

# **CONSULTATION PROTOCOL AGREEMENT**

**In Accordance With**

**The National  
Historic  
Preservation  
Act**

**On Federal-Aid Highway Undertakings in Minnesota**

**Between**

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**MILLE LACS BAND OF OJIBWE**

**and**

**THE FEDERAL HIGHWAY ADMINISTRATION**

November 2015

**WHEREAS**, the Federal Highway Administration (FHWA) is the federal agency with statutory responsibilities for administering the Federal-Aid Highway Program under Title 23 U.S.C. "Highways" and agrees to consult and coordinate under a government-to-government relationship with federally recognized tribal governments in carrying out its activities under Title 23 and other applicable federal statutes; and

**WHEREAS**, the Mille Lacs Band of Ojibwe is a federally recognized tribe and sovereign government having an interest in the preservation and protection of its treaty rights and cultural heritage: (1) within the boundaries of the Mille Lacs Indian Reservation as described in the "**Treaty with the Chippewa**" made on February 22, 1855, in Washington, DC between the United States and the Mississippi, Pillager and Lake Winnibigoshish Bands of Chippewa Indians, 10 Stat. 1165 (ratified by the Senate on March 3, 1855, and proclaimed by the President on April 7, 1855), as shown in Attachment 1 and 2 hereto; (2) on all lands currently held trust for or owned in fee by the Mille Lacs Band of Ojibwe and its members, as shown in Attachment 2 hereto; and (3) on all lands in the State of Minnesota on which it retains treaty rights to hunt fish and gather under the Treaty with the Chippewa made July 29, 1837, at St. Peters, Wisconsin Territory, between the United States and the Chippewa Nation of Indians, 7 Stat. 536 (Proclaimed by the President on June 5, 1838), and as shown in Attachment 2 hereto; and

**WHEREAS**, the Mille Lacs Band of Ojibwe have trust lands outside of the reservation boundaries hereafter referred to as "exterior trust lands".

**WHEREAS**, pursuant to 4 MLBSA (Mille Lacs Band Statutes Annotated) Section 6 (c), the Chief Executive of the Mille Lacs Band of Ojibwe has the authority to conduct external relations to participate in this Consultation Protocol Agreement (AGREEMENT); and

**WHEREAS**, the FHWA has delegated its responsibilities, to a certain extent, for compliance with Section 106 in accordance with Federal law to the professionally qualified staff (as per 36 CFR 61) in the Cultural Resources Unit (CRU) at the Minnesota Department of Transportation (MnDOT) as outlined in the *Programmatic Agreement Among the Federal Highway Administration, the Minnesota State Historic Preservation Office, The Advisory Council on Historic Preservation, The Department of the Army (Corps of Engineers, St. Paul District), and the Minnesota Department of Transportation Regarding Implementation of the Federal-Aid Highway Program in Minnesota* although FHWA remains legally responsible for all findings and determinations charged to the Agency Official in 36 CFR 800; and

**WHEREAS**, the MnDOT CRU (hereafter referred to as 'AGENT') will be acting as an agent of FHWA for the purposes of initiating consultation and establishing Section 106 findings of effect for FHWA undertakings although FHWA remains legally responsible for all findings and determinations charged to the agency official in 36 CFR 800; and

**WHEREAS**, the FHWA has determined that its undertakings may have an effect upon properties included in or eligible for inclusion in the National Register of Historic Places (NRHP) and has consulted with the Mille Lacs Band of Ojibwe, the SHPO, and FHWA's AGENT pursuant to Section 800.16 of the regulations (36 CFR 800) implementing Section 106 of the NHPA (16 U.S.C. 470f); and

**WHEREAS**, the FHWA wishes to conduct its programs in a manner consistent with 36 CFR 800 and intends to integrate its historic and archaeological preservation planning and management decisions with other policy and program requirements to the maximum extent possible consistent with Section 110 of the NHPA; and

**WHEREAS**, 36 CFR Part 800 encourages federal agencies to efficiently fulfill their obligations under Section 106 of the NHPA through the development and implementation of cooperative agreements; and

**WHEREAS**, the FHWA is committed to the design and construction of transportation systems that: (1) achieve a

safe and efficient function appropriately placed within the Minnesota context; (2) avoid, minimize and mitigate adverse effects on historic, archaeological and cultural resources; (3) recognize that investment in these historic, archaeological, and cultural resources is critical to Minnesota's continued growth and prosperity; and (4) respond to the needs of Minnesota communities including the Mille Lacs Band of Ojibwe; and

**WHEREAS**, the FHWA and the Mille Lacs Band of Ojibwe aspire to engage in meaningful, long-term planning for the protection of historic properties and, toward that end, desire to: (1) develop a comprehensive and efficient process for all Section 106 undertakings; (2) simplify procedural requirements to the maximum extent possible; (3) eliminate unnecessary paperwork; (4) affirm the role of the Mille Lacs Band of Ojibwe to the extent required; (5) devote a larger percentage of time and energies to identifying transportation-related concerns that may affect historic, archaeological and cultural properties; and (6) continue creating innovative programs to address those problems.

