

**PROGRAMMATIC AGREEMENT
REGARDING COMPLIANCE WITH SECTION 106
OF THE NATIONAL HISTORIC PRESERVATION ACT
FOR COMMUNITY DEVELOPMENT BLOCK GRANTS BETWEEN
THE TEXAS DEPARTMENT OF AGRICULTURE
OFFICE OF RURAL AFFAIRS
AND
THE TEXAS STATE HISTORIC PRESERVATION OFFICER**

WHEREAS, HUD regulations at 24 CFR 58 implement statutory authorities that permit certain entities to assume HUD's environmental responsibilities for various HUD programs, and included among the statutory authorities under which this responsibility is assumed in compliance with Section 106 of the National Historic Preservation Act of 1966, as amended [54 U.S.C. 306108] (Section 106); and

WHEREAS, The Texas Community Development Block Grants (TxCDBG) program is a federal program administered by the Texas Department of Agriculture (TDA) on behalf of the United States Department of Housing and Urban Development (HUD) and subject to Title 24 CFR Part 58; and

WHEREAS, TDA has determined that the award of TxCDBG grants may have an effect on properties listed in or eligible for inclusion in the National Register of Historic Places (NRHP) pursuant to Section 106 of the National Historic Preservation Act (54 U.S.C. 306108) and its implementing regulation, "Protection of Historic Properties," (36 CFR 800); and

WHEREAS, the TxCDBG program provides funds to enhance facilities owned by political subdivisions of the State of Texas, which are subject to compliance with the Antiquities Code of Texas (Title 9, Chapter 191 of the Texas Natural Resources Code); and

WHEREAS, this program often includes certain actions that are unlikely to have an effect on historic properties, and should, therefore, be omitted from review to streamline the Section 106 process; and

WHEREAS, TDA and the Texas State Historic Preservation Officer (SHPO) agree that it is advisable to accomplish compliance with Section 106 through the development and execution of this Programmatic Agreement (PA) in accordance with 36 CFR 800.6 and 36 CFR 800.14(b)(3); and

WHEREAS, TDA shall invite the following Indian Tribes that may attach religious and cultural significance to historic properties that may be identified to participate in this PA: Absentee-Shawnee Tribe of Indians of Oklahoma, , Alabama-Quassarte Tribal Town, Apache Tribe of Oklahoma, Caddo Nation of Oklahoma, Choctaw Nation of Oklahoma, Comanche Nation of Oklahoma, Coushatta Tribe of Louisiana, Delaware Nation of Oklahoma, Fort Sill Apache Tribe of Oklahoma, Jicarilla Apache Nation of New Mexico, Kickapoo Tribe of Texas, Kickapoo Tribe of Oklahoma, Mescalero Apache Tribe of the Mescalero Reservation of New Mexico, Muscogee (Creek) Nation, Osage Nation, Tonkawa Tribe of Indians of Oklahoma, White Mountain Apache Tribe of the Fort Apache Reservation of Arizona, Wichita and Affiliated Tribes (Wichita, Keechi, Waco & Tawakonie) of Oklahoma, and Ysleta Del Sur Pueblo Tribe – the Alabama-Coushatta Tribe of Texas has declined to participate in the PA and must be consulted independently for all applicable projects; and

WHEREAS, TDA has invited the Advisory Council on Historic Preservation (Council) to determine whether the Council wishes to enter into the Section 106 process;

NOW, THEREFORE, TDA and the SHPO agree that the proposed undertakings shall be implemented and administered in accordance with the following stipulations in order to take into account the effects of these undertakings on historic properties and to satisfy TDA's Section 106 responsibilities for all individual aspects of the undertakings.

Stipulation I. Initial Consultation

TDA shall ensure that the entity receiving the federal grant (the Responsible Entity) consults with the SHPO as early in the project planning process as possible except for actions exempted from SHPO review as shown in Stipulation V. Those actions are not to be submitted for review and are not subject to Stipulations I-IV.

