

September 19, 2023

PROGRAMMATIC AGREEMENT
AMONG
THE FEDERAL HIGHWAY ADMINISTRATION,
THE FEDERAL RAILROAD ADMINISTRATION,
THE U.S. ARMY CORPS OF ENGINEERS,
THE WISCONSIN STATE HISTORIC PRESERVATION OFFICER,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE WISCONSIN DEPARTMENT OF TRANSPORTATION, AND
THE SOKAOGON CHIPPEWA COMMUNITY
REGARDING THE TRANSPORTATION PROGRAM IN WISCONSIN

WHEREAS, the Federal Highway Administration (FHWA), under the authority of 23 United States Code (USC) 101 et seq., implements the Federal-aid Highway Program in the state of Wisconsin by funding and approving state and locally sponsored transportation undertakings that are administered by the Wisconsin Department of Transportation (WisDOT); and

WHEREAS, the Wisconsin FHWA Division Administrator is the "Agency Official" responsible for ensuring that the Federal-aid Highway Program in the State of Wisconsin complies with Section 106 of the National Historic Preservation Act (NHPA) (54 USC § 306108), as amended (Section 106), and codified in its implementing regulations, 36 Code of Federal Regulations (CFR) Part 800, as amended (August 5, 2004); and

WHEREAS, FHWA led the consultation and development of this Programmatic Agreement (Agreement) and is a signatory to this Agreement; and

WHEREAS, the Federal Railroad Administration (FRA) administers a variety of directed and competitive discretionary grant programs and other financial assistance for rail undertakings in Wisconsin; and

WHEREAS, the FRA Administrator is the "Agency Official" responsible for ensuring that FRA complies with Section 106; and

WHEREAS, the FRA has determined that undertakings funded through its financial assistance programs are undertakings pursuant to Section 106 and may have an effect on historic properties, and the FRA will utilize this Agreement for undertakings in the state of Wisconsin for which WisDOT is the applicant and/or sponsor of the undertaking; and

WHEREAS, the Advisory Council on Historic Preservation's (ACHP's) *Program Comment to Exempt Consideration of Effects to Rail Properties with Rail Rights-of-Way* (August 17, 2018) (ACHP's Program

Comment for Rail Rights-of-Way) determined that certain activities have minimal to no potential to affect historic properties, whether or not there may be historic properties in the undertaking area; and

WHEREAS, the FRA has participated in the consultation and development of this Agreement and is an invited signatory to this Agreement; and

WHEREAS, the U.S. Army Corps of Engineers, St. Paul District (USACE) administers a Department of the Army permit program under the authority of the Rivers and Harbors Act of 1899, Section 10 (33 USC 401 and 403), and the Clean Water Act of 1973, Section 404 (33 USC 1344), hereafter referred to as permits, to which transportation undertakings in Wisconsin may be subject; and

WHEREAS, for State-funded undertakings, the USACE District Commander is the "Agency Official" responsible for ensuring that the permits in the state of Wisconsin comply with Section 106 and is the Lead Federal Agency for State-funded undertakings when a permit is required; and

WHEREAS, the USACE has determined that undertakings authorized by Department of the Army permits are undertakings pursuant to Section 106 and may have an effect on historic properties, and the USACE will utilize this Agreement for WisDOT undertakings subject to its permits; and

WHEREAS, the USACE has participated in the consultation and development of this Agreement and is an invited signatory to this Agreement; and

WHEREAS, the FHWA, FRA, and USACE are collectively referred to as Federal Agencies or separately as Lead Federal Agency in this Agreement; and

WHEREAS, WisDOT administers a Transportation Program in Wisconsin that includes Federal-aid undertakings as authorized by Title 23 USC 302, financial assistance from FRA, and undertakings that are subject to USACE Permits; and

WHEREAS, WisDOT co-led the consultation and development of this Agreement and is an invited signatory to this Agreement; and

WHEREAS, the responsibilities of the Wisconsin State Historic Preservation Officer (SHPO) under Section 106 of the NHPA and 36 CFR Part 800 are to advise, assist, review, and consult with Federal agencies as they carry out their historic preservation responsibilities and to respond to Federal agencies' requests within the timeframes detailed in 36 CFR 800 unless otherwise specified in this Agreement; and

WHEREAS, SHPO has participated in the consultation and development of this Agreement and has formally agreed to participate as a signatory to this Agreement; and

WHEREAS, the ACHP has been consulted and has formally agreed to participate as a signatory to this Agreement; and

WHEREAS, for a federally recognized Indian Tribe (Tribe) that has assumed the responsibilities of the SHPO for Section 106 on tribal lands, the responsibilities of the Tribal Historic Preservation Officer (THPO) under Section 106 of the NHPA and 36 CFR Part 800 is to consult with Federal agencies in lieu of SHPO regarding undertakings occurring on or affecting historic properties on tribal lands; and

WHEREAS, FHWA solicited participation in the development of this Agreement from Tribes with ancestral lands in Wisconsin and/or that attach religious and cultural significance to historic properties

that may be affected by undertakings of the Federal Agencies (see Appendix A: Tribes Consulted with on this Programmatic Agreement), including input from tribal leadership and THPOs, FHWA has requested comments, and has taken any comments received into account; and

WHEREAS, FHWA has invited Tribes to be an invited signatory or concurring party to this Agreement. These Tribes are listed in Appendix A; and

WHEREAS, any undertaking involving tribal lands as defined in 36 CFR 800.16(x), or any undertaking that may affect a property identified by a federally recognized Tribe as possessing traditional religious and cultural significance, shall be governed by this Agreement, but shall be reviewed by the Lead Federal Agency in accordance with 36 CFR 800 and any applicable government-to-government agreement(s); and

WHEREAS, the United States government has a unique legal relationship with Federally recognized Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, and court decisions. The Federal government recognizes the right of self-determination for Indian tribal governments, the Federal trust responsibility, and the obligation to work with Indian tribal governments in a government-to-government relationship. The Lead Federal Agency has a responsibility and is committed to working with Indian tribal governments in this unique relationship, respecting tribal sovereignty, the trust relationship, and self-determination; and

