

**THIRD AMENDED PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE UTAH STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION,
THE UNITED STATES ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT,
AND THE UTAH DEPARTMENT OF TRANSPORTATION**

REGARDING

**SECTION 106 IMPLEMENTATION FOR FEDERAL-AID TRANSPORTATION
PROJECTS IN THE STATE OF UTAH**

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

WHEREAS, Title 23 United States Code Section 327 (23U.S.C. 327) and 23 United States Code Section 326 (23U.S.C. 326) allows the United States Department of Transportation Secretary, acting through FHWA, to assign responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA) and other federal environmental laws to a State Department of Transportation through a memorandum of understanding; and

WHEREAS, UDOT and FHWA, entered into a NEPA Assignment Memorandum of Understanding (NEPA MOU) concerning the UDOT's participation in the Program in which FHWA assigned and UDOT assumed FHWA's responsibilities under NEPA and 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, pursuant to the NEPA MOU, UDOT is deemed to be a federal agency for all Federal-aid Highway projects it has assumed, and in that capacity UDOT assigned the role of "agency official" to the UDOT Division of Environmental Services Director for the purpose of compliance with 36 C.F.R. Part 800; and

WHEREAS, FHWA Utah Division Administrator retains responsibility for environmental review, consultation and decision-making for specific undertakings identified in the NEPA MOU and therefore shall be the "agency official" for those specific undertakings; and

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

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

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

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

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

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

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

WHEREAS, FHWA and the Corps, as federal agencies, have a unique legal relationship with Indian tribes as set forth in the Constitution of the United States, treaties, statues, executive orders and court decision, and while an Indian tribe may agree to work directly with UDOT as part of the 36 C.F.R Part 800 compliance process, the FHWA and the USACE remain legally responsible for government-to-government consultation with Indian tribes; and

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

WHEREAS, the parties to this Agreement (except USACE) executed an earlier agreement on April 16, 2007, entitled *Programmatic Agreement Among the Federal Highway Administration, the Utah Department of Transportation, the Utah State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding Section 106 Implementation for Federal-Aid Transportation Projects in the State of Utah.*, which was amended on April 16, 2010 and June 3, 2013. This 3rd amendment of the Agreement replaces and supersedes the earlier agreements in full.

NOW, THEREFORE, FHWA, SHPO, Council, USACE, and UDOT agree that the Program in Utah shall be carried out in accordance with the following stipulations in order to take into account the effects of the Program on historic properties in Utah and that these stipulations

shall govern compliance of the Program with Section 106 of the NHPA until this Amended Programmatic Agreement expires or is terminated.

STIPULATIONS

UDOT, either as assigned by FHWA or under FHWA's authority through this Agreement, shall ensure that the following measures are carried out. For those projects where FHWA has retained NEPA responsibilities, FHWA will ensure that the stipulations 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 UDOT, will meet the responsibilities pursuant to Section 106 and 110 of the NHPA (16 U.S.C. 470f and 470h-2), as assigned by FHWA, and applies to all federal undertakings under the Program in Utah as detailed in the NEPA MOU. The NEPA MOU does not supersede the existing MOU between FHWA and UDOT under which FHWA, pursuant to 23 U.S.C 326 assigned its NEPA responsibilities to UDOT for projects that qualify as Categorical Exclusions (CE).
- B. The objective of this Agreement is to make more efficient the methods by which UDOT reviews individual undertakings processed under Section 106 that may affect historic properties and to establish the process by which FHWA, Council, SHPO, USACE, and interested parties will be involved in any such review.
- C. Through the NEPA MOU, FHWA authorizes UDOT to conduct consultation with SHPO and other consulting parties for purposes of compliance with Section 106 of the NHPA.
- D. Through this Agreement, two tiers of project review are established, dependent upon the type of impacts to historic properties.
 1. Tier 1 Project Review: Tier 1 projects have the potential to affect historic properties, but following screening, may be determined to require no case-by-case review or consultation with SHPO because they result in a finding of no historic properties affected. Tier 1 undertakings must meet the criteria outlined in Stipulation VIII.A.4.
 2. Tier 2 Project Review: Tier 2 projects result in a finding of no adverse effect or adverse effect.

- E. FHWA retains the responsibility for formal government-to-government consultation with Tribes as required under 36 CFR 800.16(m). UDOT may assist FHWA if individual Tribes agree to alternate procedures.
- F. 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.
- G. This Agreement does not supersede existing agreements currently in use in Utah by FHWA, SHPO, Council, and UDOT, except for the June 6, 1990 delegation letter. These existing agreements remain in force and are separate from this Agreement. A list of these agreements is attached hereto as Attachment 2.
- H. Cooperating Federal agencies who recognize UDOT as the lead Federal agency for an undertaking may fulfill their obligations under Section 106 of NHPA by having UDOT act on their behalf in fulfilling their collective responsibilities (36 CFR 800.2(a)(2)), provided UDOT follows 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 UDOT.
 - 1. UDOT will consult with other agencies involved in the undertaking (except USACE, who is a signatory to this Agreement) to reach an agreement that UDOT is the lead Federal agency for the undertaking, and that they will accept UDOT's compliance with NHPA.
 - 2. These agencies will be considered consulting parties in the undertaking.
 - 3. All consultation with an agency regarding lead Federal agency status and compliance with Section 106 will be documented.
 - 4. The process whereby USACE meets their Section 106 compliance responsibilities on projects that need, or anticipate, a USACE permit, is outlined in Attachment 3.

II. DEFINITIONS

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

III. PROFESSIONAL QUALIFICATIONS STANDARDS

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

UDOT shall employ personnel trained, experienced, and qualified in the fields of archaeology, history, and architectural history (as defined in 36 CFR 61, Appendix A). They are designated as professionally qualified staff (PQS). All consultation with SHPO under this Agreement, and decisions made under Tier I, shall be performed by UDOT PQS.

IV. RESPONSIBILITIES

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

A. FHWA Responsibilities

1. FHWA retains the responsibility for formal government-to-government consultation with Tribes as defined in 36 CFR 800.16(m). UDOT may assist FHWA in consultation if the individual Tribes agree to alternate procedures.

B. UDOT Responsibilities

Each PQS shall be responsible for ensuring that the following activities are carried out (Attachment 4). This list is not inclusive of all responsibilities of UDOT under this Agreement.

1. Consistent with the requirements of 36 CFR 800.2(a) and 800.2(c)(4), UDOT, as the agency official, is legally responsible for ensuring that the terms of this Agreement are carried out and for all findings and determinations made pursuant to this Agreement.
2. Determine whether the proposed federal action is an undertaking as defined in 36 CFR 800.16(y).
3. 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
4. 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).
5. Solicit public comment and involvement, in accordance with 36 CFR 800.3(e) and UDOT's public involvement procedures.
6. 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.
7. Determine and document the scope of identification efforts and level of effort, as described in 36 CFR 800.4 (a) and (b), including the undertaking's area of potential effects (APE). SHPO consultation on the APE will not be required on routine projects (defined as those projects classified as a CE). For undertakings that are non-routine or those with the potential for substantial indirect and/or cumulative effects (EAs and EISs), SHPO shall be consulted in writing.
8. Determine boundaries for historic properties.
9. Determine the eligibility of properties within the APE for listing on the NRHP.
10. 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)
11. In consultation with USACE (if a permitted undertaking, and the adverse effects are on historic properties in the USACE jurisdictional APE), SHPO, and Council (if it has chosen to participate), resolve adverse effects through the development, circulation, and execution of a Memorandum of Agreement (MOA), if appropriate.
12. Ensure conformance with the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation; The Advisory Council on Historic Preservation – Section 106 Archaeology Guidance; UDOT's Guidelines for Identifying, Recording, and

Evaluating Archaeological and Paleontological Resources and UDOT's Guidelines for Documenting and Evaluating Architectural Resources (2011), UDOT's Environmental Manual of Instruction, and any successors to those guidelines; and applicable guidelines and procedures of land-managing agencies whose lands may be affected by the undertaking.

13. The UDOT PQS shall submit to the Utah Division of State History (UDSH) copies of all fieldwork reports, Utah Archaeology Site Forms, Reconnaissance Level Survey (RLS) forms, Intensive Level Survey (ILS) forms, and any other relevant documents and digital data. If a project qualifies as a Tier 1 project, these materials will be submitted quarterly in accordance with Stipulation VIII.C
14. Ensure curation of archaeological materials produced under this Agreement at a facility meeting the standards of 36 CFR 79 and U.C.A. 53B-17-603, as appropriate.

V. CONSULTATION WITH TRIBES

- A. FHWA shall retain ultimate responsibility for complying with all federal requirements pertaining to formal government-to-government consultation with Tribes. Notwithstanding any other provision of this stipulation, FHWA shall honor the request of any Tribe for formal 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 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. Tribal consultation shall be done in accordance with 36 CFR Part 800, except where separate agreements have been executed with Tribes (Attachment 2).
- F. If a Tribe requests formal government-to-government consultation with FHWA, Stipulations V.B-E will be the responsibility of FHWA, and, if the Tribe agrees, involve UDOT in that consultation process for the remainder of the project. If a Tribal request for government-to-government consultation with the federal government is received by UDOT, UDOT shall immediately inform FHWA. All correspondence with the Tribe prior to this request will be provided to FHWA. UDOT shall continue to carry out the remainder of responsibilities under this Agreement that are not the subject of government-to government consultation. This request will also apply to the consultation process for any post-review discoveries associated with the project, as described in Stipulation XI.B.
- G. As described in Part 3.2.3 of the NEPA MOU, if a Tribe or FHWA determines that a project-specific issue or concern will not be satisfactorily resolved by UDOT where UDOT is deemed to be a federal agency, then FHWA may reassume all or part of the federal responsibilities for processing the project.

VI. PARTICIPATION OF OTHER CONSULTING PARTIES AND THE PUBLIC

A. Consulting Parties

1. Consulting parties shall be identified pursuant to, and their participation in undertakings covered under this Agreement shall be governed by, 36 CFR 800.2(c)(5) and 800.3(f). Other

individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties. Other parties entitled to be consulting parties shall be invited by UDOT to participate in the Section 106 process. Any land-managing agency whose land may be affected by an undertaking shall be invited by UDOT to participate in the Section 106 process.

2. UDOT shall invite any local governments (including Certified Local Governments, or CLGs) or applicants that are entitled to be consulting parties under 36 CFR 800.2(c). UDOT shall consider all written requests of individuals and organizations to participate as consulting parties and determine 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 UDOT's environmental compliance procedures. UDOT's Public Involvement Policy and UDOT's Manual of Instruction will provide guidance for identifying, informing, and involving the public. FHWA's Technical Advisory (T6640.8A, October 30, 1987) and similar and subsequent guidance documents will also be used where appropriate. Public involvement and the release of information hereunder shall be consistent with 36 CFR 800.2(d), 800.3(e), and 800.11(c)(1) and (3).
2. The UDOT shall continue to seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, and the likely interest of the public in the effects on historic properties, to remain consistent with the intent of 36 CFR Part 800, as amended.
3. For those actions that do not routinely require public review and comment (e.g., certain activities classified as a CE), appropriate public involvement should be based on the specifics of the situation and commensurate with the type and location of historic properties, and the undertaking's potential impacts on them.
4. The UDOT shall make SHPO, and the USACE aware of any and all public controversy as it relates to the historic properties potentially affected by the proposed undertaking, including properties of religious and/or cultural significance to the Tribes.

VII. SECTION 106 DELEGATION

- A. UDOT, under 23U.S.C 327 and 23U.S.C.326, has assumed full responsibility for Section 106 compliance pursuant to the MOUs in Attachment 1 of this Agreement. UDOT shall be deemed to be a Federal agency for those undertakings for the duration of this delegation.
- B. UDOT shall satisfy the provisions of Section 106 of the NHPA, 36 CFR 800, and Section 4(f) of the DOT Act of 1966 by complying with the stipulations of this Agreement.
- C. FHWA shall retain responsibility for formal government-to-government consultation with Tribes as defined in 36 CFR 800.16(m).
 - a. If UDOT resolves any project-specific Tribal issues or concerns, FHWA's role in the environmental process shall be limited to carrying out the formal government-to-government consultation process.
 - b. If FHWA determines through consultation with a Tribe, or a Tribe indicates to FHWA, that the proposed resolution of Tribal issues or concerns by UDOT is not adequate and requires government-to-government consultation to resolve, FHWA shall reassume responsibility for Section 106 for that project while continuing to comply with the stipulations of this Agreement.
- D. FHWA will provide necessary and appropriate monitoring and oversight of UDOT's Section 106 compliance and this Agreement. Monitoring will primarily consist of regular audits and assessment of performance measures as detailed in the NEPA MOU in Attachment 1.

- E. In furtherance of those obligations, FHWA may elect to attend meetings between UDOT and another agency, and may submit comments to UDOT and the other agency, if FHWA determines that an issue between UDOT and the other agency has broad or unique policy implications for the administration of the state or national program.

VIII. PROJECT REVIEW

A. Tier 1 Project Review

1. Tier 1 undertakings are those undertakings that have the potential to affect historic properties, but following appropriate screening, may be determined to require no further review or consultation under this Agreement. Pursuant to consultation with the other signatories to this Agreement, UDOT has identified undertakings that meet certain criteria and that will be addressed in accordance with Attachment 5 to this Agreement. The undertakings classified in this Attachment as Tier 1 undertakings do not require case-by-case review by SHPO, but may be reviewed by SHPO in a quarterly report under this Agreement when the steps set forth in the Attachment have been satisfactorily completed and when UDOT determines that no condition of the undertaking necessitates further review pursuant to this Agreement.
2. The PQS is responsible for screening undertakings to determine if those individual undertakings require further consideration, or if they may be determined not to require further review or consultation under the terms of this Agreement. The UDOT PQS may consult at any time, either formally or informally, with SHPO on any undertaking.
3. The PQS shall include the identification of all known storage, disposal, or borrow areas and construction easements, prior to the screening process. If additional project areas are added to a screened undertaking, the undertaking must be re-screened.
4. The criteria for determining if an undertaking requires no further review and consultation beyond the screening assessment and documentation of decision making by UDOT, are as follows:
 - a. Has no known public controversy based on historic preservation issues; and
 - b. Has one of the following effect findings:
 - i. No Historic Properties Affected: no cultural resources present, as determined by UDOT PQS; or
 - ii. No Historic Properties Affected: no historic properties (i.e., eligible for the National Register) present, as determined by UDOT PQS; or
 - iii. No Historic Properties Affected: Historic properties are present, but are completely avoided by the undertaking and there is no or negligible potential for adverse indirect effects, as determined by UDOT PQS.
5. If a cultural resource inventory is conducted under this stipulation, any cultural resource reports generated from the survey shall be submitted to the UDSH quarterly for filing, in accordance with Stipulation VIII.C.
6. The UDOT Standard Specification 01355, Part 3.8, Discovery Of Historical, Archaeological, or Paleontological Objects, Features, Sites, Human Remains (Attachment 6), applies to all UDOT projects and will be referenced in all environmental documents (CEs, EAs, EISs).
7. The requirements for reporting on the projects that qualify and are processed as Tier 1 undertakings will be in accordance with Attachment 5.
8. The PQS will ensure that the documentation in Attachment 5 is included in the appropriate NEPA document and project file. For Tier 1 undertakings, to document compliance in USACE decisions, UDOT shall notify USACE by submittal of screening form in permit application.

