

**PROGRAMMATIC AGREEMENT
for the
CONSULTATION PROCESS
between
DELAWARE NATION,
FEDERAL HIGHWAY ADMINISTRATION, and
OKLAHOMA DEPARTMENT OF TRANSPORTATION**

This agreement is made and entered into by and between the Delaware Nation, the Federal Highway Administration, hereinafter referred to as the "FHWA," and the Oklahoma Department of Transportation, hereinafter referred to as "ODOT."

WHEREAS, ODOT is charged with the responsibility for the construction and maintenance of certain transportation facilities in the State of Oklahoma, and

WHEREAS, FHWA has overall responsibility for the expenditure of Federal-Aid Highway funds in Oklahoma and for government-to-government consultation with Native American Tribes and Nations, and

WHEREAS, Section 106 of the National Historic Preservation Act mandates the identification, assessment, and mitigation of impacts to cultural resources potentially affected by federally-assisted highway construction, and

WHEREAS, ODOT, through in-house staff and personnel employed by the ODOT Cultural Resources Program at the University of Oklahoma, Norman Campus, possesses the technical expertise to conduct detailed cultural resources investigations and consultation on behalf of FHWA in Oklahoma, and

WHEREAS, the Delaware Nation has an interest in preserving cultural resources within the boundaries of their tribe in the State of Oklahoma, including the following counties: Bryan, Caddo, Canadian, Choctaw, Comanche, Garfield, Garvin, and Kingfisher, and

WHEREAS, the Delaware Nation possesses unique knowledge regarding places of traditional value to their people, and

WHEREAS, the Delaware Nation, as a sovereign tribal government, reserves the right to deal directly with FHWA to resolve any concerns in the implementation of this agreement

NOW THEREFORE, in consideration of these facts, the parties hereto agree that consultation among the parties in compliance with Section 106 of the National Historic Preservation Act (NHPA) shall be conducted according to the following principles:

I. ROUTINE CONSULTATION

A. ODOT shall act as agent of FHWA in initiating and conducting Section 106 consultation between the FHWA and the Delaware Nation. This consultation will be handled through the Tribal Liaison at the ODOT Cultural Resources Program.

B. Original communication regarding projects will be directed to the President of the Delaware Nation and will be handled through U.S. Mail on ODOT Cultural Resources Program letterhead. An electronic copy will be provided directly to the Director of the Delaware Nation's Cultural Preservation Department, as well as any other appropriate cultural resources and transportation offices as designated in writing by the Delaware Nation. At the request of the Delaware Nation, other means of communication including, but not limited to, face-to-face meetings, emails, fax, and telephone contacts, shall be employed.

C. Without limiting any right to communicate concerns as provided by the National Environmental Policy Act (NEPA), Section 106 of NHPA, and any other Federal law guiding relationships between Indian Nations and the United States Government, all

parties agree that it is their intent to reply within 30 days of receipt to any written communication regarding a proposed federal undertaking. All parties understand that the absence of a reply within this period may be interpreted as no objection to the previous correspondence or proposed activity. All parties understand that this time limit in no way limits any other rights of communication at any time during the project development process.

D. The parties agree that the location of cultural resources determined to be important to the Delaware Nation shall be kept confidential, notwithstanding any requirements of Federal and State freedom of information legislation. Such information shall be made available only to the ODOT Cultural Resources Director and the ODOT Tribal Liaison (as listed in Attachment I). Delaware Nation tribal members who contact ODOT or FHWA with cultural resources concerns will be advised to present their concerns to the Delaware Nation's Cultural Preservation Department for further action. ODOT and FHWA shall take all reasonable measures to preclude disclosure of confidential Native American cultural properties to the general public.

E. ODOT shall conduct a professional cultural resources survey of all proposed undertakings which have the potential to impact soil containing cultural resources and which have not been previously disturbed within the cultural boundaries of the Delaware Nation. Such surveys shall comply with Section 106 in all respects. The Delaware Nation shall be provided with copies of all cultural resources reports for proposed projects within their boundaries, as specified above.

