

ORDINANCE 2019-06-13-0494

AUTHORIZING THE EXECUTION OF A PROGRAMMATIC AGREEMENT BETWEEN THE CITY OF SAN ANTONIO, THE UNITED STATES ARMY CORPS OF ENGINEERS FORT WORTH DISTRICT, AND THE TEXAS HISTORICAL COMMISSION FOR COMPLIANCE WITH SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT OF 1966 (AS AMENDED) FOR INFRASTRUCTURE MAINTENANCE REPAIRS, IMPROVEMENT AND STABILIZATION PROJECTS IN BRACKENRIDGE PARK UNDER SECTION 404 OF THE CLEAN WATER ACT, LOCATED IN COUNCIL DISTRICTS 1 & 2

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WHEREAS, the Clean Water Act is the primary federal law in the United States governing water pollution and any discharge of dredged or fill materials into the "waters of the United States" (WOUS), including wetlands is illegal unless authorized by a permit issued by the United States Army Corps of Engineers (USACE) pursuant to Section 404; and

WHEREAS, under the National Historic Preservation Act of 1966 (as amended), Section 106 directs the review of possible effects of proposed projects on listed and eligible historic resources and when project activities occur within a historic district, or to listed or eligible historic resources, the coordination with the USACE for a Section 404 permit is mandated; and

WHEREAS, Brackenridge Park is listed as a State Antiquities Landmark (SAL) and is in the National Register of Historic Places (NRHP) as a Historic District; within Brackenridge Park, the San Antonio River (a WOUS) is a centerpiece of user activities and contributes to the unique character of the Park; and any proposed project occurring at or below the water level of the San Antonio River will trigger review under Section 404; and

WHEREAS, this Programmatic Agreement (PA) will standardize the federal permit review process, the environmental process and the overall project budget and schedule by providing procedures effecting Brackenridge Park maintenance, repairs and stabilization projects on historic properties and the execution of the agreement will enable regulatory agencies to streamline cultural resource studies and expedite the permitting process to allow future Brackenridge Park projects to be constructed in a timely manner; and

WHEREAS, this Ordinance authorizes the execution of a Programmatic Agreement (PA) between the City of San Antonio, the United States Army Corps of Engineers (USACE) Fort Worth District, and the Texas Historical Commission (THC) for compliance with Section 106 of the National Historic Preservation Act of 1966 (as amended) for infrastructure maintenance repairs, improvement and stabilization projects in Brackenridge Park under Section 404 of the Clean Water Act, located in Council Districts 1 & 2; **NOW THEREFORE**,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:


SECTION 1. The City Manager, or designee, or the Director, TCI, or designee, is hereby authorized to take all actions necessary to negotiate and execute a Programmatic Agreement (PA) between the United States Army Corps of Engineers (USACE) Fort Worth District, the Texas Historical Commission (THC), and the City of San Antonio (COSA) for addressing cultural resource activities associated with Clean Water Act Section 404 permitted activities within Brackenridge Park, located in City Council Districts 1 and 2. The term shall start after the City executes the PA. A copy of the PA, in substantially final form, is attached and incorporated herein for all purposes as **Attachment I**. The execution authority granted by this ordinance shall expire 60 days from the effective date.

SECTION 2. There is no fiscal impact to the General Fund for this initiative.


SECTION 3. The financial allocations in this Ordinance are subject to approval by the Director of Finance, City of San Antonio. The Director of Finance, may, subject to concurrence by the City Manager or the City Manager's designee, correct allocations to specific SAP Fund Numbers, SAP Project Definitions, SAP WBS Elements, SAP Internal Orders, SAP Fund Centers, SAP Cost Centers, SAP Functional Areas, SAP Funds Reservation Document Numbers, and SAP GL Accounts as necessary to carry out the purpose of this Ordinance.

SECTION 4. This ordinance shall be effective immediately upon passage by eight affirmative votes; otherwise it shall be effective on the tenth day after passage hereof.

PASSED and APPROVED this 13th day of June, 2019.



