

PROGRAMMATIC AGREEMENT

AMONG

FOND DU LAC BAND OF LAKE SUPERIOR CHIPPEWA INDIANS

AND

MINNESOTA DIVISION OF THE FEDERAL HIGHWAY ADMINISTRATION

WITH CONCURRENCE BY

MINNESOTA DEPARTMENT OF TRANSPORTATION

REGARDING IMPLEMENTING CONSULTATION IN ACCORDANCE

WITH 36 CFR 800 ON

FEDERAL TRANSPORTATION PROJECTS

IN MINNESOTA

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 FHWA has requested the Minnesota Department of Transportation (Mn/DOT), the primary recipient of federal-aid highway funds in the State of Minnesota, to provide assistance to FHWA in complying with the body of environmental law that includes the National Environmental Policy Act (NEPA), the National Historic Preservation Act (NHPA), and other similar laws; 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 and has consulted with the Fond du Lac Band of Lake Superior Chippewa Indians (Fond du Lac Band) and Mn/DOT pursuant to

Section 800.13 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 programmatic agreements; and

WHEREAS, the FHWA and Mn/DOT are 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 and the Fond du Lac Band; and

WHEREAS, the FHWA, the Fond du Lac Band, and Mn/DOT aspire to engage in meaningful, long-term planning for the protection of historic, archaeological and cultural 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 Fond du Lac Band 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.

NOW, THEREFORE, the FHWA, the Fond du Lac Band, and Mn/DOT hereby agree that the implementation of federally funded highway projects 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 Fond du Lac Band for individual undertakings of the program.

STIPULATIONS

1. **Applicability.** This Programmatic Agreement (PA) applies to all FHWA undertakings administered under its Federal-Aid Highway Program in the following Minnesota Counties: Carlton, Cook, Lake and St. Louis (the geographic area which was part of the 1854 Land Cession).
2. **Consultation Prior to Determination of Effect.** When a project is proposed that will include FHWA federal-aid funding, Mn/DOT's Cultural Resources Unit will initiate consultation as FHWA's agent, 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". However, initial contacts in the project development process will come from Mn/DOT. These contacts will provide information, in the form of a letter to the Fond du Lac Band Tribal Chairperson, which includes a map of the project area which identifies the project limits (including a topographic map, if available), description of the project, identifies known historic and archaeological sites, identifies other consulting parties and includes photographs of the project area, if available. This information will be sent "Return Receipt Requested".

Mn/DOT will request information from the Fond du Lac Band about historic, cultural and archaeological resources and other concerns.

The Fond du Lac Band will respond to this request for information within forty-five days of receipt of the initial consultation information. If Mn/DOT does not receive a response from the Fond du Lac Band within forty-five days of receipt of the request for information, FHWA and Mn/DOT will assume that the Fond du Lac Band concurs with the initial consultation information and has no additional concerns with the project.

If the Fond du Lac Band expresses an interest in the project, Mn/DOT will provide information about the

location, significance, and eligibility of historic properties in the project area as well as discuss possible project effects.

3. **Consultation After Determination of Adverse Effect.** Upon determining that there will be an adverse effect (as that term is used in 36 CFR 800.5) to a historic property of religious or cultural significance to the Fond du Lac Band, FHWA will enter directly into the consultation process. FHWA will be involved in the consultation to develop the necessary Memorandum of Agreement to minimize and mitigate any adverse effects to historic properties of religious or cultural significance to the Fond du Lac Band.
4. **Discovery During Construction.** If previously unidentified archaeological or historic sites are discovered during construction of an undertaking, that portion of the project will stop immediately. Mn/DOT's Cultural Resources Unit will make a preliminary determination of eligibility and, if deemed eligible, immediately contact the Minnesota State Historic Preservation Officer (SHPO) and Office of the State Archaeologist (OSA). 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 Mn/DOT's Cultural Resources Unit will consult with the SHPO, OSA and Native Americans, including the Fond du Lac Band, if applicable, to record, document and evaluate National Register eligibility of the site and the project's effect on the site, and to design a plan for avoiding or mitigating adverse effects on a potentially eligible site.
5. **Treatment of Human Remains.** In accordance with State and Federal laws that protect unmarked burials, if previously unidentified remains are discovered during construction, that portion of the project will stop immediately. The remains will be secured as found and protected by the project engineer. The project engineer will immediately consult with Mn/DOT's Cultural Resources Unit. Mn/DOT's Cultural Resources Unit will develop, if necessary, a reburial plan in consultation with the OSA, SHPO, FHWA and, if appropriate, with Native Americans, including the Fond du Lac Band (pertains to all areas of Minnesota).

FHWA, Mn/DOT, and the OSA will ensure that the treatment and reburial plan is fully implemented. Avoidance and preservation in place is the preferred option for treating human remains. Consistent with applicable State legislation, OSA is the lead agency for such cases.

If human remains or burials are encountered at any time prior to construction activities, 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.

6. **Emergency Situations.** This document prescribes 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 Mn/DOT, and (3) corrective measures are initiated within thirty 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, the Fond du Lac Band. Written notification of the emergency action being considered shall be provided to the Fond du Lac Band, if appropriate. 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.

7. **Professional Qualifications.** All historical preservation work carried out pursuant to this

Agreement will be performed by or under the direct supervision of a person or persons meeting the Secretary of Interior's Qualifications Standards, 48 FR 44738-9, for the discipline(s) required to complete the necessary work.

8. **Dispute Resolution.** Should any party to this Agreement object within thirty 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. Any Council comment provided in response to such a request will be taken into account by FHWA in accordance with 36 CFR 800.7 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.
9. **Amendment.** Any party to this Agreement may request at anytime that it be amended, whereupon the parties 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.
10. **Right to Terminate.** Any party to this Agreement may terminate for cause by providing thirty 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, the FHWA shall comply with 36 CFR 800 with regard to the individual undertakings covered by this Agreement.
11. **Duration.** This Agreement will be in effect until revised. However, the parties will meet annually to review and revise the Agreement, if determined necessary.
12. **Tribal Sovereignty.** Nothing in this Agreement alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of the Fond du Lac Band, or preempts, modifies, or limits the exercise of any such rights.

EXECUTION AND IMPLEMENTATION of this Programmatic Agreement evidences that the FHWA has satisfied its Section 106 responsibilities for the undertakings subject to this Agreement.



Robert Peacock

Robert Peacock, Chairman
Fond du Lac Band of Lake Superior Chippewa

2/24/04
Date



Alan Steger

Alan Steger, Division Administrator
Federal Highway Administration

2/24/04
Date

Concurring:



Carol Molnau

The Honorable Carol Molnau, Lieutenant Governor
Minnesota Department of Transportation

2-24-04
Date