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FROM: Brenda Brandon, Technical Outreach Services for Native American Communities
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SUBJECT: TOSNAC Review and Comments for K-10 South Lawrence Trafficway (SLT),
Draft Section 4(f) Evaluation, November 2006

The Technical Outreach Services for Native American Communities (TOSNAC) program provides free, non-biased technical assistance to Tribal communities by presenting fundamental scientific information related to environmental issues. Its goal is to empower Native American communities with an independent understanding of the underlying technical issues so that they may participate substantively in environmental decision-making processes. TOSNAC program is housed in the Haskell Environmental Research Studies (HERS) Center at Haskell Indian Nations University (HINU) and provides outreach services to Tribes on a national level. TOSNAC review comments provide one form of technical support through the summary and review of reports related to environmental action and impacted sites.

These TOSNAC summary and review comments for the Kansas Department of Transportation (K-DOT) Draft Section 4(f) Evaluation for the South Lawrence Trafficway (SLT) are intended to provide constructive, independent information about technical issues associated with the SLT project and K-DOT Preferred Alternative selection process. This information may help the HINU community, Native American communities, and other stakeholders gain a better understanding of the Section 4(f) Evaluation process and promote informed participation and input during the current phase of the SLT Alternative Selection process (evaluation of impact to public lands, historically significant properties, and wildlife areas).

SUMMARY OF K-DOT AND OTHER PREVIOUS REPORTS

Background

In November 2006, the US Department of Transportation (US DOT) Federal Highway Administration (FHWA) and Kansas Department of Transportation (K-DOT) released a Draft Section 4(f) Evaluation for the South Lawrence Trafficway (SLT) for public review and consideration. The Draft SLT Section 4(f) Evaluation (Draft Section 4f-Eval) examines potential impact of alternative highway alignments, as presented in the 2002 Army Corps of Engineers (ACOE) National Environmental Policy Act (NEPA) document. The Draft Section 4f-Eval is one step in a chain-of-events that are working together to satisfy agency requirements for development of the SLT project. The following summary provides a timeline of important events related to the process:

- December 2002. U.S. Army Corps of Engineers (ACOE) issued the Final Environmental Impact Statement (FEIS) Section 404 Permit Application by Kansas Department of Transportation, K-10 Highway (South Lawrence Trafficway)- completes NEPA process and satisfies public input needs related to SLT investigations, alternative options and ACOE Preferred Alternative decisions.
- July 2003. Advisory Council on Historic Preservation (ACHP) executed a Memorandum of Agreement (MOA) among the U.S. Army Corps of Engineers Kansas City District; Kansas State Historic Preservation Officer; Kansas Department of Transportation; Baker University; Douglas County, Kansas; and Advisory Council on Historic Preservation Regarding the Kansas Highway 10 Bypass (South Lawrence Trafficway) in Douglas County, Kansas (see Appendix C of Draft Section 4f-Eval)- documents agreement about alternative selection and mitigation measures required for the proposed SLT alignment.
- December 2003. The ACOE issued a Record of Decision (ROD) for SLT Permit Application under Section 404 of the Clean Water Act (Section 404 Permit) - finalizes ACOE alternative selection decisions and mitigation requirements for SLT alignment.
- December 2003. Kansas Department of Health and Environment (KDHE) executed Section 401 Water Quality Certification to ACOE - confers that the SLT project meets water quality standards for Lower Wakarusa River and Baker Wetlands and stipulates that the standards will be complied with during construction and operation of the SLT.
- March 2004. The ACOE executed the Section 404 Permit to K-DOT- specifies work authorizations and mitigation requirements for ACOE Preferred Alternative.
- November 2006. The U.S. Department of Transportation (U.S. DOT) Federal Highway Administration (FHWA) and Kansas Department of Transportation (K-DOT) released a Draft Section 4(f) Evaluation for the South Lawrence Trafficway (SLT) - informs public about intention to adopt ACOE plan and solicits public input about the Preferred Alternative Alignment.

