities proposed for assignment under Stipulation I(B), and will include a statement of the public availability of supporting documentation for any assignment under Stipulation I(B). The notice also must advise the public about how to learn about FHWA's final decision on the proposed MOU, including how to obtain a copy of any resulting final MOU. The FHWA will establish a docket in the USDOT Docket Management System to receive comments.

D. The State and the FHWA shall consider comments provided by the respondents to the public notices before finalizing the MOU, or any proposed amendment or renewal agreement. Upon completion of the decision-making process, the FHWA shall publish a notice in the *Federal Register* that announces the agency's decision and the execution of the MOU. The notice also will inform the public of the availability in the USDOT Docket Management System of a brief summary of the results of the decision-making process and a copy of any final MOU executed by the State and the FHWA, whether initial, amended, or renewed. The notice also will advise where the final MOU is available on the State's Web site.

E. The State will post on its Web site (http://www.udot.utah.gov/go/environmental) a notice of the availability to the public, upon request, of copies of the State's quarterly reports of CE determinations prepared pursuant to Stipulation IV(F)(1), the State's performance reports prepared pursuant to Stipulation IV(F)(2), and the FHWA performance monitoring reports prepared pursuant to Stipulation IV(F)(5). The FHWA will arrange for the posting of a similar notice

on the FHWA's web site or create a link from the FHWA's site to the State's site.

VII. INITIAL TERM AND RENEWAL

A. This MOU shall have an initial term of three (3) years, beginning on the date of the last signature.

B. This MOU is renewable for additional terms of three (3) years each if the State requests renewal and the FHWA determines that the State has satisfactorily carried out the provisions of this MOU. In considering any renewal of this MOU, the FHWA will evaluate the effectiveness of the MOU and its overall impact on the environmental review process. The FHWA may decide not to renew the MOU if the FHWA determines that the operation of the MOU has substantial adverse effects on the environmental review process. Such evaluation may include consideration of any effects from the assumption by the State of only some, but less than all, of the FHWA's environmental review, consultation, or other related responsibilities as listed in Stipulation II.

C. At least six (6) months prior to the end of the initial term and of any renewed term of this MOU, the State and the FHWA shall meet to discuss the results of the monitoring and consider any amendments to this MOU. This meeting may be combined with a meeting to discuss performance under the monitoring provisions in Stipulation IV(F)(2) and (F)(5) of this MOU.

D. If the parties do not renew the MOU, then it shall expire at the end of the term then in effect. The provisions of Stipulation X(A)(4), and X(C)-(E) shall apply.

VIII. AMENDMENTS

A. Any party to this MOU may request that it be amended, whereupon the parties shall consult to consider such an amendment.

B. If, after the required public notice and comment, the parties agree to amend the MOU, then the FHWA and the State may execute an amendment with new signatures and dates of the signatures. The term of the MOU shall remain unchanged unless otherwise expressly stated in the amended MOU. Any amendment that extends the term of the MOU shall be treated as a renewal and the FHWA must make the determinations required for a renewal under Stipulation VII.

IX. TERMINATION

A. Entire MOU. The State, or the State and FHWA by mutual agreement, may terminate this MOU in its entirety. The FHWA may terminate this MOU without the agreement of the State if the FHWA determines that the State has failed to adequately meet MOU requirements. The procedures in Stipulation X apply.

B. Part of MOU. By mutual agreement, the FHWA and the State may terminate the State's responsibilities with respect to particular designated activities under Stipulation I, or with respect to one or more responsibilities assigned under Stipulation II. The FHWA may exercise such partial termination without the agreement of the State if the FHWA determines that the State has failed to adequately meet MOU requirements for the responsibilities in question, but that termination of the entire MOU is not warranted. The procedures in Stipulation X apply.

X. PROCEDURES FOR TERMINATION AND FHWA-INITIATED PROJECT EXCLUSIONS

A. Except as provided in Stipulation X(B) below, the process for termination under Stipulation IX(A)-IX(B), and for exclusion of a project from the MOU assignment by the FHWA under Stipulation III(B)-III(C), is as follows:

1. The party wishing to initiate the termination or exclusion shall provide to the other party a written notice of intent. The notice should identify the proposed action and explain the reason(s) for the proposed action.