**WHEREAS**, the representatives of the FHWA have engaged in consultation with the representatives of the Mille Lacs Band of Ojibwe, and have jointly agreed to establish consultation process in an agreement per 36 CFR 800.2 (c)(2)(ii)(E); and

**WHEREAS**, FHWA's AGENT has participated in the consultation, and has been solicited to sign this AGREEMENT; and

**WHEREAS**, nothing in this AGREEMENT shall alter, amend, repeal, interpret, or waive tribal sovereignty, tribal sovereign immunity, any treaty rights, or other such rights of the Mille Lacs Band of Ojibwe, or to preempt, modify, or limit the exercise of any such rights; and

**WHEREAS**, the FHWA and the Mille Lacs Band of Ojibwe are the primary signatories to this AGREEMENT; and

**WHEREAS**, this AGREEMENT supersedes the Programmatic Agreement signed by the Mille Lacs Band of Ojibwe and the Federal Highway Administration on January 29, 2015; and

**NOW, THEREFORE**, the FHWA and the Mille Lacs Band of Ojibwe hereby agree that the implementation of Federal-Aid Highway Program shall be administered in accordance with the following stipulations in order to satisfy FHWA's Section 106 (36 CFR Part 800) responsibilities with regard to consultation with the Mille Lacs Band of Ojibwe for individual undertakings of the program.

## **STIPULATIONS**

All responsible parties to this AGREEMENT agree to ensure that the following measures are carried out:

### **1. Applicability**

- This AGREEMENT applies to all FHWA undertakings administered under its Federal-Aid Highway Program within the external Mille Lacs Reservation Treaty of 1855 boundary (10 Stat 1165) as shown in Attachment 1 and any Mille Lacs Band of Ojibwe exterior trust lands.
- This AGREEMENT also applies to any FHWA undertakings located within the geographic area of interest delineated in Attachment 3 which consists of the following Minnesota counties: Aitkin, Anoka, Benton, Cass, Chisago, Crow Wing, Itasca, Kanabec, Mille Lacs, Morrison, Otter Tail, Pine Sherburne, Todd, Wadena, and Washington. This includes all trust lands and other lands under the jurisdiction of the Mille Lacs Band of Ojibwe and lands on which the Band retains treaty rights to hunt, fish and gather under the Treaty of 1837 (7 Stat. 536) (see Attachment 2). In doing so, the FHWA, with the assistance of its

AGENT will meet its responsibilities with regards to consultation with the Mille Lacs Band of Ojibwe under Section 106 of the NHPA;

- However, if previously recorded burial mounds are located within the Area of Potential Effect (APE) of an FHWA undertaking in any portion of Minnesota, the Mille Lacs Band of Ojibwe will be consulted as described in this AGREEMENT.

## **2. Designation of Point of Contact and Their Responsibilities**

- a) The individual designated as the primary point of contact for each party to the AGREEMENT shall serve as the official representative responsible for responding to requests and issuing decisions under the provisions of this AGREEMENT. Any party to this AGREEMENT may identify others they wish to be included as secondary contacts. Secondary contacts shall be provided copies of transmitted information but are not responsible for responding to requests and making decisions.
- b) The role of the primary point of contact is to develop a relationship with other points of contact with the goal of a clearer understanding of the needs and concerns of all parties and to respect cultural resources. These individuals should strive to develop relationships that will result in more effective cultural resources management and improve the effectiveness and efficiency of the consultation process.
- c) Identification of the points of contact (Attachment 4):
  1. The FHWA's Contact:  
The FHWA Environmental Specialist is the primary point of contact for FHWA. The Division Administrator and Technical Services Team Leader are the secondary contacts for FHWA.
  2. The Mille Lacs Band of Ojibwe's Contact:  
The Tribal Historic Preservation Officer (THPO) is the primary point of contact for the Mille Lacs Band of Ojibwe. The Chief Executive and the Commissioner of Natural Resources (CNR) are secondary contacts for the Mille Lacs Band of Ojibwe.
  3. The FHWA AGENT's Contact:  
The MnDOT Cultural Resources Unit Supervisor (CRU) is the primary point of contact. The secondary contact is the Cultural Resources Unit manager assigned to the project.
- d) Change in contacts and addresses for contacts
  1. Any party to this AGREEMENT may change its point of contact person for purposes of this AGREEMENT by communicating to the other parties in writing within 30 calendar days of the effective date of that change. Such changes do not require this AGREEMENT to be amended.
  2. Addresses and other contact information for the contacts are found in Attachment 4 to this AGREEMENT. It is the responsibility of each of the parties to update any changes in that contact information based on information provided pursuant to Stipulation 2.d.1.

## **3. Activities Exempt from Consultation**

The activities listed in Attachment 5 which occur in the above listed Counties are exempt from Mille Lacs Band of

Ojibwe tribal consultation in compliance with 36 CFR 800. These activities are identified for exemption because they are routinely undertaken with Federal-Aid Highway Program funds and have limited areas of impact that are unlikely to contain properties that are included in or are eligible for inclusion in the NRHP. The areas of impact are limited because they occur largely at grade within an existing right-of-way (ROW), do not introduce new structural or visual elements, and do not require substantial ground disturbance. FHWA's AGENT will determine if one or more of the exempt activities applies on a project-by-project basis and will document their determination. Documentation supporting the application of an exemption will be part of the project file and be available for review by the signatories upon request and electronically once this online review system is put in place by FHWA's AGENT. The Mille Lacs Band of Ojibwe will not review this class of projects.

This exemption shall not apply within areas that contain burials or human remains, sacred places, places of traditional religious significance, or traditional cultural properties, or a high probability thereof, even if the area has previously been disturbed or mitigated.

This exemption shall not apply within culturally sensitive areas identified by FHWA's AGENT. Such culturally sensitive areas may include archaeologically, culturally, or historically significant areas. The Mille Lacs Band of Ojibwe will review all FHWA undertakings in the geographic area defined in Stipulation 1 where it has been determined that the exemptions provided by this AGREEMENT do not apply.

