

**PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE SOUTH DAKOTA STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL AID HIGHWAY PROGRAM IN SOUTH DAKOTA**

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

WHEREAS, the South Dakota FHWA Division Administrator is the “Agency Official” responsible for ensuring that the Program in the State of South Dakota complies with Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 306108), as amended, and codified in its implementing regulations, 36 C.F.R. § 800, as amended (August 5, 2004); and

WHEREAS, SDDOT administers Federal-aid projects, including Local Government Assistance and Transportation Alternatives Program projects using Federal-aid funds, throughout the State of South Dakota as authorized by Title 23 U.S.C. 302, has participated in the consultation and in development of this Agreement, and is an invited signatory to this agreement; and

WHEREAS, the responsibilities of the South Dakota State Historic Preservation Officer (SHPO) under Section 106 of the NHPA and 36 C.F.R. §800 are to advise, assist, review, and consult with Federal agencies as they carry out their historic preservation responsibilities and to respond to Federal agencies' requests within a specified period of time and has participated in the development of the Agreement and is a signatory to this agreement; and

WHEREAS, FHWA has invited the Advisory Council on Historic Preservation (ACHP) to participate in development of this Agreement and is a signatory to this agreement; and

WHEREAS, FHWA has determined that certain types of transportation projects processed as categorical exclusions under National Environmental Policy Act (NEPA) may have an effect upon properties included in, or eligible for inclusion in, the National Register of Historic Places (NRHP), hereafter referred to as historic properties, and has consulted with the SHPO and the ACHP pursuant to section 800.14(b) of the regulations implementing Section 106 of the NHPA; and

WHEREAS, FHWA has consulted with Federally-recognized Indian Tribes (Tribes) with ancestral lands in South Dakota about this Agreement, has requested their comments, and has taken any comments received into account. These tribes include Cheyenne River Sioux Tribe, Crow Creek Sioux Tribe, Flandreau Santee Sioux Tribe, Lower Brule Sioux Tribe, Oglala Sioux

Tribe, Rosebud Sioux Tribe, Sisseton Wahpeton Oyate, Standing Rock Sioux Tribe, Yankton Sioux Tribe, Iowa Tribe of Oklahoma, Three Affiliated Tribes, Ponca Tribe of Nebraska, Northern Arapaho Tribe, and Chippewa Cree Tribe; and

WHEREAS, each of the federally-recognized Tribes of South Dakota, with the exception of the Lower Brule Sioux Tribe, has assumed the responsibilities of the SHPO on its/their Tribal lands through the appointment of a Tribal Historic Preservation Officer (THPO) in accordance with Section 101 of the NHPA, and FHWA shall consult with the THPO in lieu of the SHPO for Undertakings occurring on or affecting its/their Tribal lands; and

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

WHEREAS, FHWA has notified the public, Federal and State agencies, and Certified Local Governments (CLGs) about this agreement, has requested their comments, and has taken any comments received into account;

NOW, THEREFORE, FHWA, the SHPO, the ACHP, and SDDOT agree that the Program shall be carried out in accordance with the following stipulations to take into account the effects of the Program on historic properties in South Dakota and that these stipulations shall govern compliance of the Program with Section 106 of the NHPA until this agreement expires or is terminated.

STIPULATIONS

The FHWA, with the assistance of SDDOT, shall ensure that the following measures are carried out:

I. APPLICABILITY AND SCOPE

- A. This Agreement sets forth the process by which the FHWA, with the assistance of SDDOT, will meet its responsibilities pursuant to Section 106 of the NHPA (54 U.S.C. § 306108) and Section 110 of the NHPA (54 U.S.C. § 306101(a) and 54 U.S.C. § 306102)
- B. This Agreement only applies to transportation projects classified as categorical exclusions under 23 C.F.R. 771.115 and 23 C.F.R. 771.117. Projects that require an Environmental Assessment or Environmental Impact Statement for compliance with NEPA will follow the procedures in 36 C.F.R. § 800.
- C. The objective of this Agreement is to make more efficient the methods by which FHWA and SDDOT review individual undertakings under Section 106 that may affect historic properties and to establish the process by which FHWA (who retains ultimate Section 106

responsibility, except where such responsibility has been delegated to SDDOT) carries out its Section 106 responsibilities.

- D. Through this Agreement, FHWA authorizes SDDOT to initiate and, in many cases, conclude consultation with the SHPO and other consulting parties for purposes of compliance with Section 106 of NHPA.
- E. Through this Agreement, FHWA and SDDOT establish two categories of projects (Exempted Projects and Standard Review Projects) that require different levels of review and consultation with the SHPO.
- F. The FHWA retains the responsibility to consult with Tribes as required under 36 C.F.R. § 800.2(c)(2), as amended. The SDDOT may assist FHWA if individual Tribes agree to alternate procedures.
- G. This Agreement shall not apply to undertakings that occur on or affect tribal lands which are under the jurisdiction of a Tribal Historic Preservation Officer (THPO) as defined in 36 C.F.R. § 800.16. For such undertakings, FHWA shall follow the procedures in 36 C.F.R. § 800 and consult with the appropriate THPO.
- H. Cooperating Federal Agencies who recognize FHWA as the lead Federal agency for an undertaking may fulfill their obligations under Section 106 of NHPA according to 36 C.F.R. § 800.2(a)(2), provided that FHWA and SDDOT follow the requirements of this Agreement and the cooperating agency's undertaking does not have the potential to cause effects to historic properties beyond those considered by FHWA and SDDOT.

