

**PROGRAMMATIC AGREEMENT
for the
CONSULTATION PROCESS
among the
FEDERAL HIGHWAY ADMINISTRATION,
TEXAS DEPARTMENT OF TRANSPORTATION
And the
TONKAWA TRIBE OF OKLAHOMA**

Whereas, the Federal Highway Administration (FHWA) is responsible for compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. §470 et seq.) and implementing regulations (36 CFR Part 800); and

Whereas, Section 106 of the National Historic Preservation Act (16 U.S.C. §470 et seq.) provides definitions and procedures for consultation between federal agencies and Native American tribes for federal undertakings, as defined in 36 CFR §800.16(y); and

Whereas, the FHWA proposes to administer the Federal Aid Highway and transportation enhancement programs in Texas through the Texas Department of Transportation (TxDOT) as authorized by 23 U.S.C. §101 et seq., 23 U.S.C. §133(d)(2) and 23 U.S.C. §315; and

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

Whereas, FHWA has determined that federal-aid highway transportation projects it funds within the State of Texas are federal undertakings carried out by TxDOT; and

Whereas, the federal-aid highway transportation projects administered by TxDOT are carried out on non-federal and non-tribal land owned and controlled by the State of Texas and its political subdivisions; and

Whereas, the FHWA and TxDOT recognize that certain of those undertakings may have an effect upon historic properties included in or eligible for inclusion in the National Register of Historic Places and properties that contain Native American burials that require compliance with the Native American Graves Protection and Repatriation Act ("NAGPRA," 25 U.S.C. §3001 et seq.) and its regulations (43 CFR Part 10); and

Whereas, the representatives of the FHWA and TxDOT have engaged in consultation with representatives of the Tonkawa Tribe of Oklahoma (hereafter, "the Tribe") to establish a Programmatic Consultation Process; and

Whereas, this Programmatic Consultation Process compliments the Programmatic Agreement executed by the FHWA, the Advisory Council on Historic Preservation, the

Texas State Historic Preservation Officer, and TxDOT for other aspects FHWA's compliance with Section 106; now

Therefore, the FHWA, TxDOT, and the Tribe do hereby agree to the following consultation process for federal-aid highway transportation projects in Texas:

1. Agreement Period. This agreement becomes effective when fully executed by all parties hereto and shall remain in effect for five years. The agreement shall automatically renew at the end of each sequent five year period unless one or more of the parties expresses in writing to the other parties the need to revise the agreement.

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

3. Consultation. FHWA grants TxDOT, using staff housed in the Environmental Affairs Division (TxDOT-ENV) who meet the Secretary of Interior's Professional Qualifications Standards (48 FR 44738-9), authority to fulfill FHWA's consultation requirements with the Tribe. FHWA shall approve the outcome of all consultations with the Tribe prior to its award of any assistance for undertakings under the Federal Aid Highway Program or other program involving FHWA assistance or approval.

4. Point of Contact

- A. The FHWA points of contact for correspondence shall be Director, Planning & Program and Development and the Environmental Coordinator for Tribal Issues.
- B. The point of contact for correspondence to the State shall be the Supervisor of Archeological Studies, TxDOT, Environmental Affairs Division (TxDOT-ENV), for consultation on projects, determinations of eligibility, findings of effect, excavation plans, or NAGPRA-related matters.
- C. The point of contact for correspondence to the Tribe concerning federal undertakings shall be Donald L. Patterson, and the Tribe's point of contact for NAGPRA shall be Donald L. Patterson. The Tribe shall direct all correspondence to the TxDOT-ENV point of contact.
- D. Each party shall notify the other parties in writing when the point of contact changes. Such changes shall not require amendment of this agreement.

5. Area of Concern: TxDOT-ENV has consulted with the Tribe to establish the specific area of the state of Texas for which that tribe has concerns for historic properties. That area shall be known as the Area of Concern. The Area of Concern for the Tribe is shown in Attachment 1 to this agreement which is incorporated herein by reference.

6. Project Specific Consultation: TxDOT-ENV shall consult with the Tribe as early as possible in project planning, environmental document development and design of project by:

- A. notifying the Tribe by letter of the following specific transportation projects that fall within their Area of Concern:
 - i. all major projects on new location;
 - ii. all other projects where Native American sites have been identified; and/or
 - iii. where a site that can be culturally affiliated with the Tribe is identified in the area of potential effects of a proposed project that is outside of the Tribe's Area of Concern.
- B. notifying the Tribe by letter when a site identified within the Tribe's Area of Concern is believed to be affiliated with another federally-recognized tribe, providing the basis for that belief, and stating that future consultation will be confined to that other tribe unless the Tribe objects within 30 days of receipt of the letter.

The Tribe shall provide TxDOT-ENV with available verbal or documentary information that would assist TxDOT-ENV in determining when Native American sites may be affiliated with the Tribe's ancestral occupation of Texas.

- 7. Timing.** The Tribe shall be provided thirty (30) days from receipt of information in which to review and provide comments to TxDOT-ENV for a:
- A. finding that no historic properties are present or likely to be present in the area of potential effect of the project;
 - B. determination of eligibility for the National Register of Historic Places;
 - C. determination of the project's effect on a historic property; and/or
 - D. treatment plan to excavate or mitigate adverse effects of the project on a historic property.

If the Tribe fails to comment within thirty (30) days of receipt of a request for review and comment, TxDOT-ENV and FHWA may proceed to the next step in the consultation process. Failure to comment will not prevent the Tribe from re-entering consultation at a later point. If the Tribe re-enters the consultation process, TxDOT-ENV and FHWA shall continue the consultation without being required to reconsider previous determinations of findings listed above.

