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# CULTURAL HERITAGE MANUAL

## A Guide for Consultation

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by

The Tribal Consultation Committee (TCC)

including

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for North Dakota Department of Transportation, Bismarck

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# TABLE OF CONTENTS



INTRODUCTION 	1
MANUAL ORGANIZATION 	5
LAWS AND REGULATIONS 	7
National Historic Preservation Act of 1966.....	8
36 CFR 800 – Protection of Historic Properties Regulation.....	10
OTHER FEDERAL LAWS 	13
American Indian Religious Freedom Act of 1979 .....	13
Native American Graves Protection and Repatriation Act of 1990.....	15
Archaeological Resources Protection Act of 1974 .....	16
National Environmental Policy Act of 1969.....	17
Department of Transportation Act of 1966.....	19
NORTH DAKOTA LAW 	21
North Dakota Burial Law of 1984 .....	21
CONTACTS IN INITIATING CONSULTATION 	25
Tribes .....	25
Tribal Historic Preservation Officer or Designee .....	26
Tribal Historian.....	27
Spiritual or Cultural Advisor .....	27
Tribal Historic Preservation Officer .....	28
Other Tribal Elders .....	29
DEFINITIONS 	31
Band .....	31
Clan .....	32
Cultural Heritage.....	33
Cultural Landscape .....	34
Programmatic Agreement .....	35
Protocol.....	37
Sovereignty .....	40
Traditional Cultural Property (TCP).....	41
Tribe.....	41

Trust Responsibility .....	43
Undertaking.....	44
<b>HERITAGE</b>  .....	45
Origin Stories .....	46
Territory v. Stewardship .....	46
Stories and a Holistic View.....	47
Historical Disputes.....	49
European Influences.....	49
Tribal Government - Then and Now.....	52
<b>PROTOCOL ETIQUETTE</b>  .....	57
Time .....	57
Dialogue.....	58
Value Conflicts .....	60
Humor .....	60
Respect and a Trusting Relationship.....	61
Confidentiality .....	62
Full Disclosure .....	63
Gender Specific Awareness .....	64
Generational Responsibilities .....	66
Relationship Assessment .....	67
Development and Follow Up.....	68
Conflict Resolution .....	69
<b>EDUCATION</b>  .....	73
Cross-Cultural Comparison .....	74
Two Cultures = Different Values.....	74
Other Cultural Values .....	76
Language Difference.....	78
Cultural Sensitivity .....	78
Feelings vs. Scientific Method.....	79
View of Nature and Environment.....	79
Privacy vs. Need to Know .....	80
Cooperation and Competition.....	80
Family/Group vs. Personal Goals .....	82
<b>BEST PRACTICES</b>  .....	83
Programmatic Agreement .....	83
Pre-Programmatic Agreement .....	84
Post-Programmatic Agreement.....	86
4-Bears Bridge .....	89
Sitting Bull Bridge .....	91
Jamestown Bypass – Highway #52.....	92
Jamestown Rest Area.....	94
Minnewakan Bypass – Highway #281 .....	95

Highway #2, Minot to Williston .....	96
Safety Projects .....	97
BIBLIOGRAPHY  .....	99
APPENDICES  .....	107
Programmatic Agreement .....	108
Jamestown Bypass No Adverse Effect Documentation.....	122





# INTRODUCTION

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It is important to understand the capacity of this Cultural Heritage Manual in light of consultation. A manual often refers to a small book that guides one through a process until a goal is reached. This manual will function not only as a guide in reaching a goal, but as an educational work that addresses cultural phenomenon that may not be well understood by the North Dakota Department of Transportation and the Federal Highway Administration as well as the Tribes. However, federal laws and regulations have provided the impetus to consult with Tribes and seriously consider their concerns. Those involved with the process of reaching an agreement programmatically, can all appreciate the process incorporated in meeting this challenge.

The manual is essentially an educational work to help both Indians and non-Indians with cultural heritage issues. Furthermore, as a manual used to expedite the consultation process, it is designed to be modified so as to create a **work in progress**. “The purpose of consultation is to elicit information and collect oral historical accounts for religious practices and beliefs that may relate to possible [archeological sites, sacred sites, ancestral areas and/or] Traditional Cultural Properties (TCPs), while ensuring full consideration of concerns of the affected

sovereign Native American Indian Tribes. Procedures that are “business as usual” are often alien to the Native American Indian sovereign governments. Therefore, agencies should not require Tribal representatives to conform rigidly to procedures that may be alien to them. To require them to conform to our [their] procedures is not in keeping with the spirit of the laws governing consultation. Negotiation and consultation with the sovereign nations requires that the federal agency be sensitive to and cognizant of cultural values, socioeconomic factors, and the administrative structure of the Tribes, including economic circumstance, seasonal availability, or other constraints that may limit the ability of individuals and people to participate and respond in a timely manner.” (Curley Youpee, 2007)



Figure 1. Photograph by Terry Wiklund, ©2008

The goal of consultation should be consensus, or in other words, agreement between all parties involved in consultation regarding a particular project or federal undertaking. Federal agencies must be prepared to give Tribal views a deference voice and consideration when making decisions affecting Tribal interests. When, after a diligent and good faith effort has been made by the federal agency to achieve consensus, it is determined that consensus is not possible, then the federal agency should seek to achieve as substantial agreement as possible among those who are participating. In addition, the views of those not in agreement should be completely and fairly recorded in any document published by the federal agency or agencies following consultation. Finally, when the federal agency has completed its consultation process, or in good faith, determined that further consultation would not be purposeful, it is important for the agency to issue its final decision expeditiously. By doing so, the federal agency timely advises those who participated in the consultation process how their views were taken into consideration. Where the federal agency's decision concurs with Tribal views, early decision making will help improve agency-tribal relations. On the other hand, where the federal agency decision is contrary to Tribal views, the Tribe and its members are then on timely notice that specific steps may be required to pursue reconsideration or appeal of the decision (*Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous People and Tribal Members in Environmental Decision Making*, National Environmental Justice Advisory Council – Indigenous Peoples Subcommittee, 2000.)

All signatories to the Programmatic Agreement recognize the need for a manual so that respect, concerns, concepts, responsibilities, visions, hopes, and humanity are addressed and understood. It is often apparent that the group, including agencies and Tribes, do not perceive the goal of the manual similarly. Basically, neither the Tribes nor the agencies have a good understanding of the other's culture and its

process. These differences can be a deterrent to reaching consensus and/or agreement regarding particular issues. However rather than allowing differences to hinder the process, the manual will allow the exchange of knowledge without judgment and allow for framework development in consultation.

Who will use the manual? The completion of a manual is part of a Programmatic Agreement developed in response to the intent of the National Historic Preservation Act specifically the §106 review and compliance process. The Programmatic Agreement and subsequent accompanying manual is a resultant product of consultation. Those that will use of the manual are the signatories to Programmatic Agreement (NDDOT, Federal Highway Administration and Tribes.) The manual cannot address the needs of other state or federal agencies or Tribes, but it is our hope that others can adopt it.

# MANUAL ORGANIZATION \_\_\_\_\_

Keeping with the theme of an education tool, a visual device called the “Heritage Wheel” accompanies the manual. The Heritage Wheel is a visual aid employed as quick reference to topics or concepts that often need clarification. Those topics included in the manual are not inclusive to each section’s content as other sections and information can be added. The Heritage Wheel is color-coded to further aid in identifying a particular topic. A modified version of the Heritage Wheel is part of the manual cover to provide a more permanent index.

The manual is divided into seven sections: Laws, Heritage, Education, Contacts, Protocol, Definitions, and Best Practices. Within each section there are from 9 to 10 topics that relate to the section. They are not meant to include all topics that apply to consultation or that should be further explored, but are topics or words that appear in our everyday lives especially in a governmental setting. Very often, we speak of these topic or words with authority when in reality we know just enough to add confusion to a given conversation. The manual will help clarify and define concepts, topics, and laws with regard to consultation.



**Figure 2. Photograph by Terry Wiklund, ©2008**

# LAWS AND REGULATIONS \_\_\_\_\_

It is highly possible that the consultation process would not take place if it were not for federal law and the accompanying regulations. Compliance with laws has forced all of us to look at each other in ways that should be governed by respect and trust. Whether or not particular individuals, agencies, companies, or Tribes agree with these laws, is not the issue. Although no one is above these laws, the process of interpreting them has been a source of misunderstanding. Ignorance of heritage, culture, and law breeds fear and often hatred. This misunderstanding and mistrust exists both in the non-Indian and Indian world.

The legal mandate for tribal consultation on a government-to-government basis is found in the United States Constitution, Article 1, Section 8, that states, “The Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts, and excises shall be uniform throughout the United States . . . To regulate commerce with foreign nations, and among the several states, and within the Indian Tribes. . . ( [www.usconstitution.net/albany.html](http://www.usconstitution.net/albany.html) ). Article 1, Section 8 has been referred to as the “Indian Commerce Clause” which

empowers Congress to regulate commerce and consult with foreign governments, between the states and with the Indian Tribes and that constitutional mandate to respect tribal sovereignty has also been repeatedly expressed in various statutes, executive orders, and policies.

### ***National Historic Preservation Act of 1966***

The National Historic Preservation Act (NHPA) P.L. 89-665, 80 Stat. 915, 16 U.S.C. §470 *et seq.* and 36 CFR 18, 60 61, 63, 68, 79, 800 declared a national policy of historic preservation, including the encouragement of preservation on the state and private levels; authorized the Secretary of the Interior to expand and maintain a National Register of Historic Places and National Historic Landmark program (§ 101) including properties of state and local as well as national significance; authorized matching federal grants to states and the National Trust for Historic Preservation for surveys and planning and for acquiring and developing National Register properties; established the Advisory Council on Historic Preservation; required federal agencies to consider the effects of their undertakings on National Register properties and provide the Advisory Council opportunities to comment (§106). Consultation regulations regarding §106 are outlined in 36 CFR 800. See more on these regulations below. Amended in 1976 (P.L. 94-422), the Act expand §106 to properties eligible for, as well as listed in, the National Register. The Amendment in 1980 (P.L. 96-515) incorporated Executive Order (E.O.) 11593 requirements, giving national historic landmarks extra protection in federal project planning, and to permit federal agencies to lease historic properties and apply the proceeds to any National Register properties under their administration. The most recent Amendment of 1992 redefined federal undertaking, addressed “anticipatory demolition,” and emphasized the interests and involvement of Native Americans and Native Hawaiians.



Confidentiality is addressed in §304 of the NHPA. This section states that federal agencies can withhold from public disclosure information on the location, character, or ownership of a historic resource if that disclosure may cause a significant invasion of privacy, risk harm to the resource, or would impede the use of a traditional religious site by practitioners. When the information is developed to comply with Sections 106 or 110(f) of the NHPA, the Secretary of the Interior must consult with the ACHP concerning disclosure and who may or may not have access to that information.



**Figure 3. Photograph by Terry Wiklund, ©2008**

NHPA is probably the most encompassing legislation with regard to the protection of cultural resources. Its complexity, interpretation, and implementation have led to a relationship among agencies and Tribes that has, at its heart, the concern for future consideration of our heritage.

### ***36 CFR 800 – Protection of Historic Properties Regulation***

Chapter 36, Part 800 of the Code of Federal Regulations (36 CFR 800) implements §106 of the National Historic Preservation Act. It requires the identification and consideration of potential adverse effects on properties as a result of a federal undertaking which may be significant due to their traditional or historic importance to an Indian Tribe.

36 CFR 800.1 (a) requires federal agencies to take into account the effects of their undertakings on historic properties and afford the Council Advisory a reasonable opportunity to comment on such undertakings.

36 CFR 800.2 (B)(ii) states this requirement applies regardless of the location of the historic property. Many agencies, companies, and Tribes are not aware of, or purposely interpret the law, as applying **only** to lands within the reservation boundary. Any federal undertaking, regardless of the location, that has the potential to adversely affect a historic property is subject to the law and the process.

36 CFR 800.2(ii)(D) states that “when Indian Tribes and Native Hawaiian organizations attach religious and cultural significance to historic properties **off**

Tribal lands, the act requires federal agencies to consult with such Indian Tribes and Native Hawaiian organizations in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands.”

Consultation under the §106 process provides the Indian Tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulates its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects. [36 CFR 800.2 (ii)(A)]

How much time is reasonable? The interpretation has been an area of misunderstanding often times interpreted to “benefit a project.” The concept of time varies greatly among Indians and non-Indians. To those involved in road and highway construction, a reasonable amount of time is a concept based on the inception to project completion and driven by the expenditure of federal funds. To Tribes, a reasonable amount of time is a concept of feeling, composed of heritage and humanity. Time concepts related to feeling are often at odds with planning, construction, and expenditure of funds. Thus consultation with Indian Tribes should be conducted in a sensitive manner respectful of Tribal sovereignty. [36 CFR 800.2(ii) (B)]

Consultation with an Indian Tribe must recognize the government-to-government relationship between the federal government and Indian Tribes. It is important to

recognize that two governments exist within the process, both with their own cultural and differing views. However, both are involved with heritage that is important to all.

The National Advisory Council on Historic Preservation's publications, "Consulting with Indian Tribes in the Section 106 Review Process," "The Relationship Between Executive Order 13007 Regarding Indian Sacred Sites and Section 106," and "Policy Statement Regarding the ACHP's Relationships with Indian Tribes" are also excellent, in-depth guidance. Also helpful is ACHP's discussion "Relationship of Section 106 to Other Laws. Please see [www.achp.gov](http://www.achp.gov).

# OTHER FEDERAL LAWS \_\_\_\_\_



## *American Indian Religious Freedom Act of 1979*

American Indian Religious Freedom Act (AIRFA), P.L. 95-341, 92 Stat. 469, 42 U.S.C § 1996 declares policy to protect and preserve the inherent and constitutional right of the American Indian, Eskimo, Aleut, and Native Hawaiian people to believe, express, and exercise their traditional religions and calls for a now-completed evaluation of federal procedures, programmatic objective, and policies. The statute imposes no specific procedural duties on federal agencies. Religious concerns should be accommodated or addressed under the National Environmental Policy Act (NEPA) or other appropriate statutes.

AIRFA arises from the First Amendment to the U.S. Constitution, under two clauses that address religion. The “Establishment Clause” says that the Congress will make no law respecting the establishment of religion, while the “Free Exercise Clause” says that Congress will make no laws prohibiting the free exercise of religion. AIRFA simply makes the point that the Free Exercise Clause applies to indigenous religions. There is a great deal of case law surrounding the First Amendment, some of which constructs a rather narrow window within which agencies must operate to avoid violating either the Establishment or the Free Exercise Clause. In simplest

terms with respect to AIRFA, an agency must respectfully consider Native American religious practices and the effects of agency actions on them, but can show respect for such practices only within very proscribed limits, and it has to be careful about the extent to which it lets Tribal religious values drive its policies and procedure.



**Figure 4. Photograph by Terry Wiklund, ©2008**

## *Native American Graves Protection and Repatriation Act of 1990*

The Native American Graves Protection and Repatriation Act (NAGPRA), P.L. 101-601, 104 Stat. 3049, 25 U.S.C. § 3001-3010, 36CFR10, assigns ownership or control of Native American human remains funerary objects, sacred objects, and objects of cultural patrimony that are excavated or discovered on federal lands or Tribal lands to lineal descendant or culturally affiliated Native American people; establishes criminal penalties for trafficking in remains or objects obtained in violation of the Act; provides that federal agencies and museums that receive federal funding shall inventory Native American human remains and associated funerary objects in their possession or control and identify their cultural and geographical affiliations within five years, and prepare summaries of information about Native American unassociated funerary objects, sacred objects, or objects of cultural patrimony. This is to provide for repatriation of such items when lineal descendants or Native American people request it.

The main thrust of the Act is to require repatriation of human remains and “Native American cultural items” to affiliated Indian Tribes and Native Hawaiian people. It also includes provision that if such items are found on federal or Indian lands, under the control of the federal government, during a project, the project must halt for at least 30 days while consultation is carried out with appropriate people and the discovery is lawfully managed. Generally, the law imposes major requirements on agencies to consult with Tribes and Native Hawaiian people about treatment of their ancestral remains and objects. NAGPRA compliance needs to be carefully coordinated with Section 106 review.

## ***Archaeological Resources Protection Act of 1974***

Archaeological Resources Protection Act (ARPA), P.L. 96-95 Stat. 712, 16 U.S.C. § 470aa *et seq.* and 43 CFR, subparts A and B, 36 CFR 79 secures the protection of archeological resources on public or Indian lands and foster increased cooperation and exchange of information between private, governmental, and professional communities in order to facilitate enjoyment and education of present and future generations. The Act regulates excavation and collection on public and Indian lands. It defines archeological resources to be any material remains of past human life or activities that are of archeological interest and are at least 100 years old. The statute further requires notification of Indian Tribes who may consider a site of religious or cultural importance prior to issuing a permit. The Act was amended in 1988 to require development of plans for surveying public lands for archeological resources and system for reporting incidents of suspected violations.

In simple terms, ARPA prohibits the unauthorized excavation or removal of “archeological resources” from federal and Indian land. ARPA establishes standards that an applicant must meet in order to obtain an ARPA permit. Penalties for violations are prescribed in the statute. This process must be followed by archeologists conducting excavations on federal and Indian lands. The Bureau of Indian Affairs issues the permits. Archeological survey does not require an ARPA permit but it does require a “surface inspection permit,” also issued by the Bureau of Indian Affairs.