II. DEFINITIONS

- A. Exempted Projects: Undertakings which have no or little potential to cause effects to historic properties. Work is limited to those activities listed in Appendix A and may not be part of a larger undertaking or require material sources, material processing sites, stockpile sites, storage areas, plant sites, or waste sites that are not designated within the project plans.
- B. Standard Review Projects: Undertakings which are not activities listed in Appendix A or are those which are listed in Appendix A but are part of a larger undertaking or require material sources, material processing sites, stockpile sites, storage areas, plant sites, or waste sites.
- C. Ground disturbance: Any work or activity that results in a disturbance of the earth, including excavating, digging, trenching, drilling, augering, backfilling, clearing, and grading.
- D. Operational Right-of-Way: all real property interests acquired for the construction, operation, or mitigation of a project. This area includes the features associated with the physical footprint of the project including but not limited to the roadway, bridges, interchanges, culverts, drainage, clear zone, traffic control signage, landscaping, and any rest areas with direct access to a controlled access highway. This also includes fixed

guideways, mitigation areas, areas maintained or used for safety and security of a transportation facility, parking facilities with direct access to an existing transportation facility, transportation power substations, transportation venting structures, and transportation maintenance facilities. (23 CFR 771.117(c)(22)) Portions of the right-of-way that have not been disturbed or that are not maintained for transportation purposes are not in the existing operational right-of-way. Work that requires the modification or relocation of ditches and backslopes are also not considered operational right-of-way.

- E. For purposes of this agreement, the definitions provided in 36 C.F.R. § 800.16 (a) through (z) shall apply whenever applicable.

III. PERSONNEL

A. Review & Compliance Archaeologist

SDDOT and SHPO will jointly fund one (1) Review & Compliance Archaeologist position for an individual who meets the Secretary of the Interior's Professional Qualifications Standards in archaeology (published in 36 CFR 61). The position will be housed at the Cultural Heritage Center and will coordinate with SDDOT to review and process SDDOT's Section 106 archaeology and history/architecture survey reports. The position will review documents submitted for interagency coordination, concur with or comment on the undertaking's area of potential effects (APE), and attend coordination meetings and project site visits with the SDDOT Environmental Office staff to familiarize the position with SDDOT engineering and construction practices and to facilitate a more comprehensive and timely review. The Review & Compliance Archaeologist will follow the procedures outlined in Stipulation VII.B. of this Agreement when conducting reviews of FHWA undertakings. For projects involving architectural resources, the Review & Compliance Archaeologist will confer with SHPO staff members who meet the Secretary of the Interior's Professional Qualifications Standards in architectural history, architecture, or historic architecture (36 C.F.R. 61) regarding determinations of eligibility and determinations of effect.

In the instance of vacancy of the position, the SHPO Review & Compliance Coordinator or another SHPO employee who meets the Secretary of the Interior's Professional Qualifications Standards in archaeology will execute the responsibilities of the Review & Compliance Archaeologist.

B. Consultants / Contractors

All consultants or contractors hired by SDDOT for actions prescribed by this Agreement that involve the identification, evaluation, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meets the Secretary of the Interior's Professional

Qualifications Standards (36 CFR 61). All such contracted reports making recommendations to FHWA or SDDOT on findings or determinations must be signed by an individual who meets the Secretary of the Interior's Professional Qualifications Standards.

C. Environmental Project Coordinator (EPC)

The Environmental Project Coordinator (EPC) is assigned by the Environmental Supervisor or designee upon an Approved Scope of work for a project and is responsible for ensuring all environmental review, coordination, and commitments on transportation projects are met. The EPC will utilize consultants/contractors who meet the Secretary of the Interior's Professional Qualifications Standards (36 CFR 61) to identify historic properties on SDDOT undertakings. The EPC will review the consultants/contractor's recommendations and will consult with SHPO on the undertaking's effects on historic properties and will coordinate consultation with other parties, as appropriate.

IV. RESPONSIBILITIES

The following section identifies the responsibilities of FHWA and of SDDOT in complying with the terms of this Agreement.

A. FHWA Responsibilities

1. Consistent with the requirements of 36 C.F.R. § 800.2(a) and 800.2(c)(4), FHWA remains legally responsible for ensuring that the terms of this Agreement are carried out and for all findings and determinations made pursuant to the Agreement by SDDOT under the authority of FHWA. At any point in the Section 106 process, FHWA may inquire as to the status of any undertaking carried out under the authority of this Agreement and may participate directly in any undertaking at its discretion.
2. FHWA retains the responsibility for government-to-government consultation with Tribes as defined in 36 C.F.R. § 800.16(m). FHWA may ask SDDOT to assist in consultation if the individual Tribes agree to alternate procedures.
3. FHWA shall be responsible for resolving disputes and objections pursuant to Stipulation XI.B. of this Agreement.
4. FHWA retains the responsibility to notify the ACHP and consulting parties of adverse effects, as per 36 C.F.R. § 800.6(a)(1) and Stipulation VII.B.3.

