

SECTION 9

# Native American Consultation Programmatic Agreement

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**DRAFT**

**PROGRAMMATIC AGREEMENT**

**Between**

**FEDERAL HIGHWAY ADMINISTRATION  
COLORADO DEPARTMENT OF TRANSPORTATION  
COLORADO STATE HISTORIC PRESERVATION OFFICE**

**And the Federally Recognized Tribes**

**CHEYENNE AND ARAPAHO TRIBES OF OKLAHOMA  
KIOWA TRIBE OF OKLAHOMA  
NORTHERN CHEYENNE TRIBE  
PAWNEE NATION OF OKLAHOMA  
SOUTHERN UTE INDIAN TRIBE**

**Regarding the**

**SECTION 106 TRIBAL CONSULTATION PROCESS FOR THE INTERSTATE 25 CORRIDOR  
ENVIRONMENTAL ASSESSMENT, EL PASO COUNTY, COLORADO**

**Whereas** 36 CFR Part 800.16, Protection of Historic Properties, provides definitions and procedures for consultation between federal agencies and Native American tribes for federal undertakings; and

**Whereas** the Federal Highway Administration (FHWA), as lead federal agency, is responsible for compliance with the provisions of the National Environmental Policy Act (NEPA) and Section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations; and

**Whereas** FHWA Colorado Division and the Colorado Department of Transportation (CDOT) are engaged in planning and environmental analysis for transportation improvements to Interstate 25 between Monument (State Highway 105) and Widefield (State Highway 16) in El Paso County, Colorado (“I-25 Corridor”), a distance of approximately 29 miles, to be documented in an Environmental Assessment (EA) and a subsequent Decision Document; and

**Whereas** FHWA and CDOT have determined that proposed transportation improvements described in the EA and Decision Document constitute an undertaking that will or may have an effect upon historic properties included in or eligible for listing in the National Register of Historic Places, and/or upon localities of cultural or religious significance to Native Americans; and

**Whereas** FHWA and CDOT have established a government-to-government relationship with the above-listed tribes for the purpose of facilitating Section 106 consultation within the Area of Potential Effect (APE) identified in the EA; and

**Whereas** the consulting tribes and principal agencies have agreed that a Programmatic Agreement (PA) is appropriate and necessary in order to outline specific protocol for tribal consultation within the I-25 Corridor for all subsequent transportation improvement projects specifically discussed in the EA; now

**Therefore** FHWA, CDOT, the State Historic Preservation Officer (SHPO) and the federally recognized signatory Tribes do hereby agree to the following stipulations to satisfy Section 106 responsibilities for all aspects of Native American consultation for future undertakings within the Interstate 25 Corridor APE:

**1. Agreement Period.** This agreement becomes effective upon the signature of the Federal and State agencies and any Signatory Tribes, but its provisions will not affect any party until and unless that party signs the PA. The PA shall remain in effect until all transportation improvements within the I-25 Corridor Area of Potential Effect, as discussed in the EA, have been successfully completed. The draft PA will be included as part of the EA, and the final PA will become part, either directly or by reference, of the resulting Decision Document.

**2. Consultation.** In correspondence dated February 12, 2001, FHWA delegated to CDOT the coordination and facilitation of all Section 106 tribal consultation for federal-aid transportation projects undertaken by CDOT (per 36 CFR Part 800.2(a)). CDOT will provide FHWA with all documentation necessary to fulfill NEPA and Section 106 requirements, as well as those outlined in Executive Order 13007, *Indian Sacred Sites*, as part of its environmental compliance process.

CDOT will provide general information to tribal governments for various stages of project development within the EA corridor that do not involve localities of cultural and religious significance to a tribe.

Consultation is ongoing between the agencies and the signatory Tribes, and serves to facilitate interaction between the principal parties to ensure that tribal concerns are appropriately and effectively addressed.

**3. Point of Contact.**

- a. On behalf of FHWA, the Manager of the Cultural Resource Section in the CDOT Environmental Programs Branch will serve as the primary point of contact for all aspects of the tribal consultation process.
- b. The FHWA point of contact for correspondence shall be the Colorado Division Environmental Program Manager, located in Lakewood, Colorado. An organizational chart showing pertinent contact information for FHWA and CDOT is included as Attachment 1.
- c. On behalf of each signatory Tribe, the tribal chairman or chairwoman or his/her designee shall be the point of contact.
- d. FHWA will notify all parties to this agreement in writing should changes to this arrangement take effect.

**4. Project Specific Consultation.** For each transportation undertaking within the I-25 Corridor as discussed in the EA and Decision Document, CDOT shall consult with the signatory Tribes as early as practicable in the project planning, design and environmental document development process by notifying the Tribes in writing of the following:

- a. The exact location of the undertaking.
- b. The nature and extent of the proposed project (i.e., highway widening, new interchange construction) and its proposed impact on the environment.
- c. Results obtained from the Section 106 cultural resources inventory, including descriptions of, and National Register eligibility determinations for, sites affiliated with Native American occupation or use.

