

AMENDED PROGRAMMATIC AGREEMENT

Among the
Federal Highway Administration,
Michigan State Historic Preservation Officer,
Advisory Council on Historic Preservation, and the
Michigan Department of Transportation
For the Administration of Federal-Aid Trunk Line Highway Projects in the
State of Michigan

WHEREAS, this Amended Programmatic Agreement (PA) sets forth the process by which the Federal Highway Administration (FHWA), with the assistance of the Michigan Department of Transportation (MDOT), will meet its responsibilities for undertakings on MDOT administered trunk line highway projects pursuant to Sections 106 and 110 of the National Historic Preservation Act (NHPA) (16 U.S.C. Part 470f and 470h-2(a) through 470h-2(e)); and

WHEREAS, the division administrator of FHWA is the “agency official” responsible for compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 et seq.), and implementing regulations (36 CFR Part 800); and,

WHEREAS, MDOT administers federal-aid highway projects throughout the State of Michigan as authorized by Title 23 U.S.C. 77; and,

WHEREAS, FHWA has determined that certain transportation projects constitute “undertakings” which may result in changes in the character or use of historic properties and has consulted with the State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (ACHP) pursuant to Subpart C – Program Alternatives, 36 CFR Part 800.14; and,

WHEREAS, the FHWA, SHPO, ACHP, and MDOT originally executed a PA for Federal-Aid Trunk Line Highway projects in Michigan on September 22, 1998, and the parties to the original PA have consulted and agreed to amend the PA pursuant to Stipulation II.5 of that Agreement, and thus this Amended PA herein supersedes the earlier PA in its entirety; and

WHEREAS, FHWA has consulted with Indian tribes that may ascribe traditional cultural and religious significance to historic properties affected by actions carried out under this PA, including federally recognized Michigan tribes (see Attachment A); and

WHEREAS, MDOT employs qualified professional staff and consultants capable of completing many steps of the Section 106 review process on behalf of FHWA and has a record of successful compliance with Section 106; and,

WHEREAS, the parties to this PA agree to the areas of responsibility for cultural resource consultant contracting as specified in Attachment B; and,

WHEREAS, the definitions contained in 36 CFR Part 800.16 are appropriate to define the terms used in this PA; and,

NOW, THEREFORE, FHWA, ACHP, SHPO, and MDOT agree to the following stipulations in order to satisfy FHWA's Section 106 responsibilities for MDOT administered federal-aid projects.

STIPULATIONS

FHWA will ensure that the following measures are carried out:

1. Purpose and Scope
 - A. In compliance with its responsibilities under the NHPA, and as a condition of its award to MDOT of any assistance under the Federal Aid Highway Program, FHWA will ensure that MDOT carries out the requirements of this PA and Council policies and guidelines for undertakings subject to this PA. The terms of this PA apply to all MDOT administered Federal-aid trunk line projects. (Trunk line refers to those routes designated with an I, US, or M, or otherwise funded with FHWA and MDOT funds and administered by MDOT.)
 - B. MDOT, using staff and/or consultants meeting the Secretary of the Interior's Professional Qualifications Standards (48 FR 44716), will supervise or perform the work and consultation described in specific sections of 36 CFR Part 800.3 – 800.6 on behalf of FHWA as follows:
 - 36 CFR Part 800.3 - Initiation of the Section 106 Process
 - (a) Establish undertaking
 - (b) Coordinate with other reviews
 - (c) Identify appropriate SHPO and/or THPO
 - (d) Consultation on tribal lands
 - (e) Plan to involve the public
 - (f) Identify other consulting parties
 - (g) Expediting consultation
 - 36 CFR Part 800.4 - Identification of historic properties
 - (a) Determine scope of identification efforts
 - (b) Identify historic properties
 - (c) Evaluate historic significance
 - (d) Results of identification and evaluation
 - 36 CFR Part 800.5 - Assessment of adverse effects

- (a) Apply criteria of adverse effects
- (b) Finding of no adverse effect
- (c) Consulting party review
- (d) Results of assessment

In recognition of the unique government-to-government relationship between the Federal government and Indian Tribes, FHWA is responsible for overall consultation with Indian Tribes, including conflict resolution and adherence to all federal requirements and related laws. The FHWA may not delegate this responsibility to MDOT. However, as allowed in 36 CFR Part 800.2(c)(4) FHWA authorizes MDOT to carry out day-to-day and project specific consultation with the Indian Tribes and Tribal Historic Preservation Officers (THPO), if agreeable to all parties. If at any time an Indian Tribe determines that it would like to consult directly with FHWA, it may do so. It may contact FHWA directly or state its wishes to MDOT who will contact FHWA. This Agreement does not apply to undertakings on tribal lands or to undertakings that may affect historic properties on tribal lands within the exterior reservation boundaries and dependent Indian communities.

