

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
THE TENNESSEE STATE HISTORIC PRESERVATION OFFICER, AND
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION
REGARDING IMPLEMENTATION OF TRANSPORTATION PROJECTS

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

WHEREAS, the Tennessee FHWA Division Administrator is the "Agency Official" responsible for ensuring that the Program in the state of Tennessee complies with Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 306108), as amended, and codified in its implementing regulations, 36 CFR Part 800, as amended (August 5, 2004) (hereafter 36 CFR 800);

WHEREAS, TDOT administers Federal-aid undertakings throughout the State of Tennessee as authorized by Title 23 U.S.C 302;

WHEREAS, TDOT has participated in the consultation and has been invited to be a signatory to the Programmatic Agreement (Agreement);

WHEREAS, the responsibilities of the Tennessee State Historic Preservation Officer (SHPO) under Section 106 of the NHPA and 36 CFR 800 are to advise, assist, review, and consult with Federal agencies as they carry out their historic preservation responsibilities and to respond to Federal agencies' requests within a specified period of time;

WHEREAS, Federal Agencies who recognize FHWA as the lead Federal agency for an undertaking may fulfill their obligations under Section 106 of NHPA according to 36 CFR 800.2(a)(2), provided that FHWA and TDOT follow the requirements of this Agreement and the other agency's undertaking does not have the potential to cause effects to historic properties beyond those considered by FHWA and TDOT;

WHEREAS, FHWA recognizes that it has a unique legal relationship with federally recognized Indian tribes (Tribes) set forth in the Constitution of the United States, treaties, statutes, and court decisions, and therefore, consultation with an Indian tribe must recognize government-to-government relationship between the federal government and Tribes;

WHEREAS, FHWA has consulted with the following Federally recognized Tribes with ancestral lands in Tennessee about this Agreement, has requested their comments, has taken any comments received into account, and has invited the Tribes to be concurring parties to this document. These Tribes include Absentee-Shawnee Tribe of Indians of Oklahoma, Cherokee Nation, The Chickasaw Nation, the Choctaw Nation of Oklahoma, Eastern Band of Cherokee

Indians, Eastern Shawnee Tribe of Oklahoma, Kialegee Tribal Town, the Muscogee (Creek) Nation, Poarch Band of Creeks, the Quapaw Nation, Shawnee Tribe, Thlopthlocco Tribal Town, and United Keetoowah Band of Cherokee Indians in Oklahoma;

WHEREAS, Section 106 consultation with the Tribes shall not be governed by this Agreement and TDOT undertakings shall continue to be coordinated with the Tribes in accordance with 36 CFR 800 Subpart B;

WHEREAS, ACHP issued the *Program Comment for Common Post-1945 Concrete and Steel Bridges*, which is applicable for bridges under TDOT's jurisdiction, on November 2, 2012 (Federal Register 77 FR 68790);

WHEREAS, pursuant to the consultation conducted under 36 CFR 800.14(b)(2)(i), the signatories have developed this Agreement in order to establish an efficient and effective program alternative for taking into account the effects of the Program on historic properties in Tennessee;

WHEREAS, FHWA has consulted with the ACHP pursuant to 36 CFR 800.14(b)(2)(i) and the ACHP has opted to participate as a signatory to this agreement;

WHEREAS, pursuant to 36 CFR 800.14(b)(2)(i), FHWA has requested comments from Federal agencies, State agencies, and representatives of local governments about this Agreement, and has taken any comments received into account;

WHEREAS, pursuant to 36 CFR 800.14 (b)(2)(ii), FHWA has notified the public, about this Agreement, has requested their comments, and has taken any comments received into account;

WHEREAS, the SHPO, ACHP, FHWA, and TDOT have participated in the development of this Agreement;

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

To aid the signatories of this Agreement, the stipulations are organized as follows:

- I. Applicability and Scope
- II. Definitions
- III. Professional Qualifications Standards
- IV. Responsibilities
- V. Consultation with Tribes
- VI. Participation of Other Consulting Parties and the Public
- VII. Review of Section 106 Undertakings
- VIII. Emergency Situations
- IX. Post-Review Discoveries

- X. Identification and Treatment of Human Remains
- XI. Curation
- XII. Administrative Stipulations
- XIII. Dispute Resolution
- XIV. Amendment
- XV. Termination
- XVI. Confidentiality
- XVII. Duration of Agreement

STIPULATIONS

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

I. APPLICABILITY AND SCOPE

- A. This Agreement sets forth the process by which FHWA, with the assistance of TDOT, will meet its responsibilities pursuant to Section 106 of the NHPA (54 U.S.C. §§ 306102 and 306108). The objective of this Agreement is to improve the efficiency and effectiveness of the procedures by which the signatories to this Agreement review Section 106 undertakings.
- B. Through this Agreement, FHWA and TDOT utilize three categories of undertakings (Unscreened Undertakings, as described at 36 CFR 800.3(a)(1); Screened Undertakings and Other Undertakings) that require different levels of review and consultation.
- C. The FHWA retains the responsibility to consult with Tribes as required under 36 CFR 800.2(c)(2) and 36 CFR 800.3(c-f), as amended. TDOT may assist FHWA with this requirement.
- D. At any time, TDOT may choose to process a project by following the procedures in 36 CFR Part 800 rather than by following the procedures in this Agreement. TDOT and FHWA will also process a project under the procedures in 36 CFR Part 800 if SHPO, ACHP, or FHWA so requests.

