

**PROGRAMMATIC AGREEMENT
AMONG
THE UNITED STATES ARMY CORPS OF ENGINEERS, ALBUQUERQUE DISTRICT,
THE UNITED STATES ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT,
THE UNITED STATES ARMY CORPS OF ENGINEERS, OMAHA DISTRICT,
THE COLORADO STATE HISTORIC PRESERVATION OFFICER,
AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION
REGARDING
STANDARD TREATMENT OF DITCHES DETERMINED ELIGIBLE FOR
INCLUSION IN THE NATIONAL REGISTER OF HISTORIC PLACES
AND CERTAIN EXEMPT ACTIVITIES
IN THE STATE OF COLORADO**

WHEREAS, the United States Army Corps of Engineers' Albuquerque, Sacramento, and Omaha Districts (collectively, USACE) administer a Department of the Army (DA) permit program under the authority of Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. § 403) and Section 404 of the Clean Water Act of 1972, as amended (33 U.S.C. § 1344), hereafter referred to as Regulatory Program, in the State of Colorado; and

WHEREAS, applicants request to perform activities requiring permits from the USACE pursuant to the Regulatory Program, and an activity proposed by the individual applicant may constitute an Undertaking as defined under Section 106 of the National Historic Preservation Act (Section 106), 54 U.S.C. § 306108 (the "Undertaking"), and accordingly would be subject to compliance with those laws and regulations; and

WHEREAS, the USACE has determined an Undertaking may have an adverse effect upon ditches included in or eligible for inclusion in the National Register of Historic Places (NRHP), and has consulted with the Colorado State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP) pursuant to 36 CFR § 800.14(b); and

WHEREAS, pursuant to the consultation conducted under 36 CFR § 800.14(b), the USACE, SHPO, and ACHP have developed this Programmatic Agreement (Agreement) in order to establish an efficient and effective program alternative for the treatment of adverse effects to Historic Properties; and

WHEREAS, the USACE has notified the ACHP in accordance with 36 CFR § 800.14(b), and the ACHP participated in the consultation process to develop this Agreement; and

WHEREAS, the USACE has consulted with the Apache Tribe of Oklahoma, Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation, Cheyenne & Arapaho Tribes of Oklahoma, Cheyenne River Sioux Tribe, Comanche Nation, Confederated Tribes of the Goshute Reservation, Nevada and Utah, Jicarilla Apache Nation, Kiowa Tribe of Oklahoma, Navajo Nation, Northern Arapaho Tribe, Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Northwest Band of Shoshone, Paiute Indian Tribe of Utah, San Juan Southern Paiute Tribe of Arizona, Shoshone-Bannock Tribes of the Fort Hall Reservation of Idaho, Shoshone Tribe of the Wind River Reservation, Skull Valley Band of Goshute Indians, Southern

Ute Indian Tribe of the Southern Ute Indian Reservation, Ute Mountain Ute Tribe of the Ute Mountain Reservation, Ute Indian Tribe of the Uintah & Ouray Reservation, collectively “Tribes”, and respective Tribal Historic Preservation Officers (THPOs) regarding the development of this PA, and invited these Tribes to participate in the development of this PA; and

WHEREAS, none of the Tribes chose to participate in the development of this PA; and

NOW, THEREFORE, the USACE, the SHPO, and the ACHP (collectively, “Signatories”) agree that the Regulatory Program shall be implemented in accordance with the following stipulations to satisfy the Section 106 responsibilities of the USACE in its issuance of a permit for the Undertaking for any adverse effects to Historic Properties addressed by this Agreement until this Agreement expires or is terminated.

STIPULATIONS

To ensure that this Agreement will satisfy the USACE’s Section 106 responsibilities, the USACE, the SHPO, and the ACHP agree that the Agreement will be implemented in accordance with the following stipulations:

I. DEFINITIONS

- A. For the purposes of this Agreement, the definitions provided in 36 CFR § 800.16(a) through (y) inclusive shall apply.
- B. For the purposes of this Agreement, the term ‘ditch’ includes any linear water conveyance feature constructed for the purposes of irrigation, drainage, hydropower, mining, or other uses as well as its distribution system or appurtenant features thereof including, but not limited to, aqueducts, canals, flumes, laterals, drains, aqueducts, siphons, pipes, pumps, headgates, intakes, outfalls, and wingwalls. A ditch does not need to be currently in use, and may include abandoned and/or segmented alignments.

