

**PROGRAMMATIC AGREEMENT**  
between  
**DELAWARE TRIBE OF INDIANS,**  
**FEDERAL HIGHWAY ADMINISTRATION,**  
and  
**OKLAHOMA DEPARTMENT OF TRANSPORTATION**

This agreement is made and entered into by and between the Delaware Tribe of Indians, the Federal Highway Administration, hereinafter referred to as 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

WHEREAS, FHWA has overall responsibility for government-to-government consultation with Native American Tribes and Nations, and

WHEREAS, Section 106 of the National Historic Preservation Act (NHPA) mandates the identification, assessment, and mitigation of impacts to cultural resources potentially affected by Federally-assisted undertakings, and

WHEREAS, Section 106 of the NHPA mandates consultation between FHWA and Native American Tribes and Nations regarding cultural resources potentially affected by their Federal undertakings, and

WHEREAS, ODOT, through in-house staff and personnel employed by the ODOT Cultural Resources Program at the University of Oklahoma, possesses the technical

expertise to conduct detailed cultural resources investigations and consultation on behalf of FHWA in Oklahoma, and

WHEREAS, the Delaware Tribe of Indians has an interest in preserving cultural resources within the boundaries of their tribe in the State of Oklahoma, including the following counties: **Craig, Rogers, Nowata, Tulsa, Wagoner, and Washington**, and

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

WHEREAS, the Delaware Tribe of Indians 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 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 FHWA and Delaware Tribe of Indians. This consultation will be handled through the Tribal Liaison at the ODOT Cultural Resources Program. Initial consultation will be handled primarily through U.S.P.S. mail on ODOT Cultural Resources Program letterhead, although at the request of the Delaware Tribe of Indians, other means of communication including but not limited to face-to-face meetings, electronic mail, and telephone contacts shall be employed.

B. Original communication regarding projects will be directed to Delaware Tribe Historic Preservation Office.

C. Without limiting any right to communicate concerns as provided by the National Environmental Policy Act (NEPA), Section 106 of the NHPA, and any other Federal law concerning relationships between Indian Tribes and Nations and the United States government, all parties agree that it is their intent to reply within 30 days to any written communication regarding a proposed Federal undertaking. All parties understand that this time limit in no way limits other rights of communication at any time during the project development process.

D. All parties agree that the location of cultural resources determined important to the Delaware Tribe of Indians shall be kept confidential, notwithstanding any requirements of Federal and State freedom of information legislation. Such information shall be made available only to those agencies and individuals charged with ensuring ODOT's and FHWA's compliance with Federal environmental law. ODOT and FHWA shall take reasonable measures to prevent the disclosure of the location of or other sensitive information about confidential Native American cultural properties to the general public.

E. For all proposed undertakings which have the potential to affect cultural resources which have not been previously disturbed, ODOT shall conduct a professional cultural resources survey of the proposed project area within the boundaries of the Delaware Tribe of Indians in the State of Oklahoma. Such surveys shall comply with Section 106 in all respects. The Delaware Tribe of Indians shall be provided with copies of all cultural resources reports produced for proposed projects within their boundaries, as specified above.

F. Any proposed undertaking within the above-stated boundaries of the Delaware Tribe of Indians that involves ground disturbing activities associated with proposed Federally-funded transportation projects will require individual notification from ODOT to the Delaware Tribe of Indians, 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. Projects that are classified as screened exemptions shall be subject to a cultural resources file search by the ODOT Cultural Resources Program, after which the Delaware Tribe of Indians shall be notified of any cultural information associated with the Delaware Tribe of Indians encountered in the file search.

H. ODOT also will notify the Delaware Tribe of Indians in the event of any discovery of artifacts, structural remains, and other cultural resources within the current boundaries of Delaware Tribe of Indians that are made as a result of soil disturbing activity. The Delaware Tribe of Indians will be provided the opportunity to consult on whether the resources are of cultural patrimony and significance to the Delaware Tribe of Indians.

I. ODOT and Delaware Tribe of Indians 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.

## **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 graves and human skeletal remains are as follows:

1. Individuals making the discovery of human skeletal remains shall initially contact the appropriate local law enforcement agency as required by Oklahoma law 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 Tribe of Indians, ODOT shall notify the Delaware Tribe of Indians, 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.

3. ODOT shall temporarily suspend all activities in the discovery locale which could further disturb the human remains and associated burial furniture. The remains shall be covered with a protective layer of soil when not being evaluated by appropriate ODOT, THPO or other tribal personnel, or SHPO. ODOT shall take all reasonable means to protect and safeguard the human remains and associated cultural items until final disposition is determined.

4. Other than preliminary evaluation necessary to assess the age and cultural patrimony of the remains, ODOT will not perform or authorize any scientific or anthropological analysis of Native American human remains unless specifically agreed to by the Federally-recognized tribes or nations with cultural patrimony.

5. Claims for repatriation of human remains and associated cultural items shall be resolved in accordance with NAGPRA.

6. ODOT will make every effort to ensure that construction personnel are aware of and adhere to these procedures.

B. It shall be the policy of ODOT and FHWA to avoid impacts to archaeological and historic resources known or suspected to contain human remains. If, following consultation with the Delaware Tribe of Indians, Oklahoma SHPO, and other parties in the Section 106 process, it is determined that avoidance of such a resource is not feasible or prudent, archaeological evaluation and/or mitigation excavation will be conducted in compliance with Section 106. The Delaware Tribe of Indians and any other Federally-recognized Tribe or Nation with cultural patrimony shall be provided an opportunity to participate in the negotiation of any Memoranda of Agreement between FHWA and SHPO for the mitigation of adverse effects to archaeological resources within the traditional cultural boundaries of the Delaware Tribe of Indians.

C. Procedures for the discovery and treatment of human remains encountered during archaeological excavations within the traditional cultural boundaries of the Delaware Tribe of Indians authorized under Section 106 for the evaluation or mitigation of adverse impacts to cultural resources are as follows:

1. The discovery of any human remains during an archaeological excavation will immediately be brought to the attention of the Delaware Tribe of Indians, Oklahoma SHPO, State Archeologist, and any other Federally-recognized Tribe or Nation with cultural patrimony to the remains. The remains shall be left undisturbed under a protective layer of soil pending a final determination regarding treatment by the above consulting parties.

2. Regarding human remains known or suspected to relate directly and only to the Delaware Tribe of Indians people, ODOT shall defer entirely to the wishes of the Delaware Tribe of Indians regarding any documentation, removal, scientific analysis, and final disposition of the human remains.

### **III. OTHER STIPULATIONS**

A. Nothing in this PA shall be interpreted to alter the requirements of NHPA, NAGPRA, or their implementing regulations. In the event that any portion of this PA is deemed contradictory to law and regulation, only that contradictory portion becomes void. The rest of the PA remains valid and in full effect. The parties agree to consult and work together to revise any voided portion of this PA in order to make it compliant with applicable law or statute.

B. This 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 PA by appropriate signatures 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 signature page and expires five years thereafter, unless otherwise noted on the signature page.

D. This PA may be unilaterally terminated by any of the signatory parties upon 90 days written notice to the other parties.

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





Division Administrator  
Federal Highway Administration

10-26-2011

Date



Deputy Director  
Oklahoma Department of Transportation

10-20-11

Date



Chief  
Delaware Tribe of Indians

11/12/2011

Date



Director of Historic Preservation Office  
Delaware Tribe of Indians

11/7/11

Date