B. SDDOT Responsibilities

SDDOT, using consultants or contractors meeting the Secretary of the Interior's Professional Qualifications Standards (36 C.F.R. 61) in the relevant field as stipulated in III.B and III.C above, will independently perform the work and consultation described in 36 C.F.R. § 800.3 – 36 C.F.R. § 800.5 (including any succeeding revisions to the regulations) on behalf of FHWA. Assignment of these responsibilities is based on adequate and appropriate performance by SDDOT as evaluated in monitoring by FHWA pursuant to Stipulation XI.A of this Agreement. These responsibilities include carrying out the following requirements:

1. 36 C.F.R. § 800.3(a) Determine whether the undertaking is a type of activity that has the potential to cause effects on historic properties.
2. 36 C.F.R. § 800.3(c) and (d) Determine whether the undertaking may occur on or has the potential to affect historic properties on tribal lands.
3. 36 C.F.R. § 800.3(e) Solicit public comment and involvement (See VI.A and VI.B).
4. 36 C.F.R. § 800.3 Identify additional consulting parties who should be invited to participate in the undertakings covered by this Agreement.
5. 36 C.F.R. § 800.4(a) and (b) Determine and document, in consultation with the SHPO, the scope of identification efforts and level of effort, including the undertaking's area of potential effects (APE).
6. 36 C.F.R. § 800.4 In consultation with the SHPO, identify properties within the APE included in or eligible for listing in the NRHP.
7. 36 C.F.R. § 800.5(a)(1) Determine whether historic properties may be affected by the undertaking by applying the criteria of adverse effect.
8. 36 C.F.R. § 800.6 Assist FHWA in consulting with the SHPO, the ACHP (if it has chosen to participate), and any other consulting parties and in addressing any adverse effects through the development, circulation, execution, and implementation of a MOA, as appropriate.
9. Provide FHWA copies of all correspondence sent out on its behalf (e.g. letters to SHPO or Tribes), when requested.

V. CONSULTATION WITH TRIBES

- A. FHWA shall take the lead in identifying and establishing consultation with Tribes consistent with the requirements of 36 C.F.R. § 800.2(c)(2) and 36 C.F.R. § 800.3(c)-(f). SDDOT EPC will provide general day-to-day project specific coordination of information to Tribes, but FHWA shall retain ultimate responsibility for complying with all federal requirements pertaining to government-to-government consultation with Tribes.
- B. In accordance with 36 C.F.R. § 800.3(f)(2), any Tribes that might attach religious and cultural significance to historic properties in the APE shall be identified by SDDOT EPC and invited by FHWA to be consulting parties.

- C. FHWA shall ensure that consultation with Tribes is initiated early in the project planning process to identify cultural, confidentiality, or other concerns and to allow adequate time for consideration.
- D. FHWA shall ensure that consultation continues with Tribes throughout the Section 106 review process prescribed by this Agreement whenever such tribes express a concern about an undertaking or about historic properties that may be affected by an undertaking.
- E. FHWA may ask SDDOT to assist in consultation if the individual Tribes agree.

VI. PARTICIPATION OF OTHER CONSULTING PARTIES AND THE PUBLIC

A. Additional Consulting Parties

1. Consulting parties shall be identified in writing by SDDOT EPC in consultation with the SHPO pursuant to 36 C.F.R. § 800.3(c-f) and their participation in undertakings covered under this Agreement shall be governed by 36 C.F.R. § 800.3(f)(3). Individuals and organizations with a demonstrated interest in an undertaking shall be invited by SDDOT in consultation with FHWA to participate in the Section 106 process. Any land-managing agency whose land may be affected by an undertaking shall be invited by SDDOT to participate in the Section 106 process. Written requests by individuals, organizations, and agencies to become consulting parties will be evaluated on a case-by-case basis by SDDOT and FHWA in consultation with the SHPO.

B. Public Involvement

1. Public involvement in planning and implementing undertakings covered by this Agreement shall be governed by FHWA's and SDDOT's environmental compliance procedures. SDDOT's Public Involvement Plan (available online at <http://www.sddot.com/resources/reports/>) provides guidance for identifying, informing, and involving the public. FHWA's Technical Advisory and similar and subsequent guidance documents will also be used. Public involvement and the release of information hereunder shall be consistent with 36 C.F.R. § 800.2(d), 800.3(e), and 800.1(c)(1,3).
2. The SDDOT shall continue to seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, to remain consistent with the intent of 36 C.F.R. § 800, as amended.
3. For those actions that do not routinely require public review and comment (e.g., exempted projects), appropriate public involvement should be based on the specifics of the situation and commensurate with the type and location of historic properties, and the undertaking's potential impacts on them.

4. The SDDOT shall make FHWA and SHPO aware of any and all public controversy, in writing, as it relates to the historic properties potentially affected by the proposed undertaking, including properties of religious and/or cultural significance to the Tribes. The SDDOT EPC will work with applicable parties to resolve controversy.

VII. PROJECT REVIEW

A. Exempted Projects

1. Certain projects have no appreciable potential to affect historic properties, whether or not there may be historic properties in the project area. The signatories to this Agreement agree that minor projects limited to the activities listed in Appendix A will require no further coordination pursuant to 36 C.F.R. § 800.3(a).
2. The SDDOT may add additional activities to the list in Appendix A upon written notice to, consultation with, and concurrence from all signatories to this Agreement.
3. For projects that are limited to the activities listed in Appendix A, SDDOT EPC will document its finding that the action is exempt from further review and maintain that documentation in its project files.

