

PROGRAMMATIC MEMORANDUM OF UNDERSTANDING

AMONG

THE IOWA DIVISION OF THE FEDERAL HIGHWAY ADMINISTRATION

THE IOWA DEPARTMENT OF TRANSPORTATION

AND THE

YANKTON SIOUX TRIBE OF SOUTH DAKOTA

REGARDING

**IMPLEMENTING NOTIFICATION AND CONSULTATION IN ACCORDANCE WITH
36 CFR PART 800 ON HIGHWAY CONSTRUCTION PROJECTS IN
THE STATE OF IOWA**

WHEREAS the Iowa Division of the Federal Highway Administration (FHWA) is an agency of the United States government that has the responsibility for administering the Federal-aid highway program in Iowa; and

WHEREAS the FHWA, has requested the Iowa Department of Transportation (DOT), the primary recipient of Federal-aid highway funds in the State of Iowa, 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 Iowa State Historic Preservation Office (SHPO) is responsible for the preservation of historic properties in the state of Iowa; and

WHEREAS the Iowa Office of the State Archeologist (OSA) is responsible for ensuring that Iowa and Federal laws regarding human remains and burials are observed; and

WHEREAS, the Yankton Sioux Tribe of South Dakota (the tribe) has indicated that it does attach religious and cultural significance to properties located in the state and has elected to provide the stipulations contained in Appendix A to reduce the notification and consultation regarding undertakings; and

WHEREAS, the FHWA, the DOT and the SHPO in consultation with the Advisory Council on Historic Preservation, the Tribes that have indicated an interest in highway projects in Iowa, and the public, have entered into a Programmatic Agreement (PA) (copy attached and incorporated by this reference) which includes an agreed upon process for implementing the provisions of the NHPA as set forth in 36 CFR Part 800.

NOW, THEREFORE, The FHWA, DOT, and the Yankton Sioux Tribe of South Dakota agree to the following process for consultation as discussed in 36 CFR Part 800.

APPLICABILITY

This PMOU applies to projects initiated after its effective date and to the maximum extent practicable to projects currently being developed.

TRIBAL REPRESENTATIVE

A letter is provided by the tribe identifying the agent who can represent the tribe for Section 106 consultation.

PROCESS

A. Early Consultation

When a project other than the type indicated in Appendix B that will include FHWA funding is proposed in the counties indicated in Appendix E, the DOT will, as FHWA's agent in accordance with 36CFR800.2(c)(4) and the PA, initiate consultation by sending an initial Tribal Notification Form (Appendix C). Initial contacts in the project development process will occur with the DOT. The initial contact will provide a map and information about the nature and extent of a project. The DOT will request information and tribal concerns about historic properties that may be of religious and cultural significance to the tribe. This consultation will occur as one of the earliest steps of the project development process as set forth in the procedures that accompany the PA and as shown on Appendix D. The tribe agrees to return the Tribal Notification Form within 14 days.

B. Consultation on the Identification and Evaluation of Historic Properties, Including those of Traditional Religious and Cultural Importance to the Tribe

Upon identifying historic properties within the area of potential effects and determining that those properties might be eligible for the National Register of Historic Places, (National Register) the DOT will, as an attachment to a Tribal Notification Form, provide to the tribe adequate maps of the area to clearly locate and identify the properties. The tribe will comment within 14 days on those properties that may be of religious and cultural significance to them. At this time there might not be adequate information for determinations of eligibility on archaeological sites. Upon completion of further archaeological survey work, the tribe will be provided additional information pertinent to the findings of that additional survey. Copies of summaries of the completed survey reports will be provided. The tribe will advise the DOT within 14 days whether it desires to continue as a consulting party on this project based on the identified properties being of religious and cultural significance to the tribe. This consultation will occur as set forth in the procedures that accompany the PA and as shown on Appendix D.

C. Consultation on Determinations of Effect

Upon further development of the project and the completion of further design, the DOT will, as an attachment to a Tribal Notification Form, provide to the tribe its determination of effect on previously identified historic properties that are eligible for the National Register and are of religious and cultural significance to the tribe. This determination will be accompanied by documentation in support of the determination and information pertaining to the potential project affects. The tribe will provide comments within 14 days on the determination of effect. In the event of an adverse effect the tribe will be asked whether it desires to consult in the resolution of the adverse effect and in the development of the Memorandum Of Agreement (MOA) which will govern the resolution of the adverse effect(s). If the tribe desires to consult, the tribe will be invited to be a signatory to the MOA and will have the same rights with regard to seeking amendment or termination of the MOA as other signatories. If the tribe chooses not to sign or concur the MOA will remain valid as written. This consultation will occur as set forth in the procedures that accompany the PA and as shown on Appendix D.