#### **4. Consultation Prior to Determination of Eligibility and Finding of Effect**

When a project is proposed that will include FHWA undertakings or when a required approval is needed from the FHWA (such as an Interstate Access Request), FHWA's AGENT will initiate consultation in a manner consistent with 36 CFR 800.2(c) (2), once the undertaking has been established. This authorization to initiate consultation is recognized in 36 CFR 800.2(c)(4) as the "Agency Official", FHWA remains legally responsible for all findings and determinations charged to the "Agency Official".

The Mille Lacs Band of Ojibwe has acquired formal Tribal Historic Preservation Officer (THPO) certification from the National Park Service (NPS) pursuant to Section 101(d) of the NHPA and currently has a person in the THPO position. Therefore:

- a) Any necessary Section 106 consultation for undertakings entirely within reservation boundaries or exterior trust lands will be with the THPO in lieu of consultation with the SHPO for all non-architectural historic properties unless otherwise provided per 36 CFR 800. Architectural historic properties will be reviewed by the SHPO and the THPO will be copied on all correspondence with SHPO concerning architectural historic properties.
- b) Any necessary Section 106 consultation for undertakings on land in the geographic area of interest defined in Stipulation 1 (but not within reservation boundaries or on exterior Mille Lacs Band of Ojibwe trust land) will be initiated by inviting the Mille Lacs Band of Ojibwe to be a consulting party.
- c) Any necessary Section 106 consultation for undertakings which are not entirely within reservation boundaries or exterior trust lands but within the geographic area of interest as defined in Stipulation 1 will be as follows:
  - o The portion of the undertaking within reservation boundaries or exterior trust lands will follow process defined in Stipulation 4a.
  - o The portion of the undertaking not within reservation boundaries or not within exterior trust lands will follow process defined in Stipulation 4b.

Consultation documentation shall be sent to the Mille Lacs Band of Ojibwe THPO. If the Mille Lacs Band of Ojibwe does not have a person in the THPO position at the time of any necessary Section 106 consultation, any documentation will be sent to the Chief Executive and the Commissioner of Natural Resources (until the THPO position is filled) per Stipulation 4 (a)(b)(c).



If the Mille Lacs Band of Ojibwe has not maintained formal THPO certification (per Section 101(d) of the NHPA) and an updated consultation protocol agreement to reflect the change in THPO certification status has not been executed at the time of any necessary Section 106 project consultation, then FHWA will consult as outlined under 36CFR 800.2 (c) (2) (B) for undertakings within reservation boundaries or exterior trust lands that are within the area of interest as defined in Stipulation 1. The Mille Lacs Band of Ojibwe will be invited to be a consulting party for undertakings outside of reservation boundaries or off exterior trust lands but still within their geographic area of interest as defined in Stipulation 1. The SHPO will continue to review architectural historic properties within reservation boundaries or exterior trust lands (as per the Programmatic Agreement executed April 7, 2015 entitled: *Programmatic Agreement Among the Federal Highway Administration; the Minnesota State Historic Preservation Office; the Advisory Council on Historic Preservation; the Department of the Army, Corps of Engineers, St. Paul District; and the Minnesota Department of Transportation Regarding Implementation of the Federal-Aid Highway Program in Minnesota (As Amended 2014)*).

If the Mille Lacs Band of Ojibwe has not maintained formal THPO certification and an updated consultation protocol agreement has not been executed at the time of the necessary Section 106 project consultation, the signatories to this agreement shall meet within six months of change in THPO certification status to initiate discussions in pursuit of an updated consultation protocol agreement.

This consultation will address historic properties (36 CFR 800.16) which may include:

- a) Properties potentially eligible, eligible, or included in the National Register of Historic Places (36 C.F.R. 800 and 16 U.S.C 470w).
- b) Properties of traditional religious or cultural importance, regardless of the location of the property, in accordance with NHPA (16 U.S.C §§ 470a (d) 6 (b)) and 36 C.F.R 800.2(c).

Initial contacts in the project development process will come from FHWA's AGENT. These contacts will provide information, in the form of an electronic notification to the Mille Lacs Band of Ojibwe, or paper notification to the SHPO, which will include a map of the project area that identifies the project limits; preliminary APE, description of the project including details of anticipated ground disturbance; identify known historic properties; identify other consulting parties; and includes photographs of the project area, if available.

FHWA's AGENT will ask for an indication whether Mille Lacs Band of Ojibwe has concerns with this project, and request any information from Mille Lacs Band of Ojibwe about historic properties in the project area and other concerns.

The Mille Lacs Band of Ojibwe will respond to this request for information within thirty (30) calendar days of receipt of the initial consultation information. If project limits are within the Mille Lacs Band of Ojibwe reservation boundaries, exterior trust land, or the geographic area of interest defined in Stipulation 1, the Mille Lacs Band of Ojibwe will notify FHWA's AGENT of specific property(s) of concern in the project area. If FHWA's AGENT does not receive an initial response from the Mille Lacs Band of Ojibwe within thirty (30) calendar days of receipt of the request for information, and FHWA's AGENT has confirmed receipt of the information, FHWA and FHWA's AGENT will assume that the Mille Lacs Band of Ojibwe concurs with the initial consultation information and has no additional concerns or information to supply.

If the Mille Lacs Band of Ojibwe requests additional information or identifies the project as one of concern, FHWA's AGENT will provide additional information about the location, significance, and eligibility of historic, cultural, or archaeological properties in the project area as well as discuss possible project effects.

## **5. Consultation after Determination of Eligibility and Preliminary Finding of “No Historic Properties Affected”**

Upon the FHWA AGENT’s preliminary determination that there are no historic properties, which may include traditional religious or cultural importance, regardless of the location of the property, in accordance with NHPA, within the project area, FHWA’s AGENT will notify the Mille Lacs Band of Ojibwe of that finding.