Section 9 (a) of the Act states that information concerning the nature and location of any archeological resource for which the excavation or removal requires a permit or other permission under this Act or under any other provision of federal law may not



be made available to the public under Subchapter II of Chapter 5 of Title 5 of the United States Code or under any other provision of law unless the federal land manager concerned determines that such disclosure would:

further the purposes of this Act or the Act of June 27, 1960 (16U.S.C 469-469c), and

not create a risk of harm to such resources or to the site at which such resources are located.

(b) Notwithstanding the provisions of Subsection (1), upon the written request of the Governor of any state, which request shall state -

(1) the specific site or area for which information is sought,

(2) the purpose for which such information is sought,

(3) a commitment by the Governor to adequately protect the confidentiality of such information to protect the resource from commercial exploitation. The federal land manager concerned shall provide to the Governor information concerning the nature and location of archeological resources within the state of the requesting Governor.

### ***National Environmental Policy Act of 1969***

The National Environmental Policy Act (NEPA), P.L. 91-190, 42 U.S.C. § 4321 *et seq.* is the basic national charter for environmental protection. The Act establishes policy, sets goals, and provides means for carrying out the policy. It contains an “action-forcing” provision to insure that federal agencies act according to the letter and spirit of the law. Statute requires a systematic analysis of major federal actions that will consider all reasonable alternatives as well as an analysis of short-term and

long term, irretrievable and irreversible, and unavoidable impacts. It is also responsible for establishing the Council on Environmental Quality.

NEPA is the federal government's general "umbrella" law for environmental review. It requires the review of projects and program impacts on all aspect of the environment, including the cultural environment. There is no single agreed upon definition of "cultural environment." It is heritage including, but not limited to historic properties, places of importance, i.e. buttes, cultural use of areas related to intangible spirituality. It can include traditional sites, sacred areas, religious practices, and other cultural phenomenon. The impacts are usually analyzed as impacts to "cultural resources" or "social impacts" to living people, or both. There is a gap between cultural resource and social impact as an impact to one may affect the other. Upon the destruction of an archeological site, the impact is not only on the physical attributes, but on the heritage of the people associated with the site as well.

Section 101(b)(4) [42 USC § 4331] It is the continuing responsibility of the federal government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate federal plans, functions, programs, and resources to the end that the nation may preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice.

## *Department of Transportation Act of 1966*

The Department of Transportation (DOT) Act, P.L. 89-670, 80 Stat. 931, 49 U.S.C. § 303 was enacted on the same day as the National Historic Preservation Act. Section 4(f) of the Act allows the Secretary of Transportation to approve a project requiring the use of a historic property **only** if there is no prudent and feasible alternative to doing so, and only if all possible planning is carried out to minimize harm to the property. The law also restricts the use of park lands for federally supported highways and other projects requiring DOT approval. The same section states that no project that requires use of land from public parks can be approved unless there is no feasible or prudent alternative and all possible planning is done to minimize the harm to such an area.

On August 10, 2005, Section 6009(a) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A legacy for Users (SAFETYEA-LU), Pub. L. 109-59, amended existing Section 4(f) legislation at Section 138 of Title 23 and Section 303 of Title 49, United State Code. The first substantive revision to Section 4(f) since the 1966 US Department of Transportation Section 6009 was amended to simplify the process and approval of projects that have only *de minimis* impacts on lands impacted by Section 4(f). Under the new provisions, once the US DOT determines that a transportation use of Section 4 (f) property results in a *de minimis* impact, analysis of avoidance alternatives are not required and the Section 4(f) evaluation process is complete.

Furthermore, Section 4(f) does not apply to archeological sites where the administration, after consultation with the State Historic Preservation Office and Advisory Council on Historic Preservation, determines that the archeological

resource is important chiefly because of what can be learned by data recovery and has minimal value for preservation in place. The exception applies both to situations where data recovery is undertaken or where the administration decides, with agreement of the State Historic Preservation Office and, where applicable, the Advisory Council on Historic Preservation, not to recover the resource.

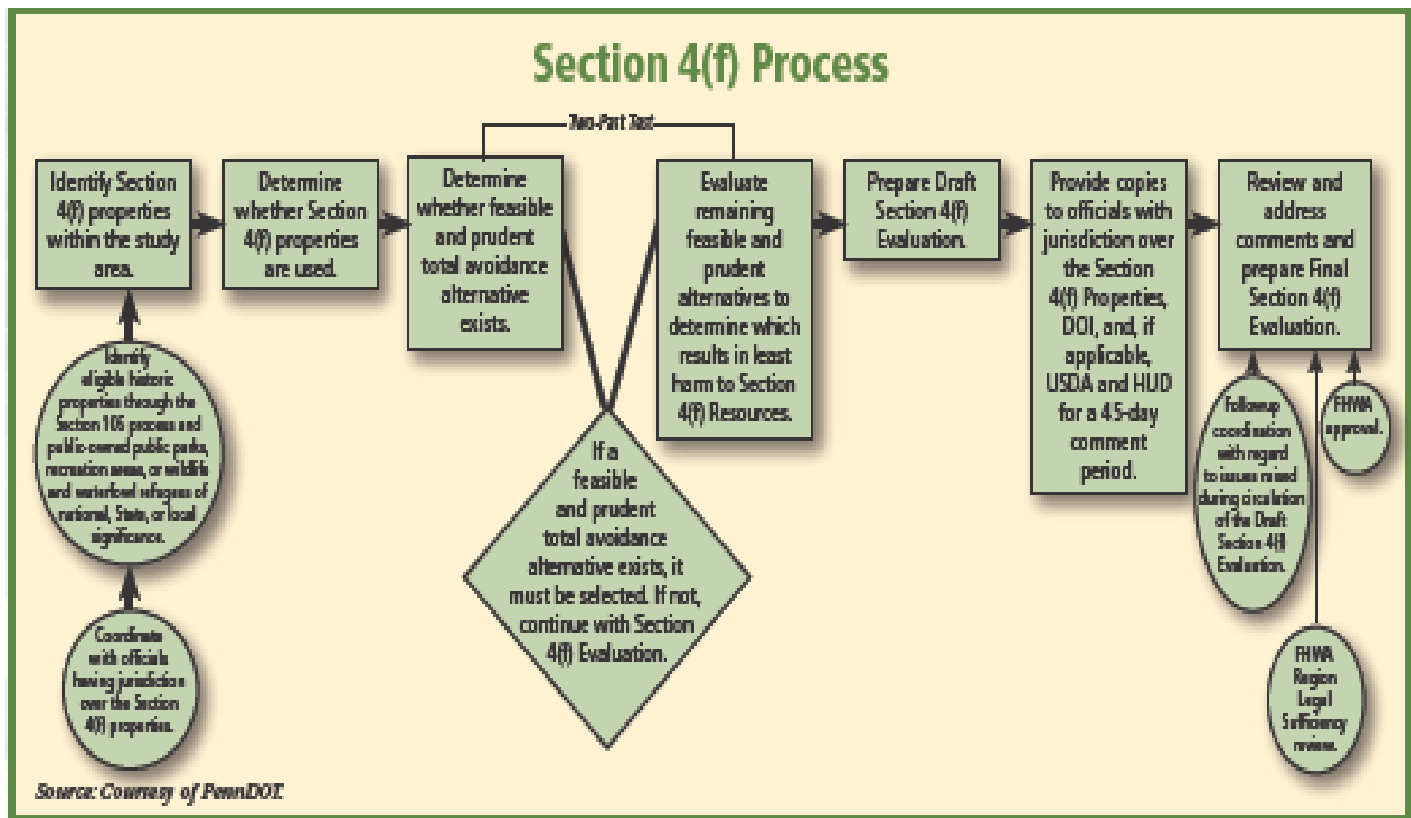


Figure 5. Courtesy of Pennsylvania Department of Transportation

# NORTH DAKOTA LAW

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## *North Dakota Burial Law of 1984*

North Dakota Burial Law (NDBL), North Dakota Century Code (NDCC) 40-02-03, and 23-06-27, Protection of Prehistoric and Historic Human Burial Sites, Human Remains, and Burial Goods, was in response to the lack of protection for prehistoric burials. Intentional removal of burial goods from mound features had been observed by Tribes and professional archeologists through the 1970s. State legislation gave human burials protection. Interestingly, this statute was in affect before the Native American Graves Protection and Repatriation Act.

NDCC 40-02-03-03, Notification for Inadvertent Disinterment requires that the law enforcement agency, usually the county sheriff, be contacted to help establish whether or not the remains are a result of a homicide. The Department of Transportation is responsible for contacting the sheriff's department as well as the State Historical Society of North Dakota - State Historic Preservation Office. The Historical Society, in turn, contacts the State Health Department. The North Dakota

Department of Transportation (NDDOT) also is responsible for contacting the “Intertribal Reinterment Committee. North Dakota is unique in that it has a burial law that includes such a committee. This committee is comprised of representatives appointed by each Tribal government to represent their respective Tribe in matters relative to the deaccession and reinterment of human remains and burial goods. These individuals play a paramount role in the protection and reinterment process. At a time when a human burial is encountered, work around the area is halted. According to the law, the local law enforcement agency is the first to be notified. Under subsection 4, if it is determined by initial examination that the human remains are non-Indian, the remains may be further examined. Further examination is considered “study” under Section 40-02-03-04 and is well defined. Under Subsection 5, if it is determined by initial examination that the human remains are American Indian, the remains may be further examined under the scope of “study” again defined in the above Section. The law enforcement agency notifies the State Historical Society of North Dakota (SHSND) and the State Department of Health and Consolidated Laboratories of the exact location and state of the human burial site, human remains, and or burial goods.

However, given the intent of the law, protecting the burial from further destruction and treating the burial with respect is obvious. Isolating the area by means of stakes and “caution” ribbon, and covering the remains with a tarp is recommended. Often times, however, and particularly with highway construction, the remains maybe scattered and the location of the burial may be obscured.

NDCC 40-02-03-05, Restoration or Reinterment of Inadvertent Disinterment requires SHSND Superintendent to contact a representative of the Intertribal Reinterment Committee no later than the first 24 hours or as soon as possible. Contacting the

committee concurrently with the notifying of the local law enforcement agency is recommended. The news of an inadvertent disinterment, especially near a reservation, can travel quickly. Other than the Superintendent, the law does not provide for this immediate notification.



**Figure 6. Photograph by Terry Wiklund, ©2008**

Once the committee is involved, the representative makes the determination if the burial can be restored in place, or if it should be removed and reburied in another location. The reinterment committee is given the opportunity of determining Tribal affiliation, if possible. Since reinterment by Tribes is not part of traditional Tribal heritage, ceremonies conducted during this process are usually those practiced at

the time of a primary burial. Such things as food, backhoe rental, and individual expenses related to customs and beliefs can be costly. The cost of conducting the reburial ceremonies, under NDCC 40-02-03-05 states that the expenses must be fully paid by the appropriate Tribal government. It should be noted that NDDOT is willing to compensate the Tribe for the cost of the reburial if disturbed by a highway construction related project, just as they cover the costs for removal and reburial of graves from formal cemeteries.



# INITIATING CONSULTATION\_\_\_\_\_

## *Tribes*

When a federal undertaking is anticipated, immediate contact with Tribes is not too soon. How one approaches the Tribes is really the crux of consultation. One must learn as much as possible about the Tribe before approaching them to establish a consultation relationship. If initiating a meeting on a particular reservation, all forms of communication should be explored. A personal introduction with the Tribal government is a good approach. This introduction is important and one must be aware of first impressions. Cultural protocol is common place and practiced on all reservations. A courtesy call to the Tribal secretary to explore a possible time to introduce oneself to the Tribal government is the first step. The time should be established by the Tribe. One can inquire whether the chairperson would prefer a private meeting or whether an initial meeting with the Tribal council is desired. Whether a private meeting or council meeting is selected, the information offered should be short and to the point. Make sure your proposal is to the advantage of the Tribe and to the agency initiating consultation. Information should be presented clearly, without jargon, and how it will be beneficial to all parties.

Initial meetings will be conducted with each Tribal government at its Tribal office. These meetings include a presentation about the federal government's and North Dakota Department of Transportation's proposed project or general program issues, the project impact on the possible Traditional Cultural Properties (TCP), discussions with Tribal elders and religious practitioners, and a request that an official representative be appointed to represent the Tribe during consultation meetings. The intent of consultation allows each consulting Tribe a reasonable opportunity to participate as co-partners with the federal government in addressing the issue of possible TCPs. In addition to the initial visit to each Tribal office, consultation consists of additional meetings, telephone contacts, written correspondence, and visits by federal agency representatives to the reservations of each Tribe. Tribal representatives are kept closely informed with all available data on the property including the cultural resources studies. Federal project personnel may be invited to appear before Tribal councils, cultural committees, elder groups, Tribal chairpersons, individual council members, treaty commissions, and traditional cultural committees. (Curley Youpee, 2007)

### ***Tribal Historic Preservation Officer or Designee***

Most Tribes have a person designated to manage cultural resource matters on behalf of the Tribe. This individual may have one or more of following titles: cultural resource manager, cultural program director, NAGPRA coordinator, spiritual advisor, cultural advisor, or Tribal Historic Preservation Officer (THPO). During a meeting with the Tribe, one should inquire the name of the individual, his or her title, and where on the reservation he or she is located. One needs to inquire whether or not the Tribal council and/or the chairperson would like to be a part of consultation process or whether they would prefer the Tribal designee to report directly to them. This also needs to be discussed with the Tribal designee. As with the initial contact,

it is important that communication with the Tribal designee follows protocol including respect for the position. If possible, a “drop-in” visit with the individual is acceptable, but only to discuss when it would be convenient to discuss consultation further. If the conversation leads to other matters, keep judgment and criticism out of the conversation. Again, keep the initial meeting brief, and remember these individuals are very busy.

### ***Tribal Historian***

Some Tribes have Tribal historians that may assist the cultural heritage manager. This individual often assists with knowledge of Tribal history and can be invaluable when considering the consultation process. It is important to include the Tribal historian in transmittal of information, meetings, and associated agendas, if requested by the Tribal historian. Do not assume that information will be transferred from one official to another.

### ***Spiritual or Cultural Advisor***

This individual may be considered a “traditionalist” but this term is sometimes confused with “traditional practitioner.” The former relates to one who believes in the traditions of a particular people. The traditional practitioner actually lives the traditions and adheres to the teachings based in spirituality. A spiritual advisor occupies a special place with the Tribe as the person is usually an elder who has gained knowledge through a gift of the Spirit. He or she is revered for both the knowledge through living a long life and for a sharing the gift of spirituality. The person speaks his native language and adheres to teachings and practices that

benefit the Tribe. Consultation with Tribes often leads to a relationship with elders who occupy this prestigious position.

### ***Tribal Historic Preservation Officer***

Under the 1992 amendments to the National Historic Preservation Act, the Tribe may establish a Tribal Historic Preservation Office and officer. The Act authorizes the Tribe to “participate in activities under regulations in lieu of the State Historic Preservation Officer (SHPO) with respect to undertakings affecting its lands, provided the Indian Tribe so requests, the SHPO concurs, and the Advisory Council on Historic Preservation finds that the Indian Tribe’s procedures meet the purposes of the regulations.” [36 CFR 800.1(c)(2)(iii)]

Under the National Historic Preservation Act, a Tribe may apply for all or some responsibilities under, i.e., archeology, Section 106 review, National Register, and survey. If approved by the National Park Service under the Tribal Historic Preservation Officer (THPO) program, a Tribe may officially assume what has been SHPO responsibilities, on a case-by-case basis or programmatically. A THPO may participate in a particular undertaking or all undertakings affecting reservation lands under its jurisdiction or control, and aboriginal lands (lands historically but no longer under Tribal control). A Tribe may require consultation on properties of cultural importance to its members, but leave SHPO with consultation on non-cultural properties, i.e. historic bridges. A Tribe may retain the services of the SHPO as a consultant. Finally, when both Indian and non-Indian lands are affected by a federal undertaking, the THPO may allow SHPO to remain a consulting party on non-Indian lands.

The THPO position benefits both Indians and non-Indian in consultation. The THPO office maintain files containing information important in gaining information related to land use, geography, location of sites, treaty information, and information pertinent to the particular Tribe. Often, THPOs are very knowledgeable regarding their heritage, local government, and helpful contacts that can be a great aid to the consultation process. The National Park Service, who administers the THPO program, requires qualified staff, such as archeologists and historians, or retain individuals with qualifications, particularly for §106 review and compliance. Archeological contractors are often employed by Tribes or by the THPO to complete cultural resource inventories or surveys within the boundaries of the reservation.

Consultation, as part of the §106 process, lends itself well to the THPO concept and organization. The individual occupying the position should be aware of the cultural resource laws and regulations. And the situation offers a good opportunity to establish a relationship between the consulting agency representative and the THPO. If the relationship with the THPO and the representative is productive, everyone benefits. It must be remembered, however, that the federal process is on a “government-to-government” basis and at anytime there may be a difference of opinion. If the Tribe is dissatisfied with the consultation effort, the THPO can contact the lead federal agency director and request consultation with him or her directly.