9. UDOT administratively completes Section 106 activities and assumes authority, responsibility, and liability for all actions, findings, and determinations.

B. Tier 2 Project Review

Tier 2 projects are all other projects not processed as Tier 1 projects (i.e., projects that result in a finding of no adverse effect or adverse effect). UDOT administratively completes Section 106 activities, and assumes authority, responsibility, and liability for all actions, findings, and determinations.

C. Quarterly Reports

1. On a quarterly basis (no later than January 15, April 15, July 15, and October 15), the UDOT Region PQS shall submit to the UDOT Central PQS a list of all projects that were processed as screened undertakings (Tier 1) (Attachment 5) in that quarter. The Central PQS will compile a complete list of Tier 1 projects, including assigned projects, for submission to FHWA, SHPO, and USACE within 30 days from the end of the quarter (submitted January 31, April 30, July 31, and October 31).
2. This list shall include the county, project name and number, type of undertaking, level of effort, consultation measures, and a description of any archaeological sites, buildings, or structures evaluated during the project. The list will also indicate which projects require a USACE permit.
3. All cultural resource reports, site forms, and other documentation for undertakings completed during the quarter, will be submitted to the SHPO by UDOT.
4. UDOT will provide the list to SHPO and USACE, who will review it for compliance with this Agreement. If there are objections regarding the manner in which the terms of this Agreement are being carried out, the parties to this agreement will proceed in accordance with Stipulation XIII.C.
5. Similar reporting of the Tier 1 undertakings will be included in the annual self-assessment report to FHWA in accordance with the 23 U.S.C. 326 MOU (Attachment 1).

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, or if the undertaking will require consultation with USACE. Coordination with USACE should be conducted early in the Section 106 process in order to determine if a permit is required.
2. If UDOT determines that the undertaking is one with no potential to cause effects, UDOT will document this decision in the project record and Section 106 is complete. Otherwise, continue the process.
3. Identify the appropriate SHPO.
4. Identify consulting parties, including Tribes, as appropriate, during the early stages of Section 106 review. If UDOT wishes to consult with SHPO on the identification of consulting parties, SHPO shall have 15 days to respond or concur. If SHPO does not respond within that time period, UDOT may assume that SHPO has no objections and may proceed.
5. Develop planning to involve the public, Tribes, USACE, and other consulting parties.
6. Begin consultation with consulting parties subject to limitations specified in Stipulation V.

B. Identification of Historic Properties

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

C. Evaluating Historic Significance

1. UDOT shall evaluate the historic significance of identified properties in accordance with 36 CFR 800.4(c), and shall make appropriate findings regarding eligibility. Where historic property boundaries have not previously been established, the PQS will identify boundaries, following standards set forth in National Register Bulletin 21, *Defining Boundaries for National Register Properties*. UDOT shall consult with SHPO on the outcome of identification and evaluation of historic resources.
2. For undertakings that have properties that are determined by the PQS to be not eligible for inclusion in the NRHP, the project will be processed as a Tier 1, in accordance with Stipulation VIII.A.
3. UDOT may simultaneously request SHPO concurrence on findings of inventory, eligibility, and effect covered by 36 CFR 800.3 through 800.6, provided other consulting parties and the public are afforded an adequate opportunity to express their views pursuant to 36 CFR 800.2(d).
 - a. If SHPO fails to comment on any findings contained in a submission within 30 calendar days of receipt, UDOT may assume they have no objection and proceed to the next step in the consultation process pursuant to 36 CFR 800.3(c)(4).
 - b. For purposes of Section 4(f) (36 CFR 774), if SHPO does not respond to a request for concurrence in the determination of no adverse effect within 30 days, the non-response together with the written agreement in Attachment 8 will be considered written concurrence in the Section 106 determination that will be the basis of the *de minimis* impact finding by UDOT.
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, SHPO, and any consulting party shall consult to resolve the disagreement within a mutual acceptable time frame.
- b. If the disagreement is not resolved, UDOT 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 FHWA, SHPO, and USACE.
- 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. UDOT shall submit its finding of effect (FOE) and supporting documentation to all consulting parties for comment, and will request SHPO concurrence on the finding.
- c. UDOT may consult at any time, either formally or informally, with SHPO regarding application of the criteria.
- d. If SHPO, or another consulting party, objects within 30 days of receipt of a UDOT finding of no adverse effect, the disagreement will be addressed in accordance with Stipulation IX.C.4.
- e. UDOT shall maintain a record of the finding and provide information on the finding to all consulting parties and the public on request, consistent with the confidentiality provisions of 36 CFR 800.11(c), prior to approving the undertaking.

3. Adverse Effect

- a. Where adverse effects, as defined by the Criteria of Adverse Effect set forth in 36 CFR 800.5(a), cannot be avoided, UDOT shall make a finding of adverse effect.
- b. Prior to any finding of adverse effect, 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, UDOT shall, in consultation with SHPO, USACE (if this is a permitted undertaking and the adverse effect is on a historic

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

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

C. Resolving Objections

1. If 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, SHPO or the Council may terminate consultation pursuant to 36 CFR 800.7(a). Upon termination, the signatories shall comply with the remaining requirements of 36 CFR 800.7.

X. EMERGENCY SITUATIONS

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

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

XI. POST-REVIEW DISCOVERIES

A. Planning for Subsequent Discoveries

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

B. Discoveries Without Prior Planning

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

XII. TREATMENT OF HUMAN REMAINS

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

XIII. ADMINISTRATIVE STIPULATIONS

A. Documentation

1. All documentation that supports findings and determinations made under this Agreement shall be consistent with 36 CFR 800.11 and shall be in accordance with the *UDOT Guidelines for Archaeological Survey and Testing*, and its subsequent revisions or editions, with attachments to this Agreement, and with applicable guidelines and procedures of land-managing agencies that have jurisdiction over the land involved in the undertaking.
2. Documentation prepared by local agencies or their consultants in support of such findings shall be submitted to UDOT for review and approval by the UDOT PQS. UDOT shall transmit all documentation cited herein to SHPO as stipulated by this Agreement. UDOT shall not transmit to 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, Utah Archaeology Site Forms, Reconnaissance Level Survey (RLS) forms Intensive Level Survey (ILS) forms, and any other relevant documents as soon as possible (and no later than 2 years) after completion of the work, unless an agreement between UDOT and UDSH states a different period.
5. For projects processed as Tier 1 projects, reports and forms will be submitted on a quarterly basis, in accordance with Stipulation VIII.A.

B. Monitoring Implementation of this Agreement

1. SHPO, USACE, and Council may review activities carried out pursuant to this Agreement. UDOT shall facilitate this review by compiling specific categories of information to document the effectiveness of the Agreement and by making this information available on an annual basis to SHPO, USACE, and Council in the form of a written report. Categories of information can include, but are not limited to, a summary of actions taken under the Agreement, including all findings and determinations, accomplishments, estimated time and cost savings, public objections, and inadvertent effects or foreclosures. The range and type of information included by UDOT in the written report and the manner in which this information is organized and presented must be such that it facilitates the ability of the reviewing parties to assess accurately the degree to which the Agreement and its manner of implementation constitute an efficient and effective program alternative under 36 CFR 800, and to determine whether this Agreement should remain in effect, and if so, whether and how it should be improved through appropriate amendment.

2. UDOT shall prepare the written report of these findings annually following execution of the Agreement. UDOT shall submit the annual reports to SHPO, USACE, and Council no later than three (3) months following the end of the Federal fiscal year (September 30).
3. UDOT, USACE, and SHPO will meet annually to evaluate the Agreement, to suggest revisions to its provisions, and to evaluate the quality of the resource identification and protection activities carried out under the Agreement. Prior to any such meetings, the Council will be notified at least 30 days in advance, and may participate at its discretion. Thirty days prior to the annual evaluation, UDOT shall submit the report of the previous year's activities to SHPO, USACE, and Council.
4. UDOT shall provide notice to the public that the annual report herein prescribed is available for public inspection and ensure that potentially interested members of the public are made aware of its availability and that the public may comment to signatory parties on the report. UDOT, in consultation with SHPO, USACE, and Council, shall identify the specific recipients of the public notice herein described.
5. At the request of any other signatory party to this Agreement, UDOT 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. FHWA review of the activities carried out under this Agreement will be conducted through the monitoring and audit process in accordance with the 23 U.S.C. 327 MOU (Attachment 1).
8. If any signatory party determines that a UDOT Region 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 regarding the manner in which the terms of this Agreement are carried out, UDOT will immediately notify the other signatory parties of the objection and proceed to consult with the objecting party to resolve the objection. UDOT will honor the request of any signatory party to participate in the consultation and will take any comments provided by such parties into account. UDOT shall establish a reasonable time frame for such consultations. If the objection concerns the manner in which UDOT is performing its Section 106 responsibilities as outlined in the NEPA MOU, the objection should be submitted to FHWA.
2. If the objection is resolved through consultation, UDOT may authorize the disputed action to proceed in accordance with the terms of such resolution.
3. If after initiating such consultation, UDOT determines that the objection cannot be resolved through consultation, UDOT shall forward all documentation relevant to the objection to the Council and other signatory parties, including the proposed response to the objection. Within 30 days after receipt of all pertinent documentation, Council shall exercise one of the following options:
 - a. Advise UDOT that Council concurs in UDOT's proposed response to the objection, whereupon UDOT will respond to the objection accordingly; or
 - b. Provide UDOT with recommendations, which UDOT shall take into account in reaching a final decision regarding its response to the objection; or

- c. Notify UDOT 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, UDOT 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, UDOT may assume Council's concurrence in its proposed response to the objection.
5. UDOT 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. UDOT's responsibility to carry out all actions under this Agreement that are not the subject of the objection shall remain unchanged.
6. UDOT 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. UDOT 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 UDOT. UDOT shall immediately notify the other signatory parties in writing of the objection. Any signatory party may choose to comment on the objection to UDOT. UDOT shall establish a reasonable time frame for this comment period. UDOT shall consider the objection, and in reaching its decision, UDOT will take all comments from the other signatory parties into account. Within 15 days following closure of the comment period, UDOT will render a decision regarding the objection and respond to the objecting party. UDOT will promptly notify the other signatory parties of its decision in writing, including a copy of the response to the objecting party. UDOT's decision regarding resolution of the objection will be final. Following the issuance of its final decision, UDOT may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

D. Amendment

1. Any signatory party may propose amendments to the Agreement, whereupon all signatory parties shall consult to consider such amendment.
2. This agreement may be amended when such an amendment is agreed to in writing by all signatories. The amendment will be effective on the date a copy signed by all the signatories is filed with the Council.
3. Each attachment to this Agreement may be individually amended through consultation of the signatory parties without requiring amendment of the Agreement, unless the signatory parties through such consultation decide otherwise.

E. Termination

1. Any signatory party may terminate this agreement. If this Agreement is not amended as provided for in Stipulation XIII.D, or if any signatory party proposes termination of this Agreement for other reasons, the party proposing termination shall notify the other signatory parties in writing, explain the reasons for proposing termination, and consult with the other parties for no more than 30 days to seek alternatives to termination.
2. Should such consultation result in an agreement on an alternative to termination, the signatory parties shall proceed in accordance with that agreement.
3. Should such consultation fail, the signatory party proposing termination may terminate this Agreement by promptly notifying the other parties in writing.

4. Should this Agreement be terminated, UDOT 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, UDOT 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.

F. Confidentiality

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

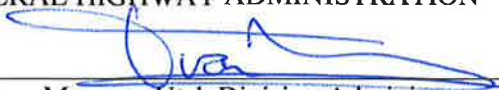
G. Duration of Agreement

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

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

SIGNATORIES


FEDERAL HIGHWAY ADMINISTRATION

By: 
Ivan Marrero, Utah Division Administrator

Date: 7/6/17

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

UTAH DEPARTMENT OF TRANSPORTATION

By: 

Carlos Bracerás, Executive Director

Date: 7/5/17

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

ADVISORY COUNCIL ON HISTORIC PRESERVATION

By: 
John Fowler, Executive Director

Date: 8/23/07

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

UTAH STATE HISTORIC PRESERVATION OFFICER

By: *P. Bradford Westwood*
P. Bradford Westwood, USHPO
Pan

Date: *7/11/17*

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

UNITED STATES ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT

By: 
Michael S. Jewell, Chief, Regulatory Division

Date: 31 July 2017

ATTACHMENT 1

MEMORANDUM OF UNDERSTANDING FOR NEPA AND CE DELEGATION

23 U.S.C. 327 NEPA Assignment: Memorandum Of Understanding Between The Federal Highway Administration And The Utah Department Of Transportation Concerning State Of Utah's Participation In The Surface Transportation Project Delivery Program Pursuant To 23 U.S.C. 327

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

**MEMORANDUM OF UNDERSTANDING BETWEEN
THE FEDERAL HIGHWAY ADMINISTRATION AND THE
UTAH DEPARTMENT OF TRANSPORTATION CONCERNING
STATE OF UTAH'S PARTICIPATION IN THE SURFACE TRANSPORTATION PROJECT DELIVERY
PROGRAM PURSUANT TO 23 U.S.C. 327**

THIS MEMORANDUM OF UNDERSTANDING (hereinafter "MOU") is entered into by and between the FEDERAL HIGHWAY ADMINISTRATION (hereinafter "FHWA"), an administration in the UNITED STATES DEPARTMENT OF TRANSPORTATION (hereinafter "USDOT"), and the State of Utah, acting by and through its UTAH DEPARTMENT OF TRANSPORTATION (hereinafter "UDOT"), and hereby provides as follows:

WITNESSETH

Whereas, Section 327 of Title 23 of the U.S. Code (U.S.C.) establishes the Surface Transportation Project Delivery Program (hereinafter "Project Delivery Program"), which allows the Secretary of the United States Department of Transportation (hereinafter "USDOT Secretary") to assign and States to assume the USDOT Secretary's responsibilities under the National Environmental Policy Act of 1969 (42 U.S.C. 4321, et seq.) (hereinafter "NEPA"), and all or part of the USDOT Secretary's responsibilities for environmental review, consultation, or other actions required under any other Federal environmental laws, with respect to highway, public transportation, railroad, and multimodal projects within the State; and

Whereas, 23 U.S.C. 327(b)(2) requires a State to submit an application in order to participate in the Program; and

Whereas, in a June 5, 2015 letter to the Federal Highway Administration's Utah Division Administrator, the State of Utah has expressed an interest in participating in the Program with respect to highway projects, and its legislature has enacted laws to allow the State to participate in the Program; and

Whereas, on October 7, 2015, prior to submittal of its application to FHWA, UDOT published notice of and solicited public comment on its intended application to the Program as required by 23 U.S.C. § 327(b)(3), and revised the application based on comments received; and

Whereas, on December 8, 2015, the State of Utah, acting by and through the UDOT, submitted its application to FHWA for participation in the Program with respect to highway projects; and

Whereas, on November 16, 2016, FHWA published a notice and provided an opportunity for comment on its preliminary decision to approve UDOT's request and solicited the views of other appropriate Federal agencies concerning UDOT's application as required by 23 U.S.C. 327(b)(5); and

Whereas, the USDOT Secretary, acting by and through FHWA pursuant to 49 C.F.R. 1.85(a)(3), has determined that UDOT's application meets all of the requirements of 23 U.S.C. 327 with respect to the Federal environmental laws and highway projects identified in this MOU.