B. Standard Review

1. For projects which are not included in Appendix A or for projects in which an exempted activity is part of a larger undertaking or requires material sources, material processing sites, stockpile sites, storage areas, plant sites, or waste sites that are not designated within the project plans, SDDOT EPC shall submit full documentation of the project consistent with 36 C.F.R. § 800.11 to SHPO for a standard review of the project consistent with 36 C.F.R. § 800.
2. When SDDOT EPC submits documentation for a finding of “No Historic Properties Affected” or “No Adverse Effect” to SHPO for consultation, the Review & Compliance Archaeologist shall have ten (10) business days from the receipt of complete information to review the project and concur with or comment on the determination. For projects where SDDOT EPC submits documentation of a finding of “adverse effect,” the Review & Compliance Archaeologist will comment as soon as practical but not to exceed thirty (30) days.
3. For all undertakings requiring the preparation of an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) under NEPA; or for undertakings in which adverse effects to historic properties cannot be avoided, SDDOT’s environmental program staff will notify FHWA, and FHWA will notify the ACHP of the finding of adverse effect and consult with the SHPO and other consulting parties to resolve the adverse effects and conclude the Section 106 process in accordance with 36 C.F.R. § 800.6.

VIII. EMERGENCY SITUATIONS

For the purposes of this Agreement, emergencies are defined as occurrences that require emergency highway system and facility repairs that are necessary to 1) protect the life, safety, or health of the public; 2) minimize the extent of damage to the highway system and facilities; 3) protect remaining highway facilities; or 4) restore essential traffic. The following stipulations apply to emergency situations:

- A. Repairs to address emergency situations as defined above can occur regardless of funding category, and regardless of declarations made by federal, state, or local agencies.
- B. If the emergency repair project could affect historic properties, SDDOT EPC shall notify the SHPO, the FHWA, and Tribes prior to any work taking place. The SHPO and any Tribe that may attach religious and cultural significance to historic properties likely to be affected will have 72 hours to respond.
- C. For projects where the repair must be made within the first 30 days of the occurrence of the event that caused the emergency or the declaration of the emergency by an appropriate authority, the review and processing of environmental documentation will happen concurrently or after the fact. In these cases, SDDOT will notify and consult with the SHPO on the appropriate actions to avoid, minimize, or mitigate adverse effects to historic or unevaluated properties.
- D. For projects taking longer than 30 days for repair, SDDOT will comply with the procedures in Stipulation VII.
- E. SDDOT EPC shall supply written notification of an emergency action to the SHPO. The notice shall be clearly and prominently marked as an emergency notification and shall include an explanation of how the action meets the requirements for emergency as defined herein. The notice shall also include a brief description of the eligibility and/or significance of the property/properties involved, the nature, effect, and anticipated effect of the emergency action on the property/properties, and the anticipated time frame available for comment.

IX. POST-REVIEW DISCOVERIES

- A. Planning for Subsequent Discoveries

When SDDOT's identification efforts indicate that historic properties are likely to be discovered during implementation of an undertaking, SDDOT EPC, in consultation with SHPO, shall include in the Section A - Environmental Commitment notes identified in the plans, or any other environmental document, contract, or specifications a plan for discovery of such properties. Implementation of the plan as originally proposed or

modified as necessary owing to the nature and extent of the historic properties discovered, will be in accordance with 36 C.F.R. § 800.4-6.

B. Inadvertent Discoveries

1. If previously unidentified historic properties, or unanticipated effects on historic properties, are discovered after SDDOT has completed its review under this Agreement, all project activities within 100 feet (30 meters) of the inadvertent discovery should cease immediately, in accordance with SDDOT Section A – Environmental Commitments, and SDDOT shall notify the SHPO and Tribes that might attach religious and cultural significance to the affected property within 48 hours of the discovery.
2. No further construction within 30 meters of the area of discovery will proceed until the requirements of 36 C.F.R. § 800.13 have been satisfied, including consultation with Tribes that may attach traditional cultural and religious significance to the discovered property.
3. SDDOT will consult with SHPO and FHWA will consult with Tribes, as appropriate, to record, document, and evaluate NRHP eligibility of the property and the project's effect on the property, and to design a plan for avoiding, minimizing, or mitigating adverse effects on the eligible property.
4. If neither the SHPO nor a Tribe files an objection within five (5) business days of SDDOT's plan for addressing the discovery, SDDOT may carry out the requirements of 36 C.F.R. § 800.13 on behalf of FHWA, and the ACHP does not need to be notified.

X. IDENTIFICATION AND TREATMENT OF HUMAN REMAINS

All undertakings involving human remains are subject to applicable federal and state burial laws and ordinances, including the Native American Graves Protection and Repatriation Act (NAGPRA) when on federal lands and South Dakota Codified Law (SDCL 34:27:21-31) when on state or private lands. In the event of an inadvertent discovery of human remains or funerary objects on state or private land, the procedures outlined in SDDOT's Inadvertent Discovery of Human Remains guidance (Attachment 2) will be followed.

XI. ADMINISTRATIVE STIPULATIONS

A. Monitoring

1. FHWA, the SHPO, and ACHP may review activities carried out pursuant to this Agreement. SDDOT shall maintain documentation of all activities exempted from review and make a report of this documentation available to FHWA and SHPO prior to January 31st, annually and ACHP upon request.

2. FHWA shall monitor the provisions of this Agreement. Prior to January 31st, annually, SDDOT will organize a meeting with representatives of the signatories to this Agreement to review the overall effectiveness and benefits of the Agreement, determine if its requirements are being met, decide if amendments to the Agreement are warranted, review the reporting format and categories for adequacy, and identify any other actions that may be needed in order to take into account the effects of the Federal Aid Highway Program on historic properties in South Dakota. Following the meeting, FHWA will prepare and submit meeting minutes summarizing the results of the annual review to SHPO and ACHP upon request.