M A Y O R
Ron Nirenberg

ATTEST:



Leticia M. Vacek, City Clerk

APPROVED AS TO FORM:



for Andrew Segovia, City Attorney

Agenda Item:	19 (in consent vote: 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21A, 21B, 22, 24, 25, 26, 27, 30, 31, 32, 33, 34, 35, 37, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 48, 50, 51A, 51B, 52)
Date:	06/13/2019
Time:	10:10:52 AM
Vote Type:	Motion to Approve
Description:	Ordinance approving a Programmatic Agreement with the United States Army Corps of Engineers Fort Worth District and the Texas Historical Commission for compliance with Section 106 of the National Historic Preservation Act of 1966 (as amended) for infrastructure maintenance repairs, improvement and stabilization projects in Brackenridge Park under Section 404 of the Clean Water Act located in Council Districts 1 & 2. [Roderick Sanchez, Assistant City Manager; Razi Hosseini, Interim Director, Transportation & Capital Improvements]
Result:	Passed

Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Ron Nirenberg	Mayor	x					
Roberto C. Treviño	District 1		x			x	
Art A. Hall	District 2		x				
Rebecca Viagran	District 3		x				x
Rey Saldaña	District 4		x				
Shirley Gonzales	District 5		x				
Greg Brockhouse	District 6		x				
Ana E. Sandoval	District 7		x				
Manny Pelaez	District 8		x				
John Courage	District 9		x				
Clayton H. Perry	District 10		x				

Attachment I

PROGRAMMATIC AGREEMENT
AMONG
THE UNITED STATES ARMY CORPS OF ENGINEERS, FORT WORTH DISTRICT,
THE TEXAS STATE HISTORIC PRESERVATION OFFICER,
THE CITY OF SAN ANTONIO, TEXAS

REGARDING COMPLIANCE WITH SECTION 106 OF THE NATIONAL HISTORIC
PRESERVATION ACT OF 1966 (AS AMENDED)

INFRASTRUCTURE MAINTENANCE REPAIRS, IMPROVEMENTS AND
STABILIZATION PROJECTS, IN BRACKENRIDGE PARK

UNDER SECTION 404 OF THE CLEAN WATER ACT

(May 17, 2019)
Project Number: SWF-2018-00493

WHEREAS, the United States Army Corps of Engineers, Fort Worth District (USACE) plans to implement a Programmatic Agreement (PA) to address potential impacts to cultural resources within Brackenridge Park (Park) in San Antonio, Texas that may be affected by future USACE permit decisions for maintenance actions within the Park (Attachment A Map); and

WHEREAS, maintenance of Park infrastructure by the City of San Antonio (COSA) will require a Department of the Army permit from the USACE Fort Worth District for activities which result in the discharge of dredged or fill material into wetlands and/or waters of the United States pursuant to Section 404 of the Clean Water Act (33 USC 1344), and activities occurring in or affecting navigable waters of the United States pursuant to Section 10 of the Rivers and Harbors Act; and

WHEREAS, USACE issuing a permit pursuant to Section 404 of the Clean Water Act (CWA) requires compliance with Section 106 of the National Historic Preservation Act (NHPA) of 1966 (as amended, 54 USC 300101 and 306108); and

WHEREAS, the Park is a listed Historic District in the National Register of Historic Places (NRHP), as well as a State Archeological Antiquities Landmark (SAL) under the Antiquities Code of Texas (Texas Natural Resources Code, Title 9, Chapter 191); and

WHEREAS, this PA covers infrastructure maintenance repairs, improvements, and stabilization projects within the Park except for the San Antonio Zoo; and

WHEREAS, the USACE has determined that the proposed maintenance of Park infrastructure has the potential to affect properties that are listed in, or are eligible for

listing, in the NRHP, and has consulted with the Texas Historical Commission (THC) as the State Historic Preservation Officer (SHPO), pursuant to the Advisory Council on Historic Preservation (ACHP) regulations, *Protection of Historic Properties* (36 CFR Part 800), implementing Section 106 of the NHPA; 33 CFR Part 325 (Appendix C) *Procedures for the Protection of Historic Properties*; Revised Interim Guidance for Implementing Appendix C of 33 CFR 325 with the ACHP regulations at 36 CFR 800 (2005); and