II. DEFINITIONS

- A. *Collection(s)*: Artifacts or other materials that are of a cultural origin and collected as a result of archaeological investigations of undertakings conducted pursuant to this Agreement and that are determined not to consist of human remains, or to contain, human remains, or to be a cultural item, associated funerary object, sacred object, or object of cultural patrimony, as defined by the Native American Graves Protection and Repatriation Act (NAGPRA). Collection(s) are also defined to include all records generated as part of archaeological investigations conducted pursuant to this Agreement.

- B. *Ground disturbance*: Any work or activity that results in a disturbance of earth, including, but not limited to, excavation or digging, trenching, drilling, augering, clearing, and grading.
- C. *Qualified Staff*: Non-contractor/consultant historians, architectural historians, archaeologists or other professional cultural resources practitioners directly employed by TDOT as employees of the State of Tennessee that meet the *Secretary of the Interior's Professional Qualifications Standards* for historic and archaeological resource studies. *Qualified Staff* are not qualified to determine or locate specific sites of cultural significance to a Tribe.
- D. *Emergencies*: Events that require immediate highway system and facility repairs necessary to 1) protect the life, safety, or health of the public; 2) minimize the extent of damage to the highway system and facilities; 3) protect remaining highway facilities; 4) restore essential traffic and/or 5) disaster or emergency declared by the President of the United States, or the Governor of Tennessee; or may be any event that results in immediate threats to life or property.

III. PROFESSIONAL QUALIFICATIONS STANDARDS

Actions prescribed by this Agreement that involve the identification, evaluation, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meets the *Secretary of the Interior's Professional Qualifications Standards* (published in 48 FR 44738-44739) and the current Tennessee SHPO Standards and Guidelines for Archaeological Resource Management Studies (as amended) for archaeological investigations. However, nothing in this stipulation may be interpreted to preclude FHWA or TDOT or any agent or contractor thereof from using the services of persons who do not meet these qualifications standards, providing their activities are conducted under the direct supervision of a person who does meet the standards.

IV. RESPONSIBILITIES

The following section identifies the responsibilities of FHWA, TDOT, SHPO, and ACHP in complying with the terms of this Agreement.

- A. FHWA Responsibilities
 - 1. Consistent with the requirements of 36 CFR 800.2(a) and 800.2(a)(1-4), FHWA remains legally responsible for ensuring that the terms of this Agreement are carried out and for all findings and determinations made pursuant to this Agreement by TDOT under the authority of FHWA. At any point in the Section 106 process, FHWA may inquire as to the status of any undertaking reviewed under the authority of this Agreement and, at its discretion, participate directly in any undertaking.

2. FHWA retains the responsibility for government-to-government consultation with Tribes, as defined in 36 CFR 800.16(m), and consistent with 36 CFR 800.2(c)(2) and 36 CFR 800.3(c-f).
3. Pursuant to 36 CFR 800.6 (a)(1), FHWA is responsible for notifying the ACHP of an adverse effect determination and offering the ACHP the opportunity to participate in the resolution of adverse effects.
4. FHWA shall provide ACHP copies of any Memoranda of Agreement (MOA) or project Programmatic Agreement developed for undertakings with adverse effects to historic properties.
5. FHWA shall be responsible for resolving disputes and objections pursuant to Stipulation XII of this Agreement.

B. TDOT Responsibilities

Under the authority of FHWA, TDOT may carry out the following steps with respect to undertakings covered by this Agreement. Delegation of these responsibilities is based on adequate and appropriate performance by TDOT as evaluated in monitoring by FHWA pursuant to Stipulation XI of this Agreement.

- a. 36 CFR 800.3(a) Determine whether the undertaking is a type of activity that has the potential to cause effects on historic properties.
- b. 36 CFR 800.3(e) Solicit public comment and involvement.
- c. 36 CFR 800.3(f) Identify other consulting parties who should be invited to participate in the undertakings covered by this Agreement.
- d. 36 CFR 800.4(a) Determine and document, in consultation with the SHPO, the scope of identification efforts including the undertaking's Area of Potential Effects (APE).
- e. 36 CFR 800.4(a) Gather information from Tribes identified to assist in identifying properties, including those located off tribal lands.
- f. 36 CFR 800.4(b) and (c) Identify and evaluate historic properties within the APE in consultation with the SHPO, Tribes, and consulting parties.
- g. 36 CFR 800.4(d)(1) and (2), On FHWA's behalf, in consultation with the SHPO, Tribes, and consulting parties determine whether historic properties will be affected by the undertaking.

h. 36 CFR 800.5(a), On FHWA's behalf, in consultation with the SHPO, Tribes, and consulting parties, apply the criteria of adverse effect to determine if historic properties within the APE will be adversely affected by the undertaking.

i. 36 CFR 800.5(a)(3) Where alternatives under consideration consist of corridors or large land areas, or where access is restricted, TDOT may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to 36 CFR 800.4(b)(2).

j. 36 CFR 800.6 In consultation with FHWA, the SHPO, the ACHP (if it has chosen to participate), and any other consulting parties, TDOT will attempt to develop alternatives that avoid adversely affecting historic properties.

k. 36 CFR 800.6 If avoidance is not possible, TDOT will continue consultation with FHWA, the SHPO, the ACHP (if it has chosen to participate), and any other consulting party, to execute a memorandum of agreement to resolve any adverse effects.

l. Provide FHWA copies of all correspondence with the SHPO and Tribes sent out on its behalf.

