

# Appendix F

## Programmatic Agreement

### **Pool 5 Dredged Material Management Plan**

Upper Mississippi River

Wabasha and Winona Counties, Minnesota

Buffalo County, Wisconsin



**US Army Corps  
of Engineers**

St. Paul District

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**PROGRAMMATIC AGREEMENT  
BETWEEN  
THE U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT  
AND  
THE MINNESOTA STATE HISTORIC PRESERVATION OFFICE  
REGARDING  
THE PURCHASE OF LANDS FOR  
THE MISSISSIPPI RIVER NAVIGATION POOL 5  
DREDGED MATERIAL MANAGEMENT PLAN,  
WABASHA COUNTY, MINNESOTA**

**WHEREAS**, the U.S. Army Corps of Engineers, St. Paul District (Corps) is proposing to purchase 909 acres of land in Wabasha County, Minnesota intended for the placement of dredged material (Project) in order to facilitate continued operation and maintenance of the Upper Mississippi River (UMR) 9-Foot Navigation Channel Project pursuant to the River and Harbor Act of 1930 and the Mississippi River Navigation Pool 5 Dredged Material Management Plan; and

**WHEREAS**, the Corps has determined that the proposed Project constitutes an undertaking subject to the requirements of 36 CFR Part 800, the regulations implementing Section 106 of the National Historic Preservation Act (54 USC § 306108); and

**WHEREAS**, the Corps has determined that the proposed Project is the type of undertaking that has the potential to affect historic properties listed in or eligible for listing in the National Register of Historic Places (NRHP), but that the identification of historic properties and determinations of effect will not be completed prior to the completion of the environmental document needed for compliance with the National Environmental Policy Act (NEPA), making execution of this Programmatic Agreement (PA) for the Project appropriate pursuant to 36 CFR § 800.14(b)(1)(ii); and

**WHEREAS**, the Corps, in consultation with the Minnesota State Historic Preservation Office (SHPO), has defined the area of potential effects (APE) for the Project to include all areas of potential direct effects, including the approximately 962 acres of land included in the purchase, as well as areas of potential indirect effects, including the areas extending approximately one quarter-mile outward from the boundary of the land purchase (see Attachment A); and

**WHEREAS**, the APE for the Project may be further refined as a result of additional Project design refinements and consultation with the SHPO and other consulting parties; and

**WHEREAS**, in accordance with 36 CFR § 800.6(a)(1), the Corps has notified the Advisory Council on Historic Preservation (Council) of its decision to enter into this PA and has invited the Council to enter into consultation, and the Council has chosen not to participate in the consultation pursuant to 36 CFR § 800.6(a)(1)(iii); and

**WHEREAS**, the Corps has invited the Lower Sioux Community, the Upper Sioux Community, the Prairie Island Community, the Shakopee Mdewakanton Sioux, the Sisseton-Wahpeton Oyate, the Ho-Chunk Nation, the Iowa of Kansas and Nebraska, and the Winnebago of Nebraska to participate in consultation and development of this PA and the Upper Sioux Community and

Shakopee Mdewakanton Sioux Community have requested to be Consulting Parties and have been invited to sign this PA as concurring parties; and

**WHEREAS**, public involvement and an appropriate level of public notification for the undertaking, pursuant to 36 CFR § 800.2(d), will be coordinated with the concurrent scoping, public review and comment, public meetings, and technical reviews as required under NEPA and its implementing regulations; and

NOW, THEREFORE, the Corps and the SHPO agree that the undertaking shall be implemented in accordance with the following stipulations in order to take into account the effects of the undertaking on historic properties.

### **Stipulations**

The Corps shall ensure that the following stipulations are carried out.

