

**TRIBAL CONSULTATION PROTOCOL AGREEMENT
BETWEEN
THE FEDERAL HIGHWAY ADMINISTRATION GEORGIA DIVISION,
GEORGIA DEPARTMENT OF TRANSPORTATION
AND
THE UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA
REGARDING COORDINATION AND CONSULTATION ON FEDERAL-AID HIGHWAY
PROJECTS IN GEORGIA IN ACCORDANCE WITH THE NATIONAL HISTORIC
PRESERVATION ACT SECTION 106 PROCESS AND 36 CFR PART 800**

WHEREAS, the Federal government has a unique legal relationship with Federally-recognized Indian tribes derived from the Constitution of the United States, treaties, statutes and court decisions whereby Indian tribes are recognized as sovereign nations, and the Federal Highway Administration (FHWA), as a Federal agency, recognizes the government-to-government relationship between the United States and federally recognized tribes and acknowledges the United Keetoowah Band of Cherokee Indians in Oklahoma (UKB) as a sovereign nation with inherent powers of self governance; and,

WHEREAS, the FHWA, Georgia Division (FHWA) is the Federal agency of the United States responsible for administering the Federal-Aid Highway Program in Georgia and with statutory responsibility under 36 CFR §800.2 to fulfill the requirements of Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. §470 et. seq.) (NHPA); and,

WHEREAS, the UKB is a sovereign government and Federally-recognized Indian tribe that claims portions of north Georgia as part of their ancestral homeland and has an interest in the preservation and protection of its historic, religious, and cultural heritage within Georgia; and,

WHEREAS, the FHWA agrees to coordinate and consult with the UKB under a government-to-government relationship in compliance with Section 106 of the National Historic Preservation Act (NHPA), the Native American Graves Protection and Repatriation Act (NAGPRA, 25 U.S.C. §3001 et seq.), the Archaeological Resources Protection Act (16 USC §9a et seq.), Presidential Executive Order (EO) 13007 (Indian Sacred Sites), EO 13175 (Consultation and Coordination with Indian Tribal Governments), and the Presidential Memorandum on "Government to Government Relations with Native American Tribal Governments (April 29, 1994); and,

WHEREAS, the FHWA has requested that the Georgia Department of Transportation (GDOT), the applicant for Federal funds, permits and approvals for highway projects in Georgia, provide assistance to FHWA in complying with the body of environmental law that includes the National Environmental Policy Act (NEPA), the NHPA, and other similar laws; and,

WHEREAS, GDOT employs professional staff capable of completing the NHPA Section 106 process on behalf of FHWA and has a record of successful compliance with NHPA Section 106; and,

WHEREAS, the FHWA has determined that its undertakings may have an effect upon properties included in or eligible for inclusion in the National Register of Historic Places (NRHP) that may be of cultural and religious significance to the UKB pursuant to 36 CFR 800.14, and also may contain American Indian burials and funerary objects that require compliance with the NAGPRA (25 U.S.C. §3001 et seq.); and,

WHEREAS, the FHWA and GDOT recognize that the UKB possess the unique experience and oral history to identify and evaluate historic properties of religious, historical, and cultural significance to its tribe; and,

WHEREAS, the provisions of the NHPA regulations (36 CFR 800.2(c)(E) encourage Federal agencies to enter into agreements with Indian tribes that specify how they will carry out their responsibilities in the NHPA Section 106 process; and,

WHEREAS, respectful of each other's legitimate values and goals, FHWA, GDOT and the UKB agree to establish and maintain a relationship based on open dialog, mutual respect, and early and continuous consultation. The overall purpose of this Agreement is to create a consultation process that allows the opportunity for tribal input on proposed FHWA undertakings, and to work together cooperatively to implement the NHPA and address other issues of mutual concern. The goal of this consultation is to allow FHWA and GDOT to consider the input from the UKB in identifying impacts to the social, cultural, natural, and economic environments and in developing measures to avoid and minimize those impacts, or to preserve or enhance the resource through mitigative measures prior to implementing an undertaking; and,

WHEREAS, the representatives of the FHWA have engaged in consultation with representatives of the UKB, and have jointly agreed to establish a consultation process in this Agreement; and,

WHEREAS, nothing in this Agreement shall alter, amend, repeal, interpret, or waive tribal sovereignty, tribal sovereign immunity, any treaty rights, or other such rights of the UKB, or to preempt, modify, or limit the exercise of any such rights; and,

NOW, THEREFORE, the FHWA, GDOT, and the UKB hereby agree to the following consultation process for Federal-aid highway transportation projects in Georgia in compliance with Section 106 of the NHPA.