C. ACHP Responsibilities

1. The ACHP will be notified of findings of adverse effect by FHWA and will be invited to participate in resolving the adverse effect of an undertaking in accordance to 36 CFR 800.6(a)(1). The Council will advise FHWA and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council will provide written notice to FHWA and the consulting parties that its decision to participate meets the criteria set forth in Appendix A to Part 800. The Council will also advise the FHWA of its decision to enter the process.
2. The ACHP will participate, in accordance to Stipulation XII, in the resolution of disputes that may occur through the implementation of this Agreement.

D. SHPO Responsibilities

1. The SHPO is responsible for responding to FHWA and TDOT requests according to the terms of this Agreement.

2. The SHPO will participate in site visits and meetings to discuss large or complex undertakings upon request by TDOT or FHWA, as staff time and resources permit.

V. CONSULTATION WITH TRIBES

- A. FHWA retains ultimate responsibility for government to government relationships and consultation with Tribes consistent with the requirements of 36 CFR 800.2(c)(2) and 36 CFR 800.3(f).
- B. FHWA will identify and maintain information regarding Tribes' counties of interest within the state of Tennessee.
- C. FHWA will plan consultations appropriate to the scale of the undertaking and will use to the extent possible existing procedures and mechanisms (e.g., TDOT's environmental guidelines and Tennessee's tribal area of interest maps) to fulfill the consultation requirements pursuant to 36 CFR 800.2(a)(4).
- D. FHWA shall ensure that consultation with Tribes is initiated as early as possible in the planning of the undertaking and maintained throughout the Section 106 review process so that Tribes are provided a reasonable opportunity to identify their concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate their views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.
- E. In accordance with 36 CFR 800.2(c)(ii)(A), FHWA, and TDOT working on behalf of FHWA, recognize and acknowledge that early identification and discussion of preservation issues and concerns about confidentiality of information on historic properties are keys to successful resolution and protection of historic properties.
- F. Implementation of this Programmatic Agreement will have no effect on the current Tribal consultation process for undertakings in Tennessee. Tribal cultural resource professionals for each Tribe will continue to receive requests for information on all transportation undertakings within the state, except for those undertakings which have no potential to cause effects, as noted in 36 CFR 800.3(a)(1), and as further described in Section VII.A.1 of this Agreement.
- G. **Protocol with Federally Recognized Tribes**
FHWA will ask TDOT to assist in consultation if the individual Tribes agree to alternate procedures. Alternate procedures will consist of outlining the process by which FHWA and TDOT provide project information and documentation to each Tribe. FHWA and TDOT will establish a Consultation Protocol with those federally recognized Tribes listed in this PA that wish to enter such agreement. The target date of completion for the Consultation Protocol will be within three years of the

signing of this PA. Consultation will follow the standard Section 106 process for those Tribes who do not wish to enter the Consultation Protocol agreement.

VI. PARTICIPATION OF OTHER CONSULTING PARTIES AND THE PUBLIC

- A. Individuals and organizations with a demonstrated interest in an undertaking shall be invited to participate in the Section 106 process due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.
1. In consultation with the SHPO, FHWA, or TDOT working on the behalf of FHWA, shall identify individuals or organizations who may have an interest in the undertaking, provide them with information about the undertaking, and invite them in writing to participate in the Section 106 process pursuant to 36 CFR 800.3(f). Their participation in undertakings covered under this Agreement shall be governed by 36 CFR 800.3(f)(3).
 2. Written requests by other individuals, organizations, and agencies to become consulting parties will be evaluated on a case-by-case basis by TDOT and FHWA in consultation with the SHPO pursuant to 36 CFR 800.3(f)(3).
 3. Other consulting parties include, but are not limited to, affected landowners, land managing agencies, permitting agencies, local governments, or historical societies.
- B. Public Involvement
1. Public Involvement in planning and implementing undertakings covered by the Agreement is referenced in the TDOT Environmental Division's Public Involvement Requirements Document that provides guidance for identifying, informing, and involving the public in all stages of environmental review. The Public Involvement Requirements Document reiterates that the Section 106 public outreach will be consistent with 36 CFR 800.2.
 2. TDOT shall seek and consider the views of the public pursuant to 36 CFR 800.2(d)(1) in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, and the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.
 3. TDOT will provide the public with information about an undertaking and its effects on historic properties and seek public comment and input pursuant to 36 CFR 800.2(d)(2).

