

**PROGRAMMATIC AGREEMENT
AMONG
THE FEDERAL HIGHWAY ADMINISTRATION
THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION
and
FORT PECK ASSINIBOINE & SIOUX TRIBES; TURTLE MOUNTAIN BAND OF
CHIPPEWA INDIANS; MANDAN, HIDATSA, AND ARIKARA NATION; SPIRIT LAKE
TRIBE; SISSETON-WAHPETON OYATE OF THE LAKE TRAVERSE RESERVATION;
STANDING ROCK SIOUX TRIBE; NORTHERN CHEYENNE TRIBE;
CROW NATION; LOWER SIOUX INDIAN COMMUNITY; SANTEE SIOUX TRIBE OF
NEBRASKA; AND WAHPEKUTE BAND OF DAKOTAH
REGARDING IMPLEMENTATION
OF TRIBAL CONSULTATION REQUIREMENTS
OF THE NATIONAL HISTORIC PRESERVATION ACT
FOR THE FEDERAL TRANSPORTATION PROGRAM
IN NORTH DAKOTA**

PREFACE

This document is the result of discussions during consultation between the North Dakota Department of Transportation (NDDOT), the Federal Highway Administration (FHWA) and the Tribes identified above. This document is intended to define consultation, for compliance with the National Historic Preservation Act (NHPA) (16 U.S.C. 470), between the Federal Highway Administration (FHWA), the NDDOT, and the Fort Peck Assiniboine & Sioux Tribes; Turtle Mountain Band Of Chippewa Indians; Mandan, Hidatsa, and Arikara Nation; Spirit Lake Tribe; Sisseton-Wahpeton Oyate of the Lake Traverse Reservation; Standing Rock Sioux Tribe; Northern Cheyenne Tribe; Crow Nation, Lower Sioux Indian Community, Santee Sioux Tribe of Nebraska, and the Wahpekute Band of Dakotah, (the Tribes). The Crow Creek Sioux Tribe, Rosebud Sioux Tribe, Oglala Sioux Tribe, Cheyenne River Sioux Tribe, and Yankton Sioux Tribe participate in the meetings but as yet are not signatory to the PA. As required under the terms of the NHPA and regulations (36 CFR Part 800), consultation has revealed that many Tribes have aboriginal ties to what is now North Dakota. The Tribes identified above expressed concern and requested to be consulted on future transportation projects in North Dakota.

The FHWA and NDDOT understand that Tribes have concerns regarding cultural resources, preservation of sacred places, continuing destruction of places and things of cultural value, and the effects of this destruction on their cultural identity. Cultural resources are revered by the Tribes. These cultural resources are a connection to their past, and important to their cultural identity, sense of self, and future well-being. Cultural resources are tied to people's ancestors, some are related to important religious activities, and many have ongoing spiritual connections. The FHWA and NDDOT recognize the importance of these remnants from the past to aboriginal people living today.

Modern development, including transportation construction, has destroyed valuable cultural resources and adversely impacted others. This agreement is intended to ensure all parties understand which cultural resources are important to the Tribes and work together to protect and preserve them. The FHWA and NDDOT are committed to providing a transportation system that will benefit all people of North Dakota. The FHWA and NDDOT are also committed to learning Tribal perspectives about cultural resources important to the Tribes. The Tribes are committed to understanding transportation issues and the perspectives of the FHWA and the NDDOT. Jointly we are committed to establishing a relationship of mutual trust and respect.

The FHWA and NDDOT recognize that transportation projects have the potential to adversely affect cultural resources: sacred sites, archaeological sites, traditional natural resources, and traditional landscapes of value to the Tribes. The FHWA and the NDDOT do not wish further destruction of these culturally valued places and recognize the inherent rights of Tribes to retain and preserve those places that they value.

It is the intention of the FHWA and NDDOT to work with the Tribes to find appropriate ways to avoid effect to important cultural resources. The NDDOT pledges to always look for ways to avoid effect to these resources as the first option. When avoidance of effect is impossible or impractical given other concerns of equal importance, the NDDOT will work with the Tribes for appropriate and respectful resolution of any unavoidable effects.

