PROGRAMMATIC AGREEMENT AMONG THE U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT, THE NORTH DAKOTA STATE HISTORIC PRESERVATION OFFICER, AND THE MINNESOTA STATE HISTORIC PRESERVATION OFFICER REGARDING THE FARGO-MOORHEAD METRO FLOOD RISK MANAGEMENT PROJECT, CASS COUNTY, NORTH DAKOTA AND CLAY COUNTY, MINNESOTA

Final – 2011

WHEREAS, the St. Paul District, U.S. Army Corps of Engineers (Corps) is conducting a feasibility study of flood risk management measures for the cities of Fargo, Cass County, North Dakota and Moorhead, Clay County, Minnesota; and

WHEREAS, the Corps is considering the following flood risk management measures for the Fargo Moorhead metropolitan area and adjacent county areas (Figures 1 and 2): (1) a diversion channel capable of passing 20,000 cfs on the west (North Dakota) side of the Red River of the North along with upstream storage and staging areas, (Locally Preferred Plan [LPP] alternative) and (2) a diversion channel capable of passing 35,000 cfs on the east (Minnesota) side of the Red River of the North (Federally Comparable Plan [FCP] alternative).

WHEREAS, the necessary cultural resources investigations, evaluations, and coordination for compliance with Section 106 of the National Historic Preservation Act of 1966, as amended, cannot be completed by the Corps or its agent prior to starting the design stage of the Fargo-Moorhead Metropolitan Flood Risk Management Project (Project); and

WHEREAS, the Corps has established the Project's Area of Potential Effects (APE), as required by 36 CFR § 800.4(a)(1) and defined in section 800.16(d), as consisting of the footprint of the selected diversion plan including the diversion channel alignment, its associated tieback levee(s), associated construction work areas, construction staging areas, borrow areas, and disposal areas, as well as associated upstream water storage and water staging areas, project-related floodproofing locations, and the viewshed to one-half mile from the diversion channel's centerline, to one-eighth mile from the tieback levee's centerline, and to one-eighth mile outside the storage area boundary levee's centerline; and

WHEREAS, the Corps has determined that the Project may have effects on historic properties within the APE and has consulted with the Advisory Council on Historic Preservation (Advisory Council) pursuant to section 800.2(b) of the regulations (36 CFR Part 800) implementing Section 106 of the National Historic Preservation Act (16 U.S.C. § 470f), and the Advisory Council has declined to participate in the Programmatic Agreement for this Project; and

WHEREAS, the City of Fargo, North Dakota, and the City of Moorhead, Minnesota (Cities), as the non-Federal sponsors for the Project, have participated in consultation on the Project's flood risk management measures and have been invited to concur in this Programmatic Agreement as consulting parties; and

WHEREAS, Cass County in North Dakota and Clay County in Minnesota are also interested parties and have been invited to participate in consultation on the Project's flood risk management measures and to concur in this Programmatic Agreement as consulting parties; and

WHEREAS, the Corps' St. Paul District Engineer initially contacted the chairman or chairwoman of the Sisseton-Wahpeton Oyate, the White Earth Band of Minnesota Chippewa, the Leech Lake Band of Ojibwe, the Turtle Mountain Band of Chippewa, the Upper Sioux Community of Minnesota, the Lower Sioux Indian Community, the Spirit Lake Tribe, and the Red Lake Band of Chippewa Indians, by letter dated April 8, 2009; initially contacted the chairman or chairwoman of the Bois Forte Band of Chippewa Indians, the Three Affiliated Tribes (Mandan, Hidatsa and Arikara Nation), the Northern Cheyenne Tribe, the Standing Rock Sioux Tribe, the Yankton Sioux Tribe, and the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, by letter dated October 7, 2010; and initially contacted the chairman of the Crow Creek Sioux Tribe and the Flandreau Santee Sioux Tribe, by letter dated May 2011, to determine these tribes' interest in the Project, particularly regarding potential Project effects on properties important to their history, culture, or religion, including traditional cultural properties, and the Corps will consult with any of these tribes interested in this Project; and