Currently, the FHWA and K-DOT have the option to approve the Section 404 Permit and accept ACOE conditions and requirements in order to place fill materials in waters and alter Haskell/Baker Wetlands for SLT highway development. The K-DOT is requesting public comment related to the selection process about conditions required for permit adoption (including mitigation requests), or reasons to deny the requested permit. Within the Draft Section 4f-Eval, K-DOT provides comprehensive examination of potential impact of the ACOE's

Preferred Alternative (32nd Street Alternative B Alignment). Impact is also evaluated for the highway option that is popularly supported by the general public (42nd Street Alternative A Alignment).

The Section 4(f) Federal law was enacted in 1966, as of the U.S. DOT Act in order to protect historic sites, public lands, and wildlife areas. Section 4(f) mandates a land-use evaluation of federally funded highway projects and provides guidance for determination and approval of programs and projects that have the least amount of environmental impact (*de minimis* impact). Primary objectives of the FHWA Section 4(f) evaluation process include the following considerations:

- Make effort to preserve natural beauty of public lands, historical sites, and wildlife areas in development projects- called Section 4(f) properties
- Develop transportation plans and programs that include mitigation measures to maintain or enhance natural beauty of impacted environment
- Approve highway projects only if; a.) there is no better land-use alternative for highway development, and b.) the project includes all possible planning to minimize harm to impacted Section 4(f) properties
- State *de minimis* impact requirements for Section 4(f) properties, which includes avoidance, minimization, mitigation, or enhancement measures required for project implementation

The Draft Section 4f-Eval describes the five step process used to evaluate proposed SLT alternatives and reasons for eliminating options from final consideration. Twelve alternative options (including no action) were examined through the Section 4(f) screening process to select the K-DOT Preferred Alternative. Most alternative options were eliminated due to the following reasons: lack of efficiency to alleviate K-10 traffic congestion (level one); higher degree of environmental, social, and cultural impact (level two); and on basis of practicality, cost, and land accessibility (level three).

In the final screening process (level four), K-DOT evaluates impact of the 32nd Street Alternative B Alignment (32nd Street-B) and 42nd Street Alternative A Alignment (42nd Street-A) in relationship to two Section 4(f) properties; the Haskell Agricultural Farm Property, including the Haskell/Baker Wetlands; and the William Meairs Farmstead south of the Wakarusa River. In Chapter B of the Draft Section 4f-Eval, K-DOT examines land-use history, property features and local significance of the two locations identified. See Chapter D for evaluation of direct, indirect, and cumulative impacts of the 32nd Street-B Alternative to Section 4(f) properties. The K-DOT also evaluates a wide range of additional environmental consequences related to 32nd Street-B Alignment, including; consistency of SLT plans with City of Lawrence future land-use projections, relocation (businesses and residential), farm severances, as well as floodplain, wetland, stream, woodland, noise, and visual considerations.

Since publication of the ACOE ROD, total cost estimates for the SLT project alternatives have increased considerably (see table below). Draft Section 4f-Eval cost totals include mitigation values and account for construction, operation, and maintenance cost. The 2002 ACOE total dollar values include mitigation cost, as part of the total estimate.

Total Projected Cost in Millions– (mitigation cost item for ACOE estimate)

	2002 Cost (ACOE)	2007 Cost (K-DOT)
32 nd Street-B Alignment	\$110.2 (\$18.6)	\$123.1
42 nd Street-A Alignment	\$128.5 (\$ 1.9)	\$175.8

K-DOT Preferred Alternative

The 42nd Street-A Alignment was eliminated during the final selection process primarily due to the level of potential adverse environmental impact. See Exhibit 4f-9 and Chapter C of the Draft Section 4f-Eval for description of the 42nd Street-A Alignment. Environmental consequences of the 42nd Street-A Alignment are expected to include: accelerated development south of Wakarusa River; urbanization adjacent to the wetlands; and increase in traffic bordering the wetlands. The 42nd Street-A Alignment mitigation proposal is not as significant as that offered with the Preferred Alternative, which contributes to decisions leaning toward selection of the 32nd Street-B option. In Chapter E of the Draft Section 4f-Eval, K-DOT describes the direct, indirect, and cumulative impacts of the 42nd Street-A Alignment to Section 4(f) properties and other environmental features.