The NDDOT will follow the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001) when there is a discovery situation within the exterior boundary of Tribal reservations or on Federal lands. Where this situation occurs in other areas, the terms of the North Dakota State Burial Law (North Dakota Century Code 23-06-27) will be followed.

WHEREAS, the FHWA is the federal agency with statutory responsibilities for administering the federal-aid- highway program under Title 23 U.S.C. 101 *et seq*, and the NDDOT is the applicant for federal funds for highway construction projects in North Dakota. The NDDOT, on behalf of the FHWA, agrees to coordinate under a government to government relationship with federally recognized tribal government officials or appointees with regard to federal responsibilities under Section 106 of the NHPA through the terms of this PA. This does not replace the requirement for FHWA to consult under Executive Order 13175. Consultation under Section 106 of the NHPA by the NDDOT does not replace FHWA's responsibilities with regard to government to government consultation. The NDDOT will consult with Tribal Historic Preservation Officers or those designated by the Tribal Government to manage or advise on matters pertaining to cultural resources.

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 that may be of interest to the Tribes, and through this agreement has consulted with the Tribes and the Advisory Council on Historic Preservation (Council) pursuant to 36 CFR 800.14 of the regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. 470f);

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

WHEREAS, nothing in this PA shall alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights, or other such rights of the Tribe, or to preempt, modify, or limit the exercise of any such rights.

WHEREAS, the NDDOT is committed to the design and construction of a transportation system that: 1) safely moves people and goods; 2) avoids, minimizes and mitigates adverse effects on cultural resources; 3) recognizes that consideration of tribal interest in preservation of significant cultural resources is important to Tribal well-being, growth and prosperity; and 4) responds to the needs of North Dakota communities and the Tribes; and

WHEREAS, the FHWA, the NDDOT, and the Signatory Tribes aspire to engage in meaningful, long-term planning for the appropriate consideration of cultural resources important to the Tribes, and to include the following:

- develop a comprehensive and efficient tribal consultation process for all Section 106 undertakings,
- streamline the process and procedural requirements,
- recognize the role of the Tribes to facilitate effective consultation,
- develop a consultation process based upon education and understanding,
- involve the Tribes' cultural resource personnel to a greater extent and at an earlier point in the planning process,
- devote a percentage of time, energy, and funding to identify relevant problems threatening cultural resources important to the Tribes,
- any additional goals identified through consultation.

BE IT RESOLVED , the FHWA, the NDDOT, and the Tribes hereby agree that the implementation of tribal consultation on highway projects shall be administered in accordance with the following stipulations in order to satisfy FHWA tribal consultation responsibilities under the National Historic Preservation Act.

Stipulations

1. Applicability

This Programmatic Agreement (PA) sets forth the process by which FHWA will meet its responsibilities with regard to consultation with the Tribes under Section 106 of the NHPA for highway projects within the state of North Dakota of the Federal Aid Highway Program. Further, this PA establishes a process and protocol for NDDOT consultation with the Tribes on individual highway projects.

2. Tribal Consultation Committee

In order to expedite the tribal project review and consultation process for Section 106 of the NHPA, a Tribal Consultation Committee (TCC) has been formed and is comprised of selected members from each consulting Indian Reservation, FHWA, and NDDOT Representative(s). Consultation with these Tribes has revealed that a structured process is preferred and they are willing to be members of the TCC Signatory Tribes and those Tribes who have requested consultation at our TCC meetings but have not signed the PA are included in correspondence regarding upcoming meetings and interim reports. Signatories have the authority to terminate or seek amendments to the PA.

Consultation can be generalized as a process of learning through education and interaction. In this case it is a process whereby Agencies and these Tribes work together to take into consideration the effects FHWA undertakings may have on cultural resources important to the Tribes. Working through this TCC has allowed a clearer understanding of relevant issues and concerns which will result in more effective cultural resource management, and continues to streamline the process.