2. Consistent with current state and federal laws and regulations and MDOT policy, FHWA and MDOT shall, through the opportunities afforded by MDOT project development process, seek and consider the views of the public, including municipalities and other interest groups. Public outreach will be conducted in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, and the relationship of the federal involvement to the undertaking.
3. MDOT will define the undertaking's Area of Potential Effect (APE) as defined in 36 CFR Part 800.16(d). The APE will initially be established during project field scoping. As the project develops, the APE will be adjusted as necessary.
 - a) As a streamlining measure, MDOT may combine consultation with the SHPO on the APE with consultation on determinations of eligibility and/or effect for projects classified as Categorical Exclusions (CEs) under NEPA.
 - b) For projects requiring the preparation of an Environmental Impact Statement (EIS) or Environmental Assessments (EA) under NEPA and the provisions of federal transportation legislation, MDOT will consult with the SHPO on the APE early in project development prior to determination of eligibility or effect.
4. In consultation with SHPO, MDOT shall identify any other parties entitled to be consulting parties and invite them to participate, including local governments and Indian tribes. Others may be invited as the Section 106 review process moves forward. A reasonable and good faith effort involving MDOT tribal liaisons shall be made to identify and invite to be consulting parties any Indian tribes that might attach religious and cultural significance to historic properties in the Area of Potential Effects.

5. If, after completion of the requirements of 36 CFR 800.3 through 800.4(c), MDOT determines that either there are no historic properties within the Area of Potential Effect, or historic properties are present but will not be affected by the undertaking, MDOT shall document a finding of No Historic Properties Affected, provide such documentation to consulting parties, if any, and make the documentation available for public inspection. Except when dispute resolution in Administrative Condition II.2. is invoked, MDOT may consider Section 106 concluded.
6. For those undertakings where historic properties may be affected, MDOT shall apply the Criteria of Adverse Effect in accordance with 36 CFR Part 800.5. If MDOT determines that the effect of the undertaking will not be adverse, MDOT will propose a finding of No Adverse Effect and will provide documentation of its finding to the SHPO and any other consulting parties. Objections from any consulting party to a finding of no adverse effect will be resolved in accordance with Administrative Condition II.2.

Under the following conditions, MDOT will request the concurrence of the SHPO on findings of No Adverse Effect:

- i) Rehabilitation projects where the findings of No Adverse Effect is based on the proposed work being consistent with the Secretary of Interior's Standards for rehabilitation,
 - ii) When there is public controversy on historic preservation issues,
 - iii) At the request of the SHPO,
 - iv) At the request of MDOT,
 - v) When a consulting party, FHWA, or an Indian Tribe requests the SHPO's concurrence.
7. If MDOT determines that an undertaking will have an Adverse Effect on properties that are listed in or determined eligible for inclusion in the National Register of Historic Places, the Section 106 consultation process will be completed by FHWA as described in 36 CFR 800.5.d. and 36 CFR 800.6. Written documentation will be prepared by MDOT for use by FHWA to notify the ACHP of the finding of adverse effects and will initiate and conduct consultation to resolve adverse effects as provided in 36 CFR 800.6.
 8. For undertakings requiring preparation of a MOA, MDOT will prepare the draft MOA or subsequent drafts for circulation to FHWA, SHPO, and other consulting parties. FHWA, SHPO, and other consulting parties will have 45 calendar days to

respond to MOA drafts, after which MDOT will incorporate changes and circulate the MOA for signature.

