PROGRAMMATIC AGREEMENT

AMONG THE UNITED STATES COAST GUARD,
THE NORTH DAKOTA STATE HISTORIC PRESERVATION OFFICE, AND THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, REGARDING THE PROPOSED BRIDGE REPLACEMENT AT MILE 1315.0 ON THE MISSOURI RIVER NEAR BISMARCK AND MANDAN, NORTH DAKOTA

WHEREAS, the United States Coast Guard (USCG) is the lead federal agency, responsible for the processing of a federal bridge permit application for the Burlington Northern Santa Fe, LLC (BNSF) Bridge Replacement Project (Undertaking) in accordance with the General Bridge Act of 1946, as amended; and

WHEREAS, the Undertaking considers permitting the construction of a railroad bridge to replace the existing BNSF through truss bridge over the Missouri River, Jamestown Subdivision, Milepost 1315.0 (Bismarck Bridge), in Burleigh County, North Dakota, constructed between 1880 and 1883; and

WHEREAS, the USCG has consulted with the North Dakota State Historic Preservation Officer (SHPO) pursuant to Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA) (54 United States Code [U.S.C.] Section 306108) and its implementing regulations at 36 *Code of Federal Regulations* (CFR) Part 800, as amended; and

WHEREAS, the USCG, in consultation with the North Dakota SHPO, has determined that the existing Bismarck Bridge is eligible for listing in the National Register of Historic Places (NRHP) under Criterion A for its association with broad patterns of railroad, commercial, and military history in the United States, under Criterion B for its association with engineer George Shattuck Morison, and under Criterion C for design and construction; and

WHEREAS, The National Trust for Historic Preservation listed the BNSF Bridge 0038-196.6 to America's Most Endangered Historic Places on May 30, 2019, because it was the first bridge to cross the upper Missouri River, George Shattuck Morison designed and oversaw its construction between 1880 and 1883, the project employed advanced construction methods, including pneumatic caissons such as those used to build its contemporary, the Brooklyn Bridge, and it is the most historically significant structure on the Northern Plains; and

WHEREAS, Mandan, Hidatsa & Arikara ancestral sites overlook this industrial infrastructure that altered the history of their lands and people that is visible from On-A-Slant Village, where Mandan Chief Sheheke was born and later accompanied Lewis & Clark back to Washington, D.C., and where Sheheke and President Jefferson met. Historic properties within the Indirect APE include Chief Looking's Village, Black Cat's Village, Crying Hill, and areas of the Missouri River bottomlands used to plant corn, beans, and squash; and for the Standing Rock Sioux Tribe the BNSF Railroad Bridge serves as reminder to a powerful and hard chapter in United States History of military oppression of indigenous peoples; and

WHEREAS, the USCG, in consultation with the North Dakota SHPO, has determined that the undertaking would have an adverse effect on the Bismarck Bridge if it was removed and could have an adverse effect if the existing bridge is retained and a new adjacent bridge is constructed; and the Area of Potential Effect is defined as the footprint of the proposed undertaking within which all proposed construction and ground disturbing activity is confined,

including the existing and proposed right of way for the replacement of the railroad bridge; and

WHEREAS, in accordance with 36 CFR Section 800.6(a)(1), the USCG has notified the Advisory Council on Historic Preservation (ACHP) of its adverse effect determination with specified documentation and the ACHP has chosen to participate in the consultation pursuant to 36 CFR Section 800.6(a)(I)(iii); and

WHEREAS, BNSF is the project proponent and has been invited to participate in this consultation and to sign this Programmatic Agreement (PA) as an Invited Signatory; and

WHEREAS, the USCG has consulted with BNSF, the North Dakota SHPO, the ACHP, Friends of the Bridge (FORB), Bismarck Parks and Recreation District, Bismarck Historical Society, Bismarck-Mandan Historical and Genealogical Society, Bismarck Tour Company, Bismarck-Mandan Metropolitan Planning Organization, Burleigh County, Captain's Landing Township, City of Bismarck, City of Mandan, Fort Abraham Lincoln Foundation, Historic Bridge Foundation, Mandan Historical Society, Morton County, Morton County Historical Society, Nancy Willis, National Trust for Historic Preservation, North Dakota Department of Transportation, North Dakota Parks and Recreation Natural Resources Division, North Dakota State Railroad Museum, Preservation North Dakota, Rails to Trails Conservancy, the State Historic Society of North Dakota, U.S. Army Corps of Engineers, North Dakota State Senator Erin Oban, and North Dakota State University Department of Landscape Architecture regarding the effects of the undertaking on historic properties and has invited them to participate in this consultation and to sign this PA as Concurring Parties; and

