FINAL

PROGRAMMATIC AGREEMENT
FOR THE
OPERATION AND MANAGEMENT OF THE
MISSOURI RIVER MAIN STEM SYSTEM
FOR COMPLIANCE WITH THE NATIONAL
HISTORIC PRESERVATION ACT, as amended

MARCH 19, 2004

TABLE OF CONTENTS

Topic/Section	Page No.
Preamble	P-1
Declarations (Whereas/Now Therefore clauses)	1
Stipulations	3
1. Definitions	3
2. 1993 Programmatic Agreement	3
3. Scope of this Programmatic Agreement	3
4. Relationship to Treaties, Statutes, Regulations, Executive Orders, Court Orders, and Other Authorities	4
5. Programmatic Agreement Coordination	4
6. Consultation	4
7. Non-National Historic Preservation Act Commitments	7
8. Undertaking Review Provisions; THPO or SHPO Non-Signature, Withdrawal, or Termination; and Exempt Undertakings	7
9. Main Stem Reservoirs Cultural Resources Management Plans	7
10. Five-Year Cultural Resources Implementation Plan	8
11. Identification of Historic Properties	10
12. Measures to Avoid, Minimize, or Mitigate Adverse Effects	11
13. Site Monitoring Program	11
14. Enforcement Program	11
15. Cultural Resource Education Program	12
16. Curation of Artifact Collections, Material, Records, and Data	13
17. Protection of Sensitive Information	13
18. Corps Main Stem System Operations Decision Documents	14
19. Tribal Partnerships	14
20. National Historic Preservation Act/Native American Graves Protection and Repatriation Act Overlap	14
21. Performance Standards and Qualifications	15
22. Annual Report	15
23. Semi-Annual Consultation Meetings and PA Annual Review	15
24. Funding and Budget Planning	16
25. Dispute Resolution	16
26. Additional Signatories	17
27. Amendments	17
28. Withdrawal	17
29. Termination	18
30. Duration	18
Signature Pages	S-1
Attachment 1 – Authorities	A1-1
Attachment 2 – Acronyms and Definitions	A2-1
Attachment 3 – MOU Regarding Commitments Outside this Programmatic Agreement	A3-1
Attachment 4 – Annual Reports	A4-1
Attachment 5 – Additional Signatory Form	A5-1

PROGRAMMATIC AGREEMENT FOR THE OPERATION AND MANAGEMENT OF THE MISSOURI RIVER MAIN STEM SYSTEM FOR COMPLIANCE WITH THE NATIONAL HISTORIC PRESERVATION ACT, as amended

PREAMBLE[1]

BACKGROUND

The Missouri River corridor is approximately 2,315 miles long. Over the course of thousands of years of occupation, Indigenous Peoples have established and maintained cultures and traditions that revolve around the natural resources of, and wildlife attracted by, the Missouri River ecosystem. This ecosystem and its well being continue to be crucial to the worship practices and life ways of contemporary Indigenous Peoples. There is a direct relationship between the environment, traditional worship practices, and the continued survival of diverse indigenous groups. Animals such as the buffalo, eagle, wolf, turtle, migratory and non-migratory birds, a variety of fish and aquatic plants and animals, as well as several species of trees, shrubs, and plants are central to traditional worship beliefs and practices. Within the Missouri River corridor, important natural springs exist which are sacred to Indigenous Peoples and have been considered so for thousands of years.

For Indigenous Tribal Peoples, the Missouri River is characterized as "The Water of Life" and the very water that created the corridor is considered sacred. When the Army Corps of Engineers built six main-stem dams on the Missouri River, life for the Indigenous Peoples who called the River home changed immediately and dramatically. Gone are many of our ancient, river-bottom homes, our medicines, our sacred places, the earthlodge and tipi village and hunting camp sites created by our beloved ancestors. Gone also are many places intrinsic to our origin stories and to events in our oral histories that are alive in our Peoples' minds and hearts and in stories which are still related today. The loss of our river homes affected every aspect of the quality of our lives: spiritual, mental, physical, emotional, and socio-economic lifeways, all of which make up our very identity as Native Peoples. Altering the flow of the River altered the face of our Mother Earth, and we are still reeling from and dealing with the consequences of these man-made changes.

As a result of the creation of the Missouri River main stem and attendant dams, there are severe threats to many of the remaining sacred places and important resources that traditional Indigenous Cultures require for continuance. These threats include but are not limited to:

- Impacts caused by increasing development expanding out from urban areas (both on and off the water), which has historically been fueled by inadequate planning and management, as well as poor enforcement of applicable laws and regulations.
- The cultural resources, including traditional and sacred places, within the corridor are routinely raided and looted by pot hunters, at night and often from boats, and by 'vacation archaeologists' and pothunters who don't acquire federally required permits.

[1] This Preamble was authored by the Tribes that consulted on this PA. It is not intended to and does not reflect the views of the U.S. Army, Corps of Engineers and may not reflect the views of the consulting parties.

- The waters of the lakes created by the Missouri River dams are constantly eroding the shoreline by ice in winter and wind generated waves in summer, or the raising and lowering of lake levels, in places removing shoreline by up to 30 or more feet per year. This erosion is not only an environmental problem, it also erodes indigenous tribal burial sites, ceremonial sites, and occupation sites. The eroding shoreline is causing the disappearance of many wild gathering and harvesting areas crucial to the continuance of traditional ways of life.
- An increasingly serious siltation problem is forming deltas at the mouths of all drainages flowing into the corridor caused by the lack of free flowing water in the corridor itself.
- The dams have adversely impacted the fish populations, as well as nesting birds, river otters, migratory birds, and many other animal species that relied on the natural rhythms of the river, which directly result in several species being identified as listed, threatened, or endangered. Studies have yet to be completed which identify plant (medicines) species that have been impacted by the dams.
- Investments of cooperative initiatives (Tribal, State and Federal) in the reintroduction of habitat along the riverbanks are seriously impacted by rapid erosion, even those plantings designed to slow or halt erosion.
- Increasing concentrations of chemicals and other pollutants are having an adverse impact on the use of water in all areas of life, including ceremonial activities.

For Indigenous Nations, Cultural Resources include animals, plants, and natural resources, as well as burial, occupation, prayer/worship, gathering, and gardening sites. Cultural Resources from the perspective of land-based worshippers also include important viewsheds, buttes, mountains, high ridges, and other natural formations that do not fit any Federal concepts or definitions. This has been problematic for Tribes and Tribal Peoples who see these resources holistically. In contrast, Federal and State law often segment these resources and assign their well being and management to diverse and, at times, competing Federal or State agencies. Under the National Historic Preservation Act (NHPA), an area that is inhabited by a unique community of plants or animals can be recognized as eligible for the National Register of Historic Places because of its ongoing importance for the culture of a living human community as a traditional cultural property (TCP), but in the implementation of the NHPA, much more attention has been given to sites that contain archaeologically important components. In addition, the importance of these relationships is subject to the interpretation of people and agencies that have no connection to either the archaeological/historic component or the plant/animal component and little understanding of their perceived sacredness by Indigenous Peoples.

This Programmatic Agreement is an attempt to address all problems associated with cultural and historic resource impacts involved with the ongoing operation and maintenance of the Missouri River system of main stem dams. It is by design an initiative that will facilitate the development of processes and strategies to minimize, avoid, or mitigate the ongoing adverse impacts the system causes. It is an attempt to overcome barriers keeping worshippers from areas and resources that are essential to their continuing ability to carry out traditional worship pursuits. Furthermore, through the collective establishment and implementation of principles of Consultation, and Collaboration, and Shared Stewardship, this document will lay the groundwork for Tribes to achieve parity with the Corps of Engineers on issues directly affecting important historic, cultural, and natural resources. Though this document is limited in its scope to the application and enforcement of historic preservation and protection laws, it provides

the opportunity to develop a dialogue and forum for the various Indigenous Nations and Federal agencies to begin addressing all resources considered sacred or important by Indigenous Peoples.

PARADIGM SHIFT

Historically, the Army Corps and the Tribes have experienced difficulties in addressing these issues in a manner that produces positive change and benefits for Tribes. It is time now to affect a shift in the paradigm that has driven the "management" of tribal sacred and cultural places; a substantial change is, in fact, long overdue. Since the 1970s, according to an Army Corps document issued during the Master Manual comment period, a total of $1.9 million has been spent by the Omaha District Army Corps to stabilize shoreline for a total of 19 archaeological sites on the Missouri River. Recently, the Northwestern Division announced that $3 million would be available annually to support the Cultural Resources Office of the Omaha District, all of which should be spent to stabilize the shoreline of the most endangered sacred and cultural places. Recently, the Army Corps staff issued a comprehensive list of the most endangered sites on the Missouri River, which comes with a price tag of $77 million for shoreline stabilization. There is a tremendous disparity between available funds and what is still needed to preserve and protect our remaining cultural resources, and this disparity can only be addressed by an immediate and drastic change in the way our sacred places are cared for and maintained.

The Tribes expect the Corps to manage lands under its jurisdiction in a manner consistent with the Federal trust responsibility to Indian Tribes. The Corps acknowledges that the trust responsibility includes legal responsibilities and obligations to provide the highest standards of fiduciary care with respect to Federal and other activities that may affect the lands, other trust resources, and the exercise of the powers and rights of Indian nations.

All Corps actions, in the Missouri River Basin, directly or indirectly affect trust land, and some of the lands managed by the Corps are within reservation boundaries established by treaties where the Tribes and their members continue to have treaty-based rights even though lands have been taken out of trust status. Federal lands managed by the Corps (both within and outside reservation boundaries) include places that hold religious and cultural importance of the Tribes, and some of these places are crucial for the cultural identities of the Tribes and, as such, for the survival of the Tribes as distinct Peoples. Some of these places contain the graves of ancestors and funerary objects, in which Federal law recognizes the right of lineal descendants and culturally affiliated Tribes to take custody in the event that they are removed from the Earth. The Tribes expect the Corps to treat these sacred and cultural significant places as subject to the Federal trust responsibility.

This means that the Tribes must be engaged in consultation before decisions are made and that the Tribes expect to be equal participants in making decisions and in carrying out decisions. Consultation shall be both specific to individual Tribes and with as many comprehensive consultations attended by all affected Tribes as are necessary, with real efforts to reach consensus. Consultations shall be conducted in a positive manner, on a government-to-government basis, honoring all treaties and the trust doctrine which entail a fiduciary and fiscal responsibility of the Corps. Decisions will be made on a government-to-government basis. Finally, the Corps shall include, as consulting parties, affected Tribes in any review or update of the Master Manual.

