

**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**

WHEREAS, the Federal Government has a unique relationship with Indian tribes derived from the Constitution of the United States, treaties, Supreme Court doctrine, and Federal statutes whereby Indian tribes are recognized as sovereign nations. The Federal Highway Administration (FHWA), as a Federal agency, recognizes the government-to-government relationship between the United States and federally recognized Indian tribes and acknowledges the Cedar Band of Paiute Indians of Utah, as a sovereign nation with inherent powers of self-governance; and

WHEREAS, the FHWA is the agency of the United States Government that has the responsibility for administering the Federal-aid highway program in Utah and agrees to coordinate under a government-to-government relationship with Federally recognized tribal governments in compliance with Section 106 of the National Historic Preservation Act (NHPA); and

WHEREAS the Cedar Band of Paiute Indians (Band) is a sovereign government having an interest in the preservation and protection of its treaty rights and cultural heritage both within the boundaries of the Cedar Band Reservation and within the lands claimed and occupied by the Band at the time described in the Paiute Indian Tribe of Utah Restoration Act (25 U.S.C. § 761) and its implementing P.L. 96-227 on April 3 1980. The Cedar Band is one out of five bands which makes up the Paiute Indian Tribe of Utah (Tribe) as shown in Attachment 1, and the Cedar Band Council is the governing body for the Band and has the authority to participate in this Programmatic Agreement (PA); and

WHEREAS, the FHWA has requested the Utah Department of Transportation (UDOT), the primary recipient of Federal-aid highway funds in the State of Utah, to provide assistance to FHWA in complying with the body of environmental law that includes the National Environmental Policy Act (NEPA), the NHPA, and other similar laws; and

WHEREAS, the Band has requested the Tribe to provide assistance to the Band in complying with the body of environmental law that includes the National Environmental Policy Act (NEPA), the NHPA, and other similar laws in its absence; and

WHEREAS, the FHWA has determined that its undertakings may have an effect upon properties included in or eligible for inclusion in the National Register of Historic Places that may be of interest to the Tribe and through this PA has consulted with the Tribe and the Advisory Council on Historic Preservation (Council) pursuant to 36 CFR 800.14 of the regulations implementing Section 106 of the NHPA; and

WHEREAS, the provisions of the NHPA regulations in 36 CFR 800.2(c)(2)(E) encourage Federal agencies to enter into agreements with Indian tribes that specify how they will carry out their responsibilities in the Section 106 process; and

WHEREAS, respectful of each other's legitimate values and goals, FHWA, the Tribe, and UDOT agree to establish and maintain a relationship based on open dialog, mutual respect, and early coordination. The overall purpose of this PA is to create a consultation process that allows the opportunity for tribal input on actions by the FHWA and UDOT and to cooperatively work together to implement the NHPA and address other issues of mutual concern. The goal of this dialog is to allow FHWA and UDOT to use this input to identify impacts to the social, cultural, natural, and economic environments and seek opportunities to avoid and minimize those impacts, or to preserve or enhance the resource when possible prior to undertaking an action; and

WHEREAS, the representatives of the FHWA have engaged in consultation with representatives of the Tribe, and have jointly agreed to establish a consultation process in a PA; and

WHEREAS, the UDOT has participated in the consultation and has been invited to sign this PA; and

WHEREAS, nothing in this PA shall alter, amend, repeal, interpret, or waive tribal sovereignty, tribal sovereign immunity, any treaty rights, or other such rights of the Tribe, or to preempt, modify, or limit the exercise of any such rights; and

NOW, THEREFORE, the FHWA, the Tribe, the Band and the UDOT hereby agree to the following consultation process for Federal-aid highway transportation projects in the State of Utah in compliance with Section 106 of NHPA.

Stipulations

All parties to this PA agree to ensure that the following measures are carried out:

1. Applicability

- a. The UDOT shall implement the provisions set forth in this PA for any Federal-aid transportation project located within the geographic area of interest delineated in

Attachment 2 by the Band. In doing so, the FHWA, with the assistance of the UDOT, will meet its responsibilities with regard to consultation with the Band under Section 106 of the NHPA.