K-DOT concludes that the 32nd Street-B Alignment provides the best SLT development option, based on four final screening criteria, including; safety, efficiency, environmental impacts, and cost. Accordingly, the K-DOT evaluation indicates that direct, cumulative, and indirect impact is minimized and positive impacts are maximized to the greatest degree with adoption of the ACOE/ K-DOT Preferred Alternative (32nd Street-B Alternative). In the SLT FEIS, the ACOE determined that the direct impacts to the Haskell/ Baker Wetlands will be mitigated through creation of additional wetlands. In selection of the Preferred Alternative, K-DOT considered the role of mitigation. The 32nd Street-B Alternative mitigation proposal includes a net gain of 259 wetland acres, addition of a \$1.2 million “Wetland and Cultural Education Center,” and other features that will benefit the general public. For description of the Preferred Alternative see Exhibit 4f-8 and Chapter C of the Draft Section 4f-Eval.

Through the public commenting process, K-DOT is requesting community input about the SLT alternative selection process and the proposed 32nd Street-B development plan. The K-DOT is also requesting response from all Native American Tribes and extends invitation for government-to-government consultation with 29 Kansas reservation and homeland Tribes. Final approval of the SLT Section 4(f) Evaluation document is scheduled for February 2007. The Record of Decision for the Section 4f-Evaluation will be finalized in July of 2007. Currently, there is no allocation of federal or state funding for SLT construction. For more information about the SLT project, Section 4f-Evaluation and K-DOT Preferred Alternative see the K-DOT sponsored website for SLT at <http://www.southlawrencetrafficway.org/>.

Haskell Community and Native American Environmental Justice Considerations

As recorded in the SLT FEIS for Section 404 Permit Application (2002), a significant proportion of public response to ACOE activities and NEPA process relate to Native American issues. Evaluation of public replies to ACOE proposed alternatives indicate that a wide-range and substantial number of cultural concerns were expressed by the HINU community, as well as participating Tribal representatives. Expressions of Native American concerns are reflected in 80.48% of the public comments provided to the ACOE for consideration in development of the SLT FEIS. Native American perspectives about SLT project are well documented in public meeting records and media reaction to NEPA activities. Through government-to-government relations with Tribes and interviews with Native American Elders, ACOE gained additional insight about highway development concerns and mitigation needs. Native American community response is reflected in ACOE decisions related to the SLT FEIS, ROD and resulting K-DOT Section 404 Permit that authorizes SLT work and outlines mitigation requirements.

TOSNAC identified four major areas of contention between HINU Community opinion and proposal of SLT development options offered by ACOE and K-DOT (TOSNAC comments for ACOE Environmental Impact Statements, 2002 and 2003). Outside of the technical concerns listed below, there are other inherent political and social considerations that have historically driven the NEPA process and decisions about the SLT alignment.

- 1.) Ownership of Wetlands
 - a. 1968 land transfer of Haskell Agricultural Farm Property to Baker University is not well documented or understood by the public
 - b. Haskell/Baker wetland operations are not well communicated to the general public and maintenance responsibilities are not shared with HINU
 - c. There is no formalized cooperative agreement or wetlands management partnership that includes HINU along with other involved stakeholders (i.e. Baker University, HINU community, Lawrence community and involved state and federal agencies)
- 2.) Designation of Wetlands (Natural or Man-made) and Historical Land-use
 - a. General lack of understanding of technical and regulatory issues related to wetland construction and management
 - b. Lack of information about the natural geological and ecological status of lands prior to human disturbance (i.e. construction of agricultural lands and wetlands)
 - c. Perceptions that historical and cultural relationship of Native American community with Haskell Agricultural Farm Property/ Wetlands is not appropriately described in NEPA documents, including the Brockington Report (Appendix A-13 of ACOE 2002 SLT FEIS)
- 3.) Potential Burial Sites and Issues of Sacredness
 - a. Native American Grave Protection and Repatriation Act (NAGPRA) considerations
 - b. Cultural sensitivity concerns related to conducting scientific studies in HINU historical properties
 - c. Inappropriate disturbance of potential burial sites is not acceptable to HINU and Native American community members
 - d. Scientific delineation of potential burial sites may be lacking