### *(a) Undertakings entirely within reservation boundaries or exterior trust lands*

Copies of adequate documentation to support that finding will be sent to the Mille Lacs Band of Ojibwe and the SHPO per Stipulation 4. The Mille Lacs Band of Ojibwe will respond to this finding within thirty (30) calendar days of receipt of documentation. The response for historic properties within reservation boundaries or exterior trust lands will be the formal concurrence action taken by the THPO in lieu of the SHPO unless otherwise provided by 36 CFR 800. If FHWA’s AGENT does not receive an initial response within thirty (30) calendar days, and FHWA’s AGENT has confirmed receipt of the information, FHWA and FHWA’s AGENT will assume that the Mille Lacs Band of Ojibwe concurs with the Finding of “No Historic Properties Affected” and has no additional concerns with the project.

If the Mille Lacs Band of Ojibwe or SHPO indicates that they do not agree with the AGENT’s preliminary finding of “no historic properties affected” and if those parties cannot readily reach agreement on identification or eligibility of properties or definition of the area of potential effect, FHWA will enter directly into the consultation process. FHWA will be involved in the consultation to develop any necessary Memorandum of Agreement (MOA) to minimize and mitigate any adverse effects to historic properties in accordance with NHPA and implementing regulations.

### *(b) Undertakings on land within Mille Lacs Band of Ojibwe geographic area of interest (but not within reservation boundaries or on exterior Mille Lacs Band of Ojibwe trust land).*

Copies of adequate documentation to support that finding will be sent to the Mille Lacs Band of Ojibwe per Stipulation 4. The Mille Lacs Band of Ojibwe will respond to this finding within thirty (30) calendar days of receipt of documentation. If FHWA’s AGENT does not receive response within thirty (30) calendar days, and FHWA’s AGENT has confirmed receipt of the information, FHWA and FHWA’s AGENT will assume that the Mille Lacs Band of Ojibwe agrees with the Finding of “No Historic Properties Affected” and have no additional concerns with the project.

If the Mille Lacs Band of Ojibwe indicate that they do not agree with the finding of “No Historic Properties Affected,” and, in consultation with FHWA’s AGENT, cannot readily reach an agreement on identification of properties or a method to achieve “No Historic Properties Affected,” or definition of the area of potential effect, the FHWA will enter directly into the consultation process.

### *(c) Undertakings which are not entirely within reservation boundaries or exterior trust lands but within the geographic area of interest as defined in Stipulation 1*

Copies of adequate documentation to support that finding will be sent to the Mille Lacs Band of Ojibwe and SHPO per Stipulation 4. The SHPO review is limited to architectural historic properties within reservation boundaries or on exterior trust land because it is a ‘No Historic Properties Affected’ finding. This limited SHPO review of architectural historic properties is a balancing of terms in the Mille Lacs Band of Ojibwe THPO certification per the National Park Service process and Stipulation 3f of the *Programmatic*

*Agreement Among the Federal Highway Administration; The Advisory Council on Historic Preservation; The Department of the Army, Corps of Engineers, St. Paul District; and the Minnesota Department of Transportation; Regarding Implementation of the Federal-Aid Highway Program in Minnesota (As Amended 2014).* The Mille Lacs Band of Ojibwe and SHPO will respond to this finding within thirty (30) calendar days of receipt of documentation. The response for historic properties within reservation boundaries or exterior trust lands will be the formal concurrence action taken by the THPO in lieu of the SHPO unless otherwise provided by 36 CFR 800. The response for non-architectural historic properties within reservation boundaries or exterior trust lands will be the formal concurrence action taken by the THPO in lieu of the SHPO unless otherwise provided by 36 CFR 800. Response about all other historic properties will be as a consulting party. All correspondence shall distinguish which historic properties are subject to the THPO's formal concurrence action and which historic properties are being acted upon as a consulting party. If FHWA's AGENT does not receive the responses within thirty (30) calendar days, and FHWA's AGENT has confirmed receipt of the information, FHWA and FHWA's AGENT will assume that the Mille Lacs Band of Ojibwe and SHPO concurs with the finding of "No Historic Properties Affected" and have no additional concerns with the project.

If either the Mille Lacs Band of Ojibwe or the SHPO indicates that they do not agree with the finding of "No Historic Properties Affected," and, in consultation with the Mille Lacs Band of Ojibwe and FHWA's AGENT, an agreement cannot readily reach an agreement on identification of properties or a method to achieve "No Historic Properties Affected," or definition of the area of potential effect, the FHWA will enter directly into the consultation process.

#### **6. Consultation after Determination of Eligibility and Preliminary Finding of "No Adverse Effect"**

This stipulation is required if, under the process described in Stipulation 4 of this AGREEMENT, the Mille Lacs Band of Ojibwe has shared information or expressed concern. Upon determining that there will be "no adverse effect" on historic properties within the project area, FHWA's AGENT will notify the Mille Lacs Band of Ojibwe and the SHPO of that finding.

##### *a) Undertakings entirely within reservation boundaries or exterior trust lands*

Copies of adequate documentation to support that finding will be sent to the Mille Lacs Band of Ojibwe and SHPO per Stipulation 4. The Mille Lacs Band of Ojibwe and SHPO will respond to this finding within thirty (30) calendar days of receipt of documentation. The response for historic properties within reservation boundaries or exterior trust lands will be the formal concurrence action taken by the THPO in lieu of the SHPO unless otherwise provided by 36 CFR 800. If FHWA's AGENT does not receive the responses within thirty (30) calendar days, and FHWA's AGENT has confirmed receipt of the information, FHWA and FHWA's AGENT will assume that the Mille Lacs Band of Ojibwe and SHPO concur with the finding of "No Adverse Effect" and have no additional concerns with the project.