- d. The potential of the project to impact National Register-eligible sites and/or those localities of cultural or religious significance to any of the signatory Tribes.
- e. As early in the project planning and development process as possible, the signatory Tribes shall, at their discretion, notify CDOT and FHWA of the presence of specific sites or areas deemed by them as Traditional Cultural Properties (TCPs) and/or Sacred Sites. Such sites will be identified according to Executive Order 13007, *Indian Sacred Sites*, as well as individual Tribes' traditions, processes and procedures, and evaluated for significance by the agencies according to National Register Technical Bulletin 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties*, and other means, as appropriate.
- f. To the extent allowed by law, the signatory agencies shall ensure that sensitive information provided by the Tribes will be protected and will not be released in a public forum without the express written consent of the pertinent Tribe(s). Each signatory Tribe also commits to keep the locations of identified sensitive sites or places confidential, even if such places are not considered of importance by that Tribe.

**5. Timing.** Any signatory Tribe with an interest in a specific undertaking shall provide CDOT with written notification to that effect within sixty (60) days of receipt of CDOT's request for review and comment. Failure of a signatory Tribe to respond within the 60-day period will not prevent the Tribe from entering consultation at a later point. However, if the Tribe enters the consultation process after the initial 60-day period CDOT and FHWA shall continue the consultation without being required to reconsider previous determinations of findings, unless significant new information is introduced.

**6. Treatment.** CDOT shall provide the signatory Tribes an opportunity to comment on CDOT's treatment plan for any sites with cultural and religious significance to the Tribes, as follows:

- a. Wherever feasible, the historic property will be avoided by the proposed transportation activity and preserved in place.
- b. Where avoidance is not a feasible alternative and this determination has been documented accordingly, treatment shall be carried out in accordance with the Secretary of the Interior's Standards and Guidelines for Archaeology and Historic Preservation, coupled with guidelines established by the Colorado Office of Archaeology and Historic Preservation.
- c. For historic properties of cultural and religious significance to signatory Tribes located on lands administered by the U.S. Air Force Academy (USAFA), which is bisected by the I-25 Corridor, Section 106 consultation will be facilitated by that agency, in consultation with FHWA and CDOT, unless otherwise stipulated. All treatment provisions specific to USAFA will be followed, as appropriate.

In the event that one or more signatory Tribes objects to the treatment plan within sixty (60) days of receipt of the proposed treatment plan, CDOT shall review the documentation provided by the Tribe to support its objection and make a reasoned response to the Tribe. If the Tribe(s) continues to object, CDOT shall provide FHWA with a copy of the documentation along with copies of the results of consultation with all parties. FHWA shall review this documentation and:

- d. Consult with the Tribe(s) to resolve the objection, or pursue consultation with CDOT, the State Historic Preservation Officer, and, if appropriate, the Advisory Council on Historic Preservation toward the same end; and
- e. Notify all consulting parties of the outcome of negotiations.

In the event one or more Tribes objects to a treatment plan developed under the lead of USAFA, USAFA will be responsible for resolving the objection in accordance with the procedures and requirements of the USAFA, in consultation with FHWA, CDOT and other parties it deems appropriate.

**7. Construction Monitoring and Emergency Discoveries.** FHWA and CDOT shall establish a construction monitoring program for I-25 Corridor construction projects specifically and only for previously identified areas of cultural and religious significance to the signatory Tribes. The monitoring program will proceed according to the following process:

- a. If a Tribal monitor is assigned, that individual will coordinate with FHWA and CDOT in assessing the required level of effort. CDOT will coordinate the tribal monitor, including appropriate payments thereto, according to the CDOT compensation policy established for these types of services.
- b. Prior to commencement of a monitoring program, the signatory Tribes shall detail in writing the nature of artifacts or objects of cultural and religious significance. Any discoveries of such artifacts or objects made by the monitor shall be reported immediately to the CDOT Engineer and the CDOT Staff Archaeologist/Cultural Resource Manager. Section 107.23 of CDOT's *Standard Specifications for Road and Bridge Construction* (Attachment 2), which outlines CDOT's policies for emergency discoveries during construction, are incorporated into this agreement by reference. These procedures are consistent with the process outlined for emergency situations under 36 CFR 800.12.
- c. Construction shall cease in the area of the find until the nature and significance of the discovery has been ascertained by all parties, and appropriate consultation involving the monitoring Tribe(s), CDOT, FHWA, the State Historic Preservation Officer (SHPO), and any other pertinent entities or agencies is completed.
- d. Construction will not resume in the area of the discovery until the lead federal agency, in consultation with the signatory Tribes, is satisfied that the find will be avoided or adverse effects mitigated.
- e. At the conclusion of this process, the CDOT Cultural Resource Manager/Staff Archaeologist will provide the Engineer with authorization to resume construction.

