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

**WHEREAS**, the Federal Highway Administration (FHWA), the Texas Historical Commission (THC) acting as the Texas State Historic Preservation Officer (SHPO), the Advisory Council on Historic Preservation (ACHP), and the Texas Department of Transportation (TxDOT) enter into an agreement pursuant to 36 CFR 800.14(b)(1) ; and

**WHEREAS**, pursuant to the assignment of National Environmental Policy Act (NEPA) compliance responsibilities to TxDOT per the December 16, 2014 "Memorandum of Understanding between Federal Highway Administration, Texas Division and the Texas Department of Transportation Concerning State of Texas' Participation in the Project Delivery Program Pursuant to 23 U.S.C. 327" (NEPA Assignment MOU), prepared in accordance with Section 1312 of the Moving Ahead for Progress in the 21st Century (P.L. 112-141), amended 23 U.S.C. 327, the Secretary of the United States Department of Transportation, acting by and through the FHWA, also assigned to TxDOT the responsibility for project compliance with Section 106 of the National Historic Preservation Act (NHPA); and

**WHEREAS**, FHWA intends for TxDOT to assume FHWA responsibilities for compliance with Section 106 of the NHPA for other highway programs that are administered by TxDOT under 23 U.S.C, Chapter 2, such as the Recreational Trails Program; and

**WHEREAS**, FHWA, SHPO, the ACHP and TxDOT consulted to enter into this programmatic agreement (PA) to recognize that the Director of the Environmental Affairs Division (ENV) at TxDOT is the "Agency Official" responsible for ensuring that the FHWA undertakings assigned to TxDOT under the NEPA Assignment MOU or this PA comply with Section 106 of the NHPA; and

**WHEREAS,** TxDOT sought review and comments regarding this agreement by posting the draft agreement on its website, in addition to emailing on March 25, 2015 all federally-recognized Indian tribes, Federal agencies, and organizations listed in Appendix 1. TxDOT responded to all received comments by email, taking comments received from those parties into account in finalizing this PA; and

**WHEREAS,** this PA supersedes and replaces the first amended PA executed by the FHWA, the ACHP , the SHPO and TxDOT on December 28, 2005 (entitled First Amended Programmatic Agreement Among the Federal Highway Administration, Texas State Historic Preservation Officer, Advisory Council on Historic Preservation, and the Texas Department of Transportation); and

**WHEREAS,** for FHWA undertakings, this PA supersedes the MOU between TxDOT and THC codified in TxDOT's rules at 43 T.A.C. 2.251-2.278 and in THC's rules at 13 T.A.C. 26.25; and

**WHEREAS,** the application of the MOU between TxDOT and THC codified in TxDOT's rules at 43 T.A.C. 2.251-2.278 and in THC's rules at 13 T.A.C. 26.25 to non-federal undertakings is unaffected by this PA;

**NOW, THEREFORE**, the ACHP, the SHPO and TxDOT agree that FHWA undertakings administered by TxDOT in the state of Texas shall be administered pursuant to the following stipulations to satisfy the requirements of Section 106 of the NHPA for all individual undertakings of the program.

## STIPULATIONS

TxDOT, either as assigned by FHWA under the NEPA Assignment MOU or under FHWA's authority through this PA, shall ensure that the following stipulations are carried out. In coordination with TxDOT where FHWA's responsibilities have not been assigned to and assumed by TxDOT, FHWA shall ensure that the following stipulations are carried out.

### I. Definitions

A. Historic properties – cultural resources that meet the definition outlined per 36 CFR 800.16(l).

1. Archeological - artifacts, archeological sites, and cemeteries; or

2. Non-archeological– buildings, structures, sites, districts, and objects.

B. Area of potential effects (APE) - the geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist (36 CFR 800.16(d)) as defined below or identified through the consulting party process.

1. Archeological - The APE for archeological properties will be confined to the limits of the proposed project right-of-way (including permanent and temporary easements), utility relocations designated by TxDOT, and project-specific locations designated by TxDOT. The APE also extends to the depth of impacts caused by the undertaking.

2. Non-archeological - The APE for non-archeological properties shall be defined as:

a) 300 feet beyond the proposed right-of-way for projects constructed on new location not involving an existing transportation corridor;

b) 150 feet beyond the proposed right-of-way for projects constructed in existing transportation corridors, including abandoned railroad lines; or

c) The existing right-of-way for project activities confined to existing right-of-way;

d) TxDOT and SHPO may consult on the need for specialized APEs to address:

(1) Elevated roadways and multi-level interchanges;

(2) Unusual design features;

(3) consulting party comments; or

(4) cultural landscapes.

C. Department delegate – the TxDOT organizational unit delegated responsibility for approval of environmental work and documents by the Executive Director as defined in TxDOT's rules at 43 TAC 2.8.

D. Minor widening – roadway projects resulting in pavement profile widened to less than double their original width, resulting from adding travel/center-turn lanes or paved shoulders.

## II. Responsibilities of the FHWA

A. For all transportation projects that entail Federal-aid funding or a FHWA approval, FHWA retains responsibility for conducting government to government consultation with federally-recognized Indian tribes.

B. FHWA may re-assume the Section 106 responsibility for a project from TxDOT under limited circumstances. In particular, FHWA may re-assume Section 106 responsibility for a project if government to government consultation issues are not adequately resolved. When this occurs, FHWA will notify all consulting parties.

C. FHWA recognizes its oversight responsibilities regarding Section 106 compliance for Federal-aid projects or projects that require FHWA approval. In furtherance of this responsibility, FHWA may audit, monitor, or take other actions to ensure TxDOT is adequately complying with 36 CFR 800 and the provisions of this PA.

## III. Responsibilities of the TxDOT

A. TxDOT shall assume FHWA's responsibilities as lead federal agency for compliance with Section 106 of the NHPA, except as provided in Stipulation II.