WHEREAS, the purpose of this Programmatic Agreement (PA) is to streamline compliance with the CWA regulations by developing procedures to satisfactorily take into account the effects of Park maintenance, repairs and stabilization on historic properties, and to increase flexibility in applying the regulations and reduce redundant documentation in a manner that will allow future Park repairs and stabilizations to be undertaken in an expeditious manner; and

WHEREAS, the USACE has consulted with the Comanche Nation of Oklahoma, the Lipan Apache (through the Mescalero Apache Tribe) Tribe of Texas, Tonkawa Tribe of Oklahoma, The Kickapoo Traditional Tribe of Texas, and invited them to participate in development of this document; and

WHEREAS, consulting parties, local historic organizations, and other interested persons have been notified and provided an opportunity to comment on and participate in consultation on this agreement document; and

WHEREAS, the public has been notified and provided an opportunity to comment on the undertaking through a public meeting; and

WHEREAS, the USACE has invited the Advisory Council on Historic Preservation (ACHP) to participate in consultation for this PA and the ACHP has chosen not to participate in development of this PA; and

WHEREAS, the USACE has consulted with SHPO, COSA, and recognized Tribes regarding the effects of the undertaking on historic properties and has invited them to sign this PA as signatories; and

NOW, THEREFORE; the USACE, COSA and the SHPO agree that the PA shall be implemented in accordance with the following stipulations in order to take into account the effect of future Park improvements on historic properties to satisfy the USACE's Section 106 responsibilities.

STIPULATIONS

The USACE will ensure that the following stipulations are carried out by COSA to identify historic properties and address adverse effects to such properties that will result from infrastructure improvements in the Park:

I. FRAMEWORK

- A. All work conducted under the PA will be performed in a manner that is 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.

II. LITERATURE REVIEW AND TREATMENT PLAN

- A. For each project COSA must prepare a Treatment Plan (TP) briefly summarizing and synthesizing pertinent archeological and architectural studies in the vicinity of the proposed work. A bibliography of previous cultural resources work in the park is attached (Appendix A). The TP shall contain:
 - 1. References to all pertinent investigations in the immediate area of the proposed work (Appendix A and others as required).
 - 2. Complete list of sites identified in the immediate area of the work, including National Register of Historic Places and State Antiquities Landmark status.
 - 3. Separate tabular listings for archeological sites and above-ground resources.
 - 4. Summary of any identified Traditional Cultural Properties (TCPs).
 - 5. Map of areas to be impacted, including locations of previously identified historic properties.
 - 6. Maps of any proposed ancillary facilities (parking areas, storage, etc.) associated with the proposed work.
- B. The USACE shall submit the TP to the signatories. The TP may be revised based on signatory comments received within 30 calendar days after receipt. The USACE shall be responsible for final comments and acceptance before implementation of the final TP. A copy of the final TP shall be made available to all signatories and concurring parties.
- C. The TP will identify research questions of importance to the Park and the region that can be reasonably addressed by resources that are likely to be encountered by maintenance work at the Park, and will set forth procedures for the identification and evaluation of these resources. These will include methods for finding and documenting archeological sites, historic sites, and above-ground

resources, analysis of data, and the curation of artifacts. The permit area in the TP shall take into account all potential direct and indirect effects of the Park improvements, including reasonably foreseeable effects.

- D. If all Section 106 compliance has been completed through previous work, a summary of that work shall be provided to the USACE and SHPO in lieu of a TP. The review summary shall include previous compliance correspondence with the USACE and SHPO. Additional assessments or work and development of a TP may be required if the previous compliance work is determined to be incomplete or inadequate to comply with Section 106 of the NHPA.
- E. If the USACE and SHPO determine that previous compliance work is complete in the area of the proposed Park improvements, no additional review under a TP shall be necessary.
- F. The SAL designation requires review of every TP, or work involving any historic property under this PA, by the THC for a state antiquities permit pursuant to Texas Natural Resources Code, Chapter 191, Section 191.054 and Texas Administrative Code, Title 13, Chapter 26. Review for the need for a state antiquities permit will be concurrent with Stipulation II (B). Issuance of Archeology Permits and Historic Buildings and Structures Permits may occur at different times in the Section 106 review process, as further noted below.