- b. The UDOT is authorized by the FHWA to initiate consultation with the Band pursuant to 36 CFR 800.2(c)(4) and the Statewide PA among the FHWA, UDOT, Utah SHPO, and the Council (Attachment 3), but the FHWA remains legally responsible for all findings and determinations charged to the agency official and this authorization is not intended to reduce the FHWA's government-to-government consultation responsibilities.
- c. This PA sets forth all aspects of Band participation in the Section 106 process and is intended to facilitate the direct participation of the parties in all phases of an undertaking that has the potential to affect historic properties and cultural resources protected by treaty and applicable statutes. A request for Band participation shall be initiated at the earliest stage possible and shall continue from the planning stage, through scoping, design, construction, operation, and into maintenance, as appropriate, based on the context and the intensity of the undertaking and possible impacts of the undertaking to historic properties and cultural resources of concern to the Band.

2. Designation of point of contact and their responsibilities

- a. The individual designated as the primary point of contact for each party to the PA shall serve as the official representative responsible for responding to requests and issuing decisions under the provisions of this PA. Any party to this PA may identify others they wish to be included as secondary contacts. Secondary contacts shall be provided copies of transmitted information but are not responsible for responding to requests and making decisions *unless the primary point of contact is unavailable*.
- b. The role of the primary point of contact is to develop a relationship with other points of contact with the goal of a clearer understanding of the needs and concerns of all parties and to respect cultural resources. These individuals should strive to develop relationships that will result in more effective cultural resources management and improve the effectiveness and efficiency of the consultation process.
- c. Identification of the points of contact (Attachment 4):
 1. The FHWA's Contact:
The FHWA Tribal Coordinator is the primary point of contact for FHWA. The Division Administrator and the Environmental Program Manager are secondary contacts for FHWA.

2. The Band's Contact:
The Band Chairperson is the primary point of contact for the Band. The Cultural Resource Coordinator and the Tribal Chairperson are secondary contacts for the Band.
3. The UDOT's Contact:
The UDOT primary point of contact shall depend upon the location of the undertaking according to regions defined by UDOT. Within each region, the primary point of contact shall be the Region NEPA/NHPA Specialist except for Region 4 where primary point of contact is recognized by Districts. The Cultural Resource Program Manager is a secondary contact for UDOT.

d. Change in contacts and addresses for contacts

1. Any party to this PA may change its point of contact person for purposes of this PA by communicating to the other parties in writing within 30 days of the effective date of that change. Such changes do not require this PA to be amended.
2. Addresses and other contact information for the contacts are found in Attachment 4 to this PA. It is the responsibility of each of the parties to update any changes in that contact information based on information provided pursuant to Stipulation 2.d.1..

3. Procedures for notifications to the Band

- a. The UDOT will contact the Band in order to provide information about undertakings and to solicit comments regarding how an undertaking may affect properties of traditional religious and cultural significance to the Band. The UDOT is authorized to consult with the Band on any matter pertaining to this PA. The FHWA remains responsible for complying with all Federal requirements, including government-to-government consultation with the Band. Therefore, the FHWA shall honor any request by the Band for government-to-government consultation notwithstanding any provisions of this PA.
- b. The UDOT shall contact the Band for proposed transportation projects located in the geographic area identified by the Band as areas of concern for cultural resources, depicted on the map in Attachment 2, subject to the exclusions in Stipulation 3(c).
- c. ~~Certain projects are exempted from review and information about them will not be provided by the UDOT. The types of projects listed in Attachment 5 are unlikely to affect cultural resources, and by agreement of the parties to this PA are exempted from the Section 106 Tribal Consultation process unless specific~~

information about a risk of affecting cultural resources is presented. This exemption is intended to streamline the consultation process.