B. Training

Each year at the annual monitoring meeting, SDDOT will organize a training session for all employees of the Environmental Program. Staff from SHPO, FHWA, and/or SDDOT will provide training to employees on the terms of this Agreement, including any alterations to the Agreement discussed at the annual meeting, pursuant to Stipulation XI.A.2. Additionally, the Review and Compliance Coordinator and/or the Review and Compliance Archaeologist will provide a brief overview of and answer questions pertaining to Section 106 and SDDOT projects, and staff from the Archaeological Research Center who meet the Secretary of the Interior's Professional Qualifications Standards in Archaeology may be present to provide a brief overview of and answer questions pertaining to cultural resources surveys and SDDOT projects.

C. Resolving Objections to the Implementation of this Agreement

1. Should any signatory object in writing to FHWA regarding the manner in which the terms of this Agreement are carried out, FHWA will immediately notify the other signatory parties of the objection and proceed to consult with the objecting party to resolve the objection. FHWA will honor the request of any signatory party to participate in the consultation and will take any comments provided by such parties into account. The FHWA shall establish a reasonable time frame for such consultations.
2. Should any signatory party object to a SDDOT or FHWA determination of eligibility, FHWA will submit the determination to the Keeper of the National Register of Historic Places for resolution.
3. If the objection is resolved through consultation, FHWA may authorize the disputed action to proceed in accordance with the terms of such resolution.
4. If, after initiating such consultation, FHWA determines that the objection cannot be resolved through consultation, FHWA shall forward all documentation relevant to the objection to the ACHP and other signatory parties, including FHWA's proposed response to the objection. Within 30 days after receipt of all pertinent documentation, ACHP shall exercise one of the following options:

- i. Advise FHWA that ACHP concurs in FHWA's proposed response to the objection, whereupon FHWA will respond to the objection accordingly; or
 - ii. Provide FHWA with recommendations, which FHWA shall take into account in reaching a final decision regarding its response to the objection; or
 - iii. Notify FHWA that the objection will be referred for comment pursuant to 36 C.F.R. § 800.7(a)(4) and proceed to refer the objection and comment. In this event, FHWA shall ensure that the Agency Official is prepared to take the resulting comments into account in accordance with 36 C.F.R. § 800.7(a)(4).
5. Should ACHP not exercise one of the foregoing options within 30 days after receipt of all pertinent documentation, FHWA may assume ACHP's concurrence in its proposed response to the objections.
6. FHWA shall take into account any ACHP recommendation or comment and any comments from the other signatory parties to this Agreement in reaching a final decision regarding the objection. FHWA's responsibility to carry out all actions under this Agreement that are not the subjects of the objection shall remain unchanged.
7. FHWA shall provide all other signatory parties to this Agreement with a written copy of its final decision regarding any objection addressed pursuant to this Stipulation.
8. FHWA may authorize any action subject to objection under this Stipulation to proceed, provided the objection has been resolved in accordance with the terms of this Stipulation.
9. At any time during implementation of the terms of this Agreement, should any member of the public raise an objection in writing pertaining to such implementation to any signatory party to this Agreement, that signatory party shall immediately notify FHWA. FHWA shall immediately notify the other signatory parties in writing of the objection. Any signatory party may choose to comment on the objection to FHWA. FHWA shall establish a reasonable time frame for this comment period. FHWA shall consider the objection, and in reaching its decision, FHWA will take all comments from the other parties into account. Within 15 days following closure of the comment period, FHWA will render a decision regarding the objection and respond to the objecting party. FHWA will promptly notify the other parties of its decision in writing, including a copy of the response to the objecting party. FHWA's decision regarding resolution of the objection will be final. Following the issuance of its final decision, FHWA may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

XII. AMENDMENT

- A. Any signatory to this Agreement may at any time propose amendments, whereupon all signatory parties shall consult to consider such amendment. This Agreement may be amended only upon written concurrence of all signatory parties.

- B. Each attachment to this Agreement may be individually amended through consultation of the signatory parties without requiring amendment of the Agreement, unless the signatory parties through such consultation decide otherwise.

XIII. TERMINATION

- A. Any signatory party may terminate this agreement. If this Agreement is not amended as provided for in Stipulation XII, or if any signatory party proposes termination of this Agreement for other reasons, the party proposing termination shall notify the other signatory parties in writing, explain the reasons for proposing termination, and consult with the other parties for no more than 30 days to seek alternatives to termination.
- B. Should such consultation result in an agreement on an alternative to termination, the signatory parties shall proceed in accordance with that agreement.
- C. Should such consultation fail, the signatory party proposing termination may terminate this Agreement by promptly notifying the other signatories in writing.
- D. Should this Agreement be terminated, FHWA would carry out the requirements of 36 C.F.R. § 800 for individual undertakings. Beginning with the date of termination, FHWA shall ensure that until and unless a new Agreement is executed for the actions covered by this Agreement, such undertakings shall be reviewed individually in accordance with 36 C.F.R. § 800.4-800.6.