III. IDENTIFICATION OF HISTORIC PROPERTIES

Identification efforts should follow the ACHP's Section 106 Archaeology Guidance, the Secretary of the Interior's (SOI) Standards and Guidelines for Archaeology and Historic Preservation, the SOI's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act. This includes reporting standards defined by the Council of Texas Archeologists (CTA) and the THC. The USACE will send archeological and architectural reports to signatories and will allow 30 calendar days after receipt of any document to submit comments. Documents may then be revised considering the comments received. The USACE shall be responsible for final comments.

A. Survey:

- 1. Previously known historic properties, including resources identified as Contributing to the NRHP District and SAL, may not require any additional work under this stipulation. Assessment of these properties continues under Stipulation IV.
- 2. For Park improvement and repair areas defined in the TP, COSA shall complete a pedestrian survey for potentially historic above-ground resources, historic sites, and prehistoric sites. Archeology Permits for

Intensive Survey must be issued prior to commencement of these activities. This survey shall follow SOI standards for identification: shovel-testing, mechanical trenching as necessary to identify archeological sites; archival research, illustrations, and photographs as necessary to record above-ground resources. The survey shall also include:

- a. Whenever possible, all archeological sites and potentially historic above-ground resources will be assessed individually for NRHP eligibility and as contributing features to the existing NRHP district and SAL. Determinations of eligibility will include NRHP-listed, NRHP-eligible, Contributing, Non-Contributing, Not Eligible, or Unevaluated. Archival research will be necessary to assess potentially historic above-ground resources. Resources that cannot be fully evaluated will be assessed by more detailed work during a test excavation phase.
- b. A draft report shall be prepared following reporting standards developed by the Council of Texas Archeologists and the THC.
- c. The draft report shall be distributed to signatories for a 30 day period of review and comment. The USACE shall ensure that comments are addressed in a final survey report and distributed to all signatories.

B. Test Excavations:

1. If testing is necessary, a Mitigation Plan (MP) shall be developed in consultation with the signatories. It must include at the minimum:
 - a. Criteria for applying eligibility to the NRHP under 36 CFR 60.4.
 - b. Archeology Permits for Testing must be issued prior to commencement of these activities.
 - c. A draft report shall follow reporting standards developed by the Council of Texas Archeologists. This report shall present the research questions pertinent to the region and explain how the tested sites can (or cannot) address these questions, resulting in a recommended determination of eligibility for tested sites as eligible, or not eligible.

- d. The draft report shall be distributed to the signatories for a 30-day period of review and comment. The USACE shall ensure that comments are incorporated into a final report and distributed to all signatories.
- C. National Register - The USACE will determine the NRHP eligibility of all new archeological and historical resources identified within the permit area in consultation with the SHPO. If the USACE and the SHPO concur on eligibility, the USACE will proceed to a determination of effect. If the USACE and the SHPO disagree on NRHP eligibility, the matter will be referred to the Keeper of the National Register in the Department of the Interior, as per 36 CFR 63. The resource will be treated as if it is eligible for inclusion in the NRHP until a decision is rendered by the Keeper. If the Keeper determines that the resource is eligible, the USACE will proceed to a determination of effect. Historic properties determined eligible for the NRHP under this stipulation will also be assessed as contributing members to the NRHP District and SAL.

