

**PROGRAMMATIC AGREEMENT
AMONG THE UNITED STATES FOREST SERVICE, PACIFIC SOUTHWEST REGION
THE UNITED STATES ARMY CORPS OF ENGINEERS SACRAMENTO DISTRICT,
THE CALIFORNIA DEPARTMENT OF TRANSPORTATION,
THE CALIFORNIA STATE HISTORIC PRESERVATION OFFICER AND
ADVISORY COUNCIL ON HISTORIC PRESERVATION REGARDING
UNDERTAKINGS AFFECTING THE RUBICON TRAIL,
EL DORADO COUNTY, CALIFORNIA**

WHEREAS, the County of El Dorado (County) proposes to maintain an active transportation system known as the Rubicon Trail and by doing such has requested and may continue to request various federal actions that constitute Undertakings as defined in the regulations implementing Section 106 of the National Historic Preservation Act (Section 106), 36 CFR 800.16(y); and

WHEREAS, the United States Forest Service, Eldorado National Forest (Forest) may issue a right-of-way easement and other authorizations to the County of El Dorado (County) for the continued use of and improvements to the Rubicon Trail, and has determined that such projects needing federal easements and other federal approvals, permits and funding requested by the County constitute Undertakings subject to review under Section 106; and

WHEREAS, the Forest has jurisdiction over a large portion of the Rubicon Trail and has consulted with the California State Historic Preservation Office (SHPO) and the Advisory Council on Historic Preservation (ACHP) in accordance with Section 800.14(b) (3) of the regulations (36 CFR Part 800) implementing Section 106 to develop this Programmatic Agreement (PA), and has agreed to be the lead federal agency for development of this PA; and

WHEREAS, the Forest may initiate or authorize other undertakings that may affect the Rubicon Trail, and the effect of those undertakings will be considered under this programmatic agreement unless the Forest decides that consultation under 36 CFR 800.3 through 800.7, 36 CFR 800.8(c), or another program alternative under 36 CFR 800.14 is warranted following consultation with the SHPO; and

WHEREAS, the Forest has concluded that the Rubicon Trail is a historic transportation corridor that may meet the criteria for the National Register of Historic Places (NRHP) with multiple periods of significance, but due to landownership issues is unable at this time to fully evaluate the property or determine the nature and extent of effects from various Undertakings on this potential historic property; and

WHEREAS, the United States Army Corps of Engineers, Sacramento District (USACE) may also have Section 106 responsibilities for Undertakings affecting the Rubicon Trail since it may authorize a permit or permits under Section 404 of the Clean Water Act for discharges of dredged or fill material into jurisdictional waters of the United States associated with County actions, and therefore has participated in this consultation and is a Signatory to this PA; and

WHEREAS, the Federal Highway Administration (FHWA), has assigned and the California Department of Transportation (Caltrans) has assumed FHWA responsibility for environmental review, consultation, and coordination under provisions of 23 U.S.C. § 327, the *Memorandum of Understanding (MOU) between the Federal Highway Administration, and the California Department of Transportation Concerning the State of California's Participation in the Surface*

Transportation Project Pilot Program, which became effective on July 1, 2007, and the *Renewed Memorandum of Understanding between Federal Highway Administration, California Division, and the California Department of Transportation State Assumption of Responsibility for Categorical Exclusions*, dated June 7, 2010. Caltrans will use this PA to comply with its federal Section 106 responsibilities when overseeing Undertakings under its authority that may affect the Rubicon Trail, and therefore has been invited to be a signatory to this PA; and

WHEREAS, the Forest, USACE and Caltrans (Agency (ies)), in consultation with the SHPO have agreed to assume eligibility of the Rubicon Trail for the purposes of their Undertakings but pursuant to 36 CFR 800.4(b)(2), intend to phase the documentation and evaluation of the Rubicon Trail in order to more fully evaluate the historic significance, integrity, and potential effects of future federal actions on this potential historic property. In accordance with the requirements of 36 CFR 800.4(b)(2), this PA sets forth the process for the Agencies to complete phased compliance with Section 106; and

WHEREAS, the Forest has notified and invited the Advisory Council on Historic Preservation (ACHP) per 36 CFR § 800.6(a)(1)(i)(C) to participate in the consultation to resolve the potential effects of the Undertakings on historic properties and, per their letter dated August 3, 2011, the ACHP has elected to participate in this PA; and