#### **I. Phase I and Phase II Historic Property Identification and Evaluation**

- A. Following the execution of this PA and prior to the commencement of any construction activities, the Corps shall have its consultants complete and document historic property identification efforts and NRHP eligibility recommendations within the undertaking's APE in accordance with 36 CFR § 800.4. The Corps shall ensure that any archaeologists, historians, or architectural historians who conduct historic property identification and evaluation efforts related to the Project meet the professional qualification standards in the appropriate field as defined in the Secretary of the Interior's (SOI) *Standards and Guidelines for Archaeology and Historic Preservation* (48 FR 44716-01).
- B. All historic property identification, evaluation, and survey work carried out pursuant to this PA will meet the SOI *Standards for Archaeology and Historic Preservation*, applicable NRHP Bulletins, and applicable State of Minnesota guidelines.
- C. The Corps shall ensure that, at a minimum, its consultants complete a literature search of the APE which includes consulting Minnesota site files, previous survey reports, and other documents at the SHPO and the Office of the State Archaeologist (OSA) for information on previously recorded historic properties, site leads, and previously surveyed areas. The literature search shall be used to direct the scope of the Phase I reconnaissance and Phase II intensive level surveys.
- D. Any archaeological investigations conducted in association with the proposed Project shall follow the guidelines outlined in the *SHPO Manual for Archaeological Projects in Minnesota*.
- E. The Phase I/Phase II architecture/history investigations shall follow the guidelines outlined in the Heritage Preservation Department, *Historic and Architectural Survey Manual* and shall include an adequate level of survey of all properties forty-five (45) years old or older within the APE for direct and indirect effects for the Project.
- F. The Corps' consultants shall provide to the Corps their fully-documented historic property identification efforts, including NRHP-eligibility determinations and recommendations. The Corps shall review the provided documentation and shall



provide its fully-documented eligibility determinations and recommendations to the SHPO and Consulting Parties, who shall have thirty (30) calendar days from receipt of the documentation to provide their comments to the Corps.

- G. After receipt of comments from the SHPO and Consulting Parties, the Corps shall provide all comments to their consultants and the consultants shall incorporate all changes requested in those comments within thirty (30) days of receipt.
- H. If the Corps chooses to not accept a comment by the SHPO or Consulting Parties, the Corps shall provide a written explanation to the SHPO and Consulting Parties and consult, as appropriate, to seek resolution. Should the Corps and the SHPO be unable to reach agreement on NRHP-eligibility determinations under this stipulation, then the Corps shall resolve the disagreement pursuant to Stipulation V *Dispute Resolution*.
- I. Following completion of review and consultation as required under Stipulation I (G-H), the consultants shall submit the final report and any associated historic property inventory forms to the Corps, and the Corps will submit these documents to SHPO for incorporation into the statewide historic property records inventory. Reports shall be considered final upon written notice from the Corps.

## **II. Assessment of Effect**

- A. The Corps will strive to avoid and protect any historic properties identified that may be affected by the Project.
- B. If the Corps finds that either there are no historic properties identified within the APE, or there are historic properties within the APE, but the Project will have no effect upon them, as defined in 36 CFR § 800.16(i), then the Corps may make a No Historic Properties Affected finding and provide this finding, along with supporting documentation, in accordance with 36 CFR § 800.11(d), including, but not limited to, photographs, maps, and drawings/plans, to the SHPO and Consulting Parties who shall have thirty (30) days to review and comment.
  - 1. If the SHPO and Consulting Parties agree with the Corps' No Historic Properties Affected finding, then no further consultation is required. The Corps shall notify the public of this finding in accordance with 36 CFR § 800.4(d)(1).
  - 2. Implementation of the Project in accordance with the Corps' No Historic Properties Affected finding, as documented, fulfills the agency's responsibilities under Section 106. If the Corps does not conduct the Project as proposed at the time of the No Historic Properties Affected finding, then the Corps will need to reopen consultation.
  - 3. If the Corps and the SHPO are unable to reach agreement on the Corps' finding of No Historic Properties Affected, the Corps shall consult with the SHPO to resolve the disagreement in accordance with Stipulation V *Dispute Resolution*.
- C. If the Corps finds that historic properties within the APE may be affected by the Project, then the Corps shall assess adverse effects in accordance with 36 CFR § 800.5.

1. Following the assessment of adverse effect, the Corps may make a finding of No Adverse Effect to historic properties. If so, then the Corps shall provide this finding, along with supporting documentation, in accordance with 36 CFR § 800.11(e), including, but not limited to, photographs, maps, and drawings/plans, to the SHPO and Consulting Parties who shall have thirty (30) days to review and comment.
  - a. If the SHPO and Consulting Parties agree with the Corps' No Adverse Effect finding, then no further consultation is required. The Corps shall maintain a record of this finding and provide information to the public on request.
  - b. Implementation of the Project in accordance with the Corps' No Adverse Effect finding, as documented, fulfills the agency's responsibilities under Section 106. If the Corps does not conduct the Project as proposed at the time of the No Adverse Effect finding, then the Corps will need to reopen consultation.
  - c. If the Corps and the SHPO are unable to reach agreement on the Corps' finding of No Adverse Effect, the Corps shall consult with the SHPO to resolve the disagreement in accordance with Stipulation V *Dispute Resolution*.
2. Following the assessment of adverse effect, the Corps may make a finding of Adverse Effect to historic properties. If an Adverse Effect finding is made, the Corps shall proceed with consultation to resolve the adverse effect by seeking ways to avoid, minimize, or mitigate the adverse effect to historic properties in accordance with Stipulation III *Resolution of Adverse Effects*.
  - a. Following a finding of Adverse Effect, the Corps shall notify and invite the Council to participate in the consultation to resolve the adverse effect in accordance with 36 CFR § 800.6(a)(1).