WHEREAS, in accordance with 36 CFR 800.2(c)(2)(ii), the USCG invited the following Federally-recognized Indian tribes to participate in consultation on this Project and to sign this PA as Concurring Parties: Cheyenne River Sioux Tribe, Chippewa Cree, Crow Creek Sioux Tribe, Crow Nation, Flandreau Santee Sioux Tribe, Fort Peck Assiniboine and Sioux Tribes, Mandan, Hidatsa & Arikara Nation, Northern Cheyenne Nation, Oglala Sioux Tribe, Rosebud Sioux Tribe, Santee Sioux Nation, Sisseton-Wahpeton Oyate, Spirit Lake Tribe, Standing Rock Sioux, Turtle Mountain Band of Chippewa, and Yankton Sioux Tribe; and

WHEREAS, the USCG invited the Wahpekute Band of Dakotah, a non- Federally-recognized Indian tribe, to participate in consultation on this Project and to sign this PA as a Concurring Party; and

WHEREAS, the Northern Cheyenne Nation accepted the invitation to participate in consultation on this Project; and MHA Nation via representation by Lakota Consulting.

WHEREAS, the ACHP in consultation with the USCG and the SHPO has determined that the development of a PA, in accordance with 36 CFR 800.14(b)(1)(ii), is warranted because effects of the undertaking are not fully known for all reasonable alternatives; and

WHEREAS, the USCG conducted a public meeting on December 14, 2017 in compliance with Section 106 of the National Historic Preservation Act, 36 Code of Federal Regulations 800.2(d) and to explain the National Environmental Policy Act process for the project; and

WHEREAS, BNSF provided to the consulting parties a description of alternatives identified and/or rejected prior to publication of the Notice of Intent to develop an Environmental Impact Statement;

and

WHEREAS, if in the course of completing the NEPA review for this undertaking, it is determined that retaining the existing bridge and constructing a new adjacent bridge is feasible and reasonable, USCG will follow stipulations related to that alternative as listed in this PA; and

NOW, THEREFORE, the USCG, North Dakota SHPO, and ACHP agree that the USCG shall ensure that the following stipulations are implemented to take into account the effects of the Undertaking on historic properties, and that these stipulations shall govern the Undertaking and all of its parts.

STIPULATIONS

Commented [SSC1]: Time frames for this section will be discussed at the next consultation meeting.

The USCG shall ensure that the following measures are implemented:

I. FORB (and other interested consulting parties) will conduct an independent floodplain evaluation to determine if there is an alternative that meets the no net rise requirement. If such an alternative is identified, at least one month prior to the draft environmental document being published for public comment, FORB (and other interested consulting parties) will submit a flood model evaluation of a new railroad bridge adjacent to the existing bridge that would cause no net rise in the floodplain. The USCG and BNSF will then analyze this alternative and its potential impacts on the environment, and include in the draft environmental document for public comment. Historic impacts, including how the new bridge will be visually compatible with the existing bridge, will either be addressed in the environmental document or in this programmatic agreement.

II. Each party that identifies an alternative that results in a net rise to the floodplain must document the potential mitigation measures (in coordination with the floodplain administrators) and local government approval process associated with the net rise for those alternatives and submit those to the USCG for incorporation in the NEPA document associated with this project.

III. If the USCG determines that the existing bridge can be retained and that this is a reasonable alternative for BNSF to pursue, FORB, BNSF and other interested consulting parties must complete the following actions [insert appropriate amount of time before commencement of construction], in order to provide BNSF sufficient time to let a contract to begin work:

Commented [SSC2]: Insert times at a future meeting

Responsible Party	Action
USCG	• If applicable, include timelines in this PA associated with mitigation measures and the approval process for accepting the floodplain net rise. [Add those additional steps and timelines here]

FORB	• Take ownership of the existing bridge or sign a contract or lease agreement with BNSF
	• Provide reasonable assurance that the following will be obtained:
	  • Pedestrian access to rail ROW
	  • Maintenance fund for the existing bridge (if applicable)

Commented [SSC3]: Need to add mitigation measures and approval steps here, including timeframes associated with that process

	• Funding for pedestrian bridge conversion • Document steps and timelines in this PA associated with obtaining the above listed items.
FORB and SHPO	• SHPO, with assistance from FORB, nominates BNSF Bridge 0038-196.6A to the NRHP and FORB initiates fundraising campaign for conversion of BNSF Bridge 0038-196.6A to pedestrian use as described in their Feasibility Report. • Include steps in this PA documenting the timeline associated with nominating the bridge to the NRHP.
BNSF	• Secure additional ROW • Protect water intake/water plant • Include steps in this PA documenting the timeline associated with the above listed steps.
FORB and BNSF	• Develop cost share agreement for additional costs to construct the alternative that retains the existing bridge • Develop a hold harmless agreement for BNSF • Include steps in this PA documenting the timeline associated with the above listed steps.

