

**MEMORANDUM OF UNDERSTANDING  
AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION,  
INDIANA STATE HISTORIC PRESERVATION OFFICER,  
INDIANA DEPARTMENT OF TRANSPORTATION,  
and  
FEDERALLY RECOGNIZED TRIBES INTERESTED IN INDIANA LANDS  
REGARDING TRIBAL CONSULTATION REQUIREMENTS  
FOR THE INDIANA FEDERAL TRANSPORTATION PROGRAM**

**PREFACE**

This Memorandum of Understanding (MOU) is the result of discussions among the Federal Highway Administration (FHWA), the Indiana Department of Transportation (INDOT), the Indiana State Historic Preservation Officer (SHPO), and federally recognized Tribes whose ancestral homelands include the State of Indiana (Tribes)<sup>1</sup>. This document is intended to define and develop procedures for consultation in compliance with the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 et seq.), among the FHWA, INDOT, and Tribes. As required under the terms of the NHPA and resulting regulations (36 C.F.R. Part 800), consultation has revealed that many Tribes have aboriginal ties to what is now the State of Indiana. Those Tribes have requested to be consulted on future transportation projects in Indiana.

The FHWA and INDOT understand that cultural resources are revered by the Tribes and are a connection to their past and important to their cultural identity, sense of self and future well-being. Tribes are concerned with the continuing destruction of places and items of cultural value, including cultural resources, burial sites, and Traditional Cultural Properties (TCPs)<sup>2</sup>. The destruction of these resources impacts Tribal cultural identity today. Cultural resources are tied to people's ancestors, some are related to important religious activities, and many have ongoing spiritual connections. The FHWA and INDOT recognize the importance of these cultural resources to aboriginal people living today.

The FHWA and INDOT recognize that transportation projects have the potential to adversely affect historic properties<sup>3</sup>: burials, funerary objects, sacred objects, objects of cultural patrimony, sacred sites, archaeological sites, and TCPs, as well as traditional cultural landscapes<sup>4</sup> and traditional natural resources<sup>5</sup> that may not be eligible and/or protected by the National Register but may still be of value to Tribes. The

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<sup>1</sup> See Appendix A: COUNTY LISTING OF THE TRIBES' ANCESTRAL HOMELANDS AND TERRITORY IN THE STATE OF INDIANA.

<sup>2</sup> A Traditional Cultural Property (TCP) is eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that: (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community. (National Register Bulletin 38).

<sup>3</sup> The term "historic property" is defined in the NHPA as, "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion, on the National Register"; such term includes artifacts, records, and remains which are related to such district, site, building, structure, or object (54 U.S.C. § 300308).

<sup>4</sup> Traditional cultural landscapes are understood to be areas considered sacred or culturally significant by tribes that include plants, animals, sound, light, view shed, and other sometimes intangible features that are revered through or described through a tribe's language, songs, stories, ceremonies, and place names (ACHP's The Protection of Indian Sacred Sites: General Information, July 2015. <http://www.achp.gov/docs/sacred-sites-general-info-july-2015.pdf>; accessed December 11, 2015).

<sup>5</sup> Traditional natural resources are understood to be trees, plants, berries, nuts, fruits, minerals, and any floral or fauna species that are considered sacred, medicinal, or culturally important to tribal religious beliefs, traditions, and practices (ACHP's The Protection of Indian Sacred Sites: General Information, July 2015. <http://www.achp.gov/docs/sacred-sites-general-info-july-2015.pdf>; accessed December 11, 2015).

FHWA and INDOT understand that the construction of the modern transportation network typically did not take into account impacts to these resources. The FHWA and INDOT do not wish further destruction of these culturally valued places, and recognize the inherent rights of Tribes to preserve those places that they value.

Modern development, including transportation construction, has the potential to destroy or adversely impact valuable cultural resources. This MOU is intended to ensure that all parties understand which cultural resources are important to Tribes and work together to protect and preserve them, or mitigate for their loss. The FHWA and INDOT are committed to providing a transportation system that will benefit all people of Indiana, both current and historic, and to learning tribal perspectives about cultural resources important to Tribes. The Tribes are committed to understanding transportation issues and the perspectives of the FHWA and INDOT. Jointly, we are committed to establishing a relationship of mutual trust and respect.

It is the intention of the FHWA and INDOT to work with Tribes to find appropriate ways to avoid, minimize or mitigate adverse effects to historic properties. The FHWA and INDOT pledge to always look for ways to avoid adverse effects to historic properties as the first option. When avoidance of adverse effects is impossible or impractical, given other concerns of equal importance, the FHWA and INDOT will work with the Tribes for appropriate and respectful resolution.

INDOT will ensure that the requirements of the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. § 3001 et seq.) are followed when there is a discovery of human remains, burials or associated funerary objects (AFOs) on federal lands. In the event of a discovery of human remains or burial objects on non-federal lands during transportation planning or construction activities, at a minimum INDOT will comply with all applicable federal and state laws and regulations, including Section 106 of the NHPA of 1966 (54 U.S.C. § 300101 and 36 C.F.R. Part 800), the Indiana Historic Preservation Act (IC 14-21), and Indiana Administrative Code 312 IAC 22 (see III.C.2).

