

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

WHEREAS, the Federal Highway Administration (FHWA), under the authority of 23 U.S.C. 101 et seq., implements the Federal-aid Highway Program (Program) in the state of Tennessee by funding and approving state and locally sponsored transportation undertakings that are administered by the Tennessee Department of Transportation (TDOT);

WHEREAS, the Tennessee FHWA Division Administrator is the "Agency Official" responsible for ensuring that the Program in the state of Tennessee complies with Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 306108), as amended, and codified in its implementing regulations, 36 CFR Part 800, as amended (August 5, 2004) (hereafter 36 CFR 800);

WHEREAS, TDOT administers Federal-aid undertakings throughout the State of Tennessee as authorized by Title 23 U.S.C 302;

WHEREAS, TDOT has participated in the consultation and has been invited to be a signatory to the Programmatic Agreement (Agreement);

WHEREAS, the responsibilities of the Tennessee State Historic Preservation Officer (SHPO) under Section 106 of the NHPA and 36 CFR 800 are to advise, assist, review, and consult with Federal agencies as they carry out their historic preservation responsibilities and to respond to Federal agencies' requests within a specified period of time;

WHEREAS, Cooperating Federal Agencies who recognize FHWA as the lead Federal agency for an undertaking may fulfill their obligations under Section 106 of NHPA according to 36 CFR 800.2(a)(2), provided that FHWA and TDOT follow the requirements of this Agreement and the cooperating agency's undertaking does not have the potential to cause effects to historic properties beyond those considered by FHWA and TDOT;

WHEREAS, FHWA recognizes that it has a unique legal relationship with federally recognized Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions, and therefore, consultation with an Indian tribe must recognize government-to-government relationship between the federal government and tribes;

WHEREAS, FHWA has consulted with the following Federally recognized Indian tribes (Tribes) with ancestral lands in Tennessee about this Agreement, has requested their comments, and has taken any comments received into account. These Tribes include Absentee-Shawnee Tribe of Indians of Oklahoma, Cherokee Nation, The Chickasaw Nation, the Choctaw Nation of Oklahoma, Eastern Band of Cherokee Indians, Eastern Shawnee Tribe of Oklahoma, Kialegee

Tribal Town, the Muscogee (Creek) Nation, Poarch Band of Creeks, the Quapaw Tribe of Indians, Shawnee Tribe, Thlopthlocco Tribal Town, and United Keetoowah Band of Cherokee Indians in Oklahoma;

WHEREAS, any undertaking that may affect historic properties identified by a Tribe as possessing traditional religious and cultural significance, shall not be governed by this Agreement, but shall be reviewed by FHWA in accordance with 36 CFR 800 Subpart B;

WHEREAS, ACHP issued the *Program Comment for Common Post-1945 Concrete and Steel Bridges*, which is applicable for bridges under TDOT's jurisdiction, on November 2, 2012 (Federal Register 77 FR 68790);

WHEREAS, pursuant to the consultation conducted under 36 CFR 800.14(b), the signatories have developed this Agreement in order to establish an efficient and effective program alternative for taking into account the effects of the Program on historic properties in Tennessee;

WHEREAS, FHWA has consulted with the ACHP pursuant to 36 CFR 800.14(b) and the ACHP has opted to participate as a signatory to this agreement;

WHEREAS, FHWA has notified the public, Federal, and State agencies, and Certified Local Governments (CLGs) about this Agreement, has requested their comments, and has taken any comments received into account;

WHEREAS, the SHPO, ACHP, FHWA, and TDOT have participated in the development of this Agreement;

NOW, THEREFORE, the FHWA, TDOT, SHPO, and ACHP agree that the Program in Tennessee shall be carried out in accordance with the following stipulations in order to take into account the effects of the Program on historic properties in Tennessee and that these stipulations shall govern compliance of the Program with Section 106 of the NHPA until this Agreement expires or is terminated.