WHEREAS, discoveries of unmarked graves, burials, human remains, or items of cultural patrimony will be subject to Wisconsin State Statute 157.70, Historical Society Administrative Code 2, and, if the discovery is on Federal lands, the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001-3013, 18 U.S.C. 1170) and the Archaeological Resources Protection Act of 1979 (ARPA) (16 U.S.C. 470aa-470mm); and

WHEREAS, FHWA has determined that implementation of the Transportation Program in Wisconsin may have an effect upon properties included in, or eligible for inclusion in, the National Register of Historic Places (NRHP) including properties of traditional religious and cultural importance, hereinafter referred to as historic properties, and has consulted with SHPO, THPOs, and the ACHP, pursuant to 36 CFR 800.14(b) of the regulations implementing Section 106 of the NHPA; and

WHEREAS, pursuant to the consultation conducted under 36 CFR 800.14(b), the signatories have developed this Agreement in order to establish an efficient and effective program alternative for taking into account the effects of the Transportation Program in Wisconsin on historic properties and for affording the ACHP a reasonable opportunity to comment on undertakings covered by this Agreement; and

WHEREAS, this Agreement applies to undertakings administered by a sub-recipient of federal-aid highway funds, commonly referred to as locally administered undertakings, and this Agreement may be applied to direct recipient undertakings where WisDOT agrees to provide oversight for the Section 106 process; and

WHEREAS, FHWA has notified the public, Federal and State agencies, and Certified Local Governments (CLGs) about this Agreement, has requested their comments, and has taken any comments received into account; and

WHEREAS, this Agreement shall supersede the Agreement executed on November 21, 1996, among the FHWA, SHPO, ACHP, and WisDOT; and

WHEREAS, WisDOT has a staff of Cultural Resources Specialists and employs consultants, who meet the professional qualifications defined in the *Secretary of the Interior's Professional Qualifications Standards* at 36 CFR 61 and 48 FR 44738-44739 in the fields of archaeology, architectural history, and history to carry out WisDOT's cultural resource programs and responsibilities and are capable of completing many of the steps of the Section 106 review process on behalf of the Federal Agencies; and

WHEREAS, the definitions contained in 36 CFR 800.16 shall be used in this Agreement;

NOW, THEREFORE, FHWA, FRA, USACE, SHPO, Tribes, the ACHP, and WisDOT (together, the signatories) agree that the Transportation Program in Wisconsin shall be carried out in accordance with the following stipulations in order to take into account the effects of their undertakings on historic properties and that these stipulations shall govern compliance with Section 106 of the NHPA until this Agreement expires or is terminated.

STIPULATIONS

The Lead Federal Agency, with the assistance of WisDOT, shall ensure that the following measures are carried out:

I. APPLICABILITY AND SCOPE

- A. This Agreement sets forth the process by which the Lead Federal Agency, with the assistance of WisDOT, will meet its responsibilities pursuant to Section 106 of the NHPA.
- B. The objective of this Agreement is to make more efficient the methods by which the Lead Federal Agency and WisDOT review individual undertakings processed under Section 106 that may affect historic properties, and to establish the process by which the Lead Federal Agency carries out its Section 106 responsibilities.
- C. Through this Agreement, the Lead Federal Agency authorizes WisDOT to initiate and, in many cases, conclude consultation with the SHPO/THPO, Tribes, and other consulting parties for purposes of compliance with Section 106.
- D. The Lead Federal Agency retains the responsibility to consult with Tribes as required under 36 CFR § 800, as amended. WisDOT may assist the Lead Federal Agency using the procedures identified in Section IV. Consultation with Tribes.
- E. Cooperating Federal Agencies that recognize FHWA, FRA, or USACE as the Lead Federal Agency for an undertaking may fulfill their obligations under Section 106, pursuant to 36 CFR § 800.2(a)(2), provided that the Lead Federal Agency and WisDOT follow the requirements of this Agreement and the Cooperating Federal Agency's undertaking does not have the potential to cause effects to historic properties beyond those considered by the Federal Agencies and WisDOT.

II. RESPONSIBILITIES

The following section identifies the responsibilities of the signatories in complying with the terms of this Agreement.

A. Lead Federal Agency responsibilities

1. Consistent with the requirements of 36 CFR § 800.2(a), the Lead Federal Agency remains legally responsible for ensuring that the terms of this Agreement are carried out and for all findings and determinations made pursuant to this Agreement by WisDOT. At any point in the Section 106 process the Lead Federal Agency may inquire as to the status of any undertaking carried out by WisDOT and may participate directly in any undertaking at its discretion.
2. The Lead Federal Agency retains the responsibility to consult with Tribes as required under 36 CFR § 800, as amended. WisDOT may assist the Lead Federal Agency using the procedures identified in Stipulation IV. Consultation with Tribes.
3. The Lead Federal Agency shall participate in the process to resolve adverse effects described in 36 CFR § 800.6, and shall notify ACHP of an adverse effect determination, offer ACHP the opportunity to participate in consultation, and provide ACHP with a copy of the Memorandum of Agreement (MOA) or Programmatic Agreement (PA) used to resolve the adverse effects of the undertaking.
4. The Lead Federal Agency will ensure that the steps in the Section 106 process are coordinated with Section 4(f) of the Department of Transportation Act (23 USC § 138 and 49 USC § 303), the National Environmental Policy Act (42 USC 4321 et seq.), and any other required reviews, as applicable, in accordance with 36 CFR § 800.3(b).
5. The Lead Federal Agency shall be responsible for resolving disputes and objections pursuant to Stipulation XII of this Agreement.
6. The Lead Federal Agency shall notify the Secretary of the Interior (Secretary) of any consultation involving a National Historic Landmark and invite the Secretary to participate in the consultation where there may be an adverse effect and notify the ACHP pursuant to 36 CFR § 800.10.