4. TDOT may use its procedures for public involvement under the National Environmental Policy Act in lieu of that required by Section 106 of the National Historic Preservation Act, if adequate opportunities for public involvement are provided and consistent with 36 CFR 800.4.
5. TDOT shall plan to involve the public by identifying appropriate points in the Section 106 process for seeking public input and for notifying the public of proposed actions consistent with 36 CFR 800.2(d) and pursuant to 36 CFR 800.3(e).
6. Public involvement and the release of information to the public shall be consistent with 800.11(c)(1 and 3).
7. TDOT shall make FHWA and SHPO aware of any and all known public comments as they relate to the historic properties potentially affected by the proposed undertaking, including properties of religious and cultural significance to the Tribes.
8. For those actions that do not routinely require public review and comment (e.g., Unscreened and Screened Undertakings), appropriate public involvement should be based on the specifics of the situation and commensurate with the type and location of historic properties, and the undertaking's potential impacts on them.

VII. REVIEW OF SECTION 106 UNDERTAKINGS

A. Projects with No Potential to Cause Effect: Unscreened Undertakings

1. Undertakings that have no potential to cause effects to historic properties, pursuant to 36 CFR 800.3(a)(1), are defined as those actions that by their nature, will not result in effects to historic properties. FHWA defines these to only non-construction related activities. For example, purchasing equipment, planning, and design all fall under this portion of the regulation and do not require any further obligations under Section 106. All other construction with a federal nexus must comply with 36 CFR 800 including any maintenance, new construction, and all construction related actions. Questions about applicability should be referred to the FHWA Federal Preservation Officer (FPO).
2. Projects with No Potential to Cause Effect will be reviewed in their entirety by TDOT Qualified Staff and will not be segmented by activity or subject to differential review procedures.

B. Screened Undertakings

1. TDOT Qualified Staff will determine that an undertaking meets the criteria necessary to be classified as a Screened Undertaking, as defined in

Appendix A. Qualified Staff will document the finding of no historic properties affected and FHWA has fulfilled its statutory responsibilities under Section 106 and will not require consultation with the SHPO.

2. Screened Undertakings will be reviewed in their entirety and will not be segmented by activity or subject to differential review procedures.
3. Screened Undertakings in Appendix A will not be coordinated with the TN-SHPO or the public due to the nature and magnitude of such undertakings and their potential to affect historic properties, assuming such properties were present.
4. TDOT Qualified Staff will review Appendix A to determine if the proposed project meets all of the outlined terms and conditions and will document TDOT project files with project-related information that indicates the reason the project was determined to be a Screened Undertaking.
5. TDOT Qualified Staff will keep the TDOT project files up-to-date and will have all information available upon request from the TN-SHPO, cooperating agencies (as defined at 40 CFR 1508.1(e)), public, and Tribes that documents the determination of No Historic Properties Affected.
6. TDOT may add additional activities to Appendix A pursuant to the amendment process provided in Stipulation XIII of this Agreement.
7. For projects requiring permits, the federal permitting agency will independently review each undertaking, and may initiate consultation with the SHPO to ensure they fulfill their responsibilities under Section 106.

C. Other Undertakings

1. For projects not listed in Appendix A, TDOT Qualified Staff shall follow the Section 106 process pursuant to 36 CFR 800.

D. Project Re-evaluation

1. At any time, if an undertaking changes in the lead federal agency designation, scope, funding, or APE, the TDOT Qualified Staff shall re-assess the previous findings issued by their respective specialties to determine if the findings remain valid or if additional survey or effects assessment is required. All determinations shall be provided to the new lead federal agency for review and comment.
2. Should SHPO or a member of the public provide new information regarding an undertaking that would alter the re-evaluation determination made above, TDOT, SHPO, and consulting parties shall consult pursuant to 36

CFR 800.4-6 and 800.13. Such information shall be provided to TDOT in a timely manner.

3. Additional Section 106 consultation shall not be required if less than 10 years have passed since the full project survey for historic properties, not including archaeological resources, was completed and concurred with by SHPO, or Right of Way (ROW) has been authorized.

VIII. EMERGENCY SITUATIONS

- A. The stipulations in this part fulfill FHWA's responsibilities under 36 CFR 800.12, *Emergency Situations*.
 1. Repairs to address emergency situations as defined in stipulation II.D. can occur regardless of funding category, and regardless of declarations made by federal, state, or local agencies.
 2. For undertakings where the repair must be implemented within the first 30 days of the occurrence of the event that caused the emergency, or within the first 30 days of the declaration of the emergency by an appropriate authority, and where the undertaking has minimal potential to affect historic properties or where no historic properties are identified within the APE, environmental review, documentation, and coordination will happen concurrently or after the fact.
 3. For undertakings where the repair will be implemented more than 30 days after the occurrence of the event that caused the emergency or more than 30 days after the declaration of the emergency by an appropriate authority, TDOT will review the undertaking according to the procedures in Stipulation VII of this Agreement before the undertaking is implemented unless FHWA requests an extension from the ACHP in accordance with 36CFR800.12(d).
 4. If historic properties are identified within the APE for the emergency undertaking, TDOT shall notify the SHPO, FHWA, Tribes and the public prior to any work taking place. The SHPO, local government officials, and any Tribe that may attach traditional religious and cultural significance to historic properties likely to be affected will have seven days to respond to this notification and for all succeeding steps in the Section 106 process necessary to assess and resolve adverse effects
 - a) Written notification of an emergency action provided to the SHPO, Tribes, and the public shall be clearly and prominently marked as an emergency notification and shall include an explanation of how the action meets the requirements to be classified as an emergency undertaking as defined in II.D. of this Agreement. The notice shall

also include a brief description of the eligibility of the resource(s) involved and the nature and anticipated effect(s) of the emergency undertaking on the resource(s).