WHEREAS, opinions and comments on the Project and its alternative alignments have been and will be solicited through comment periods on the Environmental Impact Statement and public meetings, including those held to comply with the National Environmental Policy Act (NEPA);

NOW THEREFORE, the Corps, the North Dakota State Historic Preservation Officer (SHPO), and the Minnesota State Historic Preservation Officer agree that upon filing this Programmatic Agreement (PA) with the Advisory Council on Historic Preservation, the Corps will implement the following stipulations in order to comply with Section 106 of the National Historic Preservation Act, as amended, with respect to the Project.

STIPULATIONS

The Corps will ensure that the following measures are carried out prior to the start of construction on Project flood risk management features at the cities of Fargo, Cass County, North Dakota, and Moorhead, Clay County, Minnesota:

A. The Corps will ensure that archeologists, historians, and architectural historians meeting the professional qualification standards given in the Secretary of the Interior's *Standards and Guidelines for Archeology and Historic Preservation* will conduct or directly supervise all cultural resources identification, evaluation, and mitigation related to this Project, to include archeological surveys and testing, historic structure inventories and evaluation, and data recovery and documentation mitigation, and be permitted in North Dakota pursuant to North Dakota Century Code Section 55-03-01 and in Minnesota pursuant to Minnesota Statutes Sections 138.31 to 138.42.

B. Literature and Records Search – Prior to conducting any cultural resources fieldwork, the Corps or its contractors or the Cities' contractors shall at a minimum consult the site files, previous survey reports, and other documents at the Historic Preservation Division of the State Historical Society of North Dakota at Bismarck and at the State Historic Preservation Office at the Minnesota Historical Society in St. Paul, for information on previously recorded cultural resources sites, site leads, and previously surveyed areas in the Project's APE.

C. Phase I Cultural Resources Investigation – The Corps or its contractors or the Cities' contractors will conduct a Phase I survey of all previously uninventoried project areas in order to locate any cultural resources (prehistoric, historic, and architectural) within the Project's APE. The cultural resources investigation will be an intensive, on-the-ground study of the area sufficient to determine the number and extent of the resources present and their relationships to Project features. The archeological investigations will take into account the unique geomorphology of the Red River Valley, and the potential for deeply buried soils. The survey also will consider and address visual effect impacts of proposed above-ground components (e.g., tieback levees) to cultural resources and landscapes within the project APE.

D. Phase II Testing and Evaluation – The Corps or its contractors or the Cities' contractors will evaluate the National Register of Historic Places eligibility of all cultural resources sites or structures over 50 years old located within the APE. Evaluation shall include subsurface testing using one-meter by one-meter excavation units to determine the information potential of prehistoric and historic archeological sites and archival research for historic archeological and architectural sites. The Corps will request the concurrence of the North Dakota SHPO or Minnesota SHPO, whichever is applicable, in determining each such site or structure's eligibility or non-eligibility to the National Register.

E. Phase III Mitigation – The Corps will avoid or minimize Project-related adverse effects to historic properties (National Register of Historic Places-listed or eligible sites, structures, buildings, districts, or objects) to the extent practicable. Where adverse effects due to the Project are not avoidable, the Corps will coordinate and implement a Memorandum of Agreement (MOA) with the North Dakota and/or Minnesota SHPO and the other consulting parties, any affected Indian tribes, and other interested parties, as applicable, to mitigate the adverse effects.

F. Burials – If any human burials are encountered during the cultural resources field work or Project construction, the Corps and its contractors and the Cities' contractors will comply with the Native American Graves Protection and Repatriation Act (NAGPRA) for federal or tribal lands, or with North Dakota Century Code Section 23-06-27, "Protection of Human Burial Sites, Human Remains, and Burial Goods," and North Dakota Administrative Code Chapter 40-02-03, "Protection of Prehistoric and Historic Human Burial Sites, Human Remains, and Burial Goods," for all other lands in North Dakota, or with Minnesota Statutes Section 307.08, Minnesota Private Cemeteries Act, for all other lands in Minnesota, whichever is applicable.