WHEREAS, the County has a central role in the maintenance of the Rubicon Trail as a transportation corridor and is generally the applicant for federal approvals, funding, or permits, and therefore has been invited to be a concurring party to this PA; and

WHEREAS, the Rubicon Trail Foundation and Jeepers Jamboree, Inc. both have an on-going interest in the continued use of the Rubicon Trail and have been invited to be concurring parties to this PA; and

WHEREAS, the Agencies' Undertakings may have effects on archaeological properties that have not yet been identified or do not directly contribute to the significance of the Rubicon Trail, and effects to archaeological properties are not addressed by this PA, but shall be considered by the responsible Agency through separate consultation pursuant to another applicable procedure under 36 CFR part 800;

NOW, THEREFORE, the Agencies, SHPO and the ACHP (Signatory Party/Parties) agree that the Agencies shall ensure that their Undertakings are implemented in accordance with the following stipulations in order to take into account the effects of such Undertakings on the Rubicon Trail.

STIPULATIONS

The Agencies shall ensure that for their respective Undertakings, the following stipulations are carried out:

I. AREA OF POTENTIAL EFFECTS/PERMIT AREA

The Area of Potential Effects (APE)/Permit Area for the consideration of effects to the Rubicon Trail will not extend further than what is in Attachment A to this PA. Currently, as referenced in Attachment A, the APE is defined as the length of the contemporary alignment between Airport Flat and the El Dorado and Placer County line, approximately 13.4 miles long with 8.2 miles located on federal lands and 5.2 miles on private land. The width of the

APE varies (less than 100 feet to 500 feet or more) to incorporate all anticipated federal undertakings (e.g. realignment, restoration activities, facility installation, bridge construction) that may affect any historic Rubicon Trail alignment.

Each Agency shall define an APE for each of their Undertakings, but in doing so shall evaluate the property and effects to the Rubicon Trail with respect to the area delineated in Attachment A. If an Agency determines that modifications to the Undertaking subsequent to the execution of this PA necessitates a revision of the APE, the Agency will submit the appropriate APE revisions to the Signatories along with any documentation prepared to complete identification, evaluation and effects assessments for each stage of the proposed project. The Signatories will then have 15 days to comment on the revisions to the APE. In this manner, the APE may be revised for a specific undertaking.

II. TREATMENT OF HISTORIC PROPERTIES

Evaluation of the historic significance of the historic property is difficult since no single Agency has access to the entire route nor has an Undertaking affecting the on-going use of this historic transportation corridor. In addition, it will be necessary within the scope and capacity of specific Undertakings to evaluate the multiple periods of historic significance embodied in this corridor. The corridor may have moved over the years depending on the means of transportation and that recordation of these different alignments will assist in describing and explaining the alignments' use through time. In addition, depending on the period of historic significance that may be defined, continued use may have an effect or destroy the integrity of the historic property or may contribute to the significance of the property by continuing its historic use. To maintain the Rubicon Trail as an actively used transportation corridor will result in effects to its historic significance, but failure to do so will adversely affect it by hindering its historic use. With this concept of historic significance as a guiding principle, the Parties to this agreement shall implement the following measures to take the effects of their Undertaking (s) on the Rubicon Trail and its potential historic significance into account.

This agreement applies only to the effects of Undertakings on the Rubicon Trail and not on other archaeological or historic properties that may be affected by an Undertaking. The responsible Agency shall consider such effects in separate consultation pursuant to another applicable review process under 36 CFR 800.

A. Section 106 Process Before the Determination of Eligibility on the Rubicon Trail

Until such time as a determination of eligibility on the Rubicon Trail is finalized per Stipulation II.D. of this Agreement, the Agencies shall comply with Section 106 for the effects of their Undertakings on the Rubicon Trail as follows:

- (1) Prior to approving the Undertaking, the Agency proposing the Undertaking will:
 - (a) conduct a cultural resources inventory of all evidence of current and past uses of the Rubicon Trail within its Undertaking's APE. Such uses will be recorded using a Global Positioning System unit (GPS), photography, measurements and other best practices means of recording the existing integrity of the trail segment at the time of consideration; and
 - (b) if the Agency believes the Undertaking could adversely affect the Rubicon Trail

(assuming it was an eligible property), the Agency will record the Rubicon Trail within its Undertaking's APE in a manner equivalent to HABS/HAER Level 3 with no requirement to seek approval of the National Park Service. Such HABS/HAER recordation would be performed only by individuals meeting the professional qualification standards cited in Stipulation IV.A (2); and