The Tribes expect the Corps to exercise genuine stewardship with respect to places that hold religious and cultural importance for the Tribes and to share the stewardship of these special places with the Tribes. Whether this is called "shared stewardship" or "cooperative management" or some other term, the Tribes expect the relationship that develops between the Corps and the Tribes to be respectful and cooperative, with the ultimate objective of protecting these sacred and culturally importance places and assuring access for religious and cultural activities.

Finally, the Tribes anticipate that this shared stewardship document will ensure that our sacred and cultural places are regarded and understood from a native viewpoint with our values and customs applied to their protection, and not necessarily those of archaeology. For decades, the perceived archaeological value of our sacred places has been the only viewpoint considered, and that method of assigning value to our holy places has contributed to a recipe for their destruction: mix equal parts erosion, neglect and development; let this mixture 'rest' for fifty years, add a measure of 'salvage archaeology,' destroying the sites to extract data; let the rest fall into the water. And you have a meal that is unfit to eat for Native peoples, a meal which we have been force-fed since the 1930's, when construction of the first dam near the Ft. Peck Reservation was begun.

The Tribes expect that in the new paradigm, the fundamental value will be respect: respect for the River and for our sacred and cultural places; respect for our values, our culture, our beliefs; respect for Native Peoples and our contributions to the upper Missouri River environment; as well as respect for the tremendous sacrifices we made so that newcomers to our homelands could have flood control and electricity. We want to be taken seriously when we talk about our cultures, our needs, and our issues—and we want to be taken as seriously as archeologists are when they talk about our ancestors, our cultures, and our interests. And that is the second half of the paradigm shift our Nations are all working toward: to bring our interests and issues, articulated from our value system and from our point of view, to a 'key issue' priority level with the Omaha District of the Army Corps so that they receive the same attention and resources as other issues for which the Corps has responsibility. We know that what we want is not unreasonable. We also know that the Programmatic Agreement holds great potential to improve relations between the Missouri River Tribes and the Army Corps, and can be the tool we use to create a success story of which we can all be proud.

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WHEREAS, the Omaha District and the Northwestern Division of the U.S. Army Corps of Engineers, (hereinafter the Corps) operate and manage the integrated system of multi-purpose reservoir projects and associated structures and lands on the Main Stem of the Missouri River for flood control, navigation, irrigation, municipal and industrial use, recreation, fish and wildlife protection, and other purposes as authorized by the Flood Control Act of 1944 (P.L. 78-543, as amended) and other relevant authorities; and

WHEREAS, the Corps' authorized operation and management of impounded waters of the Main Stem System results in adverse effects to properties included in or eligible for the National Register of Historic Places (hereinafter, historic properties) through inundation, erosion, exposure, and other factors; and

WHEREAS, the Corps' authorized management of project lands that are not routinely inundated or periodically inundated, including land-based support facilities for water control, facilities and measures for recreation, general public use, access, and the enhancement of the environment, fish and wildlife, and other authorized purposes may result in direct and indirect effects to historic properties such as damage or destruction from construction, burning, erosion, sedimentation, theft, looting, vandalism, and other factors; and

WHEREAS, the Corps is responsible for complying with the National Historic Preservation Act, as amended (hereinafter, NHPA) (P.L. 89-665, as amended; 16 U.S.C. 470f), including Section 110 that requires federal agencies 1) to establish a program to preserve, protect, identify, evaluate, and nominate historic properties under their jurisdiction or control (including traditional cultural properties (TCPs) and historic properties to which Tribes attach religious and cultural significance) in consultation with others and 2) to give full consideration to the preservation of historic properties not under their jurisdiction or control but affected by federal agency undertakings; and

WHEREAS, the Corps' Main Stem System operations and management actions meet the definition of undertakings for the purposes of Section 106 of the NHPA (16 U.S.C. 470f) (hereinafter Section 106) and, therefore, the Corps is responsible for complying with Section 106 for these actions; and

WHEREAS, in compliance with Section 106, the Corps, Indian Tribes (hereinafter Affected Tribes), Tribal Historic Preservation Officers (hereinafter, THPOs) and State Historic Preservation Officers (hereinafter, SHPOs), the Advisory Council on Historic Preservation (hereinafter, ACHP) and other consulting parties have developed and the Corps will implement this Programmatic Agreement (PA) in accordance with 36 CFR Section 800.14(b) for certain of the Corps' operation and management actions as outlined in this PA; and

WHEREAS, the Corps is required by Section 101(d)(6) of the NHPA to consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by a proposed federal undertaking subject to Section 106; and

WHEREAS, the United States Department of Defense recognizes its trust responsibilities to federally recognized Indian Tribes and has established an American Indian and Native Alaskan Trust policy that directs Department of Defense agencies, including the U.S Army Corps of Engineers, to work with Tribes in a manner that incorporates tribal needs, traditional resources, stewardship practices, and the development of viable working relationships; and

WHEREAS, the ACHP recognizes its trust responsibility to federally recognized Tribes and has described this trust responsibility in its, "ACHP Policy Statement Regarding ACHPs Relationship with Indian Tribes", issued November 17, 2000 and updated on April 4, 2003; and

WHEREAS, the Corps recognizes that sacred and cultural resources, many of which are historic properties, are critically important to the Affected Tribes for the continuity and revitalization of cultural and spiritual life-ways, making avoidance of adverse effects to these resources and the preservation of remaining sacred and cultural places a matter of the highest priority regardless of their eligibility to the National Register of Historic Places; and

WHEREAS, in addition to the NHPA, the Corps is responsible for compliance with other applicable legal authorities outlined in Attachment 1 to this PA that may overlap with or be supportive of the goals and purview of the NHPA and,

WHEREAS, the Corps has provided the opportunity to consult on the development of and to become a signatory to this PA to the ACHP; SHPOs of Montana, North Dakota, South Dakota, and Nebraska; Standing Rock Sioux Tribe and its Tribal Historic Preservation Officer (THPO); Cheyenne River Sioux Tribe and its THPO; Santee Sioux Tribe; Yankton Sioux Tribe; Crow Creek Sioux Tribe; Lower Brule Sioux Indian Tribe; Three Affiliated Tribes; the Assiniboine and Sioux Tribe of Fort Peck; Turtle Mountain Band of the Chippewa Tribe and its THPO; Blackfeet Tribe; Chippewa Cree Tribe; Crow Nation; Flandreau Santee Sioux Tribe; Gros Ventre and Assiniboine Tribe; Northern Arapaho Tribe; Northern Cheyenne Tribe; Oglala Sioux Tribe; Omaha Tribe of Nebraska; Ponca Tribe of Nebraska; Rosebud Sioux Tribe; Sisseton-Wahpeton Sioux Tribe; Spirit Lake Sioux Tribe; Sac and Fox of Missouri in Kansas and Nebraska; South Dakota Department of Game Fish and Parks (SDGFP); Bureau of Indian Affairs (BIA); and the National Trust for Historic Preservation (NTHP) (hereinafter consulting parties).

NOW, THEREFORE, the above parties agree that the Missouri River Main Stem System shall be administered in accordance with the following stipulations to avoid, minimize, or mitigate adverse effects and satisfy the Corps' Section 106 responsibilities for those actions outlined within this PA.

STIPULATIONS

The Corps shall ensure the following measures are implemented:

1. Definitions.
The list of definitions used in this Programmatic Agreement is provided in Attachment 2.

2. 1993 Programmatic Agreement
The Programmatic Agreement for the Missouri River Main Stem System previously executed by the ACHP, Corps and SHPOs from Nebraska, South Dakota, North Dakota and Montana on October 18, 1993 is null and void.

3. Scope of this Programmatic Agreement

A) The geographical scope of this PA, based on the Corps' concept of the Area of Potential Effects, is as follows:

i) federal lands, owned by the Corps, beginning at the headwaters of Fort Peck Lake, approximately 3 miles northwest of the Fred Robinson Bridge, Phillips County, Montana to Gavins Point Dam, Yankton County, South Dakota, including but not limited to Fort Peck Lake and Fort Peck Dam; Lake Sakakawea and Garrison Dam; Lake Oahe and Oahe Dam; Lake Sharpe and Big Bend Dam; Lake Francis Case and Fort Randall Dam; and Lewis and Clark Lake and Gavins Point Dam with project lands and related structures, generally known as the Missouri River Main Stem System; and
ii) areas downstream of and adjacent to the six Main Stem dams (which are affected by the operation of the system) are within the geographical scope of this PA, even though these areas are not under the authority or ownership of the Corps and may not be in federal ownership. It is recognized that the Corps has restrictions on its use of Main Stem operations monies and other authorities on non-Corps lands.

B) The Corps shall comply with Section 106 in accordance with 36 CFR part 800 for the following activities:

i) Projects, activities, policies by or authorized by the state of South Dakota and/or the Corps on so-called Title VI lands, e.g., lands transferred to the SDGFP pursuant to Title VI of the Water Resources Development Act of 1999, as amended (Title VI hereinafter), as the Corps will begin consultation on the development and implementation of a separate PA for these actions in accordance with 36 CFR Section 800.14(b) by December 2004.
ii) Corps lands or exchanges, including those pursuant to Title VI;
iii) Corps regulatory actions pursuant to Section 404 of the Clean Water Act.

4. Relationship to Treaties, Statues, Regulations, Executive Orders, Court Orders, and Other Authorities

A) In general, nothing in this PA diminishes or affects any treaty right of an Indian tribe, any water right of an Indian tribe, or any other right of an Indian Tribe, any external boundary of an Indian reservation of an Indian Tribe; any authority of the States that are a party to this PA; any authority of the Corps or the head of any other federal agency under a law in effect on the date of signing of this PA; any treaty or water right, or any other right of an entity that is not a party to the PA.

B) No provision of this section or of the PA shall limit any right of an Affected Tribe or other consulting party to bring an action against the Corps or any other party once final agency action is complete; shall alter existing law regarding the sovereign immunity of the Tribes, the other consulting parties, or the Corps, or any other entity that is not a part of this PA; or shall be construed to alter existing law regarding the trust duty of the United States or the Corps to the Tribes (either to limit or expand that trust duty).

C) All court orders, including settlement agreements (present and future), shall be implemented and their terms be incorporated into documents and measures or revisions to them called for in this PA. In any case of difference or ambiguity, a court order shall take precedence over the terms of this PA.

5. Programmatic Agreement Coordination.

A) Designated PA Representative(s). Within 60 days of signing this PA, each Affected Tribe and THPO, ACHP, SHPO, and other consulting party shall designate a point of contact for carrying out this PA (hereinafter, PA representative). If more than one person is designated as PA representatives, the party also shall indicate the responsibilities of each such person for carrying out this PA.