Now, therefore, FHWA and UDOT agree as follows:

PART 1. PURPOSE OF MEMORANDUM OF UNDERSTANDING

1.1 Purpose

- 1.1.1 This MOU officially approves UDOT's application to participate in the Program and is the written agreement required pursuant to 23 U.S.C. 327(a)(2)(A) and (c) under which the USDOT Secretary may assign, and UDOT may assume, the responsibilities of the USDOT Secretary for Federal environmental laws with respect to one or more highway projects within the State of Utah. For purposes of this MOU, the term "highway project" will have the definition found at 23 C.F.R. 773.103.
- 1.1.2 The FHWA's decision to execute this MOU is based upon the information, representations, and commitments contained in UDOT's December 8, 2015 application. As such, this MOU incorporates the application. However, this MOU shall control to the extent there is any conflict between this MOU and the application.
- 1.1.3 This MOU is effective upon final execution by both parties (hereinafter the "Effective Date").
- 1.1.4 This MOU does not supersede the existing MOU between FHWA and UDOT under which FHWA assigned its responsibilities to UDOT, pursuant to 23 U.S.C. 326, for determining whether certain projects qualify for categorical exclusions ("CEs") and assigned certain other responsibilities for those projects ("Section 326 MOU"). FHWA and UDOT initially executed the Section 326 MOU on July 1, 2008, and extended it for three (3) years on July 1, 2011, and another three (3) years on June 30, 2014.
- 1.1.5 Pursuant to 23 U.S.C. §§ 327(c)(3)(B)-(C), and subpart 4.3 of this MOU, third parties may challenge UDOT's actions in carrying out environmental review responsibilities assigned under this MOU. Except as provided in 23 U.S.C. 327(c)(3)(B)-(C), and subpart 4.3 of this MOU, this MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the State of Utah, its departments, agencies, or entities, its officers, employees, or agents. This MOU is not intended to, and does not, create any new right or benefit, substantive or procedural, enforceable at law or in equity by any third party against the United States, its departments, agencies, or entities, its officers, employees, or agents.

PART 2. [RESERVED]

PART 3. ASSIGNMENTS AND ASSUMPTIONS OF RESPONSIBILITY

3.1 Assignments and Assumptions of NEPA Responsibilities

- 3.1.1 Pursuant to 23 U.S.C. 327(a)(2)(A), on the Effective Date, FHWA assigns, and UDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the USDOT Secretary's responsibilities for compliance with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq. with respect to the highway projects specified under subpart 3.3. This assignment includes statutory provisions, regulations, policies, and guidance related to the implementation of NEPA for highway projects such as 23 U.S.C. 139, 40 C.F.R. parts 1500-1508, DOT Order 5610.1C, and 23 C.F.R. part 771, as applicable.

- 3.1.2 On the cover page of each environmental assessment (EA), finding of no significant impact (FONSI), environmental impact statement (EIS), and record of decision (ROD) prepared under the authority granted by this MOU, and for any memorandum corresponding to any CE determination it makes under the terms of this MOU, UDOT will insert the following language in a way that is conspicuous to the reader or include it in a CE project record:

"The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being or have been carried-out by UDOT pursuant to 23 U.S.C. 327 and a Memorandum of Understanding dated [TO BE FILLED], and executed by FHWA and UDOT."

- 3.1.3 UDOT will disclose to the public and agencies as part of initial agency outreach and public involvement procedures, including any notice of intent or scoping meeting notice and public involvement during the scoping process, the disclosure in subpart 3.1.2 above.

3.2 Assignments and Assumptions of Responsibilities to Comply with Federal Environmental Laws Other Than NEPA

- 3.2.1 Pursuant to 23 U.S.C. 327(a)(2)(B), on the Effective Date, FHWA assigns and UDOT assumes, subject to the terms and conditions set forth in 23 U.S.C. 327 and this MOU, all of the USDOT Secretary's responsibilities for environmental review, reevaluation, consultation, or other action required or arising under the following Federal environmental laws with respect to the review or approval of the highway projects specified in subpart 3.3:

Air Quality

- Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q, with the exception of any conformity determinations.

Noise

- Noise Control Act of 1972, 42 U.S.C. §§ 4901-4918
- Compliance with the noise regulations in 23 C.F.R. part 772

Wildlife

- Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544
- Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661–667d
- Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712

Hazardous Materials Management

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675
- Superfund Amendments and Reauthorization Act (SARA), 42 U.S.C. §§ 9671-9675
- Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901-6992k

Historic and Cultural Resources

- National Historic Preservation Act of 1966, as amended, 54 U.S.C. § 306101, et seq.
- Archeological and Historic Preservation Act of 1966, as amended, 16 U.S.C. §§ 470aa–479mm
- Title 54, Chapter 3125—Preservation of Historical and Archeological Data, 54 U.S.C. §§ 312501-312508
- Native American Grave Protection and Repatriation Act (NAGPRA), 25 U.S.C. §§ 3001–3013; 18 U.S.C. 1170

Social and Economic Impacts

- American Indian Religious Freedom Act, 42 U.S.C. § 1996
- Farmland Protection Policy Act (FPPA), 7 U.S.C. §§ 4201–4209

Water Resources and Wetlands

- Clean Water Act, 33 U.S.C. §§ 1251–1387 (Section 401, 402, 404, 408, and Section 319)

- Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300f–300j–26
- Rivers and Harbors Act of 1899, 33 U.S.C. § 403
- Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287
- Emergency Wetlands Resources Act, 16 U.S.C. § 3921
- Wetlands Mitigation, 23 U.S.C. §§ 119(g), 133(b)(14)
- Flood Disaster Protection Act, 42 U.S.C. §§ 4001–4130
- General Bridge Act of 1946, 33 U.S.C. §§ 525–533
- FHWA wetland and natural habitat mitigation regulations, 23 C.F.R. part 777

Parklands and Other Special Land Uses

- 23 U.S.C. § 138 and 49 U.S.C. § 303 (Section 4(f)) and implementing regulations at 23 C.F.R. part 774
- Land and Water Conservation Fund (LWCF) Act, 54 U.S.C. §§ 200302-200310

FHWA-Specific

- Planning and Environmental Linkages, 23 U.S.C. § 168, with the exception of those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135
- Programmatic Mitigation Plans, 23 U.S.C. § 169 with the exception of those FHWA responsibilities associated with 23 U.S.C. §§ 134 and 135

Executive Orders Relating to Highway Projects

- E.O. 11990, Protection of Wetlands
- E.O. 11988, Floodplain Management (except approving design standards and determinations that a significant encroachment is the only practicable alternative under 23 C.F.R. sections 650.113 and 650.115)
- E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations
- E.O. 13112, Invasive Species

3.2.2 In accordance with 23 U.S.C. § 327(a)(2)(D), any FHWA environmental review responsibility not explicitly listed above and assumed by UDOT will remain the responsibility of FHWA unless the responsibility is added by written agreement of the parties through the amendment process established in Part 14 of this MOU and pursuant to 23 C.F.R. 773.113(b). This provision will not be interpreted to abrogate UDOT's responsibilities to comply with the requirements of any Federal environmental law that apply directly to UDOT independent of FHWA's involvement (through Federal assistance or approval).

3.2.3 The USDOT Secretary's responsibilities for government-to-government consultation with Indian tribes, as defined in 36 C.F.R. 800.16(m), are not assigned to or assumed by UDOT under this MOU. The FHWA remains responsible for all government-to-government consultation, including initiation of government-to-government consultation consistent with Executive Order 13175 - Consultation and Coordination with Tribal Governments, unless otherwise agreed as described in this Part. A notice from UDOT 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 a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 C.F.R. 800.16(m), and is related to NEPA or another Federal environmental law for which UDOT has assumed responsibilities under this MOU, and either the Indian tribe or FHWA determines that the issue or concern will not be satisfactorily resolved by UDOT, then FHWA may withdraw the assignment of all or part of the responsibilities for processing the project. In this case, the provisions of subpart 9.1 concerning FHWA-initiated withdrawal of assignment will apply. This MOU is not intended to abrogate, or prevent future entry into, any agreement among UDOT, FHWA, and a tribe under which the tribe agrees to permit UDOT to administer government-to-government consultation activities for FHWA. However, such agreements are administrative in nature and do not relieve the FHWA of its legal responsibility for government-to-government consultation.

- 3.2.4 In accordance with 23 U.S.C. 327(a)(2)(B)(iv), nothing in this MOU will be construed to permit UDOT's assumption of the USDOT Secretary's responsibilities for conformity determinations required under Section 176 of the Clean Air Act (42 U.S.C. 7506) or any responsibility for the transportation planning process under 23 U.S.C. 134 or 135 and 49 U.S.C. 5303 or 5304.
- 3.2.5 On the cover page of each biological evaluation or assessment, historic properties or cultural resources report, section 4(f) evaluation, or other reports prepared under the authority granted by this MOU and distributed to other agencies or the public, UDOT will insert the following language in a way that is conspicuous to the reader:
- "The environmental review, consultation, and other actions required by applicable Federal environmental laws for this project are being, or have been, carried-out by UDOT pursuant to 23 U.S.C. § 327 and a Memorandum of Understanding dated [TO BE FILLED], and executed by FHWA and UDOT."
- 3.2.6 UDOT will disclose to the public and agencies, as part of agency outreach and public involvement procedures, the disclosure in subpart 3.2.5 above.
- 3.2.7 UDOT will continue to adhere to the terms of Biological Opinions (BOs) issued by the U.S. Fish and Wildlife Service (USFWS) prior to the effective date of this MOU, to the extent that the terms of that BO remain in effect. UDOT also will comply with any revisions or amendments to a BO made after the effective date of this MOU. UDOT will assume FHWA's environmental review role and responsibilities as identified in existing interagency agreements among UDOT, USFWS, and FHWA, such as the "Memorandum of Agreement Between State of Utah Department of Transportation, United States Department of Transportation, Federal Highway Administration, Utah Division, and United States Department of the 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 (August 30, 2005" ("UDOT Section 7 MOU"), or negotiate new agreements with USFWS, if needed. UDOT will assume FHWA's ESA Section 7 responsibilities of consultations (formal and informal) ongoing as of the effective date of the MOU with respect to the highway projects for which FHWA responsibilities are assigned in Section 3.3.1.
- 3.2.8 UDOT will not make any determination that an action constitutes a constructive use of a publicly owned park, public recreation area, wildlife refuge, waterfowl refuge, or historic site under 49 U.S.C. 303/23 U.S.C. 138 (Section 4(f)) without first consulting with FHWA and obtaining FHWA's views on such determination. UDOT will provide FHWA thirty (30) calendar days to review and provide comment on any proposed constructive use determination. If FHWA raises an objection, then UDOT agrees not to proceed with a constructive use determination.

3.3 Highway Projects

- 3.3.1 Except as provided by subpart 3.3.2 below or otherwise specified in this subpart, the assignments and assumptions of the USDOT Secretary's responsibilities under subparts 3.1 and 3.2 above will apply to the environmental review, consultation, or other action pertaining to the environmental review or approval of the following classes of highway projects located within the State of Utah. UDOT will be responsible for conducting any reevaluations required under 23 C.F.R. § 771.129 for projects for which construction is not completed prior to the Effective Date of this MOU. Prior to approving any CE determination, FONSI, FEIS, or FEIS/ROD, the State shall ensure and document that for any proposed project the design concept, scope, and funding are consistent with the current Transportation Improvement Plan (TIP), Regional Transportation Plan (RTP), or Metropolitan Transportation Plan (MTP) as applicable.
- A. Highway projects within the State of Utah that are proposed to be funded with Title 23 funds or otherwise require FHWA approval, and that require preparation of an EIS or EA with the exception of the following EIS projects:

1. West Davis Corridor EIS – This project is in UDOT Region 1 in western Davis and Weber Counties.

With regard to excepted projects described in this subpart (3.3.1.A), UDOT will be responsible for any additional environmental review of these projects required after completion of the environmental review process that is ongoing at the time of execution of this MOU. The ongoing environmental review process will be deemed complete when FHWA has issued a Record of Decision.

- B. Highway projects qualifying for CEs within the State of Utah that are proposed to be funded with Title 23 funds or that otherwise require FHWA approvals, and that do not qualify for assignment of responsibilities pursuant to the Section 326 MOU.
- C. Projects funded by other Federal agencies (or projects without any Federal funding) that also require FHWA approvals. For these projects, UDOT would not assume the NEPA responsibilities of other Federal agencies. However, UDOT may use or adopt other Federal agencies' NEPA analyses consistent with 40 C.F.R. parts 1500–1508, and USDOT and FHWA regulations, policies, and guidance.

3.3.2 The following are specifically excluded from the list of highway projects in subpart 3.3.1, and therefore responsibility for these projects is retained by FHWA:

- A. Any highway project authorized under 23 U.S.C. §§ 202, 203, and 204 unless such project will be designed and constructed by UDOT.
- B. Any highway project that crosses State boundaries.

