



Tribal Relations and Consultation at TxDOT

Draft Strategic Plan 2016

Archeological Studies Branch, Cultural Resources Management (CRM)
Section, Environmental Affairs Division (ENV)

Vision for Tribal Relations and Consultation at TxDOT

The Texas Department of Transportation is a best-in-class agency that goes above and beyond the spirit of consultation to work collaboratively with federally recognized Native American tribes toward mutually beneficial outcomes during all levels of the transportation process.

Mission of the Tribal Relations and Consultation Program:

Build relationships and purposefully collaborate with tribal nations in the planning and implementation of TxDOT projects and programs.

In working with tribal nations, TxDOT:

- Recognizes the inherent sovereign status and reserved rights of tribes;
- Practices and promotes cultural sensitivity when working with tribes;
- Honors the spirit of various federal requirements and orders to consult with tribes;
- Aims to go above and beyond current practices to foster trust and productivity;
- Commits to providing meaningful and substantive consultation with tribes on transportation projects; and
- Promotes collaborative consultation opportunities during planning and review processes within TxDOT.

Foreword

Texas' long and rich cultural history is rooted in the indigenous people who once inhabited the land. Tribal nations continue to have an inherent interest in the state's natural and cultural resources. Today, the federal government recognizes tribes' inherent sovereign status, a unique relationship that is embodied in the U.S. Constitution, treaties, court decisions, federal statutes and executive orders.

As TxDOT builds a safe and reliable transportation system, the agency (on behalf of the Federal Highway Administration) consults with tribes on statewide transportation plans and projects with federal funding.

TxDOT administers planning funds, prepares maps, collects data on the highway system and programs projects that begin at the local, county, regional and state levels.

This strategic plan outlines how the new Tribal Relations Program will be carried out by TxDOT's Cultural Resources Section. It identifies goals, objectives and actions to guide the success of the program through the next few years with proposed new procedures for consultation.

The Environmental Affairs Division (ENV) at TxDOT integrates environmental considerations into all TxDOT District activities to achieve environmental compliance.

As part of these responsibilities, archeological studies and routine tribal consultation are carried out by the Cultural Resources Section of ENV under Sec. 106 of the National Historic Preservation Act.

This strategic plan was developed by the Cultural Resources Section to guide its consultation.

For Sec. 106 Activities, TxDOT Archeology consults with 26 federally recognized tribes with areas of interest in Texas:

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
The Delaware Nation
Jicarilla Apache Nation
Kialegee Tribal Town
Kickapoo of Oklahoma
Kickapoo Traditional Tribe of Texas
Kiowa Indian Tribe of Oklahoma
Mescalero Apache Tribe
Muscogee (Creek) Nation of Oklahoma
The Osage Nation
Poarch Band of Creek Indians
Seminole Nation of Oklahoma
Thlopthlocco Tribal Town
Tonkawa Tribe of Indians of Oklahoma
Tunica-Biloxi Indian Tribe
United Keetoowah Band of Cherokee Indians
Wichita and Affiliated Tribes
Ysleta del Sur Pueblo

Feedback from Tribes

During 2015 and 2016, TxDOT hired a new tribal consultation team tasked with working with tribes to:

- 1) Assess TxDOT's current consultation activities with tribes;
- 2) Research innovative consultation practices; and 3) Develop a program that offers meaningful consultation opportunities for tribes.

Research was conducted by meeting (both in person and via phone) with Tribal Historic Preservation Officers (THPOs) and other tribal staff working on Sec. 106 reviews, transportation planners and cultural resource experts for several state DOTs. Additional information was available from reports and presentations available from the National Association of Tribal Historic Preservation Officers (NATHPO), American Association of State Highway and Transportation Officials (AASHTO) and Federal Highway Administration (FHWA).

The following highlight major themes in the research:

- Through early coordination and communication, tribes could provide meaningful input in the transportation decision making process. This early coordination and sharing of information could occur years prior to consultation under Sec. 106 of the National Historic Preservation Act.
- There is little response from Tribes when TxDOT planners send Statewide Transportation Implementation Plans (STIP), which includes four years of transportation projects that are funded. THPOs may not receive this paperwork or have little to no relevant information about historic properties to respond to.
- THPOs are challenged with overwhelming amounts of requests and paperwork from multiple entities and states for Sec. 106 consultation. Email communication and programmatic agreements have lightened this burden for some.