- (2) Also prior to approving the Undertaking, the Agency proposing the Undertaking will document and record all proposed modifications to the alignment of the Rubicon Trail by the Undertaking. Such changes will be recorded showing the original historic alignment and identifying the new alignment by date of change. This documentation and recordation shall be carried out in accordance with a plan developed by the Agencies in consultation with the SHPO, who will have no more than 30 days to comment on the Agencies' proposed plan. The Agencies shall consider any timely comments from the SHPO in finalizing their plan.
- (3) Copies of data gathered for the recordation of the Rubicon Trail, once accepted by the Agency in consultation with the SHPO, shall be provided by the responsible Agency to, and maintained by, the United States Forest Service, Eldorado National Forest, and the SHPO.
- (4) If the Rubicon Trail is determined eligible for the NRHP under Stipulation II.D and the implementation of an undertaking approved, authorized or permitted under Stipulation II.A has not commenced, the Agency shall apply the criteria of adverse effect (36 CFR 800.5(a)(1)), in consultation with SHPO, to determine if the undertaking may result in adverse effects to the Rubicon Trail. If the Agency determines that the undertaking may result in such adverse effects, the Agency will consult with SHPO to attempt reaching an agreement on ways to avoid, minimize or mitigate the adverse effect. If such an agreement cannot be reached, the matter will be treated as an objection to be resolved in accordance with Stipulation IV.C.1 through 5. If implementation of the undertaking has already commenced, the Agency shall comply with 36 CFR 800.13(b)(3). Undertakings approved under II.A that are routine maintenance and considered exempt under Stipulation II.C need not comply with this part.

B. Section 106 Process after the Determination that the Rubicon Trail is Eligible for Listing in the National Register

If, pursuant to Stipulation II.D., it is determined that the Rubicon Trail is a historic property, after that determination is made the Agencies shall comply with Section 106 for the effects of their Undertakings on the Rubicon Trail as follows:

- (1) If the Undertaking is a project requiring Forest authorization of planned construction, reconstruction or maintenance activities along the Rubicon Trail, the Forest shall review that Undertaking as a screened undertaking in accordance with Stipulation II.C. Otherwise, the Agency proposing the Undertaking will proceed in accordance with subparagraph (2), immediately below.
- (2) Prior to approving the Undertaking, the Agency proposing the Undertaking shall comply with 36 CFR 800.5 through 800.7.

C. Screened Undertakings

Maintenance activities are considered an ongoing effect necessary for continuing the Rubicon Trail as a functioning transportation system. Prior to Forest authorization of planned construction, reconstruction or maintenance activities along the Rubicon Trail, the Forest Heritage Program Manager (FHPM) shall review the proposed activity to determine whether it is routine maintenance that may be exempt from further review under this agreement pursuant to Attachment B of this Agreement. If the proposed activity is on the list of exempt activities in Attachment B and the FHPM determines that it is unlikely to modify the alignment of the Rubicon Trail in such a way that could affect its historic integrity, then the FHPM may recommend to the Forest Line Officer that the activity be exempt from Section 106 review, provided the documentation requirements of Stipulation II.A. are completed. If there is disagreement between the FHPM and Forest Line Officer about whether a proposed activity should be exempt, the undertaking will be submitted for SHPO review under 36 CFR 800.5 through 800.7. If the FHPM and Forest Line Officer agree that the proposed activity should be exempt, the Forest will not need to take any additional steps to comply with Section 106 for the proposed activity. FHPM's will consult with SHPO regarding the manner in which FHPM will document its review of proposed activities under this sub-stipulation.