**WHEREAS**, all signatory Tribes identified in Appendix A are federally recognized sovereign, self-governing Indian Tribes with their own tribal laws, with established government-to-government relationships with the United States, and a historical connection to specific areas of Indiana, as shown in Appendix A: “COUNTY LISTING OF THE TRIBES’ ANCESTRAL HOMELANDS AND TERRITORY IN THE STATE OF INDIANA,” and have been consulted and agree to be signatories to this document;

**WHEREAS**, the Indiana SHPO has been consulted and agrees to be a signatory to this document;

**WHEREAS**, the FHWA wish to affirm the government-to-government relationship with the Tribes for consultation and cooperation regarding federal acts and orders including, but not limited to, Section 106 of the National Historic Preservation Act (54 U.S.C. § 300101 et seq.); the National Environmental Policy Act, (42 U.S.C. § 4321 et seq.); the Archaeological Resource Protection Act (16 U.S.C. § 470aa et seq.); Presidential Executive Order 13007 (Indian Sacred Sites); Presidential Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments); Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. § 3001 et seq.); and, the American Indian Religious Freedom Act (42 U.S.C. § 1996);

**WHEREAS**, the FHWA is the federal agency with statutory responsibilities for administering the federal-aid highway program under 23 U.S.C. § 101 et seq., and INDOT administers and oversees federal funds for

state and local transportation projects in Indiana. The FHWA agrees to coordinate under a government-to-government relationship with Tribes with regard to federal responsibilities under Section 106 of the NHPA through the terms of this MOU. INDOT will also consult with Tribes 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 (NRHP). FHWA and INDOT have also determined that its undertakings may have an effect upon traditional cultural landscapes and traditional natural resources that may not be eligible or protected by the National Register but may still be of value to Tribes. Through this MOU, FHWA and INDOT will consult with Tribes pursuant to Section 106 of the NHPA (54 U.S.C. § 300101 et seq.);

**WHEREAS**, the FHWA and INDOT are committed to: 1) avoiding, minimizing, and mitigating adverse effects to historic properties; 2) considering tribal interests in the preservation of significant cultural resources that are important to tribal well-being, growth, and prosperity; and 3) responding to the needs of Tribes;

**WHEREAS**, INDOT will employ departmental staff that meet the federal professional qualification requirements of 36 C.F.R. Part 61 and State of Indiana standards (IC 14-21-1 and 312 IAC 21). At a minimum, the professional staff required to carry out the terms of this MOU shall consist of one permanent, full time archaeologist;

**WHEREAS**, INDOT contracts archaeological fieldwork to only qualified professionals. INDOT will ensure that all consultants conducting archaeological fieldwork meet the federal professional qualification requirements of 36 C.F.R. Part 61 and State of Indiana standards (IC 14-21-1 and 312 IAC 21). INDOT ensures and will continue to ensure that fieldwork and reporting meets federal and state guidelines;

**WHEREAS**, the FHWA, INDOT, and the signatory Tribes aspire to engage in meaningful, long-term planning for the appropriate consideration of cultural resources important to Tribes, and to pursue the following:

- develop a comprehensive and efficient tribal consultation process based upon education and understanding for Section 106 undertakings;
- continue to identify ways to streamline the Section 106 process and procedural requirements;
- recognize that Tribes share the responsibility to engage in effective consultation;
- involve the Tribes' cultural experts to a greater extent and at an earlier point than before the implementation of this MOU;
- devote the time and energy needed to identify relevant transportation problems threatening cultural resources important to the Tribes; and
- accomplish any additional goals identified through consultation and agreed upon by the parties;

**BE IT RESOLVED**, the FHWA, INDOT and Tribes hereby agree that the implementation of tribal consultation on transportation projects shall be established through government-to-government relations with Tribes. At a minimum, consultation will be in accordance with the following stipulations in order to satisfy FHWA tribal consultation responsibilities under the NHPA.

## **STIPULATIONS**

## **I. GENERAL**

A. This MOU sets forth the process by which FHWA will meet its responsibilities of the Federal Aid Highway Program with regard to tribal consultation under Section 106 of the NHPA for transportation projects within the State of Indiana. This MOU establishes a protocol for consultation with Tribes on individual transportation projects.

B. Nothing in this MOU shall be interpreted to alter the requirements of the NHPA or its implementing regulations. In the event any portion of this MOU is deemed contradictory, or less restrictive, to law or regulation, only that portion becomes void. The sole contradictory provision or issue shall not negate the entire MOU. The parties should consult to resolve the contradictory issue with the intent to reform or amend that portion of the MOU to make it compliant with applicable law or regulation while all remaining provisions of the MOU remain in full force and effect.

C. No portion of this MOU shall be interpreted to limit the rights, duties, or responsibilities of any party as may be required under federal laws, regulations, policies, executive memoranda or executive orders, or Indiana state statutes.

D. Consultation with Tribes shall begin when Section 106 consultation is initiated and before a final transportation alternative is approved. Tribal early coordination shall be sent to ensure tribal views are considered into the decision making process and consultation shall continue throughout a Section 106 undertaking. A letter or email of notification, in and of itself, from FHWA/INDOT to a Tribe is not considered consultation. Consultation is a mutual, meaningful dialogue between FHWA, INDOT, SHPO, and Tribes regarding historic properties that may be affected by an undertaking. The FHWA and INDOT shall consult with Tribes on a government-to-government basis in recognition of its sovereign status as early as possible in the planning process and throughout the Section 106 process, regarding any activity or undertaking that might affect cultural resources of concern to the Tribes.

Consultation may include face-to-face meetings, as well as communications by mail, electronic mail, facsimile, and telephone. When it is determined that consultation will be by a face-to-face meeting, FHWA and INDOT will coordinate with the consulting party Tribes to develop a mutually agreed upon time and place to meet.