- 8. Determination of Eligibility.** TxDOT-ENV shall provide the Tribe an opportunity to comment on determinations of eligibility for the National Register of Historic Places (under 36 CFR Part 60) for each Native American archeological site within the Tribe's Area of Concern that has not been determined to be culturally affiliated with another federally recognized tribe and will be affected by a proposed transportation activity. In the event that the Tribe objects within thirty (30) days of receipt to TxDOT-ENV's determination of eligibility for a Native American site, TxDOT-ENV shall review the documentation provided by the Tribe to support its objection and make a reasoned response to the Tribe. If the Tribe continues to object, TxDOT-ENV shall provide FHWA a copy of the documentation along with copies of the results of consultation with other consulting parties. FHWA shall review this documentation and:
- A. consult with the Tribe or the Keeper of the Register to resolve the objection; and
 - B. notify all consulting parties of the outcome.

9. Treatment: TxDOT-ENV shall provide the Tribe an opportunity to comment on TxDOT's treatment plan for any Native American historic property in the Tribe's Area of Concern that has not been determined to be culturally affiliated with another federally recognized tribe, as follows:

- A. Where feasible, the historic property will be avoided by the proposed transportation activity;
- B. Where avoidance is not feasible, treatment shall be carried out in accordance with the *Archaeology and Historic Preservation: The Secretary of Interior's Standards and Guidelines*. Treatment shall also:
 - i. be commensurate with the significance of the historic property; and
 - ii. may include educational or public outreach efforts.

In the event that the Tribe objects to the treatment plan within thirty (30) days of receipt of the proposed treatment plan, TxDOT-ENV shall review the documentation provided by the Tribe to support its objection and make a reasoned response to the Tribe. If the Tribe continues to object, TxDOT-ENV shall provide FHWA a copy of the documentation along with copies of the results of consultation with all consulting parties. FHWA shall review this documentation and:

- A. consult with the Tribe to resolve the objection or with the Advisory Council on Historic Preservation; and
- B. notify all consulting parties of the outcome.

10. Native American Graves. In the event that Native American burials that may be culturally affiliated with the Tribe are anticipated or discovered during archeological excavation or during construction of the project, TxDOT-ENV shall seek to avoid impacts to the site. If it is not feasible to avoid the site and the burials, TxDOT-ENV shall document why avoidance is not feasible, and:

- A. develop a treatment plan in accord with Article 9 above; and
- B. at the completion of the excavations, analysis, and reporting required by the treatment plan and TxDOT's Antiquities Permit:
 - i. complete an inventory, as per 43 CFR §10.9, the regulations implementing NAGPRA;
 - ii. complete a Repatriation Agreement in consultation with the culturally affiliated tribe; and
 - iii. transfer custody of the objects to the agreed upon, proper recipient.
- C. During the excavation of any Native American graves, TxDOT shall also take measures to ensure:
 - i. respectful, dignified treatment of burials at all times during excavation and analysis;
 - ii. security for the site and the graves to prevent vandalism when archeologists are not present at the site(s);
 - iii. no photographs are taken of human remains or open graves other than photo-documentation needed for recordation of the excavation;
 - iv. tours of the cemetery are given only if considered appropriate by the affiliated Tribe;

- v. off-site security for exhumed burials and funerary objects during and after excavation;
- vi. opportunities are provided for the culturally affiliated tribe to visit the site and provide comments during archeological excavation and for the Tribe to perform appropriate ceremonies.

11. Emergency Discovery Procedures. In the event of an emergency discovery of a Native American site after award of a construction contract, TxDOT shall:

- A. follow TxDOT-ENV's *Emergency Discovery Guidelines* (Attachment 2) which are incorporated into this agreement by reference;
- B. notify the Tribe of the finding by telecommunication of the find and invite them to visit the site with TxDOT-ENV; and
- C. notify the Tribe by fax of their determination of the need (or not) for further investigations. If further investigations are determined to be warranted, TxDOT-ENV shall provide the Tribe with a copy of the plan of those investigations by fax. The Tribe shall have one full business day to respond, unless otherwise specified. TxDOT-ENV shall be available to answer the Tribe's questions during that day. If the Tribe objects to the investigations, TxDOT-ENV shall provide FHWA a copy of the documentation along with copies of the results of consultation with all consulting parties. FHWA shall review this documentation and render its decision, notifying all parties of its decision.

12. Amendment and Termination. Any party to this consultation agreement may request that it be amended, whereupon the parties shall consult to consider such amendment. Any party to this agreement may terminate it by providing thirty (30) days' written notice to the other parties, provided that the parties will consult during the period prior to the termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, the FHWA will comply with 36 CFR §§800.4-800.6.

13. Severability. In the event any one or more of the provisions contained in this agreement shall for any reason, be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision thereof and this agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

14. Signatory Warranty. The undersigned signatories represent and warrant that each has full and complete authority to enter into this contract on behalf of their organizations. These representations and warranties are made for the purpose of inducing the parties to enter into this contract.

FEDERAL HIGHWAY ADMINISTRATION

C. D. Reagan 7/16/02
C. D. Reagan, ~~SE~~
Division Administrator

TONKAWA TRIBE OF OKLAHOMA

Donald L. Patterson
Donald L. Patterson
President

THE STATE OF TEXAS

Executed for the Executive Director and approved by the Texas Transportation Commission for the purpose and effect of activating and/or carrying out the orders, established policies or work programs heretofore approved and authorized by the Texas Transportation Commission.

By M. W. Behrens
Michael W. Behrens, PE.
Executive Director
Texas Department of Transportation

Date: 6-24-02