II. APPLICABILITY

- A. This Agreement may be applied to any Undertaking within the State of Colorado to streamline the resolution of adverse effects (36 CFR § 800.6) to Historic Properties that are ditches as defined in Stipulation I.B above. Unless otherwise noted, this Agreement does not change the statutory requirements of Section 106 as set forth by 36 CFR Part 800.
- B. The terms of this Agreement shall not apply if there are historic properties which will be affected by the Undertaking within the Area of Potential Effects that are not ditches as defined in Stipulation I.B.
- C. This Agreement shall not apply to Undertakings that occur on or affect Tribal lands as they are defined in Section 301(14) of the National Historic Preservation Act (54 U.S.C. § 300319) and 36 CFR § 800.16(x), unless the Tribe requests and concurs with the use of this

Agreement on Tribal lands. Tribal lands are all lands within the exterior boundaries of any Indian reservation, and all dependent Indian communities.

- D. This Agreement shall not apply to ditches determined to be prehistoric in age or to ditches determined to be historic acequias.

III. EXEMPT UNDERTAKINGS

- A. The list of activities in Appendix 1 of this Agreement are exempt from Section 106 consultation provided that the qualifying measures included with each activity are followed.
- B. Any Signatory to this Agreement may at any time propose an amendment to Appendix 1, whereupon all Signatories shall consult to consider such amendment pursuant to 36 CFR § 800.6(c)(7) and § 800.6(c)(8). Appendix 1 may be amended through consultation and consensus among all Signatories to this Agreement without amending the Agreement proper in accordance with Stipulation V.E.

IV. MITIGATION OF ADVERSE EFFECTS

- A. If the USACE determines, in consultation with SHPO, that an Undertaking will result in an adverse effect to a Historic Property that is a ditch as defined in Stipulation I.B, the USACE may propose one of the following treatment measures to be taken to mitigate the adverse effect. Prior to submittal of the proposal to the SHPO, the USACE shall consult with any other identified consulting parties or stakeholders to seek input regarding the proposal. The USACE will consider, in consultation with the SHPO, comments submitted by the consulting parties and/or stakeholders in making the proposal. The agreed upon measure shall depend on the scope and nature of the adverse effect and the determined level of significance of the Historic Property. A Memorandum of Agreement is not required if one or more of the below mitigation measures is chosen:
1. Documentation will be completed in accordance with the guidance found in 'Historic Resource Documentation, Standards for Level I, II and III Documentation' (Office of Archaeology and Historic Preservation Publication 1595, October 2007) prior to the start of construction.
 2. In some instances, Historic American Engineering Record (HAER) or Historic American Landscapes Survey (HALS) documentation may be determined necessary and will be conducted in accordance with the National Park Service (NPS) guidelines. In order to ensure that the appropriate level of documentation is completed, USACE will coordinate all HAER/HALS documentation projects with the NPS Inter-Mountain Regional Office in Denver, Colorado, prior to initiation of the project.
 3. Public interpretation materials may be proposed in combination with or in lieu of the documentation requirements described above and may include kiosks, signage, pamphlets, booklets, multimedia applications, and educational lesson plans.

- B. Within 30 days of receipt of the USACE's proposal, the SHPO shall respond to the USACE's proposal.
1. If the SHPO concurs with the USACE's proposal, the USACE shall proceed accordingly and include the treatment measure in the special conditions of its authorization.
 2. If the SHPO requests additional information, the USACE shall request the additional information from the applicant and continue consultation with the SHPO.
 3. If the SHPO does not concur with the USACE's proposal, SHPO will recommend a different treatment measure listed in Stipulation IV.A with an explanation regarding the new proposal. If the USACE accepts the recommendation, the USACE will notify SHPO and shall proceed accordingly and include the treatment measure in the special conditions of its authorization. If the USACE does not accept the recommendation, the USACE shall engage the ACHP pursuant to Stipulation V.B of this Agreement.
 4. If the SHPO does not respond within the 30-day timeframe, the USACE may assume the SHPO has no comment, and the project may move forward unless an objection to the treatment measure has been filed with the ACHP within the 30-day timeframe.
- C. The USACE will notify all consulting parties of the treatment measure approved under Stipulation IV.B upon inclusion of the treatment measure in the special conditions of its authorization.
- D. Work on the project shall not commence until mitigation has been completed to the satisfaction of both the USACE and the SHPO.

V. ADMINISTRATIVE STIPULATIONS

A. CONFIDENTIALITY

The Signatories acknowledge that Historic Properties covered by this Agreement are subject to the provisions of Section 304 of the NHPA (54 U.S.C. § 307103) and 36 CFR. §800.11(c), relating to the disclosure of sensitive archaeological site information and, having so acknowledged, will ensure that all actions and documentation prescribed by this Agreement are consistent with Section 304 of the NHPA, 36 CFR. § 800.11(c), and 5 U.S.C. § 552, as amended (Freedom of Information Act).