Consultation may be extended to include future management, protection, and preservation if historic properties that are of cultural and/or religious significance to Tribes are identified.

E. The FHWA and INDOT shall ensure that Tribes are afforded, in accordance with applicable federal, state, and local authorities and highway safety measures, the opportunity to conduct religious/traditional ceremonies within right-of-way owned by INDOT.

F. The FHWA and INDOT recognize that facilitating effective tribal consultation may require providing travel support for tribal officials. Future formal agreements may specify how this support may occur.

G. The FHWA and INDOT shall ensure that consultation with other consulting parties, including local governments, shall not include the dissemination, beyond those who have an official need to know, of

confidential information except as mandated by federal or state laws. Confidential information is defined as information pertaining to Native American<sup>6</sup> sites, that, if disclosed may:

1. cause a significant invasion of privacy; risk harm to historic properties; or impede the use of a traditional religious site by practitioners (54 U.S.C. § 307103 et seq.);
2. risk harm to TCPs, traditional cultural landscapes, and traditional natural resources;
3. risk harm to archaeological sites that may contain burials or human remains, funerary objects, sacred objects and/or objects of cultural patrimony; or
4. risk harm to Native American historic properties in accordance with Section 304 of the NHPA.

H. As Native American archaeological sites, TCPs, traditional cultural landscapes, traditional natural resources, burial sites, funerary objects, sacred objects, and/or objects of cultural patrimony are non-renewable resources, FHWA and INDOT shall make a reasonable and good faith effort to inform the public and private landowners regarding stewardship, site protection and preservation which may include but not be limited to tax incentives or related benefits, lectures, exhibits, site-specific consultation, brochures, and videos.

I. A Tribe may request to enter the process at any time.

J. Tribes will be contacted if Native American human remains, burials, or burial objects are found during archaeological investigations or during construction. In any instance where Native American human remains are uncovered, Tribes will be notified in accordance with III.C. of this MOU.

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<sup>6</sup> Throughout this MOU, the term Native American can refer to pre-Columbian peoples and post-Columbian American Indians.

## II. NOTIFICATION FOR CONSULTATION PROCEDURES

A. *Points of Contact*: The FHWA, INDOT, SHPO, and Tribes shall each designate primary and secondary contacts<sup>7</sup>. The primary contact for Tribes is the contact to whom all initial and formal correspondence goes, including notification and updates of public involvement for the Indiana Statewide Transportation Improvement Plan (STIP) and project specific Section 106 correspondence and documentation. If the individual designated as the primary point of contact is not available, communications shall be directed to the secondary contact. The primary and secondary contacts within each Tribe are responsible for involving the appropriate tribal individuals. Each party of this MOU shall provide in writing (hardcopy or email) the other parties with the phone numbers, email addresses, and mailing addresses for the primary and secondary contacts. Each party shall notify the other parties in writing (hardcopy or email) when either point of contact changes. On an annual basis, FHWA/INDOT will send an email request to the Tribes asking for new or updated contact information and update the contact list accordingly. Such changes shall not require the amendment of this agreement.

B. *Tribal Areas of Concern*: The Tribes have provided, or will provide, FHWA/INDOT with a listing of all Indiana counties that exist within their ancestral homeland and territory, in which they have an interest (see Appendix A). At the Tribes' discretion, a Tribe or Tribes may also be identified to review projects in other areas of Indiana. The FHWA/INDOT will maintain this list and will update as necessary when additional tribal interests are made known. If Tribes do not provide FHWA/INDOT with their counties of interest, FHWA/INDOT will utilize the table entitled *Indiana-Present Day Tribes Associated with Indiana Land Cessions 1784-1894* available from National NAGPRA Online Databases in its tribal consultation.

C. *Delegation of Certain Responsibilities to INDOT*: INDOT will provide Indiana STIP annual updates to Tribes and notify Tribes of public meetings and comment periods on the STIP. INDOT will conduct Early Coordination with the Tribes for applicable projects (see Stipulation II.F.), soliciting the Tribes' input as early as possible in the project's development, and providing them detailed project information as necessary or requested.

INDOT will maintain cultural resource staff, or utilize consultants, who, at a minimum, meet the federal qualifications set forth in the Secretary of the Interior's Professional Qualification Standards (36 C.F.R. Part 61) and State of Indiana standards (IC 14-21-1 and 312 IAC 21) for cultural resource studies. INDOT may also carry out consultation activities in accordance with Stipulation I.D., but FHWA will be involved in or monitor all such consultations and will at all times be available for direct communication with any party. The FHWA will be a signatory on all project-specific or other formal agreement documents.

D. *Indiana Program Documents*: The Indiana Statewide Transportation Improvement Program (STIP) is a four-year planning document that lists all projects expected to be funded in those four years with Federal funds and those state-funded projects that have been deemed as Regionally Significant. The list of projects included in the STIP is maintained on the INDOT website <http://www.in.gov/indot/2348.htm>.

E. *Programmatic Agreement and Projects Exempt from Section 106 Early Coordination*: FHWA and INDOT periodically execute programmatic agreements (PA) with the SHPO and the Advisory Council on Historic Preservation (ACHP) that determines how Section 106 is satisfied by FHWA in Indiana. At the

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<sup>7</sup> see Appendix B: POINT OF CONTACT LIST.

time of execution of this MOU, the FHWA IN Division administers Section 106 following the *Programmatic Agreement Among the Federal Highway Administration, the Indiana Department of Transportation, the Advisory Council on Historic Preservation Officer Regarding the Implementation of the Federal Aid Highway Program In the State of Indiana* dated September 6, 2006<sup>8</sup>. This PA includes categories of minor projects exempted from Section 106 early coordination and consultation. The project types exempted from Section 106 early coordination and consultation by the PA are generally limited to the repair, replacement or upgrade of existing transportation infrastructure. The PA can also be applied to three project types (B-8: Trails; B-9: Small Structure Replacements; and B-10: Slide Corrections) after an archaeological reconnaissance has identified no NRHP eligible archaeological sites within the project area. If a potentially eligible or eligible archaeological site is identified, the PA does not apply and Section 106 consultation is required. All archaeological reports prepared for review under the PA shall be provided to Tribes and SHPO.