To aid the signatories of this Agreement, the stipulations are organized as follows:

- I. Applicability and Scope
- II. Definitions
- III. Professional Qualifications Standards
- IV. Responsibilities
- V. Consultation with Tribes
- VI. Participation of Other Consulting Parties and the Public
- VII. Review of Section 106 Undertakings
- VIII. Post-Review Discoveries
- IX. Identification and Treatment of Human Remains
- X. Curation
- XI. Administrative Stipulations
- XII. Dispute Resolution

- XIII. Amendment
- XIV. Termination
- XV. Confidentiality
- XVI. Duration of Agreement

STIPULATIONS

The FHWA, with the assistance of TDOT, shall ensure that the following measures are carried out:

I. APPLICABILITY AND SCOPE

- A. This Agreement sets forth the process by which FHWA, with the assistance of TDOT, will meet its responsibilities pursuant to Section 106 of the NHPA (54 U.S.C. §§ 306102 and 306108). The objective of this Agreement is to improve the efficiency and effectiveness of the procedures by which the signatories to this Agreement review Section 106 undertakings.
- B. Through this Agreement, FHWA and TDOT establish three categories of undertakings (Unscreened Undertakings, Screened Undertakings and Other Undertakings) that require different levels of review and consultation.
- C. The FHWA retains the responsibility to consult with Tribes as required under 36 CFR 800.2(c)(2) and 36 CFR 800.3(c-f), as amended. TDOT may assist FHWA with this requirement.
- D. At any time, TDOT may choose to process a project by following the procedures in 36 CFR Part 800 rather than by following the procedures in this Agreement. TDOT and FHWA will also process a project under the procedures in 36 CFR Part 800 if SHPO, ACHP, or FHWA so requests.

II. DEFINITIONS

- A. *Collection(s)*: Artifacts or other materials that are of a cultural origin and collected as a result of archaeological investigations of undertakings conducted pursuant to this Agreement and that are determined not to consist of human remains, or to contain, human remains, or to be a cultural item, associated funerary object, sacred object, or object of cultural patrimony, as defined by the Native American Graves Protection and Repatriation Act (NAGPRA). Collection(s) are also defined to include all records generated as part of archaeological investigations conducted pursuant to this Agreement.
- B. *Ground disturbance*: Any work or activity that results in a disturbance of previously undisturbed earth, including, but not limited to, excavation or digging, trenching, drilling, augering, clearing, and grading.

- C. *Qualified Staff*: Non-contractor/consultant historians, architectural historians, archaeologists or other professional cultural resources practitioners directly employed by TDOT as employees of the State of Tennessee that meet the *Secretary of the Interior's Professional Qualifications Standards* for historic and archaeological resource studies.

III. PROFESSIONAL QUALIFICATIONS STANDARDS

Actions prescribed by this Agreement that involve the identification, evaluation, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meets the *Secretary of the Interior's Professional Qualifications Standards* (published in 48 FR 44738-44739) and the current Tennessee SHPO Standards and Guidelines for Archaeological Resource Management Studies (as amended) for archaeological investigations. However, nothing in this stipulation may be interpreted to preclude FHWA or TDOT or any agent or contractor thereof from using the services of persons who do not meet these qualifications standards, providing their activities are conducted under the direct supervision of a person who does meet the standards.

IV. RESPONSIBILITIES

The following section identifies the responsibilities of FHWA and of TDOT in complying with the terms of this Agreement.

A. FHWA Responsibilities

1. Consistent with the requirements of 36 CFR 800.2(a) and 800.2(a)(1-4), FHWA remains legally responsible for ensuring that the terms of this Agreement are carried out and for all findings and determinations made pursuant to this Agreement by TDOT under the authority of FHWA. At any point in the Section 106 process, FHWA may inquire as to the status of any undertaking reviewed under the authority of this Agreement and, at its discretion, participate directly in any undertaking.
2. FHWA retains the responsibility for government-to-government consultation with Tribes, as defined in 36 CFR 800.16(m), and consistent with 36 CFR 800.2(c)(2) and 36 CFR 800.3(c-f).
3. Pursuant to 36 CFR 800.6 (a)(1), FHWA is responsible for notifying the ACHP of an adverse effect determination and offering the ACHP the opportunity to become a consulting party.
4. FHWA shall provide ACHP copies of any Memoranda of Agreement (MOA) developed for undertakings with adverse effects to historic properties.

5. FHWA shall be responsible for resolving disputes and objections pursuant to Stipulation XII of this Agreement.

B. TDOT Responsibilities

Under the authority of FHWA, TDOT may carry out the following steps with respect to undertakings covered by this Agreement. Delegation of these responsibilities is based on adequate and appropriate performance by TDOT as evaluated in monitoring by FHWA pursuant to Stipulation XI of this Agreement.