B. TxDOT shall employ the risk assessment and scoping procedures described in Appendix 2 in order to consider the presence of historic properties and the potential for effects when categorizing projects under Stipulations VII, VIII, or IX of this agreement.

C. TxDOT shall employ personnel trained, experienced and qualified in the fields of archeology, architecture, architectural history, history and other closely related fields (as defined in 48 Federal Register (FR) 44716) in ENV. Qualified ENV staff in the field applicable to the resources under consideration shall be responsible for the following actions:

1. the identification and evaluation of historic properties as described in Appendix 5;

2. the reporting or documentation of the actions described in Appendix 5;

3. treatment plan development, and reporting and documentation on the treatment of historic properties.

D. TxDOT shall apply the procedures outlined in this PA to FHWA undertakings sponsored by local government project sponsors, including – but not limited to – documentation standards and consultation procedures.

1. Local government project sponsors may produce documentation following the standards of this PA.

2. TxDOT retains responsibility for the conduct and conclusion of all consultation.

E. TxDOT will conduct consultation in accordance with the procedures detailed in Appendix 6.

## IV. Responsibilities of the SHPO

A. The SHPO shall respond to TxDOT's request for comment on a non-emergency undertaking within twenty (20) calendar days of transmittal of the request by TxDOT.

B. The SHPO response to a request for comment will include:

1. a statement of concurrence or non-concurrence with TxDOT's findings and recommendations; and/or

2. a determination of eligibility or ineligibility for inclusion in the National Register of Historic Places for all evaluated properties; and

3. any comments related to effects findings.

C. The SHPO shall integrate archeological survey data into the archeological section of the THC's Texas Historic Sites Atlas and shall integrate new historical markers and designated historic properties into the public section of the THC's Texas Historic Sites Atlas.

## V. Responsibilities of the ACHP

A. The ACHP shall provide technical assistance upon request.

B. The ACHP shall assist with dispute resolution as described in Appendix 6, Stipulation 4(f)(ii).

C. Pursuant to the NEPA assignment MOU and at the request of FHWA, the ACHP may assist audits or monitoring conducted of the Section 106 process.

## VI. Cooperating Federal Agencies

Cooperating Federal agencies who recognize TxDOT as the lead agency for an undertaking and notify TxDOT or SHPO in writing may fulfill their obligations under Section 106 of the NHPA according to 36 CFR 800.2(a)(2), provided that TxDOT follows the requirements of this PA and the cooperating Federal agency's undertaking does not have the potential to cause effects to historic properties beyond those considered by TxDOT. TxDOT and SHPO agree to share with each other any written notifications that they receive pursuant to this stipulation.

## VII. Undertakings with No Potential to Cause Effects

A. Pursuant to 36 CFR 800.3(a)(1), the signatories to this PA agree that certain routine projects, by their nature and definition, constitute undertakings with no potential to cause effects on historic properties.

B. Undertaking types listed in Appendix 3 meet these requirements and shall be reviewed, documented, and approved under Section 106 of the NHPA by following the

procedures described in Appendices 2 and 3. TxDOT and the SHPO may consult to identify other classes of undertakings with no potential to cause effects.

1. Other classes of undertaking may be added upon execution of a standard two-party agreement between TxDOT and the SHPO, following consultation between TxDOT and SHPO on the agreement.

2. TxDOT will notify FHWA and ACHP in writing of any other classes of undertaking added to Appendix 3; this notification will occur before those undertakings can be processed under Appendix 3.

3. TxDOT will announce the addition to the public through its Review and Reporting process (Stipulation XV).

## VIII. Undertakings with Minimal Potential to Cause Effects

A. The signatories to this PA agree that certain undertakings have minimal potential to cause effects on historic properties.

B. Undertaking types listed in Appendix 4 shall be reviewed, documented, and approved under Section 106 of the NHPA by following the procedures described in Appendices 2 and 4.

C. TxDOT and the SHPO may consult to identify other classes of undertakings with minimal potential to cause effects.

1. Other classes of undertaking may be added upon execution of a standard two-party agreement between TxDOT and the SHPO, following consultation between TxDOT and SHPO on the agreement.

2. TxDOT will notify FHWA and ACHP in writing of any other classes of undertaking added to Appendix 4; this notification will occur before those undertakings can be processed under Appendix 4.

3. TxDOT will announce the addition to the public through its Review and Reporting process (Stipulation XV).

## IX. Undertakings with the potential to cause effects per 36 CFR 800.16(i)

For undertaking types that are neither listed in Appendix 3 nor in Appendix 4, TxDOT shall follow the procedures in Appendix 6.

## X. Treatment of Adverse Effects per 36 CFR 800.5(a)(1)

A. TxDOT shall consult with the SHPO and other consulting parties on FHWA undertakings with the potential to cause adverse effects.

B. TxDOT will notify ACHP on undertakings with the potential to cause adverse effects

1. TxDOT will provide ACHP with copies of technical reports and consultation correspondence produced per the standards and procedures of Appendices 5 and 6.

2. ACHP will respond within fifteen (15) calendar days with a determination regarding whether ACHP will join consultation.

C. In cases where TxDOT determines through consultation that adverse effects to a historic property may occur, TxDOT shall further consult with appropriate parties in accordance with 36 CFR 800.2 and 800.6 to resolve adverse effects, and TxDOT shall document its decision regarding the resolution of adverse effects. Except as provided in subsections (1) and (2) of this section, TxDOT will execute a standard two-party agreement with the SHPO that documents this commitment, following consultation with SHPO

1. If a project is controversial or consulting parties have played a significant role in the resolution of adverse effects, TxDOT may memorialize the agreed upon resolution of adverse effects in a Memorandum of Agreement (MOA) executed by TxDOT and SHPO. TxDOT or SHPO may invite other parties to become a signatory to the MOA.

