

Appendix F

Ø ð æ Programmatic Agreement

**PROGRAMMATIC AGREEMENT
BETWEEN THE
FEDERAL TRANSIT ADMINISTRATION AND THE
CALIFORNIA STATE HISTORIC PRESERVATION OFFICER
REGARDING THE BERRYESSA EXTENSION PROJECT ALTERNATIVE
OF THE SILICON VALLEY RAPID TRANSIT CORRIDOR PROJECT IN
ALAMEDA AND SANTA CLARA COUNTIES, CALIFORNIA**

WHEREAS, the Santa Clara Valley Transportation Authority (VTA) is proposing a Silicon Valley Rapid Transit Corridor Project and is seeking financial assistance from the U.S. Department of Transportation Federal Transit Administration (FTA) for the proposed 9.9-mile extension of the Bay Area Rapid Transit's (BART) system from Alameda County, California, to Santa Clara County, California (Undertaking); and

WHEREAS, The FTA has determined that the project would constitute an Undertaking under 36 CFR 800.16(y), which requires compliance with Section 106 of the National Historic Preservation Act (16 USC 470f); and

WHEREAS, FTA has defined the undertaking's area of potential effect (APE) as described in Attachment A; and

WHEREAS, the Undertaking's APE is known to include nine recorded archaeological sites or locations where archaeological remains are likely to be found, including:

Nicora farm (CA-SCL-438H)	Stocklin Farm (HR-5)
"The Dumps"	Possible slaughterhouses (HR-8)
Harrisburg Station (HR-1)	King Farm (HR-9)
Castello Farm (HR-2)	Albright Residence Park (HR-10)
Murasky Farm (HR-4)	

and;

WHEREAS, many of these sites have not been evaluated for their eligibility for the National Register of Historic Places (NRHP) or the California Register of Historical Resources; and

WHEREAS, the FTA, in consultation with the California State Historic Preservation Officer (SHPO), has determined that the Undertaking may adversely affect archeological sites listed in or eligible for listing in the NRHP, but effects cannot be fully assessed prior to the approval of FTA financial assistance; and

WHEREAS, portions of the Undertaking's APE include paved and built-over areas and areas of private land not accessible for cultural resources inventory, and areas with high potential for buried archaeological deposits that cannot be accurately located prior to construction; and

WHEREAS, the project vicinity is known to contain Native American human remains, and

WHEREAS, at such time as any unevaluated cultural resources may be discovered during the Undertaking, it may require archaeological evaluation, data recovery, Native American

consultation, and/or other historic preservation activities, in compliance with Section 106 and concurrent with active construction; and

WHEREAS, design of the Undertaking is not completed and the locations of all potential impacts have not been determined; and

WHEREAS, the FTA has consulted with the SHPO in accordance with regulations implementing Section 106 of the National Historic Preservation Act; and

WHEREAS, the FTA has consulted with the Native American Heritage Commission (NAHC) and the local Native American community regarding the cultural sensitivity of the Undertaking's project area; and

WHEREAS, the FTA has chosen to prepare this Programmatic Agreement (PA) to complete the final identification and evaluation of potential historic properties pursuant to 36 CFR 800.4(b)(2), and provide for a phased resolution of any adverse effects on historic properties within the Undertaking's APE subsequent to the approval of the Undertaking; and

WHEREAS, this PA was developed with public involvement pursuant to 36 CFR 800.2(d) and 800.6(a), and the public was provided opportunities to comment on the Undertaking and its adverse effects; and

WHEREAS, the FTA shall make the terms and conditions of this PA part of the conditions of any permissions and permits issued by the FTA for this Undertaking; and

WHEREAS, in accordance with 36 C.F.R. § 800.6(a)(1), the FTA has notified the Advisory Council on Historic Preservation (ACHP) of its potential adverse effect determination with specified documentation and the ACHP has chosen not to participate in the consultation pursuant to 36 CFR § 800.6(a)(1)(iii); and

WHEREAS, VTA is an Invited Signatory to this PA, and

NOW, THEREFORE, the FTA, the SHPO, and VTA agree that the Undertaking shall be implemented in accordance with the following stipulations to take into account the effects of the Undertaking on historic properties and further agree that these stipulations shall govern the Undertaking and all of its parts until this PA expires or is terminated.

STIPULATIONS

The FTA will ensure that the terms of this PA are carried out and will require, as a condition of any approval of Federal funding for the Undertaking, adherence to the stipulations set forth herein.

