

**APPENDIX G: PROGRAMMATIC AGREEMENT ON
CULTURAL RESOURCES MANAGEMENT
BETWEEN NORTH TEXAS MUNICIPAL WATER
DISTRICT, U.S. ARMY CORPS OF ENGINEERS –
TULSA DISTRICT, TEXAS HISTORICAL
COMMISSION, AND THE CADDO NATION**

PROGRAMMATIC AGREEMENT

AMONG

THE NORTH TEXAS MUNICIPAL WATER DISTRICT;

THE U.S. ARMY CORPS OF ENGINEERS, TULSA DISTRICT;

THE TEXAS HISTORICAL COMMISSION; AND

THE CADDO NATION OF OKLAHOMA

**REGARDING COMPLIANCE WITH SECTION 106 OF THE NATIONAL
HISTORIC**

PRESERVATION ACT OF 1966 (AS AMENDED) FOR THE

PROPOSED CONSTRUCTION OF THE LOWER BOIS d'ARC RESERVOIR

**TO BE LOCATED NORTHEAST OF THE CITY OF BONHAM,
FANNIN COUNTY, TEXAS**

AND REQUIRING AN INDIVIDUAL PERMIT ISSUED UNDER

SECTION 404 OF THE CLEAN WATER ACT

WHEREAS, the North Texas Municipal Water District (NTMWD) has proposed to construct the Lower Bois d'Arc Creek Reservoir, which will be located on Bois d'Arc Creek near the city of Bonham in Fannin County, northeastern Texas; and

WHEREAS, NTMWD is a political subdivision of the State of Texas, and as such, is subject to compliance with the Antiquities Code of Texas (Title 9, Chapter 191 of the Texas Natural Resources Code); and

WHEREAS, the U.S. Army Corps of Engineers, Tulsa District, (hereafter, Tulsa District) has Federal responsibility and review authority to evaluate applications for permits issued under the national U.S. Army Corps of Engineers (USACE) regulatory program, pursuant to Section 404 of the Clean Water Act; and

WHEREAS, construction of the Lower Bois d'Arc Creek Reservoir will require a permit in order to comply with Section 404 of the Clean Water Act; and

WHEREAS, issuing a permit pursuant to Section 404 of the Clean Water Act qualifies as an undertaking under Section 106 of the National Historic Preservation Act (NHPA) of 1966 (as amended); and

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WHEREAS, Section 106 and its implementing regulation 36 CFR Part 800 require the Tulsa District to ensure that historic properties are identified, and that adverse effects to those historic properties are identified and resolved prior to the issuance of a permit (the Section 106 Process); and

WHEREAS, the Area of Potential Effect (APE) for this project consists of the reservoir footprint itself to the elevation of the planned top of floodpool (elevation 541 ft. amsl at crest of emergency spillway), , the planned location of the dam and all associated construction and staging areas, the planned new water treatment facility at Leonard, Texas, the pipeline from the new water treatment facility to the discharge point into Pilot Grove Creek, all raw water pipelines between the reservoir and associated existing water treatment facilities, lands manipulated for impact mitigation, plus 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, the effects of this undertaking on historic properties cannot be fully determined prior to approval of the undertaking; and

WHEREAS, Texas Historical Commission (THC) is the agency that administers the Antiquities Code of Texas (Title 9, Chapter 191 of the Texas Natural Resources Code) and has responsibilities under the Chapter 711 of the Texas Health and Safety Code regarding the discovery and disposal of abandoned or unknown cemeteries; and

WHEREAS, the Executive Director of the THC serves as the State Historic Preservation Officer (SHPO) for Texas and has the authority to enter into Section 106 agreements; and

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

WHEREAS, the Tulsa District notified the Advisory Council on Historic Preservation (ACHP) about this project and requested that the agency participate in the development of this Programmatic Agreement (PA); and

WHEREAS, the ACHP declined to participate in the development of this PA except in an advisory role; and

WHEREAS, prior to contact with Europeans, the lower Bois d'Arc Creek and Red River drainages in northeastern Texas were occupied by ancestors of the Caddo Nation of Oklahoma (hereinafter, Caddo Nation) and thus may retain historic properties of importance to the Caddo Nation; and

NOW, THEREFORE, the NTMWD; the Tulsa District; the SHPO, and the Tribal Historic Preservation Officer (THPO) of the Caddo Nation agree that the proposed undertaking shall be implemented and administered in accordance with the following stipulations in order for Tulsa District to take into account the effects of the permit on

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historic properties as required by Section 106 of the National Historic Preservation Act (NHPA) of 1966 (as amended).