IX. POST-REVIEW DISCOVERIES

A. Unexpected Discoveries

1. If previously unidentified archaeological or historic resources, or unanticipated effects, are discovered during the implementation of an undertaking, all activities that may affect the newly identified resources will cease, in accordance with TDOT's Standard Specifications for Road and Bridge Construction, Section 107.06, Federal Aid Provisions (human remains and burial sites), Section 203.04, General Construction Requirements (archaeological sites or artifacts) and Tennessee Code Annotated (TCA) §11-6-107, Discovery of sites, artifacts or human remains – Notice to division, contractors and authorities.
2. No further construction in the area of discovery or other activities that might affect the newly discovered resource will proceed until the requirements of 36 CFR 800.13 have been satisfied, including consultation with Tribes that may attach traditional cultural and religious significance to the discovered resource.
3. TDOT will consult with SHPO and Tribes, as appropriate, to record, document, and evaluate NRHP eligibility of the resource, assess the undertaking's effect on the resource, and develop a plan to avoid, minimize, or mitigate the adverse effects to eligible resources.
4. If neither the SHPO nor a Tribe files an objection within 7 calendar days of TDOT's plan for resolving adverse effects to an eligible resource, then TDOT may carry out the requirements of 36 CFR 800.13 on behalf of FHWA, and the ACHP does not need to be notified.

X. IDENTIFICATION AND TREATMENT OF HUMAN REMAINS

- A. If human remains are identified prior to, during, or after construction, TDOT will develop a treatment plan in consultation with FHWA and the SHPO. If it is determined that the human remains are Native American, TDOT and FHWA will consult with the Tribes prior to the development or execution of a treatment plan. Tribes will be notified by email and phone call within 24 hours of the discovery. Data, including photographs, the use of skeletal documentation software, and any additional analysis, will not be collected on the remains without first consulting the Tribes.

- B. All work conducted on human remains and abandoned cemeteries will comply with TCA §11-6-107, 116, and 119, TCA §46-4-101 through 104, TCA §46-8-101 through 103, and TCA §39-17-311 and 312.
- C. All human remains identified during the development of undertakings on Federal lands and that are determined to be Native American will be treated in accordance with the provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), with implementing regulations at 43 C.F.R. § 10.4

XI. CURATION

A. Non-Federal Lands

- 1. For undertakings that occur on non-federal land, FHWA, or TDOT working on behalf of FHWA, shall ensure that collections resulting from archaeological investigations conducted under this Agreement are curated in accordance with guidelines of the Tennessee Division of Archaeology, the Secretary of the Interior's Standards for Archaeological Documentation and 36 CFR Part 79, "*Curation of Federally-Owned and Administered Archaeological Collections*," or as stipulated in a Memorandum of Agreement executed pursuant to 36 CFR 800.6(b)(1)(iv).

B. Federal Lands

- 1. For undertakings, or portions thereof, that occur on federal land, FHWA, or TDOT working on behalf of FHWA, shall comply with the federal land-managing agency's curation policies. In lieu of agency specific curation policies, collections resulting from archaeological investigations occurring on federal lands and conducted under this Agreement shall be curated in accordance with 36 CFR Part 79, "*Curation of Federally-Owned and Administered Archaeological Collections*," or as stipulated in a Memorandum of Agreement executed pursuant to 36 CFR 800.6(b)(1)(iv).

XII. ADMINISTRATIVE STIPULATIONS

A. Annual Evaluation. TDOT will provide the SHPO, ACHP, and FHWA with the following:

- 1. A list in table form identifying all Unscreened undertakings processed under this Agreement from the previous calendar year and specifying project names, counties, and all findings pursuant to 36 CFR Part 800;
- 2. A list in table form identifying all Screened Undertakings for the previous calendar year. This table will include county, project names, activity (e.g., Appendix A.10), and the response date that Qualified Staff used Appendix A.

3. The reporting period shall cover the previous calendar year and shall be submitted to FHWA, SHPO, and ACHP no later than March 1 of the following year.
- B. Additional Assessment: If needed, FHWA will prepare, with TDOT and SHPO input, an assessment of effectiveness of the Agreement, including a discussion of concerns and recommendations for changes, if any.