1. Agreement Period

This Agreement becomes effective when fully executed by all parties hereto and shall remain in effect for five years. At the end of the five-year period the Agreement may be renewed by all parties in writing.

2. Applicability

The GDOT shall implement the provisions set forth in this Agreement for any Federal-aid transportation project located in Georgia. In doing so, FHWA, with the assistance of GDOT, will meet its responsibilities with regard to consultation with the UKB under Section 106 of the NHPA.

This Agreement sets forth all aspects of UKB participation in the Section 106 process and is intended to facilitate the direct participation of the parties in all phases of an undertaking that has the potential to affect historic properties and cultural resources protected by applicable statutes. The parties to this Agreement shall implement the provisions set forth in this Agreement for Federal-aid transportation projects located in Georgia.

3. Federal Recognition

The UKB is acknowledged by the Federal government to have a government-to-government relationship with the United States and is recognized as eligible for the special programs and services provided by the United States to Federally-recognized tribes because of their status as Indians, and thus has status to establish a programmatic consultation process under 36 CFR §800.14(b).

4. Consultation and Coordination

a. Pursuant to 36 CFR 800.2(c)(4) FHWA grants GDOT, using staff housed in the Office of Environmental Services (OES) who meet the Secretary of Interior's Professional Qualifications Standards (48 FR 44738-9), authority to initiate consultation and fulfill FHWA's consultation requirements with the UKB, but remains legally responsible for all findings and determinations. FHWA shall approve the outcome of all consultations with the UKB prior to its award of any assistance for the undertaking under the Federal Aid Highway Program or any other program involving FHWA assistance or approval.

b. The GDOT is authorized by the FHWA to initiate consultation with the UKB pursuant to 36 CFR 800.2(c)(4) on behalf of FHWA for individual undertakings carried out under the provisions of this Tribal Consultation Protocol Agreement ("Agreement"). A request for UKB participation shall be initiated at the earliest stage possible and shall continue from the planning stage, through scoping, design, construction, operation, and into maintenance, as appropriate, based on the context and intensity of the undertaking and possible impacts of the undertaking to historic and cultural properties and resources of concern to the Tribe.

c. The GDOT, on behalf of FHWA, shall ensure that the UKB is provided information regarding proposed undertakings and are invited to participate in consultation in accordance with the requirements of Section 101(d)(6) of the NHPA and 36 CFR Part 800. Upon receipt of a request (in writing, phone, or email) from the UKB to consult with FHWA in lieu of or in addition to GDOT, FHWA shall consult with the UKB for the particular undertaking or program.

d. The GDOT shall copy FHWA on all correspondence to and from the UKB via electronic mail or other appropriate means.

e. The parties intend to engage in consultations as responsible stewards of the land and its cultural heritage in a spirit of mutual cooperation, respect, and goodwill. The parties may periodically schedule face-to-face meetings. However, it is also necessary for the parties to communicate in the absence of, or in between such meetings to continue the relationship between the parties and/or consult on matters related to the undertaking. This section does not alter this intent, but defines the means of interim and routine communications for those periods in which face-to-face consultation is not feasible due to the physical separation of the parties.

f. All communications with the UKB will be initiated by the American Indian Liaison at GDOT's OES on behalf of FHWA. Communications will be initiated as early as possible in the transportation planning process and will continue throughout the continued development of the projects.

g. The GDOT American Indian Liaison will initiate consultation with and provide information pertinent to the consultation process on behalf of FHWA to the UKB Historic Preservation

Officer on all Federally funded highway projects in the State of Georgia that have potential to effect historic properties on or eligible for listing in the NRHP, pursuant to Section 106 of the NHPA.

h. The GDOT American Indian Liaison will coordinate formal consultations and prepare a record of formal consultation meetings and conference calls between the UKB, FHWA and GDOT.

i. The UKB has provided a map of Georgia to the GDOT and FHWA showing the counties they are culturally affiliated with and would like to be consulted on(Appendix 3). The UKB will only receive project information from these 37 counties.