F. Any proposed undertaking within the current cultural boundaries of the Delaware Nation that involves ground disturbing activities associated with proposed Federally-funded road projects will require notification from ODOT to the Delaware Nation, excepting the following screened exemptions:

- Minor revisions to existing traffic controls, signage, roadway striping, pavement marking or intersection turning movements which do not entail widening or reconstruction of the existing facility.
- Resurfacing, overlays, pavement preservation, pavement reconstruction, shoulder treatments, and seal coating of existing roadways that occur within existing elevations and pavement lines.
- Minor maintenance, joint seals, pavement sealing, and deck rehabilitation on bridges.
- Placement of riprap or other erosion control methods to deter or control erosion of water ways, bridge piers, and bridge abutments within the limits of previous construction or disturbance.
- Planning or scoping activities which do not involve or lead directly to specific Federal-aid construction projects.
- Construction of sidewalk improvements in the form of curb cuts to install American Disabilities Act compliant ramps.
- Minor maintenance, rehabilitation, and reconstruction of existing roadways within the limits of previous construction and/or in existing previously disturbed right-of-way.
- Work within highway interchanges and medians of divided highways occurring within the limits of previous construction or disturbance.
- Roadway improvement projects with minor amounts of new right-of-way in areas where the adjacent land has been thoroughly disturbed by natural factors or other developments unrelated to the proposed ODOT undertaking.
- Construction of bicycle and pedestrian lanes, paths, and facilities within existing disturbed right-of-way.

G. The Delaware Nation agrees to assist ODOT in complying with any tribal or Bureau of Indian Affairs regulations regarding obtaining access to perform cultural resources surveys on tribal trust or allotment properties.

H. ODOT and the Delaware Nation will commit to keeping each other informed of changes in the designated points of contact, tribal leadership, preferred manner of communication, and addresses, phone numbers, and email addresses.

II. SPECIAL STIPULATIONS

A. Procedures for inadvertent construction discoveries of human remains, burial furniture or sacred items as defined in the Native American Graves Protection and Repatriation Act (NAGPRA) and State of Oklahoma Statutes protecting unmarked human graves and human skeletal remains are outlined below. These shall apply to human remains, burial furniture or sacred items that are discovered within the current cultural boundaries of the Delaware Nation and which are of Delaware patrimony.

1. Individuals making the discovery of human skeletal remains shall initially contact the appropriate local law enforcement agency as required by Oklahoma Statute and immediately notify the ODOT Cultural Resources Program.
2. If law enforcement officials do not assume jurisdiction, and the discovery is within the jurisdictional and historic area of interest of the Delaware Nation, ODOT shall notify the Delaware Nation, any other tribes with an expressed historic interest in the area of the discovery, the Oklahoma State Archeologist, and the Oklahoma State Historic Preservation Office (SHPO) by telephone or electronic mail, with formal written correspondence to follow, if necessary. This notification shall take place within 48 hours.
3. ODOT shall temporarily suspend all activities in the discovery area which could disturb the human remains and associated burial furniture. The remains shall be covered over by soil or other appropriate material when not being evaluated by appropriate ODOT, SHPO, or tribal cultural resources personnel. ODOT shall take all reasonable means to protect and safeguard the human

remains and associated cultural items until final disposition is determined. The Delaware Nation understands that emergency excavation and removal of the discovered remains may be necessary to complete an ongoing construction project and also agrees to expedite its review of such discoveries so as to minimize construction delays. Officially appointed representatives of the Delaware Nation may request to be present during the exhumation of remains.

4. Other than preliminary evaluation necessary to assess the age and cultural patrimony of the remains, ODOT will not perform or authorize the performance of invasive analysis of Native American human remains unless specifically agreed to by the Delaware Nation and/or any other federally recognized American Indian Tribe with cultural patrimony to the remains and associated items. Claims for any repatriation of remains as a result of inadvertent discovery during construction shall be resolved in accordance with the Native American Graves Protection and Repatriation Act and any subsequent implementing regulations.

5. The Delaware Nation requests that no photographs of burials shall be taken under any circumstances. A drawing or sketch of the burial *in situ* shall be prepared and will be used to assist the Delaware Nation in returning the burial and associated funerary objects to their original positions during re-internment. This sketch or drawing shall not be released to any parties except ODOT and the Delaware Nation's Cultural Preservation Director and shall not be used for any purpose other than preparing a burial for re-internment.

6. For cultural reasons, no women will be directly involved with the handling of human remains or burial objects or the reburial of human remains or burial objects of Delaware patrimony.

B. It shall be the policy of ODOT and FHWA to avoid impacts to archaeological and historical resources known or suspected to contain Native American human remains.