**8. Native American Graves.** In the event that Native American burials are anticipated or inadvertently discovered during controlled archaeological excavations or any phase of construction within the I-25 Corridor APE, CDOT shall seek to avoid direct and indirect impacts to the site(s) as the primary mitigation alternative. Treatment of sites containing human remains, funerary objects, sacred objects or objects of cultural patrimony shall proceed according to applicable law, as follows:

- a. Such discovery on lands owned and administered by the State of Colorado (assuming federal transportation funds are involved in the undertaking) or USAFA, in addition to temporary easements acquired by CDOT for construction purposes, shall be subject to the provisions of the Colorado Historical, Prehistorical, and Archaeological Resources Act (CRS 24-80-40) and the Native American Graves Protection and Repatriation Act (NAGPRA; 43 CFR 10), as appropriate, and any agency-specific rules and procedures for handling such matters. In the case of federal lands under the jurisdiction of USAFA, CDOT and FHWA will defer all tribal consultation and decisions in this regard to that agency unless stipulated otherwise.
- b. The consulting signatory Tribe(s) shall respond to CDOT in writing within four (4) working days of notification of the discovery regarding the specific nature and extent of their interest in further consultation.

If it is determined that avoidance of a burial site on lands administered by the State of Colorado is not a feasible alternative, CDOT shall:

- c. Develop and implement a treatment plan in accord with Article 6 above, following the permitting, excavation and non-destructive analysis procedures stipulated by the Colorado Office of Archaeology and Historic Preservation.
- d. Coordinate a mutually agreeable plan with the consulting signatory Tribe(s) for Native American monitoring of the disinterment and the performance of ceremonies, rituals or other observances desired by the consulting Tribes before, during and/or after the excavation.

During the excavation of any Native American graves, CDOT shall take measures to ensure:

- e. The respectful, dignified treatment of burials at all times during the disinterment and analysis process.
- f. Security for the site and the grave(s) to prevent vandalism when archaeologists and/or Native American representatives are not present.
- g. That no photographs are taken of human remains or open graves other than photo-documentation needed for recordation of the excavation.
- h. That media exposure to the burial site is minimized, including but not limited to keeping the site location confidential.
- i. Off-site security for exhumed burials and funerary objects during and after excavation.

At the completion of the excavations, analysis, and reporting required by the treatment plan and the State of Colorado Archaeological Permit, CDOT and FHWA shall:

- j. Transfer custody of the human remains and all associated objects to the Office of the State Archaeologist, Colorado Historical Society, for the purpose of repatriation to the appropriate tribe, as mandated by law.

**9. Amendment and Termination.** Any party to this consultation agreement may request that it be amended, whereupon the parties shall consult to consider such amendment. Any party to this agreement may terminate its participation by providing sixty (60) days' written notice to the other parties, provided that the parties will consult during the period prior to the termination to seek agreement on amendments or other actions that would avoid termination.

**10. Severability.** In the event any one or more of the provisions contained in this agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision thereof and this agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained herein.

Nothing in this Agreement shall preclude federal agencies or federal officials from fulfilling their responsibilities under the National Environmental Policy Act (NEPA) as codified in 42 USC Section 4321 et seq., or any of NEPA's implementing regulations.

**11. Signatory Warranty.** The undersigned signatories represent and warrant that each has full and complete authority to enter into this contract on behalf of their respective organizations. These representations and warranties are made for the purpose of inducing the parties to enter into this contract.

**12. Non-Funding Stipulation.** This instrument is neither a fiscal nor a funds obligation document. Any endeavor or transfer of anything of value involving reimbursement of funds between parties to this instrument will be handled in accordance with applicable laws, regulations, and procedures, including those for Government procurement and printing. Such endeavors will be outlined in separate agreements that shall be made in writing by representatives of the parties and shall be independently authorized by appropriate statutory authority. This instrument does not provide such authority. Specifically, this instrument does not establish authority for noncompetitive award to the cooperator of any contract or other agreement. Any contract or agreement for training or other services must fully comply with all applicable requirements for competition.

**AGENCIES**

FEDERAL HIGHWAY ADMINISTRATION

By: \_\_\_\_\_ Date: \_\_\_\_\_  
William C. Jones, Division Administrator

COLORADO DEPARTMENT OF TRANSPORTATION

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Tom Norton, Executive Director

COLORADO STATE HISTORIC PRESERVATION OFFICE

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Georgianna Contiguglia, State Historic Preservation Officer

**SIGNATORY TRIBES**

CHEYENNE AND ARAPAHO TRIBES OF OKLAHOMA

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Robert Tabor, Chairman

KIOWA TRIBE OF OKLAHOMA

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Clifford McKenzie, Chairman

NORTHERN CHEYENNE TRIBE

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Geri Small, Chairwoman

PAWNEE NATION OF OKLAHOMA

By: \_\_\_\_\_ Date: \_\_\_\_\_  
George E. Howell, President

SOUTHERN UTE INDIAN TRIBE

By: \_\_\_\_\_ Date: \_\_\_\_\_  
Howard Richards, Chairman