- d. The UDOT shall provide initial information about an undertaking by using a *Project Initial Tribal Notification Form* (Attachment 6) in its initial contact with the Band. The *Project Initial Tribal Notification Form* will minimally contain the following information: the project name, a map of the project area, the project type, the potential for archaeological sites in the project area, and a request to the Band to respond with concerns. This information will be transmitted via email, read return receipt, and U.S. mailed to the Band's primary point of contact and the Tribe's Cultural Resources Coordinator.
- e. The UDOT shall utilize the *Project Information Form* (Attachment 7) for transmitting information to the Band and Tribe on the identification and evaluation of historic properties and resolution of adverse effects. The UDOT shall provide information about inventories of cultural resources for undertakings as soon as they become available. The UDOT may also ask to discuss this information with the Band, including whether further involvement by the Band is desired.
- f. The UDOT shall notify the Band by email or phone of unanticipated discoveries for projects in construction, in accordance with the provisions in Stipulation 5.
- g. The UDOT shall transmit notifications and information not otherwise addresses in this section of this PA to the Band via telephone, fax, email, or US mail. For telephone transmittals a record will be kept by the UDOT and the Band of all phone conversations.
- h. The FHWA and UDOT understand that some information about cultural resources or traditional knowledge or practices is sensitive. The FHWA and UDOT shall, at the request of the Band, treat certain matters of concern to the Band as sensitive. This may result in such matters not being transcribed or written records of such matters protected from public disclosure based on applicable laws (Section 304 of NHPA and Section 9(a) of the Archaeological Resources Protection Act (ARPA)).
- i. The FHWA and UDOT may request to meet with the Band on any matter covered by this PA or regarding performance of this PA.

4. Procedures for responses from the Band

- a. The Band understands that in order to best have its issues addressed, any questions or concerns it has needs to be transmitted to the UDOT as early as possible, ideally when a project is still in its initial planning stages. Certain requests for information from the Band primary point of contact may require the Band to consider the matter internally. For these and other matters, the Band

commits to sharing information, questions, and concerns with the UDOT, as needed, even though the Band may still be deliberating on such matters.

- b. The Band shall respond after it has received either a *Project Initial Tribal Notification Form* or a *Project Information Form*. The Band will complete the *Tribal Response* sections on the forms as completely as possible and make a good-faith effort to respond within 30 calendar days of receipt. If the Band's response does not arrive at UDOT within 30 calendar days of the Band's receipt of a request for review and comment, UDOT may proceed to the next step in the consultation process. If the Band does not respond to a request for comment it will not prevent the Band from providing a response at a later point. If the Band responds with concerns on matters after the 30 day period and FHWA and UDOT have made decisions based on that lack of response, FHWA and UDOT are not required to reconsider those matters. However, UDOT will make a reasonable attempt to incorporate any information or comments received after 30 days, as the project allows.
- c. The Band's response may be transmitted by telephone, fax, email, or US mail. For telephone transmittals a record will be kept by the Band of all phone conversations.
- d. Part of the Band's response may be a request for a face-to-face meeting in order to facilitate the transmittal of information or concerns. The FHWA and UDOT shall make a reasonable and good faith effort to accommodate such requests. If a face-to-face meeting cannot be reasonably accommodated, the FHWA and UDOT will offer an alternative.
- e. The Band may request to meet with the FHWA and/or UDOT on any matter covered by this PA or regarding performance of this PA.

5. Unanticipated Discovery

- a. In the event of an unanticipated discovery of a Native American archeological site after award of a construction contract on a project in the Band's geographic area of concern, the UDOT shall notify the Band by telephone and/or email within 24 hours of the discovery. The UDOT shall invite the Band to visit the site and shall protect and secure the discovery location to the fullest extent possible. The UDOT shall notify the Band of its determination of the need (or not) for further investigations. The Band shall respond to an invitation for a visit within 24 hours of receipt of notice of the discovery.
- b. If investigations of the discovery are determined to be warranted, the UDOT shall transmit to the Band a draft of the plan of those investigations. The Band shall have one full business day to reply. The UDOT shall consider any concerns contained in the Band's response to the fullest extent possible.

- c. If the Band objects to any matter related to the discovery, the UDOT shall provide the FHWA a copy of the documentation including the basis for the Band's objection, along with copies of the results of consultation with all consulting parties. The FHWA shall review this documentation and notify all parties of its decision.