### **III. Resolution of Adverse Effects**

- A. If the Corps finds, pursuant to review and consultation under Stipulation II of this PA, that the Project will have an adverse effect on historic property(ies), then the Corps shall consult with the SHPO and others, including Consulting Parties, as applicable, to resolve the adverse effect, including consideration of whether or not the adverse effect may be avoided through modification of Project design or other measures.
- B. If the Corps, the SHPO, and Consulting Parties, if applicable, reach agreement in writing on modifications or measures to avoid adverse effects and essentially revise the finding to a No Adverse Effect finding, then the Corps shall document the agreement in the Corps administrative record for the Project and share findings with the SHPO, and Consulting Parties, as applicable. The Project shall then be carried out according to the Corps written agreement to avoid adverse effects.
- C. If the Corps, the SHPO, and Consulting Parties, if applicable, fail to reach agreement on appropriate avoidance measures pursuant to Stipulation III (A) of this PA, then the Corps shall make a determination that the adverse effect cannot be avoided and will continue consultation with the SHPO and Consulting Parties pursuant to Stipulations III (D-E) to identify appropriate minimization and/or mitigation measures to resolve the adverse effect.



- D. The Corps shall consult with the SHPO and Consulting Parties, as applicable, to this PA to determine appropriate minimization and/or mitigation measures to resolve the adverse effect. Once an agreement on resolution of the adverse effect has been reached in writing, the Corps shall develop a Mitigation Plan (Plan) appropriate to the historic property(ies) and the nature and scale of the adverse effect(s). The Plan shall incorporate minimization and mitigation measures agreed upon during consultation under Stipulation III (C) of this PA. The Corps shall provide a final draft of the Plan to the SHPO and Consulting Parties to this PA who will have thirty (30) calendar days from receipt to review and provide comments. The Corps will incorporate the comments, as feasible, into the final Plan and provide explanations to the SHPO and Consulting Parties if comments cannot feasibly be incorporated.
- E. The final Plan shall be agreed to in writing by the Corps and the SHPO and Consulting Parties to this PA and will be carried out according to its terms in order to resolve adverse effects. If the Corps and the SHPO or Consulting Parties cannot reach agreement on the Plan, the Corps will proceed with consultation in accordance with Stipulation V *Dispute Resolution*.
- F. If any agreed-upon mitigation included in the final Plan involves archaeological data recovery or some other historic property documentation, then Project-related ground-disturbing activities may not begin until after the completion of the fieldwork for the data recovery or documentation and the Corps has provided written notification in this regard.

#### **IV. Unanticipated Discoveries**

- A. If previously unidentified historic properties, including human remains, are discovered unexpectedly during construction of the Project, or previously known historic properties are affected, or have been affected in an unanticipated adverse manner, all ground-disturbing activities will cease in the area of the historic property, as well as within one hundred (100) feet of it, to avoid and/or minimize harm to the property. The contractor will immediately notify the Corps of the discovery and implement interim measures to protect the discovery from damage, looting, and vandalism, including but not limited to protective fencing and covering of the discovery with appropriate materials. Upon receipt of the notification, the Corps shall notify the SHPO and Native American groups and may inspect the construction site to ensure that construction activities have halted. The SHPO and Native American groups may jointly confer at the site to assess the property and potential impacts, and to determine the most appropriate avoidance measures.
- B. If unmarked human burials or skeletal remains are encountered during construction activities, all ground disturbing activities will cease. The contractor will immediately notify the Corps and local law enforcement and the Corps will bring in a qualified consultant as appropriate who meets the SOI professional qualification standards for his or her respective field. The consultant will comply with federal laws as well as take into account the ACHP's Policy Statement on the Treatment of Burial Sites.
  - 1. If it is immediately obvious that the skeletal remains found are non-human and are in association with cultural material, the procedures described in Stipulation IV (A) and (B) shall be followed.