D. National Register Evaluation of the Rubicon Trail

Through the use of archival historic data and oral history, the Forest will assemble information that will contribute to the body of data that hopefully will fully define the significance, integrity, extent, periods of significance, location and historic use of the Rubicon Trail as a transportation corridor. Once the Forest determines that there is sufficient information to evaluate the periods of significance, boundaries, contributing and non-contributing elements and integrity of the property, the Forest shall prepare a report documenting its determination of eligibility for the Rubicon Trail, including a description of the period of significance, boundaries, contributing and non-contributing elements, integrity, and, if eligible, an assessment of the characteristics of the Rubicon Trail important to maintaining the integrity of the trail as a historic property. The Forest will submit the report to all signatory and concurring Parties (PA Parties) and seek the concurrence of the SHPO in its determination. If the Forest finds, and the SHPO concurs, that the Rubicon Trail is not eligible for the National Register of Historic Places, or the Keeper makes a final determination that the Rubicon Trail is not eligible, this PA shall terminate and shall no longer remain in effect. If the Forest finds, and the SHPO concurs, that the Rubicon Trail is eligible for the National Register, or the Keeper makes a determination that the Rubicon Trail is eligible, the Agencies shall proceed reviewing their Undertakings per Stipulation II.B. If the Forest and SHPO disagree regarding the eligibility of Rubicon Trail, the Forest will present the matter to the Keeper, who will make a final determination on eligibility.

III. REPORTING REQUIREMENTS AND RELATED REVIEWS

- A. The data and other information collected for the Undertakings effect on the Rubicon Trail may be reported by each Agency as a stand-alone document or may be incorporated as a part of a larger cultural resources inventory with the exception of an amended DPR 523, with maps and photographs which will be provided separately and sent to the repositories identified in Stipulation II. A. 3. All other reporting shall be distributed as stipulated.

- B. The Forest, in coordination with the other Agencies, shall prepare an annual report summarizing any undertakings or activities implemented by Agencies during the year under this agreement's stipulations. The Forest may also include other information regarding the agreement's implementation, status, or suggested amendments. The annual report can be a letter report. The Forest incorporate its annual report in another annual report prepared under one of its, or other Agencies', broader programmatic agreements provided such information references this agreement and SHPO agrees. Annual reports are due no later than one year from the date of execution of this agreement; or by the annual report due date of another programmatic agreement when the Forest is incorporating this information into that annual report.

IV. ADMINISTRATIVE PROVISIONS

A. Standards

- (1) **Definitions.** The definitions provided at 36 CFR § 800.16 are applicable throughout this PA.
- (2) **Professional Qualifications.** The Agency will ensure that only individuals meeting the Secretary of the Interior's Professional Qualification Standards (48 FR 44738-39) in the relevant field of study carry out or review appropriateness and quality of the actions and products required by Stipulation II.A in this PA. However, nothing in this stipulation may be interpreted to preclude the Agency or any agent or contractor thereof from using the properly supervised services of persons who do not meet the PQS.
- (3) **Documentation Standards.** Written documentation of activities prescribed by stipulations II and III of this PA shall conform to *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.
- (4) **Curation and Curation Standards.** Agencies shall ensure that the materials and records resulting from the activities prescribed by this PA are curated in accordance with 36 CFR § 79.

B. Emergency Situations and Post-Review Discoveries

In the event of an emergency response, or the discovery of a historic property or unanticipated effects on a historic property related to work carried out under the terms of this PA, the responsible Agency(ies) will comply with the requirements of 36 CFR 800.12 and 800.13 or the applicable provisions of an existing PA.

C. Resolving Objections

- (1) Should any party to this PA object at any time in writing to the manner in which the terms of this PA are implemented, or to any action carried out or proposed with respect to implementation of the PA (other than the Undertaking itself), or to any documentation prepared in accordance with and subject to the terms of this PA, the Agency receiving the written objection shall immediately notify the other PA Parties of the objection and the receiving Agency or Agencies shall:

- (a) request comments on the objection from all PA Parties within 15 days following receipt of the written notification from Agency/Agencies; and
- (b) proceed to consult with the objecting party for no more than 15 days to resolve the objection; and
- (c) honor the request of the other Parties to participate in the consultation and take any comments provided by those Parties into account.

If the objection is resolved during the 15-day consultation period, the affected Agency/Agencies may proceed with the disputed action in accordance with the terms of such resolution.

