

Tribal Consultation Programmatic Agreement

In Accordance With

36 CFR 800

On Federal-Aid Highway Undertakings In Minnesota



WHITE EARTH NATION

Gaa-waabaabiganikaag

and

MINNESOTA DIVISION OF THE FEDERAL HIGHWAY ADMINISTRATION

With Concurrence By

MINNESOTA DEPARTMENT OF TRANSPORTATION

January 2015

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

WHEREAS, the FHWA has requested the Minnesota Department of Transportation (MnDOT), 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 delegated its responsibilities, to a certain extent, for compliance with Section 106 in accordance with Federal law to the professionally qualified staff (as per 36 CFR 61) in the Cultural Resources Unit (CRU) at MnDOT although FHWA remains legally responsible for all findings and determinations charged to the agency official in 36 CFR 800; and

WHEREAS, the FHWA has determined that its undertakings may have an effect upon properties included in or eligible for inclusion in the National Register of Historic Places and has consulted with the White Earth Nation and MnDOT pursuant to Section 800.16 of the regulations (36 CFR 800) implementing Section 106 of the NHPA (16 U.S.C. 470f); and

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

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

WHEREAS, the FHWA and MnDOT 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 including the White Earth Community; and

WHEREAS, the FHWA, White Earth Nation, and MnDOT 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 White Earth 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, White Earth Nation, and MnDOT hereby agree that the implementation of Federal-Aid Highway Program shall be administered in accordance with the following stipulations in order to satisfy FHWA's Section 106 (36 CFR Part 800) responsibilities with regard to consultation with the White Earth Nation 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: Aitkin, Becker, Beltrami, Cass, Clay, Clearwater, Crow Wing, Douglas, Hubbard, Itasca, Kittson, Koochiching, Mahnomen, Marshall, Morrison, Norman, Otter Tail, Pennington, Polk, Red Lake, Roseau, St. Louis, Stearns, Todd, and Wadena (the geographic area which was part of the 1847, 1855 and 1863 Land Cessions). However, if previously recorded burial mounds are located within the Area of Potential Effect (APE) of an FHWA undertaking in any portion of Minnesota, White Earth Nation will be consulted as described in this PA.
- 2. Activities Exempt from Consultation.** The activities listed in Appendix A which occur in the above listed Counties are categorically exempted from White Earth Nation consultation in compliance with 36 CFR 800. These activities are identified for exemption because they are routinely undertaken by MnDOT with Federal-Aid Highway Program funds and have limited areas of impact that are unlikely to contain properties that are included in or are eligible for inclusion in the NRHP. The areas of impact are limited because they occur largely at grade within an existing right-of-way (ROW), do not introduce new structural or visual elements, and do not require substantial ground disturbance. The MnDOT Cultural Resources Unit (CRU) staff will determine if one or more of the exempt activities applies on a project-by-project basis and will document their determination. The White Earth Nation will not review this class of projects.

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

This exemption shall not apply within culturally sensitive areas identified by MnDOT's CRU. Such culturally sensitive areas may include archaeologically, culturally, or historically significant areas. The White Earth Nation will review all FHWA undertakings in the geographic area defined in Stipulation 1 where it has been determined that the exemptions provided by this PA do not apply.

3. Consultation Prior to Determination of Effect. When a project is proposed that will include FHWA federal-aid funding or when a required approval is needed from the FHWA (such as an interstate access request) MnDOT's CRU 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".

If the White Earth Nation has acquired formal Tribal Historic Preservation Office (THPO) certification from the National Park Service (NPS) pursuant to Section 101(d) of the NHPA and currently has a person in the THPO position at the time of Section 106 consultation for a FHWA undertaking, then:

- Any necessary Section 106 consultation for undertakings entirely within reservation boundaries will be with the White Earth Nation THPO in lieu of consultation with the SHPO unless otherwise provided per 36 CFR 800
- The White Earth Nation THPO will receive any invitations to be a consulting party as part of any necessary Section 106 consultation for undertakings outside of the reservation boundaries but within the geographic area of interest as defined in Stipulation 1.

If the White Earth Nation has not maintained formal THPO certification or does not have a person in the THPO position at the time of any necessary Section 106 project consultation, then FHWA will invite the White Earth Nation to be a consulting party for undertakings within reservation boundaries or within the geographic area of interest as defined in Stipulation 1. Consultation materials should be sent to the Tribal Chairperson and the White Earth Natural Resources (WEDNR), Director Monica Hedstrom: P.O. Box 393, 216 North Main Street, Mahanomen, MN 56557, Phone#: 218.935.2488 Ext. 2101, email Monicahm@whiteearth.com

This consultation will address, but is not limited to:

- a) properties potentially eligible, eligible, or included in the National Register of Historic Places (36 C.F.R. 800 and 16 U.S.C 470w).

b) properties of traditional religious or cultural importance, regardless of the location of the property, in accordance with NHPA (16 U.S.C §§ 470a(d)6(b) and 36 C.F.R 800.2(c).

c) sacred sites, traditional cultural properties, and sites of special concern.