FHWA and INDOT will consult with the Tribes in development of new programmatic agreements. As new programmatic agreements are executed, Appendix C will be updated with the most recent version without requiring amendment to this MOU.

No federal-aid projects are exempt from being listed in the Indiana STIP. Tribes will see a listing of *all* federal-aid projects in their counties of interest (see III.A). If a Tribe expresses concerns about a project listed in the STIP that qualifies for Section 106 clearance under the PA, FHWA and INDOT will consult further with the Tribe. Based on this consultation, FHWA and INDOT may determine that the PA is not applicable due to tribal concerns and Section 106 consultation will be required as outlined in III.A-C.

*F. Transportation Projects to be Considered for Early Coordination:* INDOT will initiate Early Coordination with Tribes and SHPO on projects that have the potential to affect cultural resources that may be of interest to Tribes. Early Coordination will be initiated for:

1. Any INDOT project that is considered to be a Federal undertaking that is subject to Section 106 as described in 36 C.F.R. Parts 800.3(a) and 800.16(y) and is not exempt from Section 106 early coordination and consultation through application of the PA. The FHWA/INDOT will coordinate with Tribes who claim association with that project's county (see II.B); and
2. The FHWA/INDOT will consult with Tribes regarding any properties in which they have an expressed interest as a result of their review of project documentation provided by INDOT.

*G. Early Coordination:* Early Coordination provides the SHPO, Tribes, and other consulting parties the opportunity to request participation in the Section 106 process and to comment on a project's anticipated impacts early in project development. Early Coordination may be conducted via an email generated from INDOT's Section 106 electronic consultation portal, an email sent by FHWA/INDOT, or hard copy correspondence sent by FHWA/INDOT, if requested. Minimally, Early Coordination will include a project description, topographical map indicating township, section and range, a request for the recipient to indicate their interest for consulting on the project, and request for any concerns/feedback. When Section

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<sup>8</sup> See Appendix C: PROGRAMMATIC AGREEMENT (PA) AMONG THE FEDERAL HIGHWAY ADMINISTRATION, THE INDIANA DEPARTMENT OF TRANSPORTATION, THE ADVISORY COUNCIL ON HISTORIC PRESERVATION AND THE INDIANA STATE HISTORIC PRESERVATION OFFICER REGARDING THE IMPLEMENTATION OF THE FEDERAL AID HIGHWAY PROGRAM IN THE STATE OF INDIANA.

106 consultation is initiated and before a final transportation alternative is approved, tribal early coordination shall be sent to ensure tribal views are considered into the decision making process. Tribes will have 30 days from receipt of the early coordination letter to provide comments and/or concerns.

H. *Quality Assurance Reviews*: On an annual basis, FHWA and INDOT will conduct Quality Assurance Reviews (QARs) of post-construction transportation projects in three (of six) INDOT Districts. QARs consist of reviewing projects exempted from Section 106 early coordination and consultation through the PA to confirm that the PA was applied correctly based on the scope of work. QARs will also include on-site visits to project locations to verify that the project scope and construction were completed as explained in the PA or Section 106 documentation as appropriate and to ensure that any commitments regarding cultural resources were followed. Should a QAR involve a project in which Tribes expressed an interest during Section 106 consultation, Tribes will be notified two weeks prior to the QAR and invited to attend the site visit. In addition, if Tribes have specific projects of concern, they can request that those projects be included in future QARs at any time. If serious problems regarding tribal commitments not being followed are identified during a QAR, Tribes will be notified immediately. QAR annual reports will be provided to INDOT, FHWA, SHPO, and Tribes.

### **III. CONSULTATION PROCEDURES**

A. *Indiana Program Documents*: On an annual basis, INDOT will email tribal contacts the STIP website address for review. INDOT will also notify tribal contacts by email when INDOT offers public comment periods or public meetings in development of a new STIP document. This information will give the Tribes the opportunity to review and comment on *all* projects in their counties of interest in advance of project development.

If a Tribe expresses interest in any project(s) listed in the STIP, detailed project information will be sent to them and the procedures under Stipulation III. B. will be followed.

B. *Early Coordination*: In addition to the regular notification of all projects in the Indiana STIP, INDOT will initiate Section 106 early coordination and consultation early in project development when Section 106 consultation is initiated and before a final transportation alternative is approved, for undertakings that are not categories of minor projects exempted from Section 106 early coordination and consultation (Appendix C). These are projects that INDOT has determined may have potential to affect historic properties.

Tribes, FHWA, SHPO, and INDOT mutually agree on the following consultation procedures for identifying and evaluating the effects of projects on cultural resources. These procedures shall comply with all applicable federal and state laws, statutes, and regulations. To the extent any provision conflicts with or is less protective of Tribal interests than applicable federal law or regulation, the federal law or regulation shall take precedent.