1. 36 CFR 800.3(a) Determine whether the undertaking is a type of activity that has the potential to cause effects on historic properties.
3. 36 CFR 800.3(e) Solicit public comment and involvement.
4. 36 CFR 800.3(f) Identify other consulting parties who should be invited to participate in the undertakings covered by this Agreement.
5. 36 CFR 800.4(a) Determine and document, in consultation with the SHPO, the scope of identification efforts including the undertaking's Area of Potential Effects (APE).
6. 36 CFR 800.4(b) and (c) Identify and evaluate historic properties within the APE in consultation with the SHPO, Tribes, and consulting parties (as appropriate).
7. 36 CFR 800.4(d)(1) and (2), In consultation with the SHPO, Tribes, and consulting parties (as appropriate) determine whether historic properties will be affected by the undertaking.
8. 36 CFR 800.5(a), In consultation with the SHPO, Tribes, and consulting parties (as appropriate), apply the criteria of adverse effect to determine if historic properties within the APE will be adversely affected by the undertaking.
9. 36 CFR 800.5(a)(3) Where alternatives under consideration consist of corridors or large land areas, or where access is restricted, TDOT may use a phased process in applying the criteria of adverse effect consistent with phased identification and evaluation efforts conducted pursuant to 36 CFR 800.4(b)(2).
10. 36 CFR 800.6 In consultation with FHWA, the SHPO, the ACHP (if it has chosen to participate), and any other consulting parties, TDOT will attempt to develop alternatives that avoid adversely affecting historic properties.

11. 36 CFR 800.6 If avoidance is not possible, TDOT will continue consultation with FHWA, the SHPO, the ACHP (if it has chosen to participate), and any other consulting party, to execute a memorandum of agreement to resolve any adverse effects.
12. Provide FHWA copies of all correspondence with the SHPO and Tribes sent out on its behalf.

C. ACHP Responsibilities

1. The ACHP will be notified of findings of adverse effect by FHWA and will be invited to participate in resolving the adverse effect of an undertaking in accordance to 36 CFR 800.6(a)(1). The Council will advise FHWA and all consulting parties whether it will participate within 15 days of receipt of notice or other request. Prior to entering the process, the Council will provide written notice to FHWA and the consulting parties that its decision to participate meets the criteria set forth in Appendix A to Part 800. The Council will also advise the FHWA of its decision to enter the process.
2. The ACHP will participate, in accordance to Stipulation XII, in the resolution of disputes that may occur through the implementation of this Agreement.

D. SHPO Responsibilities

1. The SHPO is responsible for responding to FHWA and TDOT requests according to the terms of this Agreement.
2. The SHPO will participate in site visits and meetings to discuss large or complex undertakings upon request by TDOT or FHWA, as staff time and resources permit.

V. CONSULTATION WITH TRIBES

- A. FHWA retains ultimate responsibility for government to government relationships and consultation with Tribes consistent with the requirements of 36 CFR 800.2(c)(2) and 36 CFR 800.3(f).
- B. FHWA will identify and maintain information regarding Tribes' counties of interest within the state of Tennessee.
- C. FHWA will plan consultations appropriate to the scale of the undertaking and will use to the extent possible existing procedures and mechanisms to fulfill the consultation requirements pursuant to 36 CFR 800.2(a)(4).

- D. FHWA shall ensure that consultation with Tribes is initiated as early as possible in the planning of the undertaking and maintained throughout the Section 106 review process so that Tribes are provided a reasonable opportunity to identify their concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate their views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.
- E. In accordance with 36 CFR 800.2(c)(ii)(A), FHWA, and TDOT working on behalf of FHWA, recognize and acknowledge that early identification and discussion of preservation issues and concerns about confidentiality of information on historic properties are keys to successful resolution and protection of historic properties.

VI. PARTICIPATION OF OTHER CONSULTING PARTIES AND THE PUBLIC

- A. Individuals and organizations with a demonstrated interest in an undertaking shall be invited to participate in the Section 106 process due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties.
 - 1. In consultation with the SHPO, FHWA, or TDOT working on the behalf of FHWA, shall identify individuals or organizations who may have an interest in the undertaking, provide them with information about the undertaking, and invite them in writing to participate in the Section 106 process pursuant to 36 CFR 800.3(f). Their participation in undertakings covered under this Agreement shall be governed by 36 CFR 800.3(f)(3).
 - 2. Written requests by other individuals, organizations, and agencies to become consulting parties will be evaluated on a case-by-case basis by TDOT and FHWA in consultation with the SHPO pursuant to 36 CFR 800.3(f)(3).
 - 3. Other consulting parties include, but are not limited to, affected landowners, land managing agencies, local governments, or historical societies.
- B. Public Involvement
 - 1. Public Involvement in planning and implementing undertakings covered by the Agreement is referenced in the TDOT Environmental Division's Public Involvement Guidance Document that provides guidance for identifying, informing, and involving the public in all stages of environmental review. The Public Involvement Guidance Document reiterates that the Section 106 public outreach will be consistent with 36 CFR 800.2.
 - 2. TDOT shall seek and consider the views of the public pursuant to 36 CFR 800.2(d)(1) in a manner that reflects the nature and complexity of the

undertaking and its effects on historic properties, and the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking.