- 4.) Cultural Concerns Related to Alteration of Natural and Existing Environment
 - a. Impact to culturally significant plants, animals and wetland ecosystem
 - b. Loss of aesthetic value of existing wetlands and green-space
 - c. Impact to HINU educational systems and outdoor learning environments
 - d. Potential deleterious impact to Native American religious and ceremonial practices on and near impacted lands
 - e. Disruption to cohesiveness of cultural sites by development of highway barriers

SLT Mitigation Measures

In the Section 404 Permit (part o.), the ACOE outlines the mitigation steps that K-DOT is required to follow in order to develop SLT highway and reduce impact of 32nd Street-B Alignment option. The following mitigation conditions relevant only to the 32nd Street-B Alignment are contained within the permit text:

1. Requires K-DOT to construct, develop and implement all mitigation features described in the SLT FIES, including; creation of 304 acres of wetlands (net gain of 259 acres)
2. Requires K-DOT to relocate 31st Street to area adjacent to 32nd Street-B Alignment; remove existing 31st Street road material; re-grade and vegetate associated lands; and return construction easement to Bureau of Indian Affairs (BIA)/ HINU
3. Sets a two-year completion date (from SLT project initiation) for wetland mitigation features; relocation of Haskell Avenue and Louisiana Street with wetland construction; construction of parking, camping areas, and hike and bike trails.
4. Sets completion of “Wetland and Cultural Educational Center” at no later than 5 years from SLT project initiation date
5. Sets completion date requirements for removal of road and restoration of wetlands in existing 31st Street area (13 acres) within one year after opening the relocated 31st Street
6. Sets completion requirements of highway mitigation features to be implemented before opening relocated highway to public use - including noise walls, landscaping, and roadway runoff control features to protect wetlands
7. Requires that the 304-acre wetland mitigation areas will be protected from disturbance and preserved as wetlands in perpetuity (does not include protection considerations for vacated 31st Street area that is intended to be returned to HINU/ BIA control)

In congruence with Section 404 Permit requirements, K-DOT presents a significant mitigation proposal to address resource impact and wetlands enhancement that applies only to the ACOE/ K-DOT Preferred Alternative. Due to higher construction cost of the 42nd Street-A Alignment (primarily due to cost of expanded wetland bridge), the amount of mitigation allowance would be substantially less than that achievable with the Preferred Alternative. Other cost complexities associated with 42nd Street-A Alignment involve the need to address a large number of dislocation and severance considerations relevant to stakeholders, residential, business, farm properties and historic sites located south of the Wakarusa River. The K-DOT estimates the added cost of the 42nd Street-A Alignment to be \$23.8 million, which will significantly limit the mitigation benefits provided to the general public if selected.

Primary minimization and mitigation measures contained in the 32nd Street-B Alignment conceptual designs are prescribed by ACOE in the Section 404 Permit (see above discussion). The July 2003 MOA (Appendix C of Draft Section 4f-Eval) signifies broad agency support for building the 32nd Street-B option, with concurrence about conditional mitigation measures. Additional considerations in the MOA relate to conditions required in order to resolve adverse affects to historic properties. Some of these conditions include:

- Minimize width of bypass corridor and impact to wetlands
- Construction sequencing plans to minimize wetland impact
- Construction of 12-foot-high wall on north side, and a 6 foot berm with 6-foot-high wall along the south side of the bypass (minimize traffic noise and visual disturbance)
- Minimize highway lighting (reduce impact to wetlands)
- Record HINU Agricultural Farm Property as historic structures
- K-DOT will monitor construction activities to identify archeological site
- Protection of human remains (if encountered) under the Kansas Unmarked Burials Sites Preservation Act
- Recognize Native American Tribal representatives as monitors for excavation activities within the historic Haskell Agricultural Farm Property

Chapter F of the Draft Section 4f-Eval provides a comprehensive evaluation of proposed measures pertaining to the 32nd Street-B Alignment that K-DOT will use to minimize harm to environment. It is disclosed that K-DOT will provide Baker University with funds for an annuity that will support Baker University's efforts to manage the expanded Baker Wetlands complex. Baker University responsibilities will include ownership and management of the "Wetland and Cultural Educational Center," as well as management of 304 acres of constructed wetlands. The primary functions and secondary benefits of K-DOT mitigation efforts are summarized in the evaluation document for the following features:

- Creation of 304 acres of public wetlands
- Relocation of adjacent roadways and creation of 13 acres of HINU wetlands
- Wetland and Cultural Educational Center
- Hike and bike trails, camp sites and parking areas for public use
- Noise walls will be painted to blend-in and screened with vegetation

REVIEW COMMENTS AND RECOMMENDATIONS

To build on a spirit of open communications and respect exhibited to date during this public comment period by all parties, this paper attempts to highlight some of the most important concerns of the impacted Native American communities with respect to the development of SLT plans and impact to Haskell Wetlands and historic properties. The HINU community needs a greater understanding of technical issues associated with conceptualization and construction of SLT alignment and required mitigation features. There is need for opportunities for HINU involvement in wetland educational and public outreach programs. This includes HINU community interest in specific plans and actions to address cultural risk concerns and impact to natural resources; and collaboration with all stakeholders to communicate concerns and become

involved in decision-making processes. While the K-DOT plan makes a good start in addressing these issues, more emphasis is needed during the development and operation phases to adequately address the needs of Native Americans who currently use or have ties to the affected HINU properties. Development and implementation of a culturally appropriate educational and outreach program, that may include public information and feedback meetings and educational handouts, will help achieve meaningful community involvement.

Many of the identified Environmental Justice concerns can be approached using culturally appropriate communication processes that involve co-learning (between HINU community/ Native American Tribes and involved agencies). The development of culturally appropriate wetlands educational and outreach programs can provide measurable outcomes of success. Initiation of cooperative partnerships among HINU community and involved state and federal agencies will help address problem-definition needs and Environmental Justice issues associated with use and alteration of Native American lands. Following ACOE lead, K-DOT commits to continue government-to-government consultation with BIA, HINU Administration, HINU Board of Regents and Native American Tribes in order to help set and uphold appropriate mitigation standards. By preserving government-to-government relations established by ACOE (during the NEPA process), K-DOT is taking positive steps to sustain good faith and open communication with impacted Native American Tribes.

Development of South Lawrence Trafficway has the potential to significantly disrupt the aesthetic constitution of the natural environment and subsequently impact the integrity of educational and ceremonial sites on HINU campus, including sweat lodges and the Haskell Medicine Wheel. Haskell has influenced many lives and is part of all Native American/Alaska Native culture and history. The HINU community reaches beyond the scope of the student body, staff, faculty, administration and immediate university environment. Native American concern about SLT project extends to a national level. Because there are multiple subpopulations of impacted people, agency partnership opportunities and activities should remain open and inclusive of participation from a broad-range of Native American/ Alaska Native representatives. Use of the term "Haskell community" in the Draft Section 4f-Eval inspires the Native American reader. It is apparent that K-DOT is making attempt to convey the significance of HINU identity, as a community connected through history, cultural experience, educational values, and land. TOSNAC recommends that K-DOT continue to foster positive working relationships and include HINU community in decision-making processes for establishing and implementing SLT goals and projects.

There are a number of mitigation measures that have not been completely conceptualized, which might be addressed during the SLT implementation phase. It is not clear how the 13 acres of created Haskell wetlands will be managed. Additionally, the Draft Section 4f-Eval does not identify parties responsible for management of public campsites, hike and bike trails, and parking areas. Presumably Douglas County, the City of Lawrence, Kansas Department of Wildlife and Parks, and other agencies/organizations will play roles in managing and maintaining aspects of the expanded Baker Wetlands complex. Other issues associated with mitigation to HINU are not fully developed in the K-DOT document. One important concern relates to need for removal of the out-dated City of Lawrence sewage pump station that presents a health hazard, contaminates streams, and negatively impacts historic graveyard and cultural

areas on HINU campus (for mitigation reference see ACOE 2002 SLT FEIS Section 4.13.2). The City of Lawrence, K-DOT, ACOE, other state, federal and local agencies could collaborate and provide a more comprehensive mitigation package to HINU Administration that includes acquisition and installation of a new sewage force main (along Haskell Ave. and the SLT) to address the seriousness of campus sanitation and wastewater concerns.