### ***Other Tribal Elders***

Elders hold a special position on any reservation and with any Tribe. This position is one of status based upon knowledge gained through age. Life's experience is an

accepted basis for acquiring information regarding cultural heritage – thus it is an age-graded system. In this system, elders are held in high esteem. Only elders can discuss particular matters or information concerning cultural practices. Locations of traditional places or items are within their knowledge alone, particularly information involving the past. Tribal representatives, managers, or THPOs often refer the agency representative to elders for specific information.

How one approaches the elders involves protocol learned through asking. How one asks particular questions, again, is a matter to be pursued by those involved in consultation. Generally, there is no such thing as a stupid question. It is stupid only if it is not asked. The process of consultation is one of learning. The elder is a teacher and one must listen to learn patiently. Working with elders can be both enlightening and informative and is an integral part of the consultation process.

# DEFINITIONS

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*(Alphabetical)*

## ***Band***

The band is a small group of individuals scattered, and loosely tied together through marriage and kinship. This loosely organized group provides for the rearing of offspring and for the transmission of knowledge from one generation to the next. Historically, it became the basis for economic life, with a division of labor by sex, being primary. The greater strength of men and vulnerability of women during pregnancy were factors influencing the economic arrangement, but there are no examples to the rule that the man is the hunter and the woman the gatherer. A young man's band typically includes his father and mother, his father's brothers and their wives, their sons and unmarried daughters, his own brothers and their wives, their children, and his unmarried sisters.

There were and are at least three types of bands: (1) The Free Nomadic Community moved about frequently and without restriction. The nature of the wandering was dependent upon the availability of food resources. This "open

territory” concept was necessary when the food supply in any area fluctuated from year to year and bands either left the area or faced starvation. (2) The Restricted Nomadic Community traveled within a restricted area they defined. They had exclusive rights to its products and defended it against trespassers. This is restricted territoriality. The third type of band, (3) the Central-Based, is identified by a central base. People in this type of band wandered in search of food sources or returned to traditional places where resources are known. The balance of the year was spent at a base thus leading a semi-sedentary life style. This base may or may not be returned to at some period of time with availability of food sources greatly contributing to this pattern. (Schwartz and Ewald, 1968) Those Tribes who are part of the consultation process, resided along the Missouri River trench grew vegetable food sources; however, they occupied other areas in the winter and wandered to take advantage of meat sources. They, like others who were nomadic, have the same ties to the land since much of the belief system evolved from the acquisition of food.

### *Clan*

Tribal society is based on kinship ties and everyone is related to everyone else, either through descent or marriage. One of the most common forms of this cohesiveness within the Tribal society is called the “clan.” A clan may be described as an association of kin who trace descent through either the father’s or mother’s line from a common ancestor. Clans have the following characteristics:

1. A name, and other identifying insignia, and dress: special ceremonies, song, paraphernalia, clan stories, etc.



2. A man must find his wife in another clan, and therefore, husbands and wives are always of different clans.
3. Members may be found in all the bands or local people comprising the Tribe.
4. Having a clan ancestor which may be an animal or “creature.” Often, clan members cannot trace their descent through bloodlines but are members of the “clan family.”
5. Clans often cooperate in performing certain functions and ceremonies.

Since the clan is not a residential group and its members may be scattered, the possession of a name and other insignia is necessary for strengthening bonds. A characteristic feature of the clan system is the ready way in which clans adopt members. The clan can incorporate more members than any other form of lineage – more members than it can actually keep track of through blood ties. The function of the clan may be to perform certain ceremonies, such as burying deceased member or engaging in games with other clans, but its underling function is that of strengthening Tribal solidarity. (Schwartz and Ewald, 1968)

### *Cultural Heritage*

Cultural heritage is defined as “all the traditional culture that has been inherited from their ancestors” in a programmatic agreement with the North Dakota Department of Transportation (NDDOT) and the Federal Highway Administration. The Tribal Consultation Committee (TCC), formed as a result of this programmatic agreement, considers all areas to be significant to those who have a relationship with the land. **We are related** better describes the Dakota perspective of cultural heritage as it

expresses a sense of identity and relationship with the environment and ecosystem. This is solidified in the practice of the Sun Dance as well as the stewardship held over specific heritage areas. Cultural heritage is the images of Tribal culture that has been left on the land or facets of a Tribe's past and present that have special significance. This refers to all resources that are inherited from previous generations, providing important links to the past, present, and future. These traditional cultural resources can be and are those tangible sites or the intangibles related to beliefs. Cultural heritage resources are nonrenewable and if destroyed, cannot be replaced. Therefore, these resources must be provided with some degree of protection from inappropriate use and development. (Curley Youpee, 2007)

### ***Cultural Landscape***

Cultural landscape is a geographic area, including both cultural and natural resources and the wildlife associated with a particular event, activity, or person or exhibit other cultural or aesthetic values. There are four types of cultural landscapes:

1. Historic site landscape is one that is significant for its association with a historic event, activity, or person.
2. Historic designed landscape is one that is significant as a design or work of art; was consciously designed and laid out either by a master gardener, landscape architect, architect, or horticulturalist to a design principal, or by an owner or other amateur according to a recognized style or tradition; has historical association with a significant person, trend or movement in

- landscape gardening or architecture, or a significant relationship to the theory or practice of landscape architecture.
3. Historic vernacular landscape is a one whose use, construction, or physical layout reflect traditions, customs, beliefs, or values; in which the expression of cultural values, social behavior, and individual actions over time is manifested in physical features and materials and their interrelationships, including patterns of spatial organization, land use, circulation, vegetation, structures, and customs and everyday lives of people.
  4. Ethnographic landscape refers to areas containing a variety of natural and cultural resources that associated people define as heritage resources. (*Technical Assistance Manual*, Rocky Mountain Field Area of the United States National Park Service, 1995)

Cultural landscapes are places of importance that require management and protection. To its credit, NDDOT recognizes the relationship that American Indians, and in particular Tribes of the region, have with the landscape. A cultural, ancestral landscape is inextricably bound to Tribal spiritual, emotional, physical and social well-being and is expressed through the ethic and practice of the Sun Dance. Tribes have strong associations with ancestral and cultural landscapes because of their contemporary associations and meanings. (Curley Youpee, 2007)

### ***Programmatic Agreement***

A programmatic agreement is typically developed for a large or complex project or class of federal undertakings that would otherwise require numerous individual request from Tribes and the Advisory Council under §106. This agreement

specifically spells out various types of common projects, and when and how each project will be managed under §106. The recent landmark 2007 Programmatic Agreement between twelve Tribes in three states and the NDDOT is an excellent example of this document and how to negotiate a sound agreement. Procedures for developing a programmatic agreement are spelled out in the Advisory Council's regulations 36 CFR §800.13. Please refer to the NDDOT Programmatic Agreement in the Best Practices section, as well as the full text in the Appendices.



**Figure 7. Sam (Ron) Littleowl and Kent Good. Photograph by Terry Wiklund, ©2002**

## *Protocol*

The definition of this term and its application is an area where people seem to differ as to concept and understanding. According to the American Heritage Dictionary, protocol means “forms of ceremony and etiquette observed by diplomats and heads of state,” or a “first copy of a treaty or other document prior to its ratification,” or a “primary draft or record of a transaction.”

From the NDDOT point of view, protocol is most closely related to the first definition where etiquette is important during the consultation process. For example, a greeting in a non-Indian setting may include a handshake. The handshake is often a sign of strength and dominance as the grasp is tight and firm. In the Indian world, it is merely a greeting with a light touch and little grasping. It is saying, “I am here, recognize my existence.” Another example is the tradition of tobacco-giving. Here the NDDOT and other agencies need the assistance of Tribes to better explain this particular tradition. Tobacco is sometimes offered as a gift which, to the elder, is to be used as a sign of respect and reverence to the spirit world, Great Spirit, or great mystery. Tobacco is offered to “set things right” before information is divulged. Whether or not particular forms of information can be discussed is another matter. As stated a number of times, the individual conducting consultation, needs to ask, “what is appropriate?” Understanding cultural tradition or etiquette is not only an integral part of consultation, it is important in a larger sense. It is the essence of education when considering the relationship between cultures. In other words, proper protocol must be learned before engaging in consultation. One must crawl before they walk and recognize there are differences between Indians and non-Indians worlds. Learning the protocol will help in establishing relationships, and also make the process of consultation more meaningful as well as effective.

A third definition of protocol may be more associated and interpreted as a draft of a document or more precisely a “Cultural Management Protocol.” The framework developed to insure Tribal participation thus meeting their needs for the understanding of heritage and protection of tangible or intangible phenomenon that allows for Tribal humanity. Mr. Youpee sees four components that contribute to the assessment of Tribal heritage values in the Cultural Management Protocol:

1. Identification of Tribes with a relationship with the area proposed for change or development and in particular, Tribes that have a relationship with a site and/or area for a proposed activity. The Tribes recognized are those that have a relationship with the site through traditions and culture. These areas may include ancestral land, water, or heritage resources. (See cultural landscape).
2. Consultation with the most appropriate Tribe associated with the area or site.
3. Engage and consultation with the most appropriate people, i.e. cultural resource directors, THPOs, elders, spiritual leaders, etc., to assess the impacts of the activity on the heritage resources. (See Contacts).
4. Incorporate Tribal recommendations into planning, including consent conditions for the planned activity. Tribes will provide recommendations for future planning, including consent conditions.
5. Consenting federal authorities should encourage the practice of notifying Tribes of the consent decision concerning all resources with which assessment has been made regarding the proposed activity.

It is noted that each of the above components may require the input of other appropriate professionals such as an archeologist, landscape architects, and engineers. However, the Tribes are the experts in making a determination on the “relationship of place” to the Tribes.

It is the responsibility of the federal agency and its cultural resource professionals to insure that the intent of the law has been met and that all concerns have been considered. It is the NDDOT’s position that avoidance and preservation of heritage or cultural resources is a high priority.



**Figure 8. Photograph by Terry Wiklund, ©2008**

## *Sovereignty*

Sovereignty is the status, dominion, rule, or power of a sovereign. Tribes have the power to make and enforce laws for their Tribe and reservation, and to establish courts and other forums for resolution of disputes.

Much of federal sovereignty law is devoted to protection of Indian Tribal self-government and the Indian land-base upon which the exercise of Tribal sovereignty is dependent. Consider the purpose of Tribal government in light of sovereignty. Is the purpose only to preserve Indian cultural and religious traditions? If so, would the need for self-government lessen as a particular Tribe becomes less unique? Or, are there other reasons to protect Tribal sovereignty? Does the preservation of legal autonomy further the goals other than preservation of existing separate traditions, such as the freedom of a group to determine its own political, as well as social, destiny? Are the various purposes for preserving Tribal sovereignty furthered by the governmental structures established under federal Indian law and the scope of Tribal powers? Is the system of Tribal government recognized by the federal law consistent with Indian objective and cultural? What people should Tribal powers properly reach – Indian, enrolled members, members of the community, or only those who have reservations? Finally, do the restrictions on the reach of Tribal authority render Tribal self-governance unworkable in practice? (Clinton, Newman, and Price, 1991)

Sovereignty manifests itself in consultation. The government-to-government relationship between Tribes and the agencies through the consultation process is apparent in cultural heritage laws and is directly related to Tribes identifying themselves as independent people. In the past, laws, statutes, regulations, and guidelines were developed without much, if any, Tribal input or consideration.



Consultation, as the intent of the National Historic Preservation Act, is an attempt to take into account the concerns of the Tribes with regard to any federal action that has the potential to impact National Register-eligible sites they value. As a sovereign, the Tribes, by law, have this right.

### ***Traditional Cultural Property (TCP)***

Technically, a traditional cultural property is one that is associated with cultural practices or beliefs of a living community that are rooted in that community's history, or are important in maintaining its culture identity. Traditional cultural properties are ethnographic resources eligible for listing in the National Register of Historic Places. (*Technical Assistance Manual*, Rocky Mountain Field Area of the United States National Park Service, 1995) If tradition and beliefs are at the heart of the place, it follows that the Tribes are the most appropriate people to assess the impact on these properties. This perspective centers on the cultural beliefs and customs that the earth is sacred. Tribes are connected to the land, environment, and everything that lives on or in the land. The land and its environment are seen as the primary source of life and are the identity of Tribes. (Curley Youpee, 2007)

### ***Tribe***

The Tribe is a higher level of organization than that of the band. Tribal organization is an evolutionary stage which follows the band level as a response to increased population density made possible by a plentiful food supply. It may have its beginning during the food-collecting era of techno-economic development. But

apparently it developed as a response to the needs of larger social group living in closer proximity to their neighbors with whom they competed.

A number of Tribes with whom we consult, will agree that territory was defined before the reservations existed, and people such as Dwellers among the Leaves, Dwellers of the Spirit Lake, Dwellers of the Fish Ground, Dwellers at the End, Little Dwellers of the End and Prairie Dwellers may suggest territoriality. (Williamson, 1902) The division may have its roots in food and places of special meaning, i.e. geology or geography. Again, heritage related to a sense of place or what transpired at the location is deeply ingrained within the heart of the people with whom we consult. The memory of this practice is still part of Tribal heritage, where communities today remember through stories. The special relationship to the land, expressed by Tribes today, may have come from the freedom to wander.

The term “Tribe” can be ambiguous and is frequently used to mean a political entity having some form of centralized government. In terms of culture resource management or heritage law “Indian Tribe” means the governing body, band, nation, or other group that is recognized as an Indian Tribe by the Secretary of the Interior and for which the United States hold land in trust or restricted status for that entity or its members. Such term also includes any native village, corporation, regional corporation, and native group, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), which is recognized as eligible for the special programs and services provided by the United State to Indians because of their status as Indians.

## *Trust Responsibility*

Trust responsibility includes property which is legally held by one entity for the benefit of another. This trusteeship refers to the federal government's obligation to protect Tribal land, resources, and existence. The doctrine is rooted in the treaties between Indian Tribes and the U.S. government where Indian land was ceded to the government, under treaties, in exchange for protection of remaining Tribal lands and rights. Under this doctrine, the U.S. government holds title to Indian land in trust for the beneficial use of Indian Tribes and their members. This includes other protection, including the protection of the Indians' sovereign rights.

It is generally accepted that the United States owes fiduciary duties to American Indians, but meaning and to what extent these duties extend is a matter of case study and law. The relationship is viewed as resembling a guardianship, as a guardian-ward relationship, or trust responsibility. The trust relationship has been the source of two opposing visions, one emphasizing federal power, and the other emphasizing federal responsibility. During the infancy of United States, the relationship served as a justification for broad assertions of power against the will of the Indian people. Considering the early treaties as territorial arrangements among sovereign Indian Tribes, the guarantee of the United States was the territorial and governmental integrity of the Tribes and their self-governing status. Tribal self-determination or autonomy will almost certainly be frustrated unless the option to continue a separate existence on a territorially secure reservation is protected, and legal remedies alone offer little protection. (Clinton, Newman, and Price, 1991)

## *Undertaking*

A federal undertaking means any project, activity, or program under the direct or indirect jurisdiction of a federal agency or licensed or assisted by a federal agency. An undertaking can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. Undertakings occurring on or off Tribal lands may require consultation since some lands may be aboriginal or ancestral. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under §106.

# HERITAGE

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Heritage or “hereditary” in the cultural sense implies something passed down or descending from ancestors. Heritage also has an implication of ownership fostered by ancestors. Traditions and belief patterns most certainly fall into the definition of heritage with knowledge of them being something generated by the ancestors and past along from one generation to another. If we recognized that traditions and beliefs are part of what is considered culture, then everyone enjoys these patterns in some form, i.e., American cultural, Tribal culture, Hawaiian culture, etc. If one considers these cultural traits essential in how people identify themselves, the matter becomes very important. It is heritage that gives us the sense of place and the understanding of self. The importance of traditions and belief can be loosely tied to “religion” and as defined or practiced; they can receive a certain amount of protection through the American Indian Religious Freedom Act. If traditions and beliefs are tied to the land, and they most often are, then their manifestations can include physical features of the landscape. Under the National Historic Preservation Act these areas are offered some protection, especially coupled with traditions and beliefs. A question must be asked, “Who possess the knowledge of these places?”

## *Origin Stories*

All Tribes have stories about where they came from and how they came to be. Origin stories may be related to the landscape or physical features within the landscape since Tribal people have a connection with the land. Furthermore, places are important when creating other traditions and beliefs other than the origin of a people. Most directly, it is who they are. Land and people are, thus, inseparable.

## *Territory v. Stewardship*

Although most Tribes view land, its use, and its sacredness as their stewardship responsibility rather than in terms of ownership, Tribes do identify territory as “theirs” or “what was once theirs.” Group strength, including traditional stories and beliefs, influenced the perception of what belonged to a particular Tribe. As was found during the development of the Programmatic Agreement, territoriality before the reservations is still ingrained in Tribal history and is considered valid. As part of the legal process, aboriginal lands (ancestral lands) are considered when consulting with a particular Tribe with regard to an activity or undertaking in a given area. (See Laws)

Preservation and protection are concerns when stewardship is discussed. A territory and its features, now possibly in the hands of farmers, developers, agencies, etc., are still important to the Tribes as this is where their ancestors lived and died. It is often where their spirit and human remains are located. Tribes see development and its impact to the land as an impact to their native territory. As the physical nature of the land changes, so does the perception of one’s humanity. When burials are removed and archeological sites excavated, ties to the land are damaged and

may be seen as the physical evidence of Tribal existence slowly being erased. (Mentz, 1999) Tribes quietly mourn these losses of place and their ties to the land. Often, all that may be left are the stories. Contemporary Tribes have seen too much destroyed and feel their stewardship is in jeopardy.

