

51 SHPO and the ACHP pursuant to 36 CFR §800.14(b); and

52

53 WHEREAS, FHWA recognizes that it has a unique legal relationship with Indian Tribes
54 (Tribes) set forth in the Constitution of the United States, treaties, statutes, and court decisions,
55 and therefore, consultation with a Tribe must recognize the government-to-government
56 relationship between the federal government and Tribes; and

57

58 WHEREAS, FHWA has consulted with Tribes, as defined in 36 CFR §800.16(m), with
59 ancestral lands in Nevada about this Agreement and has taken into account comments from
60 Tribes. The Tribes consulted include the Battle Mountain Band Council, the Confederated
61 Tribes of the Goshute, Duck Valley Shoshone-Paiute Tribes, Duckwater Shoshone Tribe, Elko
62 Band Council, Ely Shoshone Tribe, Fort McDermitt Paiute Shoshone Tribe, Fort Mojave Indian
63 Tribe, Fallon Paiute-Shoshone Tribe, Lovelock Paiute Tribe, Las Vegas Paiute Tribe, Moapa
64 Band of Paiutes, Pyramid Lake Paiute Tribe, Pahrump Paiute Tribe, Reno-Sparks Indian
65 Colony, South Fork Band Council, Summit Lake Paiute Tribe, Timbisha Shoshone Tribe, Te-
66 Moak Tribal Council, Wells Band Council, Winnemucca Indian Colony, Walker River Paiute
67 Tribe, Washoe Tribe of Nevada and California, Yerington Paiute Tribe, and the Yomba
68 Shoshone Tribe; and

69

70 WHEREAS, FHWA has invited the Tribes to sign this Agreement as concurring parties
71 and [List which Tribes are signing] has/have chosen to participate in this Agreement as a
72 concurring party; and

73

74 WHEREAS, any undertaking involving tribal lands as defined in 36 CFR §800.16(x) shall
75 not be governed by this Agreement, but shall be reviewed in accordance with 36 CFR Part 800;
76 and

77

78 WHEREAS, the U.S. Army Corps of Engineers, Sacramento District (USACE)
79 administers a Department of the Army Regulatory permit program under the authority of the
80 Clean Water Act of 1973, Section 404 (33 U.S.C. §1344), and a Section 408 permission
81 program under the authority of the Rivers and Harbors Act of 1899, Section 14 (33 U.S.C.
82 §408), to which Program-funded undertakings may be subject; therefore, FHWA has consulted
83 with and invited USACE to be a signatory to this Agreement and to use this Agreement to meet
84 their Section 106 responsibilities, and USACE has chosen to participate in this Agreement as a
85 signatory; and

86

87 WHEREAS, Program-funded undertakings may cross lands managed by the Bureau of
88 Land Management (BLM); therefore, FHWA has consulted with and invited the BLM to be a
89 signatory to this Agreement and to use this Agreement to meet their Section 106
90 responsibilities, and the BLM has chosen to participate in this Agreement as a signatory; and

91

92 WHEREAS, Program-funded undertakings may cross lands managed by the U.S. Forest
93 Service (USFS) Humboldt-Toiyabe National Forest and Lake Tahoe Basin Management Unit;
94 therefore, FHWA has consulted with and invited the USFS to be a signatory to this Agreement
95 and to use this Agreement to meet their Section 106 responsibilities, and the USFS has chosen
96 to participate in this Agreement as a signatory; and

97

98 WHEREAS, Program-funded undertakings may cross lands managed by the Bureau of

99 Reclamation (Reclamation) Interior Region 10 California-Great Basin and Interior Region 8
 100 Lower Colorado Basin; therefore, FHWA has consulted with and invited Reclamation to be a
 101 signatory to this Agreement and to use this Agreement to meet their Section 106
 102 responsibilities, and Reclamation has chosen to participate in this Agreement as a signatory;
 103 and
 104

105 WHEREAS, Program-funded undertakings may cross lands managed by the U.S. Fish
 106 and Wildlife Service (USFWS) Region 8 Pacific Southwest; therefore, FHWA has consulted with
 107 and invited the USFWS to be a signatory to this Agreement and to use this Agreement to meet
 108 their Section 106 responsibilities, and the USFWS has chosen to participate in this Agreement
 109 as a signatory; and
 110

111 WHEREAS, FHWA, ACHP, SHPO, NDOT, BLM, USFS, Reclamation, USFWS and
 112 USACE are collectively referred to herein as the "signatories" or individually as "signatory"; and
 113

114 WHEREAS, FHWA has solicited public participation about this Agreement, has
 115 requested their comments, and has taken any comments received into account; and
 116

117 WHEREAS, FHWA and BLM have entered into a Memorandum of Understanding
 118 (MOU), as amended, Concerning Operating Procedures for Processing Federal-Aid Highway
 119 Rights-of-Ways from the BLM in the MOU (Handbook Appendix C). MOU Stipulation V.B. states
 120 that FHWA is the lead Federal Agency for Program-funded projects on BLM-owned land. MOU
 121 Stipulation V.C. states that NDOT will work with FHWA to comply with Section 106 of the NHPA.
 122 This Agreement spells out the process whereby MOU Stipulations V.B and V.C. are executed.
 123 This Agreement does not apply to Mineral Material Site Exploration activities or non-Program-
 124 funded projects on BLM administered lands; and
 125

126 WHEREAS, FHWA has delegated certain Section 106 responsibilities to NDOT, which
 127 are discussed below; and
 128

129 NOW, THEREFORE, the signatories agree that the Program in Nevada shall be carried
 130 out in accordance with the following stipulations in order to take into account the effects of the
 131 Program on historic properties in Nevada and that these stipulations shall govern compliance of
 132 the Program with Section 106 of the NHPA until this Agreement expires or is terminated.
 133

134 **STIPULATIONS**

135 FHWA, assisted by NDOT, will ensure that the following measures are carried out:
 136
 137

138 **I. PURPOSE AND APPLICABILITY**

139 A. This Agreement sets forth the process by which FHWA will meet its
 140 responsibilities under Section 106 of the NHPA, with the assistance of NDOT, for
 141 all FHWA undertakings implemented by NDOT. This Agreement establishes the
 142 basis for considering the effects of FHWA undertakings on historic properties and
 143 establishes alternative procedures to implement Section 106 for the review of
 144 such undertakings by FHWA, SHPO, and ACHP.

- 145 B. This Agreement intends to make more efficient the methods by which FHWA and
146 NDOT review individual undertakings with the potential to affect Historic
147 Properties and to establish the process by which signatories will be involved in
148 such reviews.
- 149 C. Through this Agreement FHWA authorizes NDOT to initiate, and conclude,
150 consultation with SHPO and other consulting parties for purposes of compliance
151 with Section 106.
- 152 D. At any point in the Section 106 process, FHWA may inquire with NDOT as to the
153 status of any undertaking and may participate directly in consultation for any
154 undertaking at their discretion. NDOT will process undertakings pursuant to 36
155 CFR §800.3 - §800.7 if FHWA, SHPO, or ACHP so request.
- 156 E. The NDOT Cultural Resources Handbook (Handbook) describes the details of
157 the implementation of this Agreement.
- 158 F. Consulting federal agencies who designate FHWA as the lead Federal agency
159 for an undertaking may fulfill their obligations under Section 106 of the NHPA
160 pursuant to 36 CFR §800.2(a)(2) through use of this Agreement, provided that
161 FHWA and NDOT follow the requirements of this Agreement, and the consulting
162 federal agency's undertaking does not have the potential to cause effects to
163 historic properties beyond those considered by FHWA and NDOT (Handbook
164 Appendix B).
- 165 G. This Agreement establishes the process for compliance with Section 106 of the
166 NHPA (54 U.S.C. §306108) for undertakings covered by this Agreement. The
167 NHPA consultation and decision-making processes set forth herein shall operate
168 independently from, and shall not be modified, delayed, expanded, or
169 superseded by, the requirements, findings, determinations, schedules, or
170 priorities of other environmental or regulatory review authorities, including
171 executive orders and agency policy directives, unless such integration is explicitly
172 authorized within this Agreement.
- 173 H. No determination, document, recommendation, or decision issued pursuant to
174 another statute, executive order, regulation, or internal agency policy shall have
175 the effect of altering the NHPA compliance responsibilities, consultation
176 framework, or outcomes established under this Agreement.

177 II. RESPONSIBILITIES OF THE FHWA AND NDOT

178 A. FHWA

- 179 1. Consistent with the requirements of 36 CFR §800.2(a), FHWA remains
180 legally responsible for ensuring that the terms of this Agreement are
181 carried out and for all findings and determinations made pursuant to this
182 Agreement by NDOT under the authority of FHWA notwithstanding any
183 other provision of this Agreement, and for ensuring compliance with all
184 other applicable federal laws and statutes.
- 185 2. FHWA retains the responsibility for government-to-government
186 consultation with the Tribes as defined in 36 CFR §800.16(f) and (m).