STIPULATIONS

The 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 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. TASKS TO ACCOMPLISH IDENTIFICATION, EVALUATION, EFFECT DETERMINATION AND RESOLUTION.

A. RESEARCH DESIGN. NTMWD will produce a research design to guide the cultural resources investigations that will be conducted within the entire Area of Potential Effect (APE). As noted above, the APE primarily includes the proposed 17,000-acre reservoir area, but also includes a new water treatment facility to be located at Leonard, Texas, and the connecting pipeline between that facility and the reservoir. Additionally, the pipeline that will be constructed to convey water from the reservoir to Pilot Grove Creek, a tributary to Lake Lavon, is also included in the APE. All construction and staging areas directly associated with the construction of the dam and reservoir are included in the APE as well. Beyond these project elements, the APE includes lands acquired or manipulated for impact mitigation, and the horizontal and vertical extent of any identified cultural or historic resources intersected by or adjacent to any of the above listed project elements and their associated impact areas, including the boundary defined by the planned top of the flood pool (elevation 541 ft. amsl at crest of emergency spillway).

The Research Design will synthesize current knowledge about the prehistory and history of the project area using existing records on historic resources, including but not limited to archaeological sites and historic standing structures in the APE. It will include information on National Register listings and historical markers in and near the APE and survey regional archeological and historical literature. Additionally, archival and aerial photographic documentation will be utilized as appropriate in the development of the research design. Information will be sought from consulting parties, and individuals and organizations likely to have knowledge of, or concerns about, historic properties in the area. The goal of the research design is to develop a survey methodology appropriate for the landscape encompassed by the APE and to develop research questions pertinent to the APE that can guide testing and data recovery efforts. The Research Design will thus present and develop arguments for the selection of an appropriate stratified random sampling method for the cultural resources investigations within the entire APE. Cultural resources investigations will follow State of Texas guidelines, which specify the methods to be employed in certain types of settings.

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B. RESEARCH DESIGN REVIEW. The draft research design will be submitted to the SHPO, the Caddo Nation Tribal Historic Preservation Officer (THPO), and Tulsa District for review. The reviewing parties will submit comments to NTMWD within 30 days of receipt of the draft Research Design. NTMWD will address comments and produce a final version of the Research Design within 30 days of receipt. The second draft will be reviewed in the same manner and time frame as the first.

C. INITIAL CULTURAL RESOURCES INVESTIGATIONS. Once the Research Design is completed, NTMWD will use the sampling methods set forth in that document to locate cultural resources. These 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. In certain instances subsurface testing will be conducted by soil coring or backhoe trenching. Additionally, archival research will 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.

D. NATIONAL REGISTER ELIGIBILITY DETERMINATIONS. When historic or cultural 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 a historic or cultural resource is intersected by the limits of a project element or adjacent to the boundary of a project element, 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.

Should NTMWD, Tulsa District, and SHPO agree that a property is or is not eligible, such consensus shall be deemed conclusive for the purpose of this PA. Should NTMWD, 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. Cultural resources determined to be ineligible for inclusion in the NRHP shall require no further protection or evaluation. Historic resources that are eligible for listing on the NRHP are "historic properties," consistent with terminology defined in 36 CFR Part 800.16.

E. DETERMINATION OF ADVERSE EFFECT. Tulsa District shall ensure that NTMWD shall make a reasonable and good faith effort to evaluate the effect of the undertaking on historic properties in the APE.

1. *Finding of No Adverse Effect.* NTMWD, in consultation with the Tulsa District, the SHPO, the THPO, and other consulting parties, shall apply the criteria of adverse effect to historic properties within the APE in accordance with 36 CFR 800.5.

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NTMWD 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. NTMWD shall provide to the Corps and SHPO documentation of this finding meeting the requirements of 36 CFR 800.11(e). The SHPO shall have 30 calendar days in which to review the findings and provide a written response to NTMWD. NTMWD 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. NTMWD shall maintain a record of the finding and provide information on the finding to the public upon request, consistent with the confidentiality requirements of 36 CFR 800.11(c).