B) Government/Personnel Changes. Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties shall provide timely written notification to the Corps and the other parties to this PA of changes in their tribal or agency leadership (tribal Chairman or President; head of agency, etc.), persons holding cultural and historic preservation positions, and PA representatives.

6. Consultation.

All consultation and coordination required under this PA shall be conducted in accordance with the following:

A) General. The Corps shall plan consultations to coordinate with the requirements of all applicable statutes and executive orders. Affected Tribes and THPOs, SHPOs, ACHP and other consulting parties shall be provided the opportunity to participate in the development and implementation of agreements, management plans, and activities developed or required under this PA. The Corps, Affected Tribes and THPOs, SHPOs, and other consulting parties shall facilitate and cooperate in the consultation process toward the mutual goal of information sharing and promotion of respect.

B) Review and Response Requirements. Unless otherwise provided for in this PA, the Corps shall afford the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties no less than 30 calendar days from receipt of a complete consultation request to respond to a Corps communication required under this PA. A complete consultation request shall include information that the party determines is needed to make an informed decision on the matter. Should any Affected Tribe or THPO, SHPO, or other consulting party not respond within this time limit or other limit specified elsewhere in the PA, the Corps will document in its records when consultation was requested and the non-response. Unless an Affected Tribe or THPO, SHPO, or other consulting party responds in writing that it does not wish to consult at all on the proposed undertaking or matter, the Corps shall assume that the party wishes to continue consulting on subsequent requests related to that initial undertaking or matter. Failure to respond will not be construed as either concurrence or non-concurrence.

C) Pre-Consultation Actions. To promote effective and meaningful consultation, the Corps shall notify the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties of the need to consult on the various matters called for in this PA as soon as possible and pre-decisionally as follows:

i) provide a notification letter with information about the proposed undertaking or matter to each PA representative, with a copy to the head of the agency or tribal government, as early as possible and prior to making any decisions about the proposed undertaking or matter;
ii) follow-up via telephone with the PA representative after distributing the notification letter to establish a person-to-person contact;
iii) provide further information as the PA representative may need for informed input and judgment;
iv) provide draft agendas, request input from the PA representative, and finalize the agenda based on this input;
v) coordinate consultation for this PA with consultation requirements for other legal bases to the extent possible and inform the PA representative of all pertinent legal bases for consultation.

D) Consultation Guidelines. For meaningful and effective consultation with the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties, the Corps shall

i) Listen carefully before any decisions are made so as to understand the needs and perspectives of the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties;
ii) Work as equal partners with the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties to consider and devise means to identify and preserve cultural resource sites and avoid effects to them, consistent with tribal viewpoints and values. If avoidance is not possible, the Corps shall work with the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties as equal partners to minimize effects to such sites to the greatest extent possible;
iii) Provide all pertinent documents and other information, consistent with Federal law, to the Affected Tribes and THPOs, SHPOs, ACHP,

and other consulting parties to enable fully informed decisions and meaningful consultation;
iv) Plan consultations jointly with the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties, including meetings (when and where), conference calls, agendas based on requested input from all involved.
v) Engage in consultation to discuss, dialogue, and make agreements, and do so through face-to-face consultation meetings to the greatest extent possible;
vi) Make and provide written accurate records of all consultations and make copies available to Affected Tribes and THPOs, SHPOs, ACHP and other consulting parties within 30 days of the consultation. Written verbatim records will be made utilizing a court reporter, on a case-by-case basis when requested by a signatory for a face-to-face consultation. When requested by a signatory, verbatim records of telephone conference calls may be made by using a tape recorder, and copies of the tape provided to the requesting signatory. Affected Tribes and THPOs, SHPOs, ACHP and other consulting parties shall have the opportunity to review, offer corrections, and add alternative views to the record;
vii) the federal agencies, affected tribes, THPOs, SHPOs, and other consulting parties shall facilitate and cooperate in the consultation process toward the mutual goal of information sharing, promotion, and respect for the unique relationship of each party and the trust doctrine and trust responsibility of the federal parties.

E) Input from Tribal Elders. An Affected Tribe or THPO, SHPO, or other consulting party may respond to a request by informing the Corps that special efforts should be made to seek input from tribal elders and other persons with traditional and cultural knowledge. If the Corps is so notified or if persons with traditional or cultural knowledge notify the Corps that they wish to be consulted regarding a matter, the Corps shall consult with the Tribe and/or THPO regarding appropriate ways to seek input from such persons, and the Corps shall seek such input. Efforts may include (but need not be limited to) conducting special meetings, scheduling meetings at locations to reduce the need for such persons to travel, ensuring that translation services are available, and adjusting the schedule to accommodate input from such persons.

F) Protocol Agreements. The Corps recognizes that an Affected Tribe, THPO, SHPO, or other consulting party may have particular issues of concern, ways of conducting business, or protocols that should be considered during consultations. When requested by an officially designated representative or PA representative, the Corps and that party shall cooperatively develop a Protocol Agreement (PRAG) to document that agreed-upon protocol. A PRAG shall be supplemental to the general procedure(s) in this PA and not modify the roles of other parties to this PA without their prior written consent.

G) Efficient Consultations. The Corps and the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties shall work together to develop ways to communicate and transmit information in an effective yet efficient manner. Possible means include (but are not limited to) development of a secure website to which the Affected Tribes and THPOs, SHPOs, ACHP and other consulting

parties have access, electronic transmission of documents, and/or an email broadcast system.

7. Non-National Historic Preservation Act Commitments.

In consultation with the Affected Tribes and THPOs, the Corps agrees to carry out the actions outlined in Attachment 3 of this PA, all of which are beyond the requirements of the NHPA and the authority of the ACHP and are under the authority of the laws and legal requirements cited therein.

8. Undertakings Review Provisions; Tribal or SHPO Non-Signature, Withdrawal, or Termination; and Exempt Undertakings.

A) Undertakings Review. For Corps undertakings that are planned or anticipated (for example, but not limited to, recreational and other development, silt or sediment removal, habitat creation or restoration, etc.), the Corps shall consult on and address effects to historic properties through the Five-Year Plan, CRMPs, and attendant Treatment Plans as outlined in stipulations 6, 8, 9, and 11 and the other provisions of this PA. However, for those planned or anticipated undertakings not addressed through the Five-Year Plan, CRMPs, and Treatment Plans, the Corps shall comply with section 106, NHPA in accordance with 36 CFR part 800, subpart B. For Main Stem System operations and their indirect adverse effects (including, but not limited to, erosion, exposure, susceptibility to looting or vandalism, etc.), the Corps shall consult regarding and address such effects to historic properties through the terms of this PA.

B) Tribal or SHPO Non-Signature, Withdrawal, or Termination. The Corps shall comply with Section 106 in accordance with 36 CFR part 800, subpart B for Corps undertakings that may affect lands, or historic properties, many of which are cultural resources sacred to Tribes, located within the exterior boundaries of an Indian reservation, including Corps lands, if that tribe is not a signatory to this PA or if that tribe has withdrawn from this PA or terminated this PA on its tribal lands (refer to Stipulation 4). Similarly, the Corps shall comply with 36 CFR part 800, subpart B for actions or undertakings within a SHPO's area of jurisdiction, if that SHPO has withdrawn from this PA or terminated this PA within its area of jurisdiction.

C) Exempt Undertakings. The Corps, Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties shall consult to determine if there are certain types of undertakings and actions that should be exempted from review and consultation under this PA because they have little or no potential to affect historic properties. In consulting on this list of exempt undertakings and actions, the Corps shall follow the consultation provisions of stipulation 6 of this PA. The exempt actions and undertakings in such a list shall not go into effect until agreed to, in writing, by the Corps, tribal signatories, SHPOs, and ACHP. The resulting list of exempt undertakings shall be provided to all Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties as an amendment to this PA.

9. Main Stem Reservoir Cultural Resource Management Plans.

A) Status. The Corps has completed the Lewis and Clark Lake, Lake Sharpe and Lake Francis Case Cultural Resources Management Plans (CRMP), and is in the process of completing the Lake Oahe, Fort Peck Lake and Lake Sakakawea CRMPs. The Corps shall ensure that CRMPs for all Main Stem reservoirs are completed by May 2005 and are developed in consultation with the Affected Tribes and THPOs, SHPOs, ACHP and other consulting parties to this PA.

B) Requirements. The CRMPs will partially fulfill the requirements of the NHPA, this PA, and the requirements of Engineer Regulation 1130-2-540. The CRMPs will provide baseline information about cultural resource sites (including historic properties) at each reservoir and a list of actions to address the goals, objective, and program areas set forth in the Five-Year Plan. The CRMPs will utilize the Lake Sharpe CRMP as a template or any revision to that template developed in consultation with the Affected Tribes, THPOs, SHPOs, ACHP, and other consulting parties. Recommended actions (i.e., TCP surveys, archeological surveys, testing and evaluations, etc.) from CRMP shall be completed in accordance with applicable federal laws governing such actions.

C) Review. The Corps and the Affected Tribes and THPOs, SHPOs, ACHP and other consulting parties shall work together to develop and implement a process by which the Affected Tribes and THPOs, SHPOs, ACHP and other consulting parties will be involved in the development and review of draft and final CRMPs and updates to them. Until completion of this process, drafts of the CRMPs and updates of them shall be provided for review and consultation according to the procedures outlined in stipulation 6, except that parties shall have no less then 60 days for review and comment. To facilitate review, the Corps shall provide Affected Tribes and THPOs, SHPOs, ACHP and other consulting parties with related historic property and management information, such as future management actions, needs, and policies; project maps and information showing historic properties, management/use areas, cultural resources survey coverage, leased areas, recreation areas, boundaries of Corps lands, Title VI lands, and so forth. The Corps shall incorporate comments from the Affected Tribes and THPOs, SHPOs, ACHP and other consulting parties in finalizing the draft or final CRMPs. After review and comment by the appropriate Affected Tribes and THPOs, SHPOs, ACHP and other consulting parties, the Corps shall ensure that the CRMPs are finalized and implemented.

D) Revision. The Corps agrees to update the completed CRMPs every two years. The intent is to monitor progress, incorporate new information, correct information, and allow for additional input into the implementation of the cultural resources program at the reservoir for which the CRMP is written. The review process outlined in stipulation 9.C., above will be used for revising CRMPs.

10. Five-Year Cultural Resources Implementation Plan.

The Corps, working cooperatively and in consultation with the Affected Tribes and THPOs, SHPOs, ACHP and other consulting parties, shall develop and carry out a plan that outlines how the Corps will conduct its Main Stem System Cultural Resources Program and its various program components individually called for in this PA for the coming five years (hereinafter, Five-Year Plan) and following five year periods

thereafter. The intent of the Corps is to incorporate the final Five-Year Plan into the Corps' Strategic Plan.