187 FHWA may ask NDOT to assist in consultation if a Tribe agrees to
188 alternative procedures.

189 3. FHWA will notify ACHP of any findings of adverse effect and invite
190 ACHP to participate in resolving the adverse effect of an undertaking in
191 accordance with 26 CFR §800.6(a)(1).

192 4. FHWA shall be responsible for resolving disputes and objections
193 pursuant to Stipulation X of this Agreement.

194 B. NDOT

195 1. NDOT, using staff meeting the *Secretary of the Interior's* (SOI)
196 *Professional Qualifications Standards*, will independently perform the
197 work and consultation described in 36 CFR §800.3 - §800.6 on behalf of
198 FHWA. These responsibilities include carrying out the following
199 requirements:

200 a. Determine whether the undertaking is a type of activity that has
201 the potential to affect historic properties pursuant to 36 CFR
202 §800.3(a).

203 b. Determine whether the undertaking may occur on or has the
204 potential to affect historic properties on tribal lands pursuant to 36
205 CFR §800.3(c) and (d).

206 c. Solicit public comment and involvement in accordance with 36
207 CFR §800.3(e).

208 d. Identify additional consulting parties as described in 36 CFR
209 §800.3(f) and invite them to participate in the Section 106 process
210 of an undertaking covered by this Agreement.

211 e. Determine, in consultation with SHPO, the scope of identification
212 efforts and level of identification, including the undertaking's Area
213 of Potential Effects (APE), pursuant to 36 CFR §800.4(a).

214 f. In consultation with SHPO and any Tribe that may attach religious
215 and cultural significance to properties within the area of potential
216 effects, identify historic properties within the undertaking's APE
217 pursuant to 36 CFR §800.4(b) and evaluate the historic
218 significance of historic properties identified within the APE
219 pursuant to 36 CFR §800.4(c).

220 g. Determine whether an undertaking has no historic properties
221 affected pursuant to 36 CFR §800.4(d)(1) or historic properties
222 that may be affected pursuant to 36 CFR §800.4(d)(2). If there are
223 historic properties that may be affected by an undertaking,
224 determine if the undertaking will have adverse effects in
225 accordance with 36 CFR §800.5.

226 h. In consultation with FHWA, SHPO, ACHP if participating, and any

- 227 other consulting parties, resolve any adverse effects to historic
228 properties in accordance with 36 CFR §800.6.
- 229 2. All actions prescribed by this Agreement that involve the identification,
230 evaluation, analysis, recording, treatment, monitoring, or disposition of
231 cultural resources, or that involve the reporting or documentation of
232 such actions in the form of reports, forms, or other records, shall be
233 carried out by or under the direct supervision of a person or persons
234 who meets the *Secretary of the Interior's Professional Qualifications*
235 *Standards* for Archaeology or History (published in 48 FR 44738-44739)
236 and for archaeological work, such individuals must also hold a valid
237 permit issued by the State of Nevada and comply with permit
238 requirements of signatories or other consulting federal agencies, as
239 applicable. However, nothing in this stipulation may be interpreted to
240 preclude FHWA or NDOT or any agent or contractor thereof from using
241 the services of persons who do not meet these qualifications standards,
242 providing their activities are conducted under the direct supervision of a
243 person who does meet the standards.
- 244 3. NDOT shall employ personnel trained, experienced, and qualified in the
245 fields of archaeology, history, and architectural history (as defined in 36
246 CFR §61 Appendix A) in the Cultural Resources Section, Environmental
247 Services Division. Except on such occasions when FHWA elects to
248 consult directly with SHPO or ACHP, all consultation with SHPO and
249 other consulting parties under this Agreement and decisions made
250 under Stipulation V may be performed by NDOT Cultural Resources
251 Section. NDOT is authorized to consult with SHPO and other consulting
252 parties in accordance with the terms of this Agreement.
- 253 4. To facilitate historic and archaeological preservation planning and
254 actions, NDOT will establish and promote progressive programs and
255 activities of mutual interest to, and in consultation with, FHWA, SHPO,
256 or other consulting parties. In its annual meeting pursuant to Stipulation
257 IX, NDOT will identify if special needs exist that should be addressed
258 through such programs and activities and prepare a plan and cost
259 estimate to address those needs.
- 260 5. NDOT shall curate archaeological materials recovered from private and
261 State lands under this Agreement at a facility meeting the standards of
262 36 CFR §79 or NRS Chapter 381, which must remain in the state
263 unless circumstances (such as exorbitant fees or shortage of curation
264 space) render in-state curation unreasonable or not prudent.
265 Archaeological collections from Federal lands will be curated at a facility
266 meeting standards of 36 CFR §79 and will be removed subject to terms
267 of an Archaeological Resources Protection Act (ARPA) permit issued by
268 the appropriate Federal land management agency.
- 269 6. For activities on BLM, Reclamation, USFWS, and/or USFS managed
270 lands, NDOT will apply for and receive appropriate permits for
271 archaeological inventory as well as for any excavation or removal prior
272 to initiating any investigations, as will any contractors or consultants
273 engaged to work on FHWA's/NDOT's behalf. NDOT and its contractors

274 or consultants will submit a fieldwork authorization request and obtain
 275 an approved BLM, Reclamation, USFWS, and/or USFS fieldwork
 276 authorization prior to initiating any work and will obtain and incorporate
 277 the required BLM, Reclamation, USFWS, and/or USFS site and report
 278 numbers prior to any submittals of site records or reports to SHPO.
 279 NDOT and any contractors or consultants will not initiate any excavation
 280 (including shovel testing or probing) or removal without the required
 281 prior authorization from BLM, Reclamation, USFWS, and/or USFS,
 282 which may include a separate process of permit application and Tribal
 283 notification/consultation conducted by the BLM, Reclamation, USFWS,
 284 and/or USFS. NDOT and any contractors or consultants will be subject
 285 to terms of BLM, Reclamation, USFWS, and/or USFS permits as they
 286 may be modified to reflect Tribal notification/consultation. Resulting
 287 products (e.g., reports, site records) for investigation on BLM,
 288 Reclamation, USFWS, and/or USFS Nevada lands will conform to
 289 current BLM, Reclamation, USFWS, and/or USFS inventory guidelines.

290 C. SHPO

- 291 1. Pursuant to Section 106 and 36 CFR Part 800, advise, assist, review,
 292 and consult with the FHWA and NDOT as delegated as they carry out
 293 their Section 106 responsibilities and respond to FHWA and NDOT
 294 requests within the time frames detailed in 36 CFR Part 800 unless
 295 otherwise specified in this Agreement.
- 296 2. Share information with NDOT and FHWA as SHPO develops or
 297 generates data and processes related to the identification, evaluation,
 298 management, and treatment of Nevada's cultural resources, including
 299 technological innovations and GIS.

300 D. ACHP

- 301 1. Upon notification of findings of adverse effect and an invitation to
 302 participate in resolving the adverse effect of an undertaking in
 303 accordance with 36 CFR §800.6(a)(1) from FHWA, ACHP shall provide
 304 correspondence to FHWA to document receipt of notifications and
 305 required filings and decisions about participation in continuing
 306 consultation.
- 307 2. Participate, in accordance with Stipulation X, in the resolution of
 308 disputes that may occur through the implementation of this Agreement.

309 **III. GOVERNMENT-TO-GOVERNMENT CONSULTATION WITH TRIBES**

- 310 A. FHWA shall retain ultimate responsibility for complying with all federal
 311 requirements pertaining to government-to-government consultation with Tribes
 312 pursuant to the NHPA. Notwithstanding any other provision of this stipulation,
 313 FHWA shall honor the request of any Tribe for government-to-government
 314 consultation regarding an undertaking covered by this Agreement. Consultation
 315 with Tribes will be initiated with a letter from FHWA to the tribe(s).
- 316 B. In accordance with 36 CFR §800.3(f)(2), any Tribes that might attach religious

317 and cultural significance to historic properties in the Area of Potential Effects
 318 (APE) shall be identified by NDOT according to NDOT's Public
 319 Involvement/Public Hearing Procedures and invited by FHWA to be consulting
 320 parties.

321 C. FHWA may ask NDOT to assist in consultation if the individual Tribes reach
 322 written agreement prior to having NDOT proceed with Tribal consultation. If the
 323 Tribe does not agree, FHWA is responsible for consultation. Consultation cannot
 324 be outsourced to contractors.

325 D. FHWA and NDOT shall ensure that consultation with Tribes is initiated early in
 326 the project planning process to identify cultural, confidentiality, or other concerns
 327 and to allow adequate time for consideration.

328 E. FHWA and NDOT shall ensure that consultation continues with Tribes throughout
 329 the Section 106 review process prescribed by this Agreement whenever such
 330 Tribes express a concern about an undertaking or about historic properties that
 331 may be affected by an undertaking.

332 F. FHWA and NDOT will notify BLM, Reclamation, USFWS, and USFS when
 333 initiating consultation with Tribes regarding undertakings on agency lands.

334 G. The BLM, Reclamation, USFWS, and/or USFS retain their separate responsibility
 335 to conduct government-to-government Tribal consultation when provisions of the
 336 Native American Graves Protection and Repatriation Act (NAGPRA) or ARPA
 337 are involved.