If either the Mille Lacs Band of Ojibwe or the SHPO indicate that they do not agree with the finding of "no adverse effect," and, in consultation with FHWA's AGENT, an agreement cannot readily be reached on identification of properties or a method to achieve "no adverse effect," or definition of the area of potential effect, the FHWA will enter directly into the consultation process. Appropriate agreements will be developed by the project-level parties to minimize and mitigate adverse effects to historic properties should the parties agree to that finding.

##### *b) Undertakings on land within Mille Lacs Band of Ojibwe geographic area of interest (but not within reservation boundaries or on exterior Mille Lacs Band of Ojibwe trust land).*



Copies of adequate documentation to support that finding will be sent to the Mille Lacs Band of Ojibwe and SHPO per Stipulation 4. The Mille Lacs Band of Ojibwe and SHPO will respond to this finding within thirty (30) calendar days of receipt of documentation. If FHWA's AGENT does not receive a responses within thirty (30) calendar days, and FHWA's AGENT has confirmed receipt of the information, FHWA and FHWA's AGENT will assume that the Mille Lacs Band of Ojibwe and SHPO concurs with the finding of "No Adverse Effect" and have no additional concerns with the project.

If either the Mille Lacs Band of Ojibwe or the SHPO indicates that they do not agree with the finding of "no adverse effect," and, in consultation with the Mille Lacs Band of Ojibwe and FHWA's AGENT cannot readily reach an agreement on identification of historic properties or a method to achieve "no adverse effect," or definition of the area of potential effect, the FHWA will enter directly into the consultation process. Appropriate agreements will be developed by the project-level parties to address effects to historic properties should the parties agree to that finding.

*c) Undertakings which are not entirely within reservation boundaries or exterior trust lands but within the geographic area of interest as defined in Stipulation 1*

Copies of adequate documentation to support that finding will be sent to the Mille Lacs Band of Ojibwe and SHPO per Stipulation 4. The Mille Lacs Band of Ojibwe and SHPO will respond to this finding within thirty (30) calendar days of receipt of documentation. The response for historic properties within reservation boundaries or exterior trust lands will be the formal concurrence action taken by the THPO in lieu of the SHPO unless otherwise provided by 36 CFR 800. The Mille Lacs Band of Ojibwe response about all other historic properties will be as a consulting party. All parties' correspondence shall distinguish which historic properties are subject to the THPO's formal concurrence action and which historic properties are being acted upon as a consulting party. If FHWA's AGENT does not receive the responses within thirty (30) calendar days, and FHWA's AGENT has confirmed receipt of the information, FHWA and FHWA's AGENT will assume that the Mille Lacs Band of Ojibwe and SHPO concurs with the Finding of "No Adverse Effect" and have no additional concerns with the project.

If either the Mille Lacs Band of Ojibwe or the SHPO indicates that they do not agree with the finding of "no adverse effect," and, in consultation with the Mille Lacs Band of Ojibwe and FHWA's AGENT, an agreement cannot readily reach an agreement on identification of properties or a method to achieve "no adverse effect," or definition of the area of potential effect, the FHWA will enter directly into the consultation process. Appropriate agreements will be developed by the project-level parties to address effects to historic properties should the parties agree to that finding.

**7. Consultation after Determination of Eligibility and Preliminary Finding of "Adverse Effect"**

This stipulation is required if, under the process described in Stipulation 4 of this AGREEMENT, the Mille Lacs Band of Ojibwe has shared information or expressed concern. Upon determining that there will be an "adverse effect" (as that term is used in 36 CFR 800.5) to historic properties, FHWA will enter directly into the consultation process pursuant to 36 CFR 800.6. FHWA will be involved in the consultation to develop the necessary MOA or project-specific agreement to avoid, minimize, or mitigate any adverse effects to historic properties.

*a) Undertakings entirely within reservation boundaries or exterior trust lands*

Copies of adequate documentation to support that finding will be sent to the Mille Lacs Band of Ojibwe and SHPO per Stipulation 4. Documentation will be sent to other parties as provided by 36 CFR 800 (e.g. National Historic Landmark). The Mille Lacs Band of Ojibwe and SHPO will respond to this finding within thirty (30)

calendar days of receipt of documentation. The response for historic properties within reservation boundaries or exterior trust lands will be the formal concurrence action taken by the THPO in lieu of the SHPO unless otherwise provided by 36 CFR 800. If FHWA's AGENT does not receive the responses within thirty (30) calendar days, and FHWA's AGENT has confirmed receipt of the information, FHWA and FHWA's AGENT will assume that the Mille Lacs Band of Ojibwe and SHPO concur with the finding of "Adverse Effect."

Consultation will continue in an effort to resolve adverse effects and appropriate agreements will be developed by the project-level parties to minimize and mitigate adverse effects to historic properties should the parties agree to that finding.

- b) *Undertakings on land within Mille Lacs Band of Ojibwe geographic area of interest (but not within reservation boundaries or on exterior Mille Lacs Band of Ojibwe trust land).*

Copies of adequate documentation to support that finding will be sent to the Mille Lacs Band of Ojibwe and SHPO per Stipulation 4. Documentation will be sent to other parties as provided by 36 CFR 800 (e.g. National Historic Landmark). The Mille Lacs Band of Ojibwe and SHPO will respond to this finding within thirty (30) calendar days of receipt of documentation. If FHWA's AGENT does not receive the responses within thirty (30) calendar days, and FHWA's AGENT has confirmed receipt of the information, FHWA and FHWA's AGENT will assume that the Mille Lacs Band of Ojibwe and SHPO concur with the Finding of "Adverse Effect."

