

APPENDIX M

PROGRAMMATIC AGREEMENT

PROGRAMMATIC AGREEMENT
AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT
AND
THE ARKANSAS STATE HISTORIC PRESERVATION OFFICER,
REGARDING
THE CONSTRUCTION OF AHTD JOB NUMBER R60101
FAP NUMBER DPI-OI00 (1)
HIGHWAY 67 – I-40 WEST
PULASKI COUNTY, ARKANSAS

WHEREAS, the Federal Highway Administration (FHWA) has determined that proposed construction of the western segment of the North Belt Freeway between Highway 67 and I-40 West (the Project) in Pulaski County, Arkansas is necessary to serve the transportation needs of central Arkansas to improve traffic flow, safety, and capacity in the Project area; and

WHEREAS, a Preferred Alternative for the Project was identified in the Supplemental Draft Environmental Impact Statement based on the review of records regarding previously recorded archeological sites and historic properties, a reconnaissance of high probability areas, and an architectural resources survey within the area of potential effect (APE) of alternative routes; and

WHEREAS, the FHWA has determined that the Project may have an effect on properties that are eligible for inclusion in the National Register of Historic Places (National Register) and in accordance with 36 CFR Part 800 *Protection of Historic Resources*, regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. 470f), as amended, must address these effects; and

WHEREAS, an architectural survey of the Preferred Alternative has been completed and all structures 50 years old or older have been identified and evaluated by FHWA in consultation with the Arkansas State Historic Preservation Officer (SHPO). Six structures (Structure Q, EE, FF, KK, NN and XXX) and five contributing structural elements (A, C-F) associated with the Camp Robinson Native Stone Historic District have been determined eligible for inclusion in the National Register; and

WHEREAS, Structures Q, EE, FF, KK and NN are outside of the APE and will not be affected by the proposed undertaking; one structure (XXX) and five structural elements (A, C-F) associated with the Camp Robinson Native Stone Historic District are within the APE and will likely be destroyed by project construction; and

WHEREAS, all of these historic properties (Structure XXX and structural elements A, CF) are contained within Camp Robinson where the Preferred Alternative is restricted due to future Camp operations. A FHWA Section 4(f) Evaluation regarding these resources

revealed no feasible and prudent avoidance alternative. All of these historic properties have been documented to the Secretary of the Interior's Standards and the SHPO has concurred that the documentation is sufficient to resolve the adverse effect of the proposed undertaking on them. No further assessment is necessary regarding architectural resources along the Preferred Alignment; and

WHEREAS, a Phase I archeological survey has not been completed for the entire project area due to property access issues. Records checks and previous survey work along sections of the route have resulted in the identification of 15 known archeological sites (3PU343, 3PU344, 3PU349, 3PU354, 3PU355, 3PU381, 3PU382, 3PU548, 3PU549, 3PU585, 3PU572, 3PU661, 3PU684, 3PU685 and 3PU789) and 10 unrecorded archeological components associated with ineligible standing structures, within or very close to the APE. Of these, 10 sites (3PU343, 3PU344, 3PU349, 3PU354, 3PU355, 3PU381, 3PU382, 3PU548, 3PU684, and 3PU572) have been evaluated during previous surveys and found to be ineligible for nomination to the National Register; five sites (3PU549, 3PU585, 3PU661, 3PU685 and 3PU789) have not been evaluated nor have any of the archeological components associated with the 10 ineligible standing structures. None of the archeological sites identified to date appear to contain elements that would warrant preservation in place or that would otherwise necessitate a FHWA Section 4(f) Evaluation. Other undiscovered archeological sites could be present within the APE; and

WHEREAS, the Preferred Alternative crosses a section of the Bell Route of the Trail of Tears and a review of the National Park Service Comprehensive Management and Use Plan for the Trail of Tears, coordination with the National Park Service Long Distances Trails Group, a records check of the site files, and a survey of the crossing has not identified any segments of intact roadbed, standing structures, archeological sites or other elements that might be associated with the Trail; and

WHEREAS, the FHWA has initiated consultation regarding the project and the Trail crossing with representatives of the Caddo Nation of Oklahoma, the Cherokee Nation of Oklahoma, the Chickasaw Nation, the Choctaw Nation of Oklahoma, the Muskogee (Creek) Nation of Oklahoma, the Alabama-Quassarte Tribal Town, the Kialegee Tribal Town, the Thlopthlocco Tribal Town, the United Keetoowah Band of Cherokee Indians, the Mississippi Band of Choctaw Indians, the Osage Nation, the Quapaw Tribe of Oklahoma, the Seminole Nation of Oklahoma, and the Tunica-Biloxi Tribe of Louisiana; and

WHEREAS, all identification, evaluation and reporting efforts have and shall comply with the Secretary of the Interior's *Standards and Guidelines for Archeology and Historic Preservation* (48 FR 44716-39), *A State Plan for the Conservation of Archeological Resources in Arkansas* (Davis ed. 1994) and for the areas of the project within the Arkansas Army National Guard's Camp Robinson, the *Integrated Cultural Resources Management Plan for Installations of the Arkansas Army National Guard* (EEM, Inc. 2007); and

NOW, THEREFORE, the signatories agree that the Project shall be implemented in accordance with the following stipulations in order to take into account the effect of the Project on historic properties.