6. Native American Remains

- a. In the event Native American burials that may be culturally affiliated with the Band are anticipated or discovered during archaeological excavation or during construction of the project, they shall be treated pursuant to the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001 *et seq.*) and the Utah Native American Graves Protection and Repatriation Act of 1992 (U.C.A. 9-9-401 *et seq.*, and its implementing Rule R230-1).
- b. During the excavation of any Native American human remains, the UDOT shall take the following measures: ensure that they are treated respectfully and with dignity at all times; provide security for the site to prevent vandalism; and no photographs will be taken of human remains or open graves other than photo-documentation needed for recordation of the excavation;
- c. The UDOT shall provide an opportunity for the culturally affiliated Band to visit the site and provide comments during archaeological excavation and for the Band to perform appropriate ceremonies.

7. Dispute Resolution

- a. Should any party to this PA object in writing to FHWA regarding any action carried out or proposed with respect to a particular undertaking or implementation of this PA, the FHWA shall consult with the objecting party to resolve the objection. If after initiating such consultation the FHWA determines that the objection cannot be resolved through consultation, the FHWA shall consult with all parties (unless the information is identified as confidential to the Band). After consultation with the other parties, the FHWA shall make a decision and forward all documentation to all parties. If the objection is relative to Section 106 consultation, the FHWA shall forward all documentation relevant to the objection to the Council pursuant to 36 CFR 800.6(b), including the FHWA's proposed response to the objection.
- b. The FHWA's responsibility to carry out all actions under this PA that are not the subject of the objection shall remain unchanged.

8. Monitoring Implementation of this Agreement

- a. The FHWA may review activities carried out pursuant to this PA. The UDOT shall facilitate this review by compiling information to document the effectiveness of the PA and by making the information available on an annual basis to the FHWA and the Band in the form of a written report. Categories of information will include, but are not limited to, a list of projects for which consultation was carried out and the extent of Tribal involvement, projects that were exempted from review, and resolution of Tribal concerns.
- b. The UDOT shall, by November 30th of each year, prepare and submit the written report to the FHWA and the Band covering the previous year from October 1 to September 30th. The initial report shall be submitted by November 30, 2009, covering the effective date of this PA until September 30, 2009.
- c. The FHWA shall monitor the consultation process outlined in this PA at its discretion, including conducting process reviews from time to time.
- d. The FHWA shall notify the Band and the UDOT of any meetings to be held for the express purpose of monitoring compliance with the provisions of this PA by providing a thirty-day notice.

9. Amendment and Termination

- a. Any party to this PA may request that it be amended at any time, whereupon the parties will consult in accordance with 36 CFR 800.14 to consider such proposed amendment.
- b. Any party to this PA may terminate it by providing thirty days written notice to FHWA, provided that the parties will consult during the period before termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, the FHWA shall comply with 36 CFR Part 800 with regard to individual undertakings, otherwise covered by this PA.

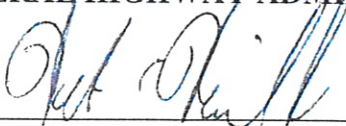
10. Duration

The conditions of this PA shall be in place, including any amendments thereto until terminated.

Execution of this PA by the FHWA, the Paiute Indian Tribe of Utah, the Cedar Band of Paiute Indians and the UDOT, and the implementation of its terms, documents the efforts of FHWA to consult with the Band under Federal law and regulations. The Band and the Tribe recognizes the actions of UDOT in assisting FHWA in carrying out its responsibilities under Section 106 of the NHPA.

SIGNATORIES

FEDERAL HIGHWAY ADMINISTRATION

By: 
Walter C. Waidelich, Jr., Division Administrator

Date: 9/29/08

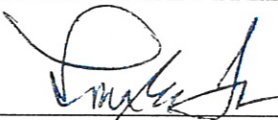
CEDAR BAND OF PAIUTE INDIANS

By: 
Renae Pete, Band Chairwoman

Date: 9/29/08

INVITED SIGNATORY

THE PAIUTE INDIAN TRIBE OF UTAH

By: 
Lora Tom, Tribal Chairwoman

Date: 9/29/08

UTAH DEPARTMENT OF TRANSPORTATION

By: 
John Njord, Executive Director

Date: 9-29-08