XIII. DISPUTE RESOLUTIONS

1. Should any signatory party object in writing to FHWA regarding the manner in which the terms of this Agreement are carried out, FHWA will immediately notify the other signatory parties of the objection and proceed to consult with the objecting party to resolve the objection. FHWA will honor the request of any signatory party to participate in the consultation and will take any comments provided by such parties into account. The FHWA shall establish a reasonable timeframe for such consultations.
2. Should any signatory party object to a TDOT or FHWA determination of eligibility, FHWA will submit the determination to the Keeper of the National Register of Historic Places for resolution.
3. If the objection is resolved through consultation, FHWA may authorize the disputed action to proceed in accordance with the terms of such resolution.
4. If after initiating such consultation, FHWA determines that the objection cannot be resolved through consultation, FHWA shall forward all documentation relevant to the objection to the ACHP and other signatory parties, including FHWA's proposed response to the objection. Within 30 days after receipt of all pertinent documentation, ACHP shall exercise one of the following options:
 - i. Advise FHWA that ACHP concurs in FHWA's proposed response to the objection, whereupon FHWA will respond to the objection accordingly; or,
 - ii. Provide FHWA with recommendations, which FHWA shall take into account in reaching a final decision regarding its response to the objection; or,
 - iii. Notify FHWA that the objection will be referred for comment pursuant to 36 CFR 800.7(a)(4) and proceed to refer the objection for comment. In this event, FHWA shall ensure that the Agency Official is prepared to take the resulting comments into account in accordance with 36 CFR 800.7(c)(4).

5. Should ACHP not exercise one of the foregoing options within 30 days after receipt of all pertinent documentation, FHWA may assume ACHP's concurrence in its proposed response to the objection.
6. FHWA shall take into account any ACHP recommendation or comment and any comments from the other signatory parties to this Agreement in reaching a final decision regarding the objection. FHWA's responsibility to carry out all actions under this Agreement that are not the subjects of the objection shall remain unchanged.
7. FHWA shall provide all other signatory parties to this Agreement with a written copy of its final decision regarding any objection addressed pursuant to this Stipulation.
8. FHWA may authorize any action subject to objection under this Stipulation to proceed, provided the objection has been resolved in accordance with the terms of this Stipulation.
9. At any time during implementation of the terms of this Agreement, should any consulting party or member of the public raise an objection in writing pertaining to such implementation to any signatory party to this Agreement, that signatory party shall immediately notify FHWA. FHWA shall immediately notify the other signatory parties in writing of the objection. Any signatory party may choose to comment on the objection to FHWA. FHWA shall establish a reasonable time frame for this comment period. FHWA shall consider the objection, and in reaching its decision, FHWA will take all comments from the other parties into account. Within 15 days following closure of the comment period, FHWA will render a decision regarding the objection and respond to the objecting party. FHWA will promptly notify the other parties of its decision in writing, including a copy of the response to the objecting party. FHWA's decision regarding resolution of the objection will be final. Following the issuance of its final decision, FHWA may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

XIV. AMENDMENT

- A. Any signatory party to this Agreement may at any time propose amendments, whereupon all signatory parties shall consult to consider such amendment. This Agreement may be amended only upon written concurrence of all signatory parties.
- B. Once written concurrence is received, a copy of the amended Programmatic Agreement will be circulated to the signatories for signing, such that each signatory will receive a copy. The amended document will become effective on the date that the final signatory has signed, which shall be ACHP.

XV. TERMINATION

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

XVI. CONFIDENTIALITY

- A. All parties to this Agreement acknowledge that information about historic properties, potential historic properties, or properties considered historic for purposes of this Agreement are or may be subject to the provisions of Section 304 of NHPA. Section 304 allows FHWA to withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if FHWA and TDOT determine that disclosure may 1) cause a significant invasion of privacy; 2) risk harm to the historic resource; or 3) impede the use of a traditional religious site by practitioners. Having so acknowledged, all parties to this Agreement will ensure that all actions and documentation prescribed by this Agreement are, where necessary, consistent with the requirements of Section 304 of the NHPA.
- B. Pursuant to Tennessee Code Annotated 11-1-102(c)(4), the Tennessee Division of Archaeology may withhold the specific location of archaeological sites or artifacts if it is determined that disclosure of such records would create a substantial risk of damage to or destruction of either the historical value of such site or artifact or private property.

XVII. DURATION OF AGREEMENT

- A. This Agreement shall take effect upon execution by all signatories and will remain in effect for a period of five (5) years after the date it takes effect, unless it is terminated prior to that time. At least ninety days prior to the conclusion of the five-year period, FHWA will notify all parties in writing. If there are no objections from

consulting parties, an amendment with signature pages will be circulated to all signatories and, once all signatories have signed the extension amendment, the Agreement shall then be extended for an additional five years.

- B. If any party objects to extending the Agreement, or proposes amendments, FHWA will consult with the parties to consider amendments or other actions to avoid termination.

Execution and implementation of this agreement provides evidence that FHWA has delegated certain Section 106 responsibilities to TDOT, and has afforded ACHP a reasonable opportunity to comment on the Program and its individual undertakings in Tennessee, that FHWA has taken into account the effects of the program and its individual undertakings on historic properties, and that FHWA has complied with Section 106 of the NHPA and 36 CFR 800 for the Program and its individual undertakings.