G. Traditional Cultural Properties – The Corps or its contractor will consult and coordinate with the tribes listed in the 8th WHEREAS clause above to identify sites of traditional religious or cultural importance to the tribe or their members within the Project area. Such sites shall be

avoided or adverse effects to them minimized to the extent practicable and the remaining effects mitigated per a MOA developed between the Corps, the applicable SHPO, and the affected tribe(s). Specific cultural and locational information on Traditional Cultural Properties (TCPs) is considered sensitive information by the tribes. Only general descriptions and general locational information will be released to the general public, unless otherwise required by law.

H. Curation – The Corps or its contractors or the Cities' contractors shall ensure that all materials and records resulting from the survey, evaluation, and data recovery or mitigation conducted for the Project, or recovered during Project construction, will be curated in accordance with 36 CFR Part 79, "Curation of Federally-Owned and Administered Archeological Collections" at a facility within the state of North Dakota or the state of Minnesota, depending upon the location of the cultural resources fieldwork or site(s) being investigated, unless the private landowner wishes to retain ownership of artifacts recovered from his/her land.

I. Construction Monitoring – In order to minimize or avoid construction delays, monitoring of construction earthwork by a qualified professional archeologist is recommended at certain Project locations, such as river terraces, oxbows, and floodplains, which have a high potential for deeply buried archeological resources that cannot be reached by normal archeological subsurface testing methods. Any monitoring at a TCP location will also have a knowledgeable tribal representative present or available. The Corps will determine which specific locations should have construction monitoring based upon the results of the Phase I cultural resources investigation and the TCP study (Stipulations C and G above) and available soils and geomorphology information.

J. Discoveries During Project Implementation – Should an unidentified site or property that may be eligible for inclusion in the National Register be discovered during Project construction, the Corps will cease all work in the vicinity of the discovered property until it can be evaluated pursuant to guidelines in Stipulation D of this Programmatic Agreement. If the property is determined to be eligible, the Corps shall comply with the provisions of Stipulation E above. Project actions which are not in the area of the discovery may proceed while the consultation and any necessary evaluation and mitigation work is conducted.

K. Reports – The Corps shall ensure that draft and final reports resulting from actions pursuant to the Stipulations of this Programmatic Agreement will be provided to the appropriate SHPOs, the non-Federal sponsors, and upon request, to other parties to this agreement. All parties will have 30 days to review and comment on any draft reports furnished to them.

ADMINISTRATIVE PROCEDURES

L. Dispute Resolution – Should the North Dakota SHPO, the Minnesota SHPO, or a concurring party to the PA object to any plans, documents, or reports prepared under the terms of this PA within 30 days after receipt, the Corps shall consult with the party to resolve the objection. If the Corps determines that the objection cannot be resolved, the Corps shall forward all documentation relevant to the dispute to the Advisory Council. Any recommendation or comment provided by the Advisory Council will be understood to pertain only to the subject of

the dispute. The Corps' responsibility to carry out all actions under this PA that are not the subject of the dispute will remain unchanged.

M. Amendments – Any party to this PA may request that it be amended, whereupon the parties will consult to consider such amendment. The PA may only be amended with the written concurrence of all parties who have signed the PA.

N. Anti-Deficiency Provision – All obligations on the part of the Corps under this PA shall be subject to the appropriation, availability and allocation of sufficient funds to the St. Paul District for such purposes.

O. Termination

1. Proof of compliance with the Stipulations to the satisfaction of the Corps, the North Dakota SHPO and the Minnesota SHPO will constitute termination of this Programmatic Agreement.

2. If the terms of this PA have not been implemented fifteen years after execution, this agreement will be null and void. In such an event, the Corps shall notify the North Dakota SHPO and the Minnesota SHPO of its expiration, and if appropriate, shall re-initiate review of the undertaking in accordance with 36 CFR part 800.