STIPULATIONS

The FHWA will ensure that the following stipulations are carried out prior to taking any action that could have an effect on properties listed in or considered eligible to the National Register.

I. AREA OF POTENTIAL EFFECT

The Area of Potential Effect is defined as the Preferred Alternative as identified in the Project's Final Environmental Impact Statement (2008). Final project design is not complete but conceptual plans based on a 300-foot wide roadway corridor with necessary expansion at the interchange locations have been developed and were used to estimate Project impacts. Potential Project impacts were determined by comparing the proximity of the resources identified with the conceptual design. Should the APE change, the FHWA will ensure that any areas requiring additional survey will follow all appropriate identification, evaluation and reporting guidelines as outlined in the Secretary of the Interior's *Standards and Guidelines for Archeology and Historic Preservation* (48 FR 44716-39) and *A State Plan for the Conservation of Archeological Resources in Arkansas*.

II. ARCHITECTURAL RESOURCES

- A. Architectural Resources are defined as structural features or elements of archeological sites that consist of historic buildings, structures, bridges, objects and districts.
- B. An architectural survey of the Project area has been completed and a total of 77 structures 50 years old or older were identified during project development. The results of the architectural survey were documented in a Request for Technical Assistance and the SHPO has reviewed the document and has concurred with the findings and recommendations. Of the 77 structures identified, the FHWA in consultation with the SHPO determined that six of these structures (Structures Q, EE, FF, KK, NN and XXX) were eligible for inclusion in the National Register; 71 were determined to be ineligible. In addition to these structures, five structural elements (A, C-F) that are part of the previously recorded Camp Robinson Native Stone Historic District have also been identified. These consist of sections of a stone walkway and steps, a stone retaining wall and stone culvert all of which are considered as elements that contribute to the eligibility of the District. Structure XXX and five structural elements (A, C-F) associated with the Camp Robinson Native Stone Historic District are within the APE and will likely be destroyed by construction of the Preferred Alternative. All of these properties are owned by Camp Robinson. Due to anticipated plans for future Camp operations, the options for avoidance are extremely limited. A FHWA Section 4(f) Evaluation revealed no feasible and prudent avoidance alternative. Architectural documentation meeting the Secretary of the Interior's standards has been completed for all of these historic properties (Structure XXX and Structural Elements A, C-F). The SHPO has concurred that the documentation is sufficient to adequately resolve the

anticipated adverse effect that construction of the Preferred Alternative will have on them. The other five eligible structures (Structures Q, EE, FF, KK and NN are not within the APE of the Preferred Alternative and none of them will be affected by construction of the Project. Ten ineligible structures (Structures MMM - VVV) fall within the APE; the remaining 61 are outside the APE and are not expected to be affected by Project construction. No additional work regarding architectural resources is anticipated within the APE. When property access is granted, the identification, documentation and evaluation of any associated archeological components will be carried out as outlined below in Stipulation IIIA(1.). Results of the architectural survey, including the RTA, architectural documentation, and all associated SHPO correspondence will be included in a forthcoming Phase I report.