I. ROLES AND RESPONSIBILITIES

As a condition of FTA project approvals, VTA shall act on behalf of FTA and coordinate all activities described in the PA to carry out the stipulations below. VTA will consult with the FTA and SHPO, as appropriate, in planning and implementing the stipulations of this PA. VTA shall submit all plans and documents required by this PA in a timely and accurate manner to the FTA and SHPO, as stipulated, for review. VTA

shall also ensure that all treatment measures developed by VTA as a result of consultation are compliant with government-wide policies and regulations.

II. AREA OF POTENTIAL EFFECTS

The Undertaking's area of potential effects (APE) is depicted in Attachment A of this PA. The APE set forth hereunder may be amended through consultation among the PA parties without amending the PA proper.

III. IDENTIFICATION AND TREATMENT OF HISTORIC PROPERTIES

- A. The FTA and VTA have chosen, pursuant to 36 CFR 800.4(b)(2) and 800.14(b), to complete the final identification and evaluation of historic properties in the Undertaking's APE subsequent to the FTA's signing of the Record of Decision and prior to construction of the Undertaking. The FTA and VTA chose to implement this phased identification, evaluation, and application of the criteria of adverse effect because of consideration for access constraints posed by urban overlay of the APE and because exact locations of direct impact areas are only generally known; and because the full nature, type, and extent of buried archaeological deposits and features are unknown.
- B. Upon FTA's decision to sign a Record of Decision for and prior to construction of the Undertaking, VTA shall, on behalf of FTA, complete the fieldwork to identify, evaluate, and apply the criteria of adverse effect to historic properties within the APE in accordance with 36 CFR 800.4(b)(1), 800.4(c)-(d), and 800.5(a)(1).
- C. As outlined in the *Archaeological Research Design and Treatment Plan for the Berryessa Extension Project, Fremont, Milpitas, and San Jose, California* (Treatment Plan) (Attachment B to this PA), completion of the identification of historic properties within the APE will include the following:
 1. VTA shall, on behalf of FTA, conduct a cultural resources survey in areas previously not accessible once access has been granted and before construction begins;
 2. In those areas covered with pavement or other obstructions, VTA shall, on behalf of FTA, have a qualified archaeologist monitor removal of the obstruction (and any underlying base, foundations, etc.) and inspect the ground for cultural materials.
 3. When the final project design is completed, VTA shall, on behalf of FTA, have a qualified professional archaeologist review the design to ensure that all potential impacts to eligible or unevaluated cultural resources have been identified.
 4. In those areas with "high" or "very high" potential for buried sites, VTA shall, on behalf of FTA, have a qualified geoarchaeologist conduct exploratory trenching or coring of areas where subsurface project disturbance is planned, prior to that disturbance.

5. VTA shall, on behalf of FTA, protect and evaluate any cultural resources discovered during exploratory trenching or coring. Evaluation and data recovery, if appropriate, will follow the research design and recommendations presented in the Treatment Plan. Where avoidance of impacts is not feasible, a qualified professional archaeologist will conduct limited sub-surface testing before any ground-disturbing project work is done within 50 meters of a known archaeological site. The objectives of the testing will be to delineate the extent and depth of the site within the Undertaking's APE; determine whether human remains are present within the APE; and assess the nature and potential significance of the archaeological deposit within the APE. The work will be guided by the Treatment Plan. All testing within a prehistoric or ethnographic site (including Mission-era sites) will include consultation with the local Native American community. If requested by the Native American community, VTA shall, on behalf of FTA, allow local Native American monitors to be present during prehistoric and ethnographic site testing.
6. The PA parties agree that any human remains and related items discovered during the implementation of the terms of this PA and of the Undertaking will be treated in accordance with the requirements of Section 7050.5(b) of the California Health and Safety Code. If, pursuant to Section 7050.5(c) of the California Health and Safety Code, the 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 Section 5097.98(a)-(d) of the California Public Resources Code. VTA shall, on behalf of FTA, ensure that the remains are not damaged or disturbed further until all stipulations in Section 7050.5 and Section 5097.98 have been met. VTA shall notify signatories within 48 hours if human remains are found.
7. The VTA shall, on behalf of and in consultation with the FTA, ensure that historic, architectural, ethnographic, and archaeological work conducted pursuant to this PA is carried out by, or under the direct supervision of, persons meeting qualifications set forth in the Secretary of the Interior's Professional Qualification Standards (36 CFR 61).