3.4 Limitations

3.4.1 As provided at 23 U.S.C. § 327(e), UDOT will be solely responsible and solely liable for carrying out all of the responsibilities it has assumed under this MOU, in lieu of and without further approval of the USDOT Secretary.

3.4.2 As provided at 23 U.S.C. § 327(a)(2)(D), any highway project or responsibility of the USDOT Secretary that is not explicitly assumed by UDOT under subpart 3.3.1 in this MOU remains the responsibility of the USDOT Secretary.

PART 4. CERTIFICATIONS AND ACCEPTANCE OF JURISDICTION

4.1 Certifications

4.1.1 UDOT hereby makes the following certifications in accordance with 23 U.S.C. § 327(c)(3)(C):

- A. UDOT has the legal authority to accept all the assumptions of responsibility identified in Part 3 of this MOU;
- B. UDOT has the legal authority to take all actions necessary to carry out all of the responsibilities it has assumed under this MOU;
- C. UDOT has the legal authority to execute this MOU;

- D. The State of Utah currently has laws in effect that are comparable to 5 U.S.C. 552, and those laws are located at Utah Code Title 63G Chapter 2 (the Government Records Access and Management Act, or "GRAMA"); and
- E. Any decision by a Utah state agency regarding the public availability of a document under GRAMA is reviewable by a Utah court of competent jurisdiction.

4.2 State Commitment of Resources

4.2.1 As provided at 23 U.S.C. § 327(c)(3)(D), UDOT will maintain the financial resources necessary to carry out the responsibilities it is assuming. UDOT believes, and FHWA agrees, that the summary of financial resources contained in UDOT's application, dated December 8, 2015, appears to be adequate for this purpose. Should FHWA determine, after consultation with UDOT, that UDOT's financial resources are inadequate to carry out the USDOT Secretary's responsibilities, UDOT will take appropriate action to obtain the additional financial resources needed to carry out these responsibilities. If UDOT is unable to obtain the necessary additional financial resources, UDOT will inform FHWA, and this MOU will be amended to assign only the responsibilities that are commensurate with UDOT's financial resources.

4.2.2 UDOT will maintain adequate organizational and staff capability, including competent and qualified consultants or outside counsel where necessary or desirable, to effectively carry out the responsibilities it has assumed under this MOU. This includes, without limitation:

- A. Using appropriate environmental, technical, legal, and managerial expertise;
- B. Devoting adequate staff resources; and
- C. Demonstrating, in a consistent manner, the capacity to perform UDOT's assumed responsibilities under this MOU and applicable Federal laws.

Should FHWA determine, after consultation with UDOT, that UDOT's organizational and staff capability is inadequate to carry out the USDOT Secretary's responsibilities, UDOT will take appropriate action to obtain adequate organizational and staff capability to carry out these responsibilities. If UDOT is unable to obtain adequate organizational and staff capability, UDOT will inform FHWA, and the MOU will be amended to assign only the responsibilities that are commensurate with UDOT's available organizational and staff capability. Should UDOT choose to meet these requirements, in whole or in part, with consultant services, including outside counsel, UDOT will maintain on its staff an adequate number of trained and qualified personnel, including counsel, to oversee the consulting work.

4.2.3 When carrying out the requirements of Section 106 of the National Historic Preservation Act, as amended, UDOT staff (including consultants) shall comply with 36 C.F.R. 800.2(a)(1), as appropriate. 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 Qualification Standards (published at 48 FR 44738-39, Sept. 29, 1983). UDOT shall ensure that all documentation required under 36 C.F.R. 800.11 is reviewed and approved by a staff member or consultant who meets the Professional Qualification Standards.

4.3 Federal Court Jurisdiction

4.3.1 As provided at 23 U.S.C. 327(c)(3)(B), and pursuant to Section 72-1-207 of the Utah Code, UDOT hereby expressly consents, on behalf of the State of Utah, to accept the jurisdiction of the Federal courts for the compliance, discharge, and enforcement of any responsibility of the USDOT Secretary assumed by UDOT under this MOU. This consent to Federal court jurisdiction will remain valid after termination of this MOU, or FHWA's withdrawal of assignment of the

USDOT Secretary's responsibilities for any decision or approval made by UDOT pursuant to an assumption of responsibility under this MOU. UDOT understands and agrees that, in accordance with 23 U.S.C. 327, this acceptance constitutes a waiver of the State of Utah's immunity under the Eleventh Amendment to the U.S. Constitution for the limited purposes of carrying out the USDOT Secretary's responsibilities that have been assumed under this MOU.

PART 5. APPLICABILITY OF FEDERAL LAW

5.1 Procedural and Substantive Requirements

5.1.1 As provided at 23 U.S.C. 327(a)(2)(C), in assuming the USDOT Secretary's responsibilities under this MOU, UDOT will be subject to the same procedural and substantive requirements that apply to the USDOT Secretary in carrying out these responsibilities. Such procedural and substantive requirements include Federal statutes and regulations; Executive Orders issued by the President of the United States; USDOT Orders; Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 C.F.R. parts 1500–1508); FHWA Orders; official guidance and policy issued by the CEQ, Office of Management and Budget (OMB), USDOT, or the FHWA (e.g., Guidance Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects); any applicable Federal court decisions; and, subject to subpart 5.1.4 below, interagency agreements such as programmatic agreements, memoranda of understanding, memoranda of agreement, and other similar documents that relate to the environmental review process (e.g., the 2015 Red Book – Synchronizing Environmental Reviews for Transportation and Other Infrastructure projects).

A. UDOT has reviewed the 2014 MOA between the US Coast Guard (USCG) and FHWA, and understands that by accepting FHWA's NEPA responsibilities, it also agrees to perform FHWA's obligations set forth in the MOU between the USDOT and the USCG, and the MOA between FHWA and the USCG.

5.1.2 Official USDOT and FHWA formal guidance and policies relating to environmental review are posted on the FHWA's website, contained in the FHWA Environmental Guidebook, published in the Federal Register, or sent to UDOT electronically or in hard copy.

5.1.3 After the Effective Date of this MOU, FHWA will use its best efforts to ensure that any new or revised Federal policies and guidance that are final and applicable to FHWA's responsibilities under NEPA and other environmental laws that are assumed by UDOT under this MOU are communicated to UDOT within ten (10) calendar days of issuance. Delivery may be accomplished by e-mail, web posting (with email or mail to UDOT notifying of web posting), mail, or publication in the Federal Register (with email or mail to UDOT notifying of publication). If communicated to UDOT by e-mail or mail, such material will be sent to UDOT's Director of Environmental Services. In the event that a new or revised FHWA policy or guidance is not made available to UDOT as described in this section, and if UDOT had no actual knowledge of such policy or guidance, then a failure by UDOT to comply with such Federal policy or guidance will not be a basis for termination under this MOU.

5.1.4 UDOT will work with all other appropriate Federal agencies concerning the laws, guidance, and policies that such other Federal agencies are responsible for administering. For interagency agreements that involve signatories in addition to FHWA and UDOT, within six (6) months after the effective date of this MOU, FHWA and UDOT will contact the relevant third party or parties to determine whether any action should be taken with respect to such agreement. Such actions may include:

A. Consulting with the third party to obtain written consent to the continuation of the interagency agreement in its existing form, but with the substitution through assignment of UDOT for FHWA; or

- B. Negotiating with the third party to amend the interagency agreement as needed so that the interagency agreement continues but that UDOT assumes FHWA's responsibilities.

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, UDOT will carry out the assumed 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.

- 5.1.5 Upon termination of this MOU, FHWA and UDOT will contact the relevant third party to any interagency agreement and determine whether the interagency agreement should be amended or reinstated as it was on the effective date of this MOU.

5.2 Rulemaking

- 5.2.1 As provided at 23 U.S.C. 327(f), nothing in this MOU permits UDOT to assume any rulemaking authority of the USDOT Secretary. Additionally, nothing in this MOU permits UDOT to establish policy and guidance on behalf of the USDOT Secretary or FHWA. UDOT's authority to establish State regulations, policy, and guidance concerning the State environmental review of State highway projects shall not supersede applicable Federal environmental review regulations, policy, or guidance established by or applicable to the USDOT Secretary or FHWA.

5.3 Effect of Assumption

- 5.3.1 For purposes of carrying out the responsibilities assumed under this MOU, and subject to the limitations contained in 23 U.S.C. 327 and this MOU, UDOT will be deemed to be acting as FHWA with respect to the environmental review, consultation, and other action required under those responsibilities.

5.4 Other Federal Agencies

- 5.4.1 As provided at 23 U.S.C. 327(a)(2)(E), nothing in this MOU preempts or interferes with any power, jurisdiction, responsibility, or authority of an agency other than the USDOT (including FHWA), under applicable statutes and regulations with respect to a project.

PART 6. LITIGATION

6.1 Responsibility and Liability

- 6.1.1 As provided in 23 U.S.C. 327(e), UDOT shall be solely responsible and solely liable for carrying out all of the USDOT Secretary's responsibilities it has assumed under this MOU, in lieu of and without further approval of the USDOT Secretary. The FHWA and USDOT shall have no responsibility or liability for the performance of the responsibilities assumed by UDOT, including any decision or approval made by UDOT while participating in the Program.

6.2 Litigation

- 6.2.1 Nothing in this MOU affects the United States Department of Justice's (hereinafter "USDOJ") authority to litigate claims, including the authority to approve a settlement on behalf of the United States if either FHWA or another agency of the United States is named in such litigation, or if the United States intervenes pursuant to 23 U.S.C. 327(d)(3). In the event FHWA or any other Federal agency is named in litigation related to matters under this MOU, or the United States intervenes in the litigation, UDOT agrees to coordinate with FHWA and any USDOJ or Federal agency attorneys in the defense of that action.
- 6.2.2 UDOT shall defend all claims brought against UDOT in connection with its discharge of any responsibility assumed under this MOU. In the event of litigation, UDOT shall provide qualified

and competent legal counsel, including outside counsel if necessary. UDOT shall provide the defense at its own expense, subject to 23 U.S.C. 327(a)(2)(G) concerning Federal-aid participation in attorney's fees for outside counsel hired by UDOT. UDOT shall be responsible for opposing party's attorney's fees and court costs if a court awards those costs to an opposing party, or in the event those costs are part of a settlement agreement.

- 6.2.3 UDOT will notify the FHWA's Utah Division Office and USDOJ's Assistant Attorney General for the Environment and Natural Resources Division, within seven (7) calendar days of UDOT's Legal Division's receipt of service of process of any complaint, concerning discharge of any responsibility assumed under this MOU. UDOT's notification to the FHWA and USDOJ shall be made prior to its response to the complaint. In addition, UDOT shall notify FHWA's Utah Division Office within seven (7) calendar days of receipt of any notice of intent to sue concerning its discharge of any responsibility assumed under this MOU.
- 6.2.4 UDOT will provide FHWA's Utah Division Office and USDOJ copies of any motions, pleadings, briefs, or other such documents filed in any case concerning its discharge of any responsibility assumed under this MOU. UDOT will provide such copies to the FHWA and DOJ within seven (7) calendar days of service of any document, or in the case of any documents filed by or on behalf of UDOT, within seven (7) calendar days of the date of filing.
- 6.2.5 UDOT will notify the FHWA's Utah Division Office and USDOJ prior to settling any lawsuit, in whole or in part, and shall provide the FHWA and USDOJ with a reasonable amount of time of at least ten (10) calendar days, to be extended, if feasible based on the context of the lawsuit, up to a maximum of thirty (30) total calendar days, to review and comment on the proposed settlement. UDOT will not execute any settlement agreement until: (1) FHWA and USDOJ have provided comments on the proposed settlement; (2) FHWA and USDOJ have indicated that they will not provide comments on the proposed settlement; or (3) the review period has expired, whichever occurs first.
- 6.2.6 Within seven (7) calendar days of receipt by UDOT, UDOT will provide notice to FHWA's Division Office and USDOJ of any court decision on the merits, judgment, and notice of appeal arising out of or relating to the responsibilities UDOT has assumed under this MOU. UDOT shall notify FHWA's Utah Division Office and USDOJ within five (5) days of filing a notice of appeal of a court decision. UDOT shall confer with FHWA and USDOJ regarding the appeal at least forty-five (45) days before filing an appeal brief in the case.
- 6.2.7 UDOT's notification to FHWA and USDOJ in subparts 6.2.3, 6.2.4, 6.2.5, and 6.2.6, shall be made by electronic mail to FHWA_assignment_lit@dot.gov and NRSDOT.enrd@doj.gov, unless otherwise specified by FHWA and USDOJ. For copies of motions, pleadings, briefs, and other documents filed in a case, as identified in subpart 6.2.4, UDOT may opt to either send the materials to the email addresses identified above, send hardcopies to the mail address below, or add to the distribution list in the court's electronic filing system (e.g., PACER) the following two email addresses: FHWA_assignment_lit@dot.gov and efile_nrs.enrd@usdoj.gov. FHWA and USDOJ's comments under subpart 6.2.5 and 6.2.6 shall be made by electronic mail to nepa_assignment@utah.gov unless otherwise specified by UDOT. In the event that regular mail is determined necessary, mail should be sent by overnight mail service to:

For USDOJ: Assistant Attorney General for the Environment and Natural Resources Division at 950 Pennsylvania Avenue, NW, Room 2143, Washington, DC 20530.

For FHWA: Division Administrator, FHWA Utah Division, 2520 West 4700 South, Suite 9, Salt Lake City, UT 84129.

For UDOT: Director of Environmental Services, Utah Department of Transportation, 4501 South 2700 West, Salt Lake City, UT 84119.

6.3 Conflict Resolution

- 6.3.1 In discharging any of the USDOT Secretary's responsibilities under this MOU, UDOT agrees to comply with any applicable requirements of USDOT and FHWA statute, regulation, guidance or policy regarding conflict resolution. This includes the USDOT Secretary's responsibilities for issue resolution under 23 U.S.C. 139(h), with the exception of the USDOT Secretary's responsibilities under 23 U.S.C. 139(h)(7) regarding financial penalties.
- 6.3.2 UDOT agrees to follow 40 C.F.R. part 1504 in the event of pre-decision referrals to CEQ for Federal actions determined to be environmentally unsatisfactory. UDOT also agrees to coordinate and work with CEQ on matters brought to CEQ with regards to the environmental review responsibilities for highway projects UDOT has assumed under this MOU.