Appropriate agreements will be developed by the project-level parties to avoid, minimize, or mitigate adverse effects to historic properties should the parties agree to that finding.

- c) *Undertakings which are not entirely within reservation boundaries or exterior trust lands but within the geographic area of interest as defined in Stipulation 1*

Copies of adequate documentation to support that finding will be sent to the Mille Lacs Band of Ojibwe and SHPO per Stipulation 4. Documentation will be sent to other parties as provided by 36 CFR 800 (e.g. National Historic Landmark). The Mille Lacs Band of Ojibwe and SHPO will respond to this finding within thirty (30) calendar days of receipt of documentation. The response for non-architectural historic properties within reservation boundaries or exterior trust lands will be the formal concurrence action taken by the THPO in lieu of the SHPO unless otherwise provided by 36 CFR 800. Mille Lacs Band of Ojibwe response about all other historic properties will be as a consulting party. All correspondence shall distinguish which historic properties are subject to the THPO's formal concurrence action and which historic properties are being acted upon as a consulting party. If FHWA's AGENT does not receive the responses within thirty (30) calendar days, and FHWA's AGENT has confirmed receipt of the information, FHWA and FHWA's AGENT will assume that the Mille Lacs Band of Ojibwe and SHPO concur with the Finding of "Adverse Effect."

Appropriate agreements will be developed by the project-level parties to avoid, minimize, or mitigate adverse effects to historic properties should the parties agree to that finding.

## **8. Discovery during Construction**

If historic properties, including but not limited to unknown sites, not consulted on following Stipulations 4, 5, 6, or 7 of this AGREEMENT are discovered (an unanticipated discovery) during construction of an undertaking, that portion of the project within the area of the discovery will stop immediately. Mille Lacs Band of Ojibwe will be notified immediately upon discovery. This applies to undertakings within the boundaries of the Mille Lacs Band of Ojibwe reservation, exterior trust lands, and the geographic areas of interest as defined in Stipulation 1. The consultation process as described in Stipulations 4, 5, 6, or 7 of this AGREEMENT will be followed prior to

resumption of work.

If historic properties deemed to have been previously destroyed, disturbed or mitigated through consultation as described in Stipulations 4, 5, 6, or 7 of this AGREEMENT are found to be less disturbed than thought or not completely destroyed or mitigated, that portion of the project will stop immediately. The consultation process as described in Stipulations 4, 5, 6, or 7 of this AGREEMENT will be followed prior to resumption of work.

*a) Undertakings entirely within reservation boundaries or exterior trust lands*

No further construction, in that portion of the construction project, will proceed until the requirements of 36 CFR 800.13 have been satisfied. FHWA and FHWA's AGENT will consult with the Mille Lacs Band of Ojibwe and the Minnesota State Historic Preservation Officer (SHPO) to record, document and evaluate National Register eligibility of the site and the project's effect on the site. A plan will be designed for avoiding or mitigating adverse effects on a potentially eligible site. If the discovery is identified as human remains refer to the "Inadvertent Discovery of Human Remains" document which is available through the Mille Lacs THPO. Both 36 CFR 800.13 regarding "post review discovery" and the Mille Lacs "Inadvertent Discovery of Human Remains" procedures must be addressed before any further construction resume in the area of the discovery. The area to be avoided in protection of these remains will be decided upon with the THPO in consultation with the construction project engineer and FHWA's AGENT. FHWA may directly enter the decision process, as appropriate.

*b) Undertakings on land within Mille Lacs Band of Ojibwe geographic area of interest (but not within reservation boundaries or on exterior Mille Lacs Band of Ojibwe trust land).*

No further construction, in that portion of the construction project, will proceed until the requirements of 36 CFR 800.13 have been satisfied. FHWA and FHWA's AGENT will consult with the Mille Lacs Band of Ojibwe, Minnesota State Historic Preservation Officer (SHPO) and Minnesota Office of the State Archaeologist (OSA) to record, document and evaluate National Register eligibility of the site and the project's effect on the site. The OSA consultation will be for archeological properties as appropriate. A plan will be designed for avoiding or mitigating adverse effects on a potentially eligible site.

*c) Undertakings which are not entirely within reservation boundaries or exterior trust lands but within the geographic area of interest as defined in Stipulation 1*

No further construction, in that portion of the construction project, will proceed until the requirements of 36 CFR 800.13 have been satisfied. FHWA and FHWA's AGENT will consult with the Mille Lacs Band of Ojibwe and the Minnesota State Historic Preservation Officer (SHPO) for discoveries within reservation boundaries and exterior trust lands. FHWA and FHWA's AGENT will consult with the Mille Lacs Band of Ojibwe, the Minnesota State Historic Preservation Officer (SHPO) and Minnesota Office of the State Archaeologist (OSA) for discoveries outside of reservations boundaries or exterior trust lands. The OSA consultation will be for archaeological historic properties as appropriate. The consultation process will record, document and evaluate National Register eligibility of the site and the project's effect on the site. A plan will be designed for avoiding or mitigating adverse effects on a potentially eligible site. The procedures will follow Stipulation 8(a) for any post-review discoveries of human remains within reservation boundaries or exterior trust lands.

Materials retrieved during the 106 process from tribal lands will be curated consistent with best practices while the relevant parties in the Section 106 process ascertain ownership and final disposition.

Materials include anything recovered during excavations excluding human remains (see Stipulation 9 below).

## **9. Treatment of Human Remains Identified During Preconstruction Activities**

If human remains or burials are encountered at any time prior to construction activities, or if there is a high potential for human remains or burials, all reasonable efforts will be made to avoid the remains or burials. If at all



possible, the project will be designed to provide protection for the area from possible future disturbance.