A) The Five-Year Plan shall describe the following:

i) actions to identify Mainstem System cultural resource sites (including historic properties) and evaluate them for the National Register of Historic Places that may be affected by Corps undertakings and operations of the Main Stem System and to comply with Section 110, NHPA. Acreage estimates and locations, prioritization of these locations, and tasks (e.g., oral histories, documentary research, etc.) should be described. (See also stipulation 11);

ii) Corps management and operational actions that may adversely affect historic properties (for example, operations, recreational development, habitat restoration/creation, susceptibility to erosion, looting and vandalism, etc.) and their locations; and

iii) actions to avoid, minimize, or mitigate adverse effects on historic properties, including identification of specific sites and proposed treatment (subject to consultation with Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties). (See also stipulation 11);

iv) actions to address potential effects of Corps operations to historic properties located off Corps lands in compliance with Section 110(a)(2)(c), NHPA, recognizing that the Corps may need to seek alternative funding approaches, special authorizations, appropriations, and/or resolution of property permission issues. (See also stipulation 11);

v) actions to address unexpected discoveries of historic properties or unexpected effects to known historic properties. (See also stipulation 11);

vi) actions for the management, analysis, and sharing of cultural resource data, including development of protocol to protect sensitive information (See also stipulations 10 and 17);

vii) actions to support the cultural resources law enforcement program. (See also stipulation 14);

viii) actions to monitor cultural resources sites, how site-monitoring information will be used for management purposes, and sites selected to be monitored. (See also stipulation 13);

ix) actions to develop and update CRMPs, Five-Year Plans, and Annual Reports. (See also stipulations 9, 10, 22);

x) actions to promote public education and interpretive initiatives and the use of historic properties. (See also stipulation 15); and

xi) other actions and program needs that the Affected Tribes or THPOs, SHPOs, ACHP, or other consulting parties have requested in the Five-Year Plan.

B) Development, Review, and Revision of Five-Year Plan. Within 180 days of the execution of this PA, the Corps shall provide a preliminary draft version of the Five-Year Plan to the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties. Then, the Corps and these parties shall work together as outlined in stipulation 6 to develop a draft version of the Five-Year Plan for review. The Corps, in consultation with the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties, shall develop a final Five-Year Plan within 120 days of submission of comments on the draft Five-Year Plan. The Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties shall be given a 60-day review and comment period for each version. The Corps shall incorporate comments received in developing, finalizing, and implementing the Five-Year Plan. Every five years, the Corps shall revise and update the Five-Year Plan using this same development, review, and consultation procedure.

11. Identification of Historic Properties.

A) Identification Activities. The Corps shall identify historic properties (including historic properties to which an Affected Tribe attaches religious and cultural significance, traditional cultural properties (TCPs), and other types of cultural resources), in compliance with Section 110 of the NHPA and the Corps' ER and EP 1130-2-540. Additionally, the Corps shall ensure that historic properties are identified prior to making decisions about undertakings, following the review process outlined in stipulation *8*.A. Identification methods to be used include (but are not limited to) pedestrian surveys and other field investigations; background and documentary research; oral histories; tribal consultation and consultation with tribal elders; and other means. The Corps shall evaluate whether properties are eligible for the National Register of Historic Places using the eligibility criteria and National Park Service guidance (including Bulletin 38), in consultation with the SHPO and/or THPO with jurisdiction and Affected Tribes that may attach religious and cultural significance.

B) Location and Recordation of Sites. The Corps shall locate sites by global positioning system (GPS), complete site visit forms, and add site information to the Corps cultural resources site GIS system. Additionally, the condition and threats to sites will be recorded through the site-monitoring program and added to the GIS system. All site identification and monitoring information shall be included in next update of the applicable CRMP.

C) Sharing of Data. Within 120 days of the execution this PA and regularly thereafter, the Corps shall provide existing and updated cultural resource site information in accepted formats or access to the Corps' cultural resources site GIS system to federal, state, and tribal offices charged with maintaining such information.

D) Traditional Cultural Property (TCP) Surveys. The Corps shall ensure that surveys and related efforts (e.g., oral history, etc.) for TCPs and other historic properties to which Affected Tribes may attach religious and cultural or

other significance are carried out for project areas identified in the CRMPs and Five-Year Plan. The results of the surveys and other efforts shall be documented using National Park Service Bulletin 38, as well as other pertinent tribal and state requirements, with sensitive information protected pursuant to stipulation 17.

12. Measures to Avoid, Minimize, or Mitigate Adverse Effects to Historic Properties.

Prior to carrying out measures to avoid, minimize, or mitigate adverse effects to a historic property as set forth in the Five-Year Plan and CRMPs, the Corps shall provide a draft Treatment Plan to the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties for review and consultation as outlined in stipulation 6. Alternatively, a draft Treatment Plan may be included in a draft CRMP or draft Five-Year Plan and be reviewed as part of those draft documents. The draft Treatment Plans shall describe the historic property and the adverse effects to it, alternatives measures considered, treatment proposed and why it was chosen, details of how treatment will be implemented, schedule and cost of proposed treatment, and how the treatment meets the pertinent standards and guidelines of the *Secretary of the Interior's Standards and Guidelines for Historic Preservation Projects*, and applicable state and tribal requirements.

13. Site Monitoring Program

A) Site Monitoring. The Corps shall develop and implement a monitoring program to provide continued oversight of historic properties located on federal land managed by the Corps and to collect information on site conditions and effects or threats to them (including but not limited to, erosion, recreational, agricultural and other encroachment, and looting and vandalism). The Corps shall use this information to plan and implement law enforcement and other preventive or corrective management actions.

B) Site Monitoring Plan. The Corps shall develop a Monitoring Plan to describe the conduct of the monitoring program. The Plan shall discuss the types and location of sites to be monitored, field methodology of monitoring and conditions recordation (including forms, data dictionary); data storage, retrieval and analysis; schedule; staffing and qualifications; and other details. The Corps shall produce a preliminary draft and then the Corps, Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties shall work together to develop a draft version of the Monitoring Plan, in accordance with stipulation 6. The Corps, in consultation with the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties shall develop a final monitoring plan within 180 days of submission of comments on the draft Monitoring Plan. The Corps shall implement the final monitoring plan according to the schedule in the monitoring plan, CRMPs, and in response to recent information about potential threats to sites.

14. Enforcement Program.

A) Enforcement Memorandum of Agreement(s) (MOA(s)).
The Corps, in cooperation with the local, state, tribal and federal law enforcement officials, shall develop an Enforcement MOA(s) that provides for a cultural resources enforcement program to address looting, vandalism, and other

illegal activity involving cultural resource sites, including TCPs, archeological resources, graves, and human remains. Specifically, the Enforcement MOA(s) shall address laws, authorities, potential cross-authorities, delegations and deputization of authorities, fine distribution, field deployment, access, sharing of equipment, public education, information reporting, gathering and exchange, and other issues. The Corps shall provide a draft Enforcement MOA for review to all interested parties, including law enforcement officials and Affected Tribes, THPOs, SHPOs, ACHP, and other consulting parties, within 60 days of the signing of this PA. The Corps shall work with the interested parties to revise the draft Enforcement MOA to address their comments. The Enforcement MOA shall be finalized only after the consultation process has been completed as stated in stipulation 6.

B) Hotline. Within 120 days of the signing of this PA, the Corps shall establish and promote a hotline for reporting of looting, vandalism, and other illegal activities and a specific protocol for documentation, verification, and tracking of information, for the purpose of prosecution of offenders.

C) ARPA Training. Every three years the Corps shall host an ARPA training class for law enforcement, cultural preservation personnel (tribal, state and federal), and others who may be involved in enforcement activities.

15. Cultural Resource Education Program.

A) Educational Program. Engineer Regulation No. 1130-2-540 authorizes the preparation of brochures, slide shows, or other media documentation for public presentation relative to historic preservation activities that may be of particular interest to the Affected Tribes and general public.

i) The Corps shall create educational displays, media shows, interpretive programs, pamphlets, and brochures to enhance public education concerning cultural resources. The parties to this PA will be involved in the development and finalization of these items. The Five-Year Plan and CRMPs will describe how the Corps will carry out this educational and interpretive program.

ii) The Corps, in consultation with the Affected Tribes and THPOs, SHPOs, and as outlined in the CRMPs and Five-Year Plan, will develop an educational program concerning the need to avoid cultural areas and to leave archaeological sites and their material remains undisturbed. The public is generally uninformed about the significance of cultural resources and unaware of the significance of these cultural areas or sites for Affected Tribes whose ancestors lived in these areas and created what are often referred to as archaeological sites.

B) Signage. The public must be made aware that cultural sites are being monitored for unauthorized activities and severe criminal penalties could result from illegal activity of looting, artifact collecting, and vandalism. The Corps, in consultation with Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties, shall develop and place signs at agreed upon points of public access to the Missouri River.

C) Press Release. In consultation with Affected Tribes and THPOs and SHPOs, the Corps shall issue press releases and conduct press conferences bi-annually (Spring and Fall) to remind the public about the penalties associated with looting, artifact collecting, and vandalizing. A list of local, regional, and multi-state media will be developed in consultation with Affected Tribes and THPOs, and SHPOs.

16. Curation of Artifact Collections, Material, Records, and Data.

The Corps shall ensure that artifacts are collected on a minimal basis only in those situations that require the collection to support a requirement of the NHPA.
The Corps shall curate artifact collections, material, records, and data according to 36 CFR Part 79.1-Curation of Federally-owned and Administered Archeological Collections and Corps Engineer Regulation 1130-2-433, except that resources meeting NAGPRA definitions will be handled according to the requirements and procedures in the NAGPRA regulations or other memoranda of agreement entered into between the Corps and tribal governments. The Corps shall curate paleontology resources as addressed in Attachment 3. The Corps will continue to carry out its current practice of reburying artifacts on or near the area where they were found during monitoring or other field actions, and their discovery and subsequent reburial will be reported to the Affected Tribes

17. Protection of Sensitive Information.

A) Legal Background. Section 9 of ARPA provides for information concerning the nature and location of archaeological resources on federal land and Indian land to be protected from disclosure under the Freedom of Information Act (FOIA), unless excepted under ARPA. Section 304, NHPA provides that information about the location, character, or ownership of a historic property shall be withheld from disclosure under FOIA if the Corps, in consultation with the National Park Service, determines that disclosure may 1) cause a significant invasion of privacy; 2) risk harm to the historic resource; or 3) impede the use of a traditional religious site by practitioners. The Corps, to the maximum degree possible, shall respect section 9 of ARPA and section 304 of the NHPA in determining *the* release or disclosure of information under FOIA. For the purposes of protection of sensitive information, the Corps shall consider properties or locations that have not been evaluated for their National Register eligibility, including TCPs and properties of religious and cultural significance, as eligible for the National Register in making this determination.