2. If the resolution of adverse effects requires actions to be taken by a party other than TxDOT, TxDOT shall memorialize the agreed upon resolution of adverse effects in a MOA executed by TxDOT, SHPO, and any other parties with responsibilities for some aspect of the resolution of adverse effects.

3. TxDOT will file any MOA executed under subsections (1) or (2) of this section with the ACHP.

## XI. Consultation

TxDOT will adhere to the following stipulations in partial satisfaction of the consultation requirements of Section 106 of the NHPA and 36 CFR Part 800. Appendix 6 provides comprehensive details regarding TxDOT's review and consultation process.

A. Consulting parties. Consulting parties will be identified as described in Appendix 6, Stipulation 1.

1. TxDOT and FHWA have developed and executed agreements for the conduct of consultation with federally recognized Indian tribes in accordance with 36 CFR 800.2(c)(2)(ii)(E).

2. TxDOT, to the extent authorized under a separate agreement with FHWA, shall consult with federally recognized Indian tribes regarding FHWA undertakings based on those tribes' areas of interest, previously developed in consultation with tribes (see Appendix 6, Stipulation 1(a)). Documentation of the areas of interest shall be revised as needed in consultation with the affected tribes and maintained at TxDOT.

3. TxDOT will satisfy its obligation to consult with the general public on FHWA undertakings per 36 CFR 800.2(d) through incorporating Section 106 of the NHPA consultation requirements into public participation programs carried out under NEPA, and 43 TAC 2, Subchapter E. Communications to the public will reflect the nature and complexity of the undertaking and its effects on historic properties.

4. TxDOT need not conduct individual, project-specific consultation with SHPO for undertakings with no potential to adversely affect historic properties. Undertakings with no potential to adversely affect historic properties include:

a) those projects listed in Appendices 3 and 4, and

b) those projects for which TxDOT determines through identification efforts that no historic properties are present per Appendix 6, Stipulation 1(e).

B. TxDOT may consult separately with SHPO and other consulting parties regarding archeological and non-archeological historic properties. See Appendix 6, Stipulation 1(c).

1. SHPO comments on archeological properties shall not be applied to non-archeological properties, and vice-versa. See Appendix 6, Stipulation 1(d).

2. Completion of consultation on archeological properties shall not constitute completion of consultation on non-archeological properties, and completion of consultation on non-archeological properties shall not constitute completion of consultation on archeological properties.

C. Per 36 CFR 800.8, TxDOT may conduct early consultation with SHPO and other parties in order to coordinate compliance with Section 106 and the requirements of the NEPA (42 USC 4321 through 4347 et seq.) See Appendix 6, Stipulation 2.

D. TxDOT shall, when appropriate for streamlining the consultation process, address multiple steps under 36 CFR 800.3 through 800.6 in its consultation with appropriate parties. See Appendix 6, Stipulations 2(b) and 3(c).

E. In the event that access is denied to private lands:

1. Archeological historic property consultation may be deferred regarding the identification, evaluation and treatment of archeological properties within the APE until right-of-way is acquired or access otherwise obtained. In this case, pursuant to 36 CFR 800.4(b)(2), TxDOT may proceed with project planning, NEPA activities, and right-of-way acquisition prior to completing the identification and evaluation of archaeological properties in the APE, provided that:

a) when TxDOT obtains access, it will complete the requirements of this PA; and

b) in consultation with SHPO and other consulting parties, if any, TxDOT considers alternatives to avoid, minimize or mitigate any adverse effects that may occur to archaeological historic properties; and

c) TxDOT takes no action that precludes the consideration of the undertaking's effects to archaeological historic properties.

2. Non-archeological historic property consultation may be based on findings drawn from additional archival research into a property's history, including but not limited to public involvement results, aerial photography analysis, deed research and links to specific historic contexts.

a) Properties will be considered non-historic based on conclusive findings that demonstrate a lack of historical significance within specific historic contexts or compromised aspects of integrity.

b) Properties will be assumed historic for purposes of coordination for a project if the research does not support conclusive findings on historical significance or compromised aspects of integrity.

c) Reevaluation of these findings at a future date may be warranted with additional research.

F. In the event of a dispute during consultation regarding proposed findings or proposals for resolution of adverse effects between TxDOT, SHPO and other consulting parties (see Appendix 6, Stipulation 4(f)):

1. TxDOT's Director of the Environmental Affairs Division or his/her delegate will continue consulting with representatives of the consulting party.

2. SHPO will be represented by the Executive Director of the Texas Historical Commission or his/her delegate during any dispute resolution meetings in which it is involved.

3. If these dispute resolution meetings do not resolve the issue, the ordinary dispute resolution procedures in 36 CFR 800 shall be followed.

## XII. Emergency Undertakings

If TxDOT determines that an emergency situation exists, resulting from a hazardous materials incident; tree, wind, water, earthquake, or landslide damage; sudden failure of water, sewer, storm drainage, electrical, or telephone lines; or the failure of a roadway or bridge structure; TxDOT shall undertake emergency repairs.

A. Notification and consultation with SHPO is not required for any emergency repair project that conforms to a type that does not require review and consultation, as described in Appendices 2 and 3.

B. If the emergency repair project is a type with potential to affect historic properties, TxDOT shall notify the SHPO as soon as possible under the circumstances. This provision applies only to emergency undertakings initiated within thirty (30) calendar days after the declaration of the emergency or disaster as stipulated in 36 CFR 800.12(d).

1. In the event of a large-scale disaster where local communications could be interrupted, TxDOT may undertake facility repairs or stabilization without prior consultation with the SHPO. Where possible, emergency actions will be undertaken in a manner that does not foreclose future preservation or restoration of historic properties affected by the emergency action.

2. Otherwise, TxDOT will consult with the SHPO on all emergency undertakings that affected or will affect historic properties.