For all projects not specifically excluded from review under Stipulation V, the Responsible Entity shall submit thorough information to the SHPO, identifying the project, TDA's involvement and the applicability of this agreement. Submitted information shall include the following:

- A. whether the property on which the proposed project activities will occur, including structures and buildings is owned or controlled by a public agency,
- B. the location of the project (including the county),
- C. a street address for the property (if applicable),
- D. a general location map,
- E. a copy of a U.S. Geological Survey 7.5-minute quadrangle clearly showing the location and the Area of Potential Effects (APE) for both direct and indirect effects as defined for the proposed project, boundary of the proposed construction, [36 CFR §800.16 \(d\)](#)
- F. a project description noting impacts that will occur to the ground surface and the depth of impact, as well as any extenuating circumstances that may be important for the review, such as evidence of severe erosion or previous construction within the project area,
- G. the construction dates (if known) for any buildings or structures located on or near the project area if the project will involve the alteration or demolition of buildings, or may otherwise have a visual effect on nearby buildings or structures more than 45 years old,
- H. photographs of at least two elevations of buildings and structures, and one streetscape of buildings on the property, and
- I. a brief history of the property on which the proposed project activities will occur, including structures and buildings and names of architects or builders (if known).

TDA and the SHPO may amend or substitute the information or submission format required by this stipulation through written agreement of both parties and upon notification to Indian Tribes, for review and comment without a formal amendment process.

Stipulation II. Identification of Historic Properties

A. TDA shall ensure that the Area of Potential Effect (APE) is established by the Responsible Entity in consultation with the SHPO. The APE shall include the footprint to be directly affected by new construction, staging areas, and access areas with regard to the identification of archeological sites. A broader APE to include the indirect APE, will be required to assess specific undertakings that have the potential for visual effects on nearby architectural properties.

B. Prior to the initiation of construction or maintenance activities, TDA shall ensure that the Responsible Entity makes a reasonable and good faith effort to identify cultural resources located within the direct and

indirect APE. These steps may include, but are not limited to, background research, consultation, oral history interviews, sample field investigations, and field survey that meets or exceeds minimum state survey requirements. TDA shall ensure that all archeological work is conducted by a Principal Investigator who meets the Secretary of the Interior's professional qualifications standards and is also eligible to receive a Texas Antiquities Permit from the Texas Historical Commission (THC).

C. All draft reports shall be submitted to the SHPO for review and comment. The SHPO shall have 30 calendar days upon receipt in which to review the findings and provide a written response to the Responsible Entity. Failure of the SHPO to respond within 30 days of receipt of the finding shall be considered agreement with the finding. Comments received by the Responsible Entity from the SHPO shall be addressed in the final reports. If no cultural resources are identified in the APE, TDA shall ensure that the Responsible Entity documents this finding pursuant to Stipulation III.A.

D. If cultural resources are identified within the APE, TDA shall ensure that the Responsible Entity consults with the SHPO to develop a testing plan to determine eligibility for inclusion in the National Register of Historic Places (NRHP) in accordance with the process described in 36 CFR 800.4(c) and criteria established in 36 CFR 60. Alternatively, the Responsible Entity may redesign the project to completely avoid all effects on the identified cultural resources (as per Stipulation III. B.). All draft reports of site testing shall be submitted to the SHPO for review and comment. The SHPO shall have 30 calendar days in which to review the findings and provide a written response to the Responsible Entity. Failure of the SHPO to respond within 30 days of receipt of the finding shall be considered agreement with the finding. Comments received by the Responsible Entity from the SHPO shall be addressed in the final reports.

E. TDA shall ensure that the determinations of eligibility shall be made by the Responsible Entity in consultation with the SHPO. Should the Responsible Entity and the SHPO agree that a property is or is not eligible for inclusion in the National Register of Historic Places, such consensus shall be deemed conclusive for the purposes of this PA. Should the Responsible Entity and the SHPO disagree regarding the eligibility of a property, the Responsible Entity shall request that TDA obtain a determination of eligibility from the Keeper of the National Register pursuant to 36 CFR 63. Cultural resources determined to be ineligible for the NRHP shall require no further protection. If no historic properties are identified in the APE, TDA shall ensure that the Responsible Entity document this finding pursuant Stipulation III.A.

Stipulation III. Assessment of Adverse Effect

TDA shall ensure that the Responsible Entity makes a reasonable and good faith effort to evaluate the effect of each undertaking on historic properties within the APE. Three outcomes are possible as discussed below:

A. *No Historic Properties Affected.* The Responsible Entity may conclude that no historic properties are affected by an undertaking if no historic properties are present in the APE, or if the undertaking will have no effect as defined in 36 CFR 800.16(i). This finding shall be documented in compliance with 36 CFR 800.11(d) and the documentation shall be provided to the SHPO for concurrence.