PART 7. INVOLVEMENT WITH OTHER AGENCIES

7.1 Coordination

- 7.1.1 UDOT will seek early and appropriate coordination with all appropriate Federal, State, and local agencies in carrying out any of the responsibilities for highway projects assumed under this MOU.

7.2 Processes and Procedures

- 7.2.1 UDOT will ensure that it has appropriate processes and procedures in place that provide for proactive and timely consultation, coordination, and communication with all appropriate Federal agencies in order to carry out any of the responsibilities assumed under this MOU, including the submission of all environmental impact statements together with comments and responses to the Environmental Protection Agency as required at 40 C.F.R. 1506.9 and for EPA's review as required by section 309 of the Clean Air Act. These processes and procedures will be formally documented. Such formal documentation may be in the form of an executed interagency agreement or in other such form as appropriate.

PART 8. INVOLVEMENT WITH FHWA

8.1 Generally

- 8.1.1 Except as specifically provided otherwise in this MOU, FHWA will not provide any project-level assistance to UDOT in carrying out any of the responsibilities it has assumed under this MOU. Project-level assistance shall include any 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 process or program-level assistance as provided in subpart 8.1.4, discussions concerning issues addressed in prior projects, interpretations of any applicable law contained in Title 23 U.S.C. or Title 49 U.S.C., interpretations of any FHWA or USDOT regulation, or interpretations of FHWA or USDOT policies or guidance.
- 8.1.2 The FHWA will not intervene, broker, act as intermediary, or be otherwise involved in any issue involving UDOT's consultation or coordination with another Federal agency with respect to UDOT's discharge of any of the responsibilities assumed under this MOU for any particular highway project. However, the FHWA may attend meetings between UDOT and other Federal agencies and submit comments to UDOT and the other Federal agency in the following extraordinary circumstances:

- A. FHWA reasonably believes that UDOT is not in compliance with this MOU;

- B. FHWA determines that an issue between UDOT and the other Federal agency concerns emerging national policy issues under development by the USDOT; or
- C. Upon request by either UDOT or the other Federal agency and agreement by FHWA.

The FHWA will notify both UDOT and the relevant Federal agency prior to attending any meetings between UDOT and such other Federal agency.

- 8.1.3 Other Federal agencies may raise concerns regarding the compliance with this MOU by UDOT and may communicate these concerns to the FHWA. The FHWA will review the concerns and any information provided to FHWA by such other Federal agency. If, after reviewing these concerns, FHWA and such other Federal agency still have concerns regarding UDOT's compliance, FHWA will notify UDOT of the potential compliance issue and will work with both UDOT and the relevant Federal agency to resolve the issue and, if necessary, take appropriate action to ensure compliance with this MOU.
- 8.1.4 At UDOT's request, FHWA shall assist UDOT in evaluating its environmental program and developing or modifying any of its processes or procedures to carry out the responsibilities it has assumed under this MOU, including, but not limited to, those processes and procedures concerning UDOT's consultation, coordination, and communication with other Federal agencies.
- 8.1.5 UDOT's obligations and responsibilities under 23 C.F.R. 1.5 are not altered in any way by executing this MOU.

8.2 MOU Monitoring and Oversight

- 8.2.1 The FHWA will provide necessary and appropriate monitoring and oversight of UDOT's compliance with this MOU. The FHWA's monitoring and oversight activities under this MOU in years one (1) through four (4) of this MOU's term will primarily consist of auditing as provided at 23 U.S.C. 327(g) and Part 11 of this MOU, and evaluating attainment of the performance measures listed in Part 10 of this MOU. After the fourth year of UDOT's participation in the Project Delivery Program, the FHWA will monitor UDOT's compliance with the MOU, including the provision by UDOT of financial resources to carry out the MOU. The FHWA's monitoring and oversight may also include submitting requests for information to UDOT and other relevant Federal agencies, verifying UDOT's financial and personnel resources dedicated to carrying out the responsibilities assumed, and reviewing documents and other information.
- 8.2.2 Pursuant to 23 U.S.C. 327(c)(4), UDOT is responsible for providing FHWA any information FHWA reasonably considers necessary to ensure that UDOT is adequately carrying out the responsibilities assigned. When requesting information subject to 23 U.S.C. 327(c)(4), FHWA will provide the request to UDOT in writing, and the request will identify with reasonable specificity the information required and the reason such information is deemed necessary. FHWA will also indicate in the request a deadline for the information to be provided. UDOT will, in good faith, work to ensure the information requested is provided by the deadline. UDOT's response to an information request under this paragraph will include, where appropriate, making relevant employees and consultants available at their work location (including in-person meeting, teleconference, videoconference, or other electronic means as may be available).
- 8.2.3 UDOT will make project files and general administrative files pertaining to its discharge of the responsibilities it has assumed under this MOU reasonably available for inspection by FHWA at the files' locations (including, where applicable, through an electronic portal or website) upon reasonable notice, which is not less than five (5) business days. These files will include, but are not limited to, all letters and comments received from governmental agencies, the public, and others with respect to UDOT's discharge of the responsibilities assumed under this MOU. As used in this paragraph, the terms "project files" and "general administrative files" include only documents in the custody and control of UDOT (whether paper or electronic).

- 8.2.4 In carrying out the responsibilities assumed under this MOU, UDOT will carry out regular quality control and quality assurance activities to ensure that the assumed responsibilities are being conducted in accordance with applicable law and this MOU. At a minimum, UDOT's quality control and quality assurance activities will include the review and monitoring of its processes and performance relating to project decisions, environmental analysis, project file documentation, checking for errors and omissions, legal sufficiency reviews, and taking appropriate corrective action as needed. Within three (3) months of the effective date of this MOU, UDOT will finalize a quality control and quality assurance (QA/QC) process that satisfies the requirements of this subpart. In developing and implementing the QA/QC process, UDOT will consult with the FHWA Utah Division Office. UDOT will cooperate with FHWA to address recommendations FHWA may have with respect to its QA/QC process.
- 8.2.5 UDOT will perform regular self-assessments of its QA/QC process and performance to determine whether its process is working as intended, to identify any areas needing improvements in the process, and to timely take any corrective actions necessary to address the areas needing improvement. At least one (1) month prior to the date of a scheduled FHWA audit, UDOT will transmit a summary of its self-assessment(s) to the FHWA Utah Division Office. The summary will include a description of the scope of the self-assessment(s) conducted and the areas reviewed; a description of the process followed in conducting the self-assessment; a list of the areas identified as needing improvement; any corrective actions that have been or will be implemented; a statement from the Director of UDOT Environmental Services concerning whether the processes are ensuring that the responsibilities UDOT has assumed under this MOU are being carried-out in accordance with this MOU and all applicable Federal laws and policies; and a summary of UDOT's progress toward attaining the performance measures listed in Part 10 of this MOU. UDOT will conduct its self-assessments no less frequently than annually.
- 8.2.6 Every three (3) months after the Effective Date of this MOU for a period of two (2) years, UDOT will provide a report to the FHWA Utah Division Office listing any approvals and decisions UDOT has made with respect to the responsibilities UDOT has assumed under this MOU. UDOT will submit its approval and decision report to the FHWA no less frequently than every six months. At its discretion, UDOT may satisfy the requirement of this paragraph by giving FHWA access to a searchable on-line database that contains records of approvals and decisions made by UDOT under this MOU.

8.3 Record Retention

- 8.3.1 UDOT will retain project files and general administrative files pertaining to its discharge of the responsibilities it has assumed under this MOU in accordance with 2 C.F.R. 200.333 and the provisions below.
- 8.3.2 In addition to the period of time specified in 2 C.F.R. 200.333, UDOT will ensure that the following retention periods are maintained for each specified type of record:
- A. **Environment Correspondence Files:** Environment correspondence files include correspondence between FHWA and UDOT relative to the interpretation, administration, and execution of environmental aspects of the Federal-aid Highway Program. UDOT will maintain environmental correspondence files for a period of three (3) years after the resolution of the particular issue for which the file is created. After three (3) years, UDOT will transmit environmental correspondence files to the FHWA to be managed in accordance with FHWA records retention and disposal policies and procedures.
 - B. **Environmental Impact Statements and/or Section 4(f) Statements- FHWA:** Files containing Records of Decision, Draft and Final EIS's, Section 4(f) evaluations for which UDOT, in assuming the FHWA's responsibilities, is the lead agency, will be maintained by UDOT for a period of eight (8) years after approval of the final statement. After eight (8) years, UDOT will transmit its EIS and Section 4(f) files (in paper or electronic form) to

FHWA to be managed in accordance with FHWA records retention and disposal policies and procedures.

- C. **Noise Barriers:** UDOT will maintain an inventory of all constructed noise abatement measures containing the information required to comply with 23 C.F.R. 772.13(f). UDOT will retain the required information for a period of four (4) years after the end of the Federal fiscal year in which construction of the particular noise abatement measure is completed.

- 8.3.3. Nothing contained in this MOU is intended to relieve UDOT of its recordkeeping responsibilities under 2 C.F.R. 200.333–200.337 or other applicable laws.

8.4 Federal Register

- 8.4.1 For any documents that are proposed by UDOT to be published in the *Federal Register*, such as the Notice of Intent under 23 C.F.R. 771.123(a) and Notice of Final Agency Action under 23 U.S.C. 139(f), UDOT will transmit such document to the FHWA's Utah Division Office. FHWA will promptly submit such document to be published in the *Federal Register* on behalf of UDOT. UDOT will, upon request by FHWA, reimburse FHWA for the expenses associated with publishing such documents in the *Federal Register* (excluding FHWA's overhead). If and when permitted by the operating procedures of the Government Printing Office and the Federal Register, UDOT will take over the procedures described above from the FHWA Utah Division Office.

8.5 Participation in Resource Agency Reports

- 8.5.1 UDOT will provide data and information requested by FHWA and resource agencies for the preparation of national reports to the extent that the information relates to determinations, findings, and proceedings associated with projects processed under this MOU. Such reports include but are not limited to:
 - A. Information on the completion of and duration to complete environmental documentation for EIS, EA, and documented CE projects processed under this MOU;
 - B. Archeology Reports requested by the National Park Service;
 - C. Endangered Species Act Expenditure Reports requested by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service;
 - D. Project status and information for EAs and EISs for use on the searchable website maintained under section 41003(b) of the FAST Act [Fixing America's Surface Transportation Act, 42 U.S.C. § 4370m-2(b); 23 U.S.C. § 139(o)] (Federal Permitting Dashboard);
 - E. NEPA Litigation Reports requested by CEQ; and
 - F. Environmental Conflict Resolution reports requested by the Office of Management and Budget and CEQ.

8.6 Conformity Determinations

- 8.6.1 UDOT shall, for any highway project located in air quality nonattainment and maintenance area, with respect to the National Ambient Air Quality Standards, and prior to approving any CE determination, FONSI, final EIS, ROD or final EIS/ROD, ensure and document that the design concept and scope of the proposed project is not significantly different from that in the Transportation Improvement Plan (TIP) and the Metropolitan Transportation Plan (MTP), in accordance with 40 C.F.R. 93.107. Pursuant to 23 U.S.C. 327(a)(2)(B)(iv)(II), for any project requiring a project-level conformity determination under the Federal Clean Air Act and its implementing regulations, the FHWA's Utah Division Office will make the project level conformity determination. FHWA's Utah Division Office will restrict its review to data, analyses, applicable comments and responses, and other relevant documentation that enable FHWA to make the project-level conformity determination.

8.7 Certification of NEPA Compliance

- 8.7.1 For projects funded by FHWA, prior to the execution of any Federal-aid project agreement for a physical construction contract, a design-build contract, or a contract for final design services, the Director of UDOT's Environmental Affairs Division will submit a certification for each individual project to the FHWA Utah Division Office specifying that UDOT has fully carried out all responsibilities assumed under this MOU in accordance with this MOU and applicable Federal laws, regulations, and policies. The Director of UDOT's Environmental Affairs Division may delegate the authority to make the certification required under this subpart to other qualified and duly authorized UDOT personnel.

8.8 Enforcement

- 8.8.1. Should FHWA determine that UDOT is not in compliance with this MOU, then FHWA will take appropriate action to ensure UDOT's compliance, including implementing appropriate remedies provided at 23 C.F.R. 1.36 for violations of or failure to comply with Federal law or the regulations at 23 C.F.R. with respect to a project, withdrawing assignment of any responsibilities that have been assumed as provided in Part 9 of this MOU, or terminating UDOT's participation in the Project Delivery Program as provided in Part 13 of this MOU.

PART 9. WITHDRAWAL OF ASSIGNED RESPONSIBILITIES

9.1 FHWA-Initiated Withdrawal of Assigned Projects

- 9.1.1 The FHWA may, at any time, withdraw the assignment of all or part of the USDOT Secretary's responsibilities that have been assumed by UDOT under this MOU for any highway project or highway projects upon FHWA's determination that:
- A. With respect to that particular highway project or those particular highway projects, UDOT is not in compliance with a material term of this MOU or applicable Federal laws or policies, and, after been given reasonable notice and an opportunity to take corrective action, UDOT has not taken corrective action to the satisfaction of FHWA;
 - B. The highway project or highway projects involve significant or unique national policy interests for which UDOT's assumption of the USDOT Secretary's responsibilities would be inappropriate; or
 - C. UDOT cannot satisfactorily resolve an issue or concern raised in a government-to-government consultation process with an Indian tribe, as provided in subpart 3.2.3.
- 9.1.2 Upon the FHWA's preliminary determination to withdraw assignment of the USDOT Secretary's responsibilities under subpart 9.1.1, FHWA will notify UDOT of FHWA's determination. After notifying UDOT of its determination, FHWA will provide UDOT written notice of its determination including the reasons for its determination. Upon receipt of this notice, UDOT may submit any comments or objections to FHWA within thirty (30) calendar days, unless an extended period of time is agreed to by the FHWA. Upon receipt of UDOT's comments or objections, FHWA will make a final determination within thirty (30) calendar days, unless extended by FHWA for cause, and notify UDOT of its decision. In making its final determination, FHWA will consider UDOT's comments or objections, the effect the withdrawal of assignment will have on the Program, the amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.
- 9.1.3 The FHWA will withdraw assignment of the responsibilities UDOT has assumed for any highway project when the preferred alternative that is identified in the environmental assessment or final

environmental impact statement is a highway project that is specifically excluded in subpart 3.3.2. In such case, subpart 9.1.2 will not apply.