The Delaware Nation and other federally recognized American Indian tribes with cultural patrimony shall be invited to participate in the consideration of alternatives which avoid or minimize adverse impacts to such sites. If, following consideration of avoidance alternatives with other participants in the Section 106 process, ODOT and FHWA determine that it is not feasible or prudent to avoid a significant archaeological resource of Delaware patrimony, a Memorandum of Agreement (MOA) among FHWA, ODOT, SHPO, and the Delaware Nation describing measures developed to mitigate the adverse effect will be negotiated. In such situations, it is recognized that archaeological data recovery may be an acceptable measure to mitigate adverse effects. As appropriate, ODOT will invite Delaware participation in such investigations. Procedures for the discovery and treatment of human remains encountered during archaeological investigations authorized under Section 106 for the evaluation or mitigation of adverse effects to archaeological resources follow:

1. The discovery of any human remains during an archaeological excavation will immediately be brought to the attention of the Delaware Nation, the State Historic Preservation Officer, the State Archeologist, and any other federally recognized American Indian tribe with cultural patrimony to the remains. The remains shall be left undisturbed under a protective layer of soil or other appropriate material pending a final determination regarding treatment by the above consulting parties.
2. For human remains of known or believed Delaware patrimony:
 - a. ODOT shall defer entirely to the wishes of the Delaware Nation regarding any documentation, removal, scientific analysis, and final disposition of the remains.
 - b. ODOT shall provide the Delaware Nation with opportunities for site visits, the performance of any necessary ceremonies, participating in *in situ* description, excavation, and scientific analysis.

c. The Delaware Nation shall receive copies of any reports prepared as a result of the archaeological investigations that exposed the human remains or burial objects.

d. The Delaware Nation understands that avoidance of the site by the subsequent construction project may not be possible.

e. ODOT will make it their policy not to store or house exhumed human remains of Delaware patrimony and will make every effort to re-inter the remains as soon as possible after exhumation.

f. ODOT will work with the Delaware Nation to select an appropriate site for the re-internment of human remains of Delaware patrimony and will cover appropriate re-internment costs.

3. Regarding historic human remains of uncertain patrimony, ODOT shall consult with the SHPO and all relevant participants in the Section 106 process regarding the treatment and disposition of the remains. All such decisions will be made in compliance with Section 106 and NAGPRA and subsequent implementing regulations.

C. The Delaware Nation recognizes that some cultural resources may be affiliated with several tribes and agrees to consult alongside other tribes in the negotiation of project-specific Memoranda of Agreement.

III. OTHER STIPULATIONS

A. Nothing in this Programmatic Agreement shall be interpreted to alter the requirements of the National Historic Preservation Act (NHPA), the Native American Graves Protection and Repatriation Act (NAGPRA), or their implementing regulations.

In the event that any portion of this Programmatic Agreement is deemed contradictory to law and regulation, only that contradictory portion becomes void. The remainder of the Programmatic Agreement remains valid and in full effect. The parties agree to consult regarding any portions of this Programmatic Agreement contradictory to Federal statute to revise any voided portion to make it compliant with the applicable law or statute.

B. This Programmatic Agreement is executed as of the last date shown below and expires no later than five years thereafter.

C. The parties may renew or extend this Programmatic Agreement by appropriate signature of all parties on a signature page reflecting the date of renewal. The renewal will be executed as of the last date shown on the renewal page and expires five years thereafter, unless otherwise noted on the signature page.

D. This Programmatic Agreement may be unilaterally terminated by any of the signatory parties upon a 90 day written notice to the other parties.

E. Nothing in this Programmatic 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. Commitments made in this Programmatic Agreement are subject to the availability of funds and staffing. However, all parties will make a good faith effort to fund any action necessary for the implementation of this Programmatic Agreement.

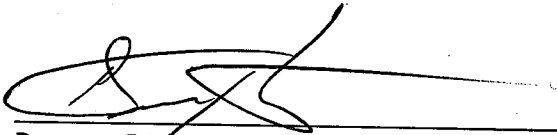
F. Terms in this Programmatic Agreement are defined according to federal authority. Where federal authority may provide conflicting definitions, the prevailing document's definition is used. By means of example, a statutory definition is binding over a regulatory one.



Division Administrator
Federal Highway Administration

1-17-2012

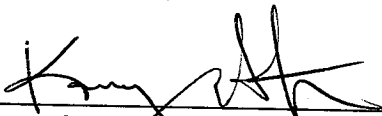
Date



Deputy Director
Oklahoma Department of Transportation

1-11-12

Date



President
Delaware Nation

1-30-2012

Date

Attachment I: ODOT - Cultural Resources Program Staff

Robert Bartlett, Director
ODOT - Cultural Resources Program
111 E. Chesapeake Ave.
Norman, OK 73019
Telephone: 405.325.7201
Email: rbartlett@ou.edu

Rhonda S. Fair, Tribal Liaison
ODOT - Cultural Resources Program
111 E. Chesapeake Ave.
Norman, OK 73019
Telephone: 405.325.8665
Email: rsfair@ou.edu