B. RESOLVING OBJECTIONS

1. Should any Signatory object in writing regarding the manner in which the terms of this Agreement are implemented, the party will immediately notify the other Signatories of its objection and attempts will be made to collaboratively resolve the objection to the satisfaction of all parties. Comments made by all Signatories will be taken into account. The USACE shall establish a reasonable time frame for such consultation. The USACE's

responsibility as lead Federal agency to carry out all actions under this Agreement that are not the subject of the objection shall remain unchanged.

2. If the objection is resolved through consultation, the USACE may proceed in accordance with the terms of such resolution.
3. If after initiating such consultation, the USACE determines that the objection cannot be resolved through consultation, the USACE shall forward all documentation relevant to the objection to the ACHP, including the USACE's proposed response to the objection, with the expectation that the ACHP will, within 30 days after receipt of all pertinent documentation, exercise one of the following options:
 - a. Advise the USACE that the ACHP concurs with the USACE's proposed response to the objection, whereupon the USACE will respond to the objection accordingly. The objection shall thereby be resolved; or,
 - b. Provide the USACE with recommendations, which the USACE shall take into account in reaching a final decision regarding its response to the objection. The objection shall thereby be resolved; or,
 - c. Notify the USACE that the objection will be referred for comment pursuant to 36 CFR § 800.7(c), and proceed to refer the objection and comment. The USACE shall take the resulting comment into account in accordance with 36 CFR § 800.7(c)(4). The objection shall thereby be resolved.
4. Should the ACHP not exercise one of the foregoing options within 30 days after receipt of all pertinent documentation, the USACE may proceed with implementation of its proposed response to the objection. The objection shall thereby be resolved.
5. The USACE shall take into account any ACHP recommendation or comment, and any comments from the other parties to this Agreement, in reaching a final decision regarding the objection.
6. 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, that party shall immediately notify the USACE. The USACE shall immediately notify the other Signatories in writing of the objection. Any Signatory Party may choose to comment on the objection to the USACE. The USACE shall establish a reasonable time frame for this comment period. The USACE shall consider the objection, and in reaching its decision, the USACE will take all comments from the other Signatories into account. Within 15 days following closure of the comment period, the USACE will render a decision regarding the objection and respond to the objecting party. The USACE will promptly notify the other parties of its decision in writing, including a copy of the response to the objecting party. The USACE's decision regarding resolution of the objection will be final.

7. The USACE, if it deems it appropriate, will issue a permit for any action subject to objection under Sections B.1-6 of this Stipulation to proceed, provided the objection has been resolved in accordance with the terms of Sections B.1-6 of this Stipulation.
8. The USACE shall provide all parties to this Agreement and any parties that have objected pursuant to Section B.6 of this Stipulation, with a copy of its final written decision regarding any objection addressed pursuant to this stipulation.

C. POST-REVIEW DISCOVERIES

If potential Historic Properties are discovered or unanticipated effects on Historic Properties are identified, USACE shall consult pursuant to 36 CFR § 800.13.

D. ANNUAL REPORTING

By February 1 of each year, commencing in 2017, the USACE shall provide to the ACHP and the SHPO in an agreed upon format, a list and description of each exempt Undertaking pursuant to Appendix 1 authorized between January 1 and December 31 of the previous year.

E. AMENDMENT

Any Signatory Party to this Agreement may at any time propose an amendment, whereupon all Signatories shall consult to consider such amendment pursuant to 36 CFR § 800.6(c)(7) and § 800.6(c)(8). All consulting parties will be notified of the proposed amendment and provided an opportunity to comment. This Agreement may be amended only upon written concurrence of all Signatories.

F. TERMINATION

1. Only a Signatory Party may terminate this Agreement. If this Agreement is not amended as provided for in Stipulation IV.E, or if any Signatory Party proposes termination of this Agreement for other reasons, the party proposing termination shall notify the other Signatories in writing, explain the reasons for proposing termination, and consult with the other Signatories for no more than 30 days to seek alternatives to termination.
2. Should such consultation result in an agreement on an alternative to termination, the Signatories shall proceed in accordance with that agreement.
3. Should such consultation fail, the Signatory Party proposing termination may terminate this Agreement by promptly notifying the other parties to the Agreement in writing. The Agreement will then terminate on the date of the notification.
4. Should this Agreement be terminated, beginning with the date of termination, the USACE shall either consult in accordance with 36 CFR § 800.14(b) to develop a new Agreement or ensure that until and unless a new Agreement is executed for Historic

Properties covered by this Agreement, such Historic Properties shall be addressed individually in accordance with Section 106 and all other applicable regulations.