A. Mission Statement and Goals

The FHWA, NDDOT and Tribes recognize fundamental human rights, the dignity and worth of the human person, and the rights of men and women to promote social progress and better standards of living. We further affirm our support for the right to freedom of thought, conscience and

religion. In that vein we support avoidance of effect to significant cultural resources. However, avoidance is not always preservation. As practical and possible, the FHWA and the NDDOT will assist the Tribes in their further goal of preservation of resources of value to them. Avoidance will always be the first option studied. When a resource cannot be avoided every attempt will be made to minimize the impacts and to mitigate the loss of information and value identified by all parties. When a resource important to the Tribes has been inadvertently disturbed on transportation projects, the NDDOT and appropriate Federal Agency will work with the Tribes to come to resolution.

To carry out this mission, mutual education regarding what might be acceptable, respectful, and feasible is necessary. The FHWA, the NDDOT and the consulting Tribes will invest time, provide opportunities, provide personnel, and seek funding for cross-cultural education pursuant to tribal and transportation cultural resource issues.

Opportunities will be sought to provide cross-training to FHWA, NDDOT, and Tribal personnel. The NDDOT will include their cultural resource contractors in this training, when necessary and practical. These training opportunities will focus on cultural awareness, language and communication skills, North Dakota transportation issues, and cultural resource laws and regulations. This training and education will have as its goal the improvement of relationships, a greater understanding of cultures and perspectives, and the building of trust.

The NDDOT intends to complete a Cultural Resource Preservation Plan as needed on individual projects. The NDDOT will consider the goals and viewpoints of the TCC in this pursuit.

B. TCC Composition

The TCC is made up of two individuals designated from each reservation (those who are signatory to the PA or request to participate in S.106 consultation) and at least one individual from the NDDOT. As needed by the TCC and the NDDOT, additional tribal participants will be supported. FHWA personnel will have a standing invitation to each meeting and can participate as a full TCC member. State Historic Preservation Office personnel can be invited to attend the meetings at the discretion of the TCC, but will not serve as official members.

Each TCC member may bring additional people to TCC meetings as they deem necessary. These additional people will not function as TCC members, but may be present to advise the TCC or observe the meeting.

C. Responsibilities of the Tribal Consultation Committee

1. The TCC will meet at least twice a year unless one meeting a year is deemed adequate by the TCC. The meetings will be held to discuss projects and policy with regard to NHPA compliance and to discuss cultural resource issues from a program-wide perspective. The TCC's views in regard to National Environmental Policy Act (NEPA) project compliance issues will also be welcomed.

2. In addition to discussing projects at TCC meetings, specific projects, sites, or issues may require TCC members to participate in on-site consultation. These on-site visits may be done by the whole TCC, or interested members, or those designated by the TCC for the specific task. This on-site consultation can be used to help identify possible impacts, to obtain first-hand knowledge of issues relating to cultural concerns, or to design site avoidance measures. Tribal elders, or other individuals identified by the TCC, who have specific knowledge of the area, project, or resource will be welcome to attend on-site meetings.

3. The Tribal TCC members will respond to NDDOT project review and consultation in a manner considerate of NDDOT project timing needs. Lack of response within necessary stated time parameters will be considered lack of need to respond on the part of these members. The process for addressing last minute or emergency projects will be email and telephone contact. These methods will continue to be used.
4. The TCC will work collaboratively to set meeting agendas through requests at meetings for upcoming meetings and comments on draft agenda provided by the NDDOT. Draft agenda are sent to each TCC member prior to the meeting to call for agenda items or revisions. Members are encouraged to suggest changes in order of discussion or content of the agenda.
5. The TCC may select delegates or student interns to be a part of the TCC for educational purposes., These delegates or interns shall be able to participate in the activities of the TCC.

