

PROGRAMMATIC AGREEMENT

AMONG

**THE U.S. ARMY CORPS OF ENGINEERS, TULSA DISTRICT,
THE OKLAHOMA STATE HISTORIC PRESERVATION OFFICE,
THE CADDO NATION OF OKLAHOMA, AND
THE CHOCTAW NATION OF OKLAHOMA**

**REGARDING COMPLIANCE WITH SECTION 106 OF THE
NATIONAL HISTORIC PRESERVATION ACT OF 1966 (AS AMENDED)
FOR THE
PINE CREEK RESERVOIR DAM SAFETY MODIFICATION PROJECT,
McCURTAIN COUNTY, OKLAHOMA**

WHEREAS, the U.S. Army Corps of Engineers, Tulsa District (hereafter, Tulsa District) owns and operates Pine Creek Reservoir, which is located on the Little River in McCurtain County, southeastern Oklahoma; and

WHEREAS, structures associated with Pine Creek Reservoir and integral to its function include the dam and an attached levee, which together function to impound the reservoir at normal conservation pool (438 ft. amsl.) and at top of flood control pool (480 ft. amsl.), respectively; and

WHEREAS, the Pine Creek dam has been determined to be at a significant risk of failure because of structural deficiencies that have developed over time, and that modification of the dam will be necessary in order to correct deficiencies and reduce the risk of dam failure; and

WHEREAS, the Pine Creek dam structurally extends to the west in the form of a levee which impounds a portion of the reservoir as it fills to the top of flood control pool, and that in order to meet appropriate engineering regulations the levee requires removal of woody vegetation along both sides for a distance of 50 feet from its toe; and

WHEREAS, because the Pine Creek dam was determined to be structurally deficient and at risk of failure, the reservoir pool was dropped five feet from normal conservation pool (438 ft. amsl.) to an elevation of 433 ft. amsl., as a precautionary measure; and

WHEREAS, the drawdown of Pine Creek Reservoir to 433 ft. amsl. was initially viewed as a temporary measure while the extent and nature of damage to the dam was evaluated and while engineering alternatives to modify the structure were developed; and

WHEREAS, all reasonable engineering alternatives to modify the Pine Creek dam and reduce its associated risk of failure include the continued drawdown of the reservoir to 433 ft. amsl., and that as an evaluation of these alternatives, Tulsa District now views the reservoir drawdown to be a long-term, multi-year measure; and

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WHEREAS, one reasonable engineering alternative being considered is the “No Action” alternative, which would require the reservoir drawdown to 433 ft. amsl to be considered permanent; and

WHEREAS, Section 106 of the National Historic Preservation Act (NHPA) of 1966 (as amended) and its implementing regulation 36 CFR Part 800 require Tulsa District to ensure that historic properties are identified, and that adverse effects to those historic properties are identified and resolved; and

WHEREAS, Tulsa District has determined the Area of Potential Effect (APE) for this project to consist of three primary components (see Attachment), including (1) the dam structure itself and all associated construction features such as roads, pipelines, electric lines, staging areas, and borrow areas; (2) the reservoir drawdown footprint, which extends entirely around the lake from elevation 438 ft. amsl. to 433 ft. amsl., plus an appropriate horizontal distance buffer at and above the 438 ft. amsl. normal conservation pool; and (3) a distance of 50 feet perpendicular to and away from the toe of the reservoir levee for its entire length on both sides, plus an additional 20 feet buffer to accommodate additional vegetation clearing, vehicle movement, and materials and vegetation staging; and additionally each component of the APE shall include the full horizontal and vertical extent of any identified cultural or historic resources intersected by or adjacent to any of the above listed project component boundaries and associated impact areas; and

WHEREAS, prior to contact with Europeans, the Little River drainage in southeastern Oklahoma was occupied by ancestors of the Caddo Nation of Oklahoma (hereafter, Caddo Nation) and thus may retain historic properties of importance to the Caddo Nation; and

WHEREAS, as part of treaty lands within historic Indian Territory, the Little River drainage in southeastern Oklahoma is historically a part of the resident Choctaw Nation of Oklahoma (hereafter, Choctaw Nation), and thus may retain historic properties of importance to the Choctaw Nation; and

WHEREAS, the Caddo Nation of Oklahoma and the Choctaw Nation of Oklahoma both have NHPA 101(d)(2) Tribal Historic Preservation Offices (THPO) and have been invited to sign this Programmatic Agreement (hereafter, PA); and

WHEREAS, the effects of this undertaking on historic properties cannot be fully determined prior to commencement of the undertaking; and