*a) Undertakings entirely within reservation boundaries or exterior trust lands*

The FHWA's AGENT will consult with FHWA, SHPO, Mille Lacs Band of Ojibwe and other federally recognized tribes that have expressed an interest by identifying geographical areas of interest that include the project area. These geographical areas of interest are identified individually within other tribal consultation agreements such as this AGREEMENT as shown in Attachment 3.

The human remains will be protected and left untouched (as found) and the area will be secured by the project engineer. The project engineer will immediately consult with FHWA's AGENT who will in turn contact FHWA. If FHWA's AGENT finds there is a possibility that the remains are American Indian, FHWA's AGENT will initiate consultation as described in Stipulation 6 (Finding of "Adverse Effect") and work will not recommence until the consultation process is complete. All reasonable efforts will be made to avoid the remains or burials. If at all possible the project will be redesigned to avoid or protect the area.

In Accordance with Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001 et seq.), if human remains are found within the Mille Lacs Reservation Treaty of 1855 boundary as shown in Attachment 1, exterior trust lands, or within other federal lands, that portion of the project will stop immediately and the relevant parties, which could include MIAC, Mille Lacs Band of Ojibwe THPO, FHWA, or SHPO (and OSA if invited by the Mille Lacs Band of Ojibwe) will convene to ascertain the appropriate procedures and to determine the disposition of the remains.

*b) Undertakings on land within Mille Lacs Band of Ojibwe geographic area of interest (but not within reservation boundaries or on exterior Mille Lacs Band of Ojibwe trust land).*

The FHWA's AGENT will consult with FHWA, the OSA (who will contact the MIAC as appropriate), Mille Lacs Band of Ojibwe and other federally recognized tribes that have expressed an interest by identifying geographical areas of interest that include the project area. These geographical areas of interest are identified individually within other tribal consultation agreements such as this AGREEMENT as shown in Attachment 3.

In accordance with State and Federal laws that protect unmarked burials, if previously unidentified human remains are discovered during construction, outside of the Mille Lacs Reservation Treaty of 1855 boundary as shown in Attachment 1 or outside of exterior trust lands, that portion of the project will stop immediately. The human remains will be protected and left untouched (as found) and the area will be secured by the project engineer. The project engineer will immediately consult with FHWA's AGENT who will in turn contact FHWA, OSA (who will contact MIAC as appropriate), and SHPO. If FHWA's AGENT finds there is a possibility that the remains are American Indian, FHWA's AGENT will initiate consultation as described in Stipulation 6 (Finding of "Adverse Effect") and work will not recommence until the consultation process is complete. All reasonable efforts will be made to avoid the remains or burials. If at all possible the project will be redesigned to avoid or protect the area.

*c) Undertakings which are not entirely within reservation boundaries or exterior trust lands but within the geographic area of interest as defined in Stipulation 1*

For remains within reservation boundaries or exterior trust lands, follow Stipulation 9(a). For remains outside reservation boundaries or exterior trust lands, follow Stipulation 9(b).

## **10. Emergency Situations**

This document describes review processes for two classes of emergency situations. The first class exists when (1) the undertakings are operations that are responding to a disaster or emergency declared by the President or Governor,



and that are responding to immediate threats to life or property, or (2) that are responding to immediate threats to life or property that are declared emergencies by the United States Secretary of Transportation in consultation with MnDOT, and (3) corrective measures are initiated within thirty (30) calendar days after the disaster or emergency has been formally declared. Review in these emergency situations shall utilize the review process described in this document, but with a shortened timeframe for participation by the SHPO, consulting parties, the general public and, if appropriate, Mille Lacs Band of Ojibwe.

This emergency notification shall include brief descriptions of the significance of the resources involved, the nature and anticipated effect of the emergency action on the resource(s), and the anticipated timeframe available for comment.

The second class of emergencies as defined by immediate rescue and salvage operations conducted to preserve life or property such as necessitated by natural disaster or other catastrophic event, are exempt from the provisions of Section 106 and this Agreement.

The shortened review time frames for FHWA Emergency Relief Program (23 CFR 668) projects that are subject to Section 106 review are as follows:

- Projects scheduled to have construction completed less than 90 days of disaster declaration will be reviewed not to exceed 7 calendar days from receipt
- Projects scheduled to have construction completed between 90 and 180 days of disaster declaration will be reviewed not to exceed 14 calendar days from receipt
- Projects scheduled to have construction completed greater than 180 days after disaster declaration will follow normal review timeframes (30 calendar days after receipt).

## **11. Professional Qualifications**

All historical preservation work carried out pursuant to this AGREEMENT by FHWA's AGENT or any consultants under contract by FHWA's AGENT will be performed by or under the direct supervision of a person or persons meeting the Secretary of Interior's Qualifications Standards, 48 FR 44738-44739, for the discipline(s) required to complete the necessary work.

## **12. Dispute Resolution**

Should any primary or invited signatory to this AGREEMENT object within thirty (30) calendar days to any actions proposed pursuant to this AGREEMENT, FHWA and the objecting party shall consult to resolve the objection. If the objection cannot be resolved, FHWA shall request comment from the Advisory Council on Historic Preservation (Council) pursuant to 36 CFR 800.6(b). Any Council comment provided in response to such a request will be taken into account by FHWA in accordance with 36 CFR 800.6(c) (2) with reference only to the subject of the dispute. The responsibility of FHWA to carry out all actions under this AGREEMENT, other than those that are the subject of the dispute, will remain unchanged.