1. Early coordination letters and any follow up correspondence will be written on either INDOT or FHWA letterhead and signed by a representative of sending agency; informal correspondence between agencies and Tribes may be by email. INDOT will use Appendices A and B to identify and invite Tribes into Section 106 consultation for a project under study in their area of concern. The early coordination letter (ECL) will provide a project description along with a 7.5 minute quadrangle map showing the proposed project location, providing township, section, and range. The Tribe will notify INDOT if there is a Native American archaeological site, TCP, traditional cultural landscape, or traditional natural resource within the



project area, or if they have an interest in the undertaking. If INDOT does not receive a response from the Tribe by the date specified by INDOT (not fewer than 30 days) they may assume the Tribe has no interest in the undertaking.

2. Tribes that respond within the time allotted by INDOT (not fewer than 30 days) with an interest in the undertaking will be a consulting party for the project. Tribes may request additional project information, which INDOT will provide. The means of consultation will be negotiated on a project case-by-case basis as appropriate for each Tribe's interest and request. Tribes may re-enter into consultation at any point during the Section 106 process.

3. If there is any disagreement among the agencies and Tribes regarding the eligibility of an archaeological site, TCP, traditional cultural landscape or traditional natural resource all parties will have further discussions to attempt to reach agreement and will follow eligibility guidelines in National Park Service Bulletin 38.

If INDOT/FHWA and Tribes cannot reach agreement regarding the eligibility of an archaeological site, TCP, traditional cultural landscape or traditional natural resource after following the guidelines outlined in National Park Service Bulletin 38, the Tribe may, per the Section 106 regulations at 36 C.F.R. Part 800.4(c)(2), ask the ACHP to request that the federal agency obtain a formal eligibility determination from the Keeper of the National Register.

4. INDOT, in consultation with SHPO and Tribes, shall conduct appropriate archaeological investigations and prepare reports, which will be posted on INDOT's Section 106 electronic communication web portal. A notification that a report has been posted will be provided to the tribal contacts and SHPO. A hardcopy report will be provided to SHPO for as long as they require hard copy report submissions. Reports may also be sent by hardcopy to any consulting party Tribe that requests a hard-copy. The Tribes and SHPO will be provided a 30-day review period that will run concurrently.

Any response received from a consulting party Tribe during this period will be provided to SHPO for consideration in the identification of historic properties. If INDOT does not receive a response within the 30-day period from a consulting party Tribe, FHWA/INDOT may assume the Tribe has no comment regarding the outcome of the archaeological investigation.

5. For identified archaeological sites that FHWA and INDOT, in consultation with consulting party Tribes and SHPO, agree are not eligible for inclusion in the NRHP, no further archaeological investigations will be required. For projects where there are no historic properties present or none that will be affected, INDOT shall provide documentation of no historic properties affected as set forth in 36 C.F.R. Part 800.11(d) to the consulting party Tribes and SHPO.

6. For archaeological sites evaluated as eligible for listing on the NRHP, consultation will continue with the SHPO and consulting party Tribes to avoid, minimize or mitigate adverse effects to the eligible resource. When a historic property may be affected by the undertaking, FHWA/INDOT will apply the criteria of adverse effect as set forth in C.F.R. 36 Part 800.5(a)(1) and shall provide documentation as set forth in 36 C.F.R. Part 800.11(e) to the consulting party Tribes and the Indiana SHPO. If adverse effects cannot be avoided, then INDOT, FHWA, the Tribes, and SHPO will consult to develop a Memorandum of Agreement (MOA).

*C. Unanticipated Discoveries During Construction:* The following procedures will be used in the event that previously unreported and unanticipated artifacts or human remains (including funerary objects, sacred objects, and objects of cultural patrimony) are found during INDOT construction activities. The procedures differ depending on whether unanticipated artifacts (see Section C.1.) or human remains (including funerary objects, sacred objects, and objects of cultural patrimony) (see Section C.2.) are encountered. These procedures are intended to ensure that the project is in compliance with all applicable federal and state laws and regulations, including Section 106 of the NHPA of 1966 (54 U.S.C. § 300101 and 36 C.F.R. Part 800), the Indiana Historic Preservation Act (IC 14-21), Indiana Administrative Code 312 IAC 22, and INDOT Standard Specification 107.10.

1. *Procedures for an Unanticipated Discovery of artifacts:* In the event of unanticipated discovery of artifacts during INDOT construction activities, INDOT will follow these procedures:

- (a) The construction contractor (Contractor) shall immediately stop all construction activity within a 100 ft. radius of the discovery and cease further disturbance. If the Contractor is unaware of the size and scope of the discovery or if the discovery suggests the possible presence of other artifacts within the work site, the Contractor shall also immediately stop all construction activity beyond a 100 ft. radius of the discovery to the extent appropriate. The Contractor shall notify the INDOT Project Engineer (Engineer) who will inform INDOT CRO of the discovery. Within two business days from the time of discovery, INDOT CRO shall notify the Indiana Department of Natural Resources-Division of Historic Preservation and Archaeology (DHPA) and Tribes.

Within 48 hours of notification of the discovery, INDOT CRO shall review a description and photographs of the discovery provided by the Contractor or Engineer and determine whether construction may resume or if a site visit is warranted to document and evaluate the discovery. Consultation with Tribes and DHPA will be initiated to help determine the value of items found and assist in determinations of eligibility. If a site visit is warranted, INDOT CRO will have two business days following the site visit and Tribal input to determine the NRHP eligibility of the discovery. Tribes shall be invited to attend site visits to assist in eligibility determinations.