XIV. CONFIDENTIALITY

All signatories to this Agreement acknowledge that information about historic properties or potential historic properties are or may be subject to the provisions of Section 304 of NHPA and SDCL 1-20-21.2. Section 304 allows FHWA to withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if SDDOT determines that disclosure may 1) cause a significant invasion of privacy; 2) risk harm to the historic resource; or 3) impede the use of a traditional religious site by practitioners. SDCL 1-20-21.2 holds that the location of an archaeological site shall remain confidential to protect the integrity of the site, but the state archaeologist may make the information available to the parties identified in SDCL 1-20-21.2. Having so acknowledged, all parties to this Agreement will ensure that all actions and documentation prescribed by this Agreement are, where necessary, consistent with the requirements of Section 304 of the NHPA and SDCL 1-20-21.2.

XV. DURATION OF AGREEMENT

This Agreement shall remain in effect for a period of seven (7) years after the date of the last signature, unless it is terminated prior to that time. Ninety days prior to the conclusion of the

seven-year period, FHWA will notify all parties in writing. If there are no objections from consulting parties, the term of the Agreement will automatically be extended for an additional seven years. If any signatory objects to extending the Agreement, or proposes amendments, FHWA will consult with the signatories to consider amendments or other actions to avoid termination.

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Execution and implementation of this Agreement evidence that FHWA has delegated certain Section 106 responsibilities to SDDOT and has afforded ACHP a reasonable opportunity to comment on the Program and its individual undertakings in South Dakota; that FHWA has taken into account the effects of the Program and its individual undertakings on historic properties, and that FHWA has complied with Section 106 of the NHPA and 36 C.F.R. § 800 for the Program and its individual undertakings.

Signatories:

Federal Highway Administration-South Dakota Division

By: _____ Date: _____
Kirk Fredrichs, Division Administrator

South Dakota State Historic Preservation Office

By: _____ Date: _____
Jay D. Vogt, State Historic Preservation Officer

Advisory Council on Historic Preservation

By: _____ Date: _____
John M. Fowler, Executive Director

South Dakota Department of Transportation

By: _____ Date: _____
Darin Bergquist, Secretary

APPENDIX A

EXEMPTED ACTIVITIES

Projects limited to the following activities (provided the projects are not part of a larger undertaking and do not include material sources, material processing sites, stockpile sites, storage areas, plant sites, or waste sites that are not designated within the project plans), by their nature and definition, are projects that have no or little potential to affect historic properties or properties which are unevaluated for listing in the National Register of Historic Places. Therefore, projects which are strictly limited to those listed below do not require consultation with the SHPO.

Terminology and phrasing for these exempted activities was adapted in part from those activities listed in Attachment 1.

1. Funding for planning and research activities, including corridor management plans and preliminary engineering.
2. Non-ground disturbing planning and research activities, including engineering activities to define the elements of a proposed action.
3. Grants for training, education, outreach, and research programs.
4. Federal-aid system revisions which establish classes of highways on the Federal-aid highway system.
5. Acquisition of scenic easements or land for hardship or protective purposes from nonfederal sources.
6. Non-ground disturbing ride sharing activities, such as marking high-occupancy vehicle lanes, production of educational materials, and funding to encourage ride sharing.
7. Funding for the development of Information Technology support materials [i.e., programs, guidelines, software] and for SDDOT and Local Transportation Assistance Program Training and equipment.
8. Non-ground disturbing Safe Routes to School education and outreach projects.
9. Non-destructive statewide bridge inspections.
10. Purchase of equipment or materials.
11. Filing of joint or multiple use permits with other agencies or encroachment permits.
12. Replacing/repairing existing underground utilities and replacement and relocation of existing utility poles in the boulevard or in the previously-disturbed median.
13. In-kind replacement or maintenance of landscape or mowing and brush removal within existing operational right-of-way.
14. Addition or replacement of devices, such as median glare screens, median barriers, guardrails, safety barriers, energy attenuators, guide posts, markers, safety cable, ladders, lighting, hoists, breakaway devices, reflective object markers, lighting, traffic and pedestrian signals, or signs within the existing operational right-of-way.

15. Deployment of electronics, photonics, communications or information processing equipment to improve safety or enhance security or passenger convenience.
16. General highway maintenance and repair, including pothole filling, crack sealing, joint repair, pavement milling or grooving, resurfacing in kind, and eligible activities listed in Attachment 1, Section I.A.
17. General pavement marking and line painting or installation of sensors, roadway delineators, raised pavement markers, or rumble strips/stripes in existing pavements.
18. Repair, replacement, or resetting of existing guardrail with replacement of existing wood or weathering steel guardrail being replaced consistent with the existing materials on bridges less than 45 years old where no new bank stabilization is required.
19. Roadway surface replacement, rehabilitation, resurfacing, or reconstruction, overlays, shoulder treatments, pavement repair, seal coating, pavement grinding, and pavement marking within areas previously disturbed by construction.
20. Herbicidal spraying within existing operational right-of-way.
21. Improving existing bicycle and pedestrian lanes and paths (such as walkways, sidewalks, and shared-use paths) on their existing alignments, provided that any and all ground disturbance is limited to existing fill material locations only, not to exceed the depth of the existing fill material, and that no borrow is required.
22. In-kind replacement of existing fencing.
23. Replacement of sidewalks and curbs and gutters to satisfy the requirements of the Americans with Disabilities Act (ADA) or exclusive of ADA projects when there are no alterations to adjacent structures or facades.
24. Routine maintenance of bridges and culverts including bridge repairs, deck replacement, or repairs, overlays, railing repair, painting, berm repairs, and eligible activities listed in Attachment 1, Section II.A, Items 1-34, provided all activities are within the existing operational right-of-way.
25. Routine roadway and drainage system preservation activities necessary to preserve existing infrastructure while maintaining roadway safety and proper drainage. Such activities are limited to blading shoulders to provide proper surface drainage, bridge cleaning and/or washing, pipe cleanout, and routine maintenance on signals and lighting fixtures.
26. Storm damage repairs, such as culvert clearing or repair, shoulder reconstruction, or slide or debris removal confined to existing operational right-of-way.