## XIII. Post-Review Discoveries

When potential historic properties are identified during implementation of an undertaking or unanticipated effects on historic properties are determined, the process for addressing the discovery shall be as follows:

A. Work in the immediate area of the discovery shall cease, and TxDOT shall be notified of the discovery; if appropriate, security measures will be initiated to protect the discovery.

B. TxDOT will notify the SHPO and, if the property or properties may be of religious or cultural significance to federally recognized Indian tribes, TxDOT will notify such tribes within 48 hours of the discovery.

C. For unanticipated discoveries of archeological materials that do not contain human burials, TxDOT will undertake the following additional actions;

1. TxDOT will verify that the discovery does not contain human burials.

2. Upon confirmation that the discovery does not contain human burials, TxDOT may allow construction at the site to proceed.

3. TxDOT shall complete or update a State of Texas Archeological Site Data Form based on the available information.

4. TxDOT will find that the property comprises an archeological historic property that is valuable chiefly for the data that it contains and does not warrant preservation in place.

5. TxDOT will develop a mitigation proposal to resolve the adverse effects of the undertaking on the archeological historic property. This proposal shall not necessarily involve any further excavations at the historic property.

6. The level of effort described in the proposal shall be commensurate with the nature of the resource, based on the available information.

7. TxDOT will develop the proposal in consultation with SHPO and other consulting parties with a demonstrated interest in the undertaking's effects, including federally recognized Indian tribes, following the consultation procedures for resolution of adverse effects described under 36 CFR Part 800 and this PA.

D. For unanticipated discoveries involving human burials, TxDOT shall follow the post-review discovery procedures of 36 CFR Part 800.13 and the applicable requirements of the Health and Safety Code, Title 1, Section 711.

1. Work may resume in areas outside the boundaries of the cemetery.

2. Work may resume in a cemetery area if that cemetery has been removed in compliance with 36 CFR 800 and the applicable requirements of the Health and Safety Code, Title 1, Section 711.

E. Upon determination of unanticipated effects on non-archeological historic properties, TxDOT will resume consultation regarding project effects, following the procedures of Appendix 6. Construction may resume following completion of consultation in accordance with Appendix 6.

## XIV. Amendment

Any signatory to this PA may at any time propose amendments, whereupon all signatories shall consult to consider such amendment. Such amendment requires the written concurrence of all signatory parties, with the exception of the FHWA as provided for in the NEPA Assignment MOU.

## XV. Review and Reporting

Pursuant to the terms of the NEPA Assignment MOU, TxDOT is responsible for providing FHWA any information FHWA considers necessary to ensure that TxDOT is adequately carrying out its assigned responsibilities. Consequently, TxDOT agrees to provide file access for the purposes of monitoring the effectiveness of this agreement by the signatories.

A. Upon request from any signatory to this agreement, TxDOT shall furnish project information in the format and on the schedule requested.

B. The SHPO shall meet quarterly with TxDOT to assess the effectiveness of the programs, projects, and activities developed to facilitate this agreement and to assist with the development or implementation of such programs, projects, and activities.

C. TxDOT will make summary information of its activities under this PA available to the general public

1. The summary information will be provided on an annual basis.

2. TxDOT will make summary information available by December 1st of each calendar year.

3. The summary information will cover the activities during the previous fiscal year (September through August).

4. The summaries may separately address archeological and non-archeological historic properties

5. The summaries will include both measures that quantify the scale and effectiveness of the program and highlights from noteworthy projects or program-initiatives.

## XVI. Alternative consultation options

In the event that the terms of this PA cannot be met for specific individual undertakings, consultation shall comply with standard procedures outlined in 36 CFR 800.3 through 800.6.

## XVII. Termination

A. Any signatory party to this PA may terminate it by submitting a thirty (30) calendar day notice in writing to all signatory parties, provided the parties continue to consult during the period prior to termination to seek agreement on amendments and other actions that would avoid termination.

B. In the event of termination of this PA, consultation for undertakings shall comply with the standard procedures outlined in 36 CFR 800.3 through 36 CFR 800.6 through TxDOT as assigned by FHWA under the NEPA Assignment MOU, or under FHWA's authority where their responsibilities have not been assigned to and assumed by TxDOT.

## XVIII. Term of this Agreement

This PA remains in force for a period of five (5) years from the date of its execution by the ACHP. For extensions of this agreement, the following process will be used.

A. Sixty (60) calendar days prior to the conclusion of the five (5) year period, TxDOT will notify all signatories in writing that it seeks to extend this PA.

B. If there are no objections from signatories, the term of this PA will automatically be extended for an additional five (5) years.

C. If any signatory objects to extending this PA or proposes amendments, TxDOT will consult with the signatory to consider amendments or other actions to avoid termination.

**EXECUTION AND IMPLEMENTATION** of this PA evidences that the FHWA and TxDOT, when it is deemed to be a federal agency, have afforded the ACHP a reasonable opportunity to comment on FHWA undertakings in Texas, and that the FHWA and TxDOT have taken into account the effects of their subject undertakings on historic properties.

**SIGNATORIES** include the Federal Highway Administration, Advisory Council on Historic Preservation, Texas State Historic Preservation Officer (Texas Historical Commission) and the Texas Department of Transportation. Separate signature pages for each agency follow.

**FEDERAL HIGHWAY ADMINISTRATION**

By:_____ Date: 5/29/2015

Achille Alonzi, Division Administrator

## EXECUTION AND IMPLEMENTATION

**SIGNATORIES** include the Federal Highway Administration, Advisory Council on Historic Preservation, Texas State Historic Preservation Officer (Texas Historical Commission) and the Texas Department of Transportation, with separate pages for each agency provided.

## ADVISORY COUNCIL ON HISTORIC PRESERVATION

By: John M. Fowler Date: 5/15/15

John M. Fowler, Executive Director

## EXECUTION AND IMPLEMENTATION

**SIGNATORIES** include the Federal Highway Administration, Advisory Council on Historic Preservation, Texas State Historic Preservation Officer (Texas Historical Commission) and the Texas Department of Transportation, with separate pages for each agency provided.