B) Confidentiality Protocol. The Corps and Affected Tribes, THPOs, SHPOs, ACHP, and other consulting parties recognize the need to treat certain kinds of sensitive or proprietary information with confidentiality, including but not limited to information about the location of places that hold sacred significance for Affected Tribes and THPOs. The Corps and Affected Tribes, THPOs, SHPOs, ACHP, and other consulting parties shall, working in close consultation as outlined in stipulation 6, and assuring compliance with Federal and other applicable law, develop a protocol for the confidentiality of such sensitive information within one-year of signing of this document.

C) Interim Confidentiality Provisions. Until such a protocol is adopted, the Corps and Affected Tribes, THPOs, SHPOs, ACHP, and other consulting parties shall protect information concerning the nature, character, ownership, or location of archaeological resources or historic properties and withhold such information from disclosure to the public as outlined in subsection A) above of this stipulation. Also, the Corps shall ensure that each document that includes information about any historic property, archaeological resource, or unevaluated location shall be accompanied with a prominent notice that the document and information are to be treated for official use only.

18. Corps Main Stem System Operations Decision Documents.

The Corps shall consult with Affected Tribes and THPOs, SHPOs, ACHP, and the other consulting parties on draft Annual Operating Plans and other decision documents to determine whether operational changes are likely to cause changes to the nature, location, or severity of adverse effects to historic properties or to the types of historic properties affected and whether amendments to the Corps' CRMP(s) and Five-Year Plan are warranted in order to better address such effects to historic properties.

19. Tribal Partnerships.

The Corps and the Affected Tribes, THPOs, SHPOs, ACHP shall work together to develop and implement partnerships so that Affected Tribes, THPOs, SHPOs, ACHP are involved in the development and implementation of the Main Stem System cultural resources program and this PA and that promote tribal historic preservation goals. Training, access to cultural resource site information (subject to provisions for protection of such information), historic preservation services, sharing of and/of access to equipment, etc. may be the basis of such partnerships. It is acknowledged that some or all these partnerships may need to be supported by cooperative agreements or other instruments to be negotiated independent of this PA. Additionally, if requested by an Affected Tribe, the Corps shall consult regarding the possibility of tribal access to historic properties that are sacred to the Affected Tribe and THPOs on Corps lands, in fulfillment of Executive Order 13007 and the Corps' EP 1165-2-1, section 3-2. Further, the Corps shall consult with Affected Tribes, THPOs, SHPOs, ACHP regarding the Corps' Tribal Partnership Program established pursuant to Section 203, Water Resources Development Act of 2000.

20. National Historic Preservation Act/Native American Graves Protection and Repatriation Act Overlap.

The Corps shall comply with Sections 106 and Section 101(d)(6) of the NHPA and the Native American Graves Protection and Repatriation Act (NAGPRA) in circumstances in which both authorities apply, such as the discovery of human remains that may be associated with a historic property. In addition to complying with NAGPRA, the Corps shall take steps to identify if human remains and other types of items meeting the definitions outlined in NAGPRA are associated with a property that may meet the National Register criteria and for which Section 106 and Section 101(d)(6) also apply. In such case, the Corps shall comply with the provisions of this PA and 36 CFR part 800, in addition to NAGPRA and any applicable NAGPRA Memoranda of Agreement (see Attachment 3).

21. Performance Standards and Qualifications.

A) Standards. The Corps shall ensure that all work required under this PA is carried out in accordance with the professional standards and guidelines outlined in the *Secretary of the Interior's Standards and Guidelines for Historic Preservation Projects* and applicable state and tribal authorities.

B) Qualifications. The Corps shall ensure that all work conducted pursuant to this PA is carried out by or under the supervision of persons meeting qualifications set forth in the *Secretary of the Interior's Professional Qualifications Standards*, as amended, for the pertinent discipline (see 48 F.R. 44739). The Corps acknowledges that Affected Tribes possess special knowledge and expertise regarding their tribal values, history, and culture, and properties that may possess traditional religious and cultural significance to them.

22. Annual Report.

The Corps shall prepare a report and distribute it to the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties not less than 60 days prior to the date of the annual review. At a minimum, the report shall discuss the topics outlined in Attachment 4 for the past year and the coming year.

23. Semi-Annual Consultation Meetings and PA Annual Review.

A) Semi-Annual Consultation Meetings. The Corps shall host, at a minimum, semi-annual consultation meetings among the affected Tribes, THPOs, SHPOs, ACHP and other consulting parties to discuss the cultural resource program, Annual report, CRMPs and Action Plan status, activity prioritization, budget planning and other budget matters as necessary, PA implementation and the Corps' Section 106 responsibilities, and other topics of concern to the affected Tribes, THPOs, SHPOs, ACHP, and other consulting parties. The Corps, Affected Tribes, THPOs, SHPOs, ACHP, and other consulting parties together shall set the agenda for each meeting by the Corps distributing a call for agenda items at least 30 days prior to the meeting. It is anticipated that one meeting will be during the month of November and the other meeting will be held during the month of April. In order to address new budget issues, a review and planning for the budgetary process shall have priority at the April meeting. The Corps and these parties working together shall develop a schedule for the involvement of the Affected Tribes, THPOs, SHPOs, ACHP, and other consulting parties in the cultural resources activities for the coming year.

B) PA Annual Review. Annually, the Corps, Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties shall review this PA and progress in carrying out its provisions to determine whether the PA should be amended or terminated. Review of the PA shall occur at one of the semi-annual consultation meetings and be based, in part, on the annual report prepared by the Corps and submitted to parties not less than 60 days prior to the date of the review. Interim review of this PA may occur due to unsatisfactory performance, based on exercise of the dispute resolution clause, by the Corps or signatory party.

24. Funding and Budget Planning.

A) General. The Anti-Deficiency Act, 31 U.S.C. 1341, et seq., applies to this PA and must be followed by the Corps as it accomplishes the tasks that it has agreed to perform in this PA. This means that no action, plan, study, task, or the like shall be construed to require the Corps to obligate or expend funds in excess or in advance of an appropriation authorized by law. In addition, the Federal Acquisition Regulations (FAR) apply to the acquisition of goods and services by the Corps as a result of tasks or actions that must be performed pursuant to this PA.

B) Additional Funding. The Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties are encouraged to look for other potential funding sources to assist in the implementation of this program. Where applicable, they are encouraged to consider participating in the funding of cultural site preservation though the use of Corps cost sharing programs or other authorities. The Corps agrees that its intent is that all appropriated funds designated for carrying out this PA and attachment 3 will be spent for these purposes. Similarly, the Corps agrees that its intent is that the availability of non-Corps funds for cultural resource purposes will not result in a reduction of Corps appropriated funds for those same purposes.

C) Budget Planning. Annually, the Corps shall provide the Affected Tribes and THPOs, SHPOs, ACHP, and other consulting parties with a 60-day period to review and consult on the Corps' draft list of proposed projects for budget consideration to ensure that they are consistent with the Five-Year Plan and CRMPs and other considerations. Signatory parties may elect to enact a prioritization system.

25. Dispute Resolution.

A) Should a dispute or objection arise regarding any aspect of this agreement or an undertaking subject to review under this agreement, the Corps shall consult with the disputing or objecting party as soon as possible to try to resolve the objection. The disputing or objecting party and the Corps are encouraged to pursue alternative dispute resolution processes including traditional tribal approaches and to consult with the other affected Tribes, THPOs, SHPOs, ACHP and consulting parties.

B) If the disputing or objecting party believes that the consultation has failed to resolve the objection or dispute and wishes to pursue the issue, the party shall notify the Corps in writing within 60 days of the initial notification of the dispute. The Corps shall, within 30 days of the receipt of the disputing party notification, submit all relevant documentation pertaining to the dispute or objection with the Corps written proposal for its resolution to the ACHP with a copy to the disputing party.

C) Within 30 calendar days of receipt of such written submittal, the ACHP shall either:

i) Notify the Corps that it shall consider the dispute pertinent to the applicable provisions of 36 CFR 800.7 (b) and respond in accordance with that subsection; or
ii) Provide the Corps with recommendations, which the Corps shall take into account in reaching a final decision; or
iii) Respond to the Corps that it will not consider the dispute or provide recommendations, in which case the Corps may proceed with the proposed resolution.

D) In the case of a ACHP response of (C)(ii) or (C)(iii), the Corps shall provide a decision to the objecting or disputing party that takes into account the ACHP's response

26. Additional Signatories.

The Corps will consult with the parties to this PA pursuant to stipulation 6 regarding parties who wish to be additional signatories. If the Corps approves the request to become an additional signatory, the party must be a state or Federal governmental agency or an affected tribe or THPO, must sign the Additional Signatory Form in Attachment 5 and submit it to the Omaha District, Army Corps of Engineers. In the annual report or sooner, the Corps shall inform the Affected Tribes, THPOs, SHPOs, ACHP and other consulting parties of additional parties who have signed the PA.

27. Amendments.

The Corps, Affected Tribe, THPO, ACHP, SHPO, or other consulting party to this PA may request that the PA be amended whereupon the parties will consult in accordance with stipulation 6 to consider such amendment(s). Any proposed amendment must be provided to the consulting parties as part of the agenda materials prior to the semi-annual meeting and must be discussed at that meeting. To implement an amendment, consensus among the signatories is required. The amendment must be executed by the signatories and in the same manner as this PA.

28. Withdrawal.

A) Any party to this PA may withdraw from the PA after first providing the other parties written notice that explains the reasons for withdrawal and providing them an opportunity to consult regarding amendment of the PA to prevent withdrawal.

B) In the case of withdrawal from this PA by an Affected Tribe with tribal lands (see definition for tribal lands in Attachment 2) within the scope of this PA or affected by the Corps' undertakings, the Corps shall comply with 36 CFR part 800, subpart B, for all undertakings on or affecting lands within the withdrawing tribe's tribal lands, in lieu of this PA. With respect to historic properties outside of the withdrawing tribe's tribal lands to which that tribe attaches religious and cultural significance, the Corps shall consult with the withdrawing tribe pursuant to 36 CFR part 800, subpart B, in lieu of this PA.

C) Withdrawal from this PA by a SHPO shall require the Corps to comply with 36 CFR part 800 with respect to all undertakings on or affecting lands within that SHPO's area of jurisdiction, in lieu of this PA.