ATTACHMENT 1

GUIDANCE ON FEDERAL-AID FUNDING ELIGIBILITY FOR HIGHWAY PRESERVATION AND MAINTENANCE

MARCH 28, 2017

PURPOSE: Provide clarification to existing rules, regulations, and policies in determining Federal-aid eligibility for highway preservation and maintenance projects in South Dakota.

Preservation consists of work that is planned and performed to improve or sustain the condition of the transportation facility in a state of good repair. Preservation activities generally do not add capacity or structural value but do restore the overall condition of the transportation facility. Preservation is now included in the definition for construction in 23 U.S.C. 101 and thus eligible and encouraged under the National Highway Performance Program (NHPP) and the Surface Transportation Block Grant Program (STBG).

Maintenance describes work that is performed to maintain the condition of the transportation system or to respond to specific conditions or events that restore the highway system to a functional state of operation. Maintenance is a critical component to the SDDOT asset management plan and is comprised of both routine and preventive maintenance. Routine maintenance encompasses work that is performed in reaction to an event, season, or over all deterioration of the transportation asset. This work requires regular reoccurring attention. Routine maintenance is not eligible for federal-aid funding. Preventive maintenance is a proactive approach and encompasses work that has proven to be a cost-effective means of extending the useful life of highways, bridges, and essential highway appurtenances. Preventative maintenance is eligible for federal-aid funding if the work is on a "Federal-aid highway." (23 U.S.C. § 116 (e)). A Federal-aid highway is defined as "a public highway eligible for assistance under this chapter other than a highway functionally classified as a local road or rural minor collector." (23 U.S.C. § 101 (a)(6)).

The key to making eligibility determinations is early communication with the FHWA Division Office. The Project Development Office will be responsible for contacting FHWA regarding any projects where eligibility may be in question.

I. Preservation and Maintenance for Pavements

A. Eligible Activities

Asphalt Concrete Pavement

1. Route and/or Seal Cracks
2. Crack-Leveling
3. Rut Filling
4. Chip Seals
5. Thin Asphalt Concrete Resurfacing
6. Micro-Surfacing

7. Macro-Surfacing

8. Slurry Seal

Portland Cement Concrete Pavement

9. Joint/spall repair, Partial and Full-Depth Repairs

10. Cross Stitching

11. Dowel Bar Retrofit

12. Re-sealing Joints and/or Random Cracks

13. Undersealing and/or Pavement Jacking

14. Diamond Grinding

Miscellaneous

15. Pavement Drainage System

16. Prime and Seal Gravel Surfacing

B. Non-Eligible Activities

1. Pothole repair or patching (temporary repair with cold or hot mix)

2. Isolated concrete/asphalt patching (fixing isolated damaged areas or repairs, smoothing out a bump(s) for ride)

3. Joint replacement at isolated locations

4. Full width and depth slab replacement at isolated locations

5. Isolated asphalt overlays on PCCP defined as lengths less than 500 feet as per SDDOT Pavement Management System

6. Blading gravel surfacing

7. Stockpiling of gravel surfacing material

8. Isolated gravel surfacing placement

9. Blading shoulders to provide proper surface drainage

II. Preservation and Maintenance for Bridges

A. Eligible Activities

Approach Roadway and Approach Slab

1. Approach Roadway Grade Profile Correction to Minimize Impact Loading

2. Approach Slab Repair and/or Replacement

Deck

3. Bridge Deck Seal Coat

4. Bridge Deck Epoxy Chip Seal

5. Bridge Deck High Friction Surface Treatment

6. Deck/Slab Repair

7. Deck Overlay

8. Bridge Joint Repair/Replacement

9. Eliminate Deck Joints

10. Bridge Deck Edge Beam Replacement

11. Bridge Railing Upgrade/Repair

12. Electrochemical Chloride Extraction Treatment
13. Drainage System Cleaning/Repair

Superstructure

14. Structural Steel Repair/Heat Straightening
15. Spot and Zone Painting/Coating
16. Painting/Coating or Overcoating of Structural Steel
17. Retrofit of Fracture Critical Members
18. Retrofit of Fatigue Prone Details

Substructure

19. Pier/Abutment Footing, Wall, Column, Cap Repair/Replacement
20. Foundation Stabilization
21. Bearing Reset/Repair/Replacement
22. Piling Repair
23. Semi-Integral/Integral Abutment Conversion
24. Installation of Scour Countermeasures
25. Scour Repair
26. Channel Debris Removal to Prevent Scour
27. Electrochemical Chloride Extraction Treatment

Deck, Superstructure and Substructure

28. Crack Sealing
29. Concrete Repair/Replacement
30. Concrete Sealants, Coatings and Membranes
31. Collision Damage Repair
32. Structure Widening for Safety
33. Bridge Cleaning and/or Washing Services
34. Cathodic Protection Systems

Bridge Length Culverts

35. Culvert Invert Repair
36. Culvert Joint Repair
37. Culvert Lining Installation/Repair
38. Culvert Extension
39. Remove and Reset RCP (reset sections must be tied).
40. Installation of Scour Counter Measures
41. Scour Repair
42. Channel Debris Removal to Prevent Scour