2. Finding of Adverse Effect. The signatories to this agreement concur that all historic properties identified within or at the elevation of the proposed flood pool of the Lower Bois d'Arc Creek Reservoir, in or near the dam site, in or near the site of the water treatment facility at Leonard, TX, within the pipeline right-of-way, or in or near proposed equipment staging areas or borrow areas are presumed to be adversely affected by the undertaking. NTMWD, in consultation with the Tulsa District, the SHPO, the THPO, and other consulting parties, shall apply the criteria of adverse effect to historic properties identified in any other areas within the APE on a case-by-case basis in accordance with 36 CFR 800.5.

F. RESOLUTION OF ADVERSE EFFECT. NTMWD and the Tulsa District, shall consult with the SHPO, the THPO and other consulting parties to resolve adverse effects in accordance with 36 CFR 800.6. Tulsa District will consult with the parties to develop and evaluate alternatives or modifications to the undertaking that could avoid or minimize the adverse effects. Adverse effects to historic properties resulting from the construction of the reservoir or pipelines or from any activities associated with construction of the reservoir or pipelines that cannot be avoided will be mitigated in order to offset the loss of those properties. NTMWD shall prepare a historic properties treatment plan (Plan) that describes the mitigation measures NTMWD proposes to resolve the undertaking's adverse effects and shall provide this Plan for review and comment to the Tulsa District, the SHPO, the THPO, and other consulting parties. All parties will have 30 calendar days in which to provide a written response to NTMWD. The Plan shall include, as appropriate, excavation and recordation strategies; work and report schedules; and curation of artifacts and records. It shall take into account all research questions set forth in the Research Design 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; c) the methods to be used with an explanation of their relevance to the 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.

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

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

A. **CURATION.** NTMWD materials and associated records owned by the State of Texas or NTMWD are governed by Texas Historical Commission Rules (Chapter 29, Rules of Management and Care of Artifacts and Collections). Therefore, NTMWD shall ensure that all such materials and records that result from identification, evaluation, and treatment efforts conducted under this PA, are accessioned into a curatorial facility that has been certified, or granted provisional status, by the THC in accordance with Chapter 29.6, except as specified for human remains in Stipulation V.

B. **REPORTS.** NTMWD 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).

III. TECHNICAL REPRESENTATIVES OF THE SIGNATORIES.

The parties to this Agreement will designate technical representatives which will engage in communication 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.

IV. EXECUTION AND APPLICABILITY OF THIS AGREEMENT.

This Agreement will go into effect when signed by all parties, and when a fully executed version is received by the Advisory Council on Historic Preservation (ACHP).

V. TREATMENT OF HUMAN REMAINS.

A. **PRIOR CONSULTATION.** If NTMWD's investigations conducted pursuant to Stipulation I of this PA indicate a high likelihood that human remains may be encountered, NTMWD shall develop a treatment plan for these remains in consultation with the Tulsa District, the SHPO, and the THPO and other consulting parties. NTMWD shall ensure that parties indicating an interest in the undertaking are afforded a reasonable opportunity to identify concerns, advise on identification and evaluation, and participate in the resolution of adverse effects in compliance with the terms of this PA.

B. **INADVERTENT DISCOVERY.** Immediately upon the inadvertent discovery of human remains during historic properties investigations or construction activities conducted pursuant to this PA, NTMWD 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. NTMWD will be responsible for

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immediately notifying local law enforcement officials, and within 48 hours of the discovery, shall initiate consultation with the Tulsa District, the SHPO, and the THPO and other consulting parties to develop a plan for resolving the adverse effects. The course of action shall comport with Title 13, Part II, Chapter 22, Cemeteries, which are the rules regarding abandoned cemeteries and the disinterment of graves, as well as any other requirements under Chapter 711 of the Texas Health and Safety Code.

VI. INADVERTENT DISCOVERIES OF HISTORIC PROPERTIES.

If historic properties (aside from pre-contact burials or other human remains discussed in Stipulation V) are inadvertently discovered during any activities directly related to construction of the reservoir (including staging areas, borrow areas, and dam construction), water treatment facility, or the pipeline, or if there are other unanticipated effects on historic properties within the proposed reservoir area, water treatment facility, or pipeline, NTMWD shall ensure that all construction activity ceases within 150 ft. of the find, ensure the area is secured and the historic property is protected, and will notify the Tulsa District, the SHPO, and the THPO within 48 hours of discovery. The parties to this Agreement will consult and formulate an appropriate course of action to address the effect on the discovery, consistent with a defensible determination of National Register eligibility.