D. Responsibilities of the North Dakota Department of Transportation

1. Through regularly scheduled meetings, last-minute and emergency notification measures, or individual contact, Tribes will be notified of FHWA undertakings (as defined in this PA) in North Dakota, as required under 36CFR Part 800.2.
2. The NDDOT will document the meetings and provide minutes at the next meeting.
3. The current Statewide Transportation Improvement Program (STIP) will be provided to the TCC at meetings and can serve as a means of forecasting, to the Tribes' cultural resource personnel, what projects are planned in advance and where they are located. Providing this information will give the TCC the opportunity to review projects well in advance of project development.
4. The NDDOT will provide a packet of information summarizing upcoming projects and issues at the beginning of each meeting. The packet may include maps, aerial coverage, or other pertinent illustrations, as available.

5. The NDDOT will continue to consult with the Tribes and/or TCC members who are identified at the meetings as contacts for further consultation in regard to a specific project, resource, or issue. The TCC may decide that a specific tribe or member may be best suited to carry out its wishes and address its concerns on a specific project, in relation to a specific resource, or to resolve a specific issue.
6. Results of cultural resource surveys will be provided at each meeting to the TCC Members through multi-media.
7. The NDDOT will provide the TCC an explanation of decisions reached in regard to project effects on cultural resources of concern to the TCC.
8. The NDDOT will continue to meet with the Tribes at each TCC member's individual office as often as needed and practical. The NDDOT will inform the Tribes of any changes in staff who might be involved in this agreement including the NDDOT consultation representative.
9. The NDDOT will continue consultation with any Tribe that requests to be consulted on FHWA undertakings within North Dakota, that does not become a party to this agreement. Consultation will continue as defined through individual discussions or formal agreements.

E. Inclusion of Interested Parties

1. Other Tribes may be added to this agreement as identified through the course of consultation.
2. 36CFR Part 800 allows for the possibility that other individuals or entities may have a demonstrated special interest in an undertaking, and that Federal agencies, in consultation with SHPO and THPO, should consider the involvement of such individual or entities as consulting parties. If any identified consulting parties, or other individuals or groups, wish to take part in a TCC meeting, these requests will be presented in writing to the TCC. If the request is deemed appropriate, the consulting party will be invited to take part in the next meeting.

3. The TCC can also issue an invitation to groups to attend specific meetings for the exchange of ideas or to gather specific information regarding an undertaking.

F. Other Points of Mutual Agreement

1. Execution and Implementation. The successful implementation of this process shall constitute adequate consultation between the FHWA and the Signatory Tribes to fulfill tribal consultation requirements of Section 106 of the NHPA.

2. Confidentiality. The FHWA and NDDOT acknowledge the need for confidentiality of certain tribal spiritual and cultural information that may be provided to the NDDOT by the Tribes during the course of TCC meetings and other aspects of tribal consultation conducted on cultural resource issues. Information provided by consulted tribal members, identified as sensitive, and requested to remain confidential, will remain confidential to the extent permitted by state and federal law. The mechanism used for confidentiality may change through time or with circumstance, but the result will be the same: information provided by the Tribes and requested to remain confidential will be protected from public disclosure to the extent permitted by State and Federal law.

All confidential materials will be temporarily housed at the ND Division Office of FHWA after project/issue completion. These materials can be distributed to the appropriate Tribe or Tribes as decided by the TCC.

3. Dispute Resolution. Should any signatory object to the implementation of this agreement in whole or in part, the objecting party will consult with the TCC to resolve the objection. If the TCC is unable to resolve the issue, and the issue involves resolution of the Adverse Effect of an NDDOT project on a site eligible for inclusion on the National Register of Historic Places, the administrative process defined in 36 CFR Part 800.6 will be followed.