B. WisDOT responsibilities

1. WisDOT, using staff and/or consultants meeting the Secretary of the Interior's professional qualification standards (48 Fed. Reg. 44716), will independently perform the work and consultation described in 36 CFR § 800.3 – § 800.5 (including any succeeding revisions to the regulations) on behalf of the Lead Federal Agency. Delegation of these responsibilities is based on adequate and appropriate performance by WisDOT as evaluated in monitoring by the Lead Federal Agency pursuant to Stipulation IX of this Agreement. These responsibilities include carrying out the following requirements:

- a. 36 CFR § 800.3(a). Determine whether the undertaking is a type of activity that has the potential to cause effects on historic properties.
 - b. 36 CFR § 800.3(c) and (d). Determine whether the undertaking may occur on or has the potential to affect historic properties on tribal lands. For undertakings on tribal lands, WisDOT will determine whether the SHPO or THPO has jurisdiction (referred to as SHPO/THPO hereafter) consistent with 36 CFR 800.2(c)(1-2).
 - c. 36 CFR § 800.3(e). Solicit public comment and involvement.
 - d. 36 CFR § 800.3(f). Identify additional consulting parties that should be invited to participate in the undertakings covered by the Agreement.
 - e. 36 CFR § 800.4(a) and (b). Determine and document, in consultation with the SHPO/THPO, the scope of identification efforts and level of effort, including the undertaking's Area of Potential Effects (APE) as defined in 36 CFR § 800.16(d).
 - f. 36 CFR § 800.4. In consultation with the SHPO/THPO and any Tribes that might attach religious and cultural significance to properties within the APE, identify properties, sites, and Traditional Cultural Properties within the APE included in or eligible for listing in the NRHP.
 - g. 36 CFR § 800.5(a)(1). Determine whether historic properties may be affected by an undertaking by applying the criteria of adverse effect in consultation with the SHPO/THPO and any Tribe that attaches religious and cultural significance to identified historic properties. For undertakings for which the FRA is the Lead Federal Agency, the FRA will review, approve, and sign all Adverse Effect determinations.
 - h. 36 CFR § 800.6. In consultation with the Lead Federal Agency, SHPO/THPO, ACHP (if it has chosen to participate), and any other consulting parties, including Tribes, WisDOT will address any adverse effects through the development, circulation, and execution of a Memorandum of Agreement (MOA) or undertaking-specific Programmatic Agreement, as appropriate.
 - i. Provide the Lead Federal Agency copies of any requested correspondence sent out on its behalf (e.g., letters to the SHPO/THPO or Tribes).
 - j. Maintain WisDOT cultural resources procedures in WisDOT Facilities Development Manual (FDM) Chapter 26, Cultural Resource Preservation (see Attachment 1) to implement the provisions of this Agreement and state and federal cultural resource laws, as applicable.
2. WisDOT shall continue to share information with the Lead Federal Agency, SHPO/THPO, and consulting Tribes as it develops or generates data and processes related to the identification, evaluation, management, and treatment of the state's cultural resources, including technological innovations and Geographic Information Systems (GIS) data.

C. SHPO/THPO responsibilities

1. The SHPO/THPO, pursuant to Section 106 and 36 CFR § 800, will advise, assist, review, and consult with Federal agencies as they carry out their historic preservation responsibilities and respond to Federal agencies' requests within the timeframes detailed in 36 CFR § 800, unless otherwise specified in this Agreement.
2. The SHPO/THPO will continue to share information with WisDOT as they develop or generate data and processes related to the identification, evaluation, management, and treatment of the state's cultural resources, including technological innovations and GIS.

D. ACHP responsibilities

1. The ACHP will be notified of findings of adverse effect by the applicable Lead Federal Agency and will be invited to participate in resolving the adverse effect of an undertaking in accordance with 36 CFR § 800.6(a)(1).
2. The ACHP will participate, in accordance with Stipulation XII of this Agreement, in the resolution of disputes that may occur through the implementation of this Agreement.

III. UNDERTAKING REVIEW

WisDOT's SOI qualified cultural resources staff and consultants will implement the following review and consultation processes under Section 106 for their undertakings that require funding and/or other action(s) by the Federal Agencies:

A. Undertakings that have no potential to cause effects to historic properties (36 CFR 800.3(a)(1)):

1. The Lead Federal Agency limits these to only non-construction related activities. For example, purchasing equipment and release of funds for planning studies and design activities fall under this portion of the regulation and do not require consideration under Section 106.
2. Undertakings that have no potential to cause effects to historic properties do not include construction or maintenance activities. Questions about applicability should be referred to the Lead Federal Agency Federal Preservation Officer (FPO).

B. Undertakings with minimal potential to affect historic properties (Screening Process Criteria):

1. Certain types of transportation undertakings have minimal potential to affect historic properties, whether or not there may be historic properties in the undertaking area. The signatories to this Agreement agree that minor undertakings will be subject to the Screening Process Criteria (streamlined undertaking review) (see Appendix B) per WisDOT FDM Chapter 26, Cultural Resource Preservation, Section 5, Section 106 Process (see Attachment 1).

2. If the transportation undertaking meets Screening Process Criteria, WisDOT will document its finding and maintain that documentation in its project files. Any commitments identified during the screening process will be included in the construction special provisions and be adhered to. The undertaking will not require further coordination under Section 106.
 3. If the transportation undertaking does not meet Screening Process Criteria, WisDOT will continue Section 106 consultation.
- C. Undertakings with potential to affect historic properties (undertakings that do not qualify for or are not subject to the Screening Process Criteria)
1. No Historic Properties in APE or No Historic Properties Affected.
 - a. WisDOT shall consult as needed with the Lead Federal Agency on the scope of the undertaking and its APE. For those undertakings in which there are a) no previously recorded historic properties within the APE and b) no newly identified historic properties within the APE, WisDOT's cultural resource staff will issue a finding of "no historic properties in the APE or no historic properties affected" and will forward this finding and supporting documentation to the SHPO/THPO for concurrence. WisDOT will maintain this documentation in its project files and provide copies to consulting parties, as requested.
 2. Eligible or potentially eligible historic properties identified within the APE
 - a. WisDOT will apply the NRHP Evaluation Criteria to determine NRHP eligibility in accordance with 36 CFR 800.4 in consultation with the SHPO/THPO.
 - b. WisDOT will consult with the Tribes per Stipulation IV of this Agreement.
 3. No Adverse Effect
 - a. WisDOT will apply the Criteria of Adverse Effect to any historic properties in consultation with the SHPO/THPO, Tribes, and other consulting parties, as appropriate, in accordance with 36 CFR 800.5.
 - b. If WisDOT determines that the undertaking will have no adverse effect on historic properties, WisDOT will provide documentation of its determination to SHPO/THPO, Tribes, and any other consulting parties, as appropriate. The SHPO/THPO will review the determination and provide written comments within 30 days from receiving WisDOT's finding and supporting documentation as set forth in 36 CFR 800.11.