3. TDOT will provide the public with information about an undertaking and its effects on historic properties and seek public comment and input pursuant to 36 CFR 800.2(d)(2).
4. TDOT may use its procedures for public involvement under the National Environmental Policy Act in lieu of that required by Section 106 of the National Historic Preservation Act, if adequate opportunities for public involvement are provided and consistent with 36 CFR 800.4.
5. TDOT shall plan to involve the public by identifying appropriate points in the Section 106 process for seeking public input and for notifying the public of proposed actions consistent with 36 CFR 800.2(d) and pursuant to 36 CFR 800.3(e).
6. Public involvement and the release of information to the public shall be consistent with 800.11(c)(1 and 3).
7. TDOT shall make FHWA and SHPO aware of any and all known public comments as they relate to the historic properties potentially affected by the proposed undertaking, including properties of religious and cultural significance to the Tribes.
8. For those actions that do not routinely require public review and comment (e.g., Unscreened and Screened Undertakings), appropriate public involvement should be based on the specifics of the situation and commensurate with the type and location of historic properties, and the undertaking's potential impacts on them.

VII. REVIEW OF SECTION 106 UNDERTAKINGS

A. Unscreened Undertakings

1. TDOT Qualified Staff determines that an undertaking meets the criteria necessary to be classified as an Unscreened Undertaking, as defined in Appendix A. Qualified Staff will document the decision and will concur that FHWA has fulfilled its statutory responsibilities under Section 106 and will require no consultation with the SHPO.
2. Unscreened Undertakings will be reviewed in their entirety and will not be segmented by activity or subject to differential review procedures.

3. Unscreened Undertakings will not be coordinated with the Tribes or public due to the nature and magnitude of such undertakings and their potential to affect historic properties, assuming such properties were present.

B. Screened Undertakings

1. TDOT Qualified Staff will determine that an undertaking meets the criteria necessary to be classified as a Screened Undertaking, as defined in Appendix B. Qualified Staff will document the decision and will concur that FHWA has fulfilled its statutory responsibilities under Section 106 and will not require consultation with the SHPO.
2. Screened Undertakings will be reviewed in their entirety and will not be segmented by activity or subject to differential review procedures.
3. Screened Undertakings will not be coordinated with the Tribes or public due to the nature and magnitude of such undertakings and their potential to affect historic properties, assuming such properties were present.
4. TDOT may add additional activities to Appendix B pursuant to the amendment process provided in Stipulation XIII.B of this Agreement.

C. Other Undertakings

1. For projects not listed in Appendices A and B, Qualified Staff shall follow the Section 106 process pursuant to 36 CFR 800.

VIII. POST-REVIEW DISCOVERIES

A. Unexpected Discoveries

1. If previously unidentified archaeological or historic resources, or unanticipated effects, are discovered after TDOT has completed its review of the undertaking, all activities that may affect the newly identified resources will cease, in accordance with TDOT's Standard Specifications for Road and Bridge Construction, Section 107.06, Federal Aid Provisions (human remains and burial sites), Section 203.04, General Construction Requirements (archaeological sites or artifacts) and Tennessee Code Annotated (TCA) §11-6-107, Discovery of sites, artifacts or human remains – Notice to division, contractors and authorities.
2. No further construction in the area of discovery or other activities that might affect the newly discovered resource will proceed until the requirements of

36 CFR 800.13 have been satisfied, including consultation with Tribes that may attach traditional cultural and religious significance to the discovered resource.

3. TDOT will consult with SHPO and Tribes, as appropriate, to record, document, and evaluate NRHP eligibility of the resource, assess the undertaking's effect on the resource, and develop a plan to avoid, minimize, or mitigate the adverse effects to eligible resources.
4. If neither the SHPO nor a Tribe files an objection within 72 hours of TDOT's plan for resolving adverse effects to an eligible resource, then TDOT may carry out the requirements of 36 CFR 800.13 on behalf of FHWA, and the ACHP does not need to be notified.