2. Following the notice, the parties shall have a 30-day period during which the FHWA and the State shall consult on amendments or other actions that would avoid termination or exclusion. By agreement, the parties may extend this consultation period, provided that such extension may not exceed the term of the MOU.

3. Following the consultation period, any termination or exclusion shall be effective as of a date thirty (30) days after the date of either a post-consultation agreement between the State and FHWA, or the date of the State's receipt of a FHWA notice of final determination of termination or exclusion. All responsibilities covered by the termination or exclusion shall revert to the FHWA as of that effective date.

4. In the event of termination or exclusion, the State and the FHWA agree to cooperate to make the transfer of responsibilities back to the FHWA effective in as orderly and administratively efficient manner as possible. The State will promptly provide FHWA any documents, records and other project-related material needed for FHWA to proceed with processing any affected project. Appropriate NEPA procedures, including those under any applicable programmatic CE agreement, shall apply to the subsequent processing of projects.

B. The FHWA, in its sole discretion, may exclude a project from this MOU pursuant to Stipulation III(B)-III(C), or terminate this MOU pursuant to Stipulation IX(A)-IX(B), without the 30-day consultation or final notice periods, if the FHWA determines that:

1. The State is not performing in accordance with this assignment; and

2. Extreme conditions exist that justify immediate exclusion or termination and transfer back to the FHWA of the responsibilities covered by the exclusion or termination.

3. In such cases, the FHWA shall notify the State in writing of its determination and action, and specify the reasons for the action.

C. The State's liability for its acts and omissions under this MOU, and the provisions of Stipulation V, shall survive the MOU. This survival clause includes, without limitation, the provisions of Stipulations IV(G)-IV(H) relating to liability and litigation.

D. Termination and exclusion actions, and any decision not to renew, do not require public notice and comment.

E. Termination or other action by the FHWA in accordance with the provisions of this MOU does not limit or otherwise affect the FHWA's ability to seek any other remedy or to take action under other provisions of applicable law, including without limitation any appropriate remedies as provided in 23 CFR 1.36.

XI. STATE EXECUTION OF ASSIGNED RESPONSIBILITIES WITHOUT FHWA INVOLVEMENT

A. The FHWA will not provide any project-level assistance to the State in carrying out any of the responsibilities assigned under this MOU. "Project-level assistance" includes advice, consultation, or document review with respect to the discharge of such responsibility for a particular highway project. However, "project-level assistance" does not include discussions concerning issues addressed in prior projects, legal interpretations of any applicable law contained in titles 23 or 49 of the United States Code, legal interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance. If a need for project-level assistance is identified as a result of the government-to-government consultation process described in Stipulation II(B)(1), then the FHWA shall reassume responsibility for the project as provided in Stipulation III(C).

B. The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving the State's consultation or coordination with another Federal, State, or local agency with respect to the State's discharge of any of the responsibilities the State has assumed under this MOU for any particular highway project. However, the FHWA holds both monitoring and quality assurance obligations under this MOU and general oversight and stewardship obligations under the Federal-aid Highway Program. In furtherance of those obligations, the FHWA occasionally may elect to attend meetings between the State and other Federal agencies. In rare or extreme circumstances and based on its observations, the FHWA may submit comments to the State and the other Federal agency if the FHWA determines such comment is necessary and in the Federal interest because:

1. The FHWA reasonably believes that the State is not in compliance with this MOU; or

2. The FHWA determines that an issue between the State and the other Federal agency has broad or unique policy implications for the administration of the national Federal-aid Highway Program.

XII. NOTICES

Any notice to either party may be given electronically so long as a paper original of the notice also is delivered to the party. The effective date of the notice shall be the date of delivery of the paper original. Paper notices shall be delivered as follows:

State of Utah
UDOT Executive Director
4501 South 2700 West – 1st Floor
Box 141245
Salt Lake City, UT 84114-8450

Federal Highway Administration:
Utah Division Administrator
2520 West 4700 South Suite 9A
Salt Lake City, UT 84118-1847

U.S. Department of Justice:
Office of the Assistant Attorney General
Environment and Natural Resources Division
950 Pennsylvania Avenue, NW
Room 2143
Washington, D.C. 20530

Execution of this MOU and implementation of its terms by the State formally evidence that the parties have reviewed this MOU and determined that it complies with the laws, regulations and policies applicable to the FHWA and the State. Accordingly, this MOU is approved and is effective upon the date of the last signature below.