Although 32nd Street-B Alignment mitigation measures provide substantial benefit to the general public, additional measures that might benefit HINU community may also be feasible and practical. Regardless of implementation intent, all achievable mitigation measures should be identified for further consideration and discussion with HINU community. Below are a few suggestions of the type of mitigation measures that could be further investigated and discussed with HINU and impacted Native American communities:

- Identify funding programs and partnership opportunities to address operation and maintenance requirements of the new Haskell Wetlands (13 acres)
- Help build HINU capacity to direct wetland management and educational programs
- Identify wetland research, educational and outreach opportunities for HINU
- Help build capacity to develop HINU historic and cultural projects applicable to Wetland and Cultural Educational Center activities
- Develop partnerships that include HINU community participation
- Include HINU community in refining wetland management and preservation strategies
- Identify funds and opportunities to help address HINU community participatory needs (i.e. wetlands outreach programs, HINU community educational material, and participation in wetlands management and protection projects)
- Identify mechanisms to secure HINU community representation and involvement in Wetland and Cultural Educational Center activities
- Provide information and fact sheets about hazardous waste sources and generation facilities near HINU campus (includes highways)
- Provide information and fact sheets about hazards associated with projected trafficway emissions and construction activities (includes wetlands)
- Assist City of Lawrence to resolve issues associated with out-dated sewage pump station on HINU campus (see ACOE 2002 SLT FEIS Section 4.13.2)

In event that FHWA and K-DOT elect to implement the Preferred Alternative plan, K-DOT should take immediate steps to involve participation of HINU and affected Native American communities. Through partnerships with involved agencies, HINU community-based participatory plans, programs, and processes can be initiated. With extension of collaborative agreements and partnerships to include the HINU community, more inclusive historic, cultural and educational programs can evolve. Through collaboration with K-DOT and Baker University, Native Americans and HINU representatives can effectively participate in projects related to wetland protection, development, mitigation, maintenance, operations, management, educational and outreach activities.

Public acceptance is one important measure of the success of any environmental action. Evidence of disproportionate environmental impact or even perceived disproportionate impact is not to the advantage of the public and is not representative of the interest of Kansas citizens as a

whole. Effective and meaningful community involvement from all sectors of the Native American community will be an important key to the successful development of the South Lawrence Trafficway. Tribal College research and outreach programs can provide avenues to address technical and culturally sensitive concerns related to SLT project. The HERS Center is in position to assist the HINU community and K-DOT with efforts to foster partnership opportunities that will contribute to Haskell Wetland development, mitigation, and protection objectives. HERS Center staff can also assist with non-biased interpretation and communication of technical information, as well as contribute to development and dissemination of community outreach material related to SLT environmental processes. Other independent, non-biased technical outreach providers may also be available.

The main recommendation is that KDOT continue opportunities for meaningful community involvement during the development and operation phase of the SLT project – to address remaining issues and to adequately address the needs of Native Americans who currently use and/or have ties to the affected HINU properties. Development and implementation of a culturally appropriate educational and outreach program, that may include public information and feedback meetings and educational handouts, will help achieve meaningful community involvement.

GENERAL COMMENTS

The above summary and associated review comments were prepared by Brenda Brandon, TOSNAC Coordinator at Haskell Environmental Research Studies Center, Haskell Indian Nations University in collaboration with Center for Hazardous Substance Research at Kansas State University. The above summary and review comments are provided at the request of Haskell Indian Nations University community representatives and prepared for use in HINU community outreach programs to help address Environmental Justice and cultural risk considerations. The Center for Hazardous Substance Research receives funding via an EPA grant to provide non-biased technical assistance to stakeholders, free of charge, at Superfund, Brownfields, Federal Facility and other environmental sites. Information presented herein is a summary of existing information in documents generated by others. It does not represent the view of Kansas State University or the EPA. No preferences or warranties, expressed or implied, are intended or made.

If you have any questions about this summary and review comments presentation or need additional information, please contact Brenda Brandon, TOSNAC Coordinator at 1-866-880-2296 or at brendabrandon@msn.com.

REFERENCES

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