- (b) If the discovery is not eligible for listing on the NRHP, INDOT CRO will report the site to DHPA and inform the Engineer that construction in the area of the discovery may resume. If there is disagreement among the agencies and Tribes regarding the eligibility of a discovery for listing, all parties shall further consult to attempt to reach an agreement. If an agreement cannot be reached after following the guidelines outlined in National Park Service Bulletin 38, the Tribe may, per the Section 106 regulations at 36 C.F.R. Part 800.4(c)(2), ask the ACHP to request that the federal agency obtain a formal eligibility determination from the Keeper of the National Register.
- (c) If the discovery is determined, through consultation, to be eligible for listing on the NRHP, INDOT CRO will consult with Tribes, previously identified consulting parties, FHWA, SHPO and the ACHP regarding INDOT CRO's proposed actions to resolve the adverse effects, if adverse effects cannot be avoided. Tribes and other consulting parties will have two business days to provide their views on the proposed actions. INDOT/FHWA will ensure that the recommendations of Tribes and other consulting parties are taken into account prior to granting approval of the measures that will be implemented to resolve adverse effects. These measures may include:

- preparation of a mitigation plan by INDOT CRO in consultation with the Tribes for approval by the DHPA;
- implementation of the mitigation plan;
- archaeological mitigation of the site (data recovery);
- DHPA approval to resume construction following completion of the fieldwork component of the mitigation plan;
- photographic documentation and/or scaled mapping of the resource;
- visits to the site by Tribes and DHPA.

(d) Dispute Resolution: The FHWA will seek and take into account the recommendations of the ACHP in resolving any disagreements that may arise regarding determination of effects.

*2. Procedures for an Unanticipated Discovery of Human Remains and Burials (including funerary objects, sacred objects, and objects of cultural patrimony):* In the event of an unanticipated discovery of human remains or burials (including funerary objects, sacred objects, and objects of cultural patrimony as defined by 43 C.F.R. § 10.2(d)) during INDOT construction activities or FHWA/INDOT archaeological investigations, INDOT will comply with the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. § 3001 et seq.), the Indiana Historic Preservation Act (IC 14-21), 312 IAC 22 and INDOT Standard Specification 107.10, and any other applicable federal and state laws, and will follow these procedures:

(a) Upon encountering human remains or an unmarked human burial (including funerary objects, sacred objects, and objects of cultural patrimony) during ground disturbing construction activities or archaeological investigations, INDOT, its consultant, or the Contractor shall immediately cease work within a 100 ft. radius of the discovery and inform local or state police and the county coroner. If the discovering party is unaware of the size and scope of the discovery or if the discovery suggests the possible presence of other human remains or an unmarked human burial within the work site, the party shall also immediately stop all construction activity beyond a 100 ft. radius of the discovery to the extent appropriate. If uncovered during construction, the Contractor shall notify the Engineer who will inform INDOT CRO of the discovery; INDOT CRO will then notify DHPA/SHPO and Tribes within two business days of the time of the discovery. If identified during archaeological work, INDOT will notify SHPO and Tribes within two business days of the time of discovery. In addition to ceasing work, the discovering party must make a reasonable effort to protect the human remains, funerary objects, sacred objects, or objects of cultural patrimony discovered inadvertently.

(b) In coordination with DHPA/SHPO and Tribes, INDOT CRO will determine if the skeletal remains are human, the degree to which they were disturbed, and if possible, assess their potential age and cultural affiliation without any further disturbance. If the skeletal remains are human and are Native American in origin, CRO will notify by email the point of contact(s) for each Tribe claiming interest in the county of the discovery. If discoveries are not of human remains, the INDOT CRO shall further consult with Tribes to determine if such discoveries are funerary objects, sacred objects, or objects of cultural patrimony.

(c) If it is determined by INDOT CRO, in consultation with DHPA/SHPO, FHWA, and Tribes, that intact or fragmented human remains are present and are Native American in origin, or that the discovered materials are funerary objects, sacred objects, and objects of cultural patrimony, INDOT

CRO will consult with Tribes, DHPA/SHPO, and FHWA regarding measures to avoid and protect the discovery or mitigate any adverse effect of the project on the discovery. These measures may include:

- INDOT CRO collaborating with design team to alter project plans to avoid human remains and/or burials (including funerary objects, sacred objects, and objects of cultural patrimony);
- avoiding the human remains and/or burial (including funerary objects, sacred objects, and objects of cultural patrimony) and preserving in place;
- if avoidance is not feasible, in consultation with Tribes, recovering the human remains and/or burial (including funerary objects, sacred objects, and objects of cultural patrimony) through standard archaeological methods;
- preparation of a mitigation plan by INDOT CRO in consultation with the Tribes for approval by the DHPA;
- implementation of the mitigation plan;
- archaeological mitigation of the site (data recovery);
- visits to the site by Tribes and DHPA;
- DHPA approval to resume construction following completion of the fieldwork component of the mitigation plan;
- consultation with Tribes, FHWA, and DHPA/SHPO regarding disinterment and reinterment of Native American human remains. FHWA and DHPA/SHPO will defer to tribal recommendations regarding cultural affiliations, disinterment, and reburial of Native American human remains and/or burials (including funerary objects, sacred objects, and objects of cultural patrimony).

#### **IV. OTHER POINTS OF MUTUAL AGREEMENT**

*A. Execution and Implementation:* This MOU is effective as of the date of the last signature among FHWA, SHPO, INDOT, and at least one Tribe with an interest in Indiana lands. Other Tribes may become signatory to this MOU after that date, without the need to amend this MOU. The successful implementation of this process shall constitute meaningful consultation between FHWA and the Signatory Tribes to fulfill tribal consultation requirements of Section 106 of the NHPA.