FEDERAL HIGHWAY ADMINISTRATION

Walter C. Waidelich Jr.
Utah Division Administrator

6/30/08
Date

STATE OF UTAH

John Njord, Executive Director
Utah Department of Transportation

6·30·08
Date

Mark Shurtleff, Attorney General
State of Utah

7/1/08
Date

Appendix A

23 CFR 771.117(d) Determinations that the USDOT Secretary Assigns to the State Pursuant to Stipulation I(B)(3)

NONE.

23 USC §326 CE Assignment MOU
FHWA, Utah Division and the Utah Department of Transportation

Appendix B

List of FHWA Responsibilities Assigned

Air Quality
Clean Air Act (CAA), 42 U.S.C. 7401–7671q. *Determinations for project-level conformity if required for the project.*

Noise
Compliance with the noise regulations in 23 CFR 772

Wildlife
Section 7 of the Endangered Species Act of 1973, 16 U.S.C. 1531–1544, and Section 1536
Marine Mammal Protection Act, 16 U.S.C. 1361
Anadromous Fish Conservation Act, 16 U.S.C. 757a–757g
Fish and Wildlife Coordination Act, 16 U.S.C. 661–667d
Migratory Bird Treaty Act, 16 U.S.C. 703–712
Magnuson-Stevens Fishery Conservation and Management Act of 1976, as amended, 16 U.S.C. 1801 et seq.

Historic and Cultural Resources
Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470(f) et seq.[1]
Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. 138 and 49 U.S.C. 303
Archeological and Historic Preservation Act of 1966, as amended, 16 U.S.C. 469–469(c)

Social and Economic Impacts
American Indian Religious Freedom Act, 42 U.S.C. 1996[1]
Farmland Protection Policy Act (FPPA), 7 U.S.C. 4201–4209

Water Resources and Wetlands
Clean Water Act, 33 U.S.C. 1251–1377
Section 404
Section 401
Section 319
Coastal Barrier Resources Act, 16 U.S.C. 3501–3510
Coastal Zone Management Act, 16 U.S.C. 1451–1465
Safe Drinking Water Act (SDWA), 42 U.S.C. 300f–300j–6
Rivers and Harbors Act of 1899, 33 U.S.C. 401–406
Wild and Scenic Rivers Act, 16 U.S.C. 1271–1287
Emergency Wetlands Resources Act, 16 U.S.C. 3921, 3931
TEA-21 Wetlands Mitigation, 23 U.S.C. 103(b)(6)(m), 133 (b)(11)
Flood Disaster Protection Act, 42 U.S.C. 4001–4128

Parklands
Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. 138 and 49 U.S.C. 303

Land and Water Conservation Fund (LWCF), 16 U.S.C. 4601-4 (known as Section 6(f))

Hazardous Materials
Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601–9675
Superfund Amendments and Reauthorization Act of 1986 (SARA)
Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901–6992k

Land
Landscaping and Scenic Enhancement (Wildflowers), 23 U.S.C. 319
Executive Orders Relating to Highway Projects
E.O. 11990, Protection of Wetlands
E.O. 11988, Floodplain Management
E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
E.O. 11593, Protection and Enhancement of Cultural Resources[1]
E.O. 13007, Indian Sacred Sites[1]
E.O. 13175, Consultation and Coordination with Indian Tribal Governments[1]
E.O. 13112, Invasive Species

Note: Under these laws and Executive Orders, FHWA will retain responsibility for conducting formal government-to-government consultations with federally recognized Indian tribes. UDOT will continue to handle routine consultations with the tribes and understands that a tribe has the right to direct consultation with FHWA upon request. UDOT may also assist FHWA with formal consultations, with the consent of a tribe, but FHWA remains responsible that this consultation occurs.

