

**MEMORANDUM OF AGREEMENT**

**BETWEEN THE CALIFORNIA DEPARTMENT OF TRANSPORTATION AND THE CALIFORNIA STATE HISTORIC PRESERVATION OFFICER AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION REGARDING THE FULTON MALL RECONSTRUCTION PROJECT, CITY OF FRESNO, FRESNO COUNTY, CALIFORNIA**

**WHEREAS**, the Federal Highway Administration (FHWA) has assigned and the California Department of Transportation (Caltrans, including all subordinate divisions defined below) has assumed FHWA responsibility for environmental review, consultation, and coordination pursuant to 23 USC 327, which became effective on October 1, 2012 and applies to this undertaking; and

**WHEREAS**, CSO has consulted with the State Historic Preservation Officer (SHPO) and Advisory Council on Historic Preservation (ACHP) pursuant to stipulation X.C and XI of the January 2014 *First Amended Programmatic Agreement among the Federal Highway Administration, the Advisory Council on Historic Preservation, the California State Historic Preservation Officer, and the California Department of Transportation Regarding Compliance with Section 106 of the National Historic Preservation Act, as it Pertains to the Administration of the Federal-Aid Highway Program in California* (Section 106 PA), and where the Section 106 PA so directs, in accordance with 36 CFR Part 800, the regulation that implements Section 106 of the National Historic Preservation Act of 1966 (16 U.S.C. 4701), as amended, regarding the Undertaking's adverse effect finding pursuant to 36 CFR Part 800.6(a)(1); and

**WHEREAS**, for the purposes of this agreement, the City of Fresno (City) is the project proponent, Caltrans District 6 (District) provides administration of the Federal Tiger Grant funded project on behalf of FHWA and is responsible for completion of environmental studies for the project described in this agreement. Caltrans Headquarters Division of Environmental Analysis is responsible for the oversight of District environmental responsibilities and Caltrans Headquarters Cultural Studies Office (CSO) is responsible for coordination of the Section 106 process; and

**WHEREAS**, the City proposes an undertaking (Undertaking), as described in the draft Environmental Assessment as Alternative 1, to convert the pedestrian-only Fulton Mall to a street by reintroducing vehicle traffic lanes to the existing pedestrian mall, for the purposes of increasing mobility and access by providing more convenient multi-modal access, improving visibility of businesses, offices and other amenities to encourage additional economic development, and increasing consistency with existing and proposed land use plans within the project study area; and

**WHEREAS**, the consulting parties do not all agree with Caltrans' selection of Alternative 1 as the preferred alternative, but have participated in developing mitigation measures to resolve the adverse effects of the alternative, and to ensure that the mitigation measures meet the public interest of the City; and

**WHEREAS**, the City in association with the District and in consultation with the SHPO has conducted intensive surveys of the Fulton Mall, incorporating the eleven blocks of the existing pedestrian mall, additional street rights of way, and properties that line the mall. Determinations and Findings have been presented to the public as described in this agreement; and

**WHEREAS**, the Area of Potential Effects (APE) for the Undertaking was established to include all areas within the vicinity of the Fulton Mall Reconstruction Project that may contain historic properties that would be directly or indirectly affected by the Undertaking. The APE included the maximum existing and proposed right-of-way, project construction easements (temporary and permanent), staging areas, and temporary or permanent changes in access (ingress or egress). The APE for the Undertaking is included as Attachment A to this MOA; and

**WHEREAS**, Caltrans has determined in the Supplemental Finding of Adverse Effect that the Undertaking will have no adverse effect on twelve historic properties within the APE for the undertaking which are either listed or eligible for listing on the National Register of Historic Places (NRHP), including: the Bank of Italy, the Hotel Californian, the Alexander Pantages Theater, the San Joaquin Light and Power Corporation Building, The Pacific Southwest Building, the Mattei Building/Guarantee Savings and Loan, the E. Griffith-McKenzie/Helm Building, the Mason Building, the Radin-Kamp Department Store/J.C. Penney Building, the T.W. Patterson Building, the Gottschalks Department Store, the Fresno Photo Engraving Building, (complete descriptions are contained in the Supplemental Finding of Adverse Effect); and