IV. If the existing bridge cannot be retained, the following stipulations apply:

A. **Alternate Preservation Considerations**

1. Before the environmental document is finalized, consulting parties shall determine what, if any, portions of the existing bridge can be retained to preserve the historicity of the bridge while still maintaining no net rise. Impacts and associated mitigation related to keeping a portion of the bridge in the waterway shall be documented in the environmental document and/or this Preservation Agreement.

B. **HISTORIC AMERICAN ENGINEERING RECORD DOCUMENTATION**

The BNSF shall develop a document that records the bridge structure in accordance with the Historic American Engineering Record (HAER) documentation guidelines. This shall include measured drawings; professional quality black and white photographs taken with a digital camera, printed on archival paper with an accompanying archival "gold" compact disc (CD); and an architectural and historical narrative, all in an archive-stable format.

1. Architectural and Historical Narrative

The narrative shall contain a description of the bridge and a summary of the history of the bridge. The narrative shall include a history of the Jamestown Subdivision between Mandan and Bismarck, including construction of the railroad and its major features, historic ownership information, the impact of the railroad on the growth and development of the towns and counties along the route, any significant historic users of the railroad, any significant alterations or new construction on the railroad, and any

Commented [CW4]: I would expect that multiple considerations for mitigation would have to be considered in addition to preserving a remnant of the existing structure. The loss of this bridge would be of a high magnitude and the mitigation would have to commensurate to the loss.

Typical mitigation examples are wide ranging:
1.Fund for façade improvements for historic buildings in Bismarck.
2.Interpretation on the banks of the river or somewhere appropriate displaying the history of the former bridge.

These are just ideas, but I'm trying to say is the mitigation could be a very creative process for the CG, SHPO, BNSF, Tribes and the consulting parties. Please leave this section open for any future ideas that come from the consultation process.

Commented [SSC5]: SHPO recommends:

- Are measures needed to insure confidentiality of sensitive information (ownership, invasion of privacy)?
- Are qualified preservation professionals stipulated?
- Public involvement and notification in treatment measures for the bridge? Should a web site or periodic news release be stipulated to keep the public informed of bridge progress (news release based on milestones/stages not just time-based)?
- Anti-deficiency act involved?

Stakeholders: Please provide your thoughts regarding the above items.

Commented [CW6]: This is good idea – a website to track the project and to provide the public with updated information is often a tool used by agencies.

significant historic events or patterns of history related to the railroad.

2. Measured Drawings of the Bridge

The documentation shall include reproduction of all existing drawings of the current bridge, minus duplicates. A site plan/aerial photograph of the bridge project and the quadrangle map of the project area shall also be included. The final version of these drawings shall be submitted on archival CDs and printed in hard copy on 11 x 17, acid-free, 100-year archival paper. No new drawings shall be produced.

3. Photographs

The documentation shall include no more than 20 black and white digital photographs to include all four elevations of the bridge, bridge details, and at least one context photograph. The documentation shall include a photograph key showing the location and view direction of each image. Final versions of the photographs will be printed on 8½ x 11, acid-free, 100-year archival paper and the digital photos shall be submitted electronically on archival CDs.

HAER DOCUMENTATION: REVIEW AND COMMENT

1. Prior to the start of construction activity, the BNSF shall prepare the draft HAER photo documentation in accordance with Stipulation I.C. and shall distribute it via electronic mail or CD to the USCG and the North Dakota SHPO for review. The USCG and the North Dakota SHPO shall review and provide comments to the BNSF within ten (10) calendar days of receipt of the photo documentation.

Commented [SSC7]: Update cite

2. If comments are provided to the BNSF, the BNSF shall revise the photo documentation in response to the comments, as needed, and resubmit the photo documentation as described in Stipulation III.A within ten (10) calendar days of receipt of comments. If no comments are provided to the BNSF by the end of the 10-day comment period, the photo documentation shall be considered complete and final.

3. The BNSF shall prepare the draft HAER narrative and measured drawings in accordance with Stipulation I.A. and I.B., and shall distribute them via electronic mail or CD to the USCG and the North Dakota SHPO for review within one hundred eighty (180) calendar days of the execution of this PA. The USCG and the North Dakota SHPO shall review and provide comments to the BNSF within thirty (30) calendar days of receipt of the draft HAER narrative and/or measured drawings.

