

**PROGRAMMATIC AGREEMENT**

AMONG

UPPER SIOUX COMMUNITY

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 23 U.S.C. “Highways” and agrees to 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 (“NPHP”) and has consulted with the Upper Sioux Community (“USC”) and MN/DOT pursuant to Section 800.14 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 historical 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 USC; and

**WHEREAS**, the FHWA, the USC, and MN/DOT aspire to engage in meaningful, long-term planning for the protection of historic and archaeological 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 USC; (5) devote a larger percentage of time and energies to identifying transportation-related concerns that may affect historic and archaeological properties; and (6) continue to create innovative programs to address those problems.

**NOW, THEREFORE**, the FHWA, the USC, 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 106b responsibilities with regard to consultation with the USE for individual undertakings of the Federal-Aid Highway Program.

## STIPULATIONS

3. **Applicability.** This Programmatic Agreement (“PA”) shall apply to all FHWA undertakings administered under the Federal-Aid Highway Program in the following Minnesota Counties: Yellow Medicine, Chippewa and Renville (those counties adjacent to or near the trust land of the USC). Except, if previously recorded burial mounds are located within the Area of Potential Effect (APE) of an FHWA undertaking in any portion of Minnesota, the Upper Sioux will be consulted as described in this PA.
4. **Consultation Prior to Determination of Effect.** The activities listed in Appendix A which occur in the above listed Counties **except** activities occurring within the exterior boundaries of the USC, are categorically exempted from exemption because they are routinely undertaken by MN/DOT 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, do not introduce new structural or visual elements, and do not require substantial ground disturbance. The MN/DOT Cultural Resources Unit Staff will determine if one or more of the exempt activities applies on a project-by-project basis and will document their determination. The USC will not review this class of projects unless located within the exterior boundaries of the USC.

However, this exemption shall not apply within cultural sensitive areas identified by the MN/DOT Cultural Unit staff or the USC’s archaeologist. Such culturally sensitive areas may include burial areas or other archaeologically or historically significant areas. These projects will be reviewed by the USC.

When a project is proposed that will include FHWA federal-aid funding and it is not exempt from review, MN/DOT’s Cultural Resources Unit will initiate consultation with the USC, as FHWA’s agent in a manner consistent with 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’s Cultural Resources Unit. This initial consultation will provide information, in the form of a letter to the USC Board of Trustees, which includes a map of the project area, a description of the project, identifies the project limits, identifies known historic and archaeological sites, identifies other consulting parties, and includes photographs of the project area, if available.

MN/DOT’s Cultural Resources Unit will request information about historic, cultural and archaeological resources and other concerns. Additional MN/DOT Cultural Resources Unit consultation may provide information about the location, significance, and eligibility of historic properties in the project area as well as discuss possible project effects.

The USC will respond to this request for information (via e-mail, letter or phone) thirty days (30) days if receipt of the initial consultation information. If MN/DOT’s Cultural Resources Unit does not receive a response from the USC within thirty (30) days of receipt of the information, FHWA and

MN/DOT's Cultural Resources Unit will assume that the USC concurs with the initial consultation information and has no additional concerns with the project.

If the USC expresses interest in the project, MN/DOT's Cultural Resources Unit will provide whatever information requested concerning the location, significance, and eligibility of historic properties in the project area as well as discuss possible effects.

3. **Consultation After Determination of Adverse Effect.** Upon determining that there will be an adverse effect (as term is used in 36 CFR 800.5) to an historic property of religious or cultural significance to the USC, 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 USC.
4. **Discovery During Construction.** 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. 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 Office ("SHPO"), Office of the State Archaeologist ("OSA") and the USC Board of Trustees. 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 will consult with SHPO, OSA and Native Americans, including the USC Board of Trustees, 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 or Tribal 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 interested Native Americans, including the USC Board of Trustees. FHWA, MN/DOT, and the OSA will ensure that the treatment and reburial plan is fully implemented. If applicable, the protocols established by the USC will be utilized.

If reburial is necessary, the final determination of reburial protocols will be made through consultation with the USC Board of Trustees. 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.

6. **Emergency Situations.** This document prescribes review processes for two classes of emergency situations. The first class exist 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 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 USC. Written notification of the emergency action on the resources(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 Programmatic Agreement.