## TEXAS STATE HISTORIC PRESERVATION OFFICER

By: Mark Wolfe Date: 5/27/15

Mark Wolfe, Executive Director

## EXECUTION AND IMPLEMENTATION

**SIGNATORIES** include the Federal Highway Administration, Advisory Council on Historic Preservation, Texas State Historic Preservation Officer (Texas Historical Commission) and the Texas Department of Transportation, with separate pages for each agency provided.

## TEXAS DEPARTMENT OF TRANSPORTATION

Recommended by:

Dated: 12/7/15

LtGen J.F. Weber, USMC (Ret)
Executive Director
Texas Department of Transportation

# APPENDIX 1

## FEDERALLY RECOGNIZED INDIAN TRIBES, FEDERAL AGENCIES, AND ORGANIZATIONS PROVIDED AN OPPORTUNITY TO REVIEW AND COMMENT ON THIS PROGRAMMATIC AGREEMENT

**Tribes**

Absentee-Shawnee Tribe of Oklahoma

Alabama-Coushatta Tribe of Texas

Alabama-Quassarte Tribal Town

Apache Tribe of Oklahoma

Caddo Nation of Oklahoma

Cherokee Nation of Oklahoma

Choctaw Nation of Oklahoma

Comanche Nation of Oklahoma

Coushatta Tribe of Louisiana

Jicarilla Apache Nation

Kialegee Tribal Town

Kickapoo Tribe of Oklahoma

Kickapoo Traditional Tribe of Texas

Kiowa Indian Tribe of Oklahoma

Mescalero Apache Tribe

Muscogee (Creek) Nation of Oklahoma

Poarch Band of Creek Indians

Seminole Nation of Oklahoma

The Delaware Nation

Thlopthlocco Tribal Town

Tonkawa Tribe of Indians of Oklahoma

Tunica-Biloxi Tribe of Louisiana

United Keetoowah Band of Cherokee Indians

Wichita and Affiliated Tribes

Ysleta del Sur Pueblo

**Federal and State Agencies**

Bureau of Indian Affairs, Southern Plains Regional Office

International Boundary and Water Commission

Office of the Adjutant General

US Army Corps of Engineers, Albuquerque District

US Army Corps of Engineers, Fort Worth District

US Army Corps of Engineers, Galveston District

US Army Corps of Engineers, Tulsa District

US Army, Fort Bliss

US Army, Fort Hood

US Department of Homeland Security (Coast Guard)

US Environmental Protection Agency

US Fish and Wildlife Service

**Local Governments and Non-Profit Organizations**

Certified Local Governments

County Historical Commissions

Historic Bridge Foundation

National Trust for Historic Preservation

Preservation Texas

Texas Archeological Society

# APPENDIX 2

## TxDOT RISK ASSESSMENT AND SCOPING PROCESS

The following procedures summarize the conditions that trigger different levels of TxDOT review. TxDOT follows separate procedures regarding potential effects on archeological and non-archeological historic properties, since proposed projects do not necessarily affect such resources in the same manner. All evaluations thus begin with a consideration of the project and whether that project is of a type that has potential to cause effects to historic properties.

**Risk Assessment for Potential Effects on Archeological Historic Properties**

- TxDOT staff review project descriptions and other project information to evaluate whether the project conforms to a type listed in Appendix 3 as a type that has no potential to cause effects to archeological historic properties or to a type listed in Appendix 4 as a type that has minimal potential to cause effects to archeological historic properties.
- Review, consultation, and further documentation are not needed if the project is listed in Appendix 3 as a type that has no potential to cause effects to archeological historic properties.
- If the project is listed in Appendix 4 as a type that has minimal potential to cause effects to archeological historic properties, TxDOT will evaluate the project to determine whether any known cemeteries occur within or adjacent to the project's APE.
    - On projects where cemeteries occur within or adjacent to the project's APE, TxDOT will undertake further evaluation per the documentation standards in Appendix 5 and will undertake consultation per Stipulation XI.
    - No further review or consultation will be done on projects where no cemeteries occur within or adjacent to the project's APE.
- If the project is listed neither on Appendix 3 nor on Appendix 4, TxDOT will proceed with review of potential project effects, using the review and consultation procedures in Appendix 6 and the documentation standards in Appendix 5.

**Risk Assessment for Potential Effects on Non-Archeological Historic Properties**

- TxDOT staff review project descriptions and other project information to evaluate whether the project conforms to a type listed in Appendix 3 as a type that has no potential to cause effects to non-archeological historic properties or to a type listed in Appendix 4 as a type that has minimal potential to cause effects to non-archeological historic properties.
- Review, consultation, and further documentation are not needed if the project is listed in Appendix 3 as a type that has no potential to cause effects to non-archeological historic properties.
- If the project is listed in Appendix 4 as a type that has minimal potential to cause effects to non-archeological historic properties, TxDOT will evaluate the project to determine if the APE contains of sensitive property types, including courthouse squares, historic

downtown commercial areas, historic residential neighborhoods, farmsteads, historic road corridors and bridges.

- On projects where such sensitive property types occur within the project's APE, TxDOT will undertake further evaluation per the documentation standards in Appendix 5 and will undertake consultation per Stipulation XI.
- No further review or consultation will be done on projects where such sensitive property types do not occur within the project's APE, but documentation will be provided to SHPO based on the guidelines outlined in Appendix 5.

If the project is listed neither on Appendix 3 nor on Appendix 4, TxDOT will proceed with review of potential project effects, using the review and consultation procedures in Appendix 6 and the documentation standards in Appendix 5.