2. The Corps shall immediately notify the SHPO, and appropriate Native American groups within twenty-four (24) hours via email, fax, or telephone. The Corps will also notify the Office of the State Archaeologist (OSA) and Minnesota Indian Affairs Council (MIAC).
3. If it is not certain whether the remains are human, all work will immediately cease within a 100-foot radius from the point of discovery and the consultant will secure the area. The consultant will place pin flags in a 100-foot radius around the discovery and ensure that appropriate measures are taken to protect the discovery from further disturbance. All human remains, regardless of ancestry, will be treated with dignity and respect.
4. The local law enforcement will investigate the human remains and contact the medical examiner. If the human remains are modern, the local law enforcement and/or medical examiner will assume responsibility. If it is determined that the remains are not modern or do not reflect a crime scene and/or the local law enforcement relinquish their jurisdiction over the remains, the Corps will consult with the SHPO and appropriate tribes regarding additional steps to be followed.
5. If the human remains appear to be precontact or historic Native American, the Corps will meet the requirements of the Native American Graves Protection and Repatriation Act for all Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony on a case-by-case basis, in accordance with 43 CFR Part 10. An action plan will be written for each case by the Corps in consultation with appropriate consulting parties.
6. Measures to protect the human remains and any associated artifact(s) will remain in effect until the remains and associated artifacts have been fully evaluated and appropriate treatment of the discovery (if applicable) has been completed. The contractor will not resume work in the vicinity of the find until the Corps has granted clearance to do so.

## **V. Dispute Resolution**

Should any party to this PA object at any time to any actions proposed or the manner in which the terms of the PA are implemented, the Corps shall consult with such party (or parties) to resolve the objection. The parties shall work cooperatively to achieve a consensus to resolve any disagreement. If the Corps determines the objection(s) cannot be resolved, the Corps shall:

- A. Forward all documentation relevant to the dispute, including the Corps' proposed resolution, to the Council. The Council shall provide the Corps with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, the Corps shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the Council, signatories and concurring parties, and provide them with a copy of this written response. The Corps will then proceed according to its final decision.
- B. If the Council does not provide its advice regarding the dispute within the thirty (30) day time period, the Corps may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, the Corps shall prepare a written response that takes into account any timely comments regarding the dispute from the Signatory Parties and provide them and the Council with a copy of such written response.



- C. Any comment provided by the Council or Signatory Party in response to a dispute shall be taken into account by the Corps with reference only to the subject of the dispute; the Signatory Parties' responsibility to carry out all other actions subject to the terms of this PA that are not the subject of the dispute remain unchanged.

## **VI. Duration**

This PA will remain in effect for a period of seven (7) years from the date of execution; at such time, if the terms of the PA have not been implemented, this agreement will be null and void. If the Corps anticipates that the terms of this PA will not be completed within this timeframe it will notify the signatories in writing at least thirty (30) calendar days prior to the expiration date. This PA may be extended by the written concurrence of the signatories. If this PA expires and the Corps elects to continue with the undertaking, then the Corps will reinitiate review of the Project in accordance with 36 CFR Part 800.

## **VII. Amendments**

This PA may be amended when such an amendment is agreed to in writing by the signatories. Any signatories to this PA may request that it be amended, whereupon the other signatories will consult in accordance with Stipulation V of this PA. The amendment will be effective on the date that a signed copy of the amendment is filed with the Council.

## **VIII. Termination**

This PA may be terminated by any of the signatories upon thirty (30) days written notice to the other signatories. The signatories will consult during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, the Corps will reinitiate review of the undertaking in accordance with 36 CFR Part 800.

## **IX. Anti-Deficiency Provision**

All obligations on the part of the Corps under this PA shall be subject to the appropriation, availability and allocation of sufficient funds to the Corps for such purposes.

## **X. Implementation of this PA**

This PA may be executed in counterparts, with a separate page for each signature. This PA will become effective on the date of the final signature of a signatory or invited signatory. The Corps will ensure each party is provided with a complete copy and that the final PA, updates to appendices, and any amendments are filed with the Council.

Execution of this PA by the Corps and the SHPO and implementation of its terms is evidence that the Corps has taken into account the effects of its undertaking on historic properties and has afforded the Council opportunity to comment pursuant to Section 106 of the NHPA.