IX. IDENTIFICATION AND TREATMENT OF HUMAN REMAINS

- A. If human remains are identified prior to, during, or after construction, TDOT will develop a treatment plan in consultation with FHWA and the SHPO. If it is determined that the human remains are associated with a Native American archaeological site, TDOT and FHWA will consult with the Tribes prior to the development or execution of a treatment plan.
- B. All work conducted on human remains and abandoned cemeteries will comply with TCA §11-6-107, 116, and 119, TCA §46-4-101 through 104, TCA §46-8-101 through 103, and TCA §39-17-311 and 312.
- C. All human remains identified during the development of undertakings on Federal lands and that are determined to be Native American will be treated in accordance with the provisions of the Native American Graves Protection and Repatriation Act (NAGPRA), with implementing regulations at 43 C.F.R. § 10.4

X. CURATION

- A. Non-Federal Lands
 1. For undertakings that occur on non-federal land, FHWA, or TDOT working on behalf of FHWA, shall ensure that collections resulting from archaeological investigations conducted under this Agreement are curated in accordance with guidelines of the Tennessee Division of Archaeology, the Secretary of the Interior's Standards for Archaeological Documentation and 36 CFR Part 79, "*Curation of Federally-Owned and Administered Archaeological Collections*," or as stipulated in a Memorandum of Agreement executed pursuant to 36 CFR 800.6(b)(1)(iv).

B. Federal Lands

1. For undertakings, or portions thereof, that occur on federal land, FHWA, or TDOT working on behalf of FHWA, shall comply with the federal land-managing agency's curation policies. In lieu of agency specific curation policies, collections resulting from archaeological investigations occurring on federal lands and conducted under this Agreement shall be curated in accordance with 36 CFR Part 79, "*Curation of Federally-Owned and Administered Archaeological Collections*," or as stipulated in a Memorandum of Agreement executed pursuant to 36 CFR 800.6(b)(1)(iv).

XI. ADMINISTRATIVE STIPULATIONS

A. Annual Evaluation. TDOT will provide the SHPO and FHWA with the following:

1. A list in table form identifying all Unscreened undertakings processed under this Agreement from the previous calendar year and specifying project names, counties, and all findings pursuant to 36 CFR Part 800;
2. A list in table form identifying all Screened Undertakings for the previous calendar year. This table will include county, project names, and the response date that Qualified Staff used Appendix B.

B. Additional Assessment: If needed, FHWA will prepare, with TDOT and SHPO input, an assessment of effectiveness of the Agreement, including a discussion of concerns and recommendations for changes, if any.

XII. DISPUTE RESOLUTIONS

1. Should any signatory party object in writing to FHWA regarding the manner in which the terms of this Agreement are carried out, FHWA will immediately notify the other signatory parties of the objection and proceed to consult with the objecting party to resolve the objection. FHWA will honor the request of any signatory party to participate in the consultation and will take any comments provided by such parties into account. The FHWA shall establish a reasonable timeframe for such consultations.
2. Should any signatory party object to a TDOT or FHWA determination of eligibility, FHWA will submit the determination to the Keeper of the National Register of Historic Places for resolution.
3. If the objection is resolved through consultation, FHWA may authorize the disputed action to proceed in accordance with the terms of such resolution.

4. If after initiating such consultation, FHWA determines that the objection cannot be resolved through consultation, FHWA shall forward all documentation relevant to the objection to the ACHP and other signatory parties, including FHWA's proposed response to the objection. Within 30 days after receipt of all pertinent documentation, ACHP shall exercise one of the following options:
 1. Advise FHWA that ACHP concurs in FHWA's proposed response to the objection, whereupon FHWA will respond to the objection accordingly; or,
 2. Provide FHWA with recommendations, which FHWA shall take into account in reaching a final decision regarding its response to the objection; or,
 3. Notify FHWA that the objection will be referred for comment pursuant to 36 CFR 800.7(a)(4) and proceed to refer the objection for comment. In this event, FHWA shall ensure that the Agency Official is prepared to take the resulting comments into account in accordance with 36 CFR 800.7(c)(4).
5. Should ACHP not exercise one of the foregoing options within 30 days after receipt of all pertinent documentation, FHWA may assume ACHP's concurrence in its proposed response to the objection.
6. FHWA shall take into account any ACHP recommendation or comment and any comments from the other signatory parties to this Agreement in reaching a final decision regarding the objection. FHWA's responsibility to carry out all actions under this Agreement that are not the subjects of the objection shall remain unchanged.
7. FHWA shall provide all other signatory parties to this Agreement with a written copy of its final decision regarding any objection addressed pursuant to this Stipulation.
8. FHWA may authorize any action subject to objection under this Stipulation to proceed, provided the objection has been resolved in accordance with the terms of this Stipulation.
9. At any time during implementation of the terms of this Agreement, should any consulting party or member of the public raise an objection in writing pertaining to such implementation to any signatory party to this Agreement, that signatory party shall immediately notify FHWA. FHWA shall immediately notify the other signatory parties in writing of the objection. Any signatory party may choose to comment on the objection to FHWA. FHWA shall establish a reasonable time frame for this comment period. FHWA shall consider the objection, and in reaching its decision, FHWA will take all comments from the other parties into account. Within 15 days following closure of the comment period, FHWA will render a decision regarding the objection and respond to the objecting party. FHWA will