# APPENDIX 3

# UNDERTAKINGS WITH NO POTENTIAL TO CAUSE EFFECTS ON HISTORIC PROPERTIES

TxDOT staff will review project descriptions and other project information as necessary to evaluate whether a project is a type with no potential to cause effects on historic properties. The department delegate has authority to approve a finding that the project is a type with no potential to cause effects on historic properties. The department delegate shall retain documentation that establishes the basis of any such findings. Undertaking types listed in this Appendix shall not be further reviewed under Section 106 of the NHPA.

This Appendix contains separate lists of undertakings that have no potential to cause effects on archeological versus non-archeological historic properties. These two lists generally contain different types of projects. Consequently, inclusion of a project type on one list does not indicate that the project has no potential to cause effects to both archeological and non-archeological historic properties.

**Archeological Historic Properties:**

Routine roadway maintenance projects and projects with minor levels of ground disturbance, by their nature and definition, do not have the potential to affect archeological historic properties, and do not require review or consultation regarding their potential project impacts on archeological historic properties. Such projects include vegetation control, traffic control, and routine painting and striping. The following activities also do not require review or consultation regarding their potential effects on archeological historic properties:

1. installation, repair, or replacement of fencing, signage, traffic signals, railroad warning devices, safety end treatments, cameras and intelligent highway system equipment;
2. projects involving purchase or acquisition of land without associated ground-disturbing activities;
3. routine structural maintenance and repair of bridges, highways, railroad crossings, picnic areas and rest areas;
4. in-kind repair, replacement of lighting, signals, curbs and gutters, and sidewalks;
5. crack seal, overlay, milling, grooving, resurfacing, and restriping;
6. replacement, upgrade, and repair of safety barriers, ditches, storm drains, and culverts;
7. intersection improvements, including repair or replacement of overpasses, within existing right-of-way;
8. placement of riprap to prevent erosion of waterway banks and bridge piers provided no ground disturbance is required;
9. all maintenance work between a highway and an adjacent frontage road;
10. installation of noise barriers or alterations to existing publicly owned buildings, to provide for noise reduction;
11. driveway and street connections;
12. all work within interchanges and within medians of divided highways;
13. all work between the flowlines of the ditches and channels and above the original line and grade;
14. ditch and channel maintenance, provided removal of fill is above the original line and grade;

15. the installation and modification of sidewalks (including the addition of Americans with Disabilities Act (ADA) ramps) except:
    1. sidewalk installations where the depth of impacts exceeds one foot;
    2. sidewalk and ADA ramp projects within the historic districts in the following cities or towns: Goliad, Rio Grande City, Roma, San Antonio, San Elizario, and San Ygnacio; and
    3. sidewalk or ADA ramp projects within the limits of the following cities or towns: Anahuac, Nacogdoches, San Patricio, and Socorro; and/or
16. bridge replacements where construction activities will be entirely confined within existing right-of-way and the bridge alignment and dimensions will not be altered.

**Non-Archeological Historic Properties:**

The following activities do not require review or consultation regarding project effects on non-archeological historic properties. TxDOT's risk analysis, internal policies and Section 110 of the NHPA inventories shall reinforce any necessary exceptions for specific historic properties. Per Stipulation XV.A, SHPO may review project files.

1. installation, repair, or replacement of fencing, signage, traffic signals, railroad warning devices, safety end treatments, cameras and intelligent highway system equipment;
2. in-kind repair, replacement of lighting, signals, curbs and gutters, and sidewalks;
3. maintenance, repair, or replacement of non-brick roadway surfacing, including crack seal, overlay, milling, grooving, resurfacing, and restriping; and/or
4. design changes for projects that have completed all applicable review and consultation where the new project elements comprise only one or more of the activities listed in this subsection.

# APPENDIX 4

## UNDERTAKINGS WITH MINIMAL POTENTIAL TO CAUSE EFFECTS ON HISTORIC PROPERTIES

Consistent with 36 CFR 800.4, some project types require minimal identification efforts to evaluate the undertaking's potential to cause effects on historic properties. TxDOT staff will review project descriptions and other project information as necessary to evaluate whether a project is a type with minimal potential to cause effects on historic properties. The department delegate has authority to approve a finding that the project has minimal potential to cause effects on historic properties. The department delegate shall retain documentation that establishes the basis of any such findings. Project types listed in this Appendix will be reviewed following the procedures in Appendix 2. Undertakings that require no further review under Appendix 2 will be found to have no effect on historic properties.

This Appendix contains separate lists of undertakings that have minimal potential to cause effects on archeological versus non-archeological historic properties. These two lists generally contain different types of projects. Consequently, inclusion of a project type on one list does not indicate that the project has minimal potential to cause effects to both archeological and non-archeological historic properties.

Further consultation may be required for compliance with other applicable state laws, including the Antiquities Code of Texas (Texas Natural Resources Code, Chapter 191) and the courthouse protection provision of Texas Government Code Section 442.008.

**Archeological Historic Properties**

The following activities do not require additional review or consultation regarding their potential effects on archeological historic properties, if they meet the criteria specified in Appendix 2.

1. activities with less than 100 cubic yards of ground disturbance below the original grade;
2. intersection improvements – including repair or replacement of overpasses – that require less than 0.5 acres of additional right-of-way at each intersection; and/or
3. design changes for projects that have completed all applicable review and consultation where the new project elements comprise only one or more of the activities listed in this section or in the Archeological Historic Properties section of Appendix 3.

**Non-Archeological Historic Properties**

1. routine structural maintenance and repair of bridges , highways, railroad crossings, picnic areas and rest areas;
2. replacement, upgrade, and repair of safety barriers, ditches, storm drains, and culverts;
3. maintenance, repair, reconfiguration, or correction of roadway geometrics, including intersection improvements and driveway and street connections ;
4. maintenance, repair, installation or modification of pedestrian and cycling-related features, including Americans with Disabilities Act (ADA) ramps, trails, sidewalks, and bicycle and pedestrian lanes;
5. maintenance, repair, relocation, addition, or minor widening of roadway, highway, or freeway features, including turn bays, center turn lanes, shoulders, U-turn bays, right turn lanes, travel lanes, interchanges, medians, and ramps ; and/or
6. maintenance, repair, replacement, or relocation of features at crossings of irrigation canals, including bridges, new vehicle crossings, bank reshaping, pipeline and standpipe components, canal conversion to below-grade siphons, and utilities.