B. *Finding of No Adverse Effect.* The Responsible Entity, in consultation with the SHPO, shall apply the criteria of adverse effect to historic properties within the APE in accordance with 36 CFR 800.5. The Responsible Entity may propose a finding of no adverse effect if the undertaking's effects do not meet the criteria of 36 CFR 800.5(a)(1) or the undertaking is modified

to avoid adverse effects in accordance with 36 CFR 68. The Responsible Entity shall provide to the SHPO documentation of this finding meeting the requirements of 36 CFR 800.11(e). The SHPO shall have 30 calendar days upon receipt in which to review the findings and provide a written response to the Responsible Entity. The Responsible Entity may proceed upon receipt of written concurrence from the SHPO. Failure of the SHPO to respond within 30 days of receipt of the finding shall be considered agreement with the finding.

C. Finding of Adverse Effect. The Responsible Entity may propose a finding of adverse effect if the undertaking's effects meet the criteria of 36 CFR 800.5(a)(1) and proceed to Stipulation IV.

Stipulation IV. Resolution of Adverse Effect

If the Responsible Entity determines that an undertaking will have an adverse effect on historic properties as measured by criteria in 36 CFR 800.5(a)(1), TDA shall ensure that the Responsible Entity consults with the SHPO to resolve adverse effects in accordance with 36 CFR 800.6.

A. For historic properties that the Responsible Entity and SHPO agree will be adversely affected, the Responsible Entity shall:

1. Afford the public an opportunity to comment on the resolution of adverse effects in a manner appropriate to the magnitude of the project and its likely effects on historic properties.
2. Consult with the SHPO, Tribes, and any additional consulting parties to seek ways to avoid, minimize or mitigate adverse effects.
3. For adverse effects on archeological sites, prepare a data recovery plan (Plan) that describes mitigation measures the Responsible Entity proposes to resolve the undertaking's adverse effects and provide this Plan for review and comment to all consulting parties. All parties have 30 calendar days in which to provide a written response to the Responsible Entity. The Plan may include, as appropriate, a research design; excavation or recordation strategies; work and report schedules; site monitoring; and relocation, preservation, or reburial; and curation of artifacts and records. It shall take into account all research and previous work conducted, and specify at a minimum: a) the historic property or properties where data recovery is to be conducted; b) the excavation or recordation that will be performed under the approved data recovery plan; c) the methods to be used with an explanation of their relevance to the project research design; and d) the methods to be used in analysis, data management, and dissemination of data, including a schedule of work and report submission.
4. When adverse effects to historic structures, buildings, or landscapes cannot be avoided, the Responsible Entity, in consultation with the SHPO and any consulting parties, shall develop a plan to mitigate the adverse effect. All parties have 30 calendar days from date of receipt in which to provide a written response to the Responsible Entity. If the SHPO approves the plan for mitigating the adverse effect, the Responsible Entity shall implement the plan. Upon completion of the approved mitigation methods, the adverse effect shall be considered to have been resolved.

B. If the Responsible Entity and the SHPO fail to agree on how adverse effects will be resolved, the Responsible Entity shall request that TDA contact the Council and request that it join the

consultation and provide the Council and all consulting parties with documentation pursuant to 36 CFR 800.11(g).

C. If the Council agrees to join the consultation, the Responsible Entity shall proceed in accordance with 36 CFR 800.9

Stipulation V. Actions Exempted from Review by the SHPO

TDA has determined that the following types of activities have limited or no potential to affect historic properties and TDA has no further Section 106 responsibilities with regards to them, pursuant to 36 CFR § 800.3(a)(1):

A. Routine road maintenance and resurfacing where work is confined to the existing right-of-way and previously maintained surfaces, ditches, culverts, and cut and fill slopes where there are no known historic properties, or historic properties would not be affected because the proposed work is clearly within a disturbed context;

B. Maintenance, alteration, or removal of existing buildings or other facilities less than 45 years old that are not listed on the National Register of Historic Places or within a National Register Historic District and that have not been previously determined eligible for inclusion in the National Register of Historic Places;

C. Point repair to an existing water or wastewater line where construction occurs in the original trench.

D. Replacement of existing water or wastewater lines where all construction occurs within the original trench.

E. Replacement of existing water or wastewater lines in a new trench paralleling the existing line if the following conditions are met:

1. The replacement occurs beneath city streets or adjacent to drainage rights-of way (as in item A);
2. The replacement does not occur within a National Register District or local Historic District, an eligible NR district or a local historic district.”
3. The replacement does not occur within the historic towns such as Goliad, San Augustine, Jefferson, Nacogdoches, Bastrop, Castroville, San Ygnacio, Roma, Refugio, Ysleta, San Elizario, and Presidio or within areas that contain a significant number of properties that are 45 years of older
4. The replacement does not occur beneath historic infrastructure such as historic bricked streets and historic curbing, or decorative streetscape features; and
5. The replacement does not occur adjacent to roads in rural areas of the county (where abandoned cemeteries or unrecorded archeological sites might be impacted by a new trench).

F. Minor alterations or additions to existing water or wastewater treatment plants or other

facilities that are less than 45 years old. (Excavation of new treatment ponds or enlargement of existing ponds are not considered minor alterations and are subject to review).

G. Installation of generators at existing water/wastewater or shelter facilities.

H. Addition or replacement of equipment within the same location and footprint. (Examples include but not limited to: Computer monitoring equipment, bar screens, clarifiers, chlorination equipment, SCADA equipment etc.)

I. Repair of bridges less than 45 years old.

TDA and the SHPO may amend, alter, or delete actions covered by this stipulation through a written agreement of both parties and upon notification to Indian Tribes, for review and comment without formal amendment process.

Stipulation VI. Actions That Require Review by the SHPO

Any undertaking with the potential to affect historic resources that is not specifically excluded from SHPO review by Stipulation V shall be subject to review under this agreement. The following actions that are funded by TDA are examples of those undertakings that require review by the SHPO under this PA. However, this list is not comprehensive and any projects that involve excavation or alteration of buildings or structures more than 45 years old that are not specifically exempted under Stipulation V must be submitted for review.

A. The construction of new water or wastewater lines using mechanized equipment.

B. The construction of new water or wastewater lines parallel to an existing line, but not within the same trench, that will disturb previously undisturbed soil, except as excluded under the conditions set forth in Stipulation V.E.

C. The installation of a new ground storage tank where soil is disturbed in order to construct the foundation for the tank. Other than previously disturbed areas that are currently part of the water / wastewater facility.

D. The installation of a new elevated storage tank where soil will be disturbed in order to construct the support structure for the tank. The visual effect of the new tower on surrounding historic properties must also be evaluated.

E. The construction of new streets in previously undisturbed areas.

F. The reconstruction of streets that increase the width of the existing roadway and disturb soil that was not disturbed during prior construction.

G. The reconstruction of bridges in areas where additional actions designed to prevent similar future damage will cause soil disturbance.

H. The construction of new drainage structures in areas that have experienced minimal disturbance of the soil. This includes the construction of new drainage ditches, storm culverts and storm water detention basins.

- I. The construction of new wastewater or water treatment facilities. In many cases the construction of various basins treatment units and associated yard piping require excavation to varying depths over much of the site.
- J. The expansion of existing water or wastewater facilities requiring excavation in areas of a plant site that may not have been disturbed during the original construction.
- K. Maintenance, alteration or removal of existing buildings or other facilities greater than 45 years old.
- L. Any projects that involve excavation or alteration of buildings or structures more than 45 years old that are not specifically exempted under Stipulation V must be submitted for review.

TDA and the SHPO may amend, alter, or delete actions covered by this stipulation through a written agreement of both parties and upon notification to Indian Tribes, for review and comment without formal amendment process.

Further consultation may be required for compliance with other applicable state laws, including the Antiquities Code of Texas (Texas Natural Resources Code, Chapter 191), provisions covering state historic markers including Recorded Texas Historic Landmarks (Texas Government Code Section 442.006), and provisions protecting county courthouses (Texas Government Code Section 442.008).

Stipulation VII. Disposition of Recovered Materials and Records

TDA materials and associated records owned by the State of Texas are treated in accordance with Texas Historical Commission Rules (Title 13, Part 2, Chapter 29 of the Texas Administrative Code (TAC), pertaining to Rules of Management and Care of Artifacts and Collections). Specifically, TDA shall ensure that all such materials and records resulting from identification, evaluation, and treatment of adverse effects conducted under this PA, are accessioned into a facility that has been certified or granted provisional status by the THC in accordance with 13 TAC 29.6 and meets the standards of 36 CFR 79.