338 **IV. PARTICIPATION OF OTHER CONSULTING PARTIES AND THE PUBLIC**

339 **A. Consulting Parties**

340 1. Consulting parties shall be identified pursuant to, and their participation
 341 in undertakings covered under this Agreement shall be governed by, 36
 342 CFR §800.2(c)(5) and §800.3(f). Other individuals and organizations
 343 with a demonstrated interest in the undertaking may participate as
 344 consulting parties. Other parties entitled to be consulting parties shall be
 345 invited by NDOT to participate in the Section 106 process. Any land-
 346 managing agency whose land may be affected by an undertaking shall
 347 be invited by NDOT to participate in the Section 106 process.

348 2. NDOT shall invite any local governments (including Certified Local
 349 Governments, or CLGs) or applicants that are entitled to be consulting
 350 parties under 36 CFR §800.2(c). NDOT shall consider all written
 351 requests of individuals and organizations to participate as consulting
 352 parties and determine which should be consulting parties for the
 353 undertaking and will consult with FHWA and SHPO prior to denying
 354 consulting party status to any party requesting such status.

355 3. Federal agencies involved who have Section 106 compliance
 356 responsibilities may be consulting parties, concurring parties or
 357 signatories.

358 B. Public Involvement

- 359 1. Public involvement in planning and implementing undertakings covered
 360 by this Agreement shall be governed by FHWA's and NDOT's
 361 environmental compliance procedures (NDOT's Public
 362 Involvement/Public Hearing Procedures). FHWA's Technical Advisory
 363 (T6640.8A, October 30, 1987) and similar and subsequent guidance
 364 documents will also be used. Public involvement and the release of
 365 information hereunder shall be consistent with 36 CFR §800.2(d)(1-2),
 366 §800.3(e), and §800.11(c)(1 and 3).
- 367 2. NDOT shall continue, through opportunities afforded by the current
 368 NDOT Public Involvement Procedures, to seek and consider the views
 369 of the public in a manner that reflects the nature and complexity of the
 370 undertaking and its effects on historic properties, and the likely interest
 371 of the public in the effects on historic properties, to remain consistent
 372 with the intent of 36 CFR Part 800, as amended.
- 373 3. For those actions that do not routinely require public review and
 374 comment, appropriate public involvement should be based on the
 375 specifics of the situation and commensurate with the type and location
 376 of historic properties, and the undertaking's potential impacts on them.
- 377 4. NDOT shall provide notice to FHWA and SHPO within one week of all
 378 documented public comments concerning cultural resources potentially
 379 affected by the proposed undertaking, including properties of religious
 380 and/or cultural significance to the Tribes.

381 V. THE SECTION 106 PROCESS

382 For all undertakings reviewed pursuant to this Agreement, NDOT shall use the
 383 following process:

384 A. Initiation of the Section 106 Process

- 385 1. NDOT will establish the undertaking, determine if the undertaking is a
 386 type of activity that does not have the potential or has minimal potential
 387 to cause effects on historic properties (Stipulations V.B. and V.C.) and
 388 determine if the undertaking will occur on Tribal lands.
- 389 2. If NDOT determines that the undertaking qualifies as an excluded
 390 undertaking (Stipulation V.C., Appendix A), NDOT will document this
 391 decision in the project record. This determination does not require
 392 SHPO or other Federal agency review prior to implementation.
- 393 3. NDOT will prepare and provide a Screening Form for undertakings that
 394 do not qualify as no potential to cause effect or an excluded undertaking
 395 and provide this document to SHPO and other signatories with
 396 jurisdiction (Handbook Chapter 1). SHPO shall have 5 working days
 397 from receipt to review a copy and other signatories with jurisdiction shall
 398 have 10 working days from receipt to review. If no response is received
 399 within the time period, NDOT may assume no comment and proceed.

400 B. No Potential to Cause Effect

- 401 1. In accordance with 36 CFR Part §800.3(a)(1) FHWA has determined
402 that some Program-funded actions administered by NDOT would have
403 no potential to cause effects to historic properties. As such, these
404 program projects do not require further obligations under the Section
405 106 process of the NHPA. FHWA defines these actions as non-
406 construction related activities, such as purchasing equipment, planning,
407 and design.
- 408 2. Undertakings must be reviewed by an NDOT SOI qualified professional
409 meeting the Secretary of the Interior's Professional Qualification
410 Standards to determine if the undertaking has no potential to cause
411 effect. This authority is non-transferable by NDOT to other parties.
- 412 3. If an undertaking is determined to have no potential to cause effect and
413 therefore requires no further Section 106 review, NDOT shall document
414 this decision internally for project files, and Section 106 is completed.

415 C. Excluded Undertakings

- 416 1. Undertakings identified in Appendix A, by their nature and definition, are
417 actions or activities excluded from further Section 106 review beyond
418 the steps outlined in Appendix A, as the potential effects of the
419 undertakings are likely to be minimal in accordance with 36 CFR
420 §800.14(b)(2). These undertakings require no further Section 106
421 review and do not require consultation with SHPO.
- 422 2. Any changes to Appendix A must be agreed upon in writing by the
423 signatories. Such changes shall be considered an amendment subject
424 to Stipulation XI.
- 425 3. Undertakings must be reviewed by an NDOT SOI qualified professional
426 meeting the Secretary of the Interior's Professional Qualifications
427 Standards to determine if the undertaking is considered excluded from
428 further Section 106 review. This authority is non-transferable by NDOT
429 to other parties.
- 430 4. FHWA agrees to administratively delegate procedures defined in
431 Stipulation V.C. to actions or activities administered by NDOT, including
432 Local Public Agency Program projects. This administrative delegation
433 does not apply to actions or activities on properties listed on or eligible
434 to be listed on the NRHP.
- 435 5. If an undertaking is determined to be excluded and therefore requires
436 no further Section 106 review beyond the steps outlined in Appendix A,
437 NDOT shall document and retain this decision internally for project files.
438 Documentation shall include (1) Identification of the activity from the list
439 in Appendix A; (2) the name of the NDOT SOI qualified professional;
440 and (3) the date the finding was made. Undertakings determined to be
441 excluded from further Section 106 review will be reported annually in
442 accordance with Stipulation IX.B.2 of this Agreement.

443 D. Identification of Historic Properties

- 444 1. NDOT shall determine the scope of identification efforts, including
445 determining and documenting the undertaking's APE, as defined at 36
446 CFR §800.16(d) and Handbook Chapter 3.
- 447 2. NDOT shall identify historic properties that may be affected by an
448 undertaking and shall gather sufficient information to evaluate the
449 eligibility and integrity of these cultural resources for listing in the NRHP.
450 Information may be obtained through cultural resource surveys or other
451 appropriate methods.
- 452 3. The identification of historic properties shall follow the Secretary of the
453 Interior's Standards and Guidelines for Identification (48 FR 44720-23),
454 and should be consistent with SHPO historic contexts described in
455 Handbook Chapter 4, FHWA guidance, NDOT guidance, Stipulation
456 II.B.5 of this Agreement, and any other guidance, methodologies,
457 agreements, or protocols that FHWA, NDOT, and SHPO agree should
458 be used to identify properties, including those of other signatories
459 and/or consulting federal agencies.

460 E. NRHP Evaluation

- 461 1. NDOT shall evaluate the historic significance of cultural resources
462 identified within the APE in accordance with National Register Bulletin
463 15 as well as the guidance in Handbook Chapters 5 and 6. Where
464 historic property boundaries have not previously been established,
465 NDOT will identify recommended boundaries, following standards set
466 forth in National Register Bulletin 21, *Defining Boundaries for National*
467 *Register Properties*. FHWA, NDOT and any Federal land manager (for
468 properties under their jurisdiction), and SHPO may jointly determine a
469 class or classes of properties to be not eligible for listing on the NRHP
470 and modify Handbook Chapter 6.
- 471 2. If a cultural resources survey is conducted where cultural resources are
472 identified and evaluated on Federal lands, a draft report will be provided
473 to the Federal land manager for review no less than 30 days prior to
474 project implementation. The Federal land manager will have a 30-
475 calendar day period for review and comment. If after 30 calendar days
476 from receipt of the document, NDOT receives no response, NDOT may
477 assume the Federal land manager has no comment on the NRHP
478 eligibility determinations.
- 479 3. Agreements regarding the NRHP eligibility of cultural resources
480 evaluated shall be governed by 36 CFR §800.4(c)(2). In the event of a
481 disagreement, NDOT shall first consult with the disagreeing party to
482 resolve the disagreement.
- 483 a. If the disagreement cannot be resolved through informal
484 consultation, NDOT shall notify FHWA, whereupon NDOT, FHWA,
485 SHPO, and any consulting party (including other signatories
486 and/or federal agencies) shall consult to resolve the disagreement

487 in accordance with a time frame specified by FHWA.

488 b. If the disagreement is not resolved, or the ACHP requests, FHWA
 489 shall refer the issue to the Keeper of the NRHP (Keeper) to obtain
 490 a determination of eligibility. The Keeper's determination will be
 491 considered final.