D. Unexpected Discovery. If, during construction of a project, undetected archaeological materials associated with any one of the above-listed historic properties, or with any previously unidentified historic properties, should be uncovered, the DOT will:

1. Cease construction activities which may disturb subsurface materials in the area of the resource and notify the SHPO and the tribe of the discovery.
2. The SHPO, or an archaeologist retained by the Iowa DOT will immediately inspect the work site and determine the spatial extent of the affected archaeological resource. Construction work may then continue in the area outside the archaeological resource as it is defined by the SHPO, or by SHPO in consultation with the Iowa DOT's archaeologist.
3. Within 14 days of the original notification of discovery, the Iowa DOT, in consultation with the SHPO will determine the National Register eligibility of the resource. The Iowa DOT may extend this 14-day calendar period one time for an additional seven days by providing written notice to the SHPO prior to the expiration date of said 14-day calendar period.
4. If the resource is determined eligible for the National Register and of possible religious and cultural significance to the tribe, the Iowa DOT shall submit a plan for its avoidance, protection, recovery of information or destruction without data recovery to SHPO and to the tribe for review and comment. The DOT will notify all consulting parties of the unanticipated discovery and provide the proposed treatment plan for their consideration. The SHPO and any consulting parties including the tribe will have 7 days to provide comments on the proposed treatment plan to the DOT and FHWA upon receipt of the information.
5. Work in the affected area shall resume pending either:
 - (a) Development and implementation of an appropriate data recovery plan or other recommended mitigation measures; or
 - (b) Determination that the newly located archaeological materials are not eligible for inclusion on the National Register.

E. Protection of Human Burials. All human burials in the State of Iowa are protected by law. In the event that human remains or burials are encountered during archaeological investigations or construction activities, the Iowa DOT shall cease work in the area, take appropriate steps to secure the site, and notify officials at the Burials Program at the Office of the State Archaeologist or the Iowa Department of Health.

1. If the remains appear to be ancient (i.e., older than 150 years), the burial is legally protected under Iowa Code Chapters 263B and 716.5, and the Office of the State Archaeologist has jurisdiction to ensure Iowa law, the *Native American Graves Protection and Repatriation Act* (25 U.S.C. 3001 through 3005) (NAGPRA) and the implementing regulations (43 CFR 10) are observed. When the cultural affiliation of the remains can be determined, the disposition will be arranged by OSA in consultation with the American Indian Tribe determined to be lineal descendants, following the provisions of NAGPRA. If the cultural affiliation of the remains cannot be determined, OSA in consultation with the Iowa Indian Advisory Council will arrange for the deposition of the remains in accordance with Iowa law. The Iowa Indian Advisory Council consists of resident American Indians who donate their time, effort and travel expense to ensure the American Indian perspective is heard. Members are activists involved in protecting American Indian rights regardless of tribal affiliation and whose members are largely responsible for the creation of Iowa's American Indian burial protection laws and the creation of non-public American Indian cemeteries.
2. If the remains appear to be less than 150 years old, the burial is legally protected under Iowa Code Chapters 144.34, 566 and 716.5 and would fall under the jurisdiction of the Iowa Department of Public Health.

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3. If human remains or burials are encountered at any time prior to construction activities, all reasonable efforts will be made to avoid or protect the remains or burials.

F. Dispute Resolution. Should any party to this agreement object in writing to any action carried out or proposed with respect to the implementation of this agreement, the parties shall consult to resolve the objection. If after initiating such consultation, the objection cannot be resolved, the FHWA shall forward all documentation relevant to the objection to the Advisory Council on Historic Preservation (Council), including the FHWA's proposed response to the objection. Within 45 days after receipt of all pertinent documentation, the Council shall exercise one of the following options:

1. Advise the FHWA that the Council concurs in the agency's proposed response to the objection, whereupon the FHWA will respond to the objection accordingly;
2. Provide the FHWA with recommendations, which the FHWA shall take into account in reaching a final decision regarding its response to the objection; or
3. Notify the FHWA that the objection will be addressed in accordance with the provisions of 36 CFR Part 800.7, and proceed accordingly. The agency shall take any resulting comment(s) into account in accordance with 36 CFR 800.7(c)(4) and Section 110(1) of NHPA.

G. Other Terms and Conditions

Modification or amendment of this PMOU shall be accomplished if necessitated by changes to the relevant Federal or State laws or implementing regulations or rules, or by request of one or more of the signatories, in consultation among the parties in the same manner as the original PMOU.

Termination of this PMOU shall be accomplished by the signatories in consultation among the parties in the same manner as the original PMOU.

FEDERAL HIGHWAY ADMINISTRATION

By: *Dwight S. Kennedy*

October 9, 2002
Date

IOWA DEPARTMENT OF TRANSPORTATION

By: *Mark Keeper*

October 9, 2002
Date

YANKTON SIOUX TRIBE OF SOUTH DAKOTA

By: *As Robert Thompson*

Oct. 9, 2002
Date