9.2 UDOT-Initiated Withdrawal of Assignment of Projects

- 9.2.1 UDOT may, at any time, request FHWA to withdraw all or part of the USDOT Secretary's responsibilities that UDOT has assumed under this MOU for any existing or future highway project or highway projects.
- 9.2.2 Upon UDOT's decision to request that FHWA withdraw the assignment of the USDOT Secretary's responsibilities under subpart 9.2.1, UDOT will informally notify FHWA of its desire for FHWA to withdraw assignment of its responsibilities. After informally notifying FHWA of its desire, UDOT will provide FHWA written notice of its desire, including the reasons for wanting FHWA to withdraw assignment of the responsibilities. Upon receipt of this notice, the FHWA will have 30 calendar days, unless extended by FHWA for cause, to determine whether it will withdraw assignment of the responsibilities requested. In making its determination, FHWA will consider the reasons UDOT desires FHWA to withdraw assignment of the responsibilities, the effect the withdrawal of assignment will have on the Program, amount of disruption to the project concerned, the effect on other projects, confusion the withdrawal of assignment may cause to the public, the potential burden to other Federal agencies, and the overall public interest.

PART 10. PERFORMANCE MEASURES

10.1 General

- 10.1.1 Both FHWA and UDOT have determined that it is desirable to mutually establish a set of performance measures that FHWA can take into account in its evaluation of UDOT's administration of the responsibilities it has assumed under this MOU.
- 10.1.2 UDOT's attainment of the performance measures indicated in this Part 10 will be considered during the FHWA audits, which are required under 23 U.S.C. 327(g).
- 10.1.3 UDOT will collect and maintain all necessary and appropriate data related to the attainment of the performance measures. In collecting this data, UDOT will monitor its progress toward meeting the performance measures and include its progress in the self-assessment summary provided under subpart 8.2.5 of this MOU. The summary will be made available to the FHWA as provided in subpart 8.2.5.

10.2 Performance Measures

- 10.2.1 The performance measures applicable to UDOT in carrying-out the responsibilities it has assumed under this MOU are as follows:
- A. Compliance with NEPA and other Federal environmental statutes and regulations:
- i. Maintain documented compliance with procedures and processes set forth in this MOU for the environmental responsibilities assumed under the Program.
 - ii. Maintain documented compliance with requirements of all applicable Federal statutes and regulations for which responsibility is assumed (Section 106, Section 7, etc).
- B. Quality Control and Assurance for NEPA decisions:
- i. Maintain and apply internal quality control and assurance measures and processes, including a record of:

- a. Involvement of legal counsel as appropriate during the environmental review process, including legal counsel review of notices that will be published in the *Federal Register*, as well as legal sufficiency reviews and legal sufficiency determinations for environmental impact statements and Section 4(f) regulations in accordance with FHWA regulations; b. Compliance with FHWA's and UDOT's environmental document content standards and procedures, including those related to QA/QC; and,
 - c. Completeness and adequacy of documentation of project records for projects done under the Program.
- C. Relationships with agencies and the general public:
- i. Assess change in and ensure effective communication among UDOT, Federal and State resource agencies and the public resulting from assumption of responsibilities under this MOU.
 - ii. Maintain effective responsiveness to substantive comments received from the public, agencies and interest groups on NEPA documents and environmental concerns.
 - iii. Maintain effective NEPA conflict resolution processes whenever appropriate.
- D. Increased efficiency and timeliness in completion of NEPA process:
- i. Compare time of completion for NEPA approvals before and after assumption of responsibilities under this MOU.
 - ii. Compare time to completion for key interagency consultation formerly requiring FHWA participation (e.g., Section 7 biological opinions, Section 106 resolution of adverse effects) before and after assumption of responsibilities under this MOU.

PART 11. AUDITS

11.1 General

- 11.1.1 As required at 23 U.S.C. 327(g), FHWA will conduct a total of four (4) audits of UDOT's discharge of the responsibilities it has assumed under this MOU (an annual audit during each of the first four (4) years after the Effective Date). During the first four (4) years, audits will be the primary mechanism used by FHWA to oversee UDOT's compliance with this MOU, ensure compliance with applicable Federal laws and policies, evaluate UDOT's progress toward achieving the performance measures identified in Part 10, and collect information needed for the USDOT Secretary's annual report to Congress.

Pursuant to 23 U.S.C. 327(g)(3), each audit carried out under this MOU shall be carried out by an audit team, consisting of members FHWA designates in consultation with the State. Such consultation shall include a reasonable opportunity for UDOT to review and provide comments on the proposed members of the audit team.

- 11.1.2 Pursuant to 23 U.S.C. 327(g)(1)(A), FHWA and UDOT will meet, not later than 180 days after the date of execution of this MOU, to review implementation of the MOU and discuss plans for the first annual audit.
- 11.1.2 Pursuant to 23 U.S.C. 327(c)(4), UDOT is responsible for providing FHWA any information FHWA reasonably considers necessary to ensure that UDOT is adequately carrying out the

responsibilities assigned. In accordance with Part 8.2.2 of this MOU, UDOT will make documents and records available for review by FHWA in conducting audits and will provide FHWA with copies of any such documents and records as may be requested by FHWA.

- 11.1.3 UDOT will cooperate with FHWA in conducting audits, including providing access to all necessary information, making all employees available to answer questions (including consultants hired by UDOT for the purpose of carrying out the USDOT Secretary's responsibilities), and providing all requested information (including making employees available) to FHWA in a timely manner. UDOT will make employees available either in-person at their normal place of business or by telephone, at the discretion of FHWA.
- 11.1.4 UDOT and the FHWA Utah Division Office will each designate an audit coordinator who will be responsible for coordinating audit schedules, requests for information, and arranging audit meetings.
- 11.1.5 The FHWA audits will include, but not be limited to, consideration of UDOT's technical competency and organizational capacity, adequacy of the financial resources committed by UDOT to administer the responsibilities assumed, quality control and quality assurance process, attainment of performance measures, compliance with this MOU's requirements, and compliance with applicable Federal laws and policies in administering the responsibilities assumed.

11.2 Scheduling

- 11.2.1 As provided at 23 U.S.C. 327(g), FHWA will conduct an annual audit during each of the first four (4) years after the Effective Date. After the fourth year of UDOT's participation in the Program, FHWA will monitor UDOT's compliance with the MOU, including the provision by UDOT of financial resources to carry out the MOU, but will not conduct additional audits under this Part 11.
- 11.2.2 For each annual audit, the designated audit coordinators for FHWA and UDOT will work to establish general audit schedules at least three (3) months prior to the semiannual or annual anniversary dates of the Effective Date of this MOU. The general audit schedules will include the dates that FHWA will conduct the audit.
- 11.2.3 UDOT's audit coordinator will make all reasonable efforts to ensure all necessary employees (including consultants) are available to FHWA during the specified dates on the general audit schedule. UDOT will also ensure that all of its documents and records are made reasonably available to FHWA as needed during the general audit schedule.
- 11.2.4 After the general audit schedule is established, the audit coordinators will work to establish specific audit schedules at least two weeks prior to the scheduled audit. The specific audit schedules will include the dates, times, and place for which FHWA will talk to UDOT's employees (including consultants) and review documents and records.
- 11.2.5 To the maximum extent practicable, the specific audit schedule will identify all employees (including consultants) and documents and other records that UDOT will make available to FHWA during the audit. Should FHWA determine that it needs access to an employee, document or other record that is not identified in the specific audit schedule, UDOT will make reasonable efforts to produce such employee, document or other record on the specified dates. With respect to employees, UDOT will work with FHWA to specifically identify each employee. With respect to documents and other records, UDOT and FHWA will try to be as specific as possible, although a general description of the types of documents will be acceptable.

11.3 Other Federal Agency Involvement

- 11.3.1 The FHWA may invite other Federal or State agencies as deemed appropriate, including State Historic Preservation Officers (SHPOs), to assist FHWA in conducting an audit under this MOU by sitting in on interviews, reviewing documents obtained by FHWA, and making

recommendations to FHWA. In any case, FHWA will ensure UDOT is aware of the role that any such other agency plays in the audit process.

11.4 Audit Report and Findings

- 11.4.1 Upon completing each audit, FHWA will transmit to UDOT a draft of the audit report and allow UDOT a period of fourteen (14) calendar days within which to submit written comments to FHWA. The FHWA will grant any reasonable request by UDOT to extend its deadline to respond in writing to a draft audit report not to exceed a total review period of thirty (30) days. The FHWA will review the comments and revise the draft audit report as may be appropriate. The FHWA will then prepare the draft audit report for public comment.
- 11.4.2 As required at 23 U.S.C. 327(g)(2), FHWA will make the draft audit report available for public comment. In carrying out this requirement, FHWA will, after receipt and incorporation of UDOT comments as provided in subpart 11.4.1, publish the audit report in the *Federal Register* and allow a comment period of thirty (30) calendar days. The FHWA will then address and respond to the public comments by incorporating the comments and response into the final audit report. The final audit report will be published in the *Federal Register* not later than sixty (60) calendar days after the comment period closes.
- 11.4.3 As required by 23 U.S.C. 327(g)(1)(C), FHWA will ensure that the time period for completing an annual audit, from initiation to completion (including public comment and responses to those comments), does not exceed 180 days.

PART 12. TRAINING

- 12.1 The FHWA will provide UDOT available training, to the extent FHWA or UDOT deems necessary, in all appropriate areas with respect to the environmental responsibilities that UDOT has assumed. Such training may be provided by either FHWA or another Federal agency or other parties, as appropriate. UDOT will have all appropriate employees (including consultants hired for the purpose of carrying out the USDOT Secretary's responsibilities) attend such training.
- 12.2 Within ninety (90) days after the effective date of this MOU, UDOT and FHWA, in consultation with other Federal agencies as deemed appropriate, will assess UDOT's need for training and develop a training plan. The training plan will be updated by UDOT and FHWA, in consultation with other Federal agencies as appropriate, annually during the term of this MOU. While UDOT and FHWA may take other agencies' recommendations into account in determining training needs, UDOT and FHWA will jointly determine the training required under this section of the MOU.

PART 13. TERM, TERMINATION AND RENEWAL

13.1 Term

- 13.1.1 This MOU has a term of five (5) years from the Effective Date.

13.2 Termination by the FHWA

- 13.2.1 As provided at 23 U.S.C. 327(j)(1), FHWA may terminate UDOT's participation in the Program, in whole or in part, at any time subject to the procedural requirements in 23 U.S.C. 327 and subpart 13.2.2 below. Failure to adequately carry out the responsibilities may include, but not be limited to:
 - A. Persistent neglect of, or noncompliance with, any Federal laws, regulations, and policies;

- B. Failure to cooperate with FHWA in conducting an audit or any oversight or monitoring activity;
- C. Failure to secure or maintain adequate personnel and financial resources to carry out the responsibilities assumed;
- D. Substantial noncompliance with this MOU; or
- E. Persistent failure to adequately consult, coordinate, and/or take the concerns of other Federal agencies, as well as SHPOs, into account in carrying out the responsibilities assumed.

13.2.2 If FHWA determines that UDOT is not adequately carrying out the responsibilities assigned to UDOT, then:

- A. The FHWA will provide to UDOT a written notification of its determination;
- B. The FHWA will provide UDOT a period of at least 120 calendar days to take such corrective action as the FHWA determines is necessary to comply with this MOU; and
- C. UDOT, after notification and the period provided under subpart 13.2.2(B), fails to take satisfactory corrective action, FHWA will provide notice to UDOT of its determination whether or not to implement the FHWA-initiated termination. Any responsibilities identified to be terminated in the notice that have been assumed by UDOT of this MOU will transfer to FHWA.

13.3 Termination by UDOT

13.3.1 UDOT may terminate its participation in the Program, in whole or in part, at any time by providing to FHWA a notice at least ninety (90) calendar days prior to the date that UDOT seeks to terminate its participation in this Program, and subject to such terms and conditions as FHWA may provide.

13.3.2. The Utah Legislature and Governor may, at any time, terminate UDOT's authority granted to participate in this Program. In that event, FHWA and UDOT will develop a plan to transition the responsibilities that UDOT has assumed back to FHWA so as to minimize disruption to projects, minimize confusion to the public, and minimize burdens to other affected Federal, State, and local agencies. The plan will be approved by both FHWA and UDOT.

13.3.3. Any such withdrawal of assignment which FHWA and UDOT have agreed to under a transition plan will not be subject to the procedures or limitations provided for in Part 9 of this MOU and will be valid as agreed to in the transition plan.

13.4 Validity of UDOT Actions

13.4.1 Any environmental approvals made by UDOT pursuant to the responsibilities UDOT has assumed under this MOU will remain valid after termination of UDOT's participation in the Program or withdrawal of assignment by FHWA. As among the USDOT Secretary, FHWA and UDOT, UDOT will remain solely liable and solely responsible for any environmental approvals it makes pursuant to any of the responsibilities it has assumed while participating in the Program.

13.5 Renewal

This MOU is renewable in accordance with 23 U.S.C. 327 and implementing regulations, as in effect at the time of the renewal.

PART 14. AMENDMENTS

14.1 Generally

14.1.1 This MOU may be amended at any time upon mutual agreement by both the FHWA and UDOT pursuant to 23 C.F.R. 773.113(b).

14.2 Additional Projects, Classes of Projects and Environmental Review Responsibilities

14.2.1 The FHWA may assign, and UDOT may assume, responsibility for additional projects, and additional environmental review responsibilities beyond those identified in Part 3 of this MOU by executing an amendment to this MOU.

14.2.2 Should UDOT decide to request this MOU be amended to add responsibility for additional projects or classes of projects, or additional environmental review responsibilities beyond those identified in Part 3 of this MOU, such request will be treated as an amendment to UDOT's original application that was submitted to FHWA pursuant to 23 U.S.C. 327(b) and 23 C.F.R. part 773. In developing the application supplement, UDOT will identify the additional projects, classes of projects, and environmental review responsibilities it wishes to assume and make any appropriate adjustments to the information contained in UDOT's original application, including the verification of personnel and financial resources.

IN WITNESS THEREOF, the parties hereto have caused this MOU to be duly executed in duplicate as of the date of the last signature written below.