492 F. Finding of Effect

493 1. No Historic Properties Affected

494 a. If NDOT finds that a cultural resources survey is positive, and
 495 either there are no historic properties present or there are historic
 496 properties present within the APE, and the undertaking will have
 497 no effect on them as defined in 36 CFR §800.16(i), NDOT shall
 498 make a finding of "no historic properties affected" (36 CFR
 499 §800.4(d)(1)). NDOT shall submit its finding of effect and
 500 supporting documentation (Handbook Chapters 2 and 4) to
 501 SHPO, other signatories with jurisdiction, consulting federal
 502 agencies, and other consulting parties for a 30-calendar day
 503 review period. If NDOT receives no response within 30 calendar
 504 days of receipt, NDOT may assume concurrence and proceed.

505 b. NDOT shall notify all consulting parties and make the
 506 documentation available for public inspection prior to approving
 507 the undertaking. As per 36 CFR §800.2(d)(1) the agency official
 508 shall seek and consider the views of the public in a manner that
 509 reflects the nature and complexity of the undertaking and its
 510 effects on historic properties. Any public involvement will be in
 511 accordance with Stipulation IV.B of this document.

512 c. If NDOT finds that a cultural resources survey is negative, NDOT
 513 shall submit a letter to SHPO as notification of these results,
 514 including a finding of "no historic properties affected" (36 CFR
 515 §800.4(d)(1)). NDOT shall document this internally in project files
 516 and proceed without response from SHPO.

517 2. No Adverse Effect

518 a. NDOT shall make a finding of "no adverse effect" if none of the
 519 undertaking's anticipated effects meet the Criteria of Adverse
 520 Effect under 36 CFR §800.5(a)(1), or if NDOT imposes conditions
 521 that will avoid adverse effects to historic properties (Handbook
 522 Chapter 7).

523 b. If NDOT finds that undertaking effects can be treated by meeting
 524 the Secretary of the Interior's Standards on Treatment of Historic
 525 Properties, then the undertaking will be treated as "no adverse
 526 effect" and documented per Handbook Chapter 4 (Treated No
 527 Adverse Effect). Individuals performing this work will be qualified
 528 consistent with Stipulation II.B.1.

- 529 c. NDOT shall submit its finding of no adverse effect and supporting
 530 documentation to SHPO, other signatories with jurisdiction,
 531 consulting federal agencies, Tribes as appropriate, and all other
 532 consulting parties for review.
- 533 d. If SHPO, a signatory, a consulting federal agency, or another
 534 consulting party, objects within 30 calendar days of receipt of a
 535 NDOT finding of no adverse effect, NDOT will notify FHWA.
 536 FHWA will either consult to resolve the objection or request the
 537 ACHP to review the finding pursuant to 36 CFR §800.5(c)(2).
- 538 e. NDOT shall maintain a record of the finding and provide
 539 information on the finding to the public on request, consistent with
 540 the confidentiality provisions of Stipulation XIII.
- 541 f. NDOT may simultaneously request SHPO review of identification,
 542 evaluation, and findings of effect (not including adverse effect)
 543 covered by 36 CFR §800.3 through §800.5. Provided other
 544 consulting parties and the public are afforded an adequate
 545 opportunity to express their views pursuant to 36 CFR §800.2(d)
 546 and 36 CFR §800.5(c).
- 547 g. If NDOT receives no response within 30 calendar days from the
 548 SHPO or other consulting party, including an affected federal
 549 agency, NDOT may assume their concurrence and proceed.

550 3. Adverse Effect

- 551 a. Where adverse effects, as defined by the Criteria of Adverse
 552 Effect set forth in 36 CFR §800.5(a), cannot be avoided, NDOT
 553 shall make a finding of "adverse effect".
- 554 b. As part of its process in assessing whether adverse effects exist,
 555 FHWA and NDOT shall consult with Tribes that ascribe traditional
 556 cultural and religious significance to affected historic properties
 557 and may consult either formally or informally with SHPO regarding
 558 application of the criteria of adverse effect.
- 559 c. NDOT shall inform consulting parties including other signatories
 560 with jurisdiction or federal agencies of the finding of adverse
 561 effect.

562 G. Resolution of Adverse Effect

- 563 1. When a finding of adverse effect has been made by NDOT, NDOT
 564 shall, in consultation with FHWA, SHPO, other signatories with
 565 jurisdiction, consulting federal agencies and other consulting parties,
 566 evaluate alternatives or modifications to the undertaking that would
 567 avoid, minimize, or mitigate adverse effects on historic properties.
 568 NDOT shall propose measures to resolve adverse effects, to be
 569 documented:

- 570 a. As a Standard Treatment (Stipulation V.H); or
- 571 b. In a Memorandum of Agreement (MOA).
- 572 2. NDOT shall make the finding available to the public, in accord with
573 Stipulation IV.B. NDOT shall provide an opportunity for members of the
574 public to express their views on resolving adverse effects of the
575 undertaking through NDOT's Public Involvement Process (Stipulation
576 IV).
- 577 3. When a Standard Treatment is not used to resolve adverse effects,
578 FHWA will notify the ACHP of the finding, pursuant to 36 CFR §800.6(a)
579 (1) and that NDOT will be preparing a MOA to resolve adverse effects.
580 NDOT will provide supporting documentation in accordance with 36
581 CFR §800.11(e).
- 582 a. The ACHP shall advise FHWA and the consulting parties whether
583 it will participate within 15 days of receipt of notice.
- 584 b. If the ACHP fails to respond within 15 days of receipt of notice,
585 FHWA may assume the ACHP will not participate.
- 586 4. After consideration of the views of all consulting parties and the public, if
587 NDOT, FHWA, SHPO, and ACHP (if it has chosen to participate
588 [pursuant to 36 CFR Part 800 Appendix A]) agree on how the adverse
589 effects will be resolved, they shall execute a MOA, pursuant to 36 CFR
590 §800.6(c).
- 591 5. FHWA will file a copy of the signed MOA with the ACHP, and shall
592 provide a copy to each signatory, invited signatory and concurring
593 signatory.
- 594 6. Once finalized, the measures to resolve adverse effects shall be
595 incorporated into the undertaking, and the undertaking may be
596 implemented.
- 597 7. If NDOT determines that an undertaking may have a direct adverse
598 effect on a National Historic Landmark, NDOT will notify FHWA, who
599 shall request SHPO, ACHP, and the National Park Service (NPS), as
600 well as any other consulting parties, to participate in consultation to
601 resolve any adverse effects, pursuant to 36 CFR §800.10.

602 H. Developing Standard Treatments

- 603 1. In consultation with the signatories of this Agreement, NDOT may
604 develop standard treatments for resolving adverse effects to certain
605 types of properties or that are caused by specific classes of
606 undertakings. Once the signatories have agreed, in writing, to a
607 standard treatment, NDOT shall incorporate it into a new chapter of the
608 Handbook and may implement it, as appropriate, to resolve adverse
609 effects (Stipulation V.I). If a standard treatment is the sole measure to
610 resolve adverse effects, no MOA is needed.

- 611 2. When a proposed standard treatment would apply to properties of
 612 traditional cultural and religious significance to the Tribes, NDOT and
 613 FHWA shall consult with any land management agency with jurisdiction
 614 and Tribes that ascribe value to such properties in developing the
 615 standard treatment.
- 616 3. NDOT shall consult with SHPO, FHWA, other signatories with
 617 jurisdiction, consulting federal agencies, the Tribes, and other
 618 consulting parties as appropriate, on standard treatments developed
 619 under 1 and 2 above.

620 I. Applying Standard Treatments

- 621 1. NDOT may propose the use of approved standard treatments for
 622 individual undertakings when it determines that the adverse effects of
 623 specific classes of undertakings are limited and can be avoided or
 624 mitigated by applying the standard treatment. NDOT shall document a
 625 finding of no adverse effects (Stipulation V.F.2) or adverse effects
 626 (Stipulation V.F.3) and provide such documentation to the SHPO, the
 627 federal or state land managing agencies with jurisdiction, participating
 628 Tribes, and consulting parties for a 30-calendar day review. If SHPO
 629 agrees in writing, and no other consulting party objects, NDOT may
 630 proceed with the undertaking in accordance with the standard
 631 treatment. Application of Standard Treatments in this case will be
 632 reported on in the reporting and consultation process of Stipulations
 633 V.F.2, V.F.3, and V.G.
- 634 2. Any standard treatment may include minor undertaking-specific
 635 changes by mutual agreement in writing by NDOT, FHWA, other
 636 signatories with jurisdiction, and SHPO, and if no other consulting
 637 parties object.
- 638 3. If a consulting party objects to use of a standard treatment for a
 639 particular undertaking, NDOT and FHWA will conclude consultation in
 640 accordance with Stipulation V.G. and/or V.J.