Initial contacts in the project development process will come from MnDOT's CRU. These contacts will provide information, in the form of an email to the White Earth Nation, which will include a map of the project area that identifies the project limits; description of the project including details of anticipated ground disturbance; identify known historic, cultural and archaeological sites; identify other consulting parties; and includes photographs of the project area, if available.

MnDOT's CRU will ask for an indication whether White Earth Nation has concerns with this project, and request any information from White Earth Nation about historic, cultural, and archaeological resources in the project area and other concerns.

The White Earth Nation will respond to this request for information within thirty (30) days of receipt of the initial consultation information. If MnDOT does not receive an initial response from the White Earth Nation within thirty (30) calendar days of receipt of the request for information, and MnDOT's CRU has confirmed receipt of the information, FHWA and MnDOT's CRU will assume that the White Earth Nation concurs with the initial consultation information and has no additional concerns or information to supply.

If the White Earth Nation requests additional information or identifies the project as one of concern, MnDOT's CRU will provide additional information about the location, significance, and eligibility of historic, cultural, or archaeological properties in the project area as well as discuss possible project effects.

4. Consultation After Determination of "No Historic Properties Affected". This stipulation is required if, under the process described in Stipulation 3 of this PA, White Earth Nation has shared information or expressed concern. Upon determining that there are no historic, cultural or archaeological properties of religious or cultural significance to the White Earth Nation within the project area, or that such properties are not eligible for the National Register of Historic Places, MnDOT's CRU will notify White Earth Nation of that finding. Copies of adequate documentation to support that finding will be sent to the White Earth Nation Chairperson with a copy to the White Earth Nation THPO or WEDNR Director if THPO position is not filled at that time. White Earth will respond to this finding within thirty days of receipt of documentation. If MnDOT's CRU does not receive an initial response within thirty (30) days, and MnDOT's CRU has confirmed receipt of the information, FHWA and MnDOT's CRU will assume that the White Earth Nation concurs with the Finding of "No Historic Properties Affected" and has no additional concerns with the project.

If the White Earth Nation indicates that they do not agree with the finding of “no historic properties affected” and the White Earth Nation and MnDOT’s CRU cannot readily reach agreement on identification or eligibility of properties or definition of the area of potential effect, FHWA will enter directly into the consultation process. FHWA will be involved in the consultation to develop the necessary Memorandum of Agreement to minimize and mitigate any adverse effects to historic, cultural or archaeological properties of religious or cultural significance to the White Earth Nation.

5. Consultation After Determination of “No Adverse Effect.” This stipulation is required if, under the process described in Stipulation 3 of this PA, the White Earth Nation has shared information or expressed concern. Upon determining that there will be “no adverse effect” on listed or eligible properties, or to historic, cultural or archaeological properties of religious or cultural significance to the White Earth Nation within the project area, MnDOT’s CRU will notify the White Earth Nation of that finding. Copies of adequate documentation to support that finding will be sent to White Earth Chairperson with a copy to White Earth THPO or WEDNR Director if THPO position is not filled at that time. White Earth Nation will respond to this finding within thirty (30) days of receipt of documentation. If MnDOT’s CRU does not receive a response within thirty (30) days, and MnDOT’s CRU has confirmed receipt of the information, FHWA and MnDOT’s CRU will assume that the White Earth Nation concurs with the Finding of “No Adverse Effect” and has no additional concerns with the project.

If White Earth Nation indicates that they do not agree with the finding of “no adverse effect,” and White Earth Nation and MnDOT’s CRU cannot readily reach agreement on identification of properties or a method to achieve “no adverse effect,” or definition of the area of potential effect, FHWA will enter directly into the consultation process. FHWA will be involved in the consultation to develop the necessary Memorandum of Agreement to minimize and mitigate any adverse effects to historic, cultural or archaeological properties of religious or cultural significance to the White Earth Nation.