A. DISCOVERIES ON FEDERAL OR INDIAN LANDS. If historic properties are discovered on Indian or Federal lands, Tulsa District shall comply with the Native American Graves Protection and Repatriation Act (NAGPRA [P.L. 101-601; 104 Stat. 3048; 25 U.S.C. Section 3001-13]) and its applicable regulations, the Archeological Resources Protection Act and its applicable regulations, and any other applicable tribal, federal, or state law, as appropriate to the discovery.

B. DISCOVERIES ON NON-INDIAN, NON-FEDERAL OR STATE LANDS. For discoveries on non-Indian, non-Federal lands or State lands, applicable laws and regulations of the State of Texas statutes shall be followed, including the Antiquities Code of Texas (Title 9, Chapter 191 of the Texas Natural Resources Code).

VII. PROFESSIONAL QUALIFICATIONS.

All historic preservation-related investigations specified in this Agreement 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. Since this project will be conducted on land controlled by the NTMWD, principal investigators must also meet the professional qualifications standards found in Title 13, Part II, Chapter 26, Rules of Practice and Procedure, and must be eligible to receive an Antiquities Permit.

VIII. DISPUTE RESOLUTION.

Should any signatory or concurring party to this Agreement object at any time to any actions proposed or the manner in which the terms of this Agreement 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.

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 Agreement, and provide them and the ACHP with a copy of such written response.

IX. ANTI-DEFICIENCY ACT.

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

X. DURATION, AMENDMENT, WITHDRAWAL, AND TERMINATION.

A. **DURATION.** Unless terminated or amended as outlined below, this Agreement shall remain in effect for a period of 10 years from the date that the Agreement goes into effect and may be extended for a second ten-year term with the written concurrence of all of the signatories.

B. **AMENDMENT.** If any signatory to the Agreement 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.

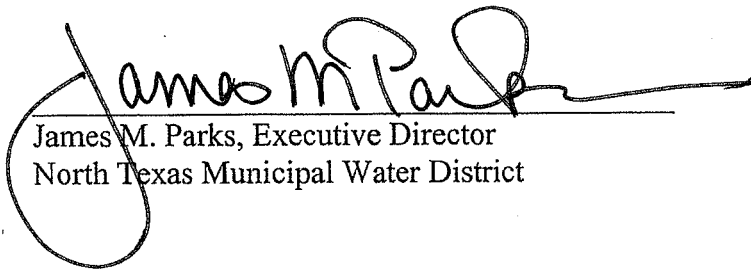
C. **WITHDRAWAL.** Any signatory may withdraw their involvement in this Agreement by providing 30 days written notice to the other parties, provided that the parties will consult during this period to seek amendments or other actions that would prevent withdrawal.

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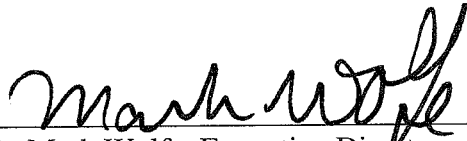
D. TERMINATION. This Agreement will be fully terminated if any of the signatories provides notice of termination and after 30 days or more of unsuccessful consultations to amend the Agreement. This Agreement may also be terminated by the implementation of a subsequent Programmatic Agreement under 36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

XI. COMPLIANCE WITH 36 CFR PART 800.

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



James M. Parks, Executive Director
North Texas Municipal Water District

A handwritten signature in cursive script that reads "Mark Wolfe". The signature is written in black ink and is positioned above a horizontal line.

Mr. Mark Wolfe, Executive Director
Texas Historical Commission

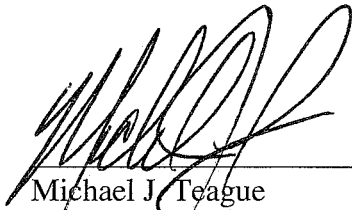
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Brenda Shemayne Edwards

Chairperson Brenda Shemayne Edwards

Caddo Nation of Oklahoma 10-01-10

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