641 J. Resolving Objections For Adverse Effects

- 642 1. If FHWA, SHPO, NDOT, other signatories with jurisdiction, consulting
 643 federal agencies, or other consulting parties are unable to agree on
 644 measures to resolve the adverse effects of an undertaking, then FHWA
 645 shall invite the ACHP to participate in the resolution pursuant to 36 CFR
 646 §800.6(b)(2).
- 647 2. Objections to measures to resolve the adverse effects of an undertaking
 648 will follow resolution procedures outlined in Stipulation X of this
 649 Agreement.

650 K. Project Re-evaluation

- 651 1. If NDOT project plans change, project scopes change, or a new project
 652 element is added to an undertaking during or after completion of

- 653 Section 106 review, NDOT shall assess the previous findings to
 654 determine if they remain valid or if additional consultation with SHPO
 655 and other consulting parties is needed.
- 656 2. NDOT is not required to conduct additional consultation under the
 657 following conditions:
- 658 a. The APE has not changed beyond the vertical and horizontal
 659 limits of previous identification efforts; and
- 660 b. The scope change does not change the project finding of effect.
- 661 3. If NDOT determines that the previous findings are no longer valid or if
 662 additional consultation with SHPO and other consulting parties is
 663 needed, NDOT will review the project scope or plan changes following
 664 Stipulation V of this Agreement.

665 VI. EMERGENCY SITUATIONS

- 666 A. For the purposes of this Agreement, emergencies are defined as occurrences
 667 that require emergency highway system/facility repairs that are necessary to:
- 668 1. Protect the life, safety, or health of the public; or
 669 2. Minimize the extent of damage to the highway system/facilities; or
 670 3. Protect remaining highway facilities; or
 671 4. Restore essential traffic.
- 672 B. These repairs can occur regardless of funding category, and regardless of
 673 declarations made by federal, state, or local agencies.
- 674 C. If NDOT determines that an emergency repair undertaking could affect historic
 675 properties, NDOT shall notify SHPO, FHWA, Tribes, other signatories with
 676 jurisdiction, and consulting Federal agencies as appropriate, within 24 hours.
 677 SHPO, the signatory, the consulting Federal agency and any Tribe that may
 678 attach religious and cultural significance to historic properties likely to be affected
 679 will have 72 hours to respond.
- 680 D. For undertakings where the repair must be made within the first 30 days of the
 681 occurrence of the event that caused the emergency or the declaration of the
 682 emergency by an appropriate authority, the processing of Section 106
 683 documentation will happen concurrently or after the fact. In these cases, NDOT
 684 will comply with the procedures in Stipulation V of this Agreement to the extent
 685 possible, but the reviews will likely be conducted after the emergency work is
 686 completed.
- 687 E. For undertakings taking longer than 30 days for repair, NDOT shall comply with
 688 the procedures in Stipulation V of this Agreement.
- 689 F. NDOT will provide written notification of an emergency action to SHPO (per

690 Stipulation VI.C) in seven days. The notice shall be clearly and prominently
 691 marked as an emergency notification and shall include an explanation of how the
 692 action meets the requirements for emergency as defined herein. The notice shall
 693 also include a brief description of the eligibility and/or significance of the
 694 resource(s) involved and the nature, effect, and anticipated effect of the
 695 emergency action on the resource(s), and the anticipated time frame available for
 696 comment.

697 VII. POST-REVIEW DISCOVERIES

698 A. Planning for Subsequent Discoveries:

699 1. When NDOT's identification efforts in accordance with Stipulation V of
 700 this Agreement indicate that historic properties are likely to be
 701 discovered during implementation of an undertaking, NDOT shall
 702 include a plan for discovery of such properties in any environmental
 703 document. Implementation of the plan as originally proposed or
 704 modified as necessary owing to the nature and extent of the properties
 705 discovered, will be in accordance with 36 CFR §800.4-6. FHWA, other
 706 signatories with jurisdiction, and appropriate consulting federal land
 707 management agencies shall review the draft discovery plan, to be
 708 included with draft reports for review. FHWA/NDOT shall determine
 709 whether a planned activity may result in intentional excavation of human
 710 remains, funerary objects, etc. subject to NAGPRA and follow
 711 Stipulation VIII.A of this Agreement.

712 B. Discoveries Without Prior Planning:

713 1. If previously unidentified archaeological or architectural properties, or
 714 unanticipated effects, are discovered after NDOT has completed its
 715 review under this Agreement, activities within that area of the
 716 undertaking will stop immediately, in accordance with Section 107.12 of
 717 the NDOT Standard Specifications for Road and Bridge Construction
 718 (Handbook Chapter 8).

719 2. No further construction in the area of discovery will proceed until the
 720 requirements of 36 CFR §800.13 have been satisfied, including
 721 consultation with Tribes that may attach traditional cultural and religious
 722 significance to the discovered property.

723 3. NDOT will consult with FHWA, SHPO, the affected signatories,
 724 consulting federal agencies and Tribes, as appropriate, to record,
 725 document, and evaluate the NRHP eligibility of the property and the
 726 undertaking's effect on the property, and to design a plan for avoiding,
 727 minimizing, or mitigating adverse effects on the eligible property.

728 4. If FHWA, SHPO, affected federal agency or a Tribe fails to file an
 729 objection within 72 hours of receipt to NDOT's plan for addressing the
 730 discovery, NDOT may carry out the requirements of 36 CFR §800.13 on
 731 behalf of FHWA, and the ACHP does not need to be notified.

732 5. Discoveries of Native American human remains without prior planning

733 will be handled per Stipulation VIII.B or VIII.C of this Agreement.

734 **VIII. TREATMENT OF HUMAN REMAINS**

735 A. For planned excavation and/or removal activities on federal land, FHWA/NDOT
736 shall apply for a permit under the Archaeological Resource Protection Act of
737 1979 (ARPA) (16 U.S.C. §470cc) from the appropriate federal land management
738 agency. Consistent with 43 CFR §10.3 et seq., and as part of its application for
739 an ARPA permit, FHWA/NDOT will provide the federal land management agency
740 with information necessary to make a reasonable determination whether the
741 planned activity may result in the excavation of Native American human remains,
742 funerary objects, sacred objects or objects of cultural patrimony (collectively
743 cultural items) from federal lands. Based on the information provided, the federal
744 land management agency may determine that the ARPA permit will include for
745 the excavation and removal of Native American cultural items and under Section
746 3(c) of the NAGPRA (25 U.S.C. §3002). If requested, the FHWA/NDOT shall
747 assist the Federal land manager in consultation with Tribes and in developing a
748 NAGPRA Plan of Action (POA), as determined by the federal land management
749 agency. The NAGPRA POA shall be developed in consultation with appropriate
750 Tribes for the treatment and disposition of any cultural items that may be
751 anticipated. The federal land management agency must approve the ARPA
752 permit and any required NAGPRA POA prior to authorizing excavation and/or
753 removal of archaeological resources under ARPA, including cultural items
754 subject to NAGPRA.

755 B. In the event of an inadvertent discovery of human remains on federal land,
756 FHWA/NDOT shall notify the appropriate federal land managing agency
757 immediately by phone and follow up immediately with written confirmation of
758 discovery, sent by certified mail. FHWA/NDOT shall be responsible for ensuring
759 security and protection of the inadvertent discovery and shall halt activities within
760 100 feet of the discovery, which may be adjusted as needed after field review of
761 the discovery following Section 107.12 of the NDOT Standard Specifications for
762 Road and Bridge Construction (Handbook Chapter 8). FHWA/NDOT shall also
763 contact the county sheriff. The FHWA/NDOT and the appropriate federal land
764 management agency may assist the county sheriff or other responsible local
765 official, as requested, to examine the discovery and to determine if the remains
766 are Native American and subject to NAGPRA. If the remains are not of forensic
767 interest, the federal land management agency shall be responsible for
768 determining the disposition and treatment of the human remains. If the federal
769 land management agency determines the remains are subject to NAGPRA, and
770 consistent with 43 CFR §10.4, FHWA/NDOT staff shall, as requested, assist the
771 federal land management agency in taking reasonable steps to protect the
772 remains and to consult with Tribes per 43 CFR §10.4. The federal land
773 management agency may halt activity for up to 30 days. Activity may be resumed
774 after 30 days if otherwise lawful and the federal land manager's responsibilities
775 are met.

776 C. Upon discovery of human remains on non-Federal lands, FHWA/NDOT shall halt
777 activities within 100 feet of the discovery, which may be adjusted as needed after
778 field review of the discovery following Section 107.12 of the NDOT Standard
779 Specifications for Road and Bridge Construction (Handbook Chapter 8).
780 FHWA/NDOT shall contact the county sheriff. FHWA/NDOT may assist the

781 county sheriff or other responsible local officials, as requested, to examine the
 782 discovery and to determine if the remains are Native American. If the remains are
 783 not of forensic interest and are determined to be Native American, they will be
 784 treated by NDOT in accordance with NRS (Nevada Revised Statutes) §383.150
 785 to §383.190.