Other

43. Slope Protection Installation/Repair
44. Retaining Wall Installation/Repair
45. Mechanically Stabilized Earth Wall Repair
46. Tunnel Repair

B. Non-Eligible Activities

1. Deck Patching (temporary).
2. Temporary Structural Repair

III. Preventive Maintenance for Preservation of Other Highway Features

A. Eligible Activities

1. Installation or Upgrading of Substandard Guardrail or End-Treatments
2. Culvert Lining Installation/Repair
3. Remove and Reset RCP (reset sections must be tied)
4. Installation/Replacement of Traffic Signs and Delineators
5. Removal/Shielding of Roadside Obstacles.
6. Mitigation of Edge Drop-Offs
7. Addition of Paved or Stabilization of Unpaved Shoulders
8. Installation of rumble strips
9. Installation/Upgrade Lighting to Current Standards
10. Original Installation of Pavement Marking
11. Region Wide Installation and/or Repair of Durable Pavement Marking
12. Slope Flattening of In-slopes and/or Approaches
13. Installation and/or Replacement of Continuous Segments of Interstate Fence
14. Interstate Rest Areas/Port of Entries
 - a. Construct/Reconstruct Parking Lots
 - b. Chip Sealing/Sealing of Parking Lots
 - c. Joint Repair of Parking Lots
 - d. Installation/Upgrade of Luminaries to Current Standards
 - e. Installation/Replace shelters
 - f. Construct Waste Treatment Pond
 - g. Installation/Upgrade Security Systems to Current Standards
 - h. Replacement of Plumbing/Heating/Cooling/Electrical (etc.) Systems Requires prior FHWA Approval

B. Non-Eligible Activities

1. Pipe Cleanout
2. Maintenance of Pavement Markings (i.e. repainting of water-borne based pavement markings)
3. Isolated Repair of Durable Pavement Markings
4. Routine Maintenance on Signal/Lighting Fixtures (i.e. changing light bulbs, lens, lens seals, lubricating cable lowering system)
5. Purchase and Installation of Traffic Signs by State or Local Forces
6. Routine Repair of Interstate Fence to Fix a Broken Wire or Reattach to Posts
7. Replacement of Isolated Posts to Maintain Control of Access on Interstate Fence
8. Any Fencing on Non-Interstate Facilities

9. Repair Plumbing, Electrical, Heating, Cooling, or any Structural Element of the Interstate Rest Area Facility
10. Cleaning of Interstate Rest Area Waste Treatment Pond
11. Mowing of Interstate Rest Area

Reference:

Guidance on Highway Preservation and Maintenance (FHWA Memo 2/25/2016)
<https://www.fhwa.dot.gov/preservation/memos/160225.cfm>

Additional information: For additional information on Federal-Aid highway programs and projects, please visit the following:

A Guide to Federal-Aid Programs and Projects:
<http://www.fhwa.dot.gov/federalaid/projects.cfm>

Eligibility of Replacement Parts for Safety-related Hardware (FHWA Memo 6/10/2008):
<https://www.fhwa.dot.gov/federalaid/080610.cfm>

Additional Guidance on 23 CFR 650A (Formerly Non-Regulatory Supplement - Storm Drainage Responsibility)
<http://www.fhwa.dot.gov/legsregs/directives/fapq/0650asu1.htm>

Bridge Preservation Guide (August 2011)
<https://www.fhwa.dot.gov/bridge/preservation/guide/guide.pdf>

ATTACHMENT 2

INADVERTENT DISCOVERY OF HUMAN REMAINS

In the event of an inadvertent discovery of human remains or funerary objects on state or private land, the following steps shall be taken pursuant to South Dakota Codified Law Chapter 34-27-25, 34-27-28, and 34-27-31:

1. The Contractor shall immediately halt construction activities within a 150-foot radius from the point of discovery and implement measures to protect the discovery from looting and vandalism. No digging, collecting or moving of human remains or other items shall occur after the initial discovery. Protection measures may include the following:
 - a) Flag the buffer zone around the find spot.
 - b) Keep workers, press, and curiosity seekers, away from the find spot.
 - c) Tarp the find spot.
 - d) Prohibit photography of the find unless requested by an agency official.
 - e) Have an individual stay at the location to prevent further disturbance until a law enforcement officer arrives
2. The Contractor shall notify local law enforcement, the FHWA and DOT, and the South Dakota State Archaeologist (State Archaeologist) within forty-eight (48) hours of the discovery.
3. The FHWA/DOT shall notify the South Dakota State Historic Preservation Office (SHPO), Indian tribes, and other consulting parties within forty-eight (48) hours of the discovery.
4. If local law enforcement determines that the remains are not associated with a crime, the FHWA/DOT shall determine if it is prudent and feasible to avoid disturbing the remains. If the FHWA/DOT, in consultation with the Project Engineer and the Contractor determine that disturbance cannot be avoided, the FHWA/DOT shall consult with the State Archaeologist, SHPO, Indian tribes and other consulting parties to determine acceptable procedures for the removal, treatment and disposition of the burial or remains. The FHWA/DOT shall ensure that the Contractor implements the plan for removal, treatment and disposition of the burial or remains as authorized by the South Dakota State Archaeologist.
5. The FHWA/DOT shall notify the Contractor that they may resume construction activities in the area of the discovery upon completion of the plan authorized by the State Archaeologist.