**WHEREAS**, Caltrans has determined that the Undertaking will have an adverse effect on two historic properties within the APE for the Undertaking: the Fulton Mall, which has been determined by the Keeper of the National Register to be eligible for the NRHP and the Fulton Street/Fulton Mall Historic District which has been determined to be eligible for inclusion in the NRHP for purposes of this Undertaking only; and

**WHEREAS**, Caltrans has considered alternatives to the Undertaking, determined that the design of the Undertaking precludes the possibility of avoiding adverse effects to historic properties during the Undertaking's implementation, and has further determined that it will resolve adverse effects of the Undertaking on the subject historic properties through the execution and implementation of this Memorandum of Agreement (MOA); and

**WHEREAS**, the project design for each proposed alternative included restoration and relocation of (in place where possible) character defining features as identified within the Supplemental Finding of Adverse Effect, including all 23 statues, and to rebuild mosaic benches and trellises

water features and install new ribboned concrete aggregate in order to suggest the original design of the landscape; and

**WHEREAS**, Caltrans has invited the following parties to consult on this Undertaking: Downtown Fresno Coalition, Downtown Fresno Partnership, Big Sandy Rancheria, Kings River Choinumni Farm Tribe, Chowchilla Tribe of Yokuts, Cold Springs Rancheria of Mono Indians, Dumna Wo-Wah Tribal Government, Dunlap Band of Mono Indians, Mr. Frank Marquez, North Fork Mono Tribe, North Fork Rancheria, Picayunc Rancheria, Santa Rosa Tachi Rancheria, Sierra Nevada Native American Coalition, Table Mountain Rancheria, The Choinumni Tribe of Yokuts, Traditional Choinumni Tribe, Fresno County Public Works and Planning Department; and

**WHEREAS**, the Downtown Fresno Coalition and the Downtown Fresno Partnership have participated in the consultation and have been invited to concur in this MOA; and

**WHEREAS**, the terms of this MOA are intended to resolve adverse effects of the Undertaking for the purposes of Section 106 only, and separately from the Section 106 process the CSO, District, and the City are analyzing impacts and providing mitigation measures pursuant to requirements under the California Environmental Quality Act (CEQA), National Environmental Policy Act (NEPA) and Section 4(f) of the U.S. Department of Transportation Act; and

**WHEREAS**, the public has been given an opportunity to comment on the proposed Undertaking and its potential to adversely affect historic properties through the Section 106 process, and the public circulation of the Draft Environmental Assessment; and

**WHEREAS**, the parties to this MOA agree that the undertaking cannot advance to the final design phase until the environmental review is complete and that preliminary designs and proposed plans may change as necessary to accommodate local, state, and federal design standards;

**NOW, THEREFORE**, Caltrans, the City, SHPO and ACHP agree that if the Undertaking proceeds, the Undertaking shall be implemented in accordance with the following stipulations to take into account the effects of the Undertaking on historic properties (NRHP-eligible or listed properties), and further agree that these stipulations shall govern the Undertaking and all of its parts.

#### **STIPULATIONS**

Caltrans shall ensure that the following measures and stipulations are carried out:

##### **I. AREA OF POTENTIAL EFFECTS (APE)**

1. If the final design of the project requires a modification to the APE and the Undertaking may affect historic properties in a manner not described in the Supplemental Finding of Adverse Effect, the District shall notify the consulting parties and provide a summary and

map of the revisions to the APE and an assessment of the potential effects to historic properties, consistent with the requirements of Stipulation VIII.A and Attachment 3 of the Section 106 PA, no later than 30 days following the notification. The parties shall consult to reach agreement on the assessment of effects to historic properties. If additional mitigation measures are needed to resolve any adverse effects then the MOA will be amended in accordance with Stipulation IV.5. If the parties to this MOA cannot reach such agreement, then the parties shall resolve the dispute in accordance with Stipulation IV.4 below.