9. MDOT will notify FHWA and SHPO when projects involve National Historic Landmarks (36 CFR Part 800.10), Emergency Situations (36 CFR Part 800.12), and/or Post-Review Discoveries (36 CFR Part 800.13). Using information provided by MDOT, FHWA will take appropriate actions to implement the provisions of 36 CFR Part 800.10, 36 CFR Part 800.12 and/or 36 CFR Part 800.13, as may be applicable.
10. SHPO and MDOT will develop research plans for studies leading to the identification of historic and archaeological properties eligible for listing in the National Register of Historic Places. The studied properties must also be potentially affected by transportation projects. MDOT will seek funds for these studies. MDOT will implement the studies in consultation with SHPO.
11. SHPO and MDOT will develop and share technological innovations enhancing Geographic Information Systems (GIS) capabilities, data sharing, and data digitizing capabilities. These technological capabilities must also support cultural resource management for transportation projects.

II. ADMINISTRATIVE CONDITIONS

1. **Applicability:** This PA applies to all trunk line projects that are administered through MDOT and funded with federal-aid through FHWA.
2. **Dispute Resolution:**
 - A. Except as provided in B (below), should any party to this PA, or a consulting party on an individual FHWA undertaking covered by this PA, object within 30 days to any actions proposed or findings submitted for review, MDOT shall consult with the objecting party(ies) to resolve the objection. If MDOT determines that such objection(s) cannot be resolved, it shall request FHWA's assistance in resolving the objection. If FHWA determines that the objection remains unresolved, FHWA will:
 - i. Forward all documentation relevant to the dispute to the ACHP in accordance with 36 CFR Part 800.2(b)(2). Upon receipt of adequate documentation, the ACHP shall review and advise FHWA on the resolution of the objection within 30 days. Any comment provided by the ACHP, and all comments from the parties to this PA, will be taken into account by FHWA in reaching a final decision regarding the dispute.
 - ii. If the ACHP does not provide comments regarding the dispute within 30 days after receipt of adequate documentation, FHWA may render a decision regarding the dispute. In reaching its decision, FHWA will take

into account all comments regarding the dispute from the parties to this PA.

- iii. FHWA's and MDOT's responsibility to carry out all other actions subject to the terms of this PA that are not subject of the dispute remain unchanged. FHWA will notify all parties of its decision in writing before implementing that portion of the undertaking subject to dispute under this stipulation. FHWA's decision will be final.

- B. If SHPO objects to a National Register eligibility recommendation made by MDOT or FHWA pursuant to this PA, and that objection cannot be resolved through consultation among SHPO, FHWA, and MDOT; OR if the ACHP so requests, FHWA will obtain a determination of eligibility from the Keeper of the National Register in accordance with 36 CFR Part 800.4(c)(2).
3. **Professional Qualifications:** All historic preservation work carried out pursuant to this PA will be performed by or under the direct supervision of a person or persons meeting the Secretary of the Interior's Professional Qualifications Standards, 48 FR 44716, for the discipline(s) required to complete the necessary work.
 4. **Monitoring:** FHWA, SHPO and the ACHP may monitor any activities carried out pursuant to this PA, and the ACHP will review such activity if so requested. MDOT will establish regular review meetings with SHPO to evaluate this PA. MDOT will cooperate with FHWA, SHPO and the ACHP in carrying out these monitoring and review responsibilities.
 5. **Amendments:** Any signatory to this agreement may request that it be amended, whereupon the parties shall consult to consider such amendment. The amendment will be effective on the date a copy is signed by all of the original signatories.
 6. **Termination:** Any signatory to this PA may terminate it by providing thirty (30) days written notice to the other parties, provided that the parties will consult during the period prior to the termination to seek agreements on amendments or other actions that would avoid termination. In the event of termination, FHWA will comply with 36 CFR Part 800 with respect to the individual undertakings covered by this PA.
 7. **Default:** In the event that FHWA or MDOT cannot carry out the terms of this PA, FHWA will comply with 36 CFR Part 800.
 8. **Regulatory Revisions:** In the event that revised regulations are promulgated, the signatories will consult to determine the applicability of the PA. If the signatories agree that only minor format changes are necessary, this PA may remain in effect until amendments addressing those changes are approved.