IV. REPORTING REQUIREMENTS AND REVIEWS

- A. Within one year of completion of all fieldwork, VTA shall, on behalf of FTA, provide a draft technical report on the methods and results of inventory, geoarchaeological exploration, evaluation, and/or data recovery to the FTA and SHPO for review.
- B. The SHPO shall have 30 days to review the draft and comment on the level of effort, results, and eligibility recommendations; those comments shall be incorporated into the final technical report, as appropriate. Lack of response by the SHPO shall not preclude the FTA from authorizing the final technical report.

- C. Within 30 days of receipt of comments on the draft technical report, VTA shall submit the final technical report to the FTA and the SHPO, the appropriate CHRIS Information Center, and the appropriate Native American contacts, and shall make it available to other interested persons who meet the confidentiality requirements. The technical report shall not be distributed to the general public, except in an abridged form that does not include sensitive information about site locations of human remains.
- D. All reports generated as a result of this PA and attachments shall be consistent with contemporary professional standards and the Secretary of the Interior's guidelines.

V. NATIVE AMERICAN CONSULTATION

The FTA and VTA have consulted with the Native American Heritage Commission (NAHC) and with individuals and groups identified by the NAHC regarding the proposed Undertaking and its effects on historic properties. The FTA and VTA will continue to consult with these individuals and groups and will afford them, should they so desire, the opportunity to participate in the implementation of the PA and of the Undertaking.

VI. MITIGATION MONITORING AND REPORTING PLAN

During final design, VTA, in cooperation with its contractors, the FTA, and the SHPO, will develop a Mitigation Monitoring and Reporting Plan (MMRP) for the Undertaking. The MMRP will include provisions to protect archeological properties from any inadvertent damage. The MMRP will be finalized prior to the start of construction. This MMRP will reference the PA and include it as an appendix.

VII. LATE DISCOVERIES AND UNANTICIPATED EFFECTS

If either the FTA or VTA determines, during implementation of the Treatment Plan or after construction of the Undertaking has commenced, that either the implementation of the Treatment Plan or the Undertaking will affect a previously unidentified property that may be eligible for the National Register of Historic Places, or affect a known historic property in an unanticipated manner, they will address the discovery or unanticipated effect in accordance with the Treatment Plan.

VIII. ADMINISTRATIVE PROVISIONS

A. STANDARDS

1. Definitions. The definitions provided at 36 CFR 800.16 are applicable throughout this PA.
2. Professional Qualifications. VTA shall, on behalf of FTA, ensure that only individuals meeting the Secretary of the Interior's Professional Qualification Standards (PQS) (48 FR 4473839) in the relevant field of study carry out or review appropriateness and quality of the actions and products required by this PA. However, nothing in this stipulation may be interpreted to preclude the FTA 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 Stipulation II of this PA 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.
4. Curation Standards. VTA shall, on behalf of FTA, ensure that, to the extent permitted under Sections 5097.98 and 5097.991 of the California Public Resources Code, the materials and records resulting from the activities prescribed by this PA are curated in accordance with 36 CFR Part 79.

B. CONFIDENTIALITY

The PA parties acknowledge that the historic properties covered by this PA are subject to the provisions of Section 304 of the National Historic Preservation Act and Section 6254.10 of the California Government Code (Public Records Act), relating to the disclosure of archaeological site information and, having so acknowledged, will ensure that all actions and documentation prescribed by this PA are consistent with said sections.

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, 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 FTA shall immediately notify the other PA parties of the objection, request their comments on the objection within 15 days following receipt of the FTA's notification, and proceed to consult with the objecting party for no more than 30 days to resolve the objection. The FTA will honor the request of the other parties to participate in the consultation and will take any comments provided by those parties into account.
2. If the objection is resolved during the 30-day consultation period, the FTA may proceed with the disputed action in accordance with the terms of such resolution.
3. If at the end of the 30-day consultation period, the SHPO determines that the objection cannot be resolved through such consultation, then the SHPO shall forward all documentation relevant to the objection to the ACHP, including the FTA's proposed response to the objection, with the expectation that the ACHP will, within 30 days after receipt of such documentation, do the following:
 - a. Advise the SHPO that the ACHP concurs in the FTA's proposed response to the objection, whereupon the FTA will respond to the objection accordingly. The objection shall thereby be resolved; or