### *Stories and a Holistic View*

“We are all related,” a phrase used by Mr. Youpee, is the essence of a holistic view of who we are and how we relate to the world around us. Many Tribes have stories related to how the world was formed and how man first appeared. Stories of giant creatures and giant men are common. Stories of animal nations with human characteristics, and how they are important in understanding the relationship of man and nature, are all part of a greater mystery and an attempt to explain and understand who we are. The message that everything is related and everything is dependent upon someone or something else seems to echo in the laws passed to protect water, air, and those things that we need to survive.

Phenomenon related to the world around us is an integral part of man’s relationship to what is natural. Then man is part of the natural world and the understanding of the relationship comes from learning through teaching. Teaching is conducted by elders who have life experience and have learned from their ancestors who give nature a moral value. Teaching is important and is ongoing. Sometimes strict rules apply to teaching or discussing phenomenon. For example, among Plains Tribes, winter and early spring are times set aside for teaching and learning. It has a moral purpose (Gill, personal communication 2007). Other things are involved such as a time when the “thunder-beings” are present or are coming back. During this period

of time particular ideas, relationships, and concepts are not discussed for fear of upsetting a balance between man and the natural cycle of life.

The holistic approach to understanding the world, and man's relation to it, is viewed as cyclical with ebbs and wanes in a never ending circle. It has no beginning and no end, the process forever travels forward through time and connects to the past. The belief that the earth is sacred, fragile, and special, not unlike a mother who nurtures us, is not a foreign concept. The reminder of this is all around, if we don't take care of mother earth, she cannot take care of us.



**Figure 9. Community honoring ceremony for Ambrose and Aileen Littleghost, July 2008.  
Photograph by Rolene Schliesman, ©2008**



## *Historical Disputes*

Disputes are part of every culture's heritage and something we inherit from our ancestors. It has been but a short time since Indians and non-Indians became embroiled in turmoil. Cultural differences with lack of understanding or caring, and the lack of respect led to death on both sides. Ignorance breeds fear and fear breeds hate. This fact has served to create a chasm that has kept people apart. The lack of trust, because of lies and broken promises propagated in the past, serve to stifle cooperation and accomplishment. Understanding and respect can overcome current and inherited disputes.

In the past, Tribes also had disputes with one another. Food resources, and particular territories which held them, are important to identity. These underlying disputes make consultation challenging and need to be recognized.

## *European Influences*

A square world and linear thinking comes immediately to mind when considering the influence Europeans have had on indigenous populations. It is not without frustration that Tribes are forced into a thinking pattern that goes against an inherited view. In a book titled, *Neither Wolf nor Dog* by Kent Nerburn (1994), the main character Dan explains this influence very eloquently:

When you (Nerburn) came among us, you couldn't understand our way. You wanted to find the person at the top. You wanted to find the fences that bound us in – how far our land went, how far our government went. Your

world was made of cages [squares] and you thought ours was too. Even though you needed them to define us.

Our people noticed this from beginning. They said that the white man lived in a world of cages, and that if we didn't look out, they would make us live in a world of cages too.

So we started noticing. Everything looked like cages. Your clothes fit like cages. Your houses looked like cages. You put fences around your yards so they looked like cages. Everything was a cage. You turned the land into cages. Little squares.

Then after you had all these cages you made a government to protect the cages. And that government was all cages. All was inside your cage. Then you wondered why you weren't happy and didn't feel free. You made cages, then you wondered why you didn't feel free.

We Indians never thought that way. Everyone was free. We didn't make cages of laws and land. We believed in honor. To us the white man looked like a blind man walking. He knew he was on the wrong path when he bumped into the edge of one of the cages. Our guide was inside, not outside. It was honor. It was more important for us to know what was right than to know what was wrong.

The world your people [Europeans] brought saw everything in terms of freedom. We have always had our freedom so you had nothing of value to give us. All you could do is take it away and give it back to us in the form of cages.” -- Dan, a Dakota.

When we look at the non-Indian world, it is one of cages or squares where things fit “in their place.” In a world where everything is part of a whole and circular in existence, squares tend to be confining and lack freedom. Circular views seldom fit into square, governmental units.



Figure 10. Photograph by Terry Wiklund, ©2008

## ***Tribal Government - Then and Now***

It is difficult to describe all the traditional forms of Tribal government because of the variety of Indian social organizations. Many Tribes were loose confederations of hunting people, hunting/gathering people who spoke the same language and ranged over a large territory. The Sioux, or the Dakota, once counted their territory as ranging from an area near the Wisconsin Dells, to the Big Horn Mountains of Montana and Wyoming a distance of almost 1,300 miles. Other peoples residing along the northwest coast were scattered independently along the many rivers of the regions and had commercial and trading contact but little political organization above the village or longhouse level. (Deloria Jr. and Lytle, 1983)

A good example of a traditional government comes from a work by Herald Driver in his ethnographic work with the Cheyenne, *Indian of North America*, 1975.

The Cheyenne were governed by a civil council of forty-four chiefs, divided into five priestly chiefs, two doormen, and thirty-seven others. The priestly chiefs, who outranked the others, conducted Tribal rituals, including the chief-renewal ritual performed every year when the group assembled. One of the five priestly chiefs presided at the meetings of the council of forty-four chiefs and manipulated the sacred medicines in the chief's bundle; he was called the Prophet, and represented the mythical cultural hero. The doormen were sometimes called upon to sum up the essence of the discussion and to render a decision for the group. When one of the five priestly chiefs retired, he chose his successor from the remaining thirty-nine members of the group; if he died so suddenly that he could not choose his successor, the surviving four priestly chiefs chose one for him. A priestly chief, on retirement, stepped

down only to the rank of the undifferentiated thirty-seven chiefs; he did not have to leave the council. If an undifferentiated chief died without choosing his successor, the entire council chose one for him. Each ordinary chief serve only ten years, which explains why the rules of succession are so complicated. New chiefs were chosen on the basis of merit, and it was considered bad taste for a man to choose his own son. The personal qualities which constituted merit were control of temper and generosity.

None of the forty-four chiefs ever exerted any force to carry out the will of the civil council. Force was applied by the members of one of the six men's societies which the council selected on two important occasions: moving the camp, and the Tribal buffalo hunt. Moving camp was a military venture because there was always some danger of encountering an enemy. The Tribal buffalo hunt was the most important occasion of the year, and teamwork was necessary to kill the maximum number of buffalo.

The two headmen and the two doormen of each of the men's societies formed a council of twenty-four war chiefs. A man could not be both a civil chief and a war chief. If a war chief was chosen as civil chief, he must first resign his position of war chief before accepting that of civil chief. The council of war chiefs chose the war leader for each military raid; but once the campaign ended, his authority terminated.

Wooden Leg (Marguis 1967) in Chapter III, *Cheyenne Ways of Life*, indicates the warrior societies were the foundation of tribal government among the Cheyennes.

That is, the members of the warrior societies elected the chiefs who governed the people. Every ten years the whole tribe would get together for the special purpose of choosing forty big chiefs. These forty then would select four past chiefs, or “old men” chiefs, to serve as supreme advisers to them and to the Tribe. There were not any hereditary chiefs among the Cheyennes.

The Elk warriors, the Crazy Dog warriors, and the Fox warriors were the ruling societies of the Northern Cheyennes. Other like organizations had been in existence before my time [Wooden Leg], but during all of the period of my [Wooden Leg] boyhood and manhood those three were the only active ones in our northern branch of the double tribe. Each warrior society had a leading war chief and nine little war chiefs. So, there were many men who might claim the title of chief. All together there were seventy-four such officials, counting both the tribal rulers and the warrior society rulers. There were four “old men” tribal chiefs, forty tribal big chiefs, three leading warrior chiefs, and twenty-seven little warrior chiefs. Ordinarily they were ranked or held in respect in this order, the old men chiefs first, the little warrior chiefs last.

Modern or contemporary Tribal government can be traced to the Franklin D. Roosevelt and his New Deal Administration. The federal government finally realized that the Allotment Period and Forced Assimilation (1871 – 1934) was not working, and it resulted in the loss of much of the Indian land estate. It was a failure, in that it impoverished people. The subsequent law, the Indian Reorganization Act of 1934, was a change in policy, from a conscious effort to obliterate Tribal forms of

government and customs, to that of self-government and providing it with sufficient authority and powers to represent the reservation population in a variety of political and economic ventures.



**Figure 11. Photograph by Terry Wiklund, ©2008**

The Act established a special fund from which the Secretary of the Interior could make loans to Tribally chartered corporations for economic development purposes. Tribal members were extended the opportunity to vote on whether or not to accept the benefits and the responsibilities of the Act. Indians on every reservation could vote on this opportunity. There were a number of cases where more than one Tribe lived on a reservation. This is where there designations of “consolidated,”

“confederated,” or “affiliated” were created. Out of this we have the “Three Affiliated Tribes (Mandan, Hidatsa, and Arikara); the Confederated Salish and Kootenai, and the Confederated Colville. (Deloria Jr., and Lytle, 1983)

The most common form of a “Tribal executive branch” is the election of a chairperson and other elected officials. The Tribal council is also an elected body with individual representatives from districts. These divisions or districts can be geographic locations with clans or extended family in residence. People on a reservation often identify themselves with a particular district, i.e. Crow Hill, Saint Michael, or Cannonball, etc.



# PROTOCOL ETIQUETTE\_\_\_\_\_



## *Time*

There is a term used in the non-Indian country called “Indian Time” to explain why Tribal people are not punctual. “Indian Time” and how it is perceived and managed has been a topic of discussion by government officials, private companies, and anthropologists. Again, as with so many preconceived ideas, the concept of time is related to beliefs or perception. A better idea of the Tribal concept of time is when everything is in balance, or “when the time is right, something will take place.” It has little to do with 24 hours in the day, seven days a week, or imposed deadlines. In the non-Indian world, time has been shortened to merely 24/7 or 40 hrs, a reflection on a work ethic or view that one should fill each hour with work or productivity. In the Indian world, time is linked to the cycles of nature, the land, and its environment. In other words, “living the heart beat.” For an individual new to a reservation, it soon becomes apparent that time is feeling-based, rather than divided into increments. In terms of traditional view, it is better explained as something to be used to accomplish good deeds and to enjoy. Time is looked upon as a gift spent to help family members or to keep things in harmony. Time is cyclical, dependent upon the sun, moon, and the earth.

In modern life on a reservation, people are forced to accept the increments of 24 hours, the 8 hour work day, and the work week of 5 or 6 days. The structured concept of time runs headlong into Tribal views and concepts of time. For example, grandmother needs to go to the grocery store or has a doctor's appointment. In the non-Indian world, often the first thought is how much time will it take and how will it fit into my work schedule. In the Tribal world, family is paramount. One takes grandmother to wherever she needs to go. It is an honor to spend the time with grandmother, the time spent is enjoyed, and it is the right thing to do, thus everything remains in balance and harmony.

When a person goes to a reservation, time slows down and the "clock must not be pushed." One must be ready to spend more time than is anticipated. It is essential that this is looked upon as beneficial. When more time is spent, more people are met and more is learned. An elder once asked, "If you go to all the trouble of setting up a meeting, why would you quit before everything was decided?" **Time is viewed as "what it takes to reach a decision."**

### *Dialogue*

A conversation between two or more people can be a dialogue or it can be an exchange of ideas, thoughts, or opinions. Dialogue is applied in order to explore the unspoken assumptions in ourselves and in others. In "opening up" through dialogue we build mutual trust and respect. Time is important in creating dialogue; remember this is an exercise of teaching and learning. Dialogue is a way of sharing hidden

assumptions in yourself and others. It also serves to break down stereotypes and facilitate more productive relationships.

When involved in dialogue with native people a good fact to remember is that silence during the conversation is not necessarily related to “nothing more to say.” Silence is a teacher, as listening with empathy and understanding shows caring. It is a time to reflect on what is being said. Long pauses are not unusual. Indian people have the longest period of time between the last discussion and when the conversation continues. The non-Indian person, especially those of the non-Indian world, becomes nervous when there is silence during a dialogue. Be patient and understand that this is a time to reflect on what has been said. The non-Indian person often interrupts a conversation, which may be their normal way of communicating, but it can be perceived as rude. The perceptions of time influences the way dialogue develops. To a person new to consulting or conversing with Indian people, interruption is poor etiquette. One needs to allow the other to finish what he or she is saying. Again, following these rules of dialogue; it is a sign that you are interested, that you value what is being said, and that you have respect for the individual who is speaking.

## *Value Conflicts*

American Indian Culture	Anglo-American Culture
<b>Speech</b> Slower, softer with periods of silence for contemplation and reflection.	<b>Speech</b> Louder, faster with interruptions. Periods of silence is cause for uneasiness.
<b>Conversation</b> Tribal people interject less. Give the speaker chance to relate views. Little verbal encouragement. Nodding of head as to indicate "I hear you." Non-verbal communication valued and prized.	<b>Conversation</b> Anglo-Americans tend to interrupt to make their point. Time is a factor. Much verbal encouragement. Tend to reinforce views verbally. Command of the English language valued a sign of education.
<b>Response</b> Delayed response to auditory messages. Allow time to formulate thoughts before commenting.	<b>Response</b> Immediate response, often without thought or substance. Want to be heard.

(The American Indian: Yesterday, Today & Tomorrow, 2003)

## *Humor*

Humor may be one of the most difficult concepts to understand, but probably one of the most important tools in establishing relationships. Definitions range from the quality of being amused or comical, to complying with the wishes or ideas, or to indulge. It often is related to the adaptation or accommodation to a situation.

(American Heritage Dictionary)

A “sense of humor” can differ between cultures, but tends to be personalized in a one on one situation. Often called an “ice-breaker,” humor is often used to initiate conversation. When establishing a relationship and meeting for the first time, it is often useful to turn the situation toward oneself, not exactly to make fun of oneself, but to emphasize the fact the one is vulnerable, but not concerned with being so. It is a way of making one strong. As example, a situation centered around a sensitive subject matter can create uneasiness when discussing it. Humor, with regard to a similar situation that others have experienced, can serve to desensitize the topic and focus it on a person who has committed a *faux pas* with regard to protocol or etiquette. Thus laughing at one’s self or desensitizing the situation helps others to see the humor in the situation and to show that one is strong and can “take it.”

### ***Respect and a Trusting Relationship***

Respect is a difficult word to define. The American Heritage Dictionary states that respect “is the state of being regarded with honor and esteem and a willingness to show consideration or appreciation.” Concepts of respect and trust go hand-in-hand. Without respect there is little chance that a trusting relationship will be developed. Many concepts discussed throughout this manual are characteristics of Tribal people and must be respected without judgment. During dialogue and consultation, questions may arise with regard to the relationship Tribal people have with spiritually, the land, and/or ancestors. It is **not imperative** that each question be answered at that time. Listen to the conversation carefully because information may be divulged through story or example.



Figure 12. Photograph by Terry Wiklund, ©2008

### *Confidentiality*

Another characteristic of non-Indian conversation or thought is the “need to know” and the “need to know – now.” Some information shared during conversation or consultation may be for “one’s own ears only” and divulging it to others is disrespectful and can be seen as a breach of trust among Tribal members. Many times this information comes from elders and although it may be important to the planning of a particular project, permission to use the information must be sought. If and how the information is recorded should be discussed with the elder, THPO, or other Tribal advisors. If the information is written down and is still confidential, areas of legal protection should be explored. (See Best Practices, Mr. Sam Littleowl and

Highway #2 project.) Mr. Littleowl (now deceased) shared information regarding the interpretation of rock features along the right-of-way. His wishes were that the information be held confidentially by the agencies. The Federal Highway Administration agreed to comply with his wishes and does not share this information.

### ***Full Disclosure***

Full disclosure refers to conveying all information and options for and about a project. When discussing particular highway projects that are considered federal undertakings, full disclosure of all the options involving how the project is to be constructed, is essential in the consultation process. Sometimes certain information is withheld by the federal agency, possibly for political reasons, only to be discovered later by Tribes. This shows a lack of respect and trust on the part of the agency. The Tribe is considered a “partner” in the planning process where expenditure of federal funds is on highway projects. The Tribe need to be aware and given all available information so as to insure the best possible product. It is very important to explore how and in what form the Tribe, THPO, or cultural resource manager, wants the information transmitted. Different Tribes have different perceptions of necessary information and how it is transmitted, i.e. colored maps, aerial photographs, concept reports, face-to-face, etc. Hesitation in providing information can create an environment of suspicion and mistrust, so the willingness to share all information regarding a project is paramount.