Appendix C

List of UDOT Programmatic Agreements/Memoranda of Understanding

Statewide Agreements

Memorandum of Agreement between the State of Utah Department of Transportation, the United States Department of Transportation Federal Highway Administration Utah Division, and the United States Department of Interior Fish and Wildlife Service Utah Field Office for Streamlining of Informal Section 7 Consultation under the Federal Endangered Species Act of 1973, as Amended
Signatories to Agreement: USFWS, FHWA, UDOT Director
Effective Date: August 30, 2005

Agreement Between UDOT and FHWA for Environmental Approval Authority for Selected Categorical Exclusion Documents
Signatories to Agreement: FHWA, UDOT Director
Effective Date: December 31, 2003

Memorandum of Understanding Between the Utah Department of Transportation and the Utah Geological Survey Concerning Agency Responsibilities Pursuant to U.C.A. 63-73-19.
Signatories to Agreement: UGS Director, UDOT Deputy Director
Effective Date: February 12, 1998

Memorandum of Understanding Between the Utah Department of Transportation and the Utah State Historic Preservation Office Concerning State Funded Minor Highway Improvements and Structure Maintenance Activities and Agency Responsibilities Pursuant to U.C.A. 9-8-404
Signatories to Agreement: SHPO, UDOT Director
Effective Date: June 16, 2004

Programmatic Agreement among the Federal Highway Administration, the Utah State Historic Preservation Officer, and the Utah Department of Transportation Regarding Compliance with Section 106 of the National Historic Preservation Act, as it Pertains to the Administration of the Federal-Aid Highway Program in Utah.
Signatories to Agreement: SHPO, ACHP, FHWA, UDOT Director
Effective Date: April 16, 2007

Appendix D

State of Utah Attorney General Opinion Letter

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL

RECEIVED
JUN 25 2008
FHWA Utah Division

MARK L. SHURTLEFF
ATTORNEY GENERAL

RAYMOND A. HINTZE
Chief Deputy

Protecting Utah • Protecting You

KIRK TORGENSEN
Chief Deputy

June 19, 2008

Jeffrey F. Paniati, P.E., Executive Director
James Ray, Acting Director and Deputy Administrator
Federal Highway Administration
1200 New Jersey Ave. SE
Washington, DC 20590

Walter Waidelich
FHWA Utah Division Administrator
2520 West 4700 South, Suite 9A
Salt Lake City, Utah 84118

Re: Wavier of Immunity and Memorandum of Understanding

Dear Mr. Paniate, Mr. Ray and Mr. Waidelich:

The Utah Department of Transportation is entering into a 23 USC 326 CE Assignment and Memorandum of Understanding with the Federal Highway Administration. Pursuant to that MOU, the Utah Attorney General is required to provide an opinion letter that the MOU is legally binding upon the state, and that the state of Utah effectively waives it 11th Amendment immunity and consents to suits arising out of the Department's responsibilities assumed through 23 USC See 326 and the resulting MOU. The purpose of this letter is to provide that necessary assurance.

The Utah legislature has expressly determined that "the state waives its immunity under the 11th Amendment of the United States Constitution and consents to suit in a federal court for lawsuits arising out of the department's compliance, discharge, or enforcement of responsibilities assumed pursuant to 23 USC Sec. 326." *See, UCA 72-1-207(5)(a).*

This waiver of immunity is effective where 1) the department executes a MOU accepting federal court jurisdiction as required by 23 USC Sec. 326(e); 2) the act or omission that is the subject of the lawsuit arises out of the obligations imposed by 23 USC 326; 3) the MOU is in effect when the act or omission that is the subject of the federal lawsuit occurs; and 4) an opinion

UTAH STATE CAPITOL COMPLEX, EAST OFFICE BLDG., SUITE E320 • P.O. BOX 142320 • SALT LAKE CITY, UTAH 84114-2320
TELEPHONE: (801) 538-9600 • FAX: (801) 538-1121

letter by the attorney general certifies that the MOU and waiver of 11th Amendment immunity are valid and binding upon the state. *See, UCA 72-1-207(5)(b).*

The 11th Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the Unites States by Citizens of another State, or by Citizens or Subjects of and Foreign State." *U.S. Constitution, Amend XI.* The Supreme Court has instructed that "although by it terms the Amendment applies only to suit against a state by citizens of another State, our cases have extended the Amendment's applicability to suit by citizens against their own States." *University of Alabama v Garrett* 531 U.S. 356, 362 (2001). The ultimate protection granted by the amendment is that non-consenting States may not be sued by private interests in federal court, absent a clear waiver of immunity by the state. *Edelman v Jordan* 415 U.S. 651, 663 (1974). A state can effectively waive it 11th Amendment immunity by the "express language" of a state statute. *V-1 Oil v Utah Department of Public Safety* 131 F.3d 1415, 1421 (10th Cir. 1997).