FEDERAL HIGHWAY ADMINISTRATION

By: 

Gregory G. Nadeau
Administrator
Federal Highway Administration

Dated: 4/17/17

**STATE OF UTAH
Department of Transportation**

By: 

Carlos M. Bracer, P.E.
Executive Director

Dated: 1/5/17

**23 U.S.C. § 326 CE Assignment MOU
FHWA, Utah Division and the Utah Department of Transportation**

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

State Assumption of Responsibility for Categorical Exclusions

THIS SECOND RENEWED MEMORANDUM OF UNDERSTANDING (“MOU”) made and entered into 30th day of June , 2014, 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 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 (DOT 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 DOT 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 July 1, 2008, the FHWA and the State executed a MOU assigning responsibilities to the State pursuant to 23 U.S.C. 326 for a three-year period, expiring on July 1, 2011 (“Original MOU”); and

Whereas, on July 1, 2011, the FHWA and the State executed a new MOU assigning responsibilities to the State pursuant to 23 U.S.C. 326 for an additional three-year period, expiring on July 1, 2014 (“Renewed MOU”);

Whereas, on July 6, 2012, the Moving Ahead for Progress in the 21st Century Act (P.L.112-141) was enacted, and it became effective on October 1, 2012;

Whereas, Section 1312 of MAP-21 amended 23 U.S.C. § 326 to (1) preserve the ability of States assuming responsibility to engage in project delivery methods that are otherwise permissible for highway projects, (2) allow States to terminate their participation in the

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program at any time by providing the DOT Secretary with a notice no later than 90 days before such termination, and (3) allow States that assume DOT responsibilities to use funds apportioned to the State under section 23 U.S.C. § 104(b)(2) for reasonable attorney's fees directly attributable to eligible activities associated with the project; and

Whereas, FHWA and the State seek to extend the existing assignment of responsibilities to the State for an additional three-year period, pursuant to a new MOU ("Second Renewed MOU" or "MOU"):

Whereas, on May 28, 2014, the FHWA published a notice of the availability of the proposed Second Renewed MOU in the Federal Register and provided a thirty (30) day opportunity for comment in the USDOT Docket Management System FHWA-2014-0017; and

Whereas, on May 28, 2014, the State published the proposed a notice of availability of the Second Renewed MOU on its website at <http://www.udot.utah.gov/go/environmental> and provided a 30-day opportunity for comment and

Whereas, the State and FHWA have considered the comments received on the Second Renewed MOU; and

Whereas, the DOT Secretary, acting by and through FHWA, has determined that specific designated activities are CEs and that it will assign specific responsibilities with respect to CEs 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, FHWA and the State agree as follows:

STIPULATIONS

I. CATEGORICAL EXCLUSION RESPONSIBILITIES ASSIGNED TO THE STATE BY FHWA

- A. For the projects covered by this MOU, FHWA hereby assigns, and the State hereby assumes, subject to the terms and conditions set forth in 23 U.S.C. § 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 DOT 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). This assignment applies only to projects for which the Utah Department of Transportation is the direct recipient of Federal-aid highway program funding or is the project sponsor or cosponsor for a project requiring

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approval by the FHWA-Utah Division Office. This assignment does not apply to responsibilities carried out by other modal administrations of the US Department of Transportation (USDOT) or the Office of the Secretary.

- B. This assignment pertains only to the designated activities described in this Stipulation I(B).
 - 1. The assignment includes the following:
 - a. Activities listed in 23 CFR 771.117 (c);
 - b. The example activities listed in 23 CFR 771.117(d); and
 - c. Additional actions listed in Appendix A: None.
 - 2. Any activities added through FHWA rulemaking to those listed in 23 CFR 771.117(c) or example activities listed in 23 CFR 771.117(d) after the date of the execution of this MOU.
- 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 FHWA concerning CEs.
- D. The State, when acting pursuant to 23 U.S.C. § 326 and this MOU, holds assigned authority to make environmental decisions and commitments pertaining to only the individual proposed projects and activities within the scope of 23 U.S.C. § 326 and this MOU. No action by the State shall bind 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 FHWA consents, in writing, to such commitment.

II. OTHER FHWA RESPONSIBILITIES ASSIGNED TO THE STATE AND RESPONSIBILITIES RESERVED BY FHWA

- A. For projects covered by this MOU, 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

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environmental responsibilities assigned to the State by the FHWA for proposed projects subject to this MOU. This assignment includes the transfer to the State of the obligation to fulfill the assigned environmental responsibilities associated with any proposed projects meeting the criteria in Stipulation I(B) that were determined to be CEs prior to the effective date of this MOU but the project has not been completed. 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 Indian 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 Indian tribe issues or concerns, then 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 an Indian tribe, or an Indian tribe indicates to 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, FHWA, and an Indian tribe under which the tribe agrees to permit the State to administer government-to-government consultation activities for FHWA. However, such agreements are administrative in nature and do not relieve FHWA of its legal responsibility for government-to-government consultation.
 2. The State and FHWA will develop and document procedures for carrying out FHWA responsibilities retained by FHWA under Stipulation II(B), including how any FHWA decisions will be communicated to the State for inclusion in the State's decision-making under Stipulations I and II(A). The procedures will ensure that:
 - a. The State provides to FHWA any information necessary in order for FHWA to carry out its consultation, evaluation, or decision-making for Stipulation II(B) activities;
 - b. The FHWA provides the State with a documented decision and any related information used for Stipulation II(B) decisions and needed by the State in order for the State to evaluate the project and make its decision whether the project qualifies as a CE; and
 - c. As part of any request for FHWA authorization for funding or other action, the State will provide to FHWA evidence that the CE

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processing 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 CEs assigned under this MOU are subject to the same existing and future procedural and substantive requirements as if those responsibilities were carried out by FHWA. This includes, but is not limited to the responsibilities of 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. If such interagency agreements are between the State and FHWA only, then the assignment occurs automatically upon the signing of this MOU for projects covered by this MOU. If the interagency agreement involves signatories other than FHWA and the State, then 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 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 FHWA's responsibilities with respect to 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 RESPONSIBILITIES

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- 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 or falls within Stipulation III(D). 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, 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, FHWA will evaluate the State's environmental processing of any project if 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 FHWA subsequently determines that the State's performance does not satisfy the terms and conditions of this MOU, then 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 the coordination of project review with an Indian tribe, as defined in 36 CFR 800.16(m), and either the Indian tribe or FHWA determines that the issue or concern will not be satisfactorily resolved by the State, then FHWA may reassume responsibility for processing the project or an individual responsibility assumed by the State. 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.
- D. Other conditions or impacts that exclude a project from assignment to the State under this MOU. Not applicable.

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, Executive Orders, policies, and guidance. The State also shall comply with State and local laws to the extent applicable.

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1. Failure to meet the requirements of Stipulation IV(A) is grounds for a decision by FHWA to terminate this MOU pursuant to Stipulation IX(A) if FHWA determines, after good-faith consultation with the State, that there is an irreconcilable material conflict between a provision of State law, regulation, policy, or guidance and applicable Federal law, regulation, policy, or guidance, and FHWA reasonably determines that such conflict is preventing the State from meeting its Stipulation IV(A) obligations. The grounds for such decision may include, but are not limited to, the mere existence of the conflict (i.e., on its face) and/or the effect of the conflict on the State's decision(s) on proposed CE project(s) (i.e., as applied).
 2. Official DOT and FHWA formal guidance and policies relating to environmental review matters are posted online at FHWA's website or sent to the State electronically or in hard copy.
 3. 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 Utah Department of Transportation Director of Environmental Services.
 4. 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.
 5. 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.
 6. In order to minimize the likelihood of a conflict as described in (1) above, after the effective date of this MOU the State will use its best efforts to ensure that any proposed new or revised State laws, regulations, policies, or guidance that are applicable to the State's performance under this MOU are communicated to FHWA for review and comment before they become final. Delivery may be accomplished by e-mail, mail, or personal delivery. If communicated to FHWA by e-mail or mail, such material may be sent to the party specified in this MOU to receive notices for FHWA.
- B. Processing projects assigned under the MOU: State identification, documentation, and review of effects. For projects and other activities assigned

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under Stipulations I(A)-(B) 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. Carry out the other environmental responsibilities that are assigned under this MOU, as necessary or appropriate for the activity;
 3. Document in the project file the CE findings and completion of all applicable FHWA responsibilities assigned under Stipulations I and II;
 4. 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 States' 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.
 5. Document its approval of the determination using, at a minimum, the printed name, title, and date of the State official approving the determination; and
 6. Include the following determination statement when documenting the CE findings: "The State has determined that this project has no significant impact(s) on the environment and that there are no unusual circumstances as described in 23 CFR 771.117(b). As such, the project is categorically excluded from the requirements to prepare an environmental assessment or environmental impact statement under NEPA. The State has been assigned, and hereby certifies that it has carried out, the responsibility to make this determination pursuant to 23 U.S.C. § 326 and a Memorandum of Understanding dated June 30, 2014, executed between FHWA and the State."
 7. Document in the project file the specific categorically excluded activity, the CE finding, including the determination that the project has no significant impact(s) on the environment, 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 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;

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2. Notify FHWA; and
 3. Working with the FHWA as the responsible party under NEPA, proceed with review and documentation and review of the project under the appropriate NEPA procedures.
- 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 U.S.C. § 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 the 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.
- 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 the State'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

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check for errors and omissions. The State shall take corrective action as needed. The State shall document its quality control activities and any needed corrective actions taken.

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 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 FHWA. Monitoring 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. The State shall submit to FHWA a list of the CE determinations and Section 4(f) determinations that the State approved during the previous 6 months (January 1 through June 30, and July 1 through December 31), within 15 business days after the end of each semi-annual reporting period. Based on the State's satisfactory performance of this MOU during the first 12 months, FHWA may reduce the frequency of this reporting requirement, but 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 FHWA, shall not be deemed an amendment under Stipulation VIII.
 2. No less than once every 18 months, the State shall submit to FHWA (via electronic and hard copy) a report summarizing its performance under the MOU and at similar intervals thereafter if the term of the MOU is renewed. The report will identify any areas where improvement is needed and what measures the State is taking to undertake those improvements. The report will include actions taken by the State as part of its quality control efforts under Stipulation IV. The State shall schedule a follow-up meeting with FHWA at which the parties will discuss the report, the State's performance of the MOU, and FHWA's monitoring activities.
 3. The State shall maintain electronic and paper project records and general administrative records pertaining to its MOU responsibilities and the projects processed hereunder. The records shall be available for inspection by FHWA at any time during normal business hours. The State shall provide FHWA with copies of any documents 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

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activities assigned under this MOU, for a period of no less than 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 (FOIA), as amended in 2002) and NEPA.
 5. The FHWA periodically shall review the State's records and may interview State staff 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 (FHWA guidance on how monitoring should occur is available at <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, 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 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 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 U.S.C. § 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 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, per 23 U.S.C. § 326(b)(2). 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 the State exercises any assigned authority on a proposed project which

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FHWA determined to be a CE prior to the July 1, 2008, execution of the Original MOU, the State assumes sole environmental review responsibility and liability for any subsequent substantive environmental review action it takes on that project.

- H. Litigation. This section assumes that 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 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 (DOJ) authority to litigate such claims, including the authority to approve a settlement, on behalf of the United States.
1. The State shall defend all claims brought in connection with its discharge of any responsibility assigned to the State. The defense shall be provided at the State's own expense, except as provided in 23 U.S.C. § 326(f). In the event that FHWA or any other Federal agency is named in litigation related to matters under this MOU, the State agrees to coordinate with DOJ in the defense of that action.
 2. The State shall notify 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 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 FHWA's Division Office and the DOJ, through its Office of the Assistant Attorney General, Environment and Natural Resources Division, 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 FHWA and DOJ shall be made prior to its response to the complaint. The State agrees to provide 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 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 consult with FHWA and DOJ prior to filing any dispositive motion in any litigation arising out of or relating to the State's discharge of any responsibility under this MOU. The State agrees to notify FHWA's Division Office and DOJ prior to settling any action or potential action and shall provide FHWA and DOJ at least 30 calendar days to review

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and comment on the proposed settlement. The State agrees not to enter into any settlement agreement without prior FHWA and DOJ consent. The State's notice will serve as the State's request for FHWA and DOJ consent to the proposed settlement. The FHWA and DOJ agree to provide an answer to the request for consent by the end of the review and comment period unless either Federal agency notifies the State that additional time is needed to obtain the appropriate settlement approval. In cases where FHWA or DOJ notify the State that additional time is needed, the Federal agency will provide an expected timeframe for responding to the State's request.

5. For 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 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 FHWA reassumes responsibility for processing a project and makes the final CE determination for the project, then FHWA shall be responsible for defending that CE determination in the event of a challenge to actions 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 FHWA's re-assumption of responsibility for processing the project.
 8. Within 7 calendar days of receipt by the State, the State will provide notice to FHWA and DOJ of any court decision, judgment, and notice of appeal arising out of or relating to the responsibilities the State has assumed under this MOU. The State agrees not to take an appeal without the consent of DOJ.
- 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(1), 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.
 - J. Participation in Resource Agency Reports. The State agrees to provide data and information requested by the FHWA Office of Project Development and Environmental Review and resource agencies for the preparation of national reports to the extent that the information relates to determinations, findings, and

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proceedings associated with projects processed under this MOU. Such reports include but are not limited to:

1. Archeology Report requested by the National Park Service;
2. Endangered Species Act Expenditure Reports requested by the United States Fish and Wildlife Service and the National Marine Fisheries Service;
3. NEPA Litigation Reports requested by the Council on Environmental Quality; and
4. Environmental Conflict Resolution reports requested by the Council on Environmental Quality.

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 U.S.C. § 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 U.S.C. § 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 the compliance, discharge, and enforcement of matters arising out of this MOU and carrying out the USDOT Secretary's responsibilities that that State assumes pursuant to this MOU and 23 U.S.C. § 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 U.S.C. § 326. A valid, binding, and sufficient waiver of the State's sovereign immunity must be in effect at all times that the State acts under the authority of this MOU.

As provided by Utah Code § 72-1-207, Utah waives its immunity under the Eleventh Amendment. If this waiver is withdrawn then the State's authority to

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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 U.S.C. § 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 U.S.C. § 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 Code § 63G-2-101, 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.

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- B. The State shall publish notice of the availability of this MOU, and any proposed amendment or renewal, for public review and comment and information regarding access to the USDOT Docket Management System on its website.
- C. The FHWA Division Office shall publish in the Federal Register a notice of availability of this MOU and any proposed amendment or renewal of this MOU, for public review and a thirty (30) 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 website.
- E. The State agrees that at all times that this MOU is in effect, the State will post on its website (<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 website or create a link from the FHWA's site to the State's site.

VII. INITIAL TERM AND RENEWAL

- A. This MOU shall have a 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

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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, or administratively modified to reflect non-substantive changes, whereupon the parties shall consult to consider such an amendment. Public notice and comment is not required for the parties to agree to a technical non-substantive change.
- 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.
 - 1. 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.
 - 2. The State may terminate its participation in the program by providing a written notice to FHWA no later than 90 calendar days before the date of termination.