- Notifications/letters do not constitute meaningful consultation. Face-to-face meetings with tribes are preferred, especially when TxDOT can visit the tribe. Phone call follow ups are helpful.
- While some tribes are able to manage the amount of consultation letters from TxDOT, others expressed a preference to scale consultation to major projects where resources/properties are present and/or where the resources have potential to cause effects to historic properties. Tools to help prioritize this work could be useful to THPOs.
- While the THPOs focus on historic properties, the consideration of natural resources and the cumulative impact on the environment are also of concern to tribes.

A ROADMAP FOR SUCCESSFUL CONSULTATION

The rationale includes consideration of the past and recent successes of the program thus far, including the following factors:

Past Partnerships and Collaborations on Projects Lead to Successful Consultation

- Field visits between TxDOT archeologists and tribal representatives (including THPOs and tribal elders) to assess site impacts and/or monitor work have provided better understanding of project effects, cultural practices and issues that cannot be conveyed by plans and written descriptions.
- TxDOT has worked successfully with tribes on projects that have adversely impacted archeological sites. Tribes have been key decision-makers in determining creative solutions to mitigate TxDOT projects, including redesigning projects to avoid sites.
- For other mitigation projects where sites could not be avoided, tribes have contributed in various ways. Tribes have provided monitors for sites where burials were present. Tribal representatives have also served as contributors to the analysis and reporting of sites.
- Future success should build on this type of more engaged and meaningful input from tribes in a more programmatic way.

Program Innovation and Expertise Make TxDOT a Leader in Cultural Resources Management

- TxDOT Archeology strives to be one of the leading agencies in the nation working on cultural resources management. The increased use of tools like statistical analysis, geomorphology, remote sensing and geographic information systems (GIS) are changing the way TxDOT's cultural resource professionals find, identify, analyze, and evaluate resources.
- TxDOT Archeology works hand-in-hand with the SHPO to record all archeological sites that have been surveyed by the agency. The program supports the Texas Archeological Sites Atlas in order to have a more comprehensive look at the states' resources, which can thus inform the management of those resources for the future.
- TxDOT staff archeologists (10 in total) are reviewing more than 400 projects a year. They have expertise in various fields of archeology, such as geoarcheology, archeobotany, stone tool analysis, and regional culture history, that allow for a thorough and good faith effort to identify, assess and evaluate cultural resources in the state.
- TxDOT also has weekly project lists, online portals and other resources available that include information on project status, process work and detailed analyses. These resources can instill confidence about the process TxDOT follows to go above compliance of the National Historic Preservation Act.

Current Programmatic Agreements are Mutually Beneficial for Tribes and TxDOT

- TxDOT has Programmatic Agreements (PA), which fine tunes consultation levels appropriate to potential project impacts, with more than half of the 26 tribes (16 in total).
- The PAs renew every five years and require TxDOT to consult only on major undertakings with potential to cause effect. In those cases, a notification letter is sent to tribes.
- Additionally, a PA with FHWA, SHPO, ACHP and TxDOT regarding the implementation of transportation undertakings (PA-TU) outline several categories of projects that require no review based on prior experience showing a low risk for impacts to cultural resources.
- This type of scaled effort is a model for successful consultation moving forward.

Major undertakings (projects) :

- Include border crossing facility construction, conversion of non-freeways to freeways, new location non-freeways, new location freeways, widening non-freeways, and widening freeways.
- Require new Right-of-Way (ROW)

Major projects would cause more than 100 cubic yards of ground disturbance to previously-undisturbed areas, and such projects may affect areas that have not been previously surveyed for cultural resources.

Major Projects Have Rare Effects to Historic Properties

- Based on past evaluations of similar projects, these major undertakings rarely have adverse effects to archeological sites.
- Additionally major projects constitute just one-third of TxDOT Archeology's project reviews and only 1 percent of projects require mitigation.

The Numbers

5716: Projects currently in development

1325: Projects that have no potential to cause effect

3581: Minor projects

810: Major projects

Going Beyond Consultation

As TxDOT evolves its consultation program, the strategy is three-fold:

- Build trusting relationships with the tribes based on respect for tribes rights' and sovereignty and an understanding and appreciation for tribal heritage and culture;
- Address the need for more interactive activities that involve the tribes early in the process of planning and programming transportation projects; and
- Enhance and tailor Sec. 106 consultation on projects that have the potential to cause adverse effects to cultural resources that are significant to tribes.

Consultation is at the heart of the historic preservation process.