G. DURATION

This Agreement shall remain in effect for a period of five (5) years after the date it takes effect and shall automatically expire and have no further force or effect at the end of this five-year period unless it is terminated prior to that time. No later than six months prior to the expiration date of the Agreement, the USACE shall initiate consultation to determine if the Agreement should be allowed to expire automatically or whether it should be extended for an additional term, with or without amendments, as the Signatories may determine. Unless the Signatories unanimously agree through such consultation on an alternative to automatic expiration of this Agreement, this Agreement shall automatically expire and have no further force or effect in accordance with the timetable stipulated herein.

H. EFFECTIVE DATE

This Agreement shall take effect upon execution by the final Signatory to sign. Additional attachments or amendments to this Agreement shall take effect on the dates they are fully executed by all Signatories. Execution and implementation of this Agreement is evidence that the USACE has afforded the ACHP a reasonable opportunity to comment on the Agreement and that the USACE has complied with Section 106 for the Agreement and its issuance of permits for individual Undertakings.

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TREATMENT OF DITCHES DETERMINED ELIGIBLE FOR INCLUSION
IN THE NATIONAL REGISTER OF HISTORIC PLACES
AND CERTAIN EXEMPT ACTIVITIES
IN THE STATE OF COLORADO**

SIGNATORIES:

UNITED STATES ARMY CORPS OF ENGINEERS, ALBUQUERQUE DISTRICT

Name:

Allan E. Steinle

Allan E. Steinle

5 April 16

Date

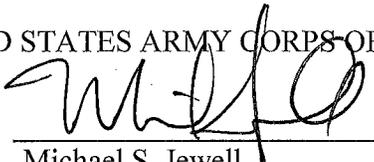
Title:

Chief, Regulatory Division

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SIGNATORIES:

UNITED STATES ARMY CORPS OF ENGINEERS, SACRAMENTO DISTRICT

Name: 

Michael S. Jewell

31 March 2016
Date

Title: Chief, Regulatory Division

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SIGNATORIES:

UNITED STATES ARMY CORPS OF ENGINEERS, OMAHA DISTRICT

Name: Martha S. Chieply 29 March 2016
Martha S. Chieply Date

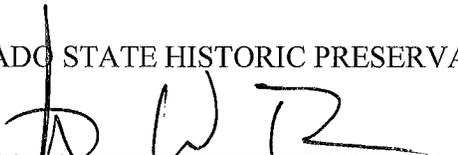
Title: Regulatory Chief, Omaha District

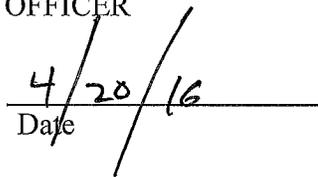
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SIGNATORIES:

COLORADO STATE HISTORIC PRESERVATION OFFICER

Name:


Steve Turner, AIA

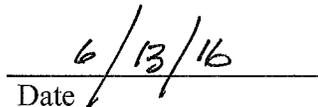

Date

Title: State Historic Preservation Officer

ADVISORY COUNCIL ON HISTORIC PRESERVATION

Name:


John M. Fowler


Date

Title: Executive Director

Appendix 1

The following list of activities will be exempt from Section 106 consultation provided that the qualifying measures are carried out.

1. Trenching through a ditch, as defined in Stipulation I.B of the PA. Trenching for the installment of utilities such as natural gas, electricity, communication, water, or other utility, or the repair and/or replacement of existing utilities, provided that the Historic Property shall be returned to pre-construction contours within 30 days of completion of trenching through the Historic Property.
2. Span over a ditch, as defined in Stipulation I.B of the PA. The repair and/or replacement of existing spans, including but not limited to roadways, bridges, culverts, and utility lines, provided that:
 - i. The span shall not modify the physical attributes of the Historic Property.
 - ii. If necessary and unavoidable, any construction activities related to the span which will physically affect the Historic Property, will be temporary and the Historic Property shall be returned to pre-construction contours within 30 days of completion of the span.
3. Horizontal boring beneath a ditch, as defined in Stipulation I.B of the PA. Boring for the installment of utilities such as natural gas, electricity, communication, water, or other utility, or the repair and/or replacement of existing utilities, provided that the Historic Property shall be returned to pre-construction conditions within 30 days of completion of boring beneath the Historic Property.