29. Termination.

The Corps, Affected Tribe, THPO, ACHP, and SHPO, or other consulting party who believes that the PA should be terminated shall provide written notification with the reasons for termination to the Corps and other consulting parties at least 60 days prior to a semi-annual consultation meeting. The Corps shall provide this notification in the meeting materials provided to the parties. The parties shall consult to consider an amendment to the PA that would prevent termination. Termination of the PA shall be executed by the consensus of the signatories; or by the ACHP individually; or by a signatory SHPO for its area of jurisdiction; or a signatory Affected Tribe or THPO for its tribal lands within the scope of this PA. In such case, the Corps shall comply with 36 CFR part 800, subpart B, for all undertakings on or affecting lands within the terminating SHPO's area of jurisdiction or the terminating tribe's tribal lands. Termination of this PA in part or entirety will require the Corps to comply with 36 CFR part 800, subpart B with respect to each individual undertaking that would be reviewed under this PA.

30. Duration.

Unless this PA is terminated or amended in accordance with this PA, its duration is 40 years from date of the execution of this PA when it will become null and void.

Execution and implementation of this Programmatic Agreement evidences that the Corps has afforded the ACHP a reasonable opportunity to comment on the effects on historic properties related to the Corps undertakings within the scope of this PA.

U.S. Army Corps of Engineers, Omaha District

By_____ _Date_____
Title

U.S. Army Corps of Engineers, Northwest Division

By_____ Date_____
Title

U.S. Army Corps of Engineers, Headquarters, Washington DC

By_____Date_____
Title

Advisory Council for Historic Preservation

By_____Date_____
Title

Nebraska State Historical Society

By_____Date_____
State Historic Preservation Officer

South Dakota State Preservation Office

By_____Date_____
State Historic Preservation Officer

Montana State Historic Preservation Office

By_____ Date_____
State Historic Preservation Officer

North Dakota State Historic Preservation Office

By_____Date_____
State Historic Preservation Officer

Cheyenne River Sioux Tribe Historic Preservation Office

By_____Date_____
Tribal Historic Preservation Officer

Standing Rock Sioux Tribe Historic Preservation Office

By_____Date_____
Tribal Historic Preservation Officer

Turtle Mountain Band of Chippewa

By_____Date_____
Tribal Historic Preservation Officer

Assiniboine & Sioux Tribes of Fort Peck

By_____Date_____
Title

Blackfeet Tribe

By_____Date_____
Title

Cheyenne River Sioux Tribe

By_____Date_____
Title

Chippewa Cree Tribe

By_____Date_____
Title

Crow Nation

By_____Date_____
Title

Crow Creek Sioux Tribe

By_____Date_____
Title

Flandreau Santee Sioux Tribe

By_____Date_____
Title

Gros Ventre & Assiniboine Tribes

By_____Date_____
Title

Lower Brule Sioux Tribe

By_____Date_____
Title

National Trust for Historic Preservation

By_____Date_____
Title

Northern Arapaho Tribe

By_____Date_____
Title

Northern Cheyenne Tribe

By_____Date_____
Title

Oglala Sioux Tribe

By_____Date_____
Title

Omaha Tribe of Nebraska

By_____Date_____
Title

Ponca Tribe of Nebraska

By_____Date_____
Title

Rosebud Sioux Tribe

By_____Date_____
Title

Sac and Fox of Missouri in Kansas and Nebraska

By_____Date_____
Title

Santee Sioux Tribe of Nebraska

By_____Date_____
Title

Sisseton-Wahpeton Sioux Tribe

By_____Date_____
Title

Spirit Lake Sioux Tribe

By_____Date_____
Title

South Dakota Department of Game, Fish and Parks

By_____Date_____
Title

Standing Rock Sioux Tribe

By_____Date_____
Title

Three Affiliated Tribes

By_____Date_____
Title

Turtle Mountain Band of Chippewa

By_____Date_____
Title

Winnebago Tribe of Nebraska

By_____Date_____
Title

Yankton Sioux Tribe

By_____Date_____
Title

AUTHORITY AND TRUST RESPONSIBILITY

AUTHORITY

The primary purpose and legal authority for this PA are found in the National Historic Preservation Act (16 U.S.C. §470f et seq) (NHPA), particularly section 106 (16 U.S.C. 470f), section 110 (16 U.S.C. 470h-2), and section 101 (16 U.S.C. 470a) of that Act. Federal agency compliance with NHPA section 106 is governed by regulations issued by the Advisory Council on Historic Preservation, 36 C.F.R. part 800, and this PA has been negotiated pursuant to those regulations. The signatories agree that the Missouri River Main Stem System shall be administered in accordance with the stipulations in this PA to take into account and attempt to mitigate adverse effects to historic properties and satisfy the responsibilities of the Corps pursuant to section 106.

In addition to section 106 and the Advisory Council's regulations, numerous other provisions of the NHPA, some of which are cited in the PA, are applicable to activities of the Corps in fulfilling its commitments under this PA. Additionally, the Corps is responsible for complying with other legal authorities, including federal statutes, regulations, executive orders, and guidance documents, as well as any applicable tribal and state laws. Citations to some of these other sources of law are provided here for reference purposes only. In the final section of this attachment, a discussion of the Federal trust responsibilities to Indian Tribes is provided.

1. Federal Laws

American Indian Religious Freedom Act (AIRFA), Pub. L. No. 95-341 (codified in part at 42 U.S.C. §1996).

Native American Graves Protection and Repatriation Act (NAGPRA), 18 U.S.C. §1170, 25 U.S.C. §3001 – 3013, implemented through regulations codified at 43 C.F.R. part 10.

Archeological Resources Protection Act, 16 U.S.C.470aa – 470mm, implemented through uniform regulations (identical except for numerical designations) codified at 18 C.F.R. part 1312 (Tennessee Valley Authority), 32 C.F.R. part 229 (Defense), 36 C.F.R. part 296 (Agriculture), 43 C.F.R. part 7 (Interior); with respect to Indian lands, see also Interior supplemental regulations, 43 C.F.R. part 7, subpart B, and Bureau of Indian Affairs supplemental regulations, 25 C.F.R. part 262.

National Environmental Policy Act (NEPA), 42 U.S.C. 4321 – 4347, implemented through regulations issued by the Council on Environmental Quality codified at 40 C.F.R. parts 1500 – 1508.

Indian Self-Determination Act, 25 U.S.C. §§450 – 450n, 455 – 458e.

2. Tribal Laws

Applicable Tribal Laws and Permits

3. State Laws

Applicable State Laws and Permits

4. Executive Orders

EO	11593	Protection and Enhancement of the Cultural Environment
EO	12898	Federal Actions to Address Environmental Justice in Minority Populations And Low-Income Populations
EO	13006	Locating Federal Facilities on Historic Properties
EO	13007	Protection of Indian Sacred Sites
EO	13175	Consultation and Coordination with Indian Tribal Governments
EO	13287	Preserve America

5. Policy

Concerning Distribution of Eagle Feathers for Native American Religious Purposes

Department of Defense, American Indian and Alaska Native Policy, 1998

Northwest Division, US ACE, Native American Desk Guide, September. 30, 2002

Guidance Letter #57, Indian Sovereignty and Government-to-Government Relations with Indian Tribes

Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Environmental Decision Making, prepared by the National Environmental Justice Advisory Council, Indigenous Peoples Subcommittee, a Federal Advisory Group of the EPA

6. Federal Guidelines

Relationship Between Executive Order 13007 Regarding Indian Sacred Sites and Section 106. Advisory Council on Historic Preservation Memo, updated April 4, 2003

Secretary of Interior's Standards and Guidelines for Archeology and Historic Preservation Projects.

Guidelines for Evaluating and Documenting Traditional Cultural Properties, National Register Bulletin 38. U.S. Department of Interior, National Park Service, Interagency Resources Division.

How to Evaluate and Nominate Designed Historic Landscapes. National Register Bulletin 18. U.S. Department of Interior, National Park Service, Interagency Resources Division.

7. Department of Defense and/or USACE Regulations and Guidelines

ER 405-1-12	Real Estate Handbook
ER 1105-2-1	Environmental Compliance Program at Corps Projects and Activities

ER 1130-2-433	Collections Management and Curation of Archeological and Historical Data
ER 1130-2-438	Project Construction and Operation Historic Preservation Program
ER and EP 1130-2-540	Cultural Resource Management – Project Operations: Environmental Stewardship Operations and Maintenance Guidance and Procedures
EP 1165-2-1	Digest of Water Policies and Authorities, section 3-12 on E.O. 13007

7. Memoranda Of Agreement

Between the Lower Brule Sioux Tribe, Bureau of Indian Affairs Agency; the Crow Creek Sioux Tribe Bureau of Indian Affairs Agency; and the Omaha District, U.S. Army Corps of Engineers concerning enforcement of federal preservation laws at Big Bend Dam, dated 4 June 2003;

Between the Turtle Mountain Band of Chippewa, the Standing Rock Sioux Tribe, the Spirit Lake Sioux Tribe and the Three Affiliated Tribes, concerning treatment and disposition of unmarked burials associated with these Tribes on Omaha District Corps lands, dated 13 December 1993.

9. Cultural Resources Memorandum

November 2002 Message from the Commander, General David Fastabend, Commander of the Northwest Division, in which he discusses Corps responsibilities to Cultural Resources.

10. Trust Responsibility to Indian Tribes

The ACHP recognizes their trust responsibilities to federally recognized Tribes with regard to this PA. The ACHP's trust relationship with Indian Tribes is described in its ACHP Policy Statement Regarding ACHP's Relationship with Indian Tribes, issued November 17, 2000 and updated on April 4, 2003.

** This background information about the federal trust responsibility to Indian Tribes was prepared by tribal attorneys for the educational benefit and convenience of any reader. It was not intended to reflect the views of the U.S. Army, Corps of Engineers and possibly, the consulting parties.*

The Army Corps of Engineers recognizes their trust responsibilities to federally recognized Tribes with regard to this PA.

The trust responsibility is a federal common law and other legal doctrine, the subject of numerous decisions by Federal courts interpreting treaties, statutes, regulation, and executive orders. As described in a 1977 report commission by Congress:

"The purpose of the trust doctrine is and always has been to ensure the survival and welfare of Indian Tribes and people. This includes an obligation to provide for those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the

standard of living and social well-being of the Indian people to a level comparable to the non-Indian society."[2]

The Federal trust responsibility to Indian Tribes has its roots in land cessions made by Tribes in treaties, in the promises made by the United States to protect the rights of the Tribes to govern themselves in the lands that they had reserved, and in the practice of the federal government holding legal title to most Indian land, subject to Indian rights of occupancy and beneficial use.[3] In the present day sense, the trust responsibility can be described as "the federal government's duty to protect this separatism [of the Tribes] by protecting tribal lands, resources, and the native way of life."[4] Congress has explicitly acknowledged that "the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government."[5] The trust doctrine includes fiduciary obligations comparable to those of a trustee for the management of trust land and natural resources and funds derived from trust land, including the duty to act "with good faith and utter loyalty to the best interests" of the Indians.[6] The Federal government has been held liable for mismanagement in some cases.[7] The Supreme Court has acknowledged "the undisputed existence of a general trust relationship between the United States and the Indian people,"[8] although for the Federal government to be liable in damages for breach of trust, the Court has held that fiduciary duties must be based on a relevant statute or regulation, or a network of statutes and regulations.