III. ARCHEOLOGICAL RESOURCES

- A. The AHTD conducted archeological surveys of two previous North Belt alternatives. In addition, there have been some overlapping surveys conducted in Camp Robinson by Archeological Assessments Inc., URS Corporation, and Parsons Inc. Comparisons of the previously surveyed areas with the APE show that about 65% of the Preferred Alternative has received some level of archeological survey coverage. The remaining 35% has not been surveyed because much of the area is privately owned and property access has been denied. While archeological reports have been prepared for the above noted surveys, a Project specific report has not been prepared for the Preferred Alternative. A current review of the state site files shows 15 known archeological sites (3PU343, 3PU344, 3PU349, 3PU354, 3PU355, 3PU381, 3PU382, 3PU548, 3PU549, 3PU585, 3PU572, 3PU661, 3PU684, 3PU685 and 3PU789) within or very close to the APE. As previously mentioned, 10 ineligible structures (Structures MMM - VVV) are also within the APE and will likely contain archeological components requiring documentation and evaluation. None of the sites identified to date are likely to contain human burials or deposits that would warrant preservation in place. Three (3PU344, 3PU349 and 3PU81) consist of very low density lithic scatters; one (3PU382) consists of a very low density scatter containing prehistoric lithics and 20th century glass/ceramics, two (3PU354 and 3PU355) consist of isolated finds (both prehistoric lithics); four (3PU343, 3PU585, 3PU684 and 3PU661) consist of late 19th/early 20th century house places; two (3PU685 and 3PU572) consist of 20th century house places or activity areas; three consist of World War II Era sites associated with Camp Robinson and include (3PU548 - the cantonment area, 3PU549 - the 1943 expansion area and 3PU789 - the hospital complex), and 10 consist of the yet to be documented archeological components associated with the ineligible 20th century standing structures (Structures MMM - VVV). Of these, 10 sites (3PU343, 3PU344, 3PU349, 3PU354, 3PU355, 3PU381, 3PU382, 3PU548, 3PU684, and 3PU572) have been evaluated during previous surveys and found to be ineligible for nomination to the National Register; five sites (3PU549, 3PU585, 3PU661, 3PU685 and 3PU789) have not been evaluated; and none of the archeological components associated

with the 10 ineligible standing structures have been documented or assessed. Other undiscovered archeological sites could be present within that part of the APE that has not been surveyed, although much of the terrain in this area is relatively steep and dissected. The following procedures outline the treatment of archeological resources.

1. The FHWA will ensure that a Phase I cultural resources survey of sufficient intensity to identify any archeological resources within the APE is completed for the Project prior to any earth altering activities that would disturb the proposed right of way. The survey will include archival research (when appropriate) and determinations of site size, contents of the archeological record, depth and integrity of cultural deposits, presence or absence of cultural features, site functions, age and cultural affiliation. The Phase I survey will include documentation and analysis of all previously identified and evaluated sites within the Preferred Alternative as well as any new sites identified. Any potentially eligible resources identified during the Phase I survey will be subjected to Phase II testing in order to determine eligibility. All investigations will be carried out under the direct supervision of a person or persons meeting the appropriate qualifications set forth in the Secretary of Interior's *Professional Qualifications Standards* (48 FR 44739) for archeology.
2. Should additional research or fieldwork result in the identification of sites or features associated with the Trail of Tears, the AHTD will also request guidance from the National Park Service Long Distances Trail Group as well as the appropriate federally recognized tribes.
3. The FHWA will determine National Register eligibility in consultation with the SHPO. Any National Register evaluations will follow the guidelines established in the National Register Bulletins *How to Apply the National Register Criteria for Evaluation* and *Guidelines for Evaluating and Registering Archeological Properties*. Any disputes concerning eligibility will be resolved by the Keeper of the National Register of Historic Places (the Keeper) as set forth in 36 CFR Part 800.
4. None of the archeological sites identified to date appear to contain deposits, features or other elements that would warrant preservation in place or that would require a FHWA Section 4(f) Evaluation. If additional research reveals archeological resources that warrant preservation in place, they will be avoided if prudent and feasible alternatives exist that avoid the use of the site(s) for highway construction.
5. The FHWA will ensure that a treatment plan is developed for any archeological site determined eligible for inclusion in the National Register that is adversely affected by the Project. This treatment plan will consider measures to avoid or mitigate adverse effects on archeological sites such as design adjustments, buffer zone establishment, protective fencing, construction

monitoring and education of construction personnel, and will take into account engineering feasibility, cost and

other factors considered appropriate by the FHWA. If adverse effects on archeological sites cannot be avoided, the FHWA will consult with the signatories, to determine appropriate measures to mitigate adverse effects. These measures will be included in the treatment plan.