## **13. Monitoring Implementation of this Agreement**

- a) The FHWA may review activities carried out pursuant to this AGREEMENT. FHWA's AGENT shall facilitate this review by compiling information to document the effectiveness of the AGREEMENT and by making the information available if requested by the FHWA and/or the Mille Lacs Band of Ojibwe in the form of a written report. Categories of information will include, but are not limited to, a list of projects for which consultation was carried out and the extent of Tribal involvement, projects that were exempted from review, and resolution of Tribal concerns.
- b) The FHWA shall monitor the consultation process outlined in this AGREEMENT at its discretion, including conducting process reviews from time to time.

- c) The FHWA shall notify the Mille Lacs Band of Ojibwe and the FHWA's AGENT of any meetings to be held for the express purpose of monitoring compliance with the provisions of this AGREEMENT by providing a (30) thirty-day notice.

#### **14. Amendment**

Any party to this AGREEMENT may at any time request that it be amended, where upon the primary and invited signatories will consult in accordance with 36 CFR 800.14 to consider such amendment. The responsibility of FHWA to carry out all actions under this AGREEMENT, other than those subject to the amendment, will remain unchanged.

#### **15. Right to Terminate**

Any primary or invited signatory to this AGREEMENT may terminate by providing thirty (30) calendar days written notice to the signatories to this AGREEMENT, provided that the parties will consult during the period before termination to seek agreement on amendments or other action that would avoid termination. In the event of termination, the FHWA shall comply with 36 CFR 800 with regard to the individual undertakings covered by this AGREEMENT.

#### **16. Duration**

This AGREEMENT will be in effect for eight (8) years from the signing date, with renewal upon written agreement by primary signatories. We will meet nine (9) months prior to the expiration to discuss the performance of this AGREEMENT and necessary changes. Any signatory may request a meeting to discuss the performance of this AGREEMENT by sending a letter to FHWA and providing a courtesy copy to the other signatories. The primary signatories will strive to meet at least once every two years discuss the performance of this AGREEMENT and any appropriate revisions.

Barring a change in federal law, the FHWA will continue to recognize the Mille Lacs Reservation Treaty of 1855 boundary (10 Stat 1165) and any Mille Lacs Band of Ojibwe exterior trust lands while consulting per 36 CFR 800 if this AGREEMENT lapses before a new Section 106 consultation agreement is executed between FHWA and the Mille Lacs Band of Ojibwe.

#### **17. Severability**

In the event any one or more of the provisions in this AGREEMENT shall for any reason be held to be invalid or illegal such invalidity or illegality shall not affect any other provision thereof and this AGREEMENT shall be construed as if such invalid or illegal provision had never been contained herein.

#### **18. Information Sharing**

As new information, regarding land status as fee or trust is acquired; the land holdings of the Mille Lacs Band of Ojibwe will be updated and shared with the FHWA's AGENT to reflect those changes. The intent of the updates is to facilitate consultation as outlined in this AGREEMENT.

As parcels successfully complete the BIA fee-to-trust process, Mille Lacs Band of Ojibwe will provide FHWA a copy of the parcel information and Bureau of Indian Affairs approval of trust status within 60 days after Mille Lacs is notified of successfully acquiring trust land status. The Mille Lacs Band of Ojibwe will notify FHWA of any land acquired in fee on an annual basis. FHWA's AGENT will be carbon copied on all parcel information communications. All communications will clearly declare the status (trust vs fee) of each parcel.

**19. Confidentiality**

Information regarding historic properties related to the Mille Lacs Band of Ojibwe within the geographic area of interest defined in Stipulation 1 will be considered confidential as required per Section 304 of the NHPA or additionally requested by the Mille Lacs Band of Ojibwe, National Register Bulletin 29, and any applicable FHWA policies.

**20. Access to Project Area**

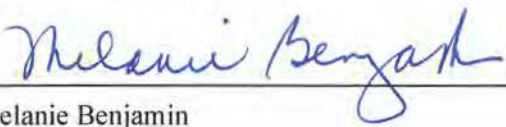
Access by persons, other than those identified as the points of contact (Attachment 4), to areas where historic properties have been identified within the reservation boundaries or on exterior trust land are at the discretion of the Mille Lacs Band of Ojibwe. All project specific access has to be balanced with safety considerations for ongoing construction operations.

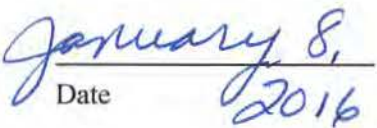
**21. Government-to-Government Relationship**

Should the Mille Lacs Band of Ojibwe want the FHWA to directly enter project-level consultation or assume direct control of project-specific consultation at any time, the Mille Lacs Band of Ojibwe will communicate the request to the primary FHWA contact.

EXECUTION of this AGREEMENT by the signatories and the implementation of its terms, document the efforts of FHWA to consult with the Mille Lacs Band of Ojibwe under Federal law and regulations. The Mille Lacs Band of Ojibwe recognizes the actions of FHWA's AGENT acting on behalf of FHWA in carrying out its responsibilities under Section 106 of the NHPA.

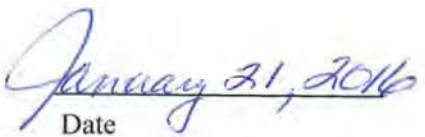
**Primary Signatory:**

  
\_\_\_\_\_  
Melanie Benjamin  
Chief Executive  
Mille Lacs Band of Ojibwe

  
\_\_\_\_\_  
Date

**Primary Signatory:**

  
\_\_\_\_\_  
Arlene Kocher  
Minnesota Division Administrator  
Federal Highway Administration

  
\_\_\_\_\_  
Date

**Concurring Signatory:**

Barbara Howard  
Barbara Howard  
Minnesota State Historic Preservation Officer

1/19/2016  
Date