4. If comments are provided to the BNSF, the BNSF shall revise the draft HAER narrative and measured drawings in response to the comments, as needed, and resubmit the report as described in Stipulation III.C. within thirty (30) calendar days of receipt of comments. If no comments are provided to the BNSF by the end of the 30-day comment period, the BNSF shall finalize the HAER narrative and measured drawings as described in Stipulation IV and submit a final copy to the USCG and the North Dakota SHPO within fifteen (15) calendar days of the end of the comment period.

HAER DOCUMENTS: FINALIZATION

1. Once photo documentation is final as defined in Stipulation III.B., construction on

the substructure of the bridge may proceed, in accordance with USCG permits. No demolition of the bridge shall occur until the photo documentation is declared final by the North Dakota SHPO, with the exception provided in Stipulation IV.E.

2. Final HAER documentation shall be produced on acid-free, 100-year archival paper, with the photographs and drawings on archival CDs.

3. Upon finalization of the HAER documentation, the BNSF shall submit one copy of the documentation to the North Dakota SHPO and shall offer one copy of the documentation to the Historic Bridge Foundation, the Bismarck Historical Society, FORB, the Mandan Historical Society, the North Dakota State Railroad Museum, the Burleigh County Library System, and the North Dakota State University library. Documentation shall be made available in print on acid-free, 100-year archival paper and/or electronically on archival CDs. The BNSF shall consult with the recipients to determine which media the recipients wish to receive and whether they wish to receive all of the photographs and drawings or only selected images and/or sheets.

4. Evidence of transfer to the recipients listed in Stipulation IV.C., which may include a copy of the transmittal letter(s), shall be provided to the North Dakota SHPO by the BNSF.

5. The HAER documentation shall be considered final upon issuance of a written notice from the USCG that all comments have been satisfactorily addressed. However, the parties acknowledge that, if the bridge is determined by the BNSF to be subject to imminent failure, derailment, or other physical breakdown, the BNSF would notify the USCG, the USACE, and the North Dakota SHPO, and commence the bridge removal and replacement immediately in coordination with the USCG and the USACE.

6. The BNSF shall bear the cost for compliance with Stipulations I–IV.

C. **POST-REVIEW DISCOVERIES**

a. If properties are discovered other than those names in this Agreement, or if unanticipated effects on historic properties are found, the USCG shall consult with the SHPO, BNSF and other affected parties to reconsider the terms of this Agreement and to ament it in accordance with Stipulation VII.

b. In the event of a discovery, any project activity in the vicinity of the discovery shall cease. The USCG and/or BNSF shall notify the SHPO and other relevant authorities of the discovery within 24 hours of the discovery. If human remains are discovered during construction, work in that portion of the project shall stop immediately. The remains shall be covered and/or protected in place in such a way that minimizes further exposure of and damage to the remains, and the USCG shall immediately consult with the SHPO and the Intertribal Reinterment Committee in compliance with *North Dakota Century Code* 23-06-27 and the North Dakota Administrative Code 40-02-03. If the remains are found to be Native American, in accordance with applicable

law, a treatment plan shall be developed by USCG and SHPO in consultation with appropriate federally recognized Indian tribes. USCG shall ensure that any treatment and reburial plan is fully implemented. If the remains are not Native American, the appropriate local authority shall be consulted to determine final disposition of the remains. Avoidance and preservation in place is the preferred option for treating human remains.

Administrative Provisions

IV. EFFECTIVE DATE

The terms of this agreement will become effective upon signature of all Signatories, and a copy filed by USCG with the ACHP.

If an emergency is declared by the President or Governor in the project are, any deadlines written into this PA are automatically extended 60 days.

Commented [SSC8]: Recommended by SHPO

V. DURATION

This PA will expire if its terms are not carried out within 6 years from the date of issuance of the USCG bridge permit. Prior to such time, the USCG may consult with the other signatories to reconsider the terms of the PA and amend it in accordance with Stipulation IX.

Commented [SSC9]: Update if needed depending on Stipulations. Bridge permit will likely be 5 years to complete construction. Depends on if we have stipulations that extend beyond the new bridge being built.

VI. MONITORING AND REPORTING

BNSF and FORB shall provide all parties to this PA a summary report detailing work undertaken pursuant to its terms on the 1st of each month following the execution of this PA until the environmental document is finalized, then reporting can occur quarterly, commencing on the 1st of the month three months after the date of the signed final environmental document, until the PA expires or is terminated. Such report shall include all proposed scheduling changes and disputes or objections received in BNSF or FORB's efforts to carry out the terms of this PA. These reports should be emailed to the USCG POC.