## *Gender Specific Awareness*

Tribal gender-specific etiquette and perimeters may play a role in consultation. The agency representative must be aware that there may be certain cultural taboos regarding gender. In some cases, information might not be divulged based upon the gender of the agency representative. If a female agency representative is consulting with a male, particular information may not be divulged. Good advice for the female representative is to talk with other female elders. If the reverse is true, where a male representative is consulting with a female Tribal official, the process follows conversely; find and talk with a male elder. This process may require additional patience and time on the part of the agency representative.

However, stereotypes created in the non-Indian world may not apply in the Tribal world. Many of contemporary Tribal leaders are women. Social organization of horticultural semi-sedentary Tribes, considered the wife as the owner of the house and the garden.

Often, terms identifying the relationship, such as sister, cousin, or grandmother, are used rather than names. Strict rules may apply to gender relationship, i.e., a man should not be in a room alone with his brother's wife. This man does not refer to her by name, but as my "sister" or sister-in-law. There are terms for this in native languages, but it is not necessary to discuss them here. If the man wants to talk with her, it is usually through another relative, and the conversation continues as if she was not present. These rules alleviate any possibility of inappropriate activity. Women are often times discouraged from visiting sacred or important places such as cultural resource sites.



Dialogue between genders hones our skills so as to overcome misunderstanding, break down stereotypes, and improve communication between men and women. Communication in the form of dialogue is often used to uncover personal and/or world view common to people of different sexes. (Curley Youpee, 2007)



**Figure 13. Photograph by Terry Wiklund, ©2008**

## *Generational Responsibilities*

Responsibility comes with age. We all have heard this quote and the same is true with Tribal people and everyone that lives long enough. In societies that are “age graded,” particular rules apply. However, unlike some societies, Tribal elders are protected, respected, and revered. Generations ago, these people had no written language, and elders held the information. More importantly, they held those things by which the Tribe identified itself - knowledge.

In contemporary Indian society, the same still holds true. Elders are still the “encyclopedias” for their people and they are cared for in a number of ways. Information, teachings, advice, rights to rituals, and knowledge of ceremonies is valued. Within a traditional age-graded society, only elders are allowed to perform certain rites or ceremonies, and/or grant permission to earn, purchase, or use a rite. However, not all elders have this status. Contemporary traditional elders acquired the responsibility and knowledge when their elders considered it appropriate.

Information vital to the Tribe’s identity and well being is protected by the elders. Elder status typically comes when an individual is 50-60 years old. To acquire knowledge and permissions, gifts are most often required. Most often a younger person requesting the knowledge, offers gifts to the elder with the responsibility and right to grant permission. Responsibility of how traditional knowledge is used, and at what age the younger person receives it, resides with the elders. When a younger person receives particular knowledge, they also become responsible for that knowledge as to how and when it is passed on.

Those involved in the consultation should be aware of the concept of age grading as it can directly influence the kinds of information that can be discussed. The older the individual, the easier consulting may be. Typically, the older the agency representative is, the more opportunity there is to understand.

### ***Relationship Assessment***

A successful, meaningful, and beneficial relationship is when:

All Tribes and agencies agree that consultation has been positive, and that the identification of heritage values and places has been completed and their importance was taken into consideration.

All Tribes and agencies see a benefit to the process, in that the experience has been positive and all agree the project was better because of all the input.

The project was successful and meets the objective of “success breeding success” and the initial investment in consultation was meaningful.

All agree that consultation has been a success even when one or more parties are not pleased with the result.

An agency representative is asked back to continue conversations, invited to Tribal events or ceremonies not often attended by non-Indians, given access to important places or controlled areas, and adopted by a Tribe or society.

### ***Development and Follow Up***

The NDDOT, FHWA and Tribes have followed an objective of creating a committee for the review of highway projects for the benefit of all signatories to the recently signed Programmatic Agreement. The Programmatic Agreement is a good example of cooperation and development as a result of consultation. Part of the Agreement is continued cross-cultural education through sensitivity training. It takes effort to identify the objective and follow-through. Follow-through is important in keeping relationships viable because Tribal people have heard many hollow words lacking commitment. It is the intention of the NDDOT and the cultural resource staff to carry out agreed-upon obligations. This manual is part of that obligation. As a teaching aid, it is designed so that those individuals coming after us and accepting the responsibility have the information and tools to proceed with the agreement's carefully crafted intent.

From the tribal perspective, they want to consult with those individuals who can make a difference. Consultation with a "pencil-pusher" is a waste of time and effort. The Tribes want the "movers and shakers" to be directly involved. If those involved are representing the lead federal agency and can make decisions then it is acceptable. Oftentimes, the cultural resource managers attempt consultation but the Tribes see them as merely listeners who have little or no stake in the situation and cannot make things happen.

## *Conflict Resolution*

Conflicts will arise, particularly when we are working with emotionally charged issues. How to resolve conflicts in terms of different worlds is and will always be a challenge.

Mistakes made need an apology. In Tribal society, once the apology is made there is no mention of it again. The apology does two things; it heals the harm to you as well as to the other person. To bring up the subject again violates a rule of conflict resolution.

One culture makes decisions based on what is perceived as right and proper, while the other gathers all the information possible before making a decision. Some people are emotionally driven with their considerations coming from the heart, while the others collect or acquire information through a perceived “scientific method,” and make decisions based upon economics and politics.

Conflict resolution, with regard to the consultation process, hinges on coming to consensus when impacts from highway reconstruction, borrow areas, or widening projects are likely. How and why the area may be impacted; why, from the NDDOT perspective, no other alternative can be found; and how the Tribe’s concerns are to be addressed, is probably the greatest challenge. Will an apology serve any use? It might and may well be a point to start with, “I am sorry for disturbing what the Tribe sees as important. We have looked at all the alternatives, considering damage, costs and feasibility, and find no other way to complete the project.” From the tribal perspective, if one destroys something, things are out of balance. One must correct

the situation and replace what is destroyed, thus putting things back in balance. One may ask, “Is apologizing appropriate and does it result in a balance?” Once a person apologizes it is not mentioned again, but a person may have to prove themselves over again. Most importantly, never give up.



**Figure 14. Photograph by Terry Wiklund, ©2008.**

Conflict resolution can be addressed by the Advisory Council on Historic Preservation. They would be advised and all documents forwarded for their review. The Advisory Council can either:

1. Provide the agency and Tribe with recommendations, which will be taken into account in reaching a final decision regarding the conflict, or
2. Notify all parties that it will comment pursuant to 36 CFR 800.6 (c)(2) with referenced to the subject of the dispute.

The Programmatic Agreement with Tribes, NDDOT, and FHWA addresses one form of dispute resolution in stating: “Should any signatory object at a later date to the implementation of this Agreement in whole or in part, the objecting party will consult with the Committee to resolve the objection. If the Committee is unable to satisfactorily resolve the issue, and the issue involves resolution of the adverse effect of a NDDOT project on a site eligible for inclusion on the National Register of Historic Places, the administrative process defined in 36CFR 800 will be followed.”

The mission statement of the Federal Highway Administration, the North Dakota Department of Transportation, and the Tribe’s Programmatic Agreement allows for resolution of dispute or conflict as it states: “Avoidance of effect to significant cultural resources is important to the FHWA, the NDDOT, and the Tribes. However, avoidance is not always preservation. As practical and possible, the FHWA and the NDDOT will assist the Tribes in their further goal of preservation of resources of value to them. Avoidance will always be the first option studied. When a resource cannot be avoided, every attempt will be made to minimize the impacts and to mitigate the loss of information and value identified by all parties (See Best Practices section within this report). To carry out this mission, mutual education regarding what might be acceptable, respectful, and feasible is necessary. The FHWA, the NDDOT, and the consulting Tribes will invest time, provide opportunities, provide

personnel, and seek funding for cross-cultural education pursuant to Tribal and transportation cultural resource issues.”



**Figure 15. Photograph by Terry Wiklund, ©2008**



# EDUCATION

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“To carry out this mission, mutual education regarding what might be acceptable, respectful, and feasible is necessary,” states the Programmatic Agreement. Again the Agreement states that “The FHWA, NDDOT and the consulting Tribes will invest time, provide opportunities, provide personnel, and seek funding for cross-cultural education pursuant to Tribal and transportation cultural resource issues. Opportunities will be sought to provide cross-training to FHWA, NDDOT, and Tribal personnel. The NDDOT will include their cultural resource contactors in this training, when necessary and practical. These training opportunities will focus on cultural awareness, language and communication skills, North Dakota transportation issues, and cultural resource laws and regulations. This training and education will have as its goal the improvement of relationships, a greater understanding of cultures and perspectives, and the building of trust.”

## *Cross-Cultural Comparison*

For a cross-cultural comparison, each culture needs to be separated in distance so that those cultural traits studied are pure. In the case of Tribes and non-Tribal cultures many traits have been obliterated by the dominance of the non-Tribal culture. Pressure of assimilation has resulted in the industrialization of the Indian world. However, a great part of the belief system and traditions are still practiced and are alive and vibrant on many of the reservations today. Some reservations are more “traditional” than others. The study of some traits such as marriage patterns, kinship systems, residence, or lines of descent may not be applicable. However, areas of etiquette, the holistic view, language, time, etc., is in need of comparison and understanding. The following chart offers examples of specific difference between Indians and non-Indians:

### *Two Cultures = Different Values*

American Indian Culture	Anglo-American Culture
<b>Speech</b> Slower, softer with periods of silence for contemplation and reflection.	<b>Speech</b> Louder, faster with interruptions. Periods of silence are cause for uneasiness.
<b>Eye Contact</b> This is avoided. Downward position of eyes and head shows lack of aggression and respect.	<b>Eye Contact</b> This is “taught” as indication of honesty, self confidence, and self esteem.
<b>Nature</b> Tribal people tend to seek harmony with nature. Mother Earth is sacred.	<b>Nature</b> Attempt to control nature. Exploitation of natural resources.

<p><b>Response</b> Delayed response to auditory messages. Allow time to formulate thoughts before commenting.</p>	<p><b>Response</b> Immediate response often without thought or substance. Want to be heard.</p>
<p><b>Cooperation</b> Tribal perspective. Essential to insure well being of the group.</p>	<p><b>Competition</b> Survival of the fittest. To gain position of authority.</p>
<p><b>Family</b> Tribe, clan, and nuclear family most important.</p>	<p><b>Family</b> Personal goals, career, or job often takes precedence over family.</p>
<p><b>Sense of Self</b> The control of the individual is emphasized. Control of others avoided. Patience, allow others to go first.</p>	<p><b>Sense of Self</b> Less control of the individual with control of others emphasized. Aggressive and competitive, first is important.</p>
<p><b>Material Items</b> Sharing and giving away practiced. Concentration on needs rather than wants.</p>	<p><b>Material Items</b> Emphasis on wants. Accumulation of material a sign of success and affluence.</p>
<p><b>Knowledge</b> Some information considered private. Respect the privacy.</p>	<p><b>Knowledge</b> The need to know everything. Lack of respect for what is not known.</p>
<p><b>Participation</b> Only act according to ability.</p>	<p><b>Participation</b> Position most important, learned through trial and error.</p>

## *Other Cultural Values*

American Indian Culture	Anglo-American Culture
<p><b>Cooperation</b> Cooperation highly valued. There is security in being a member of the group and in not being singled out and placed in a position above or below others.</p>	<p><b>Cooperation</b> This value is often at odds with the competitive spirit of in the Anglo-American society.</p>
<p><b>Group Harmony</b> Emphasis is placed on the group or the collective and the importance of maintaining harmony within the group.</p>	<p><b>Emphasis on the Individual</b> The individual is emphasized as well as task oriented. This value is often at variance with the concept of rugged individualism.</p>
<p><b>Modesty</b> The value of modesty is emphasized. Boasting and loud behavior that attracts attention to oneself are discouraged.</p>	<p><b>Modesty</b> Boasting of one's accomplishments is accepted. Non-Indians are generally unaware of special achievements of Indian co-workers.</p>
<p><b>Careful Listening</b> Being a good listener is highly valued. Because Indians have developed listening skills, they have simultaneously developed a keen sense of perception that quickly detects insincerity.</p>	<p><b>Listening</b> Speaking is often given importance. Expressing one's self is looked upon as a great asset especially within companies or agencies. Non-Indians often want to talk rather than listen.</p>
<p><b>Veneration of Age</b> Wisdom comes with age and experience. The elders are often sought out for advice and are looked upon by youth with reverence.</p>	<p><b>Age</b> The Anglo-American view of age is at odds with the American Indian view. Anglo-American place emphasis on youthfulness and physical beauty rather than experience.</p>

<p><b>Spirituality</b>  Indian people hold to a contemplative rather than a utilitarian philosophy. Religious aspects are introduced into all areas of one's life.</p>	<p><b>Spirituality</b>  Non-Indians frequently misunderstand the Indian value on religions as an integral part of each day. Avoidance of religion as an integral part of a person's life ignored and aspect of life considered essential and natural to Indians.</p>
<p><b>Family</b>  The importance and value place on extended family cannot be underestimated. Indian cultures consider many more individuals to be relatives than do non-Indians</p>	<p><b>Family</b>  Non-Indian culture often fails to understand the validity of the extended family and its support system.</p>
<p><b>Caution in Meeting Others</b>  Indians use caution in personal encounters and usually are not open with others. Some of the personal caution stems from a hesitancy about how they will be accepted by others. Because of past experiences Indians may be uncomfortable and have difficulty communicating their subjective reactions to situations.</p>	<p><b>Meeting Others</b>  Anglo-Americans ideally appear open and friendly although this may not be their true feelings. While non-Indian may see Indians as aloof and reserved, Indians may see European-Americans as superficial and hence untrustworthy.</p>

(The American Indian: Yesterday, Today & Tomorrow, 2003)

## *Language Difference*

Few people on reservations speak an indigenous language or a native language. It is estimated that 130 to 175 native dialects are being spoken at this time, but as many as 155 are approaching extinction. Some 125 will disappear by 2025 (Krause 1995). English is spoken by younger Tribal people as a first language. Those that speak a language other than English, are most often elders and/or those practicing Tribal or traditional ways. Few individuals under the age of 50 speak fluently. When having a dialogue in English with elders who converse in their own particular language a person using English often feels they are adequately expressing ideas and thoughts. This often is not the case. And it is difficult to know if the Tribal person understands what is being said. It may be important to employ visual aids as pictures, maps or drawings add greatly to a conversation. Thus a person should be cognizant of language differences regarding communication. And remember that it's not improper to ask if everyone understands what is being explained. To do so shows respect for those listening.

## *Cultural Sensitivity*

Having empathy for cultures is a way of showing sensitivity. The continued destruction of cultural features and values that are important to Tribes has a draining effect. This cumulative effect is often voiced when communicating with Tribal people, especially those who experienced the boarding school era or forced relocation. Anyone who has heard the expression of sadness can understand that history has not been fair or kind to Tribal people. Surprisingly, they have maintained their sense of humor, honor, and survivability. Lessons can be learned from their resilience.

### ***Feelings vs. Scientific Method***

One culture makes decisions based on what is perceived as right and proper, while the other gathers all the information possible before making a decision. Some people are feeling and emotionally driven with considerations coming from the heart, while the other collects or acquires information, through a perceived “scientific method,” and makes decisions based upon economics and politics. When these two belief systems come into conflict, it is the feeling culture that usually loses. Where one culture may be economically poor, it seems they are spiritually rich, while the other is the opposite. One can argue that technology and the industrial nation we live in, would not be able to offer what it does without the scientific method. The Tribes, on the other hand, can teach us how to feel and understand “heart.” The non-Indian community cannot feel what Tribes feel, however, it can be argued that the non-Indian community is also caring and feeling but has differences in what influences decisions. Contemporary societies, be it Indian or non-Indian, often times make decisions based upon economics and power. However, without consideration and feeling for others, little is left of humanity.

### ***View of Nature and Environment***

Most Tribes have a view of land and environment, in its natural state, as one of being sacred. The view of nature and environment can differ in meaning. Nature or what is natural is all part of “Mother Earth” and everything remains in harmony when it’s respected. Environment, in this instance, includes those things surrounding us such as physical landscape features, plants, and animals. Stewardship implies preservation and protection that completes the view of nature. The Tribes experience a perception of ownership when nature and the land are in the hands of farmers, developers, agencies, etc. Nature, the land, and its environment, are still

important as this is where Tribal ancestors lived and died. It is often where their spirit and remains are located. Tribes often see development and its impact to the land as an impact to their native territory. As the physical nature of the land changes, so does the perception of one's humanity.

### ***Privacy vs. Need to Know***

Tribal people respect privacy and accept those things that are a mystery. The non-Indian community, especially anthropologists, seem to need to know everything or as much as they can find out. This is looked upon as prying into areas where rules or etiquette does not allow the divulging of particular information to non-Indians. The respect for this should be shown by the acceptance of this practice. Only information pertinent to the project needs to be considered. However, it is difficult for anthropologist or others involved in the consultation process to learn or educate themselves if questions cannot be asked. If no disrespect or rudeness was intended, Tribal people need to be tolerant of those who may be ignorant of Tribal culture and practices. It is hoped that the acceptance of privacy will be respected.