3. Any signatory party to this PA may withdraw from it by providing thirty (30) days notice to the other parties, provided that the parties will consult during the period prior to withdrawal to seek agreement on amendments or other actions that would avoid withdrawal. In the event of termination, or withdrawal, the Corps will comply with federal regulation 36 CFR part 800, Protection of Historic Properties.

Execution of this Programmatic Agreement, its subsequent filing with the Advisory Council, and implementation of its Stipulations evidences that the Corps has taken into account the effects of the Project on National Register listed or eligible historic properties, and has satisfied its Section 106 responsibilities for all aspects of this undertaking.

ST. PAUL DISTRICT, U.S. ARMY CORPS OF ENGINEERS

BY: _____ Date: 29 June 2011
LTC. Kendall A. Bergmann, Acting District Engineer

NORTH DAKOTA STATE HISTORIC PRESERVATION OFFICER

BY: _____ Date: July 13, 2011
Merlan E. Paaverud, Jr., State Historic Preservation Officer

MINNESOTA STATE HISTORIC PRESERVATION OFFICER

BY: _____ Date: 6/29/11
Britta Bloomberg, Deputy State Historic Preservation Officer

Concur:

CITY OF FARGO

BY: _____ Date: 7-11-11
Dennis Walaker, Mayor

CITY OF MOORHEAD

BY: _____ Date: 7-6-2001
Mark Voxland, Mayor

BY: _____ Date: 7-6-11
Michael J. Redlinger, City Manager

CASS COUNTY BOARD OF COMMISSIONERS

BY: _____ Date: 7-6-11
Darrell Vanyo, Chairman

CLAY COUNTY BOARD OF COMMISSIONERS

BY: _____ Date: 7/6/11
Jon Evert, Chairman

Concur:

SISSETON WAHPETON OYATE

BY: _____ Date: _____
Robert Shepherd, Chairman

WHITE EARTH BAND OF MINNESOTA CHIPPEWA

BY: _____ Date: _____
Erma Vizenor, Chairwoman

LEECH LAKE BAND OF OJIBWE

BY: _____ Date: July 26, 2011
~~Arthur "Archie" LaRose, Chairman~~
GINA LEMON, LLTHPO

TURTLE MOUNTAIN BAND OF CHIPPEWA

BY: _____ Date: _____
Merle St. Claire, Chairman

UPPER SIOUX COMMUNITY OF MINNESOTA

BY: _____ Date: _____
Kevin Jensvold, Chairman

LOWER SIOUX INDIAN COMMUNITY

BY: _____ Date: _____
Gabe Prescott, President

Concur:

SPIRIT LAKE TRIBE

BY: _____ Date: _____
Roger Yankton, Sr., Chairman

BOIS FORTE BAND OF CHIPPEWA INDIANS

BY: _____ Date: _____
Kevin Leecy, Chairman

THREE AFFILIATED TRIBES (MANDAN, HIDATSA AND ARIKARA NATION)

BY: _____ Date: _____
Tex G. Hall, Chairman

NORTHERN CHEYENNE TRIBE

BY: _____ Date: _____
Leroy Spang, President

STANDING ROCK SIOUX TRIBE

BY: _____ Date: _____
Charles W. Murphy, Chairman

ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION

BY: _____ Date: _____
A.T. "Rusty" Stafne, Chairman

Concur:

YANKTON SIOUX TRIBE

BY: _____ Date: _____
Robert Cournoyer, Chairman

CROW CREEK SIOUX TRIBE

BY: _____ Date: _____
Duane Big Eagle, Sr., Chairman

FLANDREAU SANTEE SIOUX TRIBE

BY: _____ Date: _____
Anthony Reider, President

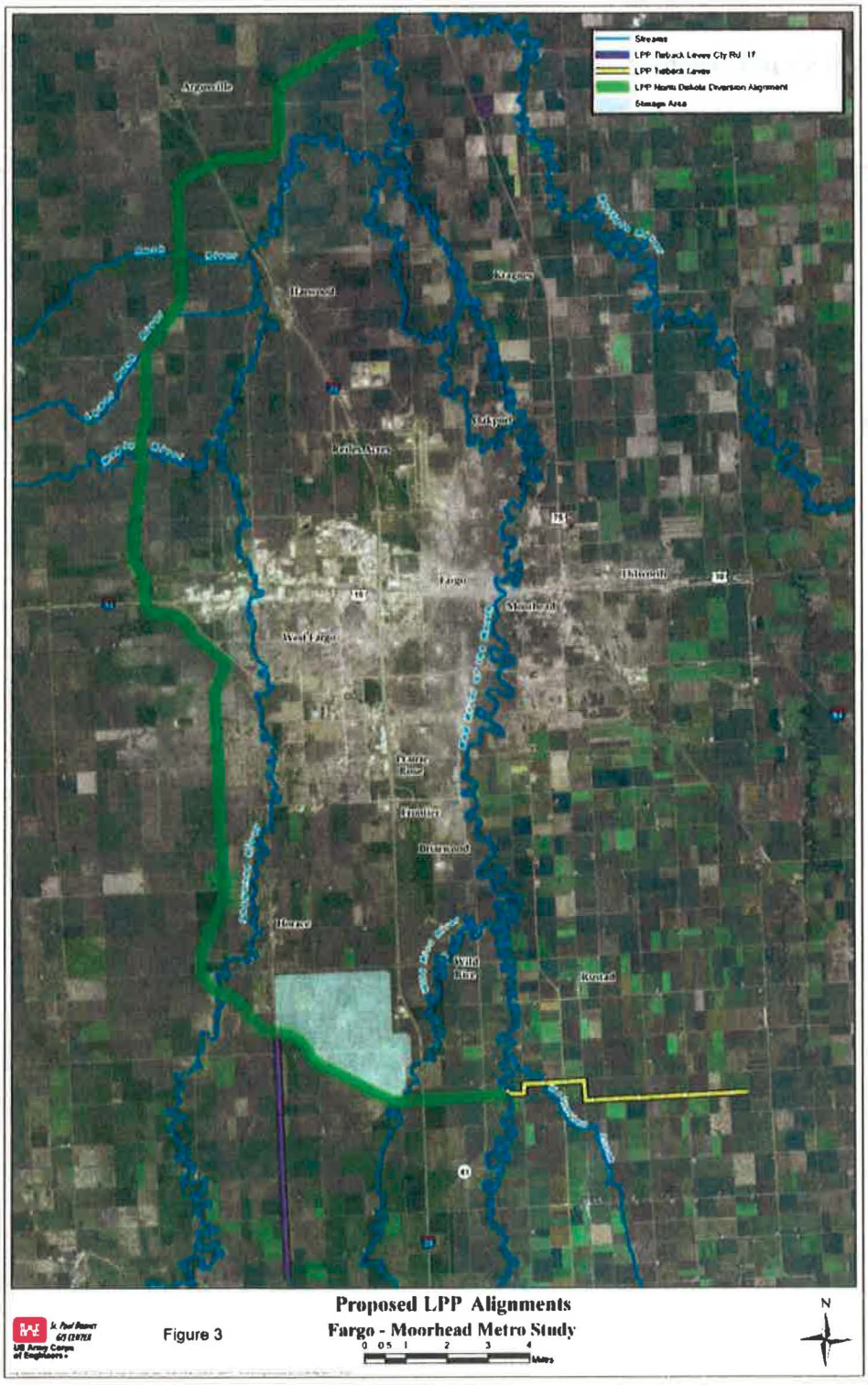

Figure 1. Proposed North Dakota Diversion alignments (Locally-Preferred Plan).