4. Termination. Any party to this PA may terminate their participation by providing thirty (30) days written notice to the other parties, 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 by a Tribe, the FHWA and the NDDOT shall comply with 36 CFR Part 800 and continue with individual tribal consultation with that Tribe. As long as the FHWA, NDDOT, and at least one Tribe continues to participate, the PA will remain in effect, but the Tribes who have terminated will no longer be held to the bounds of this agreement.
5. Funding. At least twice a year, the TCC will meet to address issues defined above. The NDDOT will host the meeting and will pay a fee and travel/per diem expenses at ND State rates for up to two representatives from each participating reservation/tribe to attend the meeting.
6. Participation in Similar Activities. This instrument in no way restricts the FHWA, NDDOT or the signatory Tribes from participating in similar activities with other public or private agencies, organizations, and individuals.
- 7) Amendment and Termination.
- Any party to this PA may request that it be amended at any time, whereupon the parties will consult in accordance with 36 CFR Part 800.14 to consider such proposed amendment.
 - Any party to this PA may terminate it by providing thirty days written notice to FHWA, provided that the parties will consult during the period before termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, the FHWA shall comply with 36 CFR Part 800 with regard to individual undertakings, otherwise covered by this PA.
- 8) Duration. This instrument is executed as of the date of last signature between the FHWA, NDDOT, and at least one tribe with Reservation boundaries within the State of North Dakota.

Other Tribes may become signatory to this agreement after that date. The conditions of this PA, including any subsequent amendments, shall be in place until terminated.

G. Projects Exempted from Consultation

Projects exempted from consultation are limited to the following activities (provided the projects are not part of a larger undertaking), by their nature and definition are either 1) types of projects that have no potential to affect historic properties (and do not require consultation) [36 CFR 800.3(a)(1)], or 2) types that have no or limited potential to result in any effects to historic properties of concern to the Tribes, and are, therefore, exempted from further consultative review by the Tribes in compliance with Section 106. The TCC, through resolution, can modify the following list.

3. NDDOT Projects

A. Types of NDDOT Projects with No Potential to Affect Historic Properties

1. Pavement Related

- Resurfacing or sealing the existing roadways without other geometric changes.
- Sidewalk replacement including no additional excavation outside existing disturbed area. Disturbance is less than 2 feet below existing surface.

2. Maintenance Related

- Pavement repairs including joint repairs, patching, and crack sealing of roads where the contract does not disturb original ground.
- All pavement making on roads where they previously existed and new striping when necessary to conform to the Design Manual.
- Bridge painting of all types of bridges where the contract does not disturb original ground.
- Bridge and other structure repairs or shoring where the contract does not disturb original ground.

3. Signing Related

- Installation and replacement of signs - replacement of existing signs in-kind. Installation of driven foundation posts 6" or less in diameter for signs. Drilled shaft foundations generally to a maximum diameter of 36". Or any other kind of sign that does not disturb original ground.

4. Roadside Safety Related

- Repair, replace or upgrade existing guardrail on highways where construction does not disturb the original ground.
- Install or replace impact attenuators on highways where construction does not disturb original ground surface.
- Replace median barriers on highways where construction does not disturb original ground surface.

5. Traffic Monitoring Related

- Install and upgrade traffic signal and lighting poles.
- Install highway monitoring systems including loop detectors (or other types of sensors), cameras, radio systems variable message signs (with the exception of towers) where construction does not disturb original ground surface.

6. Other Project Types

- Any project, not specifically mentioned above, where all proposed work will take place on existing roadways within the in-slopes (as illustrated on the attached sheet).

B. Types of NDDOT Projects with No or Limited Potential to Affect Cultural Resources of Concern to the Tribes

1. Roadside Safety Related

- Replacement of railing on bridges to meet modern safety standards.

2. Traffic Monitoring Related

- Installation of highway monitoring systems including loop detectors (or other types of sensors), cameras, radio systems variable message signs (with the exception of towers).

3. Transportation Enhancement Related

- Streetscape improvement outside a historic district. This includes, but may not be limited to, benches, decorative lighting, textured crosswalks, transit shelters, and containerized plantings where the construction does not disturb original ground.
- Rehabilitation of historic structures where construction does not disturb original ground.
- Rehabilitation of historic transportation equipment such as railroad locomotives, rail cars, and canal boats.
- Purchase of scenic easements or abandoned rail corridors where no construction activity is planned. Resale of scenic easements is not part of this agreement.
- Establishment of transportation museums and visitors centers that do not contain any information relative to the Tribes where construction does not disturb original ground.