4. Adverse Effect

- a. WisDOT will apply the Criteria of Adverse Effect to any historic properties in consultation with the Lead Federal Agency, the SHPO/THPO, Tribes, and other consulting parties, as appropriate, in accordance with 36 CFR 800.5.
- b. If the Lead Federal Agency determines that the undertaking will have an adverse effect on historic properties:
 - i. WisDOT shall continue consultation with SHPO/THPO, the Lead Federal Agency, Tribes, and other consulting parties to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties in accordance with 36 CFR 800.6.
 - ii. If the adverse effect cannot be avoided, WisDOT shall prepare a Finding of Adverse Effect/Documentation for Consultation and draft MOA for the Lead Federal Agency so that it may notify ACHP in accordance with 36 CFR 800.11(e) and 800.11(f) and FDM Chapter 26.
 - iii. For projects for which the FRA is the Lead Federal Agency, WisDOT will provide a draft Finding of Adverse Effect for the FRA to review, approve, and sign before distribution to the SHPO/THPO.

5. Re-assessment

- a. At any time, if there are changes to an undertaking (e.g., Lead Federal Agency designation, scope, funding, or APE), WisDOT shall re-assess the previous findings to determine if the findings remain valid or if additional survey or effects assessment is required. These findings will be documented in the project file and WisDOT will notify the Lead Federal Agency of the results of the re-assessment, as applicable.
- b. Additional Section 106 consultation may be required if more than 5 years have passed since the Section 106 determination (date of Screening Process completion or SHPO/THPO concurrence).
- c. If re-assessment is needed, WisDOT will provide documentation to SHPO/THPO for their concurrence and/or project file, and Lead Federal Agency, Tribes, and other consulting parties, as applicable.

IV. CONSULTATION WITH TRIBES

Consultation is the timely, mutual, meaningful, and interactive process of collaboration between the Tribes, the Lead Federal Agency, WisDOT, the THPOs and SHPO, as applicable, regarding historic properties of tribal significance that may be affected by an undertaking.

- A. The Lead Federal Agency shall identify and establish consultation with Tribes consistent with the requirements of 36 CFR §800.2(c)(2) and 36 CFR § 800.3(c)-(f). WisDOT may provide undertaking-specific information to coordinate with Tribes but the Lead Federal Agency shall retain ultimate responsibility for complying with all federal requirements pertaining to government-to-government consultation with Tribes. The Lead Federal Agency may not delegate this responsibility to WisDOT. However, as allowed in 36 CFR § 800.2(c)(4), the Lead Federal Agency authorizes WisDOT to carry out both day-to-day and undertaking-specific coordination with the Tribes and THPOs, if agreeable to all parties. WisDOT cannot delegate its responsibilities to another entity. If, at any time, a Tribe determines that it would like to consult directly with the Lead Federal Agency, it may do so. It may contact the Lead Federal Agency directly or state its wishes to WisDOT, which will then notify the Lead Federal Agency.
- B. In accordance with 36 CFR § 800.3(f)(2), any Tribes that might attach religious and cultural significance to historic properties in the APE shall be identified by WisDOT and invited by the Lead Federal Agency to be consulting parties on the undertaking.
- C. Coordination with the Tribes will be initiated early in the undertaking planning process and/or early in the design process to identify culturally significant historic properties, confidentiality, or other concerns and to allow adequate time for coordination. WisDOT maintains detailed processes and procedures on coordination with Tribes within FDM Chapter 26-5-1 (see Attachment 1). WisDOT will work with the Tribes to make sure FDM Chapter 26-5-1 remains current and consistent with the stipulations of this Agreement.
- D. WisDOT shall ensure that coordination continues with Tribes throughout the Section 106 review process as prescribed by this Agreement whenever Tribes express a concern about an undertaking or about historic properties that may be affected by an undertaking.

V. PARTICIPATION OF OTHER CONSULTING PARTIES AND THE PUBLIC

- A. Additional consulting parties
 1. In consultation with SHPO/THPO, WisDOT will identify and invite individuals and organizations with a demonstrated interest in an undertaking to be consulting parties. Any land-managing agency whose land may be affected by an undertaking shall be invited by WisDOT to participate in the Section 106 process. Written requests by individuals, organizations, and agencies to become consulting parties will be evaluated on a case-by-case basis by WisDOT and the Lead Federal Agency in consultation with the SHPO/THPO.

B. Public involvement

1. Public involvement in planning and implementing undertakings covered by this Agreement shall be governed by the Lead Federal Agency's and WisDOT's environmental compliance procedures. WisDOT's Public Involvement Procedures (Facilities Development Manual Chapter 6 located at <https://wisconsin.gov/rdwy/fdm/fd-06-00toc.pdf> at the time of this Agreement) provides guidance for identifying, informing, and involving the public. 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. Public involvement and the release of information hereunder shall be consistent with 36 CFR 800.2(d), 800.3(e), and 800.11(c)(1 and 3).
2. WisDOT shall make the Lead Federal Agency and SHPO/THPO aware of any and all public controversy as it relates to the historic properties potentially affected by the proposed undertaking, including properties of religious and/or cultural significance to the Tribes.

VI. POST-REVIEW DISCOVERIES

- A. Planning for subsequent discoveries: when WisDOT's identification efforts indicate that historic properties are likely to be discovered during implementation of an undertaking, WisDOT shall, if appropriate, develop an undertaking-specific programmatic agreement in accordance with 36 CFR 800.4(b)(2) and 800.14(b). WisDOT shall also include appropriate commitments and requirements for discovery and treatment of such properties in any environmental document, contract, and specifications. Implementation of the undertaking will proceed as originally proposed or will be modified as necessary owing to the nature and extent of the properties discovered, and will be in accordance with 36 CFR 800.4-6.
- B. Late discoveries
 1. If previously unidentified archaeological or historic properties, or unanticipated effects, are discovered after WisDOT has completed its review under this Agreement, that portion of the undertaking will stop immediately. For burial-related inadvertent discoveries, see Inadvertent Discovery Protocol in Attachment 2.
 2. No further construction in the area of discovery will proceed until the requirements of 36 CFR 800.13 have been satisfied, including consultation with Tribes per Stipulation IV. that may attach traditional cultural and religious significance to the discovered property.
 3. WisDOT, in coordination with the Lead Federal Agency, will record, document, and evaluate the NRHP eligibility of the property and the undertaking's effect on the property, in consultation with SHPO/THPO, Tribes, and consulting parties, as appropriate, to design a plan for avoiding, minimizing, or mitigating adverse effects on any eligible property.