- (2) If at the end of the 15-day consultation period the receiving or affected Agency determines that the objection cannot be resolved through such consultation, then the affected Agency shall forward all documentation relevant to the objection to the ACHP, including the affected Agency's proposed response to the objection. Within thirty (30) days after receipt of such documentation, the ACHP shall:
 - (a) Advise affected Agency and PA Parties that the ACHP concurs in affected Agency's proposed response to the objection, whereupon the affected Agency will respond to the objection accordingly. The objection shall thereby be resolved; or
 - (b) Provide affected Agency and PA Parties with recommendations, which the affected Agency will take into account in reaching a final decision regarding its response to the objection. The objection shall thereby be resolved; or
 - (c) Notify affected Agency and PA Parties that the objection will be referred for comment pursuant to 36 CFR § 800.7(c) and proceed to refer the objection for comment. Agency shall take the resulting comments into account, and respond to them, in accordance with 36 CFR § 800.7(c)(4) and Section 110(1) of the NHPA. The objection shall thereby be resolved.
- (3) Should the ACHP not exercise one of the above options within 30 days after receipt of all pertinent documentation, the affected Agency may proceed in accordance with its proposed response. The objection shall thereby be resolved.
- (4) The affected Agency shall take into account any of the ACHP's recommendations or comments provided in accordance with this stipulation with reference only to the subject of the objection. All Agencies' responsibility to carry out all actions under this PA that are not the subjects of the objection shall remain unchanged.
- (5) At any time during implementation of the measures stipulated in this PA, should a member of the public raise an objection in writing pertaining to such implementation to an Agency, that Agency 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 the Agency. The Agency shall establish a reasonable time frame for this comment period. The Agency shall consider the objection and, in reaching its decision, will take all comments from the other Signatory Parties into account. The Agency may recommend that the PA Parties further consult under D.1-5 of this stipulation to resolve the objection before making its decision. Within 15 days

following closure of the comment period, unless the Agency recommends additional consultation among the PA Parties, the Agency will render a decision regarding the objection and respond to the objecting party. The Agency will promptly notify the other Signatory Parties of its decision in writing, including a copy of the response to the objecting party. The Agency's decision regarding resolution of the objection will be final.

- (6) The Forest shall provide all Parties to this PA and any Parties that have objected pursuant to section D.6 of this stipulation, with a copy of its final written decision regarding any objection addressed pursuant to this stipulation.
- (7) Any affected Agency may authorize any action subject to objection under this stipulation to proceed after the objection has been resolved in accordance with the terms of this stipulation.

D. Amendments to the PA

- (1) Any Signatory Party to this PA may propose that this PA be amended, whereupon all Signatory Parties shall consult for no more than 15 days to consider such amendment. The amendment will be effective on the date a copy is signed by all of the original Signatories. If the Signatories cannot agree to appropriate terms to amend the PA, any Signatory may then terminate the agreement in accordance with Stipulation IV.E below.

E. Termination

- (1) If this PA is not amended as provided for in section D.1 of this stipulation, or if any Signatory proposes termination of this PA for other reasons, the Signatory Party proposing termination shall, in writing, notify the other PA Parties, explain the reasons for proposing termination, and consult with the other Parties for at least 30 days to seek alternatives to termination.
- (2) Should such consultation result in an agreement on an alternative to termination, the Signatory Parties shall proceed in accordance with the terms of that agreement.
- (3) Should such consultation fail, the Signatory Party proposing termination may terminate this PA by promptly notifying the other PA Parties in writing. Termination hereunder shall render this PA without further force or effect.
- (4) If this PA is terminated hereunder, and if an Agency determines that an Undertaking will nonetheless proceed, then Agency shall comply with the requirements of 36 CFR 800.3-800.7, or 36 CFR 800.8(c), or another applicable program alternative under 36 CFR 800.14.

F. Duration of the PA

- (1) This PA will be in effect following execution by the Forest, USACE, Caltrans, SHPO and ACHP and filing with the ACHP.

- (2) This PA will expire 10 years after its execution and filing with the ACHP. The Signatories will meet at least one year prior to the expiration date to determine whether to amend the PA to extend its duration per Stipulation IV.D.

G. Use of This Agreement by Other Agencies

- (1) Agencies other than the Forest, USACE, and Caltrans may use this Agreement to meet their Section 106 responsibilities with regard to the effects of their Undertakings on the Rubicon Trail provided that they sign a copy of this Agreement and file it with the ACHP, with copies to the other Signatories.

EXECUTION of this PA by Forest, USACE, SHPO, Caltrans and the ACHP and subsequent implementation of its terms, shall evidence that Forest, Caltrans, and USACE have afforded the ACHP an opportunity to comment on their Undertakings' effects on the Rubicon Trail, and that Forest, Caltrans, and USACE have taken into account the effects of their respective Undertakings on the Rubicon Trail.