promptly notify the other parties of its decision in writing, including a copy of the response to the objecting party. FHWA's decision regarding resolution of the objection will be final. Following the issuance of its final decision, FHWA may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

XIII. AMENDMENT

- A. Any signatory party to this Agreement may at any time propose amendments, whereupon all signatory parties shall consult to consider such amendment. This Agreement may be amended only upon written concurrence of all signatory parties.
- B. Once written concurrence is received, a copy of the amended Programmatic Agreement will be circulated to the signatories for signing, such that each signatory will receive a copy. The amended document will become effective on the date that the final signatory has signed, which shall be ACHP.
- C. All appendices to this Agreement may be individually amended through consultation of the signatory parties without requiring amendment of the Agreement, unless the signatory parties through such consultation decide otherwise.

XIV. TERMINATION

- A. Any signatory party may terminate this agreement. If this Agreement is not amended as provided for in Stipulation XIII, or if any signatory party proposes termination of this Agreement for other reasons, the party proposing termination shall notify the other signatory parties in writing, explain the reasons for proposing termination, and consult with the other parties for no more than 30 days to seek alternatives to termination.
- B. Should such consultation result in an agreement on an alternative to termination, the signatory parties shall proceed in accordance with that agreement.
- C. Should such consultation fail, the signatory party proposing termination may terminate this Agreement by promptly notifying the other parties in writing.
- D. Should this Agreement be terminated, and beginning with the date of termination, FHWA shall ensure that until and unless a new Agreement is executed for the actions covered by this Agreement, such undertakings shall be reviewed individually in accordance with 36 CFR 800 Subpart B.

XV. CONFIDENTIALITY

- A. All parties to this Agreement acknowledge that information about historic properties, potential historic properties, or properties considered historic for

purposes of this Agreement are or may be subject to the provisions of Section 304 of NHPA. Section 304 allows FHWA to withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if FHWA and TDOT determine that disclosure may 1) cause a significant invasion of privacy; 2) risk harm to the historic resource; or 3) impede the use of a traditional religious site by practitioners. Having so acknowledged, all parties to this Agreement will ensure that all actions and documentation prescribed by this Agreement are, where necessary, consistent with the requirements of Section 304 of the NHPA.

- B. Pursuant to Tennessee Code Annotated 11-1-102(c)(4), the Tennessee Division of Archaeology may withhold the specific location of archaeological sites or artifacts if it is determined that disclosure of such records would create a substantial risk of damage to or destruction of either the historical value of such site or artifact or private property.

XVI. DURATION OF AGREEMENT

- A. This Agreement shall remain in effect for a period of five (5) years after the date it takes effect, unless it is terminated prior to that time. At least ninety days prior to the conclusion of the five-year period, FHWA will notify all parties in writing. If there are no objections from consulting parties, an amendment with signature pages will be circulated to all signatories and, once all signatories have signed the extension amendment, the Agreement shall then be extended for an additional five years.
- B. If any party objects to extending the Agreement, or proposes amendments, FHWA will consult with the parties to consider amendments or other actions to avoid termination.

Execution and implementation of this agreement provides evidence that FHWA has delegated certain Section 106 responsibilities to TDOT, and has afforded ACHP a reasonable opportunity to comment on the Program and its individual undertakings in Tennessee, that FHWA has taken into account the effects of the program and its individual undertakings on historic properties, and that FHWA has complied with Section 106 of the NHPA and 36 CFR 800 for the Program and its individual undertakings.