4. If neither the SHPO/THPO nor any Tribe files an objection within 72 hours of WisDOT's plan for addressing the discovery, WisDOT may carry out the requirements of 36 CFR 800.13 on behalf of the Lead Federal Agency, and the ACHP does not need to be notified.

VII. IDENTIFICATION AND TREATMENT OF HUMAN REMAINS

- A. All work conducted on burial sites will comply with Wisconsin State Statute 157.70, Historical Society Administrative Code 2, NAGPRA, and ARPA where applicable.
- B. In the event that human remains are identified prior to, during, or after construction of the undertaking, WisDOT will comply with FDM Chapter 26-25 and develop a treatment plan in consultation with the Lead Federal Agency and the SHPO/THPO within 48 hours or a timeline agreed upon during consultation. If it is determined that the human remains are associated with historic property of religious or cultural significance to Tribes, WisDOT and the Lead Federal Agency will consult with the Tribes and will follow the agreed upon Inadvertent Discovery Protocol for human remains in Attachment 2.

VIII. EMERGENCY SITUATIONS

For the purposes of this Agreement, emergencies are defined consistent with 36 CFR 800.12 and as occurrences that require emergency transportation system and facility repairs that are necessary to 1) protect the life, safety, or health of the public; 2) minimize the extent of damage to the transportation system and facilities; 3) protect remaining transportation facilities; or 4) restore essential traffic. The determination that an emergency has occurred is not contingent on the applicability of a specific funding category or declarations by Federal, Tribal, state, or local agencies. The following stipulations apply to emergency situations:

- A. If the emergency repair undertaking could affect historic properties, WisDOT shall notify the Lead Federal Agency, SHPO/THPO, and Tribes via email prior to any work taking place. The SHPO/THPO and Tribes that may attach religious and cultural significance to historic properties likely to be affected will have seven (7) days to respond.
- B. For undertakings where the repair must be expeditious, WisDOT will comply with the procedures in Stipulations III of this Agreement to the extent possible and submit undertaking documentation within ninety (90) days of the emergency event. For these undertakings, the Lead Federal Agency, SHPO/THPO, and Tribes will have seven (7) days to respond following receipt of undertaking documentation.
- C. For undertakings taking longer than thirty (30) days for emergency notification, WisDOT will comply with the procedures in Stipulations III, as appropriate, of this PA.
- D. The email notification shall be clearly and prominently marked as an emergency notification and shall include an explanation of how the action meets the requirements for an emergency as

defined herein. The notice shall also include a brief description of the eligibility and/or significance of the resource(s) involved; the nature, effect, and anticipated effect of the emergency action on the resource(s); and the anticipated timeframe available for comment.

- E. Consistent with 36 CFR 800.12(d), immediate rescue and salvage operations conducted to preserve life or property are exempt from the provisions of Section 106 and this Agreement.

IX. MONITORING AND REPORTING

- A. WisDOT will provide information on activities under this Agreement through the Screening Process Criteria (continuously available online on WisDOT's website) and MOA annual report. The MOA annual report outlines the status of MOA stipulations. WisDOT will provide notification via email of the availability of the screening list and MOA annual report to signatories and consulting parties of this Agreement within the first quarter of each year and no later than March 31 annually.
- B. Signatories may review activities carried out pursuant to this Agreement. FHWA, SHPO, and WisDOT will use their routine program check-in meetings to identify any suggestions for improvements to this Agreement. If improvements are identified, FHWA will consult with the signatories on amendments to this Agreement per Stipulation XIII.
- C. By request of a signatory to this Agreement, FHWA will establish an annual review meeting with all signatories to evaluate this Agreement. WisDOT will cooperate with the signatories in carrying out requested review or monitoring activities, as appropriate.

X. PROFESSIONAL QUALIFICATION STANDARDS

- A. All actions prescribed by this Agreement that involve the identification, evaluation, analysis, recording, treatment, monitoring, or disposition of historic properties, or that involve the reporting or documentation of such actions in the form of reports, forms, or other records, shall be carried out by or under the direct supervision of a person or persons who meets the Secretary of the Interior's Professional Qualifications Standards (published in 48 FR 44738-44739). Professional qualification standards are further outlined in the WisDOT Facility Development Manual's chapter on Cultural Resources Preservation. However, nothing in this stipulation may be interpreted to preclude the Lead Federal Agency or any agent or contractor thereof from using the services of persons who do not meet these qualifications standards, providing their activities are conducted under the supervision of a person who does meet the standards.
- B. WisDOT and SHPO shall provide regular trainings for WisDOT staff, consultants, and other interested parties that conduct activities prescribed under this Agreement.
- C. Tribal monitoring, on and off tribal lands, will be conducted by individuals qualified and approved by the Tribal Nation, and are not required to meet the standards defined in

Stipulation X.A. The Lead Federal Agency and WisDOT will defer to the Tribal Nation to determine how individuals from the Tribal Nation will be designated as a monitor. Tribal monitors differ from archaeological monitors employed by WisDOT.

- D. Under Wisconsin law, the Director of the Wisconsin Historical Society must approve the archaeologists who work within the boundaries of a human burial site or analyze human remains (Wisconsin State Statutes 157.70 and HS 2).

XI. CONFIDENTIALITY

All parties to this Agreement acknowledge that information about historic properties, potential historic properties, or properties considered historic for purposes of this Agreement are or may be subject to the provisions of Section 304 of the NHPA and Wisconsin State Statute 44.48(1)(c). Section 304 allows the Federal Agencies to withhold from disclosure to the public information about the location, character, or ownership of a historic resource if WisDOT determines that disclosure may 1) cause a significant invasion of privacy; 2) risk harm to the historic resource; or 3) impede the use of a traditional religious site by practitioners. Having so acknowledged, all parties to this Agreement will ensure that all actions and documentation prescribed by this Agreement are, where necessary, consistent with the requirements of Section 304 of the NHPA and Wisconsin State Statute 44.48(1)(c).