WHEREAS, Tulsa District has consulted with the Oklahoma State Historic Preservation Office (SHPO), the Oklahoma Archeological Survey (OAS), and the Advisory Council on Historic Preservation (ACHP) in accordance with Section 106 of the National Historic Preservation Act. 16 U.S.C. 470 (NHPA), as amended, and its implementing regulations (36 CFR Part 800.6(b)(1)) to resolve potential adverse effects on these historic properties; and

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WHEREAS, the SHPO and OAS have entered into a cooperative agreement under which OAS provides special services to the SHPO in the Section 106 review process. OAS maintains the inventory of Oklahoma's prehistoric resources and provides professional services to the SHPO in prehistoric archeology. OAS reviews federal undertakings for possible impacts on prehistoric archaeological resources and provides written comments as the SHPO's official representative. Accordingly, OAS has been invited to concur in this PA; and

WHEREAS the ACHP has decided not to participate in consultation regarding this Project at this time, but may re-enter consultation at any time, particularly functioning to resolve potential disputes between Tulsa District , SHPO, and/or other Signatories to this PA; and

WHEREAS, Tulsa District and SHPO agree that it is advisable to accomplish compliance with Section 106 through the development and execution of this PA in accordance with 36 CFR 800.6 and 36 CFR 800.14(b)(3); and

NOW, THEREFORE, Tulsa District , SHPO, the Caddo Nation of Oklahoma, and the Choctaw Nation of Oklahoma agree that upon the Tulsa District decision to proceed with the Undertaking, Tulsa District shall ensure that the following stipulations are implemented in order to take into account the effects of the Pine Creek Dam Reservoir Safety Modification Project on historic properties as required by Section 106 of the National Historic Preservation Act (NHPA) of 1966 (as amended), and that these stipulations shall govern the Project and all of its parts until this PA expires or is terminated.

STIPULATIONS

Tulsa District shall ensure that the following measures will be carried out. All work conducted under this PA will be performed in a manner consistent with the Secretary of the Interior's "Standards and Guidelines for Archeology and Historic Preservation" (48 FR 44716-44740; September 23, 1983), as amended, or the Secretary of the Interior's "Standards for the Treatment of Historic Properties" (36 CFR 68), as appropriate.

I. IDENTIFICATION OF HISTORIC PROPERTIES.

A. ARCHAEOLOGICAL INVESTIGATIONS. Tulsa District will conduct a complete archaeological investigation, in multi-year phases if necessary because of funding, of the entire Area of Potential Effect (APE) associated with this project. Investigations and associated results will be coordinated as appropriate to the Section 106 process. Investigation methods will include, but not be limited to, pedestrian survey conducted at appropriate intervals and excavation of shovel tests at appropriate intervals, including screening of excavated material where appropriate. In certain instances subsurface testing will be conducted by 1X1 meter excavation units, soil coring, or backhoe trenching. Additionally, archival research may be necessary to establish chain of title or to establish historical significance to support National Register eligibility determinations for sites dating to the historic period.

B. NATIONAL REGISTER ELIGIBILITY EVALUATIONS AND DETERMINATIONS. When archeological or historic resources are identified within the APE, their eligibility for inclusion in the National Register of Historic Places (NRHP) will be assessed using the criteria outlined in 36 CFR Part 60. If in the event an archeological or historic resource is intersected by the limits of a project element or adjacent to the APE boundary, the entire property will be considered when determining National Register eligibility of that property. In some instances, information beyond that readily available from survey and archival research may be necessary to complete an eligibility determination. In these instances, additional work in the form of subsurface test excavations or further archival research may be necessary. The actual amount of work conducted will vary from resource to resource, but it must obtain data sufficient to allow an independent assessment as to whether a resource can or cannot be expected to address the research questions set forth in the Research Design.

In addition to archeological and historic resources, non-archeological resources will be identified within the APE as well. Non-archeological resources may consist of, but not be limited to, historic standing structures (e.g., Pine Creek Reservoir Dam), Traditional Cultural Properties (TCP's), Sacred Sites, and historic landscapes. TCP's and Sacred Sites will be identified through consultation with the Caddo Nation of Oklahoma and the Choctaw Nation of Oklahoma. Historic standing structures should be documented in accordance with guidance in the SHPO's "Review and Compliance Manual."