*B. Annual Report and Evaluation of MOU Implementation:* On an annual basis, INDOT will submit a report to FHWA, SHPO, and Tribes identifying projects processed under this MOU. The report shall include a description of actions taken to comply with this MOU. The report should provide a description and summary of exempted projects listed in Appendix C for which INDOT did not conduct Section 106 early coordination and consultation. At the same time, FHWA and INDOT will offer the opportunity for a meeting (in-person, teleconference or web-conference) with signatories to discuss issues defined in this MOU. The purpose of the annual meeting is to continue effective working relationships and evaluate the implementation of this agreement.

*C. Confidentiality:* The FHWA and INDOT acknowledge the need for confidentiality of certain tribal religious and cultural information that may be provided by Tribes during the course of consultations, and other aspects of tribal consultation conducted on cultural resource issues. Information identified as sensitive by consulted tribal members, and requested to remain confidential, will remain confidential to the extent permitted by state and federal law (54 U.S.C. § 307103 et seq. and Section 304 of NHPA).

D. *Dispute Resolution*: Should any signatory object at a later date to the implementation of this agreement in whole or in part, the objecting party will consult with all signatories to resolve the objection. If all signatories are unable to satisfactorily resolve the issue, and the issue involves resolution of the Adverse Effect of an INDOT project on a site eligible for inclusion on the NRHP, the administrative process defined in 36 C.F.R. Part 800.6 will be followed.

E. *Failure to Comply/Termination*: If any signatory determines that the terms of this MOU cannot be or are not being carried out, then the signatories shall consult regarding the reasons, and will seek amendment to the MOU, if appropriate. If the MOU is not amended, any signatory may terminate their participation in the MOU by providing 30 calendar days written notice to the other parties. In the event of termination by a Tribe, the FHWA and INDOT shall comply with 36 C.F.R. Part 800 and continue with individual tribal consultation with that Tribe. As long as the FHWA, INDOT, SHPO, and at least one Tribe continues to participate, the MOU will remain in effect, but the Tribes who have terminated their participation will no longer be held to the terms of this agreement.

F. *Amendment*: Any signatory to this MOU may request that it be amended, whereupon all signatories shall consult to consider such an amendment. Any resulting amendments shall be developed and executed among the signatories in the same manner as the original MOU. Any amendment to this MOU will go into effect only upon written agreement of all signatories.

G. *Participation in Similar Activities*: This MOU in no way restricts the FHWA, INDOT, or the signatory Tribes from participating in similar activities with other public or private agencies, organizations, and individuals.

H. *Commencement/Termination Date*: This MOU is executed as of the date of last signature between FHWA, INDOT, SHPO, the ACHP, and at least one Tribe. Other Tribes may become signatory to this agreement after that date. This MOU is effective through December 31, 2030, at which time it will expire unless specifically extended by signatory resolution. One year prior to expiration, the signatories will discuss whether this agreement should be renewed, modified, or allowed to expire.

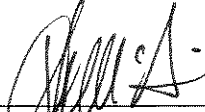
**SIGNATORIES:**

FEDERAL HIGHWAY ADMINISTRATION

By: Mayela Sosa  
Mayela Sosa  
Division Administrator

Date: 14 Feb 2017

INDIANA DEPARTMENT OF TRANSPORTATION

By:   
\_\_\_\_\_  
Joseph McGuinness  
Commissioner

Date: 2/3/2017



INDIANA STATE HISTORIC PRESERVATION OFFICER

By: \_\_\_\_\_



Cameron Clark,

Director, Indiana Department of Natural Resources

Date: \_\_\_\_\_

3-6-17

Insert individual Tribe(s) pages here:

MEMORANDUM OF UNDERSTANDING  
AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION,  
INDIANA STATE HISTORIC PRESERVATION OFFICER,  
INDIANA DEPARTMENT OF TRANSPORTATION,  
and  
FEDERALLY RECOGNIZED TRIBES INTERESTED IN INDIANA LANDS  
REGARDING TRIBAL CONSULTATION REQUIREMENTS  
FOR THE INDIANA FEDERAL TRANSPORTATION PROGRAM

Name of Tribe: RED CLIFF BAND OF LAKE SUPERIOR CHIPPWAS

Signature: Lawrence Balber


Date: 4/4/2017

Please Print Name: LAWRENCE BALBER

Title: TRIBAL HISTORIC PRESERVATIONS  
OFFICER

**MEMORANDUM OF UNDERSTANDING  
AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION,  
INDIANA STATE HISTORIC PRESERVATION OFFICER,  
INDIANA DEPARTMENT OF TRANSPORTATION,  
and  
FEDERALLY RECOGNIZED TRIBES INTERESTED IN INDIANA LANDS  
REGARDING TRIBAL CONSULTATION REQUIREMENTS  
FOR THE INDIANA FEDERAL TRANSPORTATION PROGRAM**

Name of Tribe: Delaware Nation

Signature: 

Date: 5/16/2017

Please Print Name: Kerry Holton

Title: 5/16/2017

MEMORANDUM OF UNDERSTANDING  
AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION,  
INDIANA STATE HISTORIC PRESERVATION OFFICER,  
INDIANA DEPARTMENT OF TRANSPORTATION,  
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FEDERALLY RECOGNIZED TRIBES INTERESTED IN INDIANA LANDS  
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FOR THE INDIANA FEDERAL TRANSPORTATION PROGRAM