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

Signatories:

Federal Highway Administration

By: *Pamela M. Kordenbrock* 6/23/2021
Pamela M. Kordenbrock, Division Administrator
Federal Highway Administration, TN Division

PROGRAMMATIC AGREEMENT AMONG
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THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Signatories:

State Historic Preservation Officer

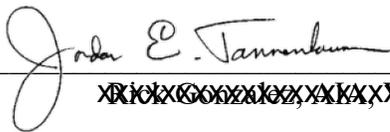
By: *E. Patrick McIntyre, Jr.*
E. Patrick McIntyre, Jr. (Jun 22, 2021 11:51 CDT)

E. Patrick McIntyre, Jr., Executive Director and SHPO

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE TENNESSEE STATE HISTORIC PRESERVATION OFFICER,
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THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Signatories:

Advisory Council on Historic Preservation

By:  Jordan E. Tannenbaum, Vice Chairman July 30, 2021
~~Rick Gonzalez, ACA, Vice Chairman~~

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
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REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Invited Signatory:

Tennessee Department of Transportation

By: Clay Bright
Clay Bright (Jun 22, 2021 08:08 CDT)

Clay Bright, Commissioner

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
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THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

Absentee-Shawnee Tribe of Indians in Oklahoma

Nothing in this Agreement shall be construed to waive the sovereign rights of the Absentee-Shawnee Tribe of Indians in Oklahoma, its officers, employees or agents

By: _____
John R. Johnson, Governor

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
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THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

Cherokee Nation

Nothing in this Agreement shall be construed to waive the sovereign rights of the Cherokee Nation, its officers, employees or agents

By: _____
Chad Harsha, Secretary of Natural Resources

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
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THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

The Chickasaw Nation

Nothing in this Agreement shall be construed to waive the sovereign rights of the Chickasaw Nation, its officers, employees or agents.

By: _____
Bill Anoatubby, Governor

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
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THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

The Choctaw Nation of Oklahoma

Nothing in this Agreement shall be construed to waive the sovereign rights of The Choctaw Nation of Oklahoma, its officers, employees or agents.

By: _____
Gary Batton, Chief

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
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THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
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Concurring Party:

Eastern Band of Cherokee Indians

Nothing in this Agreement shall be construed to waive the sovereign rights of the Eastern Band of Cherokee Indians, its officers, employees or agents.

By: _____
Richard Sneed, Principal Chief

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
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THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

Eastern Shawnee Tribe of Oklahoma

Nothing in this Agreement shall be construed to waive the sovereign rights of the Eastern Shawnee Tribe of Oklahoma, its officers, employees or agents.

By: _____
Glenna J. Wallace, Chief

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
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THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
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Concurring Party:

Kialegee Tribal Town

Nothing in this Agreement shall be construed to waive the sovereign rights of the Kialegee Tribal Town, its officers, employees or agents.

By: _____
Tiger Hobia, Mekko

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
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THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

The Muscogee (Creek) Nation

Nothing in this Agreement shall be construed to waive the sovereign rights of The Muscogee (Creek) Nation, its officers, employees or agents.

By: _____
David Hill, Principal Chief

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
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THE TENNESSEE DEPARTMENT OF TRANSPORTATION
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Concurring Party:

Poarch Band of Creeks

Nothing in this Agreement shall be construed to waive the sovereign rights of the Poarch Band of Creeks, its officers, employees or agents.

By: _____
Stephanie A. Bryan, Tribal Chair

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

Concurring Party:

Quapaw Nation

Nothing in this Agreement shall be construed to waive the sovereign rights of the Quapaw Nation, its officers, employees or agents.

By: _____
Joseph Byrd, Chairman

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
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THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

Shawnee Tribe

Nothing in this Agreement shall be construed to waive the sovereign rights of the Shawnee Tribe, its officers, employees or agents.

By: _____
Ben Barnes, Chief

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
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THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

Thlopthlocco Tribal Town

Nothing in this Agreement shall be construed to waive the sovereign rights of the Thlopthlocco Tribal Town, its officers, employees or agents.

By: _____
Ryan Morrow, Town King

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
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THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

United Keetoowah Band of Cherokee Indians in Oklahoma

Nothing in this Agreement shall be construed to waive the sovereign rights of the United Keetoowah Band of Cherokee Indians in Oklahoma, its officers, employees or agents.

By: _____
Joe Bunch, Chief

Appendix A

Screened Undertakings Not Requiring TN-SHPO Review

Projects limited to activities listed in Appendix A require internal review by Qualified Staff to determine whether a project including the listed activities meets all the terms and conditions in Appendix A and that no circumstances exist that would call for additional review. All activities listed in Appendix A are being performed within existing, previously disturbed right-of-way. Should the project activities fall outside existing, previously disturbed right-of-way, the project will be processed in the “Other Undertaking” category. If no such circumstances exist, Qualified Staff will document the finding of No Historic Properties Affected and that the project does not require any further review, will document the project file as appropriate, and provide an annual list of projects to the TN-SHPO, ACHP, and FHWA. Refer to Section VII.B of the Programmatic Agreement.

1. Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, or preventative maintenance of pavement. Historic highways (National Register listed, those determined to be NR eligible by consensus, or those that have the potential for NR eligibility) are excluded from Appendix A and will be coordinated with the TN SHPO.
2. General highway maintenance and repair, including filling potholes, crack sealing, joint grinding, milling, and resurfacing using materials like those that are being replaced or repaired.
3. Extension of acceleration/deceleration lanes on a controlled access highway.
4. Pavement marking including striping, lane designations, and raised markings.
5. Pavement or installation of depressed curbs at existing driveways.
6. Conversion of existing paved medians to turning lanes.
7. Channelizing divisional refuge islands without increasing total pavement width.
8. Modification of existing access control in divided highways including but not limited to highway patrol cut-throughs and turn-arounds. Repair, replacement, or upgrading of signals, signs, and other traffic control devices in the same location and using materials like those that are being replaced or repaired.
9. Construction of turning and auxiliary lanes (e.g., truck climbing, acceleration, and deceleration lanes) and shoulder widening.
10. Installation of rumble strips on existing shoulders.
11. Construction of pavement test areas on an existing roadway.
12. Installation of sidewalks, bicycle lanes, and shared use paths
13. Replacement or repair of existing curbs and gutters, sidewalks, Americans with Disabilities Act of 1990 (ADA) ramps and other features, fences, driveways and installation, replacement, or repair of street furniture in the same location and using materials like those that are being replaced or repaired.

14. Installation, restoration, replacement, or upgrading of under-deck lighting.
15. Installation, restoration, replacement, or upgrading of lighting systems including conventional, high-mast, and offset lighting systems.
16. Installation of highway safety improvements including breakaway devices, shielding systems, reflective object markers, delineators, raised/snow plowable pavement markers and shoulder scoring.
17. Repair, replacement, or upgrade of existing highway safety hardware including guardrail, end terminals, attenuators, median barriers, cable barriers, and glare screens.
18. Installation of new cable barrier in the median of a divided highway.
19. Drainage structures that are less than or equal to twenty feet in length, are repaired or replaced in the same location and may include work to grade, drain, base, and pave the area immediately surrounding the small structure. Drainage structures that contribute to the National Register eligibility of a historic property or historic district are excluded from Appendix A and will be coordinated with the TN SHPO.
20. Improvements to existing TDOT-owned maintenance facilities that are less than 50 years old.
21. All work within interchanges, including realignment of on and off ramps, and within medians of divided highways.
22. Installation, repair, replacement, or upgrading of flashing signals or lights, traffic calming devices (lights, signs, and speed bumps), medians, crosswalks (including those constructed with pavers), or bicycle racks and lockers in the same location and using materials like those that are being replaced or repaired.
23. Erosion control measures requiring new excavation, such as sediment ponds.
24. Hazardous waste removal requiring excavation and disposal constituting a public hazard, and which requires immediate removal.
25. Repairs to bridges that are less than 50 years old, of a ubiquitous design, or that have been previously determined to be ineligible for listing in the National Register in consultation with the TN-SHPO. Repairs include but are not limited to bridge painting, cleaning, and replacement or repair of existing drainage system elements including plugging pipe, installation of stone riprap, rock-and-wire (gabion) mattress, concrete slabs in the waterways and other bridge scour counter-measures, milling and resurfacing of bridge decks, maintenance, deck patching, and replacement or repair of bridge joints, bridge railings, and guard rails, and seismic retrofitting a bridge in the same location and using materials similar to those that are being replaced or repaired.
26. Storm damage repairs, such as culvert cleaning or repair, shoulder reconstruction, or slide or debris removal.
27. Repair, replace, or upgrade the crossing surface between the railroad tracks and ten feet outside the railroad tracks.

28. Repair, replace, or upgrade existing Bungalow Boxes/Signal Control Boxes.
29. Repair, replace, reset, or upgrade of highway safety improvements including automatic flashing lights and gates, warning bells, and constant warning time track circuitry (train detection to activate lights and gates).
30. Repair, replace, reset or upgrade of electronic variable message signs, traffic sensors, closed circuit television cameras, and highway advisory radio systems including remote controlled flashing signs support structures.
31. Installation of ramp metering systems and computer links to monitor and control traffic volumes throughout the roadway system.
32. Installation and operation of Intelligent Transportation System elements such as cameras, weather stations, and traffic counters.
33. Vegetation control, including activities such as mowing, brush removal/trimming, and herbicidal spraying.
34. Replacement or repair, slip-lining, or extension of culverts and other drainage structures which do not extend beyond or deeper than previous construction limits in the same location and using materials like those that are being replaced or repaired.
35. Erosion control measures that are affixed to or that otherwise occur on an existing structure (e.g., bridge or overpass) or within the prism (roadway and slopes) of an existing roadway.
36. Above-ground hazardous waste removal and disposal constituting a public hazard, and which requires immediate removal.
37. Acquisition of scenic easements.
38. Inventory, control, or removal of outdoor advertising.
39. Bridge re-striping on four-lane roadways that include median cross-over lanes built to redirect traffic during construction, but which are then removed after construction is completed.
40. At or above grade improvements to existing rest areas, park, and ride lots, and truck weigh stations that are less than 50 years old.
41. Lease, licensing, or disposal of excess right-of-way that has been previously surveyed for architectural/historical within the last ten years and for archaeological resources within the last twenty years as part of an earlier TDOT Section 106 survey and where the results of that study found that the requested parcel(s) of excess right-of-way does not contain NRHP listed or eligible historic properties, or potentially eligible archaeological sites and the SHPO concurred with TDOT's findings.
42. Lease, licensing, or disposal of excess right-of-way that is within existing and previously disturbed right-of-way whether through road construction, private development, or changes in land use that render its potential for containing NRHP listed or eligible historic properties, or potentially eligible archaeological sites, moot.