## **II. TREATMENT OF HISTORIC PROPERTIES**

1. The City, in consultation with CSO, District and SHPO, will develop a Mitigation and Monitoring plan, concurrently with final design and prior to award of contract currently planned for December 2014, to include Stipulations a-d listed below:
  - a) The City, in consultation with CSO, District, and SHPO, so as to avoid inadvertent damage to historic properties and ensure the protection of their material and structural integrity, will develop a Noise and Vibration Monitoring and Mitigation Plan (NVMMP): (1) The NVMMP shall be prepared prior to the start of any construction activities that would result in vibration and will identify procedures for a pre-construction survey of buildings to identify existing cracks, location of basement or underground utility structures and other structural issues, to determine a baseline measure and establish protocol in the event that construction hastens damage; (2) define a pre-construction analysis of anticipated vibration impacts to determine effect thresholds and appropriate measures that might be required to minimize vibration risks during construction; (3) define vibration and analysis methods to be used during construction and outline specific protective response provisions should adverse effects to structural and/or material integrity occur during construction; and (4) vibration minimizing techniques as identified in the NVMMP, construction plans and ESA action plan will be used within six feet of basement areas. Existing sidewalk vault lights uncovered during construction either will be rehabilitated or reconstructed to the Secretary of the Interiors Standards for Rehabilitation or Reconstruction, as applicable, and incorporated into the new sidewalk design or documented and encased in a manner so as to ensure preservation in place concurrent with construction.
  - b) The NVMMP will be coordinated with the Caltrans Standard Special Provisions, Caltrans Environmental Commitments Record, and will be included as notes in the construction plans for contractors. The City shall be responsible for repairing any material or structural damage, including cosmetic cracks caused to any historic property as a result of vibration. Any required repairs to restore a historic property to its condition prior to the construction work shall be carried out in

accordance with the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings.

- c) The City, in consultation with CSO, District and the SHPO will prepare an Archaeological Monitoring Plan to identify ground disturbing activities to be monitored by an archaeologist who meets the Secretary of the Interior's Professional Qualification Standards for Archaeology. One or more Native Americans representing the local tribal communities will be invited to monitor identified construction activities.
  - d) The City, in consultation with CSO, District and SHPO will prepare an Environmentally Sensitive Area (ESA) Action Plan that will establish the placement of ESA fencing during construction around the extant basement features identified in the *Supplemental Finding of Effect Document for the Fulton Mall Reconstruction Project*, in order to protect them from proximity impacts. The ESA fencing will be monitored by a professional who meets the Secretary of the Interior's Professional Qualification Standards in Architectural History. If ESA fencing cannot be maintained, and basements are damaged as a result of project activities, any associated basement features will be rehabilitated in accordance with the Secretary of the Interior Standards for Rehabilitation. Additional measures may be developed to mitigate for potential adverse effects identified post damage and in consultation with signatories and concurring parties to this MOA.
2. Prior to any work that would adversely affect any characteristics that qualify the Fulton Mall as an individual property or as a character defining feature of the Fulton Street/ Fulton Mall Historic District, Caltrans shall ensure Historic American Landscape Survey (HALS) documentation consistent with National Park Service standards is completed and will consult with the National Park Service Pacific West Region office as to the required level of documentation. Upon completion and approval, the District will distribute HALS documentation to the NPS for transmittal to the Library of Congress; the Office of Historic Preservation; the California Room of the California State Library; the University of California Berkley, Environmental Design Archives, Garrett Eckbo collection; the Regional Information Center at California State University (CSU) Bakersfield; the Madden Library Special Collections Research Center at CSU Fresno; Fresno County Library; Fresno City and County Historical Society Archives; City of Fresno Historic Preservation Manager; Caltrans District 6; and Caltrans Headquarters Library and History Center.
  3. The City in consultation with the CSO, District, the SHPO and concurring parties will develop an Interpretive Program that documents the project area history including the