6. Consultation After Determination of “Adverse Effect.” This stipulation is required if, under the process described in Stipulation 3 of this PA, White Earth Nation has shared information or expressed concern. Upon determining that there will be an “adverse effect” (as that term is used in 36 CFR 800.5) to listed or potentially eligible properties, or to historic, cultural or archaeological properties of religious or cultural significance to White Earth Nation, FHWA will enter directly into the consultation process. FHWA will be involved in the consultation to develop the necessary Memorandum of Agreement or project-specific Programmatic Agreement to minimize and mitigate any adverse effects to historic, cultural or archaeological properties of religious or cultural significance to White Earth Nation.

7. Discovery During Construction. If historic, cultural or archaeological sites, including but not limited to unknown sites, not consulted on following Stipulations 3, 4, 5, or 6 of this PA are discovered (an unanticipated discovery) during construction of an undertaking, that portion of the project will stop immediately. White Earth Nation will be

notified immediately upon discovery. This applies to the exterior boundaries of the White Earth reservation, and counties of interest. The consultation process as described in Stipulations 3, 4, 5, or 6 of this PA will be followed prior to resumption of work.

If historical, cultural, or archaeological sites deemed to have been previously destroyed, disturbed or mitigated through consultation as described in Stipulations 3, 4, 5, or 6 of this PA are found to be less disturbed than thought or not completely destroyed or mitigated, that portion of the project will stop immediately. The consultation process as described in Stipulations 3, 4, 5, or 6 of this PA will be followed prior to resumption of work.

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 MnDOT's CRU will consult with White Earth Nation, Minnesota State Historic Preservation Officer (SHPO) and Minnesota Office of the State Archaeologist (OSA) to record, document and evaluate National Register eligibility of the site and the project's effect on the site. A plan will be designed for avoiding or mitigating adverse effects on a potentially eligible site.

Materials retrieved during the 106 process from tribal lands will be curated consistent with best practices while the relevant parties in the Section 106 process ascertain ownership and final disposition. Materials include anything recovered during excavations excluding human remains (see Stipulation 8 below).

8. Treatment of Human Remains. If human remains or burials are encountered at any time prior to construction activities, efforts will be made to avoid the remains or burials. If at all possible, the project will be designed to provide protection for the area from possible future disturbance. If unavoidable, the MnDOT Cultural Resources Unit will consult with FHWA, the OSA (who will contact the MIAC), SHPO, and federally recognized tribes that have expressed an interest by identifying geographical areas of interest that include the project area. These geographical areas of interest are identified in the individual Section 106 tribal consultation agreements with MnDOT and FHWA in Minnesota.

In accordance with State and Federal laws that protect unmarked burials, if previously unidentified human remains are discovered during construction, that portion of the project will stop immediately. The human remains will be protected and left untouched (as found) and the area will be secured by the project engineer. The project engineer will immediately consult with MnDOT's Cultural Resources Unit, acting on behalf of the FHWA, who will in turn contact FHWA, OSA, Minnesota Indian Affairs Council (MIAC), and SHPO. If MnDOT's CRU finds there is a possibility that the remains are American Indian, the CRU will initiate consultation as described in Stipulation 6 (Finding of "Adverse Effect") and work will not recommence until the consultation process is complete. All reasonable efforts will be made to avoid the remains or burials. If at all possible the project will be redesigned to avoid or protect the area.

9. Emergency Situations. This document describes review processes for two classes of emergency situations. The first class exists when (1) the undertakings are operations that are responding to a disaster or emergency declared by the President or Governor, and that are responding to immediate threats to life or property, or (2) that are responding to immediate threats to life or property that are declared emergencies by the United States Secretary of Transportation in consultation with MnDOT, and (3) corrective measures are initiated within thirty 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, White Earth Nation. 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.

10. 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 44738-44739, for the discipline(s) required to complete the necessary work.

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

12. Amendment. Any party to this PA may at any time 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.

13. Right to Terminate. Any party to this PA may terminate by providing thirty (30) days written notice to the signatories to this PA, 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 PA.

14. Duration. This PA will be in effect for five (5) years from the signing date, with renewal upon written agreement by all parties. We will meet nine (9) months prior to the expiration to discuss the performance of this PA and any necessary changes. Any

signatory may request a meeting to discuss the performance of this PA by sending a letter to FHWA and providing a courtesy copy to the other signatories.

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

16. Tribal Sovereignty. Nothing in this Agreement alters, amends, repeals, interprets, or modifies tribal sovereignty, any treaty rights, or other rights of the White Earth Nation, 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 undertaking subject to this Agreement.





Feb. 6, 2015

Erma Vizenor, Chairwoman

Date

White Earth Nation





3/24/2015

Dave Scott, Acting Minnesota Division Administrator

Date

Federal Highway Administration

Concurring:





3-10-15

Charles A. Zelle, Commissioner

Date

Minnesota Department of Transportation