**PROGRAMMATIC AGREEMENT  
BETWEEN  
THE U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT  
AND  
THE MINNESOTA STATE HISTORIC PRESERVATION OFFICE  
REGARDING  
THE PURCHASE OF LANDS FOR  
THE MISSISSIPPI RIVER NAVIGATION POOL 5  
DREDGED MATERIAL MANAGEMENT PLAN,  
WABASHA COUNTY, MINNESOTA**

**SIGNATORY**

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

By: Karl Jansen  
Colonel Karl Jansen, District Engineer

Date: 30 OCT 19

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WABASHA COUNTY, MINNESOTA**

**SIGNATORY**

**Minnesota State Historic Preservation Office**

By: 

Date: 11/4/19

Amy Spong, Deputy State Historic Preservation Officer



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WABASHA COUNTY, MINNESOTA**

**CONCURRING PARTY  
Upper Sioux Community**

By: \_\_\_\_\_  
Kevin Jensvold, Chairman

Date: \_\_\_\_\_

**PROGRAMMATIC AGREEMENT**

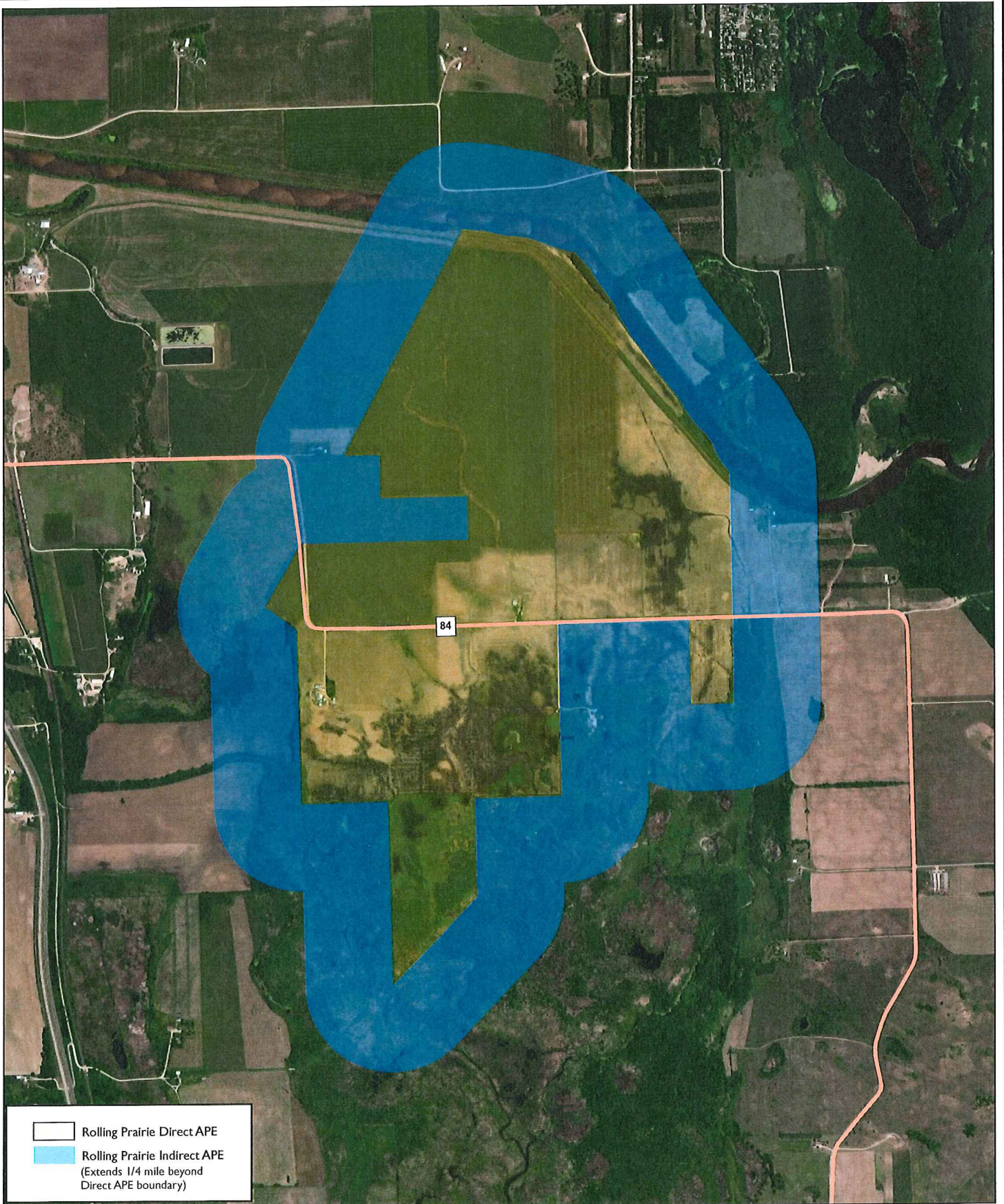
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**CONCURRING PARTY  
Shakopee Mdewakanton Community**

By: \_\_\_\_\_  
Charles R. Vig, Chairman

Date: \_\_\_\_\_





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### Rolling Prairie Area of Potential Effect (APE)

Base Image: Esri, DigitalGlobe Imagery

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