Fulton Mall, the Fulton Street/Fulton Mall Historic District and individually eligible properties. The interpretive program would include:

- a) A website and smart-phone application (app) to be made available to the public that will provide an interactive experience for visitors. The website and app would employ GPS/GIS, social media, 3-D imaging, including Lidar data and other electronic technologies, combining historic themes and contexts with present-day conditions and artwork in order to guide visitors to and around Fulton Street. The website and smart-phone app would be made available to the public within 12 months of completion of the project.
  - b) The City will prepare interpretive panels or plaques or wayside exhibits and identify appropriate locations in consultation with the District, CSO, the SHPO and concurring parties to this MOA. The wording on the panels or plaques or wayside exhibits will be prepared by a professional who meets the Secretary of Interior Professional Qualification Standards in Architectural History and shall be reviewed by the SHPO and concurring parties within 15 days of submission. The plaques will be fabricated within sufficient time for their placement at approved locations by the contractor during construction and under the direction of Caltrans Professionally Qualified Staff who is certified as a Principal Architectural Historian, as described in Attachment 1 to the Section 106 PA.
4. No less than four months prior to construction, the City in consultation with CSO, District and the SHPO will develop a restoration plan for the twenty-three identified sculptures within the Fulton Mall. The sculptures will be conserved, stored and reinstalled in appropriate areas in consultation with CSO, District, SHPO and the concurring parties and designated in the final construction plans. The scope of this work will be incorporated in the construction contract and be completed by the Contractor under the direction of a qualified conservator described below.
- a) The Build Contractor will contract with an established and qualified art conservator. The conservator must have demonstrable experience in the field of objects conservation with a Masters Degree in Art Conservation, or related field with a certificate in Art Conservation, plus a minimum of 5 years of experience in that field that includes at least three major successful projects. The conservator/s shall adhere to the Code of Ethics of the American Institute for the Conservation of Historic and Artistic Works (AIC) included in Attachment B of this MOA.
  - b) The City and the District will consult with the SHPO on any potential conservators. This consultation will not exceed 15 days. The conservator will be hired within a timeframe sufficient to supervise the following: examination of the artwork, determination of the method of safe removal, conservation of the artwork and reinstallation within the APE.

5. The City in consultation with CSO, District and SHPO shall be responsible for reevaluation of historic properties within the APE within one year of completion of the project. The evaluations will be completed by a person or persons who meet the Secretary of Interior's Professional Qualifications Standards for Architectural History and shall be submitted to the SHPO and/or the Keeper of the National Register to ascertain whether the remaining contributing elements of the Fulton Mall and the Fulton Street/Fulton Mall Historic District retain sufficient integrity to remain eligible for listing in the NHRP, The City will also consider those properties for potential listing on the City of Fresno's Local Register of Historic Resources.
6. The City, through consultation with the City's Historic Preservation Commission and its public review process, will develop proposed design guidelines that can be applied to individual buildings within the project area to ensure that their rehabilitation will be sympathetic to the historic nature of the area. Within 18 months of execution of this MOA, City staff shall bring these proposed design guidelines before the City Council for consideration. The City may consider such guidelines separately, for incorporation into amendments to the City's zoning ordinance, or as part of the amendment or adoption of land use plans covering the project area, including the Draft Fulton Corridor Specific Plan and Downtown Development Code. Any approved guidelines shall be consistent with the City's Historic Preservation Ordinance, which permits the development of locally designated resources consistent with the Secretary of the Interior's Standard for the Treatment of Historic Properties.
7. City staff will, within 18 months of the completion of the project, develop and present to City Council for approval two local programs that will provide financial incentive to owners of individual buildings for the rehabilitation of buildings in a manner consistent with the Secretary of the Interior Standards for Rehabilitation as discussed below in a) and b).
  - a) A Preservation Mitigation Fund (Fund) with dedicated or discretionary funding, to help support efforts to preserve and maintain historic and cultural resources. The express purpose of the Fund is to foster and support the preservation, rehabilitation, restoration, and interpretation of historic resources within Fresno. The City will determine the application procedures, selection process, funding levels, schedule, and any other issues relating to the Fund. Funding procedures will be established to make the Fund available for use within 5 years of the completion of the project.
  - b) Develop an Ordinance to establish the City as a Mills Act entity.
8. If any of the mitigation measures cannot be completed as proposed or the City fails to approve agreed-upon proposed measures described in this MOA, the signatories and