Name of Tribe: Niami Tribe of Oklahoma

Signature: Douglas Lansford Date: 3-16-17

Please Print Name: Douglas Lansford Title: Chief

**MEMORANDUM OF UNDERSTANDING  
AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION,  
INDIANA STATE HISTORIC PRESERVATION OFFICER,  
INDIANA DEPARTMENT OF TRANSPORTATION,  
and  
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FOR THE INDIANA FEDERAL TRANSPORTATION PROGRAM**


Name of Tribe: Seneca-Cayuga Nation

Signature: William L. Fisher Date: 3-13-2017

Please Print Name: William L. Fisher Title: Chief

**MEMORANDUM OF UNDERSTANDING  
AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION,  
INDIANA STATE HISTORIC PRESERVATION OFFICER,  
INDIANA DEPARTMENT OF TRANSPORTATION,  
and  
FEDERALLY RECOGNIZED TRIBES INTERESTED IN INDIANA LANDS  
REGARDING TRIBAL CONSULTATION REQUIREMENTS  
FOR THE INDIANA FEDERAL TRANSPORTATION PROGRAM**

Name of Tribe: Delaware Nation

Signature: 

Date: 4/4/2017

Please Print Name: # Kerry Holton

Title: 4/4/2017

MEMORANDUM OF UNDERSTANDING  
AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION,  
INDIANA STATE HISTORIC PRESERVATION OFFICER,  
INDIANA DEPARTMENT OF TRANSPORTATION,  
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FEDERALLY RECOGNIZED TRIBES INTERESTED IN INDIANA LANDS  
REGARDING TRIBAL CONSULTATION REQUIREMENTS  
FOR THE INDIANA FEDERAL TRANSPORTATION PROGRAM

Name of Tribe: DELAWARE TRIBE OF INDIANS

Signature: Chester L. Brooks Date: 3-6-2017

Please Print Name: CHESTER L. BROOKS Title: CHIEF



**MEMORANDUM OF UNDERSTANDING  
AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION,  
INDIANA STATE HISTORIC PRESERVATION OFFICER,  
INDIANA DEPARTMENT OF TRANSPORTATION,  
and  
FEDERALLY RECOGNIZED TRIBES INTERESTED IN INDIANA LANDS  
REGARDING TRIBAL CONSULTATION REQUIREMENTS  
FOR THE INDIANA FEDERAL TRANSPORTATION PROGRAM**

Name of Tribe: Eastern Shawnee Tribe of Oklahoma

Signature: Glenna J. Wallace

Date: 3-1-2017

Please Print Name: GLENN J. WALLACE

Title: Chief

**MEMORANDUM OF UNDERSTANDING  
AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION,  
INDIANA STATE HISTORIC PRESERVATION OFFICER,  
INDIANA DEPARTMENT OF TRANSPORTATION,  
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FEDERALLY RECOGNIZED TRIBES INTERESTED IN INDIANA LANDS  
REGARDING TRIBAL CONSULTATION REQUIREMENTS  
FOR THE INDIANA FEDERAL TRANSPORTATION PROGRAM**

Name of Tribe: F. C. P.

Signature: alw. milham


Date: 3/20/2017

Please Print Name: AL W. MILHAM

Title: Vice Chairman

**MEMORANDUM OF UNDERSTANDING  
AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION,  
INDIANA STATE HISTORIC PRESERVATION OFFICER,  
INDIANA DEPARTMENT OF TRANSPORTATION,  
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FEDERALLY RECOGNIZED TRIBES INTERESTED IN INDIANA LANDS  
REGARDING TRIBAL CONSULTATION REQUIREMENTS  
FOR THE INDIANA FEDERAL TRANSPORTATION PROGRAM**

Name of Tribe: Leech Lake Band of Ojibwe

Signature:  Date: 3-16-17

Please Print Name: Faron Jackson Sr. Title: chairman

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**LEECH LAKE BAND OF OJIBWE**



**Maggi Jordan**  
Executive Assistant  
Tribal Chairman  
Maggi.Jordan@llojibwe.org  
Fax: (218) 335-7225  
190 Sailstar Drive NW  
Cass Lake, MN 56633

**Office: (218) 335-4404 Cell: (218) 513-5623**

MEMORANDUM OF UNDERSTANDING  
AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION,  
INDIANA STATE HISTORIC PRESERVATION OFFICER,  
INDIANA DEPARTMENT OF TRANSPORTATION,  
and  
FEDERALLY RECOGNIZED TRIBES INTERESTED IN INDIANA LANDS  
REGARDING TRIBAL CONSULTATION REQUIREMENTS  
FOR THE INDIANA FEDERAL TRANSPORTATION PROGRAM

Name of Tribe: Pokagon Band of Potawatomi Indian

Signature: Jason M. Wesaw

Date: 3-31-17

Please Print Name: Jason M. Wesaw

Title: Government Manager

MEMORANDUM OF UNDERSTANDING  
AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION,  
INDIANA STATE HISTORIC PRESERVATION OFFICER,  
INDIANA DEPARTMENT OF TRANSPORTATION,  
and  
FEDERALLY RECOGNIZED TRIBES INTERESTED IN INDIANA LANDS  
REGARDING TRIBAL CONSULTATION REQUIREMENTS  
FOR THE INDIANA FEDERAL TRANSPORTATION PROGRAM

Name of Tribe: Turtle Mountain Band of Chippewa Indians

Signature: Wayne Keplin Date: 3/5/12

Please Print Name: Wayne Keplin Title: Tribal Chairman