Stipulation VIII. Post-Review Discoveries and Unforeseen Effects

(A) If, during the implementation of an Undertaking, a previously unidentified historic property is encountered, or a known historic property may be affected in an unanticipated manner, the TDA will assume its responsibilities under 36 CFR § 800.13(b), “Post-Review Discoveries: Discoveries without Prior Planning.” The Responsible Entity will stop construction activities in the vicinity of the discovery and take all reasonable measures to avoid or minimize harm to the property until TDA concludes consultation with the SHPO.

(B) TDA will notify the SHPO of the discovery at the earliest possible time and consult to develop actions to take into account the effects of the Undertaking. TDA will notify the SHPO of any time constraints, and all parties shall mutually agree upon timeframes for this consultation. The Undertaking Applicant may participate in this consultation. TDA will provide the SHPO with complete documentation on the change in the Undertaking, potential effects, and written recommendations, to take into account the effects of the Undertaking.

(C) When the discovery contains burial sites or human remains, TDA shall follow the post-review

discovery procedures of 36 C.F.R. § 800.13 and applicable requirements of the Texas Health and Safety Code, Title 1, Chapter 711, and treat said sites and/or remains in a manner consistent with the provisions of ACHP's Policy Statement Regarding Treatment of Burial Sites, Human Remains, or Funerary Objects (February 23, 2007). Work shall immediately cease within a fifty (50) foot radius of the area of discovery.

(D) If the SHPO does not object to TDA's recommendations within the agreed upon timeframe, as developed pursuant to Section (B) above, TDA will modify the scope of work to implement the recommendations. If the SHPO objects to the recommendations, TDA and the SHPO will consult further to resolve the objection through actions including, without limitation, identifying Undertaking alternatives that result in the Undertaking having no adverse effect on historic properties, or proceeding in accordance with Stipulations I through IV above.

Stipulation IX. PA Amendments, Disputes, and Termination

A) Amendments. Any party to this PA may propose to the other parties that it be amended, whereupon the parties will consult in accordance with 36 CFR 800.6(c)(7) to consider such an amendment. This agreement may be amended when such an amendment is agreed to in writing by all signatories.

B) Disputes. Should any signatory to this agreement or any Responsible Entity object at any time to any actions proposed or the manner in which the terms of this agreement are implemented, TDA shall consult with such party to resolve the objection. If TDA determines that such objection cannot be resolved, TDA will:

A. Forward all documentation relevant to the dispute, including the **TDA's** proposed resolution, to the Council. The Council shall provide **TDA** with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, **TDA** shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the Council, signatories and concurring parties, and provide them with a copy of this written response. **TDA** will then proceed according to its final decision.

B. If the Council does not provide its advice regarding the dispute within the thirty (30) day time period, **TDA** may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, **TDA** shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories and concurring parties to the agreement, and provide them and the Council with a copy of such written response.

C. **TDA's** responsibility to carry out all other actions subject to the terms of this agreement that are not the subject of the dispute remain unchanged.

D. Termination of the PA. Any party to this PA may terminate it by providing sixty (60) days 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 will avoid termination. In the event of termination of this PA by TDA or SHPO, TDA shall comply with the provisions of 36 CFR 800, Subpart B.

Stipulation X. Term of this Agreement

This PA remains in force for a period of ten (10) years from the date of its execution by all signatories, unless amended or terminated pursuant to Stipulation IX.D. Six (6) months prior to the conclusion of the ten (10) year period, TDA will notify all parties in writing of the end of the ten year period to determine if

the parties desire to consult on a new agreement or an amendment to extend this agreement. EXECUTION and implementation of this PA evidences that the TDA has afforded the Council an opportunity to comment on the undertakings and their effects on historic properties, and that TDA has taken into account those effects and fulfilled Section 106 responsibilities regarding the undertakings.

SIGNATURES

TEXAS DEPARTMENT OF AGRICULTURE

DocuSigned by:
Jason Fearneyhough 1/29/2021
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Jason Fearneyhough **Date**
Deputy Commissioner

TEXAS STATE HISTORIC PRESERVATION OFFICER

DocuSigned by:
Mark Wolfe 1/28/2021
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Mark Wolfe **Date**
Texas State Historic Preservation Officer