- b. Provide the SHPO with recommendations, which the FTA will take into account in reaching a final decision regarding its response to the objection. The objection shall thereby be resolved; or
 - c. Notify the FTA that the objection will be referred for comment pursuant to 36 CFR 800.7(c) and proceed to refer the objection and comment. The FTA shall take the resulting comments into account in accordance with 36 CFR 800.7(c)(4) and Section 110(1) of the National Historic Preservation Act. The objection shall thereby be resolved.
4. Should the ACHP not exercise one of the above options within 30 days after receipt of all pertinent documentation, the FTA and the SHPO may assume the ACHP's concurrence in the proposed response to the objection, and the FTA may proceed to implement that response. The objection shall thereby be resolved.
 5. The FTA 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.
 6. The FTA's responsibility to carry out all actions under this PA that are not the subjects of the objection shall remain unchanged.
 7. The FTA shall provide all parties to this PA and the ACHP, if the ACHP has commented, with a copy of its final written decision regarding any objection addressed pursuant to this stipulation.
 8. The FTA 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

Any signatory or invited signatory party to this PA may propose that this PA be amended, whereupon all signatory and invited signatory parties shall consult for no more than 30 days 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 and invited signatories cannot agree to appropriate terms to amend the PA, any signatory may terminate the agreement in accordance with Section E of this stipulation.

E. TERMINATION

1. If this PA is not amended as provided for in Section D of this stipulation, or if any of the signatories or invited signatories propose termination of this PA for other reasons, the signatory or invited 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. Such consultation shall not be

required if the FTA proposes termination because the Undertaking no longer meets the definition set forth in 36 CFR 800.16(y).

2. Should such consultation result in an agreement on an alternative to termination, the signatory and invited signatory parties shall proceed in accordance with the terms of that agreement.
3. Should such consultation fail, the signatory or invited 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 the FTA determines that the Undertaking will nonetheless proceed, then the FTA shall comply with the requirements of 36 CFR 800.3 through 800.6.

F. DURATION OF THE PA

1. Unless terminated pursuant to Section E of this stipulation or unless it is superseded by an amended PA, this PA will be in effect following execution by the signatory and invited signatory parties until the FTA, in consultation with the other signatory parties, determines that all of its stipulations have been satisfactorily fulfilled.
2. The terms of this PA shall be satisfactorily fulfilled within ten years following the date of execution by the signatory and invited signatory parties or until the completion of construction, whichever is later. If the FTA determines that this requirement cannot be met, the PA parties will consult to reconsider its terms. Reconsideration may include continuation of the PA as originally executed, amendment of the PA, or termination. In the event of termination, the FTA will comply with Section E.4 of this stipulation if it determines that the Undertaking will proceed notwithstanding termination of this PA.

G. EFFECTIVE DATE

This PA will take effect on the date that it has been executed by the FTA, VTA, and the SHPO.

H. EXECUTION

Execution of this PA by the FTA and the SHPO, its filing with the ACHP in accordance with 36 CFR 800.6(b)(1)(iv), and subsequent implementation of its terms, shall evidence, pursuant to 36 CFR 800.6(c), that this PA is an agreement with the ACHP for purposes of Section 110(1) of the National Historic Preservation Act, and shall further evidence that the FTA has afforded the ACHP an opportunity to comment on the Undertaking and its effects on historic properties, and that the FTA has taken into account the effects of the Undertaking on historic properties.

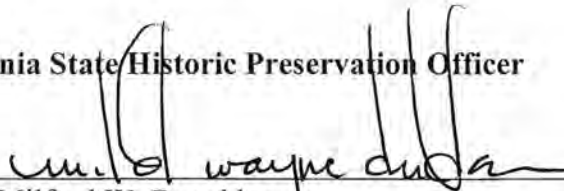
SIGNATORIES

We, as signatories of this Programmatic Agreement, concur with its provisions and will follow the procedures and stipulations outlined above.

Federal Transit Administration

By:  _____ Date: 3-25-10
Leslie T. Rogers
Region IX Administrator

California State Historic Preservation Officer

By:  _____ Date: 25 MAR 2010
Milford W. Donaldson
State Historic Preservation Officer

INVITED SIGNATORY

Santa Clara Valley Transportation Authority

By:  _____ Date: 3-25-10
 Michael T. Burns
General Manager

- Attachment A: Area of Potential Effects for Archaeology and Historic Architecture
- Attachment B: *Archaeological Research Design and Treatment Plan for the Berryessa Extension Project, Fremont, Milpitas, and San Jose, California*