5. Communications

a. Routine communications include the transmittal of all Section 106 related documentation, including, but not limited to: Initiation of Section 106 Early Coordination Letters, Draft Archaeological Reports, Draft Assessment of Effects, Draft Data Recovery Plans, and Draft Public Outreach materials. All documents will be provided to the UKB Historic Preservation Officer as soon as they become available to the GDOT OES American Indian Liaison.

b. The preferred methods for routine communications with the UKB Historic Preservation Officer shall be electronic mail, telephone, and webinars or other technology-based methods as they develop that are mutually agreeable to the parties to this Agreement. If documents are too large to be sent via electronic mail, then documents will be mailed in PDF version on CD via mail or any other electronic means agreeable to the parties.

c. Without limiting the right to communicate after this review period, the UKB Historic Preservation Officer shall reply within 30 calendar days to all GDOT routine communications. In the absence of a reply, GDOT will proceed with the undertaking after expiration of 30 calendar days as though no objections or expressions of concern were received. Failure to comment will not prevent the UKB Historic Preservation Officer from re-entering consultation at any point thereafter during the planning of the undertaking.

d. The UKB shall provide GDOT with available verbal or documentary information that would assist GDOT in determining when American Indian sites in the project area may be affiliated with the Tribe's current or ancestral occupation of Georgia, the NRHP eligibility of such sites, and the potential effect of the proposed undertaking on the site(s).

e. The parties agree to maintain the confidentiality of all information pertaining to historic and cultural properties where possible, limited to applicable law. The parties shall take all reasonable measures to preclude disclosure of confidential information regarding American Indian cultural properties. The parties recognize that the UKB may be reluctant to divulge specific information regarding location, nature, and activities associated with such properties based on cultural, traditional, and religious beliefs. The UKB confidentiality concerns shall be taken into account during the identification process. The FHWA and GDOT shall incorporate the comments of the UKB into the project development process, while efforts to identify cultural resources and historic properties on undertakings shall proceed by the GDOT or its designee.

f. The UKB may at any time request further participation by FHWA on any project or in policy matters related to consultation.

6. Points of Contact

- a. The FHWA Georgia Division Administrator and the UKB Chief or their designees shall be the respective representatives for consultation.
- b. The point of contact for correspondence to the FHWA Georgia Division shall be the Environmental Coordinators for the respective GDOT district. See Appendix 1 for the FHWA Georgia contacts for these areas.
- c. The point of contact for correspondence to the UKB concerning Federal undertakings shall be the UKB Historic Preservation Officer. The UKB shall direct all correspondence to the GDOT American Indian Liaison, who shall provide copies of all correspondence to FHWA.
- d. Each party shall notify the other parties in when the point of contact changes. Such changes shall not require amendment of this Agreement. Appendix 2 contains detailed information for the current points of contact.

7. Project Planning

- a. Pursuant to 23 CFR §450.210 (Interested parties, public involvement and consultation), FHWA and GDOT will ensure that the UKB is provided the opportunity to review and comment on the Georgia Statewide Transportation Improvement Program (STIP) by providing written notice of the availability of the STIP for review and a web address to access the proposed STIP on the GDOT website.
- b. The annual review shall provide the UKB an opportunity to identify and comment on projects proposed for inclusion in the STIP that may involve traditional religious and cultural properties during the planning stages of project development. Response to the request for comments STIP is open-ended, and the UKB may respond as it deems necessary and appropriate.

8. Expedited Consultation for Emergency Relief Projects

- a. The State of Georgia may experience a disaster (natural or otherwise) event triggering a state of emergency, as declared by the President of the United States and/or the Governor of Georgia. The FHWA makes funds available to GDOT through FHWA's Emergency Relief Program under Section 125 of Title 23, U.S.C., for the repair of damage to bridges, streets, roads, or highways on the Federal-aid system, and other Federal-aid highways as a result of disasters or catastrophic failures from an external source.
- b. The Emergency Relief Program allows for emergency repairs (23 CFR § 668.103), defined as those repairs including temporary traffic operations undertaken during or immediately following the disaster occurrence for the purpose of minimizing the extent of damage; protecting remaining facilities; or restoring essential traffic; as well as permanent repairs or restoration done as part of the emergency repairs, approved by FHWA (23 CFR § 668.109), hereby collectively referred to as Emergency Repairs.
- c. All eligible Emergency Repairs are reviewed and approved by FHWA. Construction for the eligible Emergency Repair under the Emergency Relief Program normally will be completed within 180 calendar days of the occurrence of the declared emergency event. The expedited consultation procedures put forth in this section apply only to those Emergency Repairs for which construction is completed within 180 calendar days of the emergency unless the FHWA finds there to be an extenuating circumstance to construction completion that would warrant a minor time deviation. Section 106 NHPA compliance, including tribal consultation, for all other

repairs undertaken using FHWA Emergency Relief funds will proceed in accordance with the procedures contained in this Agreement.

d. After the declaration of a state of emergency by the President of the United States and/or the Governor of Georgia, GDOT will notify the UKB of any emergency repair projects that may affect historic properties. The notification letter will be as succinct as possible given available information and will detail the proposed reporting and review/comment schedule for Emergency Repairs. Pursuant to 36 CFR 800.12(b), after receipt of the notification, identified parties will have 7 calendar days to review and provide comments to GDOT. If GDOT or FHWA determine that circumstances do not permit 7 calendar days for comment, GDOT will notify the UKB points of contact and invite any comments within the time available.