786 IX. REPORTING AND MONITORING

787 A. Documentation

- 788 1. All documentation that supports findings and determinations made
 789 under this Agreement shall be consistent with 36 CFR §800.11, and any
 790 applicable guidelines and procedures of applicable signatories and
 791 consulting federal land-managing agencies that may be affected by the
 792 undertaking.
- 793 2. Documentation prepared by local agencies, or their consultants, in
 794 support of such findings shall be submitted to NDOT for review and
 795 approval. NDOT shall not transmit to FHWA, SHPO, or other consulting
 796 parties any documentation that it has not reviewed and approved.
- 797 3. All documentation prepared under this Agreement shall be kept on file
 798 at NDOT and made available to consulting parties and the public at their
 799 request, consistent with applicable confidentiality requirements per
 800 Stipulation XIII of this Agreement.

801 B. Annual Reporting

- 802 1. NDOT shall compile an annual report for submission to FHWA, SHPO,
 803 and ACHP. Information in the report shall include, but is not limited to, a
 804 summary of actions taken under the Agreement, including all findings
 805 and determinations, accomplishments, estimated time and cost savings,
 806 public objections, and inadvertent effects or foreclosures. The range
 807 and type of information included by NDOT in the report and the manner
 808 in which this information is organized and presented must be such that
 809 it facilitates the ability of the reviewing parties to assess accurately the
 810 degree to which the Agreement, and its manner of implementation,
 811 constitutes an efficient and effective alternative procedure under 36
 812 CFR Part 800, and to determine whether this Agreement should remain
 813 in effect, and if so, whether and how it should be improved through
 814 appropriate amendment.
- 815 2. NDOT shall include in the annual report a list of undertakings completed
 816 using Stipulation V of this Agreement.
- 817 3. NDOT shall prepare the report of these findings annually following
 818 execution of the Agreement. The reporting period shall be the Federal
 819 calendar year. The initial report shall be prepared following completion
 820 of the first full Federal fiscal year under this Agreement. NDOT shall
 821 submit the annual reports to FHWA, SHPO, and ACHP no later than
 822 December 30. NDOT shall notify other affected signatories and/or
 823 consulting federal agencies of the posting and location of this website

- 824 notice.
- 825 4. NDOT, FHWA, and SHPO will meet annually to evaluate the
826 Agreement, to suggest revisions to its provisions, and to evaluate the
827 quality of the resource identification and protection activities carried out
828 under the Agreement. Prior to any such meetings, the ACHP and
829 consulting parties will be notified and may participate at their discretion.
- 830 5. NDOT shall post the annual report on their website so that it is available
831 for public inspection at the time it is submitted to the signatories. The
832 web posting shall include a provision that allows the public to comment
833 on the report. NDOT will consider public comments along with
834 comments from signatories. At the request of any other signatory FHWA
835 shall ensure that a meeting is held to facilitate review of, and comment
836 on, the report to address questions and issues, or to resolve adverse
837 comments. The annual report will not contain confidential information as
838 outlined in Stipulation XIII of this Agreement.

839 **X. DISPUTE RESOLUTION**

- 840 A. Should any signatory or invited signatory object to FHWA regarding the manner
841 in which the terms of this Agreement are carried out, FHWA will immediately
842 notify the other signatories of the objection and proceed to consult with the
843 objecting party to resolve the objection. FHWA will honor the request of any
844 signatory or invited signatory to participate in the consultation and will take any
845 comments provided by such parties into account. FHWA shall establish a
846 reasonable time frame for such consultations.
- 847 B. If the objection is resolved through consultation, FHWA may authorize the
848 disputed action to proceed in accordance with the terms of such resolution.
- 849 C. If after initiating such consultation, FHWA determines that the objection cannot
850 be resolved through consultation, FHWA, with the cooperation of NDOT, shall
851 forward all documentation relevant to the objection to the ACHP and other
852 signatory parties, including FHWA's proposed response to the objection. Within
853 30 calendar days after receipt of all pertinent documentation, ACHP shall
854 exercise one of the following options:
- 855 1. Advise FHWA that ACHP concurs in FHWA's proposed response to the
856 objection, whereupon FHWA will respond to the objection accordingly;
857 or
- 858 2. Provide FHWA with recommendations, which FHWA shall take into
859 account in reaching a final decision regarding its response to the
860 objection; or
- 861 3. Notify FHWA that the objection will be referred for comment pursuant to
862 36 CFR §800.7(a)(4) and proceed to refer the objection and comment.
863 In this event, FHWA shall ensure that the Agency Official is prepared to
864 take the resulting comments into account in accordance with 36 CFR
865 §800.7(c)(4).

- 866 D. Should ACHP not exercise one of the foregoing options within 30 calendar days
867 after receipt of all pertinent documentation, FHWA may assume there is no
868 objection from the ACHP in its proposed response to the objection.
- 869 E. FHWA shall take into account any ACHP recommendation or comment and any
870 comments from the other signatory or invited signatory parties in reaching a final
871 decision regarding the objection.
- 872 F. FHWA shall provide all other signatory or invited signatory parties with a written
873 copy of its final decision regarding any objection addressed pursuant to this
874 Stipulation.
- 875 G. FHWA may then authorize any action subject to objection under this Stipulation
876 to proceed, provided the objection has been resolved in accordance with the
877 terms of this Stipulation.
- 878 H. FHWA's responsibility to carry out all other actions under this Agreement that are
879 not the subject of the objection shall remain unchanged.

880 **XI. AMENDMENT**

- 881 A. Any signatory or invited signatory may at any time propose amendments to this
882 Agreement, whereupon all signatory and invited signatory parties shall consult to
883 consider such amendment. This Agreement may be amended only upon written
884 concurrence of all signatory and invited signatory parties. The amendment will be
885 effective on the date a copy is signed by all of the signatories and invited
886 signatories.
- 887 B. Any changes to the Handbook must be agreed upon in writing by the signatories
888 and invited signatories and, upon approval, published on NDOT's Cultural
889 Resources webpage.

890 **XII. TERMINATION**

- 891 A. Any signatory may terminate this Agreement. If any signatory proposes
892 termination of this Agreement the party proposing termination shall notify the
893 other signatory parties in writing, explain the reasons for proposing termination,
894 provide suggestions for resolution that would end the signatory's desire for
895 termination, and consult with the other parties for no more than 30 calendar days
896 to seek alternatives to termination.
- 897 B. Should such consultation result in an agreement on an alternative to termination,
898 the signatory parties shall proceed in accordance with that agreement.
- 899 C. Should such consultation fail, the signatory proposing termination may terminate
900 this Agreement by promptly notifying the other parties in writing.
- 901 D. Should this Agreement be terminated, FHWA would carry out the requirements of
902 36 CFR Part 800 for individual undertakings.
- 903 E. As an alternative to terminating this Agreement, invited signatories may withdraw
904 from this Agreement by notifying FHWA, NDOT and ACHP in writing of their

905 intention to withdraw. If a resolution cannot be reached or alternatives agreed
 906 upon to prevent an invited signatory's withdrawal from this Agreement within 30
 907 calendar days from the date written notification was received, the invited
 908 signatory proposing withdrawal may withdraw from this Agreement by promptly
 909 notifying the other parties in writing. Should an invited signatory withdraw from
 910 this Agreement, the federal agency would carry out the requirements of 36 CFR
 911 Part 800 for individual undertakings.

912 **XIII. CONFIDENTIALITY**

913 A. All signatories acknowledge that information about historic properties is subject
 914 to the provisions of Section 304 of NHPA. Section 304 allows NDOT on behalf of
 915 FHWA to withhold from disclosure to the public, information about the location,
 916 character, or ownership of a historic property if NDOT determines that disclosure
 917 may 1) cause a significant invasion of privacy; 2) risk harm to the historic
 918 property; or 3) impede the use of a traditional religious site by practitioners.
 919 Having so acknowledged, all signatories will ensure that all actions and
 920 documentation prescribed by this Agreement are, where necessary, consistent
 921 with the requirements of Section 304 of the NHPA.

922 **XIV. DURATION**

923 A. This Agreement shall remain in effect for a period of five (5) years after the date
 924 of execution of the Agreement, unless it is terminated or amended in accordance
 925 with Stipulation XI of this Agreement. Ninety days prior to the conclusion of the
 926 five-year period, NDOT will notify all parties in writing of the upcoming
 927 anniversary. Before the end of the five-year term, FHWA will consult with NDOT,
 928 SHPO, and ACHP to determine interest in renewing this Agreement. The
 929 Agreement may be extended for an additional five-year term upon the written
 930 agreement of the signatories and invited signatories.

931 **EXECUTION** and implementation of this Agreement evidence that FHWA has delegated certain
 932 Section 106 responsibilities to NDOT and has afforded ACHP a reasonable opportunity to
 933 comment on the Program and its individual undertakings in Nevada; that FHWA and other
 934 signatories have taken into account the effects of the Program and its individual undertakings on
 935 historic properties, and that FHWA and other signatories have complied with Section 106 of the
 936 NHPA and 36 CFR Part 800 for the Program and its individual undertakings.