In several lower Federal court decisions, the trust doctrine has been said to extend to Federal agencies other than the agency charged with management of trust land, resources, and funds (i.e., generally the Bureau of Indian Affairs carrying out the authority of the Secretary of the Interior),[9] Regardless of whether the trust doctrine might

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[2] AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT, at 130 (1977) (herein "AIPRC Final Report"), *quoted in* STEVEN PEVAR, THE RIGHTS OF INDIANS AND TRIBES at 27 (2d ed., 1992).

[3] *See generally* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471 (1994) [hereinafter "Wood, Trust I"]; Mary Christina Wood, Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources, 1995 UTAH L. REV. 109 (1995) [hereinafter "Wood, Trust II"]. *See also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220-28 (1982 ed.).

[4] Wood, Trust I, at 1496.

[5] 25 U.S.C. §3601.

[6] AIPRC Final Report, *supra* note 1, at 128, *quoted in* Pevar, *supra* note 1, at 27.

[7] *E.g*., United States v. Mitchell, 463 U.S. 206 (1983) (liability in money damages for mismanagement of timber resources by the Department of Interior) (often referred to as "Mitchell II" to distinguish this decision from United States v. Mitchell, 445 U.S. 535 (1980) ("Mitchell I"), in which the Federal government was not held liable); See also United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) (holding that the Court of Federal Claims has jurisdiction over a breach of trust claim arising out of mismanagement of land and buildings held in trust for tribe but occupied by federal government); *contra* United States v. Navajo Nation, 537 U.S. 488 (2003) (holding federal government not liable in damages for alleged breach of trust in leasing of land for mineral extraction).

[8] Mitchell II, 463 U.S. at 225.

[9] *E.g.*, Nance v. Environmental Protection Agency, 645 F.2d 701, 710 (9th Cir. 1981) (EPA held to have a fiduciary duty to consider impacts of Northern Cheyenne Tribe's designation of its reservation as Class I for air quality purposes on Crow Tribe's ability to mine coal on its reservation, and finding duty fulfilled); Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of the Navy, 898 F.2d 1410, 1420 (9th Cir. 1990) (trust obligation to consider impacts on tribal water rights recognized but held to be satisfied through conservation measures); Morongo Band of Mission Indians v. Federal Aviation Administration, 161 F.3d 569, 573-74 (9th Cir. 1998) (discussing distinction between general and specific trust responsibility and hold that general responsibility "is discharged through the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes"); *contra* (North Slope Borough v. Andrus, 642 F.2d 589, 611 (1980) (a post-*Mitchell I* and pre-*Mitchell II* decision finding no trust

give rise to judicially enforceable claims, the Tribes expect the Corps to act in accordance with the Federal trust responsibility. This includes government-to-government consultation whenever the Corps' "plans or actions affect trust resources, trust assets, or tribal health and safety."[10]

Some Corps actions directly or indirectly affect trust land, and some of the lands managed by the Corps are within reservation boundaries established by treaties where the Tribes and their members continue to have treaty-based rights even though lands have been taken out of trust status. Federal lands managed by the Corps (both within and outside reservation boundaries) include places that hold religious and cultural importance of the Tribes, and some of these places are crucial for the cultural identities of the Tribes and, as such, for the survival of the Tribes as distinct peoples. Some of these places contain the graves of ancestors and funerary objects, in which Federal law recognizes the right of lineal descendants and culturally affiliated Tribes to take custody in the event that they are removed from the Earth. The Tribes expect the Corps to treat these sacred and cultural significant places as subject to the Federal trust responsibility.

This means that they must be engaged in consultation before decisions are made and that the Tribes expect to participate in making decisions and in carrying out decisions. Consultation will be both specific to individual Tribes and with as many comprehensive consultations attended by all affected Tribes, THPOs, SHPOs, ACHP as are necessary with real efforts to reach consensus. Consultations will be conducted in a positive manner, on a government-to-government basis, honoring all treaties and the trust doctrine and other law, which entails a fiduciary and fiscal responsibility of the Corps. Decisions will be made on a government-to-government basis. Finally, the Corps will continue to include, as consulting parties, affected Tribes, THPOs, SHPOs, ACHP in any review or update of the Master Manual.

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responsibility in the absence of specific statutory provisions). *See* Wood, Trust I, *supra* note 2, at 1527-1535, Wood, Trust II at 117-21, *supra* note 2.

[10] The quoted language is from the Department of the Interior's Departmental Manual (DM) and applies to all bureaus and offices within DOI. 516 DM 2.2. While the DM does not apply to the Corps, the Tribes believe that the basic principle does apply to the Corps.

ACRONYMS AND DEFINITIONS

ACRONYMS

ACHP – Advisory Council on Historic Preservation
APE – Area of Potential Effects
ARPA – Archaeological Resources Protection Act
CRMP – Cultural Resources Management Plan
NAGPRA – Native American Graves Protection and Repatriation Act
NHPA- National Historic Preservation Act
SDGFP-South Dakota Department of Game, Fish, and Parks
SHPO – State Historic Preservation Officer
THPO – Tribal Historic Preservation Officer

DEFINITIONS

Adverse Effect – "an effect of an undertaking that may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." 36 C.F.R. §800.5(a). This section of the ACHP regulations provides additional guidance on how to determine whether an effect is adverse and examples of adverse effects.

Advisory Council on Historic Preservation (ACHP) – an independent agency created by the Title II of the National Historic Preservation Act (NHPA), 16 U.S.C. §§470i through 470v. The ACHP issued regulations, 36 C.F.R. part 800, governing the section 106 review process and oversees the conduct of the Section 106 process (see section 106, 16 U.S.C. §470f, and section 211, 16 U.S.C. §470s.)

Affected Tribe – Any Indian Tribe, as defined in this Attachment, that attaches religious and cultural significance to cultural resources, including historic properties, as provided in the scope of this PA, regardless of the location or nature of the undertaking, or regardless of whether the Tribe has been or will be developing any other agreements. Any Tribe that is included in the signatory portion of this PA, whether or not such tribe has signed this PA, and any other Tribe that becomes an "additional signatory" pursuant to Stipulation 26.

Archaeological Resource – "any material remains of past human life or activities which are of archaeological interest," and that are at least 100 years of age, including graves and human remains if found in an archaeological context, as defined in the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §470bb. The uniform regulations provide extensive elaboration on the definition, including the key phrase "of archaeological interest." 43 C.F.R. §7.3(a); 32 C.F.R. §229.3(a). The phrase "of archaeological interest" is defined in regulations as "capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observations, contextual measurement, controlled collection, analysis, interpretation and explanation." The statutory definition explicitly includes graves and human remains, which are also the subject matter of the Native American Graves Protection and Repatriation Act (NAGPRA); funerary objects, sacred objects, and objects of cultural patrimony covered

by NAGPRA may be archaeological resources if at least 100 years of age and found in an archaeological context. An archaeological resource may be a historic property, or located within a historic property, as that term is used in the National Historic Preservation Act (NHPA) and this PA. A site at which archaeological resources are located may also be an Indian sacred site as defined in Executive Order 13007.

Area of Potential Effects – "the geographic area or areas within which an undertaking may directly or indirectly cause alternations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." 36 C.F.R. §800.16(d).

ARPA Permitting Process – permit process for the excavation or removal of archaeological resources from federal public lands and Indian lands, established pursuant to ARPA and conducted pursuant to uniform regulations codified at 43 C.F.R. part 7; 32 C.F.R. part 229. For "Indian lands" see also supplemental regulations issued by Department of Interior 43 C.F.R part 7, subpart B (§§7.31 – 37) and supplemental regulations issued by Bureau of Indian Affairs, 25 C.F.R. part 262.

Consensus – For purposes of this PA, consensus means either that all of the signatories agree or that none of the signatories objects.

Consultation – "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's 'Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act' provide further guidance on consultation." 36 C.F.R. §800.16(f). The stipulations in this PA provide detail on how consultation will be conducted for purposes of compliance with this PA. Consultation in other contexts may be conducted somewhat differently than as provided for in this PA, and may be subject to the requirements of other statutes, regulations and other sources of law, including those listed in Attachment 2.

Consulting Parties – with the exception of the Corps, all officials and entities named in the "Signatures" section of this PA whether or not they have signed the PA and all additional signatories pursuant to Stipulation 26. Those consulting parties whom are signatories to this agreement shall be consulted and treated as outlined in this PA. Those consulting parties that have not signed will be consulted following the Secretary's "Standards and Guidelines for Federal Agency Preservation Programs Pursuant to the National Historic Preservation Act" 36 C.F.R. §800.16(f).

Cultural Resource(s) – a general "term of art" without a specific legal definition used to refer to "all elements of the physical and social environment that are thought to have cultural value." Thomas F. King, Places That Count: Traditional Cultural Properties in Cultural Resources Management (Alta Mira Press, 2003), p. 11. For purposes of this PA, cultural resources include historic properties, archaeological resources, sacred sites, religious sites, burial sites, properties of traditional religious and cultural importance, and Native American cultural items (including human remains, associated funerary objects, unassociated funerary objects, sacred objects, and objects of cultural patrimony). A cultural resource site is the location of a cultural resource.

Cultural Resource Management – activities and tasks involved in the stewardship of cultural resources, including to identify, evaluate, maintain, protect, and otherwise treat

cultural resources, and to comply with historic preservation and environmental law (including the NHPA, ARPA, AIRFA, NEPA, EO 13007, EO 13287). These activities and tasks are described in detail in many sources, including federal laws, regulations, and guidance and the "Secretary of the Interior's Standards and Guidelines for Historic Preservation Projects," (48 Fed. Reg. 44716) and the many publications of the National Park Service. U.S. Army Corps Engineering Regulation and Pamphlet 1130-2-540 discuss cultural resources stewardship and cultural resources management.

CRMP – cultural resources management plan. See stipulation 9 of the PA.

Effect – "alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register." 36 C.F.R. §800.16(i).