IV. DETERMINATION OF EFFECT

- A. For all resources determined as contributing to the NRHP District and SAL or individually eligible for inclusion in the NRHP, the USACE will apply the Criteria of Effect (36 CFR 800.5, Assessment of Adverse Effects) to assess whether or not adverse effects will occur to historic properties as a result of the Park maintenance. In consultation with the SHPO, the USACE shall make a determination of effect. Projects previously identified as requiring a Historic Buildings and Structures Permit should submit the permit application for processing concurrent with review under this Section.
- B. Finding of no Adverse Effect (NAE). USACE, in consultation with the SHPO, shall apply the Criteria of Adverse Effect to identified historic properties in accordance with 36 CFR 800.5(a). For projects determined to have NAE, historic properties shall be avoided and/or protected from all potential current and future impacts. If COSA alters its plans such that historic properties may be affected, those properties will require re-assessment of effects.
- C. Finding of Adverse Effect. For all NRHP-eligible historic properties that will be adversely affected, a plan to avoid, minimize, or mitigate any adverse effects will be developed in consultation with all signatories. The draft report shall be distributed to the signatories for a 30-day period of review and comment. The USACE shall ensure that comments are incorporated into an MP and distributed to all signatories.
- D. Development of a separate Memorandum of Agreement (MOA) may be required for unusual or complex projects exceeding the Stipulations of this PA.

V. RESOLUTION OF ADVERSE EFFECT

- A. The MP will be implemented to resolve adverse effects in accordance with 36 CFR 800.6.
 - 1. For archeological sites, the mitigation plan will specify the areas to be documented or excavated, the methods to be used, special samples to be collected, the specialists who will conduct specialized analyses, the problems set forth in the RD that can be addressed by data recovered from the site being excavated, and include reporting methods and curation of artifacts and records. Archeology Permits for Data Recovery must be issued prior to commencement of these activities.
 - 2. For architectural resources, adaptive reuse shall be considered whenever possible, and reuse meeting the Secretary of the Interior's Standards for Rehabilitation will be considered to avoid the adverse effect. For buildings and structures that will be modified or destroyed by the Park improvements, the mitigation plan will specify the level of SOI documentations standards, including HABS-HAER drawings and photographs that will be necessary to document the resources. Historic Buildings and Structures Permits for Rehabilitation or Demolition must be issued prior to commencement of these activities.
- B. All work conducted to treat adverse effects will be described in a draft report that shall follow reporting standards developed by the THC and the CTA.
- C. The draft report shall be distributed to the signatories, for a 30-day period of review and comment.
- D. If the signatories fail to agree on how adverse effects will be resolved, the USACE shall request that the ACHP be provided an opportunity to comment. The USACE shall provide comments from signatories to the ACHP, pursuant to 36 CFR 800.11 (g). Once the ACHP has commented, the USACE shall consider all comments and provide signatories a final resolution on addressing the adverse effects. If the ACHP declines to comment in 30 days under 36 CFR 800.5(c)(3)(i) the USACE shall consider signatory comments then proceed with resolutions to the adverse effect.

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

- A. COSA will ensure that copies of documents, final reports, photographs, drawings, and artifacts will be submitted to a state approved curation facility, the Library of Congress, or other approved federal curation repository identified by the SHPO.

VII. TREATMENT OF HUMAN REMAINS

- A. TREATMENT PLAN. If human remains are encountered, COSA shall develop a treatment plan for the discovery of human remains in consultation with the SHPO and consulting Tribe(s) following Chapter 11 of the Texas Health and Safety Code.
- B. If requested, the USACE shall ensure that recognized Tribe(s), the American Indians of the Spanish Colonial Missions, and other consulting parties are afforded a reasonable opportunity to identify concerns, review evaluation procedures, and determination of the ultimate disposition of human remains and associated funerary artifacts.

VIII. INADVERTENT DISCOVERIES OF HISTORIC PROPERTIES

COSA recognizes the possibility that inadvertent effects may occur to a recorded or previously unidentified historic property. Upon such a discovery, COSA shall use the following procedures:

- A. The signatories will be notified by COSA immediately upon discovery that a protected or previously unidentified cultural resource has been, or could be, inadvertently affected by the work.
- B. If work has not been completed at the time the effect is discovered, all activities in the vicinity (minimum of 10 meters) of the discovery shall cease, and reasonable efforts shall be taken to avoid or minimize harm to the cultural resource.
- C. The Principal Investigator will evaluate the discovery, assess the effects, develop possible treatment recommendations and implement additional protection measures as necessary to prevent further harm to the cultural resource.
- D. Within seven (7) days of this evaluation, COSA will initiate consultation with the USACE, and SHPO to determine if the resource is an eligible historic property and, if so, to develop a Treatment Plan to assess and mitigate any adverse effect under Stipulations II-V.