concurring parties will consult to develop alternative mitigation measures within sixty days of notification of failure to adopt.

### III. TREATMENT OF HUMAN REMAINS OF NATIVE AMERICAN ORIGIN

1. The parties to this MOA agree that human remains and related items discovered during the implementation of the terms of this MOA and of the Undertaking will be treated in accordance with the requirements of §7050.5(b) of the California Health and Safety Code (HSC). If pursuant to HSC §7050.5(c), the Fresno County coroner/medical examiner determines that the human remains are or may be of Native American origin, then the discovery shall be treated in accordance with the provisions of California Public Resources Code §5097.98 (a)-(d). Caltrans shall ensure that, to the extent permitted by applicable law and regulation, the views of Tribes and the Most Likely Descendent(s), as determined by the California Native American Heritage Commission, are taken into consideration when decisions are made about the disposition of Native American materials and records.

### IV. ADMINISTRATIVE PROVISIONS

1. Definitions
  - a) The definitions provided at 36 CFR § 800.16 are applicable throughout this MOA.
2. Professional Qualifications and Standards
  - a) District will ensure that the actions and products required by Stipulations II.1.a through II.1.b of this MOA will be carried out by or under the direct supervision of persons meeting the *Secretary of the Interior's Professional Qualification Standards (48 FR 44738-39) (PQS)*, as defined in Attachment I of the Section 106 PA, in the relevant field of study.
  - b) All written documentation prescribed by Stipulation II of this MOA shall conform to the *Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation (48 FR 44716-44740)* as well as to applicable standards and guidelines established by the SHPO
3. Discoveries and Unanticipated Effects.

If District determines after construction of the Undertaking has commenced, that the Undertaking will affect a previously unidentified property that may be eligible for the NRHP, or affect a known historic property in an unanticipated manner, District will address the discovery or unanticipated effect in accordance with 36 CFR §800.13(b)(3). District at its discretion may hereunder assume any discovered property to be eligible for inclusion in the NRHP in accordance with 36 CFR §800.13(c).

#### 4. Resolving Objections

- a) Should any party to this MOA object at any time in writing to the manner in which the terms of this MOA are implemented, to any action carried out or as proposed with respect to implementation of the MOA, District shall immediately notify the other parties of the objection, request their comments on the objection within fifteen (15) days, following receipt of Caltrans' notification, and proceed to consult with the objecting party for no more than thirty (30) calendar days to resolve the objection.
- b) If such objection cannot be resolved within the thirty (30) day timeframe, District will:
  - a. Forward all documentation relevant to the dispute, including District proposed resolution, to the ACHP. District will also provide a copy to all signatories and concurring parties. The ACHP will provide District with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, District will prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP, signatories, and concurring parties, and provide them with a copy of this written response. District will then proceed according to its final decision.
  - b. If the ACHP does not provide its advice regarding the dispute within the thirty (30) day time period, District may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, District will prepare a written response that takes into account any timely comments regarding the dispute from the signatories and concurring parties to this MOA, and provide them and the ACHP with a copy of such written response.
- c) District will carry out all other actions subject to the terms of this MOA that are not subject to the dispute.
- d) At any time during the implementation of the Stipulations in this MOA, should a member of the public raise an objection in writing pertaining to such implementation to any signatory party to this MOA, that signatory party shall immediately notify District. District shall immediately notify the other signatory parties in writing of the objection. Any signatory party may choose to comment in writing on the objection to District. District shall establish a reasonable time frame for this comment period. District shall consider the objection, and in reaching its decision, District will take all comments from the other signatory parties into account. Within 15 days following the closure of the comment