6. If the appropriate treatment of an archeological site involves data recovery, the FHWA will ensure that a data recovery plan is developed in consultation with the SHPO and other consulting parties, as appropriate. Any data recovery plans will meet the Secretary of the Interior's *Standards and Guidelines for Archeological Documentation* (48 FR 44734-37) and the standards in *A State Plan for the Conservation of Archeological Resources in Arkansas*.
 7. The FHWA will provide treatment plans and data recovery plans to appropriate parties for review. Comments must be provided by these parties within thirty (30) calendar days. Failure to comment within thirty 30 calendar days of receipt shall be taken as concurrence with the submitted plan. Any disputes arising from such review will be resolved in accordance with Stipulation VIII of this Programmatic Agreement (PA).
- B. Following completion of the Phase I, Phase II, and (if necessary) Phase III investigations (as defined in *A State Plan for the Conservation of Archeological Resources in Arkansas*), the appropriate analysis will be conducted and documentation shall be prepared for review and comment. Depending on the construction schedule, management summaries may be necessary to streamline the review process and obtain review comments prior to the preparation of the final report. These will be followed by draft and final reports for all phases of fieldwork.
1. The FHWA will ensure that all management summaries and reports resulting from actions pursuant to this PA are provided to the SHPO for review and comment. The SHPO comments must be provided to the FHWA within thirty (30) calendar days. Final copies of reports will be provided to appropriate consulting parties and to the Arkansas Archeological Survey.
 2. The FHWA will ensure that all archeological reports shall meet the Secretary of the Interior's *Standards and Guidelines for Archeology and Historic Preservation* (48 FR 44716-39) and the standards for fieldwork and report writing in *A State Plan for the Conservation of Archeological Resources in Arkansas*.
 3. The FHWA, AHTD and the SHPO will ensure that site location information will be made available only to qualified persons in accordance with state and federal guidelines.

4. Following appropriate analysis, the FHWA will ensure that all material, data recovered, field notes, drawings, photographs, and other records (with the possible exception of human remains, burial furniture or sacred items) from public land and from private land shall be curated in a permanent facility approved by the SHPO in accordance with 36 CFR Part 79 and the guidelines in *A State Plan for the Conservation of Archeological Resources in Arkansas*.

IV. DISCOVERY SITUATIONS

Pursuant to 36 CFR Part 800.11, if potentially significant cultural material or previously undiscovered sites are found during Project construction, the AHTD will suspend all activities in the area of the discovery until an assessment of the situation can be made. The FHWA in consultation with the SHPO will determine the National Register eligibility of the property and determine if further work is needed. FHWA, in consultation with AHTD, SHPO and other appropriate parties, will develop treatment plans for any discoveries determined to be eligible for the National Register. If the discovery cannot be avoided, treatment plans will be developed to minimize or mitigate any adverse effects caused by completion of the Project. Once treatment plans are acceptable to all parties involved, they will be carried out as soon as practicable. Construction can proceed within the restricted area once the treatment plan has been carried out and SHPO has reviewed and approved the results.

V. HUMAN REMAINS

Human remains, burial furniture or sacred items, as defined in the Native American Graves Protection and Repatriation Act (NAGPRA) and the State of Arkansas Statutes protecting unmarked graves and skeletal remains, are not expected at any of the sites identified; however, if they are encountered during testing, data recovery or implementation of the Project, the procedures outlined below will be followed.

1. The treatment of human remains and associated funerary objects will be in compliance with the recommended guidance set forth in the Advisory Council on Historic Preservation's *Policy Statement Regarding the Treatment of Human Remains and Funerary Objects* and the Arkansas burial law (Arkansas Act 753 of 1991, as amended).
2. If human remains are discovered, whether during additional survey work, controlled excavation, or during project construction, the AHTD will temporarily suspend all activities in the area that could disturb the remains, associated burial furniture or sacred items. The remains will be left as found and reasonable measures will be made to protect and safe guard the find until the proper authorities can be notified.
3. The AHTD will immediately contact the appropriate law enforcement agency as required by Arkansas law. If it is obvious that the remains are non-Indian or if law enforcement officials assume jurisdiction of the remains (as in the case of a homicide, missing persons case or unreported death), then there will be no need

to contact the Tribes for further evaluation. The AHTD will notify the SHPO and/or appropriate next of kin and comply with the relevant requirements of Section 106 of the National Historic Preservation Act of 1966, as amended and the Arkansas burial law (Act 753 of 1991, as amended).

4. If preliminary evaluation of the find indicates that the remains are not a crime scene and are or could be Native American, then the FHWA will contact the SHPO and any federally recognized Tribe or Tribes that may be culturally affiliated. The parties will consult as per the regulations set forth in 36 CFR Part 800 and the Arkansas burial law (Act 753 of 1991, as amended).
5. In cases of uncertain cultural affiliation, the FHWA will consult with the SHPO and all relevant participants in the Section 106 review process regarding the treatment and disposition of the remains. All decisions will be made in compliance with Section 106 and the Arkansas burial law (Act 753 of 1991, as amended).