### ***Cooperation and Competition***

As a result of two different status acquisition systems these two concepts may never be resolved. Tribes in the northwestern Plains practice the "give away" where one that acquires more than he needs, is expected to share with members of his group that may not be so fortunate. A person is entitled to a share and the non-Indian's concept of welfare is not comprehensible. The dissemination of goods was developed in the past to insure that all members of the Tribe were taken care of as a



necessity for the health of group. Food, of course, was paramount for the survival of one's family and the Tribe as a whole, and needed to be distributed equally. Deeds, more than power or position, were important with regard to status. If a person provided for others as a good hunter, and treated elders with respect and made sure of their welfare, he was looked upon as someone to emulate.



**Figure 16. Photograph by Terry Wiklund, ©2008**

In the non-Indian world, status is acquired by accession or possession. This system is greed-based and special systems of welfare had to be constructed so those less fortunate would have food and shelter. Social Security helps the elderly in non-Indian society, but it is all by law rather than by caring practice.

### ***Family /Group vs. Personal Goals***

In keeping with the previous discussion of competition and competition, similarly the family takes precedent over most concerns. Furthermore, after the family, the group, or Tribe's health and well being are of utmost concern. If the Tribe does not survive and/or thrive, those comprising it will surely deteriorate physically and mentally. In Tribal culture everyone is related and everyone depends on everyone else.

# BEST PRACTICES

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This section identifies and discusses North Dakota Department of Transportation projects that were positive with regard to consultation and completion.

## *Programmatic Agreement*

The following is a discussion of a Programmatic Agreement between the NDDOT and its eleven Tribal partners: Turtle Mountain Band of Chippewa Indians; Mandan, Hidatsa, and Arikara Nation; Spirit Lake Dakotah Nation; Standing Rock Sioux Tribe (in North Dakota); Sisseton-Wahpeton Oyate (in North Dakota and South Dakota); Northern Cheyenne Tribe; Crow Tribe; Fort Peck Assiniboine and Sioux Tribes (in Montana); and Lower Sioux Indian Community (in Minnesota).

### *Pre-Programmatic Agreement*

Consultation began with Tribes in North Dakota on behalf of the North Dakota Department of Transportation soon after the NHPA was amended in 1992. Face-to-face meetings were organized with five reservations representing seven Tribes. Meetings were primarily conducted on the reservations. Individuals contacted were those given the responsibility for cultural resources by the Tribal government. Few Tribal Historic Preservation Offices existed at the time, consequently Tribal Chairman were contacted to learn with whom the agency representative should consult. Often times the person was a traditional practitioner, elder, or spiritual leader. Sometimes cultural resource programs or cultural resource management offices did exist and were contacted. First contact concentrated on establishing relationships. Discussions centered on the obligation and responsibilities of agencies under the NHPA with regard to Federal undertakings (FHWA and NDDOT) having the potential to impact cultural resources.

As relationships developed, NDDOT projects, having the potential to impact cultural resources, were presented to each Tribe individually. Maps and concept reports were supplied to the Tribes for their review and a follow-up meeting was established to discuss the project. At least a month was allowed for review. During meetings discussions often times included information about other Tribes concerns with regard to aboriginal territory(s). Suggestions from Tribes residing in North Dakota lead to the inclusion of three additional reservations located in eastern Montana. Eventually, the Lower Sioux Community (Minnesota) was added to the group as a signatory to the Programmatic Agreement.

As time progressed and relationships matured, it became apparent that Tribes were willing to meet as a group and form a Tribal Cultural Committee. This committee first met in Bismarck, North Dakota, in 2004. This committee, established as their goal, the formulation of a Programmatic Agreement, which addresses the responsibilities and obligations of the FHWA and the NDDOT with regard to federal law pertaining to cultural resources. The agreement, between FHWA, NDDOT and the Tribes listed above, was signed at a ceremony in Bismarck on November 28, 2006. (See the text of the document in the Appendices.)



**Figure 17. Photograph by Terry Wiklund, ©2008**

## *Post-Programmatic Agreement*

Can one say that an agreement that outlines a “program to be undertaken” by those that have, by their signature, agreed to dedicate themselves to its terms, be called a success? The agreement has been referred to as “the first of its kind.” These are strange words for something so obvious but good to hear, nevertheless. This is an obligation, a chance to move forward by recognizing a proper path of consensus, not only regarding treatment of cultural resources, but the treatment of people.

The programmatic agreement’s signatories are obligated to fulfill the terms and tasks. Cultural resource managers, staff, and spiritual and cultural advisors, sat together twice for two days each and worked through all the terms. By listening and respecting one another, we came to a greater understanding and celebrated a signing. The NDDOT did not approach the Tribes with preconceived notions. Instead they came to ask assistance in working toward a cultural resources agreement that all had a hand in crafting. Each person at the table was dedicated to help create something meaningful. Those individuals representing the Tribes (listed previously) voiced their concerns and, working through a complex system, made themselves heard. The NDDOT listened and incorporated their thoughtful ideas, concerns, and requirements.

A copy of the Programmatic Agreement is in the Appendices of this document. Primary issues in the agreement are paraphrased as follows:

1. Recognition that transportation projects have in the past had, and have potential to in the future to have, an adverse effect upon cultural resources that are important to the Tribes.

2. Recognition that these resources are a connection to the Tribes' past, and important to their cultural identity, heritage, sense of self, and future well-being.
3. Recognize that the FHWA and NDDOT are dedicated to working with the Tribes to avoid effect to sacred site, archeological site, traditional natural resources, and traditional landscapes of value to the Tribes.
4. Recognized that we all aspire to engage in meaningful, long-term planning for the appropriate consideration of cultural resources important to the Tribes.
5. Agree that the NDDOT and Committee will pursue training opportunities that focus on cultural awareness, language and communication skills, North Dakota transportation issues, and cultural resource laws and regulations to improve relationships, pursue a greater understanding of cultures and perspectives, and to build trust.
6. Recognize that we have formed a Tribal Consultation Committee to meet at least twice a year.
7. The Committee will consist of two members from each reservation, at least one from the NDDOT, and one from FHWA Division Office.
8. Others can be brought to meetings as members see the need.
9. In addition to discussion of the project, on-site visits may be needed by the Committee or the person designated by the Committee may be necessary.
10. The Committee will be responsive to project timing needs, and failure to respond within defined parameters will be considered a lack of need to respond.

11. Agree that the Committee will define procedures for last minute or emergency situations.
12. The NDDOT will use the STIP in our meetings as part of efforts to notify the Committee of upcoming projects, that we will provide them a packet of information for projects we will be working on in the near future to include maps, aerial coverage, or other pertinent illustrations, as available.
13. The Committee may decide that a specific Tribe or member may be best suited to carry out its wishes and address its concerns on specific project in relation to a specific resource, or to resolve a specific issue.
14. The NDDOT will provide the Committee an explanation of decisions reached in regard to project effects on cultural resources of concern to the Committee.
15. The NDDOT agrees to continue meeting with the Tribes at each Committee member's individual office at least, once per year.
16. The FHWA and the NDDOT acknowledge the need for confidentiality of certain Tribal spiritual and cultural information, that may be provided to the NDDOT by the Tribes during the course of Committee meetings and other aspects of tribal consultation conducted on cultural resource issues.
17. The NDDOT will host the meetings and will pay for up to two representatives from each participating reservation to attend (payment currently includes travel expenses, motel rooms, per diem, and a fee of at least \$300.00).
18. There is a list of projects exempted from Tribal review. These are projects that either have no potential to affect, or have minimal potential to affect, or have potential to affect only cultural resources not important to the Tribes.



### *Four Bears Bridge*

Tribal consultation and general involvement in the Four Bears Bridge project (completed in 2006) was very positive. Without going into a great detail, conflicts and disputes were revolved concerning the preservation of the Bridge. The Bridge represented a past that was prosperous when considering the life on the Fort Berthold Reservation. People farmed the bottomland of the Missouri River and raised cattle. The Tribe was self sufficient and enjoyed their lifestyle. With the construction of the Garrison Reservoir, people were displaced and the fruitful bottom land inundated. The center span for the Bridge originally connected districts of the reservation across the river and was located at the community of Elbowoods. Later, the center span from this Bridge connected the government-planned town of New Town to that of Tribal lands across Lake Sakakawea.



Figure 18. Photograph by Terry Wiklund, ©2008

The replacement of the Bridge with the historic center span represented one more example of heritage lost. The elders were not pleased and conversations were heated and full of emotion.

Furthermore, the site of the Little Shell Celebration Grounds was needed as a staging area for the construction of the new Four-Bears Bridge. The NDDOT couldn't save the Bridge as it would have cost an addition 11 million dollar, but the portals of the Bridge were saved and an interpretive display was constructed nearby to memorialize the structure. Members of the Antelope Society were contacted and many meetings followed. Information provided by the Society indicated that the Society was at least 300 years old. The location for celebrations had been moved out of the bottomlands during the flood to a nearby coulee and then to its present location in the 1960s. The arbor was not 50 years old and didn't qualify for the National Register as an historic property, but it was important to the Tribe's well-being and was considered an important resource under the National Environmental Policy Act. The rites, songs, and traditions governing the move of the arbor had been lost. Consensus was that if an arbor could be constructed that would include facilities for the elders, including running water and bathroom facilities, it might be possible. Good lighting and a sound system were also requested. Negotiations resulted in construction of a state of the art celebration grounds. Interestingly, the Tribe found ceremonies and songs from other Tribes that could be borrowed for moving the arbor in order to address the concerns of the organization. The elders had a place of honor and felt they had been included in the decision-making process. Everyone benefited from the process.

## *Sitting Bull Bridge*

The Bridge is located across the Heart River at the southern edge of Mandan, North Dakota, on Highway 1804. The Bridge had been constructed in 1950, replacing an unsafe structure that did not meet the safety standards. It was dedicated in honor of Sitting Bull, a Lakota leader. As part of the transportation plan, a bicycle path and trailhead was to be constructed on the south side of the bridge where pedestrians, bicyclist, and others could enjoy the area. The trailhead was designed as a natural arbor with native plantings and interpretation plaques. Standing Rock, the historic home of Sitting Bull, is located approximately 60 miles south of the site and consultation with the Tribe was warranted. Furthermore, consulting with any relatives of Sitting Bull might prove to be beneficial and informative. The Tribal Historic Preservation Officer, Mr. Tim Mentz, Sr., was contacted and he referred the NDDOT cultural resource staff to Mr. Isaac DogEagle a Tribal judge and great-grandson of Sitting Bull's sister. Mr. DogEagle was delighted in our initiative and provided guidance for the interpretive plaques discussing Sitting Bull. He said he would ask the relatives if it was appropriate to have plaques interpreting Sitting Bull's life. Having relatives write the text insured the accuracy of the information and this activity included the Tribe in the process. The dedication of the arbor was well received by the Tribe as the information included on the plaques discussed how Sitting Bull received his name, his birth and childhood, role in warrior societies, Sitting Bull's family life, Sitting Bull and his wife, visions and the sundance, and virtues of a Lakota leader. Information was also included with regard to deeds he accomplished as a young boy leading to his status as a great leader among his people.

## *Jamestown Bypass – Highway #52*

Archeological sites dominated the area through which a bypass around the city of Jamestown, North Dakota, was planned. Until the bypass was constructed in 2005, Highway #52 bisected the town. Truck traffic hauling hazardous material was traveling through the city next to businesses, schools, and the population. A bypass around the city on the west side was proposed. Further archeological survey revealed cultural resources, including mounds, campsites, and stone features. Consultation was warranted since the project would potentially impact heritage, traditional, and cultural resources. Eight Tribes were consulted, with maps and aerial photographs being provide to the Tribes depicting the alternative routes and the location of endangered sites. It was the first time that the Sisseton/Wahpeton Tribe were consulted. They were included because the James River was a travel route form Sisseton to Devils Lake. Relatives on each reservation used the James River route to make trips back and forth from Spirit Lake. Mr. Jerry Flute, Sisseton-Wahpeton's NAGPRA coordinator, provided information concerning a military leader, Inkpaduta (Red Point), who used the area. He is important in Tribal history as a military leader who refused to sign the Laramie Treaty of 1868. Furthermore, the crescent shape of a tributary to the James River, the Pipestem, was interpreted as an important feature influencing the prehistoric use of the area.

A meeting between the NDDOT, consultant representatives and the Tribe was held in Jamestown in 2003 and a field trip to the project area was conducted. All Tribal representatives met privately and came to a consensus, favoring the project only if the cultural resources were protected from future development. Their concern centered on development that may takes place after the bypass was constructed. Landowners were contacted to discuss the possibility of a protective easement, with lands retaining their present use (pasture stayed pasture and farmland could stay

under cultivation). However, in terms of the protective easement, no other development could take place. After some negotiations with the landowners, they agreed to the terms. It is the first and only cultural resource protective easement in North Dakota. The news of the protective easement was received by the Tribes with great appreciation.



**Figure 19. Photograph by Terry Wiklund, ©2008**

## *Jamestown Rest Area*

During the late 1990's transportation enhancement projects saw the construction of a number of new rest areas along state highways and along the interstate system in North Dakota. Designs for these areas centered on the fact that travelers stopped frequently at these sites and rest stops would be an excellent opportunity to introduce people to the state. Although the buildings at many of the stops saw similar design the interpretation was unique to each site. The Jamestown rest area located on the east-bound lanes of Interstate 94 west of the Jamestown, North Dakota, interpreted the Plains Tribes residing in the State. The façade was constructed of brick incorporated a mural depicting Plains Tribes hunting buffalo. The cultural resource staff of the North Dakota Department of Transportation and the visual art section came up with the design. The first run of the design called for a "medicine wheel" to be placed in the peak of the structure. Consultation with the Dakota and Lakota, residing on the Standing Rock reservation (the nearest reservation to the project) revealed the fact that the medicine wheel was not appropriate for the structure. After showing the drawing to the Tribal Historic Preservation officer, Mr. Tim Mentz, Sr., the question was asked, "Would you (the non-Indian community) place a crucifix on a rest area?" The answer was obvious, no. The design was abandoned. The idea of a buffalo hunt was agreeable with all parties and drawings were produced. The figures were stylized and reaction was not favorable as the Standing Rock people felt the buffalo resembled "monkeys" so the design was changed once more. Interestingly enough, the individual depicted as the hunter on the mural donned ribbons associated with a warrior clan. These ribbons were not appropriate for a buffalo hunt and were removed. The design was accepted. Ledger art was used inside the building as a way of depicting Plains Tribe's way of life. Ledger art was produced in the 1800s and early parts of the 20<sup>th</sup> century and used accounting "ledger paper" as the canvas. The Standing Rock THPO staff traveled to Denver, Colorado, to visit a museum to select the art for the

interpretive panels. Without consultation the project may have resulted in an inappropriate design and interpretation.

### ***Minnewakan Bypass – Highway #281***

With the rising lake waters of Devils Lake located in central North Dakota, communities such as Minnewakan were in danger of being inundated. Highway #281 bisected the town and proceeded north connecting with Highways #19 and #2. Several attempts were made to keep the route stable by raising the grade. In 2001, it was decided that the highway could not safely be maintained and a bypass was proposed. Several alternatives were investigated and surveyed for archeological sites. Since the south two miles of the project lies within the exterior boundary of the Fort Totten Sioux Indian reservation, consultation was warranted. The project was presented to the Tribe and to the public as required by law. Tribal spiritual advisor Mr. William Ambrose Littleghost was consulted and he related traditional stories of the area, particularly with regard to the formation of small lakes to the southwest of the lake, through which the project would traverse. Other interested parties on the reservation raised concerns over the boundary of the reservation and demanded their concerns be addressed. Research on the boundary revealed, that in fact, an incorrect survey was a matter of record and that the Tribe had been compensated for the land. Letters of explanation were provided to the group.

Mr. Littleghost suggested that an effort be made to avoid the recorded sites, and that monitoring of construction activities on the sensitive southern two miles, be accomplished. Similar information was provided to other Tribes with interest in the area, but all suggested that Mr. Littleghost monitor the construction. He accompanied the NDDOT cultural resource staff on all surveys of borrow areas and

he also monitored the construction. The resource staff made sure that he was provided with food and transportation. All known cultural resources were avoided and no human remains or cultural resources were discovered or disturbed during construction. Everyone benefited by the consultation process and Highway #281 still functions as a north-south route.

### ***Highway #2, Minot to Williston***

The approximately 100 miles of proposed construction between Minot and Williston, North Dakota, saw at least 100 archeological sites in the one-half mile wide survey corridor for the proposed project. The majority of sites were stone features, found to be of concern and importance to all Tribes consulted. Representatives and elders from five reservations were taken to the project area, and discussions of concerns centered on the importance of stone features. An elder religious leader, Mr. Ron Littleowl, was taken to each site and his interpretation of each feature was recorded on tape and transcribed. Although the information is confidential it gave NDDOT archeologists a greater understanding of stone features and their importance. One lithic scatter along the White Earth River was test excavated and the affects mitigated through archeological data recovery. All stone features were avoided using innovative engineering strategies. It is to the NDDOT's credit, that engineers developed plans that would avoid the features and still make the highway safe and functional. The Tribal concerns were met and the project was completed.