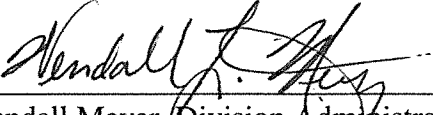
C. Projects to be Reviewed

Projects that the NDDOT will consult on will be projects with potential to affect historic properties that may be of interest to Tribes.

1. Any NDDOT highway project with a federal nexus, not specifically exempted in Stipulation 3A and B above, will be included in the information presented to the TCC. A copy of relevant portions of the Statewide Transportation Implementation Program (STIP) will be provided at the meetings and reviewed as needed.


2. The NDDOT will consult with the Tribes for all material sources and local government projects where cultural resource sites have been identified. A representative from a Tribe near the project will be called upon to assist with site avoidance issues on all material sources. If direct impact to cultural resource sites can be avoided on Local Government projects, Tribal representatives will not need to be present in the field. Results of material source and local government projects will be provided at each TCC meeting. Tribes who have concerns with any aspect of the site avoidance measures can request further consultation including a field visit.

FEDERAL HIGHWAY ADMINISTRATION

By: 
Wendall Meyer, Division Administrator
Federal Highway Administration


Date: 9/5/14

NORTH DAKOTA DEPARTMENT OF TRANSPORTATION

By: 
Grant Levi, PE, Director
North Dakota Department of Transportation

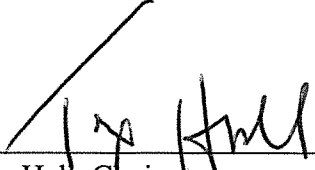
Date: 9/5/14

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

By: 
Richard McCloud, Chairman
Turtle Mountain Band of Chippewa Indians

Date: 9.5.14

MANDAN, HIDATSA, ARIKARA NATION (THREE AFFILIATED TRIBES)

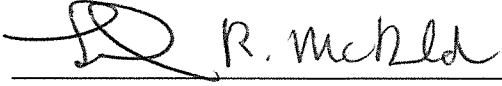
By: 
Tex Hall, Chairman
Mandan, Hidatsa, Arikara Nation

Date: 9-5-14

SISSETON-WAHPETON OYATE

By: Robert Shepherd Date: 9-5-14
Robert Shepherd, Chairman
Sisseton-Wahpeton Oyate of the Lake Traverse Reservation

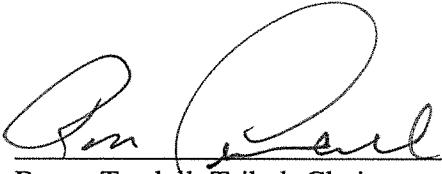
SPIRIT LAKE DAKOTA NATION

By: 

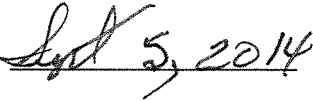
Leander'Russ' McDonald, Chairman
Spirit Lake Tribe

Date: 9-5-14

SANTEE SIOUX TRIBE OF NEBRASKA

By: 

Roger Trudell, Tribal, Chairman
Santee Sioux Tribe of Nebraska

Date: 

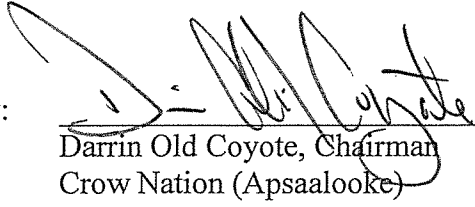
Sept 5, 2014

OMAHA TRIBE

By: *Doran L Mams Jr.*
~~Amen Sheridan, Chairman~~
Omaha Tribe

Date: *9-5-14*

CROW TRIBE (APSAALOOKE)

By:  _____
Darrin Old Coyote, Chairman
Crow Nation (Apsaalooke)

Date: 10-1-14