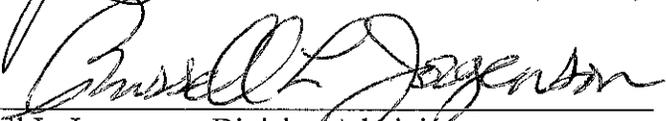
9. **Reporting:** MDOT will prepare an annual report on the activities carried out under this PA. The report will include a list of projects and findings made by MDOT. The report may also identify issues, and make recommendation for improving the implementation of the PA. In the report, the names and qualifications of MDOT's professional cultural resources staff carrying out the terms of this PA will be listed. MDOT will submit the report to the SHPO, FHWA and ACHP within 30 days of the end of the fiscal year, September 30. The report will serve as the basis for an annual review of the PA. Upon written request by SHPO, FHWA or ACHP, MDOT will make additional project information available. If desired by SHPO, FHWA or MDOT, following report submittal, MDOT will meet with SHPO and FHWA to discuss the report and any other issues related to the implementation of this PA. MDOT or FHWA shall also invite the ACHP to participate in this annual meeting if the issues under discussion include non-compliance with the PA or proposed amendments to the PA.
10. **Communication and Outreach:** SHPO and MDOT will continue their work on communication and outreach on Section 106 and historic preservation. The objectives will include the following:
- a. Educate MDOT staff and consultants about Section 106 as it applies to MDOT projects, as well as about other cultural resource management concerns.
 - b. Identify opportunities for MDOT and SHPO to jointly participate in the promotion of transportation related historic preservation subjects to the public and other local government agencies.
 - c. Improve MDOT's coordination of Section 106 activities with Michigan's Indian tribes and local governments.
- MDOT and SHPO will be jointly responsible for implementing these objectives. MDOT may seek funds to either assist these objectives.
11. **Correspondence:** All SHPO responses to correspondence from MDOT shall be to MDOT. This does not preclude SHPO from copying PA signatories on this correspondence. Email correspondence will be used whenever possible.
12. **Duration:** The effective date of this PA shall be the latest date of the fully executed primary signatures. FHWA, in consultation with MDOT, SHPO, and the ACHP, will review this PA every ten (10) years from the date of execution to determine if it should continue in force, be amended, or terminated. If no changes are proposed and no party objects, the term of the PA will be extended automatically for another ten years without re-execution.

EXECUTION AND IMPLEMENTATION of this PA evidences that FHWA has afforded the ACHP a reasonable opportunity to comment on the administration of federal-aid highway projects subject to this PA, and that FHWA has taken into account the effects of subject undertakings on historic properties.

ADVISORY COUNCIL ON HISTORIC PRESERVATION (ACHP)

By:  Date: 7/25/2011
for John M. Fowler, Executive Director

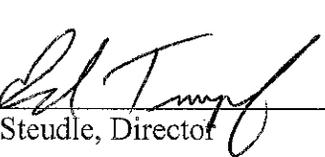
FEDERAL HIGHWAY ADMINISTRATION (FHWA)

By:  Date: 6/30/11
Russell L. Jorgenson, Division Administrator

MICHIGAN STATE HISTORIC PRESERVATION OFFICER (SHPO)

By:  Date: 6/21/11
Brian D. Conway, State Historic Preservation Officer

MICHIGAN DEPARTMENT OF TRANSPORTATION (MDOT)

By:  Date: JUN 23 2011
for Kirk T. Steudle, Director

Attachment A
Federally Recognized Tribes in Michigan

Pokagon Band of Potawatomi Indians
Keweenaw Bay Indian Community
Lac Vieux Desert Band of Lake Superior Chippewa Indians
Little River Band of Ottawa Indians
Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians/Gun Lake Tribe Sault Ste.
Marie Tribe of Chippewa Indians
Bay Mills Indian Community
Little Traverse Bay Bands of Odawa Indians
Nottawaseppi Huron Band of Potawatomi Indians
Saginaw Chippewa Indian Tribe
Hannahville Indian Community
Grand Traverse Band of Ottawa & Chippewa Indians

Attachment B

Areas of Responsibility for Cultural Resource Consultant Contracting

1. SHPO and MDOT jointly develop the list of pre-qualified bidders.
2. MDOT executes two-party agreements with pre-qualified consultants for cultural resource studies.
3. SHPO reviews and approves the general MDOT agreement format, but will not review individual contracts.
4. MDOT allows consultants to apply for pre-qualification on a continuing basis with SHPO input.
5. MDOT maintains the list of pre-qualified bidders, supplying a copy to SHPO.
6. MDOT prepares preliminary scope of work with SHPO input if necessary.
7. MDOT solicits proposal from the consultant/s.
8. MDOT authorizes the consultant to proceed.
9. MDOT and SHPO review the draft report.
10. MDOT will send copies of all final reports to SHPO for data integration, regardless of the survey results.