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**PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE NEVADA DEPARTMENT OF TRANSPORTATION,
THE UNITED STATES ARMY CORPS OF ENGINEERS,
THE BUREAU OF LAND MANAGEMENT,
THE BUREAU OF RECLAMATION,
THE UNITED STATES FOREST SERVICE,
THE UNITED STATES FISH AND WILDLIFE SERVICE,
THE NEVADA STATE HISTORIC PRESERVATION OFFICER,
AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION
REGARDING
IMPLEMENTATION OF FEDERAL-AID TRANSPORTATION PROJECTS IN THE STATE OF
NEVADA**

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SIGNATORIES

FEDERAL HIGHWAY ADMINISTRATION

_____ Date _____
Khoa Nguyen, Division Administrator, Nevada Division

965 **PROGRAMMATIC AGREEMENT AMONG**
966 **THE FEDERAL HIGHWAY ADMINISTRATION,**
967 **THE NEVADA DEPARTMENT OF TRANSPORTATION,**
968 **THE UNITED STATES ARMY CORPS OF ENGINEERS,**
969 **THE BUREAU OF LAND MANAGEMENT,**
970 **THE BUREAU OF RECLAMATION,**
971 **THE UNITED STATES FOREST SERVICE,**
972 **THE UNITED STATES FISH AND WILDLIFE SERVICE,**
973 **THE NEVADA STATE HISTORIC PRESERVATION OFFICER,**
974 **AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION**
975 **REGARDING**
976 **IMPLEMENTATION OF FEDERAL-AID TRANSPORTATION PROJECTS IN THE STATE OF**
977 **NEVADA**
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980 **SIGNATORIES**
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984 ADVISORY COUNCIL ON HISTORIC PRESERVATION
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988 _____ Date _____
989 Reid Nelson, Executive Director
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**REGARDING
IMPLEMENTATION OF FEDERAL-AID TRANSPORTATION PROJECTS IN THE STATE OF
NEVADA**

INVITED SIGNATORIES

NEVADA DEPARTMENT OF TRANSPORTATION

_____ Date _____
Tracy Larkin Thomason, Director

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REGARDING
IMPLEMENTATION OF FEDERAL-AID TRANSPORTATION PROJECTS IN THE STATE OF
NEVADA**

INVITED SIGNATORIES

BUREAU OF LAND MANAGEMENT

Jon Raby, State Director, Nevada State Office

Date _____

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REGARDING
IMPLEMENTATION OF FEDERAL-AID TRANSPORTATION PROJECTS IN THE STATE OF
NEVADA**

INVITED SIGNATORIES

U.S. ARMY CORPS OF ENGINEERS

_____ Date _____
Col. Robert M. McTighe, Commander, Sacramento District

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**PROGRAMMATIC AGREEMENT AMONG
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THE BUREAU OF RECLAMATION,
THE UNITED STATES FOREST SERVICE,
THE UNITED STATES FISH AND WILDLIFE SERVICE,
THE NEVADA STATE HISTORIC PRESERVATION OFFICER,
AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION
REGARDING
IMPLEMENTATION OF FEDERAL-AID TRANSPORTATION PROJECTS IN THE STATE OF
NEVADA**

INVITED SIGNATORIES

U.S. FOREST SERVICE

_____ Date _____
Jon Stansfield, Forest Supervisor, Humboldt-Toiyabe Forest

1163 **PROGRAMMATIC AGREEMENT AMONG**
1164 **THE FEDERAL HIGHWAY ADMINISTRATION,**
1165 **THE NEVADA DEPARTMENT OF TRANSPORTATION,**
1166 **THE UNITED STATES ARMY CORPS OF ENGINEERS,**
1167 **THE BUREAU OF LAND MANAGEMENT,**
1168 **THE BUREAU OF RECLAMATION,**
1169 **THE UNITED STATES FOREST SERVICE,**
1170 **THE UNITED STATES FISH AND WILDLIFE SERVICE,**
1171 **THE NEVADA STATE HISTORIC PRESERVATION OFFICER,**
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1173 **REGARDING**
1174 **IMPLEMENTATION OF FEDERAL-AID TRANSPORTATION PROJECTS IN THE STATE OF**
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1182 BUREAU OF RECLAMATION
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1186 _____ Date _____
1187 Adam Nickels, Acting Regional Director, Interior Region 10 California-Great Basin
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1219 **PROGRAMMATIC AGREEMENT AMONG**
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1235 **INVITED SIGNATORIES**
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1239 U.S. FISH AND WILDLIFE SERVICE
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1241
1242 _____ Date _____
1243 Paul Souza, Regional Director, Region 8 Pacific Southwest
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Appendix A Excluded Undertakings

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1248
1249
1250 Project types and activities listed in Appendix A are undertakings excluded from further review
1251 (Stipulation V.C.), as the potential effects of the undertakings are likely to be minimal in
1252 accordance with 36 CFR §800.14(b)(2). Projects will be reviewed by an NDOT SOI qualified
1253 professional to determine whether the project meets the conditions detailed in Appendix A and
1254 to verify no circumstances exist that would merit further Section 106 review.
1255

1256 The following general conditions must be met for an undertaking to be excluded from further
1257 review:

- 1258 1. The undertaking is limited to the existing right-of-way and/or existing material source
1259 site;
- 1260 2. The undertaking is limited to areas that have been previously disturbed; or the
1261 undertaking is limited to areas that have been previously inventoried to current
1262 standards (Federal Register Vol. 48, No. 190) for historic properties with negative
1263 results;
- 1264 3. The undertaking is limited to in-kind replacement of roadway features, such as signs,
1265 lighting, and signals;
- 1266 4. The undertaking must not be located within or adjacent to a historic property as defined
1267 in 36 CFR §800.16(l); and
- 1268 5. The undertaking may be carried out on roads that are historic properties and/or roads
1269 within historic districts that are not contributing elements and that will have no effect to
1270 the district's character defining features, provided that an NDOT SOI qualified
1271 professional determines the undertaking will have no effect to the historic property's
1272 character defining features.

1273 The review process, to be conducted by an NDOT SOI qualified professional, must include one
1274 or more of the following:

- 1275 1. Literature and records review using NVCRIS, NDOT CRS records, and any other
1276 relevant agency records and archives, to determine potential for involvement of historic
1277 properties.
- 1278 2. Field check and/or review of the project area.
- 1279 3. Review of project plans, including plan sets and special provisions.
- 1280 4. Review of modern and historical aerial photography, historical maps, historical highway
1281 maps and as-built records.
- 1282 5. Review of right-of-way, assessment parcel, or ownership data.
- 1283 6. Contact of Tribes, land managing agencies, local historical societies, or other potential
1284 consulting parties who may have information or concerns.

1285 If an undertaking is listed below and is identified by an NDOT SOI qualified professional to
1286 meet the conditions of an excluded undertaking, then no further Section 106 review will be
1287 required. An NDOT SOI qualified professional will internally document the finding with the
1288 project file.
1289

1290 The following project types and activities are determined to be excluded from further review:

1291 **ROADS**

- 1292 1. All work within interchanges and within medians of divided highways.

- 1293 2. Roadway surface replacement, rehabilitation, resurfacing, reconstruction, milling,
1294 overlays, pavement repair, seal coating, crack-sealing, pothole repair, installation of
1295 rumble strips, dowel bar retrofits, profile grinding, joint sawing and sealing, pavement
1296 grinding, and pavement marking within areas previously disturbed by construction.
1297 (Condition: Does not apply to brick streets).
- 1298 3. Construction of turning and auxiliary lanes (e.g., truck climbing, acceleration and
1299 deceleration lanes), existing interchange ramp expansion, chain control areas, and
1300 maintenance pullouts in areas previously disturbed by vertical and horizontal
1301 construction activities.
- 1302 4. Erosion control to prevent erosion of roadways.
- 1303 5. Routine roadside maintenance activities necessary to preserve existing infrastructure
1304 and maintain roadway safety, including but not limited to: cleaning ditches, mowing,
1305 replacing signs on existing poles, replacing non-historic guardrails, noxious weed
1306 removal, water control and water delivery systems including canals and ditches where
1307 no new ground disturbance is required.
- 1308 6. Sub-base improvement limited to the depth of the existing sub-base.
- 1309 7. Construction staging areas or other locations proposed for temporary use during
1310 construction within the demonstrated vertical and horizontal limits of previous
1311 construction or disturbance.
- 1312 8. Geotechnical borings (8 inches in diameter or less), data collection, and non-invasive
1313 environmental sampling required to support the planning or design of an undertaking.

1314 **SHOULDERS AND SLOPES**

- 1315 9. Roadway shoulder treatments within the disturbed roadway prism.
- 1316 10. Shoulder widening within the current right-of-way limits.
- 1317 11. Borrowing of rock and rock removal and stabilization activities (e.g., rock scaling,
1318 bolting) within existing rights of way.
- 1319 12. Slide corrections, slope corrections and slope flattening by placement of fill material on
1320 the side slopes to meet safety criteria, and other slope flattening done within the
1321 demonstrated vertical and horizontal limits of previous construction or disturbance.
- 1322 13. Construction activities in areas of continuous slides, other mass wasting, or unstable
1323 landforms.