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THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Signatories:

Federal Highway Administration

By: _____ Date: _____
Pamela M. Kordenbrock, Division Administrator

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Signatories:

State Historic Preservation Officer

By: _____
E. Patrick McIntyre, Jr., Executive Director and SHPO

Date: _____

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REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Signatories:

Advisory Council on Historic Preservation

By: _____
Aimee K. Jorjani, Chairman

Date: _____

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Invited Signatory:

Tennessee Department of Transportation

By: _____
Clay Bright, Commissioner

Date: _____

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Concurring Party:

Absentee-Shawnee Tribe of Indians in Oklahoma

By: _____ Date: _____

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Concurring Party:

Cherokee Nation

By: _____ Date: _____

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Concurring Party:

The Chickasaw Nation

By: _____ Date: _____

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THE TENNESSEE DEPARTMENT OF TRANSPORTATION
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Concurring Party:

Eastern Band of Cherokee Indians

By: _____ Date: _____

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PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE TENNESSEE STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

Eastern Shawnee Tribe of Oklahoma

By: _____ Date: _____

DRAFT

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE TENNESSEE STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

Kialegee Tribal Town

By: _____ Date: _____

DRAFT

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE TENNESSEE STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

The Muscogee (Creek) Nation

By: _____ Date: _____

DRAFT

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE TENNESSEE STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

Poarch Band of Creeks

By: _____ Date: _____

DRAFT

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE TENNESSEE STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

The Quapaw Tribe of Indians

By: _____ Date: _____

DRAFT

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE TENNESSEE STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

Shawnee Tribe

By: _____ Date: _____

DRAFT

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE TENNESSEE STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

Thlopthlocco Tribal Town

By: _____ Date: _____

DRAFT

PROGRAMMATIC AGREEMENT AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE TENNESSEE STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE TENNESSEE DEPARTMENT OF TRANSPORTATION
REGARDING THE FEDERAL-AID HIGHWAY PROGRAM IN TENNESSEE

Concurring Party:

United Keetoowah Band of Cherokee Indians in Oklahoma

By: _____ Date: _____

DRAFT

Appendix A
Unscreened Undertakings not requiring TN-SHPO Review

TDOT, TN-SHPO, and FHWA have jointly concurred that the following list describes activities that have minimal potential to cause effects to historic properties. Based on their past experience with similar actions, the signatories agree that projects limited to activities listed in Appendix A have no appreciable potential to affect historic properties (36 CFR 800.3 (a)(1)). These projects are stand-alone transportation activities, based on the signatories' past experience with similar actions, will not result in any significant impacts to the human or natural environment.

1. Activities that do not involve construction or ground disturbance, such as planning, preliminary engineering, training, technical studies, non-invasive inspections or assessments, educational programs, development of educational/interpretive information and non-infrastructure programs, capital investments that do not involve ground-disturbance or that involve purchase of vehicles, equipment, materials or services that can cause ground disturbance, funding, marketing and lease renewals provided that such renewals do not allow for changes in land use or would facilitate ground disturbing activities.

Appendix B

Screened Undertakings Not Requiring TN-SHPO Review

Projects limited to activities listed in Appendix B require internal review by Qualified Staff to determine whether a project including the listed activities meets all of the terms and conditions in Appendix B and that no particular circumstances exist that would call for additional review. All activities listed in Appendix B are being performed within existing, previously disturbed right-of-way. Should the project activities fall outside existing, previously disturbed right-of-way, the project will be processed in the “Other Undertaking” category. If no such circumstances exist, Qualified Staff will document the finding that the project does not require any further review, will document the project file as appropriate, and provide an annual list of projects to the TN-SHPO and FHWA.

1. Modernization of a highway by resurfacing, restoration, rehabilitation, reconstruction, or preventative maintenance of pavement.
2. General highway maintenance and repair, including filling potholes, crack sealing, joint grinding, milling, and resurfacing in kind.
3. Pavement marking including striping, lane designations, and raised markings.
4. Channelizing divisional refuge islands without increasing total pavement width.
5. Pavement or installation of depressed curbs at existing driveways.
6. Conversion of existing paved medians to turning lanes.
7. Installation of rumble strips on existing shoulders.
8. Construction of pavement test areas on an existing roadway.
9. Modification of existing access control in divided highways including but not limited to highway patrol cut-throughs and turn-arounds.
10. In-kind replacement or repair of existing curbs and gutters, sidewalks, Americans with Disabilities Act of 1990 (ADA) ramps and other features, fences, driveways and installation, replacement, or repair of street furniture.
11. In kind repair, replacement, or upgrading of signals, signs, and other traffic control devices.
12. Extension of acceleration/deceleration lanes on a controlled access highway.
13. Construction of turning and auxiliary lanes (e.g., truck climbing, acceleration and deceleration lanes) and shoulder widening.
14. Installation, restoration, replacement, or upgrading of under-deck lighting.
15. Installation, restoration, replacement, or upgrading of lighting systems including conventional, high-mast, and offset lighting systems.
16. Installation of highway safety improvements including breakaway devices, shielding systems, reflective object markers, delineators, raised/snow plowable pavement markers and shoulder scoring.
17. Repairs to bridges that are not listed in or eligible for listing in the National Register that include but are not limited to bridge painting, cleaning, and in-kind replacement or repair of existing drainage system elements including plugging pipe, installation of stone riprap, rock-and-wire (gabion) mattress, concrete slabs in the waterways and other bridge scour counter-measures, milling and in-kind resurfacing of bridge decks, maintenance, deck patching, and replacement or repair of bridge joints, bridge railings, and guard rails, and seismic retrofitting a bridge.