- E. If work has already been concluded when an effect to a property has been discovered, COSA, USACE, and the SHPO, shall consult to develop a Treatment Plan under Stipulations II-V to mitigate adverse effects. COSA must implement this plan within a mutually agreed upon specified time period.
- F. Within the agreed upon schedule, COSA shall provide the signatories with a report describing the discovery, the circumstances surrounding the effects, and the results of treatment plan implementation.

IX. 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 Interior's (SOI) *Professional Qualification Standards* (36 CFR Part 61) and meeting the requirements to receive an Antiquities Permit under the Rules of Practice and Procedure for the Antiquities Code of Texas (Texas Administrative Code, Title 13, Chapter 26, Rule 26.4) in a discipline appropriate for the task and the nature of the historic properties.

X. DISPUTE RESOLUTION

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

- A. **CONSULT ACHP.** Forward all documentation relevant to the dispute, including the signatories' comments and USACE's proposed resolution, to the ACHP. The ACHP shall provide the USACE with its advice on the resolution of the objection within 30 calendar days of receiving adequate documentation. Prior to reaching a final decision on the dispute, the USACE shall prepare a written response that includes any timely advice or comments regarding the dispute from the signatories and the ACHP. After consideration of all comments, the USACE will then proceed with resolution of the dispute.
- B. **FINAL DECISION.** If the ACHP does not provide its advice regarding the dispute within the 30 calendar day time period, the USACE may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, the USACE shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories to the Agreement, and provide them and the ACHP with a copy of such written response.

- C. Carry out all other actions subject to the terms of this PA that are not the subject of the dispute.

XI. DURATION, AMENDMENT, AND TERMINATION:

- A. DURATION. This Agreement shall be null and void if its terms are not carried out within 10 years from the date of its execution. Prior to such time, the USACE may consult with the other signatories to reconsider the terms of the Agreement and amend in accordance with this stipulation.
- B. AMENDMENT. This Agreement may be amended when such an amendment is agreed to in writing by all signatories. The amendment will be effective on the date a copy signed by all of the signatories is filed with the ACHP.
- C. TERMINATION. If any signatory to this Agreement determines that its terms will not or cannot be carried out, that party shall immediately consult with the other parties to attempt to develop an amendment per Stipulation XI(B), above. If within 30 calendar days (or another time period agreed to by all signatories) an amendment cannot be reached, any signatory may terminate the Agreement upon written notification to the other signatories.
- D. EXTENSION OF THIS AGREEMENT DOCUMENT: Signatories may choose to extend the duration (Stipulation XI A) of this document. Signatories shall be given 30 days to comment on the proposed extension. If signatories agree, the document may be extended by an agreed-upon time. If any signatory objects, they shall follow Stipulation X to resolve the dispute.

Once the Agreement is terminated, and prior to work continuing on any historic property in the Park requiring a Regulatory permit, the USACE must either (a) execute an agreement document pursuant to 36 CFR 800.6, or (b) request, take into account, and respond to the comments of the ACHP under 36 CFR 800.7. The USACE shall notify the signatories as to the course of action it will pursue.

XII. REPORTING AND MONITORING:

Upon execution of this PA, COSA shall provide an annual summary of the compliance projects to the USACE. The date of the PA execution shall be the reporting date. The annual update on the status of all activities covered by this PA may be provided electronically to the USACE. The USACE shall provide a copy of the summary to signatories.

XIII. EXECUTION:

Signature of this Agreement by the USACE, SHPO, and the COSA and implementation of its terms, evidence that the USACE has taken into account the effects of Park improvements on historic properties and afforded the ACHP an opportunity to comment.