In this instance, pursuant to the "express language" found in UCA 72-1-207(5), the State of Utah has waived its 11th Amendment protection because the state is acting pursuant to assumed responsibilities arising from 23 USC 326. In the opinion of the Utah Attorney General's Office, under the circumstances presented in this case, this 11th Amendment waiver is valid, enforceable, and legally binding upon the state of Utah. Likewise, the MOU signed by UDOT's executive director or his designee constitutes a valid and legally binding obligation upon the state.

We believe this opinion meets the certification requirements necessary for the CE grant of authority to the state of Utah. We appreciate the opportunity to work together on this matter.

Sincerely,

Mark L. Shurtleff
Utah Attorney General

ATTACHMENT 2

EXISTING AGREEMENTS

1. Memorandum of Understanding Between the Utah Department of Transportation and the Utah State Historic Preservation Officer Concerning State Funded Minor Highway Improvements and Structure Maintenance Activities and Agency Responsibilities Pursuant to U.C.A. 9-8-404 (amended June 16, 2004)
2. Memorandum of Understanding Between the Utah Department of Transportation and the Utah State Historic Preservation Officer Concerning Right-of-Way Encroachment Permits and Agency Responsibilities Pursuant to U.C.A. 9-8-404 (January 20, 1998)
3. Memorandum of Understanding Between the Utah Department of Transportation and the Utah Geological Survey Concerning Agency Responsibilities Pursuant to U.C.A. 63-73-19 (February 12, 1998)
4. 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 (July 29, 2008)
5. 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 (September 29, 2008)
6. 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 (September 29, 2008)
7. Agreement to Share Protected Records Between Governmental Entities (Division of State History and Utah Department of Transportation) (August 21, 2007)

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ATTACHMENT 3

RESPONSIBILITIES

TIER 1 AND TIER 2 PROJECTS

PA Stipulation No.	Activity	FHWA	UDOT PQS	Consultant[1]	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		
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[2]		X	X	May be combined with FOE
IX.C	Submit DOE to SHPO and consulting parties		X		
IX.C	Resolve disagreements on eligibility, including	X			

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PA Stipulation No.	Activity	FHWA	UDOT PQS	Consultant[1]	Comments
	notifying the Keeper of the National Register				
IX.D	Determine effect		X		
N/A	Draft FOE[3]		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[4] 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, 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			

[1] At the request and under the direction of the UDOT PQS
[2] Determination of Eligibility
[3] Finding of Effect
[4] Memorandum of Agreement

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DELEGATED CEs

PA Stipulation No.	Activity	FHWA	UDOT PQS	Consultant[1]	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		
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[2]		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[3]		X	X	

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PA Stipulation No.	Activity	FHWA	UDOT PQS	Consultant[1]	Comments
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[4] 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, 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			

[1] At the request and under the direction of the UDOT PQS
[2] Determination of Eligibility
[3] Finding of Effect
[4] Memorandum of Agreement

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ATTACHMENT 4

SCREENED UNDERTAKINGS (Tier 1)

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/records review to determine potential for involvement of historic properties
- Consultation with Tribes who may attach religious or cultural significance to properties within the project area, as appropriate for the scope of the undertaking.
- Field review of project area, including survey if necessary
- Review of detailed project plans
- Consultation with 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

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 following form:

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TIER 1 SCREENING FORM

Project No:
PIN No:
Project Name:
Project Description (give detailed description):
City:
County:

Screened 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.

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

Check all that apply.

Antiquities Project No: _____

Literature Review

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

Field Review

- ❑ Pedestrian survey (Class III) (survey interval)
  If no field survey conducted, describe why not:
- ❑ Field review other than survey (list methods used, e.g., reconnaissance, windshield)
- ❑ Other (describe):

Consultation

- ❑ SHPO (formal or informal?)
- ❑ CLG: List _____

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- ❑ Tribes: List _____
- ❑ Knowledgeable Informants: List _____
- ❑ Other: List _____

- ❑ Controversy based on historic preservation issues? If yes, consultation with SHPO and FHWA is required.