**Figure 20. Standing, L to R: Brady Grant, Frankie Jackson, George Reed, Jr., Byron Olson, Mark Schrader, Calvin Grinnell, Jeani Borchert, Bob Christensen, Elgin CrowsBreast, and Curley Youpee. Seated, L to R: Aileen Littleghost, Wm. Ambrose Littleghost, Kent Good, Conrad Fisher, and Tim Mentz, Sr. Photograph by Terry Wiklund, ©2006**

### *Safety Projects*

Federally funded highway resurfacing often requires a safety inspection. It meets the federal requirements, soil may be taken from backslope, found between the right-of-way and the ditch, to improve the inslopes changing it to avoid “nosing in” if a vehicle leaves the road. Similarly, drive slopes to residences are changed to a similar dimension avoiding the same situation. Pipes are extended at drainage

crossings to alleviate collision if a vehicle leaves the highway. Borrow for these safety projects often comes from within the right-of-way, particularly from areas between the backslope and the right-of-way boundary. This area has been found to contain the remains of cultural resources sites that were bisected by original construction before laws requiring archeological survey.

It became obvious as dirt was taken from the right-of-way that cultural resource sites could be further impacted. As a matter of policy, all safety projects are reviewed by the NDDOT cultural resource staff and are surveyed, if necessary. Projects are presented to Tribes to inform them of the nature and extent of disturbance. Any sites discovered during the survey are fenced and avoided during construction. Although avoidance is not considered preservation, fencing insures protection from this type of NDDOT project, and the locations are recorded so as to be known if other projects are proposed in the future.

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# APPENDICES

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Figure 22. Photograph by Terry Wiklund, ©2008

# ***PROGRAMMATIC AGREEMENT***

AMONG  
THE FEDERAL HIGHWAY ADMINISTRATION  
THE NORTH DAKOTA DEPARTMENT OF TRANSPORTATION  
and  
FORT PECK ASSINIBOINE & SIOUX TRIBES; TURTLE MOUNTAIN BAND OF  
CHIPPEWA INDIANS; MANDAN, HIDATSA, AND ARIKARA NATION; SPIRIT LAKE  
DAKOTAH NATION; SISSETON-WAHPETON OYATE; STANDING ROCK SIOUX  
TRIBE; NORTHERN CHEYENNE TRIBE;  
AND CROW TRIBE  
REGARDING IMPLEMENTATION  
OF TRIBAL CONSULTATION REQUIREMENTS  
OF THE NATIONAL HISTORIC PRESERVATION ACT  
FOR THE FEDERAL TRANSPORTATION PROGRAM  
IN NORTH DAKOTA

## **PREFACE**

This document is the result of discussions during consultation between the North Dakota Department of Transportation (NDDOT), the Federal Highway Administration (FHWA) and the Tribes identified above. This document is intended to define consultation, for compliance with the National Historic Preservation Act (NHPA) (16 U.S.C. 470), between the Federal Highway Administration (FHWA), the NDDOT, and the Fort Peck Assiniboine & Sioux Tribes; Turtle Mountain Band Of Chippewa Indians; Mandan, Hidatsa, and Arikara Nation; Spirit Lake Dakotah Nation; Sisseton-Wahpeton Oyate; Standing Rock Sioux Tribe; Northern Cheyenne Tribe; and Crow Tribe (the Tribes). As required under the terms of the NHPA (16 U.S.C. 470) and resulting regulations (36 CFR 800), consultation has revealed that many Tribes have aboriginal ties to what is now North Dakota. The Tribes identified above expressed concern and requested to be consulted on future transportation projects in North Dakota.

The FHWA and NDDOT understand that Tribes have concerns regarding cultural resources, preservation of sacred places, continuing destruction of places and things of cultural value, and the effects of this destruction on their cultural identity. Cultural resources are revered by the Tribes. These cultural resources are a connection to their past, and important to their cultural identity, sense of self, and future well-being. Cultural resources are tied to people's ancestors, some are related to important religious activities, and many have ongoing spiritual

connections. The FHWA and NDDOT recognize the importance of these remnants from the past to aboriginal people living today.

Modern development, including transportation construction, has destroyed valuable cultural resources and adversely impacted others. This agreement is intended to ensure all parties understand which cultural resources are important to the Tribes and work together to protect and preserve them. The FHWA and NDDOT are committed to providing a transportation system that will benefit all people of North Dakota. The FHWA and NDDOT are also committed to learning Tribal perspectives about cultural resources important to the Tribes. The Tribes are committed to understanding transportation issues and the perspectives of the FHWA and the NDDOT. Jointly we are committed to establishing a relationship of mutual trust and respect.

The FHWA and NDDOT recognize that transportation projects have the potential to adversely affect cultural resources: sacred sites, archaeological sites, traditional natural resources, and traditional landscapes of value to the Tribes. FHWA and the NDDOT do not wish further destruction of these culturally valued places and recognize the inherent rights of Tribes to retain and preserve those places that they value.

It is the intention of the FHWA and NDDOT to work with the Tribes to find appropriate ways to avoid effect to important cultural resources. The NDDOT pledges to always look for ways to avoid effect to these resources as the first option. When avoidance of effect is impossible or impractical given other concerns of equal importance, the NDDOT will work with the Tribes for appropriate and respectful resolution of any unavoidable effects.

The NDDOT will follow the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001) when there is a discovery situation within the exterior boundary of Tribal reservations or on Federal lands. Where this situation occurs in other areas, the terms of the North Dakota State Burial Law (North Dakota Century Code 23-06-27) will be followed.

WHEREAS, the FHWA is the federal agency with statutory responsibilities for administering the federal-aid-highway program under Title 23 U.S.C. 101 *et. seq* and the NDDOT is the applicant for federal funds for highway construction projects in North Dakota. The NDDOT, on behalf of the FHWA, agrees to coordinate under a government to government relationship with federally recognized tribal government officials or appointees with regard to federal responsibilities under Section 106 of the NHPA through the terms of this PA. This does not replace the requirement for FHWA to consult under Executive Order 13175. Consultation under Section 106 of the NHPA by the NDDOT does not replace FHWA's responsibilities with regard to government to government consultation. The NDDOT will consult with Tribal Historic Preservation Officers or those designated by the Tribal Government to manage or advise on matters pertaining to cultural resources.

WHEREAS, the FHWA has determined that its undertakings may have an effect upon properties included in or eligible for inclusion in the National Register of

Historic Places that may be of interest to the Tribes, and through this agreement has consulted with the Tribes and the Advisory Council on Historic Preservation (Council) pursuant to 36 CFR 800.14 of the regulations implementing Section 106 of the National Historic Preservation Act (16 U.S.C. 470f);

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

WHEREAS, the NDDOT is committed to the design and construction of a transportation system that: 1) safely moves people and goods; 2) avoids, minimizes and mitigates adverse effects on cultural resources; 3) recognizes that consideration of tribal interest in preservation of significant cultural resources is important to Tribal well-being, growth and prosperity; and 4) responds to the needs of North Dakota communities and the Tribes; and

WHEREAS, FHWA, the NDDOT, and the Signatory Tribes aspire to engage in meaningful, long-term planning for the appropriate consideration of cultural resources important to the Tribes, and to include the following: develop a comprehensive and efficient tribal consultation process for all Section 106 undertakings,

- streamline the process and procedural requirements,
- recognize the role of the Tribes to facilitate effective consultation,
- develop a consultation process based upon education and understanding,
- involve the Tribes' cultural resource personnel to a greater extent and at an earlier point in the planning process,
- devote a percentage of time, energy, and funding to identify relevant problems threatening cultural resources important to the Tribes,
- any additional goals identified through consultation.

BE IT RESOLVED, the FHWA, the NDDOT, and the Tribes hereby agree that the implementation of tribal consultation on highway projects shall be administered in accordance with the following stipulations in order to satisfy FHWA tribal consultation responsibilities under the National Historic Preservation Act.

## **STIPULATIONS**

### **1. Applicability**

This Programmatic Agreement (PA) sets forth the process by which FHWA will meet its responsibilities with regard to consultation with the Tribes under Section 106 of the NHPA for highway projects within the state of North Dakota of the Federal Aid Highway Program. This PA establishes a protocol for consultation with the Tribes on individual highway projects.

## 2. Tribal Consultation Committee

In order to expedite the tribal project review and consultation process for Section 106 of the NHPA, a Tribal Consultation Committee (Committee) will be formed and comprised of selected members from each consulting Indian Reservation and NDDOT Representative(s). Consultation with these Tribes has revealed that a structured process is preferred and most are willing to be members of the Committee. The Tribes not signatory to the PA will be consulted on an individual basis. Those Tribes not signing this PA will still be notified of Committee meetings and are welcome to attend.

Consultation can be generalized as a process of learning through education and interaction. In this case it is a process whereby Agencies and these Tribes work together to take into consideration the effects FHWA undertakings may have on cultural resources important to the Tribes. Working through this Committee will allow a clearer understanding of relevant issues and concerns which will result in more effective cultural resource management, and may streamline the process.

### A. Mission Statement and Goals

Avoidance of effect to significant cultural resources is important to the FHWA, the NDDOT, and the Tribes. However, avoidance is not always preservation. As practical and possible, the FHWA and the NDDOT will assist the Tribes in their further goal of preservation of resources of value to them. Avoidance will always be the first option studied. When a resource cannot be avoided every attempt will be made to minimize the impacts and to mitigate the loss of information and value identified by all parties. To carry out this mission, mutual education regarding what might be acceptable, respectful, and feasible is necessary. The FHWA, the NDDOT and the consulting Tribes will invest time, provide opportunities, provide personnel, and seek funding for cross-cultural education pursuant to tribal and transportation cultural resource issues.

Opportunities will be sought to provide cross-training to FHWA, NDDOT, and Tribal personnel. The NDDOT will include their cultural resource contractors in this training, when necessary and practical. These training opportunities will focus on cultural awareness, language and communication skills, North Dakota transportation issues, and cultural resource laws and regulations. This training and education will have as its goal the improvement of relationships, a greater understanding of cultures and perspectives, and the building of trust.

The FHWA, NDDOT and the Committee believe there is value for all concerned parties in completion of Traditional Cultural Site inventories. The NDDOT will work through the Committee, as funding and opportunity allows, to complete Traditional Cultural Site inventories, similar to that already completed for the NDDOT by the Turtle Mountain Band of Chippewa Indians.

The NDDOT intends to complete a Cultural Resource Preservation Plan. The NDDOT will consider the goals and viewpoints of the Committee in this pursuit.

### B. Committee Composition

The Committee will be made up of two individuals designated from each reservation and at least one individual from the NDDOT. FHWA personnel will have a standing invitation to each meeting and can participate as a full Committee member. State Historic Preservation Office personnel can be invited to attend the meetings at the discretion of the Committee, but will not serve as official members.

Each Committee member may bring additional people to Committee meetings as they deem necessary. These additional people will not function as Committee members, but may be present to advise the Committee or observe the meeting.

### C. Responsibilities of the Committee

1. The Committee will meet at least twice a year to discuss projects and policy with regard to NHPA compliance. The Committee's views in regard to National Environmental Policy Act (NEPA) project compliance issues will also be welcomed.
2. In addition to discussing projects at Committee meetings, specific projects, sites, or issues may require Committee members to participate in on-site consultation. These on-site visits may be done by the whole Committee, or interested members, or those appointed by the Committee for the specific task. This on-site consultation can be used to help identify possible impacts or to obtain first-hand knowledge of issues relating to cultural concerns. Tribal elders, or other individuals identified by the Committee, who have specific knowledge of the area, project, or resource will be welcome to attend on-site meetings.
3. The Tribal Committee members will respond to NDDOT project review and consultation in a manner considerate of NDDOT project timing needs. Lack of response within necessary stated time parameters will be considered lack of need to respond on the part of these members. The process for addressing last minute or emergency projects will be defined for action by the Committee, as needed.
4. The Committee will work collaboratively to set meeting agendas.



5. The Committee may select high school delegates or student interns to be a part of the Committee, and these delegates or interns shall be able to participate in the activities of the Committee.
6. The Committee will seek funding to supplement and support the duties of the Committee and their advisors.

#### D. Responsibilities of the North Dakota Department of Transportation

1. Through regularly scheduled meetings, last-minute and emergency notification procedures defined by the Committee, or individual contact, Tribes will be notified of FHWA Undertakings (as defined in this PA) in North Dakota, as required under 36CFR part 800.2.
2. The NDDOT will document the meetings and make minutes available upon request.
3. The current Statewide Transportation Improvement Program or “STIP” will be provided to the Committee at meetings and can serve as a means of forecasting, to the Tribes’ cultural resource personnel, what projects are planned in advance and where they are located. Providing this information will give the Committee the opportunity to review projects well in advance of project development.
4. The NDDOT will provide a packet of information summarizing upcoming projects prior to a scheduled meeting. The packet may include maps, aerial coverage, or other pertinent illustrations, as available. This will be sent to each Committee member through the mail or Email, as specified by each committee member.
5. The NDDOT will continue to consult with the Tribes and/or committee members who are identified at the meetings as contacts for further consultation in regard to a specific project, resource, or issue. The Committee may decide that a specific tribe or member may be best suited to carry out its wishes and address its concerns on a specific project, in relation to a specific resource, or to resolve a specific issue.
6. Results of cultural resource work and SHPO consultation completed for NDDOT projects will be forwarded to the Committee or specifically identified members of the Committee, for review, as devised through initial project consultation. Review will be time sensitive, with limits expressed in the accompanying cover letter or email.

7. The NDDOT will provide the Committee an explanation of decisions reached in regard to project effects on cultural resources of concern to the Committee.
8. The NDDOT will continue to meet with the Tribes at each Committee member's individual office at least once per year. The NDDOT will inform the Tribes of any changes in staff who might be involved in this agreement including the NDDOT consultation representative.
9. The NDDOT will continue consultation with any Tribe which does not become a party to this agreement. Consultation will continue as defined through individual discussions or formal agreements.

#### E. Inclusion of Interested Parties

1. Other Tribes may be added to this agreement as identified through the course of consultation, and agreed upon by all parties signatory to this agreement.
2. 36CFR part 800 allows for the possibility that other individuals or entities may have a demonstrated special interest in an undertaking, and that Federal agencies, in consultation with SHPO and THPO, should consider the involvement of such individual or entities as Consulting Parties. If any identified Consulting Parties, or other individuals or groups, wish to take part in a Committee meeting, these requests will be presented in writing to the Committee. If the request is deemed appropriate, the consulting party will be invited to take part in the next meeting.
3. The Committee can also issue an invitation to groups to attend specific meetings for the exchange of ideas or to gather specific information regarding an undertaking.

#### F. Other Points of Mutual Agreement

1. Execution and Implementation. The successful implementation of this process shall constitute adequate consultation between the FHWA and the Signatory Tribes to fulfill tribal consultation requirements of Section 106 of the NHPA.
2. Confidentiality. The FHWA and NDDOT acknowledge the need for confidentiality of certain tribal spiritual and cultural information that may be provided to the NDDOT by the Tribes during the course of Committee meetings and other aspects of tribal consultation conducted on cultural resource issues. Information provided by consulted tribal members, identified

as sensitive, and requested to remain confidential will remain confidential to the extent permitted by State and Federal law. The mechanism used for confidentiality may change through time or with circumstance, but the result will be the same: information provided by the Tribes and requested to remain confidential will be protected from public disclosure to the extent permitted by State and Federal law.

3. **Dispute Resolution.** Should any signatory object at a later date to the implementation of this agreement in whole or in part, the objecting party will consult with the Committee to resolve the objection. If the Committee is unable to satisfactorily resolve the issue, and the issue involves resolution of the Adverse Effect of an NDDOT project on a site eligible for inclusion on the National Register of Historic Places, the administrative process defined in 36 CFR Part 800.6 will be followed.
4. **Termination.** Any party to this PA may terminate their participation by providing thirty (30) days written notice to the other parties, 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 by a Tribe, the FHWA and the NDDOT shall comply with 36 CFR 800 and continue with individual tribal consultation with that Tribe. As long as the FHWA, NDDOT, and at least one Tribe continues to participate, the PA will remain in effect, but the Tribes who have terminated will no longer be held to the bounds of this agreement.
5. **Amendment.** The signatories to this PA may amend it.
6. **Funding.** At least twice a year, the Committee will meet to address issues defined above. The NDDOT will host the meeting and will pay a fee and travel/per diem expenses at ND State rates for up to two representatives from each participating reservation to attend the meeting.
7. **Participation in Similar Activities.** This instrument in no way restricts the FHWA, NDDOT or the signatory Tribes from participating in similar activities with other public or private agencies, organizations, and individuals.
8. **Commencement/Termination Date.** This instrument is executed as of the date of last signature between the FHWA, NDDOT, and at least one tribe with Reservation boundaries within the State of North Dakota. Other Tribes may become signatory to this agreement after that date. This PA is effective through December 31, 2012 at which time it will expire unless specifically extended by Committee resolution.

### 3. Projects Exempted from Consultation

Projects limited to the following activities (provided the projects are not part of a larger undertaking), by their nature and definition are either: 1.) types of projects that have no potential to affect historic properties (and do not require consultation) [36 CFR 800.3(a)(1)], or 2.) types that have no or limited potential to result in any effects to historic properties of concern to the Tribes, and are, therefore, exempted from further consultative review by the Tribes in compliance with Section 106. The Committee, through resolution, can modify the following list.