1324 **BRIDGES**

- 1325 14. Projects on bridges that include the following activities and meet the following
1326 conditions:
- 1327 a. Bridge project activities:
- 1328 1) Bridge deck resurfacing, overlay, pavement repair, seal coating,
1329 pavement grinding, and pavement marking (define actions) provided
1330 the work is limited to the roadway cross section only and does not
1331 impact structural members of the bridge. Work under this category can

- 1332 only take place where the existing surface is already concrete or
1333 asphalt pavement.
- 1334 2) Scour protection projects for bridges that are not historic properties;
1335 and there are either no cultural resources, no historic properties, or
1336 historic properties can be avoided.
- 1337 3) Riprap and other erosion control methods on bridge piers in previously
1338 disturbed soils.
- 1339 b. Conditions:
- 1340 1) The project takes place in previously disturbed soils; and
- 1341 2) Age of structure:
- 1342 (a) The bridge is less than 45 years old; or
- 1343 (b) The bridge is over 45 years old, and the bridge was determined,
1344 in consultation with the SHPO, to be ineligible in an historic
1345 bridge inventory less than twenty years old.; or
- 1346 (c) The bridge is over 45 years old and is part of the Interstate
1347 system, but was not determined a historic property under the
1348 Section 106 Exemption Regarding Effects to the Interstate
1349 Highway System adopted by the ACHP on March 10, 2005; or
- 1350 (d) The bridge has been evaluated as a historic property and the
1351 actions are limited to activities listed in (a) (1) above; or
- 1352 (e) The bridge has been determined exempt as part of the Bridge
1353 Program Comment.

1354 WATERWAYS

- 1355 15. Storm damage repairs, including but not limited to culvert cleaning or repair, shoulder
1356 reconstruction, or slide/debris removal.
- 1357 16. Replacement, repair, lining, cleaning, or extension of culverts and other drainage
1358 structures (i.e., dikes, headwalls, ditches, drainage berms, etc.).
- 1359 17. Re-establishment/reconstruction of existing drainages with no new ground disturbance.
- 1360 18. Placement of riprap or other erosion control method to prevent erosion or waterways
1361 within the demonstrated vertical and horizontal limits of previous construction or
1362 disturbance.

1363 ROAD FEATURES

- 1364 19. Guardrail, cable barrier and bridge rail installation, repair, and replacement.
- 1365 20. Traffic signals, intersection lighting, pedestrian signals, underpass lighting, railroad
1366 lighting, safety appurtenances and traffic control devices including but not limited to
1367 glare screens, snow and ice detectors, energy attenuators, cameras, automated traffic
1368 maintenance systems, raised pavement markers, thermoplastic tape, raised bars, or
1369 ramp metering sensors within existing right-of-way.

- 1370 21. Installation, repair, replacement, and maintenance of lighting, signals, and other traffic
1371 control devices.
- 1372 22. Installation, repair, replacement, and maintenance of Intelligent Transportation System
1373 elements, such as poles, cameras, weather stations, and traffic counters.
- 1374 23. Installation, maintenance, and repair/replacement of signs, kiosks, markers, fences,
1375 retaining walls, noise barriers, landscaping guardrails, barriers, glare screens, and
1376 crash attenuators.
- 1377 24. Installation, repair, or replacement of fencing including highway fencing, wildlife fencing,
1378 tortoise fencing, etc. within previous construction limits.

1379 UTILITIES

- 1380 25. Trenching or other excavation to install, replace, or repair electrical, water, sewer lines,
1381 fiber optics, telephone cable, or other utilities in areas demonstrated to have been
1382 previously disturbed by construction, fill, or prior trenching activities, when the depth
1383 and width of excavation is delineated.

1384 CURBS AND SIDEWALKS

- 1385 26. Construction or modification of sidewalks and curb ramps to satisfy the Americans with
1386 Disabilities Act unless on or adjacent to historic property constructed prior to 1945.
1387 Compliance under the Americans with Disabilities Act (ADA) includes but is not limited
1388 to the following: ramps, railing, re-surfacing, parking, signage, trail access and
1389 restrooms. Note: Construction of curbs and sidewalks after 1945 was largely
1390 standardized, including width, approaches, and materials. (Condition: Does not apply to
1391 historic-age brick sidewalks).
- 1392 27. Modification of existing features, such as curbs, sidewalks, and driveways. (Condition:
1393 Does not apply to historic-age brick sidewalks).

1394 MATERIAL PITS

- 1395 28. Work within existing NDOT permitted material source pits, quarries or other borrow
1396 sources, or borrow pits that have been previously inventoried and where no historic
1397 properties were identified.
- 1398 29. Installation of material source fencing in active material source applications, including
1399 wildlife and tortoise fencing, in previously inventoried applications.

1400 RAILROADS

- 1401 30. Resurfacing of railroad crossings including: abandonment, removal, reconstruction, or
1402 alteration of railroad grade crossings or separations or grade crossing protection within
1403 previously disturbed soils, unless the crossing is composed of historic materials.
- 1404 31. In kind replacement of existing bolt connected railroad tracks, ballast and wood ties.

1405 TRAILS

- 1406 32. Construction, rehabilitation, maintenance, widening, and improvement of existing
1407 bicycle and pedestrian lanes, walkways, amenities, social trails and paths.

- 1408 33. Maintenance of existing trails, bicycle lanes and pedestrian walkways such as: debris
 1409 removal, brush clearing, surface re-grading, drainage structures, and course design
 1410 features including:
- 1411 a. trail way surface replacement; rehabilitation, resurfacing, or reconstruction;
 1412 overlays; laying down of crushed stone or gravel and pavement marking.
 - 1413 b. shoulder treatments; pavement repair; seal coating; pavement grinding.
 - 1414 c. installation of new signals and other traffic control devices, landscaping, bike
 1415 racks, fences, signage and/or kiosks, benches, trash cans, pit or vault toilets,
 1416 and other amenities, excluding lighting.
 - 1417 d. trail heads and trail accesses that do not involve rehabilitation or alteration of
 1418 historic properties and occur within areas previously disturbed by vertical and
 1419 horizontal construction activities.
 - 1420 e. parking lots that occur within areas previously disturbed by vertical and
 1421 horizontal construction activities when such activities when such do not take
 1422 place adjacent to or within a historic property.
 - 1423 f. replacement in kind of minor structures and facilities (comfort stations, pit toilets,
 1424 fences kiosks, signs, displays) with little or no change in location, capacity, or
 1425 appearance if they are not in or adjacent to historic properties.
- 1426 34. Minor trail relocation or development of less than one mile on compatible trail networks
 1427 using existing roads or other established routes.

1428 **BUILDINGS AND STRUCTURES**

- 1429 35. Construction or modification of bus transfer structures and bus turnouts.
- 1430 36. Modernization of transit facilities within existing property boundaries including roadway
 1431 resurfacing, installation of bus shelters, pullouts, park and ride facilities, bike racks,
 1432 benches, etc.
- 1433 37. Preliminary engineering tests, such as seismic, geologic, or hazardous materials testing
 1434 that involve buildings or structures or require trenching or ground boring within
 1435 previously disturbed soils unless the structure is a historic property.
- 1436 38. Maintenance and minor improvements to existing Park and Rides, except lighting,
 1437 where no excavation will take place outside of previously disturbed soils.
- 1438 39. Improvements, additions, alterations, routine repair and maintenance to existing
 1439 buildings and facilities, such as work on or in offices or equipment buildings,
 1440 maintenance stations, warehouses, roadside rests, rest areas, minor transit facilities,
 1441 weigh and inspection stations, toll facilities, truck weigh stations, equipment, or state-
 1442 owned rentals.
- 1443 40. Restoration or rehabilitation of deteriorated or damaged structures, facilities, or
 1444 mechanical equipment to meet current standards of public health and safety.

1445 **OTHERS**

- 1446 41. Acquisition of scenic easements.

- 1447 42. Approvals for disposal of excess right-of-way or for joint or limited use of the right-of-
1448 way provided no cultural resources over 50 years old are located within the property.
- 1449 43. Acquisition of land for hardship or protective purposes; advance land acquisition loans
1450 under section 3(b) for the UMT Act. Hardship and protective buying will be permitted
1451 only for a particular parcel or a limited number of parcels, as long as those parcels do
1452 not contain cultural resources over 50 years old.
- 1453 44. Construction or repair of fish screens or ladders, springs, waterholes, or stream
1454 channels (e.g., clearing of debris from streams, ditches, or culverts).
- 1455 45. Hazardous waste removal and disposal constituting an immediate public hazard, and
1456 which require immediate removal.
- 1457 46. Removal of vegetation and noxious weeds and other vegetation control, including
1458 activities such as mowing, brush trimming, and herbicidal spraying.
- 1459 47. Subsurface boring, to include sending and receiving pits, where the bore extends well
1460 below the local strata for intact cultural resources and the sending and receiving pits
1461 are located on surfaces previously inventoried and negative for cultural resources.
1462 (Condition: Staging areas must be identified).
- 1463
- 1464