Should Tulsa District, SHPO, the Caddo Nation of Oklahoma, and the Choctaw Nation of Oklahoma agree that a property is or is not eligible for the National Register, such consensus shall be deemed conclusive for the purpose of this PA. Should Tulsa District or SHPO disagree regarding the eligibility of a property, Tulsa District shall obtain a determination of eligibility from the Keeper of the National Register pursuant to 36 CFR 63. Resources determined to be ineligible for inclusion in the NRHP shall require no further protection or evaluation. Archeological or historic resources that are eligible for listing on the NRHP are "historic properties," consistent with terminology defined in 36 CFR Part 800.16. Until resources have been conclusively determined to be eligible or not eligible for the NRHP, they will be treated as though they are eligible.

II. DETERMINATION OF ADVERSE EFFECT. Tulsa District shall make a reasonable and good faith effort to evaluate the effect of the undertaking on historic properties in the APE. Tulsa District and SHPO shall apply the criteria of adverse effect to historic properties within the APE in accordance with 36 CFR 800.5.

III. RESOLUTION OF ADVERSE EFFECT. Tulsa District shall consult with the SHPO to resolve adverse effects in accordance with 36 CFR 800.6. Tulsa District will consult with all signatories to develop and evaluate alternatives or modifications to the undertaking that could avoid or minimize the adverse effects, with preference to avoidance if possible. Adverse effects to historic properties that cannot be avoided will be mitigated in order to offset the loss of those properties. Tulsa District shall prepare a historic properties treatment plan (Plan) that describes the mitigation measures the District proposes to resolve the undertaking's adverse effects and shall provide this Plan

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for review and comment to SHPO and other consulting parties. All parties will have 30 calendar days in which to provide a written response to Tulsa District. The Plan shall include, as appropriate, excavation and recordation strategies; work and report schedules; and curation of artifacts and records. It shall 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; c) the methods to be used; and d) the methods to be used in analysis, data management, and dissemination of data, including a schedule of work and report submission.

If Tulsa District and SHPO fail to agree on how adverse effects will be resolved, the District shall request that the ACHP join the consultation and provide the Council and all consulting parties with documentation pursuant to 36 CFR 800.11(g).

IV. CURATION AND DISPOSITION OF RECOVERED MATERIALS, RECORDS, AND REPORTS.

A. CURATION. Tulsa District shall ensure that all archaeological materials and records that result from identification, evaluation, and treatment efforts conducted under this PA are ultimately accessioned into the Sam Noble Oklahoma Museum of Natural History in Norman and curated to 36 CFR Part 79 standards.

B. REPORTS. Tulsa District shall provide copies of final technical reports of investigations to the signatories and consulting parties. The signatories and consulting parties shall withhold from the public all site location information and other data that may be of a confidential or sensitive nature pursuant to 36 CFR 800.11(c).

C. ANNUAL REPORT. Tulsa District will provide an annual status report on implementation of the PA to SHPO and other Signatories.

V. TECHNICAL REPRESENTATIVES OF THE SIGNATORIES.

The parties to this PA will designate technical representatives which will communicate to fulfill the terms outlined in order to comply with the Section 106 process. Technical representatives will conduct consultation required to establish determinations of eligibility for the National Register, determinations of adverse effect, and the methods for resolving adverse effects to historic properties.

VI. EXECUTION AND APPLICABILITY OF THIS AGREEMENT.

This Agreement will go into effect when signed by Tulsa District, and SHPO, and when an executed version is received by the Advisory Council on Historic Preservation (ACHP).

VII. TREATMENT OF HUMAN REMAINS.

A. PRIOR CONSULTATION. Tulsa District shall comply with the Native American Graves Protection and Repatriation Act (NAGPRA) and its associated regulation, 43 CFR

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Part 10. If Tulsa District's investigations conducted pursuant to Stipulation I of this PA indicate a high likelihood that human remains may be encountered, Tulsa District shall develop a treatment plan (e.g., NAGPRA Plan of Action) for these remains in consultation with the Caddo Nation and the Choctaw Nation. Tulsa District shall ensure that these Nations are afforded a reasonable opportunity to identify concerns, provide advice on identification and evaluation, and participate in the resolution of adverse effects in compliance with the terms of this PA and all related federal laws.

B. INADVERTENT DISCOVERY. Tulsa District shall comply with the Native American Graves Protection and Repatriation Act (NAGPRA) and its associated regulation, 43 CFR Part 10. Immediately upon the inadvertent discovery of human remains during historic properties investigations or construction activities conducted pursuant to this PA, Tulsa District shall ensure that all ground disturbing activities cease in the vicinity of the human remains and any associated grave goods, and that the site is secured from further disturbance or vandalism. Within 48 hours of the discovery, Tulsa District shall initiate consultation with SHPO, the Caddo Nation, and the Choctaw Nation to resolve adverse effects. Because of the sensitivity of inadvertent discovery issues, no information about site locations or burial contents will be provided to the media.