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EL DORADO COUNTY, CALIFORNIA**

SIGNATORY:

United States Forest Service, Pacific Southwest Region

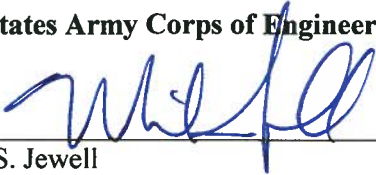
By *Randy Moore*
Randy Moore
Regional Forester

10/18/11
Date

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SIGNATORY:

United States Army Corps of Engineers, Sacramento District


By 
Michael S. Jewell
Chief, Regulatory Division

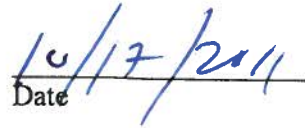

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SIGNATORY:

California Department of Transportation

By 
Jay Norvell
Chief, Division of Environmental Analysis


Date

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SIGNATORY:

California State Historic Preservation Officer

By 
Milford Wayne Donaldson, FAIA
State Historic Preservation Officer

20 OCT 2011
Date

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SIGNATORY:

Advisory Council on Historic Preservation

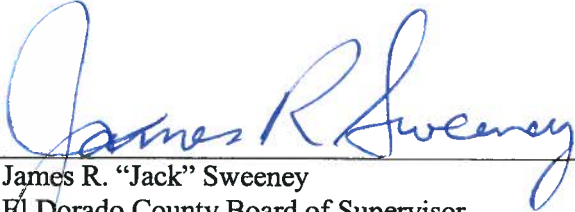
By John M. Fowler
John M. Fowler
Executive Director

Date 11/9/11

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CONCURRING:

County of El Dorado

By 
James R. "Jack" Sweeney
El Dorado County Board of Supervisor
District III

10-14-11
Date

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CONCURRING:

United States Forest Service, Eldorado National Forest

By Kathryn D. Hardy 10/17/11
Kathryn D. Hardy Date
Forest Supervisor

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CONCURRING:

California Department of Transportation, District 3

By _____
Jody Jones
District Director

Jody Jones

10/21/11

**PROGRAMMATIC AGREEMENT
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CONCURRING:

Rubicon Trail Foundation

By _____

_____ Date

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EL DORADO COUNTY, CALIFORNIA**

CONCURRING:

Jeepers Jamboree, Inc.

By _____

_____ Date

Attachment A – APE Map

Attachment B – Screened Undertakings

Under Stipulation II.C. (Screened Undertakings), the Forest Heritage Program Manager (FHPM) and the Forest Line Officer may determine whether proposed maintenance of the Rubicon Trail can be treated either as an activity that is exempt from further Section 106 review, or as an activity that may affect the integrity of the historic property, requiring application of the criteria of adverse effect and further consultation (36 CFR 800.5 through 800.7). **Classes of activities that may be exempt after FHPM review and agreement by the Forest Line Officer are listed below under Section A of this Attachment.** No other activities may be considered exempt. Section B of this attachment provides a sampling of such non-exempt activities.

- A. Activities that may be exempt from further review:
- a. routine road maintenance, where work is confined to previously maintained surfaces, ditches, culverts, and cut and fill slopes within road prism (area clearly associated with road construction, from road surface to top of cut and/or toe of fill);
 - b. installation of temporary features (BMPs') necessary to protect resources; such as filter fence or fiber roll;
 - c. installation of road features within road prism, such as:
 - i. log barrier;
 - ii. rock fill;
 - iii. rock check or ditch crossing;
 - iv. rock apron;
 - v. rock inlet/outlet protection;
 - vi. rock energy dissipater;
 - vii. rock slope protection;
 - viii. rock lined channel;
 - ix. rock berm;
 - x. rock breast wall;
 - xi. rock gabion;
 - xii. rock ford crossing;
 - d. felling of hazardous trees along roadway for health and safety reasons provided they are left in place or cut up with hand tools, including chain saws, and removed by hand;
 - e. felling and removal of hazard and wind thrown trees from road prisms where deemed necessary for health, safety, or administrative reasons, so long as trees are felled into and removed from within existing road prism
- B. Activities other than those listed in (A), above, are not exempt. Such activities include, but are not limited to:
- a. road construction activities;
 - b. road restoration or decommissioning activities;
 - c. road reroute or realignment;
 - d. stock pile access and utilization;
 - e. bridge construction (e.g., Ellis, Friends Of The Rubicon, Gerle);
 - f. blasting activities;
 - g. installation of new road features outside of current road prism though within or adjacent remnant wagon route segments