XII. DISPUTE RESOLUTION

- A. Should any signatory party or consulting party object in writing to the Lead Federal Agency regarding the manner in which the terms of this Agreement are carried out, the Lead Federal Agency will immediately notify the other signatory parties of the objection and proceed to consult with the objecting party to resolve the objection. The Lead Federal Agency will honor the request of any signatory party to participate in the consultation and will take any comments provided by such parties into account. The Lead Federal Agency shall establish a reasonable timeframe for such consultations.
- B. Should any signatory party object to a WisDOT or Lead Federal Agency determination of eligibility, the Lead Federal Agency will submit the determination to the Keeper of the National Register of Historic Places for resolution.
- C. If the objection is resolved through consultation, the Lead Federal Agency may authorize the disputed action to proceed in accordance with the terms of such resolution.
- D. If after initiating such consultation, the Lead Federal Agency determines the objection cannot be resolved through consultation, the Lead Federal Agency shall forward all documentation relevant to the objection to the ACHP and other signatory parties, including the Lead Federal Agency's proposed response to the objection. Within thirty (30) calendar days after receipt of all pertinent documentation in accordance with 36 CFR 800.11, the ACHP shall exercise one of the following options:

1. Advise the Lead Federal Agency that the ACHP concurs in the Lead Federal Agency's proposed response to the objection, whereupon the Lead Federal Agency will respond to the objection accordingly; or
 2. Provide the Lead Federal Agency with recommendations, which the Lead Federal Agency shall take into account in reaching a final decision regarding its response to the objection; or
 3. Notify the Lead Federal Agency that the objection will be referred for comment pursuant to 36 CFR 800.7(a)(4) and proceed to refer the objection and comment. In this event, the Lead Federal Agency shall ensure that the Agency Official is prepared to take the resulting comments into account in accordance with 36 CFR 800.7(c)(4).
- E. Should the ACHP not exercise one of the above options within thirty (30) calendar days after receipt of all pertinent documentation, the Lead Federal Agency may assume the ACHP's concurrence in its proposed response to the objection.
- F. The Lead Federal Agency shall take into account any ACHP recommendation or comment and any comments from the other signatory parties to this Agreement in reaching a final decision regarding the objection. The Lead Federal Agency's responsibility to carry out all actions under this Agreement that are not the subjects of the objection shall remain unchanged.
- G. The Lead Federal Agency shall provide all other signatory parties to this Agreement with a written copy of its final decision regarding any objection addressed pursuant to this stipulation.
- H. The Lead Federal Agency may authorize any action subject to objection under this stipulation to proceed, provided the objection has been resolved in accordance with the terms of this stipulation.
- I. Any individual, agency, or organization may request ACHP review of Section 106 compliance for an individual undertaking in accordance with 36 CFR 800.9(a).

XIII. AMENDMENT

- A. Any signatory party may at any time propose amendments to this Agreement, whereupon all signatory parties shall consult to consider such amendments. This Agreement may be amended only upon written concurrence of all signatory parties.
- B. Each attachment to this Agreement may be individually amended through consultation of the signatory parties without requiring amendment of the Agreement, unless the signatory parties, through consultation, decide otherwise.
- C. Each appendix may be amended by WisDOT, on its own behalf or on behalf of another signatory. WisDOT shall notify the signatories of its intent to amend the appendix(ces) and shall provide a draft of the updated appendix(ces) to all signatory parties for review. If no other

signatory party objects in writing within thirty (30) days of receipt of the proposed amended appendix(ces), WisDOT shall date and sign the amended appendix(ces) and provide copies to the other signatory parties. Such amendment shall go into effect on the date WisDOT transmits the amended copies to the signatory parties.

XIV. TERMINATION

- A. If any signatory party proposes termination of this Agreement, that signatory party shall notify the other signatories in writing, explain the reasons for proposing the termination, and consult with the other signatories for no more than thirty (30) days, or another time period agreed upon by all signatories, to seek alternatives to termination.
- B. Should such consultation result in an agreement amongst the signatory party proposing termination and the other signatories on an alternative that avoids termination, the Agreement shall be amended pursuant to Stipulation XIII to incorporate the agreed upon terms.
- C. Should such consultation fail, the signatory party proposing termination may terminate this Agreement by promptly notifying the other signatories in writing. The effective date of such termination is when all signatories have been notified in writing of the termination of this Agreement.
- D. Should this Agreement be terminated, the Federal Agencies shall carry out the requirements of 36 CFR § 800 for individual undertakings.
- E. Beginning with the effective date of the termination, the Federal Agencies shall ensure that until and unless a new Agreement is executed for the actions covered by this Agreement, such undertakings shall be reviewed individually in accordance with 36 CFR §§ 800.4-800.6.

XV. DURATION OF AGREEMENT

This Agreement shall remain in effect for a period of five (5) years after the date it takes effect (the date of the last signature), unless it is terminated prior to that time pursuant to Stipulation XIV of this Agreement. No later than one hundred and twenty (120) days prior to the conclusion of the five (5)-year period, WisDOT will consult, in writing, with all signatory parties. If all signatory parties agree, in writing, the Agreement may be extended for an additional five (5)-year period. If any signatory objects, or proposes amendments, WisDOT will consult with the signatories to consider amendments or other actions to avoid termination.