e. If the evaluation of historic properties results in negative findings (no eligible or potentially eligible NRHP historic properties are located in the Area of Potential Effect (APE), Section 106 requirements will be deemed to have been met. The UKB Historic Preservation Officer and the will be provided all documentation for their files.

f. If historic properties are identified in the APE of an Emergency Repair and result in No Effect/No Historic Properties Affected or No Adverse Effect, the UKB Historic Preservation Officer respond to the findings accompanied by supporting documentation within 7 calendar days after receipt unless GDOT/FHWA determines the nature of the Emergency Repair warrants a shorter review period. Any comments received will be taken into account by GDOT/FHWA when finalizing any treatment for historic properties.

g. If it is determined that that the proposed action may have an adverse effect on historic properties, GDOT will propose actions to avoid, minimize or mitigate the adverse effects. GDOT will document the resolution of Adverse Effects in a Commitment Letter that includes proposed mitigation measures in lieu of an individual Memorandum of Agreement, and provide it to the UKB. If the UKB Historic Preservation Officer provide concurrence to GDOT or if no objection is received within 7 calendar days of the receipt of the Commitment Letter GDOT will assume concurrence, and GDOT will proceed with the implementation of the commitments.

9. Post-Review Discoveries

All cases of inadvertent discoveries under construction shall follow the procedures outlined in 36 CFR 800.13(3) of the regulations implementing Section 106 of the NHPA.

10. Treatment of Burials

a. In the event that American Indian burial(s) are unexpectedly discovered during archaeological excavation or construction of a project, GDOT shall immediately halt all work in the area of the burial(s) and secure the burial(s) to protect it from unauthorized excavation. The FHWA and GDOT shall explore all options to seek to avoid impacts to the burial site.

b. The GDOT American Indian Liaison shall notify the UKB Historic Preservation Officer by telephone within 24 hours and by certified mail within 72 hours of such discovery.

c. The specific treatment of American Indian burials will be addressed on a project-by-project basis due to the inherent complexity and uniqueness of each project and burial site. Specific

treatment procedures may also include consultation with other Federally-recognized Indian tribes culturally affiliated with Georgia.

d. The provisions of NAGPRA will apply only in those instances where the GDOT, at the direction and under the auspices of FHWA, takes "possession and control" of American Indian human remains, funerary objects or objects of cultural patrimony as defined by NAGPRA (25 USC 3001, Section 5[a]) or when American Indian human remains, funerary objects, or objects of cultural patrimony are located on Federally owned land pursuant to 25 USC §3002, Section 3. In such cases the National Park Service's NAGPRA program manager will be consulted as to the legal sufficiency of the proposed actions. Additionally, the FHWA and the GDOT shall comply with State of Georgia statutes, when applicable, regarding the treatment and disposition of human burials (OCGA 36-72, OCGA 31-21-6, and OCGA 44-12-260).

11. Other

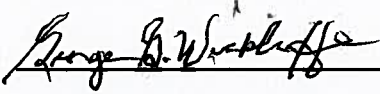
a. Nothing in this Agreement shall be interpreted to alter the requirements of Federal laws or their implementing regulations. In the event any portion of this Agreement is deemed contradictory to law or regulation, only that portion becomes void. The sole contradictory issue does not void the entire Agreement. The parties shall consult to resolve the contradictory issue in compliance with the applicable law or regulation, while the remaining portions of the Agreement remain in effect.


b. Nothing in this Agreement shall be construed as limiting or affecting the legal authority of either party, nor does it commit either party to exceed their available appropriations.


c. Any party to this Agreement may request that it be amended, where upon the parties shall consult to consider the amendment. All proposed amendments will become valid once all parties have concurred with the amendment in writing, in either letter format or email.

d. This Agreement can be unilaterally terminated by any party upon 30 calendar day written notice. Prior to termination, the parties shall consult during the period prior to the proposed termination to seek agreements on amendments or other actions that would avoid termination.

NOW, THEREFORE, it is agreed upon that the FHWA, GDOT, and the UKB will cooperate to achieve the principles and purposes set forth in this Tribal Consultation Protocol Agreement.

By:  **MAR 09 2012**
George Wickliffe, Chief Date
United Keetoowah Band of Cherokee Indians in Oklahoma

By:  **5-22-12**
Rodney N. Barry, Division Administrator Date
Federal Highway Administration Georgia Division

By:  **5-15-12**
Keith Golden, P.E., Commissioner Date
Georgia Department of Transportation