period, District will render a decision regarding the objection and respond to the objecting party. District will promptly notify the other signatory parties of its decision in writing, including a copy of the response to the objecting party. District decision regarding resolution of the objection will be final. Following issuance of its final decision, District may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

5. Amendments

- a) Any signatory party to this MOA may propose that this MOA be amended, whereupon all signatory parties shall consult to consider such amendment. The amendment will be effective on the date a copy signed by all of the original signatories is filed with the ACHP. If the signatories cannot agree to appropriate terms to amend the MOA, any signatory may terminate the agreement in accordance with Stipulation IV.6.a below.

6. Termination

- a) Any signatory party can propose to terminate the MOA. The signatory party proposing termination shall, in writing, notify the other MOA parties, explain the reasons for proposing termination, and consult with the other parties for at least 30 days to seek alternatives to termination. Such consultation shall not be required if Caltrans proposes termination because the Undertaking no longer meets the definition set forth in 36 CFR §800.16(y).
- b) Once the MOA is terminated, and prior to work continuing on the undertaking, District must either (a) execute an MOA pursuant to 36 CFR §800.6 or (b) request, take into account, and respond to the comments of the ACHP under 36 CFR §800.7. District shall notify the signatories as to the course of action it will pursue.

7. Duration of MOA

- a) Unless terminated pursuant to Section 6 of this stipulation, or unless it is superseded by an amended MOA, this MOA will be in effect for five years following execution by the signatory parties. The signatory parties may consult prior to this expiration date to consider an amendment pursuant to Stipulation 5 to extend the duration of the MOA if necessary.

8. Reporting

- a) The City shall provide the signatory and concurring parties to this agreement annual updates and will post these updates to District project website as to the progress of the completion of the stipulations described above by December 31st

of each year, beginning December 31, 2015. Such report shall include any scheduling changes proposed, any problems encountered, failures to adopt proposed mitigation measures, and any disputes and objections received in District and the City's efforts to carry out the terms of this MOA.

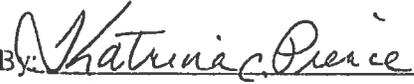
9. Effective Date

This MOA will take effect on the date that it is executed by Caltrans, the SHPO, and the ACHP.

**MEMORANDUM OF AGREEMENT**

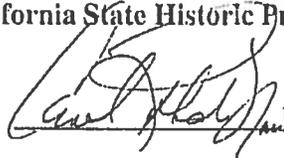
**SIGNATORY PARTIES**

**California Department of Transportation**

By:  Date: 5/13/2014

Katrina Pierce, Chief  
Division of Environmental Analysis

**California State Historic Preservation Officer**

By:  Date: 5-13-2014

Carol Roland-Nawi  
State Historic Preservation Officer

**Advisory Council on Historic Preservation**

By:  Date: 5/16/14

John Fowler, Executive Director  
Advisory Council on Historic Preservation

**INVITED SIGNATORIES**

**California Department of Transportation**

By:  Date: 5/15/2014

Sharri Bender-Ehlert  
District Director  
District 6, Fresno

**MEMORANDUM OF AGREEMENT**

**City of Fresno**

By: Bruce Rudd Date: 5/15/14  
Bruce Rudd, City Manager  
City of Fresno

**CONCURRING PARTIES**

**Downtown Fresno Coalition**

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Linda Zachritz  
Co-Chairperson

**Downtown Fresno Partnership**

By: Craig Scharton Date: 5/15/14  
Craig Scharton  
Executive Director