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- 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 by FHWA 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. In the event of termination initiated by the State, the termination shall be effective 90 days after the date of FHWA's receipt of the State's termination notice. 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.

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- 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).

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- 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
Salt Lake City, UT 84129

Federal Highway Administration:

Division Administrator
2520 West 4700 South Suite 9A
Salt Lake City, UT 84129-1847


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

**23 U.S.C. 326 CE Assignment MOU
FHWA, Utah Division and the Utah Department of Transportation**

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



Ivan Marrero, Division Administrator
Federal Highway Administration

6/30/2014

Date

STATE OF UTAH

Carlos Braceras, Executive Director
Utah Department of Transportation

Date

Sean Reyes, Attorney General
State of Utah

Date

**23 U.S.C. 326 CE Assignment MOU
FHWA, Utah Division and the Utah Department of Transportation**

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FEDERAL HIGHWAY ADMINISTRATION

Ivan Murreroo, Division Administrator
Federal Highway Administration

Date

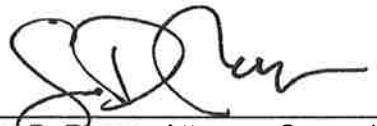
STATE OF UTAH



Carlos Braceras, Executive Director
Utah Department of Transportation



Date



Sean D. Reyes, Attorney General
State of Utah



Date

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FHWA, Utah Division and the Utah Department of Transportation**

Appendix A

23 CFR 771.117(d) Determinations that the USDOT Secretary Assigns to the State

Pursuant to Stipulation I(B)(3)

NONE.

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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; 23 CFR Part 774
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. 1996¹
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

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Parklands

Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C. 138 and 49 U.S.C. 303; and 23 CFR 774

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 Resources¹

E.O. 13007, Indian Sacred Sites¹

E.O. 13175, Consultation and Coordination with Indian Tribal Governments¹

E.O. 13112, Invasive Species

Note:

¹Under 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.

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FHWA, Utah Division and the Utah Department of Transportation**

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

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, USACE, UDOT

Effective Date: April 16, 2007, amended June 3, 2013.

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 (State Funded Minor Highway Projects MOU) (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 (Encroachment Permits MOU) (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. 79-3-508 (UGS MOU) (March 25, 2010)
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 (Goshute PA) (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 (Cedar Band PA) (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 (Indian Peaks PA)(September 29, 2008)
7. Programmatic Agreement Among the Federal Highway Administration, the Utah Department of Transportation, and the Shivwits Band of the Paiute Indian Tribe of Utah Regarding Coordination and Consultation on Federal-Aid Highway Projects in Utah in Accordance with the National Historic Preservation Act Section 106 Process and 36 CFR Part 800 (Shivwits PA) (March 15, 2011)
8. Agreement to Share Protected Records Between Governmental Entities (Division of State History and Utah Department of Transportation) (UDSH Records Agreement) (August 21, 2007)

ATTACHMENT 3

USACE COMPLIANCE WITH SECTION 106

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

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

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

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

- USACE will have 15 days to respond or concur with the APE. If they do not respond within that time period, UDOT may assume USACE has no objections and that the UDOT-defined APE encompasses the USACE-defined jurisdictional APE/Permit Area, and may proceed.
- USACE will be copied on all correspondence to and from Native American Tribes
- Tier 1 projects
 - USACE will accept the Tier 1 quarterly submittals through the process defined in this PA and will not require further SHPO consultation on each individual project. UDOT will include a copy of the Tier 1 Screening Form with all permit applications.
- Tier 2 projects
 - USACE will be copied on the determination of eligibility and finding of effect (DOE-FOE) letter to SHPO submitted by UDOT.
 - The DOE-FOE or FOE will describe the effects on historic properties within the USACE-defined jurisdictional APE/Permit Area.
 - UDOT will request USACE concurrence on the determinations and findings within the USACE-defined jurisdictional APE/Permit Area.
 - If USACE fails to comment on any findings contained in a submission within 30 calendar days of receipt, UDOT may assume they have no objection and proceed to the next step in the consultation process pursuant to 36 CFR 800.3(c)(4).
- Memorandums of Agreement (MOAs)
 - USACE will be a signatory on all MOAs with adverse effects within their jurisdictional APE/Permit Area.
- On projects with a USACE permit, the discovery process will include the USACE if within their jurisdictional APE/Permit Area.

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

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

1. Pavement repairs within the roadway prism including pothole repairs, joint repairs, pavement patching, soft spot repairs, crack sealing of roads, rumble strips, and pavement marking, striping, and messaging where the construction does not disturb original ground.
 2. Bridge maintenance and other structure repairs where work is limited to the structure, including deck and joint repairs, sealing, painting, approach slab work, and barrier/railing upgrades or replacement.
- C. Signing Related
1. Installation and replacement of signs within the roadway prism, including replacement of existing signs in-kind and/or any sign that does not disturb original ground. Signs include traffic signs, information signs, mile markers, and other delineators.
 2. Other signs within the roadway prism that include installation of driven foundation posts 6" or less in diameter for signs, or drilled shaft foundations generally to a maximum diameter of 36."
- D. Roadside Safety Related
1. Install, repair, replace or upgrade existing guardrail, impact attenuators, and/or crash cushions on highways within the roadway prism where construction does not disturb original ground.
 2. Install or replace center median or shoulder barriers on highways within the roadway prism where construction does not disturb original ground. Includes barriers of concrete, cable, or similar material type.
- E. Traffic Monitoring Related
1. Install, replace, and upgrade traffic signal and lighting poles, located entirely in uplands. Includes street lighting poles.
 2. Install highway monitoring systems including loop detectors (or other types of sensors), cameras, radio systems, ATMS systems, and variable message signs (with the exception of towers) where construction does not disturb original ground, located entirely in uplands.
- F. Other Project Types
1. Any project, not specifically mentioned above, where all proposed work will take place on existing roadways within roadway prism (toe of slope to top of cut).
 2. Streetscape improvements, including benches, decorative lighting, textured crosswalks, transit shelters, community signage, and containerized plantings where the construction does not disturb original ground.
 3. Rehabilitation of historic structures where construction is limited to the structure.
 4. Rehabilitation of historic transportation equipment such as railroad locomotives and rail cars.
 5. Purchase of scenic easements or abandoned rail corridors where no construction activity is planned. Resale of scenic easements is not part of this agreement.

ATTACHMENT 4

RESPONSIBILITIES

TIER 1 AND TIER 2 PROJECTS

PA Stipulation No.	Activity	FHWA	UDOT	USACE	Consultant¹	Comments
IV.A	Ensure compliance with the terms of Agreement	X				
IV.B.1 & IX.8	Determine undertaking		X			
IV.B.2 & IX.A	Determine if type of undertaking has potential to cause effects		X			
IV.B.3 & IX.A	Determine if undertaking has potential to affect historic properties on tribal lands		X			
V.A & IX.A.C	Initial consultation with Tribes	X				Unless Tribes have agreed to consultation with UDOT PQS
V.E	Subsequent consultation with Tribes	X				Unless Tribes agree to alternate procedures
IV.B.6 & IX.A	Identify and invite consulting parties		X		X	
IV.B.5	Solicit public comment		X		X	
IV.B.7 & IX.B	Determine scope and level of effort; if field survey is needed		X			
IV.B and IX.B	Determine APE		X	X		
IX.B	Conduct literature search		X		X	
IX.B	Conduct field survey		X		X	
VII.A	Determine if project qualifies for Tier 1 review process		X			
IV.B. and IX.C	Determine historic property boundaries		X		X	
N/A	Recommendations of eligibility				X	
IV.B.9 & IX.C	Determine eligibility		X			
N/A	Draft DOE 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	
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		X			

PA Stipulation No.	Activity	FHWA	UDOT	USACE	Consultant ¹	Comments
	comment					
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, USACE, SHPO, Council, Tribes of discovery		X			
XI.B.	Develop treatment plan for discovery		X		X	
XI.B.	Consultation on discovery		X			
XI.B.	Data recovery of discovery		X		X	
XIII.B	Monitor implementation of Agreement					
XIII.C	Resolving objections to implementation of Agreement	X	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

DELEGATED CEs

PA Stipulation No.	Activity	FHWA	UDOT PQS	USACE	Consultant¹	Comments
IV.A	Ensure compliance with the terms of Agreement	X				
IV.B.1 & IX.8	Determine undertaking		X			
IV.B.2 & IX.A	Determine if type of undertaking has potential to cause effects		X			
IV.B.3 & IX.A	Determine if undertaking has potential to affect historic properties on tribal lands		X			
V.A & IX.A.C	Initial consultation with Tribes	X				Unless Tribes have agreed to consultation with UDOT PQS
V.E	Subsequent consultation with Tribes	X				Unless Tribes agree to alternate procedures
IV.B.6 & IX.A	Identify and invite consulting parties		X		X	
IV.B.5	Solicit public comment		X		X	
IV.B.7 & IX.B	Determine scope and level of effort; if field survey is needed		X			
IV.B and IX.B	Determine APE		X	X		
IX.B	Conduct literature search		X		X	
IX.B	Conduct field survey		X		X	
VII.A	Determine if project qualifies for Tier 1 review process		X			
IV.B. and IX.C	Determine historic property boundaries		X		X	
N/A	Recommendations of eligibility				X	
IV.B.9 & IX.C	Determine eligibility		X			
N/A	Draft DOE 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	
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	

PA Stipulation No.	Activity	FHWA	UDOT PQS	USACE	Consultant ¹	Comments
IX.D	Execute MOA or finalize Treatment Plan		X			
IX.D	Distribute executed MOA or final Treatment to consulting parties		X			
IX.D	Send executed MOA and supporting documentation to Council		X			
IX.D	Carry out stipulations in MOA or Treatment Plan		X		X	
XI.B.	Notify FHWA, USACE, SHPO, Council, Tribes of discovery		X			
XI.B.	Develop treatment plan for discovery		X		X	
XI.B	Consultation on discovery		X			
XI.B	Data recovery of discovery		X			
XIII.B	Monitor implementation of Agreement	X			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

ATTACHMENT 5

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 is 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 which will be included in the appropriate environmental document. The Tier 1 Screening Form and Supporting documentation will be submitted to the SHPO quarterly.

ATTACHMENT 6

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

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

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

ATTACHMENT 7

DELINEATION OF AREA OF POTENTIAL EFFECTS (APE)

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

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

As defined in 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 its setting; visual, audible, or atmospheric intrusions; shadow effects; vibrations; and change in access or use.

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

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

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

1. Noise: When considering potential noise effects, there must be a reasonable basis for predicting an effect based on an increase over existing noise level. Noise effects should be considered when a project would result in a new through lane or a substantial change in vertical or horizontal alignment.
2. Visual: Highways on new alignments, multi-level structures, or elevated roadways are considered to have potential for visual effects if they could be out of character with or intrude upon a historic property or isolate it from its setting. Projects for improvement or expansion

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

Different APEs may be established for archaeological and built properties:

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

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

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

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

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

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

ATTACHMENT 8

SECTION 4(F) *DE MINIMIS* AGREEMENT

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

09-0696



State of Utah

GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

DEPARTMENT OF TRANSPORTATION

CARLOS M. BRACERAS, P.E.
Executive Director

SHANE M. MARSHALL, P.E.
Deputy Director

April 13, 2017

Mr. Brad Westwood
Deputy State Historic Preservation Officer
Utah Division of State History
300 Rio Grande
Salt Lake City, UT 84101-1182

RE: Section 4(f) De Minimis Determination Pursuant to SAFETEA-LU Section 6009

Dear Mr. Westwood:

In accordance with Parts 3.1.1 and 3.2.1 of the *Memorandum of Understanding Between the Federal Highway Administration and the Utah Department of Transportation Concerning State of Utah's Participation in the Surface Transportation Project Delivery Program Pursuant to 23 USC §327* (executed January 17, 2017), the Utah Department of Transportation (UDOT) assumes responsibility, assigned by the Federal Highway Administration (FHWA), for ensuring compliance with Section 4(f) of the DOT Act of 1966, as amended. This letter was prepared in accordance with FHWA Guidance regarding Section 6009(a) of the 2005 Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). Section 6009 allows increased flexibility with respect to minor transportation impacts to Section 4(f) properties, including historic properties. It simplifies the processing and approval of federally funded transportation projects that have a *de minimis* impact on lands protected by Section (f). For historic properties, a finding of *de minimis* impact on a historic site may be made by the UDOT when Section 106 consultation results in the written concurrence of the State Historic Preservation Office (SHPO) with the determination of "no adverse effect" or "no historic properties affected".

SAFETEA-LU has no other Section 106 implications other than the requirement for written SHPO concurrence with Section 106 findings of effect for individual Section 4(f) properties. It does require UDOT to notify the SHPO of UDOT's intent to utilize the finding of "no historic properties affected" or "no adverse effect" for individual Section 4(f) properties as a basis for making a Section 4(f) *de minimis* use finding.

On December 13, 2005, FHWA issued guidance to implement the Section 6009 provision of SAFETEA-LU. The guidance (attached) includes *Questions and Answers on the Application of the Section 4(f) de minimis Impact Criteria* and offers several points of relevant direction. We refer you to Question 2 of the guidance titled: *De Minimis Impact Findings for Section 4(f) Uses of Historic Properties*.

Therefore, in accordance with the 2005 Guidance, and by transmittal of this letter, the FHWA is notifying your office of UDOT's intent to make the Section 4(f) *de minimis* use finding for properties where a determination of "no historic properties affected" or "no adverse effect" has been concurred in by your office or when your office has not replied within the appropriate timeframe with written concurrence.

Received
APR 19 2017
USHPO

Should you have any questions or need additional information, please feel free to contact Liz Robinson at 801-910-2035 or lizrobinson@utah.gov. Please return this signed letter to UDOT Central Environmental Division.

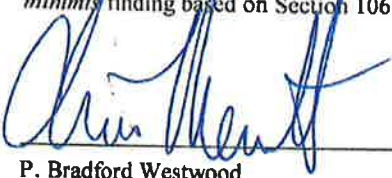
Sincerely,



Brandon Weston
Environmental Services Director
UDOT Central Environmental

Enclosures

By the following signature, the SHPO acknowledges it has been notified of the intent of the UDOT to make a *de minimis* finding based on Section 106 determinations of effect for specific properties.



P. Bradford Westwood
State Historic Preservation Officer

4/21/17
Date

For