7. **Professional Qualification.** 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 CFR 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 request comment from the advisory 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.
9. **Amendment.** Any party to this Agreement may request 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 for five years from the date of execution, with renewal upon written agreement by all parties. However, the parties will meet annually to review and revise the Agreement, if determined necessary.

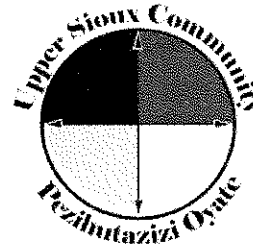
EXECUTION AND IMPLEMENTATION of the Programmatic Agreement evidences that the FHWA has satisfied its Section 106 responsibilities of the undertakings subject to this Agreement.

Kevin J. Jensvold 4/15/11

Kevin Jensvold, Chairman

Date

Upper Sioux Community



Derrell E. Turner 4/15/11

Derrell Turner, Division Administrator

Date

Federal Highway Works Administration

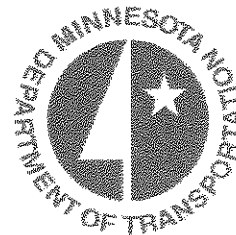


Thomas Sorel 4/15/11

Thomas Sorel, Commissioner of Transportation

Date

Minnesota Department of Transportation



## APPENDIX A

### ACTIVITIES EXEMPTED FROM REVIEW

1. Repair or replacement in kind of curb and gutter and sidewalk in the same location. This will include construction of handicapped access ramps at existing sidewalks.
2. Any work on bridges over 50 years in age that are not on the list of eligible bridges or bridges to be preserved in MN/DOT's Bridge Management Plan, if there are no ground-disturbing activities beyond areas that have been previously disturbed. If MN/DOT work funded by the FHWA or state funds is being performed on railroad bridges over water or as part of a potentially eligible railroad line, this exemption does not apply.
3. Any work on wayside rests that are not on the list of eligible wayside rests in Mn/DOT's Historic Roadside Development Structures report, if there are no ground-disturbing activities beyond areas that have been previously disturbed.
4. Hazardous Waste removal and disposal from within existing highway Right of Way, if such waste material constitutes a public hazard that requires immediate removal.
5. Minor changes to previously reviewed projects that will not result in any additional new ground disturbance.

The following activities are exempt, unless a NRHP eligible or listed property (including buildings, structures, objects, sites, and districts) is within the Area of Potential Effect.

6. All work within interchanges and within medians of divided highways that have a distance of 125 feet or less between roadway centerlines.
7. All work between a highway and an adjacent frontage road if the distance between the respective centerlines is 150 feet or less.
8. Replacement or extension of culverts and other drainage structures less than 50 years in age with waterway openings of 100 square feet or less and which do not extend beyond the present highway Right of Way.
9. Roadway surface replacement, overlays, shoulder treatments, pavement repair, seal coating, pavement grinding, and pavement marking.
10. Replacement or repair of lighting, signals and traffic control devices where the existing units were installed less than 50 years ago. Installation, replacement or repair of signs if they are consistent with and not larger than the provisions of the Minnesota Manual on Uniform Traffic Control Devices. Installation of new lighting, signals and other traffic control devices, unless adjacent to National Register listed or previously determined eligible bridges, properties or districts.

11. Installation, replacement or repair of safety appurtenances such as guardrails, barriers, glare-screens, and energy attenuators.
12. Fencing, including salvage yards, provided no grading or other landscaping is involved.
13. Landscaping on fill slopes and backslopes only. All landscaping beyond toe of fill slopes or beyond top of backslope must be reviewed.
14. Railway crossing sign and signal installation or modification and surface improvement.
15. Air and river navigation obstruction lighting.
16. Construction of turn lanes, bypass land and shoulder widening where only placement of fill material is involved, provided that no topsoil is removed beyond the area of previous disturbance, which can be assumed to be 15 feet beyond the existing toe of the fill slope, and on existing cut sections where no work shall be done beyond the existing top of backslope.
17. Placement of fill material on the side slopes of crossroads and entrances for purposes of flattening these slopes to meet safety criteria, provided that no topsoil is removed beyond the area of previous disturbance, which can be assumed to be 15 feet beyond the existing toe of the fill slope, and in existing cut sections where no work shall be done beyond the existing top on backslope.
18. Permits for sing entrances only, provided they are not within culturally sensitive area that may be defined by MN/DOT's Cultural Resources Unit or the USC.
19. Placement or riprap with existing Right of Way to prevent erosion of waterways and bridge piers.