18. Removal, relocation, or mitigation of fixed object hazards such as utility poles, non-breakaway signs, pipes, headwalls, boulders, shrubbery, and naturally occurring vegetation (including trees), unless vegetation removal results in an adverse visual effect on a historic resource.
19. Storm damage repairs, such as culvert cleaning or repair, shoulder reconstruction, or slide or debris removal.
20. Repair, replacement, or upgrade of existing highway safety hardware including guardrail, end terminals, attenuators, median barriers, cable barriers, and glare screens.
21. Installation of new cable barrier in the median of a divided highway.
22. Repair, replace, or upgrade the crossing surface between the railroad tracks and ten feet outside the railroad tracks.
23. Addition of fill material to expand existing fill slopes.
24. Repair, replace, or upgrade existing Bungalow Boxes/Signal Control Boxes.
25. Repair, replace, reset, or upgrade of highway safety improvements including automatic flashing lights and gates, warning bells, and constant warning time track circuitry (train detection to activate lights and gates).
26. Structures that are less than or equal to twenty feet in length, are repaired or replaced in the same location and may include work to grade, drain, base, and pave the area immediately surrounding the small structure.
27. Repair, replace, reset or upgrade of electronic variable message signs, traffic sensors, closed circuit television cameras, and highway advisory radio systems including remote controlled flashing signs support structures.
28. Installation of ramp metering systems and computer links to monitor and control traffic volumes throughout the roadway system.
29. Installation and operation of Intelligent Transportation System elements such as cameras, weather stations, and traffic counters.
30. Herbicidal spraying.
31. Mowing or brush removal/trimming.
32. Improvements to existing TDOT-owned maintenance facilities that are less than 50 years old.
33. All work within interchanges, including realignment of on and off ramps, and within medians of divided highways.
34. In-kind replacement or repair, slip-lining, or extension of culverts and other drainage structures which do not extend beyond or deeper than previous construction limits.
35. Erosion control measures that are affixed to or that otherwise occur on an existing structure (e.g., bridge or overpass) or within the prism of an existing roadway.
36. Hazardous waste removal and disposal constituting a public hazard, and which requires immediate removal.
37. Acquisition of scenic easements.
38. Inventory, control, or removal of outdoor advertising.
39. Bridge re-striping on four-lane roadways that include median cross-over lanes built to redirect traffic during construction but which are then removed after construction is completed.
40. At or above grade improvements to existing rest areas, park and ride lots, and truck weigh stations that are less than 50 years old.

41. Installation, in-kind repair, replacement, or upgrading of flashing signals or lights, traffic calming devices (lights, signs, and speed bumps), medians, crosswalks (including those constructed with pavers), or bicycle racks and lockers.
42. Lease, licensing, or disposal of excess right-of-way that has been previously surveyed for architectural/historical within the last ten years and for archaeological resources within the last twenty years as part of an earlier TDOT Section 106 survey and where the results of that study found that the requested parcel(s) of excess right-of-way does not contain NRHP listed or eligible historic properties, or potentially eligible archaeological sites and the SHPO concurred with TDOT's findings
43. Lease, licensing, or disposal of excess right-of-way that has been subjected to 100 percent disturbance through previous road construction, development, or changes in land use that render its potential for containing NRHP listed or eligible historic properties, or potentially eligible archaeological sites, moot.
44. Any Section 106 undertaking that would ordinarily be covered by the *Section 106 Exemption Regarding Effects to the Interstate Highway System, ACHP Program Comment to Exempt Consideration of Effects to Rail Properties within Rail Rights-of-Way, and/or ACHP Program Comment on Post-1945 Concrete and Steel Bridges*.