Signatory

Federal Highway Administration

By:  _____
Glenn Fulkerson, Division Administrator

Date: 9/19/23

Signatory

Wisconsin State Historic Preservation Officer

By:  Date: 9/19/2023
Daina Penkiunas, State Historic Preservation Officer

Signatory


Advisory Council on Historic Preservation

By:  Date: 9.28.2023

Reid Nelson, Executive Director

Invited Signatory

Wisconsin Department of Transportation

By:  _____ Date: 9/19/2023
Craig Thompson, Secretary of Transportation

Invited Signatory

Federal Railroad Administration

By: _____ Date: September 12, 2023

For Laura Shick, Acting Federal Preservation Officer

Invited Signatory

U.S. Army Corps of Engineers, St. Paul District

By: _____ Date: 12 September 2023

for Chad Konickson, Chief, Regulatory Division

TRIBAL SIGNATURE PAGES

FHWA invited all Tribes listed in Appendix A to participate in the consultation to develop this Agreement and to enter into this Agreement as an invited Signatory or Concurring Party. FHWA will incorporate additional executed signature pages by Tribal Invited Signatories or Concurring Parties into this Agreement in the order they are received by FHWA.

To date, the following Tribes have indicated they will be signing the document (signature level to be determined):

- Miami Tribe of Oklahoma will be signed by Douglas Lankford, Chief (invited)
- Oneida Nation
- Sokaogon Community confirmed intending to sign as an invited signatory
- Bad River
- St. Croix Ojibwe
- Ho Chunk
- Iowa Tribe-Kansas & Nebraska
- Match-E-Be-Nash-She-Wish Band of Pottawatomi (concurring)
- Winnebago Tribe of Nebraska
- Stockbridge-Munsee Community
- Menominee Indian Tribe of Wisconsin
- Pokagon Band of Potawatomi Indians
- Peoria Tribe of Indians of Oklahoma

Invited Signatory

Sokaogon Chippewa Community

By: Robert Van Zile Date: 9/19/23
Robert Van Zile, Chairman

Invited Signatory

Miami Tribe of Oklahoma

By: _____ Date: 10/17/2023

Douglas Lankford, Chief

Concurring Party

Oneida Nation of Wisconsin

By: _____ Date: _____

Tehassi Hill, Chair

Concurring Party

Bad River Band of the Lake Superior Tribe of Chippewa Indians

By: _____ Date: _____

Mike Wiggins Jr., Chairman

Concurring Party

St. Croix Chippewa Indians of Wisconsin

By: _____ Date: _____

Thomas Fowler, Chairman

Concurring Party

Ho-Chunk Nation

By: _____ Date: _____

Jon Greendeer, President

Wisconsin Programmatic Agreement

Concurring Party

Winnebago Tribe of Nebraska

DocuSigned by:
Sunshine Bear 9/11/2023
By: 4F9737FE7C014B9... Date: _____
Sunshine Thomas-Bear, Cultural Preservation Director

Concurring Party

Match-e-be-nash-she-wish Band of Pottawatomi

By: _____ Date: _____

Eric Sprague, Chief Operating Officer

Concurring Party

Stockbridge-Munsee Community of Wisconsin

By: Shannon Holsey Date: 08 / 21 / 2023

Shannon Holsey, President

Concurring Party

Menominee Indian Tribe of Wisconsin

By: _____ Date: _____

Gena Kakkak, Tribal Chairwomen

Concurring Party

Pokagon Band of Potawatomi Indians

By: _____ Date: _____

Rebecca Richards, Tribal Chairwomen

Concurring Party

Forest County Potawatomi Community

By: _____ Date: _____

James Crawford, Chairman

Concurring Party

Lac Courte Oreilles Band of Lake Superior Chippewa Indians

By: _____ Date: _____

Louis Taylor, Chairman

Concurring Party

Lac du Flambeau Band of Lake Superior Chippewa Indians

By: _____ Date: _____

John Johnson, President

Concurring Party


Red Cliff Band of Lake Superior Chippewa Indians

By: _____ Date: _____

Nicole Boyd, Chairwoman

Invited Signatory

Tribe: Peoria Tribe of Indians of Oklahoma

By:  _____ Date: 9/29/23

Craig Harper, Chief

APPENDIX A

Tribes Consulted with on this Programmatic Agreement

There are 11 Federally recognized Tribes in Wisconsin and 65 Federally recognized Tribes outside of Wisconsin that were consulted on this Agreement.

Federally Recognized Tribes Resident to Wisconsin

Bad River Band of the Lake Superior Tribe of Chippewa Indians

Forest County Potawatomi Community of Wisconsin

Ho-Chunk Nation

Lac Courte Oreilles Band of Lake Superior Chippewa Indians

Lac du Flambeau Band of Lake Superior Chippewa Indians

Menominee Indian Tribe of Wisconsin

Oneida Nation of Wisconsin

Red Cliff Band of Lake Superior Chippewa Indians

Sokaogon Chippewa Community, Mole Lake Band of Lake Superior Chippewa

St. Croix Chippewa Indians of Wisconsin

Stockbridge-Munsee Community of Wisconsin

Tribes Outside of Wisconsin

Absentee Shawnee Tribe of Indians of Oklahoma

Bay Mills Indian Community

Bois Forte Band of Chippewa

Chippewa Cree Tribe

Citizen Potawatomi Nation

Delaware Nation

Delaware Tribe of Indians

Eastern Shawnee Tribe of Oklahoma

Flandreau Santee Sioux Tribe

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Fond du Lac Band of Lake Superior Chippewa
Fort Belknap Indian Community
Grand Portage Band of Lake Superior Chippewa
Grand Traverse Band of Ottawa and Chippewa Indians
Hannahville Indian Community
Iowa Tribe of Kansas and Nebraska
Iowa Tribe of Oklahoma
Kaw Nation
Keweenaw Bay Indian Community
Kickapoo Traditional Tribe of Texas
Kickapoo Tribe in Kansas
Kickapoo Tribe of Oklahoma
Lac Vieux Desert Band of Lake Superior Chippewa Indians
Leech Lake Band of Ojibwe
Little River Band of Ottawa Indians
Little Shell Tribe of Chippewa Indians of Montana
Little Traverse Bay Bands of Odawa Indians
Lower Sioux Indian Community
Mandan, Hidatsa & Arikara Nation
Match-e-be-nash-she-wish Band of Pottawatomi
Miami Tribe of Oklahoma
Mille Lacs Band of Ojibwe
Muscogee (Creek) Nation
Nottawaseppi Huron Band of the Potawatomi
Omaha Tribe of Nebraska
Osage Nation
Otoe-Missouria Tribe of Indians
Ottawa Tribe of Oklahoma
Pawnee Nation of Oklahoma

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Peoria Tribe of Indians of Oklahoma