# APPENDIX 5

# REPORTING AND DOCUMENTATION STANDARDS FOR TxDOT REVIEW

The following standards govern TxDOT's conduct of investigations and reporting for the identification and evaluation of historic properties. Different standards apply to the documentation and reporting of archeological historic properties and non-archeological historic properties. The next two sections present these standards.

## Archeological Historic Properties

1. Background Studies for Archeological Resources and Cemeteries.
    a. For projects subject to review for archeological resources and cemeteries under this PA, based on the results of background research, TxDOT will identify projects or portions of projects' APEs that require archeological field investigation.
    b. Eligibility determinations that TxDOT performs under this PA will not require field investigations if sufficient background information exists to demonstrate that the portion of the site to be affected does not have potential research value.
    c. Determinations that TxDOT makes under this PA regarding the presence of cemeteries in project APEs may be made through the use of maps, project-area photographs, or other background research.
2. Surveys for Archeological Resources and Cemeteries.
    a. Surveys may be limited to an evaluation of existing impacts or stratigraphic integrity when these activities are sufficient to determine that any sites present are unlikely to be eligible.
    b. Eligibility determinations that TxDOT performs under this PA do not require subsurface investigation if it can be demonstrated that the portion of the site to be affected is not likely to have sufficient integrity to be eligible.
    c. For portions of the APE where deposits may retain sufficient integrity for sites to be eligible, TxDOT survey methods will conform with the Texas Historical Commission's Archeological Survey Standards or with other appropriate methods, except as provided in subsection (i) of this section:
        i. TxDOT reserves the right to depart from published survey standards in cases where it deems appropriate.
        ii. SHPO reserves the right to review non-standard procedures for their adequacy.
    d. Survey methods will be considered adequate for the identification of burials and cemetery boundaries when the portions of the APE within 25 feet of a known cemetery have been investigated and the survey included scraping to a depth adequate to determine whether grave shafts or burials occur in the APE.
    e. A survey to identify burials does not comprise an activity with the potential to cause an adverse effect to a historic property.

3. Archeological Eligibility Testing Phase.
    a. The following methods will be employed for test excavations:
        i. Mechanical trenches will be excavated and profiles documented in order to characterize the area's potential for archeological deposits with sufficient integrity to be eligible to occur at the site.
        ii. The extent of the site within the APE will be sampled through some combination of shovel-testing, column sampling, augering, surface collection, and geophysical prospection in order to characterize the distribution of archeological materials across the site.
        iii. Additional units will be excavated and screened to evaluate site areas that appear to have the best potential for yielding important data with good integrity, based on the results of previous work.
        iv. The materials analyzed will comprise those materials most likely to contribute important information about prehistory or history.
    b. TxDOT reserves the right to depart from these methods in cases where it deems appropriate and shall justify deviations in the report.
4. Documentation for Archeological Resources and Cemeteries.
    a. Projects subject to review for archeological resources and cemeteries under this PA will be documented by TxDOT in the manner described in this section. Documentation for each such project will include, at a minimum:
        i. a description of the project, defining the APE or the investigated portion of the APE in three dimensions;
        ii. a project location map, plotting the project location on 7.5' Series USGS quadrangle maps;
        iii. information regarding the setting that is relevant for the assessment of the integrity of any archeological sites within the APE;
        iv. information on previously recorded archeological sites in the project location;
        v. description and justification of the level of effort undertaken for the investigation; and
        vi. results and recommendations.
    b. All TxDOT survey and testing reports will also include:
        i. description and justification of field methods, including the sampling strategy;
        ii. description and quantification of any archeological materials identified;
        iii. accurate plotting of any sites found on 7.5' Series USGS quadrangle maps;
        iv. submission of electronic TexSite archeological site survey forms to the Texas Archeological Research laboratory; and
        v. recommendations regarding whether any site(s) merit further investigation.

**Non-Archeological Historic Properties**

1. For review-exempt projects under Appendices 3 and 4, documentation shall be limited to that maintained in TxDOT's official project files. THC may audit TxDOT files for specific projects upon request.

2. For internally reviewed projects, documentation for each such project will include, at a minimum:

    a. project description and scope;
    b. project location map with delineation of the APE and location of historic properties;
    c. methodology used to identify historic properties;
    d. photographic and descriptive information for each identified property;
    e. description of public involvement activities;
    f. justification for findings of historic properties, including setting, integrity, and contextual information; and
    g. justification of effects on historic properties, including evaluations, reports, and other information relevant to the findings by TxDOT.
3. For individually coordinated projects, documentation submitted to THC will include items a-g of this subsection, and a description of efforts to avoid or minimize harm, proposed mitigation, and commitments.

## APPENDIX 6

## PROCESSES FOR REVIEW AND CONSULTATION REGARDING PROJECTS WITH POTENTIAL TO CAUSE EFFECTS TO HISTORIC PROPERTIES

Per Stipulation XI of this agreement, the following procedures specify the process to be followed by TxDOT for all undertakings not otherwise found to have no or minimal potential to cause effects on archeological and/or non-archeological historic properties.