Commented [SSC10]: SHPO asks:

How will we provide information transfer to local cities and involved federal agencies about the status of the terms?

Commented [SSC11]: FORB requested that we add that we will have consulting party meetings to update them on the status of these terms. That is part of the consultation process so we do not think we need to call that out here.

VII. DISPUTE RESOLUTION

If any party to this agreement objects to any actions conducted during the term of this PA or to the manner in which the terms of this PA are implemented, the USCG shall consult with such party to resolve the objection. If the USCG determines that such objection(s) cannot be resolved, the USCG will:

a. Forward all documentation relevant to the dispute, including the USCG's proposed resolution, to the ACHP. The ACHP shall provide the USCG with its advice on the resolution of the objection within thirty (30) calendar days of receiving documentation. Prior to reaching a final decision on the dispute, the USCG shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP and Signatories and provide them with a copy of this written response. The USCG will then proceed according to its final decision.

b. If the ACHP does not provide its advice regarding the dispute within the thirty (30)-day time period, the USCG may make a final decision regarding the dispute and proceed accordingly. Prior to reaching a final decision, the USCG shall prepare a written response that

takes into account any timely advice or comments regarding the dispute from the Signatories to the PA and provide them and the ACHP with a copy of such written response.

c. The USCG's responsibility to carry out all other actions subject to the terms of this PA that are not the subject of the dispute remain unchanged.

VII. AMENDMENTS AND NONCOMPLIANCE

This Agreement may be modified upon the mutual written consent of the parties in accordance with 36 CFR 800.6(c)(7).

VIII. TERMINATION

a. If the USCG, SHPO or ACHP determines that the terms of this PA will not or cannot be carried out, that party shall immediately consult with the other signatories to attempt to develop an amendment per Provision VII above. If within thirty (30) days (or another time period agreed to by all signatories) an amendment cannot be reached, the USCG, SHPO or ACHP may terminate the PA upon written notification to the other signatories. The Party proposing to terminate the Agreement shall so notify all parties to this Agreement explaining the reasons for termination and affording at least sixty (60) days to consult and seek alternatives to termination. The parties shall then consult.

b. Should such consultation fail to resolve the dispute, the USCG, the ACHP or the SHPO may terminate the Agreement by so notifying all parties. Should this Agreement be terminated, the USCH shall either:

1. Consult in accordance with 36 CFR 800.6(a) in an effort to resolve any adverse effects, or

2. Terminate consultation and request the Council comment in accordance with 36 CFR 800.7(c).

VIV. POINTS OF CONTACT

The USCG Point of Contact (POC) will be the Chief, Office of Bridge Programs, Coast Guard Headquarters, (202) 372-1510. The POC for the SHPO will be Lorna Meidinger, (701-328-3576). The POC for the ACHP will be Chris Wilson, (202) 517-0229. The POC for BNSF will be Mike Herzog (913)551-4229.

Execution of this PA by the USCG, North Dakota SHPO, ACHP, and BNSF, and implementation of its terms, is evidence that the USCG has taken into account the effects of this undertaking on historic properties and afforded the ACHP an opportunity to comment.

SIGNATORY PAGE

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Signatory:

United States Coast Guard

_____ Date _____

David R. Callahan, Rear Admiral, U.S. Coast Guard
Commander, Eighth Coast Guard District

Commented [SSC12]: "Consulting Parties" includes Signatories, Invited Signatories, and Concurring Parties, and "Signatories" as defined in 36 CFR 800(c)(1) have the sole authority to execute, amend, or terminate this PA, and "Invited Signatories" as defined in 36 CFR 800(c)(2) have the same rights with regard to seeking amendment or termination of this PA as the Signatories.

A Concurring Party is one who is asked to concur in the PA, indicating acceptance of the process leading to the PA and a desire and willingness to participate in future consultations as needed, but cannot prevent the PA from being executed, amended, or terminated.

We need to figure out responsibilities of each party and determine the appropriate signatory pages for each.

Commented [SSC13]: Need a signature page for ACHP

SIGNATORY PAGE

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Signatory:

North Dakota State Historic Preservation Officer

_____ Date _____

Claudia Berq, State Historic Preservation Officer

INVITED SIGNATORY PAGE

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Invited Signatory:

Burlington Northern Santa FE, LLC

_____ Date _____

Xxx, Burlington Northern Santa Fe, LLC

CONCURRING PARTY PAGE

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Concurring Party:

Historic Bridge Foundation

_____ Date _____

Kitty Henderson, Executive Director

CONCURRING PARTY PAGE

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Concurring Party:

_____ Date _____