The following Supporting Documentation* is attached. (List below)

1. _____
2. _____
3. _____

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

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 sites present
- ❑ No Historic Properties Affected: sites present but no sites eligible
- ❑ No Historic Properties Affected: eligible sites present, but sites are completely avoided by the undertaking and the potential for substantial indirect effects is very low.
- ❑ No Adverse Effect: effects do not meet the criteria of adverse effect or the undertaking is modified or conditions are imposed to avoid adverse effects

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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
- ❑ Categorical Exclusion: _____
- ❑ Environmental Assessment: _____
- ❑ Environmental Impact Statement: _____

Name: _____

Title: _____

Date: _____

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ATTACHMENT 5

UDOT STANDARD SPECIFICATION FOR DISCOVERY OF HISTORICAL, ARCHEOLOGICAL, OR PALEONTOLOGICAL OBJECTS FEATURES, SITES, HUMAN REMAINS, OR MIGRATORY AVIAN SPECIES

Standard Specification Section 01355, Part 1.13, Discovery of Historical, Archaeological or Paleontological Objects

Standard Specification Section 01355, Part 1.13, Discovery of Historical, Archaeological or Paleontological Objects, Features, Sites, Human Remains, or Migratory Avian Species, will be enforced during this project. This specification stipulates procedures to be followed should any archaeological, historical, or paleontological resource be discovered during construction of the project. These procedures are as follows:

1. Immediately suspend construction operations in the vicinity (minimum 100-ft buffer around the perimeter) of the discovery if a suspected historic, archeological or paleontological item, feature, or site is encountered.
2. Verbally notify the Engineer of the nature and exact location of the findings.
3. The Engineer contacts the UDOT Region staff archaeologist, who will assess the nature of the discovery and determine the necessary course of action.
4. Notify the Engineer who in turn notifies the Region Environmental Manger and the UDOT Wildlife Biologist if bats or migratory birds are discovered on structures.
    1. Coordinate to determine the necessary course of action.
5. Protect the discovered objects or features and provide written confirmation of the discovery to the Engineer within two calendar days.
6. 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 discovered item.
    2. The Engineer will provide written confirmation when work may resume in the area.

Should a discovery occur, the FHWA will consult with the SHPO/THPO, and the Council in accordance with 36 CFR 800.13(b)(3) and this PA toward developing and implementing an appropriate treatment plan prior to resuming construction.

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ATTACHMENT 6

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 the SHPO regarding APE and level of effort will typically not be necessary. Consultation with the 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 26 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 it's 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 effects 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

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of existing transportation facilities that will not substantially deviate from existing alignment or profile are not expected to involve visual impacts. If circumstanced indicate potential for visual effects, consultation with the 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.

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EXAMPLE ADVERSE EFFECT NOTICE¶
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NOTICE TO THE PUBLIC OF ADVERSE EFFECTS¶
¶
On Historic Properties from the Proposed 11400 South Project Alternatives,¶
Salt Lake County, Utah.¶
UDOT Project SP-0151(1)0¶
¶
The Federal Highway Administration (FHWA) and the Utah Department of Transportation (UDOT), in partnership with the cities of South Jordan, Riverton, Sandy, and Draper, are considering improvements on east-west corridors in the southwest portion of the Salt Lake Valley. In accordance with Section 106 of the National Historic Preservation Act of 1966, as amended, and 36 CFR 800, the FHWA and the UDOT herewith advise all interested persons or groups that the proposed project may have an Adverse Effect on six (6) properties (depending on which alternative is selected during the environmental process) that are eligible for listing on the National Register of Historic Places (NRHP). These properties are the houses at 191 West 12300 South and 736 West 12300 South in Draper; the commercial building at 2779 West 12600 South in Riverton; the house at 11407 South 1300 West in South Jordan; the Fairbourn Historic District (comprising the farmsteads between 170 West 11440 South and 260 West 11400 South) and the bridge over the Jordan and Salt Lake City Canal in South Jordan and Draper.¶
¶
Any person or group wishing to submit comments regarding the adverse effect to the historic properties or resolution of adverse effects may do so in writing. The public comment period is thirty days, beginning from the first date of publication of this notice. Comments should be directed to Betsy Skinner, Region Two Archaeologist, UDOT Region Two, 2010 South 2760 West, Salt Lake City, Utah 84104-4592. Letters must be postmarked no later than midnight November 20, 2004. ¶
¶
At any time during regular office hours, the cultural resource inventory reports will be available for public inspection at the UDOT Region Two office indicated above.

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