Eligible for Inclusion in the National Register – "includes both properties formally determined to be as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria." 36 C.F.R. §800.16(l)(2). Criteria of eligibility are codified at 36 C.F.R. §60.6. Regulations of the Secretary of the Interior for determinations of eligibility are codified at 36 C.F.R. part 63. Determinations of eligibility may also be made during the section 106 process. 36 C.F.R. §800.4.

Federal Acquisition Regulations – the regulations governing procurement by federal agencies, codified at 48 C.F.R. Part 1.

Federal Lands – In NAGPRA, the term "Federal lands" is defined as any "lands other than tribal lands which are controlled or owned by the United States, including lands selected by but not yet conveyed to Alaska Native corporations and groups organized pursuant to the Alaska Native Claims Settlement Act." 25 U.S.C. §3001(5). The substance of this definition closely corresponds to the definition of the term "public lands" as used in ARPA. "Federal lands" that are within the boundaries of an Indian reservation are also "tribal lands" for purposes of NHPA and NAGPRA. [Note: Individual Indian allotments that are outside the boundaries of an Indian reservation and not otherwise within a "dependent Indian community" are considered "federal lands" for purposes of NAGPRA. 60 Fed. Reg. 62140 (1995).]

Final Agency Action – an agency action that is not subject to review within the agency and, as such, may be subject to judicial review in federal court pursuant to the Administrative Procedure Act. 5 U.S.C. §§551, 701 – 706, or other federal statute.

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 C.F.R. §800.16(l)(1), providing elaboration on the statutory definition codified at 16 U.S.C. §470(w)(5). See also definitions of "eligible for inclusion in the National Register" and "National Register Criteria" in this Attachment.

Historic Resource – is a statutory synonym of "historic property." 16 U.S.C. §470w(5).

Impacts - any change to a cultural resource site, including a historic property

Indian Land – as defined in the Archaeological Resources Protection Act (ARPA), "lands of Indian Tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction on alienation imposed by the United States, except for any subsurface interests in lands not owned or controlled by an Indian tribe or an Indian individual." 16 U.S.C. §470bb(4). This term is not synonymous with "tribal lands" as defined in NHPA and NAGPRA.

Indian Sacred Sites – as used in Executive Order 13007, "any specific, discrete, narrowly delineated location on Federal land that is identified by an Indian tribe, or an Indian individual determined to be an appropriately authoritative representative of an Indian religion, as sacred by virtue of its established religious significance to, or ceremonial use by, an Indian religion, provided that the tribe or appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site." Executive Order 13007 (May 24, 1996) (published in notes following 42 U.S.C. §1996). [Note: The definition in EO 13007 is considerably more narrow than the way in which this term is commonly used by Tribes and individual Indians.]

Indian Tribe or Tribe – "an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional corporation or Village Corporation, 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 States to Indians because of their status as Indians." 16 U.S.C. §470w(4).

Main Stem – the series of dams and reservoirs along the upper Missouri River. For the purposes of this PA those dams and reservoirs are Gavins Point Dam,/Lewis and Clark Lake, Fort Randall Dam/Lake Francis Case, Big Bend Dam/Lake Sharpe, Oahe Dam/Lake Oahe, Garrison Dam/Lake Sakakawea, and Fort Peck Dam/Fort Peck Lake.

National Register – the National Register of Historic Places maintained by the National Park Service through the authority of the Secretary of the Interior.

National Register Criteria – the criteria of eligibility for the National Register established in regulations issued by the Secretary of the Interior. 36 C.F.R. §60.6.

Project Lands – land owned by the U.S. Army Corps of Engineers, Omaha District that are associated with the dams and reservoirs on the upper Missouri River. For the purposes of this PA those dams and reservoirs are Gavins Point Dam,/Lewis and Clark Lake, Fort Randall Dam/Lake Francis Case, Big Bend Dam/Lake Sharpe, Oahe Dam/Lake Oahe, Garrison Dam/Lake Sakakawea, and Fort Peck Dam/Fort Peck Lake.

Section 106 – section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. §470f, as implemented through regulations issued by the ACHP, 36 C.F.R. part 800.

Shared Stewardship – pre-decisional consultation with Affected Tribes, THPOs, SHPOs, ACHP and other consulting parties, especially with any Affected Tribe concerning an undertaking that may affect any sacred or cultural resources associated with such a tribe. Any Affected Tribe that attaches religious or cultural importance to a historic resource that is the subject of consultation will have an equal role with the Corps in determining the appropriate treatment and management of the resource.

Signatories – all the parties that have signed this PA, including any that may be added as additional signatories pursuant to stipulation 26.

State Historic Preservation Officer (SHPO) – "the official appointed or designated pursuant to section 101(b)(1) of the [NHPA] to administer the State historic preservation program or a representative designated to act for the State historic preservation officer." 36 C.F.R. §800.16(v).

Traditional Cultural Property -- a property that is "eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community." National Park Service, National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties (1990), available at www.cr.nps.gov/nr/publications/bulletins/nrb38/htm.

Treatment Plan – Information describing a historic property and how it is proposed to be treated. Rehabilitation, stabilization (including riprapping, revegetation, recontouring of areas surrounding the property, etc.), maintenance, and archaeological excavation are possible treatments.

Tribal Historic Preservation Officer (THPO) – "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 [State Historic Preservation Officer] for purposes of section 106 compliance in tribal lands in accordance with section 101(d)(2) of the act." 36 C.F.R. §800.16(w). [Note: See section 101(d)(2), National Historic Preservation Act, 16 U.S.C. §470a(d)(2).]

Tribal Lands – as defined in the National Historic Preservation Act, "(A) all lands within the exterior boundaries of any Indian reservation; and (B) all dependent Indian communities. 16 U.S.C. §470w(14). Within the scope of this PA, the NHPA definition is identical to the Native American Graves Protection and Repatriation Act (NAGPRA) definition, 25 U.S.C. §3001(15). [Note: "Tribal lands" for purposes of NHPA and NAGPRA is not synonymous with "Indian lands" for purposes of ARPA. Federal lands, including lands administered by the Corps, as well as lands owned by state and local governments and private persons, within reservation boundaries of Indian Tribes are "tribal lands" for purposes of NHPA and NAGPRA. For the purposes of this PA, the service area of the Santee Sioux Tribe of Nebraska shall be considered "tribal lands".]

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 with Federal financial assistance; those requiring a Federal permit, license or approval..." 36 C.F.R. §800.16(y). [Note: The regulatory definition includes one more clause: "and those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." This clause was the subject of a federal court decision in 2003, and the ACHP has issued a proposed revision to that clause of the regulatory definition. 68 Fed. Reg. 55354 (Sept. 25, 2003).]

<u>The Corps agrees to complete the following with all Affected Tribes:</u> Memoranda of Agreement among the Omaha District, Army Corps of Engineers and Affected Tribes Regarding NAGPRA, ARPA, Paleontological Resources, and Other Items that are Commitments Outside of the Missouri River Main Stem System Programmatic Agreement utilizing but not limited to the following outline:

Should a disagreement occur between the parties that have entered into these requirements the processes under each of these laws shall be used to resolve those disagreements.

Outline:

1. Native American Graves Protection and Repatriation Act (NAGPRA)

a) Inadvertent discoveries of human remains, artifacts, and funerary objects. The Corps will follow the terms of the Native American Graves Protection and Repatriation Act regulations (NAGPRA), 43 CFR 10 et seq and applicable Memoranda of Agreement (MOA) with Tribes.

b) Memorandum of Agreement, North Dakota Intertribal Reinterment Committee. The Corps will follow the provisions as detailed in the North Dakota Intertribal Reinterment Committee (NDIRC) Memorandum of Agreement. This would apply for all those Tribes that have signed the NDIRC MOA. There is a clause in the NDIRC MOA that allows for other Tribes to join the agreement.

c) Memorandum of Agreement, Non-NDIRC Tribes. The Corps will develop a MOA to implement the provisions of the Native American Graves Protection and Repatriation Act (NAGPRA) with those Tribes that have not signed the NDIRC MOA. A draft NAGPRA MOA shall be developed collaboratively with the affected Tribes, THPOs, SHPOs, ACHP, within 2 years of signing of this programmatic agreement. A final NAGPRA MOA shall be completed within 180 days from receipt of comments on the Draft NAGPRA MOA.

d) The Corps will ensure that resources meeting NAGPRA definitions are handled according to the requirements and procedures listed in the NAGPRA regulations or other memoranda of agreement entered into by the Corps and tribal governments. Continued progress will be made on the repatriation of artifacts under the Corps control and protection and located in a museum or curation facility in which the Corps has an active agreement or contractual obligation.

2. Archeological Resources Protection Act.

a) ARPA Permits. Prior to a decision about issuance of an ARPA permit, the Corps will provide copies of the ARPA permit application to affected Tribes, THPOs, SHPOs, ACHP and other consulting parties for review and comment. The Corps will take these comments into account in making a decision about issuance of the permit.

3. Paleontology Resources

a) The Corps will curate paleontology resources in the same manner as archeological collections. Agreements with curation facilities will be formatted according to the example given in 36 CFR Part 79.1.

4. Federal Undertakings and actions on lands outside the scope of this PA

a) In consultation with the Affected Tribes, the Corps, will review its protocols and procedures regarding Corps actions, past and present, beyond the scope of this PA to ensure tribal consultation consistent with Federal laws, Executive Orders, and other legal authorities.

ANNUAL REPORTS

Annually, the Corps shall prepare a report that includes discussion of the following topics both for the past year and as anticipated or planned for the coming year:

1) List of all undertakings within the project area;
2) Description of all surveys and activities undertaken to identify and evaluate historic properties and results of such efforts;
3) Description of all historic properties affected or potentially affected by Corps undertakings;
4) Description of measures to avoid, minimize, or mitigate effects to historic properties, including Treatment Plans;
5) Status of Five-Year Plan, assessment of progress in meeting its goals, and suggestions for revision;
6) Status of CRMPs and assessment of progress in fulfilling recommendations;
7) Status of the enforcement program and assessment of its effectiveness;
8) Status of site monitoring program and assessment of progress in meeting its goals;
9) Status of public education and interpretive activities;
10) Status of cultural resources program budget, including funding problems;
11) Additional signatories to the PA; notifications to amend, withdraw from, or terminate the PA;
12) General assessment of how well the PA is working; and
13) Any other facts the Corps considers pertinent to evaluation of the activities covered by the PA and any available information that the affected Tribes, THPOs, SHPOs, ACHP and other consulting parties may have requested that the Corps incorporate into the report.

Additional Signatory Form

Missouri River Main Stem System Programmatic Agreement

_____
Tribe/Agency/Entity

By_____Date_____