Pokagon Band of Potawatomi Indians

Ponca Tribe of Indians of Oklahoma

Ponca Tribe of Nebraska

Prairie Band Potawatomi Nation

Prairie Island Indian Community

Quapaw Nation

Red Lake Nation

Sac & Fox Nation

Sac & Fox Nation of Missouri in Kansas and Nebraska

Sac & Fox Tribe of the Mississippi in Iowa

Saginaw Chippewa Indian Tribe of Michigan

Santee Sioux Nation

Sault Ste. Marie Tribe of Chippewa Indians

Seneca Nation of Indians

Seneca-Cayuga Nation

Shakopee Mdewakanton Sioux Community

Shawnee Tribe

Sisseton Wahpeton Oyate

Spirit Lake Tribe

Tonawanda Seneca Nation

Turtle Mountain Band of Chippewa

Upper Sioux Community

White Earth Nation

Winnebago Tribe of Nebraska

Wyandotte Nation

Yankton Sioux Tribe

APPENDIX B

Screening Process Criteria

A decision that there is minimal potential to affect historic properties is warranted when all of the following are true.

Archaeology Screening Criteria

- An archival and literature search conducted resulted in no known cultural resources (archaeological, burial sites, mounds, others) in the project area.
- There will be no changes in the type or dimensions of any highway-related elements. Highway-related elements include but are not limited to the roadway, median, curb and gutter, sidewalks, shoulders, beam guard, as well as activities that might change a building's setting such as ditching, flattening a curve, or grading
- Project acquires land, in easement or fee simple, less than 0.5 acre (0.20 hectare), or in strips equal to or less than five feet (1.52 meters) wide.
 - Contact CRT to discuss strip acquisition.
- There will be no change in the traffic-carrying capacity of the highway (e.g., no parking removed to create additional lane or lanes).
- No trees, bush, or other substantial landscape features, such as retaining walls, will be removed or altered.
- Results of solicitation of public input indicate that there are no concerns about historic properties.
- Results of solicitation of input from Indian tribes indicate there are no concerns about historic properties.
- Review of the National Register of Historic Places (NRHP) and state inventories for archaeological resources indicate no listed or eligible historic properties in or adjacent to the project.

Architecture/History Screening Criteria

- An archival and literature search conducted resulted in no known cultural resources (objects, buildings, structures, districts) in the project area.
- There will be no changes in the type or dimensions of any highway-related elements. Highway-related elements include but are not limited to the roadway, median, curb and gutter, sidewalks, shoulders, beam guard, as well as activities that might change a building's setting such as ditching, flattening a curve, or grading
- Project is not adjacent to, within or proposing to rehabilitate historic buildings or structures within historic districts.
- There will be no change in the traffic-carrying capacity of the highway (e.g., no parking removed to create additional lane or lanes).
- No trees, bush, or other substantial landscape features, such as retaining walls, will be removed, or altered.

Wisconsin Programmatic Agreement

- Results of solicitation of public input indicate that there are no concerns about historic properties.
- Results of solicitation of input from Indian tribes indicate there are no concerns about historic properties.
- Review of the National Register of Historic Places (NRHP) and state inventories for architectural and historical resources indicate no listed or eligible historic properties in or adjacent to the project.

ATTACHMENT 1

Wisconsin Department of Transportation Facilities Development Manual

Chapter 26 Cultural Resource Preservation

Available at: [FDM Chapter 26 Table of Contents \(wisconsin.gov\)](#)

ATTACHMENT 2

Inadvertent Discovery Protocol

The Inadvertent Discovery Protocol below is an agreed-upon process between the Wisconsin Historical Society and the Wisconsin Inter-Tribal Repatriation Committee (WITRC) for handling and transferring of identified Native American human remains that were inadvertently disturbed as part of Wisconsin State Statute 157.70. As a standard practice, WisDOT follows this protocol and is therefore attaching this to the PA.

I) Human remains are inadvertently disturbed

II) Human remains identified as Native American

A) Wisconsin Historical Society (WHS) shall contact Tribe(s) and Wisconsin Inter-Tribal Repatriation Committee (WITRC) within 24 hours of identification (II above). Contacted Tribes shall be determined from NAGPRA Tribal Area of Interest Maps/other Information.

(Special Caveat: Timing is a critical factor for closing inadvertently discovered graves, or for removing burials from graves. Any information related to timing shall be transmitted to Tribe(s) and/or WITRC, when WHS becomes aware of specifics. Such special-timing requirements may affect the respective notice provisions of this protocol.)

[*Special Note: WHS has need for Current Contact information for appropriate Tribe and WITRC representatives (including one alternate contact).]**

B) Tribe(s) and/or WITRC shall respond with information on: handling of remains; desire to observe or monitor; specific undertaking contact person(s) w/contact information; other within 24 hours. [This Tribe/WITRC information is hereinafter referred to as "Treatment."]

1) If human remains and objects related to the burial are removed (through disturbance) from the grave, and Tribe(s) and/or WITRC transmit Treatment request, then WHS notifies parties to put in place Treatment plan.

2) If remains are left in grave, then no further involvement, unless Tribe(s) and/or WITRC transmit request for Treatment at grave site. Then, if such Grave-site treatment is requested, WHS shall notify all parties to put in place Treatment plan.

[NOTE: all subsequent contact with Tribe(s) and/or WITRC shall be made according to undertaking-specific information as conveyed in "B" above; or, in the absence of such undertaking specific information, pursuant to existing contact Information of "A" above.]

C) If human remains and objects related to the burial must be excavated, then a Contract for such activity must be negotiated.

1) WHS shall contact Tribe(s) and/or WITRC of removal requirement.

2) Tribe(s) and/or WITRC, if desired, shall provide additional Treatment provisions for excavation and temporary curation of human remains and objects related to the burial.

[NOTE: WHS shall advise Tribe(s) and/or WITRC of decision to excavate human remains and objects related to the burial within 24 hours of notice of such decision. Tribe(s) and/or WITRC shall respond

with Treatment request within 24 hours of such notice. In any event, all information exchange must take place prior to finalizing excavation Contract]

III) Disposition of human remains and objects related to the burial shall be undertaken pursuant to existing statutory and administrative code provisions.