Section 106 of the National Historic Preservation Act (NHPA) gives Tribes opportunities to **inform** federal agencies of the historic properties they value and to **influence** decisions about projects that affect them.

Building Trust Step-by-Step

Goal 1: Ensure that tribal interests and rights, beyond the Sec. 106 consultation process, are recognized throughout the agency and throughout the transportation process.

Objective	Outcome
Raise awareness of tribal consultation requirements and activities throughout the agency.	TxDOT leadership recognizes the importance of tribal relations and consultation as part of the agency's mission.
Bridge communication between Environmental Affairs (ENV) and Transportation Planning and Programming Divisions (TPP) about tribal concerns, including the opportunity to participate in transportation planning processes early and often.	Tribes are involved and engaged as Planning Partners early in a project.
Streamline ENV processes so that tribes can participate early in scoping for major projects (where TxDOT is conducting Environmental Assessments and Environmental Impact Studies).	Tribes feel engaged during the Environmental Review Process for projects.

Goal 2: Empower tribes through research, training and outreach activities.

Objective	Outcome
Develop opportunities to enhance the sharing of knowledge and resources between TxDOT and Tribes.	Tribes have confidence that TxDOT is advancing a productive and trusting relationship.
Increase tribes' confidence and knowledge of TxDOT Archeological processes.	Trust in the process helps tribes and TxDOT prioritize consultation to major projects of concern or significance.
Host in-person meetings at a minimum annually and review the tribal relations and consultation program with tribes.	<p>Tribes regard TxDOT as meaningfully engaged in the program.</p> <p>The tribal relations program is truly a collaboration developed with input and feedback from the tribes.</p>

Goal 3: Tailor Sec. 106 consultation to meet the needs and interests of tribes.

Objective	Outcome
Increase transparency and access to information that tribes receive on TxDOT projects that have potential to cause effect.	Knowledge of projects in the pipeline allows Tribes to consult with TxDOT based on their priorities
Gain more interactive participation from tribes on projects.	Tribes feel involved Sec. 106 processes beyond routine consultation letters.
Work with tribes regularly to review transportation programs and plans in advance of Sec. 106 review using new tools, outreach and more.	<p>Tribes are responsive to planning information in a way that is accessible and useful.</p> <p>Tribes are able to prioritize and focus consultation on projects of concern and significance.</p>

Consultation Activities

1. Programmatic- and Project-focused Consultation Meetings

TxDOT Archeology is committed to meeting and/or contacting tribal consulting parties directly on a regular basis to foster better communication and trust in the decision-making and consultation processes.

We will engage in ongoing discussions about the consultation program and facilitate dialogue with key decision makers about issues of concern, and any project-specific issues identified by the tribes, including but not limited to:

- Identification, assessment and treatment of potential effects a project will have on places of cultural significance to the tribes, including traditional cultural properties, prehistoric archeological sites, and cemeteries;
 - Project site visits and other face-to-face consultation during various phases of work as appropriate for the project and associated issues;
 - Discovery, assessment and treatment/protocol of sacred Indian burials in the project APE;
 - Commenting on data recovery plans and research design;
- Managing and balancing effects to cultural resources, including through avoidance, minimization or project and/or programmatic mitigation; and
- Determining options for alternative creative mitigation early in planning.

2. Early Coordination with Tribes

Through a partnership with TxDOT Archeology and the Texas Historical Commission, TxDOT now provides tribes access to certain data from the Texas Archeological Sites Atlas (Atlas). The **TxDOT Early Tribal Coordination Tool** is an online tool that layers TxDOT projects with archeological sites so that tribes can participate early in the transportation planning process.

TxDOT consults with 26 federally recognized tribes. Each tribe will receive unique log-in information to the Early Tribal Coordination Tool. The Tool contains maps with project information and archeological site data that is unique to each tribe, based on the tribe's Areas of Interest in Texas.

3. Engaging in Tribal Consultation under Sec. 106

TxDOT will focus consultation efforts on projects with substantive issues.

- TxDOT will continue to consult and send letters to provide more detail for **major undertakings** with new ROW or for undertakings where archeological sites have been identified in the area of potential effects during the course of environmental studies.
- TxDOT will meet or contact tribal consulting parties on a regular basis to discuss any project-specific issues identified by those consulting parties, issues of concern, and the consultation program.
- As warranted, TxDOT may work directly with consulting parties to resolve particular issues, such as conducting investigations of cemeteries in cooperation with tribal representatives.
- TxDOT honors any request for government-to-government consultation by engaging the Texas FHWA Division Office.