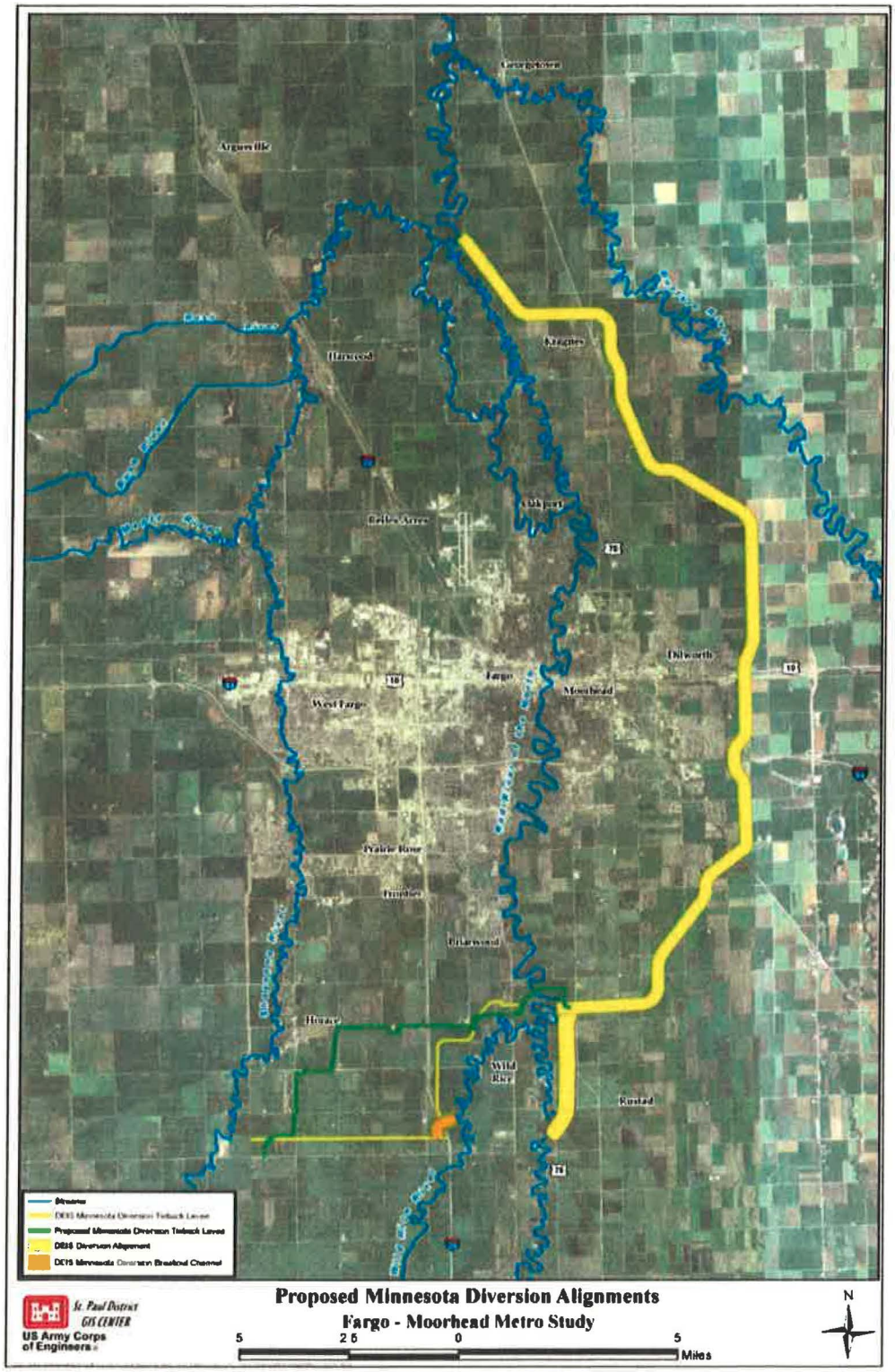

Figure 2. Proposed Minnesota Diversion alignments (Federally Comparable Plan).