VI. TRIBAL CONSULTATION

FHWA consultation was initiated during the early planning stages with letters soliciting views about the Project from the federally recognized Caddo Nation of Oklahoma, Cherokee Nation of Oklahoma, Chickasaw Nation, Choctaw Nation of Oklahoma, Muskogee (Creek) Nation of Oklahoma, United Keetoowah Band of Cherokee Indians in Oklahoma, Mississippi Band of Choctaw Indians, Osage Nation, Quapaw Tribe of Oklahoma, Seminole Nation of Oklahoma and Tunica-Biloxi Tribe of Louisiana. During preparation of this PA, the SHPO suggested that the Alabama-Quassarte Tribal Town, the Kialegee Tribal Town, and the Thlopthlocco Tribal Town also be included in the consultation. Copies of the Project's Supplemental Environmental Impact Statement have been sent to all of these Tribes for review. To date, only the United Keetoowah Band of Cherokee Indians has responded. They requested additional information regarding the sites identified, and had concerns about the possibility of unmarked graves along the Trail of Tears crossing. The Tribe also requested formal consultation and development of an agreement regarding any inadvertent discoveries of human remains, associated or unassociated funerary items, or other artifacts. The AHTD has provided the requested additional information regarding the sites identified and this PA has been developed to address other concerns listed.

1. The FHWA consultation with the Tribes listed above will remain open throughout the duration of the Project. If further research or analysis results in the identification of other federally recognized Tribes with interests or cultural ties to the Project, they will also be added to the list of consulting Tribes. Consultation methods will vary depending on the requests from the Tribes. These may include phone calls, on-site meetings, providing various levels of documentation for review, field reviews and jointly developing site specific treatment plans and/or agreement documents.
2. Consultation may vary according to the type of resource involved and the periods when the various tribes are known to have occupied the project vicinity. Tribes

with ancestral ties to the Arkansas River Valley (Caddo, Quapaw, Osage and Tunica) may be consulted regarding evaluation or treatment of sites that contain Indian components that are thought to be prehistoric, proto-historic, or historic. Other tribes that were known to have passed through or briefly settled in the state during Indian Removal (Chickasaw, Choctaw, Creek, Keetoowah, Cherokee and Seminole) may be consulted regarding sites with historic (18th/early19th century) Indian components or those that may be associated with the Trail of Tears.

VII. COMMENCEMENT OF CONSTRUCTION

Construction may commence in a portion of the Project area once appropriate efforts to evaluate and mitigate adverse effects on historic properties in that portion have been completed and the SHPO and the FHWA have reviewed and commented on the results of the investigation and the SHPO concurs that the effort is consistent with the agreed evaluation plan, treatment plan or data recovery plan and provisions in this PA. Construction may commence if the FHWA and the SHPO concur that no adverse effect on historic properties will occur as a result of construction in a specific area of the Project.

VIII. DISPUTE RESOLUTION

Should the SHPO or any signatory object within thirty (30) calendar days to any findings, proposed actions or determinations made pursuant to this PA, the FHWA will consult with the objecting party to resolve the objection. If the FHWA determines that the objection cannot be resolved, it will request further comments from the Council pursuant to 36 CFR Part 800.6(b). Any Council comment provided in response to such a request will be taken into account by the FHWA in accordance with 36 CFR Part 800.6(b)(2) with reference only to the subject of the dispute; the FHWA responsibility to carry out all actions under this PA that are not subject to the dispute shall remain unchanged.

IX. AMENDING THE PROGRAMMATIC AGREEMENT

Should any of the signatories to this PA believe that the terms are not being met or cannot be met, that party will immediately notify the other signatories and request consultation to amend this PA in accordance with 36 CFR Part 800.13. The process to amend this PA will be conducted in a manner similar to that leading to the execution of this PA.

X. TERMINATING THE PROGRAMMATIC AGREEMENT

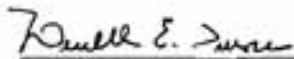
Any signatory to this PA may terminate it by providing 30 calendar days notice to the other parties, provided that the parties shall consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, the FHWA will comply with 36 CFR Part 800.4 through 800.6 with regard to the Project covered by this PA.

XI. FAILURE TO CARRY OUT THE PROGRAMMATIC AGREEMENT

In the event the FHWA does not carry out the terms of this PA, the FHWA will comply with 36 CFR Part 800.4 through 800.6 with regard to the undertaking covered by this PA.

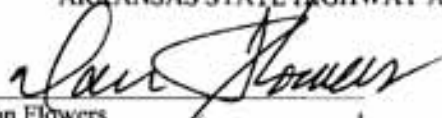
Signatories

FEDERAL HIGHWAY ADMINISTRATION


Derrell Turner
Acting Division Administrator

4/29/08
Date

ARKANSAS STATE HIGHWAY AND TRANSPORTATION DEPARTMENT


Dan Flowers
Director of Highways

4-28-08
Date

ARKANSAS HISTORIC PRESERVATION OFFICER


Cathie Matthews
Arkansas SHPO

5/2/08
Date