#### A. Types of NDDOT Projects with No Potential to Affect Historic Properties

1. Pavement Related
  - Resurfacing or sealing the existing roadways without other geometric changes.
  - Sidewalk replacement including no additional excavation outside existing disturbed area. Disturbance is less than 2 feet below existing surface.
2. Maintenance Related
  - Pavement repairs including joint repairs, patching, and crack sealing of roads where the contract does not disturb original ground.
  - All pavement making on roads where they previously existed and new striping when necessary to conform to the Design Manual.
  - Bridge painting of all types of bridges where the contract does not disturb original ground.
  - Bridge and other structure repairs or shoring where the contract does not disturb original ground.
3. Signing Related
  - Installation and replacement of signs - replacement of existing signs in-kind. Installation of driven foundation posts 6" or less in diameter for signs. Drilled shaft foundations generally to a maximum diameter of 36" or any other kind of sign that does not disturb original ground.
4. Roadside Safety Related
  - Repair, replace or upgrade existing guardrail on highways where construction does not disturb the original ground.
  - Install or replace impact attenuators on highways where construction does not disturb original ground surface.
  - Replace median barriers on highways where construction does not disturb original ground surface.

5. Traffic Monitoring Related
  - Install and upgrade traffic signal and lighting poles.
  - Install highway monitoring systems including loop detectors (or other types of sensors), cameras, radio systems variable message signs (with the exception of towers) where construction does not disturb original ground surface.
6. Other Project Types
  - Any project, not specifically mentioned above, where all proposed work will take place on existing roadways within the in-slopes (as illustrated on the attached sheet).

B. Types of NDDOT Projects with No or Limited Potential to Affect Cultural Resources of Concern to the Tribes

1. Roadside Safety Related
  - Replacement of railing on bridges to meet modern safety standards.
2. Traffic Monitoring Related
  - Installation of highway monitoring systems including loop detectors (or other types of sensors), cameras, radio systems variable message signs (with the exception of towers).
3. Transportation Enhancement Related
  - Streetscape improvement outside a historic district. This includes, but may not be limited to, benches, decorative lighting, textured crosswalks, transit shelters, and containerized plantings where the construction does not disturb original ground.
  - Rehabilitation of historic structures where construction does not disturb original ground.
  - Rehabilitation of historic transportation equipment such as railroad locomotives, rail cars, and canal boats.
  - Purchase of scenic easements or abandoned rail corridors where no construction activity is planned. Resale of scenic easements is not part of this agreement.
  - Establishment of transportation museums and visitors centers that do not contain any information relative to the Tribes where construction does not disturb original ground.

#### 4. Projects to be Reviewed

Projects that the NDDOT will consult on will be projects with potential to affect historic properties that may be of interest to Tribes.

- A. Any NDDOT project that is considered to be a Federal Undertaking subject to Section 106 as described in 36 CFR Part 800.3(a)(1) and Part 800.16(y) not specifically exempted in Stipulation 3B above will be included in the information presented to the Committee. Review will consider the special timing needs of Local Government projects and shall include a time stipulation for response.
- B. The NDDOT will consult with the Tribes for all material sources that fall near or within areas of traditional concern that the Tribes have identified along project routes considered through review of the Statewide Transportation Improvement Program (STIP). The Committee will work with the NDDOT to devise methods for material source consultation that take into consideration the extremely short response time needed on individual material sources.

#### 5. Definitions

**Cultural Resources:** Prehistoric and historic districts, sites, buildings, structures, or objects that may or may not be eligible for the National Register of Historic Places. The term includes resources of traditional religious and cultural importance to an Indian Tribe.

**Effect:** Alteration of the characteristics of a cultural resource that qualifies it for inclusion in or eligibility for the National Register of Historic Places [36 CFR 800.16(i)].

**Historic Property:** Any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian Tribe or Native Hawaiian organization and that meet the National Register criteria [36 CFR 800.16(l)(1)].

**Mitigation:** To act in such a way as to cause an offense to seem less serious; to moderate a quality or condition in force or intensity; alleviate; to become milder [Dictionary.com].

**National Historic Preservation Act:** An act to establish a Program for the Preservation of Additional Historic Properties throughout the Nation and for Other Purposes. The Congress finds and declares that: 1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage; 2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people; 3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency; 4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans; 5) in the face of ever-increasing extensions of urban centers, highways, residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation; 6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and 7) although the major burdens of historic preservation have been borne and major effects initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities [16 U.S.C. 470(b)].

**National Register criteria:** The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location design, setting, materials, workmanship, feeling, and association, and: a) that are associated with events that have made a significant contribution to the broad patterns of our history; or b) that are associated with the lives of significant persons in our past; or c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or d) that have yielded or may be likely to yield information important in history or prehistory [National Park Service; National Register Bulletin: How to Apply the National Register Criteria for Evaluation].

**NEPA:** National Environmental Policy Act. An act to establish a national policy for the environment. The purposes of the act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality [42 U.S.C. 4321].

**SHPO:** State Historic Preservation Officer. The official appointed or designated pursuant to section 101 (b) (1) of the National Historic Preservation Act to administer the State historic preservation program [36 CFR 800.16(v)].

**Tribal Consultation Committee:** A group of members designated by each consulted Tribe, FHWA, and NDDOT who gather for the purposes of conducting Tribal Consultation on projects undertaken by the NDDOT as an applicant for Federal funding through the FHWA.

**THPO:** Tribal Historic Preservation Officer means the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the SHPO for purposes of section 106 compliance on tribal lands in accordance with section 101(d)(2) of the act.

**Undertaking:** A project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval; and that is a type of activity that has potential to cause effects to an historic property [36 CFR 800.3(a) and 800.16(y)].

Signatures:

Allen R. Radliff, Division Administrator, Federal Highway Administration  
Francis G. Ziegler, PE, Director, North Dakota Department of Transportation  
Ron His Horse Is Thunder, Chairman, Standing Rock Sioux Tribe  
Myra Pearson, Chairwoman, Spirit Lake Dakotah Nation  
Jerry Flute, Chairman, Sisseton-Wahpeton Oyate  
Marcus Wells, Jr., Chairman, Mandan, Hidatsa, Arikara Nation  
Rusty Stafne, Chairman, Fort Peck Assiniboine and Sioux Tribes  
Rick Wolfname, Interim Chairman, Northern Cheyenne Tribe  
Carl Venne, Chairman, Crow Tribe  
David Brien, Chairman, Turtle Mountain Band of Chippewa Indians



TRIBES WHO WISH TO PARTICIPATE AFTER INITIAL DEVELOPMENT OF THE PROGRAMMATIC AGREEMENT:

WE WELCOME THE LOWER SIOUX INDIAN COMMUNITY TO THIS AGREEMENT

Shannon Blue, President, Lower Sioux Indian Community

WE HAVE ALSO RECOGNIZED AND WELCOMED THE WAHPEKUTE BAND OF DAKOTAH

Dennis Gill, Representative of the Wahpekute Band of Dakotah

WE ARE IN OPEN DISCUSSIONS WITH AND HOPE TO SOON WELCOME THE ROSEBUD AND OGLALA SIOUX TRIBES TO THIS AGREEMENT.

WE HAVE ALSO INVITED AND WELCOME THE SANTEE SIOUX TO THE TABLE IN RESPONSE TO AN EARLIER REQUEST.

## ***JAMESTOWN BYPASS NO ADVERSE EFFECT DOCUMENTATION***

PROJECT NO. HPP-2-052(18)915

Jeani Borchert, NDDOT Archaeologist, 4/26/2000

### **Description of Undertaking**

The NDDOT is proposing to construct a bypass around the west side of Jamestown. This bypass would divert truck traffic from Jamestown and provide a convenient connecting link for traffic traveling both US 52/281 and 1-94. Since the late 1950s, there have been discussions regarding construction of a truck bypass west of Jamestown to avoid the busy downtown area. There has been concern from Jamestown residents about the heavy volume of truck traffic, and the hazardous materials they transport. The Jamestown City Land Use and Transportation Plan stated that about 280 trucks came through the city each day in the early 1990s. Volume has increased noticeably to 765 per day, partially due to NAFTA (the North American Free trade Agreement) bringing truck traffic carrying Canadian products into this country. The bypass is needed to reduce truck traffic through the heart of Jamestown and to improve the flow of traffic on US 52/281. The US 52/281 truck bypass at Jamestown is one of several high priority projects that were identified by Congress in the Transportation Equity Act for the 21<sup>st</sup> Century (TE-21). The preferred alternative uses the existing Woodbury Interchange as a starting point, proceeds north along, but shifted slightly east of, the existing township road between Sections 33 and 34, T140N, R64W (Attachment A). From the northwest corner of Section 34 the road would curve to the northeast. After crossing over the Burlington Northern Santa Fe tracks, the alignment would curve to the north, paralleling (200-400\* east) the shelterbelt between Sections 27 and 28. From Stutsman County road #40, the road would curve to the northeast to tie in with US 51/281 just north of the Highland Home Cemetery.

### **Identification of Historic Properties**

Class III cultural resource inventories were completed in 1998 and 1999 by the University of North Dakota Archaeological Resources - West (UNDAR-West). The inventories covered 4060 acres. A large area was decided upon for the inventory in 1998 to allow flexibility in design and avoidance measures, and to allow consideration of effects which are reasonably foreseeable that may occur later in time, be farther removed in distance, or be cumulative. The 1999 inventory was designed to aid in understanding and defining a possible historic district. The inventories recorded 12 isolated finds, 21 prehistoric sites, and 14 historic sites. The prehistoric sites are primarily stone feature and/or mound sites. One mound site also has a lithic scatter component.

Native American tribes were consulted regarding this project. During NDDOT consultation with interested Native American tribes we were told the area was of great significance. They were particularly concerned about mound and stone feature sites located along the crescent of the Pipestem (See Attachment A) and requested that we consider nominating these sites to the National Register of Historic Places as a district.

The Lakota and Dakota people (Spirit Lake Tribe, Sisseton-Wahpeton Tribe, and the Standing Rock Sioux Tribe) attending an NDDOT sponsored meeting in Jamestown visited the sites and said the sites near the Pipestem in the northern portion of the project area were related to the crescent-shape of Pipestem Creek. The story they told was of Drifting Goose, a Dakota leader from long ago. This area was his territory. The stone features are related to ceremonies for young men to gain powers needed to become warriors. After completion of the ceremony a young man could wear the crescent shape on his shield. They also suggested the mounds were related to Dakota occupation of the area and were placed at this location because of the importance of the crescent-shaped of the Pipestem Creek.

The Native Americans consulted for this project requested that we pursue a district for these sites and wish to see them protected from destruction. After in-house NDDOT discussions, discussions with Federal Highway, and consideration of the district justification and boundaries, we consulted again with the Native Americans about nominating a discontinuous historic district made up of four distinct units. They concur with the establishment of a discontinuous historic district (as it was defined by the NDDOT Cultural Resource Section) in this area.

At a later date we consulted with the Turtle Mountain Band of Chippewa and they expressed an interest in the project. They concur with the other tribes on the importance of the area, the district, and the protective easements and requested to be included as a signatory to this document.

The State Historical Society of North Dakota was consulted. They agreed with Class III inventory boundaries, accepted the inventory reports, and concurred with our decisions regarding a discontinuous historic district (SHPO Reference #99-324).

### **Description of Affected Properties**

There is an eligible, discontinuous Historic District in the project area.

A discontinuous historic district of stone feature and mound sites has been defined along a crescent of Pipestem Creek northwest of Jamestown (Attachment A). In total there are 3 mound sites; one stone circle and mound site; one lithic scatter and mound site that also contains an historic depression; and 9 stone feature sites. We have defined four district areas. The northernmost district area (Area A) would

contain 32SN306, 32SN305 and 32SN304. The second district area (Area B) would contain a single mound, 32SN319. The third (and largest) district area (Area C) would contain 32SN312, 32SN301, 32SN300, 32SN299, 32SN298, 32SN297, 32SN296, 32SN295 and 32SN294. The last district area (Area D) would contain two mound sites, 32SN293 and 32SN292.

Following is a brief description of each site. Klinner (1999a) and Klinner (1999b) should be consulted for detailed information on the sites. **Area A:** 32SN306 is a stone feature and mound site that consists of 4 stone circles and 1 mound. The site is located on the top of a large triangular-shaped ridge that tapers to a narrow point to the southwest. 32SN305 consists of 3 stone circles located on a wide bench at the southwestern base of a large southwest-trending ridge. 32SN304 consists of 2 stone circles located along a narrow finger extending west from the base of a higher finger ridge. **Area B:** 32SN319 is a mound located on an upland finger that overlooks Pipestem Creek. **Area C:** 32SN312 consists of 3 mounds, a lithic scatter, and 2 historic depressions filled with trash. One of the depressions appears to have originated from total excavation of a fourth mound. The other depression is a hole or dugout into a mound. 32SN301 consists of 2 stone circles located near the southeastern end of a large east-southeast trending ridge. 32SN300 consists of 1 stone circle near the northeastern end of a large east-southeast trending ridge. 32SN299 consists of 3 stone circles located near the northwestern end of a wide southwest-trending ridge. 32SN298 consists of 1 stone circle and 1 cairn located near the northern end of a small ridge. 32SN297 consists of 3 cairns located near the end of a small north-trending ridge. 32SN296 consists of 1 partial stone circle located on a narrow portion of an east-trending ridge, just below the highest portion of the landform. 32SN295 consists of 1 stone cairn located near the end of a small north-trending ridge. 32SN294 consists of 1 stone circle located near the end of a small northeast-trending ridge. **Area D:** 32SN293 consists of 1 mound located near the edge of the Pipestem Creek valley. 32SN292 consists of 1 mound located on a rise near the edge of the Pipestem Creek valley.

Three of the Historic District areas (Areas B, C, & D) would be affected by the bypass project. Area A and is a mile from the proposed bypass and northeast of the Pipestem Creek.

### **Description of Effects**

Identified effects consist of both direct impact and those which are reasonably foreseeable that may occur later in time, be farther removed in distance, or be cumulative.

### Direct Impact

As originally planned the bypass would have directly impacted 32SN295, 296, and 297. These sites are all stone feature sites and are part of Area C of the eligible historic district.

### Reasonably Foreseeable Effects

These effects for the bypass project are anticipated construction of commercial and residential buildings typical for bypass roadways. The NDDOT believes development which can be reasonably tied to the bypass project are most likely to occur within 500' of the roadway. Sites/District Units within 500' of the roadway include Areas C and D of the eligible historic district. Area B of the district is also considered vulnerable as it is on the southwest side of the pipestem, in an area where development could be reasonably expected as a result of this project.

### **Conditions which Avoid, Minimize, or Mitigate Adverse Effects**

#### Direct Impact

The proposed bypass, preferred alternative, has been altered to avoid direct impact to 32SN295-297. The route now is east of these sites and outside the boundaries of Area C of the eligible historic district.

#### Reasonably Foreseeable Effects

The NDDOT is pursuing purchase of protective easements covering the three areas of the defined eligible historic district (Areas B, C, and D). This protective easement will allow current landuse activities, but will restrict placement of buildings, recreational activities/facilities which would disturb the landscape, development related activities such as roads, trails, and pipelines, and farm related land-disturbing activities beyond current use.

### **Views of Consulting Parties and the Public**

The Native American tribes (Spirit Lake Tribe, Sisseton-Wahpeton Tribe, and the Standing Rock Sioux Tribe, Turtle Mountain Band of Chippewa) consulted for this project requested that we pursue a district for these sites and wish to see them protected from destruction. After in-house NDDOT discussions, discussions with Federal Highway, and consideration of the district justification and boundaries, we consulted again with the Native Americans about nominating a discontinuous historic district made up of four distinct units. They concur with the establishment of a discontinuous historic district (as it was defined by the NDDOT Cultural Resource Section) in this area. Further, they have agreed that purchase of a protective easement for 3 of the 4 district areas would adequately protect the district from the effects of the bypass project.

The State Historical Society of North Dakota was consulted. They agreed with Class III inventory boundaries, accepted the inventory reports, and concurred with our decisions regarding a discontinuous historic district and protective easement purchase (SHPO Reference #99-324).

There have been 2 public input meetings held in regard to this project. There were no comments at either meeting concerning cultural resources. The public hearing will be held after completion of environmental documentation. Solicitation of Views letters were sent to all known interested parties, including various state and federal agencies, utilities, and tribes. The only response which concerned cultural resources was from the State Historic Preservation Office. They requested that Class III cultural resource inventory be undertaken for the project.

### **References Cited**

Klinner, Duane

1999a NDDOT Highway 52 By-Pass Project in Stutsman County, North Dakota: Cultural Resources Inventory Report. Prepared for the NDDOT, Bismarck.

1999b NDDOT 1999 Highway 52 By-Pass Project in Stutsman County, North Dakota: Cultural Resources Inventory Report. Prepared for the NDDOT, Bismarck.

### **We concur with the finding of No Adverse Effect and agree to the stated conditions:**

Skip Longie, Spirit Lake Tribal Chairman  
Charles Murphy, Standing Rock Tribal Chairman  
Andrew Grey, Sisseton-Wahpeton Tribal Chairman  
Richard LaFromboise, Turtle Mountain Band of Chippewa Tribal Chairman  
Grant Levi, Deputy Director for Engineering, North Dakota Department of Transportation  
Samuel Wegner, North Dakota State Historic Preservation Officer  
J. Michael Bowen, Division Administrator, Federal Highway Administration