VIII. INADVERTENT DISCOVERIES OF HISTORIC PROPERTIES.

If historic resources (aside from pre-contact burials or other human remains discussed in Stipulation VII) are inadvertently discovered during any activities directly related to modification of the dam or the associated levee or if there are other unanticipated effects on historic properties within the proposed reservoir area, Tulsa District shall ensure that all construction activity ceases within a reasonable distance of the find, ensure the area is secured and the historic property is protected, and will notify SHPO within 48 hours of discovery. Tulsa District and SHPO will consult and formulate an appropriate course of action to address the effect on the discovery, consistent with a forthcoming, defensible determination of National Register eligibility.

IX. PROFESSIONAL QUALIFICATIONS.

All investigations specified in this PA shall be carried out by principal investigators meeting the pertinent professional qualifications of the Secretary of the Interior's (SOI) *Professional Qualification Standards* (36 CFR Part 61) in a discipline appropriate for the task and the nature of the historic properties.

X. DISPUTE RESOLUTION.

Should any signatory or concurring party to this PA object at any time to any actions proposed or the manner in which the terms of this PA are implemented, the objector is encouraged to consult the other signatories in resolving the objection. If that objector determines that such objection cannot be resolved, Tulsa District shall perform the following tasks.

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A. CONSULT ACHP. Forward all documentation relevant to the dispute, including proposed resolution, to the ACHP. The ACHP shall provide the agency 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, the agency shall prepare a written response that takes into account advice or comments regarding the dispute from the ACHP, signatories and concurring parties, and provide them with a copy of this written response. The agency will then proceed according to its final decision.

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

XI. ANTI-DEFICIENCY ACT.

It is understood that the implementation of this Agreement is subject to Federal and State anti-deficiency statutes.

XII. DURATION, AMENDMENT, WITHDRAWAL, AND TERMINATION.

A. DURATION. Unless terminated or amended as outlined below, this PA shall remain in effect for a period of 10 years from the date that the PA goes into effect and may be extended for a second, five-year term with the written concurrence of all of the signatories. During the time in which this PA is in effect, relevant portions of this PA will be superseded, if appropriate, by future revisions to 36 CFR Part 800 or other federal historic preservation law or regulation.

B. AMENDMENT. If any signatory to the PA determines that the Agreement cannot be fulfilled or that modification of the Agreement is warranted, that signatory shall consult with the other signatories to seek amendment of the Agreement. The Agreement may be amended after consultation among the signatories and all parties agree in writing with such amendment.

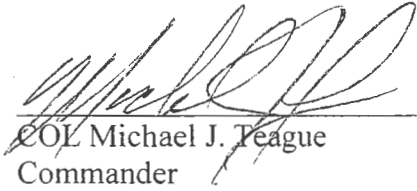
C. WITHDRAWAL. Any signatory may withdraw their involvement in this Agreement by providing 30 days written notice to the other parties, provided that the parties will consult during this period to seek amendments or other actions that would prevent withdrawal. Withdrawal of Tulsa District or SHPO will invalidate the PA.

D. TERMINATION. This Agreement will be fully terminated if Tulsa District or SHPO provide notice of termination and after 30 days or more of unsuccessful consultations to amend the Agreement. This Agreement may also be terminated by the implementation of a subsequent Programmatic Agreement per 36 CFR Part 800 that explicitly supersedes this Agreement.

XIII. COMPLIANCE WITH 36 CFR PART 800.

Execution of this Programmatic Agreement and implementation of its terms is evidence that U.S. Army Corps of Engineers, Tulsa District has taken into account the effects of the agency's undertakings on historic properties and has afforded the ACHP an opportunity to comment.

SIGNATORIES

A handwritten signature in dark ink, appearing to read "Michael J. Teague", is written over a horizontal line.

COL Michael J. Teague
Commander
U.S. Army Corps of Engineers, Tulsa District

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A handwritten signature in black ink, appearing to read "Bob Blackburn", written over a horizontal line.

Dr. Bob Blackburn
Oklahoma State Historic Preservation Officer

4/1/13

INVITED SIGNATORIES

Chairperson Brenda Shemayne Edwards
Caddo Nation of Oklahoma

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Chief Gregory E. Pyle
Choctaw Nation of Oklahoma

CONCURRING PARTY

Dr. Robert L. Brooks, Director
Oklahoma Archeological Survey