**PROGRAMMATIC AGREEMENT
AMONG THE U.S. ARMY CORPS OF ENGINEERS, ST. PAUL DISTRICT,
THE NORTH DAKOTA STATE HISTORIC PRESERVATION OFFICER, AND
THE MINNESOTA STATE HISTORIC PRESERVATION OFFICER
REGARDING
THE FARGO-MOORHEAD METRO FLOOD RISK MANAGEMENT PROJECT,
CASS COUNTY, NORTH DAKOTA AND CLAY COUNTY, MINNESOTA**

AMENDMENT NO. 1

WHEREAS, the St. Paul District, U.S. Army Corps of Engineers (Corps) is continuing to evaluate and design flood risk management measures for the cities of Fargo, Cass County, North Dakota and Moorhead, Clay County, Minnesota; and

WHEREAS, a Programmatic Agreement between the Corps, the North Dakota State Historic Preservation Officer, and the Minnesota State Historic Preservation Officer, was executed on June and July 2011; and

WHEREAS, project features may include environmental mitigation areas and in-town (Fargo and Moorhead) levees, in addition to those previously addressed in the original Programmatic Agreement;

NOW THEREFORE, the parties agree to amend the Programmatic Agreement as follows:

Revise the 4th WHEREAS clause from:

WHEREAS, the Corps has established the Project's Area of Potential Effects (APE), as required by 36 CFR § 800.4(a)(1) and defined in section 800.16(d), as consisting of the footprint of the selected diversion plan including the diversion channel alignment, its associated tieback levee(s), associated construction work areas, construction staging areas, borrow areas, and disposal areas, as well as associated upstream water storage and water staging areas, project-related floodproofing locations, and the viewshed to one-half mile from the diversion channel's centerline, to one-eighth mile from the tieback levee's centerline, and to one-eighth mile outside the storage area boundary levee's centerline; and

To the following:

WHEREAS, the Corps has established the Project's Area of Potential Effects (APE), as required by 36 CFR § 800.4(a)(1) and defined in section 800.16(d), as consisting of the footprint of the selected diversion plan including the diversion channel alignment, its associated tieback levee(s), associated construction work areas, construction staging areas, borrow areas, and disposal areas, as well as associated upstream water storage and water staging areas, project-related floodproofing locations, project-related environmental mitigation areas, project-related in-town

(Fargo and Moorhead) levees, and the viewshed to one-half mile from the diversion channel's centerline and all other above-ground project features; and

Signature below indicates concurrence with the above proposed amendment to the original Programmatic Agreement.

ST. PAUL DISTRICT, U.S. ARMY CORPS OF ENGINEERS

BY: _____ DATE: 15 NOV 2012
COL Michael J. Price, District Engineer

NORTH DAKOTA STATE HISTORIC PRESERVATION OFFICER

BY: _____ DATE: 11-20-12
Merlan E. Paaverud, Jr., State Historic Preservation Officer

MINNESOTA STATE HISTORIC PRESERVATION OFFICER

BY: Barbara Howard DATE: 12-04-2012
Barbara M. Howard, MN Deputy State Historic Preservation Officer

Concur:

CITY OF FARGO

BY: _____ DATE: 12-19-12
Dennis Walaker, Mayor

CITY OF MOORHEAD

BY: _____ DATE: 2-14-2013
Mark Voxland, Mayor

BY: _____ DATE: 2/13/13
Michael J. Redlinger, City Manager

Concur:

CASS COUNTY BOARD OF COMMISSIONERS

BY: Vern Bennett DATE: 1-7-2013

~~Ken Pawluk,~~ Chairman
Vern Bennett

CLAY COUNTY BOARD OF COMMISSIONERS

BY: [signature] DATE: 2-15-13

~~Grant Weyland,~~ Chairman
Wayne Ingersoll

LEECH LAKE BAND OF OJIBWE

BY: [signature] DATE: 5-15-13

Gina Lemon, Leech Lake Tribal Historic Preservation Officer