1. Consulting parties
    a. Unless otherwise directed per the terms of tribe-specific programmatic agreements for consultation under Section 106 of the NHPA, TxDOT will contact federally recognized tribal consulting parties to seek their assistance in the identification of any property or properties within the APE that may be of religious and cultural significance and to consult with them about proposed findings.
    b. TxDOT may also identify and invite other consulting parties with a demonstrable interest in the project's effects on historic properties to participate in consultation. Potential consulting parties include but are not limited to County Historical Commissions, Certified Local Governments, Preservation Texas, Historic Bridge Foundation, and tribal groups that lack formal federal recognition.
    c. TxDOT may invite separate sets of consulting parties regarding potential project effects to archeological and potential effects to non-archeological historic properties.
    d. TxDOT may separately conduct and conclude consultation regarding potential effects to archeological properties and potential effects to non-archeological historic properties.
    e. If identification efforts resulted in a determination that no historic properties occur within the APE, TxDOT does not need to conduct individual, project-specific consultation with SHPO. Such undertakings will be determined to have no effect on historic properties as a result of this finding.
2. Early Consultation
    When feasible, TxDOT will undertake early consultation to determine that project's potential to cause effects on historic properties.
    a. This consultation may be initiated prior to the development and/or availability of detailed plans about the undertaking and prior to the identification of historic properties in an appropriate APE. Documentation provided as part of early consultation will describe the general type of undertaking (highway improvement or bridge replacement, for example) and define the APE.
    b. TxDOT will disclose the APE and the level of investigative effort per the procedures in Appendix 2. Consultation may include multiple steps under 36 CFR 800.3 through 800.6.
    c. If TxDOT review determines that no historic properties are likely to be affected by the undertaking and no consulting party provides substantive comment on the undertaking, TxDOT will conclude its review and consultation.
    d. If TxDOT review determines that historic properties may be affected by the undertaking, or a consulting party provides substantive comment on the undertaking, TxDOT will continue consultation, per Stipulation 3 in this Appendix.

e. TxDOT will resume its review and consultation for any design change that alters the APE beyond the boundaries previously considered, except for those minor design changes permitted under Appendices 3 and 4.

3. Standard Consultation

In cases where early consultation is not undertaken, TxDOT will adhere to the following procedures for determining an undertaking's potential effects on historic properties

a. TxDOT will determine the appropriate level of effort for review.

b. TxDOT will follow the standards in Appendix 5.

c. TxDOT will present the results of its review and propose findings in consultation with consulting parties. This consultation may include multiple steps under 36 CFR 800.3 through 800.6.

d. If TxDOT review determines that no historic properties will be affected and TxDOT receives no substantive comments from consulting parties, TxDOT will conclude its review and consultation.

e. If TxDOT review determines that historic properties may be affected by the undertaking or a consulting party provides substantive comment on the undertaking, TxDOT will continue consultation, per Stipulation 4 in this Appendix.

f. TxDOT will resume its review and consultation for any design change that alters the APE beyond the boundaries previously considered, except for those minor design changes permitted under Appendices 3 and 4.

4. Continuing Consultation

TxDOT will continue consultation with consulting parties when a project may affect historic properties or TxDOT receives substantive comments from a consulting party on a project's potential effects.

a. TxDOT may identify and invite additional consulting parties with a demonstrable interest in the project's effects on historic properties to participate in consultation.

b. TxDOT will provide all consulting parties with the documentation following the reporting and documentation standards of Appendix 5.

i. TxDOT will invite consulting parties to comment on project alternatives insofar as the alternatives under consideration may have different effects on historic properties.

ii. TxDOT will invite consulting parties to propose mitigation measures to resolve any potential adverse effects on historic properties.

iii. TxDOT will make reasonable efforts to accommodate requests for additional information during the consultation process.

c. TxDOT will use its documentation and consulting party comments to propose explicit findings about project effects and to propose resolutions to adverse effects, if any adverse effects may occur.

d. If TxDOT receives no substantive comments or no further substantive comments from consulting parties, TxDOT will conclude its review and consultation.

e. TxDOT will respond to substantive comments from consulting parties and document the response.

f. If TxDOT staff cannot resolve disputes about proposed findings or plans for the resolution of adverse effects with any consulting party, the issue will be escalated to the Director of the Environmental Affairs Division.

i. The Division Director will work with representatives of the consulting party and continue consultation to attempt to resolve the dispute.
ii. If the Division Director cannot resolve the dispute, the dispute will be resolved following the dispute resolution procedures in 36 CFR 800.
    1) If the SHPO disagrees whether a property is eligible for the National Register of Historic Places for Section 106 purposes or the if the Secretary of the Interior (Secretary) or the ACHP request it, TxDOT shall obtain a determination of eligibility from the Keeper pursuant to 36 CFR 63.
    2) If the SHPO disagrees with a finding of no historic properties affected, SHPO may request ACHP comment pursuant to 36 CFR 800.4(d)(1)(ii).
    3) If the SHPO or another consulting party disagrees with a finding of no historic properties adversely affected, TxDOT will request ACHP comment pursuant to 36 CFR 800.5(c)(2).
    4) If the SHPO disagrees on how adverse effects should be resolved, TxDOT will request ACHP comment pursuant to 36 CFR 800.6(b)(1)(v).
    5) For any other dispute circumstances, TxDOT will consider consulting party comments and provide a recommendation for approval by the Division Director.

5. If the SHPO or the ACHP requests an opportunity to comment on a specified undertaking, or if a consulting party requests SHPO participation in review, TxDOT shall follow the consultation procedures of 36 CFR Part 800 and this PA.
6. TxDOT may initiate consultation with the SHPO on an individual basis for undertakings that otherwise do not require SHPO consultation.
7. If disclosure of location information could result in disturbance of a historic property, all parties to this PA shall ensure that shared data, including data concerning the precise location and nature of historic properties and properties of religious and cultural significance, are protected from public disclosure to the greatest extent permitted by law, including conformance to Section 304 of the NHPA, as amended, Section 9 of the Archaeological Resource Protection Act (ARPA) of 1979, and Executive Order on Sacred Sites 13007 FR 61-104 dated May 24, 1996.